

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

2017/HP/1541

(Civil Jurisdiction)



BETWEEN

ZAMBIAN BREWERIES PLC

PLAINTIFF

AND

GWABI RIVER LODGE LIMITED

DEFENDANT

Before the Honorable Mrs. Justice C. Lombe Phiri in Chambers

For the Plaintiff : Ms. M. Moonga – Tembo Ngulube & Associates

For the Defendant : Mr. A. Kearnes – Willa Mutofwe & Associates

RULING ON PRELIMINARY ISSUE

CASES REFERRED TO:

1. **Indeni Petroleum Refinery Company Limited v Kafco Oil Limited and Others**
2. **Charlie Wise v Harvey (1985) ZR 179**
3. **BP Zambia Plc v Interland Motors (Judgment No 5/2001)**
4. **Hamalambo v Zambia National Building Society (Appeal no. 64/2013) (2016) ZMSC 240**

5. Associated Chemicals Limited v Hill and Delamain Zambia Limited and Ellis and Company (Sued as a Law Firm) (1998) SJ 7 (SC)

This was the Defendant's application by way of Notice of Motion to Raise a Preliminary Issue pursuant to Order 14A of the Supreme Court Ruled of England and Wales (1999) ed as read with Order 33 Rule 3 and 7 of the same law. The Defendant sought the determination of the Court on the following issues:

- 1) *Whether or not the Plaintiff has a cause of action in the matter against the Defendant;*
- 2) *Whether or not the Defendant's unreasonable delay in prosecuting their claim before the Court did not accrue within the prescribed term of years permitted by law;*
- 3) *Whether or not this cause of action amounts to a multiplicity of actions and /or res judicata as it bears the same facts as those in Cause No. 2017/HP/1538 (Zambian Breweries PLC v Rebrew Enterprises Limited) as already adjudicated by this Court; and*
- 4) *If all the questions or one of them is answered in the affirmative, then the Defendant cause in the matter should stand dismissed with costs.*

The Defendant's application was supported by an affidavit deposed to by one Anthony Gordon Weber, a Director in the Defendant Company. He stated that on 7th September, 2017 the Plaintiff Company commenced legal

proceedings against the Defendant company for *inter alia* the sum of K322,739.00 being the outstanding balance in respect of various beverages purportedly supplied to the Defendant by the Plaintiff. Following this the Defendant on 27th November, 2017 entered conditional appearance. Both the Writ of Summons and Conditional Appearance were exhibited in the affidavit. It was further averred that on 13th December, 2017 the Defendant applied before the Court to have the Writ of Summons set aside or struck out. The first page of the Affidavit in support of the application was exhibited. It was also stated that the Defendant Company has had no dealings with the Plaintiff as alleged in the originating process. Further that a wrong party has been sued therefore the action ought to be dismissed in accordance with the Rules of Procedure of the Court. It was further averred that the cause of action in this matter appears to be very similar and arises out of the same facts as the cause of action adjudicated on by this Court in Cause 2017/HP/1538 between Zambia Breweries Plc v Rebrew Enterprises Limited and that allowing this matter to proceed may amount to a multiplicity of actions by the Plaintiff Company. It was stated that the aforementioned matter was dismissed by the High Court.

In the arguments in support of the application the Defendants submitted that the application before the Court was made pursuant to Orders 14A and 33 (3) and (7) of the Rules of Supreme Court of England and Wales (1999 edition). The law was quoted in full and the case of **Indeni Petroleum Refinery Company Limited v Kafco Oil Limited and Others**⁽¹⁾ cited as case law to

provide the authorities to demonstrate that the Court had jurisdiction to entertain the preliminary issue.

It was then submitted that the Plaintiff did not have a cause of action against the Defendant. The definition of a cause of action as provided for in the case of **Charlie Wise v Harvey (1985) ZR 179⁽²⁾** was quoted to show that the Plaintiff had not alleged any factual situation containing facts upon which the Defendant can be held liable or upon which the Plaintiff can establish a right or an entitlement to a judgment in their favour.

It was further submitted that the Section 2 (1)(a) of the Limitation Act, 1939 provides that no action shall be brought after the expiration of six years from the date which the cause of action accrued in relation to actions founded on simple contract or tort. It was stated in relation to the case in casu that the action before the Court was premised on Contract. Various Supreme Court and Court of Appeal cases were cited to demonstrate the principle of statutory limitation of time in relation to actions founded on simple contracts or tort. The Defendant prayed that by simply raising the defence of limitation of time the matter ought to be dismissed at the preliminary stage.

In relation to multiplicity of actions and/ or res judicata it was submitted that the Court frowns upon the conduct of a Plaintiff in commencing a multiplicity of actions and the matter should be struck out on those grounds. Authorities of decided cases in our jurisdiction were provided to demonstrate what amounts to multiplicity of actions. It was submitted that the action commenced by the

Plaintiff was an abuse of the Court process for multiplicity and ought to be dismissed or struck out with costs.

The Defendant prayed that in view of their evidence and submissions the Court ought to uphold the preliminary issues raised on a point of law and dismiss the Plaintiff's process and award costs to the Defendant.

The Plaintiff opposed the application by the Defendant by filing into Court its affidavit in opposition and attendant skeleton arguments.

In an affidavit deposed to by one Deborah Bwalya, the legal Counsel and Company secretary of the Plaintiff Company, the 1st to 7th paragraphs of the Defendant's affidavit in support were not opposed as they contained facts not in dispute. It was deposed to that the issue of whether or not the Defendant was a client of the Plaintiff was a question of fact which would be proven at trial and also by a statement exhibited in the affidavit. It was further deposed to that the Defendant in Cause 2017/HP/1538 was different from the one in casu. Also that the claims in the two case do not arise out of the same set of facts. It was stated that the fact that the defendant companies in the two cases have the same directors does not make the two entities the same. Liability of one does not automatically extend to the other. It was further averred that proceedings in Cause 2017/HP/1508 were concluded by the entry of a default judgement wherein the Defendant failed to enter appearance and defence. It was deposed to that the Defendant failed to prosecute an appeal in that regard and is trying to use it as a bar to these proceedings. It was deposed to that in

view of the foregoing the Defendant's application is defective, devoid of merit and improperly before the Court.

It was submitted in the Plaintiff's skeleton arguments and list of authorities that there was a cause of action demonstrated by the Plaintiff in its Writ of Summons and Statement of Claim. Regarding the submission relating to delayed prosecution of the matter it was submitted by the Plaintiff that the action in casu had been brought four years and nine months after the fact. That this is well within the 6 years of the Limitation period relating breach of contract. Regarding multiplicity of actions/ res judicata, it was submitted that the case before the Court does not fall within the definition of multiplicity of actions as espoused in the cases of **BP Zambia Plc v Interland Motors (Judgment No 5/2001)**⁽³⁾ and **Hamalambo v Zambia National Building Society (Apeal no. 64/2013) (2016) ZMSC 240**⁽⁴⁾. It was submitted that the Defendant, Gwabi River Lodge Limited was a separate and distinct entity from Rebrew Enterprises Limited who were the defendants in the other suit. It was submitted that a company has a legal personality separate and independent from its shareholders. The case of **Associated Chemicals Limited v Hill and Delamain Zambia Limited and Ellis and Company (Sued as a Law Firm) (1998) SJ 7 (SC)**⁽⁵⁾ was cited as an authority. It was prayed that the Notice to raise preliminary issue by the Defendant be dismissed for being defective, devoid of merit and improperly before the Court.

In Reply the Defendant filed into Court an affidavit deposed to by Anthony Gordon Weber. In reply it was stated that upon perusal of the Plaintiff's

affidavit in opposition it was stated that the Appellant was given leave to appeal out of time. It was further stated that despite the Plaintiff being given leave to appeal in the other proceedings they had failed to do so. It was also deposed to that the delay in the proceedings related to the fact that two years had elapsed without any progress being made in the action. Further, that the application to appeal was dismissed for want of prosecution. It was also deposed to that the Plaintiff's affidavit in opposition ought to be dismissed on grounds of procedural irregularity and / or being a multiplicity of proceedings or in the alternative to have paragraphs 6, 7, 9 -14 expunged on grounds of containing extraneous matters and not properly before the Court.

The main issue being brought to the Court's attention is whether the Plaintiff has a cause of action in the matter. The Black's Law Dictionary at page 275 defines "*cause of action*" as "*a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles a person to obtain a remedy in court from another person*". In arriving at a decision as to whether a cause of action exists it is imperative upon the Court to carefully look at the Claims as set out in the Writ of Summons and particulars in the Statement of Claim. The Court has done so in this matter. On the face of it, it is clear that there are grounds to consider. On the face of it I find that there are facts before the Court that give the Plaintiff a basis to sue the Defendant. I find that the first issue is answered in the affirmative.

The second issue raised by the Defendant is that there was unreasonable delay in the Plaintiff prosecuting their claim. The Defendant has cited the statutory

limitation period of six years. They claim that this should apply to the matter before the Court. Now other than making this assertion there is no evidence to show that the Plaintiff did not commence the action within time. The record does show that the matter has progressed rather slowly. However, where the matter is in progress it cannot be said that the limitation period can be applied to the case. Once the case sets motion time stops running. The Statute of Limitation requires litigants to exercise their right to commence an action within a specified period. The statutory time period begins to run immediately on the accrual of the cause of action. The rationale for the limitation period is to prevent injustice by postponement of a trial until memories have faded, become confused. And witnesses vanished. Further, if a claim is brought long after the events in question, the likelihood is that evidence which may have been available may have been lost. Such a state of affairs creates a substantial risk that justice may not be done. The foregoing issues are questions of fact that need to be decided on a case by case basis. In the case before Court the subject of the dispute occurred in 2012. This action was commenced in 2017. On a simple mathematical calculation the action was commenced within time. Through out the existence of the suit the Plaintiff has taken various action to pursue the matter. It cannot therefore be said that the action is either statute barred or that the Plaintiff has delayed in prosecuting its matter. This issue lacks merit and is dismissed.

The third issue raised by the Defendants was that this action amounted to a multiplicity of actions as the Plaintiff had sued in an earlier suit. In the earlier suit the Defendant was an entity called Rebew Enterprises Limited. The

Plaintiff argued and demonstrated that the Defendant in this matter was not the same as the one for in cause 2017/HP/1538. I have carefully considered the facts before the court. I find that while the Directors of the Defendant in this case and in the entity called Rebew Enterprise Limited may be the same it is trite that limited companies have their own legal identity independent of their owners. It can therefore not be said that just because the same Directors were sued in one entity then the same ought to extend to the other entity. I find that there is no basis for this issue raised.

Having dismissed all the issues raised by the Defendant in the matter the motion to raise preliminary issues is dismissed.

Costs are awarded to the Plaintiff for this application.

Delivered at Lusaka this 9th day of September, 2020.



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C. LOMBE PHIRI
JUDGE