

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

2013/HP/0841

BETWEEN:

STICHTING MACHA WORKS



PLAINTIFF

AND

BRETHREN IN CHRIST CHURCH, ZAMBIA CONFERENCE	1 ST DEFENDANT
MUKUWA KALAMBO	2 ND DEFENDANT
MOSES MUNSAKA	3 RD DEFENDANT
ABRAHAM M'HANGO	4 TH DEFENDANT
MELVIN MABETA	5 TH DEFENDANT
RICHARD MULEYA	6 TH DEFENDANT
CHRISTOPHER MULEYA	7 TH DEFENDANT
MAXWELL MULEYA	8 TH DEFENDANT
MUNGWANGWA	9 TH DEFENDANT
WAMULUME MAFELOMALE	10 TH DEFENDANT
DANIEL HANGUNZU	11 TH DEFENDANT

*Delivered in open court by Hon. Mr. Justice Mathew L. Zulu, at
Lusaka the 30th day of June 2020*

For the Plaintiff: Mr. L. Mwanabo, Messrs. LM Chambers

For the Defendants: Mr. C. Sianondo, Messrs. Malambo and Company

JUDGMENT

Cases referred to:

1. North Western Energy Co Limited v. Energy Regulation Board(2010/HP/786)

2. **Galaunia Farms Ltd v. National Milling Company Ltd(2004) Z.R. 1(S.C.)**
3. **National Milling Co Ltd v. M. Vashee(Suing as Chairman of Zambia National Farmers Union)(2000) Z.R. 98**
4. **Wilfred Balashundram v. Bible Society of Zambia(S.C.Z. Appeal No. 124 of 2013)**
5. **H.C. Sitanga v. The Attorney General(1977) Z.R. 258(H.C)**
6. **Kajimanga v Chilemya (S.C.Z Appeal No. 50 of 2014)**
7. **Trevor Limpic v. Rachel Maware and two others(Appeal No. 121/2006)**
8. **Harry Mwanga Nkumbula and another v. United Independence Party(1978) Z.R. 388**
9. **The Siskina(1979) AC 210**
10. **Edge v. Boileau(1885) 16 QB 117.**
11. **Sata v. Chanda Chimba III and Zambia Broadcasting Corporation**
12. **Re Mwaiseni Properties Limited(1983/HP/ 532)**
13. **Jama Abdirashid v. The Attorney General(Selected Judgment No.21 of 2018) at page 776-778**
14. **Amchile Import and Export Limited and other others v. Ian Chimanga(T/A Tawana Business Venture) and another(S.C.Z. Appeal No. 43A/2011)**

Legislation referred to:

1. ***The Co-operative Societies Act No. 20 of 1998***

Other materials referred to:

1. ***The Halsbury's Laws of England, Vol 27(1)(4th Edition Reissue) Butterworths, 1994.***
2. ***Chitty on Contracts; General Principles, 31st Edition, para 29-167***

This action was commenced on 13th June, 2013 by way of writ of summons accompanied by a statement of claim. The originating process was later amended on 19th September, 2014. The plaintiff seeks the following reliefs:

- 1. A perpetual injunction restraining the defendants and their agents from interfering with the operations of Stichting Macha Works in Macha, Choma and restraining the 1st defendant from depriving the plaintiff and Stichting Macha Works peaceful and quiet enjoyment of the premises it leased to Stichting Macha Works;**
- 2. An Order that the plaintiff and Stichting Macha works are entitled to peaceful and quiet enjoyment under the Lease entered into with the 1st defendant;**
- 3. Damages for defamation and mental anguish and torture;**
- 4. Any other relief the court may deem fit; and**
- 5. Costs.**

The case as pleaded by the plaintiff is that it is a Dutch Foundation that supports various works and projects in Macha under the name Macha Works and also at Macha Research Trust and Macha Mission Hospital since 2003. Since 2003, the plaintiff has paid out more than KR35 million in support of projects in Macha and other rural communities in Zambia by spearheading and supporting a

number of activities in the area. Sometime around 25th April, 2007 Stichting Macha through Gertjan Van Stam facilitated the registration of Linknet Multipurpose Co-operative Society Limited to save as its linkage and to facilitate its operations and works in Macha such as real estate at Ubuntu Campus, restaurant, bank, internet services, ICT Training, Macha Innovative Christian School, library and craft shop, Bio Energy Macha, flying services by local heroes Some of its members were the Attorney and the 2nd defendant.

In May, 2008, Stichting Macha Works under its former name Privaserve Foundation entered into a 5 year lease agreement with the 1st defendant on which land it is operating and it has put up a number of buildings. The plaintiff asserts that in 2012 as its operations and projects expanded, the organization started facing interference from the defendants under the guise that they were concerned citizens. The interference being in form of; leasing out, charging and collecting rentals from tenants occupying properties built by the plaintiff, influencing the withholding of funds which are

with Macha Research Trust which Linknet employees worked for and attempts to take over the plaintiff's assets.

The plaintiff states that due to internal squabbles, Linknet ceased to operate *ipso facto* and was rendered defunct prompting the plaintiff to appoint the Fred Mweetwa, the donee of a power of attorney to oversee its operations and projects while efforts were being made to register another organization to look after Macha Works operations. The plaintiff also claims that the defendants have defamed the attorney through statements they have issued bordering on libel by a letter to the police implying dishonest conduct and reporting him to the 1st defendant's lawyer as a trespasser. The plaintiff therefore, seeks the reliefs in the writ of summons.

The plaintiff also filed into court an application for an interim injunction which application the court ordered to be heard *inter partes*. In the mean time, the defendants filed into court a notice to raise the following preliminary issues. The preliminary issues were dismissed in a ruling dated 16th September, 2013. The court also granted the plaintiff an interim injunction *ex parte* and ordered

counsel for the plaintiff to cite the correct plaintiff, hence the amendment substituting Fred Mweetwa, the Attorney with Stichting Macha Works. The ex parte order of interim injunction was confirmed after an inter partes hearing in a ruling dated 7th April, 2014.

On 23rd September, 2014 Linknet Multipurpose Co-operative Society Ltd filed into court an application to discharge the interlocutory injunction which application was dismissed in a ruling dated 27th January, 2014.

The defendants filed into court their amended defence and a counter claim on 19th April, 2016. The defendants challenge the legal capacity of the plaintiff and assert that there is a contradiction with the earlier claim that the plaintiff was Macha Works Netherland. The 1st defendant asserts that it is not the plaintiff's Landlord as the lease agreement it has is with Privaserve Foundation and not the plaintiff which was already in existence at the time the lease agreement was entered into. The defendants state that the buildings towards which the 1st defendant contributed assets were under the umbrella of Linknet and not the plaintiff.

They deny that Linknet was registered to facilitate the operations of Macha Works but that it was done by Van Stam to receive K85,000.00. They deny interfering with the operation of the plaintiff or influencing anyone to withhold funds to Linknet. The defendants however assert that the board members of Linknet and the church intervened to prevent the dissipation of the assets by Fred Mweetwa and his colleagues.

The defendants assert that Linknet ceased to operate due to the mismanagement of funds by *inter alia* Fred Mweetwa. They allege that the plaintiff has no power to appoint Fred Mweetwa to manage the assets of Linknet while they by virtue of being board members and the 1st defendant being the owner of the land are entitled to protect the assets of Linknet. They assert that Fred Mweetwa has been illegally collecting rentals without any right or responsibility to account. They admit lodging a complaint to the police against the illegal operation of Fred Mweetwa who was involved in non retirement of imprest and they aver that a letter of demand was a lawful means of soliciting cooperation of Fred Mweetwa. The defendants refute that the plaintiff has any investment in Macha

Works Zambia and there is no such registered organisation. The defendants counter claim for the following:

- a) An order that the assets of Linknet Multi Purpose Corporate Society Limited (sic).**
- b) A restraining order against the plaintiff from interfering with the assets of Linknet Multi Purpose Corporate Limited (sic).**
- c) An order that the Board of Linknet Multi Purpose Corporate Society Limited is entitled to the management of the assets (sic).**
- d) An order directed at the plaintiff to account for the operation of Linknet Multi Purpose Corporate Society Limited and the funds it owes (sic).**
- e) Any other relief the Court may deem just**
- f) Interest.**
- g) Costs.**

In the reply and defence to the counter claim dated 10th May, 2016, the plaintiff denies the defendants' assertions in the defence and counter claim. It states that Stichting Macha Works and Macha Works Netherlands are the same entity; the former is the registered name. It states that the lease agreement was for 35 years though not registered but it has been paying rent to the 1st defendant. The plaintiff denies that the buildings were built under the umbrella of

plaintiff and not Van Stam facilitated the registration of Linknet so it could carry out all the activities of Macha Works. He was the Board Secretary of Linknet and he facilitated its registration through Macha Works Netherlands. It was his evidence that Stichting Macha Works and Privaserve are one and the same. The name Stichting changed in 2009 after Macha Works Zambia and Privaserve sat and changed the name to Macha Works Stichting and as such, there was a lease between the plaintiff and the 1st defendant. PW1 testified that there was verbal and written communication to him as the executive officer of the Foundation demanding for rentals and there was also an attempt by the 1st defendant to terminate the lease agreement as proof of this relationship. He communicated with Macha Works Netherlands and they deposited the rentals for 2010 to 2017 into the 1st defendant's account and these events occurred when the matter was already in court. PW1 testified that there was no demand for rentals prior to this action. He testified that before rentals would be paid, the 1st defendant was supposed to issue an invoice as warned by the Anti Corruption Commission.

PW1 told the court that this action was commenced because the 1st defendant attempted and threatened to take over the plaintiff's assets. It was his evidence that the 2nd defendant who is the Chairperson of the Station Coordinating Committee called a meeting of the members of that committee which is an organ of the 1st defendant which oversees the assets and property of the 1st defendant and he was also present. The 2nd defendant informed the members that Linknet was declared redundant and that all assets of Macha Works would go in the hands of the Station Coordinating Committee and he employed two guards to secure the property. PW1 testified that after the meeting, he was reported to the police for looting the property of Macha Works by the Committee who are the 2nd to 11th defendant to this action.

PW1 testified that the members of the Committee called another meeting where they informed the plaintiff's tenants to stop paying rentals for the structures built by the plaintiff. It was his evidence that after the dispute, there is correspondence that was exchanged between the plaintiff and the 1st defendant produced at page 14 to 24 of the plaintiff's bundle of documents. PW1 testified that the

money for Macha Stichting Works was generated by Macha Stichting Works Netherlands using Linknet's account to facilitate Macha Works activities. It was his evidence that after the works of Macha Works were declared redundant, the redundancy packages were paid by Macha Works Netherlands through Linknet. It was his evidence that Linknet had no lease with the 1st defendant.

When cross examined, PW1 confirmed that he did not produce any document to show that the plaintiff organization existed as a legal entity but he had minutes to show that it existed as a legal entity in Netherlands. He confirmed that Macha Works is not registered, only Linknet is. He however confirmed that the document at page 65 of the plaintiff's bundle of documents was a translation from Dutch to English but it was not signed and neither is there proof of where it was translated or that it was a translation and that there was no certificate to show it was a translation. In relation to the bank statement at pages 72 to 76 PW1 confirmed that the owner of the bank statement is Linknet and there is no evidence that any organization he sought to represent deposited money into that account.

PW1 confirmed that there was an unretired imprest of K20, 000.00 and that he had no evidence before court that he retired the imprest. He also confirmed that he as well as other members of the Macha Works Netherlands Board sold a truck belonging to the 1st defendant and the money was used to pay off a debt. He confirmed that according to the audit at page 156 of the defendant's bundle of documents, the buildings belonged to Linknet. PW1 also confirmed that salaries were paid by Linknet. He confirmed that based on the audited report, Linknet was receiving funding from Privaserve or Sticing Macha. PW1 confirmed that he was running the affairs of the Cooperative alone and some tenants were paying money which he was receiving. He confirmed that there was no account or report on how he was using the money or that he channeled the rentals received to Linknet. He confirmed that the letters of demands for rentals which he issued were on Linknet and Macha Works headed paper. PW1 confirmed that Macha Works is not registered and that the registered entity is Linknet. He confirmed that the statutes of Linknet did not allow him to do what he was doing. He confirmed that Linknet was receiving money from Privaserve or Macha Works Stichting and that the property belonged to Linknet.

PW1 confirmed that the document at page 76 of the plaintiff's bundle of documents, proves that Privaserve through Linknet paid the 1st defendant the rentals in the sum of US\$500 but confirmed that the document did not show that the money came from Privaserve. He confirmed that from 2008 to date, the plaintiff has not paid rentals. PW1 confirmed that the 1st defendant and Privaserve had the right to terminate the lease agreement and that the 1st defendant terminated the lease. He confirmed that Privaserve has allowed the Macha Institute of Health Sciences to be on the property and that the students are paying money to the institute which goes into the building.

During re-examination PW1 testified that the funding for Macha Works was generated by Macha Stichting Netherlands and paid through Linknet's account. He confirmed that the document at page 161 of the defendant's bundle of pleadings showed that there was money coming from Privaserve to Linknet and that there was no contribution from the 1st defendant. He testified that the bank statements presented before court in the defendant's bundle of documents only showed part of the funds sent through Macha

Works Netherlands through Linknet. Regarding the issue of the Truck belonging to the 1st defendant that was sold, PW1 testified that it was purchased by Macha Works Netherlands but cleared in the name of the church duty free. He testified that the truck was in the custody of Macha Works.

PW1 maintained that he was reporting to Macha Works Netherlands. It was his evidence that since 2012, Linknet has never called for any board meeting which is the responsibility of the Board Chair through the Secretary. He testified that the lease was terminated in 2015 when the matter was already in court and that the plaintiff's continued occupation of the premises is based on the restraining order from court. He testified that Macha Works Netherlands and Stichting Macha are one and the same.

The plaintiff's 2nd witness was Hendrick Johannes Uy ttewaal, a director as well as secretary for the Board of Macha Works and he was PW2. He testified that Stichting Macha Works referred to as Macha Works was registered in 2001 in Netherlands initially under the name Privaserve Foundation and the change in name occurred in 2009. PW2 confirmed the assets or facilities that the plaintiff set

up in Zambia such as the craft shops, training centre for ITC etc. it was his evidence that the works in Macha started in 2004 and the discussions a year prior. PW2 testified that they have an agreement with the 1st defendant from 2008 for the land on which they are undertaking their activities for 35 years and they raised funds from international donors. The rent was \$ 25 per year per developed area. The plaintiff has invested over K25, 000,000 on infrastructure on the leased premises.

PW2 testified that the plaintiff was up-to-date with their rentals as per the invoices as confirmed by the documents at page 4 of the Supplementary Bundle of Documents. He testified that Stichting Macha was operating in Zambia through Linknet which is currently non operational hence the power of attorney to Fred Mweetwa an employee of Linknet to act on their behalf in Zambia. It was his evidence that Stichting Macha Works was the Dutch Legal entity while Linknet was the Zambian Legal entity. He asked that the court grants the plaintiff the reliefs sought.

During cross examination PW2 maintained that they build a community center on the premises between 2003 and 2006. He

confirmed that there was no lease agreement between his entity and the 1st defendant. He confirmed that Privaserve changed its name to Macha Works Netherlands and subsequently to Stichting Macha Works. He confirmed that he had not produced evidence to show Privaserve exists or has existed as an entity. PW2 confirmed that the plaintiff was in existence in 2003 and 2008 but they presented Privaserve to sign the lease. He confirmed that after Linknet was registered by Van Stam and his organization started channeling money through Linknet and the buildings that have been built have been built under Linknet. He confirmed that Linknet was a recipient of money from donors and the 1st defendant among others. PW2 confirmed that there was no document to show that Linknet was dissolved.

PW2 testified that Macha is non-existent or registered in Zambia and that that is the reason it is trading through Linknet which he confirmed was registered in 2007. He maintained that Linknet stopped operating in 2013. He confirmed that under the Linknet rules, there is no rule that authorizes the donor to appoint Fred Mweetwa or any person to manage the activities of Linknet. He

confirmed that there was no evidence that the plaintiff paid rentals for 2008, to 2010 but he maintained that they received no invoice though he also agreed that there was no stipulation that rentals would only be paid after issuance of an invoice. He confirmed that when they sent a payment in April, 2016, the lease had already been terminated for non-payment of rentals in January, 2015. He confirmed that Fred Mweetwa leased out the premises to a nursing school in 2017 while the proceedings were ongoing and he also confirmed that there was an injunction on the premises. He maintained that the nursing school was not paying rentals. He confirmed that there was no evidence to show that Linknet benefited from the sale of its assets.

In re-examination, he confirmed that the lease was terminated when the action was already in court and that prior to that date, there was no demand for payment of rentals.

This marked the close of the plaintiff's case.

The defendant's first witness was Mukuwa Kalambo, the Managing Director of Macha Mission Research Trust. He testified that Van Stam and his wife went to Macha Hospital in 2003. Van Stam's wife

was going to be the clinical scientist investigator while Van Stam the engineer who would provide internet to the department of the hospital. The Churches Health Association secured a work permit for him as a self-employed person. The 1st defendant allowed him to operate under its auspices of Macha Hospital which gave him an office which was previously a sanitation project building and a warehouse which the government had built for the distribution of relief food called Community Center Vision between 2004 and 2007. DW1 testified that the Hospital built a block of flats which would later be used for Linknet employees using money from the Dutch Embassy and funding from Netherlands. The office block given to Van Stam was gutted by fire and they used the funds from the Netherlands to rebuild it. He testified that Van Stam called his operations Linknet which was part of Macha Hospital. Linknet was registered in 2007. It was his evidence that during this period Linknet imported and cleared goods using the 1st defendant.

DW1 testified that in 2007, Linknet was registered and Fred Mweetwa was the secretary. In 2008, Van Stam approached him and told him that a foundation in the Netherlands called Privaserve

was in the process of soliciting funds for the construction of houses to be used by employees of all church affiliated institutions among them, Linknet, MAIAM, Macha Hospital, Macha Mission and Macha Secondary School. He referred him to the Bishop of the 1st defendant to secure land on which to build the houses and a lease was signed between the 1st defendant and Privaserve. It was his evidence that between 2009 and 2010 Van Stam and Dick told him that the operations of Privaserve wound up and that a new organization called Macha Works was in the process of being registered. He informed them to inform the 1st defendant's Bishop because it warranted a new contract but this was never done. They asked if they could start using the name Macha works but they were advised to indicate that it was doing business as MAIAM or Linknet. DW1 testified that they later discovered that Macha Works was inscribed on the headed letter of Linknet as Linknet Macha Works. He testified that as far as they were concerned Macha Works and Linknet were one and the same. He testified that after they were registered, as Linknet, it started receiving money from different sources including Privaserve and Communications Authority and Dutch Government. The Dutch Government later withdrew their

funding and in 2011, Linknet's employees were laid off as the money coming in to support the activities was not enough. DW1 testified that Linknet started as a department of Macha Hospital.

It was DW1's evidence that after the workers were laid off, he had a meeting with Van Stam and Abraham and they resolved that they would appoint an ad hoc committee to take care of the assets of Linknet consisting of the former managers of Linknet. They also resolved to sale some assets to pay the workers that had been laid off. After a few weeks Van Stam informed DW1 and Abraham that he had dissolved the committee and that he would be the caretaker of the assets. But a few weeks later he resigned and informed them that he had asked Fred Mweetwa to be the caretaker but DW1 told him that could only happen if they called for a meeting of directors. DW1 then called for a meeting of the Macha Station of Coordinating Committee and invited Fred Mweetwa, Dick in the Netherlands and Van Stam.

DW1 testified that they agreed that about 11 or 12 members of the committee including himself would take care of the property of Linknet. DW1 left for America and while there he was told that Fred

and Dick and Van Stam had started selling property of Linknet because Abraham the chairperson of the Committee had abandoned his position. It was his evidence that the trio sold the Truck, a vehicle driven by Van Stam, a V-set equipment used to access internet, block making machine and two containers of building material. He said the properties at page 25 to 29 of the plaintiff's bundle of documents were constructed by Linknet from donor funding and that the building belong to the 1st defendant.

DW1 confirmed that the donors to Linknet included CNB, Privaserve and Communications Authority and that the funds became Linknet's. In relation to the claims of defamation of character, DW1 told the court that it is the 11 that complained to the police about the things that were being sold without being properly accounted for. He testified that Fred Mweetwa has rented out a property to a nursing school and he is collecting rentals from the students.

During cross examination, DW1 confirmed that there was no signed agreement with Van Stam and that he did not see the permit. He confirmed that at the time the lease was signed with Privaserve in

2003, there were already some developments at the time as facilitated by Privaserve as confirmed by paragraph 5 of the lease agreement at page 1 of the plaintiff's bundle of documents. He confirmed that he had no proof that Privaserve had been closed. He also confirmed that he could not dispute the authenticity of the document at page 5 to 7 of the plaintiff's supplementary bundle of documents which speaks to the existence of Stichting Macha Works. He also confirmed that there was a change of name from Stitching Privaserve Foundation to Stitching Macha Works. He confirmed that the project with the Communications Authority of Zambia and Linknet had nothing to do with the construction of structures and the project was to be done at foreign places at Chilongo, Kaleni and Petauke.

DW1 confirmed that the person overseeing the day to day activities of Linknet at the time the workers were laid off was Van Stam. He testified that the board of Linknet was non functional and it never existed. He testified that Macha Works never existed in Zambia and that Privaserve was never registered in Zambia and it had no authority to operate in Zambia. He testified that Privaserve was

given land by the church to build structures but never did. He testified that Privaserve through Linknet was entitled to put up structures on the land. He confirmed that there is no document that shows the relationship between the 1st defendant and Linknet. He maintained that he was not representing Linknet when he called the meetings. He confirmed that there was no agreement between Linknet and the 1st defendant. DW1 confirmed that Linknet was not party to these proceedings. He confirmed that Linknet was supposed to work through the board but there was no board to do that. DW1 confirmed that he had no evidence to show that Linknet owned the assets he was claiming. He maintained that the 1st defendant had no intentions of taking over the assets but to stop the looting.

During re-examination, DW1 testified that clause 5 of the lease agreement did not state that there were buildings at the time of the signing of the lease. He testified that at the time of the agreement, Privaserve was in the process of soliciting funds and once the funds were solicited, they went to Linknet. He testified that Macha Works

Netherlands and Privaserve do not appear at page 5 of the plaintiff's supplementary bundle of documents.

Thuma Hamukang'andu was the defendants' second witness and he was DW2. He testified that he is the Bishop of the 1st defendant Church. It was his evidence that sometime at the beginning of 2008, Van Stam approached him and told him that he could help raise funds for the church to use in higher ministries. He told him he had an organization called Privaserve which could raise the funds for Zambia but there was need for an assurance that the land on which they wanted to use for building houses or training activities was actually there and they were free to use it. DW2 testified that he told him the land would be leased on the condition that whatever was done was supportive of the ministry and mission of the church.

DW2 testified that he also told him that whatever developments would be put up would be the property of the church and that if houses were built, they had institutions such as Macha Mission Hospital, Macha Nursing Hospital, Macha Girls Secondary School, Malaria Research Trust, Macha Primary School and Francis

Davison Secondary School which could use the same and they would be responsible for them. They later signed the agreement. He testified that Privaserve would raise the funds but Linknet would implement them and it would be accountable to them and the board. He confirmed that the buildings at page 25 to 29 of the plaintiff's bundle of documents were done after signing the agreement in 2008 through Linknet. He testified that the rentals were not paid for 2009 to 2015 and they decided to terminate the lease agreement. He testified that no invoices were required. He testified that they were not told about the money that was sent in 2016 for the rentals and by then the lease had been terminated.

During cross examination DW2 confirmed that according to the lease, Privaserve started doing developments in the area in 2003. He confirmed that the discussion to raise funds and have structures put in place was with Van Stam bringing in Privaserve and not Linknet. He confirmed that the condition that the donor should not claim ownership of the property was not in the lease agreement. He confirmed that he had no issue with the existence of Privaserve at the time of signing the lease and that when

terminating the lease, the same was addressed to Privaserve. He confirmed that according to the agreement, the rentals were supposed to be according to the developed acreage but he did not know how much was supposed to be paid as at 2015 or the amount outstanding. He confirmed that he did not get the impression that the plaintiff wanted to take over the assets. He confirmed that he was aware of the injunction at the time he wrote the letter terminating the lease agreement. DW2 confirmed that he saw the money for the rentals in their account in 2016 and they have never sent it back. He confirmed that he had no instructions from Linknet to represent its interests.

In re-examination, DW2 testified that the money to effect the developments came through Linknet. He testified that the developments in clause 5 of the lease agreement were already done as a volunteer.

This marked the close of the defendant's case.

After the close of trial the plaintiff filed into court their submissions on 29th August, 2018. The gist of the submissions is that the plaintiff and the 1st defendant entered into a lease agreement for 35

years commencing on 1st May, 2008 to 30th April, 2043. The plaintiff was allowed to develop the land at US\$ 25 per acre and payments have been made prior and post the commencement of the matter. The plaintiff mobilized funds which were transmitted through Linknet and built a number of structures on the land. The plaintiff asserts that the 1st defendant is estopped by its conduct from resiling from the lease agreement as the developments were done with its consent. The case of **North Western Energy Co. Ltd v. Energy Regulations Board**¹ and **Galaunia Farms Ltd v. National Milling Co**² were cited for persuasive purposes.

The plaintiff also contends that it should be allowed to recover on a quantum meruit basis for the value of the works done with the consent of the defendant even though the lease agreement could not be put in evidence as it did not satisfy the Statutes of Fraud but reference can be made to it for collateral purposes. It was argued that the agreement between the plaintiff and the 1st defendant is binding and that the plaintiff and Privaserve Foundation are one and the same. Further it is argued that the correspondence at page 102 and 127 of the defendant's bundle of pleadings shows the

connection between Macha Works and Linknet. It is argued that Linknet was created by the plaintiff as a means through which it could carry out its projects and it is not disputed that there was no lease agreement between the former and the 1st defendant. It is further argued that the termination shows that the 1st defendant was the plaintiff's landlord. It is contended that it cannot be argued that the assets belong to Linknet which is not even a party to these proceedings. It is therefore, argued that the plaintiff has proved its case and the lease agreement is still subsisting.

It is also submitted that the termination of the lease while this matter was in court is null and void as there was an injunction restraining the 1st defendant from interfering with the plaintiff's operations and occupation of the leased premises. And that in any event, the letter of termination did not state the amount owing or the area that had been developed and amounts that were paid. Counsel for the plaintiff contends that the 1st defendant cannot terminate the lease and take over the assets without compensation. The plaintiff referred this court to an excerpt in **Chitty on**

Contracts, Volume 1, General Principles, 31st Edition at para 29-167 at page 2139 which states:

There are other equitable rules which may create equitable proprietary interests. For instance where a person in occupation of land expends money on the land (e.g buildings) in the expectation induced or encouraged by the owner of the land, that he will be allowed to remain in occupation, an equity is created under which the court will protect his occupation of the land. The nature of the relief will depend on the circumstances.

The defendants filed into court their submissions on 20th September, 2018. The defendants are challenging the legal existence of the plaintiff. They contend that Hendrick Johannes Uytewaal confirmed that the plaintiff was in existence since 2003 including 2008 when a lease was entered into with the Privaserve. It is therefore, argued that as the two entities existed at the same time, one cannot be considered to be a former of the other. The defendant contends that they asked for the certificate of incorporation of the plaintiff and Privaserve but none was produced thereby confirming that the plaintiff does not exist. Reliance is therefore placed on the case of **National Milling Co Ltd v. M.**

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that it cannot sue or be sued.

In any event, counsel contends that the plaintiff cannot claim under a lease to which it is not a party based on privity of contracts as the plaintiff was in existence at the time of the lease. It is argued that the assets are owned by Linknet as all the donors donated money to Linknet and therefore owned by Linknet. It is also contended that the audited reports confirm this. PW1 confirmed that the plaintiff had no document to prove the assets belonged to it. On the termination of the lease agreement, it is argued that it was terminated for non-payment of rentals and after it was terminated, the plaintiff purportedly paid the arrears as confirmed by the document at page 3 to 4 of the plaintiff's supplementary bundle of documents. It is argued by reference to the Supreme Court decision in the case of **Wilfred Balashundram v. Bible Society of Zambia**⁴ that purging a breach of a tenancy obligation by settling rent arrears does not obliterate the breach. It is further argued that the court will not grant an injunction to a tenant whose lease agreement is subject to a condition precedent which has not been

performed and that in any event an injunction cannot be used to restore the lease which has been terminated.

On the issue of estoppel and compensation, the defendants contend that the same cannot be entertained as it was not pleaded and reliance is placed on the case of **Sitanga v. Attorney General**⁵.

With regard to the issue of defamation, it is argued that no evidence was adduced to show that the estimation of the plaintiff was lowered and the defendants had a duty to report the sale of the truck to the Police. On the counterclaim, the defendants contend that this claim is anchored on the fact that the properties belong to Linknet.

The plaintiff filed into court submissions in reply on 12th October, 2018. On the issue of the existence of the plaintiff, it is contended that the defendants did not object to the production of the documents at pages 5 to 12 of the plaintiff's supplementary bundle of documents. He contends that the same were not objected to during trial and as such, the court is not precluded from considering them based on the authority in **Kajimanga v. Chilemya**⁶. It is argued that the change of names of the plaintiff

was addressed in the ruling by Chisanga J. as she then was, which has not been appealed against and that their conduct after the name change seems to suggest that they accepted the plaintiff. The plaintiff further submits that it is not claiming the assets but for the quiet enjoyment of the leased land if not, for compensation for all the developments carried out through Linknet.

On the issue of estoppel, the plaintiff contends that even if it was not pleaded, evidence was adduced to that effect which was not objected to and that the court has the power to grant any relief a party may appear to be entitled to under **section 13 of the High Court Act**. It is further argued that the Supreme Court in the case of **Limpic v Trevor Mawere and others**⁷ granted the appellant compensation for the improvements on the property even if not pleaded as allowing the respondent to take the property with the massive improvements would have amounted to unjust enrichment. It is argued that Linknet cannot claim compensation as it had no lease with the 1st defendant and that the 1st defendant has no locus to make the claim.

I have considered the pleadings, the oral evidence, the bundles of documents and the parties' written submissions. The following facts are not in dispute, Privaserve Foundation and the 1st defendant executed a lease agreement for 35 years commencing on 1st May, 2008 to 30th April, 2043. The lease was not registered. The Foundation agreed to pay US\$ 25 per year per developed acre of land. Linknet Co-operative Society Limited was registered on 25th April, 2007. By power of attorney dated 3rd May, 2013, the Macha Works Netherlands granted Fred Mweetwa a power of attorney to represent them in this matter. I also find that it is not in issue that after the lapse of the lease, the assets and developments on the leased property would vest in the 1st defendant.

The first issue I shall consider is the challenge the defendant has mounted against the legal capacity of the plaintiff to sue and be sued and the issue of privity of contracts in so far as it relates to the lease agreement between Privaserve and the 1st defendant. The defendant contends that Stichting Macha Works was in existence in 2003 and must have been in existence in 2008 when Privaserve and the 1st defendant entered into the lease agreement. It is therefore,

argued that as the plaintiff and Privaserve existed at the same time, one cannot be considered to be the former of the other. Counsel for the defendant also contends that the plaintiff failed to submit the certificate of incorporation for either Stichting Macha Works or Privaserve and that as such, the plaintiff has no legal capacity to sue and be sued. In countering the argument, the plaintiff asserts that Stichting Privaserve Foundation changed its name to Stichting Macha Works as confirmed by the documents at page 7 of the Supplementary Bundle of Documents and page 49 of the Plaintiff's Bundle of Pleadings. It therefore claims that the two entities are one and the same.

In the case of **Harry Mwanga Nkumbula and another v. United National Independence Party**⁸ Sakala J. as he then was observed the following:

....The court in that case had to consider submissions as presented before me in the present case. There were various English decisions cited and followed. The court among others held that an unregistered trade union can have no more legal status than an unincorporated members' club which cannot sue in its club name. The court further held that the proper course where an

He confirmed that the plaintiff is non-existent or unregistered in Zambia.

To begin with, in a ruling dated 16th September, 2013, in addressing the preliminary issue raised by the 1st defendant that there was no privity between the plaintiff and itself Chisanga J. as she then was, found that on the affidavit evidence before her, the Privaserve had its name changed to Macha Works Netherlands. The court therefore, found that there was privity of contract between the Macha Works Netherlands and the 1st defendant. This finding was not appealed against. In arriving at the preceding finding, the Court relied on the minutes at page 65 of the plaintiff's bundle of documents exhibited in the affidavit in support of the injunction and the further affidavit. The said minutes showed that the name change from Privaserve Foundation to Stichting Macha Works.

The above notwithstanding, **Order 14A/2/10 of the White Book** pursuant to which the preliminary issue was raised states that upon determination of a question of law or construction, the court may dismiss the action or make such order or judgment as it thinks just and the Judgment or order will have the same effect and force

as the judgment or order after a full trial. Also **Order 33/3/1 of the White Book** which was equally relied on provides that the decision or order ordered to be tried as preliminary issue is not a decision preliminary to a final order but is the final order and therefore leave to appeal is not required. I am therefore, of the considered view that this Court having decided on the preliminary issue on privity of contracts, the only recourse available to the defendants was to appeal which it did not.

Coming to the legal capacity of the plaintiff, the extract **at pages 5 of the plaintiff's supplementary bundle of documents** shows that the plaintiff is a legal entity which was incorporated in the Netherlands on 18th December, 2001. And it shows that there was an amendment to the Articles of Association on 10th December, 2009. Further, the document at page 7 of the same bundle shows the amendment to the Foundation Articles dated 10th December, 2009 and the amendment was to the name of the Foundation from Privaserve foundation to Stichting Macha Works. The extract was generated on 25th September, 2017 and was clearly showing the status of affairs as that date. I am therefore of the considered view

that the plaintiff is a legal entity as was maintained by PW1 and PW2. I find that the plaintiff was initially incorporated as Privaserve Foundation in 2001 and later amended to Stichting Macha Works in 2009 and as such it has the capacity to sue and be sued.

Before I deal with the substantive claims the defendants contend that the plaintiff cannot sustain this action because it does not own the assets in issue. At trial PW1 and PW2 testified that the developments on the land were put up by the plaintiff through Linknet but that the same belong to latter. This was also confirmed by DW1 and DW2. DW2 testified that the agreement between Privaserve and the 1st defendant was that the Privaserve would raise funds while Linknet would implement the projects. The Financial report at page 44 of the defendants' bundle of documents shows that Privaserve was among the two donors to Linknet.

Also page 36 to 37 is an email from the 2nd defendant to 1st defendant's Bishop. The said email shows that Privaserve and Linknet were being treated as one. The email also shows that there was a request by the 2nd defendant for a new lease to be signed with the 1st defendant church following the de-registration of

Linknet/Privaserve. PW1 also testified that the rentals in 2009 were paid to the defendant through Linknet as is evidenced at page 76 of the plaintiff's bundle of documents. This evidence was not challenged. DW1 confirmed that there was no lease agreement between the 1st defendant and Linknet. PW1 confirmed that the properties belonged to Linknet. The **Co-operative Society's Act**, provides that after registration, the Society becomes a body corporate with power to hold property, to institute and defend suits and other legal proceedings.

On the evidence before me, it is not in issue that the demised land belongs to the 1st defendant. DW2 testified that it was agreed that after the termination of the lease, the structures that would be put up were to vest in the 1st defendant. The plaintiff in its submissions also makes it abundantly clear that it is not claiming ownership of the properties and submits that the assets are on the 1st defendant's land and that it is merely enjoying possession, occupation and use. Therefore, ownership remained with the 1st defendant and to argue that the properties belonged to the Co-operative Society or the plaintiff would be to confuse the issue

because by owning the land, the 1st defendant also owns everything on it. There is further no evidence that the 1st defendant ceded ownership of the leased land. The plaintiff was granted a lease on part of the land for 35 years for the activities set out in the lease which included construction and operation of residence and other activities set out in the lease during that period. It is clear that the plaintiff and Linknet were being treated as one by both the plaintiff and the defendants as shown above. DW1 conceded that their agreement was that the plaintiff would raise the Funds and the implementation would be through Linknet. Further, the evidence also shows that after incorporating Linknet, no board was appointed and that in fact it never existed. Furthermore, a reading of the lease agreement shows that the plaintiff has since 2003 and prior to the execution of the lease constructed ABFA- Macha Aerodrome and some structures. In the circumstances, I find that the plaintiff has sufficient interest and can raise the claim for an injunction and for an order of peaceful and quiet enjoyment of the leased property based on the lease.

Coming to the substantive matter, from the reliefs sought by the plaintiff in its writ of summons, it will be observed that the main claims appear to be the claim for an injunction; an order for the peaceful and quiet enjoyment of the premises lease; and damages for defamation and mental anguish and torture. I am guided by the **Siskina case**⁹ that an injunction is not a cause of action and cannot stand alone. The following was stated:

"A right to obtain an (interim) injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an (interim) injunction is merely ancillary and incidental to a pre-existing cause of action."

I will therefore, consider whether the plaintiff is entitled to an order peaceful and quiet enjoyment of the demised premises. One of the implied covenants of the Landlord of any demised premises is that the tenant will have peaceful and quiet enjoyment of the demised premises. In this case, the covenant for quiet and peaceful enjoyment of the premises is expressly provided in clause 6 of the

lease agreement. The defendant contends that this covenant was subject to the payment of rentals. However, I must hasten to state that the payment of rent is not a condition precedent to this covenant. See **Edge v. Boileau**¹⁰. Apart from physical interference with the enjoyment of the property the covenant of peaceful and quiet enjoyment may be breached by the conduct of the Landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as a tenant, noise, disorderly conduct or even a nuisance. See: **Halsbury's Laws of England, Vol 27(1) (4th Edition reissue) 1994 para 412.**

Coming to this case, the plaintiff in paragraph 9(a) of its statement of claim has highlighted the interference that it has faced from the defendant which includes threats and attempts to take over the plaintiff's assets and charging and collecting rentals from tenants occupying the properties built by the plaintiff. PW1 testified that a meeting was called by the Station Coordinating Committee which is an organ of the 1st defendant company where it was announced that following the dissolution of Linknet, the assets of Linknet would go in the hands of the Committee. DW1 confirmed that he called a

meeting of the Station Coordinating Committee and it was agreed that he and 11 others would take care of the property of Linknet. Further the email at page 39 to 40 of the plaintiff's bundle of documents shows that the 2nd defendant had instructed the administrator of Macha Research Trust to withhold money due to the plaintiff. This therefore, amounted to interference with the lessee's peaceful and quiet enjoyment of the leased property. I therefore, dismiss the defendants' argument that there was no breach of the covenant of peaceful and quiet enjoyment of premises or that the enjoyment of this covenant was dependant on the payment of rent.

Coming to the issue of the injunction, Matibini J. in the case of **Sata v. Chanda Chimba III and Zambia Broad Casting Corporation**,¹¹ Matibini J. as he then was observed that the fundamental principle upon which an injunction whether interim or perpetual is granted is that the injury to be inflicted would be of such character that the claimant would not be practically compensated in damages. It is also trite that an injunction is an equitable remedy and that it is discretionary. The plaintiff has

established that the defendants have interfered with the quiet enjoyment of the leased premises to entitle it to an injunction.

However, the defendants contend that the plaintiff breached the covenant to pay rentals which was the condition precedent to the enjoyment of the right to peaceful and quiet enjoyment of the land. In the case of **Re Mwaiseni Properties Ltd**¹² it was held that a plaintiff who complains of a defendant's breach of contract will not obtain an injunction if he too is in breach. Equally, he who comes to equity must come with clean hands. Though the 1st defendant did not plead breach of contract, I however, note that at trial, questions were put to PW1 and PW2 on this issue. PW2 testified that there was no demand or issuance of an invoice by the 1st defendant. It was his evidence that though the lease agreement did not make the issuance of an invoice a requirement before the rentals could be paid, he was directed by an officer from the Anti-Corruption Commission not to make payments unless an invoice was generated. This evidence is supported by the document at page 77 of the plaintiff's bundle of documents. The document also shows that the plaintiff had requested for an invoice from the 1st defendant

on several occasions but the same was not forth coming. He however, testified that the rentals were transferred to the 1st defendant in 2016 after they terminated the lease agreement. PW2's evidence was not challenged. In the circumstances, I am disinclined to find that the plaintiff breached the lease agreement as it is apparent that it is the 1st defendant that rather failed to avail the plaintiff the invoices as requested.

However, while the matter was in court, the 1st defendant terminated the lease agreement on 8th January, 2015. The plaintiff in its pleadings has not challenged the said termination. The only challenge is in the submissions where it is argued that the termination is null and void. I am guided by the principle espoused by the Supreme Court in the case of **Jama Abdirashid v. The Attorney General**¹³ in the following passage:

The decision we have made in the preceding paragraph does not however affect the predicament, which the appellant finds himself in. By this we mean that although the service of the writ stayed the deportation i.e. the minister should not have taken further steps in the deportation, he nonetheless went ahead and deported the Appellant. This action effectively altered the status quo as there was no longer anything to stay

and the position could not be remedied by the order which the learned High Court Judge made on 30th April that the Appellant should be returned to the jurisdiction of the Court by the respondent by next session. We sympathize with the Appellant in the manner in which the detention and the deportation were handled by the respondent which would appear on its face to have been calculated at perverting the course of justice...However, the remedy available to the appellant as an aggrieved party in such circumstances lies in an action for contempt of court. The court where appropriate will punish the offender for contempt of court and not order the restoration of the status quo which had already been disturbed. There was thus a misdirection on the part of the learned trial High Court Judge when he ordered the return of the Appellant to the jurisdiction by the Respondent at its expense and to render explanation for his deportation.

In the circumstances, I find myself constrained to grant the plaintiff an order of perpetual injunction restraining the defendants from disturbing the plaintiff's peaceful and quiet enjoyment of the leased premises as the status quo has been disturbed i.e. there is no lease agreement pursuant to which this court may make an order for the peaceful and quiet enjoyment of the leased premises. The effect of this finding is that the structures developed by the plaintiff through Linknet will remain the property of the 1st defendant as the owner of

the land and also based on the evidence of DW2, the Bishop in the 1st defendant Church.

I however, I am of the considered view that it would be inequitable and unjust to allow the defendant to terminate the lease agreement prematurely as it did and without any default on the part of the plaintiff as found above. Though not pleaded, in exercise of my equitable jurisdiction, I order that the plaintiff is entitled to compensation for the structures put up on the leased premises and I refer the same to the Registrar for assessment. In arriving at this finding, I am fortified by the decision of the Supreme Court in the case of **Amchile Import & Export Limited and two others v. Ian Chimanga (T/A Tawana Business Ventures) and another**¹⁴ where the Supreme Court held the following:

Equitable jurisdiction is part of our system of justice, which is designed to supplement the common law by taking action in a reasonable and fair manner, which results in just outcomes. Equitable jurisdiction averts and mitigates the rigidities of the common law and given the judge exercising it enormous discretion.

The plaintiff has also pleaded a claim for defamation of character. The plaintiff claims that the defendants issued statements against Fred Mweetwa bordering on libel. It states that the defendants wrote a letter to the police implying dishonest conduct on the part of the Fred Mweetwa in his running of the activities of Macha Works and also reporting him to the 1st defendant's lawyer as a trespasser. Firstly, it is a well established principle of law this court is legally and effectively precluded from considering the interests of a non party. Fred Mweetwa is a non-party to this suit despite him being the holder of a power of attorney to represent the plaintiff in this action. I am therefore, precluded from making any order in his favour. Also during trial no evidence was led by the plaintiff on this claim and neither was it addressed in the submissions. I therefore dismiss this claim.

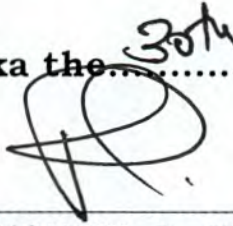
Similarly, a perusal of the defendants' counter claim reveals that the reliefs sought all relate to or are in favour of Linknet Multi-Purpose Co-operative Society Limited. Linknet is an incorporated body with capacity to sue and be sued. It has been argued that the said Linknet was deregistered though no sufficient evidence has

been tendered to establish that fact. That notwithstanding, **Section 81(4) of the Co-operative Societies Act** empowers the Registrar to make such order as he sees fit for the protection of the assets of the Society when he orders the cancellation of registration of the Society and he may order the appointment of a liquidator. This court is therefore, precluded from making any orders in favour of Linknet as it is a non-party. In any event, I have found that the property has reverted to the 1st defendant.

In a nutshell, both the plaintiff's claims fails for the reasons highlighted above save that I make an order in favour of the plaintiff for compensation for the properties structures put up on the leased premises same to be assessed by the Registrar. I therefore discharge the interim order of injunction. The defendant's counter claim also fails. The parties will bear their own legal fees.

Leave to appeal is hereby granted.

Delivered at Lusaka the ^{30th}.....day of June, 2020.



MATHEW. L. ZULU
HIGH COURT JUDGE