

SCZ Judgment No. 50 of 2014

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IN THE SUPREME COURT OF ZAMBIA

Appeal No.134/2010

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

CORPUS LEGAL PRACTITIONERS

Appellant

AND

MWANANDANI HOLDINGS LIMITED

Respondent

Coram: Muyovwe, Malila, JJS, and Lisimba, A/JS

On the 2nd September, 2014 and 31st October, 2014

For the Appellant: Mr. G. Pindani, Lewis Nathan Advocates

For the Respondent: Mr. M. Mutemwa, Mutemwa Chambers

JUDGMENT

Lisimba, A/JS, delivered the judgment of the Court.

Cases referred to:

- 1. Rural Development Corporation Limited Vs. Bank of Credit and Commerce (Z) Limited (1987) Z.R. 35.**

- 2. New Plast Industries Vs. The Attorney General and Commissioner of Lands (2001) Z.R. 51.**
- 3. Richard Nsofu Mandona Vs. Zambia National Commercial Bank Plc and Others (2008) Z.R. 23.**
- 4. Anti-Corruption Commission Vs. Barnnet Development Corporation Limited (2008) Z.R. (Vol. 1) 69.**
- 5. Collet Vs. Van Zyl Brothers Limited (1966) Z.R.75.**
- 6. General Nursing Council of Zambia Vs. Mbangweta (2008) Z.R. (Vol. 2) 105.**

Legislation referred to:

- 1. Section 24 (1) (d) of the Supreme Court Act, Cap 25 of the Laws of Zambia.**
- 2. Order 6, Rule 1 of the High Court Rules, Cap 27 of the Laws of Zambia.**
- 3. Sections 11 and 81 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia.**

Other authorities referred to:

- 1. Orders 20/8/52, and 59/1 /95 of the Rules of the Supreme Court, 1999 Edition.**

This is an appeal against a Ruling of the High Court sitting at Lusaka, dated 4th March, 2010 in which the Court granted, with costs, the Respondent's application to amend Writ of Summons and Statement of Claim. The effect of the amendment was to join the Appellant as 6th Defendant to these proceedings

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and to allow the inclusion of further claims against the Defendants in the Court below.

The brief background of this case is that on 26th September, 2005, the Respondent company, which was the plaintiff in the Court below, took out a Writ of Summons and Statement of Claim against one Claude Demetrous Vlahakis and Cell City Limited the 1st and 2nd Defendants in the Court below respectively seeking a declaratory order to nullify a contract, for the sale of Lot No. 2558/M, Siavonga, which was entered into between the 1st and 2nd Defendants. The gist of the Respondents' claim was that the said contract illegal, null and void as the 1st Defendant had no legal authority to dispose of the property in question.

On 11th January, 2006 the Respondent sought and was granted an amendment of the writ of summons wherein it substituted Cell City Limited with Nkolongwe Limited.

Subsequently, in 2009 the Respondent filed into Court an application to amend Writ of Summons and Statement of Claim

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and for Joinder of Parties. Six other Defendants, including the Appellant as shown at pages 115 to 124 of the Record of Appeal. The supporting and supplementary affidavits, filed by show that the Respondent sought to join the Appellant as 6th Defendant, on grounds that it acted on behalf of the 1st Defendant in the conveyance relating to the property in issue, by which it was sold and conveyed by the 1st to the 3rd Defendant and therefore, facilitated the fraudulent sale of the said property. The Respondent also sought to amend its claims against the 1st and 3rd Defendants, who were initially the two Defendants in the suit, as well as to include some reliefs against the Appellant and the other additional Defendants which it sought to be joined to the suit. In particular, in paragraph 14 (1) and (3) of its proposed amended Statement of Claim, which was exhibited in the supplementary affidavit at page 123 of the record of appeal, the Respondent sought, against the Appellant and all the existing and proposed additional Defendants in the Court below, among other reliefs and of relevance to this appeal, the following:

- (1) An Order that the Caveat entered on Lot No. 2558/M Siavonga by the 3rd Defendant Cell City Limited be vacated and the purported contract of sale dated 8th September, 2005 is null and void.**

- (2) An Order that the Certificate of Title issued in favour of the 2nd Defendant in respect of Lot. No. 2558/M Siavonga be cancelled and a Certificate of Title in favour of the plaintiff be reinstated.”**

The Appellant opposed the Respondent's application and filed an opposing affidavit. There is also on record an affidavit in reply filed by the Respondent.

On 4th March 2010, the trial Judge delivered a ruling in which he granted the Respondent's application to amend the Writ of Summons and Statement of Claim and to join the Appellant as 6th Defendant, among others, to these proceedings. The Court also awarded costs to the Respondent. It is against the said ruling that the Appellant has appealed on the following three grounds:

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- 1. That the Learned Judge in the Court below erred in law and in fact when he allowed the amendment of the statement of claim**

by including a claim for the cancellation of a certificate of title without the Respondent having fulfilled the condition precedent prescribed in the Lands and Deeds Registry Act by appealing first to the Registrar of Lands and Deeds to correct the lands register before issuing process.

- 2. That the Learned Judge in the Court below erred in law and in fact when he allowed the amendment of the statement of claim by including a claim for the removal of a caveat which must be removed through an action commenced by originating summons and not by writ of summons.**
- 3. That the Learned Judge in the Court below did not act judiciously when he awarded costs to the Respondent for its application to amend process and to join the Appellant despite the fact that the Appellant had nothing to do with the failure by the Respondent to properly plead its claim.**

At the hearing of this appeal, on the 2nd September 2014, both Counsel for the Appellant, Mr. Pindani, and Counsel for the Respondent, Mr. Mutemwa, indicated that they would rely on the written heads of argument which they had filed into Court on behalf of the parties respectively. In addition, Mr. Pindani made a

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brief oral submission to augment the Appellant's written arguments in respect of ground three only.

The gist of the Appellant's written arguments, in support of ground one, is that the Respondent's claims in these proceedings, seeking the cancellation of a certificate of title, are premature as the Respondent did not first apply or make representations to the Registrar of Lands and Deeds, to rectify the lands register in respect of the property in issue, before issuing Court process, as required under **Section 11 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia.**

In support of ground two, it was argued that it was erroneous for the learned Judge in the Court below to allow the amendment of these proceedings, which were began by Writ of Summons and Statement of Claim, to include a claim for the removal of a caveat. The following authorities were cited in support of this argument: **Order 6 Rule 1 of the High Court Act, Cap 27 of the Laws of Zambia**, and the cases of **Rural Development Corporation Limited Vs Bank of Credit and**

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Commerce (Z) Limited¹ and New Plast Industries Vs. The Attorney General and Commissioner of Lands².

In support of ground three, the Appellant submitted that, although costs are in the discretion of the Court, the Court must exercise its discretion judiciously and on reasonable grounds. It was argued that, since the amendments to these proceedings were sought by the Respondent and resulted from its errors or omissions, the costs occasioned by the application to amend these proceedings in the Court below, should have been awarded against the Respondent. A number of authorities were cited to support these arguments including **Order 20/8/52 of the Rules of the Supreme Court, 1999 Edition**.

In his oral submission, Mr. Pindani, submitted that, under both **Section 24 (1) (d) of the Supreme Court Act, Cap 25 of the Laws of Zambia** and **Order 59/ 1/95 of the Rules of the Supreme Court, 1999 Edition**, the requirement for leave to appeal applies only where the appeal is solely against an Order

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for costs, which is not the case in this appeal, as there are other grounds which do not relate to costs.

In the Respondent's written response, it was argued, in respect of ground one, that the import of **Section 11 of the Lands and Deeds Registry Act** is to allow the Registrar of Lands and Deeds to correct errors or omissions occasioned by fraud or mistake in the process of recording entries and transactions in the lands register; that it did not apply to fraud or illegalities involving the entire process of transfer of land by parties as claimed in this case.

In response to ground two, the Respondent argued that there was no misdirection in allowing the relief, for the removal of a caveat, to be dealt with together with all the other many reliefs sought by the Respondent against the many parties in this action which was commenced by Writ of Summons; that bringing the different claims before Court separately would amount to multiplicity of actions.

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It was the Respondent's argument, in response to ground three, that this ground is incompetent and must be dismissed because the Appellant did not obtain leave of the Court below to

appeal on costs as required by law. In support of this argument, the Respondent relied on the following authorities: **Richard Nsofu Mandona Vs Zambia National Commercial Bank Plc and Others³** and **Order 59/1/95 of the Rules of the Supreme Court, 1999 Edition.**

In his reply, Mr. Pindani submitted that in fact, the Appellant was granted leave to appeal by the Court below as indicated in its ruling at page 11 of the record of appeal.

We have considered the Appellant's grounds of appeal, the arguments by Counsel for both parties and the authorities cited, the record of proceedings and the ruling of the Court below.

In ground one, the Appellant has challenged the decision of the trial Judge to allow the inclusion, by the Respondent, of a claim for the cancellation of a certificate of title. The question

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which this ground raises is whether or not, in terms of **Section 11 of the Lands and Deeds Registry Act**, it is a condition precedent that the Respondent should have first applied to the

Registrar of Lands and Deeds, to rectify the lands register in relation to the property in question, before commencing these proceedings.

Section 11 of the Lands and Deeds Registry Act provides as follows:

“11. (1) Where any person alleges that any error or omission has been made in a Register or that any entry or omission therein has been made or procured by fraud or mistake, the Registrar shall, if he shall consider such allegation satisfactorily proved, correct such error, omission or entry as aforesaid.

(2) Any person aggrieved by any entry or omission made in a Register after application to the Registrar under subsection (1) may apply to the Court for an order that the Register may be rectified, and the Court may either refuse such application with or without costs to be paid by the applicant or it may, if satisfied of the justice of the case,

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make an order for the rectification of the Register in such manner as it shall direct.**

In our view, **Section 11 of the Lands and Deeds Registry Act** is concerned with the process of correcting errors and omissions to entries made in the lands register by the Registrar of Lands and Deeds. It does not empower him to determine disputes which have the effect of determining the rights of the parties to any land or to cancel a Certificate of Title duly issued to the registered proprietor of the land to which it relates. In **Anti-Corruption Commission Vs. Barnnet Development Corporation Limited**⁴, we held that, under **Section 33 of the Lands and Deeds Registry Act**, a certificate of title is conclusive evidence of ownership of land by the holder thereof although it can be challenged and cancelled, for fraud or other reasons relating to impropriety, in its acquisition.

We further take the view that a person alleging fraud or any other impropriety, with regard to the issuance of a Certificate of Title, must challenge the same through a Court action and prove the allegations of fraud or other impropriety, as the case may be,

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to obtain a Court order for the cancellation of the affected Certificate of Title by the Registrar of Lands and Deeds.

Further, in order for the Court to determine the matter, it is necessary that all the persons who must help the Court to come to a just decision are joined and made parties to the case. In this regard, all persons who may be entitled to, or who may claim some share or interest in the subject matter of the case or who may be likely to be affected by the result of the case must be made party to the proceedings so that the Court can determine the matter conclusively.

We therefore, reject the argument by the Appellant that **Section 11 of the Lands and Deeds Registry Act** prescribes a condition precedent to apply first to the Registrar of Lands and Deeds to correct the register of lands before issuing process for the cancellation of a Certificate of Title. Consequently, we find no basis to fault the decision by the Judge in the Court below, to allow the amendment of the Respondent's Statement of Claim, to include a claim for the cancelation of the Certificate of Title

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relating to the property in question. We find no merit in ground one and dismiss it.

In ground two, the Appellant has challenged the decision of the trial Judge to allow the amendment of these proceedings, to include the relief of an order for the removal of a caveat, in an action commenced by way of Writ of Summons. Looking at the authorities, which were cited in support of this ground, the Appellant appears to suggest that a matter involving a claim of this nature must be commenced by way of Originating Summons.

Order 6 Rule (1) of the High Court Rules prescribes the appropriate originating process for commencement of matters in the High Court. It states that:

“Except for petitions under the Constitution and Matrimonial Causes Acts and applications for writs of habeas corpus, every action in the Court shall, notwithstanding the provisions of any other written law, be commenced by writ of summons endorsed with or accompanied by a full statement of claim.”

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In the **New Plast Industries Case²**, we held that the practice and procedure for commencement of proceedings is determined by the relevant statute and not by the reliefs sought.

Section 81 of the Lands and Deeds Registry Act outlines the procedure for the removal of a caveat as follow:

- “81. (1) Such Registered Proprietor or other interested person may, if he thinks fit, summon the caveator, or the person on whose behalf such caveat has been lodged, to attend before the Court or a Judge thereof to show cause why such caveat should not be removed.**
- (2) Such Court or Judge, upon proof that such person has been summoned, may make such order in the premises, either ex parte or otherwise, as to such Court or Judge seems fit.”**

In the **Rural Development Corporation Limited Case¹**, we discussed the procedure under **Section 81 of the Lands and Deeds Registry Act** when we held that:

“Although s. 81 of the Lands and Deeds Registry Act ... provides no procedure for the removal of a caveat, an originating summons is

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the proper form for commencing proceedings for removal of a caveat.”

From the above, it is clear that the correct mode of commencing proceedings, seeking an Order for the removal of a caveat, is by Originating Summons. However, we must hasten to mention here that the **Rural Development Corporation Limited Case¹** is distinguishable from the present case in the sense that the relief sought by the Appellant, for the removal of the caveat in this case, is not the only claim which the Respondent is seeking in the Court below. In our view, the position of the law, as stated in the **Rural Development Corporation Limited Case¹** envisages a situation and is only applicable where the sole claim in an action is for an Order for the removal of a caveat.

We take the further view that, looking at the circumstances of this case, to insist that the claim for the removal of the caveat must be brought in a separate action, commenced by way of Originating Summons, would amount to asking that the different claims in this case, although involving the same parties and arising from the same set of facts, be severed and brought in

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separate actions. In turn, this would amount to multiplicity of actions, a practice which we have always frowned upon.

For the reasons we have given, we find no basis to fault the decision by the Judge in the Court below to allow the amendment of these proceedings, which were commenced by way of writ of Summons, to include the relief of an order for the removal of a caveat. Ground two has no merit and we dismiss it.

Ground three is about the exercise of the powers of the trial Court to award costs. We note however, that in responding to this ground, the Respondent has questioned the competence of this ground on grounds that the Appellant did not obtain prior leave of the Court below to appeal on costs. We shall therefore, address this issue first as our decision on this point will determine whether or not we can proceed to consider this ground on the merits.

In **Collet Vs. Van Zyl Brothers Limited**⁵ Blagden, C.J, as he then was, stated that:

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“Where an appeal is limited to costs, leave to appeal is required. Where the appeal is not limited to costs alone, leave to appeal need not be obtained”.

The decision in the **Van Zyl Brothers Limited Case⁵**, although quite old, is in consonant with the provisions of **Section 24 (1) (d) of the Supreme Court Act, Cap 25 of the Laws of Zambia** which provides as follows:

“24. (1) No appeal shall lie-

- (d) ... from an order as to costs only which by law is left to the discretion of the court without the leave of the Court or of the Judge who made the order or, if that has been refused, without the leave of a Judge of the Court.”**

Order 59/1/95 of the Rules of the Supreme Court also contains a similar provision. It reads as follows:

“Costs only appeals- Leave to appeal is required in the case of appeals on costs only where costs are in the discretion of the court (or tribunal) which made the costs order.”

From the above, it is clear that leave to appeal against an award of costs is required where the appeal is against an order for

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costs only. In this appeal however, ground three, which is against the order by the Court below to award costs to the Respondent, is

only but one of the three grounds listed by the Appellant for consideration by this Court on appeal.

We want to comment on the **Richard Nsofu Mandona Case**³, which was cited by the Appellant in support of its objection to ground three. In that case, there were eight grounds of appeal, one of which was against the decision of the trial Judge not to award the Appellant costs on the 1st and 2nd Respondent's discontinued counterclaims. Based on our holding, that no appeal on costs lies to this Court without leave of the Judge in the Court below, we found that the affected ground was not before us as there was no evidence on record that leave to appeal had been granted by the trial Court.

Looking at the decision in the **Van Zyl Brothers Limited Case**⁵ and the provisions of both **Section 24 (1) (d) of the Supreme Court Act** as well as the **1999 Edition of the Rules of the Supreme Court**, we take the view that our decision in the

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Richard Nsofu Mandona Case³ was arrived at per incuriam as the provisions on the requirement for leave to appeal on costs, as stated in the authorities we have referred to above, are very clear

that such leave is required in cases where the appeal is solely on costs.

It is our view that, as this appeal is not solely against the order for costs, the Appellant is not by law required to obtain leave of the Court below to bring this ground of appeal before us.

In any event, we agree with the oral submissions made by Mr. Pindani, that in this case, leave to appeal was granted by the Court below in its ruling. In this regard, the trial Judge stated in his judgment, to page 11 of the record of appeal, as follows:

“Consequently, I allow the Plaintiff’s applications to join 6th Defendant as other Defendants have been made parties and amend the writ of summons and the statement of claim. Costs are for the Plaintiff.

RULED BY ME ON 4TH DAY OF MARCH, 2010.

LEAVE TO APPEAL GRANTED.”

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From the above, it is clear that in its ruling, the Court below granted the Appellant leave to appeal. For this reason and on the

basis of the authorities we have referred to above, we find that ground three is competent before this Court.

We shall now consider the substance of ground three and in doing so, we want to begin by reiterating what we said in **General Nursing Council of Zambia Vs. Mbangweta**⁶ when he held that:

“It is trite law that costs are awarded in the discretion of the Court. Such discretion is however to be exercised judicially. Costs usually follow the event.”

In discussing the issue of the costs of and incidental to an amendment of proceedings, **Order 20/8/52 of the Rules of the Supreme Court, 1999 Edition**, specifically provides that a party amending the proceedings must bear the costs incidental thereto. The said rule reads as follows:

“The usual penalty imposed as a term for giving leave to amend is that the party seeking the amendment should pay in any event all

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the costs incurred and thrown away by the amendment and the costs of any consequent amendment.”

In this case, the application to amend these proceedings, to include additional parties and claims, was made by the Respondent in the Court below. In our view, although the Respondent was successful with its application, it was by reason of its omission to plead its case correctly that the said application was necessitated. Therefore, it follows that, the costs occasioned by and incidental to the same are attributable to the Respondent. For this reason and on the basis of the authorities we have referred to above, we take the view that the Respondent was not entitled to an award of costs relating to its application to amend the Writ of Summons and Statement of Claim and for joinder of parties in the Court below. We also find that it was a misdirection on the part of the Judge in the Court below to have awarded the Respondent the costs of the said application. Ground three has merit and succeeds.

All in all, grounds one and two have failed while ground three is successful. This appeal having been partially successful,

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we set aside the Order by the Court below awarding costs to the Respondent. We award costs in the Court below to the Appellant

and costs in this appeal to the Respondent, same to be taxed in default of disagreement.

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E. N. C. MUYOVWE
SUPREME COURT JUDGE

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M. MALILA
SUPREME COURT JUDGE

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M. LISIMBA
ACTING SUPREME COURT JUDGE