IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 61 OF 2020

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MINET ZAMBIA INSURANCE BROKERS LIMITED APPELLANT

AND

MAINSTREET PROPERTIES LIMITED 1st RESPONDENT

MOHAMED IBRAHIM PATEL AND MOMAMED IBRAHIM PANDOR (T/a GREEN CITY PROPERTIES) INTENDED 2nd RESPONDENTS

CORAM: Chashi, Sichinga and Banda-Bobo, JJA

ON: 24th August and 5th November 2021

For the Appellant:	*K. Nchito, Messrs Kapungwe Nchito, Legal Practitioners*
For the 1st Respondent and the Intended 2nd Respondent:	*I. Nonde, Messrs Isaac and Partners*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Indeni Petroleum Refinery Company Limited v Kafco Oil Limited and Others - SCZ Selected Judgment No. 29 of 2017**

2. **The Attorney General v Aboubacar Tall and Zambia Airways Corporation Limited - SCZ Appeal No. 77 of 1995**
3. ***African Banking Cooperation Zambia v Mubende Country Lodge Limited - SCZ Appeal No. 116 of 2016 (2020) ZMSC 18***

Rules referred to:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia**
2. **The Supreme Court Practice (White Book) 1999**

1.0 INTRODUCTION

1.1 This appeal emanates from the Ruling of Honourable Mrs. Justice S. Kaunda-Newa delivered on 30th January 2020 in cause number 2018/HP/1646.

1.2 In the said Ruling, the learned Judge dismissed the Appellant's application, who was the defendant in the court below for joinder of the intended 2nd Respondent as a 2nd plaintiff and the application to have the consent settlement Order in cause number 2019/HPC/0388 charged to the matter in cause number 2018/HP/1646, by way of a charging order.

2.0 BACKGROUND

2.1 On 5th November 2008, The Agricultural and Commercial Society of Zambia as beneficial owner of stand number 2374 Lusaka (the property), leased the property to Mainstreet Properties Limited (the 1st Respondent). The 1st Respondent in turn, on 3rd August 2015 engaged Green City Properties (the intended 2nd Respondent) vide a development agreement.

2.2 In May 2017, the 1st Respondent upon completion of the development entered into a lease agreement with the Appellant for an initial term of five (5) years. The lease was only registered on 14th May 2018.

2.3 On 8th January 2018, the Agricultural and Commercial Society of Zambia, the intended 2nd Respondent *(whom we shall refer to as the 2nd Respondent)* and the 1st Respondent executed a deed of novation of the lease. In accordance with clause 3 of the deed, the 2nd Respondent agreed to release and discharge the 1st Respondent from all claims and demands whatsoever in respect of the lease and accept liability upon the indenture in lieu of liability of the 1st Respondent.

2.4 What followed then is that the 1st Respondent, despite the deed of novation, on 20th September 2018 commenced an action by way of writ of summons, under cause number 2018/HP/1646 against the 1st Respondent, claiming the following reliefs:

(i) The sum of US$105,600.00 being six months payment in lieu of notice for termination of the lease agreement dated 14th May 2018 made between the plaintiff and the defendant.

(ii) The sum of US$35,200.00 being outstanding rentals for the months of April and May 2018 relating to stand No. 2374, off Thabo Mbeki Road, Lusaka;

(iii) Damages for inconvenience; and

(iv) Costs and any other relief that the court may deem fit in the circumstances.

2.5 At the time the matter was ready for trial, the Appellant applied for the dismissal of the action pursuant to Order 3/2 of **The High Court Rules**[1] (**HCR**). The issue for determination was whether in light of the deed of novation, the 1st Respondent still had rights against the

Appellant. The learned Judge in her ruling delivered on 8th August 2019 was of the view that the 1st Respondent ceded its rights to the 2nd Respondent. That on that basis, the 1st Respondent had no *locus standi* in the matter and could not maintain the action against the Appellant.

2.6 The learned Judge in addition refused the alternative to exercise her inherent jurisdiction to order an amendment so that the 2nd Respondent becomes the plaintiff, because in her view it would not be appropriate, as a person claiming to enforce a right should be moved by themselves to exercise that right and not for the court to move an unwilling person to exercise their rights. The learned Judge accordingly dismissed the action with costs to the Appellant.

2.7 When the parties could not agree on the issue of costs, the Appellant's lawyers taxed the bill of costs and a certificate of taxation was issued in the sum of K389,523.68, upon which a taxing fee of K30,527.65 was paid by the Appellant.

2.8 When the Appellant levied execution by way of writ of *fieri facias*, the same was returned with remarks that:

"the plaintiff was no longer at the given address."

2.9 Meanwhile, after the ruling of 8th August 2019 in which the cause of action under cause number 2018/HP/1646, was dismissed, the 2nd Respondent, commenced an action under cause number 2019/HPC/0388 against the Appellant, claiming the same reliefs as in cause number 2018/HP/1646. The matter was referred to mediation and was settled by way of a consent settlement Order, in which the Appellant agreed to pay the sum of US$80,000.00 in instalments.

2.10 When the lawyers for the Appellant became aware of the settlement Order, they applied under cause number 2018/HP/1646 to have the 2nd Respondent joined as the 2nd plaintiff in the cause. They further applied for the consent settlement Order in cause number 2019/HP/0388 to be charged to cause number 2018/HP/1646 by way of a charging Order to enable the lawyers for the Appellants realise their costs.

2.11 What followed then, is that the intended 2nd Respondent filed a notice to raise preliminary issues pursuant to Order 14A of **The Rules of the Supreme Court[2]** (**RSC**).

The issues for determination being whether the intended 2nd plaintiff had sufficient interest to be joined to the proceedings. Secondly whether the Appellant's application was properly before the court and lastly whether the consent settlement order under cause number 2019/HPC/0388 can be charged.

2.12 The Appellant in response applied to have the preliminary issues dismissed, alleging non-compliance with Order 14A **RSC** alleging that there was no intention to defend as a prerequisite to the raising of the preliminary issues, had not been filed by the 2nd Respondent.

3.0 DECISION BY THE COURT BELOW

3.1 After considering the affidavit evidence and the arguments by the parties, the learned Judge in her Ruling, was of the view that the liabilities that the 2nd Respondent took up were in relation to the lease and not to the action under cause number 2018/HP/1646, that the 1st Respondent took up after it had granted the 2nd Respondent rights under the lease. That in short, the 1st

Respondent wrongly took out the action, as it had no right to do so. That the deed of novation did not extend such acts being taken over by the 2nd Respondent as it would be absurd to hold so, especially after having found that the 1st Respondent had no *locus standi* to commence the action.

3.2 The learned Judge found that there was compliance with Order 14A **RSC** as the issues raised by the intended 2nd Respondent in its notice to raise preliminary issues, were in fact arguments in opposition to the Appellant's application, which amounted to notice to defend. It was on that basis that she proceeded to determine the preliminary issues.

3.3 On the issue as to whether the intended 2nd Respondent could be joined to the proceedings as the 2nd plaintiff, the learned Judge found that the 2nd Respondent had no interest in the matter and therefore could not be joined to the proceedings.

3.4 As regards the charging Order, the learned Judge found that there was no basis upon which the amounts due under the consent settlement Order can be charged with

the Order for costs due to the Appellant for the wrong action taken by the 1st Respondent.

4.0 THE APPEAL

4.1 Dissatisfied with the Ruling, the Appellant has appealed to this Court advancing six grounds of appeal couched as follows:

1. The learned Judge in the court below misdirected herself in law and fact when she held that the issues raised in the notice to raise preliminary issues were in fact arguments in opposition to the applications when the position of the law is that an intimation of the intention to defend is by filing affidavits in opposition which was not done.
2. The learned Judge in the court below misdirected herself in law and fact when she ignored and failed to deal with the issue of joining the 2nd Respondent to the action despite having found that Mohammed Ibrahim Pandor was involved in the running of both entities and

the law provides that any party who ought to have been joined as a party or whose presence before court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined as between him and that party and as between parties to the cause or action.

3. The learned Judge in the court below misdirected herself in law and in fact when she found that Mohammed Ibrahim Pandor a Director in the 1st Respondent and a partner in the 2nd Respondent was the only common person in both entities and did not declare that there was a nexus between the Respondent and the 2nd Respondent.

4. The learned Judge in the court below misdirected herself in law and fact when she found that the liabilities that the 2nd Respondent took up were in relation to the lease and not the action commenced by the Respondent when the deed of novation did not

specify which liabilities the intended 2nd Respondent had taken up and did not provide for the time frame within which the liabilities were taken up in relation to the lease.

5. The learned Judge in the court below misdirected herself in law and fact when she found that the failure to execute the writ *fieri of facias* was because the Respondent was no longer at the given address and did not state that the Respondent had stopped operating or that the Respondent was a shell company incapable of paying its debts when the law provides that a notice must be filed at the Patents and Companies Registration Agency when the registered company is changed and the bailiffs had failed to locate the Respondent.

6. The learned Judge in the court below misdirected herself in law and fact by stating that the Appellant had not shown that the Respondent had a beneficial interest in the

consent settlement order under cause number 2019/HPC/0388 when:

(i) The Appellant had applied for the beneficial interest of the 2nd Respondent and not the Respondent.

(ii) The beneficial interest of the intended 2nd Respondent in the consent settlement Order under cause number 2019/HPC/0388 was derived out of the lease entered into between the Respondent and the Appellant whose liabilities were assumed by the intended 2nd Respondent.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 At the hearing of the appeal, Mr. Nchito, Counsel for the Appellant relied on the heads of argument filed into Court on 21st April 2020. In arguing the first ground, Counsel submitted that the position of the law is that an intimation of the intention to defend is done by filing affidavits in opposition which was not done.

That therefore the learned Judge misapprehended the law, when she found that the notice to raise preliminary issues were in fact arguments in opposition.

5.2 Our attention was drawn to Order 14A **RSC**, on condition precedent to raising preliminary issues. Reliance was placed on the case of **Indeni Petroleum Refinery Company Limited v Kafco Oil Limited and Other**[1] where in adopting Order 14A, the Supreme Court stated that by filing affidavits in opposition, the Respondents intimated their intention to defend.

5.3 It was further submitted that the intended 2nd Respondent did not meet the requirements by failing to show their intention to defend as they did not file an affidavit in opposition to the Appellant's application. According to Counsel, there was no legal basis on which the court below decided that the notice to raise preliminary issues can be substituted as an intention to defend.

5.4 In arguing the second ground, Counsel submitted that the court below fell in error by not joining the intended 2nd Respondent because the basis upon which the

Respondent could have been joined is provided for under Order 14 (5) (1) **HCR**.

5.5 Further that the court below ignored the guidance of the Supreme Court in the case of **The Attorney General v Aboubacar Tall and Zambia Airways Corporation Limited**[2] where the Supreme Court emphasized on the need by the courts to adjudicate upon every aspect of the suit between the parties, so that every matter in controversy is determined in finality.

5.6 According to Counsel, it was important to have joined the 2nd Respondent to the proceedings as a party as its presence was necessary to ensure that all matters in dispute were effectually and completely adjudicated upon. It was further submitted that they needed to be joined because they have the responsibility to deal with the Order in taxation having taken over the liabilities from the 1st Respondent.

5.7 The third and fifth grounds of appeal were not argued. We will therefore take it that they had been abandoned.

5.8 In arguing the fourth ground, Counsel submitted that the deed of novation was entered into freely and voluntarily

by the 1st Respondent and the 2nd Respondent and the court below fell into error by inferring into the deed of novation, provisions which were not provided for. Counsel drew our attention to clause 3 of the deed and contended that the court below misdirected itself by stating that the liabilities were in relation only to the lease, when the action was commenced as a result of the lease and the deed of novation did not specify to what extent the liabilities would be taken up and the time frame the liabilities would be taken up.

5.9 In respect to the sixth ground, Counsel submitted that the Appellant has an interest in the beneficial interests of the 2nd Respondent in the consent settlement Order under cause number 2019/HPC/0388 because by deed of novation the intended 2nd Respondent discharged the Respondent from all claims and demands whatsoever in relation to the lease, without expressly mentioning the type of claim nor the time frame. That the 2nd Respondent accepted the liability of the 1st Respondent in relation to the lease without any conditions.

6.0 ARGUMENTS IN OPPOSITION

6.1 In response to the first ground of appeal, Mr Nonde, Counsel for the 1st and 2nd Respondents submitted that, the position of the law as regards the requirement of a party to file a notice of intention to defend in order to raise a preliminary issue under Order 14A is only applicable when the preliminary issue raised relates to a party to a suit and not an intended party as with the ***adest materia***.

6.2 It was Counsel's argument in the alternative, that even if the Court is of the opinion that the 2nd Respondent should have filed an affidavit in opposition to the Appellant's application for non- joinder in order to raise a preliminary issue, the court below at page 34 lines 6-10 of the record of appeal *(the record)* held that the issues raised in the notice to raise preliminary issues are in fact arguments in opposition to the application. That, being the position, all the requirements under Order 14/A/2/3 **RSC** were met. In light of the holding, the court below proceeded to determine the issues raised.

6.3 In response to the second ground, Counsel submitted that the ground is clearly misconceived as the court below did not ignore and/ or fail to deal with the issue of joining the 2nd Respondent to the action despite having found that Mohamed Ibrahim Pandor was involved in the running of both entities. According to Counsel, the court below at page 36 lines 14-15 of the record stated that, the question that arises in the matter was whether the 2nd Respondent should be joined to the proceedings. The Court then proceeded to address the issues of requisite interest and the principle of separate legal personality.

6.4 In response to the fourth ground, it was Counsel's contention that the court below was on firm ground when it held that the liabilities that the 2nd Respondent took up were in relation to the lease and not the action commenced by the 1st Respondent. It was submitted that the ground of appeal is misconceived as the effect of the deed of novation was held under the ruling of 8th August 2019. That therefore the court below in its Ruling subject of the appeal merely made reference to its earlier ruling as regards the deed of novation and its effect.

6.5 It was Counsel's further contention that the Appellant cannot raise this ground of appeal as regards the deed of novation under the current appeal before this Court, as the Appellant ought to have appealed against the ruling of 8th August 2019.

6.6 As regards the sixth ground, Counsel submitted that the court below was on firm ground when it held that the Appellant had not shown that the Respondent had a beneficial interest in the consent settlement order under cause no. 2019/HPC/0388. Reference was made to Order 50/1 **RSC** which states as follows:

> *"(1) The power to make a Charging Order under section 1 of the Charging Order Act 1979 (referred to in this Order as "the Act") shall be exercisable by the Court.*
>
> *(2) An application by a judgment creditor for a charging order in respect of a judgment debtors beneficial interest may be made ex parte, and any Order made on such an application shall in the first instance be an order made in form no. 75 in Appendix A, to show cause, specifying the*

time and place for further consideration of the matter and imposing the charge in any event until that time."

6.7 According to Counsel, it is clear that the underlying factor in an application for a Charging Order is that it must be established that the judgment debtor has a beneficial interest in the property being charged. It was submitted that the arguments by the Appellant on this ground are misconceived as the law is clear that the determining factor for the court in granting a Charging Order is that a party must highlight that the judgment debtor has an interest in the property being charged.

6.8 According to Counsel, the Appellant ought to have highlighted the beneficial interest the 1st Respondent as the judgment debtor had in the consent settlement order. That the Appellant had not showed in any way that the mediation settlement Order was the property of the 1st Respondent or that the 1st Respondent had a beneficial interest in the said mediation order.

7.0 DECISION OF THIS COURT

7.1 We have considered the arguments by the parties and the Ruling being impugned. As earlier alluded to, the third and fifth grounds of appeal were abandoned. In determining the appeal, we shall first deal with ground one and thereafter ground two, four and six together as they are entwined.

7.2 The first ground of appeal attacks the learned Judge in the court below for holding that the issues raised in the notice to raise preliminary issues were in fact arguments in opposition to the application. In our view, the issue for determination is whether the learned Judge was correct in her interpretation of a notice to defend under Order 14A **RSC** when she found that the preliminary issues raised were to be taken as arguments in opposition and equated that to a notice to defend.

7.3 Order 14A/2/3 **RSC** sets out the requisites for raising a preliminary issue under Order 14A **RSC.** It states as follows:

"Requirements of Order 14A - *The requirements for employing the procedure under this Order are the following:*

(a) the defendant must have given notice of intention to defend

(b) the question of law or construction is suitable for determination without a full trial of the action

(c) such determination will be final as to the entire cause or matter or any claim or issue therein and

(d) *the parties had an opportunity of being heard on the question of law or have consented to an Order or Judgment being made on such determination.*

7.4 In interpreting Order 14A/2/4 as to what amounts to notice of intention to defend, the Supreme Court in the case of ***African Banking Cooperation Zambia v Mubende Country Lodge Limited*** [3] succinctly held that:

(1) There are certain requirements which must be satisfied before a matter can be disposed on a point of law. One such requirement, according to Order

14A/1-2/2 of the White Book is giving of notice of intention to defend.

(2) What constitutes a notice of intention in the context of the High Court rules, is the filing of a memorandum of appearance which is accompanied by a defence. It therefore follows that the filing of a memorandum of appearance with a defence is a pre-requisite to launching an application under Order 14A of the White Book.

7.5 In view of the aforestated case, which was recently delivered and after the delivery of the **Indeni Petroleum Refinery**[1] case cited by the Appellant, our view is that the learned Judge in the court below misapprehended the law in her interpretation of a notice to defend. She therefore erred in equating the preliminary issues raised by the 1st Respondent to arguments in opposition and eventually to a notice to defend. As there was no memorandum of appearance and defence filed, this was not an appropriate matter for raising a preliminary issue under Order 14A **RSC**. In the view that we have taken, the first ground of appeal succeeds.

7.6 As regards ground two, four and six, this set of grounds attacks the manner in which the learned Judge approached and/or considered the Appellant's application for joinder of the 2nd Respondent as the 2nd plaintiff in the matter in the court below.

7.7 We note from the onset that in her ruling of 8th August 2019, the learned Judge dismissed the cause on the basis that the 1st Respondent had no basis to maintain the action as it had no *locus standi* in the matter. Although the learned Judge found that the 2nd Respondent did not have interest in the matter, our view is that at the time the application for joinder of the 2nd Respondent was being made, the cause of action stood dismissed, save for costs. Therefore, the 2nd Respondent could not be joined to a dismissed cause.

7.8 We further note that, in the aforestated ruling of 8th August 2019 at page 172, line 19 of the record of appeal, the learned Judge had this to say:

> *"While Counsel for the Plaintiff argued in the alternative that I should exercise my inherent jurisdiction to order amendment so that Green City*

Properties is the Plaintiff in this matter, my view is that this would not be appropriate, as a person claiming to enforce a right should be moved by themselves to exercise that right, and not for the court to move an unwilling person to exercise their rights."

7.9 This ruling has never been challenged and is therefore in subsistence. Therefore, to try to join the same party once again through a joinder application is an abuse of court process which should not be encouraged. This set of grounds of appeal fails.

8.0 CONCLUSION

8.1 The appeal having substantially failed, it is accordingly dismissed with costs to the 1st and 2nd Respondents, to be paid forthwith. Same to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

D. Y. L. SICHINGA, SC
COURT OF APPEAL JUDGE

A. M. BANDA - BOBO
COURT OF APPEAL JUDGE