

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

2018/HP/1725

(Civil Jurisdiction)

BETWEEN:

ELIAS TEMBO

AND

VIVOM INVESTMENTS LIMITED

KABWE CHANDA

EVANS MBEWE t/a Lexus Liquor Store

RAMATA CAMARA t/a Pause Cafe

DANIEL NALISHEBO MUYENGA t/a Pause Cafe

DAVID TEMBO



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

4TH DEFENDANT

5TH DEFENDANT

6TH DEFENDANT

Before the Honourable Ms. Justice S. Chocho, in Chambers.

For the Plaintiff (s) : *Mr. J. Chimankata of Messrs Cholt Legal Practitioners*
For the 1st Defendant : *Mr. A. Tembo of Messrs Tembo Ngulube Advocates*
For the 2nd Defendant : *No Appearance*
For the 3rd & 6th Defendant : *Mr. L Chaile Messrs Dzeke-Dzeke Advocates*
For the 5th Defendant : *No Appearance*

R U L I N G

Cases referred to:

- i) *Lord Pearson in Drummond – Jackson V British Medical Association (1970) 1 W.L.R 688; (1970) All E.R 1094, CA***
- ii) *Granduare Property Development Limited V Emporium Fresh Foods Limited T/A Food Lovers Market (In Receivership) Appeal No. 138/2020***

Legislation referred to:

- i) *Order 30 Rule (10)(3) High Court Rules*
- ii) *Order 18 Rule 19 of the Rules of the Supreme Court 1999 ED (White Book).*
- iii) *Order 18(19)(1) of the Rules of the Supreme Court of England (White Book) 1999 edition*
- iv) *Order 18 Rule 19 (2) of the Rules of the Supreme Court (White Book)*

Other works

- 1.1. *Clerk and Lindsell on Tort (Sweet and Maxwell 17th Edition)*

1. INTRODUCTION

1.1. This Ruling is in respect of the Appeal and Cross Appeal against the decisions of the Honourable District Registrar dated 12th February, 2019 and 17th October, 2018.

- The Plaintiff appealed against the District Registrar's decision to strike out claim against the 1st Defendant. The Plaintiff the raised 5 grounds of appeal:

Ground 1: The Learned District Registrar erred in fact and in law when she held that the pleadings are frivolous and vexatious and are not sustainable at trial against the 1st Defendant.

Ground 2: The Learned District Registrar erred in fact and in law when she held that the basis upon which the 1st Defendant was imputed liability and further that imputed liability is not sufficient.

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Ground 3: The Learned District Registrar erred in law when she determined the liability of the 1st Defendant without trial.

Ground 4: The Learned District Registrar erred in fact and in law when she held that the 1st Defendant did not fit the description of conspiracy to defraud.

Ground 5: The Learned District Registrar erred in fact and law when she held that all the goods the 1st Defendant received were returned to the Plaintiff.

• The 3rd and 6th Defendant cross appealed the Learned District Registrar's ruling of 17th October 2019 in which the District Registrar refused to dismiss the entire matter. The 3rd and 6th Defendant raised the following grounds.

Ground 1 - The Learned District Registrar erred in fact and in law when she held that the pleadings are frivolous and vexatious and are not sustainable at trial against the 1st Defendant.

That the District Registrar erred in law and fact when she refused to dismiss the matter as against the 3rd and 6th Defendants for lack of a cause of action.

2. **BACKGROUND**

2.1. The background to the application is that the Plaintiff commenced an action on 3rd October, 2018 against the 6 Defendants claiming.

• An order for restitution of 596 cases of assorted whiskies and Champaign unlawfully obtained by the Defendants from the Plaintiff's warehouse and /or payment of the sum of K 2,203,200.00 being the value of the said goods.

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- Damages for conspiracy to defraud.
 - Damages for trespass to goods.
 - Interest at Commercial Bank lending rate.
 - Costs of the proceedings.
- 2.2. The 3rd and 6th Defendants filed an application to dismiss the Plaintiff's matter for want of cause of action, on 17th October, 2018.
- 2.3. The 1st Defendant also filed an application for an order to strike out pleadings for being frivolous and vexations, on 19th October, 2018.
- 2.4. The Honourable District Registrar pronounced her Ruling on the applications which were granting the 1st Defendant's application and dismissing the 3rd and 6th Defendant's application with costs.
- 2.5. It is from these Rulings that arose appeal by the Plaintiff and Cross Appeal by the 3rd and 6th Defendants.

3. **AFFIDAVIT EVIDENCE**

- 3.1. The Plaintiff relies on his Affidavit in Support of Appeal to Judge in Chambers against the District Registrar's Ruling striking out pleadings against the 1st Defendant filed on 31st May, 2010. The gist of the Plaintiff's appeal is that the learned District Registrar erred by striking out the Plaintiff's claims against the 1st Defendant.
- 3.2. The Plaintiff avers that he had business dealings/relationship with the 1st Defendant. He supplied goods to the 1st Defendant who runs a supermarket in Northmead, Lusaka.
- 3.3. The Plaintiff further avers that in June, 2018 upon conducting stock take of his warehouse, he discovered that 596 cases of assorted beverages were missing.

- 3.4. The Plaintiff further avers that on 4th July, 2018 whilst at the 1st Defendant's business premises in Northmead, the Plaintiff found the 1st Defendant and 2nd Defendant transacting on a delivery of assorted Jack Daniel Whiskey brands which he discovered were part of the 596 cases missing from his warehouse.
- 3.5. The Plaintiff avers that he reported to the police at Northmead Police post, where the 2nd Defendant was detained and the 1st Defendant later handed over 15 cases and 5 bottles of assorted beverages allegedly bought from the 2nd Defendant, goods belonging to the Plaintiff.
- 3.6. The Plaintiff avers that his originating process contains sufficient averments showing cause of action as against the 1st Defendant.
- 3.7. The Plaintiff further avers that 1st Defendant did concede having previously received consignments from the 2nd Defendant.
- 3.8. The Plaintiff avers that the 1st Defendant in league with the 2nd Defendant and other Defendants, to defraud the Plaintiff of his goods to the Plaintiff's detriment. That this is shown by the 1st Defendant's action to decline to share tax invoices and documents to prove deliveries made by the 2nd Defendant to 1st Defendant's business premises.
- 3.9. The Plaintiff urges this Court to find that the learned District Registrar erred by dismissing action/claims against the 1st Defendant and that the 1st Defendant should file defence to the Plaintiff's claims.
- 3.10. The appeal is dated 18th June 2019 (opposed by the 1st Defendant who in its affidavit in opposition avers inter alia that he concedes to the contents of paragraph 9 – 18 of the Plaintiff's affidavit in support which paragraphs chronicles contents of 3.4 -3.5 and 3.7 above.

- 3.11. The 1st Defendant further avers that the Plaintiff's claims against the 1st Defendant are based on imputation and or assumption that all the 573 cases of assorted beverages were in the 1st Defendant's possession.
- 3.12. The 1st Defendant further avers that the Plaintiff has failed to establish a prima facie case against the 1st Defendant as the Plaintiff acknowledges that the 2nd Defendant supplied other persons with commodities stolen from the Plaintiff.
- 3.13. The 1st Defendant further avers that the learned District Registrar was on firm ground in striking out the claims as against the 1st Defendant for being frivolous and vexations and cannot be sustained.
- 3.14. In his Affidavit in Reply dated 28th June, 2019 avers that 1st Defendant has failed/ neglected to show the delivery notes /receipts for the 25 cases it purports to have procured from the 2nd Defendant.
- 3.15. The Plaintiff further avers that the 1st Defendant and the other Defendants conspired and defrauded him of his 573 cases of assorted beverages.
- 3.16. The Plaintiff further avers that he has established prima facie case against the 1st Defendant by demonstrating its wilful misconduct and concealing and suppression of material facts.
- 3.17. Affidavit evidence on cross - appeal

4. **THE LAW**

- 4.1. I have had occasion to review and consider the Appeal and Cross Appeal, having read the Affidavits, skeleton arguments and submissions filed herein I am indeed grateful for the same.

4.2. This Court has jurisdiction to determine/hear appeals against decisions of District Registrar in Chambers pursuant to Order 30 Rule (10)(3) High Court Rules which provides.

“(3) An appeal from the decision, order or direction of the Registrar on appeal from a decision, order or direction of an Assistant Registrar shall lie to a Judge in accordance with the provisions of sub-rule (1)”.

4.3. Principally the Plaintiff submits that he has in his originating process shown sufficient cause of action against the 1st Defendant.

“(1) In ground 1 and 2 argued together the Plaintiff submits that the criteria to dismiss in matter for want of reasonable cause of action is not that there must be a clear cause of action / that the action must be destined to succeed. 1st Defendant relied on Order 18 Rule 19 of the Rules of the Supreme Court 1999 ED (White Book).

The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) It discloses no reasonable cause of action or defence, as the case may be; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action;

6. The Explanatory note to Order 18 Rule 19 defines the phrase “reasonable cause of action” as follows:

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A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per LORD PEARSON IN DRUMMOND – JACKSON V BRITISH MEDICAL ASSOCIATION (1970) 1 W.L.R 688; (1970) ALL E.R 1094, CA¹).

- 4.4. The Court of Appeal in **GRANDUARE PROPERTY DEVELOPMENT LIMITED V EMPORIUM FRESH FOODS LIMITED T/A FOOD LOVERS MARKET (IN RECEIVERSHIP) APPEAL NO. 138/2020²** held:-

“On an appeal from the High Court in which the lower Court declined to strike out writ of summons and statement of claim on alleged account of failure to disclose reasonable cause of action said that:

The test applied by the Court is whether it is “plain and obvious” that the Plaintiff’s statement of claim discloses no reasonable claim. Only if the action is certain to fail should the statement of claim be struck out or where it is plain and obvious that allowing the action to proceed would amount to an abuse of process. It is not for the court on a motion to strike to reach a decision as to the Plaintiff’s chances of success. (Emphasis ours)

- 4.5. In ground 3 and 5 the Plaintiff submitted that the District Registrar erred in law by determining liability of 1st Defendant without trial and that 1st Defendant had returned to the Plaintiff the goods. Plaintiff relied on Order 18 Rule 19 (2) of the Rules of the Supreme Court which states “that no evidence shall be admissible on an application under paragraph (i)(a).

- 4.6. In ground 4 the Plaintiff submitted that the District Registrar erred in law by holding that the 1st Defendant did not fit the description of definition of conspiracy to defraud, without stating which definition she used. Plaintiff relied on definition by learned authors of Clerk and Lindsell on Tort (Sweet and Maxwell 17th Edition)

"Of the various words used to describe a conspiracy, "combination" has been preferred on the ground that an "agreement" might be thought to require some agreement of a contractual kind, whereas all that is needed is a combination and common intention. But judicial descriptions still speak of "concerted action taken pursuant to agreement". A party to a conspiracy need not understand the legal effect of it; but he must know the facts on which the combination is unlawful. But there must be a combination; lack of overt acts or an un-communicated intention to join a conspiracy may show there has not been an effective combination. It seems the better view that an employer is not ordinarily "in combination" with his employees and that no charge of conspiracy can be brought when the latter merely goes about his business. A company, being a separate legal person, can conspire with its directors; and the knowledge of the company may be found in the person (usually a director) who has management or control (as its "alter ego") for the transaction or act in question. 7 (Emphasis ours)"

5. COURT'S ANALYSIS AND DECISION

- 5.1. I shall consider the appeal, the arguments advanced and author cited by learned Counsel for the Parties, in the Appeal and Cross Appeal.
- 5.2. I shall first attend to the Appeal as filed by the Plaintiff. This deals with the question whether or not the Plaintiff's originating process discloses a reasonable cause of action against the 1st Defendant as pleaded.

Whether the Plaintiff's pleadings as against the 1st Defendant are frivolous and vexatious and therefore not sustainable at trial.

5.3. Order 18(19)(1) of the Rules of the Supreme Court of England (White Book) 1999 edition does grant this Court the power to strike out/order amendment of pleadings at any stage where the offending pleadings does not have legal basis/merit.

5.4. The Court of Appeal had occasion to consider this question and in its Judgment in the case of **GRANDUARE PROPERTY DEVELOPMENT LIMITED V EMPORIUM FRESH FOODS LIMITED (T/A FOOD LOVERS MARKET (IN RECEIVERSHIP))**. The following was the test set in determining the answer as to whether a pleading can be struck out:-

“The test to be applied is whether it is “plain and obvious” that the Plaintiff’s statement of claim discloses no reasonable claim. Only if the action is certain to fail should the statement of claim be struck out or where it is plain and obvious that allowing the action proceed would amount to an abuse of process. It is not for court on a motion to strike to reach a decision as to the plaintiff’s chances of success.”

5.5. I have considered and read the Plaintiff's originating process. The Plaintiff provides factual statements at paragraph 12 – 14 and I use the word factual because the 1st Defendant actually admits this in its Affidavit in Opposition filed 18th June 2019 in paragraph 5. These statements speak to commodities belonging to the Plaintiff found in the possession of the 1st and 2nd in the course of a business transaction.

5.6. I am of the considered opinion that in fact the Plaintiff's originating process and claims against the 1st Defendant is not frivolous and vexatious but does show or disclose reasonable cause of action. It is trite that the question of whether the Plaintiff can prove that the 1st

Defendant or indeed any of the other Defendants had in their possession in capacities more than that they are stating or admitting is not one to be answered in an application to strike out pleadings/claim.

- 5.7. I find that the learned District Registrar misdirected herself in law and fact in holding that the Plaintiff's claim against the 1st Defendant is frivolous and vexation and thus not sustainable at trial. Therefore Grounds 1 and 2 of the Plaintiff's appeal succeeds.
- 5.8. Grounds 3 and 5 were argued together. The Plaintiff argues that the learned District Registrar erred in law by determining the 1st Defendant's liability to have been limited to the goods returned by the 1st Defendant. Counsel relied on the provisions of Order 18 Rule 19 (2) of the Rules of the Supreme Court (White Book).
- 5.9. The provision cited, is
- “(2) No evidence shall be admissible on an application under paragraph (1) (a).**
- 5.10. I opine that the provision needs no further explanation and therefore it follows that the Plaintiff's ground of Appeal 3 and 5 succeed. I restate or reiterate paragraph 5.6 above.
- 5.11. Finally, in dealing with Ground 4, I find that this ground as similar to ground 3 and 5, must also succeed.
- 5.12. As refers to the Cross-Appeal by the 3rd and 6th Defendant in principle the same authorities deal with the Court's jurisdiction to hear and determine the Cross-Appeal.
- 5.13. I find that the learned District Registrar was on firm ground in her holding that the Plaintiff's statement of claim does disclose a cause of action against the 3rd and 6th Defendants.

5.14. I find no merit in the 3rd and 6th Defendants Cross Appeal and thus dismiss the same.

6. **CONCLUSION**

6.1. By reason of the foregoing I find that the Plaintiff's appeal succeeds on all grounds.

6.2. I further find that the 3rd and 6th Defendants Cross Appeal lacks merit and thereby fails in it's entirety. I hereby dismiss the Cross Appeal.

6.3. I grant the Plaintiff costs.

6.4. I order that the matter be scheduled for issuance of Orders for Directions on the 4th July, 2024 at 08:15.

Delivered at Lusaka on 29th May, 2024.



**S. CHOCHO
HIGH COURT JUDGE**

