

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 182 OF 2025
HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N:

ELEANA STELLA KOUKOU DIS 1ST APPELLANT
(Trading as Aetos Estates)

JULIET MUBABE 2ND APPELLANT
(Trading as Aetos Estates)

AND

IMAGE CIVIL AND ELECTRICAL RESPONDENT
ENGINEERING LIMITED

CORAM: Chashi, Ngulube and Banda-Bobo, JJA
ON: 18th and 25th March 2026

For the 1st Appellant: E. Chibeluka, Messrs Chibeluka & Partners

For the 2nd Appellant: C. Chilufya, Messrs DMK Legal Practitioners

For the Respondent: G. Tembo, Messrs James & Doris Legal Practitioners

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Mohamed S. Itowala v Variety Bureau De Change (2001) ZR, 96**
- 2. Tembo and Another v Chitambala (2009) ZR, 326**

3. *Limpic v Mawere & Others – SCZ Appeal No. 121 of 2006*

4. *Kashikoto Conservancy Limited v Darrel Alexander Watt – CAZ Appeal No. 146 of 2019*

Legislation referred to:

1. *The Zambia Institute of Architects Act, Chapter 442 of the Laws of Zambia*

Rules referred to:

1. *The Supreme Court Practice (White Book) 1999*

1.0 INTRODUCTION

1.1 This is an appeal against the Ruling of Honourable Mrs Justice S. Kaunda Newa, delivered on 23rd April 2025.

1.2 In the said Ruling, the learned Judge dismissed the preliminary issues, which were raised by the Appellants, who were the defendants in the court below.

2.0 BACKGROUND

2.1 The Respondent, as plaintiff in the court below, commenced an action against the Appellants on 8th May 2023, by way of writ of summons claiming the following reliefs:

- (i) The sum of US\$8,629.00, for the design and manning of the property*
- (ii) Damages for repudiation of the agreement*
- (iii) Interest on sums found due*
- (iv) Costs and*
- (v) Any other relief as the court may deem fit*

2.2 The Appellants settled their respective defences denying the claims in their entirety. The trial in this matter commenced on 22nd July 2024. On 28th October 2024, before the Respondent's witness could proceed with his evidence, the Appellants filed a notice of motion to determine the matter on points of law (*preliminary issues*).

3.0 THE PRELIMINARY ISSUES

3.1 The notice of motion was made pursuant to Order 14A/2 as read with Order 33/3 of **The Rules of the Supreme Court (RSC)**¹. The following issues were advanced for determination:

- (i) Whether the Respondent was registered with Zambia Institute of Architects for purposes of offering Architectural services in the Republic of Zambia;*

- (ii) Whether the Respondent's claim for the sum of US\$7,629.00 and damages for repudiation of the agreement were illegal and unenforceable for breach of various provisions under The Zambia Institute of Architects Act, Chapter 442 of the Laws of Zambia;***
- (iii) Whether the Honourable Court had jurisdiction to hear and determine the action in light of the issues raised.***

3.2 In support of the motion, the Appellants filed an affidavit and skeleton arguments. The Appellants contended that the Respondent was a limited liability company and was not registered with the Zambia Institute of Architects. They further contended that none of its directors were licensed by the Institute to offer architectural services in the Republic.

3.3 According to the Appellants, a limited liability company is incompetent and disqualified to offer architectural services under the laws of Zambia. That therefore, the claim for payment of US\$7,629.00 for the purported design works and damages for repudiation of the purported agreement were illegal and offended the law.

3.4 Reliance was placed on the provisions of **The Zambia Institute of Architects Act¹** and **Statutory Instrument No. 106 of 1999**, on the qualification to register as an Architect. Reliance was also placed on the case of **Mohamed S. Itowala v Variety Bureau De Change¹**, where the Supreme Court held that:

“A party cannot sue upon a contract if both knew that the purpose, the manner of performance and participation in the contract necessarily involved the commission of an act which to their knowledge is legally objectionable.”

3.5 It was the Appellants’ prayer that the action in relation to the claim for the payment of US\$7,629.00, for the purported design works purportedly undertaken by the Respondent and the claim for damages for repudiation of the agreement must be dismissed for want of jurisdiction and illegality.

3.6 In opposing the application, the Respondent filed an affidavit and skeleton arguments. According to the Respondent, the design works were done by Creators Concept Architects Limited at the instruction of the

Respondent, for the benefit of the Appellants, at the Respondent's cost.

- 3.7 Further that, the dismissal of the claim would result in the unjust enrichment of the Appellants, as they have benefited from the drawings. It was argued that, the Respondent must be allowed to prove its case for the drawings. It was the Respondent's prayer that the preliminary issues be dismissed.

4.0 DECISION OF THE COURT BELOW

- 4.1 In her consideration of the motion, the learned Judge interrogated Order 14A **RSC**, the affidavit evidence and the arguments by the parties. The learned Judge was emphatic that the motion was raised pursuant to Order 14A **RSC** and went on to consider the provisions of Order 14A/2/8 **RSC**. She opined that an application under that Order disposes of the matter with finality and entails that the issues raised by the application should determine the rights of the parties in relation to what has been pleaded.
- 4.2 The learned Judge then went on to state as follows:

“The fact that the averments in the affidavit in opposition dispute facts which are alleged in the affidavit which was filed in support of the notice of motion, shows that the application is not suitable to be determined under Order 14A of The Rules of the Supreme Court of England, as seen from the explanatory notes in Order 14A/2/8 of the Rules of The Supreme Court of England which I have cited above.”

4.3 The learned Judge stated that the affidavit in opposition in part traversed, challenged and contradicted the facts as deposed to in the affidavit in support. She then went on to hold that whilst it was argued that the pleadings did not allege that the claim was being made on behalf of a third party, that did not bring the application within the ambit of Order 14A **RSC**, as the explanatory notes referred to facts contained in the affidavits which are filed in respect of the application and not the pleadings.

4.4 The learned Judge further observed that there were claims for payment for the manning of the building, which were not related

to the drawings. She also noted that there was a claim for damages for repudiation of the agreement.

4.5 The learned Judge in concluding, made a finding that the issues raised in the notice of motion could not stand and could only be determined at trial. She further held that the issues raised could not determine the rights of the parties with finality in relation to the reliefs which were being sought. The motion was accordingly dismissed.

5.0 THE APPEAL

5.1 Disenchanted with the Ruling, the Appellants appealed to this Court advancing the sole ground as follows:

“The learned trial Judge in the court below erred in both law and fact when she held that the issues raised in the notice of motion cannot stand and that they can only be determined at trial. Further that the issues raised cannot determine the rights of the parties with finality in relation to the reliefs which were sought.”

6.0 ARGUMENTS IN SUPPORT

- 6.1 At the hearing, Mr Chibeluka and Mr Chilufya, Counsel for the 1st and 2nd Appellants respectively, relied on the jointly filed Appellants' heads of argument, which they augmented with brief oral arguments.
- 6.2 In arguing the sole ground, it was submitted that the notice of motion to determine the matter on a point of law in the court below was predicated on provisions of Order 14A/1 (1) **RSC** as read with Order 33/3 **RSC**. Our attention was drawn to the case of **Tembo and Another v Chitambala**² at page 338, where Mutuna J, as he then was, observed that Order 33/3, allows for raising of a preliminary issue on facts, law or partly of fact or law. That there is no requirement that a preliminary issue should be raised on points of law only.
- 6.3 According to the Appellants, the question that was raised by the Appellants was one of law.
- 6.4 It is noted that the majority of the arguments by the Appellants relate to the function of pleadings, the

separation of claims and other issues which do not speak to the sole ground of appeal. They are therefore not necessary to recapitulate and consider.

7.0 ARGUMENTS IN RESPONSE

- 7.1 In response to the sole ground of appeal, Mr Tembo, Counsel for the Respondent, submitted that Order 14A **RSC**, cannot be invoked where material facts are in dispute. That since the Appellants' affidavits traversed and contradicted the Respondents evidence, the court below rightly declined to determine the matter summarily.
- 7.2 According to the Respondent, it did not contravene any provision of **The Zambia Institute of Architects Act¹**, as the design works were lawfully executed by a registered Architect and as such, there was no illegality
- 7.3 It was further submitted that, the Appellants have enjoyed the benefit of the design works and services paid for by the Respondent.
- 7.4 On the issue of pleadings raised by the Appellants, it was submitted that, it was not part of the legal questions in the

court below. Reliance was placed on the case of **Limpic v Mawere & Others**³, where the Supreme Court stated as follows:

“The issue raised was not pleaded and argued in the court below and the learned trial Judge did not rule upon it. As an appellate court we cannot properly deal with it now.”

7.5 According to the Respondent, the argument is incompetently before the court as it was not before the court below and it must therefore be disregarded.

8.0 ANALYSIS AND DECISION

8.1 We have considered the Ruling being impugned and the arguments by the parties. The sole ground of appeal attacks the finding by the learned Judge that the issues raised by the Appellants did not fall within the ambit of Order 14A **RSC** and were not suitable for determination under that Order.

8.2 It is evident from the notice of motion to determine matter on point of law, appearing at page 275 of the record of

appeal (*the record*), as earlier alluded to, that the motion was made pursuant to Order 14A/2 as read with Order 33/3 **RSC**.

8.3 It is, however, clear from the Ruling being impugned, that the learned Judge only considered and determined the preliminary issues pursuant to Order 14A **RSC** and did not invoke Order 33/3 **RSC**.

8.4 In the case of **Kashikoto Conservancy Limited v Darrel Alexander Watt**⁴, we considered at length the applicability of Orders 14A and 33/3 **RSC**. We opined that Order 14A deals with the determination of questions of law or construction of any document. Order 14A/1 provides as follows:

“ 1 – (i) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that -

- (a) Such question is suitable for determination without a full trial of the action; and**
- (b) Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.”**

8.5 We went on to state that Order 14A/2/3, provides the requirements for employing the procedure under Order 14A as follows:

- (a) The defendant must have given notice of intention to defend, by filing the memorandum of appearance and defence;**
- (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;**

(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.

8.6 As regards Order 33, Order 33/3 states as follows:

“The court may Order any question or issue arising in a cause or matter whether of fact or law or partly of fact or law and whether raised by the pleadings or otherwise to be tried before, at or after the trial of the cause or matter, and may give direction as to the manner in which the question or issue is to be stated.”

8.7 We stated that Order 33/3 should be read together with Order 14A and 18/11 **RSC**. Under Order 33/3 **RSC**, the court has power to try a preliminary question of law or fact before, at or after the trial. Order 33/3 therefore envisages a trial or inquiry into the issues, so as to establish it as a matter of fact or law in the determination of the whole cause or matter.

8.8 Order 33/3 **RSC**, is not suited for the disposal of the cause or matter on a point of law as envisaged under Order 14A **RSC**. In other words, there cannot be a determination summarily under this Order, without trial of the issues.

8.9 We note that the court below, without giving directions and ordering a trial on the questions which were raised before it, proceeded with summary determination of the issues. Although the learned Judge at the end of the day dismissed the motion, it erred in determining the issue as if it had solely been raised under Order 14A **RSC**, when it had actually been raised under that Order as read with Order 33/3 **RSC**.

8.10 As regards the Order that the issues raised can only be determined at trial, we find nothing wrong with that Order, as Order 33/3 **RSC**, empowers the court to try the issues before, at or after the trial. In this case as was earlier alluded to, trial had already commenced and it was therefore only logical and convenient to try the issues at trial. We find no basis on which to fault the learned Judge. In any case, the learned Judge did not shut the door in the

Appellants' faces; she merely deferred the determination of the issues to trial.

9.0 CONCLUSION

9.1 In the view that we have taken, the appeal is dismissed for lack of merit. Costs to the Respondent to be paid forthwith. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE



A.M. BANDA-BOBO
COURT OF APPEAL JUDGE