

IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA

2017/HPC/0093

*(Civil Jurisdiction)*



**BETWEEN:**

**RURALNET AGRICULTURAL HOLDINGS LIMITED**

**PLAINTIFF**

**AND**

**CONTINENTAL GRAINS TRADING LIMITED**

**DEFENDANT**

**Before the Honourable Mr Justice W. S. Mweemba at Lusaka in  
Chambers.**

*For the Plaintiff: Mr B. Gondwe- Messrs Buta Gondwe & Associates*

*For the Defendant: No Appearance*

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## **RULING**

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### **LEGISLATION REFERRED TO:**

1. The High Court (Amendment) Rules, 2012 Statutory Instrument No. 27 of 2012.
2. Rules of the Supreme Court of England 1965 (White Book) 1999 Edition.

### **CASES REFERRED TO:**

1. Leopold Walford (Z) limited V Unifreight (1985) Z. R. 203.
2. Stanley Mwambazi V Morrester Farm Limited (1977) Z. R 108 (SC)
3. Water Wells Limited V Wilson Samuel Jackson (1984) Z. R 98.
4. Botswana, Ministry of Works Transport And Communications, Rinceau Design Consultants (Sued As A Firm Previously Trading As Kz Architects) V Mitre Limited (1995) ZR 113.
5. Zambia Revenue Authority V Jayesh Shah (2001) ZR 60.

**6. Sonny Paul Mulenga & Vismer Mulenga, Chainama Hotels Limited and Elephants Head Hotel Limited V Investrust Merchant Bank 1999 Z. R. 124.**

This is a ruling on an application by the Defendants to set aside Originating Process for Irregularity.

The application is supported by an Affidavit sworn by Chituwa Simuziya Mwamba Counsel for the Defendant and Skeleton Arguments filed into Court on the 5<sup>th</sup> and 6<sup>th</sup> of April, 2017 respectively.

It is deposed by Mrs Mwamba that the Plaintiff caused to be issued Originating Process herein and by way of Writ of Summons and Statement of Claim. Exhibited to the Affidavit are "CSM1- CSM2" a copy of the Writ of Summons and Statement of Claim.

That she caused to be filed a Conditional Memorandum of Appearance at the Commercial Registry which was not uplifted from the Court. She exhibited "CSM3" a copy of the Conditional Memorandum of Appearance.

That the writ of Summons and Statement of Claim purported to have been served upon the Defendant is irregular in material particulars as the Plaintiff's full address was not endorsed on the Writ of Summons in terms of the Amended High Court Rules.

That resulting from the failure to have the Conditional Memorandum of Appearance uplifted, the Plaintiff entered an Interlocutory judgment in Default of Appearance and Defence engrossed by the Court on 22<sup>nd</sup> March, 2017. She exhibited "CSM4" a true copy of the said Default Judgment.

That she further applied to file in the Summons to Set Aside Originating Process for Irregularity together with the Affidavit in Support of Summons to set Aside Originating Process. She exhibited "CSM5 - CSM6" a copy of the said Summons to Set Aside Originating Process for Irregularity together with Affidavit in Support of Summons to Set Aside Originating Process for Irregularity.

It was lastly deposed that she craved the Court's indulgence that a Stay of Execution of the Interlocutory Judgment in Default of Appearance be granted pending her application to set aside Originating Process for Irregularity.

There is also an Affidavit in Opposition filed into Court on 26<sup>th</sup> April, 2017 sworn by Buta Gondwe the Advocate of Plaintiff.

Mr Gondwe deposed that it was not true that the Plaintiff's address was not endorsed on the Writ of Summons filed herein.

It is further deposed that the Plaintiff's and the Plaintiff's Advocate's address including electronic mail address were clearly endorsed on the Writ of Summons, as shown in exhibit "CSM1" in the Defendant's affidavit to set aside Originating Process.

That the Defendant had already admitted owing the Plaintiff as shown in exhibit produced and marked "BG1" being a letter from the Defendant's Advocates indicating that the Defendant would complete payment of the debt by December, 2016, which they have failed to do.

Counsel for the Defendant filed in Skeleton Arguments in support of the application. Counsel submitted that the Plaintiff caused to be issued originating process by way of writ of Summons and Statement of Claim. However, the said writ of summons was irregular in material particulars as the Plaintiff's full address was not endorsed on the Writ of Summons pursuant to the provisions of Rule 2 (relating to amendment of Order VII) of the High Court (Amendment) Rules, 2012 Statutory Instrument No. 27 of 2012 which provides as follows:

**"Order VII of the principal Rules is amended—**

**(a) by the deletion of paragraph (a) of sub-rule (1) of rule 1 and the substitution therefor of the following:**

**(a) physical, postal and electronic address of the plaintiff;**

(b) in paragraph (b) of sub-rule (1) of rule 1, by the insertion, immediately after the word "postal", of a comma and the words "physical and electronic";

(c) in sub-rule (2) of rule 1 by the insertion, immediately after the word "business", of the words "and electronic mail address";

(d) in sub-rule (1) of rule 2 by the insertion, immediately after the word "postal", of the words "and electronic mail";

(e) by the insertion, immediately after the word "written", of the words "or electronic"; and

(f) by the deletion of rule 3 and the substitution therefor of the following:"

Counsel also stated that she was fortified by the Judgment of the Supreme Court of Zambia in the case of **LEOPOLD WALFORD (Z) LIMITED V UNIFREIGHT (1)** where the Court stated that;

"In our view Order VII r. 1 is clear in its terms and requires, not only that the address of the Plaintiff's Advocates shall be endorsed on the writ, but also that the address of the plaintiff shall similarly be endorsed thereon. The relevant part of the Order reads as follows:

'the Solicitor of the Plaintiff suing by Solicitor shall endorse upon the writ of Summons-

(a) The address of the Plaintiff;

(b) His own name or firm and his own place of business and the postal address thereof;

As can be seen from what has been set out above it is necessary for the Plaintiff's address as well as that of his advocate, to be endorsed on the writ."

Counsel went on to state that the Defendant's Advocate filed a Conditional Memorandum of Appearance at the Commercial Registry which was not uplifted from the Court.

Accordingly, the Plaintiff proceeded to enter an Interlocutory Judgment in Default of Appearance and Defence engrossed by the Court on 22<sup>nd</sup> March, 2017.

Based on the foregoing, Counsel argued that such Judgment be set aside as the originating process was irregular.

Counsel for the Plaintiff also filed Skeleton Arguments to oppose the application. He submitted that the alleged irregularity was misconceived as could be clearly seen from the Defendant's own exhibit marked "CSM1."

The Plaintiff clearly endorsed their address including that that of their advocates. Further that even if the Court was to find any such omission, the Supreme Court in the case which had been cited by the Defendant's advocates in the case of **LEOPOLD WALFOLD (Z) LIMITED V UNIFREIGHT (Z) LTD (1)** ruled that such omission was not one which would justify the setting aside of process but one which was curable and therefore did not go to the root of the process. Silungwe C. J as he then was, stated the following:

**"...Where there has been a breach of a regulatory rule such breach will not always be fatal as much will depend upon the nature of the breach and the stage of the proceedings reached. This therefore means that as a general rule breach of a regulatory rule is curable."**

According to Counsel, this case was still good law and had not been overturned by the Supreme Court in any way. He went on to submit that the application by the Defendant had no merit and was merely intended to stop the Plaintiff from enjoying the fruits of their judgment. That as was held in the case of **SONNY PAUL MULENGA & VISMER MULENGA, CHAINAMA HOTELS LIMITED V INVESTRUST MERCHANT BANK (6)**, a judgment

could only be stayed or a party stopped from enjoying the fruit of its judgment where there was a just cause.

He also cited the case of **STANLEY MWAMBAZI V MORRESTER FARM LIMITED (2)** and especially the case of **WATER WELLS LIMITED V WILSON SAMUEL JACKSON (3)** where it was held that:

**“Although it is usual on an application to set aside a default judgment not only to show a defence on the merits, but also to give an explanation of that default, it is the defence on the merits which is the more important point to consider.”**

That for these reasons the application by the Defendant could not succeed to justify the setting aside of process for irregularity including judgment.

During the hearing on 2<sup>nd</sup> May, 2017 only Counsel for the Plaintiff appeared before Court.

Mr Gondwe Counsel for the Plaintiff submitted that the Defendant had not given or shown a Defence on the merits and as such it had not disclosed reasons why the Default Judgment should be set aside.

He also stated that the **LEOPOLD WALFORD (Z) LIMITED (1)** case showed that the omission was not fatal and was not one on which process could be set aside and on this basis the application by the Defendant should be set aside.

Counsel also added that should the Court consider that the Plaintiffs address was not complete, the Plaintiff was amenable to making an amendment by adding the Plaintiff's email address which would not in any way prejudice the Defendant.

I have considered the affidavit evidence and the Skeleton Arguments and authorities cited by both learned Counsel for the Plaintiff and the Defendant.

Having done so, the main issue for determination by this Court is whether Originating Process of the Plaintiff should be set aside for irregularity for two

reasons advanced by the Defendant. First for the fact that the Plaintiff's full address was not properly endorsed on the Writ of Summons and secondly that the Defendant had not brought out a defence that could allow this Court to exercise its jurisdiction to set aside the Default Judgment that was entered on 22<sup>nd</sup> March, 2017.

Counsel for the Defendant stated that the Plaintiff caused to be issued originating process by way of Writ of Summons and Statement of Claim. However, that the latter was irregular in materials particular as the Plaintiff's full address was not endorsed thereon pursuant to **Rule 2 of the High Court (Amendment) Rules, 2012 of S.I No. 27 of 2012** which has been quoted above.

In determining this issue, I have considered the case of Republic of **BOTSWANA, MINISTRY OF WORKS TRANSPORT AND COMMUNICATIONS, RINCEAU DESIGN CONSULTANTS (SUED AS A FIRM PREVIOUSLY TRADING AS KZ ARCHITECTS) V MITRE LIMITED (4)** where at page 116 the Supreme Court held that:

**"As regards whether or not the rule is mandatory or directory and therefore discretionary we wish to refer to Order 2 Rule 1(1) of the White Book, 1995 Edition, Volume 1 and to our decision in Leopold Walford case cited by Mr Kawanambulu. O.2 r 1(1) provides as follows:**

**"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 and shall not nullify the proceedings any step taken in the proceedings or any document, judgment or order herein.**

**And in Leopold Walford case (2) at page 205 we said:**

**“As a general rule, breach of a regulatory rule is curable and not fatal.”**

**The High Court rules, like the English rules, are rules of procedure and therefore regulatory and any breach of these rules should be treated as mere, irregularity which is curable”.**

I have also considered the Supreme Court decision in the case of **ZAMBIA REVENUE AUTHORITY V JAYESH SHAH (5)** where it was 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”.**

This being the case, I FIND that although Counsel for the Plaintiff omitted to endorse the Plaintiff's full address on the Writ of Summons it is not a ground upon which the Originating Process should be set aside or struck out. This is premised on the fact that the requirement of endorsing the physical, postal and electronic addresses although couched in mandatory terms in the High Court Rules is not something that cannot be cured and as was stated in **BOTSWANA, MINISTRY OF WORKS TRANSPORT AND COMMUNICATIONS, RINCEAU DESIGN CONSULTANTS (SUED AS A FIRM PREVIOUSLY TRADING AS KZ ARCHITECTS) V MITRE LIMITED (4)** the High Court Rules like the English rules, are rules of procedure and therefore regulatory and any breach of these Rules should be treated as a mere irregularity which is curable.

Based on the foregoing I have come to the conclusion that this is not a proper case where the Court can exercise its jurisdiction to set aside the Originating Process herein for irregularity. I accordingly refuse the Defendant's application to Set Aside the Writ of Summons for irregularity.

I now turn to the issue of whether the Judgment in Default of Appearance that was awarded to the Plaintiff on 22<sup>nd</sup> March, 2017 should be set aside as pleaded by the Defendant herein.



Counsel for the Plaintiff in response argued that a judgment could only be stayed or a party stopped from enjoying the fruit of its judgment where there was a just cause as was held in the case of **SONNY PAUL MULENGA & VISMER MULENGA, CHAINAMA HOTELS LIMITED AND ELEPHANTS HEAD HOTEL LIMITED V INVESTRUST MERCHANT BANK (6)**.

I accept the submission by learned Counsel for the Plaintiff that a default judgment can only be set aside if there is a just cause. The case of **WATERWELLS LIMITED V WILSON SAMUEL JACKSON (3)** relied on by the Plaintiff makes it clear that a default judgment can only be set aside if there is a defence on the merits.

I agree with Counsel for the Plaintiff that the Defendant has not exhibited any Defence in its Affidavit and as such there are no grounds upon which the Judgment in Default can be set aside.

As stated by Mr. Gondwe in the Affidavit in Opposition to Summons for Stay of Execution of Judgment in Default of Appearance and Defence filed into Court on 26<sup>th</sup> April, 2017 the Defendant admitted being indebted to the Plaintiff in the Sum of K110,000.00. This is contained in a letter dated 8<sup>th</sup> December, 2016 from the Defendant's Advocates to the Plaintiff exhibited to the said Affidavit marked as "BGI". Based on this clear admission the Plaintiff would have been granted a Judgment on Admission for the sum of K99,000.00 if the Default Judgment had not been entered on 22<sup>nd</sup> March, 2017.

For the foregoing reasons, I find no merit in the application of the Defendant and dismiss it accordingly.

Pursuant to **Order 18 Rule 1 of the High Court Rules, Cap 27 of the Laws of Zambia**, the Plaintiff is allowed to amend the Writ of Summons and rectify the omission. I Order and Direct that the Plaintiff do file the Amended Writ of Summons on or by the 6<sup>th</sup> April, 2018.

I further Order that the Order of Stay of Execution which I granted on 18<sup>th</sup> April, 2017 is hereby set aside forthwith.

I make no order as to costs. That is each party is to meet its own costs.

Leave to appeal is granted.

**Delivered in Chambers at Lusaka this 19<sup>th</sup> day of March, 2018.**

A handwritten signature in dark ink, appearing to read 'W. S. Mweemba', written over a horizontal dotted line.

**WILLIAM S. MWEEMBA  
HIGH COURT JUDGE**