

SECRETARY-GENERAL OF THE UNITED NATIONAL INDEPENDENCE PARTY
v ELIAS MARKO CHISHA CHIPIMO (1983) Z.R. 125 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J. AND GARDNER, J.S.
31ST AUGUST, 1983
(S.C.Z. JUDGMENT NO.24 OF 1983)
APPEAL NO.15 OF 1983

Flynote

Civil Procedure - Parties - Secretary - General of UNIP - Official capacity - Appearance as such.
Civil Procedure - Parties - Secretary - General of UNIP - Representative capacity Appearance as such.

p126

Headnote

The Secretary - General of UNIP appealed against a High Court judgment holding that it was proper to sue him his official capacity, on behalf of the Party.

Held:

- (i) The Secretary - General of UNIP is not a corporation sole nor a legal entity, hence cannot sue or be sued by virtue of his office.
- (ii) He can only be sued a representative capacity by name, in which case, in compliance with O.XIV (High Court Rules, Cap. 50) he may be sued on his own behalf and on behalf of all the other members of UNIP who were members at the time of the defamation; providing it is shown that there was a community of interest between himself and the other members.

Cases cited:

- (1) Nkumbula and Kapwepwe v UNIP (1978) Z.R. 388.
- (2) London Association for Protection of Trade and Anor v Greenlands Limited, 1(1916) 2 A.C. 15.
- (3) Mercantile Marine Service Association Toms anal Ors. (1916) 2 K.B. 243

Legislation referred to:

High Court Rules, Cap. 50, O. XIV rr. 1, 3.

For the appellant: A M Mtopa, Party Legal Counsel.

For the respondent: Dr R Mushota Lusaka Partners.

Judgment

SILUNGWE, C.J.: delivered the judgment of the Court.

This is an appeal from a judgment of the High Court in which it was held that it was proper to sue the Secretary - General of the United National Independence Party (hereinafter referred to as UNIP) in his official capacity, on behalf of the Party. The appeal arises out of an action for defamation brought by the respondent against Mr Mainza Chona, the first defendant (and the immediate past Secretary - General of UNIP), the Secretary - General of UNIP, the second defendant, and the Attorney-General for Zambia, the third defendant.

The main argument presented by Mr Mtopa, learned counsel for the second defendant, is that the writ of summons contains misdescription of the appellant, in that the Secretary - General of UNIP, not being a corporation sole, or a legal entity, cannot sue or be sued. He contends that, in an action against an unincorporated body, a representative thereof should be named and the writ of summons endorsed to the effect that he is being sued in a representative capacity.

The position taken by Dr Mushota, on behalf of the respondent, is that there is no misdescription of the second defendant. In saying so, he

p127

relies on the following obiter dictum of Sakala J. in *Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe v United National Independence Party*, (1), at page 394, lines 38 to 40:

"... it would appear for practical purposes that the Secretary- General of the party would be a proper Party to these proceedings. . ."

There is no dispute that UNIP is an unincorporated body. It is trite law that an unincorporated body cannot sue or be sued in its own name. Order XIV, rule 1, of the High Court Rules (made under the High Court Act, Cap. 50) provides (citing only the relevant part thereof):

"Order XIV 1. If any plaintiff sues, or any defendant is sued, in any representative capacity, it shall be expressed on the writ. . ."

It is clear to us that nowhere in the writ is it shown that the appellant in this case is being sued in a representative capacity. We are thus satisfied that the provisions of Order XIV, rule 1, of the High Court Rules have not been complied with by the respondent.

The Secretary - General of UNIP is not a corporation sole and so he cannot sue or be sued as such. He can, however, be sued in a representative capacity by name, not by the title of the office he holds, in which case he may be sued on his own behalf and on behalf of all the other members of UNIP who were members of the Party at the time the alleged defamation took place. In those circumstances, the representative action can only succeed if it is shown that there was a community of interest between the representative and other members of their unincorporated body. This is in conformity with rule 3 of Order XIV, aforesaid, which provides that:

"Order XIV

3. Where more persons than ones have the same interest in one suit, one or more of such persons may be authorised to sue or to defend in such suit for the benefit of or on behalf of all parties so interested."

There are two important English cases in point, the first one being *London Association for Protection of Trade and Another v Greenlands Ltd* (2), where a libellous report had, on request, been received by the Secretary of an association which was not a corporate body, a partnership or a creature of a statute. As the report was for the benefit of member of the association, the Secretary transmitted the substance of it to him. In an action for libel, the Secretary and the association were among those sued. An important issue was whether the members of the association had a common interest within Order XVI, r. 9 of the Rules of the Supreme Court (which is similar to our own Order XIV, r. 3 of the High

p128

Court Rules), or in any way liable for the tort of the Secretary. In his judgment, Lord Parker said, at page 39:

"To use the words of the 8th edition of Lindley on Partnership, p. 14, 'If liabilities are to be fastened on' any member of such an association 'it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none implied by the mere fact of association.' In view of such cases (i.e. club cases) it would be going very far to hold that every member was liable for the tort of the secretary, even though such tort were committed in the course of carrying out the duties assigned to him under the contract between him and the persons who engaged him. In other words, there might be separate defences open to some members of the association and not to others, and if this were so there would be no common interest within the rule."

Apart from the finding that the publication had been made on a privileged occasion, it was held that the Secretary acted not as the agent of the association as a whole, but as the confidential agent of a particular member. As there was no common interest amongst the members it was not competent to sue the association nor could the Secretary represent all its members.

In the second case - *Mercantile Marine Service Association v Toas and Others* (3) - an action was brought for an alleged libel published in journal owned and managed by the Imperial Merchant Service Guild, an unincorporated body. In the action, the plaintiffs sued the chairman, the vice-chairman, and the secretary of the guild, "on their own behalf and on behalf of all other members of the guild, and applied for an order under Order XVI, r. 9, that the defendants should be appointed to represent all the other members of the guild. Swinfen Eady LJ, made the following observations, at pages 216-217:

"I have great difficulty in seeing that in this case there are, numerous persons having the same interest in this cause or matter within the meaning of the rule. The action is for libel, and the plaintiffs must prove who published the libel, and prima facie only those who have published it either by themselves or by their servants or agents or have authorised its

publication are liable.

The various members of this association may be in a wholly different position. If the members of the management committee were sued, and if in fact they had authorised the publication of the libel they could raise such defences as might be open to them. It might be that their defence would be that the words complained of were not capable of the meaning alleged or of any defamatory meaning, or that the words did not refer to the plaintiff. The other member of the association, if sued, might say that, however defamatory the words complained at might be, they did not authorise their publication: that they were on the high seas and knew nothing about the matter. In my opinion this rule is not intended to apply to such a case as this."

p129

Not only do we find the observations referred to in the foregoing English cases persuasive, but we also agree with them.

In the instant case, it is common ground that UNIP is an unincorporated body. We are satisfied that, as the Secretary - General of UNIP is neither a corporation sole nor a legal entity, he cannot sue or be sued, merely by virtue of his office. We are further satisfied that the provisions of Order XIV, rule 1, of the High Court Rules, have not been complied with by the respondent.

For the reasons given, the appeal is allowed and the second defendant is struck out of the action.

Costs will follow the event.

Appeal allowed
