

IN THE HIGH COURT FOR ZAMBIA

2017/HPC/0231

AT THE COMMERCIAL REGISTRY

(Civil Jurisdiction)

BETWEEN:

KEREN MOTORS LIMITED

PLAINTIFF

AND

ZAMBIA NATIONAL COMMERCIAL BANK Plc

1ST DEFENDANT

CLEMENT MUGALA

2ND DEFENDANT

(Sued in his capacity as Receiver and
Manager of Keren Motors Limited in
Receivership)

Before: The Hon. Lady Justice Dr. W. S. Mwenda in Chambers at
Lusaka the 17th day of January, 2018.

For the Plaintiff : Mr. L. Mudenda of Messrs Kalokoni
& Company

For the 1st Defendant : Mrs. K. Musana, In House Counsel

For the 2nd Defendant : Mr. K. Chenda of Messrs. Simeza
Sangwa & Associates

RULING

Cases referred to:

1. *Castanho v. Brown & Root (UK) Limited and Another* (1981) 1 All ER 143.
2. *Finsbury Investments Limited v. Antonio Ventriglia and Another* -
2008/HPC/0366.

3. *Smith v. Peters* (1875) L.R. 20 Eq. 511.
4. *Lindsay Gordon Pearce (Suing an Executor of the Estate of Johannes Hendrix Young) v. Johannes Daniel Young* - 2014/HPC/1859.
5. *Zambia Revenue Authority v. Shah*, SCZ Judgment No. 10 of 2001.
6. *Barclays Bank Zambia Plc v. ERZ Holdings Limited, F.X Nkhoma and 4 Others*, SCZ Appeal No. 71 of 2007.
7. *Twampane Mining Co-operative Society Limited v. E and M Storti Mining Limited*, SCZ Judgment No. 20 of 2011.
8. *Philip Mutantika and Mulyata v. Kenneth Chipungu*, SCZ Judgment No. 13 of 2014/Appeal No. 94 of 2012.
9. *Ravindranath Morargi Patel v. Rameshbhai Jagabhai Patel* SCZ Appeal No. 37 of 2012.

Legislation referred to:

1. Order 32, rule 6 and Order 2, rule 2 of the Rules of the Supreme Court, 1999 Edition (White Book).
2. Order 5 rules 15 and 16 of the High Court Act, Chapter 27 of the Laws of Zambia.
3. Order 32, rule 6 of the Rules of the Supreme Court.
4. Order 3, rule 2 of the High Court Rules.
5. Explanatory Notes in Order 18/8/17, Rules of the Supreme Court.
6. Order 5, rule 14 of the High Court Rules.
7. Article 118 (2) (e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

This is a motion to set aside order for irregularity and/or abuse of court process pursuant to Order 32, rule 6 of the Rules of the Supreme Court, 1965 Edition (contained in the White Book, 1999 Edition) and the inherent jurisdiction of the Court and to set aside Affidavit in Reply for irregularity pursuant to Order 2, rule 2 of the Rules of the Supreme Court.

The 2nd Defendant filed the Notice of Motion on 16th June, 2017 in which he seeks the following orders:

- (i) that the Order of Mandatory and Prohibitory Injunction drawn up by the Plaintiff and filed herein on 18th May, 2017 be set aside for irregularity and/or abuse of the process of the Court on grounds that the said order included relief not prayed for in the summons dated 18th May, 2017;
- (ii) that the Affidavit in Reply filed by the Plaintiff on 5th June, 2017 be set aside for irregularity on grounds of non-compliance with the provisions of Order 5, rules 15 and 16 of the High Court Rules, Chapter 27 of the Laws of Zambia;
- (iii) that the Court gives further directions for the hearing of the Plaintiff's application for a mandatory and prohibitory injunction; and
- (iv) that the costs of and occasioned by this application be paid by the Plaintiff to the 2nd Defendant in any event.

In the Skeleton Arguments filed by the 2nd Defendant in opposition to the motion, the 2nd Defendant contends that under Order 32, rule 6 of the Rules of the Supreme Court, this Court has the discretion to set aside any order which was granted *ex-parte*. The 2nd Defendant argues that a perusal of the *ex-parte* order filed by the Plaintiff shows that it was drawn to include extra relief which was not prayed for in the underlying summons and thus caused the Court to sign an order with relief that was not prayed for.

According to the 2nd Defendant this was grossly irregular and an abuse of the court process. The 2nd Defendant argues that this Court has inherent jurisdiction to thwart any abuse of its process. For this contention, the 2nd Defendant relies on the English case of *Castanho v. Brown & Root (UK) Limited and Another*¹ where Lord Scarman stated the following: -

“The Court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain ...”

● The 2nd Defendant argues further that even the rules recognise the inherent power vested in the Court and to that effect, cites the explanatory notes to Order 18 of the Rules of the Supreme Court which simply put, provide that a court can prevent the improper use of its machinery and in a proper case, will prevent its machinery from being used as a means of vexation and oppression in the process of litigation.

● According to the 2nd Defendant, it is not just the power that the Court has, but a duty to prevent its machinery from being abused by continuing the *ex-parte* order of injunction. That had the Plaintiff desired to have extra relief granted by the Court, it should have prayed for it in the summons and it is their submission that a party can only obtain relief on matters prayed for in the summons.

With regard to the contention that the Affidavit in Reply filed by the Plaintiff on 5th June, 2017 be set aside for irregularity for non-compliance with the provisions of Order 5, rules 15 and 16 of the High Court Rules, the 2nd Defendant submits that Order 5, rule 15 prohibits the inclusion of certain matter in an affidavit, namely,

extraneous matter by way of objection, or prayer or legal argument or conclusion; while Order 15, rule 16 prescribes the permissible content of an affidavit, namely, statements of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.

The 2nd Defendant cites a number of paragraphs from the Plaintiff's Affidavit in Reply which allegedly contain legal provisions, legal argument and conclusion. According to the 2nd Defendant, the Plaintiff has cited a legal provision in paragraph 17; legal arguments in paragraphs 4, 9, 15, 20, 26, 28, 35 and conclusions in paragraphs 6, 11, 12, 18, 21, 22, 32 and 37 of the Affidavit in Reply. I will not reproduce these paragraphs here because they are rather lengthy.

It is the 2nd Defendant's submission that the extraneous matters in the Plaintiff's affidavit are incurable and attract the ultimate sanction of setting aside and that they are fortified in that submission by the case of *Finsbury Investments Limited v. Antonio Ventriglia and Another*², where Chishimba J (as she then was), held that the affidavit was irregular by virtue of it containing extraneous matters; that it was not merely the format of the affidavit which was defective but the contents therein and since the provisions of order 5, rule 15 are mandatory, an affidavit containing extraneous matters is irregular and has to be set aside.

It is, therefore, the 2nd Defendant's prayer that the Plaintiff's Affidavit in Reply filed on 5th June, 2017 be set aside for irregularity on the ground that it contains extraneous matter by way of arguments, the law and conclusions contrary to the mandatory

prohibition and prescription under Order 5, rules 15 and 16, respectively, of the High Court Rules.

In opposing the application, the Plaintiff filed Skeleton Arguments, wherein it argues that this Court has jurisdiction under Order 3, rule 2 of the High Court Rules to make any order it considers necessary, whether such order has been expressly asked for by the person entitled to the benefit or not and with regard to the issue of the inherent jurisdiction of the Court to make such orders, cites the dictum of Jessel M.R. in *Smith v. Peters*³. The Plaintiff submits that the import of the foregoing propositions of law is that the Court is endowed with a *carte blanche* jurisdiction when dealing with interlocutory applications to make any order in its quest to achieve justice, and this applies with equal measure whether the relief being ordered has been expressly prayed for or not.

It is the Plaintiff's further argument that the 2nd Defendant cannot be heard to say that the *ex-parte* application for injunction is an abuse of the court process firstly because at substantive level, where a matter is commenced by writ of summons, the relief endorsed on the writ of summons is but a mere summary of the relief that the plaintiff is claiming from the defendant hence, by virtue of Order 18 rule 1 of the Rules of the Supreme Court, the Plaintiff is permitted in his subsequent statement of claim, to alter, modify or extend his original claim to any extent, and to claim further or other relief, without amending the writ.

It is the Plaintiff's argument that by parity of reasoning, at interlocutory level such as a stage of applying for an interlocutory injunction, the *ex-parte* summons merely contains a summary of the

relief that the applicant is claiming and in the subsequent affidavit in support of the injunction and the order for an injunction, the applicant is allowed at law to modify, alter and extend the relief that is sought in the *ex-parte* summons.

Further, that the contents of the order for an *ex-parte* injunction are based not only on the brief summary of the relief in the *ex-parte* summons but also on the contents of the affidavit in support of the injunction which expands on the relief sought in the *ex-parte* summons for injunction.

Secondly, that the Plaintiff has raised the question of illegality vide paragraph 7 of the Affidavit in Support of Summons for Mandatory and Prohibitory Injunction and it is the Plaintiff's contention that once the question of illegality has been brought to the attention of the Court, all questions of pleadings, prayers are sacrificed at the altar of the Court's quest to do substantial justice; which, according to the Plaintiff, is a contention buttressed by Order 18/8/17 of the Rules of the Supreme Court.

In view of the above, the Plaintiff submits that the application for mandatory and prohibitory injunction is supported by law and cannot, therefore, be said to fall in the province of abuse of court process. Thus, according to the Plaintiff, this ground is misconceived and not supported by law.

With regards to the contention that the Affidavit in Reply offends the provisions of Order 5, rule 15 and that the defect is incurable, the Plaintiff argues that paragraphs 4, 9, 15, 20, 26, 28 and 35 of the Affidavit in Reply do not contain legal arguments but

information obtained not from the deponent's own personal knowledge but from facts obtained from his advocate who is seized with the conduct of the matter, which advice formed the basis of the deponent's belief as provided for by Order 5, rules 16 and 17 of the High Court Rules.

The Plaintiff argues that similarly, the remaining paragraphs cannot be said to contain either arguments or conclusions. That the Affidavit in its totality is an affidavit in reply and as such, will invariably contain phrases that make reference to the facts deposed in the affidavit being replied to. Therefore, the paragraphs in question, when read in line with Order 5, rules 15, 16 and 17, do not offend Order 5.

As a corollary to the above proposition, the Plaintiff argues that even assuming, without conceding, that the paragraphs pointed out are an affront to Order 5, rules 15, 16 and 17, the said defect is curable. To this end, the Plaintiff cites Order 5, rule 14 of the High Court Rules which provides that: -

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

According to the Plaintiff, the foregoing finds expression in the observation of Sitali J (as she then was), in the case of *Lindsay Gordon Pearce (Suing as Executor of the Estate of Johannes Hendrix Young) v. Johannes Daniel Young*,⁴ that a defective affidavit is curable and the application cannot be dismissed merely because the said affidavit is defective.

According to the Plaintiff, the foregoing feeds in the general narrative that the court must endeavour to ensure that matters are determined on their merits. That breach of a regulatory rule is not fatal as the party in default can be ordered to make amends. To this end, the Plaintiff cites the case of *Zambia Revenue Authority v. Shah*⁵ where the Supreme Court held that cases should be decided on their substance and merit where there has been only a very technical omission or oversight not affecting the validity of process. That rules must be followed but the effect of a breach will not always be fatal if the rule is merely regulatory or directory.

It is the Plaintiff's submission that the above position has since been enshrined in the Constitution, where in articles 118 (2) (e) it is provided that justice must be administered without undue regard to procedural technicalities. Against the above backdrop, the Plaintiff submits that the provisions of the Affidavit in Reply alluded to, do not offend the provisions of Order 5, rule 15 of the High Court Rules.

Alternatively, that even assuming that the said provision offends Order 5, rule 15, the same defect is a result of a regulatory rule which is curable as provided by law. In conclusion, the Plaintiff submits that the Applicant has not demonstrated sufficient grounds to warrant the setting aside of the *ex-parte* order granted by this Court. It is the Plaintiff's prayer that the application be dismissed with costs for being frivolous.

In reply, the 2nd Defendant filed Skeleton Arguments in Reply to Opposition to Motion to Set Aside Order and Affidavit in Reply for Irregularity wherein he reiterates the fact that the *ex-parte* order

contains relief that has not been prayed for. That in its argument in opposition the Plaintiff has not refuted the aforesaid fact but has instead tried to justify the wrong by arguing that this Court has authority to grant relief which was not prayed for. To counter this argument, the 2nd Defendant cites the Supreme Court case of *Barclays Bank Zambia Plc v. ERZ Holdings Limited, F. X. Nkhoma and Four Others*⁶ where Chibesakunda, JS (as she then was), stated as follows: -

"It would appear that the Appellant Bank, seeking the declaratory orders, was seeking by the same token to set aside this consent judgment. As per our several authorities, no relief can be granted by any court if such relief has not been pleaded."

Applying the Supreme Court decision to the case in *casu*, the 2nd Defendant submits that it was wholly misleading to the Court and an outright abuse for the Plaintiff to, on the one hand, limit the scope of relief it sought in the summons and yet later draw up and file an order with relief which was not prayed for in the summons and thus which was not granted by this Court. The 2nd Defendant accordingly reiterates the prayer that the *ex-parte* order of injunction be set aside with costs.

The 2nd Defendant further submits in reply that there are irrefutable defects in the Affidavit in Reply and argues that the Supreme Court has time and again underscored the importance of adhering to the rules of court and in this regard refers this Court to the case of *Twampane Mining Co-operative Society Limited v. E and M Storti Mining Limited*⁷ where the Court stated that it could not over-emphasise the importance of adhering to rules of court and that

those who choose to ignore rules of court do so at their own peril. The 2nd Defendant also cites the case of *Philip Mutantika and Mulyata v. Kenneth Chipungu*⁸ where the Supreme Court reminded the parties that it has always underscored the need for parties to strictly adhere to rules of court and that failure to comply can be fatal to a party's case.

The 2nd Defendant submits further that in its arguments in opposition the Plaintiff has not demonstrated or even attempted to show how the paragraphs which the 2nd Defendant questioned in the affidavit can be said to be regular; that it is irrefutable that the Plaintiff's Affidavit in Reply is grossly irregular. That what this Court ought to determine is the consequence of the irregularity. According to the 2nd Defendant, the consequence of the irregularity is fatal and thus prays that the Plaintiff's Affidavit in Reply filed on 5th June, 2017 be set aside for irregularity on account of containing extraneous matter by way of arguments, law and conclusions, contrary to the mandatory prohibition and prescription under Order 5, rules 15 and 16 respectively, of the High Court Rules. The 2nd Defendant also prays for costs.

I have meticulously examined the documents filed in support of the Notice of Motion to Set Aside Order for Irregularity and/or Abuse of Court Process and the documents in opposition to the motion. I am indebted to Counsel for the 2nd Defendant as well as Counsel for the Plaintiff for the spirited arguments filed in support of their respective cases.

After perusing the document, I am left in no doubt that the *ex-parte* order of injunction filed by the Plaintiff on 18th May, 2017 contains

additional relief from the ones prayed for in the summons for mandatory and prohibitory injunction. Indeed, as Counsel for the 2nd Defendant rightly submitted in the Skeleton Arguments in Reply, this is a fact which the Plaintiff has not refuted.

It is also my finding that the paragraphs in the Affidavit in Reply referred to earlier are undoubtedly grossly irregular as they contain extraneous matter in the form of legal arguments, law and conclusions contrary to the provisions of Order 5, rules 15 and 16 of the High Court Rules. Thus, the issue to be determined, as correctly submitted by the 2nd Defendant, is what the consequence of the irregularity is.

In justifying its inclusion of additional relief in the *ex-parte* order of injunction, the Plaintiff has argued that pursuant to Order 3, rule 2 of the High Court Rules, this Court has jurisdiction to make any order it considers necessary, whether such order has been expressly asked for by the person entitled to the benefit or not. However, in my view, this provision does not give leeway to a party to an action to include in an order it draws up, additional relief not specifically pleaded or prayed for in the summons. Order 3, rule 2 of the High Court Rules is only there to enable a Court or Judge to make orders that the Court or Judge considers necessary in the interest of justice.

As the Supreme Court guided in the case of Barclays Bank Zambia Plc v. ERZ Holdings Limited, F.X. Nkhoma and 4 Others (cited above), no relief can be granted by any court if such relief has not been pleaded. Therefore, had the Plaintiff herein desired to have extra relief, it ought to have prayed for it in the Summons for an

Order of Injunction. I concur with the submission by the 2nd Defendant that it was highly irregular and an abuse of the court process for the Plaintiff to draw up and thereby cause the Court to sign an *ex-parte* order which contained relief not prayed for in the summons.

This Court is clothed with the discretion to set aside an order granted *ex-parte* and therefore, in exercise of that discretion I am setting aside the *ex-parte* order of injunction granted to the Plaintiff on 18th May, 2017 for the reasons put forth above.

Regarding the issue of inclusion of extraneous matter in the Affidavit in Reply, the Plaintiff likened a summons for injunction and supporting affidavit to a writ of summons and statement of claim. The Plaintiff argued that the endorsement on a writ of summons are but a mere summary of the relief that the Plaintiff is claiming from the Defendant and by virtue of Order 18, rule 1 of the Rules of the Supreme Court, the Plaintiff is permitted in the statement of claim to alter, modify or extend his original claim to any extent, and to claim further or other relief without amending the writ; that by parity of reasoning, the *ex-parte* summons contains a summary of the relief that the applicant is claiming and the affidavit in support is allowed at law to modify, alter and extend the relief that is sought in the *ex-parte* summons.

Further, that the contents of the *ex-parte* order of injunction are based not only on the brief summary of the relief on the *ex-parte* summons, but also on the contents of the affidavit in support of the injunction which expands on the relief sought in the *ex-parte* summons for injunction.

I hold a contrary view to the above for the following reason. If the permissible content of an affidavit as per Order 5, rule 16 of the High Court Rules are 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 and if Order 5, rule 15 expressly prohibits the inclusion of extraneous matter by way of objection or prayer or legal argument or conclusion in an affidavit, it cannot by any stretch of the imagination be correct to argue, as the Plaintiff does, that the law gives allowance for an affidavit to modify, alter and extend the relief sought in the *ex-parte* summons. Order 5, rule 15 of the High Court Rules does not permit the inclusion of a prayer for relief in an affidavit. Therefore, an affidavit in support, unlike a statement of claim, cannot expand on the relief sought in a summons.

I concur with the submission by the 2nd Defendant that the Supreme Court has on a number of occasions in its judgments underscored the importance of adhering to rules of court and stated that those who choose to ignore rules of court do so at their own peril. However, apart from the High Court ruling in the case of *Lindsay Gordon Pearce* cited above, which is persuasive, the Supreme Court itself has held that breach of a regulatory rule is not always fatal. Thus, in the case of *Ravindranath Morargi Patel v. Rameshbhai Jagabhai Patel*⁹, the Court held as follows: -


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

In my view, the default in this case is regulatory and therefore, curable. However, the Plaintiff's other argument about the courts' stance of letting matters be decided on the merits does not hold water in this case because the granting of the application to set aside the *ex-parte* order of injunction will not, in any way, stop the application for an injunction from being heard on the merits.

I, therefore, find that the 2nd Defendant's application has merit. The *ex-parte* order of injunction granted on 18th May, 2017 is discharged forthwith. Further, Affidavit in Reply is set aside for offending the provisions of Order 5, rules 15 and 16 of the High Court Rules. The Plaintiff shall cause to be filed within seven (7) days of the date hereof, a fresh Affidavit in Reply which shall conform to the requirements of Order 5 rules 15 and 16. The summons for an order of injunction shall be heard *inter-partes* on the 24th day of January, 2018 at 10.00 hours.

Costs follow the event.

Dated at Lusaka this 17th day of January, 2018.


W. S. Mwenda (Dr)
HIGH COURT JUDGE