

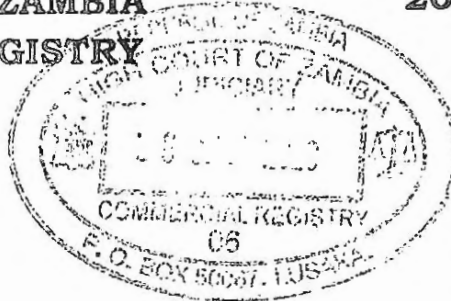
IN THE HIGH COURT FOR ZAMBIA

2016/HPC/0430

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

XUE JIANG XU

1ST PLAINTIFF

YANGTS JIANG ENTERPRISES LIMITED

2ND PLAINTIFF

AND

LEWIS MOSHO (*Sued as Receiver of Platinum
Gold Equity and Kitwe Development Limited*)

1ST DEFENDANT

LEWIS NATHAN ADVOCATES

(*Sued as a Law Firm*)

2ND DEFENDANT

CORAM: *Hon. Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka
this 28th day of January, 2020*

For the Plaintiffs: Mr. B. Phiri of Tutwa Ngulube and Company

For the Defendants: Mr. P. Chola of Lewis Nathan Advocates

RULING

Cases referred to:

- 1) *Magnum (Z) Limited v. Basil Quadrin (Receiver/Manager) and Grindlays Bank International (Z) Limited (1981) Z.R. 141.*
- 2) *Development Bank of Zambia and KPMG Peat Marwick v. Sunvest Limited and Sun Pharmaceuticals Limited, (1997) S.J. 10 (SC).*
- 3) *BP Zambia Plc v. Interland Motors Limited, SCZ Judgment No. 5 of 2001.*
- 4) *Chick Masters Limited and Another v. Investrust Bank Plc, Appeal No. 74 of 2014 (unreported).*

Legislation referred to:

- 1) *Order 14A of the Rules of the Supreme Court of England, 1999 Edition (the White Book).*
- 2) *Sections 346 and 281 of the Companies Act, Chapter 388 of the Laws of Zambia.*
- 3) *Order 15, rules 6 and 7 of the Rules of the Supreme Court of England, 1999 Edition (the White Book).*

This is the 1st and 2nd Defendant's application to dispose of the matter herein on a point of law, filed pursuant to Order 14A of the Rules of the Supreme Court of England, 1999 Edition (the White Book). The Summons to Dispose of Matter on a Point of Law was filed on 5th September, 2016 and is supported by an Affidavit in Support and Skeleton Arguments of even date; Further Affidavit in Support and Further Skeleton Arguments and List of Authorities in Support, both dated 12th September, 2016.

The Affidavit in Support was deposed to by Lewis Mosho, the 1st Defendant herein and a partner in the 2nd Defendant law firm. The Affidavit attested to the fact that on 30th October and 23rd November, 2015, the High Court, under cause number 2015/HN/285 placed Platinum Gold Equity Limited (In Liquidation), Kitwe Development Limited (In Liquidation) Optima Business Consultants Limited (In Liquidation), under compulsory winding up and the deponent was appointed as the Liquidator thereof. Copies of the Consent Judgments to that effect were produced as exhibits "LM1" and "LM2", respectively. The Affidavit also disclosed that the 1st Plaintiff is a shareholder of the 2nd Plaintiff. That, on 29th October, 2015, the High Court of Zambia placed the 2nd Plaintiff in receivership and one

Luwita Sayila was appointed as Receiver of property for the 2nd Defendant. A copy of the Order Appointing Receiver by Way of Equitable Execution and Granting Injunction Meanwhile, was produced as exhibit "LM3". Further, that, both Plaintiffs were parties to the Consent Judgments exhibited herein as "LM1" and "LM2", wherein the High Court placed Platinum Gold Equity Limited (In Liquidation), Kitwe Development Limited (In Liquidation) and Optima Business Consultants Limited (In Liquidation) under compulsory winding up and in which the deponent was appointed as the Liquidator thereof.

The deponent averred that as the Liquidator of the 1st and 2nd Defendants, he reviewed the loan agreement under which the 2nd Plaintiff advanced its monies to the 1st Defendant and ranked the 2nd Plaintiff in accordance with the terms of the loan agreement under which the 2nd Plaintiff ranked last among all other creditors of the 1st Defendant. A copy of the letter written to the 1st Plaintiff on 7th February, 2014, which showed that the 2nd Plaintiff could only be paid after all other creditors had been paid, was produced as exhibit "LM4".

It is averred that on 24th January, 2016, the Plaintiffs, acting through the Receiver of the 2nd Plaintiff, commenced an action in the High Court Commercial Registry under cause number 2016/HPC/0021, claiming the same amount of sums of monies allegedly owed by Kitwe Development Limited (In Liquidation) and Optima Business Consultants Limited (In Liquidation), the same sums shown in

exhibit "LM4" herein. Copies of the Affidavit in Support of Summons for Leave to Commence Proceedings filed under cause number 2016/HPC/0021 and a Statement of Claim filed under cause number 2016/HPC/0028, were produced as exhibits "LM5" and "LM6", respectively.

That, on 10th February, 2016, Justice Nigel K. Mutuna, then High Court Judge, dismissed the Plaintiff's entire action on a point of law on grounds that the action commenced by the Plaintiffs herein under cause number 2016/HPC/0021 was an abuse of the court process and forum shopping and condemned the counsel for the Plaintiffs therein to be personally liable for costs incurred in defending that action. The Ruling by Justice Nigel K. Mutuna to that effect, was produced as exhibited as "LM7".

The deponent averred that he was advised by Counsel that the action commenced by the Plaintiffs herein is the same action commenced under cause number 2016/HPC/0021, which action was dismissed by Justice Nigel K. Mutuna and that this action is therefore, another clear abuse of the court process and forum shopping as the Plaintiffs should have presented their grievances in the other existing action under cause number 2015/HN/285 where the Plaintiffs are a party as exhibited herein under exhibits "LM1" and "LM2".

In the Further Affidavit in Support, also sworn by Lewis Moshu, it was averred that the deponent is not a Receiver of Platinum Gold Equity Limited (In Liquidation) and Kitwe Development Limited (In Liquidation), but the Liquidator of the aforementioned companies as

evidenced by his initial Affidavit in Support filed on 5th September, 2016 and the 2nd Defendant is one of the advocates or law firms representing the aforementioned companies in the liquidation process. That, was advised by Counsel that not being a Receiver, he could not be sued in that capacity and therefore, is not the right party to this action. Further, that the 2nd Defendant being the advocates for the aforementioned companies in liquidation, is also a wrong party to this action. That, he was also advised by Counsel, that both Platinum Gold Equity Limited (In Liquidation) and Kitwe Development Limited (In Liquidation) are companies in liquidation and any action or otherwise commenced in relation to such companies or in relation to any assets or property thereof, cannot be commenced without leave of Court. That, there is no leave of Court obtained by the Plaintiff's to commence this action.

The application is opposed, and on 28th September, 2018, the Plaintiffs filed an Affidavit in Opposition sworn by Xue Jiang Xu, the 1st Plaintiff herein, who deposed that he commenced proceedings against the Receiver, Mr. Lewis Mosho for the recovery of the sum of USD8,182,432.00 plus interest. Let it be noted that I have disregarded the contents of paragraph 4 of the Affidavit in Opposition for containing extraneous matter, contrary to the provisions of Order 5, rule 15 of the High Court Rules, Chapter 27 of the Laws of Zambia, as it is in the form of a conclusion. I have also disregarded the contents of paragraphs 5-9 for being legal arguments, contrary to the provisions of Order 5, rule 15 of the High Court Rules. The said legal

arguments should have been raised in the Skeleton Arguments and not in the Affidavit.

In reply, the Defendants filed an Affidavit in Reply sworn by Lewis Mosho, wherein he averred that he has never been a Receiver of Platinum Gold Equity Limited (In Liquidation) and therefore, could not be sued as a Receiver. That, he has been the Liquidator of Platinum Gold Limited (In Liquidation) as the receivership of Platinum Gold Equity Limited was quashed by the High Court *ab initio*. Let it be noted again that I have not considered paragraphs 5, 7, 8, of the Affidavit in Opposition, for being legal arguments and paragraphs 9 and 10, for being conclusions, and therefore contrary to Order 5, rule 15 of the High Court Rules.

The Affidavit in Reply discloses that the 2nd Defendant are advocates for Platinum Gold Equity Limited (In Liquidation) who did not sell any property but acted as advocates for Platinum Gold Equity Limited (In Liquidation). Further, that there are many creditors who are still standing in the queue for payment in the liquidation process of Platinum Gold Equity Limited (in Liquidation) and the 2nd Plaintiff is a subordinated creditor who can only be paid after all secured creditors have been paid. That, as far as the liquidation process is concerned, there are no sufficient assets to cover all creditors' claims, including the 2nd Plaintiff. The deponent averred that the 1st Plaintiff has never been a creditor of a company in liquidation, including Platinum Gold Equity Limited (In Liquidation).

The application came up for hearing on 26th November, 2018 and both parties submitted that they would rely on the documents they had filed in support of their cases.

In the Skeleton Arguments and List of Authorities in Support of Summons to Dispose of Action on a Point of Law filed on 5th September, 2016, the Defendants argued that this action by the Plaintiff is irregular and a nullity as it has not been commenced by a Receiver of the 2nd Plaintiff but by a shareholder of the 2nd Plaintiff as well as the company itself. The Defendants' argue that when a company is in receivership, it has no capacity to bring or commence an action except through the Receiver. The Defendants cited the case of *Magnum (Z) Limited v. Basil Quadrin (Receiver/Manager) and Grindlays Bank International (Z) Limited*¹, where the Court held as follows:

"A company under receivership has no locus standi independent of its receiver. As long as a company continues to be subjected to receivership, it is the receiver alone who can sue or defend in the name of the company."

The Defendants contended that it was clear from the above case, that a company in receivership commences an action and defends an action through the receiver. That, in this case, the action has been commenced by the company in receivership through its shareholder who is not the receiver of the company, hence not entitled under law. Thus, the action is irregular and a nullity and as such, must be dismissed with costs on a point of law.

The Defendants contended further, that the action against the 1st and 2nd Defendants filed by the Plaintiffs herein, is an abuse of the court process and a duplicity of actions. They argued that the present action is a clear abuse of the court process, forum shopping and a misuse of the Court's jurisdiction as it was shown in the Affidavit in Support of this application that the Plaintiffs herein are parties to the Consent judgment in cause number 2015/HN/285 wherein the 1st Defendant is the appointed liquidator, and not receiver, as alleged by the Plaintiffs. Further, that the Plaintiffs' decision to commence separate action instead of expressing their grievances under cause number 2015/HN/285, to which they are parties, is clearly a duplicity and an abuse of the court process, which has been condemned by courts. That, the Supreme Court in the case of *Development Bank of Zambia and KPMG Peat Marwick v. Sunvest Limited and Sun Pharmaceuticals Limited*², put the issue clearly when it stated as follows:

"The court does not approve of the commencement of a multiplicity of procedures, proceedings and actions in different courts which may result in the courts making contradictory decisions on the same matter...the justice of the case demands that the parties must raise whatever they wish to raise with the court in the earlier action."

The Defendants also cited the case of *BP Zambia Plc v. Interland Motors Limited*³, to underscore the displeasure by courts of multiplicity of proceedings by parties and forum shopping.

The Defendants contended that from the Affidavit evidence before Court it is stated that on 24th January, 2016, the Plaintiffs, acting through the Receiver of the 2nd Plaintiff commenced an action in the High Court Commercial Registry under cause number 2016/HPC/0021 under which they claimed the same things being claimed in this action and on 10th February, 2016 Justice Nigel K. Mutuna, then High Court Judge, dismissed the Plaintiff's entire action on a point of law on grounds that the action commenced by the Plaintiffs herein under cause number 2016/HPC/0021 was an abuse of the court process and forum shopping and condemned Counsel for the Plaintiffs therein to be personally liable for costs incurred in defending the action. It was contended that it is clear from the authorities cited above, that the action by the Plaintiffs herein is one disapproved by courts as it is a duplicity and abuse of the court process as the reliefs sought in this action could have been sought under cause number 2015/HN/285.

It has been further argued that Section 346 of the Companies Act, Chapter 388 of the Laws of Zambia, as applied with the common law, provides the order or ranking of distribution in a winding up as follows:

- a) Secured creditors;
- b) Costs and expenses of winding up, including liquidator's remuneration;
- c) Preferential debts, such as ZRA dues and employment emoluments, etc.;
- d) Charges secured by a floating charge;

- e) Unsecured creditors
- f) Deferred debts, such as sums due to shareholders in their capacity as members of the company in liquidation, including dividends declared but not paid;
- g) Surplus, if any, distributed among members according to their rights under the articles of association or the terms of issue of their shares.

It was submitted that exhibit "LM4" in the Affidavit in Support of this application, provides that the debt was subordinated to the Development Bank of Zambia debt, creditors and shareholders' equity. That, it is clear that the 2nd Plaintiff's debt, if any, as creditor of Platinum Gold Equity Limited (In Liquidation), Kitwe Development Limited (In Liquidation) and Optima Business Consultants Limited (In Liquidation), ranks after all other creditors of the aforesaid companies in liquidation and the liquidator thereof can only entertain the 2nd Plaintiff's claim after all other creditors have been paid. Thus, this action is premature as the liquidator is in the process of attending to all creditors according to their respective rankings.

It was submitted that the Defendants herein, as Liquidator and advocates for the Liquidator of the companies aforesaid, are not personally liable to the Plaintiffs.

That, in view of the above submissions, this action be dismissed with costs for lack of merit.

On 12th September, 2016, the Defendants filed Further Skeleton Arguments and List of Authorities in Support of Summons to Dispose of Action on a Point of Law, wherein it was submitted that the parties to this action are the wrong parties, as the 1st Defendant has been sued in his capacity as receiver when he is not a receiver but a liquidator of Platinum Gold Equity Limited (In Liquidation), and Kitwe Development Limited (In Liquidation, both companies of which are not in receivership. Further, that the 2nd Defendant is one of the advocates for Platinum Gold Equity Limited (In Liquidation) and Kitwe Development Limited (In Liquidation).

Further, that the action herein is null and void as the Plaintiffs did not obtain leave of Court to commence the action herein. That, the Affidavit filed in support herein have clearly shown that the High Court placed Platinum Gold Equity Limited (In Liquidation) and Kitwe Development Company Limited (In Liquidation) in compulsory liquidation on 30th October, 2015 and 23rd November, 2015. That, Section 281 of the Companies Act, Chapter 388 of the Laws of Zambia provides:

“When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.”

It was contended that what the above section means is that any dispute relating to a company in liquidation or to any of its assets cannot be commenced without leave or permission of the Court. That, the Plaintiffs herein have commenced the action herein and the

said action relates to the assets of the companies in liquidation. That, there being no leave or permission from this Court, the action is disrespectful to the Court and a nullity. That, in view of the above submissions, it is the Defendants' prayer that this action by the Plaintiffs be dismissed with costs.

The Plaintiffs filed their Skeleton Arguments in Opposition to Summons to Dispose of Action on a Point of Point of Law on 16th November, 2018. The Plaintiffs submitted that the fact of the matter is that the Plaintiffs sued the Company at first and Consent Judgment was entered to liquidate the said Company and it was ruled that after the liquidation of the Company, the 1st Defendant as the Receiver, would distribute the monies to the parties accordingly. That, therefore, the actions commenced are two different matters, in that in the first cause of action the Plaintiffs sued the company, while in this action, the Plaintiffs sued the Defendant for not giving the money to the Plaintiffs after the liquidation of the company. That, therefore, the commencement of this action did not amount to abuse of court process because the facts are different. Further, that the debt owed to the Plaintiff was to be paid to him after the sale of the property and the action in cause number 2015/HN/285 referred to by the Defendants was a petition for the liquidation of the company and this action which was commenced by the Plaintiffs only relates to the question of settlement of debt. That, in this case there is no multiplicity of actions because the company which was sued at first and the Defendants are different persons or parties.

It was further submitted on behalf of the Plaintiff, that abuse of court process was defined in the case of *Chick Masters Limited and Another v. Investrust Bank Plc*⁴, where Kaoma, JS explained that:

“Abuse of court process can arise where the claim is vexatious, scurrilous or obviously ill-founded, such as where proceedings are started to pursue a claim which has already been dealt with by way of full and final settlement between the parties.”

That, it was clear from the authorities cited, that abuse of court process occurs where there's multiplicity of action where the matter has been dealt with fully by way of final settlement but one commences another action over the same facts with the same parties. That, it is clear that the Plaintiffs' commencement of this action was done in good faith and was not forum shopping. It was contended that the Plaintiffs' claim has not been settled fully by the Defendants because they have not been paid what is owed after the Court ordered the company to be liquidated to settle the debts the company owed. That, the two matters are different because in the first action the Consent Judgment was entered into with a view of settling the Plaintiffs' debt but the Defendants are holding on to the money, hence the Plaintiffs suing the Defendants to give the Plaintiffs the money they recovered from the liquidation of the company.

In conclusion, it was submitted on behalf of the Plaintiffs, that it is clear that the Plaintiffs' action is different from the first one because in the first cause, the issue was settled clearly by the Court ordering the liquidation of the company with a view of settling the debt. That, the Defendant were given the responsibility of distributing the monies

to the debtors accordingly, and they had not done so, hence the commencement of this action. Therefore, the Defendants had a duty to pay the money owed to the Plaintiffs the moment they recovered the sum of USD19,000,000.00 from the liquidation. With regard to the point raised by the 1st Defendant in the Affidavit in Support, of him not being a receiver of Platinum Gold Equity Limited (In Liquidation), and Kitwe Development Company Limited (In Liquidation), but a liquidator of the aforesaid companies, the Plaintiff responded that the 1st Defendant was initially the receiver of the aforementioned companies; he was receiving instructions on behalf of the company, hence him being sued as a receiver.

The Plaintiffs cited Order 15, rules 6 and 7 of the Rules of the Supreme Court, 1999 Edition (the White Book) which stipulated as follows:

"The Plaintiff is entitled to choose the person against whom to proceed, and to leave out any person against whom he does not desire to proceed. Under this rule, the Court has power on the application of the plaintiff to add or substitute a defendant..."

That, therefore, the correct defendant be substituted for the 1st Defendant in his capacity as liquidator to these proceedings. The Plaintiffs submitted that the issues raised on the point of law be dismissed and the Defendants be ordered to pay the Plaintiff's the money owed to them.

I have considered the documents filed both for and against the Summons to Dispose of Matter on Point of Law, including the

authorities cited. The points of law for consideration in this application are the following:

- 1) That the action is irregular and a nullity for having been commenced by a shareholder of the company and the company itself while under receivership instead of the Receiver;
- 2) That the action is an abuse of court process, a duplicity of actions and constitutes forum shopping.

With regard to point of law number (1) above, the Defendants are claiming that the 2nd Plaintiff is in receivership and the action herein has been commenced by the 1st Plaintiff who is a shareholder of the 2nd Plaintiff and the 2nd Plaintiff, which is the company in receivership. The Defendant have argued that when a company is in receivership, it has no capacity to bring or commence an action except through the receiver. For that argument, the Defendants have cited the High Court case of *Magnum (Z) Limited v. Basil Quadrin (Receiver/Manager) and Grindlays Bank International (Z) Limited*¹ where it was held that:

“A company under receivership has no locus standi independent of its receiver. As long as a company continues to be subjected to receivership, it is the receiver alone who can sue or defend in the name of the company.”

I find the holding in the *Magnum (Z) Limited v. Basil Quadrin* case persuasive and therefore, adopt the reasoning therein. The Plaintiffs have not contested the fact that the 2nd Plaintiff is in receivership and therefore, I will take it as a fact that the 2nd Plaintiff is indeed in

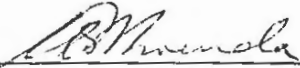
receivership. In fact, it would be remiss of me not to take judicial notice of the fact that cause number 2016/HPC/0028, an action involving the 2nd Plaintiff herein, was commenced by a receiver on behalf of the 2nd Plaintiff and the originating process indicated that the company (2nd Plaintiff herein), was in receivership. Therefore, being in receivership, the action herein should have been commenced by the 2nd Plaintiff's receiver and not a shareholder and/or the company itself. That requirement not having been met, the action herein was irregularly filed and hence, *null and void ab initio*.

Having found as above, it would be an exercise in futility to address the Defendants' other issue about the action being an abuse of court process, a duplicity of actions and forum shopping.

The action is accordingly dismissed with costs to the Defendants. The costs are to be agreed by the parties or taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 28th day of January, 2020.



DR. W.S. MWENDA
JUDGE