

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 020 OF 2020

HOLDEN AT NDOLA

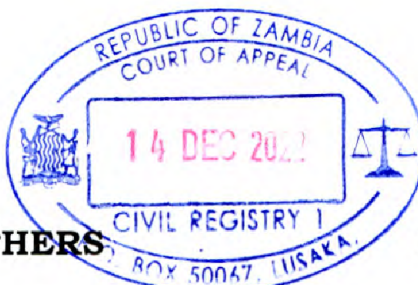
(Civil Jurisdiction)

B E T W E E N:

SAASA SHAMAMBO

AND

JONATHAN MWANZA & 13 OTHERS



APPELLANT

RESPONDENTS

CORAM: Chashi, Siavwapa and Banda-Bobo, JJA

ON: 15th November and 14th December 2022

For the Appellant: N/A

For the Respondents: N/A

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court

Cases referred to:

- 1. Anderson Kambela Mazoka & Others v Mwanawasa & Others (2005) ZR, 135***
- 2. Associated Chemicals Limited v Hill and Delamain Zambia Limited & Another-SCZ Judgment No 2 of 1998***

Legislation referred to:

- 1. The Companies Act, No 10 of 2017***

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 is an appeal against the Ruling of Honourable Lady Justice G. Milimo delivered on 13th December 2021.

1.2 In the said Ruling, the learned Judge dismissed the Appellant's (*who was the applicant and 2nd defendant in the court below*) application for misjoinder.

2.0 BACKGROUND

2.1 On 11th June 2021, the Respondents, who are the plaintiffs in the court below, commenced an action by way of writ of summons against Techserve Logistics & Car Hire Limited (the Company) and the Appellant as 1st and 2nd defendants respectively. The reliefs being claimed are as follows:

- (1) An Order for the payment of underpayments on gratuity severance and leave payments due to the plaintiffs in the sum of K789,105.00**
- (2) Damages for breach of contractual obligation to pay the plaintiffs dues on time**

2.2 It was averred in the attendant statement of claim that the Appellant is and was at all material times a Director in the 1st defendant Company entrusted with the conduct and activities of the 1st defendant. That the Respondents were employed in different positions in the Company through the 2nd defendant. That later on, their services were terminated by the 1st defendant through the 2nd defendant. The reliefs being sought were therefore directed at both defendants.

2.3 In its defence settled on 24th June 2021, the 1st defendant denied that the Respondents were employed through the Appellant and also that the terminations were done by the Appellant. It was averred that the Respondents were not entitled to the reliefs being sought as all payments due to them were duly paid.

3.0 APPLICATION FOR MISJOINDER

3.1 On 30th June 2021, the Appellant filed into court an application for misjoinder pursuant to Order 14/5 (2) of **The High Court Rules¹ (HCR)** on the following grounds

- (1) That there were no averments or allegations or otherwise connecting him to the reliefs or remedies being sought and that therefore was wrongly made a party to the proceedings.**
- (2) That the plaintiffs were employed and later terminated by the 1st defendant.**
- (3) That the 1st defendant has a separate personality and capable of defending this matter.**
- (4) That he has no interest in the matter and therefore, not likely to be affected by the results of the matter.**

3.2 In the accompanying affidavit, the Appellant deposed that there is no averment and or allegation of fact or otherwise connecting him to the reliefs being sought. That the Respondents were employed and terminated by the 1st defendant. Exhibited to the said affidavit is a copy of the

contract of employment and a letter of termination of one of the Respondents.

3.3 In opposing the application, the Respondents filed an affidavit in opposition deposed to by Jonathan Mwanza, the Respondents' representative in which he deposed that the Appellant has played an active and instrumental role in the whole affair whilst hiding behind the role of Director. That in fact, he has been making all the decisions in his personal capacity without consultation with the other Directors. According to the Respondents, they will be severely prejudiced if the Appellant was removed as he was complicit in how the funds were applied.

4.0 DECISION OF THE COURT BELOW

4.1 After considering the affidavit evidence and the arguments, the learned Judge formulated the following issues for determination:

- (1) Whether or not the applicant was the Director of Techserve Logistics Car Hire Limited**

**(2) Whether or not the Applicant had control of
the affairs of the said Techserve**

- 4.2 The learned Judge after considering Section 85 (5) of **The Companies Act**¹ confirmed the Appellant as Director of the 1st defendant. As regards the issue of control, the learned Judge was of the view that the Appellant acted as a Director and should therefore be held to be a Director in accordance with Section 85 (a) (b) of the Act.
- 4.3 The Judge then went on to address the contention by the Appellant that the Company is a separate legal entity. The learned Judge agreed that the Company was a separate legal entity. The learned Judge then went on to apply the provisions of Order 15/6 (1) and (2) **HCR** and held that the Appellant shall remain joined as a party to the proceedings, as he is a necessary party to ensure that all matters in dispute are effectually and completely determined. In concluding, the learned Judge had this to say:

“ I further find that the applicant is liable for the liabilities of Techserve in accordance with Section 85 (5) of the Act No. 10 of 2015.”

4.4 The learned Judge as earlier alluded to, accordingly dismissed the application for misjoinder with costs.

5.0 THE APPEAL

5.1 The Appellant being dissatisfied with the Ruling has appealed to this Court advancing the following grounds:

- (1) The learned Judge erred both in law and fact when she held that the Appellant shall remain a joined party to the proceedings without considering the question of whether or not he has any interest in the matter.
- (2) The learned Judge erred both in law and fact when she held that the Appellant shall remain a joined party to the proceedings as he is a necessary party to ensure that all matters in dispute are effectively determined without

considering the main question raised by the application being that there are no averments and or allegations of fact or otherwise (in the pleadings) connecting the Appellant to the reliefs or remedies sought by the Respondent

- (3) The learned Judge erred both in law and fact when she held that the Appellant is liable for liabilities of Techserve Logistics & Car Hire Limited when Techserve Logistics & Car Hire Limited, the principal did not in its defence or through any means complain about the conduct of the Appellant as Director of the company
- (4) The learned Judge erred both in law and fact when she held that the Appellant shall remain a joined party to the proceedings despite having determined as an undisputed fact that the Respondents were employed by Techserve Logistics & Car Hire Limited which later terminated their contracts.

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

- 6.1 None of the parties appeared at the hearing of the appeal, despite having been notified. It is in that respect that we decided to proceed to determine the appeal based on the parties' respective heads of argument filed into Court.
- 6.2 In arguing the first ground, the Appellant submitted that the facts of the case as shown in the statement of claim and the defence, show that the Respondents were employed in various positions by the Company as shown by the contract of employment. That on 30th November 2020, Techserve Logistics terminated the Respondents' employment.
- 6.3 According to the Appellant, the Company, in its defence, admits to employing the Respondents though it denies underpaying them. That the defence traverses various issues raised and explains the nature of contracts that the parties had and their various entitlements after termination of the contracts

- 6.4 It was submitted that the High Court has jurisdiction pursuant to Order 14/5 (2) **HCR** to strike out an improperly joined party from the proceedings upon establishing certain facts. The Appellant contended that he was improperly joined to the proceedings. That the statement of claim and the defence are clear in so far as they show the nature of issues in dispute and the parties being called upon to help resolve the matter, which issues revolve around the underpayments.
- 6.5 It was further submitted that, the Appellant has no interest in the matter by virtue of the concept of privity of contract.
- 6.6 In arguing the second ground, it was submitted that there are no averments in the statement of claim and defence connecting the Appellant to the reliefs or remedies being sought by the Respondents. On the function of pleadings, our attention was drawn to the case of **Anderson Kambela Mazoka & Others v Mwanawasa & Others**¹ where the Supreme Court stated that:

“The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in Order to determine the matters in dispute between the parties.”

- 6.7 According to the Appellant, there are no facts alleged in the pleadings which invite the Appellant to answer at trial. That the pleadings do not in any way show a cause of action against the Appellant.
- 6.8 As regards the third ground, it was submitted that the court below erred in relying upon Section 85 (5) (b) of **The Companies Act**¹, as it relates to a situation where a person holds himself as a Director when in fact not and is therefore not applicable.
- 6.9 In arguing the fourth ground, it was submitted that the court below should have examined the relationship between the Appellant and the Company, which would have revealed that the Company is a limited liability company with distinct corporate personality from its

members or agents. Reference in that respect was made to Section 16 of **The Companies Act**¹, which provides as follows:

“A company registered in accordance with this Act, acquires a separate legal status, with the name by which it is registered and shall continue to exist as a corporate until it is removed from the Register of Companies.”

6.10 Our attention was also drawn to the case of **Associated Chemicals Limited v Hill and Delamain Zambia Limited & Another**², where the Supreme Court had this to say:

“It is wrong in principle to distinguish between old and new shareholders or between new and old management or treat business transactions giving rise to the claim as one essentially between individuals. Ngulube CJ stated, following the decision in *Salomon v Salomon & Co* that a “*a principle of the law which is now too entrenched to require elaboration is the corporate existence*”

of a company as a distinct legal person...upon the issue of the certificate of incorporation, the company becomes a body corporate”

6.11 It was submitted that the Appellant is independent and separate from the Company and as such cannot personally be liable for the liabilities of the Company, which has the ability to sue and be sued on its own and capable of defending itself in this matter. That as such the court below erred in holding that the Appellant should remain a party to the proceedings.

7.0 ARGUMENTS IN OPPOSING THE APPEAL

7.1 In response to the first ground, it was the Respondent's contention that the court below did not err when it stated that the Appellant should remain party to the proceedings. That the Appellant holds a paramount position as Director and as such is liable to sanctions under **The Companies Act**¹. Further that in his application for misjoinder, the Appellant failed to demonstrate that he lacked knowledge, wrong doing, consent, connivance or that he took

reasonable steps to avoid the contracts entered into by the company. That the Appellant is therefore an effective party to the proceedings.

- 7.2 That it has further been demonstrated that the Appellant played an active and instrumental role in hiding behind the role of Director of the Company, whilst making all the decisions relating to the matter without consulting other Directors and as such, his removal will severely prejudice the Respondents in this action.
- 7.3 According to the Respondent, the doctrine of privity of contract does not apply on the part of the Appellant because of the role he played.
- 7.4 In response to the second ground, it was submitted that the reliefs being sought by the Respondents are not specific to the company but also extends to the Appellant as a Director. That it has been demonstrated that the pleadings have disclosed the necessary cause of action against the Appellant.

7.5 In response to the third and fourth grounds, our attention was drawn to Section 105 (c) of **The Companies Act** and submitted that it is evident from his conduct as a Director in the misappropriation of funds, that the Appellant did not act in the best interest of the company.

8.0 CONSIDERATION AND DECISION OF THE COURT

8.1 All the four grounds of appeal in our view are related as they are basically attacking the learned Judge's refusal to misjoin the Appellant from the proceedings. We shall therefore address all the grounds in one breath.

8.2 Order 14/5 (2) **HCR** provides as follows:

“The Court or a Judge may at any stage of the proceedings and on such terms as may appear to the court or a Judge to be just, Order that the name or names of any party or parties, whether as plaintiffs or as defendants improperly joined, be struck out.”

8.3 In amplifying the issue on having proper parties before the court, necessary for determination of the point at issue,

Order 15/6 of **The Rules of The Supreme Court² (RSC)**
provides as follows:

“6-(1) no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interest of persons who are parties to the cause or matter.

(2) subject to the provision of this rule, at any stage of the proceedings in any cause or matter, the court may on such terms as it thinks just and either of its own motion or on application-

(a) Order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party

(b) Order any of the following persons to be added as a party namely-

(i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.”

8.4 It is clear from the statement of claim that the Respondents in the court below, are seeking the following reliefs:

- (i) An Order for the payment of underpayments on gratuity, severance and leave payments due to the plaintiffs in the sum of K789,105.00
- (ii) Damages for breach of contractual obligation to pay the plaintiffs' dues on time.

8.5 It is clear from the reliefs being sought by the Respondents that the claim arose as a result of contracts of employment executed between the Respondents and the Company as a separate legal entity to which contract the Appellant was not privy. The Appellant can only be made liable upon lifting the Company's corporate veil by challenging the doctrine of separate legal personality and limited liability which was not done in this matter.

8.6 It must also be noted that the court will not at this stage decide questions of right on application under this rule as the court below did by making a finding that the Appellant

was liable for the labilities of the Company in accordance with Section 85 (5) of the Act, No 10 of 2015.

8.7 From the issues formulated by the learned Judge in the court below, it is clear that the court formulated wrong issues for determination and as such started on a false footing. The circumstances of this case demands that it would be unjust to maintain the Appellant to the suit as a defendant.

9.0 CONCLUSION

9.1 In the view that we have taken, the appeal succeeds. The Appellant is accordingly struck off from the cause as a defendant. Costs to the Appellant. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



M. J. SLAVWAPA
COURT OF APPEAL JUDGE



A.M BANDA-BOBO
COURT OF APPEAL JUDGE