

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

2020/HP/0486

(Civil Jurisdiction)



BETWEEN:

WANG SHUNXUE

1ST PLAINTIFF

YANG YUAG

2ND PLAINTIFF

QIAO HONGXIAN

3RD PLAINTIFF

WANG ZEN

4TH PLAINTIFF

ZHU HULIN

5TH PLAINTIFF

ZHANG MIAO

6TH PLAINTIFF

ZHANG ZHUANLE

7TH PLAINTIFF

HE ZHIHONG

8TH PLAINTIFF

ZHANG CHUNCI

9TH PLAINTIFF

AND

KINGPHAR COMPANY ZAMBIA

DEFENDANT

LIMITED *(Under Supervision and Commencement
of Business Rescue Proceedings)*

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON 31ST AUGUST, 2020.**

*For the Plaintiffs: Mr. N. K. R. Sambo – Messrs. Sambo Kayukwa
and Company*

*Mr. S. K. Simwanza – Messrs. Lungu Simwanza
and Company*

For the Defendant: Mr. P. Chola – Messrs. Lewis Nathan Advocates

RULING

CASES REFERRED TO:

1. *Attorney General v Law Association of Zambia (2008) Vol. 1 Z.R. 21; and*
2. *Zambia Democratic Congress v Attorney General (2006) Z.R. 6.*

LEGISLATION REFERRED TO:

1. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia;*
2. *The Constitution of Zambia (Amendment) Act No. 2 of 2016;*
3. *The Constitutional Court Act No. 8 of 2016; and*
4. *The Corporate Insolvency Act No. 9 of 2017.*

1 INTRODUCTION

1.1 The Court has been moved to determine whether or not the proceedings should be stayed pending hearing and determination of the constitutional issues by the Constitutional Court of Zambia.

2 BACKGROUND

2.1 On 22nd May, 2020, the Plaintiffs were granted leave to commence legal proceedings against the Defendant, following which they issued a Writ of Summons and Statement of Claim seeking the following reliefs: -

1. *Damages for Unfair Dismissal;*
2. *Damages for Wrongful Dismissal;*
3. *An injunction restraining the Defendant and/or its Business Rescue Administrator Lewis Chisanga Mosho from exercising powers unlawfully;*
4. *Costs arising out of and incidental; and*

5. Any other relief the Court may deem fit and just in the circumstances.

2.2 On 18th June, 2020, the Defendant applied pursuant to **Order III, Rule 2** of **The High Court Rules**¹, to stay proceedings pending hearing and determination of the constitutional issues by the Constitutional Court of Zambia as referred to the Constitutional Court by the High Court for Zambia under Cause Nos. 2020/HB/15 and 2020/HPC/165, which causes were consolidated.

3 AFFIDAVIT EVIDENCE

3.1 In support of the application, an Affidavit deposed to by one Lewis Chisanga Mosho who is the Court appointed Business Rescue Administrator of the Defendant, was filed herein, in which it is averred, *inter alia*, that he applied under Cause Nos. 2020/HB/15 and 2020/HPC/165 for an order to stay the interlocutory proceedings therein and refer the matter to the Constitutional Court for determination of the constitutional issues. Consequently, the Court under Cause Nos. 2020/HB/15 and 2020/HPC/165 as consolidated, stayed the interlocutory proceedings therein and referred the matter to the Constitutional Court for determination of the constitutional issues.

3.2 It is further averred that one of the constitutional issues to be determined by the Constitutional Court is whether or not the High Court sitting at Lusaka under Cause Nos.

2020/HPC/268, 2020/HP/0486 and 2020/HPC/0336, before different Judges and the High Court sitting at Kabwe before another Judge under Cause No. 2020/HB/023, can properly hear and determine these causes of actions considering that each of these causes interferes with the performance of the judicial function by a Judge sitting at Kabwe under Cause No. 2020/HB/015 and 2020/HPC/165 as consolidated contrary to Article 122 (2) of ***The Constitution of Zambia***².

- 3.3 It is also averred that the constitutional issues referred to the Constitutional Court by the Court under Cause Nos. 2020/HB/015 and 2020/HPC/165 as consolidated, have a potential of affecting the jurisdiction of this Court to hear and determine this cause.
- 3.4 The application is opposed by the Plaintiffs who filed herein an Affidavit in Opposition on 28th July, 2020, deposed to by the 1st Plaintiff Wang Shunxue, who averred, *inter alia*, that the gist of the matter before this Court is to challenge the illegal and wrongful termination of employment of the Plaintiffs. It is also averred that in fact, it is the Defendant's action herein which amounts to judicial interference and an abuse of Court process as it did not lay before the Court at Kabwe and before this Court any facts that point to this Court's interference with the functions of the Court at Kabwe.

4 SUBMISSIONS

- 4.1 In its submissions filed herein on 18th June, 2020, the Defendant submits, *inter alia*, that the constitutional issues before the Constitutional Court essentially challenge the jurisdiction of this Court to hear and determine this cause and that they have a huge bearing on this matter touching on whether this matter should be merged with the matter under Cause No. 2020/HB/015 and 2020/HPC/165 as consolidated. It is contended that it is imperative to allow the Constitutional Court to make its decision on these issues before this Court can take any further steps in this matter, as not doing so may render the Constitutional Court engaging in an academic exercise. To fortify its contention, the cases of **Attorney General v Law Association of Zambia**¹ and **Zambia Democratic Congress v Attorney General**² were cited for their pronouncement of Courts being engaged in academic exercises.
- 4.2 In their brief submissions filed herein on 28th July, 2020, the Plaintiffs argue that there is no constitutional issue raised herein affecting the matter under Cause Nos. 2020/HB/15 and 2020/HPC/165 as consolidated as the matters herein seeks to challenge the termination of employment of the Plaintiffs in the manner it was done. It is also submitted that staying the proceedings herein is tantamount to denying the Plaintiffs a right to come to

Court to seek recourse, on the issue of termination of employment.

5 HEARING OF APPLICATION TO STAY PROCEEDINGS

- 5.1 On the return date on 30th July, 2020, the Defendant's Learned Counsel, Mr. Chola, applied to stay the proceedings pending hearing and determination of the constitutional issues raised under Cause Nos. 2020/HP/15 and 2020/HPC/165, as consolidated. He relied entirely on the Affidavit in Support of the application and skeleton arguments filed herein.
- 5.2 The application was opposed by Learned Counsel for the Plaintiffs, who argued that the question for determination at trial before this Court is the manner in which the Plaintiffs' employment was terminated, which is unrelated to the consolidated matter before Justice Kamwendo at Kabwe High Court and does not raise any constitutional issues. It was further argued that the application to stay the proceedings pending hearing and determination of constitutional issues raised in another matter is mischievous in that the Applicant has not demonstrated how challenging termination of employment interferes with the duties of the Judge in Kabwe in line with **Article 122** of **The Constitution**². That the failure to demonstrate such interference does not help the Defendant to move this Court to stay proceedings. It was also argued that the question that

the Defendant requires hearing and determination in the consolidated cause in Kabwe by the Constitutional Court is unrelated to these proceedings. He prayed that the application be dismissed.

5.3 In reply, Learned Counsel for the Defendant stated that he had not had sight of the Plaintiffs' Affidavit in Opposition and skeleton arguments as they were not served on them. He therefore applied to be given an opportunity to file herein an Affidavit in Reply before the Court proceeds to determine the application. In the interest of justice, I granted the application and directed the Defendant to file its Affidavit in Reply within five days thereof. At the time of delivering this Ruling, the Defendant had not complied with the Court's directive.

6 THE LAW

6.1 The Defendant's application to stay the proceedings was made pursuant to **Order III Rule 2 of The High Court Rules**¹, which gives the Court powers to make any interlocutory order that it deems necessary for doing justice. It is couched as follows: -

"Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."

6.2 **Article 128 (1) (a) and (2) of The Constitution**² provides as follows: -

"(1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—

(a) a matter relating to the interpretation of this Constitution...

(2) Subject to Article 28 (2), where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court."

6.3 **Section 8 (2) of The Constitutional Court Act**³ provides as follows: -

"Subject to Article 28 (2) of the Constitution, where a question relating to the Constitution arises in a court, the person presiding in that court shall refer the question to the Court."

7 ANALYSIS AND FINDINGS

7.1 I have considered the submissions by the parties. I find that the key issue I must determine is whether or not this action should be stayed pending hearing and determination of constitutional issues raised in a consolidated matter at Kabwe High Court under Cause Nos. 2020/HB/15 and 2020/HPC/165.

7.2 The Defendant has argued that in the interest of justice, the Court must stay the proceedings pending hearing and determination of the constitutional issues raised in another cause at Kabwe High Court. One of the

constitutional issues raised at Kabwe High Court under Cause No. 2020/HB/15 is whether or not the High Court sitting at Lusaka under Cause Nos. 2020/HPC/0268, 2020/HP/0486 and 2020/HPC/0336 before different Judges and the High Court sitting at Kabwe before another Judge under Cause No. 2020/HB/023 can properly hear and determine these causes of actions considering that each of these causes interferes with the performance of the judicial function by a Judge sitting at Kabwe under Cause Nos. 2020/HB/15 and 2020/HPC/165, as consolidated contrary to **Article 122 (2)** of **The Constitution**², which is couched as follows: -

"A person holding a public office shall not interfere with the performance of a judicial function by a judge or judicial officer."

- 7.3 On the other hand, the Defendant has argued that this matter challenges the manner in which termination of the Plaintiffs' employment was done by the Defendant, which action does not in any way raise any constitutional issue nor affect the proceedings at Kabwe in the consolidated cause.
- 7.4 It is trite that every matter relating to the interpretation or to a violation or contravention of **The Constitution**¹ shall be heard by the Constitutional Court. **Article 128 (3) (c)** of **The Constitution**¹ provides that *"a person who alleges that an act, omission, measure or decision by a*

person contravenes the Constitution, may petition the Constitutional Court for redress".

7.5 Looking at the reliefs sought by the Plaintiffs, which are outlined in paragraph 2.1 above, it is my considered view that no question has arisen, at this stage, that warrants the stay of the proceedings herein pending determination and hearing of the constitutional issues raised at Kabwe High Court under Cause Nos. 2020/HB/15 and 2020/HPC/165, as consolidated. I have had an opportunity to peruse the Statement of Claim herein. It is clear from the pleadings that the questions that require interrogation herein are as an incident of termination of the Plaintiffs' employment. The Plaintiffs are clearly within their rights to bring such an action. It is clear from ***The Corporate Insolvency Act***⁴ that any action affecting employment in business rescue proceedings shall be subject to the Constitution, Employment Act and other applicable employment legislation. This action is separate and independent from the action in Kabwe, wherein constitutional issues have been raised.

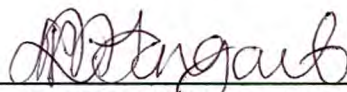
7.6 Further, the Plaintiffs herein are not party to the consolidated action in Kabwe. Furthermore, I do not see how this Court, by presiding over an action founded on the Employment Act, will interfere with the functions of another Court as the Defendant has not demonstrated

how this action challenging termination of the Plaintiffs' employment interferes with the duties of the Judge presiding over the consolidated action, wherein constitutional issues have been raised. Premised on this, there is no constitutional issue arising out of this action, which requires hearing and determination by the Constitutional Court. The reliefs sought by the Plaintiffs are all determinable by this Court which is vested with jurisdiction to hear such matters.

8 CONCLUSION

- 8.1 For the foregoing reasons, the application to stay the proceedings herein is dismissed for lack of merit.
- 8.2 Costs are for the Plaintiffs to be taxed in default of agreement.
- 8.3 Leave to appeal is granted.

Delivered on the 31st day of August, 2020.



**P. K. YANGAILO
HIGH COURT JUDGE**