

IN THE COURT OF APPEAL FOR ZAMBIA

Appeal No. 126/2021

HOLDEN AT LUSAKA

CAZ/08/153/2021

(CIVIL JURISDICTION)

BETWEEN:

BELL EQUIPMENT ZAMBIA LIMITED APPELLANT

AND

FOVEROS MINING LIMITED 1st RESPONDENT

JOHN STAVROS SAMAREAS 2nd RESPONDENT



CORAM: KONDOLO SC, MAKUNGU, NGULUBE JJA

On 15th June, 2023 and 26th June, 2023

For the Appellants : Mr. K. Phiri of Messrs Corpus Legal Practitioners

For the Respondent : Not Present

J U D G M E N T

KONDOLO SC JA delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. Mike Hamusonde Mweemba v Kamfwa Obote Kasongo & Zambia State Insurance Corporation Limited (Intended Joinder) (2006) ZR 101**

- 2. Attorney General v Tall & Zambia Airways Corporation Limited (1995-1997) ZR 54**
- 3. Zulu v Avondale Housing Project Limited (1982) Z.R. 172.**
- 4. Hotelier Limited v Odys Works Limited & Finsbury Investments Limited (2012) Vol2 220 ZR**

LEGISLATION REFERRED TO

- 1. High Court Rules, High Court Act, Chapter 27, Laws of Zambia**
- 2. The Rules of the Supreme Court 1999 Edition (The Whitebook)**

1. INTRODUCTION.

- 1.1. This appeal is against the Ruling of the High Court delivered by Madam Justice I.Z. Mbewe on 31st December 2020.
- 1.2. The Appellant was the Plaintiff in the High Court, the Respondent was the Defendant and the 2nd Respondent was the Intended 2nd Defendant.
- 1.3. We shall refer to the parties throughout this judgment as Appellant, 1st Respondent and 2nd Respondent.

2. BACKGROUND

- 2.1 The Appellant and the 1st Respondent entered into a rental agreement by which the 1st Respondent was to rent 6 used dump trucks from the Appellant for a period of 18 months from 1st June, 2015 to 31st December 2016.
- 2.2 According to the Appellant, the 1st Respondent failed to make any rental payments despite taking possession of the trucks.
- 2.3 The Appellant commenced proceedings against the 1st Respondent by Writ of Summons seeking, *inter alia*; *payment of the sum of US\$1,095,626.12 pursuant to the rental agreement signed on 5th May, 2015.*
- 2.4 At some later date, the 1st Respondent applied to the Appellant for credit facilities in the sum of \$100,000. The application form was undated but signed on behalf of the 1st Respondent by the 2nd Respondent as a Director.
- 2.5 The application form had a part which provided for a surety and the 2nd Respondent signed as surety.
- 2.6 After the Appellant commenced the action against the 1st Respondent, it later applied to join the 2nd Respondent to the action.
- 2.7 The lower Court dismissed the application, hence this appeal.

3. PROCEEDINGS BEFORE THE HIGH COURT

3.1. The Appellant's Case

3.2. The Appellant filed an application for joinder of parties pursuant to **Order 14 Rule 5 of the High Court Rules (HCR)** as read together with **Order 15 Rule 6 of the Rules of the Supreme Court Rules, Whitebook, 1999 Edition (RSC)**.

3.3. The application was supported by an affidavit in which it was attested that the 2nd Respondent had pledged himself as a surety and agreed to be personally liable for all monies which may from time to time, be owing by the 1st Respondent to the Appellant in respect of goods sold and delivered or for any other cause.

3.4. That the Appellant wished to pursue the 2nd Respondent because it had not yet received any payment from the 1st Respondent.

3.5. The Appellant based its entire argument on the Application for Credit Facilities Form on which the 2nd Respondent signed as surety. The Appellant focused on the part which reads as follows;

"We the undersigned do hereby bind myself/ourselves jointly and severally, as surety in solidum and co-

principal debtor with the Purchaser for all monies which may now or from time to time be owing to the Seller in respect of goods sold and delivered or for any other cause.

I/We hereby revoke the benefits of excussion and division.

I/We hereby declare that this guarantee shall remain effective as security until the Purchasers indebtedness to the Seller has been fully discharged.”

3.6. The Appellant submitted that **Order 15 Rule 5 (1) HCR** as read with **Order 15 Rule 6 (2) (b) and (3) RSC** provides the High Court with wide powers, *inter alia*, to join a party who may be likely affected by the result; or to join a party whose presence will enable all matters in controversy to be adjudicated, and, to avoid a multiplicity of proceedings.

3.7. The Appellant also cited a number of cases which highlight the cited Orders and Rules as follows; **Mike Hamusonde Mweemba v Kamfwa Obote Kasongo & Zambia State Insurance Corporation Limited (Intended Joinder)** ⁽¹⁾;

Attorney General v Tall & Zambia Airways Corporation Limited ⁽²⁾ and Zulu v Avondale Housing Project Limited ⁽³⁾.

3.8. It was submitted that the 2nd Respondent had personally put himself out as a surety and should therefore be added to these proceeding so as to allow all matters in dispute to be effectually and completely determined.

3.9. The 2nd Respondent's Case

3.10. The 2nd Respondent had no argument with the law but submitted that in the circumstances of this case, nothing warranted the 2nd Respondent being joined to the action.

3.11. It was argued that the application for Credit Facilities is not dated and nothing connected it to the Rental Agreement and that the Appellant had provided no proof that the two documents ought to be read together.

3.12. Appellant's Reply

3.13. The Appellant, in reply, stated that the document showed that the 2nd Respondent bound himself in solidium and as co-principal debtor with the 1st Respondent for all monies which may from time to time be owing to the Appellant in respect of

goods sold and delivered or for any other cause. That the surety was a general surety to bind the 2nd Respondent to the 1st Respondent's debt however it arose.

4. HIGH COURT DECISION

- 4.1. The learned trial Judge considered the wording of clause 12 of the application for credit facilities form and found that it only bound the 2nd Respondent to sale and not to any rental.
- 4.2. The trial Judge further found that paragraph 13, which the 2nd Respondent also signed against does not refer to any rental agreement but states that it is in respect of goods sold and delivered or for any other cause.
- 4.3. The lower Court held that it would not extend the meaning of the phrase "**any other cause**" to include the rental agreement because the application for credit facilities makes specific reference to the sale of goods and not goods on hire under the rental agreement.
- 4.4. She further held that by the 2nd Respondent appending his signature to the application for credit facilities form as surety, in his capacity as director in the 1st Respondent company, the

surety does not include goods for hire under the rental agreement.

4.5. The lower Court concluded that the Plaintiff had failed to meet the threshold under **order 14 Rule 5 HCR** and consequently dismissed the application.

4.6. The Appellant promptly appealed to this Court.

5. APPEAL

5.1. The Appellant has appealed on the following grounds:

1. **The Court below erred in law and fact when it held at page R6 of the Ruling that the Appellant had failed to show sufficient cause as to why the intended 2nd Respondent should be joined to the proceedings and has failed to meet the threshold under Order 14 Rule 5 of the High Court Rules Chapter 27 of the laws of Zambia notwithstanding the evidence that the intended 2nd Respondent had clearly executed as a surety for any debt of the Respondent in his capacity as director.**
2. **The Court below erred in law and fact when it held at page R6 of the Ruling that it would not extend**

the meaning of the phrase “or for any other cause” to include the rental agreement, when the phrase was intended to cover any other transactions, the Respondents entered into which included rental agreements.

5.2. Appellant’s Arguments

5.3. The Appellant filed heads of argument dated 9th June, 2021, which basically repeated the arguments advanced before the lower Court. The gravamen of the Appellant’s case rested on the wording of clause 13 of the application for credit facilities which is reproduced in paragraph 3.5 of this Judgment.

5.4. THE HEARING

5.5. At the hearing, Counsel for the Appellant, Mr. Phiri informed us that the record of appeal and heads of argument which were filed on 9th June, 2021 were served on the Respondents on 10th June, 2021.

5.6. We further verified with our clerks that the Respondents were duly notified of the hearing. The Respondents having failed to file their heads of argument in opposition and being absent

from the hearing without notice, we decided to proceed with the appeal on the basis of the record of appeal and Appellant's heads of argument.

6. ANALYSIS AND DECISION

- 6.1. We have considered the record of appeal and heads of argument filed by the Appellant and shall address the two grounds of appeal as one.
- 6.2. As correctly observed by the learned trial Judge at page 12 (R5) of the record of appeal; in order to determine the 2nd Respondent's liability, if any, the true construction of the agreement would have to be determined. She then proceeded to consider clause 12 and 13 of the application for credit facilities.
- 6.3. In our view however, having started from a firm premise, the trial Judge proceeded to misapprehend the import of the document she was analysing.
- 6.4. Having perused the document, it is clear that it has two distinct parts, emphasised by the fact that the two parts both have provisions for appending signatures but requiring different information about the person signing. The learned trial Judge made no such distinction.

- 6.5. The signing provision after clause 12 provides for the capacity of the signatory and the 2nd Respondent signed as Director.
- 6.6. The signing provision after clause 13 provides for the Identification Number and Residential Address of the surety and the 2nd Respondent signed and endorsed his Identification Number.
- 6.7. The first part of the document runs from Clause 1 to 12 and is purely in relation to acknowledging the facility in the sum of \$100,000 and as correctly observed by the trial judge, clause 12 states that the 1st Respondent agrees to be bound by the standard terms and conditions of sale. As earlier stated, this part was signed by the 2nd Respondent in his capacity as director of the 1st Respondent.
- 6.8. Clause 13 forms the second part of the document and confines itself to the surety agreement. The trial Judge misapprehended the clause when she stated at page 13 (R6) of the record of appeal that the 2nd Respondent signed it in his capacity as a Director. She had earlier on page 12 (R5) of the record of appeal, stated that it was not clear in what capacity the 2nd Respondent had signed the second part of the subject document. We hold

the view that he signed the second part of the document in his personal capacity.

6.9. In declining the application for joinder, the trial Judge's reasoning was built around the notion that the undertakings by the surety in the second part of the agreement were confined to the activities or transactions referred to in the objects of the first part of the agreement which made specific reference to the sale of goods and not goods for hire under the rental agreement.

6.10. The learned trial Judge duly noted that the 2nd Respondent had placed himself as surety *for all monies which may now or from time to time be owing to the Seller in respect of goods sold and delivered or for any other cause*. She, however, narrowed the meaning of "*or for any other clause*" to exclude anything outside the goods sold and delivered but did not explain what, for example, might constitute "*or any other cause*".

6.11. In our view "*any other cause*" could only relate to a debt contracted from an activity, venture or agreement other than in respect of "*goods sold and delivered*".

6.12. Having dismissed the application on account of the foregoing, the learned trial Judge decided that it was irrelevant for her to

determine the effect of the application for credit facility not having been dated.

6.13. The 2nd Respondent had raised this issue in his arguments before the lower Court.

6.14. Though the failure to date an agreement can cause complications, the general position of the law is that failure to date a document does not necessarily render such a document invalid.

6.15. There are, however, certain types of documents, such as agreements which provide a definite duration that might be voidable purely on account of the document not being dated. This is because, in the event of a dispute, it might be challenging to determine the specific dates when such an agreement commences and ends.

6.16. The subject document does not provide a duration and it is not in dispute that the parties executed the application for credit facility for a specific purpose. The dispute relates to the extent of the indemnity provided by the surety clause and the capacity in which the 2nd Respondent signed it.

6.17. The trial Judge at page 13 (R6) of the record of appeal confined her decision to the Appellant having failed to meet the threshold under **Order 14 Rule 5 HCR** for joinder of parties.

6.18. In his arguments, both in the Court below and before this Court, the Appellant referred to the case of **Hotelier Limited v Odys Works Limited & Finsbury Investments Limited** ⁽⁴⁾ in which the Supreme Court noted that there is a gap in **Order 14 Rule 5 HCR** and resort should be had to **Order 15 Rule 6 (2)(b) and (3) RSC** which lays down the law on joinder of parties as follows;

“Order 15 Rule 6 (2)(b) and (3)

Subject to the provisions 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—

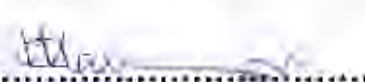
(b) order any of the following persons to be added as a party, namely—

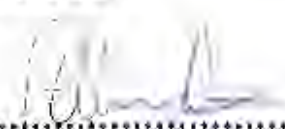
- (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or*
- (ii) any person between whom and any party to the cause or matter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

- 6.19. The 2nd Respondent clearly falls within the ambit of **Order 15 Rule 6 (2)(b) and (3) RSC** joining him will allow all matters in dispute in the cause or matter to be effectually and completely determined adjudicated upon.
- 6.20. The issue as to whether the application of clause 13 is limited by clause 12 is a triable issue that should be determined at trial under the same cause. Secondly, the relief the Appellant seeks against the 2nd Respondent is also a question best settled at trial under the same cause.
- 6.21. Joining the 2nd Respondent to this action does not prejudice any of the parties and also avoids the danger of a multiplicity of actions.
- 6.22. We consequently allow this appeal with costs to the Appellant.


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M.M. KONDOLO SC
COURT OF APPEAL JUDGE


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C.K. MAKUNGU
COURT OF APPEAL JUDGE


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P.C.M. NGULUBE
COURT OF APPEAL JUDGE