

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

APPEAL No. 124/2023

BETWEEN:

NARENDRA VALAND
APPELLANT

SUNANDA VALAND

VORTEX REFRIGERATION CO LTD

VORTEX ELECTRICAL CO LTD

26 JUL 2024

1ST

2ND APPELLANT

3RD APPELLANT

4TH APPELLANT

AND

DIPESH SHAH

PATENTS & COMPANIES REGISTRATION
AGENCY

1ST RESPONDENT

2ND RESPONDENT

CORAM: SIAVWAPA JP, CHISHIMBA & PATEL, JJA

On 21st May and 26th July 2024

FOR THE APPELLANTS:

MISS E. MUKUKA OF MESSRS
E.M. MUKUKA & CO

FOR THE RESPONDENTS:

NOT IN ATTENDANCE

J U D G M E N T

SIAVWAPA, JP delivered the Judgment of the Court

Cases referred to:

- 1. Development Bank of Zambia and KPMG, Peak Marwich v Sunvest Limited & Sun Pharmaceuticals Limited (1995-97) ZR 187.*
- 2. Hamalambo v. Zambia National Building Society Appeal No. 64 of 2013*

3. *Hakainde Hichilema & others v the Government of the Republic of Zambia, (2017) ZMHC 379 (HC)*
4. *Kelvin Hang'andu & Co v Webster Mulubisha (2008) ZR 82 (SC)*
5. *Finance Bank Zambia Limited v Dimitrios Monokandilos and another CAZ Appeal No 120 of 2020*
6. *Christopher Lubasi Mundia v sentor Motors (1982) ZR 66 (HC)*

Legislation referred to:

1. *Rules of the Supreme Court 1999.*
2. *Arbitration Act No. 19 of 2000.*

1.0 INTRODUCTION

- 1.1. The appeal herein is against the Ruling delivered by the Honourable Mr. Justice E. L. Musona, sitting in the Commercial Division of the High Court dated 27th February, 2023.
- 1.2. By the said Ruling, the learned Judge dismissed the Appellants' (Defendants in the Court below) counterclaim.
- 1.3. In dismissing the counterclaim, the learned Judge found the same to have constituted a multiplicity of actions because of other matters that were before the High Court at the time.

2.0 BACKGROUND

- 1.1 On 11th May 2021, the 3rd and 4th Appellants Registered Debenture Deeds with the 2nd Respondent as security for the sums of USD 350, 000.00 obtained by each of the two Appellants.
- 1.2 The 1st and 2nd Appellants, who are Directors in the 3rd and 4th Respondents, signed the Debenture Deeds in that capacity.
- 1.3 Apparently, the two Debentures were issued consequent to the execution of what is termed an “Emergency Bail-out Fund Agreement” between the 1st Respondent of the one part and the 1st and 2nd Appellants of the other part.
- 1.4 The document occurs from page 344 to 358; volume two, of the Record of Appeal and it is dated 10th May, 2021, a day before the registration of the Debenture with PACRA.
- 1.5 The parties entered into the said Agreement to save the 3rd and 4th Appellants from being declared insolvent and to avert liquidation of their properties following their default on the debt they owed to Indo-Zambia Bank in the sum of K19, 106, 383.17
- 1.6 By this Agreement, the 1st Respondent would avail the 3rd and 4th Appellants the sum of USD 860, 647.89 which was equivalent to the Kwacha amount the Appellants owned to Indo-Zambia Bank.

- 1.7 An Addendum Agreement to the Emergency Bail-out Fund in the sum of USD 733, 551.00 of even date was not signed by the 1st Respondent.
- 1.8 On 22nd February, 2022, Yeah Madaika, purportedly acting as advocate for the creditor, the first respondent, filed two Notices of Discharge for the release of property from charge. The two notices were in respect of the Debenture Deeds registered against the 4th and the 3rd Appellants in the sum of USD 350, 000.00 each.
- 1.9 According to the Notices which occur at pages 405 and 407, volume two, of the Record of Appeal, the debts had been paid in full resulting in the full discharge of the Debentures.
- 1.10 The Notices also name the 1st Respondent as the creditor implying that Yeah Madaika filed the Notice on behalf of the creditor.

2.0 ACTION IN THE COURT BELOW

- 2.1 Displeased with the turn of events, the 1st Respondent commenced an action in the High Court against the 2nd Respondent. This is evident from the Writ of Summons and statement of Claim occurring from page 57 to page 63 of volume one of the Record of appeal.

2.2 He filed the Writ of Summons on 27th May, 2022, together with the accompanying statement of claim.

2.3 In the endorsement to the Writ of Summons and in the Statement of Claim, the 1st Respondent claimed as follows;

- i) An Order for payment by the Defendant to the Plaintiff of the sum of USD 243, 768.00 as at 22nd February, 2022 and continuing being in respect of the outstanding debt sum advanced by the Plaintiff to the debtors lost by the Plaintiffs as a result of the Defendant's negligent and/or careless acts and conduct complained of by the Plaintiffs herein.*
- ii) Damages for negligence suffered by the Plaintiffs.*
- iii) Interest therein (i) and (ii) above.*
- iv) Costs.*
- v) Any other relief the Court may deem fit under the circumstances.*

2.4 In the Statement of Claim, the 1st Respondent averred that the 4th Appellant defaulted on the USD 350, 000.00 debenture entered into and that he had appointed Mr. Anthony Kasolo as receiver on 16th February, 2022.

2.5 The 1st Respondent further states that the 2nd Respondent negligently discharged the Debenture on instructions from Mr. Madaika who had no power to discharge the mortgage.

- 2.6 Along the way, the 2nd Respondent applied for leave to issue third party Notice against Mr. Madaika and J and M. Advocates which the Court below granted on 9th August, 2022.
- 2.7 On 23rd September, 2022, Messrs J and M Advocates applied for an order for joinder of party to proceedings.
- 2.8 By consent order dated 4th October, 2022 the 1st, 2nd and 3rd Appellants were added as intended 2nd, 3rd and 4th Defendants. The 4th Appellant was later added as the 5th Defendant via a separate application.
- 2.9 Ultimately, the newly added parties filed their defence and counterclaim on 27th October, 2022.
- 2.10 Upon filing his reply to the Defene and defence to the Counterclaim on 8th November, 2022, the 1st Respondent simultaneously filed Notice of Intention to raise preliminary issues pursuant to Order 14A Rules of the Supreme Court 1999 edition as read with Section 10 of the Arbitration Act No. 19 of 2000.
- 2.11 The 1st Respondent advanced two issues for determination by the Court as follows;

1. *Whether the claims in the 2nd -5th Defendants' Counterclaim amount to multiplicity of actions as the Defendants are litigating the claims before the High Court at Kabwe under cause No. 2022/HB/51 and this is therefore an abuse of court process.*
2. *Whether this court has jurisdiction to hear the counterclaim as an Arbitral award has been delivered pursuant to the provisions of the Emergency Bail Out Agreement between the Plaintiff and the 2nd – 5th Defendants.*

2.12 In the supporting affidavit, the 1st Respondent averred that the issues canvassed in the counterclaim had already been raised in cause No. 22/HB/051 before the High Court at Kabwe and Cause No. 2022/HPC/0284.

2.13 Further, in relation to the second issue, he averred that the Emergency Bail-out Agreement contained an Arbitration Clause. That an Arbitral Award has since been delivered awaiting to be registered by the High Court.

3.0 DECISION OF THE HIGH COURT

3.1 After considering the evidence before him, the learned Judge found that the counterclaim was a multiplicity of actions and dismissed it accordingly.

4.0 THIS APPEAL

4.1 The Memorandum of Appeal filed on 3rd March, 2023 contains four grounds of appeal set out as follows;

1. The learned High Court Judge erred in law and fact when he held that the issues raised in the counterclaim before the Lusaka High Court under cause number 2022/HPC/0293 are the same issues in the matter before the Kabwe High Court under cause number 2022/HB/051.
2. The learned High Court Judge erred in law and fact when he overlooked that the parties under cause number 2022/HB/051 and the parties under cause number 2022/HPC/0293 and the matters herein are different.
3. The learned High Court Judge erred in law and fact when he did not address his mind to the fact that the matters before the Lusaka High Court under Cause Number 2022/HPC/0294 (*sic* 0293) and the matter under cause 2022/HB/051 have never been litigated upon with a result of a final judgment, having been delivered and
4. Alternatively, having found that the matters in cause number 2022/HPC/0294 (*sic* 0293) and 2022/HB/051 deal with the same issue, the learned High Court Judge erred in only dismissing Counterclaim and failing to deal with the main claim filed by the Plaintiff (1st Respondent) which, if the lower court's Ruling is found to be correct,

would also be affected by the same multiplicity of actions.

5.0 ARGUMENTS IN SUPPORT

- 5.1 In the heads of argument filed together with the Record of Appeal, the Appellants have argued that the parties and issues in cause number 2022/HPC/0293 and 2022/HB/051 are different.
- 5.2 They further argued that the causes in question have not been determined on their merits and as such cannot constitute a multiplicity of actions.
- 5.3 On the basis of the arguments in paragraphs 5.1 and 5.2 above, the Appellants have submitted that the doctrine of multiplicity of actions, as defined in many court decisions such as Development Bank of Zambia and KPMG, Peat Marwick v Sunvest Limited & Sun Pharmaceuticals Limited¹ and Hamalambo v Zambia National Building Society² to cite but only a couple did not apply.
- 5.4 In the alternative, they argue that if the Appellants' counterclaim is a multiplicity of actions in relation to the other two causes before the High Court, then the learned Judge ought to have applied his mind to the fate of the 1st Respondent's action.

5.5 In the Appellants' view, if the counterclaim is a multiplicity of actions, so is the main action commenced by the 1st Respondent.

6.0 ARGUMENTS IN OPPOSITION

6.1 The 1st Respondent filed his arguments in opposition on 30th May 2023 while the 2nd Respondent did not file heads of argument.

6.2 In responding to grounds one and two, the 1st Respondent has argued that the learned Judge below was on firm ground. This argument is based on the considerations set out in the case of Hakainde Hichilema and Others v the Attorney-General³ for a matter to constitute a multiplicity of actions. The relevant considerations are; 1, same parties and 2, same subject matter.

6.3 The 1st Respondent has further argued that in all the matters the Appellants had commenced in Lusaka and in Kabwe, the subject matter was the Emergency Bail-Out Agreement. They argue that the actions of the Appellants amounted to forum shopping, which is frowned upon by Courts as held in the case of Kelvin Hang'andu and Company v Webster Mulubisha⁴.

6.4 In ground three, the 1st Respondent essentially argues that the fact that a matter has not been disposed of on its merits is immaterial for it be an abuse of Court process. In their

view, what matters is whether the claim is vexatious, scurrilous or obviously ill-founded in line with Order 18/19/18 of the Rules of the Supreme Court, 1999 edition.

- 6.5 In responding to ground four, in the alternative, the 1st Respondent has submitted that the issue being canvassed in the ground was not raised in the Court below and cannot therefore, be raised on appeal.
- 6.6 In holding the above view, the 1st Respondent has relied on our decision in Finance Bank Zambia Limited v Dimitrios Monokandilos and another⁵, and that of the Supreme Court of Zambia in Christopher Lubasi Mundia v Sentor Motors⁶.
- 6.7 In the Finance Bank case (Supra), the relevant portion is where we stated that ‘a finding of fact is made when there is a question of fact presented to the Court.’ In the Christopher Mundia case (Supra), the Supreme Court stated the essence of pleadings as ‘to give a fair notice of the case.’
- 6.8 In this regard, the 1st Respondent has argued that because the issue was not raised in the court below, it offends against the rule of pleadings and we therefore, should not consider the ground of appeal.

7.0 OUR ANALYSIS AND DECISION

- 7.1 The question whether a matter is a multiplicity of actions or not is one that has been answered many times through judicial decisions and settled.

- 7.2 The law is firmly established and there can be no departing from the principles upon which it is founded.
- 7.3 To start with, it is important to identify the matters before the High Court which the 1st Respondent believes cause the Appellants' counterclaim to be a multiplicity of actions.
- 7.4 In the affidavit in support of summons to raise preliminary issues and strike out defence and dismiss counterclaim on a point of law occurring at page 240 of the Record of Appeal, the 1st Respondent, in paragraphs 4 and 5, cites cause numbers 2022/HB/051 and 2022/HPC/0284 as the relevant actions.
- 7.5 In the two causes occurring at pages 244 and 267 of volume one of the Record of Appeal, the 1st and 2nd Appellants are the Plaintiffs in both, while Anthony Kunda Kasolo is the only Defendant in cause number 2022/HPC/0284 and the 1st Respondent is the 2nd Defendant in cause number 2022/HB/51.
- 7.6 It is however, noted that cause number 2022/HPC/0284, was filed on 23rd May 2022 in the Commercial Registry at Lusaka while cause number 2022/HB/051 was filed on 17th June 2022 at Kabwe.

- 7.7 The question is; what motivated the 1st and 2nd Appellants to file another action at Kabwe within thirty days of filing one at Lusaka?
- 7.8 A close look at the claims in both causes reveals that the 1st and 2nd Appellants were disputing the purported placing of the 3rd and 4th Appellants under receivership.
- 7.9 They claimed in both matters that the appointment of Anthony Kunda Kasolo, as receiver, was fraudulent and should therefore, be declared null and void.
- 7.10 It is however, curious that cause number 2022/HPC/0284, was discontinued and withdrawn on 23rd May 2022, the same day it was filed into Court as shown by the Notice of Discontinuance and Withdrawal occurring at page 273 of the Record of Appeal.
- 7.11 The move to discontinue is surprising because at the time of withdrawing, the Appellants had not yet commenced the action in Kabwe.
- 7.12 That notwithstanding, the fact that cause number 2022/HPC/0284 was withdrawn takes it out of the picture in considering the question whether the counterclaim, which was filed on 27th October 2022, resulted in a multiplicity of actions.

7.13 This leaves only one matter; which is cause number 2022/HB/051, filed at Kabwe, to be considered as against the counterclaim for a possible multiplicity of actions.

7.14 In the counterclaim, which occurs from page 219 to page 223 of volume one of the Record of Appeal, in particular at page 223, the Appellants oppose the Emergency Bail-Out Fund Agreement on alleged fraud.

7.15 They also dispute receiving any funds from the 1st Respondent upon which Debenture Deeds were executed and upon which default is claimed necessitating the appointment of a receiver.

7.16 Turning to the claims in cause number 2022/HB/051, as set out in the amended statement of claim at page 244, volume one, of the Record of Appeal, it is noted that the Appellants are disputing the receivership on account of fraud.

7.17 The Appellants are also disputing the Emergency Bail-Out Fund Agreement on account of fraud.

7.18 Ultimately, the claims in cause number 2022/HB/051 and those in the Appellants' counterclaim are the same and arise from the same facts.

7.19 Further to that, the parties in both matters are the same because the 1st and 2nd Appellants are shareholders/Directors in the 3rd and 4th Appellants.

7.20 In our view, and to all intents and purposes, the learned Judge below correctly found that the counterclaim amounted to a multiplicity of actions and liable to be dismissed.

7.21 With regard to the argument that cause number 2022/HB/051 has not been heard and determined on its merits as the reason the counterclaim should not be deemed to be a multiplicity of actions, we dare say the opposite is what is correct.

7.22 This is so because the doctrine of multiplicity of actions rides on the deploying of same issues by same parties before different courts to run concurrently. This was the position the Supreme Court took in the *Hamalambo case* (supra).

7.23 If one matter had been determined on its merits, the question of multiplicity of actions would not arise. Instead, the issue would be that of the matter becoming res-judicata.

8.0 GROUND IN THE ALTERNATIVE

8.1 With the main grounds of appeal having failed, it is appropriate to consider the ground and the arguments in the alternative.

8.2 In the main, the argument in the alternative is that in considering and determining that the counterclaim constituted a multiplicity of actions, the learned Judge ought to have also addressed his mind to the sustainability of the main action by the 1st Respondent.

8.3 To address the issue, it is necessary to review the principles governing counterclaims.

8.4 Order 15 Rule 2/2 of the Rules of the Supreme Court 1999 edition provides as follows;

“In short if a defendant has a valid cause of action of any description against the plaintiff there is no necessity for him to bring a cross-action unless his cause of action is of such a nature, that it cannot be conveniently tried by the same tribunal or at the same time as the plaintiff’s claim.”

8.5 In the above principle, it appears that for an action to be conveniently tried by the same tribunal and at the same time as the plaintiff’s claim by way of a counterclaim, the parties must be identical and the facts of the counterclaim must be connected to or flow from the facts in the Plaintiff’s action.

8.6 In this appeal, it is important to check if there is a nexus between the facts in the counterclaim and the facts founding the 1st Respondent’s claims in the Court below.

8.7 If a nexus is established, it follows that the 1st Respondent's claims are equally connected to cause number 2022/HB/051 filed earlier in the High Court at Kabwe.

8.8 This will yield the same fate as that suffered by the counterclaim for being a multiplicity of actions.

8.9 The history of this appeal has been sufficiently given in the background part of this Judgment. The cause number of the action that yielded this appeal is 2022/HPC/0293. It was filed into Court on 27th May 2022.

8.10 At page 486 volume two of the Record, from line 11 of the proceedings, the 5th Defendant submitted as follows;

"No objection but we want the Court to take judicial notice of case No. 2022/HP/051. The Court will note that at paragraph 4 of the Plaintiff's Affidavit in support the exhibits an amended statement of claim. Cause No 2022/HP/051. Court should take note that the initial statement of claim and writ of summons were filed on 23/5/22 prior to commencement of this matter. Court should consider that there is no multiplicity."

8.11 From the above submission, which was not opposed, it is clear that at the time of filing the cause, the subject of this appeal, number 2022/HPC/0293, on 27th May 2022, cause number 2022/HB/051, was already pending and it was the first in time.

8.12 This then leads to the comparative analysis of the facts founding the claims in the two causes to establish whether

the learned Judge ought to have treated the 1st Respondent's cause as a multiplicity of actions.

8.13 A closer look at the statements of claim in both causes reveals that they both revolve around the Emergency Bail-Out Fund Agreement which gave rise to the execution of the two Debenture Deeds.

8.14 The 1st Respondent alleges default by the Appellants resulting in the appointment of a receiver.

8.15 The Appellants, on the other hand, dispute receiving the funds but that a third party availed the funds and not the 1st Respondent.

8.16 From the findings stated above, a clear nexus is established between the cause of action in cause number 2022/HB/051, which was the first in time and cause number 2022/HPC/0293 which was filed later.

8.17 It follows therefore, that the 1st Respondent's cause was equally liable to be dismissed for constituting a multiplicity of actions. However, on the principle that matters not raised before the trial Court cannot be raised on appeal, the issue is not properly before us and therefore, liable to be dismissed.

9.0 CONCLUSION

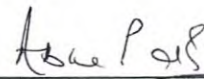
- 9.1 Having dealt with all the grounds and issues raised in this appeal, the ultimate position is that the appeal is wholly dismissed for want of merit.
- 9.2 However, in view of the fact that there are now two surviving causes namely; 2022/HB/051 and 2022/HPC/0293, which involve the same parties and issues, we order that the two be consolidated to be heard under cause No 2022/HPC/0293. The Judge in Charge, Commercial Division, shall re-allocate the matter to another Judge.
- 9.3 Costs will be for the Respondents to be taxed in default of agreement.



M.J. SIAVWAPA
JUDGE PRESIDENT



F. M. CHISHIMBA
COURT OF APPEAL JUDGE



A.N. PATEL, SC
COURT OF APPEAL JUDGE