**IN THE SUPREME COURT OF ZAMBIA** **APPEAL NO.196/2014**
**HOLDEN AT NDOLA** **SCZ/8/190/2014**
*(CIVIL JURISDICTION)*



BETWEEN:

**TEICHMANN ZAMBIA LIMITED** **APPELLANT**

**AND**

**MUMANA PLEASURE RESORT** **1ST RESPONDENT**
**PUMA ENERGY ZAMBIA PLC** **2ND RESPONDENT**

**CORAM: Chibomba, Hamaundu and Kaoma, JJS**
**On 3rd March, 2015 and 22nd February, 2018**

For the Appellant : Mr J. Jalasi, Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioners

For the 1st Respondent : N/A
For the 2nd Respondent : Mr S. Lukangaba, Messrs Mweemba Chashi & Partners and Messrs Shamwana & co

---

# JUDGMENT

---

**Hamaundu, JS** delivered the Judgment of the court.

Legislation referred to:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia, Order XIV Rule 5(1)**
2. **The Rules of the Supreme Court (White Book), Order 14A**

The appellant appeals against the ruling of the High Court dated the 12th August, 2014 by which the High Court removed the two respondents from these proceedings and replaced them with Mumana Hotels Limited. The background to this appeal is as follows: On 22nd May, 2014, the appellant commenced an action against the two respondents, seeking in the main an order of specific performance of a contract of sale between the appellant and the 1st respondent with respect to a portion of Stand No.10446 described as *"S/D "A"*. The appellant averred in its statement of claim that when the parties entered into an agreement dated 31st August, 2011, for the sale of the above property, they made provision within the contract that should the 1st respondent desire to sell or develop the neighbouring vacant piece of land, the appellant would have the first option either to buy it or to partner with the 1st respondent in a joint venture. In March, 2014 the appellant discovered that the 1st respondent had, instead, offered the vacant land to the 2nd respondent.

The 1st respondent's immediate reaction was to raise two preliminary issues on a point of law pursuant to **Order 14/5/2** of

the **High Court Rules, Cap 27** and **Order 14/A** of the **Rules** of the **Supreme Court 1999** namely;

(i) that the 1st respondent was never a party to the purported contract between Mumana Hotels Limited and the appellant, and;

(ii) that the appellant did not exist at the time that the purported contract was entered into.

The 2nd respondent also raised a preliminary issue of its own, namely that the appellant had no cause of action against the two respondents because they were not privy to the contract between the appellant and Mumana Hotels Limited.

The appellant filed an objection to the motions to raise preliminary issues. The objection was on the following grounds;

(i) that, although the respondents had raised these issues, they had not yet filed any notice of intention to defend, as required by **Order 14A of the Rules of the Supreme Court (White Book)**;

(ii) that no entity known as Mumana Hotels Limited was registered at the Patents and Companies Registry, but that only Mumana Pleasure Resort Limited was registered, and;

(iii) that Teichmann Zambia Limited was in existence on 31st August, 2011, having been incorporated and registered on 17th April, 2007.

The 1st respondent's argument on the first of its preliminary issues was that the contract which is the subject of this action was entered into by Mumana Hotels Limited and not Mumana Pleasure Resort Limited (the 1st respondent). Consequently, it was argued, the 1st respondent is a stranger to that contract and is, therefore, the wrong party to sue.

The argument on the second preliminary issue was that the appellant has had changes of name; in this case, from Teichmann Zambia Limited to Teichmann Africa Limited, as at 11th February, 2011, and then back to Teichmann Zambia Limited with effect from 8th February, 2012. It was submitted that when the subject contract was entered into on 31st August, 2011, the company that was in existence was Teichmann Africa Limited and yet Teichmann Zambia Limited (the appellant) purported to enter into the contract. The 1st respondent argued that since the appellant was not a competent party to enter into that contract, this action was incompetent and should be dismissed.

The issue raised by the 2nd respondent was the same as the first issue raised by the 1st respondent. Hence, the arguments were the same.

The appellant's argument with regard to the provisions of **Order 14A** was that a defendant cannot raise preliminary issues thereunder unless they have filed a notice of intention to defend. It was pointed out that in this case the 1st appellant had merely filed a conditional memorandum of appearance.

On the second point of objection, the appellant argued that the burden is on the respondents who assert that Mumana Hotels Limited exists to prove that it does, indeed, exit. It was argued by the appellant that, as far as the records at the Patents and Companies Registry were concerned, Mumana Hotels Limited did not exist. The appellant argued further that, in any event, **Order XIV, Rule 5** of the **High Court Rules**, upon which the respondents' motion was founded, provides that no suit shall be defeated by reason of non-joinder or misjoinder of parties. The appellant also argued that the 1st respondent could not plead privity of contract because it was the correct party.

In the alternative, the appellant submitted that the witnesses that signed the contract on behalf of Mumana Hotels Limited were also Director and Shareholder of Mumana Pleasure Resort Limited. It was argued that, in the circumstances, the two entities were controlled by the same people; and should be treated as one. The appellant concluded by arguing that this was a fit and proper case for piercing the corporate veil.

On the third point of objection the appellant insisted that the documents available showed that the appellant was in existence at the material time.

The court below held that, since the 1st respondent had filed a conditional memorandum of appearance, that constituted a notice of intention to defend the action. Consequently, the 1st respondent's motion was held to be properly before it.

The cardinal issue, according to the court, was that of privity of contract. The court examined the contract of sale and observed that the parties thereto were Mumana Hotels Limited and the appellant. The court observed also that there was exhibited on the record a certificate of incorporation showing that a company known as Mumana Hotels Limited was incorporated on 31st Mach, 1981. The

court, therefore, rejected the appellant's contention that Mumana Hotels Limited did not exit.

The court also rejected the appellant's argument on common shareholding and directorship on the principle that an incorporated company is a separate legal entity from the shareholders and directors. In the same vein, the court considered the appellant's contention that this could be an appropriate case to lift the corporate veil and was of the view that the contention was untenable on the ground that there was no plea of that contention in the appellant's pleadings as they stood at the time of the application.

Consequently, the court held that the 1st respondent, not having been a party to the contract, could not be sued. For the same reason, the court held that the appellant had no cause of action against the 2nd respondent.

The court then considered whether or not the entire action should be dismissed for misjoinder. The court held that, since it had been established that the party to the contract was Mumana Hotels Limited, it would not dismiss the action entirely but would, instead, substitute Mumana Hotels Limited for the two respondents. The court, therefore, struck out the action as against the two respondents

but joined Mumana Hotels Limited as a defendant. Hence this appeal.

The appellant has advanced three grounds, namely:

> **"1. The learned Puisne Judge erred in law and fact when she held that a certificate of incorporation *per se* proves a corporation's existence. Part II of the Companies Act, Chapter 388 Volume 21 of the Laws of Zambia which governs incorporation and modification of companies provides that incorporation is subject to the provisions of the companies Act.**
>
> **2. The learned Puisne Judge erred in law and fact when she declined to adjudicate on all issues in controversy *qua* the relationship between the non-compliant Mumana Hotels Limited and Mumana Pleasure Resort Limited.**
>
> **3. The learned Puisne Judge erred in law and fact when she ordered misjoinder of Mumana Pleasure Resort Limited and Puma Energy Zambia Plc."**

We have examined the grounds of appeal. We wish to point out that this matter is yet to go for trial; at least as between the appellant and Mumana Hotels Limited. Therefore, arguments such as those that have been advanced in support of the first ground of appeal relating to the incorporation of Mumana Hotels Limited and to its compliance with the provisions of the Companies Act are arguments that will be relevant at the trial of the action. We would not like to

pre-empt the trial court's decision on them. Further, the arguments, as shall be demonstrated shortly, are not on point with the issue that should have been considered in this application. Likewise, in the second ground of appeal the arguments are with regard to the relationship between Mumana Hotels Limited and Mumana Pleasure Resort Limited, *vis a vis*, their common shareholding and directorship. Again, these are arguments that will probably be forceful when the matter goes to trial, but they are certainly not on point as far as the real issue that the parties and the court should have focused on.

The only ground that can be said to be relevant in this appeal is the third ground; which, generally, impugns the court's misjoinder of the two respondents from the action. On this ground, the sole argument that was advanced on behalf of the appellant before us was that the court below, having held that non-joinder cannot defeat a cause of action, should have simply added Mumana Hotels Limited to the action and maintained the two respondents as defendants in the action in order to enable a full comprehensive determination of all issues in controversy.

In response, the argument advanced on behalf of the 1st respondent was that the court below discharged its duties and adjudicated over all issues before it to the full extent of the law; and in conformity with the provisions of **Sections 9 and 13** of the **High Court Act**, based on the pleadings, issues raised for determination and the evidence before court.

On behalf of the 2nd respondent, the argument that was advanced before us on this point was that **Order XIV Rule 5(1)** and **(2)** of the **High Court Act** formed the lawful basis for the court to have ruled as it did. It was argued that the above provisions empower the court to join parties to the suit and to remove those that are improperly joined to the proceedings.

We have considered the arguments by the parties in this appeal. This was an application that fell to be resolved entirely under **Order XIV Rule 5(1)** of the **High Court Rules, Chapter 27** of the **Laws of Zambia**. The relevant portion of the rule states:

> **"5(1) if it shall appear to the court or a judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in the subject matter of the suit, or who may be likely to be affected by the results, have not been made parties, the court or a judge may adjourn the hearing of the suit to a future day, to be fixed by the court or a judge, and**

> **direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be. In such case, the court shall issue a notice to such persons, which shall be served in the manner provided by the rules for the service of a writ of summons, or in such other manner as the court or a judge thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not shall be bound by all proceedings in the cause....."**

It is clear from the record that the parties and the court below were alive to the power given to the court under this rule to join parties to an action or to remove them from such action. They were also alive to the requirement under **Section 13** of the **High Court Act** that the court should determine disputes before it in such a manner that all issues in controversy are resolved. To that end, a number of our decisions on the two issues were cited. We do not see the need to cite them again as they are well known; and the principles enunciated therein are not at the centre of the issue herein. However, from the provisions of **Rule 5** which we have quoted above we see the following words as being key to the resolution of the application that was before the court below. The words are: *"the subject-matter of the suit"*. This is where, in our view, the court below missed the point;

the court focused its attention on the contract and the parties thereto instead of the subject-matter of that contract.

In this case, it was established that the appellant and Mumana Hotels Limited entered into a contract whose subject matter was a portion of Stand No. 0446 which was described as *"S/D "A"*. It was established that in that contract Mumana Hotels Limited appears to have promised to give priority to the appellant in the event of the sale of the adjacent vacant portion of land. It was also established that there was a transaction of sale between the 1st respondent and the 2nd respondent involving the same vacant portion of land; in fact, that is what brought about this action. While the court below, rightly, joined Mumana Hotels Limited to the action, it overlooked the fact that the subject of the action between the appellant and Mumana Hotels Limited is a portion of land in which the two respondents also have an interest; and that the two respondents are likely to be affected, probably adversely, by the result of this action. Therefore, in terms of **Rule 5** of **Order XIV** of the **High Court Rules**, the two respondents needed to be parties to this action in order for all issues in controversy to be determined conclusively. Hence, the issue at this stage of the proceedings is not whether or not the appellant's

intention to pierce the corporate veil was pleaded, or that any cause of action has been established against the respondents. The issue is simply that, since the common denominator is the vacant portion of land, all the parties that have an interest in it must be joined to the action so that the issues are determined in a holistic fashion. It is for this reason that we concur with the appellant in its third ground of appeal that the court below erred in law when it struck out the action as against the two respondents.

This appeal, therefore, is allowed. We order that the two respondents be re-joined to the action as defendants so that the appellant may proceed against all the three defendants at trial. We award the costs of this appeal to the appellant, to be taxed in default of agreement.

.....
H. Chibomba
**SUPREME COURT JUDGE**

.....
E. M. Hamaundu
**SUPREME COURT JUDGE**

.....
R. M. C. Kaoma
**SUPREME COURT JUDGE**