

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2014/HPC/0372

BETWEEN:

SECONDO TORRIANI

AND

ALESSANDRA TROIELLI

MUCCABELLA LIMITED



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

Before the Honourable Mr. Justice W.S. Mweemba in Chambers at Lusaka.

For the Plaintiff : Mr D. Mwape. – Messrs Darlington & Company.

For the Defendant : Mr R. Musumali- Messrs S.L.M Legal Practitioners.

R U L I N G

LEGISLATION REFERRED TO:

1. RULES OF THE SUPREME COURT OF ENGLAND 1999 EDITION (WHITE BOOK).
2. THE LIMITATION ACT OF 1939.
3. THE LANDS AND DEEDS REGISTRY ACT, CAP 185 OF THE LAWS OF ZAMBIA.

CASES REFERRED TO:

1. MACAURA VS. NORTHERN ASSURANCE CO. LTD (1925) AC 619.
2. DEVELOPMENT BANK OF ZAMBIA AND KPMG PEAT MARWICK V SUNVEST LIMITED AND SUN PHARMACEUTICALS LTD SCZ JUDGMENT NO. 3 OF 1997.
3. FOSS V HARBOTTLE (1843) (2 HARE 461).
4. STEIN V BLAKE (1998) BCC 316.

This is a ruling on an application by the 1st Defendant for an order to Strike out an action pursuant to Order 18 Rule 19 of the Rules of the Supreme Court of England, (White Book) 1999 Edition.

The application is supported by an Affidavit sworn by Alessandra Troielli the 1st Defendant herein and Shareholder and Director of the 2nd Defendant Company and Skeleton Arguments filed into Court on 15th October, 2014.

It is deposed by Ms Troielli that the Plaintiff commenced this action against her and the 2nd Defendant on 9th September 2014 praying for a declaration that Farm No.1885, Chisamba was an asset of a company known as Alense Agriculture Company Limited (in liquidation) and the transfer of the said farm to the 2nd Defendant is null and void.

Moreover, that prior to Alense Agriculture Company Limited being placed under voluntary liquidation, she and the Plaintiff were its sole shareholders with each of them holding 50% of its shares.

Further that prior to the aforesaid company's liquidation, it transferred the said Farm No.1885, Chisamba to her (Ms Troielli) after the passing of a Resolution on 26th September 2007 signed by her and the Plaintiff to inter alia transfer the property to her. A copy of the Resolution was exhibited to the Affidavit and marked "AT1".

It is also deposed that after the Company's resolution to transfer the property to her, she elected to hold it in the name of a company and nominated the 2nd Defendant where she had shareholding interest to hold title to the property (in Farm No. 1885 Chisamba) aforesaid.

Ms Troielli further deposed that the Deed of Transfer was executed between Alense Agriculture Company Limited and the 2nd Defendant and that Farm No. 1885 Chisamba was registered in the name of the 2nd Defendant on 24th

November 2008. A copy of the Lands Register was exhibited to the Affidavit and marked "AT2".

She also stated that the Plaintiff's action against her and the 2nd Defendant was statute barred as more than 6 years had elapsed from the date of agreement to transfer the property to her by resolution dated 26th September 2007.

That the Plaintiff had no legal standing to challenge the transfer of the said farm to her and her subsequent registration of the farm in the name of the 2nd Defendant because the farm at the material time belonged to the said Alense Agriculture Company Limited and not the Plaintiff.

Moreover, that Alense Agriculture Company Limited (in liquidation) being in voluntary liquidation was under the control and management of the two liquidators, Mr. Francis Mwiya and Ms Margaret Chalwe, and they were the rightful persons to commence an action for any alleged wrong on the company and not the Plaintiff.

That she has been advised that this action by the Plaintiff amounted to a multiplicity of actions because there was a pending matter before the Honorable Madam Justice F.M. Chishimba in cause No. 2013/HPC/0567, involving her as the Applicant and the Plaintiff as one of the Respondents and it concerned the liquidation of Alense Agriculture Company Limited (in liquidation).

Further that in the said pending court action in Cause No. 2013/HPC/0567, she was seeking the reliefs of rendering final accounts, distributing the assets of the company and finalizing the liquidation process, therefore the subject matter or issues arising in it were substantially the same as the Plaintiff's claims against her and the 2nd Defendant in this action.

Lastly, that the Plaintiff's action against her and the 2nd Defendant were frivolous, vexatious and an abuse of court process.

There is also an Affidavit in Opposition filed into Court by the Plaintiff on 4th of December, 2014. It was sworn by Secondo Torriani the Plaintiff herein.

He deposed that Alense Agriculture Company Limited (in liquidation) was owned by the Plaintiff and the 1st Defendant, who each held 50% of the shareholding.

Mr Torriani also deposed that the Resolution dated 26th September 2007 was intended to divide the assets between the shareholders and that the said Resolution had been superseded by the Resolution dated 9th September 2009.

It is also his deposition that the assets of the company were being divided between the shareholders pursuant to the winding up Resolution dated 9th September 2009 and that there was no Resolution authorizing the transfer of Farm No. 1885 Chisamba to the 2nd Defendant.

He also averred that the Deed of Transfer purporting to transfer the said property to the 2nd Defendant was not authorized by Alense Agriculture Company Limited (in liquidation).

Further that the matter before Honourable Madam Justice F.M Chishimba in cause 2013/HPC/0567 did not relate to this particular asset and he believed that unless the purported transfer of the said Farm 1885 was reversed, he would suffer loss as it would be excluded from the liquidation.

Counsel for the Defendant filed in Skeleton Arguments to support the application before Court. Counsel for the Defendants relied on Order 18

Rule 19 of the Rules of the Supreme Court of England (White Book) 1999 Edition which provides that;

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly as the case may be”.

According to Counsel this was a proper case for the Court to exercise its discretion to strike out the Plaintiff's pleadings and dismiss the entire action as firstly, the Plaintiff had no locus standi to commence this action and challenge the decision of Alense Agriculture Company Limited (in liquidation) to transfer Farm No. 1885, Chisamba to the 1st Defendant via a Resolution of 26th September 2007.

Counsel then stated that the concept of separate legal personality of a company from its shareholders was trite and he cited the case of **MACAURA VS. NORTHERN ASSURANCE CO. LTD (1)** in which the House of Lords held that “....a shareholder has no interest in the property of the Company”.

Based on this he argued that the Plaintiff had no interest in the farm or property such that he could legally challenge its transfer to the 1st

Defendant. Further he contended that by the renowned rule in **FOSS VS HARBOTTLE (3)** it has been established that the Plaintiff to any alleged wrong to a company on the part of anyone, whether director, member or outsider, should prima facie be the company and no individual member could bring an action on its behalf.

In other words the company is normally the proper Plaintiff in an action to recover loss or to enforce a duty owed to the company. Thus since Alense Agriculture Company Limited (in liquidation) being in voluntary liquidation was under the control and management of the Liquidators these were the only persons who could sue for and on behalf of the company for any alleged wrong to it.

The second argument raised by Counsel for the Defendants was that this action was statute barred because it had been brought outside the limitation period. The 2nd Defendant deposed that the farm was transferred to the 1st Defendant by a Company Resolution of 26th September, 2007 and she decided to hold it in the name of the 2nd Defendant in which the 1st Defendant had shareholding interest. The **Limitation Act (1939)** requires in Section 2 (1) (a) that any action on a normal or simple contract should be commenced within 6 years from the date of the contract. It was contended that the company resolution not having been under deed was legally a normal and simple contract and therefore any action thereon should have been commenced within 6 years from the date of the Resolution which was passed on 26th September 2007. However, over 7 years had elapsed from the date of the resolution to date and as such this action was statute barred.

Thirdly, it was submitted that this action amounted to a multiplicity of actions by the Plaintiff in that there was a pending matter before the Honourable Madam Justice F.M Chishimba in cause No. 2013/HPC/0567 involving the 1st Defendant as the Applicant and the Plaintiff as one of the Respondents and it concerned the voluntary liquidation of Alense Agriculture Company Limited (in liquidation).

Further that one of the issues in contention in the said action concerned the distribution of the assets of the company and therefore substantially bordered on the issues raised by the Plaintiff. Counsel submitted that commencing this action by the Plaintiff amounted to duplicity of actions because the action in cause 2013/HPC/0567 was still pending.

Counsel relied on the Supreme Court of Zambia decision in **DEVELOPMENT BANK OF ZAMBIA AND KPMG PEAT MARWICK VS SUNVEST LIMITED AND SUN PHARMACEUTICALS LIMITED (2)** in which the Court strongly condemned the commencement of a fresh action when another action with similar issues was pending before another Court. The Supreme Court added that such actions would result in various Courts making conflicting and contradictory decisions over the same subject matter.

In view of the above, Counsel prayed that the Plaintiffs action against the Defendants was an abuse of court process and should be dismissed with costs to the Defendants.

There are also Skeleton Arguments filed in Opposition to the application before Court on the 13th of May, 2015. In response to the three grounds raised by Counsel for the Defendants, Counsel for the Plaintiff stated that the Plaintiff did in fact have locus standi, that the action was not statute barred and that it did not amount to a multiplicity of actions.

He also cited the case of **MACAURA VS NORTHERN ASSURANCE CO LTD (1)** where the House of Lords held that “a shareholder has no interest in the property of the company”. He submitted however, that this rule was not held absolutely and that the House of Lords went on to hold in the words of the Lord Buckmaster with concurrence from the other Lords that **“He (shareholder) is entitled to a share in the profits of the company while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up”**.

The argument of Counsel for the Plaintiff on this point was basically that the company in issue was in the process of being wound up on a voluntary basis and it was not in dispute that there were surplus assets subject to distribution which the Plaintiff was seeking to protect.

It was Counsel's position that unless this interest was protected the Plaintiff would suffer loss of this share in the surplus assets of the company and as such he had the requisite locus standi to pursue this legal interest in the surplus assets.

In regard to the Limitation Act (1939), Counsel contended that the Resolution 3(i) of the Resolution dated 26th September 2007, was a Resolution to transfer land (Farm No.1885 Chisamba) and that it was this Farm which was a subject of this action and Section 4 (3) of the Limitation Act (1939) provided a period of 12 years within which to commence an action for recovery of land.

He also added that this was further amplified in the **Halsbury's Laws of England (4th Edition Vol 28)** paragraph 705, at page 319 as follows:

"The Limitation Act 1939 prescribes a normal limitation of twelve years from the date on which the right of action occurred for actions for the recovery of land. An action to recover land is an action to obtain any land by Judgment of a court and is not limited to actions which claim possession".

According to Counsel, this action was within the 12 year period, considering that the Resolution purporting to transfer the land in issue was dated 26th September 2007.

Regarding the argument on multiplicity of actions whereby the Defendants contended that this action amounted to multiplicity of actions in view of the action before Madam Justice F.M Chishimba in cause No.2013/HPC/0567 –

it is contended that exhibit "AT5" in the 1st Defendants affidavit clearly showed that the gist in the cause was to compel the liquidators to complete the winding up of the company. That the action in case No. 2013/HP/0567 did not in any way extend to the status of particular assets but merely sought to compel the Liquidators to distribute the assets and unless Farm No. 1885 Chisamba was ruled to be part of the assets to be distributed, the Liquidators would not include it in the list of assets. Moreover, that the said farm had not been included in the latest Statement of Liquidators.

Lastly it was contended that the two actions were dealing with very distinct actions and the facts in this matter required that the matter be determined on its merits without which the Plaintiff would suffer injustice and loss of his share in the surplus assets and that the question of the transfer to the 2nd Defendant contrary to the Resolution required judicial determination.

Counsel then prayed that the application be dismissed with costs to the Plaintiff.

During the hearing on 7th May, 2015 Counsel for the Plaintiff and Counsel for the Defendants were both present and relied on their respective Affidavits, List of Authorities and Skeleton Arguments.

I have considered the Affidavit evidence and the Skeleton Arguments filed by both parties.

The main issue for determination by this Court is whether or not the 1st Defendant's application to strike out this action has merit and should be granted.

Counsel for the 1st Defendant relied on Order 18 Rule 19 of the Rules of the Supreme Court (White Book) 1999 Edition which provides that;

“(1)The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly as the case may be”.

The gist of the 1st Defendant’s application is threefold. Firstly, that the Plaintiff has no locus standi to commence this action, secondly that this action was statute barred and thirdly that it was a multiplicity of actions for the Plaintiff to have commenced this matter.

Although the 1st Defendant argued this application on three grounds I have found that the most pertinent ground is the first one on whether or not the Plaintiff did in fact have the requisite locus standi to commence this action.

I consider that ground two does not aid the 1st Defendant’s application. I accept the Plaintiff’s contention that as Resolution 3 (i) of the Resolutions in Writing dated 26th September, 2007 relates to the transfer of land i.e transfer of Farm No. 1885 Chisamba the applicable limitation period is 12 years pursuant to Section 4 (3) of the Limitation Act, 1939.

I therefore find and hold that the action herein is within the 12 year period considering that the Resolution transferring the land in issue is dated 26th September, 2007.

As regards ground three, I accept the 1st Defendants contention that the commencing of this action by the Plaintiff amounts to a duplicity of actions because the action in Cause 2013/HPC/0567 was pending. Both the Plaintiff and the 1st Defendant are parties to the action. Further that action relates to the voluntary liquidation of Alense Agricultural Company Limited (In Liquidation) and the issues in contention include the distribution of the assets of that company. Therefore the claim by the Plaintiff that Farm No. 1885 Chisamba is still an asset of Alense Agricultural Company Limited (In Liquidation) and that the transfer of Farm No. 1885 Chisamba to the 2nd Defendant is null and void is better dealt with and determined under Cause No. 2013/HPC/0567.

I therefore agree with Mr. Musumali's submissions that allowing this matter to proceed would result in a multiplicity of actions. I do not accept Mr. Mwape's submissions that the two actions are dealing with very distinct actions because the parties are the same and the dispute is over assets of Alense Agricultural Company Limited now in liquidation and how the assets should be distributed between the Plaintiff and the 1st Defendant in this cause. I agree that this matter must be dismissed.

In support of ground one the 1st Defendant contended that the Company was a separate legal entity whose shareholders had no interest in its property based on the case of **MACAURA VS. NORTHERN ASSURANCE CO. LTD (1)**. Further that the Plaintiff had no right to commence this action since he had only been a shareholder of Alense Agricultural Company Limited which was now undergoing liquidation and was currently under the control and management of Liquidators who were in fact the only persons that could bring an action on its behalf for any alleged wrong done to it.

It was argued in response by the Plaintiff that he had locus standi as a Shareholder in Alense Agricultural Company Limited based on the exception to the general rule in the **MACAURA (1)** case where Lord Buckmaster with concurrence from the other Lords stated that "He (shareholder) is entitled to

a share in the profits of the company while the company continues to carry on business and **a share in the distribution of the surplus assets when the company is wound up**". Therefore it was the Plaintiffs position that the farm in question was actually a surplus asset to which the Plaintiff was entitled upon liquidation of Alense Agricultural Company Limited.

The record will show that while it is not in dispute that Alense Agricultural Company Limited was being wound up at the time this matter was commenced, the background of this case shows that the farm in question is in fact now the property of the 2nd Defendant Company as shown by the Lands Register exhibited as "AT2" in the Affidavit in Support of the 1st Defendants application.

The law in Zambia as set out by Section 33 of the **Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia** is such that a Certificate of Title shows conclusive ownership of land. In this matter, while I acknowledge that no certificate of title has been adduced by the 1st Defendant, I recognise the fact that the copy of the Lands Register exhibited in the Affidavit does in fact show that Farm No. 1885, Chisamba is registered in the name of the 2nd Defendant and I find that this has sufficiently shown the owner of the said property. The 2nd Defendant is the Registered Proprietor of the land comprised in Certificate of Title No. 81227 and holds the same subject only to such encumbrances, liens, estates or interests as may be shown by the Certificate of Title. The law contemplates that fraud will vitiate a Certificate of Title but no fraud has been alleged in this matter.

I have noted that the Plaintiff states that the Resolution dated 26th September, 2007 which was intended to divide the assets of Alense Agricultural Company Limited has been superseded by the Resolution dated 9th September, 2009. There is no Resolution dated 9th September, 2009 on the Record contrary to the Plaintiffs averments at paragraphs 7 and 8 of the Plaintiffs Affidavit in Opposition filed into Court on 4th December, 2014.

It is clear that the Plaintiff refers to the Resolution exhibited to the 1st Defendant's Affidavit in Support dated 18th October, 2014 and marked as "AT3" as the Winding Up Resolution. A perusal of "AT3" shows that the members of Alense Agricultural Company Limited met on Friday 4th September, 2009 and that the Resolutions in Writing were signed on 7th September, 2009 and not 9th September, 2009. The Winding Up Resolution by the shareholders of Alense Agricultural Company Limited is therefore dated 7th September, 2009. This Resolution does not state that it has superseded the Members Resolution dated 26th September, 2007. Even if the Winding Up Resolution had stated that it was superseding the one dated 26th September, 2007 it could not have varied Resolution 3 (i) which stated that:

"Farm No. 1885 known as 'Mweka Farm' be immediately transferred to Alessandra Troielli".

In view of the foregoing I find and hold that the Resolution of the Members of Alense Agricultural Company Limited dated 26th September, 2007 was not superseded by the Members Winding Up Resolution dated 7th September, 2009.

As the Resolution dated 26th September, 2007 authorised the immediate transfer of Farm No. 1885 Chisamba to Alessandra Troielli, she was at liberty to have the same transferred by Alense Agricultural Company Limited to Muccabella Limited a Company in which she has shareholding interest. The Lands Register relating to F/1885 shows that the Deed of Transfer assigning Farm No. 1885 Chisamba from Alense Agricultural Company Limited to Muccabella Limited was registered on 24th November, 2008 and that Certificate of Title No. 81227 was issued in the name of Muccabella Limited on the said 24th November, 2008.

As ownership of Farm No. 1885 Chisamba was transferred to Muccabella Limited on 24th November, 2008 one year before Alense Agricultural Company Limited was put in voluntary liquidation by its shareholders that property is not part of the surplus assets of Alense Agricultural Company Limited (In Liquidation). The Liquidators took custody and control of those of the Company's assets and properties which were registered in the Company's name and belonged to the Company on the 7th day of September, 2009. Farm No. 1885 Chisamba was not an asset of Alense Agricultural Company Limited (In Liquidation) on that date and did not therefore come under the custody and control of the Liquidators. In view of the foregoing, Farm No. 1885 Chisamba is not among the surplus assets of Alense Agricultural Company Limited (In Liquidation).

It follows that the contention by the Plaintiff that he is entitled to seek to protect his legal interest as a shareholder in Farm No. 1885 Chisamba which is a surplus asset of the Company under the exception created by the House of Lords in its holding in the case of **MACAURA V NORTHERN ASSURANCE COMPANY LIMITED (1)** is untenable.

In the event I find that the Plaintiff as shareholder of Alense Agricultural Company Limited (In Liquidation) has no interest in Farm No. 1885 Chisamba which was transferred to the 2nd Defendant on 24th November, 2008 and ceased to be the property of that Company.

The principle that in order to redress a wrong done to a company or to the property of the company, or to enforce rights of the company the proper Plaintiff or Claimant is the company itself, and the Court will not ordinarily entertain an action brought on behalf of the company by a shareholder is well settled by the case of **FOSS V HARBOTTLE (2)**. I accept the 1st Defendants submission that in *casu* as Alense Agricultural Company Limited (In Liquidation) is in voluntary liquidation Ms. Margaret Chalwe Kunda and Mr. Francis Inambao Mwiya the Joint Liquidators of the Company are the persons who can sue for and on behalf of the company for

any alleged wrong on the company and its assets. I am of the considered view that the Plaintiff has no locus standi to commence this action and challenge the decision of Alense Agricultural Company Limited to transfer Farm No. 1885 Chisamba to the 1st Defendant.

The Rule in **FOSS V HARBOTTLE** is an enshrined principle in English company law and by extension Zambian company law and was applied by the English Court of Appeal in the recent case of **STEIN V BLAKE (4)**. Here the Plaintiff and Defendant were equal shareholders in a number of companies with the Defendant also acting as the sole director. The Plaintiff commenced a personal action against the Defendant and alleged that he had misappropriated company assets. It was held that the proper Plaintiff for the wrongs done to them was the companies. The facts of this case are similar to the case herein.

The net result is that the application to strike out the Plaintiffs pleading and dismiss the action pursuant to Order 18 Rule 19 of the Rules of the Supreme Court of England, (White Book 1999 Edition) is allowed. This action is hereby dismissed for being an abuse of the process of the Court. Costs to the 1st Respondent to be taxed in default of agreement.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 26th day of January, 2017.



.....
WILLIAM S. MWEEMBA
HIGH COURT JUDGE.