

BETWEEN:

WANG YING

AND

YOUJUN ZHUANG

WANG QINGHAI

KINGPHAR COMPANY ZAMBIA LIMITED

BUMU GENERAL TRADING FZE

THE ATTORNEY GENERAL



PETITIONER

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

Coram: Sitali, Mulenga and Mulonda, JJC on 10th December, 2020 and on 10th February, 2021

For the Petitioner	:	Captain I.M. Chooka (Rtd), Milimo Chooka & Associates
For the 1 st and 2 nd Respondents	:	No appearance
For the 3 rd Respondent	:	Mr. P. Chola, Lewis Nathan Advocates
For the 4 th Respondent	:	Mr. N. Yalenga, Nganga Yalenga and Associates Mr. S. K. Simwanza, Lungu Simwanza and Associates
For the 5 th Respondent	:	Mr. F.K. Mwale and Ms. D.M. Mwewa, Attorney General's Chambers

R U L I N G



Cited cases:

- 1. Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited S.C.Z Judgment No. 3 of 1997**
- 2. Maxwell Mwamba and Stora Solomon Mbuzi v Attorney General (1993) 3 Z. R. 166(SC)**
- 3. Mukumbuta and Others v NkwilimbaChoobanaLubinda and Others SCZ Judgment No. 8 of 2003**
- 4. Benjamin Mwelwa v Attorney General 2020/CCZ/007**
- 5. Chick Masters Limited and Another v Investrust Bank Plc SCZ Appeal No. 74 of 2014**

Legislation referred to:

- 1. Constitution of Zambia (Amendment) Act No. 2 of 2016**
- 2. Corporate Insolvency Act No. 9 of 2017**

Works referred to:

- 1. The Supreme Court Practice, 1999 Edition (White Book)**
- 2. Halsbury's Laws of England, Fourth Edition Reissue Volume 37**
- 3. Dr. P. Matibini, Zambian Civil Procedure: Commentary and Cases, Volume 1, LexisNexis, 2017**

Introduction

[1] This ruling is on an application by the 4th Respondent for dismissal of the Petition on a point of law filed on 16th October, 2020. The notice of intention to raise preliminary issue is made pursuant to Order 14A of the Supreme Court Practice 1999

Edition (White Book) which provides for disposal of an action on a point of law.

- [2] The 4th Respondent has raised the following three issues:
- i. **The presentation of the Petition is an abuse of court process and duplicity of actions.**
 - ii. **The Petitioner has no *locus standi* to present this Petition.**
 - iii. **The Petitioner did not obtain consent from the Business Rescue Administrator or leave from this Court to institute proceedings against the 3rd Respondent as provided for under Act No. 9 of 2017.**

Background

[3] The brief background to this matter is outlined in both the affidavits of the 4th Respondent and the Petitioner as well as in the Petition and the affidavit verifying the Petition.

[4] The common facts are that the 1st, 2nd and 3rd Respondents, through their respective Counsel, executed a Consent Order on 21st April, 2020 in the Kabwe High Court under cause number 2020/HB/15 directing that; the matters under cause numbers 2020/HPC/165 and 2020/HPC/15 be consolidated to cause number 2020/HB/015, the 3rd Respondent be placed

under supervision and begin business rescue proceedings, and Lewis Chisanga Mosho, the provisional liquidator of the 3rd Respondent under cause number 2020/HPC/165, be appointed as its Business Rescue Administrator under the Corporate Insolvency Act. Thereafter, the business rescue proceedings commenced.

[5] On 11th May, 2020, the 4th Respondent, as one of the shareholders in the 3rd Respondent, commenced an action under cause number 2020/HB/23 to among others, challenge the Consent Order and terminate the business rescue proceedings under cause number 2020/HB/15. On 13th May, the 4th Respondent joined cause number 2020/HB/15 as an Interested Party and filed an application to stay the business rescue proceedings pending the determination of its action under cause number 2020/HB/23.

[6] On 5th June, 2020, the 1st Respondent applied under cause number 2020/HB/15 for referral of some questions to the

Constitutional Court and to consequently stay the proceeding pending the determination of the referral. The questions in the referral relate to whether the proceedings under cause number 2020/HB/23 interfere with or undermine the judicial functions and powers of another High Court Judge under cause number 2020/HB/15 and the constitutionality of the parties commencing the proceedings under the two causes before different Judges over the same matter.

- [7] This application for referral was granted through the Ruling of 12th June, 2020. The 1st Respondent then applied under cause number 2020/HB/23 to stay those proceedings pending the determination of the referral to the Constitutional Court under cause number 2020/HB/15. However, this application was denied and the proceedings continued and the matter is now pending the delivery of Judgment. On 22nd September, 2020 the 1st, 2nd and 3rd Respondents obtained a stay of proceedings under cause No. 2020/HB/23 in the Court of Appeal pending an interlocutory appeal.

[8] Following the Ruling ordering the referral, the necessary documents were only received and processed by the Constitutional Court Registry on 30th September, 2020 under cause number 2020/CCZ/R003. In the meantime, the Petitioner filed the Petition herein on 28th September, 2020.

4th Respondent's evidence and submissions

[9] Coming to this instant application, the 4th Respondent and the Petitioner are relying on their respective affidavits and skeleton arguments which they augmented with oral submissions at the hearing. The 1st, 2nd, 3rd and 5th Respondents took no position on this application.

[10] The 4th Respondent in its affidavit in support deposed to by Wenxiu Pan, a director, states that at the time this Petition was being presented on 28th September, 2020, the Petitioner, as per paragraph 19 of the affidavit verifying Petition, was aware of the Ruling in cause No. 2020/HB/15 referring the questions raised as regards the constitutionality of commencing

proceedings under cause No. 2020/HB/23 in the light of cause No. 2020/HB/15. That the Petitioner, further in paragraph 25, stated that after the ruling on the referral, the record for cause No. 2020/HB/15 had not been moved to this Court to determine the constitutional issues. And that the Petitioner seeks precisely the same issues that are in the referral from the Kabwe High Court.

[11] It was the 4th Respondent's further averment that the Petitioner has no *locus standi*, more so that she was not a party to the cases before the Kabwe High Court and had not demonstrated the requisite interest. Further, that the Petitioner did not obtain either the express consent of the Business Rescue Manager or the leave of this Court to commence these proceedings against the 3rd Respondent, which is under business supervision, as provided under the Corporate Insolvency Act No. 9 of 2017.

[12] In the skeleton arguments in support, the 4th Respondent submitted that there was abuse of court process by the Petitioner for bringing multiple actions over the same matter. That as demonstrated in the affidavit in support of this application, the Petitioner was aware that there was a referral to this Court from the Kabwe High Court case under cause number 2020/HB/15. Further, that the issues and reliefs sought by the Petitioner are couched in exactly the same manner as the referral under cause number 2020/CCZ/ R003.

[13] It was the 4th Respondent's further argument that the Petitioner was a meddlesome busy body and her misguided Petition amounts to duplication as held in the case of **Development Bank of Zambia and Another vSunvest Limited and Another**¹. It was added that there are many authorities in this jurisdiction which have held that duplication amounts to abuse of court process.

[14] On the issue of *locus standi*, the 4th Respondent's contention was that the Petitioner did not have the requisite *locus standi* on the ground that she was not a party to the proceedings before the Kabwe High Court and that she merely claims to be owed money without requisite proof, otherwise she would have raised her claim under cause number 2020/HB/15. In support of this argument, reliance was placed on the case of **Maxwell Mwamba and Stora Solomon Mbuli v Attorney General**².

[15] The 4th Respondent in arguing the third ground submitted that the Petitioner did not obtain consent from the Business Rescue Administrator or leave of this Court to institute these proceedings. Section 25 (1) of the Corporate Insolvency Act No. 9 of 2017 was quoted as providing for the mandatory requirement for one to obtain either the consent of the Business Rescue Administrator or leave of court. However, that in this case the Petitioner has not satisfied either of the two mandatory requirements.

[16] The 4th Respondent prayed that the Petition should be dismissed as an abuse of court process and that the Petitioner's counsel should be condemned in costs for the deliberate act of duplication and abuse of court process in line with the authority of **Mukumbuta and Others v NkwilimbaChoobanaLubinda and Others**³.

[17] In augmenting the 4th Respondent's skeleton arguments, Mr. Yalenga submitted that the Petitioner rushed to petition this Court while being fully aware that the referral was making its way through the judicial system as acknowledged in her affidavit in which she was lamenting the delay in transmitting the record from Kabwe to this Court.

[18] Co-counsel, Mr. Simwanza reiterated that the reliefs being sought by the Petitioner are the same reliefs sought in the constitutional reference and that the parties in both the referral and this Petition are the same except for the Petitioner who nonetheless has demonstrated knowledge of the referral.

Counsel added that the Petitioner's claim of being owed money should have been dealt with under the business rescue proceedings under cause number 2020/HB/15 rather than presenting a petition where there is no constitutional issue raised. Counsel concluded that the Petition be dismissed with costs.

Petitioner's evidence and submissions

[19] The Petitioner relied on her affidavit in opposition and skeleton arguments that on 23rd October 2020. In the affidavit, the Petitioner deposed that the 4th Respondent had misconstrued Article 128 of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution) which permits her to petition the court for redress. She averred that she did not need to be party to the High Court case for her to bring a petition and that at the time she commenced these proceedings there was no active or pending

proceedings before this Court relating to the subject matter hereof.

[20] On the issue of *locus standi*, the Petitioner stated that the 4th Respondent had over looked the definition of 'affected person' in the Corporate Insolvency Act which covers her as a former employee of the 3rd Respondent. As regards the requirement to obtain consent from the Business Rescue Administrator, the Petitioner exhibited a letter to that effect dated 22nd September, 2020 authorizing her to institute any court proceedings.

[21] In the skeleton arguments in opposition, the Petitioner submitted that the issues for determination in these proceedings, such as the constitutionality of and whether or not the matter under cause number 2020/HB/23 ought to be stayed, are subject matters that can only be determined by this Court under Articles 128 and 122. It was the Petitioner's further argument that there were no multiple actions before this

Court when this Petition was presented. Further, that the Petitioner could not join the actions in the High Court for purposes of raising a constitutional issue because the High Court had no jurisdiction to hear and determine a matter relating to the interpretation of the Constitution by virtue of Article 128.

[22] The Petitioner, on the issue of *locus standi*, submitted that as a former employee she was an affected person as defined by section 2 (1) of the Corporate Insolvency Act. It was also her submission that she had the requisite authority from the Business Rescue Administrator to commence court proceedings through the letter of 22nd September, 2020. The Petitioner concluded that the motion should be dismissed for lack of merit with costs to the Petitioner.

[23] In augmenting the skeleton arguments in opposition, Counsel for the Petitioner, Capt. Chooka, submitted that only this Court has authority to determine the matter brought by the Petitioner

in this matter as the Petitioner was not a party to either the Kabwe High Court cases or the referral under cause number 2020/CCZ/R003. Hence, that the 4th Respondent's preliminary issue lacks merit and should be dismissed with costs.

4th Respondent's reply

[24] In the affidavit in reply, the 4th Respondent reiterated that Article 128 does not give *carte blanche* rights to persons without *locus standi* to commence petitions. That as per paragraph 7 of the affidavit verifying facts in the Petition, the Petitioner clearly stated that at the time of presenting her petition, she was aware that there was a referral from the Kabwe High Court to determine the precise questions she has raised in these proceedings. That this is *ipso facto* an admission of duplicity. It was further averred that the Petitioner's status under the Corporate Insolvency Act was only applicable to the matters before the Kabwe High Court which she did not join and that her claim of being owed salary

arrears was being litigated in cause number 2019/HP/1068 and is denied by the 3rd Respondent in its defence therein.

[25] Mr. Yalenga, Counsel for the 4th Respondent, submitted in reply that the Petitioner as per her submission of being an affected person should have raised her grievances in the High Court cause number 2020/HB/15. That by not doing so and instead rushing to this Court she deprived herself of the necessary *locus standi* meaning that this Court has no jurisdiction to entertain her Petition.

[26] Further, that this Court in the case of **Benjamin Mwelwa v Attorney General**⁴ emphasized the importance of jurisdiction before the Court can determine a matter. Mr. Yalenga reiterated that the Petition is misconceived and should be dismissed.

Decision

[27] We have considered the respective affidavits, skeleton arguments and oral submission by the parties. This application

has been brought pursuant to Order 14A of the White Book which provides in Rule 1 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.

.....

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provision of these rules.

[28] The 4th Respondent's motion raises two main issues namely, abuse of process also hinged on duplicity of actions on one hand and *locus standi* on the otherhand.

[29] The first issue is whether the Petition herein is an abuse of court process and duplicity of actions. The 4th Respondent's position is that there is abuse of court process in that the Petitioner commenced the matter whilst being fully aware that

there was an earlier referral to this Court regarding the same issues and that the Petition constitutes duplicity of actions. The Petitioner on the other hand acknowledges that she was aware of the referral but argued that her Petition was filed earlier before the referral was received and processed by this Court and therefore did not constitute duplicity of actions.

[30] This brings out two issues for determination. The first is whether the Petition is an abuse of process and the second is whether the Petition constitutes duplicity of actions.

[31] Regarding the first issue, we are alive to the fact that abuse of process is broad and encompasses wide ranging categories of conduct of which duplicity of action is only a part. The 4th Respondent has thus raised both the issue of duplicity and the broader issue of abuse of court process.

[32] As already indicated above, abuse of court process is a general term that covers a variety of conduct. Black's Law Dictionary 5th Edition defines abuse of process as:

The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process scope.....

This definition highlights the core aspects of improper and tortious use of a legitimate legal process. It covers instances where a party employs the legal process for some unlawful object or the object not intended by law. In other words, it's a misuse of the legal process or using the legal process in bad faith. The courts have broad inherent power to prevent abuses of the legal process.

[33] In his book *Zambian Civil Procedure:Commentary and Cases* Volume 1, Dr. Patrick Matibini cites the Supreme Court decision in **Chick Masters Limited and Another vInvestrust Bank Plc**⁵where abuse of process is explained as follows:

Abuse of court process can arise where the claim is vexatious, scurrilous or obviously ill founded.....Of course an action tainted by abuse of process is likely to compromise the integrity of the court's procedures. It might do so if it wastefully occupies the time and resources of the court in a claim that is obviously without merit. The court will prevent the improper use of its machinery and will not allow it to be used as a

means of vexatious and oppressive behaviour in the process of litigation.

The White Book in paragraph 18/19/18 discusses abuse of court process as follows:

This term connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of the machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation..... The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material.

In the subsequent paragraphs, some examples of abuse of court process are highlighted as re-litigation, spurious claims and hopeless proceedings, among others. This attests to the fact that the categories of conduct comprising abuse of court process are wide.

[34] These definitions and discussions show that an abuse of court process arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or simply where the process is

misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Hence, even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an improper or ulterior motive or purpose to the prejudice of the opposite party, what was originally a maintainable action may be dismissed as an abuse of the process of the court.

[35] In this matter, the 4th Respondent's contention is that there is abuse of court process as the Petitioner seeks the same reliefs that are the subject of the earlier referral order granted in June, 2020 which order she was fully aware of at the time of filing her Petition.

[36] In order to determine whether the reliefs sought by the Petitioner in these proceedings are essentially the same as those in the constitutional reference of 12th June, 2020 under cause No. 2020/CCZ/R003 we hereby reproduce the same. In the constitutional reference the three questions are as follows:

- i. Whether or not the actions and conduct of affected persons as shown in the affidavit in support hereof amount to interference with or undermine the judicial functions and or independence of a Judge or the Judiciary contrary to Article 122 of the Constitution of Zambia (Amendment) Act No. 2 of 2016?**
- ii. Whether or not the High Court sitting at Lusaka under cause Nos. 2020/HPC/0268 and 2020/HP/0486 and 2020/HPC/336 before different Judges and the High Court sitting at Kabwe before another judge under cause No. 2020/HP/023 can properly hear and determine those causes of actions considering that each of those causes interferes with the performance of the Judicial function by a Judge sitting at Kabwe under cause Nos. 2020/HB/15 and 2020/HPC/165 as consolidated contrary to Article 122(2) of the Constitution of Zambia Act No. 2 of 2016.**
- iii. whether or not the supervisory jurisdiction of the High Court includes supervision of one High Court Judge by another High Court Judge contrary to Article 134 (b) of the Constitution of Zambia.**

[37] In this Petition, the Petitioner seeks the following substantive reliefs:

- (a) **An Order that the continued hearing and determination of cause No. 2020/HB/23 by a High Court Judge other than Judge I. Kamwendo who sealed and signed the Consent Order under cause No. 2020/HB/15 interferes and undermines the performance of judicial functions and independence of Judge I. Kamwendo contrary to Article 122 of the Constitution of Zambia (Amendment) Act No. 2 of 2016.**
- (b) **An Order that the continued hearing and determination of cause No. 2020/HB/23 by a High Court Judge other than Judge I. Kamwendo amounts to supervision of one High Court Judge by another High Court Judge contrary to Article 122 of the Constitution of Zambia (Amendment) Act No. 2 of 2016.**
- (c) **An Order that the proceedings under cause No. 2020/HB/023 violate Articles 122 and 128 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and therefore are illegal and null and void *ab initio* pursuant to Article 1 (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.**

[38] The questions in the referral under cause No. 2020/CCZ/R003 and the reliefs sought in this Petition are similar and essentially relate to the two Kabwe High Court cases under cause numbers 2020/HB/15 and 2020/HB/23. The bone of contention in both matters centers on the alleged interference and undermining of the performance of judicial functions of a

Judge under cause number 2020/HB/15, by the action under cause number 2020/HB/23, contrary to Article 122 of the Constitution. Further, that the latter action amounts to supervision of one High Court Judge by another High Court Judge and therefore a violation of the constitutional provisions, mainly Article 122. We note that two other High Court cases are mentioned in the referral but with the Kabwe High Court case under cause number 2020/HB/23 at the center.

[39] The Petition and affidavit verifying facts in the Petition make it abundantly clear that the Petitioner was fully aware of and well versed in the proceedings under the two Kabwe High Court cases and also exhibits the referral order of 12th June, 2020. The Petitioner further states in paragraph 25 of her affidavit verifying Petition as follows:

25. That after the Ruling of the Court in cause number 2020/HB/15 which referred the constitutional issues to this Court, the file and record have not yet moved to this honourable court to allow it determine the pertinent constitutional issues that have been referred to it by his Lordship Justice I. Kamwendo.

[40] The issue then is whether, holistically considering the circumstances of his case, there is abuse of court process by the Petitioner. Our answer to this question is in the affirmative. We say so because it is clear that what moved the Petitioner to file this Petition was the delay in the transmission of the record for the referral to this Court. Indeed a delay of about four (4) months in transmitting the record in this case was inordinate. This, however, was not justification to commence another action regarding the same subject matter of the referral. We wish to state that where one feels that there is either a sense of urgency or inordinate delay in the transmission of the referral record, there are administrative avenues that can be resorted to in order to remedy the same. Further, once the referral is before this Court, any party like the Petitioner, who was not party to the proceedings that are the subject of a referral but has sufficient interest in the issues in the referral, is at liberty to apply to join as an interested party and be heard in the determination of the referral.

[41] Therefore, instituting an action, albeit a couple of days earlier than the processing of the referral, amounts to abuse of court process as it is an improper use of the court machinery. This amounts to hurling the parties to the referral to another court process which amounts to oppressive or vexatious behavior and is ill founded.

[42] Coming to the second aspect on duplicity of actions, the word 'duplicity' in common parlance means double. In civil procedure, this is usually used interchangeably with the word multiplicity. The reasons against duplicity or multiplicity of actions are among others, to ensure that the parties are not vexed twice over the same issue and that all issues touching on a particular subject matter are as much as possible finally determined in one action.

[43] Dr. Matibini, in *Zambian Civil Procedure: Commentary and Cases* touches on the issue of multiplicity of actions when discussing the **Chick Masters**⁵ case as follows:

Therefore, when considering whether the second claim is an abuse of court process, it is necessary to decide not only that the second claim could have been brought in the earlier claim, but whether it should have been brought in the first claim. Further, the court has to make a broad merits-based judgment taking into account all the public and private interests involved and all the facts. In this regard, the court must focus on the crucial question whether in all circumstances, the claimant is misusing or abusing the process of the court.

[44] The Petitioner has argued that since the Petition was filed a couple of days earlier than the processing of the referral in the Constitutional Court Registry, the Petition did not amount to duplicity as it was first in time.

[45] Indeed the general position is that it is normally the action that is commenced second or after the initial one that amounts to duplicity or multiplicity. However, despite this technical definition on what amounts to duplicity or multiplicity, in this particular case, the fact that the Petitioner was fully aware of the referral that was granted about four (4) months earlier, but which delayed in reaching this Court due to administrative lapses, brings this case under the ambit of the general or broader abuse of court process. It would have been a different

case if the Petitioner was not aware of the referral. We wish to stress that the processes of the Court must be used bonafide and not abused.

[46] The two limbs of the first issue have both succeeded. The first preliminary issue having succeeded, the second and third issues regarding *locus standi* and consent or leave to commence the action become *otiose* and we shall not discuss them any further.

[47] Order 14A Rule 1 (2) gives the Court discretion to either dismiss the cause or matter or make such other order as it deems fit. In terms of what is envisaged by the other orders other than dismissal, we are alive to the fact that these may include; an order for the causes or matters in issue to be consolidated on such terms as the court thinks just, an order for the matters to be tried at the same time or one immediately after another, or an order for any of the causes to be stayed until after determination of any other of them. We have

addressed our minds to the wide discretion. However, in this case, we are of the firm view that the proper course of action is to dismiss this Petition as prayed.

Orders

[48] In summary, the first preliminary issue has succeeded and this Petition is accordingly dismissed.

[49] Each party is to bear their own costs.



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A. M. Sitali
CONSTITUTIONAL COURT JUDGE



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M.S. Mulenga
CONSTITUTIONAL COURT JUDGE



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P. Mulonda
CONSTITUTIONAL COURT JUDGE