

IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

CAZ Appeal No. 087/2021  
CAZ/08/080/2021

BETWEEN:

**AFRICARE**

AND

**JORDAN CHIWAMINE TUNDU  
ISAAC SAKALA  
NCHIMUNYA CHIBOOLA**

**APPELLANT**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT**



**CORAM : Chashi, Chishimba and Sharpe-Phiri, JJA**

**On 18<sup>th</sup> January, 2022 and 2<sup>nd</sup> February, 2022**

For the Appellant : Mr. M.C. Sitali of Messers Ellis & Co.

For the Respondents: Mr. E.B. Mwansa SC of Messrs. EBM  
Chambers

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## **JUDGMENT**

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**Chishimba JA, delivered the Judgement of the Court.**

**CASES REFERRED TO:**

- 1) Shell & BP (Z) Limited v Conidaris & Others (1974) ZR 174
- 2) American Cyanamid Co. v Ethicon Company Limited (1975) AC 396
- 3) Harry Mwaanga Nkumbula & Simon Mwansa Kapwepwe v United National Independence Party (1978) ZR 388
- 4) Mike Contractors & Allied Workers Union of Zambia v Silondwa Engineering Limited-Comp/31/2016
- 5) Shipe (Trustee of the Salvation Army, Zambia) & Others v Mung'ambata & Others (Parents Community School Committee)-SCZ Appeal No. 150/2009

- 6) National Milling Company Limited v A. Vashee (Suing as Chairman of Zambia National Farmers Union) (2000) Z.R. 98
- 7) Nkhata & Four Others v The Attorney-General of Zambia (1966) Z.R. 124
- 8) The Attorney-General v Marcus Kampumba Achiume (1983) Z.R.1
- 9) Ridge v Baldwin (1964) A.C. 40
- 10) Royal Oak (Pvt) Limited v Lusaka City Council & Attorney General 2010/HP/776
- 11) Vestergaard Fraudsen A/S and Others v Best Net Europe Limited and Others [2009] E.W.H.C. 1456 Ch.
- 12) Godfrey Miyanda v The High Court (1984) Z.R. 62.
- 13) Bernard Mukupa Chisanga & others v Kabwe Municipal-Council CAZ Appeal. No. 105 of 2018
- 14) Campbell v Thompson & Another (1953) 1 All ER 831

### **LEGISLATION CITED:**

- 1) Societies Act Chapter 119 of the Laws of Zambia.
- 2) Non-Governmental Organisations Act No. 16 of 2009 of the Laws of Zambia.
- 3) The Constitution of Zambia (Amendment) Act No. 2 of 2016 of the Laws of Zambia.
- 4) The High Court Act Chapter 27 of the Laws of Zambia.
- 5) The Rules of the Supreme Court of England, 1999 Edition.

### **OTHER WORKS REFERRED:**

- 1) Atkin's Forms, Second Edition, Vol. 22

#### **1.0 INTRODUCTION**

1.1 This appeal emanates from the ruling of the High Court delivered by the Hon. Mrs. Justice Sharon Kaunda-Newa on 26<sup>th</sup> February, 2021. In the said judgment the court below granted the respondents, an injunction against the appellant; joined the Attorney General as the 2<sup>nd</sup> defendant and ordered the

amendment of the writ of summons and statement of claim to show the representative capacity of the appellant as a Non-Governmental Organisation.

## 2.0 **FACTUAL BACKGROUND**

- 2.1 The appellant is a non-governmental organization initially registered as an unincorporated society on 24<sup>th</sup> July, 1980 under the **Societies Act, Chapter 119 of the Laws of Zambia**. It was subsequently registered under the **Non-Governmental Organisations Act No. 16 of 2009 of the Laws of Zambia** (hereinafter the NGO Act). The respondents were employees of the appellant recruited at different times.
- 2.2 In June 2020, the respondents were informed that the appellant intended to cease its operations in Zambia. In August 2020, the respondents wrote to the Ministry of Labour and Social Security notifying them of the appellant's intention to close office in Zambia. The Ministry, in turn wrote to the appellant advising it to state the reasons for the closure, the mode of separation with the employees and advised it not to sell any property or assets of the organization until the ministry is notified of proof of payment of redundancy packages.

- 2.3 In September, 2020, the respondents were served with letters of termination of employment, stating that they would be paid their accrued leave days. Further that any additional payments would be offered at a reduced, negotiated and or calculated dollar amount. In addition, requesting that the respondents handover the appellant's equipment, including motor vehicles in their possession.
- 2.4 On 27<sup>th</sup> November, 2020 whilst negotiations were on going, the appointed bailiffs seized motor vehicles that were in the custody of the 2<sup>nd</sup> respondent.
- 2.5 On 1<sup>st</sup> December, 2020, the respondents issued a writ of summons and statement of claim seeking, inter alia, payment of their redundancy packages in accordance with the law; an order of injunction prohibiting the seizure, sale or transfer of the seized assets, property or motor vehicles until final determination of the matter.
- 2.6 On the same date, summons for an interim order of injunction was issued pursuant to **Order 27 of the High Court Rules Chapter 27 of the Laws of Zambia (HCR)** and **Order 29 Rule 1 of the Rules of the Supreme Court of England, 1999**

**Edition (RSC).** The respondents also filed summons seeking leave to amend pleadings pursuant to **Order 3 Rule 2 of the HCR** and **Order 20 of the RSC**, to reflect the full and proper name of the appellant.

### 3.0 **ARGUMENTS IN THE COURT BELOW**

- 3.1 At the hearing of the application for the injunction, the respondents referred to the case of **Shell & BP (Z) Limited v Conidaris & Others** <sup>(1)</sup> and submitted that they had demonstrated a clear cause of action to be entitled to the injunctive relief sought. The appellant was closing its offices having terminated the respondents' employment without paying them redundancy packages, and had seized the only assets available in the country. The appellant's head office being in Washington, United States of America, the injunction was necessary to prevent the appellant from transferring or selling the available assets. By its actions, the appellant had demonstrated that it intended to remove, transfer and/or sell the said assets.
- 3.2 The respondents further submitted that the grant of the injunction was imperative to ensure that their rights were not

prejudiced. They would suffer injury that could not be atoned for by an award of damages if the assets were sold, there being no other property belonging to the appellant in the country. The said assets were also said not to be sufficient to pay the respondents their full packages. In this regard, the respondents argued that the balance of convenience lay in their favour because they would be gravely inconvenienced if the property is taken away. They placed reliance on the case of **American Cyanamid Co. v Ethicon Company Limited** <sup>(2)</sup>.

- 3.3 In opposing the application, the appellant contended that it did not have the capacity to be sued as it was registered as an unincorporated society under the **Societies Act**. Reliance was placed on **Order 14 Rule 1 of the HCR** and the cases of **Harry Mwaanga Nkumbula & Simon Mwansa Kapwepwe v United National independence Party** <sup>(3)</sup> and **Mike Contractors & Allied Workers Union of Zambia v Silondwa Engineering Limited** <sup>(4)</sup>.

- 3.4 The appellant further argued that it had since ceased its operations in Zambia having requested for cancellation of its

certificate of registration pursuant to **section 13(2) of the NGO Act, 2009.**

- 3.5 Citing **Shell & BP (Z) Limited v Conidaris & Others** <sup>(1)</sup> the appellant submitted that a perusal of the writ of summons, statement of claim and affidavit in support for an order of interim injunction filed by the respondents had not demonstrated irreparable injury that would be suffered. The respondents' claims were for liquidated damages, in the form of redundancy packages which were quantified and could be redressed by an award of damages.
- 3.6 As regards the balance of convenience, it was contended that equity is a shield and not a sword. The appellant is the absolute owner of the motor vehicles in issue without any restriction on the use or custody of the same and that the respondents had no legal or equitable interest in the said vehicles. Therefore, an order of injunction would create new conditions favourable only to the respondents. The vehicles were not part of the redundancy packages to be claimed by the respondents.
- 3.7 In respect of the affidavit in opposition deposed to by Martin Waluka Sitali, counsel for the appellants, submits that he was

neither a director nor employee of the respondent, and thus, incompetent to depose on behalf of the appellant. That the Officer-in-Charge of the respondent in Zambia, is or was the 2<sup>nd</sup> respondent as evidenced by exhibit marked 'MSW1' attached to affidavit in opposition.

#### 4.0 **DECISION OF THE COURT BELOW**

4.1 In her ruling, the learned Judge considered the issue of the legal capacity of the appellant to be sued. The Judge in reference to the case of **Shipe (Trustee of the Salvation Army, Zambia) & Others v Mung'ambata & Others (Parents Community School Committee)**<sup>(5)</sup> stated that the legal capacity of any party to sue or be sued goes to the jurisdiction of the matter; an application in relation to the same ought to be brought and determined at the earliest possible time in the proceedings, as a preliminary issue. Though the appellants had raised the issue in the affidavit in opposition, the issue of *locus standi* goes to the root of the matter and the court proceeded to determine it.

4.2 The lower court considered the arguments advanced by the parties and the documents exhibited. It found that at the time the 2<sup>nd</sup> respondent was sued as the representative of the

appellant in Comp. No/IRCLK/364/2019, he was still an employee, being the Officer-in-Charge. The Consent judgment in that matter was entered on 2<sup>nd</sup> July, 2020 while the 2<sup>nd</sup> respondent's contract of employment was terminated on 28<sup>th</sup> September, 2020. Consequently, at the time of these proceedings, the 2<sup>nd</sup> respondent was still an employee and Officer-in-Charge of the appellant, and could lawfully represent the appellant in that capacity.

- 4.3 Whether the 2<sup>nd</sup> respondent had legally ceased to be an officer-in-charge of the appellant was contentious in light of the provisions of the **Employment Code No. 3 of 2019**. However, in view of the definition of 'defendant' in **section 2 of the High Court Act**, a defendant cannot be both plaintiff and defendant in these proceedings. In view of exhibit 'MWS3', the letter authored by Ms. Earlene Turner-Barnes as Chief Human Resources and Administration Officer for the appellant, the court below directed that the said officer shall represent the appellant in these proceedings.
- 4.4 The Ministry of Labour having oversight powers over terminations of employment in terms of the Employment Code,

2019, the learned Judge directed that the Attorney General as legal representative of the government, has an interest in the proceedings and must be joined as 2<sup>nd</sup> defendant in the matter.

4.5 With respect to the interim order of injunction, the lower court reasoned that where damages would be an adequate remedy and are quantifiable, an injunction should not be granted. While accepting that the motor vehicles in issue and equipment belonging to the appellant do not form part of the redundancy packages being claimed by the respondents, the court below found that it was not in dispute that those are the only assets that the appellant has in the country.

4.6 Therefore, if the respondents were to succeed at trial and an order of injunction was not granted, they would not be able to recover any sums that may be awarded to them, as there would be no goods against which execution could be levied. On the principle that an award of damages may not atone for the loss that the plaintiffs may suffer and that the order of injunction was necessary to protect the respondents' claims, the lower court granted the order of injunction restraining the appellants from seizing, transferring or selling the equipment, property and

assets it owns or has possession of, and from taking the same out of the country. The court below further ordered the appellant to return the vehicles seized from the respondents to be kept under the custody of the Sheriff of Zambia until further order of the court.

#### **5.0 GROUNDS OF APPEAL**

5.1 Being dissatisfied with the Ruling of the lower court he appellant filed an appeal advancing five grounds of appeal as follows:

- 1) The learned Judge misdirected herself in law and fact when she granted the interim injunction against:*
  - (i) Well established principle that an injunction shall not be granted where the claimant's injury can be redressed by an award of damages; and*
  - (ii) An unincorporated entity.*
- 2) The learned Judge erred in law and fact when she held that Ms. Earlene Turner-Barnes is carrying out the duties of office bearers in the appellant, despite there being no evidence of her appointment to that capacity;*
- 3) The learned Judge erred in law and fact when she arbitrarily joined Ms. Earlene Turner-Barnes to the proceedings as the representative of the appellant without according the appellant an opportunity to be heard;*
- 4) The learned Judge erred in both law and fact when she proceeded to determine the respondents' application for leave to amend*

*pleadings without according the appellant an opportunity to be heard on the said application; and*

*5) The learned Judge erred in both law and fact when she ordered the Attorney General to be joined to the proceedings.*

## 6.0 **ARGUMENTS BY THE APPELLANT**

- 6.1 In support of the appeal, the appellant filed heads of argument dated 3<sup>rd</sup> May, 2021. With respect to ground one, it was submitted that the court below found that the respondents' claims are for liquidated damages which can be atoned in damages and that their conditions of service did not extend to the appellant's assets. Therefore, the lower court should not have granted the interim injunction on the sole ground that the respondent did not demonstrate that it had other assets upon which the respondents could levy execution in the event that judgment is in their favour.
- 6.2 The appellant submitted that it is trite that where damages would be an adequate remedy, an injunction should not be granted. As held in the case of **Shell & BP Zambia Limited v Conidaris & Others** <sup>(1)</sup> an interlocutory injunction can only be granted where the right to relief is clear, the injunction is

necessary to protect the plaintiff from irreparable injury. Mere inconvenience is not enough.

- 6.3 We were further referred to **Atkin's Forms, Second Edition, Vol. 22 at page 70** where the learned authors state as follows:

*"It is now settled as a good working rule that, if the injury to the plaintiff's legal right is small, is capable of being estimated in money and is one which can be adequately compensated by a small money payment, and the case is one in which to grant an injunction would be oppressive to the defendant, damages may be awarded in substitution for an injunction."*

- 6.4 It was contended that the respondents' claims for payment of redundancy packages i.e. liquidated damages can easily be quantified and redressed by an award of damages.

- 6.5 As regards the lack of capacity, we were referred to the case of **National Milling Company Limited v A. Vashee (Suing as Chairman of Zambia National Farmers Union)**<sup>(6)</sup> that an unincorporated entity is not a legal person and therefore, cannot sue or be sued save through its representative. The appellant being such an entity, it follows that the respondents' action cannot be sustained in the lower court on the basis that

the appellant lacks the requisite capacity to be sued except through its representatives.

6.6 In ground two, the appellant does not dispute that the letter marked and exhibited as "MSW3" at page 84 of the record of appeal is authored by Ms. Earlene Turner-Barnes in her capacity as Chief Administrative and Human Resources Officer for Africare albeit at its head office in Washington D.C., USA. It was contended that the finding of the lower court that Ms. Earlene Turner-Barnes has assumed the role of office bearer for the appellant is perverse and made in the absence of evidence to support such a finding. The appellant stated that the notice of termination was issued in conformity with **section 17 of the NGO Act**. Therefore, the holding that Ms. Earlene Turner-Barnes has assumed the role of office bearer on the basis of the letter of 23<sup>rd</sup> December, 2020, is perverse and a misapprehension of facts in the absence of a notice of change of office bearers as required under section 28 of the Act as the change of office bearers is not in effect on assumption of certain roles the court deemed to be the preserve of office bearers.

6.7 Citing the cases of **Nkhata & Four Others v The Attorney-General of Zambia** <sup>(7)</sup> and **The Attorney-General v Marcus Kampumba Achiume** <sup>(8)</sup>, we were urged to reverse the above finding by the lower court.

6.8 Grounds three and four, were argued together. The appellant contends that the High Court does not have jurisdiction to order the joinder of Ms. Earlene Turner-Barnes to the proceedings as she is situated outside jurisdiction and is an American citizen.

**Section 9 of the High Court Act, Article 119 and 134 of the Constitution of Zambia Chapter 1 of the Laws of Zambia**

were cited to show that besides these provisions, there is currently no law that extends judicial jurisdiction outside Zambia. Therefore, the order of joinder of Ms. Earlene Turner-Barnes is of no force as she is not subject to the jurisdiction of the High Court of Zambia.

6.9 The second limb to grounds three and four is that the appellant was not accorded an opportunity to be heard on the applications for joinder of Ms. Earlene Turner-Barnes to the proceedings and on the application to amend pleadings. The summons for leave to amend pleadings appearing at page 96 of

the record of appeal were not endorsed with a return date and that the appellant had not yet filed its affidavit in opposition to the application at the time the court below made its determination to join Ms Turner Barnes and ordered amendment of the pleadings.

6.10 **Ridge v Baldwin**<sup>(9)</sup>, a leading authority on natural justice, was called in aid to show that the court below ought to have invited the parties, particularly the appellant, to address her on the application for joinder and to set a date for hearing of the application for leave to amend the pleadings. The appellant was and is still greatly prejudiced by the imposition of Ms. Turner-Barnes as its representative as she is not an office bearer in the appellant and in accordance with the NGO Act. Further that the appellant has been prejudiced by the decision to deny it an opportunity to be heard in respect of the application for leave to amend pleadings. The appellant had intended to argue that the pleadings as they appear at pages 39 to 44 of the record of appeal, cannot be cured by any amendment.

6.11 Lastly, the appellant submits in ground five, that the joinder of the Attorney General to the proceedings was solely based on the

letter from the Commissioner of Labour in view of **section 10(5)** and **(8)** and **135 of the Employment Code Act No. 3 of 2019.**

In that letter, the appellant was requested not to sell or transfer any assets until the Ministry was notified of the nature of the redundancy packages. Failure to comply with the directive is an offence punishable by a fine or imprisonment.

6.12 Therefore, the appellant contends that the proper mode of enforcement of the provisions of the Employment Code is not through court proceedings as ordered by the lower court, but by way of criminal prosecution. The court below had no jurisdiction to order joinder of the Attorney General as a measure of ensuring the adherence to the employment Act is irregular. That the High Court only enjoys appellate jurisdiction in terms of **section 10(9) of the Employment Code.**

6.13 We were urged to allow the appeal with costs both here and in the court below.

## 7.0 **ARGUMENTS BY THE RESPONDENTS**

7.1 The respondents filed heads of arguments dated 3<sup>rd</sup> June, 2021. In arguing ground one, the respondents submit that it is not in dispute that they have a serious question to be tried and/or a

clear cause of action, and that the balance of convenience lies in their favour. Despite damages being adequate, the appellant in terms of assets only has motor vehicles and equipment in Zambia which the appellant intends to export to Zimbabwe before paying the respondents their redundancy packages. Further that it does not deny owing the respondents redundancy packages.

7.2 If the respondents were to succeed at trial and the order of injunction is set aside, they will not be able to recover any sums that may be awarded to them as there would be no goods against which execution could be levied, thereby making this case an academic exercise. In this regard, the injunction granted by the lower court is necessary to protect the claims as damages may not atone for the loss to be suffered should we set aside the injunction granted by the court below.

7.3 We were referred to the High Court decision of **Royal Oak (Pvt) Limited v Lusaka City Council & Attorney General**<sup>(10)</sup>, where the case of **Vestergaard Frauldsen A/S and Others v Best Net Europe Limited and Others**<sup>(11)</sup> was cited in which Arnold J, stated as follows:

*“More recently adequacy of damages has ceased to be regarded as a jurisdictional threshold, but it remains relevant to the exercise of discretion. Furthermore, where the claimant has established the invasion of a legal right and sufficient risk of repetition, the claimant is generally regarded as entitled to an injunction save in exceptional circumstances. In such case, damages are ordinarily not regarded as an adequate remedy even if the expected injury to the claimant’s rights is relatively minor.”*

Arnold J, went on to state that:

*“... there may also be cases in which though the four above mentioned requirements exist, the defendant by his conduct, as for instance hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff’s rights has disentitled himself from asking that damages may be assessed in substitution for an injunction when an interim injunction is sought, the Court’s task is holding the ring pending trial.”*

- 7.4 The respondents argued that in any event, the appellant has not demonstrated any loss or injury likely to suffer during the subsistence of the injunction. On the other hand, the injunction is necessary to protect the respondents from irreparable injury not mere inconvenience, but injury that cannot be remedied or atoned for by damages because there will be no assets upon which execution can be levied.

- 7.5 With respect to lack of capacity, the respondents contend that it is not in dispute that the appellant is registered as an unincorporated entity and therefore has no capacity to sue and be sued. It was for this reason that an appropriate application was made and the court below ordered the joinder of Ms. Turner-Barnes to represent the appellant in her capacity as the Chief Human Resources and Administration Officer. Therefore, the lower court did address its mind to the issue of lack of capacity of the appellant.
- 7.6 In arguing the second ground of appeal, the respondents submitted that the finding of fact in the court below that Ms. Turner-Barnes has assumed the role of the Office Bearer for the appellant is not perverse but was made in the presence of relevant evidence as evidenced by the Notice of Termination made in conformity with **section 17 of the NGO Act, 2009**. The said notice was written by Ms. Turner-Barnes in her capacity as Chief Human Resources and Administration Officer of the appellant.
- 7.7 Ms. Turner-Barnes could not have been appointed as the appellant's office bearer after the appellant ceased operations in

Zambia. Therefore, she can be deemed as the office bearer in the appellant in the absence of a change of office bearers as the appellant winds down operations in Zambia.

7.8 The respondents argued grounds three, four and five together. It was submitted that it is an elementary requirement of fairness and justice that as a general rule, both sides are afforded an opportunity to be heard. Where it is sought to depart from this norm, as in an ex parte application for an injunction, strong grounds must be shown to justify the application being made ex parte.

7.9 We were referred to **Order 14(5) of the High Court Rules** and **section 9 of the High Court Act Chapter 27 of the Laws of Zambia**. We were also referred to the cases of **Godfrey Miyanda v The High Court** <sup>(12)</sup> where the Supreme Court defined the term ‘jurisdiction’ as follows:

*“... In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. ...”*

7.10 The respondents contend that the matter in question is within the scope of matters that can be determined by such court having been presented in a formal way as prescribed by the appropriate legislation. Further, that the court below was on firm ground to order the joinder of Ms. Turner-Barnes to the proceedings as representative of the appellant without according the appellant an opportunity to be heard because the court has the discretion and power to do so without having heard the party. That discretion was properly exercised and the power to join a party is a preserve of the court to be exercised either on application or on the court's own motion.

7.11 The order of joinder was based on the principle of avoiding a multiplicity of actions and ensuring that all persons that are likely to be affected by the outcome of the judgment must be joined accordingly. Ms. Turner-Barnes being the representative that communicated the dismissal of the respondents and being the Chief Human Resources and Administration Officer, her interest in this matter cannot be over-emphasised.

7.12 It was argued that since the appellant was registered in Zambia, the contracts of employment occurred in Zambia, the tenure

and terms of employment of the respondents being governed by employment and labour laws applicable in Zambia, the High Court has jurisdiction to hear and determine the matter. The argument that Ms. Turner-Barnes is not subject to the jurisdiction of Courts in Zambia amounts to arguing that the respondents have no remedy at law for which they can seek justice.

7.13 The respondents submit that the High Court has the jurisdiction to determine any matter regardless of whether the person is in Zambia or not, as long as the alleged breach occurred in Zambia. Therefore, it is perverse to state that court below has no jurisdiction to join Ms. Turner-Barnes to the proceedings simply because she is in the United States of America.

7.14 As regards the application for leave to amend the pleadings, the respondents contend that the application was served on the appellant's advocates sometime in January 2021 and that they had the opportunity to respond, if they so wished. That once service of an application is made, the court can proceed to hear and determine the application.

7.15 As regards ground five, the respondents maintained that there is sufficient reason to join the Attorney General to the proceedings. The court below cannot be faulted because it has the power to order that all persons who may be entitled to, or have some claim, share or interest in the subject matter of the suit, or may be likely to be affected by the result, may be joined to the matter to avoid multiplicity of actions and for finality in matters.

7.16 Equally that the lower court has the power to order the joinder of Ms. Turner-Barnes to represent the appellant in her capacity as Chief Human Resources and Administrative Officer of the appellant, without being given an opportunity to be heard because the court was exercising its inherent jurisdiction. Further that, it is on behalf of the appellant that she was being joined and not on her own behalf.

#### **8.0 APPELLANT'S ARGUMENTS IN REPLY**

8.1 On 18<sup>th</sup> June, 2021, the appellant filed heads of argument in reply. In response to the contention that the loss cannot be atoned by an award of damages, the appellant reiterated that the court below found that the loss can be atoned by an award

of damages and that the respondents have no interest in the appellant's assets. Therefore, the order of injunction should not have been granted because the redundancy claims are clearly damages which can be assessed and redressed by way of damages.

- 8.2 The appellant sought to distinguish the cited case of **Vestergaard Frausden A/S & Others v Best Net Europe Limited and Others**<sup>(11)</sup> case from the present appeal on the basis that in *casu*, the appellant has not taken any step to disentitle it from asking that damages be assessed in substitution for an injunction.
- 8.3 As regards the lack of capacity, the appellant submits that having found that the entity is unincorporated, the lower court could not cure defect in the originating process by way of joinder of a third party to act as the appellant's representative, because the said defect is incurable.
- 8.4 With respect to ground two, the appellant submits that in terms of **section 28(1) of the NGO Act**, no change in office bearers at the appellant was registered or led in evidence to show that Ms. Turner-Barnes was appointed as an office bearer, save for the

fact that she authored the notice of termination of operations.

In the absence of any such evidence, the finding of the lower court that she assumed the role of office bearer is perverse, unsupported by evidence and should be overturned.

- 8.5 In response to the contentions by the respondent in three, four and five, the appellant reiterated that while the High Court has jurisdiction to determine disputes arising from contracts of employment consummated within the jurisdiction, it does not enjoy extra-territorial jurisdiction to order the joinder of a party who is not subject to its jurisdiction.
- 8.6 Since the order of joinder of Ms. Turner-Barnes to the proceedings affects the appellant's ability to defend the suit, the court below ought to have afforded the appellant an opportunity to be heard.
- 8.7 The appellant contends that the fact that it was served the application for leave to amend pleadings in good time does not mean it was heard. This is because the lower court did not endorse a return date and the appellant did not file an affidavit in opposition as the said application for leave to amend pleadings was not scheduled for hearing. Therefore, the

appellant was not afforded an opportunity to be heard on the application.

8.8 On the joinder of the Attorney General, the appellant maintains that this was meant to secure enforcement of section 10(5) of the Employment Code which is enforceable through criminal proceedings.

#### **9.0 DECISION OF THE COURT**

9.1 We have considered the record of appeal, the submissions advanced by the learned counsel and state counsel, as well as the authorities cited.

9.2 In ground one, the appellant is challenging the grant of an interim order of injunction on the following basis; the first being that an award of damages is adequate to remedy of the injury to be suffered by the respondents, and in the second instance, that the appellant lacks the capacity to be sued.

9.3 We propose to first deal with the second limb to ground one together with grounds two, three and four as they are related. In the second limb of ground one, the appellant argues that it has no capacity to be sued as it is an unincorporated body, and as such, an injunction should not have been granted. In

grounds two and three it is contended that there was no evidence adduced that Ms. Turner-Barnes is an office bearer in the appellant. Further that the appellant was not heard on Ms. Turner-Barnes' joinder to the proceedings.

- 9.4 As regards unincorporated bodies, **Order 14 Rule 1 of the High Court Rules** is instructive. The provision reads as follows:

*1. If any plaintiff sues, or any defendant is sued, in any representative capacity, it shall be expressed on the writ. The Court or a Judge may order any of the persons represented to be made parties either in lieu of, or in addition to, the previously existing parties.*

In **Harry Mwaanga Nkumbula & Simon Mwansa Kapwepwe v United National independence Party** <sup>(3)</sup> it was held that an unincorporated body is not a legal person and therefore cannot sue or be sued in its own name but in a representative capacity.

- 9.5 It is common cause that the appellant is an unincorporated body having been initially registered under the Societies Act and later, the NGO Act. This fact is conceded to by the appellant who raised the point of law of lack of capacity to sue, and also had pleaded in its defence that "**due to its unincorporated status it has no capacity to be sued....**" Therefore, as

unincorporated entity Africare can only sue and be sued in a representative capacity.

9.6 The issue to be determined is whether the court below erred by holding that Ms. Turner-Barnes be held out as a representative in the suit on behalf of Africare. **Order 14 Rule 3 of the HCR** provides that:

***3. Where more persons than one have the same interest in one suit, one or more of such persons may be authorised to sue or to defend in such suit for the benefit of or on behalf of all parties so interested.***

9.7 It is clear that before a court orders the joinder of any person to defend an action, the court must be satisfied that the person or persons have '***the same interest***' in the suit. Thus, in the English case of **Campbell v Thompson & Another**<sup>(14)</sup> the court held that:

***"The members of the club had a common interest in resisting the plaintiff's claim, and, consequently, it was a proper case for an order (under Ord 16, r 9), authorising the defendants to defend the claim on behalf and for the benefit of all the members of the club who were members at the date of the accident."***

9.8 The appellant contends that the lower court joined Ms. Turner-Barnes to the proceedings on the basis that she is carrying out

the duties of an office bearer when there is no evidence to that effect, and that the joinder was made without hearing the appellant.

9.9 We are of the view that Ms. Turner-Barnes must be deemed to have an interest in the suit against the appellant. She authored the letters of termination on behalf of Africare and advised of the closure of the operations in Zambia. We uphold the decision of the lower court ordering that Ms. Turner-Barnes, in her capacity as Chief Human Resources and Administration Officer for the appellant, be a party to the proceedings as representative of the appellant.

9.10 A consideration of the termination employment notices collectively marked “JT3” attached to the affidavit in support of ex-parte summons for an order of interim injunction, and the ‘Notice of termination of operations in Zambia’ marked “MWS3” exhibited in the affidavit in opposition reveals that they were authored and signed by Ms. Earlene Turner-Barnes, in her capacity as Chief Human Resources and Administrative Officer. We consider this to be evidence that Ms. Turner-Barnes’ is

carrying out duties of an officer-in-charge of the appellant as it winds up its operations.

9.11 We are of the view that Ms. Turner-Barnes must be deemed to have an interest in the suit against the appellant. She authored the letters of termination on behalf of Africare and advised of the closure of the operations in Zambia. We uphold the decision of the lower court ordering that Ms. Turner-Barnes, in her capacity as Chief Human Resources and Administration Officer for the appellant, be a party to the proceedings as representative of the appellant.

9.12 Without hesitation, we must reject as misguided and mischievous the argument that the order of joinder to the proceedings of Ms. Turner-Barnes is of no force as she is not subject to the jurisdiction of the High Court being resident outside Zambia and that she is a citizen of the United States of America. An order of joinder is not limited to persons within the jurisdiction; it includes persons outside jurisdiction, if the circumstances of the case so demand.

9.13 Further, the law provides for the service of pleadings upon any person joined to the proceedings but resident outside

jurisdiction under **Order 10 Rules 14, 15 and 16 of the HCR** provided an appropriate application is made.

9.14 It is not in issue from the perusal of the record of appeal that on 13<sup>th</sup> January, 2021, prior to the hearing, the respondents had filed summons for leave to amend pleadings seeking to have the 2<sup>nd</sup> respondent represent the appellant. The summons were not endorsed with a return date. As regards the issue of amendment of pleadings the record of appeal shows that when the matter came up for hearing in the court below, State Counsel, Mr. Mwansa informed the court that the appellant opposed the application for the grant of an interim injunction and that they relied on the fact that the appellant lacked legal capacity. State Counsel, Mr. Mwansa stated that the appellant had initially filed a conditional appearance but went on to file a defence and statement of claim. No attendant application was made pursuant to the conditional appearance entered.

9.15 State Counsel, further submitted in the lower court, that the appellant had not filed any opposition to the respondents' application for leave to amend pleadings.

9.16 Though, the appellant argued that it was not given an opportunity to be heard, we are of the view that the appellant was heard. The appellant itself raised the issue of lack of capacity and the court considered the jurisdictional issue and ordered that Ms. Turner-Barnes be substituted as a representative party of Africare. Having found that Ms. Turner-Barnes was a representative of Africare, the court was empowered to equally order the amendment of pleadings. We are of the view that by arguing that the appellant lacked capacity to be sued, the court below was invited to address the issue notwithstanding that the appellant was as yet to file its arguments in opposition to the application to amend the pleadings.

9.17 Further, as noted by the court below, the capacity of a party to sue and be sued, goes to the jurisdiction of the court to determine the matter and must be determined at the earliest time in proceedings. This is the import of the case of **Shipe (Trustee of the Salvation Army, Zambia) & Others v Mung'ambata & Others (Parents Community School**

**Committee)** <sup>(5)</sup>, relied upon by the learned Judge when she dealt with the issue.

9.18 In these circumstances, we cannot fault the learned Judge for ordering amendments of pleadings, without hearing the application by the respondent to amend, because she had already addressed and determined the issue of capacity raised by the appellant. It would have been *otiose* or academic to proceed to hear the said application. The moment the appellant argued its lack of capacity to be sued, the court below was duty bound to resolve it. Consequently, the appellant cannot argue that Ms. Turner-Barnes was not accorded an opportunity to be heard. For the above reasons, grounds three and four do not succeed.

9.19 As regards the grant of the injunction, the appellant contends that, though the lower court held that the claims being for liquidated damages, can be atoned by an award of damages, it went on to grant an injunction on the basis that the appellant had no other assets upon which the respondents could levy execution in the event that judgment was in their favour. This

was said to be contrary to the principles espoused in the cases of **Shell & BP (Zambia) Limited**<sup>(1)</sup> and **American Cyanamid**<sup>(2)</sup>.

9.20 On the other hand, the respondents argue that if the injunction is set aside, an award of damages would be inadequate to atone for the injury they would suffer as they will not be able to recover any sums that may be awarded to them because there would be no assets upon which execution could be levied.

9.21 In her ruling, the learned judge guided herself on the principle of law applicable to injunctions and reasoned that the motor vehicles and equipment belonging to the appellant do not form part of the redundancy packages being claimed by the respondents. However, as these were the only assets the appellant had in the country, the learned judge was of the view that if the respondents were to succeed at trial and the injunction was not granted, they would not be able to recover any sums that may be awarded to them. This was because there would be no goods against which execution could be levied.

9.22 We do not fault the learned judge for apparently departing from the principles governing the grant of injunctions. In **Bernard**

**Mukupa Chisanga & others v Kabwe Municipal Council** <sup>(13)</sup>,

at page J.22, we said:

*"... We opine that the fact that the learned judge found that damages would adequately compensate the appellants does not necessarily mean that he failed to follow the guidelines. As rightly stated by counsel for the appellants, the cited cases merely provide guidelines to the court and the court can decide based on the evidence before it as each case is different. The guidelines are not cast in concrete or stone such that one cannot deviate from them. We are of the view that it is possible for a court to arrive at a different decision so long as it gives a sound reasoning of how it arrived at such a dissenting decision."*

9.23 The lower court considered the guidelines governing the grant of injunctions and, based on the circumstances of the case, was of the view that an injunction, as opposed to an award of damages would do justice. We agree with her considering that the appellants, having wound up operations in Zambia, may dispose of the available assets upon which execution could be levied in the event the respondents were successful and an injunction was not granted.

9.24 For these reasons, we uphold the grant of the interim injunction.

9.25 In ground five, the joinder of the Attorney General to the proceedings as 2<sup>nd</sup> defendant is challenged on the basis that the Employment Code Act has criminal remedies for the failure of an employer to comply with its provisions.

9.26 A reading of the ruling of the court below shows that the basis for joining the Attorney General to the proceedings was on account of the oversight powers over terminations vested in the Ministry of Labour under the Employment Code Act. On that basis, the learned Judge was of the view that the Attorney General had an interest in the proceedings and proceeded to order joinder pursuant to **Order 14 Rule 5 of the HCR**.

9.27 A reading of the letter dated 9<sup>th</sup> September, 2020 authored by Ms. Kabuba Mufana, the Principal Labour Officer marked “JT/2” at page 63 of the record of appeal, shows that the Ministry directed the appellant to adhere to the provisions of **section 55(a) of the Employment Code**, and “... *not to transfer or sale any property or assets of the organisation until the Ministry is notified of the nature of the redundancy package, the period within which the redundancy is to be affected and proof of payment of the redundancy package is submitted.*”

9.28 In this regard, we are of the view that, in terms of **Order 14 Rule 5 of the HCR**, the Attorney General has an interest in the subject matter of the suit and ought to be joined to the proceedings. For this reason, ground five is bereft of merit.

9.29 The appeal accordingly fails and is dismissed with costs to the respondents, in default to be taxed in default of agreement.

.....  
J. Chashi  
**COURT OF APPEAL JUDGE**

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

  
.....  
N. A. Sharpe-Phiri  
**COURT OF APPEAL JUDGE**