

IN THE HIGH COURT FOR ZAMBIA
IN THE COMMERCIAL DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2016/HPC/0559

IN THE MATTER OF: ORDER 30 RULE 14 OF THE HIGH COURT
RULES, CHAPTER 27 OF THE LAWS OF
ZAMBIA

AND

IN THE MATTER OF: AN APPLICATION FOR PAYMENT OF
MONIES SECURED BY A MORTGAGE AND
AN APPLICATION FOR DELIVERY UP OF
POSSESSION OF PROPERTY KNOWN AS
S/D No. 47 OF STAND No. 9812, LUSAKA,
HELD ON CERTIFICATE OF TITLE NO.
24563

BETWEEN:

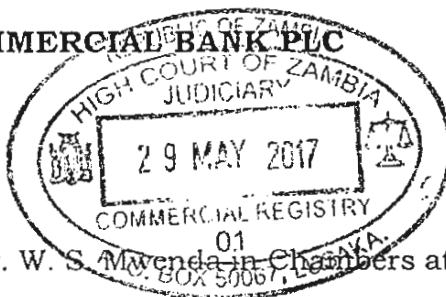
ZAMBIA NATIONAL COMMERCIAL BANK PLC

APPLICANT

AND

MUBIANA MUBIANA

RESPONDENT



Before Hon. Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka the 29th day of May, 2017.

For the Applicant: Mrs. N. Mbao of Nkusuwila Nachalwe Advocates

For the Respondent: Ms. S. Chungu of Simeza Sangwa & Associates
appearing with Mr. B. Abwino

RULING

Cases referred to:

1. *Inyatsi Construction Limited v. Pouwells Construction Zambia* 2013/HPC/0265.
2. *Finsbury Investments Limited v Antonio Ventriglia and Another* 2008/HPC/0366.
3. *Indo Zambia Bank Limited v Amazon Carriers and Kimberley Aretha Antosha Baines* 2014/HPC/0141.
4. *Genesis Finance Limited v Longreach Commodities Limited and Others* – 2012/HPC/0144.
5. *Leopold Walford (Z) Limited v. Unifreight* (1985) Z.R. 203.

6. *Attorney General v. Edward Jack Shamwana, Valentine Shula Musakanya, Mundia Sikatana, Goodwin Yoram Mumba, Anderson Kambwali Mporokoso, Macpherson Mbulo, Patrick Mkandawire, Matinanja Liswaniso, Thomas Mupunga Mulewa, Godfrey Miyanda, Deogratias Simba, Albert Chilambe Chimbale and Roger Kanyembu Kabwita* (1981) Z.R. 12 (H.C.).
7. *Re Gospel of God Church, Isaac Matongo v. Shadreck Masedza and the Attorney General* (1977) Z.R. 292 (H.C.).
8. *Patel v Surma Stationeries Limited & others* (SCZ Judgment No. 12 of 2009).
9. *Chisata v. Attorney General* S.C.Z. Judgment No.3 of 1992.
10. *Access Bank Zambia Limited v. Group Five/Z Con Business Park Joint Venture (sued as a firm)* SCZ/8/52/2014.
11. *NFC Mining Plc v. Techpro (Zambia) Limited* (2009) ZR. 236.
12. *Ravindrananth Morargi Patel v. Rameshbhai Jagabhai Patel – SCZ Appeal No. 37 of 2012.*

Legislation referred to:

1. Order 2 rule 2 of the Rules of the Supreme Court of England 1965 (White Book).
2. Order 7 rule 1(1) (a) of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia.
3. Order 5 rules 15, 16, and 20 (g) of the High Court Rules.
4. Order 88 rule 5 (1), (2), 3 (b) and (c), 4 (a), 6 (a) and (b) and (7) of the Rules of the Supreme Court of England, 1965.
5. Order 2 rule 1 (1) of the Rules of the Supreme Court of England 1965.
6. Section 6 of the Commissioner for Oaths Act, Chapter 33 of the Laws of Zambia.
7. Order 5 rules 13 and 14 of the High Court Rules.

The Applicant herein caused to be filed in the Commercial Registry of the High Court of Zambia on 28th November 2016, an originating summons accompanied by a verifying affidavit, for the determination of the following questions:

1. Payment of all monies which as at 3rd October, 2016 stood at ZMW1,063,547.17 plus interest, costs and other charges due and owing to the Plaintiff Bank by the Respondent under facilities that include-under a loan facility-loan agreement comprising house loan facility, car loan, personal and personal development loans together amounting to ZMW793,856.93; together with a Mortgage Deed of 2012 over subdivision No. 47 of Stand 9812 situate in Lusaka;
2. Foreclosure;
3. Delivery up by the Respondent to the Plaintiff of the mortgaged property;
4. Sale of the said mortgaged property;

5. Any further or other relief the Court may deem fit; and
6. Costs.

The Respondent entered a conditional appearance on 27th January 2017 and on the same date filed a Motion to Set Aside Process for Irregularity pursuant to Order 2 rule 2 of the Rules of the Supreme Court 1965 (contained in the White Book, 1999 Edition). According to the Notice of Motion, the Respondent's application is for an order that the originating summons and supporting affidavit be set aside and that the action be dismissed for irregularity on the grounds:

- (a) that the originating summons does not comply with the provisions of Order 7 rule 1(1) (a) of the High Court Rules, Chapter 27 of the Laws of Zambia; and
- (b) that the affidavit in support of originating summons does not comply with the provisions of:
 - (i) Order 5 rules 15, 16 and 20 (g) of the High Court Rules, Chapter 27 of the Laws of Zambia;
 - (ii) Order 88 rule 5 (1), (2), (3) (b) and (c), 4 (a), 6 (a) and (b) and (7) of the Rules of the Supreme Court of England, 1965.

And that the costs of and occasioned by this action be paid by the Applicant to the Respondent.

The Respondent filed a List of Authorities and Skeleton Arguments in Support of the Notice of Motion.

The Respondent's first argument as outlined in the Skeleton Arguments is that non-compliance with rules of court is an irregularity. The Respondent has cited Order 2 rule 1 (1) of the Rules of the Supreme Court of England (hereinafter referred to as "RSC") which, according to the Respondent, defines "irregularity".

The provision reads as follows:

"Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceeding, 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 and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.”

It is the Respondent’s argument that clearly irregularity means non-compliance with the rules of court and therefore, in order to establish that proceedings before court are irregular, one must firstly point out a particular rule of court which will serve as a yardstick or measure and secondly, demonstrate how the proceedings have fallen short of the prescription(s) under that rule of court.

The Respondent argues further that whereas Order 7 rule 1(1) (a) of the High Court Rules makes it mandatory for the solicitor of a Plaintiff suing by solicitor, to endorse upon the writ of Summons, the physical, postal and electronic addresses of the Plaintiff, the electronic address of the Applicant is not endorsed on the originating summons herein. The Respondent has cited a ruling of Wood, J., as he then was, in an unreported case of ***Inyatsi Construction Limited v Pouwels Construction Zambia***¹ where he said as follows at page R3:

“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 address. This is because Order VII rule 1 of the High Court Rules as amended by the High Court (Amendment) Rules, Statutory Instrument No. 27 of 2012 is couched in mandatory terms.”

Judge Wood went on to set aside the writ of summons and statement of claim for irregularity. It is the Respondent’s argument that in the case before this Court the writ of summons filed shows that only the physical address of the Plaintiff is endorsed and no reference is made to his postal and electronic addresses as required by Order 7 rule 1(1) (a) of the High Court Rules. Further, that no document has been served by the Applicant on the Respondent as proof that he does not have any postal or electronic address for endorsement on the writ. It is also argued that the Respondent has not been presented with any alternative application or argument advanced before the Court for leave to amend to cure the defect. That therefore, the circumstances leave this Court with no option but to set aside the originating process for irregularity with costs to the Respondent.

It is the Respondent's argument in relation to Order 88 rule 5 of the RSC that it contains some mandatory prescriptions for an affidavit in support of an originating summons in a mortgage action. The Respondent has quoted extensively from the said order. I find it unnecessary to reproduce the contents of the said order but will, however, indicate the reasons given by the Respondent for reaching the conclusion that the affidavit in issue has fallen short of the mandatory requirements under Order 88 rule 5.

It is the Respondent's contention that in breach of Order 88 rule 5 (2), the affidavit does not exhibit a true copy of the mortgage and the original mortgage and it does not show the circumstances under which the alleged right to possession of the mortgaged property arises, contrary to Order 88 rule 5 (3). Further, that in breach of Order 88 rule 5 (3) (a), the affidavit does not state the amount of periodic payments required to be made and it also does not state the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit in contravention of Order 88 rule 5 (3) (c).

The Respondent argues further that in breach of Order 88 rule 5 (6) (a) and (b), the affidavit does not state the amount and dates of any periodic repayments and interest that have to be paid in order to redeem the mortgage, respectively, at the date of commencement of the proceedings. Lastly, that in breach of Order 88 rule 5 (7), the affidavit does not state the amount of a day's interest.

The Respondent contends that the affidavit in support of originating summons is quite clearly fundamentally irregular and cannot by any measure survive being set aside for the multiple glaring breaches of the mandatory rules of court.

It is the Defendant's further argument that the affidavit in support of originating summons contains extraneous matter. That Order 5 rule 15 of the High Court Rules prohibits the inclusion of certain matter in an affidavit, the exact proscription being as quoted hereunder:

"15. An Affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion."

As for the permissible content of an affidavit, Order 5 rule 16 of the High Court Rules provides as follows:

"16. Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true."

It is the Respondent's contention that the Applicant herein has drawn the following conclusion from the originating summons, namely:

"That in the premise the Respondent has no defence whatsoever to this claim."

Further, that he has also made the following prayer in the affidavit in support of originating summons.

"That I therefore, crave for the reliefs contained in the originating summons."

The Respondent contends that the inclusion of the conclusion and prayer in the affidavit is a blatant breach of the requirement of Order 5 rule 15 of the High Court Rules and therefore, an irregularity. The Respondent submits that the inclusion of extraneous matters in the Applicant's affidavit is an incurable defect which attracts the ultimate sanction of setting aside the same and to that end has cited the ruling of Chishimba, J., as she then was, dated 25th January, 2013 in the case of ***Finsbury Investments Limited v Antonio Ventriglia and Another***² where the learned Judge found the affidavit on record to be irregular for containing extraneous matters. While acknowledging that the court has the discretion to permit an affidavit to be used notwithstanding that it is defective, Chishimba, J. stated that the defect has to be in form. She found that in the case before her, it was the content of the affidavit that was defective and not merely the format. The Judge granted the application and set aside the proceedings. On the strength of the case cited above, the Respondent prays that the Applicant's affidavit in support of the originating summons be set aside for incurable irregularity and that the originating summons be consequentially dismissed *in limine*.

The last argument advanced by the Respondent in support of its motion to set aside process for irregularity is premised on the mandatory requirement

prescribed by Order 5 rule 20 (g) of the High Court Rules with respect to a jurat of an affidavit filed in court. The said provision states as follows:

"The jurat shall be written, without interlineations, alteration, or erasure (unless the same be initialled by the Commissioner), immediately at the foot of the affidavit, and towards the left side of the paper, and shall be signed by the Commissioner. It shall state the date of the swearing and the place where it is sworn."

To strengthen his argument, the Respondent has also cited section 6 of the Commissioner for Oaths Act, Chapter 33 of the Laws of Zambia, which similarly provides:

"Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

To further reinforce his arguments, the Respondent has cited a ruling by Chashi, J., as he then was, in the case of ***Indo Zambia Bank Limited v. Amazon Carriers and Kimberley Aretha Antosha Baines***³, where he stated that it is mandatory that the jurat to an affidavit must state the date of the swearing and that an affidavit that does not show in the jurat the date, the oath or affirmation was taken offends the mandatory provision of Order 5 rule 20 (g) of the High Court Rules and section 6 of the Commissioner for Oaths Act and is to that extent incurably defective. The learned Judge went on to expunge the affidavit in issue from the record and consequentially dismissed the claim. Judge Chashi came to the same conclusion in another ruling in a case that came before him of ***Genesis Finance Limited v Longreach Commodities Limited and Others***⁴.

The Respondent contends that a perusal of the Applicant's affidavit in support of originating summons shows that it does not, in the jurat, state the date on which the oath was taken, which according to the case law cited, renders the affidavit incurably defective and the originating summons liable to dismissal *in limine*. He accordingly urged this Court to follow the case law cited and expunge the affidavit in issue from the record coupled with dismissal of the originating summons.

Skeleton Arguments in rebuttal were filed on 20th February, 2017 wherein the Applicant indicates that it does not dispute that non-compliance with rules of

procedure may be an irregularity. However, the Applicant contends that it is up to the Court to decide on the effect of the irregularity on the matter but in doing so, the Court must be guided by the law, among which is Order 2 rule 1 (1) of the RSC which provides that a failure to comply with the requirements of the rules shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

The Applicant concedes that the High Court Rules as amended by the High Court (Amendment) Rules, 2012 require that the Plaintiff's electronic address be indicated on the originating process but argues that the Court should not set aside the process merely on the basis that the Applicant omitted its electronic address. The Applicant contends that the omission of an electronic address should fall among the type of irregularities that do not go to the core of the matter and therefore, should be treated as not sufficient to nullify the proceedings as espoused in Order 2 rule 1(1) of the RSC.

The Applicant contends further that the electronic address for the Applicant's advocates is, in any event, endorsed on the originating process on the jacket of the affidavit, which jacket forms part of the originating process. That, therefore, the Respondent's application to set aside the originating process for failure to endorse an electronic address on the process has no basis and lacks merit.

It is the Applicant's argument that an omission of its address on the originating summons is curable and not fatal as suggested by the Respondent. To this end, the Applicant has cited the case of **Leopold Walford (Z) Limited v Unifreight^s** where the Supreme Court held that as a general rule, breach of a regulatory rule is curable and not fatal depending on the nature of the breach and the stage reached in the proceedings.

The Applicant argues that since the current proceedings are still at preliminary stage, the omission of the Applicant's electronic address on the originating summons can be cured by the Court making an order that the originating process be amended by endorsing the electronic address and the Respondent would not

suffer any prejudice or injustice if such an order was made as he has not filed any opposition on the merits yet.

With respect to the issues raised by the Respondent regarding the affidavit in support of originating summons, that is, that the Applicant omitted particular requirements as outlined in Order 88 rule 5 of the RSC, the Applicant contends that the contents demanded by the Respondent have been availed by the Applicant except not in the manner expected by the Respondent. Further, that the omission by the Applicant to exhibit the original copy of the mortgage is a curable irregularity over which the Court can exercise its discretion and allow the Applicant to file the said document on terms to be decided by the Court in the interest of justice. It is the Applicant's argument that such an order by the Court would not prejudice the Respondent because he has neither denied having executed a mortgage nor any of the demands from the Applicant.

The applicant urges this Court not to consider the irregularities pointed out as enough to lead to a declaration that the affidavit in issue is a nullity because the said irregularities are procedural ones and as such should not be considered in such a manner as to defeat the cause of justice. In this regard, the Plaintiff referred this Court to the case of **Attorney General v. Edward Jack Shamwana, Valentine Shula Musakanya, Mundia Sikatana, Goodwin Yoram Mumba, Anderson Kambwali Mporokoso, Macpherson Mbulo, Patrick Mkandawire, Matinanja Liswaniso, Thomas Mupunga Mulewa, Godfrey Miyanda, Deogratias Simba, Albert Chilambe Chimbalile and Roger Kanyembu Kabwita**⁶ where the Court held as follows:-

"Rules of procedure need not be strictly adhered to where injustice would result, particularly bearing in mind that the court has a wide discretion in matters of procedure".

It is the Applicant's submission that on the authorities cited, this Court should not consider the affidavit in support of originating summons a nullity and should see the claims by the Respondent solely as an intent to defeat the cause of justice. He urged this Court to guide and order the Applicant to make the necessary corrections in order to conform to the procedural requirements.

According to the Applicant, by doing so, the Court will be continuously exercising its inherent powers as well as powers vested in it by Order 5 of the High Court Rules, particularly rules 13 and 14 thereof which provide as follows:

"13. The Court or a Judge may permit an affidavit to be used notwithstanding it is defective in form according to these Rules, if the Court or a Judge is satisfied that it has been sworn before a person duly authorised."

"14. A defective or erroneous affidavit may be amended or re-sworn, by leave of the Court or a Judge, on such terms as to time, costs or otherwise as seem reasonable."

The Applicant submitted that on the authorities cited, this Court should not entertain the request to expunge the entire affidavit but should instead exercise its discretion and direct the Applicant to make the necessary amendments to the same.

Regarding the issue of the affidavit containing extraneous matters, the Applicant referred this Court to the case of ***In Re Gospel of God Church, Isaac Matongo v. Shadreck Masedza and the Attorney General***⁷, where the court decided to ignore the extraneous matter in the affidavit instead of nullifying or expunging the affidavit and proceeded to hear the matter on its merits. The Applicant submitted that in the same manner and fashion, this Court, if it finds that the affidavit contains extraneous matters, should ignore the extraneous matters and proceed to hear the matter on its merits.

It is the Applicant's further averment that this Court has the power and jurisdiction to allow for an amendment without defeating the whole action and cited Order 18 rule 1 of the High Court Rules which provides as follows: -

"The Court or a Judge may, at any stage of the proceedings, order any proceedings to be amended, whether the defect or error be that of the party applying to amend or not, ... Every such order shall be made upon such terms as to costs or otherwise as shall seem just."

According to the Applicant, the weight of Order 18 rule 1 of the High Court Rules was showcased in the case of ***Patel v Surma Stationeries Limited & Others***⁸

when on appeal the Supreme Court overturned the lower court's refusal to grant leave to appeal. The judgment read in part as follows:

"The learned trial judge wrongly refused the application as both our Order 18 rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia and Order 20 rule 5 of the Supreme Court, White Book, empowered him to grant leave requested by the Plaintiff. His refusal to grant leave was misdirected in law. We grant the leave requested and order that the matter now proceeds to trial as amended."

It is the Applicant's contention that the significance of the Supreme Court's decision cited above, is that courts must always grant leave to amend rather than throw out an action because of an irregularity, which does not go to the root of an action but is curable. Further, that in the case of **Chisata v. Attorney General**⁹ the Supreme Court clearly showed that it is not in favour of throwing out matters on mere irregularities when it stated thus:

"We cannot stress too strongly what we have said in the past, that such cases should, whenever possible, and where there is no prejudice to either party by some irregularity, be allowed to come to trial so that the issue may properly be resolved."

For the above reasons, it is the Applicant's prayer that the application to set aside originating process be dismissed with costs as it lacks merit and is a mere ploy by the Respondent to delay justice. It is the Applicant's argument that the irregularities in the originating process, if at all, are curable and not fatal to warrant the dismissal of the whole action at this preliminary stage.

The Applicant contends that in any case, the Respondent's actions up to this point have gone to confirm that he has no defence to the Applicant's claims. The Applicant submits that the Respondent has through his advocates, surrendered the keys to the mortgaged property to the Applicant's advocates to take possession of the property, sell the same and recover its money. The Applicant contends that this application is, therefore, unwarranted and would have the effect of defeating the confirmation by the Respondent that he has no defence to the Applicant's claims which he has made by surrendering the mortgaged property to the Applicant. Thus, the Applicant urges this Court to dismiss the application with costs for want of merit.

At the hearing of the application, submitting in reply to the submission by learned Counsel for the Applicant, Counsel for the Respondent, Ms. Chungu, stated that in relation to curable defects, she would cite the case of **Access Bank Zambia Limited v. Group Five/Z Con Business Park Joint Venture (sued as a firm)**¹⁰ where it was stated, *inter alia*, that any reason, no matter how well articulated, cannot, of its own, cure a defect. That the party concerned must take out an appropriate application seeking to cure a defect and that the Court has no mandate to choose to ignore the defect and of its own motion proceed as if the defect never existed. In light of this case, it is Counsel's submission that since the Applicant has not filed any application to cure the defects in the originating process, this Court must set aside the said originating process.

In addition, Mr. Abwino co-counsel for the Respondent submitted on curable defects that as alluded to at page 1 of their Skeleton Arguments, Order 2 rule 1 of the RSC is to the effect that non-compliance with the rules of the court is an irregularity and not an automatic nullification of the proceedings. Counsel submitted that Order 2 rule 2 of the RSC is the precondition that paves the way for invoking the application to set aside based on Order 2 rule 1. Counsel also referred to the case of **Access Bank Zambia Limited v Group Five Z Con Joint Venture (sued as a firm)**¹⁰ cited by his co-counsel at page J23-J24 where the Supreme Court stated as follows: -

"We have in many cases consistently held the view that it is desirable for matters to be determined on their merits and in finality rather than on technicalities and piece meal ... we re-affirm this position. Matters should, as much as possible, be determined on their merits rather than be disposed of on technical or procedural points. This, in our opinion, is what the ends of justice demand. Yet, justice also requires that this court, indeed all courts, must never provide succour to litigants and their counsel who exhibit scant respect for rules of procedure. Rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed. Under the guise of doing justice through hearing matters on their merit, courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules."

Counsel submitted that the Supreme Court went on to cite at page J25, the case of **NFC Mining Plc v. Techpro (Zambia) Limited**¹¹ that the rules of court are intended to assist in the proper and orderly administration of justice and as such, must be strictly followed. Failure to comply with the rules of court by the litigants could be fatal to their case.

I have taken time to carefully analyse the motion to dismiss the originating summons for irregularity, the verifying affidavit and skeleton arguments. I have similarly perused the affidavit in opposition to the motion and opposing skeleton arguments. In addition, I have considered the oral arguments by both counsel for the Applicant and the Respondent in support of their respective cases. In my view, it is common cause that irregularities have been identified in the originating process and supporting affidavit. The issue to be determined in this application, in my opinion, is whether the irregularities that the Respondent has pointed out in the originating process are of such a nature as to warrant the dismissal of the originating summons and consequentially, the whole action.

It is not in dispute that the originating summons filed in this matter does not have an electronic address. That is undoubtedly an irregularity. The Respondent cited a judgment by Judge Wood who set aside the writ of summons and statement of claim for irregularity due to non-inclusion of the electronic address by the Plaintiff. In our legal system, a judgment of a court of similar jurisdiction to this Court is not binding on the Court but is merely persuasive. I am not persuaded by Judge Wood's ruling that an irregularity of this nature warrants the setting aside of the whole originating process. Further, it is my considered view that whereas Order 7 rule 1 (1) (a) is couched in mandatory terms, the provision is a regulatory one whose breach should not always be fatal as guided by the Supreme Court in the case of **Ravindvanath Morargi Patel v. Rameshbhai Jagabhai Patel**¹² when it said as follows:

"Rules of procedure must be followed. However, the effect of breach of the rules will not always be fatal, if the rule in question is merely directory or regulatory."

I concur with the submission by Counsel for the Applicant that non-inclusion of an electronic address on an originating process is not an irregularity that goes to the core of the originating process; it is curable and therefore, as espoused by Order 2 rule 1 (1) of the RSC, should not be treated as sufficient to nullify the proceedings.

The Respondent has argued that it has not been presented with any alternative application or argument advanced before the Court for leave to amend to cure the defect and that consequently, the Court is left with no option but to set aside the originating process for irregularity with costs to the Respondent. It is this Court's view that, that fact notwithstanding, it has the inherent jurisdiction to order a party to amend pleadings and other documents when a curable irregularity has been brought to its notice, by either party, particularly at a preliminary stage in the proceedings when no prejudice is likely to be suffered by the other party by virtue of the order.

With respect to the Respondent's argument that the affidavit in support of originating summons has left out mandatory prescriptions for an affidavit in support of an originating summons in a mortgage action, it is a fact that the affidavit does not exhibit a copy of the mortgage and the original. However, that omission can be cured by a court order to the Applicant to produce a certified copy of the Mortgage Deed. It is not, in my view, necessary to file the original Mortgage Deed. As for the other mandatory prescriptions, it is noteworthy that clause 5 in the letter dated 19th July, 2012 addressed to the Respondent and exhibited as "AC1" in the affidavit in support of originating summons indicates a loan repayment of K5,019,000.00 per month for 20 years inclusive of interest charged at the rate of 8% per annum. Exhibit "AC3" is a statement of account for the loan advanced to the Respondent, which shows an outstanding amount of ZMW 1,063,547.17 and debit interest on overdraft of ZMW 22,431.47 as at 29th September 2016. It is apparent that information on periodic payments and the amount of interest to be paid in order to redeem the mortgage as at the date of commencement of the proceedings is available. Clearly, the information required by Order 88 rule 5 has been materially provided in the documents exhibited in

the affidavit in support of the originating summons, save for the fact that the said information has not been presented in the manner desired by the Respondent.

The above notwithstanding, I am, in any event, of the considered view that the arguments advanced by the Respondent in relation to the requirements in Order 88 rule 5 of the RSC, should have been raised in the affidavit in opposition to the originating summons and not at this preliminary stage as grounds for the application to set aside process for irregularity.

It is not in dispute that paragraphs 10 and 11 of the affidavit in support of originating summons do contain extraneous matter in the form of a conclusion and prayer, respectively. This is a breach of the provisions of Order 5 rule 15 of the High Court Rules and therefore, an irregularity. However, as stated earlier in this ruling, the irregularity is curable and as per the authority of the Supreme Court in the case of **Chisata v. Attorney General**⁹, referred earlier, where no prejudice would be occasioned by an irregularity, cases should be allowed to go to trial so that issues may be properly resolved. I am of the view that no prejudice would be occasioned to the Respondent if paragraphs 10 and 11 of the affidavit in support of originating summons are expunged from the affidavit and the affidavit is allowed to remain on record.

Therefore, pursuant to the powers vested in me by Order 5 rule 14 and Order 18 rule 1 of the High Court Rules, I expunge forthwith paragraphs 10 and 11 from the affidavit in support of originating summons.

Lastly, it is common cause that the jurat in the affidavit in support of originating summons offends the mandatory provision of Order 5 rule 20 (g) of the High Court Rules and section 6 of the Commissioner for Oaths Act, Chapter 33 of the Laws of Zambia in that it is not dated. However, unlike Judge Chashi who found a similar defect incurably defective in the case of **Indo Zambia Bank Limited v. Amazon Carriers and Kimberley Aretha Baines**³, I am of the view that the defect is not fatal but curable. I take this stand on the strength of Order 5 rule 14, which provides that a defective or erroneous affidavit may be amended or re-

sworn by leave of the court or a Judge on such terms as to time, costs, or otherwise as seem reasonable. I am further fortified by the provisions of Order 2 rule 1 (1) of the RSC which stipulates that a failure to comply with the requirements of the rules should be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein. I am of the view that even though this provision is in relation to the Rules of the Supreme Court of England, similar considerations can be applied to the High Court Rules. Being regulatory in nature, failure to comply with the rules of the High Court, provided the failure does not go to the core of the proceedings, should not automatically nullify the proceedings but should be treated as an irregularity. I am expressing this view while being mindful of the Supreme Court's ruling in the case of **Access Bank Zambia Limited v. Group Five Z Con Joint Venture (sued as a firm)**¹⁰, that as much as possible matters should be determined on the merits rather than be disposed of on a technicality or procedural point. The Supreme Court went on to state at page J24 that:

"...yet, justice also requires that this court, indeed all courts, must never provide succour to litigants and their counsel who exhibit scant respect for rules of procedure. Rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed. Under the guise of doing justice through hearing matters on their merit, courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules."

While accepting the Supreme Court's ruling in its entirety, it is my considered view that the court's views were directed at litigants and counsel who quite clearly exhibit scant respect for rules of procedure. It cannot be said in all honesty that in the case in *casu* the Applicant has exhibited scant respect for rules of procedure or that this Court is aiding in the bending or circumventing of the rules of procedure and shifting of goal posts. While irregularities have been identified in this matter, they do not go to the root of the proceedings and are therefore, non-fatal and curable.

For the reasons aforesaid, the application to set aside originating process for irregularity fails and is dismissed. However, I make the following order with regards to the irregularities identified herein, namely:

1. The Applicant shall amend the originating summons by inserting the Applicant's electronic address in accordance with the High Court Rules and shall file and serve the amended copy of originating summons on the Respondent within 7 days of the date hereof.
2. The Applicant shall file and serve a certified copy of the Mortgage Deed relating to the property known as Subdivision No. 47 of Stand No. 9812 held on Certificate no. 24563, Lusaka in the Lusaka Province of the Republic of Zambia on the Respondent within 7 days of the date hereof.
3. Paragraphs 10 and 11 of the affidavit in support of originating summons are expunged from affidavit for containing extraneous matter contrary to Order 5 rule 15 of the High Court Rules.
4. The undated Affidavit in Support of Originating Summons deposed to by Arnold Chinyama shall be re-sworn and dated to satisfy the requirement of Order 5 rule 20 (g) of the High Court Rules; filed in Court and served on the Respondent within 7 days of the date hereof.

Costs in the cause.

Leave to appeal is hereby granted.

Delivered in Chambers at Lusaka this 29th day of May, 2017.



Winnie S. Mwenda (Dr.)

HIGH COURT JUDGE