

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

2012/HPC/0675



IN THE MATTER OF: AN APPLICATION FOR VACANT POSSESSION AND
SALE OF STAND NO. 896, SITUATE IN THE LUSAKA
PROVINCE OF THE REPUBLIC OF ZAMBIA

AND

IN THE MATTER OF: ORDER 88 RULE 1 OF THE SUPREME COURT RULES
OF ENGLAND, SUPREME COURT PRACTICE (WHITE
BOOK) VOL 1, 1999 EDITION.

BETWEEN:

FINANCE BANK ZAMBIA LIMITED

APPLICANT

AND

BETRICH INVESTMENTS LIMITED

1ST RESPONDENT

BETTY CHIZYUKA

2ND RESPONDENT

RICHARD CHIZYUKA

3RD RESPONDENT

HOTEL MACHA -LENI LIMITED

CLAIMANT

**Before Hon. Madam Justice Dr. W. S. Mwenda in Chambers at Lusaka on the
21st day of April, 2017.**

For the Applicant : Mr. M. Mukupa of Isaac and Partners

For the Respondents : Mr. M. Haimbe of Sinkamba Legal Practitioners
& Claimant

RULING

Cases referred to:

1. Cecilia Mwengwe v. Jeff Muyambango 2014/HP/0868 (unreported)
2. Technistudy v Kelland (1976) 3 ALL. E.R. 632

3. Kennedy Wemba v Prince Matambo & Another- 2011/HP/600 (unreported)
4. Ethiopian Airlines Limited v. Sunbird Safaris Limited and Others (2007) Z.R. 235

Legislation referred to:

1. Order 14A rules 1 and 2 of the Rules of the Supreme Court, 1999 Edition
2. Order 27 rule 3 of the Rules of the Supreme Court, 1999 Edition
3. Order 33 rule 3 of the Rules of the Supreme Court, 1999 Edition
4. Landlord and Tenant (Business Premises Act, Chapter 193 of the Laws of Zambia

This is the Claimant's Notice of Motion to Determine a question of Law and Fact pursuant to Order 14A rules 1 and 2 and Order 33 rule 3 of the Rules of the Supreme Court, 1999 Edition (White Book).

The Claimant's prayer is that this Court makes a determination on the following issues, namely:

- (i) Whether or not the Applicant's letter of 8th December, 2016 amounts to an admission of the Claimant's claim of the properties described in the application for interpleader dated 1st December, 2016 as well as in the letters of 29th November, 2016 and 20th December, 2016;
- (ii) Whether or not the Claimant is entitled to re-enter Stand No. 896, Lusaka to have access to its properties and whether or not it is entitled to ample time to make arrangements to remove its properties which include trade fixtures and to repair any damage arising from the foregoing; and
- (iii) Whether or not the Claimant is entitled to compensation for loss of business from the date of possession, that is, 25th November, 2016 till determination at the rate of US\$2,250.00 per day being loss of

earnings from room charges as well as punitive damages, damages for trespass and any other remedy arising from injury suffered as a result of execution of the Writ of Possession.

In support of the Notice of Motion, the Claimant filed an Affidavit sworn by one Richard M. Chizyuka, the 3rd Respondent herein together with a List of Authorities. Both sets of documents were filed into Court on 30th December, 2016. The Claimant also filed Skeleton Arguments dated 26th January, 2017; an Affidavit in Reply and Skeleton Arguments in Reply both dated 15th February, 2017.

According to Mr. Haimbe, learned Counsel for the Claimant, the Application is based on one cardinal issue and that is, the admission of the Claimant's claim by the Applicant's Advocates in a letter dated 8th December, 2016 and exhibited as "RMC 12" in the affidavit in support of the motion. Counsel submitted further that of particular importance is paragraph 2 of the said letter in which it is stated that the Applicant has no claim or interest in the Claimant's property. In the same letter it is stated that the Advocates have instructions to release the property to the Claimant. It is Counsel's submission that despite the said admission, the Claimant has not been allowed access to the property, several requests to that effect notwithstanding. Counsel cited the case of *Cecilia Mwengwe v. Jeff Muyambango (1)* in which the Court stated thus:-

"It is clear where an admission of fact is made by a party to a matter or cause, the other party to the cause may apply to the court for such judgment based on the admission... this is because when a fact is admitted, it ceases to be in issue".

Mr. Haimbe cited another case of *Technistudy v Kelland (2)* wherein it was held that admissions may be express or implied, but they must be clear. He further referred this Court to the explanatory notes found in Order 27/3/4 which provides that an admission may be made in a letter before or since the

action is brought. Counsel submitted that based on the authorities before this Court, and because all the documents filed by the Applicant in Opposition to the Notice of Motion have not denied the fact that the admission was made, the Court must sustain the Notice of Motion.

Mr. Mukupa, learned Counsel for the Applicant, submitted that in opposing the application before Court, the Applicant would rely on the Affidavit of one Hendrix Chiyenge filed into Court on 27 January, 2017 together with the Applicant's List of Authorities and Skeleton Arguments filed into Court on 31st January, 2017.

According to learned Counsel, the gist of the Applicant's opposition to the Notice of Motion is that the issues raised therein cannot be determined summarily in accordance with the provisions of Order 14A of the Rules of the Supreme Court. Counsel submitted that the Notice of Motion to Determine on Point of Law raises three issues and that the first issue can only be determined upon hearing the substantive application which is before this Court for interpleader proceedings.

As for the second and third issues, it was Counsel's submission that the two claims can only be determined in a separate cause of action as they disclose triable issues. To this end, the Applicant cited the High Court case of ***Kennedy Wemba v Prince Matambo & Another (3)*** where the High Court stated that the admission therein was not one on which judgment on admission could be obtained. The Court also stated that there were triable issues that could not be disposed of on points of law as the same could occasion an injustice to the other parties to the action.

Counsel submitted further that whereas his learned colleague made reference in his submission to the letter of 8th December, 2016 authored by the Applicant's Advocates in which the Applicant offered to release movable properties to the Claimant, he omitted to mention the issues which were raised in exhibits "RMC 13" and "RMC 14" which show the unreasonableness

of the Claimant in causing the delay in releasing the movable properties. It was Counsel's further submission that it is the Applicant's argument that the Claimant company which has the same shareholders and directors as the 1st Respondent and those individuals being the 2nd and 3rd Respondents in this matter, is a mere sham incorporated for the purpose of depriving the Applicant of the fruits of its judgment.

In this regard, learned Counsel referred this Court to the case of *Ethiopian Airlines v Sunbird Safaris Limited & Others (4)* particularly at page 238 where the Court accepted the position that if a company continues to carry on business and incur debts at a time when there is, to the knowledge of the directors, no reasonable prospects of the creditors ever receiving payments for debts, it is in general, a proper inference that the Company is carrying on business with intent to defraud.

It was Counsel's submission that the Claimant's company was specifically created to deprive the judgment creditor, the Applicant herein, of the fruits of its judgment and therefore, the Applicant should not be disadvantaged by the Claimant's claim. It was the Applicant's prayer that this Court does not grant the Claimant's application and should instead dismiss it with costs.

In reply, Mr. Haimbe reiterated his earlier submission that the application before Court was predicated on an admission contained in a letter dated 8th December, 2016 which the Applicant has not denied making and asked this Court to determine whether the said letter amounts to an admission or not. He further referred the Court to exhibit "RMC 11" in the Affidavit in Support of Notice of Motion to Determine on a Point of Law and Fact. He particularly referred to paragraph 4(ii) of the exhibit and pointed out that the letter predates the admission of 8th December, 2016. According to Counsel, paragraph 4(ii) of exhibit "RMC 11" indicates the properties and equipment being claimed by the Claimant which includes trade fixtures.

Mr. Haimbe submitted further that the interpleader application which is dated 1st December, 2016 also predates the admission and was accompanied by an affidavit in which all the properties claimed by the Claimant were tabulated. It was therefore, Counsel's submission that there is nothing unreasonable about the Claimant's claim. In addition, he submitted that the Applicant's admission which is on record, was voluntary and there is no evidence that it was coerced out of the Applicant and further, that the Applicant had notice of the properties which are subject to the interpleader.

With respect to the Applicant's claim that the Claimant is a mere sham created solely to deprive the Applicant the fruits of its judgment, Mr. Haimbe referred the Court to the Claimant's Affidavit in Reply to Affidavit in Opposition To Notice of Motion filed on 15th February 2017, paragraph 11 thereof, where the deponent, Richard M. Chizyuka explains the circumstances surrounding the 'conversion' (as deposed by the deponent) of Macha-Lein Bed and Breakfast which was operated as a business name and run by the 2nd and 3rd Respondents and which rented the foreclosed property, into Hotel Macha-Lein. Mr. Haimbe submitted that the explanation and circumstances prevailing did not amount to fraud in any way.

Counsel submitted further that the Applicant had made submissions that this is a matter of piercing the corporate veil. He was of the view that the Applicant was at liberty to do so but could only do so in an application of its own specifically aimed at piercing the corporate veil. He submitted that the Notice of Motion before the Court was for the Court to determine whether or not the letter of 8th December, 2016 is an admission. He asked the Court to make a determination based on the Notice of Motion before it and to that end, once again called on this Court to rely on the authority of the Cecilia Mwengwe case.

In addition, Counsel argued that contrary to the Applicant's contention, the motion is not frivolous and unreasonable for demanding occupation and costs because the Claimant was and still is a tenant of Stand No. 896, Lusaka and is

therefore, entitled to adequate notice of at least six (6) months as provided by the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia. Further, that by the nature of the Claimant's property which includes trade fixtures, there is need for the Claimant to be granted enough time to collect and gather all its properties and to make alternative arrangements for their storage or installation at another site. The Claimant also responded to the issue of annexation of some trade fixtures raised by the Applicant. I shall not delve into that issue for the reason that will become evident later in the ruling.

I have considered the affidavits filed by the Claimant in support of the Notice of Motion and Skeleton Arguments as well as viva voce submissions by Mr. Haimbe. I have also considered the Affidavit in Opposition to the Notice of Motion and Skeleton Arguments augmenting the affidavit as well as the viva voce submissions by Mr. Mukupa.

In determining the Notice of Motion before me the question to be answered is simply whether the issues raised by the Claimant are suitable for summary determination under Order 14A of the Rules of the Supreme Court. The answer to this question, in my view, is in the negative for the reasons which follow.

The Applicant has cited the judgment of this Court in ***Kennedy Wemba v Prince Matambo & Another***, which states that where there are triable issues, judgment on admission cannot be entered because doing so would occasion an injustice on the other parties to the action. Indeed that is the law as it stands.

A perusal of exhibits "RMC 12" to "RMC 15" in the Affidavit in Support of motion to determine a point of law reveals that the issues raised therein are contentious. Indeed, even the arguments advanced by Counsel on both sides in support of their respective positions, show that the issues are contentious.

It is therefore, my finding that the three issues on which the Claimant wants this Court to make a determination on, raise triable issues.

Whereas it is not in dispute that the Applicant wrote to the Claimant indicating that it was not disputing the Claimant's right to the movable property on the foreclosed property, it is in dispute whether the said property included fixtures thereon. I concur with the Applicant's submission that this issue can and should be determined when the substantive application for interpleader comes up for hearing.

Regarding the 2nd and 3rd issues, it is my considered view that they raise triables issues which cannot be disposed of summarily under the provisions of Order 14A of the Rules of the Supreme Court, but can be determined under a separate application by the Claimant.

For the above reasons, the Notice of Motion is denied with costs to the Applicant to be agreed and in default thereof, taxed.

Dated at Lusaka the 21st day of April, 2017



W. S. Mwenda (Dr.)
HIGH COURT JUDGE