

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

2015/HPC/0224



BETWEEN:

SAVOY HOTEL LIMITED

PLAINTIFF

AND

RAINBOW TOURISM GROUP LIMITED

1ST DEFENDANT

RAINBOW TOURISM GROUP (ZAMBIA) LIMITED

2ND DEFENDANT

**Delivered in Chambers before Hon. Mr. Justice Sunday B. Nkonde, SC at
Lusaka this 1st day of November, 2016**

For the Plaintiff : Mr. N. Ng'andu of Messrs Shamwana and Company

For the Defendants : Mr. M. Chiteba & Miss S. Sichalwe of Messrs Mulenga
Mundashi Kasonde, Legal Practitioners.

R U L I N G

LEGISLATION REFERRED TO:

1) *Supreme Court Practice Rules 1999 Edition Volume 1*

This is the Defendant's application by way of amended Summons filed on 28th July, 2016 for determination of matter on a point of law pursuant to **Order 14A of the Supreme Court Practice Rules** on two grounds:

- 1) *Whether the Plaintiff's action is Statute barred?*
- 2) *Whether these proceedings constitute an abuse of the Court process on the basis that it is res-Judicata.*

Also filed by the Plaintiff was a supporting affidavit sworn by TAPIWA MARI, Legal Officer of the 1st Defendant. He deposed that the claim arising under the Sale and Purchase Agreement executed on 29th October, 2008 was statute barred as the cause of action arose on 23rd February, 2009 when the balance of the Purchase Price was agreed therein to be paid.

The deponent further stated that the Plaintiff is estopped from raising any claims arising under the Management Settlement Agreement dated 8th February, 2013 as the Management Settlement Agreement was the subject of litigation under cause Number 2014/HPC/0209 before Nyambe, SC, J which Court did deliver its Judgment on 12th December, 2014. The Judgment has since been appealed to the Supreme Court by the 2nd Defendant under Appeal No. 29 of 2015 and Judgment is yet to be delivered.

The application was opposed by the Plaintiff. The affidavit in support was sworn by CHARITY CHITALU LUMPA, a Director in the Plaintiff Company. The deponent contended that the cause of action arose on 31st December, 2009 being the date when the Defendants in writing undertook to make full payment of the Purchase Price. A copy of the letter of undertaking was exhibited and marked 'CCL1'.

Turning to estoppel, the deponent contended that the question of re-litigating the matter or claims did not arise as cause 2014/HPC/0209 instituted by the 2nd Defendant against the Plaintiff was for enforcement of a mortgage and restricted to recover the Management Fees payable to the 2nd Defendant under the Management Settlement Agreement.

The parties also filed respective Skeleton Arguments and List of Authorities and placed reliance on the same at the hearing. I will not delve into the arguments advanced save to state that I have taken the same into account and will make reference to the Skeleton Arguments where necessary.

In my view, the question I have to consider is whether this matter can suitably be determined pursuant to **Order 14A** of the **Supreme Court Practice Rules**.

Order 14A provided as follows:

“1. - (1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that-

- (a) such question is suitable for determination without a full trial of the action; and**
- (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim therein.**

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either-

- (a) had an opportunity of being heard on the question, or
- (b) consented to an order or judgment on such determination.

(4) The jurisdiction of the Court under this Order may be exercised by a master.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, Rule 19 or any provision of these rules.”

Further, since in the determination on a question of law culminates in the action being finally be disposed of without a full trial, **Order 14A/2/7** also states as follows:

“The Summons should specify, with particularity if necessary, what Judgment or Order is being claimed upon the determination of the question of law.”

Therefore, my understanding of **Order 14A/2/7** is that to avoid making a determination in a void, I should satisfy myself that the Summons specify the judgment or Order being claimed upon the determination of the questions of law before me.

I have perused the amended Summons filed on 28th July, 2016 and which for convenience is here below re-produced:

“LET THE PARTIES concerned attend before the Honourable Judgesitting in chambers on theday of2016 athours in thefore noon or soon thereafter on the hearing of an application on the part of the Defendant for the determination of the following question (s) of law, that is:

- I. Whether the Plaintiff’s action is statute barred**
- II. Whether these proceedings constitute an abuse of Court process on the basis that it re judicata**

Dated at Lusakaday of2016.

(Signed)

**Per: Mulenga Mundashi Kasonde
Legal Practitioners,
1st Floor Zimbabwe House,
Haile Selassie Avenue, Long Acres
P.O Box 34972,
LUSAKA**

Advocates for the Plaintiffs

**The Respondent Advocates
Messrs Shamwana and Company
Paseli Road
Northmead
LUSAKA”**

Clearly, the above Summons did not specify what Judgment or Order was being claimed upon the determination of the questions of whether the Plaintiff's action is Statute barred and whether these proceedings constitute an abuse of Court process on the basis that the same is res judicata. The consequence is that the application is improperly before me and is struck out for irregularity with costs to the Plaintiff.

I, however, note that the same questions which where before me for determination are matters pleaded in the Defence. I will, therefore, proceed to hear and determine at trial whether the special defence of the action being Statute barred and the special defence of abuse of Court process on account of the doctrine of res judicata where successfully pleaded.

The matter will come up for a Scheduling Conference on 24th November, 2016 at 14:00 hours.

Dated at Lusaka this²².....day of November, 2016.



Hon. Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE