

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

2018/HPC/0213



BETWEEN:

KAFULA KABASO

PLAINTIFF

AND

**PREMIER CHOICE FINANCE LIMITED
FURNTRADE INVESTMENTS LIMITED
PETER MAJULA
NEW FUTURE FINANCE COMPANY
LIMITED**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT**

**CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at
Lusaka on the 10th day of August, 2020.**

For the Plaintiff:

*Ms. D. Chisengalumbwe of Kapungwe Nchito
Legal Practitioners*

*For the 1st to 3rd
Defendants:*

*Mr. M. Mwanza and Ms. W. Chirwa of J & M
Advocates*

For the 4th Defendant:

N/A

RULING

Cases referred to:

1. *Re Rica Gold Washing Co. (1879) 11 CH D 36.*
2. *Wallingford v. Mutual Society (1880) 5 APP CAS 685.*
3. *Nampak Zambia Limited v. Copperfields Brewing Company Limited 2010/HN/149.*
4. *Kitwe Supermarket v. Southern Africa Trade Limited 2007/HK/243.*

5. *Southern Cross Company Limited v. Nonc Systems Technology Limited* 2011/HK/223.
6. *Sablehand Zambia Limited v. Zambia Revenue Authority*, S.C.Z. Judgment No. 20 of 2005.
7. *Doctor J.W. Billingsley v. J.A. Mundi* (1982) Z.R. 11 (S.C.).

Legislation referred to:

1. *Order 14A of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book)*.
2. *Order 14A of the White Book*.
3. *Order 18, rule 8 of the White Book*.
4. *Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia (High Court Rules)*.
5. *Order 8, rule 1 of the White Book*.
6. *Practice Note 18/12/2 of the White Book*
7. *Practice Note 18/8/16 of the White Book*
8. *Practice Note 18/12/18 of the White Book*.
9. *Practice Note 14A/2/10 of the White Book*.

This is the Defendant's application to raise a preliminary issue (hereinafter referred to as "the Application"). The Application was made pursuant to Order 14A as read with Order 33, rule 3 of the Rules of the Supreme Court of England and Wales, 1999 Edition (hereinafter called the "White Book"). The Application was filed into court on 20th November, 2019, and is accompanied by Skeleton Arguments of even date.

The issues outlined in the Notice, upon which the Defendants seek an order expunging the portions of the Plaintiff's affidavit in opposition that speak to the allegation of fraud and overlooking the corporate veil, are as follows:

- (i) Whether the Plaintiff's allegation of fraud in an affidavit in opposition to a misjoinder application is properly before the Court, when the Writ of Summons and Statement of Claim clearly has no particulars of fraud as against the 3rd Defendant;
- (ii) Whether the allegation of fraud can properly be pleaded in an affidavit in opposition to a misjoinder application; and
- (iii) Whether as argued, by the Plaintiff in the skeleton arguments, the Court can overlook the veil of incorporation in the circumstances when the gist of the matter is a misjoinder application by the 3rd Defendant as opposed to an application to overlook the veil of incorporation.

As to whether the Plaintiff's allegation of fraud in an affidavit in opposition to a misjoinder application is properly before the Court, when the Writ of Summons and Statement of Claim clearly has no particulars of fraud as against the 3rd Defendant; and whether the allegation of fraud can properly be pleaded in an affidavit in opposition to a misjoinder application; it was submitted by Counsel for the 1st to 3rd Defendants, in the Skeleton Arguments augmenting the Application, that any allegation relating to fraud that a plaintiff seeks determination of, ought to be specifically pleaded in the pleadings.

Counsel for the 1st to 3rd Defendants contended that a look at the Plaintiff's pleadings filed before this Court indicates that there are no particulars of fraud as against the 3rd Defendant or any of the

Defendants herein, and yet the Plaintiff has in paragraph 15, 16 and 21 of the affidavit, raised the allegations of fraud and has in the skeleton arguments, directed its focus on the allegations of fraud not pleaded.

Citing Order 18, rule 8 of the White Book and the cases of *Re Rica Gold Washing Co.*¹ and *Wallingford v. Mutual Society*², Counsel for the 1st to 3rd Defendants submitted that if the Plaintiff is allowed to use the affidavit in opposition, containing allegations of fraud against the 3rd Defendant, the same would be an ambush on the 3rd Defendant and the ultimate function of pleadings would be defeated. That, it is trite that the function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will determine the matter. It was thus, submitted by Counsel that the affidavit in opposition to the 3rd Defendant's misjoinder application does not sit well before this Court as it contains allegations of fraud which were not pleaded by the Plaintiff in his pleadings. That, it is a grave misconception on the part of the Plaintiff to allege fraud as against the 3rd Defendant when the said allegations were not particularly pleaded in the Plaintiff's pleadings.

It was contended by Counsel for the 1st to 3rd Defendants that the application before this Court is an application for a misjoinder of the 3rd Defendant and the Plaintiff would have done well to have just merely responded to the issues relating to the misjoinder and have the Court make a determination, rather than delving into matters that are not unique to the application that is before this Court.

Counsel, thus, submitted that the allegations of fraud, as contained in the Plaintiff's affidavit in opposition, are not properly pleaded and the Court should expunge them from the affidavit and the skeleton arguments.

As to the issue, whether the Court can overlook the veil of incorporation in the circumstances when the gist of the matter is an application for joinder and not an application to overlook the veil of incorporation, Counsel for the 1st to 3rd Defendants submitted that the Court cannot overlook the veil of incorporation unless the Plaintiff had specifically pleaded the same in the pleadings and brought before Court, facts which speak to the overlooking of the veil of incorporation, by the Court. That, the Plaintiff cannot, by mere mention of arguments relating to the corporate veil, ask the Court to overlook the same when there is no specific application before the Court to do so. In this regard, Counsel referred the Court to the High Court cases of *Nampak Zambia Limited v. Copperfields Brewing Company Limited*³, *Kitwe Supermarket v. Southern Africa Trade Limited*⁴ and *Southern Cross Company Limited v. Nonc Systems Technology Limited*⁵.

The Application is opposed and to this end, an affidavit (hereinafter referred to as "the Affidavit in Opposition"), sworn by one Kafula Kabaso, the Plaintiff herein, was filed into court on 29th November, 2019.

In the Affidavit in Opposition, the deponent deposed that the Statement of Claim clearly shows the particulars of fraud against the

3rd Defendant who is prime mover in the transaction, from paragraph 10 to 13. That, particularly, paragraphs 10, 11, 12 and 13 refer to fraudulent transfer of the Plaintiff's property to the 2nd Defendant, with the 3rd Defendant being prime mover.

It was the further testimony of the deponent that the said paragraphs in the Statement of Claim also refer to how the Plaintiff's Certificate of Title was not returned to him, but transferred to the 2nd Defendant, 6 days after the loan facility offer and contract of sale was signed, when that was not agreed.

The deponent averred that, contrary to the 1st to 3rd Defendants' assertion, the particulars of fraud have already been pleaded in the Statement of Claim.

The Affidavit in Opposition is augmented by Skeleton Arguments of even date and the essence of which is that the preliminary issues raised by the 1st to 3rd Defendants lack merit and should be dismissed; and the Court be allowed to proceed to hear the application for misjoinder.

Counsel for the Plaintiff, in this regard, submitted that the Plaintiff has already pleaded fraud in its pleadings, particularly paragraphs 10 to 13 of the Statement of Claim and thus, the evidence in paragraphs 15, 16 and 21 of the Plaintiff's affidavit in opposition to the application for misjoinder should not be expunged as the same has been pleaded in the Statement of Claim.

Responding to the 1st to 3rd Defendants' argument that the Plaintiff has failed to plead the facts of the fraud in its pleadings, as based on the case of *Re Rica Gold Washing Co.*¹, Counsel for the Plaintiff submitted that the Statement of Claim did, in fact, state the facts that amounted to fraud and therefore the 3rd Defendant is very aware of the case he has to meet. That, the 3rd Defendant is precluded from alleging that there is an ambush against him as he has had fair notice of the case which he has to meet. In this regard, Counsel for the Plaintiff submitted that the Plaintiff has satisfied the requirement, at law, that he must state the facts that constitute fraud.

It was Counsel's further submission that as much as the application before this Court is one for misjoinder, the facts as presented by the Plaintiff in the affidavit in opposition to the misjoinder, are necessary for the Court to determine the application. That, on this basis and on the basis that the facts of fraud have been specifically pleaded, the Court should not expunge any portion of the affidavit in opposition to the misjoinder application.

As regards the issue of whether the Court can overlook the veil of incorporation when the gist of the matter is a misjoinder, Counsel for the Plaintiff stated that she was relying on Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia (hereinafter referred to as the "High Court Rules"). That, in as much as the Plaintiff has not specifically made a formal application to overlook the corporate veil, this Court, by virtue of the said Order, can proceed to overlook the corporate veil in the interest of justice.

It was submitted by Counsel for the Plaintiff that, in the circumstances, it is necessary that the Court overlooks the veil of incorporation because the 3rd Defendant has been sued in his personal capacity as director. That, as can be gleaned from the Statement of Claim, the 3rd Defendant was a prime mover in the transaction wherein the title of the Plaintiff's property was changed to the 2nd Defendant and the 2nd and 3rd Defendants borrowed money from the 4th Defendant using the Plaintiff's property as security.

Counsel for the Plaintiff argued that from the facts in the Statement of Claim, the 3rd Defendant is director in both the 1st and 2nd Defendant companies and was intricately connected to the matter as prime mover, and thus, the Court should overlook the veil of incorporation as it determines the application for misjoinder as the Court has power to do so.

With this, Counsel prayed that the preliminary issues raised be dismissed.

I have carefully considered the documents filed on behalf of the Plaintiff and 1st to 3rd Defendants, in support of their respective positions.

From the Notice filed in pursuance of this Application, the issues for determination are:

- (i) Whether the Plaintiff's allegation of fraud in an affidavit in opposition to a misjoinder application is properly before the Court, when the Writ of Summons and Statement of Claim

clearly has no particulars of fraud as against the 3rd Defendant;

- (ii) Whether the allegation of fraud can properly be pleaded in an affidavit in opposition to a misjoinder application; and
- (iii) Whether as argued, by the Plaintiff in the skeleton arguments, the Court can overlook the veil of incorporation in the circumstances when the gist of the matter is a misjoinder application by the 3rd Defendant as opposed to an application to overlook the veil of incorporation.

With regard to the first and second preliminary issues, which in my view are very closely related, it was submitted by Counsel for the 1st to 3rd Defendants that a look at the Plaintiff's pleadings filed before this Court indicates that there are no particulars of fraud as against the 3rd Defendant or any of the Defendants herein, and yet the Plaintiff has in paragraph 15, 16 and 21 of the affidavit, raised the allegations of fraud and has in the skeleton arguments, directed its focus on the allegations of fraud not pleaded. That, if the Plaintiff is allowed to use the affidavit in opposition, containing allegations of fraud against the 3rd Defendant, the same would be an ambush on the 3rd Defendant and the ultimate function of pleadings, namely; to give fair notice of the case which has to be met and to define the issues on which the Court will determine the matter, would be defeated.

To counter the 1st to 3rd Defendants' position, Counsel for the Plaintiff submitted that the facts/particulars of the alleged fraud have been

pleaded in the Statement of Claim, under paragraphs 10 to 13 and therefore the 3rd Defendant is very aware of the case he has to meet. That, the 3rd Defendant is precluded from alleging that there is an ambush against him as he has had fair notice of the case which he has to meet.

Indeed, it is trite that if fraud is to be a ground in proceedings, then it should be pleaded with utmost particularity. In this regard, the Supreme Court, thus ably guided as follows, in the case of *Sablehand Zambia Limited v. Zambia Revenue Authority*⁶:

“On the authorities cited to us (i.e. Associated Leisure Limited v. Associated Newspaper Limited and Wilde and Another v. Gibson), we entirely agree with the appellant’s counsel that where fraud is to be a ground in the proceedings, then the defendant or respondent wishing to rely on it must ensure that it is clearly and distinctly alleged... a defendant should raise issues of fraud, statute of limitation, etc. as special pleas, so as to show that the action is not maintainable or that the transaction upon which the plaintiff relies is either void or voidable in point of law because if these are not raised, then they are likely to take the plaintiff by surprise.”

This whole requirement that fraud should be pleaded with utmost particularity has its roots in the general principles on pleadings, best expressed under Practice Note 18/12/2 of the White Book as follows:

“The requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises and, as far as possible, so as to minimise costs...The function of particulars is accordingly:

- (1) *to inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved;*
- (2) *to prevent the other side from being taken by surprise at the trial;*
- (3) *to enable the other side to know with what evidence they ought to be prepared and to prepare for trial;*
- (4) *to limit the generality of the pleadings;*
- (5) *to limit and define the issues to be tried, and as to which discovery is;*
- (6) *to tie the hands of the party so that he cannot without leave go into any matters not included."*

As regards matters which must be specifically pleaded in a pleading such as fraud, Order 8, rule 1 of the White Book provides as follows:

"A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, the expiry of any relevant period of limitation, fraud or any fact showing illegality -

- (a) which he alleges makes any claim or defence of the opposite party not maintainable; or*
- (b) which, if not specifically pleaded, might take the opposite party by surprise; or*
- (c) which raises issues of fact not arising out of the preceding pleading."*

From the above, it is clear how allegations of fraud are expected to be introduced into proceedings. It was contended by Counsel for the 1st to 3rd Defendants that a look at the Plaintiff's pleadings filed before this Court indicates that there are no particulars of fraud as against the 3rd Defendant or any of the Defendants herein, and yet the

Plaintiff has in paragraph 15, 16 and 21 of the affidavit in opposition to the misjoinder application, raised the allegations of fraud.

I have had occasion to look at the said paragraphs 15, 16 and 21 of the affidavit in question, and the same are couched as follows:

“15. That the aforementioned action of the 3rd Defendant establishes an impropriety and his actions were fraudulent in that the 3rd Defendant intended on defrauding Plaintiff of his property.

16. That in this regard, the 3rd Defendant who is prime mover should also be held personally liable to meet the claims of the Plaintiff in the Writ of Summons and Statement of Claim filed in this matter.

21. That in response to paragraph 8, I have been advised by my counsel and verily believe the same to be true that the 3rd Defendant can be sued in his personal capacity where there are allegations of fraud and impropriety on the part of the director of a company.”

I have also perused paragraphs 10, 11, 12 and 13 of the Statement of Claim and observed that the same state as follows:

“10. Upon repayment of the loan amount in full, the 1st Defendant did not return the certificate of title for property number L/19897/A/M86 which had been used as security and upon inquiry from the 3rd Defendant, he revealed that the property had been transferred to the 2nd Defendant on the 15th of September, 2017, 6 days after it was signed.

11. The pre signed contract of sale was a security required for the loan and the property was only liable to be transferred to the 2nd Defendant if at all the Plaintiff had failed to repay the loan and redeem the property. The 2nd Defendant transferred the property in breach of the loan agreement.

12. Upon changing the property from the Plaintiff to the 2nd Defendant, the 2nd Defendant with the 3rd Defendant as prime mover borrowed money from the 4th Defendant using the Plaintiff's property as security and the 4th Defendant has proceeded to place a caveat on the property as intending purchaser.

13. After the fraudulent transfer of the Plaintiff's property to the 2nd Defendant, the 2nd Defendant offered to buy the property from the Plaintiff at the cost of ZMW1,800,000.00 (Zambia Kwacha One Million Eight Hundred Thousand only)."

As per Practice Notes 18/8/16 and 18/12/18 of the White Book, any charge of fraud or misrepresentation must be pleaded with the utmost particularity and fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not permissible to leave fraud to be inferred from the facts.

A careful examination of paragraphs 10, 11, 12 and 13 of the Statement of Claim, in my considered view, seems to reveal that the said paragraphs clearly allude to the particulars of the fraud being alleged, with specific reference to the 1st, 2nd and 3rd Defendants in the said paragraphs. In this regard, I find the contention by Counsel for the 1st to 3rd Defendants that the Plaintiff just suddenly introduced the allegations of fraud in the affidavit in opposition to the application for misjoinder, with the effect of ambushing the 1st to 3rd Defendants, baseless. From the record, it is not true that the Statement of Claim does not contain any particulars of fraud as against the 3rd Defendant, because the paragraphs of the Statement of Claim reproduced above clearly speak to particulars of fraud.

This also rebuts the 1st to 3rd Defendants' contention that allowing paragraphs 15,16 and 21 of the affidavit in opposition, to form part of the evidence, would be an ambush on the 3rd Defendant and the defeat of the ultimate function of pleadings, namely; to give fair notice of the case which has to be met and to define the issues on which the Court will determine the matter. By virtue of the allegations of fraud having been established as expressed in paragraphs 10, 11, 12 and 13 of the Statement of Claim, it can only logically be assumed that the 1st to 3rd Defendants were made aware of the case which they were to meet, at pleading stage.

Further, I am inclined to agree with Counsel for the Plaintiff that as much as the application before this Court is one for misjoinder, the facts as presented by the Plaintiff in affidavit in opposition to the misjoinder, are necessary for the Court to determine the application.

In light of the above, I am not satisfied that the 1st to 3rd Defendants have advanced convincing reasons to warrant this Court's order to have paragraphs 15, 16 and 21 of the affidavit in opposition to the application for misjoinder, expunged from the said affidavit. The first two preliminary issues are accordingly dismissed for lacking merit.

I now turn to the third issue, namely, whether the Court can overlook the veil of incorporation in the circumstances when the gist of the matter is a misjoinder application by the 3rd Defendant as opposed to an application to overlook the veil of incorporation.

It has been contended by the 1st to 3rd Defendants that the Court cannot overlook the veil of incorporation unless the Plaintiff had

specifically pleaded the same in the pleadings and brought before Court, facts which speak to the overlooking of the veil of incorporation, by the Court. That, the Plaintiff cannot, by mere mention of arguments relating to the corporate veil, ask the Court to overlook the same when there is no specific application before the Court to do so. It has also been contended by Counsel for the 1st to 3rd Defendant that the application before this Court is an application for a misjoinder of the 3rd Defendant and the Plaintiff would have done well to have just merely responded to the issues relating to the misjoinder and have the Court make a determination, rather than delving into matters that are not unique to the application that is before this Court.

In response, the Plaintiff argued that in as much as he has not specifically made a formal application to overlook the corporate veil, this Court, by virtue of Order 3, rule 2 of the High Court Rules, can proceed to overlook the corporate veil in the interest of justice.

It is not in dispute that the application before this Court, and in respect of which the preliminary issues herein have been raised, is one for misjoinder and not for piercing the corporate veil. Further, it is also not in dispute that the Plaintiff has not made any formal application for this Court to order the piercing of the corporate veil. The Supreme Court, in the case of *Doctor J.W. Billingsley v. J.A. Mundi*⁷, clearly guided as follows, on how such circumstances should be treated:

“When the application for an interlocutory injunction came up before the learned High Court Commissioner, the advocates concerned contrived to argue not only the application properly before the court, but every aspect of the respondent's case as disclosed by the writ. In the event the learned High Court Commissioner in his judgment on the application granted a perpetual injunction, an order for vacant possession, and awarded damages. In fact, and in effect that judgment purported to be a final determination of the entire action.

Mr. Muzyamba, who now has conduct of the appellant's case submitted that the learned High Court Commissioner erred in law in granting vacant possession, perpetual injunction, and damages on an application for an interim injunction when such relief fell to be determined on the merits in the normal course after a trial. With these submissions, I entirely agree. Indeed, Mr. Chuunga, who appears for the respondent, quite properly concedes and agrees that the judgment appealed against cannot be supported.

...I am of the view that it is unnecessary to give further consideration to any aspect of this case other than to stress that, unless the parties have specifically and clearly applied for a consent judgment, which they are at liberty to apply for at any stage of an action, the court should only deal with the particular application properly before it. The application for an interim injunction should be treated as such and should not be taken as a convenient opportunity for the summary determination in finality of an entire suit. In this case I would hold that the purported final determination of all the issues at that stage was premature and incompetent, and accordingly a complete nullity.”

From the above guidance given by the Supreme Court, it is clear that this Court should only deal with the particular application properly before it, in this respect, the application for misjoinder. In light of this, I am inclined to agree with Counsel for the 1st to 3rd Defendants that the application before this Court is an application for a

misjoinder of the 3rd Defendant and the Plaintiff would have done well to have just merely responded to the issues relating to the misjoinder and have the Court make a determination, rather than delving into matters that are not unique to the application that is before this Court. No application to pierce the corporate veil has been filed before this Court for the Court to proceed to determine the same. Proceeding to grant an order piercing the corporate veil, at this juncture would thus, be premature.

The third preliminary issue, in this regard, is accordingly resolved to the effect that the Court cannot overlook the veil of incorporation in the circumstances when the gist of the matter is a misjoinder application by the 3rd Defendant as opposed to an application to overlook the veil of incorporation.

The Application herein was made pursuant to Order 14A and Order 33, rule 3 of the White Book. The former provides as follows:

“r.1. - Determination of questions of law or construction

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) ...

(a) ...

(b)...

(4) ...

(5) ...

r.2 - Manner in which application under rule 1 may be made

An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1... may be made orally in the course of any interlocutory application to the Court."

The latter Order provides as follows:

"The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

Under Order 14A of the White Book, the Court is particularly empowered, upon determination of preliminary issue, to dismiss the cause/matter or application, or make such order or judgment as it thinks just.

To this end, Practice Note 14A/2/10 under Order 14A of the White Book provides as follows, regarding the nature of the order that would follow a determination as in the Application herein:


"Upon making its determination of the question of law or construction, the Court may dismiss the action or make such order or judgment as it thinks just... In this way, the action will be finally disposed of without a full trial and the judgment or order will have the same force and effect as the judgment or order after a full trial of the action."

It appears to me that the 1st to 3rd Defendants having cited Order 14A in their Notice of Motion to raise preliminary issues, had an order of such manner in mind, which would effectively operate to summarily dismiss the Plaintiff's allegations of fraud in his affidavit in opposition to the application for misjoinder of party. However, for the reasons in this ruling, the 1st to 3rd Defendants' Application herein succeeds in part. Thus, I am inclined towards not summarily expunging paragraphs 15,16 and 21 of the affidavit in opposition on the strength of the points of law raised by the 1st to 3rd Defendants. On the other hand, I find merit in the point of law that the Plaintiff cannot request this Court to grant an order to lift the corporate veil, under an application for misjoinder, when in fact, no formal application for the lifting of the corporate veil has been made before this Court. While I find merit in the third preliminary issue, I am of the view that disposing of the Plaintiff's request for this Court to overlook the corporate veil, at this point, in accordance with Order 14A of the White Book, would be premature.

Costs shall be in the cause.

Leave to appeal is denied.

Dated at Lusaka the 10th day of August, 2020.



W.S. MWENDA (Dr)
JUDGE