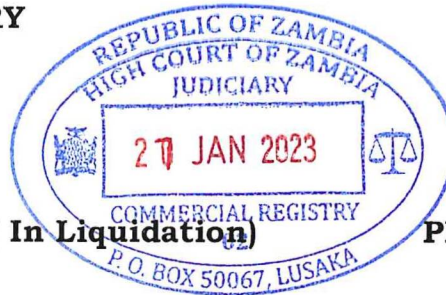


Musa Dudhia

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

2022/HPC/0445



BETWEEN:

KONKOLA COPPER MINES PLC (In Liquidation)

PLAINTIFF

AND

MILINGO LUNGU
LUNGU SIMWANZA AND COMPANY (A Firm)

FIRST DEFENDANT
SECOND DEFENDANT

Before the Honourable Mr. Justice E. L. MUSONA on 20th January 2023

For the Plaintiff : Mr. G. Mbezhi with Mr. C. Sianondo of Messrs Malambo & Co. and
Mr. Yosa of Messrs Musa Dudhia & Co.
For the First Defendant : Mr. A. Tembo of Messrs Tembo Ngulube & Associates with Mr. J. Zimba
of Messrs Makebi Zulu Advocates
For the Second Defendant : Mr. T. Munalula of Messrs Chisenga Mulongoti Legal Practitioners and
Mr. A. Tembo Messrs Tembo Ngulube & Associates

JUDGMENT

Cases referred to:

1. *Lewanika and Others v Chiluba* (1988) ZR
2. *Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited* (1995 – 97) ZR

Legislation referred to: referred to:

1. Order 14A rule 1 of the Rules of the Supreme Court of England (1999) Edition.
2. Section 17 of the Corporate Insolvency Act No. 9 of 2017

The Plaintiff commenced this action by Writ of Summons on the 29th day of July, 2022 claiming the following reliefs:

- i) a declaration that the Remuneration Agreement and Addendum to the Remuneration Agreement are null and void for illegality;

- ii) the sum of US\$59,336,903 being the sum drawn by the First Defendant from the Plaintiff's accounts;
- iii) an Order that the First Defendant renders an account of all money belonging to the Plaintiff which came into the hands of the First Defendant as Provisional Liquidator of the Plaintiff or received by any other person on behalf or on account of the Defendant as such agent or employee;
- iv) an order for payment by the First Defendant to the Plaintiff of any sum found due to from the First Defendant to the Plaintiff upon taking such account;
- v) an order for loss of use of the monies improperly drawn and paid by the First Defendant;
- vi) in the alternative to (i) above reimbursement of the sum of US\$53,872,952 being remuneration collected in excess of the amount prescribed by the CIA and the CIA regulations;
- vii) damages for the Defendant's breach of duties as Provisional Liquidator of Plaintiff Company to be assessed;
- viii) as against the Second Defendant, the sum of US\$29,154,319.44 being the sum received by the Second Defendant for which no

service was provided by the Second Defendant to the Plaintiff company

- ix) further or other relief; and
- x) costs of and incidental to this action.

On 27th September 2022, the First Defendant filed a Notice of Motion for the determination of preliminary questions on points of law, pursuant to **order 14 A rule 1 of the rules of the Supreme Court of England (1999)**

Edition. That order provides as follows:

‘1-(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;**
- (c) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.”**

On 11th November 2022, the Plaintiff filed summons for an order for leave to amend pleadings and for variation of orders for directions pursuant to order 18 of the High Court Rules Chapter 27 of the Laws of Zambia, as read with order 20 Rule 5 of the Supreme Court Rules (the White Book) 1999 Edition and order xix Rules 2 and 3 (2)(m)(IV) of the High Court Rules, Chapter 27 of the Laws of Zambia.

At a status conference held on 16th November, 2022 both parties agreed to begin with the application for preliminary issues and revert to the application to vary orders for directions and to amend pleadings later. This, therefore, is a ruling on the Notice of Motion to raise preliminary issues.

The questions to be resolved as preliminary issues are as follows;

1. Whether this action as commenced is properly or competently before this Honourable Court?
2. Whether the Plaintiff is a competent party to commence these proceedings?
3. Whether a fresh action may be commenced against the First Defendant for alleged acts and or omissions arising out of the

performance of his functions as Provisional Liquidator of the Plaintiff?

4. Whether the Plaintiff can commence fresh proceedings in respect of matters and issues that are currently pending before other Courts?
5. Whether the Statement of Claim discloses a reasonable cause of action for the declaration of the Remuneration Agreement as null and void for illegality?
6. Whether a cause of action can be based on an allegation of illegality?
7. In the alternative, whether the cause of action or claims for an account, reimbursement and a claim for alleged breach of duty herein have accrued?

Milingo Lungu who is the within First Defendant deposed to his affidavit in support of notice of Motion to arise preliminary issues on a point of law. In the said affidavit, the said deponent stated that there is no reasonable cause of action for the restitution of USD58 million on the grounds of illegality as claimed by Plaintiff. He further stated that any person aggrieved by the exercise of power or function by the First defendant as provisional liquidator of the Plaintiff company ought to have applied to court hearing the winding up proceedings or applied to modify, revert or confirm any decision made by the First Defendant. Following the

Defendant's appointment as provisional liquidator by order dated 21st May 2019, the Deponent executed a remuneration agreement and addendum thereto with the official receiver who acted in the exercise of her powers as official receiver. The Plaintiff was not privy to the said remuneration agreement. Further, the order appointing him as provisional liquidator gave him express powers to sell any asset of the Plaintiff and to enter into compromises in settlement of any disputes involving the Plaintiff. He further stated that all the issues being raised by the Plaintiff in this matter are issues which are determined in the winding up petition under cause No. 2019/HP/0455.

By consent settlement agreement dated 17th March 2022 and entered into between First Defendant and official receiver, the Parties agreed to a reconciliation of account and appointment of independent auditors to audit the Plaintiff's books of account during the tenure of the First Defendant as provisional liquidator of the Plaintiff company following which the accounts were to be filed before the court hearing the winding up petition for consideration. However, no accounts have been agreed between the First Defendant and the official receiver as was envisaged by the said settlement agreement.

No application has been filed into court for the release of the First Defendant as provisional liquidator of the plaintiff company and no reconciliation of accounts has been done between the First Defendant who is the provisional liquidator and the official receiver.

This Notice of Motion to raise preliminary issues is not without opposition. According to the affidavit in opposition to notice of motion to raise a preliminary issue on a point of law, Celine Meena Nair who is official receiver of the Plaintiff company deposed that this action was commenced in order to recover monies illegally paid to the First Defendant and to redress the First Defendant's misfeasance and breach of fiduciary duties to the Plaintiff's company and not to reverse the decisions or acts of the First Defendant and that, therefore this court has the requisite jurisdiction to determine the matter notwithstanding the proceedings under cause No. 2019/HP/0499 which according to Celine Meena Nair are currently stayed pending arbitration.

I have keenly read the parties' arguments. The Parties have heavily relied on the Corporate Insolvency Act No. 9 of 2017.

The First Defendant has argued that in terms of section 74(4) and 117 of the Corporate Insolvency Act No. 9 of 2017, any person aggrieved by any act or omission of a liquidator done or not done in the course of a liquidation may apply to the court hearing the winding up proceedings for an order to modify, reverse or confirm the act done or omission made.

Section 117 of the Corporate Insolvency Act No. 9 of 2017 provides as follows;

“A person aggrieved by an act or a decision of the liquidator may apply to the Court, which may confirm, reverse, or modify the act or decision complained of and make such order as it considers just’.”

The Plaintiff have argued that in interpreting the provision of section 117 of the Corporate Insolvency Act No. 9 of 2017 a plain and literal interpretation of the words used therein must be applied. to this effect, the Plaintiff cited the case of Lewanika and others v Chiluba⁽¹⁾ wherein the supreme Court stated as follows:

“The fundamental rule of interpretation of all enactments, to which all other rules are subordinate, is that they should be construed according to the intent of parliament, which passed

the law. Such intent is that which has been expressed where the language is plain. It is inadmissible to read into the terms anything else on grounds such as policy, political expediency, and motive of the framers and the like”.

Am well-guided, I have applied the literal rule to this section. I have considered the decision of the Supreme Court in the cited case of *Lewanika and Others v Chiluba* by which I am bound.

I have looked at the case of *Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited*⁽²⁾ where the Supreme Court stated as follows regarding multiplicity of actions;

“we listened to the arguments in this appeal; and would like to immediately affirm the judge on his disapproval of the action taken in this matter whereby one action is pending and some other steps are being pursued. We also disapproved of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter. The objection raised by the borrowers in this action to the bank pursuing the remedy of self-

redress in this action, that an action was pending applies with equal force to the whole idea of the borrowers commencing a fresh action when there is already another one pending in the Court with the result that various courts may end up making various conflicting and contradictory decisions because the parties have started another action in the Courts. It follows therefore that we disapprove completely of the steps taken by the borrowers in commencing action No.1995/HN/1394 when they could have made all the applications in the earlier action No. 307. we also disapprove the multiplicity of actions between the same parties involving various issues proposed to be raised in the new action which as we said we disapprove of. It follows therefore that in the considered opinion of this court justice of the case demands that the parties must raise whatever they wish to raise with the court in the earlier act of No. 307. We allow this appeal. Not only do we quash the injunctions which were granted, we quash the whole of the new action 1995/HN/1394.

A reading of the writ of summons and statement of claim indicates that the Plaintiff is aggrieved by certain acts, omissions or decisions made by the First Defendant in the execution of his duties as provisional liquidator.

It is on those bases that the First Defendant contends that the Plaintiff ought to bring their grievance within the winding up proceedings as opposed to instituting a fresh action.

What I discern in this case is that there is a pending case under cause No. 2019/HP/0455. The issues, in this case, can as well be determined in the existing case thus, claim number one in this matter reads as follows;

“a declaration that the numeration agreement and addendum to remuneration agreement are null and void for illegality”

This claim can be determined under cause No. 2019/HP/0455 by way of confirming or reversing that remuneration agreement. This is in line with the application of the literal rule and as elucidated by the Supreme Court in the cause herein cited.

I do not find the Plaintiff (under liquidation) as a competent party to commence these proceedings. I have already stated herein that the issues raised in this action can ably be determined under cause No. 2019/HP/0455. It follows therefore that it is wrongful to commence a

fresh action against the First Defendant for alleged acts and omissions arising out of the performance of his functions as provisional liquidator for the Plaintiff company, Particularly, that these issues are currently pending before another court.

Having looked at the statement of claim, I am not satisfied that the statement of claim discloses a reasonable cause of action for the declaration of the remuneration agreement as null and void for illegality, and it is not sufficient to base a cause of action on illegality per se.

Suffice to state that a cause of action or claims for an account, reimbursement and a claim of the alleged breach of duty herein are all matters that can be determined under cause No. 2019/HP/0455.

The claim against the 2nd Defendant herein can also be determined between the parties under cause NO. 2019/HP/0455 without the involvement of the Second Defendant who was not privy to the liquidation process.

Now, therefore, all the preliminary issues raised by the First Defendant have succeeded. The net result is that this action is not competently before me and I dismiss it forthwith. It follows that the application for leave to amend pleadings and variation of orders for directions have fallen away by reason of the dismissal of this action.

I order costs in favour of both Defendants to be taxed in default of agreement.

Leave to appeal is granted.

Delivered and Signed At Lusaka this the 27th January, 2023



E. L. Musona
Judge of the High Court