IN THE HIGH COURT FOR ZAMBIA **2009/HP/1388**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

TOMBWE PROCESSING LIMITED **PLAINTIFF**

AND

BAK STORAGE LIMITED **1ST DEFENDANT**

SALT LAKE LIMITED **2ND DEFENDANT**

Before the Hon. Lady Justice C. Lombe Phiri in Chambers

For the Plaintiff: *Mr Yosa – Musa Dudhia & Company*

For the Defendants: *Mr R. Musumali – SLM Legal Practitioner*

RULING

CASES REFERRED TO:

1. **Development Bank of Zambia and KPMG Peat Marwick vs Sunvest Limited and Sun Pharmaceutical Limited 1995/1997 – Z.R 187 (SC)**

2. **Attorney General v Law Association of Zambia (2008) ZR 21 Vol 1 (S.C)**

This is a ruling on the Defendant's application to raise Preliminary issues pursuant to Order 14A as read with Order 33 Rule 3 and 7 of the Rules of the Supreme Court (RSC) (1999 edition).

The application was in relation to the Plaintiff's application for an Order to set-aside Judgment of 21st October 2015 and to set aside Writ of Fieri Facias in light of the Plaintiff's appeal in the Court of Appeal in relation to the High Court's refusal to grant the Plaintiff special leave to review its own Judgment.

The issues raised by the Defendant were whether:

1. *The Plaintiff's applications were competent and properly before the Court in light that the Plaintiff has lodged an appeal in the Court of Appeal against the Ruling of the Court of 5th June, 2019;*
2. *The Court entertaining the Plaintiff's application would be tantamount to an abuse of Court process and as such it ought to be dismissed;*
3. *Whether the Plaintiff is not liable to settle the Defendant's costs for abuse of Court process.*

The Defendant filed into Court its affidavit in support of the Application and Heads of Argument.

The gist of the Affidavit in Support was to lay out the facts before the Court pertaining to the pending application before the Court of Appeal and the Supreme Court. It was revealed in the Affidavit that the applications were pending before the respective Courts. It was deposed that as a result of this the

application to set aside the Judgment of the High Court dated 21st October, 2015 is improper and an abuse of the process of Court.

In the heads of argument filed into Court it was submitted that the decision by the Plaintiff to make an application before the High Court to set aside the Judgment while it was actively pursuing an appeal in the Supreme Court of Zambia and another appeal in the Court of Appeal is prima facie an abuse of process of Court. That this amounts to a multiplicity of actions because there is a real risk of the Courts rendering decisions that are conflicting and/or academic. The circumstances that would give a rise to the conflict were illustrated. Reliance was placed on the case of **Development Bank of Zambia and KPMG Peat Marwick vs Sunvest Limited and Sun Pharmaceutical Limited 1995/1997 – Z.R 187 (SC)**[1] to drive home the point that the Courts strongly condemn the idea of having actions with similar issues pending before another Court or Judge. It was submitted that this was the case before this Court. Various other authorities were also cited to persuade the Court regarding how the conduct of the Plaintiff's action amounts to abuse of the Court process.

It was also submitted that the Plaintiff ought to be condemned in costs in order not to encourage such conduct which is inimical to administration of justice.

In response the Plaintiff filed into Court its affidavit in opposition to the Application. The gist of their submission was that the application to set aside Judgment dated 21st October, 2015 was made in light of the direction of the Court of Appeal contained in the Judgment dated 21st June, 2019. It was

deposed that the Defendants also applied on 6th November, 2019 to raise preliminary issues to the Plaintiff's Application for leave to appeal to the Supreme Court in the Court of Appeal. It was deposed to that the Application by the Defendants had been overtaken by events in light of the Ruling of the Court of Appeal dated 23rd April, 2020. The affidavit laid out the occurrences before the Court of Appeal and the contents of the Ruling exhibited in the Affidavit, the contents of which will be referred to later in the Ruling. The Plaintiff also filed into Court written heads of arguments which give a preamble suggesting that the Plaintiff had not been heard in the case before Court. The Plaintiff then set forth a chronology of Applications before the Court that have not been heard. It was then submitted that the preliminary issues raised by the Defendants had been overtaken by events as there were now no applications pending before the Court of Appeal. It was also submitted that the Plaintiff had withdrawn its appeal under cause CAZ /08/185/2019.

It was submitted that the submission by the Defendants that there is a multiplicity of actions is therefore misconceived.

Due consideration has been made of the submissions filed by the parties and the affidavits filed in relation to the application.

Before proceeding to the core issue in question I would wish to address the manner in which the Plaintiff has sought to pursue its application before Court. The Plaintiff has suggested in its submission that this Court has *"closed the doors of Justice"* to it because certain applications have not been heard by this Court. The Plaintiff has conveniently decided to leave out all the other applications

that have been heard and determined, through the entire Court system, from the time of Judgment. It is highly regrettable that the Plaintiff would seek to apportion blame on the Court system while ignoring all the times this Court and the Court of Appeal have given it an opportunity to be heard. Even the Court of Appeal in its Ruling dated 23rd April, 2020 observed that the Plaintiff seems to be undecided as to whether to move forward or backwards in this matter. The parties in this matter have filed multiplicity of applications, some before the Judge in Chambers and others before the Deputy Registrar. There were also other applications in the Court of Appeal.

In all these applications the Plaintiff has been given, at the very least, an opportunity to file arguments. It is therefore misleading and acrimonious for the Plaintiff to make blanket accusations in relation to the Court for refusal to be heard. Such allegations are unfortunate and seek to cast aspersions on the Court. That said this Court will not be swayed by the incomplete version of events presented by the Plaintiff and will focus on the issues before the Court.

As is clear from the time of filing of the application before the Court and the delivering of this Ruling there has been an inadvertent delay in the disposal of the application. Also the record will show that subsequent to the physical hearing of the matter in August, 2019, the record has been misplaced. The time lapse has been inordinate and as a result there have been Rulings before the Court of Appeal and Supreme Court that have affected the complexion of the application. I will remind myself that Courts hearing applications are strongly discouraged from making decisions that would merely be rendered academic and serve no purpose to the disposal of the issues before court. The

approach of the Supreme Court in the case of **Attorney General v Law Association of Zambia (2008) ZR 21 Vol 1 (S.C)**[2] is adopted.

In the application before this Court the issue was that there were pending applications before the Court of Appeal and the Supreme Court that could potentially affect the outcome of this application. Before this Court the Plaintiff has sought to have the Judgment of 21st October, 2015 set aside following guidance of the Court of Appeal when it dismissed its Appeal for Review. The Plaintiff however, subsequently moved the Court of Appeal for special leave to review the High Court Judgment of 21st October, 2015. This application was declined and they appealed to the Supreme Court. Furthermore, the Plaintiff appealed against the decision of this Court of 5th June 2019 refusing to issue Orders for Directions.

It is important to understand what the sum total effect of these applications would have been. All the applications would have in one way or the other affected the Judgment. This issue was recognized in the Ruling of the Court of Appeal dated 23rd April, 2020 at page R10 where it stated:

> *"by applying to set aside that Judgment, the applicant has abided by our Judgment. It is therefore an abuse of the Court process to apply for leave to appeal against same".*

This cannot be made more clear or plain.

Be that as it may, this Court cannot ignore that circumstances have changed since the Application was filed. That even though it is plain to see that the

Plaintiff was all over the place, undecided in what action it wanted to take, this Court would not be just in dismissing the application to set aside Judgment based on the preliminary issues as they were then. Sound guidance was given by the Court of Appeal regarding what course of action the Plaintiff ought to have taken.

It is on that premises that while this Court will find that the Plaintiff's action of having one foot in the High Court and another in the Court of Appeal amounts to an abuse of the Court process the application to have the entire application dismissed is not tenable as the issues before the Court of Appeal are no longer subsisting.

In view of the foregoing the application is dismissed.

Cost are ordered in the cause.

Dated at Lusaka this **26th May, 2020**

C. LOMBE PHIRI
JUDGE