

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

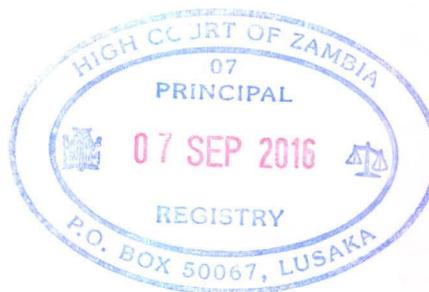
2016/HP/0328

BETWEEN:

KENNETH MUTETO

AND

ZESCO LIMITED



PLAINTIFF

DEFENDANT

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 6TH SEPTEMBER, 2016 - IN CHAMBERS

For the Plaintiff : *Mr. B. Katuta – Messrs Chanda Chizu & associates*

For the Defendant : *Mrs. M.S. Kabombe – Zesco Limited*

RULING

CASES REFERRED TO:

1. *Development Bank of Zambia and KPMG Peat Marwick V Sunvst Limited and Sun Pharmaceuticals Limited (1997) SJ 10(SC)*
2. *BP Zambia PLC v Interland Motors Limited 2001 ZR 37*
3. *Kelvin Hangandu and Company (a firm) V Webby Mulubisha (2008) ZR 82 Vol 2 (SC)*
4. *Lubanza v Pauwels 2012 ZR Vol 2 at page 518*

AUTHORITIES REFERRED TO:

1. *Section 13 of the High Court Act*
2. *Order III Rule 5, Order 4 Rule 9*

The Plaintiff was a Director Distribution and Customer Service. The Defendant was his employer. The Plaintiff claims as follows:-

1. *K27,160.50 being as underpayment on contract gratuity in respect of the contract which was terminated on 10th October, 2014.*
2. *Three months pay in lieu of notice in respect of the contract terminated on the 1st December, 2014.*
3. *Contract gratuity (to be assessed) in respect of the contract terminated on 1st December, 2014.*
4. *K16,628.92 being an underpayment on a contract gratuity in respect of the contract terminated on 6th March, 2015.*
5. *Interest on the late payment of the reduced sum of K419,977.62 in respect of the contract terminated on 6th March, 2015.*
6. *Interest*
7. *Costs*

On the 3rd May, 2016 the Defendant filed an affidavit in opposition to summons to strike out writ of summons and statement of claim for abuse of court process.

According to the Defendant on the 4th November, 2015, the Plaintiff did together with one Mr. Christopher Mubemba, commence an action by way of writ of summons issued from the High Court Principle Registry under cause number

2015/HP/2110 claiming specific performance of the same contract of employment and an order to purchase a motor vehicle also emanating from the termination of his contract of employment on the 6th March and this matter is active in the High Court.

It was brought to the court's attention that these matters which have been commenced under different courts are both arising from the same set of facts. The court was referred to **Section 13 of the High Court Act** which provides as follows:

“In every civil cause or matter which shall come in the dependence in the court, law and equity shall be administered concurrently, and the court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter so that as far as possible all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.”

The court was further referred to the case of **Development Bank of Zambia and KPMG Peat Marwick V Sunvst Limited and Sun Pharmaceuticals Limited (1997) SJ 10(SC)**¹ in which the court held that:

- (i) *“It was wrong plaintiff bank to commence an action in court and then at the same time adopt some measure of self-redress*
- (ii) *The injunction should be quashed because there is already an action on the same subject matter and the court does not approve of the commencement of a multiplicity of procedures, proceedings and actions in different courts which may result in the courts making contradictory decisions on the same matter.”*

The court was further referred to the case of *BP Zambia PLC v Interland Motors Limited 2001 ZR 372* in which the court held that:

“In terms of the Section (Section 13 of the High Court Act Cap 27) and in conformity with the court’s inherent power to prevent abuses of its processes a party in dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various courts.”

The court was also referred to the case of *Kelvin Hangandu and Company (a firm) V Webby Mulubisha (2008) ZR 82 Vol 2 (SC)*³ where the court held that:

“Once a matter is before court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involved, all interested parties have an obligation to bring all issues in that matter before that particular court. Forum shopping is abuse of process which is unacceptable.”

Counsel for the Plaintiff submits that in essence there is no multiplicity of actions. According to him the causes of action in

2015/HP/2110 and 2016/HP/328 are distinct and separate. In simple language the subject matter is not the same. Counsel pointed out that in cause No. 2015/HP/2010 the cause of action is the refusal by the Defendant to sale the personal to holder vehicles to the Plaintiff. Counsel submitted that cause 2016/HP/328 and 2015/HP/2010 are poles apart. Counsel pointed out that the Plaintiff in cause 2016/HP/328 is not re-litigating the same issues as are in cause 2015/HP/2110. Therefore there was no multiplicity of actions of any kind. Counsel submitted that since the causes of action are distinct and separate the possibility of two courts making various conflicting and contradictory decision will never arise at all thus arraying the Defendants fears. Counsel also referred the court to the case of ***Development Bank of Zambia and KPMG V Sunvsnt Limited (1995 - 1997) ZR 187.***⁴

Counsel pointed out that the rule giving a Plaintiff power to join on one writ several different causes of action is not an absolute one. It is not a rigid formulae cast in concrete. It is quiet flexible. Each case as it arises must be dealt with upon its special facts.

The court was referred to the case of ***Lubanza v Pauwels 2012 ZR Vol 2 at page 518***⁵ Makungu J. said:

“There is nothing to show the Respondent was unable to bring his claims under the previous case.”

Counsel submitted that the Plaintiff has given a plausible explanation as to why certain issues are being raised later. The concern was the impact this would have had on the 1st Plaintiff in cause 2015/HP/2110 such as elongating and delaying the trial to the detriment of the 1st Plaintiff. The 1st Plaintiff would have been put through extra expenses by being required to attend and be in proceedings in which he had no interest and that he would have prejudiced the interests of the 1st Plaintiff in that action in that there was no common questions of law or fact on the issues interse the two Plaintiffs on these issues.

Counsel submitted that this is a court of equity and that it would be unconscionable, hash and drastic and inequitable to dismiss this action because the Plaintiff did not raise them in the previous cause. In the issues raised by the Defendant is the fact that since the matter before this court arises from the termination of the Plaintiff's contract ought the matter be dealt with under one cause of action should the matter thus be struck out or in the alternative would the two matters be consolidated and be heard by one Judge.

I agree with Counsel for the Plaintiff that to struck out the matter would be a very drastic step indeed.

Counsel for the Plaintiff proposed that instead of striking out the matter the court can consider consolidating the two matters.

Order III Rule 5 that Counsel referred the court to provides as follows:

“Causes or matters pending in court may, by order of the court or a Judge, be consolidated and the court or a Judge shall give any directions that may be necessary as to the conduct of the consolidated actions.”

On the same issue **Order 4 Rule 9** provides as follows:

“(a) 1. Where two or more causes or matters are pending in the same division and it appears to the court:

- a) That some common question of law or fact arises in both or all of them or***
- b) That the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions or***
- c) That for some other reason it is desirable to make an order under this paragraph.”***

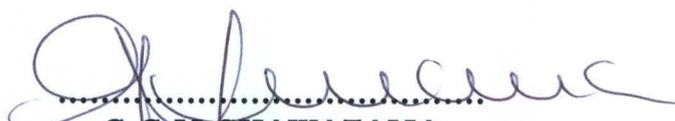
The court may order these causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any or other of them.

The main purpose of consolidation is to save costs and time. In the matter before me the Plaintiff is one of the Plaintiffs in the other matter. Counsel in the matter before me is Counsel in the

other matter. The rights to relief claimed in the matter before me are in respect of or arise out of the same transaction as the one before my sister Hon. Justice Lengalenga.

I order that the causes be consolidated. This will no doubt save costs and time especially since there is already a date set for trial

DELIVERED AT LUSAKA THIS 6TH DAY OF SEPTEMBER, 2016.



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G.C.M. CHAWATAMA
HIGH COURT JUDGE