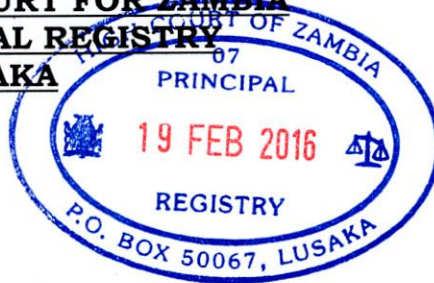


Wb

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2015/HP/2387



BETWEEN:

ZIMPLOW HOLDINGS LIMITED T/A MEALIE BRAND

PLAINTIFF

AND

NEEELKANTH GROUP ZAMBIA LIMITED

DEFENDANT

**Before the Honourable Mrs. Justice M. C. Kombe on 19th day of February
2016 in Chambers.**

For the Plaintiff : *Ms. J. Mutemi- Messrs Theotis, Mataka & Sampa
Legal Practitioners*

For the Defendant : *Mr. W. Muhanga- Messrs AKM Legal Practitioners*

R U L I N G

Cases referred to:

- 1. Zambia National Holdings Limited and the United National Independence Party (UNIP) v. The Attorney General (1994) Z.R. 22.**
- 2. Zambia Revenue Authority v. T & G Transport Limited SCZ No. 2 of 2007 (Unreported).**
- 3. Leopold Warfold (Z) Limited v. Unifreight (1985) Z.R. 203 (S.C).**
- 4. Zambia Revenue Authority v. Jayesh Shah (2001) Z.R. 60.**
- 5. Lily Drake vs. M.B.L Mahtani and Another (1985) Z.R 236.**

Legislation and other material referred to:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia.**
- 2. The Rules of the Supreme Court 1999 Edition (White Book).**

This is a Ruling on the Defendant's application to raise a preliminary issue on a point of law. The application was made pursuant to Order 14A rule 1 and 2 and Order 33 rule 3 of the Rules of the Supreme Court of England as read with Order 3 rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia.

According to the Notice filed on 6th January, 2016, the issues for determination are as follows:

1. Whether the originating process being the Writ of Summons and Statement of Claim were properly launched before the court without the leave of court to file such process during the Christmas Vacation.
2. And once determined why such process should not be set aside or dismissed for such an irregularity as the said irregularity accordingly brings the court in want of jurisdiction.

The application is supported by an affidavit deposed to by **SANJAY GADGE**, the group Accountant in the Defendant Company.

In brief, he deposed that he had instructed his advocates to make an application before this court for an order to set aside or dismiss the Writ of Summons and Statement of Claim in this matter for legal irregularities; that the originating process was filed into court during the Christmas Vacation without leave of the court. He produced a copy of the Certificate or Publication for Gazette Notice and a copy of the Gazette Notice issued indicating that the Christmas Vacation commenced on 11th December, 2015 and terminated on 9th January, 2016. The said was marked as '**SG1**'.

He further deposed that based on the above, the Writ of Summons was irregular and could not stand and a conditional Memorandum of Appearance to the Writ of Summons had equally been filed.

The Plaintiff opposed the application and learned counsel for the Plaintiff **JOY RACHEL MUTEMI** deposed to the affidavit in her capacity as advocate seized with the conduct of the matter. She deposed that the originating process filed into court on 14th December 2015 was amended and filed into court on 6th January 2016. A copy of the Amended Writ of Summons and Statement of Claim were produced and marked as '**JM1**'; that the amendment and filing was done within the last eleven days of the Christmas vacation and that they were served with a copy of the Defendant's application on 8th January, 2016; that the defect was curable and was not fatal so as to defeat the legal proceedings.

At the hearing of the matter on 15th January, 2016, learned counsel for the Defendant Mr. W. Muhanga informed the court that he was relying on the affidavit in support and the list of authorities and skeleton arguments filed into court on 6th January, 2016.

In the skeleton arguments, Mr. Muhanga submitted that the Writ of Summons and Statement of Claim were filed into court on 14th December, 2015 and that the affidavit showed that the Christmas vacation commenced on 11th December, 2015 and terminated on 9th January 2015. Therefore the Writ was filed within the Christmas vacation.

He referred the court to Order 2 Rule 4 of the High Court Rules which provides that:

4. Summonses may be issued and pleadings may be amended delivered or filed during the last eleven days if the Michaelmas and Christmas vacations respectively, but pleadings shall not be

amended, delivered or filed during any other part of such vacations unless by the direction of the Court or Judge.

In reference to the above provision, Mr. Muhanga submitted that other than during the last eleven days of Christmas and Michaelmas vacations, no pleadings could be filed into court without leave or by direction of the court or Judge. He submitted that pleadings in this matter were filed without such direction and therefore were irregular. Furthermore, counsel submitted that the irregularity brought the court in want of jurisdiction as the issue of leave went to the root of the court's jurisdiction to hear the matter not properly presented before it.

On the issue of jurisdiction counsel referred the court to the case of **Zambia National Holdings Limited and the United National Independence Party (UNIP) v. The Attorney General** ⁽¹⁾. On this authority, counsel argued that parties were entitled to relief only on matters properly brought forward by them before the courts.

Furthermore, Mr. Muhanga relied on the case of **Zambia Revenue Authority v. T & G Transport Limited** ⁽²⁾ where it was stated that:

'...the requirement of obtaining leave to appeal goes to the Jurisdiction of the Court of appeal...and jurisdiction cannot be conferred by consent of the parties nor in consequence of an applied waiver...its cardinal to comply with the rules.'

In conclusion, counsel submitted that on the authorities cited, this court had the powers to set aside the writ upon an application by any person as was the case herein. His prayer was that the writ be set aside.

In his oral submissions, Mr. Muhanga in substance repeated what was contained in the skeleton arguments.

In answer to the question by the court whether the purported irregularity was fatal, Mr. Muhanga's contention was that the irregularity went to the jurisdiction of the court on the basis that where leave was required, the requirement of obtaining such leave went to the jurisdiction of the court.

In opposing the application, learned counsel for the Plaintiff Ms. J. Mutemi informed the court that she was relying on the affidavit in opposition as well as the skeleton arguments filed into court on 12th January, 2016.

In the skeleton arguments, Ms. Mutemi submitted that the Plaintiff amended its Writ of Summons and Statement of Claim without leave of the Court pursuant to Order 20 rule 1 of the Rules of the Supreme Court on 6th January, 2016 and therefore the amendment was filed during the last eleven days of the Christmas vacation.

She further submitted that the amendment having been made on 6th January, 2016, the amended Writ which was filed during the last eleven days of the Christmas vacation as envisaged by Order 20 Rule 8 sub rule 2 was now the origin of the action.

Ms. Mutemi also argued in the alternative and submitted that in the event that the court was of the view that the Writ of Summons was irregular, the defect was curable as the breach by the Plaintiff was one of a regulatory rule being Order 2 rule 4 of the High Court Rules which was curable by amendment. She referred the court to the case of ***Leopold Warfold (Z) Limited v. Unifreight⁽³⁾*** where on appeal to the Supreme Court, the issues were whether leave to issue a Writ for service out of jurisdiction had been obtained before or after the Writ was issued after the District Registrar struck out the action for non-compliance. The Supreme Court stated that:

“In this case there was no compliance with Rule 16 or Order X since the Writ was issued before the Court's leave could be

obtained. However, as we have said in relation to breach of (1) (a) of Order VII, contravention of that Rule was not fatal but curable. Moreover, an application was made by the Plaintiff's Advocate for the amendment of the Writ so as to have the Plaintiff's address reflected thereon."

Therefore, the Supreme Court directed as follows:

"... We direct the amendment of the Writ so as to have the Plaintiff's address reflected thereon. Thereafter, the Court's leave must be sought and obtained for the issue of the amended Writ and the service thereof outside the Court's jurisdiction."

Relying on this authority, counsel submitted that the defect by the Plaintiff in not seeking leave of the court before filing the originating process was curable by amendment as the Plaintiff had amended its Writ of Summons and Statement of Claim on 6th January, 2016.

In her verbal submissions, Ms. Mutemi urged the court to dismiss the application based on the above cited case.

In reply, Mr. Muhanga submitted that they had not sought dismissal but setting aside of the Writ and that Order XI Rule 1 (4) which they were relying on referred to setting aside which was different from dismissal. He further submitted that his understanding was that failure to comply with the rules by a party had consequences which included condemnation to costs.

I have carefully considered the affidavit evidence, the submissions by learned counsel for the respective parties and the authorities cited therein.

The first preliminary issue raised by the Defendant touches on this court's jurisdiction to hear and determine this matter in view of the provisions of Order 2 rule 4 of the High Court Rules. The Defendant contends that this action which was filed on 14th December, 2015 during the Christmas vacation which

commenced on 9th December, 2015 and ended on 11th January, 2016 was filed without the leave of the court.

It is not in dispute that the action was originally commenced on 14th December, 2015 during the Christmas vacation. However, the Plaintiff contends that following the amendment on the 6th January, 2016, no leave of the court was required as the amendment was done in the last eleven days of the vacation. In support of this, counsel relied on Order 20 rule 8 sub rule 2 of the Rules of the Supreme Court. This Order reads as follows:

'An amendment duly made with or without leave takes effect not from the date when the amendment was made but from the date of the original document which it amends; and this rule applies to every successive amendment of whatever nature and at whatever stage the amendment is made. Thus when an amendment is made to the writ, the amendment dates back to the date of the original issue of the writ and the action continues as though the amendment had been inserted from the beginning: 'the writ as amended becomes the origin of the action...'

Applying the aforesaid provision to the present case, Ms. Mutemi submitted that the amendment having been made on 6th January, 2016 the amended writ which was filed during the last eleven days of the Christmas vacation was now the origin of the action.

I have carefully considered the above mentioned Order and the argument advanced by the counsel for the Plaintiff. I am of the view that since an amendment takes effect from the date of the original document which it amends, the date of the action is the date of the original issue of the Writ. In the present case, the Writ of Summons was filed on 14th December, 2015 and an amendment was made on 6th January, 2016. The origin of the action is therefore 14th December, 2015 notwithstanding the fact that the amendment

was made on 6th January, 2016. That being the case, I do not accept the Plaintiff's argument that the origin of the action was 6th January, 2016.

Having said so, the argument by counsel for the Defendant as I have alluded to is that since leave to commence the action was not obtained from the court, then the pleadings filed on 14th December, 2015 were irregular and should be set aside or dismissed.

I have examined the provisions of Order 2 rule 4 which Mr. Muhanga relied on. For the avoidance of doubt, the said provision reads as follows:

4. Summonses may be issued and pleadings may be amended delivered or filed during the last eleven days if the Michaelmas and Christmas vacations respectively, but pleadings shall not be amended, delivered or filed during any other part of such vacations unless by the direction of the Court or Judge.

It is very clear from the above provision that before pleadings are filed, amended or delivered during any part of the Christmas and Michaelmas vacations excluding the last eleven days of such vacations, leave of the court should be obtained. In the present case, there is no evidence that leave was obtained before the pleadings were filed on 14th December, 2015. In determining the first preliminary issue therefore, I find that the Writ of Summons and Statement of Claim as amended were not properly launched by the Plaintiff as no leave of court was obtained as provided for under Order 2 rule 4 of the High Court Rules.

In relation to the second preliminary issue, Mr. Muhanga urged this court to set aside the process for irregularity in the event that the court found that the pleadings were not properly launched. However, counsel for the Plaintiff argued in the alternative that should this court find that the Writ of summons and Statement of claim were irregular, the defect was curable as the breach by the

Plaintiff was one of a regulatory rule being Order 2 rule 4. Ms. Mutemi relied on the Supreme Court case of ***Leopold Warford***.

In considering whether to set aside the writ or dismiss this action, I have considered the holding of the Supreme Court in the case of ***Leopold Warford*** which counsel for the Plaintiff relied on. In that case, the Supreme Court held that:

'As a general rule, breach of regulatory rule is curable and not fatal, depending upon the nature of the breach and the stage reached in the proceedings.'

Although there was no compliance with rule 16 of Order X, since the writ was issued before the court's leave could be obtained, the Supreme Court in the above case found that the contravention of that rule was not fatal but curable.

The Supreme Court took a similar approach in the case of ***Zambia Revenue Authority v. Jayesh Shah***⁽⁴⁾ when it held that:

'Cases should be decided on their substance and merit. The Rules must be followed but the effect of a breach will not always be fatal if the rule is merely regulatory or directory.'

Furthermore, the approach which the Supreme Court took in the case of ***Lily Drake v. M.B.L Mahtani and Another***⁽⁵⁾ a matter which was incorrectly commenced thereby raising the issue of the jurisdiction of the court, was to order an amendment of the originating process and not to dismiss the action on the ground that no injustice was done to the other party.

In the present case, I have already made a finding that the Plaintiff did not comply with the provisions of Order 2 rule 4 as no leave of the court was obtained before filing the Writ of Summons and Statement of Claim. However, guided by the above authorities, I consider the defect or irregularity to be that

of a regulatory rule which is not fatal but can be cured depending on the stage of proceedings and whether the breach or irregularity causes prejudice to the Defendant.

I have considered that this matter is still in its preliminary stages as the application for an order of interlocutory injunction and the substantive matter are yet to be heard and determined by this court. Thus, the Defendant has an opportunity to adequately respond to the claims made therein. I am therefore of the view that no prejudice or injustice will be occasioned to the Defendant if the defect is cured.

For the foregoing reasons, I invoke the provisions of Order 3 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia and in the interest of justice order that the originating process, that is the Writ of Summons and Statement of Claim as amended be deemed to have been issued with leave of the court as provided for under Order 2 rule 4 of the High Court Rules. By this order, the defect in not obtaining leave of the court before filing the originating process has been cured. However, in the circumstances of this case, I order that costs of and occasioned by this application be borne by the Plaintiff.

Leave to appeal is granted.

Delivered at Lusaka this 19th day of February, 2016.



.....
M.C. KOMBE
JUDGE