

IN THE SUPREME COURT FOR ZAMBIA

SCZ/8/199/2009

HOLDEN AT LUSAKA

Appeal No

155/2009

(Civil Jurisdiction)

BETWEEN:

ANTI-CORRUPTION COMMISSION

APPELLANT

AND

SERIOES FARMS LIMITED

RESPONDENT

CORAM: Chibesakunda, Ag C.J, Chibomba JS and Lengalenga Ag. JS

On 12th February, 2013, and 6th January, 2014

FOR THE APPELLANT : Mr. N. Nchito of Messrs Nchito & Nchito

FOR THE RESPONDENT : Mr. J. Banda of Messrs A.M. Wood & Co.

JUDGMENT

Chibesakunda, Ag. C.J, delivered the Judgment of the Court.

Cases referred to:

- 1. The Anti-Corruption Commission v Ng'ona Mwelwa Chibesakunda Appeal No 99 of 2003 (unreported)***
- 2. Salomon v Salomon and Company [1897] AC 22***
- 3. Anti-Corruption Commission v Barnett Development Corporation Limited (2008) ZR 69 Vol 1***

4. ***Associated Chemicals Ltd v Hill and Delamain Zambia Limited and Ellis and Company (as a law firm) (1999) ZR 9***
5. ***King Farm Products Limited, Mwanamuto Investments Limited v Dipti Rani Sen (Executrix and Administratrix of the Estate of Ajit Barab Sen (2008) ZR 72 Vol 2***

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Legislation referred to:

1. ***Anti-Corruption Act No. 42 of 1996 Section 24(1)***

Works referred to:

1. ***Gower and Davies Principles of Modern Company Law 8th Edition***

This is an appeal against the Judgment of the High Court dated 6th August, 2006 reversing a Restriction Notice issued by the Appellant (Respondent in the Court below) in respect of the following farms: F/2915 Mkushi, F/2924 Mkushi, F/3168 Mkushi, F/3170 Mkushi and F/3171 Mkushi, properties of the Respondent Company (Applicant in the Court below).

The Respondent commenced action against the Appellant by way of originating summons and sought the following orders:

1. ***That the Restriction Notice dated 8th May 2007 and issued by the Respondent pursuant to Section 24(1) of the Anti-Corruption Commission Act No 42 of 1996 in respect of Property Nos. F/2915 Mkushi, F/2924 Mkushi, F/3168 Mkushi, F/3170 Mkushi and F/3171 Mkushi otherwise known as Serioes Farms be reversed.***
2. ***That the Applicant be at liberty to deal with the properties mentioned in paragraph (1) above in any manner as it shall deem fit.***

3. That the Respondent do pay the Applicant damages for misfeasance in public office.

4. That the Respondent do pay the Applicant the costs of this action.”

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The evidence before the court below was by Affidavit. This was augmented by oral submissions from both Counsel. The affidavit evidence of Faustin Mwenya Kabwe, a Director and Shareholder of the Respondent Company, was that he bought shares in the Respondent Company from the shareholders, Serioes Limited in or about 1987. He deposed that the shares were purchased using the Company's loan facilities and his earnings as Group Finance Director of Chibote Group of Companies. Mr. Kabwe further deposed that he was paid sum of \$90,000.00 by one Xavier Franklin Chungu as deposit towards the acquisition of his interest in the Respondent Company. He deposed that the sale was subject to valuation of the farm properties and assets as well as agreement as to the structure of the transaction in terms of it being a sale of shares or sale of assets. According to Mr. Kabwe's written testimony, the sale was never concluded because of investigations, which were commenced against Xavier Franklin Chungu by the Taskforce on Corruption.

Mr. Kabwe further deposed that on 2nd June, 2005, the Appellant served him with a Restriction Notice dated 28th May, 2005 and issued against the Respondent Company. That he commenced an action against the Appellant under cause no. 2005/HP/1035 but before the matter was heard, the Appellant reversed the Restriction Notice and

the matter was discontinued. That on 8th May, 2007 the Appellant re-issued the Restriction Notice. That the renewed Restriction Notice was illegal as there was no provision for renewal of the Notice. Mr. Kabwe

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deposed that the imposition of the said Notice was done in bad faith. That it was not true that there were investigations going on against the Respondent Company and that this was evidenced by the return of the Certificates of Title relating to the properties by the Appellant.

In response, Friday Tembo, a Senior Investigation Officer of the Appellant deposed, in an Affidavit in Opposition, that while it was true that the Title deeds of the said properties were released to the Respondent, that did not mean the Appellant had abandoned investigations on the matter. That to the contrary, investigations had resumed and were on-going. That the nature of the investigations was complex and sophisticated, and included the following:

- “(i) Determining the source of the money, which the deponent of the Affidavit in Support by his own admission, received from Mr. Xavier Franklin Chungu...in respect of and related to the properties in issue.***
- (ii) To ascertain whether those were the only monies paid in respect thereof;***
- (iii) To determine whether the said monies paid were or were not in fact in full and final settlement of the***

acquisition of all the shares in the Applicant by one X.F. Chungu and whether the purchase was in fact on behalf of the Office of the President Special Division.”

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Mr. Tembo further deposed that the Restriction Notice was not a renewal but a fresh notice. He argued that the same Notice was still subsisting because of the action in the Court below.

After considering all the evidence, the learned trial Judge held, and rightly so, that, from its wording, the Restriction Notice issued on 8th May, 2007 was a fresh notice and not a renewal.

The learned trial Judge then went on to comment in his Judgment that,

“Whether or not the directive contained in the Restriction Notice should be reversed or varied depends on the explanation that the Respondent has given in its Affidavit in Opposition.

“It seems to me that, although the Respondent has issued the Restriction Notice, its investigations are not yet properly focused. For example, in its investigations the Respondent would like to determine whether or not the sum of \$90,000.00 which Mr Xavier Franklin Chungu paid to Mr. Faustin Kabwe was in full and final settlement of the acquisition of all the shares in the Applicant Company. It is obvious that those shares belonged to Mr. Faustin Kabwe. In terms of Section 57(1) of the Companies Act, Chapter 388 of the Laws of

Zambia, those shares were the personal estate and moveable property of Mr. Faustin Kabwe. By buying shares in the Applicant Company, Mr. Xavier Franklin Chungu would not be buying farms listed in the Restriction

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Notice because those farms were and still remain the property of the Applicant Company and not that of Mr. Faustin Kabwe. Therefore if the transaction concerns the purchase of shares, the Restriction Notice should be directed to Mr. Faustin Kabwe in his personal capacity and should relate to the shares that he is alleged to have sold to Mr. Xavier Franklin Chungu and not the property of the Applicant Company.

“The Respondent has not shown that its investigations include determining the possibility that the Applicant Company was directly selling its farms to Mr. Xavier Franklin Chungu. In the circumstances, the Restriction Notice dated 8th May, 2007 directed to the Applicant Company ought to be reversed.”

This is the judgment that has been appealed against. The Appellant raised before this Court one ground of appeal. Namely that,

- 1. The learned trial Judge erred in law and fact when he purported to delve into the issue of what type of investigations were being conducted and thereafter held that the investigations were unfocused and on that basis**

reversed the Notice of Restriction when all the law requires for a Restricted Notice is that investigations are being conducted.

At the hearing of the appeal Mr. Nchito, Counsel for the Appellant applied for leave to file into Court, rather belatedly, written Heads of

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Argument on which he relied entirely. Mr. Nchito also tendered apologies on behalf of Counsel for the Respondent, Mr. Banda, who he said was not in Court as he was before another Court where he was a litigant. Mr. Banda later appeared before the Court in the course of proceedings and apologized for his absence. He also sought leave to file Heads of Arguments, which application was granted.

The gist of Mr. Nchito's argument was that the learned trial Judge erred in law and fact when he delved into the merits or otherwise the nature of the investigations that were being carried out by the Appellant in respect of the Restriction Notice. He submitted that Section 24 of the Anti-Corruption Commission Act No 42 of 1996 merely required that there be an ***"investigation in respect of the offence alleged or suspected to have been committed under the Act"*** in order for a Restriction Notice to issue. According to Mr. Nchito, there was no specification of what nature or manner the investigations ought to have assumed. He submitted that from the provisions in Section 24 there were no special qualifications that had been spelt out to define the nature of the investigations being carried out under the Act. He argued that while the learned trial Judge properly found that the Restriction

Notice was legal and that investigations were ongoing (at page 11, paragraphs 8-10 of the Record of Appeal), he erred in considering the nature as that amounted to the Court attempting to supervise the conduct of criminal investigations.

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Mr. Nchito referred us to the case of ***The Anti-Corruption Commission v Ng'ona Mwelwa Chibesakunda***¹ where we held that the Director General of the Appellant needed not specify the offence that was being investigated to support his argument.

In response, Mr. Banda submitted that the learned trial Judge was on firm ground when he held that the Appellant's investigations were directed at Mr. Faustin Kabwe in his personal capacity and not at the Respondent Company, and whether it (the Respondent) was selling the properties directly to Mr. Xavier Franklin Chungu. Mr. Banda further submitted that the transaction between Mr. Kabwe and Mr. Chungu related to the purchase of shares and as such, the Restriction Notice should have been directed at Mr. Kabwe in his personal capacity and should have related to the shares allegedly sold to Mr. Chungu, and not to the property of the Respondent.

Mr. Banda submitted that the provisions of Section 24 were very clear and referred us to the celebrated case of ***Salomon v Salomon and Company***² and to the learned authors of ***Gower and Davies Principles of Modern Company Law 8th Edition at page 33*** to enforce his proposition that one of the attributes of incorporation was that the Company becomes a separate legal entity from its members

or shareholders, and has a separate legal personality. Counsel submitted that the Restriction Notice which was issued against the Respondent was wrongfully placed and was rightfully reversed by the learned trial Judge. He submitted that the learned trial Judge could not be faulted for venturing into the nature of the investigations as it was crucial to

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determining whether there were investigations against the person whom the Restriction Notice was issued. Mr. Banda further, submitted that from the record, it was clear that the investigations into the matter at hand had concluded and that the Appellant had even handed back the Certificates of Title of the properties to the Respondent. He concluded by stating that the Restriction Notice was illegally issued as there were no investigations that were going on.

We have carefully considered the evidence on the record and the submissions. We have also studied the authorities, cited by both Counsel, for which we are grateful. It is common ground that the Appellant issued a Restriction Notice against the Respondent's properties collectively known as Serioes Farms Limited in respect of some investigations into offences alleged or suspected to have been committed under Part IV of the Anti-Corruption Commission Act. It is also common ground that the Appellant first issued the Restriction Notice on 28th May, 2005 which was revoked on 10th March, 2006. Again, the Appellant issued a Restriction Notice on 8th May, 2007, the subject of this appeal. We have already concurred with the learned trial Judge that the Notice was a fresh one and not a renewal. The

main issue is whether the learned trial Judge was in order to reverse the Restriction Notice, for the reasons that he did.

Mr. Nchito argued that for the Restriction Notice to issue under Section 24(1) of the Anti-Corruption Commission Act there ought only to have been an investigation. According to Counsel, there was no specification of the nature or manner of investigation. That it was

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sufficient that there was an on-going investigation. On the other hand, Mr. Banda argued that it was crucial for the learned trial Judge to venture into the nature of investigations in order to determine whether there was indeed any investigation against the person whom the Restriction Notice had been issued. According to Mr. Banda, not doing so would have left room for miscarriage of Justice.

We have anxiously read and considered Section 24(1) of the Anti-Corruption Commission Act No 42 of 1996 which we have reproduced hereunder. The provision states as follows:

“The Director-General may, by written notice to a person who is the subject of an investigation in respect of an offence alleged or suspected to have been committed under this Act, or against whom a prosecution for such offence has been instituted, direct that such person shall not dispose of or otherwise deal with any property specified in such notice without the consent of the Director-General.”

We hasten to observe that this Court has had occasion before to consider the interpretation of the Section 24(1). This was in the case

of ***The Anti-Corruption Commission v Ng'ona Mwelwa Chibesakunda***¹ referred to us by Mr. Nchito and also in a later case, ***Anti-Corruption Commission v Barnett Development Corporation Limited***³ though the issues raised in the later case have no relevance for our present purposes. On the other hand, the Chibesakunda case provides some

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direction, not to all, but one of the issues at hand. We shall explain what we mean later. In that case, the lower court had reversed a Restriction Notice on the ground that it lacked specificity because it did not state the particular offence envisaged or suspected to have been committed under the Act. In overturning the lower court's decision, we stated as follows:

“We are satisfied that when issuing a Restriction Notice the Defendant's Director General is not required to specify the offence being investigated. All that the Director-General is required to state is that the offence being investigated is under Part IV of the Act. The Act specifically deals with corruption and corruption-related offences and a person who is served a Restriction Notice under Section 24(1) of the Act should have an idea that he is being investigated for an offence relating to corruption.”

We confirm our holding as good law so far as it relates to the investigations and the nature thereof. For this reason, we agree with Mr. Nchito that the Act does not require anything more than an

investigation for the Restriction Notice to issue. However, there is force in Mr. Banda's argument that the investigations were not directed at the Respondent Company but at a Shareholder/Member of the Company, in this case, Mr. Faustin Kabwe. We say so for the following reasons. Firstly, the Appellant in its own Affidavit in Opposition to

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Originating Summons at pages 35-36 of the Record of Appeal gave the scope of the investigations as follows:

“That the nature of the investigations was complex and sophisticated and included:

- a. Determining the source of the money, which the deponent of the Affidavit in Support by his own admission, received from Mr. Xavier Franklin Chungu...in respect of and related to the properties in issue.***
- b. To ascertain whether those were the only monies paid in respect thereof;***
- c. To determine whether the said monies paid were or were not in fact in full and final settlement of the acquisition of all the shares in the Applicant by one X.F. Chungu and whether the purchase was in fact on behalf of the Office of the President Special Division.”***

Quite clearly, and as rightly observed by the learned trial Judge and also submitted by Mr. Banda, these investigations were pointed

at or were in reference to the sale or transfer of Mr. Faustin Kabwe's interest in Serioes Farms Limited to Mr. Xavier Franklin Chungu-the interest, in this case, being his shares. Although we note from the record that the inclusion of the scope of investigations in the Appellant's Affidavit in Opposition was meant to prove to the Court that investigations were indeed on-going (see page 54), we hold the view, that this piece of evidence was equally necessary in determining

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whether there were any investigations at all instituted against the Respondent Company. We dare not think that this sort of inquiry amounts to supervising investigating organs, as argued by Mr. Nchito. In any event, we do not think it was the intention of the legislators that the investigations should be a blank cheque for a fishing expedition.

Secondly, the case before us relates to a Company that is an incorporated entity, and not a partnership. Therefore, the Appellant ought to have taken into account the distinction between the Members of the Company and the Company, itself. This follows the age-old principle of corporate personality as pronounced in the celebrated case of ***Salomon v Salomon and Company***², which this Court has adopted with approval. We have stated in a plethora of cases that,

"A principle of the law which is now too entrenched to require elaboration is the corporate existence of a

company as a distinct legal person. In the eyes of the law it (the Company) is a person distinct from its members or shareholders.” (Emphasis ours) See Associated Chemicals Ltd v Hill and Delamain Zambia Limited and Ellis and Company (as a law firm)⁴ and also King Farm Products Limited, Mwanamuto Investments Limited v Dipti Rani Sen (Executrix and Administratrix of the Estate of Ajit Barab Sen (2008) ZR 72 Vol. 2⁵

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Apart from the investigations being targeted at Mr. Faustin Kabwe, we find, as the learned trial Judge did, that the farms, which were the property of the Respondent Company, ought not to have been made a subject of the Restriction Notice. In fact, the learned authors of Gower and Davies Principles of Modern Company Law stated at page 40 that,

“On incorporation, the corporate property belongs to the Company and the Members have no direct proprietary rights to it but merely to their “shares” in the undertaking.”

For the reasons stated above, we find that the learned trial Judge was perfectly within jurisdiction to consider the issues raised. There is no basis to overturn his decision to reverse the Restriction Notice.

Accordingly, we dismiss this appeal with costs to the Respondent to be taxed in default of agreement.

L. P. Chibesakunda
ACTING CHIEF JUSTICE

H. Chibomba, JS
SUPREME COURT JUDGE

F. Lengalenga, Ag. JS
SUPREME COURT JUDGE