

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

2018/HP/1938

BETWEEN:

AYUB FARMS LIMITED

AND

AFRICAN BANKING CORPORATION LIMITED



PLAINTIFF

DEFENDANT

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

For the Plaintiff: N/A

For the Defendant Mrs. T. Kasonka – AB & David Mr. S. Banda (LLP)

RULING

CASES REFERRED TO

1. Frank Bwalya vs The Attorney General, Katele Kalumba William Banda (2012) ZR 354
2. Zambia Oxygen Limited and Zambia Privatisation Agency vs Paul Chisakula, Francis Phiri Yesani Chimwala, Rumbani Mwandira and Richard Somanje SCZ Judgment No. 4/2000
3. Attorney General vs Seong Sang Company SCZ Judgment 16/2013
4. Bellamano v Lombardo Limited (1976) ZR 267

LEGISLATION REFERRED TO:

- 1. Order 14A Rule 1 and 2 of the Rules of the Supreme Court (RSC) Whitebook 1999 Edition**
- 2. Order XI Rule 1(4) of the High Court Act, Chapter 27 of the Laws of Zambia.**

The Defendant filed into Court an application to dismiss the matter on a point of law and or to set aside the Writ of Summons for irregularity pursuant to Order 14A Rule 1 and 2 of the Rules of the Supreme Court (RSC) Whitebook 1999 Edition and Order XI Rule 1(4) of the High Court Act, Chapter 27 of the Laws of Zambia. The Defendant alleged that the Plaintiff has no locus standi to commence the action against them on the question in issue or in the alternative that the Writ of Summons be set aside for irregularity on grounds stated in an affidavit they filed into Court.

In the Affidavit in support of the Application deposed to by one Joseph Simonda Kalondawanga, the Corporate Recoveries Officer in the Defendant Company it was deposed to that the Plaintiff commenced an action against the Defendant by Writ of Summons and Statement of Claim. It was deposed to that the claim was premised on a failed transaction through an undated contract of sale entered between the Defendant and Gulam Hussein Gangat and executed by the parties some time in July 2015. It was further deposed to that there is no commercial or any transactional relationship between the Plaintiff and the Defendant either in relation to the subject matter or in any way that would give rise to the Plaintiff to commence an action against the

Defendant. It was deposed to that the Plaintiff is a total stranger to the subject matter of the claim hereto. That the claim is unclear, incomprehensible and confusing. It was finally deposed to that the Plaintiff's claim is improperly before the Court.

In the skeleton arguments in support of the application it was submitted that the Court had jurisdiction to hear the application before it and reliance was placed on the case of **Frank Bwalya (suing on behalf of himself and in his capacity as Executive Director of Change Life Zambia Limited) v the Attorney General, Katele Kalumba (sued in his capacity as the Secretary General of the Movement of Multi-party Democracy), William Banda (2012) ZR 354⁽¹⁾** where the principal of locus standi was restated. Further, it was submitted that in the present case the doctrine of privity of contract is a principle that the Court ought to address itself on when considering whether or not to grant an Order to dismiss the matter on a point of law or set aside the Writ for irregularity. Reliance was placed on the cases of **Zambia Oxygen Limited and Zambia Privatisation Agency v Paul Chisakula, Francis Phiri Yesani Chimwala, Rumbani Mwandira and Richard Somanje SCZ Judgment No. 4/2000⁽²⁾** and **Attorney General vs Seong Sang Company SCZ Judgment 16/2013.⁽²⁾** It was also stated that a careful perusal of the Statement of Claim reveals that the originating process does not disclose a clear cause of action against the Defendant. That the Plaintiff is a stranger to the contract on which it seeks to attach liability to the Defendant. The Court was referred to cases that discuss the definition of "cause of action". The Court was further referred to Section 28 of the Companies Act. Regarding irregularity of the

Writ the Court was referred to the case of **Bellamano v Lombardo Limited (1976) ZR 267⁽⁴⁾**. It was submitted that the Writ of Summons was endorsed with the wrong address. That the address on the Writ was not the registered office address of the Defendant as is provided for in Section 28 of the Companies Act. On the basis of the foregoing submissions it was prayed that an Order to dismiss the matter on a point of law or to set aside the writ for irregularity be granted.

In response to the Application before Court the Plaintiff filed into Court an affidavit in response deposed to by one Gulam Hussain Gangat, the Managing Director of the Plaintiff company. It was deposed to that after the Defendant filed its application on 14th December, 2018, the Plaintiff filed into Court an application for non-joinder and another application to amend the Writ of Summons and Statement of Claim. It was stated that the intended 2nd Plaintiff intends to be accorded an opportunity to be heard on the issues that are in contention in this matter as he was an interested party to the subject matter of the action. It was also deposed to that the irregularity cited by the Defendant does not go to the root of the action to warrant its dismissal. It was further deposed to that it was a well established principle that the object of the court is to decide the rights of the parties and not to punish them for the mistake that they may make unknowingly in the conduct of their case by deciding otherwise than in accordance with the interest of justice.

Further in support of the application the Plaintiff filed a list of the authorities and skeleton arguments. The gist of the arguments was that the Court is

mandated to decide the rights of parties and not to punish them for mistakes that they may make unknowingly in the conduct of their case by deciding otherwise than in accordance with the rights. Reference was made Order 33 Rule 3 of the Rules of the Supreme Court (Whitebook) 1999 Edition and Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia. It was further submitted that the defects to the Statement of Claim is curable. It was submitted that once the amendment is made then it would date back to the day when the originating process was issued.

In reply the Defendant filed into an affidavit wherein it was stated that any application for joinder would not cure the defect in the Writ nor would it grant the intended 2nd Plaintiff standing in the matter.

At the hearing of the application the Plaintiff's counsel was not present. However, I found that they had due notice of the matter before Court and I directed that the Defendant to present their arguments. The viva voce arguments were in substance a restatement of the written skeleton arguments filed into Court and summarized above. I will therefore not repeat them.

The legal issue to be resolved here is whether the Plaintiff has locus standi in the matter before Court. Locus standi basically refers to the right to bring an action or to be heard in a given forum. That right is premised on whether the Plaintiff is entitled to make the claims it is making against the Defendant. From the affidavit evidence it is clear that there is no challenge to the

assertions that the Plaintiff was not a party to the Contract which it seeks to enforce. It is therefore clear that the Plaintiff not being a party to the Contract does not have the requisite right to enforce the terms of the said Contract. However, the Plaintiff has stated before the Court that it intends to correct its mistake by applying for a joinder of a party to the action so that the rightful person now sues the Defendant. A question I need to ask myself is whether the “*mistake*” made by the Plaintiff is one that can be cured by the joinder application proposed by the Plaintiff or that it is fatal to the entire action before the Court.

Rules of the Court are designed in such a way as to level the playing field for all the parties involved. One of the pinnacles of the rule of law is that it is predictable. A party must be able to come to Court and dependent on the rules of the Court and the precedents in the legal system the outcome should be known. The law regarding locus standi is one that is premised both on law and fact. The law presupposes that a person has sufficient interest in a matter that they are bringing to Court for determination. Depending on the area of the law different rules will determine who has standing. The case before the court involves a matter premised on Contract Law. In Contract law for one to have locus standi there is a principle of privity of contract to consider. Blacks Law Dictionary defines “privity of contract” as “the relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so”. A plethora of cases have dealt with this principle. I find that the Defendant has demonstrated that the Plaintiff indeed does not

have any right to bring this action against them as the Plaintiff is not a party to the Contract on which it is claiming rights.

I also wish to point out that the actions by the Plaintiff to amend the Writ of Summons and Statement of claim without leave of this Court does not cure the defect. Their action is one that would require the exercise of the discretion of this Court. The Plaintiff cannot use a procedure that is outside the Rules of the Court to fix another defect. The Plaintiff should have argued the application before the Court by citing the law and precedents to persuade this Court not to dismiss the matter instead of attempting to change the pleadings to suit their situation. That is not the law and there is no procedure in our laws that allows such an approach.

In view of the foregoing I find that the Defendant's application to dismiss the action with merit. The action is therefore dismissed on account that the Plaintiff has no locus standi to commence this action.

Costs are ordered for the Defendants.

Leave to appeal is granted.

Delivered at Lusaka this 27th day of February, 2020.



.....
C. LOMBE PHIRI
JUDGE