

**HOLDEN AT KABWE**

*(Civil Jurisdiction)*



**BETWEEN:**

**CARGILL ZAMBIA (2009) LIMITED**

**APPELLANT**

**AND**

**HASTINGS MAFELOMALE AND 340 OTHERS      RESPONDENTS**

**CORAM:** *Chashi, Chishimba and Sichinga, JJA*

**ON:** *22<sup>nd</sup> May, 26<sup>th</sup> June and 5<sup>th</sup> July 2019*

*For the Appellant:*

*C. M. Mwansa (Ms.), Messrs Corpus Legal Practitioners*

*For the Respondents:*

*Y. Silomba, Messrs Robson Malipenga and Company*

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**J U D G M E N T**

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**CHASHI, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. **Peter Biemba v AMI Zambia Limited - SCZ Appeal No. 104 of 2004**
2. **William David Carlisle Wise v E. F. Harvey Limited (1985) ZR, 179**

3. **Alech Lobb v Total Oil GB Limited (1983) All ER, 944**

**Legislation referred to:**

1. **The Supreme Court Practice (White Book), 1999**
2. **The Legal Practitioners Rules, Statutory Instrument No. 51 of 2002**
3. **The High Court Act, Chapter 27 of the Laws of Zambia**

**Other works referred to:**

1. **Black's Law Dictionary, Bryan A. Garner - Eighth edition**

This appeal emanates from the Ruling of the learned Judge of the High Court, Hon. Mrs. Justice G. C. Chawatama.

The background to this matter is that, the plaintiffs in the court below, now the Respondents, commenced an action by way of writ of summons on 14<sup>th</sup> November 2018, which was subsequently amended, claiming the following reliefs.

- (1) An Order for payment of long service bonus;
- (2) An Order for payment of non-remitted NAPSA contributions for three months;
- (3) An Order for payment of one-month salary in lieu of notice for those who were not paid;
- (4) An Order for payment of under paid redundancy package;
- (5) Damages; and

(6) Costs.

The Respondents' case is that some of them were employees of Clark Cotton Zambia Limited, which was later bought by the Appellant on or about 21<sup>st</sup> March 2006.

The other Respondents were employed after the purchase.

Those who were employees of Clark Cotton Zambia Limited consented to the transfer of the contracts of employment to the Appellant and the parties agreed that the recognition agreement which had been signed with Clark Cotton Zambia Limited shall be maintained and the rights contained therein be observed.

According to the Respondents, the collective agreement provided for payment of long service bonus for the Respondents who had served four years and above. The Respondents allege to have served for more than four years and that as such, they were eligible for long service bonus.

The Respondents are further claiming repatriation under some collective agreements for those who were retrenched or retired between 2015 and October 2017 and were not paid.



The Respondents are also claiming NAPSA contributions for the months of December, 2016, August and September, 2017 which were not remitted by the Appellant.

Further, according to the Respondents, the collective agreement provided for payment of one month's salary in lieu of notice on separation, either by resignation, termination or retrenchment for those who were not paid.

Lastly, the Respondents allege that they were underpaid redundancy packages, as the Appellant on computing the packages used net pay, without allowances.

The Appellant entered conditional appearance and made a composite application to dismiss the cause of action on the following grounds:

- (1) To dismiss the action for want of cause of action in respect to some of the Respondents, pursuant to Order 14A/1 and 19/19 (a) and (d) of **The Rules of the Supreme Court**<sup>1</sup> (RSC). According to the Appellant, this category of employees had been fully paid and they signed letters of acknowledgment and disclaimers and waived any further claims against the Appellant as shown at pages 47-200 of the record of appeal (the record).

- (2) To dismiss the action for want of authority and/or instructions in respect to some Respondents, to commence court action pursuant to Rule 16 (3) of **The Legal Practitioners Rules<sup>2</sup>** and Order 15/6 (4) **RSC**. There are letters at pages 202-206 of the record, written by the said Respondents after commencement of the action, dissociating themselves from the action.
- (3) To strike out and/or set aside the action for irregularity pursuant to Order 2/1 **RSC** and/or an Order for further or better particulars. This is premised on the Respondents' failure to provide physical, postal and electronic addresses and national registration card numbers.

In opposing the first ground, the Respondents' claim that they were forced to sign the disclaimers and waivers due to economic duress and coercion as they were told the Appellant was winding up and relocating to United States of America.

As regards the second ground, the Respondents admitted that, Respondent number 125 is no longer a party to the proceedings as he had withdrawn. In respect to the other Respondents, it was asserted that they had given instructions to Messrs Robson Malipenga and Company by appending their signatures.

As regards the third ground, it is alleged that most of the Respondents came from villages and therefore apart from indicating the districts, it was not possible to provide physical, postal and electronic addresses for them.

After considering the affidavit evidence and the parties respective arguments, the learned Judge as regards the third ground ruled that it be cured by amending the writ of summons to include the physical, postal and electronic addresses for the Respondents.

Dissatisfied with parts of the Ruling, the Appellant has appealed to this Court advancing two grounds of appeal as follows:

- (1) That the court below erred in law and fact when it failed to consider the application to have the action dismissed in respect to some of the Respondents and made a finding that the issues were contentious and required to be proved at trial despite the overwhelming evidence.
- (2) That the court below erred in law and fact when it failed to consider and adjudicate on the application to dismiss the action for want of authority and/or instructions to Messrs Robson Malipenga and Company to commence the action in respect to some of the Respondents.



On the first ground, the learned Judge took the view that it touched on the entitlements of the Respondents and it was clear that the issue was contentious and required to be proved at trial and as such refused to delve into the same. The learned Judge then ordered the Respondents' advocates to furnish the Appellant with relevant details concerning their request in accordance with Order 15/1 of **The High Court Rules<sup>3</sup> (HCR)**. According to the learned Judge, this would also resolve the second ground, as regards which Respondents were not part of the action.

At the hearing of the appeal, both parties relied on their respective heads of argument.

In arguing the first ground of appeal, it was submitted that it is clear from the annexures, which are statements implying full and final settlement of the Respondents' dues, that out of the 341 Respondents, 179 of them do not have a cause of action against the Appellant as the Appellant paid all their dues in full, upon being declared redundant. According to the Appellant, the said Respondents acknowledged receipt of their dues by signing; confirming that they understood the contents and waiving any further rights or demand against the Appellant.

Our attention was drawn to the case of **Peter Biemba v AMI Zambia Limited<sup>1</sup>** and submitted that the affected Respondents can neither attach

any liability against the Appellant nor any right or entitlement so as to secure a Judgment in their favour because they freely and voluntarily signed waivers and as such they do not have a cause of action.

As regards the court's view that the issue was contentious and required to be proved at trial, it was submitted that, the Respondents were given an opportunity to respond through their affidavit in opposition and did not dispute having knowledge of the contents of the annexures and neither did they oppose or deny that they signed the same.

According to the Appellant, the Respondents did not raise any issue with regard to the issues being contentious and requiring determination at trial. That it was a misdirection by the court below to pronounce itself on a matter that was not raised by either party in their pleadings or affidavits.

As regards the second ground of appeal, it was submitted that, five of the Respondents did not give their consent or instructions to be parties to the action. That it is clear from the letters appearing at pages 202-205 of the record that Respondents 245, 304, 308 and 338 had not given authority to Messrs Robson Malipenga and Company or the group representatives to be joined or to be made parties to the proceedings.



According to the Appellant, it is unethical and a serious breach of **The Legal Practitioners Rules**<sup>2</sup> for the advocates to have commenced an action on behalf of persons without authority or instructions.

In turn, the Respondents in response to the first ground of appeal, submitted that the learned Judge did not fail to consider the Appellant's application, as she did so, as shown in the Ruling that the learned Judge took into account the writ of summons and statement of claim, the affidavit evidence and arguments by the parties. On the issue of want of cause of action, she held as follows:

*"I will not delve into the entitlements of the plaintiffs as it is clear that the issue is contentious and will require to be proved at trial."*

Counsel drew our attention to Order 18/19/10 **RSC**, which provides as follows:

*"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered."*

Counsel submitted that there are 341 Respondents in the matter, all with individual contracts and on different terms and conditions and with

varying claims, which can only be determined at trial. Reliance was placed on the case of **William David Carlisle Wise v E. F. Harvey Limited**<sup>2</sup> where the Supreme Court held as follows:

*“A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a Judgment in his favour against the other.”*

On the argument that the Respondent acknowledged receipt of their dues by signing statements, implying full and final settlement of their dues, Counsel contended that the Respondents are among other things challenging the very signing of the statements, thereby warranting the issue to be one that should be determined at trial. It was submitted that the statements were signed under economic duress. Reference was made to **Black’s Law Dictionary**<sup>1</sup> where the learned authors define economic duress as:

*“an unlawful coercion to perform or threatening financial injury at a time when one cannot exercise free will.”*

According to Counsel, the Respondent signed the statements unwillingly, as they were threatened that they would never see their monies as Clark

Cotton Zambia Limited was exiting Zambia. As such they had no alternative but to submit to the demand.

The case of **Alech Lobb v Total Oil GB Limited**<sup>3</sup> was cited, where three requirements to be satisfied before economic duress can be established were set as follows:

- “(i) That they entered into the transaction unwillingly with no real alternative but to submit to the defendant’s demand, or*
- (ii) That their apparent consent to the transaction was extracted by the defendant’s coercive acts, or*
- (iii) That they repudiated the transaction as soon as the pressure on them was relaxed.”*

It was Counsel’s contention that the plight that the Respondents found themselves in, prior to, during and subsequent to the execution of the statements satisfies all the three tests aforesated.

In response to the second ground of appeal, it was submitted that the learned Judge considered and adjudicated on the Appellant’s application to dismiss the action for want of authority or instructions to Messrs Robson Malipenga and Company to commence the action with respect to some of the Respondents and made a determination that, her order for



the Respondents Advocates to furnish further and better particulars would answer the question of who did not give consent or instructions.

According to Counsel, the learned Judge granted, the application for further and better particulars among other reasons as an alternative to dismissing an action for want of authority or instructions from the Respondent to commence the action.

We have considered the arguments and the Ruling being impugned.

In the first ground of appeal, the Appellant attacks the learned Judge's failure to consider the Appellant's application to have the action dismissed for want of cause of action. Secondly, the ground attacks the finding that the issues were contentious and required to be proved at trial.

A perusal of the Ruling at pages 8-17 reveals that the learned Judge did not fail to consider the application. The learned Judge considered the application and in doing so, also took into consideration what reliefs were being sought by the Respondents by examining the writ of summons and statement of claim. The learned Judge further considered the affidavit evidence in relation to the application which was before her and the arguments by the parties in arriving at the conclusion that the issues were contentious and could only be resolved at trial.

We note that, although the Judge did not go further, it is clear from the arguments that various issues were being raised such as which collective agreements were applicable to the Respondents and as to which Respondents were entitled to the reliefs being sought.

Furthermore, there were issues being raised in respect to disclaimers and waivers which the Respondents were alleging were procured through coercion and economic duress and all this needed adducing of evidence at the trial and the same to be tested through cross examination and calling of all relevant documentation.

In the view that we have taken, we find no basis on which to fault the learned Judge in the manner she exercised her discretion and finding that the issues which were being raised were contentious.

As regards the second ground of appeal, it is evident from the record, that the Respondents appearing at pages 202-206, expressly dissociated themselves from the cause of action and there was no need for further and better particulars in that respect in order to resolve which Respondents had not instructed Messrs Robson Malipenga and Company.

In the view that we have taken on this ground, plaintiff number 125 in the court below, whom it is conceded had withdrawn and numbers 245,

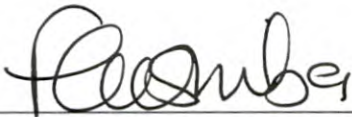
304, 308, 310 and 338 who dissociated themselves, should forthwith be misjoined from the proceedings.

The net result is that, the appeal fails on ground one and succeeds on ground two. We accordingly remit the matter to the court below for directions.

The costs of the appeal shall abound the outcome of the proceedings in the court below.

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**J. CHASHI**  
**COURT OF APPEAL JUDGE**

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**F. M. CHISHIMBA**  
**COURT OF APPEAL JUDGE**

A handwritten signature in blue ink, appearing to read 'D. L. Y. Sichinga' in a cursive script.

**D. L. Y. SICHINGA**  
**COURT OF APPEAL JUDGE**