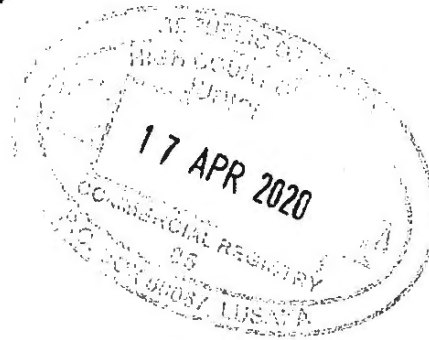


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)

2019/HPC/0467

BETWEEN:

MUSONDA CHANSA
GEORGE CHIRWA
MANESSEH SINKALA



1st PLAINTIFF
2nd PLAINTIFF
3rd PLAINTIFF

AND

ZAMBIAN FERTILIZER LIMITED
LOWKIE LOGISTICS AND SUPPLIERS LIMITED

1ST DEFENDANT
2nd DEFENDANT

Before Lady Justice B.G. Shonga this 17th day of April, 2020

For the plaintiffs, Mr. M. Sinkamba, Messrs. Sinkamba Legal Practitioners

For the 2nd Defendant, Mr. B. Mwanza, Messrs. AB & David

RULING

Cases Referred To:

1. *Dunlop Pneumatic Tyre co. Ltd. V. Selfridge & Co ltd 1915 AC 847.*
2. *Teichmann Zambia Limited v. Mumana Pleasure Resort, Puma Energy Zambia Plc Appeal No. 196/2014, SCZ/8/2014.*
3. *Development Bank of Zambia and KPMG Marwick v. Sunvest Limited and Sun Pharmaceuticals Limited (1995/1997) ZR 187.*
4. *Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172.*

5. *Gould v National Provincial Bank and Another [1960] 1 All ER 549.*

Legislation and Other Material Referred To:

1. *Order XIV, rule 5 (2), High Court Rules, High Court Act, Chapter 27, Vol.3 of the Laws of Zambia.*
2. *Order 15, Rule 6 (2) (a), Rules of the Supreme Court of England, 1965, Supreme Court Practice, 1999 (White Book).*
3. *G.H. Treitel, the Law of Contract, 9th edition, 1995 at page 588*

1.0 APPLICATION

This Ruling speaks to an application by the 2nd defendant for an order to be struck out as defendant. The application was made pursuant to *Order XIV, rule 5 (2) of the High Court Rules, High Court Act, Chapter 27, Vol.3 of the Laws of Zambia* as read with *Order 15, Rule 6 (2) (a) of the Rules of the Supreme Court of England, 1965, Supreme Court Practice, 1999 (White Book).*

The application is supported by an affidavit in support and skeleton arguments filed on behalf of the 2nd defendant on 12th November, 2019.

The application attracted opposition from the plaintiffs who, in turn, filed an affidavit in opposition and skeleton arguments on 16th January, 2020.

The application was heard on 21st January, 2020.

2.0 BACKGROUND

On 4th October 2019, the plaintiffs took out a writ of summons against the defendants. A summary of the principal claims made by the plaintiff's, as endorsed on the writ are: (i) Demurrage at \$250 per day for each truck load from the date the trucks were loaded; (ii) damages for breach of contract; (iii) interest; and (iv) costs.

3.0 FACTS UNDERLYING THE APPLICATION

The undisputed facts, as discerned from the affidavits on record, are that the 2nd defendant has a contract to transport 300 tons of fertilizer on behalf of Export Trading Group. Sometime in September, 2019, the 2nd defendant sub-contracted Cargorine Management and Logistics Limited to transport part of the 300 tons of the fertilizer. The 2nd

defendant fully paid Cargorine Management and Logistics Limited for its services. In turn, Cargorine Management and Logistics Limited hired the plaintiffs to transport part of the 300 tons of the fertilizer from Lusaka to Lubumbashi in the Democratic Republic of Congo.

In addition, On 5th October, 2019, the 2nd defendant and the plaintiffs entered into a contract relating to the storage of the fertilizer cargo which was on the plaintiffs' five (5) trucks and was being held by the plaintiffs as security for the payment of the storage charge, exhibit marked "**MS1-2**" to the affidavit in opposition. Subsequently, a deposit of K10,000.00 was paid by the 2nd defendant. On 7th October, 2019 the plaintiffs released the fertilizer that was loaded on four (4) trucks. Acting on the instruction of the 2nd defendant the plaintiffs offloaded the fertilizer at the premises of Export Trading Group where it was initially collected from. The defendants acknowledged receipt of the fertilizer by issuing goods received notes nos. 61693, 61694 and 61695, exhibits marked "**MS1-2**" to the affidavit in opposition. The plaintiffs

have retained one (1) truck load of fertilizer as security for the storage charges.

4.0 LEGAL ARGUMENTS

4.1 Arguments presented on behalf of the 2nd defendant

Recalling the affidavit evidence, counsel for the 2nd defendant observed that the plaintiffs were strangers to the relationship between the 1st and 2nd defendants. Additionally, that the 2nd defendant was not a party to the contract between Cargorine Management and Logistics Limited and the plaintiffs. Consequently, it was contended that since the plaintiffs and the 2nd defendant have no contractual relationship, the plaintiffs have failed to demonstrate a cause of action against the 2nd defendant. Counsel therefore argues that the 2nd defendant is the wrong party to be sued for any breach of contract between the plaintiffs and Cargorine Management and Logistics Limited.

In support of its argument, counsel for the 2nd defendant referred to the erudition of **G.H. Treitel, the Law of Contract, 9th edition, 1995 at page 588** where the erudite laments that the rule

that no one except a party to a contract can be made liable is just and sensible. Further, the case of ***Dunlop Pneumatic Tyre co. Ltd. V. Selfridge & Co ltd 1915 AC 847¹*** was cited in aid of the application.

4.2 *Arguments presented on behalf of the plaintiffs*

On behalf of the of the plaintiffs, counsel highlighted the agreement dated 5th October, 2019, between the plaintiffs and the 2nd defendant. He observed that the subject matter *in casu* is one truck of fertilizer that belongs to the 1st defendant, which the plaintiffs are holding as security for storage charges owing by the 2nd defendant under the agreement. Counsel pointed out that it was not disputed that the 2nd defendant has an interest in the subject matter of the proceedings. It was submitted that since the 2nd defendant has an interest, they ought to remain a party.

In addition, it was argued that that since the fertilizer belonged to the 1st defendant and the plaintiffs have custody of the said fertilizer through the agreement with the 2nd

defendant, issues relating to ascertaining the parties to the agreements are triable issues that ought to be determined holistically at trial. The gist of the arguments presented on behalf of the plaintiffs is that all controversies between the parties must be resolved in one court to avoid duplicity and multiplicity of actions.

The submissions were anchored on *Order XIV, rule 5 (2) of the High Court Rules, High Court Act, Chapter 27, vol.3 of the Laws of Zambia* and *Section 13 of High Court Act, Chapter 27, vol.3 of the Laws of Zambia*.

Aside the above mentioned *lex scripta*, I was invited to consider the cases of *Teichmann Zambia Limited v. Mumana Pleasure Resort, Puma Energy Zambia Plc Appeal No. 196/2014, SCZ/8/2014²; Development Bank of Zambia and KPMG Marwick v. Sunvest Limited and Sun Pharmaceuticals Limited (1995/1997) ZR 187³; and Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172⁴*.

5.0 Determination

I have carefully read and scrutinized all the affidavit evidence, legal arguments and submissions before Court. Firstly, I note that in attempting to aid the Court to determine this application, both parties referred to **Order XIV, Rule 5 (2) of the High Court Rules**, which reads as follows:

“The Court or a judge may, at any stage of the proceedings, and on such terms as appear to the Court or a judge to be just, order that the name or names of any party or parties whether as plaintiffs or as defendants, improperly joined, be struck out.”

Having read the rule, I accept that this Court has power under Order 14, Rule 5(2) to strike out a party who has been improperly joined.

At this stage, I take pause to highlight the case of **Teichmann Zambia Limited v. Mumana Pleasure Resort and Puma Energy Zambia, Plc. SCZ/8/190/2014** cited by the plaintiffs. In that case, the Supreme Court opined that the trial court missed the point by focusing its attention on the contract and the parties thereto instead of the subject matter of that contract in an application that fell to be resolved entirely under Order XIV, rule 5 (1) of the High Court Rules. The opinion caught

my attention to the extent that I was prompted to guard against falling prey to concentrating on the arguments relating to whether the plaintiffs were a party to the contract between the 1st defendant and the 2nd defendant; or whether the 2nd defendant was a party to the contract between the plaintiffs and Cargorine Management and Logistics Limited.


Having applied the necessary caution, I resolved that this application falls to be resolved squarely under Order 14, Rule 5(2) of the High Court Rules. Therefore, the question that requires my rumination is simply whether the 2nd defendant is an improper party to this action. Asked in another way, whether the 2nd defendant is a proper party to this action.

Turning to consider the question posed, I observe that the rule does not offer guidance on how to determine propriety or impropriety. I visited English case law and in particular the case of *Gould v National Provincial Bank and Another* [1960] 1 *All ER* 549⁵ where the English Courts opined that for a person to be a proper party to the action, it was essential that the person be legally or equitably interested in some part of the

relief. I am persuaded by that ratiocination and I adopt it *in casu*.

In this case, the first relief claimed is, “*demurrage at \$250 per day for each truck load from the date the trucks were ...*”. The undisputed affidavit evidence before Court is that the plaintiffs entered a contract with the 2nd defendant relating to the storage of fertilizer cargo on the plaintiffs’ trucks as security for the payment of the storage charge. The claim for demurrage is clearly premised on the contract of 5th October, 2019. That being the case, I opine that the 2nd defendant, through its contractual relationship with the plaintiffs, has a legal interest in the relief endorsed on the writ in these proceedings. Resultantly, I am satisfied that the 2nd defendant is a proper party to these proceedings. Accordingly, the application fails and must be dismissed. Application dismissed. Costs are awarded to the plaintiffs, to be taxed in default of agreement.

Dated this 17th day of April, 2020


G. B. Shonga
JUDGE