



IN THE HIGH COURT OF MALAWI
(COMMERCIAL DIVISION)
LILONGWE REGISTRY
COMMERCIAL CAUSE NO. 52 OF 2020
BETWEEN:

CHANDRAKANT MAKADIA 1ST CLAIMANT
FRANK HARAWA t/a LUVINDA GENERAL DEALERS 2ND CLAIMANT
AND
ILLOVO SUGAR (MALAWI) PLC..... DEFENDANT

Coram: Hon. Justice Charlotte Wezi Mesikano Malonda
Mr. Madalitso M'meta, Counsel for the Claimant
Mr Noel Chalamanda for the Defendant
Ms Sella Nyirenda , Court Clerk

RULING ON APPLICATION FOR A DECLARATORY ORDER

1. The Claimants' filed an application for declaratory orders under Order 19, rule 27 of the Courts (High Court) (Civil Procedure) Rules 2017 (hereafter referred to as the Rules) as follows:
 - a. A declaratory order that the defendant, being a public company listed on the stock exchange, is in breach of its duty to disclose information to the Claimants as shareholders of the defendant company.
 - b. A consequential declaratory order that the above named defendant should immediately disclose to the Claimants the terms of the settlement agreement entered into between themselves and Prudential Holdings Limited in Commercial Cause No. 33 of 2016 as a condition precedent to the "Agreed Order for Disposal of Action" therein dated 18th May, 2018.

- c. An order for exemplary and aggravated damages for breach of the duty to disclose information to the shareholders and more particularly, the Claimant.
 - d. Such order(s) and declaration(s) as the Court shall deem just and proper.
- The "Application for a declaratory order" was filed with the Court on 4th March 2020.
2. In support of the Application, the claimants have filed the sworn statements of Chandrakant Makadia and Frank Harawa, with exhibits **MM1**, **MM2** and **MM3**. The exhibits comprise of details for the securities accounts, Originating Motion for Commercial Case No 33 of 2016, and the Agreed Order for Disposal of Action respectively. The claimants also filed Skeletal arguments in support of the Application, and a Reply the Sworn Statement and Supplementary sworn statements of Maureen Kachingwe in opposition of application.
 3. The Defendant filed 2 preliminary objections, the first objection was related to the mode of commencement of the proceeding. The second preliminary objection was that the application was Res Judicata. The Defendant further filed in opposition a Sworn statement of Maureen Kachingwe who is company Secretary of the Defendant, and they also filed skeletal arguments in opposition. The Defendant also cross-examined both Claimants.
 4. Both parties made oral submissions and filed supplementary submissions after cross examination and re-examination of the Claimants.

Background

5. The Claimants deposed the following in brief : that they are holders of shares in the Defendants company which is a public limited company; that in or about 2016 the Defendant's Board of Directors was sued by Prudential Holdings limited under Commercial Cause No.33 of 2016 on claims bordering on oppression and unfair prejudice to minority shareholders, failure to disclose in annual accounts commission, payments of fees and charges to undisclosed

related parties; that the settlement agreement for the Commercial Case was not disclosed to Defendants shareholders; that during the Annual General meeting of the Defendant, Claimants requested a full disclosure of the settlement agreement and the request was not acceded to by the Defendant; that the Defendant stated that the out-of-court settlement was made at no cost to the company but was subject to a confidentiality agreement ; that the Defendant was under no obligation under the Companies Act section 36(1) to disclose the information to shareholders; that this none disclosure borders on oppression and unfair prejudice to minority shareholders as they are entitled to know so as to determine the extent of its effect on their interest; that the right claimed is under section 36(1) of the Companies Act and section 343 of the Companies Act (unfair , prejudicial conduct against the Claimants).

6. The Defendant deposed the following in brief ; that they make no comment to paragraph 3 and 5 of the claimants sworn statement; that the claims in the Prudential Case were denied; that the Settlement agreement was not filed in Court because there was no legal requirement to do so as it is privileged and confidential; that the agreement was disclosed to those who were parties to the court case; that no statutory obligation exist under the companies Act; that there would be breach of the Settlement agreement to disclose its contents to parties that are not a party to it; that there are no adverse effects on the interest of the company or its shareholders as no money was paid by the Defendant; that the contents of the Agreement are confidential and privileged; that there is no action before this court whereof the court can award any reliefs as there is no proceeding commenced; the application is incompetent in as far as it was commenced wrongly; the sworn statements are defective. The rest of the issues deposed in the sworn statement are a repetition and deposed to strengthen the above issues raised.
7. The Claimants in response deposed in brief ; the matters raised are of public knowledge (exhibit MM4, Nation Newspaper article) ; alleged appeasement of

the minority shareholder that sued the company through a Board Director appointment of Mr R Savijani which was done during the same period the Settlement was reached (exhibit **MM5**, copy of AGM Minutes of 27th February 2019) ; that the appointment was questioned by some shareholders in particular Old Mutual Investment Group (letter exhibited **MM6**); that some costs were incurred based on the newspaper report exhibited; that Section 7.28 of the Malawi Stock Exchange Listing Requirement state that a listed company must ensure that all holder of its securities receive fair and equal treatment ; that there was a breach of the law; that the none disclosure of the agreement is wrong, prejudicial to minority shareholder, diversion of profits, breach of fiduciary duty; and consequently the settlement affected the share value.

Issues for Determination

8. The following are the matters for determination:
 - a. Whether an Application for a Declaratory Order can be made under Order 19 Rule 27 of CPR and not require commencement under Order 5 of the same rules.
 - l) If the above is correct, whether the Court can Order for disclosure and damages under the same Order 19 Rule 27.
 - b. Whether the defective Sworn and Unattested Statements are of legal effect.
 - c. Whether the claimants, as minority shareholders of the defendant company, are entitled to know the settlement of the case that was before the High Court against the defendant company. That is between **Prudential Holdings Limited v R.J. De Allende, Illovo Sugar (Malawi) Limited and Illovo Sugar Limited and Ten Others** Commercial Case No. 33 of 2016 (hereafter "*the Prudential – Illovo Case*"), regardless of the confidentiality agreement. If so;

- i) Whether such a confidentiality clause, if any, excludes the claimants, as minority shareholders of the defendant company, from knowing the outcome of *the Prudential – Illovo Case*?
 - ii) Whether or not a consideration of all the above will not result in Re-litigation, Res Judicata, Abuse of the Process of Court, and vexatious litigation.
- d. Whether or not the defendants were treated differently from other minority shareholders and their rights under law were affected in relation to;
- i) Access to information under the Companies Act
 - ii) Fair and equal treatment under the 7.28 of the Malawi Stock Exchange Listing Requirement which states that a listed company must ensure that all holder of its securities receive fair and equal treatment; that there was a breach of the law.
 - iii) Effect of none disclosure to the Defendants right to property guaranteed under the Constitution section 28.

Analysis and Findings

9. The starting point in considering this application is the commencement of the proceedings which both counsels have addressed. Counsel for the Defendant filed the following: a Notice of Preliminary Objection on 17th of March 2020, in which he raised that the Defendant shall be raising a preliminary objection on the breach of Order 5 of the Courts (High Court) (Civil Procedure rules 2017 as the application is fundamentally defective as there is no proceeding in the court in respect of the application made, On 3rd April 2020, the Counsel for the Defendant further filed Notice of Another Preliminary Objection that the matter was Res Judicata and abuse of the court process. A Notice to cross-examine the Claimants was filed on 1st December 2020.
10. The Claimants submit that the Court should not entertain these notices. The reason they argue is that the Courts (High Court) (Civil Procedure) Rules, 2017 (hereafter "the rules") do not allow introduction of matters for determination by

the Court through Notices. Instead, the rules state that all interlocutory matters shall be commenced by either a written application or oral application as the case may be: see Order 10, rules 1-9 CPR. The Claimant supports his argument with the citation of *Chakwera and Chilima vs Mutharika and Electoral Commission Constitutional Reference No. 1 of 2019 the Constitutional Court*, which emphatically disposed of the legal position with regard to filing of notices for preliminary objections. The Court held that such Notices are not recognizable under the Civil Procedure rules. Therefore, a party that intends to introduce a matter for determination has to do so through either a written or oral application under **Order 10** of the CPR.

11. During hearing on 19th of April 2021 before the court could dispose of the Preliminary matters, during hearing learned Counsels from both sides agreed that the Preliminary Objections will not be treated as such, however they will be treated as one of the issues, which will be disposed of at once together with the other matters by the Court.

12. On the other hand, the Defendant argues that the Application for Declaratory Order has been commenced in a wrong Mode. The Defendant argues that to allow an application under Order 19 rule 27 without a Cause of Action or Proceeding commenced under Order 5 of the Rules is tantamount to: -

- depriving the opportunities offered under Order 5 to properly defend himself including the statement of case, the documents, the period of 28 days etc.
- unlawfully abridging time given to defendant (28 days) to respond (as per Order 5).
- denying the Defendant to consider the full spectrum of the case through statement of case and a list of documents.
- Simply put to allow an application as the present without a proceeding is to sanction ambushing of the Defendant.

13. I have considered the submissions by both Counsels and these are my findings.

14. *In Chakwera and Chilima vs Mutharika and Electoral Commission*

Constitutional Reference No. 1 of 2019 the Constitutional Court found that the irregular Notices for Preliminary objection were condonable and curable under the Rules, as no party was prejudiced because of the deviation from the rules. Similarly, I find that the Notices for Preliminary objections deviated from the prescribes of the Law under Order 10 rule 1 of the rules , however , neither the Court nor the Claimant was misled or ambushed by such Irregularity . Hence I declare these Notices effectual in line with Order 2 rule 3(d) of the rules.

15. As for the mode of commencement, the current application was commenced under **Order 19 Rule 27 CPR 2017** which states the following:

- (1) A person may make an application to the Court for a declaratory order.
- (2) An objection to a proceeding may not be made on the ground that the proceeding is merely seeking a declaratory order.
- (3) The Court may make a binding declaratory order based on a right even if no consequential relief is or may be claimed.

16. I am in agreement with Counsel Chalamanda for the Defendant, who argues that, one of the overriding objectives of the rules is to put Parties on an equal footing and fairness.

17. In the first instance, the Court has to ensure that the procedural rules are followed, prior to the litigants asserting their rights arguing their case, thereafter the Court will decide the case based on merit. However, the same rules have given the court powers to cure some irregularities which result from none compliance with the rules through **Order 2 rule 2 and 3**. Though the parties agreed during hearing that the court should not dispose of the preliminary objections at an early stage but rather for it to be dealt with as one of the

arguments. It is my finding that, for preliminary objections brought through application, Order 2 rule 2, 3 and 4 will apply **before any fresh step is taken in the proceedings (emphasis is mine)** after becoming aware of the irregularity. As opposed to pursuing the whole matter and bringing the issue as an argument. This practice will allow curable defects to be cured and none curable defects to be dismissed.

18. **Order 5** of the rules enumerates how to commence a proceeding and prescribes a format and procedures that both litigants are supposed to follow. In terms of litigation, this brings fairness between the parties as there is predictability in terms of court processes, hence the litigants concentrate on arguing the merits of their case and asserting the rights with full knowledge of current and subsequent steps.

19. On the other hand, Order 19 in some parts, provides for commencement for some proceedings:

- i) Proceedings for matters under the constitution shall be commenced by summons **O. 19, rule 3.**
- ii) A constitutional referral by the president shall be commenced by notice of referral. **Order 19, rule 3 and 6.**
- iii) A constitutional referral by the court shall be commenced by a notice of referral in Form 20. **Order 19, rule 3(3).**
- iv) Election matters shall be commenced in accordance with the Parliamentary and Presidential Elections Act, Local Government Act or by an Application. **Order 19, rule 13.**
- v) Judicial review shall be commenced by an Application. **Order 19, rule 20.**
- vi) Habeas Corpus shall be commenced by an Application. **Order 19, rule 26.**
- vii) Declaratory orders. **Order 19, rule 27 CPR.**

20. However, when it comes to Order 19 rule 27 (Part V), there is no specific

reference on the commencement procedure. To be specific the section provides:

- i) A person may make an application to the Court for a declaratory order.
- ii) An objection to a proceeding (emphasis is mine) may not be made on the ground that the proceeding is merely seeking a declaratory order.
- iii) The Court may make a binding declaratory order based on a right even if no consequential relief is or may be claimed.

21. My reading of this Provision, is that it assumes that there is already an existing proceeding, hence the Declaratory Order is applied for, within an existing proceeding. Even if the pre-existing proceeding, is merely seeking a Declaratory Order, the Court may make an Order. It is my finding that the commencement of a declaratory order in the absence of a proceeding takes away the predictability and fairness that comes with legal proceedings and therefore is an irregularity.

22. The Plaintiff has cited cases to support this mode of commencement *Realsim Limited v Puma Energy Malawi Limited Commercial Cause No. 386 of 2019* unreported, and *Timothy Kazombo v Attorney General and Regional Commissioner for Lands Civil Cause No. 205 of 2019* wherein the matters were commenced and disposed of through an application for declaratory orders under **Order 19, rule 27 CPR**.

23. I have gone through the cases and, the question whether or not Order 19 r 17 was a correct mode of commencement were not argued and no determination was made on the question. In *Realsim Limited v Puma Energy Malawi Limited Commercial Cause No. 386 of 2019*, the Declaratory Orders were granted as the matter was not defended by the Defendant. I therefore do not find the case cited persuasive.

24. In *Perfecto Pest Control (PVT) Ltd v. Malawi leaf Co. Ltd Civil Cause No. 261 of 2012* Justice Kenyatta Nyirenda noted;

'Although failure to comply with CPR does not render a proceeding, document, step taken or order a nullity, it is important to remember that not all irregularities are curable. In terms of Order 2 rule 3 CPR, the powers of the court on non-compliance includes the power to declare a document to be ineffectual'.

25. Courts have evolved and no longer strike out a case merely on a point of technicality. In *Chakwera and Chilima vs Mutharika and Electoral Commission Constitutional Reference No. 1 of 2019 the Constitutional Court*, the court cited *Kendall v Hamilton (1878) 4AC 504, 525, Earl Cairns*, Lord Chancellor stated that;

"procedure is only the machinery of the law, the channel whereby it is administered, and the means whereby justice is reached, and it departs from its proper office when it is allowed to obstruct and even extinguish legal rights instead of facilitating them this governs where it ought to sub serve"

And further reading of Section 5 of the **General Interpretation Act** which reads;

Where a form prescribed or specified by any written law, deviations therefrom neither materially affecting the substance nor calculated to mislead shall not invalidate the form used.

26. It is my finding that the Court's inherent powers to cure an irregularity under **Order 2 rule 3** of the rules are not exercised as a matter of course. Such discretion is exercised on condition and subject to first determining what the effect such irregularity will have on the substance of the case.

27. I have read case law, both authorities submitted by the parties and otherwise, and the questions that have exercised my mind are, what is the commencement procedure for a Declaratory Order? whether a Declaratory order application

can be converted to an Ordinary proceeding under Order 5? Whether a Declaratory application which is stand alone can be converted into a Judicial review application? What do the Rules allow and what does case law say?.

28. Going through the presentation of this case , it comes to me that this case is one in which the claimants are asserting their rights not purely under private law. My finding is that this application is seeking to apply both private law rights and public law rights. The private law rights that the claimants seek to assert are those protected under contract law and company law. As for Public law rights, the claimants seek protection of their public law rights with relation to the right to property under the Constitution. Now this is where the substance of the case is negatively affected by its mode of commencement.
29. Neither the court nor the Defendant has been provided the benefit of a Summons which specifically outlines the relief claimed (aggravated and exemplary damages), there is no statement of case, and no list of documents related to the claim. On the Defendant's side, they have been unable to file a Defence, nor benefit from timelines prescribed in the rules for preparing their Defence. I must say, though the case proceeded, the presentation of evidence was through sworn statements only. Both parties and the court have not been able to robustly go through the evidence, interrogate it and properly frame and decide the merits of the case. Actually both parties are prejudiced and I find such commencement grossly irregular and incurable in so far as determination of the rights of the parties is concerned such that the court cannot proceed to determine the other arguments.
30. It is trite law that the rights which the parties seek to protect, are the determining factor in deciding which mode of commencement will be used. As cited in the Koreai case; **Oreilly V Mackeman [1982] ALLER 1124**
- "it would, as a general rule be contrary to public policy and as such an abuse of process of the court, to permit a person seeking to establish that a decision of a public authority or authority infringed rights to which he was*

entitled to protection under public law, to proceed by way of ordinary action and by this means to evade the provisions of Order 53 for protection of such authorities”

see also *Koreal v. Designated Board Schools* [1995] 2 MLR 649 , see also *OUSMAN KENNEDY etal V Blantyre International University and National Council of Higher Education , CIVIL CAUSE NO. 495 OF 2016, Sheikh Ismail Daudi, Ali Saizi and 47 Others Vs. The Registered Trustees of Al-Barakah Charity Trust; Civil Cause No. 180 of 2016.*

31. Similarly, proceeding by way of Order 29 rule 7 of the Rules alone, evades the provisions of Order 5 of the same rules, occasioning injustice to both parties, including the Claimants.

Conclusion and Decision

32. In light of the foregoing, I find that the mode of commencement used cannot be used to determine the rights of the parties and further cannot provide the reliefs sought.

33. I hereby dismiss the application.

34. Each party to pay its cost.

Made in Chambers this 3rd Day of June 2021



Charlotte Wezi Mesikano Malonda

JUDGE