

***IN THE HIGH COURT FOR ZAMBIA**

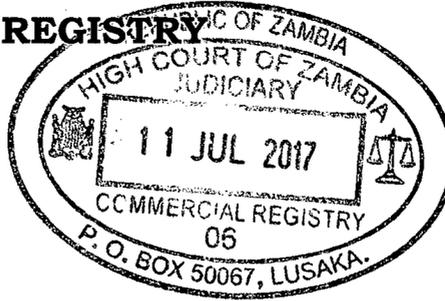
2017/HPC/0083

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



SCIROCCO ENTERPRISES LIMITED

PLAINTIFF

AND

BELL EQUIPMENT LIMITED

DEFENDANT

Before The Hon Lady Justice Irene Zeko Mbewe

For the Plaintiff : N/A

For the Defendant : *Ms L. Maboshe instructed by Messrs
Corpus Legal*

R U L I N G

Cases Referred To:

1. *Genesis Finance Ltd v Longreach Commodities Ltd and 5 Others*
2012/HPC/0144.
2. *CMA CGM Zambia Limited v Interfood Zambia Limited* 2016/HPC/0276.
3. *Jamas Milling Company Limited v Amex International SCZ Judgment No*
20 of 2002
4. *Access Bank v Group Five/ZCON Business Park Joint Venture (suing as a*
Firm) SCZ/8/52/2014
5. *Mukisa Biscuits Manufacturing Company Limited v West End Distributors*
Company Limited [1969] E A 696.

6. *DBZ and KPMG and Others v Sunvest Pharmaceutical and Sun Pharmaceuticals Limited DBZ SCZ No 10 of 1997*

Legislation Referred to:

1. *High Court Rules, Cap 27 of the Laws of Zambia.*
2. *Rules of the Supreme Court, 1999 Edition*

This is a Ruling on the Defendant's Notice of Motion to raise a preliminary issue pursuant to **Order 30 Rule 15 of the High Court Rules, Cap 27 of the Laws of Zambia** as read with **Order 33 Rule 3 Rules of the supreme Court, 1999 Edition**. The points for determination are as follows:

1. That the Affidavit in Opposition to summons to dismiss the action for being an abuse of Court Process filed on 15th May 2017 is defective as the same was not signed in accordance with **Order 5 Rule 20 (g) of the High Court Rules, Cap 27 of the Laws of Zambia** and **Section 6 of the Commissioner for Oaths Act, Cap 33 of the Laws of Zambia**.
2. That the Affidavit in Opposition is incompetently before the Court since it is not accompanied by Skeleton Arguments and List of Authorities, as is required by **Order 53 Rule (8) and (9) of the High Court Rules, Cap 27 of the Laws of Zambia**.

In support of the application, the Defendant filed skeleton arguments and list of authorities on 26th May 2017. Counsel for the Defendant argues that the Plaintiff's affidavit in opposition to the summons for an order to dismiss the action for being an abuse of court process filed on the 15th May 2017 is defective as it does not state the date and place of swearing of the jurat contrary to **Order 5 Rule 20 (g)** of the **High Court Rules Cap 27 of the Laws of Zambia** and **Section 6** of the **Commissioner for Oaths Act, Cap 33 of the Laws of Zambia**. In support of this proposition on defective affidavits, the Court's attention was drawn to the case of **Genesis finance Limited v Longreach Commodities and 5 Others¹**, **CMA CGM Zambia Limited v Interfood Zambia Limited²** which cases are persuasive in nature.

Counsel for the Defendant submits that the Plaintiff's application in opposition to the summons for an order to dismiss the action for being an abuse of Court process is incompetently before the Court as it is not accompanied by skeleton arguments and list of authorities as required under **Order 53 Rule Rules of the High Court, Cap 27 of the Laws of Zambia**. The Court's attention was

drawn to the case of **Jamas Milling Company Limited v Amex International Limited³** and **Access Bank v Group Five/ZCON Business Park⁴** in respect to the requirement to file skeleton arguments and list of authorities in the Commercial List.

The genesis of the Defendant's Notice of Motion to raise a preliminary issue arises from its application for dismissal of the action for abuse of court process made pursuant to **Order 18 Rule 19 (1) of the Rules of the Supreme Court, 1999 Edition.**

I have examined the Defendant's affidavit in opposition filed on 15th May 2017 and find that it offends the provisions of **Order 5 Rule 20 (g) of the High Court Rules Cap 27 of the Laws of Zambia** and Section 6 of the **Commissioner for Oaths Act, Cap 33 of the Laws of Zambia** as it does not state the date and place where it was sworn. For all intents and purposes I find that the said affidavit is defective and therefore incompetently before the Court and is expunged from the record. The consequence of expunging the affidavit in opposition from the record means that there is no opposing affidavit before this Court as the affidavit is considered as never having been filed and is deprived of its validity. Having

expunged the Plaintiff's opposing affidavit, the Defendant's application for an order to dismiss the action for being an abuse of court process remains unchallenged. The first preliminary issue succeeds.

The second preliminary issue relates to the affidavit in opposition being incompetently before Court as it is not accompanied by skeleton arguments and list of authorities as required under **Order 53 Rule 8 and (9) of the High Court Rules, Cap 27 of the Laws of Zambia** which states as follows:

“(8) An Applicant in an interlocutory application shall file together with the interlocutory application, skeleton arguments of the applicant’s case, stating the facts, law and authorities relied upon with copies of such authorities, wherever possible.

(9) Sub-rule (8) shall apply to a respondent filing an affidavit in opposition and to applications for assessment of damages”.

A perusal of the record confirms that the Plaintiff did not file skeleton arguments and list of authorities as required under **Order**

53 Rule 8 and 9 of the High Court Rules, Cap 27 of the Laws of Zambia. I take this opportunity to caution Counsel that rules of Court are meant to be obeyed. Those who choose to ignore them do so at their own peril and there is a plethora of authorities in this respect. This preliminary issue succeeds.

The Defendant's Notice of Motion is predicated on **Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition** and it states as follows:

"(3) The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

This Order is to be read with **Order 14A of the Rules of the Supreme Court** which states as follows:

"1. (1) 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.**

(2) Upon such determination, the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have -

- (a) had an opportunity of being heard on the question; or**
- (b) consented to an order or judgment on such determination**

The question to address is what is the effect of the preliminary issue succeeding? It is trite that a preliminary issue may dispose of a matter on a point of law or fact, or on both partly points of law and fact. This is the more reason why preliminary issues must be rigorously scrutinised to obviate from situations whereby litigants cannot pursue their matters further. I am persuaded by the Kenyan case **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Company Limited**⁵ where the Court held as follows:

"If inappropriately applied, it can be a dangerous tool of operation. It would lock out deserving litigants out of their case. On the other hand it could condemn deserving respondents to undue pressure and costs in pursuing undue litigation. This is a delicate balancing act under all circumstances."

In my view, this case aptly puts the position of Notice of Motion to raise a preliminary issue into perspective and the implications. The aim of a preliminary issue is to save the Court's time and the parties by not going into the merits of the application because there

is a point of law that will dispose of the matter summarily. I opine that the raising of a preliminary issue which envisages dismissal of a claim should not be used to avoid liability.

In the case in *casu*, the Plaintiff made no response to the Notice of Motion to raise preliminary issues and it is therefore taken to be unchallenged and unopposed. Since a preliminary issue has the effect of dismissing the Plaintiff's case without hearing it, the Court must consider the sufficiency of the cause of action alleged to amount to an abuse of court process before disposing of the matter.

The Plaintiff by way of writ of summons claims for the following reliefs:

- (i) Payment of the sum of US\$311,332.40 being rentals incurred to the Plaintiff whilst it rented the PR744 Dozer from the Defendant;
- (ii) Payment of loss of use of 850 C Bull Dozer from May 2014 until September 2016 when the parts were delivered back to the Plaintiff
- (iii) Payment of the sum of US\$499,200 as special damages for loss of business

- (iv) Damages for fraudulent misrepresentation
- (v) Damages for inconvenience and distress caused by the Plaintiff
- (vi) Interest on the sums claimed and found
- (vii) In the alternative or in addition any other order the Court may deem fit
- (viii) Interest
- (ix) Costs

Under Cause No 2015/HPC/0567 the Plaintiff is Bell Equipment Zambia Limited whilst the Defendant is Scirocco Enterprises Limited. The Plaintiff's claim is for:

- (i) Payment of the sum of US\$132,888.40 being outstanding rentals for the rent of PR744 Dozer pursuant to a rental Agreement or any such sum found to be due
- (ii) Interest on the sum found to be due to the Plaintiff
- (iii) Damages for breach of contract
- (iv) Legal costs
- (v) Any other relief the court may deem fit.

A perusal of the pleadings on records shows that the cause of action in 2015/HPC/0567 arises from the same rental agreement claimed in the current cause particularly relating to rentals of PR744 Dozer where either party is making different claims relating to the same subject-property. I find that there is a multiplicity in the claim. Forum shopping by a litigant is frowned upon by the Court as this may lead to conflicting judgments in different courts of similar jurisdiction. I am ably guided by the Supreme Court in the case of I am guided by the case of **DBZ and KPMG and Others v Sunvest Pharmaceutical and Sun Pharmaceuticals Limited**⁶ where the Supreme Court stated that:

"we also disapprove of parties commencing multiplicity of procedures and proceedings over the same subject matter".

I am satisfied that the claim (i) in Cause No 2015/HPC/0567 and claim (i) in the current action refer to the same subject matter being rentals relating to PR744 Dozer against the same parties in respect of the exercise of the same rights. In my considered view, this particular claim constitutes an abuse of court process.

I find that the rest of the claims in the current cause are not similar to those under Cause No 2015/HPC/0567 as they relate to 850 C Bull Dozer and the consequential claims arising from late delivery of parts, loss of business, damages for fraudulent misrepresentation, damages for inconvenience and distress caused to the Plaintiff, interest and costs. I am therefore not satisfied that the rest of the claim constitutes an abuse of court process which forms the background to the Notice of Motion.

As the Notice of Motion to raise preliminary issues are intended to dispose of the matter summarily, I opine that doing so will result in an injustice. In my considered view, this matter requires further interrogation by proof of evidence and hearing the parties herein. Notwithstanding that the Plaintiff's affidavit in opposition to the Defendant's application to dismiss the action for abuse of court process is expunged from the record, in order to serve the ends of justice, I hereby invoke **Order 3 Rule 2 High Court Rules, Cap 27 of the Laws of Zambia** which provides as follows:

"(2) Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory

order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."

Accordingly, I expunge the following claim in the writ of summons, namely:

- (i) *Payment of the sum of US\$311,332.40 being rentals incurred to the Plaintiff whilst it rented the PR744 Doze from the Defendant*

Consequentially, I grant the Plaintiff leave to amend the writ of summons and statement of claim pursuant to **Order 20 Rule 5 Rules of the Supreme Court, 1999 Edition**. The Plaintiff shall serve the amended court process on the Defendant by the 26th July 2017.

The Defendant to amend their defence and counterclaim if any by the 9th August, 2017.

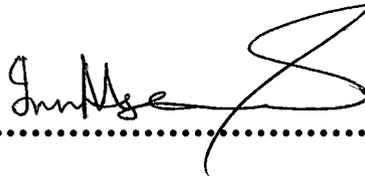
The Plaintiff shall then file its amended reply and defence to counterclaim if any by the 16th August 2017.

The Defendant's preliminary issues partially succeeds.

I make no order as to costs.

Leave to appeal granted.

Dated in Chambers this 11th day of July 2017.

A handwritten signature in black ink, appearing to read 'Irene Zeko Mbeve', is written over a horizontal dotted line.

HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE