

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2017/HP/1145

(Civil Jurisdiction)



B E T W E E N :

SYACHOKE SIMEMEZA
(Suing as the General Secretary of the Voluntary
Separatees and Retrenched Association of
Zambia and 9,975 Others)

PLAINTIFFS

AND

NATIONAL PENSION SCHEME AUTHORITY

DEFENDANT

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 4th
day of December, 2017**

*For the Plaintiffs : Mr. B. Mukatuka, Messrs Robson Malipenga & Company
For the Defendant : Mrs. M. Lambe In-house Counsel, National Pension Scheme
Authority*

R U L I N G

Cases Referred To:

1. *Inyati Construction Limited v Pouwels Construction Zambia Limited and Pouwels Hotels and Resorts Limited 2013/HPC/0285*
2. *Twampane Mining Cooperative Society Limited v E and M Storti mining Limited (2011) ZR 67*
3. *Secretary General of the United National Independence Party v Elias Chipimo and Marko Chisha Chipimo (1983) ZR 125 (S.C)*
4. *Phillip Mutantika and Mulyata v Kenneth Chipungu SCZ Judgment No. 13 of 2014/Appeal No. 94 of 2012*

Legislation Referred To:

1. *High Court Act, Chapter 27*
2. *Rules of the Supreme Court 1999*

This is the Defendant's application to set aside originating process for irregularity and for an order for security of costs. It is made pursuant to Order 2 Rule 2 and Order 23 Rule 1 of the Rules of the Supreme Court.

In the supporting Affidavit **Mwape Lambe**, Legal Counsel of the Defendant Organisation states that the Plaintiffs commenced their action by Writ of Summons and Statement of Claim on 31st July, 2017. That they seek the following claims:

- (i) *An order for the payment for those who were underpaid*
- (ii) *An order of payments for those who have not reached statutory age to be paid in full, considering that the Plaintiffs stopped contributing and are not working any more.*
- (iii) *An order for payment for individuals appearing on NAPSA database who contributed through the 2nd Defendant.*
- (iv) *Interest from the date of termination to the full settlement*
- (v) *An order of full payment to those who have attained full statutory age.*
- (vi) *Damages*
- (vii) *Costs*
- (viii) *Any other relief that the Court may deem fit.*

She also avers that the Defendant is not aware of any assets owned by the Plaintiffs, which could be employed to pay costs if the proceedings are set aside. She prays to the Court to set aside the Plaintiffs' writ of summons for irregularity and for security of costs.

In the opposing Affidavit, **Syachoke Simemeza** deposes that he commenced this action in his capacity as Secretary General of Voluntary Separatees and Retrenchees Association of Zambia representing 9,975 others. He states that he has been reliably advised by his advocates, Messrs Robson Malipenga and Company and believes that under the law, an Association can sue through its Secretary General who must endorse his physical address or E-mail address, and has done so.

Further, that under a group action brought through an Association, the Secretary General's physical address and E-mail are sufficient for serving Court process on the Defendant. He avers that the space provided in the Writ of Summons cannot accommodate the physical and E-mail addresses of the 9,976 other

Plaintiffs. The deponent also avers that costs are paid after a matter has been concluded in Court.

In the Affidavit in Reply, **Mwape M. Lambe** deposes that it is a mandatory requirement under the law that where a Plaintiff sues by an advocate, the advocate of the Plaintiff is supposed to endorse upon the writ, the physical address, postal and electronic address of the Plaintiff. That the said addresses should have been endorsed on the schedule against the name of each Plaintiff.

She further deposes that the reason given by the Plaintiffs that the space provided in the writ of summons is insufficient to accommodate 9,976 personal physical and E-mail addresses is not valid for impeaching the mandatory Rules of Court. She reiterates her prayer for an order to set aside the writ for irregularity and for the costs occasioned by this application.

Learned Counsel for the Defendant filed Skeleton Arguments, where she submitted that it is a mandatory requirement for a

Plaintiff to endorse a physical and E-mail address on the writ according to Order VII Rule 1 of the High Court Rules.

Counsel further submitted that the Order is couched in mandatory terms and Courts have emphasized the importance of endorsing an address. She called in aid the case of **Inyatsi Construction Limited v Pouwels construction Zambia Limited and Another**¹, where the Court held that the omission of any form of address was critical in the following:

“Even though the requirement for an electronic address appears to be *de minimis* it is the law nevertheless and must be followed by all Plaintiffs who have electronic or postal addressed. This is because Order VII of the High Court Rules, Chapter 27 of the Laws of Zambia as amended by the High Court (Amendment Rules, Statutory Instrument No. 27 of 2012 is couched in mandatory terms.”

It was Counsel’s submission that the consequence of the Plaintiffs’ failure to endorse addresses on the writ of summons rendered the originating process irregular. She adverted to the case of **Twampane Mining Corporation Society Limited v E.M. Storti Mining Limited**², where the Supreme Court stated that litigants ignored the Rules of the Court at their own peril. She prayed to the

Court to set aside the Plaintiffs' writ for offending Order VII Rule 1 of the High Court Rules.

On security for costs, Counsel cited Order 23 Rule 1 of the Rules of the Supreme Court, which reads:

- "1. (i) Where, on the application of a Defendant to an action or other proceeding in the High Court, it appears to the Court.**
- (a) -----**
 - (b) That the Plaintiff (not being a Plaintiff who is suing in a representative capacity) is a nominal Plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the Defendant if ordered to do so, or**
 - (c) Subject to paragraph (2) that Plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or**
 - (d) -----**
- Then if having regard to all circumstances of the case, the Court thinks it just to do so, it may order the Plaintiff to give such security for the Defendant's costs of the action or other proceedings as it thinks just."**

Counsel submitted on that authority that the Plaintiffs must pay security for costs because if the Defendant were to succeed, it would be unable to recover from them. She also prayed for the costs of this application.

Learned Counsel for the Plaintiffs filed Skeleton Arguments, where he begun by citing Order VII Rule 3 of the High Court Act, which states:

“An address for service shall be an address where notices pleadings orders, summons warrants and other documents proceedings, electronic and written communications, if not required to be served personally, may be left for transmitted or posted to the Plaintiff or his advocates as the case may be.”

It was his submission that the rational of including a physical and electronic address in the writ of summons is primarily for service of Court documents or other documents. For that reason only the 1st Plaintiff’s physical and electronic mail address was included and it was sufficient for the service of documents on behalf of the other 9,975 Plaintiffs.

Counsel also stated that only the 1st Plaintiff’s postal and electronic address were included because he is the Secretary General of the Plaintiff organization. He fortified his position by stating that an unincorporated body cannot sue or be sued in its own name but through its Secretary General. Counsel referred me to Order XIV Rule 1 of the High Court Rules, which provides:

“If any Plaintiff sues or any Defendant is sued in a representative capacity, it shall be expressed on the writ of Summons.”

Counsel contended that the 1st Plaintiff stated on the writ of summons that he is suing as a representative of his Association, which is not incorporated. Counsel cited the case of **United National Independence Party v Elias Chipimo and Marko Chisha Chipimo**³, where the Supreme Court stated that:

“It was proper to sue the Secretary General of the United Independence Party (UNIP) in his official capacity on behalf of the party.”

Counsel added that a writ of summons had limited provision for stating the physical and electronic addresses of all the Plaintiffs and the Advocate. It was therefore impossible to list all the 9,975 Plaintiffs in the space provided. Counsel argued that costs usually follow the event and it was not necessary to demand them in advance. Counsel prayed to the Court to dismiss the application with costs to the Plaintiffs.

I am grateful to the Learned Counsels for their submissions.

I have anxiously considered the affidavit evidence and submissions filed herein. The issue to be determined is whether the Plaintiffs writ of summons is fraught with irregularity and liable to be set aside.

Order 2 Rule 1(1) of the Rules of the Supreme Court defines irregularity as:

“Where in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity.”

According to that Order, irregularity implies that there is a failure to comply with the Rules of Court and a party's action can be set aside. This provision is reinforced by Order 2 Rule 1(2) of the Rules of the Supreme Court, which reads:

“Subject to paragraph (3) the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment...”

Order VII Rule 1 of the High Court Rules prescribes the mandatory endorsements, which should be stated on a writ of summons. It reads:

“Where the Plaintiff sues by advocate

(1) The advocate of a Plaintiff suing by an advocate shall endorse upon the writ of summons-

- (a) physical, postal and electronic address of the Plaintiff.**
- (b) His own name or firm and his own place of business and the postal, physical and electronic address thereof and...”**

In the case of **Twampane Mining Cooperative Society Limited v E and M Storti Mining Limited²**, the Supreme Court inter alia held that:

“Indeed there is no need to appeal for the sake of appealing when the appeal has no prospect of success. In this regard, we cannot over-emphasise the importance of adhering to Rules of court as this is intended to ensure that matters are heard in an orderly and expeditious manner. Allowing this appeal would be tantamount to us encouraging laxity and non-observance of rules by practitioners and litigants in general. We repeat what we said in Nkhuwa v Lusaka Tyre Services Limited (3) that those who choose to ignore Rules of Court will do so at their own peril.”

Thus, where a party ignores or disobeys the Rules of Court, such party commits the transgression at his or her own peril. It is not difficult to discern that the Plaintiffs’ Writ of Summons is only endorsed with the addresses of the 1st Plaintiff who states that he is suing as the Association’s representative and is covered by Order

XIV Rule 1 of the High Court Rules. The 1st Plaintiff contends that as Secretary-General of an unincorporated body he is authorized to take action on behalf of the other Plaintiffs.

The 1st Plaintiff also contends that he is representing the claims of former government employees who left employment between 1997/1998 through voluntary separation. While it could be argued that there is some community interest, the list of Plaintiffs filed into Court on 31st July, 2017, falls short of Order 7 Rule 1 because it does not contain the physical and electronic addresses of the other Plaintiffs. This is a mandatory requirement. I accept that the information about the other Plaintiffs cannot be endorsed on the Writ of Summons. However, my firm view is that their addresses can be stated against their names on the list filed into Court.

I am fortified by the case of **Phillip Mutantika and Mulyata v Kenneth Chipungu**⁴, where the Supreme Court stated that:

“On our part, we have always underscored the need for parties to strictly adhere to the Rules of Court and that the failure to comply can be fatal to a party’s case.”

The fact that the Plaintiff appears in a representative capacity does not exonerate the others from giving their addresses because they all carry an equal responsibility in the shares and spoils of this cause.

I accordingly set aside the Writ of Summons for irregularity and order the Plaintiffs to amend their Writ and Plaintiffs' list within the next twenty-one (21) days, failing which, this action shall stand dismissed.

Before I conclude, I have considered that the litigants might be indigent. This however this does not prevent them from having their full day in Court. I decline to make an order for the payment of security for costs.

I nevertheless, award the Defendant costs for this application to be taxed in default of agreement.

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Dated this 4th day of December, 2017.

M. Mapani
M. Mapani-Kawimbe
HIGH COURT JUDGE