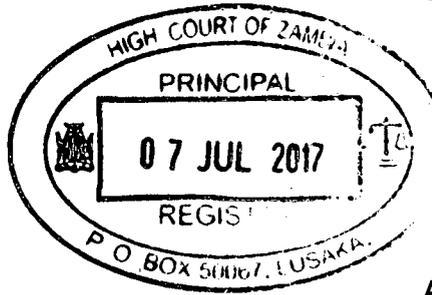


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2013/HP/1692



BETWEEN:

NATURAL VALLEY LIMITED

APPLICANT

AND

DAVID ZULU (*sued as administrator of the estate
of the late Msimango Zulu*)

1st RESPONDENT

NSONDA EAGAN MULAISHO (*sued as administrator
of the estate of the late Rosemary Zulu Mulaisho*)

2nd RESPONDENT

DOUGLAS AND PARTNERS
(a law firm sued as advocates for the 1st Respondent)

3rd RESPONDENT

LUSITU CHAMBERS
(a law firm sued as advocates for the 2nd Respondent)

4th RESPONDENT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 7th DAY OF JULY,
2017**

For the Applicant : Mushota and Associates

For the 1st Respondent : No appearance

For the 2nd Respondent : Mr P. Matimba, Lisutu Chambers

For the 3rd Respondent : No appearance

For the 4th Respondent : Mr P. Matimba, Lusitu Chambers

R U L I N G

CASES REFERRED TO:

- 1. Development Bank of Zambia and KPMG Peat Marwick V Sunvest Limited and Sun Pharmaceuticals Limited 1997 SJ 10**

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court, 1999 edition*

This is a ruling on an application made by the 4th respondent for an order to dismiss the matter on account of duplicity and abuse of court process, made pursuant to Order 18 Rule 19 (18) of the Rules of the Supreme Court, 1999 edition.

Counsel relied on the affidavit that was filed in support of the application, and also referred to the affidavit that was filed in support of the originating summons on 11th November, 2013, and sworn by the applicant. Particular reference was made to paragraphs 1-16 of the said affidavit, which Counsel stated refer to the sale of sub division K of Farm 380a by the 1st and 2nd respondents. Secondly that an undertaking was made by the 3rd and 4th respondents, and that ZMW490, 000.00 was to be paid to the applicant.

It was further stated that paragraph 17 of the said affidavit in support of the originating summons refers to the same subject matters. That when one looks at paragraph 4 of the affidavit in opposition to this application, sworn by Counsel, it alleges that the undertakings made by the 3rd and 4th respondent were not complied with, as per the ruling dated 11th August, 2014.

Counsel's contention was that contrary to this assertion, the circumstances had significantly changed, as the undertakings had been complied with in line with the consent order to liquidate the principal sum of ZMW490, 000.00. It was submitted that Counsel for the applicant either mixed up the facts or deliberately misled the court so that it could not see the clear connection between this case and the matter before Hon Mr Justice M. Chitabo.

This he submitted was premised on the fact that paragraph 8 of the affidavit in opposition to this application indicates that only ZMW100, 000.00 has been paid towards the ZMW490, 000.00. It was stated that as at 17th October, 2016, the entire principal sum of ZMW490, 000.00 had been paid, which is what the 3rd and 4th respondents undertook to do. Further in the submissions, Counsel stated that this could be confirmed by the charging order nisi, which Counsel for the applicant obtained on 20th September, 2016.

That as the applicant had obtained a charging order nisi, this action is an abuse of court process, as the said charging order seeks to fully implement the consent order, and that only interest remains to be paid under that order. Counsel also told the court that the parties had asked for a longer adjournment period before Hon Mr Justice M. Chitabo in order that the consent order could be fully implemented. That the matter comes up before that court on 27th July, 2017 to see how the 1st, 2nd, 3rd and 4th respondents can sell the remaining piece of land to raise money to pay the outstanding interest due.

It was added that if the said monies are raised, the 3rd and 4th respondents would have met the undertakings that they made under the consent order. That if however the said money is not raised, the court before which the charging order nisi was made would invoke its implementation, to the applicant's benefit. Therefore the reliefs sought by the applicant in paragraphs 4-17 of the affidavit in support of the originating summons in this cause have been catered for in the action before Hon Mr Justice M. Chitabo, and it was prayed that this action be dismissed with costs.

I have considered the application. Order 18 Rule 19 (18) of the Rules of the Supreme Court, 1999 edition, pursuant to which the application was made provides that;

“Para.(1)(d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation”.

Paragraph (1)(d) of Order 18 Rule 19 states 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 –

(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”.

Thus the question is whether this action is an abuse of the court process, and it ought to be dismissed? It is common cause that under cause number 2008/HP/1284 the now 2nd respondent (as 1st applicant) and Chakupa Mulaisho (as 2nd applicant) had sued the now 1st respondent, and a consent order was executed to the effect among others, that the co-administrator of the estate sells off 25 acres of sub division K of Farm 380a Annisdale, Lusaka.

That the proceeds of sale of 15 acres out of the 25 acres would be for the defendant (now 1st respondent), and that the proceeds of sale of the 10 acres would be shared equally the 1st applicant in that cause (now 2nd respondent) and her elder brother Chilangu Marvin, while 5 acres would

be reserved for the 2nd applicant, Chakupa Mulaisho. The consent order provides that 6 acres of the land would be reserved for the claimant Nathan Lupupa, which would be conveyed to him by the co-administrators upon payment of the agreed purchase price.

Further that Natural Valley (now applicant) and Mr Lufuma who were purported purchasers of part of sub division K of Farm 380a (Annisdale) Lusaka from the respondent, David Zulu, (now 1st respondent) be refunded ZMW490, 000.00 and ZMW20, 000.00 respectively from proceeds due to the respondent. Natural Valley Limited was joined as an intervener in the cause by way of a consent order dated 17th May, 2012.

On 23rd July, 2013 yet another consent order was executed in the cause wherein it was agreed among others, that the co-administrator, David Zulu, and Nsonga Eagan Mulaisho would sell off 25 acres of sub division K of Farm 380a Annisdale Lusaka, and that proceeds shared as in the first consent settlement.

The same agreement relating to the refund of monies by David Zulu to be made to Natural Valley and Mr Lupupa was also maintained, except it was added that interest was payable on the amounts due from the date of the originating summons until full payment. Further that the co-administrators, David Zulu and Nsonda Eagan Mulaisho would ensure that Natural Valley Limited as intervenor, and Mr Lufuma would be paid first from the proceeds of sale of the 15 acres due to David Zulu.

There was also an undertaking made by applicants' and respondents advocates not to part with the certificate of title to the property in jeopardy of the intervener's interests, but would avail the same for purposes of facilitating the sale of portions of the land, as and when required, and would on obtaining the necessary applications such as consent to assign, return it to the intervener's advocates. That the intervener's advocates would surrender the said certificate of title to the

applicants and respondent's advocates upon receipt of all the money due, and would have no further claim to sub division K of Farm 380a Annisdale, Lusaka.

On 13th November, 2013 the applicant commenced this action seeking among other reliefs, interpretation of the consent settlement order executed by the parties on 23rd July, 2013, and an order to set aside the said consent order on the grounds of fraud, dishonesty, non-disclosure of facts, malice and bad faith. Further reliefs sought are a declaration that the applicant is entitled to the portion of land it purchased at ZMW490, 000.00, and that the certificate of title be surrendered to it as guarantee for the said portion of land pending sub division and marking off, and surveying in order to separate the titles, and facilitate title for the applicant. It is also claimed that an injunction be granted restraining the respondents, their assignees, successors, purchasers or otherwise until the matter is resolved, and a determination whether the respondents are in contempt of court for disobeying the court order, and disposing or purporting to dispose of the property, when there are court proceedings pending the determination of the rights of the parties to the property, as well as a consent settlement order.

In the affidavit in support of the application, Counsel for the 4th respondent has shown that under cause number 2008/HP/1284 before Hon Mr Justice M. Chitabo similar facts as in this cause are being litigated. Under that cause, the respondents have made payments to Natural Valley Limited, and as at 20th September, 2016, the amount outstanding on the principal sum was ZMW100, 000.00, and interest of ZMW20, 000.00. That the ZMW100, 000.00 was paid on 17th October, 2016, and is evidenced by the acknowledgment of receipt issued by Counsel for the now applicant, marked as exhibit 'PM6'.

The affidavit further shows that the principal sum due to the applicant in this cause was paid under cause number 2008/HP/1284, and that a charging order was obtained in that cause, and that the outstanding interest as evidenced on exhibit 'PM10', shall be paid.

In the affidavit in opposition, Counsel for the applicant deposes that the applicant is aggrieved by the failure of the 3rd and 4th respondents to abide by the undertakings they made in the consent settlement order dated 23rd July, 2013, to ensure that the monies due to the applicant were paid. That the 3rd and 4th respondents had not challenged this, but had applied to be misjoined from the proceedings, and did not allege abuse of court process or duplicity.

In paragraph 8 of the said affidavit in opposition it is averred that while the ZMW100, 000.00 was paid on 17th October 2016, the principal has not been liquidated, and there is interest due bringing the total amount due to ZMW510, 000.00. Therefore the 3rd and 4th respondents have breached the undertakings that they made, and they should oblige the reliefs sought.

A perusal of cause number 2008/HP/1284 shows that matter is active before Hon Mr Justice M. Chitabo. It was last adjourned on 20th April 2017 to allow the parties to sell the property, so that the balance due to the applicant can be paid. On that date Mr Mutofwe, Counsel for the 1st respondent had indicated to the court that they applied for an adjournment to allow the applicant and 1st respondent sell the remaining portions of the land so that interest that is outstanding is paid, as the major portion due had since been paid.

This application was adopted by Counsel for the applicants, who is Counsel for the 4th respondent in this cause. Counsel for the intervener, who is Counsel for the applicant in this matter, while not objecting to the application for the adjournment noted the consent settlement order was

executed in July, 2013, and asked that the next date of hearing be set for 30th May, 2017, if the outstanding amount was not paid.

It will be noted that Counsel for the now applicant, as Counsel for the intervener in that cause did not dispute the submissions made by Mr Mutofwe that what remains to be paid is only interest. Further charging order nisi which Counsel for the applicant in this matter filed in cause number 2008/HP/1284 on 20th September, 2016 exhibited as 'PM4', on the affidavit in support of this application shows that ZMW100, 000.00 and interest of ZMW20, 000.00 was outstanding as at that date. Exhibit 'PM6' a letter dated 17th October, 2016 authored by Counsel for the now applicant to Willa Mutofwe and Associates is an acknowledgement of the receipt of ZMW100, 000.00, being payment of the balance owing on the principle amount of ZMW490, 000.00.

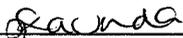
Going by this state of affairs, the reliefs sought in this matter cannot be the subject of litigation, as they have been overtaken by events, namely, by the giving effect to the consent settlement in cause number 2008/HP/1284, and the applicant having been paid the principal sum due under that cause. What is just remaining is the payment of interest, which as rightly argued by Counsel for the 4th respondent can be achieved by obtaining a charging order absolute in the event that the interest due is not settled when the matter comes up on 27th July, 2017, as a charging order nisi was obtained.

Therefore in my view, to seek to proceed with trial in this matter when the consent order executed in cause number 2008/HP/1284 is being implemented under that cause, is multiplicity of actions, and an abuse of court process, which is frowned upon by the courts, as it may lead to different courts making conflicting decisions over the same subject matter. The case of **DEVELOPMENT BANK OF ZAMBIA AND KPMG**

PEAT MARWICK V SUNVEST LIMITED AND SUN PHARMACEUTICALS LIMITED 1997 SJ 10 is instructive.

I accordingly grant the application, and order that this action is dismissed for multiplicity, and for being an abuse of court process. I however order that each party bears their own costs. Leave to appeal is granted.

DATED THE 7th DAY OF JULY, 2017



S. KAUNDA NEWA
HIGH COURT JUDGE