

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

2015/HP/1118



BETWEEN:

OMICRON SERVICES ZAMBIA LTD

PLAINTIFF

AND

NDAMBO NDAMBO

DEFENDANT

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff: N/A

For the Defendants: Mr. G. Pindani of Messrs Chonta Musaila & Pindani Advocates

For the 3rd Party: Ms Karen Banda – In house Counsel

R U L I N G

Legislation referred to:

- 1. Supreme Court Rules of England, Vol. 1 (1999) Edition*
- 2. High Court Act chapter 27 of the Laws of Zambia*
- 3. Constitution of Zambia No. 2 of 2016*

Cases referred to:

1. *Chikuta v. Chipata Rural Council* 1974 ZR 241
2. *Access bank Zambia Limited and Group Five /Zcon Business Park Ventures (suing as a firm) SCZ/ 8/ 52/ 2014*
3. *Henry M. Kapoko v. the People* 2016/ CC/ 0023
4. *Twampane Mining Co-operative Limited v. AM Storti Mining Limited* (2011) 3 ZR 67

This is an application by the third party to raise a preliminary issue filed on 21st August, 2017 anchored on Order 14A as read together with Order 33 of the Supreme Court Rules to challenge the Third Party notice filed on 21st December, 2016.

At this stage it is necessary to recount the chronological genesis of the case.

The record reveals that on 16th July, 2015 the Plaintiff commenced proceedings by mode of writ of summons and statement of claim against the Defendant seeking the following reliefs:

- (i) An order of injunction restraining the Defendant from preventing the Plaintiff and its employees from using a gazette public road and entering the Plaintiffs land and interfering with the activities thereat.
- (ii) An order that the Defendant should pay the Plaintiff a sum of K153, 000.00 being damages for loss of business arising from the Defendants interference with the activities at the

Plaintiffs concrete batching plant on mentioned dates leading to the cancellation of the concrete order.

- (iii) An order that the Defendant should pay the sum of K38,000 being the cost of removing concrete that solidified in the trucks following the Defendants directive that the trucks should not use his road.
- (iv) Damages for mental anguish.
- (v) Any other relief that the Court may deem fit.

On 4th May, 2016, an application was filed for joining of the intended 2nd to 6th Defendants to the proceedings. The joinder was duly granted on 12th July, 2016 by the Learned Deputy Registrar.

On 21st December, 2016 the Advocates for the Defendants filed third party notice which was duly served on the Third Party as demonstrated by an affidavit of service filed on 12th July, 2016.

On 21st December, 2016 the Defendants filed in defence and counterclaim save as admitted they essentially denied the Plaintiffs claims and counterclaimed for:

- (a) Damages for private nuisance;
- (b) Damages and consequential loss for setting up the Concrete Batching Plant without consulting the Defendants;

- (c) An order that the Plaintiffs industrial activities and operations at the subject property be closed permanently;
- (d) An order that the Plaintiff repairs the damaged gravel access commuting road from the Great East Road to the plant;
- (e) Damages for loss of business;
- (f) An interim injunction to restrain the Plaintiff from continuing with its operations until the case is disposed off;
- (g) Any other relief the Court may deem fit;
- (h) Legal costs and incidental to the claim.

On 28th June, 2017, the third party entered memorandum of appearance and filed third party defence to statement of claim and counterclaim.

The gist of the defence was a denial of any liability save as admitted.

On 27th August, 2017 the third party launched notice of intention to raise preliminary issue which is the application under consideration. The issue was to determine that (1) the nature of the claims by the Defendants against the third party were against the provisions of Order 16 Rule (1) of the Supreme Court Rules of England, on the grounds set out in the affidavit.

The application was supported by an affidavit deposed to by one **Humphrey Kasiya Mwale** In House Counsel for the third party.

The gravamen of which is that:

- i) The Defendants have not claimed any contribution or indemnity from the 3rd party; or any relief or remedy relating to or connected with the original subject matter or the action is substantially the same as that sought or claimed by the plaintiff.
- ii) That the Defendants have not claimed that any question or issue relating to or connected with the Plaintiffs claim should also be determined between the Defendants and the third party.
- iii) That the claims related to the third party notice are defective and inappropriate and cannot be entertained before the Court.

The application was countered by an affidavit in opposition deposed to by one **Gilbert Pindani**, the Defendants Advocate. The essence of which was that the basis of the third party claim was inter-alia the decision letter made and issued by the third party in favor of the Plaintiff to set up a Concrete Batchery Plant.

It was deposed that the Defendants were claiming damages for misrepresentation against the third party for alleging in their correspondence that they interviewed some of the Defendants who agreed to the setting up of the Concrete Batchery when in fact not.

That the Defendants in the third party notice have in several paragraphs pleaded facts upon which the third party has been

joined to the case as well as basis from counterclaiming from the Plaintiff.

That the third party has since filed in a defence.

It was further deposed that the third party notice has been prepared in substantial conformity with the prescribed form and facts positively pleaded in paragraphs 1 – 12 of the notice.

Finally, it was deposed that the issues and questions of fact raised in the third party notice are directly connected to the Plaintiffs claim in its statement of claim.

At the time of hearing the parties, Advocates agreed that they will file their submissions and skeleton arguments and I gave orders to that effect. Contrary to the said agreement and consequent order for directions of 16th October, 2016 the parties omitted to file their submissions.

Before I deal with the substantive application, I wish to make the following observations.

(i) Ground/s on which notice to raise preliminary is/are anchored

The third party's notice to raise preliminary issue does not in its body specify the grounds upon which the preliminary application is anchored save to state that the nature of the Defendants claims are contrary to the provisions of Order 16(1) of the Rules of the Supreme

Court of England on the ground set out in the affidavit in support of notice of motion.

The proper procedure is for the mover of any application, notice, summons or motion to specify in the body of such process to specify therein the ground or grounds upon which the same is anchored.

The role of an affidavit is to support the grounds relied upon by evidence.

The practice of scheming the grounds of the application in the affidavit poses a danger of the opponent to sneak into legal arguments and discourse which offends Order 5 Rule 15 of the High Court Rules which directs that an affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion.

(ii) **Swearing of affidavits by Counsel**

It is trite that the Courts disapprove of Advocates swearing affidavits in behalf of their clients on contentious matters. A case in point is the erst-long case of **Chikuta v. Chipata Rural Council**.¹

The further danger of Advocates swearing affidavits on behalf of clients on contentious matters is that Advocates in essence are giving evidence from the Bar which is inadmissible.

In the case in casu, the affidavit in opposition was deposed to by an Advocate for the Defendants. A reading of the same discloses that the Advocates are deposing to issues of contestable facts. (See for example paragraph 6 which refers to a letter authored by the party but not exhibited).

Paragraph 7 alludes to misrepresentation on the part of the third party.

Paragraph 8 advances a legal argument alleging that it is on the pleaded facts upon which the third party has been joined as well as for the basis for counterclaiming.

These have not been specified in the third party notice. There was however no challenge to the offending paragraphs by the third party to expunge the said paragraphs.

I therefore allowed the opposing affidavit to stand notwithstanding the inadequacies pursuant to Rule 15 of Order 5 of the High Court Rules.

I now turn to the substantive application.

(i) **Third party notice**

The starting point is to examine order 16 (1) of the Supreme Court Rules. It provides as follows:-

“Third Party Notice

(1) -*(i) where in any action a defendant who has given notice or intention to defend:-*

(a) claims against a person not already a party to the action any contribution or indemnity, or

(b) claims against such a person any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the Plaintiff, or

(c) requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action.

then subject to paragraph (2), the defendant may issue a notice in Form No. 20 or 21 in Appendix A whichever is appropriate (in the order referred to as a third party notice) containing a statement of the nature of the claim made against him and as the case may be, either of the nature and grounds of the claim made by him or of the question or issue to be determined.

(2) A defendant to an action may not issue a third party notice without the leave of the Court unless action was begun by writ and he issues the notice before serving his defence on the Plaintiff.

(3) Where a third party notice is served on the person against whom it is issued, he shall as from the time of service be a party to the action (in this order referred to as third party) with the same rights in respect of his defence against any claim made against him in the notice and otherwise as if he had been duly sued in the ordinary way by the defendant by whom the notice is given”

Three things come out clearly which ought to be done before a third party notice can be said to be validly issued.

Firstly There must be a claim or claims by the Defendant against the third party for which the Defendant requires indemnity in the event that Judgment is awarded in favor of the Plaintiff and must state the reliefs sought from the third party; or

Secondly The defendant must state the issues that ought to be determined between the defendant and the third party but also between the plaintiff and the 3rd party or between either or both;

Thirdly The notice should be issued by adoption of either Form 21 or Form 21 found in volume 2 of the Supreme Court Rules of England at pages 31 and 32.

I have combed the third party notice and I have found that none of the above 3 requirements have been made. There has therefore been no compliance with Order 16 (1) of the Supreme Court Rules.

The question to ask is what is the effect of non compliance with Order 16 (1) of the Supreme Court Rules of England? The starting point is to consider the provisions of Article 118 (2) (e) of the Constitution³ which requires the Courts in adjudication not to take undue regard to procedural technicalities but to deal with matters on the merits of the case.

The Court of final resort had to pronounce itself on the subject matter in the case of **Access Bank Zambia Limited and Group Five/Zcon Business Park Ventures (suing as a firm)**, Malila, JS, SC as he then was had this to say

“All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the Courts”

In a similar manner, the apex Court in Constitutional matters reverberated the above legal proposition. Munalula, JC delivering the Judgment of the Court in the case of **Henry M. Kapoko v. the People**³ had this to say

“Article 118 (2) (e) does not direct courts to ignore technicalities. It enjoins Courts not to pay undue regard to technicalities that obstruct the course of justice”

Non compliance with the imperatives of Order 16 (1) of the Supreme Court Rules (*ibid*) can be fatal.

The Court of final resort had occasion to pronounce itself on the subject of non compliance with Court orders. This was in the case

of ***Twampane Mining Co-operative Limited v. AM Storti Mining Limited***⁴ where it was held as follows:-

“It is important to adhere to the rules of the Court in order to ensure that matters are heard in an orderly and expeditious manner, and those who choose to ignore rules of the Court do so at their own peril”

The above principle ought to militate against the Defendants.

In my view the purported third party notice was null and void for non compliance with the Order 16 (1) of the Supreme Court Rules. Lord Denning had occasion to pronounce himself on the null and void situations. He put it this way:-

“If an act is void, then it is a nullity, it is not only bad, it is incurably bad. There is no need for an order of the Court to set it aside. It is automatically bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado though it is sometimes convenient for the Court to declare it so. And any proceedings which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse”

I respectfully agree with His Lordship that his pronouncement is the correct status of the law. I adopt the same as my very own and I have nothing useful to add.

(3) **Defendant alleging claim against third party contained in pleadings of statement, defence and counterclaim**

I have already observed that the defendants did not adhere to the regulatory statutory impositions of Order 16 (1) of the Supreme Court Rules. I have also observed that the non compliance is fatal and as such has rendered the purported third party notice a nullity.

No authority was cited to the effect that a mortally defective and third party notice can be resuscitated by an affidavit. There is no force in the defendants' position under this limb.

(4) Delivery of defence to statement of claim and counterclaims

The delivery of defence to statement of claim and counterclaim is no answer to the predicament the defendants find themselves in. As observed by Lord Denning in the **Macfoy case** *"you cannot put something on nothing and expect it to stay, it will collapse"*.

In any event, it was not argued that the non compliance was curable. Nor was any attempt made to amend the offending third party notice. Instead the defendants adamantly chose to stick to their guns taking a firm position that the purported third party notice was richly anchored.

(5) Substantial compliance with prescribed form

It was meekly deposed to by the Defendants Advocates that the challenged third party notice was prepared in substantial conformity with prescribed form. There was no demonstration of how the Defendants had complied.

Firstly, it was not specified which form had been substantially complied with or adopted. There are 2 forms that the Defendant had an option to adopt namely form No. 20 or Form No. 21. The Defendants did not specify which form had been employed.

On the foregoing and in sum I hold that the purported third party notice filed herein on 21st December, 2016 is irregular and is set aside for irregularity.

The costs follow the event and they are for the third party, which costs are to be taxed in default of agreement.

Leave to appeal to the Court of Appeal granted.

Delivered under my hand and seal this 21st day of December, 2017



Mwila Chitabo, SC
Judge