SELECTED JUDGMENT NO. 12 OF 2016

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO. 79/2015
SCZ/8/83/2015

BETWEEN:

ABDUL EBRAHIM DUDHIA,
ARSHAD ABDULLA DUDHIA
AND GULAM FARID PATEL
(Trading as Musa Dudhia and
Company, a Law Firm) — APPELLANTS

AND

SANMUKH RAMANLAL PATEL — 1ST RESPONDENT

FIRST ALLIANCE BANK ZAMBIA LIMITED — 2ND RESPONDENT

CORAM: Hamaundu, Wood and Kaoma, JJS.
On 7th October, 2015 and 26th May, 2016.

For the Appellants : Mr. E.S. Silwamba, SC, with Mr. L. Linyama, both of Messrs Eric Silwamba, Jalasi & Linyama Legal Practitioners

For the Respondents : Mr. V.B. Malambo, SC, of Messrs Malambo and Company.

J U D G M E N T

KAOMA, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Rooks Ryder (a firm) v Steel and others (1993) 4 All. ER. 717.*
2. *Mohammad S. Itowala v Variety Bureau De Change, SCZ judgment No. 15 of 2001.*
3. *Turnkey Properties v Lusaka West Development Company Limited (1984) Z.R. 85.*
4. *John Mumba v Zambia Red Cross Society (2006) Z.R. 137.*
5. *Dr. J W Billingsley v J A Mundi (1982) Z.R. 11*
6. *Chibwe v Chibwe (2001) Z.R. 1 at 8*
7. *William David Carlisle Wise v E F Hervey Limited (1985) Z.R 179.*
8. *Millington v Loring (1880) 6 QBD 190*
9. *Udall v Capri Lighting Limited (1987) 3 All ER 276.*
10. *Geoffrey Silver and Drake v Thomas Antony Baines (1971) 1 All ER 473.*
11. *Hastingwood Property Limited v Saunders Bearman Anselim (a firm) (1990) 3 All ER 137*
12. *John Chisata vs Attorney General (1992) S.J. 19 (S.C.)*
13. *Musa Ahmed Adam Yousuf v Mahtani Group of Companies, Finsbury Investments Limited, Chimanga change Limited and Rajan Lekrhaj Mahtani, 2011/HPC/0081.*
14. *Minister of Home Affairs and Attorney General v Lee Habasonda (Suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes) (2007) ZR 207.*
15. *Chazya Silwamba v Lamba Simpito (2010) ZR 475.*
16. *Mayor, etc., of London v Horner (1914) 111 L.T. 514*
17. *Kenya Reinsurance Corporation vs Muriu (1995-1998) 1 EA 107 (CAK)*
18. *Lombard Insurance v Landmark Holding (2010) 2 SA 86.*
19. *Munali Insurance Brokers Limited and Another v The Attorney General and Another (2010) ZR Volume 2 at 60*
20. *John Fox (a firm) v Bannister King & Rigbeys (a firm) (1987) 1 All ER 737*
21. *Chimanga Changa Limited v Stephen Chipango Ngombe (2010) Z.R. Volume 1 at 208.*
22. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172*
23. *Davey v Garrett (1877) D 167.*
24. *re: Morgan (1904) 35 Ch D 492*
25. *re: Robinson's Settlement, Gant v Hobbs (1912) 1 Ch 728.*

Statutes and other works referred to:

1. *The Money Lenders Act, Chapter 398 of the Laws of Zambia.*
2. *The Rules of the Supreme Court, 1999 Edition, Orders 18/8; 18/11 and 18/19.*
3. *Halsbury's Laws of England, 4th edition, Volume 4 (1), para 354 at page 381.*

For convenience, we shall refer to the appellants in this appeal as the defendants and the respondents as plaintiffs, which is what they are in the court below.

This is the defendants' interlocutory appeal against the Ruling of the High Court, Commercial List at Lusaka in which the learned Judge struck out paragraphs 10, 11 and 12 of the defence on the ground that the same are prejudicial to the plaintiffs since the defendants had given an undertaking to the plaintiffs and at the time of making the undertaking, they ought to have known about the alleged illegality.

The history of this matter, according to the statement of claim is that the defendants were acting for First National Bank Zambia Limited (FNB) which was refinancing loans from the plaintiffs to Courtyard Hotel and Ayub Mulla. The defendants received from the 2nd plaintiff on or about 28th October, 2011, the original Certificate of Title for Stand No. 25211, Lusaka and Stand No. 5528 Ndola together with original copies of legal Mortgage Deeds in favour of the 2nd plaintiff and Memorandum of Discharge of Mortgage in respect of the said properties.

In the letter the 2nd plaintiff expressly stated that it was their understanding that the Certificate of Title shall not be released to any

person or entity or be lodged at Lands and Deeds Registry to be discharged prior to the 1st plaintiff being paid US$5 million via his account in their bank and that the defendants' acknowledgement of the documents signified their undertaking that they shall abide by that condition.

On 31st October, 2011 the defendants acknowledged receipt of the title deeds in a communication to their clients, seeking instructions on the conditionality placed by the plaintiffs and the communication was copied to the plaintiffs though they were not aware of what, if any, instructions the defendants received from their clients. On 8th November, 2011 the defendants formally communicated to the 2nd plaintiff that they had written authority from Courtyard Hotel that upon the US$5 million being paid to them by FNB, they were to transfer the same to the 2nd plaintiff as required by the plaintiffs in their letter of 28th October, 2011. All these facts are admitted by the defendants in their defence.

According to the plaintiffs, by this exchange of letters there came to exist a valid and binding personal and professional undertaking by which the defendants undertook not to release the Deeds of Title or register any interest adverse to the plaintiffs prior to the 1st plaintiff receiving the sum of US$5 million or in the alternative that the defendants would procure and

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remit the said amount to the plaintiffs as required by the latter in the letter of 28th October, 2011. Further, that the existence of a valid and binding undertaking was acknowledged by the defendants in their letter of 8th November, 2001.

Furthermore, according to the plaintiffs, in breach of their professional undertaking, and without their authority, the defendants registered third party interests against the title deeds and released the same to a third party prior to receipt of the US$5 million by the 1st plaintiff; and by their own effort they have recovered US$2 million of the US$5 million secured by the title deeds from Ayub Mulla and Courtyard Hotel leaving a balance of US$3 million and interest. The plaintiff averred that they are entitled to enforce the valid and binding professional undertaking given by the defendants against each personally, severally and jointly.

In their defence, the defendants denied that they had an obligation, positive or otherwise, to procure and remit the US$5 million to the plaintiffs and averred that if the alleged undertaking ever came into existence, it was conditional or qualified on funds being paid to them by FNB for onward transfer to the 2nd plaintiff, and so, a breach of the alleged undertaking would only occur if default was through the defendants' own default.

The defendants further aver that any purported undertaking was only made to the 2nd plaintiff and not the 1st plaintiff. The defendants also averred that the 2nd plaintiff on or around 9th November, 2011 expressly released them from their purported undertaking by giving them authority in writing to (i) proceed to do the mortgage over Stand No. 25211 Lusaka in favour of FNB; and to (ii) release the certificate of title in respect of Stand No. 5548 Ndola to Ayub Mulla of Courtyard Hotel.

Further, that the 2nd plaintiff reached an agreement with FNB that the latter would pay the US$5 million upon the preparation of the mortgage; that the plaintiff elected to rely on the undertaking from FNB which led the 2nd plaintiff to release the defendants from the latter's purported undertaking; that the plaintiffs were aware of the circumstances of the refinancing by FNB of Courtyard Hotel and its related entities and of the release and securitisation of the certificates of title and are therefore, estopped and precluded from saying that they did not authorise the defendants to release the title deeds.

The defendants averred that they were not in control of such requests and that the circumstances around the release of the money by FNB were

well known to the plaintiffs, who were negotiating directly with Ayub Mulla and Courtyard Hotel and FNB.

The defendants also averred that the 1st plaintiff was not entitled to any money from the refinancing as he is not a registered money lender in Zambia pursuant to the provisions of the *Money Lenders Act, Chapter 398 of the Laws of Zambia.* Further, that the 2nd plaintiff has received payment in full of monies that were comprised in the purported undertaking; and that the purported monies being claimed by the plaintiffs are mired in uncertainty as to their legality and the plaintiffs would be put to strict proof as to how the alleged debt to Courtyard Hotel and its related entities were created, if at all, and whether such amounts are even legally due.

On 10th October, 2014, the plaintiffs applied to strike out paragraphs 10, 11 and 12 of the defence pursuant to *Order 18 rule 19 of the Rules of the Supreme Court (RSC), 1999 Edition* on grounds that the said paragraphs were frivolous and vexatious; and tended to prejudice, embarrass, or delay the fair trial of the action.

In the affidavit in support, the 1st plaintiff deposed, inter alia, that the said paragraphs were devoid of merit, unsustainable and that the defendants were not even entitled to raise issues of alleged illegality over a

financing transaction between the plaintiffs and Courtyard Hotel; that the claim as against the defendants being solely on their breach of their professional undertaking made to the plaintiffs, the allegations of illegality were a sham, irrelevant, immaterial and unnecessary and merely intended to prejudice, embarrass, or delay the fair trial of the action, and were being used as a means of vexation and oppression in the process of litigation.

In the affidavit in opposition, Abdulla Ebrahim Dudhia, deposed, inter alia, that the averments in the defence are of a legal nature which could only be determined at trial after the court has had occasion to review the evidence; and that the issue relates to an extension of a financial facility by the 1st plaintiff, therefore a matter relating to the 1st plaintiff's qualification and eligibility to engage in such transactions could not be held to be irrelevant, scandalous, immaterial or indeed designed to delay the holding of a fair trial; and that the 1st plaintiff was duty bound to demonstrate the prejudice which would be occasioned to him by the defence to warrant the grant of the order prayed for, which he had failed to discharge.

It was further averred that the court has a duty to adjudicate over all matters pleaded by the parties and the application was designed to defeat

the determination of a vital issue at trial which would lead to gross prejudice against the defendants.

It was also deposed that the circumstances in which the purported undertaking was given, was part of the refinancing of the loans made by the plaintiffs to Courtyard Hotel and Ayub Mulla; that the deponent was acting for FNB who was refinancing the loans from the plaintiffs to Courtyard Hotel and Ayub Mulla; and that even though the deponent did not know it at the time of the purported undertaking, it now appeared to him that the circumstances of the loans from the plaintiffs are mired in uncertainty and illegality as it is not clear how much was loaned, whether the loans had been paid in full, and whether the loans were made by the 2nd plaintiff or 1st plaintiff or whether the monies paid by FNB to the plaintiffs pursuant to the refinancing were even applied to the alleged loans from the plaintiffs to Courtyard Hotel and Ayub Mulla.

It was also deposed that any illegality with the financing and refinancing arrangements between the plaintiffs and Courtyard Hotel and Ayub Mulla at law would make the purported undertaking (if it had not been waived) unenforceable.

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The parties also filed written arguments to substantiate the assertions in their respective affidavits. The plaintiffs' main argument was that it was not open for the defendants, as Advocates and officers of the court, to defend themselves on their breach of their professional undertaking on the ground that the underlying transaction between the plaintiffs and their client was allegedly illegal.

That the undertaking given to the plaintiffs was sufficiently separate for it to be considered on its own merit so far as the alleged illegality was concerned as the aspect as to illegality in relation to associated transactions is that they are concerned with contracts, while undertakings are not enforceable on a contractual basis but as a disciplinary matter. And that even assuming the transaction between the plaintiffs and the defendants' client was illegal; the alleged illegality did not vitiate the defendants' undertaking. The case of *Rooks Ryder (a firm) v Steel and others*[1] was relied on to support this argument.

The defendants' main argument based on the same case of *Rooks Ryder (a firm) v Steel and others*[1] was that the plaintiffs had full knowledge of the illegality surrounding the financing and refinancing of Courtyard Hotel, thus, this knowledge tainted the enforceability of the alleged

undertaking, and the defence of *ex turpi causa non oritur actio* was available to the defendants.

In his ruling, the learned trial Judge was cognizant that most of the issues raised in the affidavits were dealing with the merits of the main matter and that he would desist from making any comments which may have the effect of pre-empting the decision on the issues which were to be decided on the merits later.

The Judge then went on to find that the defendants undertook not to release the Deeds of Title for Stand No. 25211 Lusaka and Stand No. 5528 Ndola or to register any interest adverse to the plaintiffs prior to the 1st plaintiff receiving the sum of US$5 million; that the letter of 8th November, 2011 was an acknowledgment of the undertaking made by the defendants to the plaintiffs; that there was evidence that the defendants registered a third party interest against the title deeds and released the same to a third party; and that no evidence had been shown that the 1st plaintiff authorised the defendants to register any adverse interest or release the title deeds to any person or entity prior to receipt of the US$5 million by the 1st plaintiff.

On the issue of illegality of the underlying transaction, the trial Judge agreed with the plaintiffs' submission that the undertaking given to the

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plaintiffs by the defendants was sufficiently separate for it to be considered on its own merit so far as the alleged illegality was concerned.

With regard to the case of *Rooks Ryder v Steel and others*[1], the Judge took the view that such associated transaction must be concerned with contracts which are enforceable on a contractual basis but not undertakings which are enforceable as a disciplinary matter. The Judge was also of the view that the decision of this Court in the case of *Mohammad S. Itowala v Variety Bureau De Change*[2] in which the defence of illegality was pleaded confirms that this plea only applies to contracts.

The learned Judge further found that the defendants knew who the parties to the financing and re-financing arrangement pertaining to Courtyard Hotel and Ayub Mulla were before they wrote to the 2nd plaintiff on 8th November, 2011 as they received the original certificates of title for the two properties together with original legal mortgage deeds in favour of the 2nd plaintiff. Thus, they had presumed knowledge of any alleged illegality before giving the undertaking to the plaintiffs who are lay persons and clients and who relied and acted on the same. The Judge agreed with the plaintiffs that the defendants cannot defend themselves on the ground that their undertaking is not enforceable as a contract against them.

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Furthermore, the Judge found that the undertaking given by the defendants to the plaintiffs met the requirements mentioned for liability on undertakings given by a solicitor under *paragraph 354 of Halsbury's Laws of England, 4th edition, volume 4 (1)*. The Judge also found that the defendants have not pleaded the facts relating to the 2nd plaintiff's qualification and eligibility in extending financial facilities, given the allegations made against the 1st plaintiff.

Regarding the issue of prejudice and embarrassment to the plaintiffs, the Judge again agreed with the plaintiffs' argument that prejudice comes in because the defendants gave an undertaking to a transaction that they knew or ought to have known; and that they could not now renege from their undertaking on the pretext that the same is unenforceable.

Consequently, the Judge found that paragraphs 10, 11 and 12 of the defence were unnecessary and tended to prejudice, embarrass and delay the trial of the action and were beyond the defendants' rights and that the authorities cited by counsel for the defendants did not apply as the defendants knew or ought to have known about the alleged illegality at the time the undertaking was given to the plaintiffs. Ultimately, the Judge struck out paragraphs 10, 11 and 12 of the defence with costs.

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The defendants have appealed on three grounds. The first ground alleges that the trial Judge erred in law when he proceeded to delve into the merits of the main matter whilst adjudicating over an interlocutory application, notwithstanding an expression of caution, which clearly and effectively pre-empts the determination of the main matter.

The second ground alleges that the trial Judge erred in law and fact when he proceeded to strike out the contents of paragraphs 10, 11 and 12 of the defence in the absence of any evidence or demonstration of prejudice or embarrassment on the part of the plaintiffs.

The third ground alleges that the trial judge erred in law and misdirected himself by holding that the defendants are precluded from putting up a plea of *ex turpi causa non oritur actio* as their defence when the same is a complete defence at law and this decision is contrary to the provisions of *Order 18 rule 11* of the *RSC.*

In support of ground 1, Mr. Silwamba, SC, for the defendants, argued that the application before the learned trial Judge was an interlocutory application to strike out the offending paragraphs in the defence. However, the Judge erroneously went on to make findings and holdings which pre-empted the determination of the matter on the merits. Further, that the

learned Judge lost sight of the application before him and made a finding going to the merits of the main matter which is still waiting for parties to complete discovery of documents, particularly that the defendants have disputed the existence of the alleged undertaking, and the trial Judge erroneously treated the plaintiffs as the clients of the defendants.

The case of *Turnkey Properties v Lusaka West Development Company Limited*[3] was cited where this Court stated that it was not necessary for a proper determination of the issue at hand to broaden the scope of the inquiry to include questions touching on the validity or enforceability of the contracts; or the ultimate propriety and adequacy or otherwise of one final remedy as opposed to another which are the very matters upon which the trial judge must adjudicate at the proper time.

The case of *John Mumba v Zambia Red Cross Society*[4] was also relied upon. In that case, we held that it is improper for a court hearing an interlocutory application to make comments which may have the effect of pre-empting the decision on the merits at trial.

Furthermore, the case of *Dr. J W Billingsley v J A Mundi*[5] was quoted where this Court stated that the court should only deal with the particular application properly before it; and that the purported final determination of

all the issues at that stage was premature and incompetent and accordingly, a complete nullity. We were urged to set aside the findings and holdings of the trial Judge which purport to determine the matter finality.

In support of ground 2, it was submitted that the learned trial Judge failed to heed the guidance given in the case of *Chibwe v Chibwe*[6] to the effect that the court's conclusions must be based on facts stated on record. That there was no evidence before the learned Judge for him to determine that prejudice was demonstrated by the plaintiffs on the basis of an argument claiming that the defendants were reneging; and that the Judge accepted the plaintiffs' version in its entirety and ignored or missed out paragraph 5 of the defence which categorically states that the plaintiffs expressly released the defendants from the alleged undertaking.

Counsel for the defendants also submitted on the function of pleadings and cited the case of *William David Carlisle Wise v E F Hervey Limited*[7] and *Millington v Loring*[8] where, it was argued, the court dealt with a claim that a matter which was pleaded was scandalous or would tend to prejudice, embarrass or otherwise delay the fair trial of the action. On the basis of this authority, it was argued that even if the contents of the offending paragraphs in the defence are untrue, that would not entitle the

plaintiffs to have these paragraphs struck out. And that it is imperative that the issues raised in these paragraphs are determined at trial; and that the parties have an opportunity to prepare in advance for their determination.

It was further argued that the learned Judge failed to fully consider the full import of his order as he also struck out part of the pleadings which was not alleged to be embarrassing that the 2nd plaintiff has received the money in full; and that the defendants were not required in their defence to provide evidence of illegality of the plaintiffs' dealings with Courtyard Hotel.

We were invited to find that without the learned Judge giving the parties an opportunity to do discovery, complete pleadings and give testimony, the Judge did not have sufficient evidence to support his striking out of the paragraphs in issue.

As to ground 3, State Counsel Silwamba argued that the learned trial Judge misdirected himself in holding that the defence of illegality is only available in cases involving contracts. It was contended, in the alternative, that in any event, an undertaking is like a contract since it is a unilateral promise. Further, that the defence of illegality is a matter of public policy requiring the court not to be seen to be aiding illegal transactions

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regardless of the characterisation of these activities, and to deny a party the right to even plead illegality is an affront to justice.

Further, that the Judge erroneously failed to consider that illegality as a defence to a claim for breach of professional undertaking is clearly available. As authority, State Counsel cited the case of *Rooks Ryder (a firm) v Steel and others*[1] where the court explained the solicitor's undertaking *vis-a-vis* the defence of *ex turpi causa non oritur actio*.

It was argued that if there is any underlying illegality in the transaction by which the plaintiffs were said to have supplied Courtyard Hotel with tiles and various hardware, the *ex turpi causa* defence ought to be available to the defendants and if the security or the undertaking were procured by an illegal transaction then this too ought to be brought before the court, and hence the undertaking itself cannot be enforced at law.

Furthermore, it was contended that the learned Judge seems to have mistakenly treated the matter before him as a disciplinary matter and not an action at law for payment of money. The case of *Udall v Capri Lighting Limited*[9] was cited in which the procedural options available to someone seeking to enforce an advocate's professional undertaking were outlined as by an action at law, if there is a cause of action; by an application to the

court to exercise its inherent supervisory jurisdiction; and by an application to the Law Society.

It was submitted that there is a big difference between an action at law and the court being called on to exercise its supervisory jurisdiction. That the application for the court to exercise its inherent supervisory jurisdiction is by originating summons and tends to take the character of a summary jurisdiction by which the court is entitled and obliged to oversee the conduct of legal practitioners as officers of the court but even in such cases, the summary jurisdiction which the court below purported to exercise is only exercised in clear cases.

The cases of *Geoffrey Silver and Drake v Thomas Antony Baines*[10] and *Hastingwood Property Limited v Saunders Bearman Anselim*[11] were cited as authority wherein it was held that the summary jurisdiction means that the solicitor is deprived of the advantages which ordinarily are available to a defendant on trial. It was pointed out that in a summary proceeding there are no pleadings, no discovery, and no oral evidence hence, this jurisdiction should, therefore, only be exercised in a clear case.

It was contended that this case has several issues and facts in dispute between the parties and their clients and therefore, could not be the

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subject of summary jurisdiction proceedings and in order for justice to be done all the facts need to be before the court and the parties should be permitted to plead the material facts that they will rely on and the issue of whether the illegality defence applies ought to be decided at the trial.

In his oral submissions, Mr. Silwamba, SC, added that the striking out power of the High Court must be exercised sparingly. As authority for this argument, State Counsel cited the cases of *John Chisata v Attorney General*[12] and *Musa Ahmed Adam Yousuf v Mahtani Group of Companies and others*[13]. He further submitted that the learned Judge correctly warned himself of not delving into the merits of the matter but still made findings which go to the plaintiffs' first prayer in the main matter and that it would be an academic exercise to proceed to trial before the same judge who has determined the main matter at interlocutory stage.

We were invited to uphold the appeal and to restore paragraphs 10, 11, and 12 of the defence and refer the matter to a different judge for trial.

In opposing ground 1 of the appeal, it was submitted by Mr. Malambo, SC that it is not in dispute that the undertaking was purportedly given and therefore, the holding by the learned trial Judge was to show the requirement as to when a cause of action can be said to exist so as to

attach liability on the undertaking given. That this was done in conformity with the direction we gave in the case of *Minister of Home Affairs and Attorney General v Lee Habasonda (Suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes)*[14] in which we outlined the attributes of a good judgment.

It was submitted that the learned Judge neither stated that the defendants are liable nor that the alleged purported withdrawal of the undertaking by the plaintiffs was ineffective as these are issues for determination at trial. That what the learned Judge did was merely to confirm what the defendants stated in their pleadings and affidavit. It was contended that the authorities relied upon by the defendants are distinguishable and inapplicable in the circumstances of this case as the Judge confined himself to the application before him.

State Counsel Malambo also cited the case of *John Mumba v Zambia Red Cross Society*[4] in which it was stated that the circumstances of the case put the court in a situation where some issues determinable at trial had been determined at interlocutory stage, not because the court wanted to do so but the pleadings dictated that the court does so. It was argued that the circumstances of this case put the court in a similar situation where

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it had to determine the issue of the undertaking at the interlocutory stage, not because the court wanted to do so but because the defendants in their defence have failed to deny the existence of the said professional undertaking.

It was further submitted that there is no dispute that the claim by the plaintiffs against the defendants as contained in the statement of claim is for enforcement of the professional undertaking that the defendants made to the plaintiffs and which undertaking the plaintiffs placed reliance on to their detriment. That from their defence, the defendants have failed to dispute the existence of the professional undertaking or indeed show that they did not at all make any professional undertaking to the plaintiffs where they undertook not to release the Title Deeds or register any interest adverse to the plaintiffs prior to the 1st plaintiff receiving the sum of US$5 million or alternatively, that they would procure and remit the sum of US$5 million to the plaintiffs.

And that although they have been evasive in their defence, under paragraphs 3, 4, 5 and 6 of the defence, the defendants have in fact conceded that there was in existence a professional undertaking made by them to the plaintiffs. State Counsel cited the case of *Chazya Silwamba v*

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Lamba Simpito[15] to illustrate that an evasive defence is frowned upon by the court. In that case, it was held that a defence must not be evasive, it must answer all the allegations at the level of detail of the underlying allegation and that every allegation must be admitted frankly or denied boldly, any half-admission, or half-denial is evasive.

It was argued that therefore, the learned Judge was on firm ground when he held that the undertaking given by the defendants to the plaintiffs meets the requirements mentioned for liability on undertakings given as a solicitor under paragraph 354 of the *Halsbury's Laws of England;* and that the learned Judge had enough material at his disposal from the pleadings to hold that there was in fact an undertaking and did not have to wait upon any evidence, oral or documentary to determine that fact. We were accordingly, urged to dismiss ground 1 of this appeal.

Grounds 2 and 3 were responded to together. State Counsel Malambo began by citing Order 18/19/1 of the *RSC* which provides that:-

"19. Striking out pleadings and indorsements

(1) The Court may at any stage of the proceedings order to be struck out or amend any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that -

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) *it may prejudice, embarrass or delay the fair trial of the action…*"

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The explanatory notes to Order 18/19/4; 18/19/15; 18/19/16 and 18/19/17 of the *RSC* were also referred to in outlining the circumstances in which the court can invoke the discretion of striking out pleadings. It was submitted that the plaintiffs' application did not seek to have wholesale setting aside of the defence but specifically to set aside paragraphs 10, 11 and 12.

As regards the meaning of 'embarrassing' pleading, State Counsel cited the case of *Mayor, etc., of London v Horner*[16], in which embarrassment was interpreted to mean that the allegations are so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues.

It was submitted that the prejudice and embarrassment arise from the mere fact that the defence of illegality of the underlying transaction that gave rise to the professional undertaking, which the plaintiffs sought to strike off in the court below is not available to legal practitioners who voluntarily and in the course of practice undertake to do something to a person who places reliance on it to his detriment.

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Further, that the plea of alleged illegality is not available to advocates who acted for the parties and knew of the illegality as this plea is prejudicial to non-professional parties who acted to their detriment on the basis of the undertaking that was given by the defendants. It was argued that if there was any alleged illegality on the transaction, then the defendants as Advocates ought to have known and would have not advanced the said undertaking. And that as can be deduced from the defendants' pleadings and affidavit in opposition, the alleged illegality is borne out of a relationship between the plaintiffs and Mr. Ayub Mulla and Courtyard Hotel Limited. However, a professional undertaking cannot be watered down on account of a dispute between an advocate's client and the party to whom the undertaking was given. Hence, the relationship between the plaintiffs and Mr. Ayub Mulla and Courtyard Hotel Limited is distinct and cannot be brought to bear on an undertaking given by an advocate. To buttress this argument, he relied on the case of *Kenya Reinsurance Corporation v Muriu*[17] in which the court in Kenya stated that:

> "*The learned Judge in our view, with respect quite clearly erred in placing the Respondent advocate in the shoes of the client. He was only required to determine whether the respondent advocate had given an undertaking which was capable of being enforced….*
>
> *Simply and plainly the Respondent advocate was bringing in the dispute between his client and the appellant corporation to qualify his clear undertaking. This was*

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quite wrong and if allowed to stand would encourage advocates to resile from their undertakings."

In view of the above, it was contended that by placing emphasis on the relationship between the plaintiffs and Mr. Ayub Mulla and Courtyard Hotel Limited, the defendants were placing themselves in the shoes of Mr. Ayub Mulla and Courtyard Hotel Limited and this is what the law says cannot be done as the undertaking given by the defendants to the plaintiffs is wholly independent of any purported agreement between the aforesaid parties. Therefore, paragraphs which are intended to front that position cannot stand and as such, the learned Judge cannot be faulted for striking out the offending paragraphs as the same would prejudice, embarrass and delay the fair trial of the matter.

State Counsel Malambo drew an analogy between an undertaking and an irrevocable letter of credit issued by a bank and used in trade as illustrated in the case of *Lombard Insurance v Landmark Holding*[18] in which it was stated thus:

"*The guarantee by Lombard is not unlike irrevocable letters of credit issued by banks and used in international trade, the essential feature of which is the establishment of a contractual obligation on the part of a bank to pay the beneficiary (seller). This obligation is wholly independent of the underlying contract of sale and assures the seller of payment of the purchase price before he or she parts with the goods being sold. Whatever disputes may subsequently arise between buyer and the seller is of no moment in so far as the bank obligation is concerned. The bank's obligation is to honour the credit. The bank*

undertakes to pay provided only that the conditions specified in the credit are met."

It was further submitted that where pleadings do not disclose a set of circumstances to a right or entitlement to a judgment, the appropriate step to take is to seek to have the pleading struck out or indeed to raise a preliminary point of law as was guided in *Munali Insurance Brokers Limited and another v Attorney General and another*[19] wherein it was stated that if the endorsement on the writ and the statement of claim do not disclose a cause of action, a conditional appearance ought to be entered followed by an application to strike out an action for non-disclosure of cause of action or raising a preliminary point of law as an alternative.

It was argued that this applies with equal force to a defence, and in particular the paragraphs in issue, as they are premised on the circumstances which would not entitle the defendants to a judgment. Thus, we were urged to similarly dismiss grounds 2 and 3 of the appeal.

In his oral submissions, State Counsel Malambo re-iterated that the learned Judge relied on Order 18/19 of the RSC in striking out the offending paragraphs having considered the statement of claim, defence and the authorities. That the Judge decided that the defence of illegality was not available as the defendants knew or ought to have known about

the alleged illegality at the time they gave the undertaking to the plaintiffs and the Judge gave reasons for accepting the plaintiffs' submissions as these were matters of law and not evidence. He argued that despite the paragraphs in issue being struck out, other defences such as the undertaking having been waived by the plaintiffs, still remained.

According to State Counsel Malambo, the learned Judge did not answer the question whether the contract and security between FNB and Courtyard Hotel was tainted with illegality and hence, unenforceable but that the Judge was alive to the fact that these were issues that he was required to answer at trial.

State Counsel Malambo also submitted that the cases of *Kenya Reinsurance Corporation vs Muriu*[17] and *John Fox (a firm) vs Bannister King & Rigbeys (a firm)* [20] are instructive as they set out a principle that a practitioner who gives a professional undertaking cannot say that some other contract is illegal and hence his undertakings cannot be enforced.

Further, that the issue of quantum is peripheral to the trial as the question is whether this defence is available to a lawyer in the circumstances of this case; and the standard for a lawyer is extremely high and in terms of Order 18/19 of the RSC, if the embarrassment, prejudice or

delay of trial would be caused to a party, then such a provision should be struck off the pleadings. It was also submitted that when parties are obligated to bring evidence to rebut a defence which should not be there, this increases the cost and prolongs the trial and security for costs cannot be applied for if things that can cloud the trial can be removed.

However, State Counsel conceded that the second part of paragraph 10 of the defence which states ought not to have been struck out.

In reply, Mr. Silwamba, SC, re-iterated part of his main arguments on ground 1and added that the finding that the defendants have since paid the US$3million also effectively disposes of the entire case without a trial. It was argued that the application that was before the Judge was to strike out the impugned paragraphs of the defence for being frivolous and vexatious but the Judge did not strike them out on the basis of Order 18/19, RSC. Rather the Judge struck out the paragraphs on the ground that the defendants had made an undertaking separate from the illegality.

Mr. Linyama added that since paragraphs 10, 11 and 12 of the defence have been struck out, then as the matter stands, there would be no need for a trial as no defence whatsoever is available to the defendants who have been stripped of all other available defences. He argued that the

court below should have allowed the issue of the undertaking to go to trial. We were beseeched to allow this appeal.

We have seriously considered the affidavit evidence that was before the learned trial Judge, the ruling appealed against and the arguments by learned counsel for the parties. In resolving this appeal, we have not lost sight of the fact that this is an interlocutory appeal and the main matter is yet to be heard and determined in the court below.

We shall begin with ground 1 of the appeal. As a starting point, it is imperative to bear in mind the first relief the plaintiffs are seeking before the court below, namely a declaration that the defendants are individually, severally and collectively bound by the professional undertaking given to the plaintiffs. Although the plaintiffs have argued that the defendants have not denied the existence of the professional undertaking in their defence, it is however, clear from paragraph 5 of the defence that the defendants have disputed the subsistence of the alleged undertaking.

The position we take is that the learned Judge erred when he held that the undertaking given by the defendants to the plaintiffs meets the requirements mentioned for liability on undertakings given as a solicitor under paragraph 354 of the *Halsbury's Laws of England,* before hearing the

full case. This holding, as has been contended by State Counsel Silwamba, in effect pre-empted the decision of the first claim and thus disposed of that claim at interlocutory stage without a full hearing.

Further, the learned Judge did not heed our guidance in the case of *John Mumba v Zambia Red Cross Society*[4] in which we held that it is improper for a court hearing an interlocutory application to make comments which may have the effect of pre-empting the decision on the merits at trial.

We also guided in *Turnkey Properties v Lusaka West Development Company Limited*[3] that it was not necessary for a proper determination of the issue at hand to broaden the scope of the inquiry to include questions touching on the validity or enforceability of the contracts; or the ultimate propriety and adequacy or otherwise of one final remedy as opposed to another which are the very matters upon which the trial judge must adjudicate at the proper time.

And on the basis of our decision in *Dr. J W Billingsley v J A Mundi*[5], we find that the purported final determination of the issues at interlocutory stage was premature and incompetent and a complete nullity. Moreover, it is our considered view that all claims in this matter are anchored on the

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issue of the alleged undertaking as such it was premature for the learned Judge to consider it at interlocutory stage.

Therefore, we reverse the finding by the Judge that the undertaking given by the defendants to the plaintiffs meets the requirements mentioned for liability on undertakings given as a solicitor. We agree with State Counsel Silwamba that this case was not one of summary or supervisory jurisdiction by the court below.

While we fully acknowledge that there is a higher standard when undertakings involve legal practitioners, we however, note that the action instituted by the plaintiffs was not one of purely seeking enforcement of a lawyer's professional undertaking as was the case in the cases of *Kenya Reinsurance Corporation vs Muriu*[17] and *John Fox (a firm) vs Bannister King & Rigbeys (a firm)* [20] which have been heavily relied upon by State Counsel Malambo. If it were so, then the plaintiffs ought to have commenced the action by originating summons instead of writ of summons so that the matter could have been dealt with summarily. In *Geoffrey Silver & Drake v Baines*[10], Lord Denning, MR, said that:

> "*This summary jurisdiction means that, however, that the solicitor is deprived of the advantages which ordinarily avail a defendant on a trial. There are no pleadings; no discovery and no oral evidence save by leave. The jurisdiction should, therefore, only be exercised in a clear case.*"

Therefore, the cause of action not being one for summary jurisdiction, the court should have all the material facts and pleadings before it in order to arrive at a just and fair decision. Ground 1 succeeds as it has merit.

We shall deal with grounds 2 and 3 together as they are related. The kernel of the arguments under the two grounds of appeal is whether or not theJudge was on firm ground when he struck out paragraphs 10, 11 and 12 of the defence on ground that they were prejudicial and embarrassing to the plaintiffs. For clarity, we recast these paragraphs hereunder as follows:

> "10. *The contents of paragraphs 12 and 13 of the Statement of Claim are denied as the 1st Plaintiff was not entitled to any money from the refinancing as he is not a registered money lender in Zambia pursuant to the provisions of the Money Lenders Act, Chapter 398, Volume 22 of the Laws of Zambia. Further, the 2nd Plaintiff has received payment in full of monies that were comprised in the purported undertaking (underlining is ours for emphasis only).*
>
> 11. *The purported monies being claimed by the Plaintiffs in this matter are mired in uncertainty as to their legality and at trial the Defendants will put the Plaintiffs to strict proof as to how the alleged debt to Courtyard Hotel Limited and its related entities was created, if at all, and whether such amounts are even legally due.*
>
> 12. *No claim for interest can be sustained as no monies are legally owed to the Plaintiffs as alleged or at all."*

In striking out these paragraphs, the Judge agreed with the plaintiffs that prejudice and embarrassment would be caused to them if these paragraphs are retained because the defendants gave an undertaking to a

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transaction that they knew or ought to have known and could not renege from their undertaking on the pretext that the same is unenforceable.

In our view, the arguments advanced by the parties tend to tilt towards the question of why pleadings are important in a matter. In *Chimanga Changa Limited v Stephen Chipango Ngombe*[21], we guided that a party to a cause must plead all material facts on which he relies for his claim or defence and that the rule that all material facts must be pleaded is necessary in order to prevent the opposite party from being taken by surprise and to put the party on his guard and tell him what he has to meet when the case comes on for trial. In *Wilson Masauso Zulu v Avondale Housing Project Limited*[22], we held that "*the trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality.*"

In considering pleadings to be embarrassing such as to result in them being struck out as did the Judge in this case, it is cardinal to understand what is meant by 'embarrassing pleading'. Pickford, L.J., in *Mayor, etc., of London v Horner*[16] said the following:-

> *"I take 'embarrassing' to mean that the allegations are so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues."*

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Further, in *Davey v Garrett*[23], it was stated that "*embarrassment may arise where a party sees certain matters in a pleading but has no clue how they will be used at trial, or how relevant they are to the issue. A party may further be embarrassed by the statement of unnecessary facts.*"

Furthermore, in *re: Morgan*[24] it was held that just as it is not embarrassing for a plaintiff to plead several and distinct claims, it is not embarrassing for a defendant to plead inconsistent defences.

We entirely adopt the above interpretations of what would constitute embarrassing pleadings and apply them to this case. As stated above, the defendants have disputed the alleged undertaking particularly in paragraphs 4 and 5 of the defence.

Moreover, as the plaintiffs have raised an alternative prayer for an order that the defendants do pay them US$3million with interest which is in respect of a financial facility the 1st plaintiff extended to a third party, this shows that the cause of action is not purely about enforcing an undertaking but also a money action. As we see it, all this goes to show that the alleged undertaking is cloaked in controversy which needs to be determined at trial. Therefore, in order to rebut the allegations advanced by the plaintiffs, the defendants are duty bound to present their case in the defence.

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Order 18/8/3 of the RSC provides that:

> "*It often is not enough for a party to deny an allegation in his opponent's pleading; he must go further and dispute its validity in law, or set up some affirmative case of his own in answer to it. It will not serve his turn merely to traverse the allegation; he must confess and avoid it. Thus, if the plaintiff sets up a contract which was in fact made, it will be idle for the defendant merely to traverse (i.e. deny) the making of the contract: he should confess (i.e. admit) that he made the contract, but avoid the effect of that confession by pleading the Statute of Frauds or Limitation Act 1980 or L.P.A. 1925, s.40, or setting up that the contract has been duly performed or rescinded.*"

Additionally, Order 18/11 of the RSC, gives a party the right to raise any point of law in the pleadings. There is no restriction or limitation on the type of points of law a party can raise. What the defendants raised in the expunged paragraphs of their defence is the *ex turpi causa* defence. In *re: Robinson's Settlement, Gant v Hobbs*[26], Buckley, LJ, held that whenever a party has a special ground of defence or raises an affirmative case to destroy a claim or defence as the case may be, he must specifically plead the matter on which he relies.

In our view, this is exactly what the defendants did in their defence as the plea of illegality is intended to address the plaintiffs' prayer relating to the payment of the US$3million. It is trite law that illegality as a defence must be specifically pleaded by a defendant. In this vein, Order 18/8/17 of the *RSC* provides that illegality, once brought to the attention of the Court,

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overrides all questions of pleadings, including any admissions made therein and the requirement for a party to plead illegality is mandatory.

It is therefore, our firm position that by striking out the said paragraphs of the defence, the Judge precluded the defendants from raising the defence of illegality. Whether the alleged defence of illegality is sustainable or not under the circumstances of this case, is a matter for final determination at trial. In fact, by raising illegality as a defence, the defendants were in essence informing the plaintiffs of what case they were to expect from the defendants. We see nothing scandalous, frivolous, vexatious, prejudicial, and or embarrassing or anything that is meant to delay the fair trial of the matter by retaining the impugned paragraphs.

On the exercise of the power to strike out pleadings, Order 18/19/6 of the RSC provides as follows:

> *"...Where an application to strike out pleadings involves a prolonged and serious argument, the Court should, as a rule decline to proceed with the argument unless it not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial, and therefore, where the Court is satisfied, even after substantial argument both at first instance and on appeal, that the defence does not disclose a reasonable ground of defence, it will order it to be struck out ... A stay or even dismissal of proceedings may "often be required by the very essence of justice to be done" ... so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation...)."*

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The foregoing shows that the power to strike out is stringent and must therefore, be exercised sparingly and in very clear cases. This is in line with what we held in the case of *John Chisata v Attorney General*[12] where we put the matter as follows:

> *"We cannot stress too strongly what we have said in the past, that such cases should whenever possible, and where there is no prejudice to either party by some irregularity, be allowed to come to trial so that the issues may properly be resolved. Interlocutory orders which prevent this should be avoided."*

We reiterate the above position in the case *in casu*. The best course the Judge should have taken was to allow the whole matter to go to trial so that the issues raised by the parties may be properly resolved. On our part, we are not satisfied that this is one of those clearest of cases where striking out should be done especially that the defence of illegality put forward by the defendants is a matter of public policy.

Further, State Counsel Malambo conceded that the second part of paragraph 10 of the defence ought not to have been struck out. By striking out the said paragraphs of the defence, the Judge essentially shut the defendants out of all possible defences and as argued by learned counsel for the defendants, there would then be nothing remaining in the defence requiring a trial as the matter was more or less dealt with in finality at interlocutory stage. In conclusion, we set aside the order striking out

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paragraphs 10, 11 and 12 of the defendants' defence as the decision to do so was perverse. Grounds 2 and 3 also succeed.

The sum total is that this appeal has wholly succeeded. We remit the matter back to the High Court for trial before another judge. The costs of this appeal shall abide the outcome of the matter in the court below.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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A. M. WOOD
SUPREME COURT JUDGE

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R. M. C. KAOMA
SUPREME COURT JUDGE