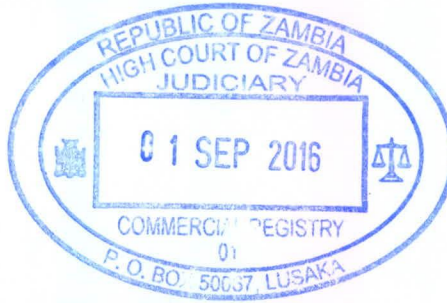


IN THE HIGH COURT FOR ZAMBIA 2016/HPC/0147
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



B E T W E E N:

CITIZENS ECONOMIC EMPOWERMENT Plaintiff
COMMISSION

and

RODGERS LYEMPE T/A FREEWILL Defendant
CONTRACTORS & DISTRIBUTORS

Before the Honourable Justice Irene Z. Mbewe on 2nd day of
September, 2016

For the Plaintiff: Mr. Raymond Musumali of Messrs
SLM Legal Practitioners.

For the Defendant: In Person

R U L I N G

Cases referred to:

- (1) *Salomon vs A Salomon* (1887) AC 22 HL.
- (2) *Associated Chemicals Limited vs Hill and Delamin Zambia Limited and Ellis and Co* (1988) SCJ 7
- (3) *National Milling Company Ltd v Vashee* (Suing as Chairman of Zambia National Farmers' Union) SCZ 23 of 2000.

Legislation referred to:

- (1) *High Court Rules, Chapter 27 of the Laws of Zambia.*
- (2) *Rules of the Supreme Court, 1999 Edition.*

This is the Defendant's application to raise a motion on a preliminary issue pursuant to Order 14 Rule 1 and 2 of the High Court Rules, Cap 27 of the Laws of Zambia as read with Order 33 Rule 3 and 7 of the Rules of the Supreme Court, 1999 Edition. In support of the application, the Defendant filed an affidavit on 3rd August, 2016 sworn by Rodgers Lyempe the Defendant herein. The Defendant filed skeleton arguments on the same date.

The gist of the preliminary issue raised is that the Plaintiff has sued the Defendant in his personal capacity as a sole trader when the proper party should have been the company in which the Defendant has an interest.

The brief background to the matter is that the Plaintiff commenced an action by way of Writ of Summons and Statement of Claim on 3rd April 2016. The Defendant entered an appearance and filed a defence and counterclaim. The facts are that the Plaintiff availed a loan facility to the Defendant for the purpose of financing a tipper truck. The Plaintiff has sued the Defendant for:

- (i) *The payment of the sum of ZMW353,356.12 as at 31st January 2016 due to the Plaintiff from the Defendant being the outstanding amount of the loan facility furnished to the Defendant on 27th December 2009;*
- (ii) *An order for possession and sale of the vehicles being Volvo truck registration ABX 2016 which was pledged by the Defendant as security for the loan;*
- (iii) *Interest;*
- (iv) *Further or other relief the court may deem fit; and*

(v) Costs.

The Defendant has made a counterclaim claiming for:

- (i) *payment of damages arising from the negligence of the Commission from the period the Plaintiff was advised to sell the truck due to problems it had developed up to date of writ in the sum of K180,000.00 (the market value of the tipper truck at the time)*
- (ii) *Payment of damages in the sum of in the sum of K195,000 for the inconvenience, stress and mental anguish due to pressure to source for money to pay the debt that the Commission caused to swell on its ill decision;*
- (iii) *Any other relief the court may deem best; and*
- (iv) Costs.

The evidence as it is revealed in the affidavit in support filed on 24 May, 2016 is that the deponent is a Director in the Defendant Company known as Freewill Contractors and Distributors Limited. The evidence reveals that the Defendant obtained a loan facility as a limited company from the Plaintiff. The evidence reveals that the Plaintiff commenced an action for the recovery of monies owed which was borrowed by a company in which the Defendant is a director. The Certificate of Incorporation of the Company is exhibited as "RL1".

The affidavit in opposition was deposed by Monde Nchimunya the Director of Credits in the Plaintiff. The evidence reveals that the Defendant made an application for a loan facility and availed the Certificate of Registration of a business name to the Plaintiff which is produced as "**MN1**". The evidence reveals that at the material time of the transaction between the parties, the Defendant was a business name and sole trader and that the Plaintiff had properly transacted with the Defendant in that capacity. The evidence further reveals that paragraph 7, 8 and 9 of the Defendant's affidavit in reply

contains legal arguments and should be expunged from the affidavit. Further that paragraph 10 of the Defendant's affidavit in support should be expunged as it is a prayer.

The Plaintiff concluded by revealing that the Defendant is not wrongly sued and prayed that the preliminary issue be dismissed and for the Plaintiff to proceed with their application for judgment on admission. In the alternative the Plaintiff prayed that the action should not be dismissed merely because a wrong party has been cited.

On the 3rd August, 2016, the Defendant filed an affidavit in reply in response to the Plaintiff's affidavit in opposition. The evidence reveals that the Defendant filed a notice of cessation of business which is produced as **"RL2a"**. The evidence reveals that the funds were disbursed to Freewill Contractors and Distributors Limited. According to the evidence, the Plaintiff instructed their bankers Zambia National Commercial Bank on 19th January to effect a payment for the purchase on a tipper truck on behalf of Freewill Contractors and Distributor produced as **"RL2b"**.

The evidence further reveals that the Plaintiff processed the White Book at Road Transport Safety Agency (RTSA) in the name of Freewill Contractors and Distributors Limited as owner and the Plaintiff as the absolute owner of the tipper truck. The White Book is produced as **"RL2c"**.

At the hearing of the motion to raise a preliminary issue, the Defendant relied on the skeleton arguments filed on 13th May, 2016 and made oral submissions which were more or less a repeat of what is contained in the affidavit filed on 23 May, 2016 and 3rd August 2016. According to the Defendant, he argued that the conversion from a sole trader to a limited company was done on the advice of the Plaintiff. It was deposed that a limited company was thereafter incorporated in the name of Freewill Contractors and Distributors Limited.

It was the Defendant's argument that a company is a separate legal entity which can sue and be sued, and is separate from the shareholders or its officers unless it can be shown that a fraud has been perpetuated or the corporate veil is lifted which the Defendant argued is not the case. The Defendant relied on the principles enunciated in the celebrated case of **Salomon v A.Salomon (1) and Associated Chemicals Ltd v Hill and Delamin and Ellis & Co (2)**.

The Defendant argued that the Plaintiff was aware that it is the Company that borrowed and not the individual. The Defendant submitted that equity demands that he who seeks justice must come with clean hands. The Defendant submitted that the Plaintiff has made a fatal mistake and sued the wrong party, and consequently the process is irregular and should be dismissed with costs.

In response, Counsel for the Plaintiff, Mr Musumali relied on the list of authorities, skeleton arguments filed on 7th July, 2016 and made oral submissions. The Plaintiff argued that it is on firm ground to sue the Defendant as a sole trader and in his personal capacity in view of the Certificate of Registration of a business name that was presented to the Plaintiff at the time the application for the loan facility was made.

Counsel brought the Court's attention to the case of **National Milling Company of Zambia vs Vashee (Suing as Chairman of Zambia National Farmers' Union) (3)** where the Supreme Court observed that an unincorporated body cannot sue or be sued in its name and that a suit or action cannot be defeated for misjoinder or non-joinder in such circumstances. Counsel argued that this case buttressed the Plaintiff's position of suing the Defendant herein. It was Counsel's argument that I should dismiss the preliminary issue as it is legally unfounded.

I have considered the affidavit evidence of the parties and list of authorities and skeleton arguments filed herein. By this

motion, the Defendant seeks to have the proceedings dismissed on grounds that the Defendant is not the proper party to be sued. The application is premised on Order 14 Rule 1 and 2 of the **High Court Rules, Cap 27 of the Laws of Zambia** as read with Order 33 Rule 3 and 7 of the **Rules of the Supreme Court**.

Order 14 Rule 1 and 2 of the High Court Rules states as follows:

- (1) *If any plaintiff sues, or any defendant is sued, in any representative capacity, it shall be expressed on the writ. The Court or a Judge may order any of the persons represented to be made parties either in lieu of, or in addition to, the previously existing parties.*
- (2) *Where a person has jointly with other person an alleged ground for instituting a suit, all those other persons ought ordinarily to be made parties to the suit.*

The Defendant cited Order 33 Rule 3 and 7 of the **Rules of the Supreme Court, 1999 Edition** which provides that:

"3. The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

7. If it appears to the Court that the decision of any question or issue arising in a cause of action or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just."

By the said Orders, this Court has the jurisdiction to entertain an application by way of a preliminary issue raised at any stage of the proceedings in a matter. Further, if the determination of the issue is such that the Court finds that the action as a whole will have been disposed of by such determination, the Court may dismiss the matter. I therefore find that this application is properly presented before the Court and that I do have jurisdiction to entertain the application.

The issue for determination is whether the Defendant is a proper party to the proceedings sued in his individual capacity and as a business name, instead of in the name of the company which is a separate legal entity from its directors and shareholders.

The Plaintiff argued that paragraph 7, 8, 9 and 10 of the Defendant's affidavit in reply filed on 3rd August, 2016 should be expunged for containing legal arguments, and having found so, the paragraphs were expunged from the record.

It has been argued by the Defendant that it is Freewill Contractors and Distributors Limited as a company that obtained the loan facility from the Plaintiff. The Plaintiff on the other hand has argued that at the material time the application for a loan facility was made, the Defendant was operating under a business name as a sole trader with a Certificate of Registration dated 19th July, 2004 and trading as Freewill Contractors and Distributors pursuant to the Registration of Business Names Act, Cap 389 of the Laws of Zambia.

The records show that the Defendant registered a limited company on the 1st December 2009 pursuant to the **Companies Act, Cap 388 of the Laws of Zambia**. A perusal of the record shows that a notice of cessation of business dated 27th November, 2009 (produced in the Defendant's Bundle of Documents) was filed at the Patents and

Bundle of Documents) was filed at the Patents and Registration Agency (PACRA). This supports the position taken by the Defendant that by the time the loan facility was availed, the business name was no longer in existence.

There is evidence on record showing that the Plaintiff on some occasions dealt with Freewill Contractors and Distributors as a business name and at other times Freewill Contractors and Distributors Limited, the company. This is further demonstrated by the following action. The Defendant signed the loan facility letter as Freewill Contractors and Distributors. On another occasion, I find that the Plaintiff dealt with Freewill Contractors and Distributors Limited as evidenced by the Plaintiff's letter of instructions to their Bankers, Zambia National Commercial Bank instructing them to make payment to Freewill Contractors and Distributors Limited.

There is evidence to show that the Plaintiff continued to engage and transact with Freewill Contractors and Distributors Limited. The White Book produced in the Defendant's Bundle of Documents shows that the Volvo tipper truck Registration No. ARX 2016 which the Defendant acquired from the loan is registered under Freewill Contractors and Distributors Limited. The statements of accounts from Zambia National Commercial Bank (exhibited in the Defendant's Bundle of Documents) show the account holder as Freewill Contractors and Distributors Limited.

From the evidence on record, I find that at the material time the loan facility was availed to the Defendant, Freewill Contractors and Distributors Limited had been incorporated. I find that following the notice of cessation, the business name continued for purposes of winding up as stated on the notice of cessation. There is however no evidence showing the process of winding up the business name so as to determine its standing.

The Defendant vehemently argued that the company is a separate legal entity and drew the Court's attention to the case of **Salomon vs Salomon (1) and Associated Chemicals Limited vs Hill and Delamain Zambia Limited and Ellis & Company (2)** where both cases principally held that a company is a distinct legal person different from its members or shareholders. I endorse the principles contained in the said case and the same are applicable herein. I find that the Plaintiff was dealing with Freewill Contractors and Distributors Limited as a company for reasons stated in the preceding paragraphs.

However, the view I take is that, I do not believe it would be in the interests of justice to remove the Defendant from these proceedings as the Defendant has made a counterclaim for damages for inconvenience, stress and mental anguish which according to the Defendant are occasioned by the Plaintiff's inaction in the same matter under dispute.

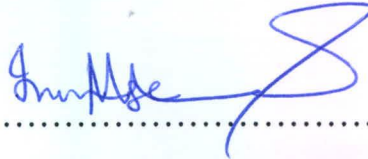
I find that there are triable and contentious issues which will require the Defendant to clarify in order to enable the Court make an informed decision in this matter. If the Defendant is struck off the proceedings, the Court will not have the full benefit of the facts to determine issues such as the counterclaim against the Plaintiff. I am guided by and invoke Order 15 Rule 6 (2) (b) of the **Rules of the Supreme Court, 1999 Edition** wherein a party may be added whose presence is necessary to ensure that all matters in dispute in the cause or matter may be adjudicated upon. The Defendant as an individual remains a party to this action.

For the avoidance of doubt, the Plaintiff is granted leave to amend and add parties as they deem fit so as to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon. The Plaintiff shall make any consequential amendments to the pleadings to be effected within 14 days from date of this Ruling.

By way of conclusion, and in view of my findings that I have made in the preceding paragraphs, the Defendant's preliminary issue fails.

Costs are in the cause.

Dated the 2nd September, 2016.

A handwritten signature in blue ink, appearing to read 'Irene Z. Mbeke', is written over a horizontal dotted line.

HON. JUSTICE IRENE Z. MBEKE
HIGH COURT JUDGE