IN THE HIGH COURT OF ZAMBIA **2011/HPC/0081**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N:

MUSA AHMED ADAM YOUSUF	PLAINTIFF
AND	
MAHTANI GROUP OF COMPANIES	1st DEFENDANT
FINSBURY INVESTMENTS LIMITED	2nd DEFENDANT
CHIMANGA CHANGA LIMITED	3rd DEFENDANT
RAJAN LEKRHAJ MAHTANI	4th DEFENDANT

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON THE 9th DAY OF MAY, 2011.

For the Plaintiff : N/A
For the Defendants : Mr. Chenda of Messrs. Simeza Sangwa & Associates

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R U L I N G

Cases Referred to;

1. ***Newplast Industries Limited –VS- Commissioner of Lands and Another (2001) ZR page 51.***
2. ***Drummond Jackson –VS- British Medical Association (1970) 1 ALL ER page 1094.***

Other Authorities Referred to:

1. ***The Legal Practitioners Act, Chapter 30 of the Laws of Zambia.***
2. ***The Supreme Court Practice 1999.***
3. ***Commercial Actions Practice Directions of the High Court (Amendment) Rules 1999.***
4. ***Legal Practitioner (Costs) Order, Statutory Instrument No. 9 of 2001.***
5. ***High Court Act, Chapter 27 of the Laws of Zambia.***
6. ***Odgers on Civil Court Actions Practice and Procedures, 24th edition by Simon Goulding, Sweet and Maxwell, 1996.***
7. ***Practical Approach to Legal Advice and Drafting, by Susan Blake 5th edition, Universal Law Publishing Co. Pvt. Ltd.***

This is an application to strike out writ of summons and statement of claim and to dismiss action. It is made by the Defendants; Mahtani Group of Companies, Finsbury Investments Limited, Chimanga Changa Limited and Rajan Lekhraj Mahtani, against the Plaintiff, Musa Ahmed Adam Yousuf. The application is made by way of summons supported by skeleton arguments, pursuant to Section 77 (3) of the ***Legal Practitioner's Act*** and Order 18 rules (7) and (19) of the ***Supreme Court Practice (white book),*** as read with the ***Commercial Action Practice Directions of the High Court (Amendment) Rules of 1999***.

The summons were filed on 25th February, 2011, and the endorsement there on is as follows;

> *"... for order that the writ of summons and statement of claim be stuck out and this action be dismissed with costs for the following reasons:*
>
> *(i) On the part of all the Defendants for non compliance with the provisions of section 77 (3) of the Legal Practitioner's Act, Cap 30;*
>
> *(ii) On the part of the First Defendant, in that the juristic capacity in which it has been sued has not been disclosed; and*
>
> *(iii) On the part of Second, Third and Fourth Defendants, for irregularity in that no clear cause of action is disclosed against them as required by the provisions of order 18 rule 7 and 19 of the Rules of the Supreme Court when read together with paragraph 1 of the Commercial Action Practice Directions for the High Court (Amendment) Rules 1999, Cap 27."*

The matter came up for hearing on 3rd May, 2011, having been adjourned to that date on 14th April, 2011. The said motion to adjourn was moved by counsel for the Plaintiff for purposes of affording him time to take instructions to respond to the application. At the hearing of 3rd May, 2011, counsel for the Plaintiff was not present and neither had he filed the Plaintiff's response to the

application. Further, there were no reasons given for his absence. I therefore proceeded to hear the application.

In advancing arguments in support of this application, Mr. Chenda, counsel for the Defendants relied upon the skeleton arguments. He, in this respect, began by arguing that the basis of the Plaintiff's claim is that he is a legal practitioner who had an agreement with the Defendants to provide legal services. Arising from the said agreement, he claims for remuneration. It was argued further that the Plaintiff's remuneration, as a practitioner, for contentious matters is prescribed by statute. This fact notwithstanding, Section 76 of the ***Legal Practitioners Act*** and paragraph 2 (2) of the ***Legal Practitioners (Costs) Order 2001***, allows a legal practitioner and client to enter into a written agreement for remuneration outside statute. This however, must be within the prescribed limits of the statute which provides a ceiling of an hourly rate of K540,000.00 for state counsel. It was argued in this respect that by paragraph 19 of the statement of claim the Plaintiff seeks to claim remuneration at the hourly rate of USD 750.00, which is well above the statutory ceiling.

Before advancing the second limb of his arguments counsel for the Defendants began by defining the phase "contentious business" and the word "costs" as per Section 2 of the ***Legal Practitioners Act***. He proceeded to argue that the said Act, prescribes the manner in which a practitioner may seek remuneration under an agreement with a client. My attention in this respect was drawn to Section 77 of the ***Legal Practitioners Act***. It was argued further, that since there is a statutory prescription of how to move a Court where a legal practitioner seeks to recover fees due to him, any departure is fatal to the grant of the relief sought. My attention in this respect was drawn to the case of ***Newplast Industries Limited –VS- Commissioner of Lands and Another (1)***. The action in its current state is fraugh with illegality because the Plaintiff as a regulated person should have moved the Court to; establish the existence of a written agreement for his usual charge out rates; determine the terms thereof;

ascertain the persons whom he believes are bound by such agreement; establish breach of such agreement; and seek its enforcement against the said persons. It was argued further that, by commencing the action in its current form, amounts to the Plaintiff masquerading as a normal litigant and brings an action couched seemingly, in simple contract. This, it was argued, is a dereliction of duty on the part of the Plaintiff as an officer of the Court. My attention in this respect was drawn to Section 85 of the ***Legal Practitioners Act***. The result of this is the Plaintiff not submitting himself to the stringent supervisory jurisdiction conferred on the Court by Section 77 (4) of the ***Legal Practitioners Act***.

In the last limb of his arguments, counsel advanced further arguments for striking out the originating process as follows; as against the First Defendant, the writ of summons and statement of claim do not disclose the juristic capacity of the First Defendant, as such the action against it should be struck out. (My attention in this respect was drawn to Order 3 rule 2 of the ***High Court Act)***; as against the Second, Third and Fourth Defendants, the pleadings were defective and do not reveal a cause of action. (My attention in this respect was drawn to Order 18 rules 7 and 19, of the ***white book*** and the case of ***Drummond – Jackson –VS- British Medical Association (2***) and Order 53 of the ***High Court Act)***. In articulating the argument further, counsel submitted as follows; with respect to the Second Defendant, the pleadings do not allege any specific acts or dealings between itself and the Plaintiff which give rise to the alleged contractual liability; with respect to the Third Defendant, the only connecting factor was the cheque payments made to the Plaintiff out of the Third Defendant's account. Apart from this there is no pleading of any specific acts on the part of the Third Defendant or dealings with the Plaintiff; and as regards the Fourth Defendant there is no pleading as to the nature and terms of the contract or indeed what the alleged breach is.

I have considered the arguments advanced by counsel for the Defendants. The grounds upon which this application has been anchored are highlighted at page R2 of this ruling and they are as follows;

(i) (i) *On the part of all the Defendants for non compliance with the provisions of section 77 (3) of the Legal Practitioner's Act, Cap 30;*

(ii) *On the part of the First Defendant, in that the juristic capacity in which it has been sued has not been disclosed; and*

(iii) *On the part of Second, Third and Fourth Defendants, for irregularity in that no clear cause of action is disclosed against them as required by the provisions of order 18 rule 7 and 19 of the Rules of the Supreme Court when read together with paragraph 1 of the Commercial Action Practice Directions for the High Court (Amendment) Rules 1999, Cap 27."*

In determing the grounds, I will first determine whether or not the Plaintiff as a legal practitioner can institute proceedings in his personal capacity. A determination of this issue will by and large resolve the major issue in contention in the matter. I will then proceed to address the points raised with respect to the pleadings.

It is evident from the heading on the writ and statement of claim that the Plaintiff has instituted this claim in his personal name of Musa Ahmed Adam Yousuf. This is notwithstanding the fact that he states, under paragraph 1 of the statement of claim, that he practices law in Zambia with the firm of AD Adams and Company. It is in this capacity, as practitioner, in the firm of AD Adams and Company, that the alleged services to the Defendants were provided. My finding is based on the provisions of Section 36 of the ***Legal Practitioners Act*** which prescribes the requirements for applying for a practicing certificate. The said Section states in part as follows;

"36 (i) (a) Every practitioner applying for a practicing certificate shall

(i) Obtain from the Association a certificate showing that he is a member in good standing of the Association.

(ii) <u>Deliver to the Association a written declaration in the prescribed form stating the name and place of business of the applicant</u> and the date of his admission and signed by the applicant ..."

(The underlining is the Court's for emphasis only).

The requirement for a legal practitioner to state the name and place of his business confirms the fact that a legal practitioner can only practice through a firm name and not in his personal capacity. Indeed practice in Zambia will show that this is what actually happens. Therefore, since he provides legal services under the umbrella of his firm, it is only in the firm name that the Plaintiff can institute an action for payment of his fees. He can not claim the fees in his personal capacity as he has no *locus standi* or sufficient stake in the funds to enable him do so. It is to this extent only that ground (i) as endorsed in the summons, moving this motion, succeeds.

I will not comment on the merits or demerits of the arguments raised in support whereof the Defendants relied upon Sections 77 and 85 of the ***Legal Practitioners Act*** because it would amount to my addressing the merits in the main action at interlocutory stage, which I am not permitted to do, suffice to say that if indeed the Plaintiff has wrongly commenced the action by way of the endorsement in the writ and statement of claim it can be addressed at the trial. To this extent the ***Newplast (1***) case cited by counsel for the Defendants does not aid their case as it can be distinguished from this case in that, the situation there, was a case of filing the wrong originating process as opposed to a wrong endorsement as alleged in this case. The case reaffirmed the position that mode of commencement of an action is determined by statute. It states, in this respect, at page 51 as follows;

> ***"It is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute."***

Regarding ground (ii), it has been alleged that the First Defendant has no juristic existence in the manner it has been named in the writ of summons. It was argued, in this respect, that the legal capacity of the First Defendant has not been disclosed for purposes of establishing whether or not it is amendable to a suit. Counsel therefore, submitted that the offending portion of the writ and statement of claim should be struck out and the claim against the First Defendant dismissed. My attention in this respect was drawn to Order 3 Rule 3 of the ***High Court Act*** and the ***Drummond - Jackson (2)*** case.

The First Defendant in this matter is named as Mahtani Group of Companies. There is no accompanying description such as "private limited company," "public company Plc," "a firm" (in which case the process should say that it is sued as a firm) or other legal entity. Order 6 rule 1 subrule 11 of the ***white book*** makes provision for endorsement in respect of the name of the Defendant. It states in this respect as follows;

> ***"The Plaintiff should see that the Defendant is described in the writ by his proper name. If a Defendant is misnamed the Plaintiff will have great difficulty in enforcing a judgment in default. A summon should in such case be issued for leave to amend the writ and judgment,"***

Regarding corporate and other bodies, Order 6 rule 1 subrule 17 of the ***white book*** states as follows;

> ***"If the true legal description of a corporate or other body is not apparent from its name, the description must be stated in the writ of summons, whether the party is Plaintiff or Defendant."***

It is apparent from the foregoing authorities that it is necessary to name the Defendant properly and state its capacity. This has not been done in this case in respect of the First Defendant as I have demonstrated. I have therefore been requested by the Defendants to invoke my inherent jurisdiction as per Order 3 rule 2 of the ***High Court Act*** and strike out the offending portions of the writ and statement of claim as they relate to the First Defendant and dismiss the action against it. Order 3 rule 2 of the ***High Court Act*** states as follows;

> ***"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"***

The foregoing provisions spells out the wide discretion that this Court enjoys in granting interlocutory orders. It does not specifically prescribe what steps this Court should take in situations where the pleadings do not conform to the law. The remedy has been provided for by Order 6 rule 1 subrule 11 of the ***white book*** which is the grant of leave to amend. The aggressive remedy of striking out can only be resorted to in instances where it merits as demonstrated by ***Odgers on Civil Court Actions Practice and Procedure*** by Simon Goulding, which states at page 206 as follows;

> ***"The attack may be directed at the whole of an opponent's pleading or upon certain objectionable portions of it; the objective may be to expose the entire action or the defence to it as sham, or one which cannot possibly succeed in law, and to obtain judgment accordingly; or it may be to force an opponent to amend the whole or some part of an embarrassing pleading under pain of having it struck out if he does not.***
>
> ***The provisions of Order 18, r. 19(1) and C.C.R. Order 13, r. 5 afford a prompt and summary method of disposing of groundless actions and of excluding immaterial issues. <u>Under this rule the Court has</u>***

power at any stage to strike out or order the amendment of the whole or part of any pleading or indorsement which discloses no reasonable casue of action or defence, or which is scandalous, frivolous or vexatious, or which may prejudice, embarrass or delay the fair trial of action, or which is otherwise an abuse of the process of the court. The court also has power on these grounds to stay or dismiss any action or to order judgment to be entered accordingly."

(The underlining is the Court's for emphasis only).

A Court must exercise the power to strike out sparingly as per the ***Drummond - Jackson (2)*** case which states at page 1094 as follows;

> ***"The summary power to strike out a pleading for failure to disclose a reasonable cause of action was one which should be exercised only in plain and obvious cases, where the alleged cause of action, on consideration only of the allegations in the pleading, was certain to fail."***

Given that the omission by the Plaintiff is not as serious as the ones highlighted in the passage cited from ***Odgers*** and in view of the holding in the ***Drummond - Jackson (2)*** case, the best remedy in such a situation is amendment. I am fortified in my finding by Susan Blake, ***A Practical Approach to Legal Advice and Drafting***, which states at page 120 as follows;

> ***"The third possibility is in RSC Order 20, rule 5, which provides that at any stage in the proceedings, the court may allow any party to amend a pleading on such terms as to costs or otherwise as may be just, and in such manner as the court may direct. An application for leave should be made by summons to a master. An amendment may be allowed after the expiry of the limitation period in the action if the court thinks just, provided the writ was***

issued in time. The name of a party may be amended even if the effect is to join a new party provided there was a genuine mistake, and the capacity in which a party sues may be amended. The name of a party can be amended even after final judgment if the purpose is simply to correct a slip, Singh v Atombrook Ltd (1989) 1 ALL ER 385."

To this extent, this application fails on ground (ii).

In the last ground, the Defendants allege that there is no clear cause of action against the Second, Third and Fourth Defendants as required by order 18 rule 19 subrule 1 of the ***white book,*** as read with Order 53 of the ***High Court Act***. It has been argued in this respect that the pleadings do not allege specific acts or omissions as regards the Second and Third Defendants. The connecting factor with the Third Defendant being only that cheque payments were made to the Plaintiff out of its account. As for the Fourth Defendant although the Plaintiff alleges the existence of an agreement to provide legal services, the pleadings do not state the alleged terms of the contract and the breach for which the Plaintiff seeks redress.

Order 18 (19) (1) of the ***white book*** states as follows;

"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) It discloses no reasonable cause of action or defence, as the case may be; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the Court;

> ***And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be..."***

On the other hand, ***The Practice Directions*** made pursuant to the ***High Court (Amendment Act) Order*** at 1 as follows;

> ***"Each statement of claim must state in clear terms the material facts upon which the Plaintiff relies and above all must show a clear cause of action failing which the statement of claim may be struck out, set aside or the action shall be dismissed summarily;"***

Odger on Civil Court Actions at pages 207, in interpreting Order 18 rule 19 (1), states as follows;

> ***"On an application based on this ground alone, no evidence is admissible. The application is analogous to a demurrer and the court can look only at the pleadings and particulars, not at any affidavit. The court's power is exercisable at any stage of the proceedings, but it should only strike out a pleading in "plain and obvious cases" and where no reasonable amendment would cure the defect."***

Applying the foregoing formula to this case, a perusal of the writ of summons and statement indicates that the Plaintiff seeks payment of the sums of USD 275,000.00 and K347,000,000.00. The said sums are denoted as being due in respect of legal services provided by the Plaintiff to the Defendants. The relief sought is therefore, in my considered opinion, clear. Further, under paragraphs 10, 11, 12, 14, and 15, the Plaintiff catalogues how instructions were given to him and the various payments made to him, in pursuit thereof, and the purpose of the said payment. At paragraph 19, he sets out his hourly rate (albeit, that it is subject to justification) and prior to that at paragraphs 7 and 8, states the nature of the work he was to undertake. Lastly at paragraph

26, the Plaintiff sets out the refusal and neglect by the Defendants to settle the fees.

I find that the foregoing paragraphs of the statement of claim make sufficient disclosure of the terms of the contract and indeed the alleged breach to enable the Defendants to respond to them. The pleadings therefore disclose a cause of action and the application therefore fails on ground (iii).

By way of concluding, since I have found that the Plaintiff lacks capacity to sue, there is no way this action can be sustained. I accordingly dismiss it with costs to the Defendants.

Leave to appeal is granted.

Delivered this 9th day of May, 2011.

Nigel K. Mutuna
HIGH COURT JUDGE