

IN THE HIGH COURT FOR ZAMBIA

2017/HPC/0097

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN

DEVELOPMENT BANK OF ZAMBIA

APPLICANT

And

EMMY'S DRY CLEANERS LIMITED

1ST

RESPONDENT

EMMANUEL KASANGA

2ND RESPONDENT

FRANCIS NGONGA

3RD RESPONDENT

FAITH MUSHONGO SIDIBE

4TH RESPONDENT

Before the Hon Lady Justice Irene Zeko Mbewe in Chambers

For the Applicant:

*Mr. M. Mukonde In House Legal Counsel
Development Bank of Zambia*

For the 4th Respondent:

*Mr. Muhanga of Messrs AKM Legal
Practitioners*

R U L I N G

Cases Referred To:

1. *Mukumbuta and Others v Choobana and Others SCZ Judgment No 8 of 2003*
2. *Nkongolo Farms Limited v ZANACO, Kent Choice Limited (In Receivership) and Charles Haruperi SCZ No 19 of 2007*
3. *Benny R W Mwiinga v Hon. Grey Zulu, Clement Mwananshiku, Felix Luputa and Daniel Makipi Simoloka v Attorney General [1990] S.C*
4. *Doctor J. W. Billingsley v J. A. Mundi [1982] ZR 11*
5. *Daws v Daily Sketch and Sunday Graphics Limited and Another [1960] 1 ALL E R 397 C.A*
6. *Bascom Enterprises Limited, Gillion Casilli, Diego Casilli and Richard Anthony Hadley v Bharti Airtel Zambia Holding BV, Celtel Zambia Plc and Securities Exchange Commission 2011/HPC/0201*

This is a Ruling on the 4th Respondent's application for a stay of proceedings and to consolidate Cause 2017/HPC/0097 herein and 2017/HPC/0085 pursuant to **Order 3 Rules (2) and (5) of the High Court Rules of the Laws of the Zambia**. The application was filed into Court on 7th April 2017.

The application is supported by an affidavit deposed to by Faith Mushonge Sibide the 4th Respondent herein. The deponent asserts that on 22nd February 2017 together with a company called Chisasa Villa Investments Limited in which she has an interest commenced

proceedings by way of Writ of Summons accompanied by a Statement of Claim under Cause No. 2017/HPC/0085. The deponent asserts that the 1st Respondent herein is the Defendant whilst the Applicant herein is a party cited **(Exhibit "FMS 1-2")**. The deponent asserts that Stand 7384, Kitwe the subject property in the Originating Summons is a subject matter of the proceedings in Cause No. 2017/HPC/0085. The deponent asserts that there is a pending application in Cause No. 2017/HPC/0085 for an Order for preservation of property and the appointment of a Receiver/Manager to manage the business of the 1st Respondent (Emmy's Dry Cleaners Limited) and that the subject property is amongst the security for the loans obtained from the Applicant herein. The deponent asserts that the application for preservation of property if granted will protect the interests of all parties in Cause No. 2017/HPC/0085 and that the Applicant can still protect its interest and exercise any of its rights once the causes are consolidated, it being the earlier suit to the present case.

According to the deponent, there are a number of contentious issues in the present case surrounding the loans obtained using the

Stand 7384 Kitwe and that it would be unjust to have the subject property foreclosed by the Applicant without having the contentious matters determined. The deponent asserts that the contentious matters include the registration of Stand 7384 Kitwe before finalisation of the second facility letter dated 14th October 2014 (**Exhibit "JH 7"**) in the affidavit in support of the Originating Summons, the withdrawal of Stand 7384 Kitwe as collateral (**Exhibit "FMS 3"**), varying amounts reflected in the second facility letter and the Third Party Mortgage, inclusion of Stand 7384 Kitwe in the second facility letter without the knowledge or consent of the deponent as beneficial owner of the said property.

The deponent asserts that despite the Applicant being fully aware of Cause No. 2017/HPC/0097, the Applicant chose to commence parallel proceedings disregarding issues relating to the claims raised (**Exhibit "FMS 4"**). The deponent asserts that the Applicant herein was served with the application for preservation of property and failed to disclose this fact when it commenced proceedings on 2nd March 2017 (**Exhibit "FMS 5"**). The deponent asserts that on 10th March 2017 the Applicant herein proceeded to enter

appearance and defence in Cause No. 2017/HPC/0097 despite commencing parallel proceedings (**Exhibit “FMS 6”**).

The deponent asserts that the Applicant's actions are meant to circumvent the earlier suit commenced in another Court and amounts to abuse of court process and is a multiplicity of actions. The deponent asserts that any decision made by this Court will affect her as beneficial owner of Stand 7384, Kitwe and that the matter be stayed and the two matters be consolidated and determined under one cause to avoid conflicting decisions. That this will equally save the Court's time as well as costs on all parties and this will not prejudice any party.

Counsel for the 4th Respondent filed into Court skeleton arguments dated 7th April 2017 and relied on **Order 3 Rule 2 and Order 4 Rule 9 (1) Rules of the Supreme Court of England, 1999 Edition**. Reliance is placed on the case of **Mukumbuta and Others v Choobana and Others**¹ on the rationale for consolidation. Counsel argues that the two causes have common question of rights and reliefs arising out of the same transaction. Counsel argues that there are contentious issues relating to Stand 7384

Kitwe pledged to the Applicant as the same property was pledged in respect to a third facility after the second facility had already been paid. Counsel argues that no fresh consent from the 4th Respondent was obtained in this respect, and that the Applicant neglected to inform the 4th Respondent on the status of loan. To buttress the 4th Respondent's position, the case of **Nkongolo Farms Limited v ZANACO, Kent Choice Limited (In Receivership) and Charles Haruperi²** was cited.

The application was opposed by the Applicant who filed an affidavit into Court on 12th May 2017 deposed to by Jala Hapunda the Risk Officer in the Applicant Bank. The deponent asserts that proceedings were commenced on 22nd February 2017 under Cause No. 2017/HPC/0085 and centered on an alleged breach of contract by the 1st and 4th Respondents. The deponent asserts that it commenced separate proceedings to recover what is owed so as to avoid further escalation of its exposure by way of accrual of interest.

The deponent asserts that the current proceedings were already in contemplation at the time as evidenced by the letter of demand

which is a precursor to the proceedings (**Exhibit "JH 1"**). The deponent asserts that there is no suppression of facts and that it did not disclose the details of the cause of action as it deemed it to be separate and distinct from the Cause 2017/HPC/0085. The deponent asserts that it has a limited window under the law within which to enforce its contractual rights hence the commencement of the present proceedings. The deponent asserts that the 4th Respondent has not responded to the Originating Summons by way of affidavit and that the issues raised can be dealt with in these proceedings.

The deponent asserts that the two matters although related on account of the mortgaged property, are distinct causes of action arising from different transactions and raise different issues for determination. The deponent avers that the current claim is a mortgage action whilst 2017/HPC/0085 is commenced by way of Writ of Summons.

Counsel for the Applicant filed skeleton arguments dated 12th May 2017 and argues that the 4th Respondent labored at this interlocutory stage to address substantive issues touching on the

Applicant's claim which ought to be raised in the opposing affidavit to the Originating Summons and placed reliance on the case of **Benoni R W Mwiinga v Hon. Grey Zulu, Clement Mwananshiku, Felix Luputa and Daniel Makipi Simoloka v Attorney General**³ and **Doctor J. W. Billingsley v J. A. Mundi** ⁴ where it was held that it is improper for a court hearing an interlocutory application to make comments which have the effect of pre-empting the decision of the issues to be decided at trial. The gist of Counsel for the Applicant's argument is that there is no common question of law as Cause No. 2017/HPC/0085 relates to breach of contract and allotment of shares in consideration of the 4th Respondent creating a mortgage over Stand 7384, Kitwe, and for the appointment of a Receiver/Manager to oversee the running of the 1st Defendant, whilst in the current cause it is a mortgage action secured by four properties including Stand 7384, Kitwe. Counsel for the Applicant argues that whilst being mindful that the mortgage property is common to both causes of action, it does not translate to having a question of law common to both cases. In this respect, the case of **Daws v Daily Sketch and Sunday Graphics Limited and Another** ⁵ was cited. Counsel argues that the right to relief does not arise

from the same transaction in which the two causes are rooted and drew the Court's attention to the case of **Bascom Enterprises Limited, Gillian Casilli, Diego Casilli and Richard Anthony Hadley v Bharti Airtel Zambia Holding BV, Celtel Zambia Plc and Securities Exchange Commission**⁶. Counsel argues that the two matters were commenced by different modes and it would be undesirable to consolidate them one being a mortgage action by Originating Summons under **Order 30 Rule 14 High Court Rules, Cap 27 of the Laws of Zambia** and the other by Writ of Summons.

Counsel further argues that not all the parties are the same and it would be unjust and unfair to subject the respective parties to issues that do not concern them. In conclusion, Counsel argues that instead of consolidation the matters be heard immediately after another, and prayed that the 4th Respondent's application be dismissed with costs.

The 1st, 2nd and 3rd Respondent did not oppose the application.

At the hearing of the application on 16th May 2017, the parties relied on the affidavit evidence, skeleton arguments, list of authorities and augmented these with oral submissions.

I have carefully considered the affidavit evidence, skeleton arguments, list of authorities and oral submissions by Counsel for the parties and have fully applied my mind to the authorities to which my attention was drawn.

The issue for my determination is simply whether or not to consolidate the present cause with Cause 2017/HPC/0085.

The 4th Respondent's application is premised on **Order 3 Rule 2 High Court Rules, Cap 27 of the Laws of Zambia** and **Order 4 Rule 9 Rules of the Supreme Court, 1999 Edition**. The latter states as follows:

(1) *Where two or more Causes or matters are pending in the same division and it appears to the court –*

(2)

(a) *That some common questions of laws or fact arises in both or all of them; or*

(b) *That the rights to relief claimed therein are in respect of or arise out of series of transactions;*
or

(c) *That for some other reason it is desirable to make an order under this paragraph*

(2) *The Court may order those Causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.*

Where the Court makes an order under paragraph (1) that two or more Causes or matters to be tried at the same time but no order is made for those causes or matters to be consolidated, then a party to one of those cases or matters may be treated as if he were a party to any other of those Causes or matters for the purpose of making an order for costs against him or in his favour."

The 4th Respondent's application for consolidation requires to satisfy the test laid out in **Order 4 Rule 9 Rules of the Supreme Court, 1999 Edition**. My starting point is to examine the claims in both causes. In Cause 2017/HPC/0085 the 1st Plaintiff in that action is Faith Sidibe, 2nd Plaintiff is Chisasa Company whilst the

1st Defendant is Emmy's Dry Cleaners Limited and Development Bank of Zambia is a party cited. The claim as endorsed in the Writ of Summons is for the following relief:

- (1) *An order directed to the party cited to provide the full status, statement and performance of the loan/additional loans if any to the Plaintiffs as they have a right to know.*
- (2) *An interim order to freeze all bank accounts and to appoint an independent person or provisional Receiver/Manager of the Company and operate the company for the preservation of the assets until the full determination of the matter.*
- (3) *An order that the independent person or provisional Receiver/Manager takes possession of the Company and all bank accounts and render full account of the operation of the Company.*
- (4) *An order that the Agreement between the Plaintiffs be enforced and complied with.*
- (5) *Payment of all moneys due through dividends or otherwise due or owed to the plaintiffs.*

- (6) *In the alternative, an order that the security provided by the 1st Plaintiff be removed from the loan agreement and the 1st Defendant Company finds its own security.*
- (7) *In the further alternative operation of the company by the independent person or provisional Receiver/Manager until repayment of the loan to the party cited and all other liabilities owed by the 1st defendant Company.*
- (8) *Damages for breach of contract*
- (9) *Interest on the sum due*
- (10) *Costs.*
- (11) *Any other relief the Court may grant interim or final in the circumstances.*

In the Statement of Claim under Cause 2017/HPC/0085, it is revealed that the Plaintiff and 1st Defendant entered into an agreement where the Plaintiff would provide security for a loan with the party cited and in return, shares were to be allotted to the Plaintiff in the 1st Defendant Company. That the 1st Plaintiff released its Certificate of Title for property Stand 7384 Kitwe and it was subsequently used as security by the 1st Defendant. That the

1st Defendant failed to transfer any shares to the 1st Plaintiff and on 15th September 2014 wrote to the party cited withdrawing Stand 7348, Kitwe as security to the loan facility availed to the Defendant therein. According to the 1st Plaintiff, at the material time, the loan had not been disbursed though the security had already been registered at the Lands and Deeds Registry. That on 14th February 2015, the 1st Plaintiff and the 1st Defendant re-negotiated and agreed to formally execute a subsequent agreement in respect to the same transaction wherein Stand 7384, Kitwe would be used as security in order for the 1st Defendant to obtain additional financing from the party cited, and in return the 1st Plaintiff would have 25% shares in the 1st Defendant, which shares would then be allotted to the 2nd Plaintiff. That the 1st Defendant has not complied with the said agreement and the Plaintiff does not know the status of the loan agreement.

In the current case, the claim is for:

- (1) *Payment of ZMW2,676,345.11 which is the amount outstanding from the Respondents as at 27th February, 2017 under facility*

letters dated 23rd July 2012, 14th October, 2014 and 13th May 2015.

- (2) Contractual interest accrued thereon*
- (3) Delivery up of the 2nd Respondent to the Applicant of the Mortgaged property namely Stand No 15000 Solwezi*
- (4) Delivery up by the 3rd Respondent to the Applicant of the Mortgaged Property namely Subdivision No 1638 of Stand 7398 Lusaka*
- (5) Delivery up by the 4th Respondent to the Applicant of the mortgaged property namely Stand No 7384 Riverside Kitwe*
- (6) An order of foreclosure of the mortgaged properties*
- (7) Order of Sale of the mortgaged properties*
- (8) Order of sale of 1st Respondent's assets charged under the Debenture herein*
- (9) Order of Sale of equipment charged by specific charges herein*
- (10) An order of payment by the 2nd Respondent as guarantor of all the sums due from the 1st Respondent*
- (11) Any other relief the Court may deem just and equitable*

In the affidavit in support of the Originating Summons, it is revealed that the Applicant (Development Bank of Zambia) and the 1st Respondent (Emmy's Dry Cleaners Limited) entered into a loan facility agreement dated 23rd July 2012 in the sum of ZMK795,678,000 and a working capital loan in the sum of ZMW262,911,000. That the 1st Respondent requested for an additional medium-term facility of ZMW500,000.00 and a restructuring of its facilities which was availed by way of a facility letter dated 14th October 2014. The facilities were secured by Third Party Mortgages over Stand 7348, Kitwe belonging to the 4th Respondent, Stand 15000 Solwezi belonging to the 2nd Respondent and Subdivision 1638 of Stand 7398 Lusaka belonging to the 3rd Respondent. That the 1st Respondent is in default and the Applicant herein has demanded full payment of the principal and accrued interest and seek the relief of foreclosure, possession and to exercise the power of sale of the mortgaged properties.

It is trite that the main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient.

The issue is whether there is a common question of law and fact arising from the two actions, and whether the causes of actions arise from the same transaction or series of transactions.

In Cause No. 2017/HPC/0085, the issue for determination arises from a breach of agreement between the Plaintiffs and the 1st Defendant (Emmy Dry Cleaners Limited) over the un-allotted shares resulting in the 1st and 2nd Plaintiff having no business interest in the 1st Defendant Company. The Plaintiffs seek the appointment of a Manager/Receiver over the 1st Defendant's assets.

The present case is a mortgage action and the Applicant Development Bank of Zambia herein seeks recovery of ZMW2,676,345.11 as at 27th February 2017 advanced to the 1st Defendant (Emmy Dry Cleaners Limited) and secured by Stand 7384, Kitwe belonging to the 4th Respondent, S/D 1638 of Stand 7398 belonging to the 3rd Respondent and Stand 15000 Solwezi belonging to the 2nd Respondent. The Applicant seeks to foreclose, take vacant possession and exercise the power of sale over the said mortgaged properties. It further seeks the order of sale of the 1st Respondent's assets charged under a debenture, order of sale of

equipment of the 1st Respondent charged by a specific charge, and an order for payment by the 2nd Respondent as guarantor of all sums due from the 1st Respondent, and costs.

I find that a common denominator in both causes is Stand 7384, Kitwe. In the present action, the Applicant seeks foreclosure, possession and power of sale over Stand 7384, Kitwe, whilst in Cause No 2017/HPC/0085 the 1st Plaintiff seeks in the alternative, the removal of Stand 7384, Kitwe as security in respect to the loan agreement with the Applicant herein.

The second common denominator is in respect to the assets of the 1st Defendant (Emmy Dry Cleaners Limited) wherein in the present action, the Applicant seeks an order of sale of the assets charged under a debenture, and an order of sale of equipment charged by a specific charge. In Cause No 2017/HPC/0085, the Plaintiffs therein seek *inter alia* the preservation of the assets of the 1st Defendant and the appointment of a Manager/Receiver of the 1st Defendant until the full determination of the matter. It is clear that there is a common question of law and fact and the test for consolidation succeeds on this ground.

As to whether or not the rights to relief claimed in both causes of action arise from or are in respect to the same transaction or series of transactions, I find that both actions arise from the 1st Defendant's transaction with the Applicant herein (Development Bank of Zambia) which is a trigger for providing *inter alia* security over Stand 7384, Kitwe by the 4th Respondent herein, and consequently resulting in the 4th Respondent's claim for an equity interest in the 1st Defendant company. It can safely be said that the causes of action are from a series of the same transaction. Therefore, the test for consolidation succeeds on this ground.

Counsel for the Applicant opposed the application for consolidation on the basis that it is meant to delay the Court process. I find that consolidation is necessary as having two different causes with a common question of law arising from the same series of transaction has the prospects of undesirable results in that courts arrive at two directly opposed verdicts in a suit over the same property and assets. I am ably guided by the Supreme Court in the case of **Mukumbuta and Others v Choboona and Others**¹ where it was held that:

" Both parties appear to us to be agreed on the principle governing consolidation namely; common question of law or facts and rights to relief arising out of the same transaction. The rationale for consolidation, namely saving of costs, is also agreed."

We agree that avoidance of multiplicity of actions is the more the reason for ordering consolidation. In the instant case, it was however more of a case of duplication of actions, than multiplicity of actions. But because there was also the element of multiplicity in that there were same parties, common questions of law and facts and rights to relief arising out of same transactions, the interests of justice in our view demand that Cause No. 1999/HP/1807, be consolidated to the earlier Cause No. 1999/HT/16 at Mongu, as all the parties seem to be residents at Mongu."

A perusal of the record shows that the Defendant's Advocates in both actions are Messrs AKM Legal Practitioners and the Applicant's Advocates in both actions are represented by In House

Counsel of Development Bank of Zambia. This militates towards consolidation.

Counsel for the 4th Respondent cited the case of **Nkongolo Farms Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (In Receivership) and Charles Haruperi** ², which is irrelevant for purposes of this application as in my view it is an attempt at this stage of the proceedings to pre-empt the Court to address the substantive issues. I concur with Counsel for the Applicant that substantive issues should be addressed in the main hearing.

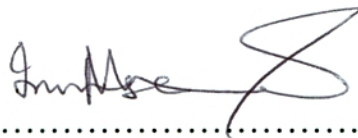
Counsel for the Applicant argues that Cause No. 2017/HPC/0085 was commenced by way of Writ of Summons whilst the current case is commenced by way of Originating Summons, and hence the causes of action should not be consolidated. This not a bar to consolidation at all because once directions are taken the Originating Summons will be deemed to have been commenced by way of Writ of Summons.

Counsel for the Applicant contends that the Court should instead order that the matters be heard one immediately after another and cites **Order 4 Rule 9 (1) Rules of the Supreme Court**. I am satisfied that the 4th Defendant has met the conditions for consolidation and that this is a proper case for consolidation. I therefore make the following Order:

1. This case is hereby consolidated to Cause No. 2017/HPC/0085 for purposes of being heard and determined together.
2. Cause No. 2017/HPC/0085 shall be the control file having been commenced earlier of the two causes of action.
3. Costs in the cause.

Leave to appeal granted.

Dated in Lusaka this 31st day of May 2017.



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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE