

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 051 OF 2018

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

**JULDAN MOTORS LIMITED**

**IBRAHIM NASSA**

**OLYPA DANOBO**

**AND**

**FIRST NATIONAL BANK ZAMBIA LIMITED**

**JULY DANOBO**



**1<sup>st</sup> APPELLANT**

**2<sup>nd</sup> APPELLANT**

**3<sup>rd</sup> APPELLANT**

**1<sup>st</sup> RESPONDENT**

**2<sup>nd</sup> RESPONDENT**

**CORAM: Chashi, Lengalenga and Siavwapa, JJA**

**ON: 27<sup>th</sup> June and 6<sup>th</sup> September 2018**

*For the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants: (1) K. Mweemba and M. Mwiinga (Ms), Messrs Keith Mweemba Advocates*

*(2) G. Phiri, Messrs PNP Advocates*

*For the 1<sup>st</sup> Respondent: G. Musyani, (Ms) and M. Moonga – In house*

*For the 2<sup>nd</sup> Respondent: (1) H. H. Ndhlovu, SC, Messrs H. H. Ndhlovu and Company*

*(2) J. Zimba, N. Botha, M. Phiri (Ms) and M. Mpemba,*

*Messrs Makebi Zulu Advocates*

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## **J U D G M E N T**

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**CHASHI, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. *Development Bank of Zambia and Another v Sunvest Limited and Another (1995 – 1997) ZR 87*

2. *Mukumbuta Mukumbuta and Others v Nkwilimba Choobana and Others - SCZ Judgment No. 8 of 2003*
3. *Musakanya and Another v Attorney General (1981) ZR, 221*
4. *Barclays Bank of Zambia v ERZ Holdings Limited and Others - SCZ Appeal No. 71 of 2007*

**Legislation referred to:**

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *The Legal Practitioners Rules, 2002 - Statutory Instrument No. 51 of 2002*

**Other works referred to:**

1. *Halsbury's Laws of England, 4<sup>th</sup> edition, Volume 44 (1) - Reissue*
2. *Cordery on Solicitors, Cordery's Law Relating to Solicitors, 5<sup>th</sup> edition, London, Butterworths (1961)*

This appeal emanates from the Ruling of the High Court delivered on 16<sup>th</sup> January 2018, in which the learned Judge dismissed the cause on account of multiplicity of actions.

The background to the matter is that, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants who were the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs respectively in the court below, commenced proceedings against the defendant, now the 1<sup>st</sup> Respondent by way of writ of summons, under cause number **2015/HP/1139**, claiming the following reliefs:

- (1) Repayment of special damages by the defendant of K2,800,000.00 and K30,060,000.00 being monies paid out by them without the authority of the 2<sup>nd</sup> plaintiff.
- (2) An injunction prohibiting further transfer from the account at Industrial branch without authorization of the 2<sup>nd</sup> plaintiff
- (3) Further or in the alternative, an order directed at the defendant to rectify the signing mandate on the kwacha and rand accounts

to reflect the 2<sup>nd</sup> plaintiff as a co-signatory (should it be found that he was illegally removed).

According to the accompanying statement of claim, the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are shareholders in the 1<sup>st</sup> plaintiff company, in which the 2<sup>nd</sup> plaintiff is a co-signatory on both the kwacha and rand accounts.

That it was a mandate at the time of opening of the accounts that the 2<sup>nd</sup> plaintiff and the intervenor now the 2<sup>nd</sup> Respondent, who was joined to the proceedings by Order of the court dated 13<sup>th</sup> August 2015, would jointly sign for any payments or transfers out of the accounts and that had never been altered, hence the claim.

On 13<sup>th</sup> August 2015, the 1<sup>st</sup> Respondent filed a summons before the learned Deputy Registrar to dismiss/strike out the writ of summons for being irregular and an abuse of the court process as well as for misjoinder of parties. It was deposed to in the affidavit in support of the application, that, there is another matter under cause number **2015/HP/0678** in which the 1<sup>st</sup> Appellant and the 2<sup>nd</sup> Respondent have sued the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants, in which the 1<sup>st</sup> Appellant has alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants have engaged in fraudulent transactions relating to change of shareholding, directorship and misappropriation of huge sums of money in the company, in which matter, the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants have filed a defence and counter claim. This application was supported by the 2<sup>nd</sup> Respondent.

In the ruling dated 8<sup>th</sup> September 2015, the learned Deputy Registrar, considered the issue relating to misjoinder of the plaintiffs and multiplicity of actions and omitted to deal with the issue relating to commencement of actions without the authority of the company.

The learned Deputy Registrar opined as follows:

*“It is my considered view after considering the court process, all the circumstances of the case that all the parties to the cause of action have an interest and or may be affected by the proceedings before court...On the issue of cause number **2015/HP/0678**, I am of the considered view that necessary applications may be made for consolidation of matters to be determined. I accordingly dismiss the application.”*

That ruling prompted the 2<sup>nd</sup> Respondent to renew the application for multiplicity of actions before the learned Deputy Registrar, who in his ruling dated 17<sup>th</sup> April 2017 refused to entertain the application as in his view it would amount to reviewing his earlier decision of 8<sup>th</sup> September 2015.

On 17<sup>th</sup> April 2017, after settling the defence, the 2<sup>nd</sup> Respondent through his Counsel, raised two preliminary issues before the learned Judge in the court below, couched as follows:

- (1) That the Appellant’s Advocates were conflicted; and
- (2) That there was no adherence to principles of corporate governance.

On the issue of the Advocates being conflicted, it was alleged that, the Appellant’s Advocates are the ones representing the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants in cause number **2015/HP/0678** as defendants, where they have been sued by the 1<sup>st</sup> Appellant and 2<sup>nd</sup> Respondent.

On the second issue, it was alleged that, there was no resolution to allow the 1<sup>st</sup> Appellant as a company to appoint the Advocates and to commence proceedings in court.

After considering the issues, the learned Judge was of the view that, the issue of conflict of interest was to a large extent related to whether the present action was an abuse of the court process in respect to multiplicity of actions. The learned Judge opined that, the issues raised in the case before him were not different to those raised in the earlier cause, in particular as contained in the counter claim and as such there was multiplicity of actions.

The learned Judge was of the view that it was the same multiplicity of actions which had brought about the conflict of interest on the part of Messrs Keith Mweemba Advocates and PNP Advocates and upheld the preliminary objections.

Dissatisfied with the Ruling, the Appellants have appealed to this Court advancing four grounds of appeal as follows:

1. The court below erred in both law and fact when it dismissed the Appellant's action for multiplicity of actions when the same is/was not the case.
2. The court below erred in both law and fact when it adjudicated the issue of multiplicity of actions and abuse of court process which was res judicata having been dismissed by the Deputy Registrar and the Respondents having not appealed against the said decision.
3. The court below gravely misdirected itself in both law and fact when it held that Messrs Keith Mweemba Advocates and PNP Advocates were conflicted in acting for Juldan Motors Limited in this action.
4. The court below erred in both law and fact when contrary to and against the weight of the facts at hand, held that there was a real

risk of conflict of interest and risk of breach of confidence if the same Advocates were allowed on one hand to advocate against Juldan Motors Limited and on the other hand to champion the interests of the same company in two different actions over the same subject matter.

At the hearing of the appeal, Counsel for the Appellants relied on the heads of argument which were filed into Court.

In arguing ground one, Counsel drew our attention to a number of Supreme Court decisions, where the issue of multiplicity of actions has been adjudicated upon, notable amongst them, the case of **Development Bank of Zambia and Another v Sunvest Limited and Another**<sup>1</sup>.

According to Counsel, the essential features that need to be present for an argument of multiplicity of actions to be successful are that the subject matter must be the same and the parties must be the same.

Counsel submitted that the subject matter or issue for determination under cause number **2015/HP/0678** was the transfer of shares and shareholding. Whilst in *casu* the core subject matter or issue is the breach of duty by the 1<sup>st</sup> Respondent and its liabilities as a bank for assisting in the propagation of illegalities.

Counsel cited the case of **Mukumbuta Mukumbuta and Another v Nkwilimba Choobana and Others**<sup>2</sup> where the Supreme Court stated as follows:

*“... the principle governing consolidation of actions is that common questions of law or facts and rights or reliefs arising out of the same transaction should be consolidated in one action...”*

*The rationale for consolidation is to save costs and avoidance of multiplicity of actions.”*

It was Counsel's contention that no such common questions of law are present in *casu* as envisaged by the Supreme Court in the aforestated case.

Counsel further submitted that, in relation to the requirement that the parties must be the same, the 1<sup>st</sup> Respondent was not a party to the action under cause number **2015/HP/0678** and has no interest in the shareholding of the company. Furthermore, that the 2<sup>nd</sup> Respondent was not initially a party to these proceedings but only joined as intervenor for purposes of an order to dismiss the action.

Counsel further submitted that the interest of justice would not have been served by consolidating the two actions or joining the 1<sup>st</sup> Respondent to the action under cause number **2015/HP/0678** as the issues raised in the action constituted two separate actions.

As regards ground two, our attention was drawn to the cases of **Musakanya and Another v Attorney General**<sup>3</sup> and **Barclays Bank of Zambia v ERZ Holdings Limited and Others**<sup>4</sup> and submitted that, the essence of the defence of *res judicata* is that once an issue had been determined on its merits and the right of appeal has either been exhausted or not exercised, the issue cannot be relitigated.

It was Counsel's submission that, the issue of multiplicity of actions and abuse of court process was already adjudicated upon by the learned Deputy Registrar and it could therefore not be raised before the learned Judge by the 2<sup>nd</sup> Respondent; If the Respondents were dissatisfied, they should have appealed the ruling as prescribed by law.

Grounds three and four were argued together and submitted that, there is no conflict of interest or breach of confidence in the present case on the part of the Appellant's Advocates. Our attention was drawn to a number of cases dealing with protection of confidential information.

We were in conclusion urged by Counsel to set aside the Ruling by the learned Judge and allow the matter to proceed to trial in the interest of justice.

In response, the 1<sup>st</sup> Respondent's Counsel also relied on the heads of argument filed into court.

In respect to ground one, Counsel submitted that, a perusal of the record of appeal (the record) at pages 138 – 140 clearly shows that the issues for determination in cause number **2015/HP/0678** are the same issues for determination herein. That the defendants in that cause made allegations concerning the funds and accounts of the company held in the two accounts at the 1<sup>st</sup> Respondent and under paragraph 43 of the defence at page 137 of the record made allegations relating to the use of funds in the sum of K2,800,000.00 without authority; an allegation that forms part of the claim herein.

It was further submitted that under paragraph 45 of the defence and counter claim at page 137 of the record, the defendants in the other cause made allegations of suspicious and unauthorised transfers of company funds from the company accounts at the 1<sup>st</sup> Respondent and prayed for an account of proceeds of the company, including funds that passed through the accounts held at the bank.



According to Counsel, the issues raised in the defence and counter claim are the same issues which have been brought by the Appellant for determination in the court below.

According to Counsel, with the commencement of this matter by the Appellant, there is effectively two matters before different courts involving the same parties over the same subject matter. That there is a real danger of the two courts rendering conflicting Judgements over the same matter with difficulty in enforcement.

In response to ground two, Counsel submitted that, the learned Judge was on firm ground when he heard and determined the preliminary issues brought before him as the same were not *res judicata*. That the application before the learned Judge was different from the earlier applications heard by the Deputy Registrar. That the issues of conflict of interest and breach of the rules of corporate governance were being raised for the first time in this cause.

According to Counsel, the learned Judge was on firm ground when he delved into the issues of multiplicity and determined the same, even though they were not raised in the application before him as he has inherent jurisdiction as provided under Section 13 of ***The High Court Act***<sup>1</sup>.

Counsel submitted that, the court has power to make a determination at any point of the proceedings, to avoid multiplicity of actions and the finding by the learned Judge cannot be faulted on the basis that the same application was heard and determined by the Deputy Registrar.

Counsel equally argued ground three and four together. It was submitted that the Appellants' Advocates have completely missed the legal point of conflict of interest and breach of confidence.

That, what the principles around conflict of interest and protecting of a client's confidentiality seek to achieve is averting a situation where there is a real risk of actual breach, and not that actual breach has to occur.

According to Counsel, it is not in dispute that the Appellant's Advocates have in one action acted against the company while they purport to act on its behalf in this case.

That the subject matter of these two cases is common and there exists a real risk of the Advocates breaching the clients confidentially and as a result they are conflicted.

Our attention was drawn to Rule 33 (1) (3) of ***The Legal Practitioners Rules of 2002***.

It was Counsel's contention that the act by the Advocates is inappropriate and erodes the confidence that the public ought to have in the legal profession.

In conclusion, it was Counsel's prayer that the appeal be dismissed in its entirety as it is misconceived.

The 2<sup>nd</sup> Respondent did not file any heads of argument. State Counsel Ndhlovu elected to rely on the submissions which were made in the court below and we have accordingly taken note of the same. We have no intention of recapitulating the same as they are taken care of by the 1<sup>st</sup> Respondents arguments.

We have considered the arguments, submissions by the parties and the Ruling being impugned.

We shall address grounds one and two together as they are related. The issues the two grounds raise are as follows:

- (1) Whether the issue of multiplicity of actions which was considered by the learned Judge in the court below was *res judicata*; and
- (2) Whether there was multiplicity of actions.

In considering the first issue, we note, as correctly observed by Counsel for the 1<sup>st</sup> Respondent that, the issue of multiplicity of actions was not supposed to be an issue for consideration before the learned Judge in the court below as it was not one of the issues raised before him. The Judge was however of the view that, the issue of conflict of interest which was before him for consideration was to a large extent related to the issue of abuse of court process in respect to multiplicity of actions.

We do not see how the two issues are connected; neither did the learned Judge endeavour to explain the connection. The issue of multiplicity of actions was not raised before him and he should therefore have not delved into consideration of the same.

Furthermore, as earlier alluded to, at pages J3 - J4 of this Judgment, the issue was dealt with by the learned Deputy Registrar in his ruling of 8<sup>th</sup> September 2015.

The said ruling was never appealed. We would in that vein agree with Counsel for the Appellant that the issue is *res judicata*. The effect the defence of *res judicata* has, is that, it forecloses relitigation of matters that have once been litigated and decided.

As regards the issue of whether there was multiplicity of actions, in the face of having found for *res judicata*, the same becomes otiose.

Grounds one and two are accordingly allowed.

As regards ground three and four, we shall equally address them together as they are also related.

The issue they raise, is whether the Appellants Advocates are conflicted.

It is common cause that at the time the Advocates commenced this matter on behalf of the 1<sup>st</sup> Appellant, they were already acting against the 1<sup>st</sup> Appellant who was the defendant in cause number **2015/HP/0678** in which case, they were representing the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants against the 1<sup>st</sup> Appellant.

Rule 3 (2) of **The Legal Practitioners Rules**<sup>2</sup> provides as follows:

*“A practitioner shall not do anything in the course of practice or permit another person to do anything on the practitioner’s behalf, which compromises or impairs or is likely to compromise or impair any of the following:*

*(c) The practitioner’s duty to act in the best interest of the client*

*(d) the good repute of the practitioner or of the legal profession.”*

Further, Rule 33 (1) provides that:

*“A practitioner shall not accept any brief, if to do so would cause the practitioner to be embarrassed under the following circumstances:*

*(b) there is or appears to be some conflict or a significant risk of some conflict either between the interest of the practitioners or any partner or other associate of the practitioner and some other person or between the interests of any one or more of their clients.”*

We note that, both this matter and cause number **2015/HP/0678** are contentious proceedings bordering on serious allegations of fraud. By

acting for the Appellants in this cause and acting for the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants against the 1<sup>st</sup> Appellants in the other cause, at the same time, in our view, not only would it appear that there is some risk of conflict, but we would also find it difficult to appreciate how the Advocates would act in the best interest of the 1<sup>st</sup> Appellant as a company.

The learned authors of *Halsbury's Laws of England*<sup>1</sup> at paragraph 440 (9) have stated that, allegations of conduct unbecoming a lawyer have been substantiated where a lawyer continued to act for a client where a situation has arisen in which a possible conflict of interest existed between the client and the lawyer.

According to the learned authors of *Cordery On Solicitors*<sup>2</sup>, they observe at page 85 as follows:

*"If it is shown that a Solicitor in pursuit of his profession had done something with regard to which would reasonably be regarded by his professional brethren of good repute and competency, then it is open to say that he has been guilty of professional misconduct."*

In other words, it must be shown that the conduct is dishonorable to the lawyer as a man and dishonorable in his profession.

We are mindful that each case turns on its own facts and while as courts we may require from lawyers a higher standard of conduct than from persons who are not officers of the court, yet the principle upon which the courts restrains a lawyer from acting where there is a likelihood of a conflict of interest is the prevention of the confidence reposed in the lawyer by the client.

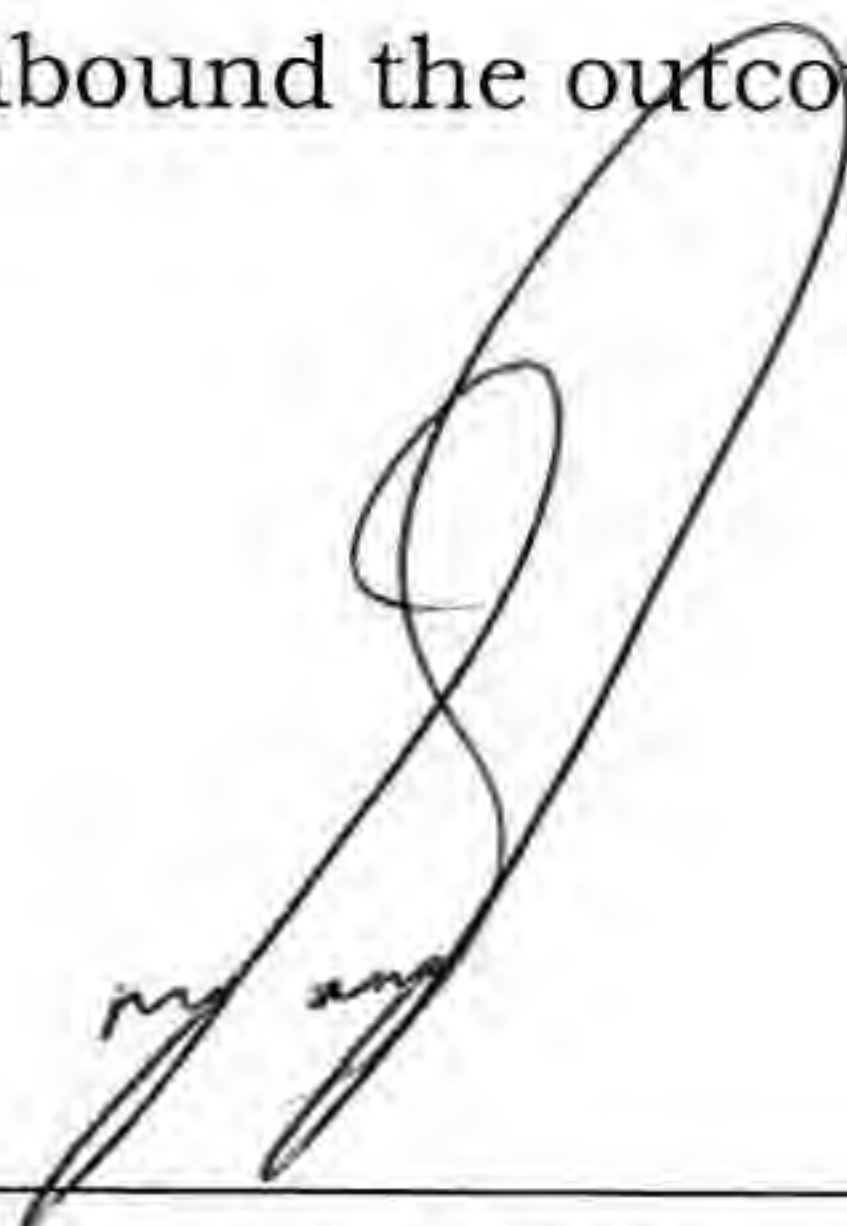
In our view, the conduct by the Advocates for the Appellants is unwarranted and is not what is expected of them as legal practitioners as it offends the provisions of ***The Legal Practitioners Rules***.

In the view that we have taken we cannot fault the learned Judge in the court below for finding that the firm of Messrs Keith Mweemba Advocates and PNP Advocates were conflicted and we accordingly Order that they cease to act on behalf of the 1<sup>st</sup> Appellant.

The sum total of this appeal is that grounds one and two succeed and ground three and four fails.

The Ruling of the learned Judge as regards dismissal of the cause of action on account of multiplicity of actions is set aside and the matter sent back to the High Court to be tried on its merits.

Costs of this appeal are to abound the outcome of the trial.



**J. CHASHI**  
**COURT OF APPEAL JUDGE**



**F. M. LENGALENGA**  
**COURT OF APPEAL JUDGE**



**M. J. SIAVWAPA**  
**COURT OF APPEAL JUDGE**