IN THE SUPREME COURT OF ZAMBIA **SCZ/8/303/2014**
HOLDEN AT LUSAKA **APPEAL No.21/2015**
(*Civil Jurisdiction*)

BETWEEN:

FINANCE BANK LIMITED **APPELLANT**

AND

DIMITRIOS MONOKANDILOS **1ST RESPONDENT**
FLANDRA KOURI **2nd RESPONDENT**

CORAM: Chibomba, Hamaundu and Kaoma, JJS
On 3rd June 2014 and 28th October, 2016

For the Appellant : Mr K. Chenda, Messrs Simeza Sangwa & Associates and Mr D. Chakoleka, Messrs Mulenga Mundashi & Kasonde Legal Practitioners

For the Respondent: Mr S. Sikota, S.C, Messrs Central Chambers and Mr S. Mambwe, Messrs Mambwe Siwila & Lisimba, Legal Practioners

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J U D G M E N T

HAMAUNDU, JS, delivered the Judgment of the Court

Legislation referred to:

Order 28 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia

Works referred to:

Odger's Principles of Pleading & Practice, 22nd Edition, D.B. Carson and I.H. Dennis (1981, London, Stevens and Sons Limited)

This is an appeal against a judgment of the High Court which refused to grant the appellant an application for

amendment of its defence so that it could include a counter-claim.

The background to this appeal, as can be discerned from the record, is thus:

In 1996, the appellant sued Dimitros Monokandilos, the 1st respondent herein, and one Kosmas Mastrokolias in Cause No. 1996/HP/4739 for the sum of US$ 1,200,000, being monies outstanding on the personal guarantees that they had provided on behalf of a company known as International Investments and Financing Limited.

On the 17th of May, 1999 in that action, the appellant obtained judgment under **Order XIII** of the **High Court Rules**, **Chapter 27** of the **Laws of Zambia** in the sum of US$1,200,000 with interest at 12% per annum.

In the meantime, in 1997, the 1st respondent and his wife, the 2nd respondent, sued the appellant in Cause No. 1997/HP/136 for damages for conversion of a sum of US$ 949,933.87. It was alleged that the two respondents held a joint United States dollar account which at the material time held a sum of US$ 983,858.74. They further alleged that the appellant, on the 26th of February, 1996 without any instructions

from the respondents and without any lawful authority debited their account with the sum of US$ 949,933.87.

Thereafter, the respondents' action appears to have gone into abeyance; and so did the appellant's action.

For reasons that cannot be discerned from the record before us, the respondent's action resurfaced in 2012. This time it appeared under Cause No. 2012/HPC/0577. The appellant filed a defence to the action under this new cause number. The appellant stated that the actual amount that was in the account was US$ 643,501 and that it debited the account with that amount as a set-off against the sum of US$1,200,000 which the 1st respondent owed on his personal guarantee. The appellant further alleged that, in his guarantee, the 1st respondent had given the appellant the right to set-off against his two foreign currency accounts, which included the joint account in this case.

In March, 2014 the appellant applied to transfer its action in Cause No. 1996/HP/4739 from the General List to the Commercial List and then consolidate it with that of the respondents.

The court below refused to consolidate the appellant's action on the ground that the parties and the claims were not the same.

The court explained that the two actions had two different subjects; that in the action by the appellants, the claim arose out of a joint account while in the action by the appellant, the claim arose out of guarantee proceedings. On those grounds, the court declined to consolidate the two matters but allowed the application to transfer the appellant's action to the Commercial List.

On the 26th of August, 2014 the appellant came up with another application. This time the appellant sought to amend its defence. By the amendment, the appellant sought to counter-claim the sum of US$1,200,000 which it had obtained by the Judgment in its action against the 1st respondent and one Kosmas Mastrokolias.

The court below was of the view that the application was misconceived because the issue which the appellant sought to introduce was already adjudicated upon by the High Court. The court was of the further view that the application was inappropriate and an buse of court process, given that the attempt to consolidate the action, in which the judgment counter-claimed was given, with the respondents' action was rejected. The court held that this was an attempt by the appellant

to bring back the application for consolidation through the back door.

The court also went on to hold that the appellant's application, if allowed, would prejudice the 2nd appellant who is not a party to the action which contains the judgment to be counter-claimed. It was also the court's view that the amendment, if allowed, would delay the fair trial of the suit.

Finally, the court held that an amendment could only be allowed if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed.

On those grounds, the court dismissed the appellant's application.

The appellant filed three grounds of appeal. These are:

1. **That the court below erred both in law and fact by holding that allowing the amendment would amount to an abuse of the process of the court on the ground that the issue raised had already been decided upon by the court.**
2. **That the court below erred both in law and fact by holding that the proposed amendment would prejudice and embarrass the 2nd respondent and delay the fair trial of the suit.**

3. That the court below misdirected itself in law and fact by dismissing the application for leave to amend pleadings and for extension of time in the circumstances of the case.

We must state that because of the manner in which the appellant sought to set up the counter-claim, namely by way of amendment, this application when it was in the court below and now here on appeal, was, and has been, argued entirely on the rules governing amendment of pleadings. It must be borne in mind that the appellant could have set up the counter-claim at the time that it filed its defence. The question is whether the respondents would have successfully objected to the counter-claim at that time. In our view, therefore, the approach to this appeal or application should be premised on the following question: If the proposed counter-claim had been set up at the time that the appellant filed its defence would it have been liable to be struck down? It is only when that question is answered in the negative that it should be determined whether the setting up of the counter-claim should nevertheless be rejected on account of any one or more of the rules governing amendments. That is how we shall approach this appeal.

We go back to the question whether the appellant would have been allowed to set up this particular counter-claim. For the

reason that we have just pointed out, the grounds of appeal do not directly address that question. Understandably, the arguments do not either. However, the appellant's arguments in the third ground of appeal do substantially deal with the question.

On this question the appellant relied on **Order 28 Rule 3** of the **High Court Rules, Chapter 27** of the **Laws of Zambia**. That rule provides:

> **"A defendant in an action may set off, or set up by way of counter-claim against the claim of the plaintiff, any right or claim whether such set off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross- claim. But the court or Judge may, if in its or his opinion, such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereto"**

Commenting on this provision, Mr Chenda, learned counsel for the appellant argued that the provision does not require a defendant's right or claim to be founded on a particular cause of action or other; nor does the provision exclude rights or claims based on an unsatisfied judgment debt.

Counsel submitted that the appellant had demonstrated in the court below that the 1st respondent owed the appellant an unsatisfied judgment debt which initially was US$ 1,200,000 but as at 31st July, 2014 had risen to US$ 2,547,419.18. Counsel submitted that in his reaction to the amendment, the 1st respondent did not deny the existence of the judgment debt and the fact that it was still owing. Counsel pointed out that the appellant in its proposed amended pleading intended to include an averment denying that the 1st and 2nd respondents had a joint account. Counsel, therefore, argued that it mattered not whether the judgment debt affected the 2nd respondent because the appellant intended to argue that the 2nd respondent was a stranger to the relationship between the appellant and the 1st respondent.

In response to those arguments, Mr Sikota, SC, learned counsel for the respondent argued that it is a misunderstanding of **Order 28 Rule 3** of the **High Court Rules** to suggest that a party is at liberty to use an unsatisfied judgment in a particular case as a set-off or counter-claim in a different case. The learned State Counsel went on to submit that when a party obtains judgment, he is at liberty to enforce it by execution and not to

bring the judgment as the basis of a counter- claim in another action. Counsel argued that it was because of that submission that the respondents advanced the arguments on the principle of *res judicata* in the court below, and wished to now repeat.

Those were the only arguments advanced by the parties on the question we have posed. We have considered them.

The record shows that what the appellant proposes to introduce is a counter-claim. According to the proposed averments in the counter-claim, the appellant intends to show that on the 21st May 1999 judgment was entered in cause number 1996/HP/4739 in favour of the appellant against the 1st respondent for the sum of US$1,200,000 together with interest and costs. The appellant intends to claim the sum of US$1,200,000 less any sum found to have been standing to the credit of the 1st respondent. The appellant intends to claim interest at the rate prescribed in the judgment in cause 1996/HP/4739.

The learned editors of **Odger's Principles of Pleading & Practice, 22nd edition,** on the topic of counter-claims, provide:

> **"A counter-claim is governed by the same rules of pleading as a statement of claim and the reply to it by the same rules as a defence."**

The learned editors go on to provide:

"Ample provision is made to protect the plaintiff from inconvenient and improper claims. If he can show that the counter-claim is one which cannot conveniently be disposed of in the pending action, or ought not to be allowed, the master may strike it out or exclude it under Order 15, r.5 leaving the defendant to bring a cross-action. If the counter-claim is frivolous or vexatious, or if it discloses no valid cause of action, or if it may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the court, the master may order that it be struck out or amended under Order 18, r.19(i)."

We now wish to look at the proposed counter-claim. It is not in dispute that the counter-claim is in the form of a judgment which the appellant obtained in cause number 1996/HP/4739. It is common cause that that action was transferred to the Commercial List and is now an active matter in that list for the purposes of execution of the judgment. However, the appellant, by the counter-claim, would like again to enter the same judgment in this cause. We think that the counter-claim offends the rules in several respects: First, it discloses no cause of action because we cannot see, and neither has the appellant disclosed, any cause of action that has arisen as a result of the judgment in cause 1996/HP/4739 which the court in this matter will be called upon to try and determine. Secondly, we think that the

counter-claim is frivolous and vexatious because the matter in which the judgment was made is very active, having recently been transferred to the Commercial List. We do not see what prevents the appellant from enforcing the judgment in that matter; and, thirdly, to the extent that the appellant wants to duplicate the judgment both in cause 1996/HP/4739 and in this one, we think that the counter-claim is an abuse of the process of the court.

Therefore, it is our view that had the appellant setup the counter-claim at the time of filing the defence, it would have been liable to be struck out. Consequently, its subsequent introduction by way of amendment of pleadings was bound to fail. The court below, therefore, was on firm ground when it declined to grant the appellant the amendment sought. We dismiss this appeal with costs to the respondents. The costs shall be taxed in default of agreement.

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H. Chibomba

SUPREME COURT JUDGE

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E. M. Hamaundu

SUPREME COURT JUDGE

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R. M. C. Kaoma

SUPREME COURT JUDGE