

IN THE HIGH COURT FOR ZAMBIA

2011/HP/260

AT THE PRINCIPAL REGISTRY

AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

HOTELIER LIMITED

FIRST PLAINTIFF

ODY'S WORKS LIMITED

SECOND PLAINTIFF

AND

FINSBURY INVESTMENTS LIMITED

DEFENDANT

BEFORE HON. MR. JUSTICE N.K. MUTUNA ON 25TH DAY OF OCTOBER, 2012

For the Plaintiff: Mr. S. Sikota SC. of Central Chambers and Mr. M. Mutemwa of Mutemwa Chambers

For the Defendant: Mr. J.P. Sangwa and Ms. N. Kantumoya of Messrs Simeza Sangwa and Associates

R U L I N G

Cases referred to:

- 1) *Mwamba and Mbuzi-Vs-Attorney General and Another(1993) 3 LRC 166***
- 2) *Zinka -Vs-Attorney General (1993) 3 LRC1***
- 3) *Kumbi-Vs-Zulu (2009) ZR page 183***

4) Simbeye Enterprises Limited and Another-Vs-Yousuf (2000) ZR page 159

5) Sinkamba-Vs-Doyle (1974) ZR page 1

Other authorities referred to:

1) High Court Act, Cap 27

2) Supreme Court Practice, 1999, Vol. 1

3) English Law (Extent of Application) Act, Cap 11

4) English Law (Extent of Application) (Amendment) Act, No.14 of 2002

5) English Law (Extent of Application) (Amendment) Act, No.6 of 2011

6) High Court (Amendment) Act, No.7 of 2011

7) Statutory Interpretation by Francis Bennion

This is the Defendant's application for joinder of a party. It seek to have the following persons namely, Elenor Mandenakis, Katerina Mandenakis, Odysseas Mandenakis and Odysseas Leonnis Mandenakis, joined to this action as Plaintiffs.

The application is made by way of summons and supporting affidavit filed on 21st September, 2012, pursuant to Order 14 rule 5 of the **High Court Act**.

The Plaintiff opposed the application by way of an affidavit in opposition filed on 28th September, 2012 sworn by one Odysseas Mandenakis.

The brief facts of this case as they relate to this application are that the Plaintiffs took out this action against the Defendant on 22nd March, 2011. The action was commanded by way of writ of summons and statement of claim and one of the reliefs sought is for a declaration that the Defendant is not a shareholder nor is it entitled to any shares in the First Plaintiff company. In response to the statement of claim, the Defendant filed a defense and counter claim on 8th June, 2011. By the said defense and

counter claim the Defendant has alleged that the Second Plaintiff introduced other members into the First Plaintiff company by reducing the Defendant's share holding therein. These persons introduced as new members in the First Plaintiff are Elena Mandenakis, Katerina Mandenakis, Odysseas Mandenakis and Odysseas Leonnis Mandenakis. As a consequence of this, the Defendant counter claimed that the said new members be removed from the register of members of the First Plaintiff. Effectively, the counter claim seeks to reverse the allotment of the shares in the First Plaintiff to the four persons.

The affidavit in support is sworn by one Rajan Mahtani, the chairman of the Defendant. The gist of the facts in the affidavit is that should the counter claim filed by the Defendant be successful, the new members of the First Plaintiff company whom it is sought to be joined will lose their shares in the First Plaintiff, whose share structure will revert to its original state. As such the deponent verily believes that the four new members of the First Plaintiff are likely to be affected by the judgment of this Court, therefore, they should be made parties to the action.

In the affidavit in opposition, the deponent set out the back ground to the case and stated that the changes to the membership in the First Plaintiff have already been effected. He also stated that the Defendant has not sufficiently demonstrated why the four should be added as Plaintiffs to these proceedings.

The application came up for hearing on 3rd October, 2012. Counsel for the Defendant Mr. J.P. Sangwa argued that it is necessary to add the four new members of the First Plaintiff as parties to this action because they are likely to be affected by the judgment. He argued that this arises from the fact that the Defendant's counter claim includes a claim for the quashing of the transfer of the shares, to the four. It was argued that the rules of natural justice dictate that the four need to be heard on the issue of the quashing of

their shares. Counsel relied upon the cases of ***Mwamba and Another-Vs-The Attorney General (1)*** and ***Zinka-Vs-Attorney General (2)*** which cases it was argued reinforce the need for a person to be heard. Reliance was also made on Order 14 rule 5 of the ***High Court Act***.

Counsel argued further that the application should succeed because it has not been opposed by the four persons who it is sought to be joined to these proceedings. He argued that although an affidavit in opposition had been filed and sworn by one of the four persons, the said person swore the affidavit as managing director of the First and Second Plaintiff and not in his individual capacity. The application, counsel argued was therefore not opposed despite the Defendant serving process on the four persons. Further that, they did not send counsel to represent them. He also argued that in terms of Order 41 rule 2 of the ***Supreme Court Practice (white book)***, the affidavit in opposition could only cover the deponent and not the other three persons sought to be joined.

In opposing the application, counsel for the Plaintiffs Mr. M. Mutemwa began by submitting that Order 14 rule 5 of the ***High Court Act*** should not be read in isolation from Order 15 rule 6 subrule 4 of the ***white book***. He argued that the Supreme Court had decided in the case of ***Kumbi-Vs-Zulu (3)*** that the ***white book*** applies as a matter of law in Zambia.

Counsel argued further that, in terms of Order 15 rule 6 subrule 4 of the ***white book***, no person can be added as a Plaintiff to proceeding without his consent in writing. This he argued was restated by the Supreme Court in the case of ***Simbeye Enterprises Limited and Another-Vs-Yousuf (4)***.

In the last limb of his arguments counsel argued in relation to the submission by the Defendant that this application should be granted because it is not opposed. He argued that all matters must be determined on their merits notwithstanding default by one of the parties. Therefore, the fact that the person sought to be joined has not opposed the application does not mean

that the relief sought will automatically be granted. Counsel went on to argue that in any event the two Plaintiffs have opposed the application.

In response to the Plaintiffs' arguments, Mr. J.P. Sangwa argued that following the decision in the ***Kumbi-Vs-Zulu (3)*** case, there was an amendment to our law which states that resort can only be had to the ***white book*** where there is a lacuna in our laws. He argued further that Order 14 rule 5 of the ***High Court Act*** clothes this Court with power to make the order sought and that there are no preconditions to be met before the grant of such an order.

I have considered the affidavit evidence and arguments by counsel. Before I determine the application it is important that I initially comment on the argument by counsel for the Defendant in respect of the four persons opposing the application and the extent to which the ***white book*** is applicable to Zambian law.

As regards the argument on the failure by the four persons to oppose the application, it is common practice that a person can only be heard or oppose an application if he is a party to the suit. The four persons that are sought to be joined are merely intending parties (of course subject to the decision of this Court) and as such they are not parties to the action. They are therefore not expected to file an affidavit in opposition to the application. For this reason there was no need for the Defendant to serve process upon them in respect of this application because Order 14 rule 5 of the ***High Court Act*** pursuant to which this application is made, makes provision for service of notice upon the persons joined subsequent to their being joined. This position is illustrated more clearly in the latter part of this ruling where I have quoted Order 14 rule 5 in full. The only persons or entities who are expected to file an affidavit in opposition are the Plaintiffs for the simple reason that they are parties to this action and as such entitled to be heard.

Further as counsel for the Plaintiffs has quite rightly argued, even assuming the four persons were in default, the Defendant as the person asserting its right to the relief sought is still obliged to prove to the Court's satisfaction that the application is meritorious.

I now turn to determine the extent to which the **white book** is applicable to Zambia.

The application of English law in Zambia is governed by the **English Law (Extent of Application) Act**. The said Act was amended in 2002 by the **English Law (Extent of Application)(Amendment) Act No.14 of 2002**. By virtue of the said amendment Act, section 2 of the **English Law (Extent of Application) Act** was amended to extend the application of English Law in Zambia to the **white book**. It is important that I set out here the old section 2 and the new section 2 for purposes of elaborating the point.

Section 2 of the **English Law (Extent of Application) Act** states as follows:

“Subject to the provisions of the Constitution of Zambia and to any other written law-

- (a) the common law; and***
 - (b) the doctrines of equity; and***
 - (c) the statutes which were in force in England on the 17th of August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and***
 - (d) any statutes of later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or otherwise;***
- shall be inforce in the Republic.”***

The **English Law (Extent of Application) (Amendment) Act, 2002**, pursuant to which section 2 aforementioned was amended states as follows:

“The principle Act is amended in section two by -

(a) the insertion, at the end of paragraph (d), of the word “and”

(b) the insertion after paragraph (d) of the following new paragraph:

(e) the Supreme Court Practice rules of England in force until 1999:

“Provided that the Civil Court Practice 1999 (The Green Book) of England or any other Civil Court practice rules issued after 1999 in England shall not apply to Zambia except in matrimonial courses”

This is the amendment that introduced the **white book** 1999 edition into the Zambian law. It is also the basis upon which the **Kumbi-Vs-Zulu (3)** matter was determined. In the said case, the Supreme Court in interpreting the application of **Act No.14 of 2002** had this to say at page 190:

“As argued by State counsel, before section 2 of the English Law (Extent of Application Amendment) Act, Chapter 11 was amended by Act No.14 of 2002, the rules of the Supreme Court only filled gaps in our own practice and procedure, with the insertion of (e) in section (2) of the English Law (Extent of Application Amendment) Act Chapter 11, the whole of 1999 edition of the White Book has been incorporated in our Rules and procedure. Now by statute, the Zambian Courts are bound to follow all the rules and procedure followed in England as stated in the 1999 edition of the White book. The entire provisions of the rules of the Supreme Court as expounded in

the White Book, 1999 edition, including the decided cases are now Zambian Law by statute and as such binding on the Zambian Courts.”

The foregoing holding by the Supreme Court demonstrates that with the enactment of **Act Number 14 of 2002**, the **White Book** 1999 edition became part of Zambian law and binding on Zambian Courts in relation to practice and procedure. It ceased to be applicable to Zambian law merely for purposes of filling up gaps.

Subsequently, in 2011, the situation was reversed by virtue of the enactment of the **English Law (Extent of Application) (Amendment) Act, 2011, Act No.6 of 2011.**

The said Act deleted the new section two of the principal Act and introduced a new section 2. The relevant portion of the Act states as follows:

Section 2 ***“The principal Act is amended by the deletion of section two and the substitution therefore of the following:***

2. Subject to the provisions of the Constitution and to any other written law-

(b) the doctrines of equity;

(c) the statutes which were in force in England on 17th August, 1911, being the commencement of the Northern Rhodesia Order in Council, 1911 and

(d) any statutes of a later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which

hereafter shall be applied thereto by any Act or otherwise;

shall be in force in the Republic .”

The effect of this Act is that it removed the **white book** 1999 edition from the list of English laws that are applicable to Zambia.

At the time Act No. 6 of 2011 was being Assented to on 12th April, 2011, another Act was also Assented to on the same date. This was the **High Court (Amendment) Act, No.7 of 2011**. The said Act came into force on 15th April, 2011 as did **Act No. 6 of 2011**. By virtue of the said **Act No.7 of 2011**, the **White Book** 1999 edition was re-introduced into the Zambian law. It states in section 2 as follows:

Section 2 **“The principal Act is amended by the deletion of section ten and the substitution therefore of the following:**

2. (1) The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, the Criminal Procedure Code, the Matrimonial Courses Act, 2007, or any other written law, or by such rules orders or directions of the Court as may be made under this Act, the Criminal Procedure Code, the Matrimonial Courses Act, 2007, or such written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England and subject to subsection(2), the law and practice applicable in England in the High Court of Justice up to 31st December, 1999.

(2) The Civil Court Practice, 1999 (Green Book) of England and any Civil Practice rules issued in England after 31st December, 1999, shall not apply to Zambia.”

By virtue of the foregoing Act, resort is to be had to the **White Book** 1999 edition, where our law is deficient in practice and procedure to be adopted. It is therefore available to fill any gaps that may exist in our law.

The fact that **Act No.6 of 2011** removed the **White Book** from the list of English laws applicable to Zambia and **Act No.7 of 2011**, re-introduces it into our law, suggests that there is a conflict in our laws. However, in my considered view, by removing the **White Book** from the **English Law (Extent of Application) Act** to the **High Court Act**, Parliament, was merely correcting an anomaly that existed following Act No.14 of 2002.

My finding is based on the fact that, the **White Book** 1999 edition contains rules of practice and procedure as they existed in England up to 1999. It is not an English statute. As such its application to Zambia could not reside in the **English Law (Extent of Application) Act** because the said Act prescribes the English statutes and not rules of practice and procedure, that are applicable to Zambia. This is evident from the preamble to the Act which sets out its purpose as follows:

“An Act to declare the extent to which the Law of England applies in the Republic.”

(The underlining is the Court’s for emphasis only).

The rules of practice and procedure in the High Court for Zambia are contained in the **High Court Act**. As such this is the proper place for the application of the **white Book** 1999 edition to reside, hence the introduction of **Act No.7 of 2011**. But even assuming there was conflict in the two pieces of legislation, **Act No.7 of 2011** would prevail over **Act No.6 of**

2011 on account of the former being later in time. This is the case notwithstanding that they were both Assented to on the same day. The former is to be presumed to be later in time by virtue of the fact that it is later in terms of numbering. My finding with respect to the fact that an Act that is later in time prevails over an earlier one which is contradictory, is based on the text ***Statutory Interpretation by Francis Bennion***, which states at pages 214 to 215 as follows:

“If a later Act cannot stand with an earlier, parliament (though not said so) is taken to intend an amendment of the earlier. This is a logical necessity, since two inconsistent texts cannot both be valid without contravening the principle of contradiction.”

The same principle was applied by the then Court of Appeal for Zambia in the case of ***Sinkamba-Vs-Doyle (4)*** when it held at page 13, and quoting from ***The India***, by ***Dr. Lushington*** as follows:

“The prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one;”

I now turn to determine the issue or question I stated earlier, which is to what extent is the ***White Book*** 1999 edition applicable to Zambia. It is, in my considered view, to the extent that it fills gaps in the practice and procedure in our law. As such its application has been varied from the extent to which the Supreme Court in the ***Kumbi-Vs-Zulu (3)*** held it is applicable.

Having determined the two issues I now turn to determine this application. The parties are agreed that Order 14 rule 5 of the ***High Court Act*** makes provision for joining a person to the proceedings where it appears to the

Court that, that person is likely to be affected by the outcome of the proceedings. The Order states as follows:

“If it shall appear to the Court or a Judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in the subject matter of the suit, or who may be likely to be affected by the result, have not been made parties, the Court or a Judge may adjourn the hearing of the suit to a future day to be fixed by the Court or a Judge and direct that such persons, shall be made either plaintiffs or defendants in the suit, as the case may be.

In such case, the Court shall issue a notice to such persons, which shall be served in the manner provided by the rules for service of a writ of summons, or in such other manner as the Court or a Judge thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not shall be bound by all proceedings in the course.”

(The underlining is the Court’s for purposes of emphasizing the point made earlier on attendance by the persons sought to be joined)

The said Order as counsel for the Defendant has argued serves the purpose of ensuring that all persons who are interested in a dispute or may be affected by it are heard and heard at the same time. This serves the purpose of affording them an opportunity to be heard, bringing finality to proceedings once and for all and to avoid a multiplicity of actions and conflicting decisions.

The issue therefore is, are the four persons sought to be joined to the proceedings as Plaintiff interested parties or persons who are likely to be affected by the decision of this Court. Counsel for the Defendant has argued

that they are by virtue of the nature of the counter claim, whilst counsel for the Plaintiff has argued that sufficient cause has not been shown for the four to be joined. This is the first point of departure by the parties.

As counsel for the Defendant has quite rightly argued the nature of the counter claim is such that if it succeeds, it will have the effect of divesting the four persons sought to be joined to the proceedings of their shares in the First Plaintiff. To this extent they are interested persons or persons likely to be affected by the judgment of this Court. However, the matter does not end there, which brings me to the second point of departure by counsel for the parties which is interpretation of Order 14 rule 5. The Plaintiffs' counsel has alleged that the said Order must not be read in isolation from Order 15 rule 6 subrule 4 of the **White book**. The said Order, counsel has argued provides that a person can only be joined to the proceedings as Plaintiff if he consents to being so joined. The Defendant's counsel on the other hand has argued that by virtue of Order 14 rule 5 of the **High Court Act**, this Court has power to add a person to the proceedings as Plaintiff or Defendant. Further that, there are no preconditions to the Court's exercise of such power and that the **white book** is merely there to fill gaps in our practice and is not binding.

Although Order 14 rule 5 of the **High Court Act** makes provision for adding a person to the proceedings as Plaintiff or Defendant it does not fully prescribe the practice and procedure pursuant to which such quest or desire can be achieved. It can therefore safely be said that there is a gap in our law as it relates to practice and procedure for joinder of a party pursuant to Order 14 rule 5 of the **High Court Act**. To this end, resort should be had to the **White Book** which, not only lays down the law on joinder of a party but the practice to be adopted in doing so. This is not only explicit in Order 15 rule 6 subrule 4 of the **White Book** but also the explanatory notes thereto.

Having found that there is a gap in our law and procedure on joinder, I agree with counsel for the Plaintiffs that Order 14 rule 5 of the **High Court Act** should be read with Order 15 rule 6 subrule 4 of the **White Book**. The said Order states as follows:

“Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks fit and either of its own motion or on application.

...

b) order any of the following persons to be added as a party namely -

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

(3) ...

(4) no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.”

The foregoing Order sets out the practice to be adopted in adding of parties by prescribing criteria to be followed and the limits. Further the effect of the Order was explained by the Supreme Court in the case of **Simbeye Enterprises Limited and Another-Vs-Yousuf (4)** referred to by counsel for the Plaintiffs. The Supreme Court stated in this respect as follows at page 161:

“In our view the rule applies only where the application is made either by a plaintiff to join another person as co-plaintiff or by another person to join the other as a plaintiff.

It is only fair and proper that, that person do consent because of the attendant consequences of being a litigant.”

There is no consent to be added that has been signified by the four persons sought to be joined and neither has the Defendant alleged that the same has been given. The four persons cannot therefore be joined to these proceedings because doing so would be contravening Order 15 rule 6 subrule 4 and the principle laid down in the **Simbeye Enterprises Limited (4)** case.

In view of my finding in the preceding paragraphs I find that this application lacks merit and I accordingly dismiss it with costs. I further order that the matter come up for hearing of the application to appoint a receiver manager on 8th November, 2012 at 09:00 hours.

Leave to appeal is granted.

Delivered on the 25th day of October, 2012

**NIGEL K. MUTUNA
HIGH COURT JUDGE**

