

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

**APPEAL NO./133/2022
CAZ/08/087/2022**

BETWEEN:

NIGEL GEORGE SEABROOK

APPELLANT

AND

CATHERINE HOVSTAD VAN AARDT

RESPONDENT



CORAM : Kondolo SC, Chishimba, Banda-Bobo JJA
on the 27th April, 2022 and 29th June, 2023

For the Appellant: Mrs B. Chanda and Mr. M. Mbulo of Messrs Moira
Mukuka Legal Practitioners

For the Respondent: Mr. A. Dhudia and Mr. Y. Yosa of Messrs Musa
Dudhia & Company

J U D G M E N T

KONDOLO SC, JA delivered the Judgement of the Court.

CASES REFERRED TO:

- 1. Burton Construction Limited v Zaminco Limited (1983) ZR 20 S.C.**
- 2. Rosemary Bwalya, Attorney General & Commissioner of Lands v Mwanamuto Investment Limited SCZ/8/2023**

3. **Hesperides Hotels Limited and Another v Muftizade (1978)**
2All ER 1168
4. **Development Bank of Zambia & KPMG Marwick v Sunset Ltd
& Sun Pharmaceuticals Ltd Sun Pharmaceuticals Ltd**
5. **BP Zambia Plc v Interland Motors Limited (1995/1997) ZR
187**
6. **Cropper v Smith (1884) 26 Ch.D 700**
7. **Weldon v Neal (1887) 19 QBD**
8. **Minister of Home Affairs and Attorney General v Lee
Habasonda**
9. **Natural Valley Ltd v Zambia Revenue Authority
SCZ/Appeal/12/2021.**
10. **Wilson Masauso Zulu v Avondale Housing Project Limited
(1982) ZR 172**
11. **Sentor Motors Limited and 3 Other Companies. In Re: The
Companies Act (1995-1997) ZR 163**
12. **Zambia Telecommunications Company Limited v
Mulwanda & 2 Others (2012) Vol. 1 ZR 404 at page 413**
13. **Tombwe Processing Limited & Bak Storage Limited and
Saltlak Holdings Limited CAZ/Appeal/001/2019**
14. **Enock Kavindele & Another v Bologna Properties Limited
& Another CAZ/Appeal/ 136/2020**

LEGISLATION CITED:

1. **The High Court Act Chapter 27 of the Laws of Zambia.**
2. **The Rules of the Supreme Court of England, 1999 Edition.**

1. INTRODUCTION

- 1.1. This is an interlocutory appeal against the ruling of Justice G. Milimo Salasini dated 10th February, 2022 in which she dismissed the Appellant's application for an order for leave to amend defence.
- 1.2. The Respondent and Appellant were the Plaintiff and Defendant respectively in the Court below. In this Judgement, we shall refer to them as Appellant and Respondent.
- 1.3. When this matter was heard we sat with Bobo-Banda JA but she has since proceeded on long leave. This Judgment is therefore a majority decision.

2. BACKGROUND

- 2.1. On 8th May, 2020, the Respondent commenced an action by way of writ of summons against the Appellant, in which she sought an order of declaration of 50% ownership of various properties called Palm Grove, Sunbird 21, Sunbird 22 and a property located in Chilanga. She alleged that she and the Appellant acquired the said properties together.

- 2.2. The Respondent also sought an order of declaration that the parties hold the properties as tenants in common in equal shares and on sale, the proceeds of such sale are to be divided equally between the parties.
- 2.3. The Respondent further claimed for 50% payment of rentals from Sunbird 21 and an order that all claims by Phil Turner Construction Limited relating to the Palm Grove property should be paid out of the Appellant's portion of that property. Lastly, she claimed for damages for undue distress, mental suffering and inconvenience.
- 2.4. The Appellant filed his defence on 21st May, 2020, denying the Respondent's claims and alleged that only two properties were bought by the two of them and he bought and financed the rest of the properties alone. He alleged that the parties entered into an agreement on apportioning the properties bought jointly, but that the Respondent has gone ahead to secure 7b Seymour Road Wynberg Cape Town for herself and has gone ahead to make further claims to properties which she is required to transfer for the benefit of the Appellant.

3. THE APPLICATION BEFORE THE HIGH COURT

3.1. Applicant's Case

3.2. On 3rd September, 2020, the Appellant filed summons for an order for leave to amend defence pursuant to **Order 18 Rule 1 of the High Court Rules Chapter 27 of the Laws of Zambia (HCR)** and **Order 20 Rule 5(1) and (5) of the Rules of the Supreme Court, 1999 Edition (RSC)**.

3.3. The application was supported by an affidavit in which the Appellant deposed that after filing his defence, he discovered that he had a claim against the Respondent and as such, it became necessary for him to amplify his defence and file a counter claim hence his application to amend the defence.

3.4. The Appellant deposed that the inclusion of the counter claim was necessary to avoid a multiplicity of actions and allow all the issues to be determined by the same Court.

3.5. Respondent's Objection

3.6. The Respondent filed an affidavit in which she deposed that a review of the affidavit in support indicates that the Appellant's amendments aim to have the Court pronounce itself on the

Cape Town property being 7b Seymour Road, Wynberg, Cape Town, which property is not subject to the jurisdiction of this Court.

- 3.7. The Respondent further deposed that the Appellant intends to bring a claim regarding a dispute between Phil Turner Construction relating to a joint venture agreement in relation to the Palm Grove property. That the said dispute is already subject of an existing action under cause No. 2021/HPC/0130 to which the Appellant is party and that the Court dealing with that matter is better placed to deal with all claims and issues in controversy arising out of the purported joint venture.
- 3.8. The Respondent averred that the Appellant would not suffer any prejudice if the Court did not grant his application for leave to amend his defence because the Appellant can raise his claim in the proceedings under cause No. 2021/HPC/0130.
- 3.9. Reference was made to the cases of **Burton Construction Limited v Zaminco Limited** ⁽¹⁾ and **Rosemary Bwalya, Attorney General & Commissioner of Lands v Mwanamuto Investment Limited** ⁽²⁾ where the Court stated that the general rule is that amendments made under **Order 18** are unjustified

if they result in the mere recasting of the case in order to agree with the evidence and without the introduction of any new cause of action.

3.10. In her filed skeleton arguments before the lower Court, the Respondent contended that the application to amend the defence will not determine the real issues in controversy between the parties because all the amendments seek is to bring into contention the Cape Town property over which the Court has no jurisdiction. The Respondent cited the case of **Hesperides Hotels Limited and Another v Muftizade** ⁽³⁾ where the Court held that actions for trespass to foreign lands are not justiciable in the English Courts whether or not any question of title is involved.

3.11. The Respondent further contended that the amendment of the defence to introduce a counterclaim in respect of the joint venture with Turner Construction Limited leads to a multiplicity of actions over the same subject matter. The cases of **Development Bank of Zambia & KPMG Marwick v Sunset Ltd & Sun Pharmaceuticals Ltd** ⁽⁴⁾ and **BP Zambia Plc v Interland Motors Limited** ⁽⁵⁾ where the Supreme Court held

that all parties to a dispute relating to one subject matter should be brought to Court at the same time and that the administration of justice would be brought into disrepute if a party managed to get conflicting decisions which undermined each other from two or more different Judges over the same subject matter.

3.12. Lastly, the Plaintiff submitted that the Defendant would not suffer any prejudice if the amendment of the defence was not allowed because the Court in cause No. 2021/HPC/0130 will determine all the issues in controversy between the Plaintiff, Defendant and Turner Construction Limited

4. DECISION OF THE LOWER COURT

4.1. In considering the application for leave to amend pleadings and skeleton arguments, the lower Court stated that the purpose of amending a pleading is to ensure that the real question in controversy between the parties is determined.

4.2. The trial Court cited Order **20/8/6 RSC** and the cases of **Cropper v Smith** ⁽⁶⁾ and **Weldon v Neal** ⁽⁷⁾ which state that amendments should not be allowed if they would prejudice the

rights of the opposite party as existing at the time of the amendment.

- 4.3. The trial Judge dismissed the application to amend the defence after finding that the proposed defence and counter claim aimed at bringing new issues and also having the Court pronounce itself on a property over which the Court had no jurisdiction.

5. GROUNDS OF APPEAL

- 5.1 The appellant, being dissatisfied with the judgment, has appealed raising the following grounds of appeal:

- 1) The learned High Court Judge erred in law and in fact by failing to address its mind to the evidence and averments contained in the Appellant's Affidavit in Support of the application for leave to amend defence and the Affidavit in Reply, thereby dismissing the Appellant's application without providing any adequate reasons.**
- 2) The learned High Court Judge erred in law and in fact when it dismissed the Appellant's application for leave to amend his defence entirely on the ground that it brought in new issues as regards relief sought on the property in Cape Town, South Africa without considering and making a determination on the rest of the Appellant's**

proposed claims and reliefs contained in the application.

5.2 Appellant's Arguments

5.3 The Appellant filed heads of argument dated 27th June, 2022.

5.4 In ground one, the Appellant submitted that a review of the ruling at page 16 of the Record of Appeal reveals that the Court below did not address its mind to the evidence and the averments contained in the Appellant's Affidavit in support of the application for leave to amend the defence and neither did it address its mind to the Appellant's Affidavit in reply. That had it done so, it would have realized that the application did not only deal with introducing the proposed counterclaim but also with a proposed amendment of the defence. That the trial Judge gave no reason for ignoring the Appellants averments.

5.5 It was further submitted that that the ruling fell short of the guidelines provided by the Supreme Court in several cases including the cases of **Minister of Home Affairs and Attorney General v Lee Habasonda**,⁽⁸⁾ **Natural Valley Ltd v Zambia Revenue Authority and Attorney General** ⁽⁹⁾ and others in

which it was held that *inter alia* a Judgement must have the reasoning of the Court on the facts presented to it.

- 5.6 It was pointed out that the affidavit in reply clearly acknowledged and recognized that the Cape Town property was subject to the jurisdiction of the South African Courts and was merely mentioned to inform the Court of its existence to enable a proper and just determination of the matter. It was prayed that ground one be allowed.
- 5.7 In ground two, the Appellant submitted that the Court below dismissed the application on the basis that the Appellant had introduced new issues vis-à-vis the property in Cape Town and the Court did not consider the rest of the reliefs sought under the application.
- 5.8 That the other proposed amendments did not hinge on any perceived determination on the Cape Town property.
- 5.9 It was submitted that **section 13 of the High Court Act** enjoins that Court to conclusively address and determine all the claims advanced by the parties and that this position was repeated in the cases of **Wilson Masauso Zulu v Avondale**

Housing Project Limited ⁽¹⁰⁾ and **Sentor Motors Limited and 3 Other Companies** ⁽¹¹⁾.

5.10 In conclusion, the Appellant submitted that the trial Court's Ruling ought to be overturned because, contrary to settled jurisprudence, it failed to conclusively consider and determine the Appellant's claims.

6. Respondents Arguments

- 6.1. The Respondent equally filed heads of argument dated 5th August, 2022.
- 6.2. **In relation to ground 1** the Respondent cited the case of **Zambia Telecommunications Company Limited v Mulwanda & 2 Others (2012)** ⁽¹²⁾ another matter in which the Supreme Court set out what a Judgement should contain.
- 6.3. It was submitted that the trial Judge had met the benchmark set in the cited case because she had clearly stated at pages 17 to 19 of the record of appeal, that she had refused the amendment because it sought to introduce a new issue (The Cape Town Property) over which she had no jurisdiction and allowing it would prejudice the other party.

- 6.4. It was further submitted that the mere fact that the trial Judge has not addressed every single issue brought before it does not mean that it falls short of the requirements for Judgement writing. The ruling of this Court in the case of **Tombwe Processing Limited & Bak Storage Limited and Saltlak Holdings Limited** ⁽¹³⁾ **CAZ/Appeal/001/2019** in which similar shortcomings were found to not be good enough to remit the matter back to the lower Court. We were urged to dismiss ground one.
- 6.5. **With regard to Ground 2**, the Respondent clarified that its objection to the amendments was limited to any reliefs sought in relation to the Cape Town property and not with regard to the other reliefs sought by the Appellant. It was submitted that where a Court lacks jurisdiction it cannot make any orders in that regard as the decisions made by such a Court are a complete nullity. Several cases were cited to this effect including the case of **Enock Kavindele & Another v Bologna Properties Limited & Another** **CAZ/Appeal/136/2020** ⁽¹⁴⁾.
- 6.6. The Respondent submitted that she was only objecting to the amendments in relation to the Cape town properties and also in

particular to the reliefs sought in paragraphs 4.6 (a) (h); (i) and (j) because as allowing them would result in a multiplicity of actions because similar reliefs were being sought in another matter pending determination under cause no. 2021/HPC/0130 and which was on appeal before this Court under Appeal no. 98 of 2022.

6.7. It was submitted, in conclusion, that the appeal be dismissed insofar as it related to the Cape Town property; the claims for damages for breach of contract; and, the claims arising from the parties' relationship with Turner Construction Limited.

7. Appellants Arguments in Reply

7.1. In rejoinder on ground 1 the Appellant pointed out that the Respondent dwelt on the structure of the Judgement when the Appellant's main bone of contention was that the lower Court's Judgement should be set aside because it failed to conduct a balanced evaluation of the evidence as guided by the Supreme Court in cases such as **Attorney General v Marcus Kapumba Achiume** ⁽¹⁵⁾ (1983) ZR1; **Natural Valley Limited v Zambia**

Revenue Authority and Attorney General (16)

SCZ/Appeal/12/2021.

- 7.2. It was submitted that unlike in the **Tombwe Case (supra)** cited by the Respondent, where the Court was alive to the issues at hand, the affidavit evidence and the submissions by the parties, *in casu* the trial Judge did not address its mind to the Appellant's affidavit evidence.
- 7.3. On ground two the Appellant replied by stating that the trial Court erred by dismissing all the proposed amendments even though they did not hinge on any perceived decision in relation to the Cape Town property.
- 7.4. It was submitted that with regard the Respondent's opposition to the relief sought in paragraphs 4.6 (a) (h); (i) and (j) was hypocritical as the Respondent had made the exact claim as Plaintiff in Cause No. 2020/HP/0462.
- 7.5. That despite claiming that these claims will result in a multiplicity of actions because of similar claims before Chenda J, the Respondent continues to pursue these claims in Cause No. 2020/HP/0462.

7.6. That allowing the amendments, the Respondent did not oppose would not prejudice the Respondent and that the trial Court's ruling should be set aside accordingly.

8. HEARING

- 8.1. At the hearing Counsel for both parties essentially relied on the arguments advanced in their respective heads of argument.
- 8.2. Mr. Yosa on behalf of the Respondent admitted that in dismissing the proposed amendments on account of the Appellant introducing the Cape Town property and to use his words, the learned trial Judge "*threw out the baby with the bath water*". This was essentially an admission that the trial Judge should not have dismissed all the proposed amendments.
- 8.3. It was however submitted that the appeal should be dismissed in relation to the claims with regard to the joint venture agreement between the parties and Turner Construction Limited as they were replicated in the claim currently before the commercial under Cause No. 2021/HPC/0130.

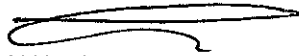
9. DECISION AND ANALYSIS

- 9.1. We have considered the record of appeal, the heads of argument and the authorities cited. The issue for determination in this matter is whether the Court below erred in law and fact by refusing to grant leave to the Appellant to amend the defence and to introduce the counter claim.
- 9.2. The final submission by Mr. Yosa, Counsel for the Respondent makes that task facing this Court a lot easier when he stated that when determining the application before her, she had *thrown out the baby with the bath water*.
- 9.3. We are in agreement with Mr. Yosa and by the same token he has conceded that the trial Judge need not have thrown out all the proposed amendments to the defence. He went further and submitted that there was no objection to the proposed amendments except as they related to the Cape Town property and to the claims arising from the joint venture agreement between the parties and Turner Construction Limited.

- 9.4. In the premises, we therefore allow the amendments that have not been objected to by the Respondent as set out in the proposed Amended Defence and Counter-Claim exhibited as “NGS 1” in the affidavit in support of summons for leave to amend defence filed on 3rd September, 2020. The amendments to the defence and counter-claim in the following paragraphs are accepted; 17; 38; 42 to 56; 58; 61 (b) to (g), (k), (l) and (m).
- 9.5. The trial Judge was on firm ground when she declined to allow amendments in relation to the Cape Town house on account of the fact that she has no jurisdiction to determine any issues in relation to the said property. In that regard the appeal in relation to the proposed amendments shown as paragraphs 45; 55; 57; 59; 60; 61 (a) is dismissed.
- 9.6. The panel that considered this appeal also heard the appeal CAZ/Appeal No./98/2022 arising from the ruling of Chenda J in Cause No. 2021/HPC/0130. We agreed with him that the claims complained about by the Respondent in respect to the parties’ relationship to Turner Construction Limited are indeed replicated in cause no 2021/HPC/0130 and they do indeed result in a multiplicity of actions.

9.7. In our view the claims are better determined under Cause No. 2021/HPC/0130 in which Turner Construction Limited is a party. As a consequence, the appeal is dismissed in respect of the proposed amendments shown as paragraphs 19; 24 to 27; 47 to 54 and 61 (h), (i), (j) and (k)

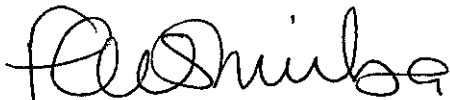
9.8. There being only partial success in this appeal, we order that each party bears its own costs.



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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