

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2018/HP/0064

BETWEEN:

FRED M'MEMBE

POST NEWSPAPERS LIMITED (IN LIQUIDATION)

AND

ABEL MBOOZI

ROY HABAALU

ANDREW CHIWENDA

MWENDALUBI MWEENE

BONAVENTURE BWALYA

ZAMBIA REVENUE AUTHORITY



PLAINTIFF

1st DEFENDANT

2nd DEFENDANT

3rd DEFENDANT

4th DEFENDANT

5th DEFENDANT

6th DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 29th DAY OF
JANUARY, 2018**

For the Plaintiffs : Mr N. Nchito, SC and Mr C. Hamwela, Messrs
Nchito and Nchito

For the 1st to 5th Defendants : Mr B. Mosha and, Mosha and Company and Mr
K. Mambwe, Ferd Jere and Company

For the 6th Defendants : Mr M. Lungu, Lungu Simwanza and Company

R U L I N G

CASES REFERRED TO:

1. *Development Bank of Zambia and Kpmg Peat Marwick V Sunvst Limited and Sun Pharmaceuticals Limited 1997 SJ 10*

The Plaintiffs commenced this action by way of writ of summons on 15th January, 2018 claiming;

- i. An order setting aside the consent order in Cause No 2016/HPC/0518 dated 10th January, 2018 for being illegal and obtained by fraud.*
- ii. An order staying the proceedings and orders granted by Mr Justice Nkonde in cause number 2016/HPC/0518*
- iii. Any other reliefs that the court may deem fit; and*
- iv. Costs*

On the same date that the process was filed, an ex-parte summons to stay execution of the consent order and other orders obtained in cause number 2106/HPC/0518 was filed, which was accompanied by a certificate of urgency. My learned colleague who had conduct of the matter then directed that the application be heard inter partes. When I assumed conduct of the matter, and the parties appeared before me on 18th January, 2018, the matter was adjourned to 24th January, 2018 to allow Counsel for the 6th Defendant to be served the application, and also because Counsel for the 1st to 5th Defendants indicated that they wished to raise issue with the 2nd Plaintiff continuing with the action when a notice of discontinuance had been filed.

The matter was also adjourned on account of the fact that Counsel for the Plaintiffs wished to challenge the notice of discontinuance. Prior to the parties appearing before me Messrs Lewis Nathan Advocates and Messrs Palan and George Advocates had on 16th January, 2018 filed a notice of change of advocates stating that pursuant to the Consent judgment dated 10th January, 2018 they had been appointed advocates for the purported 2nd Plaintiff in place of Messrs Nchito and Nchito Advocates. The two law firms on the same date filed a notice of discontinuance of the proceedings by the 2nd Plaintiff against all the Defendants. This is the notice that Messrs Nchito and Nchito wish to set aside.

On the other hand on the same 16th January, 2018, the 1st to 5th Defendants filed a notice to dismiss the action on a point of law, accompanied by an affidavit and skeleton arguments, as well as a notice of appointment as advocates, and entered conditional appearance to the writ of summons.

On 19th January, 2018 the advocates for the Plaintiffs filed summons to set aside the notice of change of advocates as well as the notice of discontinuance pursuant to Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia which was accompanied by an affidavit and skeleton arguments, and they also filed an ex-parte summons for preservation of assets pursuant to Order 29 Rule 2 of the Rules of the Supreme Court, 1999 edition. The application was supported by an affidavit.

I directed that all the applications be heard on the same day, which was 24th January, 2018. On 22nd January, 2018, the 6th Defendant entered conditional appearance and filed a notice to raise preliminary issues, and on the same day Messrs Ferd Jere and Company filed a notice of appointment as co advocates for the 1st to 5th Defendants, and also filed a notice to raise preliminary issues. When the matter came up on 24th January, 2018, Counsel for the Plaintiffs told the Court that they were ready to proceed, as the status of the 2nd Plaintiff was important and needed to be dealt with.

However Mr Mosha on behalf of the 1st to 5th Defendants stated that whilst they agreed that status of the 2nd Plaintiff was important, a lot had transpired since the matter last came up before the Court on 18th January, 2018. He stated that as could be seen from the record, a number of applications had been filed since the last hearing, and most notable among them, was the fact that an action had been filed before the Constitutional Court.

That a search conducted on that record on cursory perusal revealed that the reliefs being sought in that action, overlap with some of the reliefs being sought in this action. Therefore as a matter of housekeeping, and without delving into the merits of the preliminary issue that had been filed into Court, Counsel

asked for the Court's guidance on whether this matter should proceed as any order made by this Court would have the potential of undermining any decisions that the Constitutional Court would make, or that this Court may be undermined by the decisions of the Constitutional Court.

Mr Lungu on behalf of the 6th Defendant stated that they had filed a notice to raise preliminary issues which went to the root of the matter as they related to whether this court has jurisdiction to hear the matter, and whether there is a reasonable cause of action that had been revealed. Counsel stated that it is trite that these issues ought to be determined first on account that they could save the court's time.

Mr Mambwe on behalf of the 1st to 4th Defendants submitted that when the matter last came up, they had indicated that they were in receipt of a notice of change of advocates as well as a notice to discontinue the proceedings by the 2nd Plaintiff, which was filed by Messrs Palan and George Advocates. However they had noted that in the letter of service accompanying the application to set aside the notice discontinuing the proceedings, Messrs Palan and George Advocates had not been included. Counsel further submitted that the application to set aside the notice of discontinuance fell squarely on the Liquidator who is being represented by Messrs Palan and George Advocates, and in the absence of them being served the said application, the court could not proceed to hear the application, as any order made by this Court, would affect the Liquidator, and not necessarily the Defendants.

In response, State Counsel Mr Nchito with regard to Mr Mosho's submission that the 1st Plaintiff had commenced an action before the Constitutional Court confirmed this position stating that the Attorney General and Hon Mr Justice S. Nkonde had been sued, and had been served process. That the two respondents in the matter before the Constitutional Court were not parties to these proceedings, and there was therefore transparency in making known the process as the two had been served.

State Counsel went further to submit that without delving into the merits of that action, but merely to illustrate the distinct nature of the two actions, they were challenging the consent order executed between His Lordship Justice Nkonde and the State. State Counsel conceded that the orders that may be issued by the Constitutional Court may have an impact on this matter, but his argument was that this court should not be presumptuous as no order had yet been obtained. It was State Counsel's view that if this Court were to be inclined to stay these proceedings, it should at least deal with the issue of the parties.

On Mr Lungu's submission that the preliminary notices that they had filed, go to the root of the action, State Counsel submitted that he was only served the preliminary notices that morning. He went to state that the said notices presumed that the 2nd Plaintiff was no longer a party to these proceedings, and had made the applications on that premise, which was like putting the cat before the horse.

As regards the issue of service of the notice to set aside the notice of discontinuance of the action by the 2nd Plaintiff, it was submitted that the said application was pending to be heard that day as directed by the court, and no appeal or application to review the same had been made, but that they would stand guided by the Court.

Mr Mosha in reply stated that the court needed to only look at the reliefs being sought in the petition before the Constitutional Court, and note that one is for an order of stay of the orders granted in cause number 2016/HPC/0518 before Mr Justice S. Nkonde. That this is the same relief being sought before this court, even though the Defendants in this matter were not a party to the petition before the Constitutional Court. Therefore it would not be healthy for this court to proceed in the interest of the proper administration of justice.

Mr Lungu in reply submitted that they had served the notice to raise preliminary issues on the 1st Plaintiff on 22nd January, 2018, and therefore

being served on the morning of the hearing did not arise with respect to the 6th Defendant.

Mr Mambwe stated that the court having directed that all the applications be heard on that day was not in dispute. That the hearing was however dependent on proper service being effected on all the parties, which would be demonstrated by way of filing an affidavit of service. He went on to state that if this was done, it would satisfy the court that no party had been prejudiced by being unaware of the proceedings, which would potentially affect their rights.

I have considered the submissions. The issue for consideration is whether these proceedings should be stayed on account of the action that was filed before the Constitutional Court. Attached as exhibit 'MK1' to the affidavit in support of the notice to raise preliminary issues on a point of law dated 23rd January, 2018 is a copy of the petition that has been filed before the Constitutional Court, in which the parties are Mr Fred M'membe as Petitioner and Sunday Bwalya Nkonde, SC and the Attorney General as the Respondents.

In that action the Petitioner seeks the following reliefs;

Interim Remedies

- 1. An order staying the decision of the High Court at Kitwe to quash the ruling of the Judicial Complaints Commission.*

Substantive Remedies

- 1. A declaration that the High Court did not have jurisdiction to hear and determine a matter relating to the exercise of the constitutional power by the Judicial Complaints Commission.*
- 2. A declaration that the proceedings and orders made in 2017/HK/771 were a nullity on account of want of jurisdiction, and that all actions taken on account of the proceedings in 2017/HK/771 including the consent judgment dated 10th January, 2018 in 2016/HPC/0518 are null and void.*

When one looks at the reliefs sought in this case they will note that the Plaintiffs seek an order to set aside the consent order dated 10th January 2018 in cause number 2016/HPC/0518, and an order to stay proceedings and orders granted by Mr Justice Nkonde in that cause. The Constitutional Court is a superior court than this court, and this court is bound by any decision made by that court. Therefore if that court is being asked to set aside the consent order dated 10th January, 2018 in cause number 2016/HPC/0518, this court cannot go ahead to hear the Plaintiffs claim in this matter with regard to setting aside the said consent order, as doing so has the potential of the two courts arriving at conflicting decisions, which may bring the administration of justice into disrepute.

The argument by State Counsel that no orders have been issued in the matter before the Constitutional Court, and on that basis this court should proceed the matter cannot stand, as if both courts were to proceed, there is risk of conflicting decisions being made. The case of **DEVELOPMENT BANK OF ZAMBIA AND KPMG PEAT MARWICK V SUNVST LIMITED AND SUN PHARMACEUTICALS LIMITED 1997 SJ 10** is instructive in this respect. On that basis, I will stay these proceedings pending the outcome of the petition before the Constitutional Court.

State Counsel had submitted that in the event of my staying these proceedings, I should proceed to determine the status of the 2nd Plaintiff in this matter. In as much the issue of the status of the 2nd Plaintiff in this matter is pertinent, the question of whether the consent order executed in cause number 2016/HPC/0518 will be set aside in the petition before the Constitutional Court will have a bearing on that issue. Moreover as argued by Mr Mambwe, Counsel that filed the notice of change of advocates and the notice of discontinuance, being Messrs Palan and George Advocates, as well as Messrs Lewis Nathan Advocates have a right to be heard on the application.

Therefore before the application can be heard, and in keeping with the requirement that all the parties affected by any order shall be heard, Messrs Palan and George Advocates and Messra Lewis Nathan Advocates shall be served the said application. However, the application shall be heard once the proceedings before the Constitutional Court are determined, and the same goes for the preliminary notices filed, and the applications to stay execution of the consent order and the order for preservation of assets. Costs shall be in the cause.

DATED THE 29th DAY OF JANUARY, 2018

 S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE