

**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

**APPEAL NO. 98/202
CAZ/08/027/2022**



BETWEEN:

CATHERINE HOVSTAD VAN AARDT

APPELLANT

AND

TURNER CONSTRUCTION LIMITED

1ST RESPONDENT

NIGEL GEORGE SEABROOK

2ND RESPONDENT

CORAM: KONDOLO SC, CHISHIMBA, BOBO-BANDA, JJA

On 27th April, 2023 and 29th June, 2023

For the Appellant: Mr. A.A. Dudhia & Mr. Yosa of Messrs Musa Dhudia
& Company

For the 1st Respondent: Mr. L. Zulu of Messrs Malambo & Company

For the 2nd Respondent: Mrs. B. Chanda & Mr. M. Mbulo of Messrs Moira
Mukuka Legal Practitioners

J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Zambia National Holdings Limited and United National Independence Party (UNIP) v The Attorney General (1993-1994) ZR.115**
2. **Mundia Sikatana v Attorney General (1982) ZR 109**
3. **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited & Sun Pharmaceuticals Ltd (1995-97) ZR 187**
4. **B.P. Zambia Plc v Interland Motors Limited (2001) ZR 37 page 41**
5. **Sangwa v Nkonde SC SCZ/2/2021.**
6. **Richard Smith v Judge Thomas O'Donnel v the Director of Public Prosecutions 2004 IEHC 72**
7. **Ntombie Zibwele Siwale (As administrator of the Estate of the late Zola Cheyo Jeremiah Siwale) v The Registrar of Lands & Deeds & Other SCZ/133/2012.**
8. **Optima Business Consultants Limited (In Liquidation) and Platinum Gold Equity Limited (In Liquidation) v Platinum Investments Ltd SCZ/195/2016.**
9. **Betty Chizyuka, Betrich Investments Limited & Hotel Macha-Leni Limited v Finance Bank Zambia Ltd CAZ/137/2019**
10. **Zambia Seed Company Limited and West Co-Op Haulage Limited and Western Province Cooperative Union Limited SCZ/112/2013**
11. **Zambia Consolidated Copper Mines Limited and Joseph Davis Chileshe (2002) ZR 86**

LEGISLATION REFERRED TO:

1. **Article 134 of the Constitution of Zambia (Amendment) Act No.2 of 2016**

2, High Court Act (& High Court Rules), Chapter 27, Laws of Zambia

1. INTRODUCTION

- 1.1. This is an appeal against the Ruling of the High Court delivered on 21st March, 2021 by Mr. Justice K Chenda.
- 1.2. The Appellant was the Defendant, the 1st Respondent was the Plaintiff and the 2nd Respondent was the Third Party.
- 1.3. When this matter was heard we sat with Bobo-Banda JA but she has since proceeded on long leave. This ruling is therefore a majority decision.

2. BACKGROUND

- 2.1. The Plaintiff commenced an action against the Defendant who then joined the Third Party from whom she sought indemnity against the Plaintiff's claims.
- 2.2. The Third Party filed his defence which he later applied to amend on the grounds that he had discovered that he had a claim against the Defendant and wished to amplify his defence and include a counter-claim.
- 2.3. The Defendant opposed the application on the ground that the proposed amended defence and counter-claim replicated a number of claims pending determination under Cause No.

2020/HP/0462 before Hon. Justice Mrs G Salasini ("Existing Action") in which the Third Party is the Defendant.

3. HIGH COURT DECISION

3.1. The trial Judge cited the law and various Supreme Court decisions on amendment of pleadings and opined that amendments can be allowed at any stage of the proceedings (before Judgement) provided that;

- (i) It will assist the Court identify the real question or questions in controversy.*
- (ii) It will not cause any prejudice which cannot be compensated by an order for costs; and*
- (iii) It will not otherwise change the action into one of a substantially different character which would more conveniently be the subject of a fresh action.*

3.2. After analysing the facts and considering the evidence and arguments of the parties, the Court came to the conclusion that some of the claims were indeed replicated in the Existing Action and the action before him.

3.3. That this gave rise to a multiplicity of actions and the danger of conflicting decisions by the two Courts. The trial Judge however, allowed the application on the following conditions;

- (i) That the Third Party herein should abandon the duplicated claims and reliefs sought under cause no. 2020/HPC/0462, in which event his counterclaim against the defendant herein shall be tried with the case for the Plaintiff against the Defendant after the Third Party has moved this Court for preparatory directions following filing of his amended defence; and*
- (ii) That if the Third Party maintains the paragraphs alluded to in 3.3 (i) above and if his application for amendment in cause 2020/HPC/0462 succeeds, then scheduling conference and trial of his counterclaim against the defendant herein shall only take place after final determination of cause 2020/HPC/0462.*

4. APPEAL

4.1. Dissatisfied with the Judgement, the Appellant appealed on the following grounds;

- 1. The Court below erred in law when it exceeded its jurisdiction by making pronouncements and orders**

which affect the Existing Action under cause 2020/HP/0462 which is pending determination before Honorable Madam Justice M G Salasini, a Judge of commensurate jurisdiction;

2. The Court below erred in fact and law when at paragraph 4.3 of the Ruling it ordered that the 2nd Respondent make an election of the following conditions and thereby pre-empting the ruling of Madam Justice Salasini in the Existing Action under cause number 2020/HP/0462:

i) That the 2nd Respondent should abandon the following paragraphs of his proposed defence and counterclaim in the application for amendment in cause 2020/HPC/0462, namely 19, 24 to 27, 47 to 54 and reliefs 61 j) and k) in the event that his counterclaim against the Applicant shall be tried with the case for the 1st Respondent against the Applicant after the 2nd Respondent has moved the Court for preparatory direction following the filing of his amended defence; and

ii) That should the 2nd Respondent maintain the above cited paragraphs and if his application for amendment in Cause 2020/HP/0462 succeeds then the scheduling conference and trial of his counterclaim against the Applicant shall only take place after final determination of cause 2020/HP/0462

5. PARTIES ARGUMENTS

5.1. We have considered the detailed arguments advanced by the parties in their filed heads of argument which we shall, however, not endeavour to reproduce for reasons that shall become clear.

6. THE HEARING

6.1. At the hearing, the parties essentially relied on their heads of arguments filed before the Court.

6.2. The Court observed that Messrs August Hill & Associates had filed a notice of non-appearance on behalf of the 1st Respondent. However, Mr Zulu who appeared on behalf of the 1st Respondent was not aware of the said notice. After interrogating Mr. Zulu, it became clear that he didn't have instructions to argue the appeal. We declined to hear any oral

arguments from him but he beseeched the Court to consider the 1st Respondents heads of argument filed by his firm on 18th June 2022.

7. DECISION AND ANALYSIS

- 7.1. We have considered the record of appeal and arguments advanced by the parties.
- 7.2. The record will show that the main bone of contention in this matter was with regard to reliefs being sought in the Existing Action which were replicated *in casu* thus resulting in a multiplicity of actions with the attendant danger of ending up with conflicting Judgement.
- 7.3. The reason we have avoided to delve into analysing the detailed and brilliant arguments advanced by the parties is because this panel heard an appeal (CAZ/133/2022) emanating from the Existing Action in which the crux of the matter was, *inter-alia*, the possibility of a multiplicity of actions on account of claims replicated in this matter and the Existing Action.
- 7.4. An excursion into analysing the arguments presented by the parties *in casu* will be a mere academic exercise because our decision in CAZ/133/2022 has essentially resolved the main

issue arising from this appeal which is a multiplicity of actions and the attendant dangers described in the preceding paragraph.

7.5. With regard to ground one, the Appellant submitted that the trial Judge herein had overstepped his jurisdiction by making orders which interfered with matters in Cause No. 2020/HPC/0462 which was under active determination by Salasini J, who is his fellow High Court Judge.

7.6. In our view Chenda J in no way interfered with the matter before Salasini J, he merely informed the parties of the available options in view of the replicated claims. He advised the parties on how he would proceed depending on which option the 2nd Respondent took. We would in fact commend Chenda J on his ingenuity in seeking to avoid a multiplicity of actions. Ground one consequently fails.

7.7. With regard to ground 2, Chenda J's ruling was overtaken by events because Salasini J proceeded to deny the 2nd Respondent's application to amend his defence and counterclaim. The 2nd Respondent appealed under CAZ/Appeal No. 133/2022 and our decision in that appeal orders that all matters to do with the Appellant and 2nd

Respondent's relationship with the 1st Respondent be removed from the proceedings before Salasini J and be heard by Chenda J under Cause No. 2021/HPC/0130.

7.8. The effect of our Judgement in CAZ/Appeal No. 133/2022 has a direct bearing on this appeal because the claims in the matter before Salasini J which were troubling the Appellant herein have been removed from her Court and renders ground 2 otiose.

7.9. This appeal consequently fails but because of its peculiar nature we order, as we did in CAZ/Appeal No. 133/2022 that each party bears its own costs.

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M. M. Kondolo SC
COURT OF APPEAL JUDGE


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F. M. Chishimba
COURT OF APPEAL JUDGE

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A.M. Banda-Bobo
COURT OF APPEAL JUDGE