

BETWEEN:

WORLD VISION ZAMBIA LIMITED

APPELLANT

AND

DR. BECK BANDA

RESPONDENT

CORAM : Kondolo, Chishimba and Sichinga JJAs

On 16th June, 2021 and 20th August, 2021

For the Appellant : Mr. K. Musaila of Messrs. Chonta Musaila & Pindani Advocates

For the Respondent : Mr. S. Mbewe of Messrs. Keith Mweemba Advocates

JUDGMENT

Chishimba JA, delivered the Judgement of the Court.

CASES REFERRED TO:

1. Mukumbuta Mukumbuta & Others v Nkwilimba Choobana Lubinda & Others (2003) Z.R. 55
2. Development Bank Of Zambia & KPMG Peat Marwick v Sunvst Limited & Sun Pharmaceuticals Limited (1995 - 1997) ZR 187
3. Daws v Daily Sketch & Sunday Graphic Limited & Another : Darke and Others v Same (1960) 1 All ER 397

LEGISLATION CITED:

1. The High Court Rules Chapter 27 of the Laws of Zambia.
2. The Rules of the Supreme Court of England. 1999 Edition.

OTHER WORKS CITED

1. Dr. Patrick Matibini. (2017). Zambian Civil Procedure: Commentary and Cases. Volume 1. LexisNexis.

1.0 INTRODUCTION

1.1 This is an interlocutory appeal against the ruling of Mrs. Justice Mapani-Kawimbe dated 2nd March, 2020 in which she declined to execute and grant a consent order drawn by the parties for consolidation of causes number 2019/HP/0119 and 2020/HP/0072.

2.0 BACKGROUND

2.1 The background being that on or about 22nd November, 2018, the respondent gave an interview to the Daily Nation Newspaper in which he alleged, and caused to be published allegations, that the appellant had infringed the respondent's alleged copyright in the Safe Motherhood Action Groups (SMAGs) Model.

2.2 On 25th January, 2019, the appellant issued a writ of summons against the respondent in Cause No. 2019/HP/0119 seeking, *inter alia*, the following reliefs:

- 1) Damages for slander and/or libel;**
- 2) Aggravated damages; and**
- 3) An injunction to restrain the respondent, his servants or agents from further publishing the words complained of or any similar words defamatory of the appellant.**

2.3 On 20th February, 2019, the respondent, filed a defence and counterclaim in which he averred that on or about 6th December, 2012, he had formalized his Theater for Community Action (TCA) with its end products including Safe Motherhood Action Croups (SMAGs), by registration with the Registrar of Copyright under the Ministry of Information and Broadcasting. It was stated that the appellant had violated and continues to violate this copyright by reason of which the respondent has suffered loss and damage to his moral and economic rights. Consequently, the respondent counterclaimed, *inter alia*, the following reliefs against the appellant:

- (1) An injunction to restrain the appellant whether by its respective directors, officers, servants or agents from using or employing SMAGs Model that is essentially identical to the respondent's SMAGs Model and/or clearly using the**

respondent's SMAGs Model as their basis without the respondent's licence or express permission;

- (2) *An inquiry as to damages for infringement on the respondent's copyrighted SMAGs Model or, at the option of the respondent an account of profits made by the plaintiff by reason of its infringement of the respondent's moral and economic rights in the copyrighted SMAGs Model; and*
- (3) *An order for the payment of all sums found to be due to the respondent upon the taking of such inquiry or account.*

2.4 A year later on 16th January, 2020, the respondent commenced an action against the Attorney General by way of writ of summons under Cause No. 2020/HP/0072. In that action, the respondent, as plaintiff, sought several reliefs including the following:

- (1) *A declaration that the plaintiff is the copyright holder in Safe Motherhood Action Groups (SMAGs) Model/Concept;*
- (2) *A declaration that the defendant, through the Ministry of Health, has infringed the copyright on the plaintiff's Safe Motherhood Action Groups (SMAGs) Model by establishing, training and supporting SMAGs in health centers without the permission or authorization of the plaintiff;*
- (3) *An inquiry as to damages for infringement of copyright or, at the option of the plaintiff, an account of profits made by the defendants by reason of their infringement of the plaintiff's moral rights and economic rights copyrighted SMAGs Model; and*
- (4) *An order for payment of all sums found to be due to the plaintiff upon the taking of such inquiry or account.*

2.5 Before trial could commence under Cause No. 2019/HP/0119, the appellant filed summons for consolidation of actions pursuant to **Order 3 Rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia**. In an affidavit in support dated 12th February, 2020, the deponent Chikwashi Chilufya, alluded to the respondent's action against the Attorney General under Cause No. 2020/HP/0072 and states that a perusal of the counterclaim in Cause No. 2019/HP/0119 and the originating process under Cause No. 2020/HP/0072 shows that common questions of law or facts and rights or reliefs, are likely to arise in the two actions.

3.0 ARGUMENTS ADVANCED IN COURT BELOW

3.1 In its skeleton arguments filed in support of the application, the appellant placed reliance on **Order 3 Rule 5 of the HCR** and **Order 4 Rule 9(1) of the Rules of the Supreme Court, 1999 Edition**. The case of **Mukumbuta Mukumbuta & Others v Nkwilimba Choobana Lubinda & Others**⁽¹⁾ was also cited on the principle governing consolidation of actions that common questions of law or facts and rights or relief arising out of the

same transaction, should be consolidated in one action so as to save costs and avoid a multiplicity of actions.

- 3.2 Strangely, in paragraph 4 of the arguments at page 48 of the record of appeal, the appellant stated that it had commenced an action against the respondent seeking payment of rent and other charges due from the respondent in respect of premises known as Shop No. F19, Levy Business Park.
- 3.3 This is contrary to the endorsement on the writ of summons at page 15 of the record of appeal. It would appear that this was an inadvertent error caused by copy and paste.
- 3.4 The appellant contended that a consideration of the writ of summons and statement of claim in Cause No. 2020/HP/0072, shows that common questions of law or facts and rights or reliefs are likely to arise in the two actions. Therefore, allowing the two actions to proceed separately will merely result in multiplicity of actions and escalate costs.
- 3.5 On 18th February, 2020, the advocates for the parties executed a consent order for consolidation of matters which was presented to the learned Judge on 2nd March, 2020 for her endorsement.

4.0 **DECISION OF THE COURT BELOW**

- 4.1 In an ex tempore ruling dated 2nd March, 2020, the learned Judge considered the application together in respect of consolidation of the causes. She stated that the central theme in both causes rested on a claim of the alleged infringement of the SMAGs patent brought by the respondent. She noted that in the action before her, the appellant alleged that the respondent had defamed it and sought damages for slander, while in the 2nd action, the respondent as plaintiff, alleged that the defendant, being the Attorney General, had infringed his SMAGs copyright.
- 4.2 The court below further noted that in the matter before her, the respondent had also counterclaimed seeking a declaration that he is the rightful owner of the SMAG patent. In the other action where the respondent is plaintiff, a similar claim for a declaration as the rightful owner of the said patent was also being sought.
- 4.3 Judge Mapani-Kawimbe formed the view that the two causes could not be consolidated given the parties' positions in the cases. She wondered whether, if the actions were to be

consolidated, Dr. Beck Banda, who is the defendant in the first cause, could be described as a co-plaintiff or remain as a defendant. The Judge noted that since consolidation served to advance the causes of the parties without changing their positions in a suit, this was not a proper case for consolidation.

4.4 Consequently, she declined to execute the consent order and ordered the parties to appear before her on 19th March, 2020 for setting of trial dates in the matter before her.

5.0 **GROUNDS OF APPEAL**

5.1 Being dissatisfied with the decision above, the appellant advanced one ground of appeal couched as follows:

“That the court below erred in law and fact by holding that Cause No. 2019/HP/0119 and cause No. 2020/HP/0072 could not be consolidated.”

6.0 **ARGUMENTS BY THE APPELLANT**

6.1 The appellant filed heads of argument dated 28th May, 2020 in which they began by citing the provisions of **Order 3 Rule 5 of the HCR, Order 4 Rule 9(1) of the RSC** and the case of **Mukumbuta Mukumbuta & Others v Nkwilimba choobana Lubinda & Others**⁽¹⁾ relied upon in the court below. Further,

they called in aid the learned author, **Dr. Patrick Matibini's**, text book, **Zambian Civil Procedure: Commentary and Cases**, at page 323 where he explains that:

"The primary purpose of consolidation is to have issues that are substantially similar, tried in a single hearing, in order to save time and costs that ensue from a multiplicity of actions. Therefore, where there are two or more plaintiffs and two or more causes of action, they may be consolidated into a single action if the right to relief and the causes of action arise from the same act or transaction or there is 'some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject matter of the actions 'to render it desirable that the whole should be disposed at the same time'."

6.2 The appellant submits that a perusal of paragraphs 15 - 25 of the respondent's defence and counterclaim in Cause No. 2019/HP/0119, and paragraphs 4 - 15 of the statement of claim in Cause No. 2020/HP/0072 commenced by the respondent against the Attorney General, shows that the said paragraphs are identical and state the same facts that originate the respondent's counterclaim against the appellant and the claim against the Attorney General.

6.3 The appellant further contends that the reliefs sought by the respondent in Cause No. 2020/HP/0072 are also similar to

those in Cause No. 2019/HP/0119 in so far as they relate to a declaration that he is the copyright holder in the SMAGs Model; that there has been an infringement and the order sought for payment of all sums found due to the respondent upon an inquiry or account. Therefore, as the respondent's counter-claim and claim in the two actions are based on the allegation that the respondent is the copyright holder in the SMAGs Model, the common question of law that will arise in both actions, is whether or not the respondent is the copyright holder in the SMAGs Model.

6.4 It was further submitted that the facts that the respondent relies upon to found his counterclaim in Cause No. 2019/HP/0119 and in Cause Number 2020/HP/0072 are similar. The respondent is also represented by the same lawyers in both actions, namely Messrs. Keith Mweemba Advocates. The appellant submits that allowing the two actions to proceed separately will result in a multiplicity of actions which may result in various conflicting and contradictory decisions on whether the respondent is a holder of the copyright in the SMAGs Model, and be a waste of time as well as escalate costs.

As authority, the case of **Development Bank of Zambia & KPMG Peat Marwick v Sunvst Limited & Sun Pharmaceuticals Limited**⁽²⁾ was cited.

6.5 The appellant submitted that they are aware that consolidation of actions is at the discretion of the court but that such discretion must be exercised judiciously with a view to prevent multiplicity of actions, save time and costs. We were referred to page 327 of the book, **Zambian Civil Procedure: Commentary and Cases**, where the learned author states as follows:

"The consolidation of actions is within the discretion of the court. When faced with an application for consolidation, the court may make any of the following orders:

- (a) The applications may be consolidated into one action with a possibility of common counsel, one set of pleadings and a single discovery, judgment and bill of costs;*
- (b) The actions may not be consolidated, but instead, may be heard together within one trial immediately following the other, with separate pleadings, discoveries and judgments; or*
- (c) One action may be heard, and the remaining actions may be stayed.*

The judgment in the first case may eventually govern the outcome of the stayed actions. Although the discretion to consolidate actions lies in the court, a liberal approach is adopted in order to prevent multiplicity of proceedings, save time and save costs."

6.6 The appellant prayed that the appeal be allowed with costs.

7.0 **ARGUMENTS BY THE RESPONDENT**

7.1 The respondent filed heads of argument in opposition to the appeal dated 11th June, 2020 in which it was submitted that the appeal, in essence, questions the lower court's exercise of discretionary power in refusing to grant an order for consolidation. The respondent referred to the provisions of **Order 3 Rule 5 of the HCR** and **Order 4 Rule 9(1) of the RSC, 1999**, and submitted that it is trite that the power reserved for the court by these provisions is a discretionary power.

7.2 It was further submitted that judicial discretion, must be exercised judiciously and upon reason, rather than arbitrarily, on humor or fancifulness. The respondent contends that the reason proffered by the lower court in refusing to grant the order is not without legal basis and referred us to the provisions of **Order 4/9/2 of the RSC** which states as follows:

“... There may, however, be further circumstances which will militate against an order being made. Two actions cannot be consolidated where the plaintiff in one action is the same person as the defendant in another action, unless one action can be ordered to stand as a counterclaim or third party proceedings in another action. ...”

- 7.3 We were further referred to page 326 of the book **Zambian Civil Procedure: Commentary and Cases. Vol. 1** which states:

"7.6 Test for Consolidation"

The test the court follows is whether the balance of convenience favours consolidation. Convenience is defined as expediency or appropriateness in the sense that such consolidation appears to be fitting and fair to all the parties involved. One of the crucial factors taken into account in this regard, is whether the consolidation will cause substantial prejudice to the other parties. Thus, a court will not order a consolidation of actions unless it is satisfied that such a course of action is favoured by the balance of convenience, and there is no possibility of prejudice being suffered by any party. Consolidation will be refused where it will result in substantial prejudice to a party, even though the balance of convenience would favour it."

- 7.4 In this regard, the respondent contends that it cannot be argued that the lower court failed to exercise its discretion judiciously in declining to execute the consent order seeking consolidation as it was perfectly entitled to refuse the application for consolidation as it appeared to the court that Dr. Beck Banda could not assume both positions of defendant and plaintiff in the same matter. This is because, in terms of **Order 15/5/1 of the RSC, 1999**, the causes of action in question, cannot be conveniently tried together.

7.5 The respondent further contends that a perusal of the ruling of the lower court reveals that it was alive to the issues or claims advanced by the parties in the respective causes of action, being defamation and copyright infringement. Therefore, the fear by appellant that allowing the two actions to proceed separately will result in a multiplicity of actions and result in conflicting and contradictory decisions on whether the respondent is the holder of the copyright in the SMAGs Model, is unfounded. This is because the appellant has ignored the other factors at play in considering whether or not to grant an order for consolidation, such as, whether the balance of convenience favours consolidation for all parties, including the Attorney General who is the defendant in **Cause No. 2020/HP/0072**.

7.6 The respondent submits that in terms of **Order 4/9/5 of the RSC, 1999**, the appellant's cause of action being founded on defamation, can only be consolidated to another defamation cause of action based on substantially the same words against the defendants. Therefore, as Cause No. 2020/HP/0072 is not premised on defamation, it cannot be consolidated with Cause No. 2019/HP/0119 which is a defamation suit.

7.7 The respondent concluded by submitting that he has not found any sufficient basis upon which the lower court's exercise of discretion in declining to grant the consolidation order can be faulted because consolidation may or may not be granted taking into account the relevant applicable tests.

7.8 We were urged to dismiss the appeal for lack of merit with costs.

8.0 THE DECISION OF THIS COURT

8.1 We have considered the appeal, the arguments advanced and authorities cited by both learned counsel.

8.2 The appellant seeks to overturn the decision of the lower court in which it refused to exercise its discretion to consolidate Cause Nos. 2019/HP/0119 and 2020/HP/0072, on the ground that the parties in the actions were not the same in that the defendant in the first action was the plaintiff in the second action. We have perused the pleadings and averments in both suits. Under 2019/HP/0119, the appellant sued the respondent for damages for slander libel and injunction restraining him from further publishing similar defamatory words arising from interviews given by the respondent published in the Daily Nation Newspaper. The respondent alleged that the appellant

had infringed his copyright in the SMAGs Model. Earlier in 2018 the respondent had made a claim of copyright infringement against the appellant of the said SMAGS Model.

- 8.3 In the defence and counter claim by the respondent it was averred that he is the author and owner of the copyright in the safe motherhood Action Group (SMAGs) Model. That the appellant has been using SMAGs identical to the respondent without license or express permission. This includes training 33, 000 SMAGs in Zambia, publishing online training to SMAGs in Zambia, videos on online media and YouTube referring to SMAGs Model without his express permission. That the appellant is the holder of the SMAGs Model or concept acquired in 2002.
- 8.4 The respondent, arising from the above, sought in the counter claim; an injunction restraining the appellant from using or employing the SMAGs Model which was identical to his model without license or express permission, an inquiry as to damages for infringement/account of profits made by the appellant and payment of sums found to be due.

- 8.5 The appellant in its reply and defence to counter claim denied the counter claim and pleads in the alternative that the claim is statute barred.
- 8.6 Under cause **2020/HP/0072**, the respondent sued the Attorney General seeking a declaration that he is a copyright holder of the SMAGs Model/Concept, that the Attorney General (A.G) through Ministry of Healthy has infringed the copyright by establishing training and supporting SMAGs in Health Centers without permission or authorization. The respondent also sought an inquiry as to damages for infringement of copyright and an account of profits made by the A.G as a result of infringement and payment of all sums found to be due upon taking of such inquiry.
- 8.7 The principles of law as to consolidation of suits is settled. The court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are combined and treated as one matter. The purpose of consolidation being to save costs, time and make the conduct of several matters more convenient. It also avoids multiplicity of actions or conflicting decisions. It arises where it appears to

the court that there are some common questions of law or facts arising in either suits or that the rights to reliefs sought are in respect of or arise out of the same transaction or series of transactions. And, or where, for same reason it is desirable to make an order consolidating the suits. See the case of **Mukumbuta Mukunbuta & Others v Nkwilimba Chooban & Others** ⁽¹⁾ (**supra**) where the court considered consolidation of actions, the rationale and principles governing consolidation of actions. The rationale being to avoid multiplicity of actions.

8.8 The issues for determination are as follows;

- (i) Whether the same question of law or fact arise in both causes.
- (ii) Whether the rights/reliefs claimed in the suits arise out of the same transaction or series of transactions.
- (iii) Whether any party will be prejudiced or be conferred with undue advantage to the other party.
- (iv) Whether it is convenient and efficient to pursue the same in a consolidated suit.

8.9 It is trite that the power reposed in a court to make an order of consolidation in terms of **Order 3 Rule 5 of the HCR** and **Order**

4 Rule 9(1) of the RSC, is discretionary, and in the exercise of that discretion, the court has to consider whether it is desirable in all the circumstances that the common questions of law or fact arising, or the rights to relief claimed in the several causes or matter should all be disposed of at the same time. Thus, in a case where there are no common questions of law or fact, or the rights to relief being claimed in the several causes or matters are different, consolidation will not be ordered as was the case

in **Daws v Daily Sketch & Sunday Graphic Limited & Another : Darke and Others v Same** ⁽³⁾.

8.10 In *casu*, it is not in issue that the parties in the causes sought to be consolidated are different. In Cause No. 2019/HP/0119 the respondent herein is the defendant, whilst in Cause No. 2020/HP/0072 he is the plaintiff.

8.11 With respect to the claims, in the first action, the plaintiff, who is the appellant before us, seeks damages for defamation while in the second action, the plaintiff therein, who is the respondent herein, seeks damages for infringement of the SMAGs Model Patent against the Attorney General. The common question of law that arises in both actions relates to the alleged

infringement of the SMAGs Model Patent that the respondent has counterclaimed in the first action.

8.12 As stated by the learned author of **Zambian Civil Procedure: Commentary and Cases** cited by the respondent at paragraph 6.3 above, the test for consolidation applied by a court in the exercise of its discretion, is whether the balance of convenience favours consolidation, that is, whether it is appropriate or fitting and fair to all the parties involved to order that two or more causes be consolidated.

8.13 We have considered the pleadings in both subject suits. We note that the respondent in both suits is represented by the same firm, save for the A.G and the appellant who are represented independently. The averments by the respondent in the counterclaim cause 2019/HP/0072 and claim in cause 2020/HP/0072 paragraphs 15 - 25 and 4 -15 respectively are the same or nearly identical in all respects. The particulars or averments relate to the alleged infringement of the appellant's copyright. The key claims being an inquiry as to damages for infringement, an injunction in respect of 2019/HP/0119. And in respect of 2020/HP/0072 a declaration that the respondent

is the copyright holder of SMAGs Model and that the A.G has infringed the said copyright and an inquiry as to damages. The suit by the appellant seeks damages for slander and/or libel arising from allegations of infringement of the respondent's alleged copyright of his SMAG's Model.

8.14 We are of the view that, the facts giving rise to the two claims arose from the same circumstances or act, namely the alleged infringement of the copyright in issue. There are some common questions of law or fact, namely whether there was breach of the copyright and by whom. This in turn would resolve the issue of whether the appellant was defamed or not.

8.15 The court has a discretion to order consolidation of suits to tie more than one action together, for separate individual actions into one where the issues and right of the parties can be determined in one suit as in *casu*.

8.16 We therefore hold that the court below did not properly exercise its discretionary power by refusing consolidation. Consolidation in our view will achieve the overriding objective of **Order 3 Rule 5 of High Court Rules**, which is the expeditious disposal of civil disputes, saving of costs, time, and effort and

make the conduct of several actions more convenient by treating them as one action. We are also of the view that none of the parties will be prejudiced or conferred with undue advantage by the consolidation. Further, that it is convenient and efficient to pursue the claims in a consolidated suit.

8.17 We therefore for the forgoing reasons, uphold the appeal. We accordingly hereby set aside the ruling of the court below and order that the matters be consolidated into one cause with the respondent DR Beck Banda being designated as Plaintiff vs World Vision Zambia and Attorney General as Defendants in his claim against them. That World Vision's claims for damages for slander libel etc stand as a counter-claim against DR Beck Banda.

8.18 We remit the record back to the high Court to be determined by a different Judge. Costs to the appellant.



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M. M. Kondolo

COURT OF APPEAL JUDGE



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F. M Chishimba

COURT OF APPEAL JUDGE



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D. L. Y. Sichinga

COURT OF APPEAL JUDGE