

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

2015/HP/2135

**BETWEEN:**

**CHRISPINE KANDINDIMA**

**AND**

**ALICK NDALAMETI**

**FRANCIS PHIRI**

**LAMECK PHIRI**

**LAMECK NJOBVU**

**ATTORNEY GENERAL**



**PLAINTIFF**

**1<sup>ST</sup> DEFENDANT**

**2<sup>ND</sup> DEFENDANT**

**3<sup>RD</sup> DEFENDANT**

**4<sup>TH</sup> DEFENDANT**

**5<sup>TH</sup> DEFENDANT**

**CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC**

*For the Plaintiff:*

*Mr. H.M Mulunda of Messrs L M Chambers*

*For the Defendants:*

*Ms. M. Kapamba Assistant Senior State Advocate*

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**RULING**

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**Cases referred to:**

- 1. Stickrose (PTY) Limited and Permanent Secretary Ministry of Finance SCJ No. 30 of 1999*
- 2. Acropolis Bakery v. ZCCM Ltd (1985) ZR 232*

**Legislation referred to:**

1. *State Proceedings Act, Cap 71 of the Laws of Zambia*
2. *The High Court Rules Chapter 27 of the Laws of Zambia*
3. *State Proceedings Act*

The legend of this matter is that on 9<sup>th</sup> November, 2015 the Plaintiff launched an action against the Defendants by mode of writ of Summons and statement of claim seeking the following reliefs:

- (i) *Damages for defamation in the sum of K500,000.00*
- (ii) *Damages for malicious prosecution in the sum 500,000.00*
- (iii) *Damages for assault and battery in the sum of K800,000.00*
- (iv) *Damages for false imprisonment in the sum of K700,000.00*
- (v) *Loss of business in the sum of K500,000.00*
- (vi) *An injunction restraining the Defendants from harassing the plaintiff*
- (vii) *Exemplary damages*
- (viii) *Interest*
- (ix) *Costs*
- (x) *Any other relief the court may deem fit*

On 5<sup>th</sup> May, 2016 the 5<sup>th</sup> Defendant launched summons for misjoinder to disjoin the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants from the action pursuant to Order 14 (5) (2) of High Court Act, Cap 27 of the laws of Zambia.

The summons was supported by an affidavit. The essence of the affidavit is that the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants are investigating officers from the drug Enforcement Commission who were acting in

the course of their duties when the alleged tortious wrongs were allegedly committed and therefore the proper party to be sued was the 5<sup>th</sup> Defendant the Attorney General of the Republic of Zambia.

At the hearing Learned Counsel Ms. Kapamba relied on **Section 12 (1) of the state Proceedings Act<sup>1</sup>**. She also called in aid the case of **Stickrose (PTY) Limited and the Permanent Secretary – Ministry of Finance<sup>1</sup>** where the Supreme Court held that:

*“Public officers need protection of the law. They are not to be individually harassed as a means of enforcing Judgments against the State”.*

The Plaintiff countered that position through an affidavit in opposition. The gravamen of the affidavit was that notwithstanding that the 5<sup>th</sup> Defendant is liable for the acts or omissions of the 1<sup>st</sup> to 4<sup>th</sup> Defendants done in the course of their employment; the said defendants were still personally liable for the tortious acts.

It was deposed that the principle of the tort of vicarious liability is to enable the claimant recover damages from the employer of the employees who may not have the capacity to pay and not to excuse the employees from liability. That liability should be found against the employee before the employer can be found liable.

Learned Counsel for the Plaintiff Mr. Mulunda then enlisted the aid of the case of **Acropolis Bakery v. ZCCM Limited<sup>2</sup>** where the Supreme Court held in Ruling No. 1 as follows:-

*“Acts of vengeance and violence unrelated to the proper or improper or bonafide performance will not be regarded as falling in the course of employment and will not create vicarious liability”*

He finally submitted that it is not the intention of Parliament to absolutely to absolve public officers from tortious liability. It was his further submission that the Stickrose case<sup>1</sup> was distinguishable.

Before I deal with the substantive application, I wish to make preliminary observations in respect of 2 matters namely the need to reveal the grounds of any application in the main body of the summons and secondly the undesirability of presenting legal arguments in an affidavit.

**(1) DISCLOSURE OF GROUNDS OF ANY APPLICATION IN THE SUMMONS**

A perusal of the summons for the misjoinder does not disclose the grounds for the application in the main body of the summons. The grounds appear in the supporting affidavit.

The proper practice in any application is to clearly state the grounds upon which the application or summons is premised or anchored in the main body of the application or summons as the case might be.

The supporting affidavit will then seek to state the facts tending to explain or substantiate the matters revealed or stated in the

summons. This leads to the second issue of what is supposed to be contained or not contained in an affidavit.

## (2) **CONTENTS OF AFFIDAVIT**

The affidavit in support of the summons for misjoinder and the affidavit in opposition both suffer from containing legal arguments. Order V Rule 15 of the High Court Rules<sup>2</sup> states as follows:-

*“An affidavit shall not contain legal extraneous matter by way of objection or legal argument or conclusion”*

Advocates and litigants are advised to strictly comply with orders of the Court. For Advocates and litigants who choose to ignore Court Orders do so entirely at their own peril.

In the case in casu, I have invoked the provisions of Order V Rule 13 of the High Court Rules which grants jurisdiction to the court to rely on an affidavit notwithstanding that the same is deficient in form and in substance instead of expunging the offending paragraphs in the affidavits. The Rule provides as follows:-

*“The Court or a Judge may permit an affidavit to be used notwithstanding it is defective in form according to these Rules, if the Court or a Judge is satisfied that it has been before a person duly authorised”.*

I now deal with the substantive application for misjoinder.

The starting point is Section 12 (1) of the State Proceedings Act<sup>3</sup>. It provides as follows:-

*“Subject to the provisions of any other written law, civil proceedings by or against the State shall be instituted against the Attorney General”.*

The provision need no interpretation, its language is clear – that subject to the provisions of any other written law proceedings by or against the State shall be instituted against the Attorney General. I cannot read in the section an express provision prohibiting or directing that persons working in the government cannot be sued in respect of matters done or not done outside the course of their duties.

In the case in casu, the Plaintiff has properly sued the 5<sup>th</sup> Defendant in respect of certain tortious Acts allegedly committed by the 1<sup>st</sup> to the 4<sup>th</sup> Defendants.

In the event that the plaintiff succeeds, the 5<sup>th</sup> Defendant will be liable to meet the awards the Court may make against the tort feasers. The **Stickrose** case<sup>1</sup> clearly lays down the law that public officers need protection of the law and they are not to be individually harassed by way of civil actions as a means of enforcing Judgments against the State.

It has been submitted by the learned Counsel for the Plaintiff that for the Plaintiff to succeed against the 5<sup>th</sup> Defendant, he necessarily has to prove liability on the part of the 1<sup>st</sup> to the 4<sup>th</sup> Defendants who are employees of the State for the latter to be vicariously liable.

If for arguments sake the Court was to find after hearing evidence that the 1<sup>st</sup> to 4<sup>th</sup> Defendants committed tortious acts outside their course of employment or that they were on a frolic of their own or they had embarked on errand of committing criminal and or tortious acts which acts cannot legitimately be classified as one of those acts they were employed to do then the State, the 5<sup>th</sup> Defendant will not be liable for such wrongs. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants will then be personally liable for criminal and civil wrongs.

There is force in this argument by Learned Counsel for the Plaintiff. The instructive and authoritative pronouncement by the Supreme Court in the case of ***Acropolis Bakery Limited v. ZCCM Limited***<sup>2</sup> states that

*“Acts of vengeance and violence unrelated to the proper or improper or bonafide performance will not be regarded as falling in the course of employment and will not create liability”*

This clearly settles the issue.

If the 1<sup>st</sup> to 4<sup>th</sup> Defendants were to be disjoined from these proceedings at this stage and it was found at a later stage that they acted ultra vires their mandate, then the 5<sup>th</sup> Defendant will not be liable. The Plaintiff will then have to proceed personally against the tort feasers.

The net result would be to encourage multiplicity or duplicity of actions which is not in public interest. All issues relating in one transaction or several relating to the same parties in same point in time space to which the same principles of law apply should be dealt with in one Court of competent jurisdiction.

This approach will have the advantage of wholistic determination of issues and avoidance piecemeal or scattered litigation which prolongs conclusion of matters. There must be an end to litigation.

I am in agreement with the submissions of the Learned Counsel for the Plaintiff that it was not the intention of Parliament to totally absolve public officers in tortious liability.

To demonstrate that if as I discussed earlier the Court was to disjoin the 1<sup>st</sup> to the 4<sup>th</sup> Defendants on account of Section 12 (1) of the State Proceedings Act<sup>1</sup>, and later if it were to be found that the State was not vicariously liable; and if the action was to be brought against the 1<sup>st</sup> to the 4<sup>th</sup> Defendants, the said Defendants would put up a defence that no action can lie against them because of the provisions of Section 12 (1) of the Act<sup>1</sup>. This will lead to gross absurdity which could not have been intended by the legislature.

At this stage I have formed a very firm view that this is not a fit and proper case to disjoin and strike out the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants from the proceedings. Proceedings will not in any way prejudice the affected Defendants.

In sum, the application for misjoinder is declined.



Ordinarily costs follow the event unless good cause is shown why the successful litigant should be denied his well earned costs. In exercising its discretion in awarding or denying costs the discretion should be applied judiciously. The issues raised in respect of this matter raise important issues of public concern surrounding the protection of public officers.

One of the mischief sought to be arrested by the provisions Section 12 (1) of the State Proceedings Act is for the Protection of Public servants so that they are not inhibited in their discharge and execution of public duties for fear of being visited with sanctions personally arising out of acts or omission in the lawful course of their duties.

In my view, the justice of the case demands that I make no order as to costs. In other words costs shall be in the cause.

Leave to appeal to the Court of Appeal is hereby granted.

**Dated at Lusaka this <sup>19th</sup>..... day of October, 2016**



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**Mwila Chitabo, SC**  
**Judge**