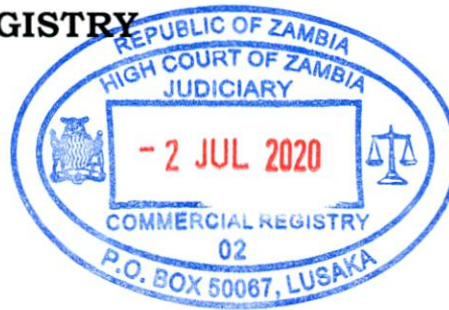


**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**2017/HPC/0476**



**BETWEEN:**

**INVESTRUST BANK PLC**

**APPLICANT**

**AND**

**PAMAGWE INVESTMENT LIMITED**

**1<sup>ST</sup> RESPONDENT**

**IAN MBEWE**

**2<sup>ND</sup> RESPONDENT**

**JOHN NG'ANDU**

**3<sup>RD</sup> RESPONDENT**

**GEORGE MAGWENDE**

**4<sup>TH</sup> RESPONDENT**

**CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at  
Lusaka the 2<sup>nd</sup> day of July, 2020.**

*For the Applicant:* N/A

*For the 1<sup>st</sup> and 4<sup>th</sup>  
Respondents:* Ms. K. Parshotam of Messrs. Andrew and  
Partners

*For the 2<sup>nd</sup> Respondent:* Mr. G. Chongo of Chombo and Partners  
*For the 3<sup>rd</sup> Respondent:* N/A

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## **RULING**

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**Cases referred to:**

1. *Nkongolo Farm Limited v. Zambia National Commercial Bank Limited, Kent Choice Limited (In Receivership), Charles Haruperi (2005) Z. R. 78 (S.C.).*
2. *Association Leisure Limited v. Associated Newspapers Limited (1970) 2 Q.B. 450.*

3. *Credit Lyonnais Bank Nederland NV v. Burch* [1997] 1 All ER 144.
4. *Stanbic Bank Zambia Limited v. Savenda Management Services Limited* (2016/CAZ/08/040).
5. *Collum Coal Mining Industries Limited v. Frontline Financial Services Limited, Yangst Jian Enterprises Limited and Xu Jian Xue*, Appeal No. 55/2019 (Unreported).

**Legislation referred to:**

1. Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia (the High Court Rules).
2. Order 30, rule 14 of the High Court Rules.
3. Order 28, rule 1 and rule 1A of the Rules of the Supreme Court of England and Wales, 1999 Edition (White Book).
4. Order 28, rules 4(4) and (5), 7 and 8 of the White Book.
5. Order 28, rule 8 of the White Book.
6. Order 11, rule 1 of the High Court Rules.
7. Order 28, rule 1A (1) of the White Book.
8. Order 28, rule 7 of the White Book.
9. Practice Note 28/7/1A of the White Book.
10. Order 28, rule 4 of the White Book.
11. Order 10, rule 5 of the Court of Appeal Rules, S. I. No. 65 of 2016 (the Court of Appeal Rules).

This is an application by the 2<sup>nd</sup> Respondent for leave to file Defence and Counterclaim (hereinafter referred to as “the Application”). The Application, which was filed into court on 12<sup>th</sup> November, 2019, was made pursuant to Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia (hereinafter referred to as “the High Court Rules”).

The Application is supported by an affidavit (hereinafter referred to as “the Affidavit in Support”); and List of Authorities and Skeleton Arguments, all of even date.

The Affidavit in Support was sworn by Ian Mbewe, the 2<sup>nd</sup> Respondent herein, and it was his testimony that on 11<sup>th</sup> September, 2019, this court expunged from the record, his Defence and Counterclaim for the reason that the 2<sup>nd</sup> Respondent had not sought leave of court prior to filing the same.

The Affidavit in Support was augmented by Skeleton Arguments, the crux of which is that it is in the interest of justice that the 2<sup>nd</sup> Respondent be granted leave to file his Defence and Counterclaim.

It was contended, in the said Skeleton Arguments, that the 2<sup>nd</sup> Respondent insists that there is an element of fraud in this matter and to avoid duplicity of actions, bordering on the same issues, all issues should be dealt with in this action, rather than 2<sup>nd</sup> Respondent commencing a fresh action.

It was further contended that the procedure under Order 30, rule 14 of the High Court Rules cannot allow the 2<sup>nd</sup> Respondent to plead his allegations of fraud by filing a Defence and Counterclaim. That, if the said procedure is used, the 2<sup>nd</sup> Respondent can merely respond to the Applicant's claims by filing an affidavit in opposition to the Originating Summons, which cannot contain contentious and triable issues, as it would be procedurally improper to include such allegations of fraud in the Affidavit, instead of having them in pleadings. To fortify this contention, the 2<sup>nd</sup> Respondent cited the cases of *Nkongolo Farm Limited v. Zambia National Commercial Bank Limited*, *Kent Choice Limited (In Receivership)*, *Charles Haruperi*<sup>1</sup>, and *Association Leisure Limited v. Associated Newspapers Limited*<sup>2</sup>, where

he has had sight of the 2<sup>nd</sup> Respondent's Application herein and that he has been advised by his advocates and verily believes that it is contrary to the rules of this Court, to file a Defence and Counterclaim when a matter is commenced by Originating Summons and supported by affidavit. That, where a matter is commenced by Originating Summons with an accompanying affidavit, the correct manner of response is to file an affidavit in opposition.

It was the deponent's further testimony that he had also been advised by his advocates and verily believed that if the 2<sup>nd</sup> Respondent is granted leave to file his Defence and Counterclaim, the other parties to this action would not be able to respond or be heard and defend themselves against all the allegations raised.

The Affidavit in Opposition is augmented by Skeleton Arguments, the gist of which is that the 2<sup>nd</sup> Respondent's Application herein, should be dismissed with costs, as there is no rule or law allowing a Defence and Counterclaim to be filed, where a matter is commenced by way of Originating Summons.

Counsel for the 1<sup>st</sup> Respondent cited Order 28, rule 1 and rule 1A of the Rules of the Supreme Court of England and Wales, 1999 Edition (hereinafter referred to as "the White Book") to buttress her submission that where the mode of commencement is Originating Summons accompanied by an Affidavit in Support, the Respondent has a right of responding by way of affidavit evidence and that this applies to all originating summonses. That, if other evidence in the form of pleadings is sought to be relied on, such position should be

made known to the Court at the earliest time in order that the Court makes the relevant order. To support this, Counsel cited Order 28, rules 4(4) and (5), 7 and 8 of the White Book.

It was Counsel's submission that it is only this Court that can make an order or direction to proceed with this matter as if it had begun by writ and statement of claim and also order that the parties file their defences and counterclaims. That, the law does not allow for the respondent to seek leave to file a defence and counterclaim for the reason that if leave is granted and the 2<sup>nd</sup> Respondent does file his Defence and Counterclaim, the other parties would not be able to reply to such Defence and Counterclaim. In this regard, Counsel for the 1<sup>st</sup> Respondent submitted that in the circumstances, the only avenue available to the 2<sup>nd</sup> Respondent is to make an application and demonstrate to this Court that the matter is contentious and cannot be resolved by affidavit evidence and inform the Court of his claim, and that it would be prudent for the Court to proceed as if the matter had been commenced by Writ and Statement of Claim, pursuant to the provisions of Order 28, rule 8 of the White Book.

Citing Order 11, rule 1 of the High Court Rules, Counsel for the 1<sup>st</sup> Respondent submitted that the law is clear as to when a defence and counterclaim can be filed, that is, when a matter is commenced by Writ of Summons and Statement of Claim and not where a matter is commenced by originating summons. That, in the premises, there is no law that allows this Court to entertain, hear and grant the reliefs sought under the Application made herein.

Citing the case of *Stanbic Bank Zambia Limited v. Savenda Management Services Limited*<sup>4</sup>, Counsel for the 1<sup>st</sup> Respondent submitted that the Application herein is incompetent and a waste of this Court's time, and should be dismissed with costs.

At the hearing of the Application, Counsel for the 2<sup>nd</sup> Respondent indicated that he would rely on the documents filed in support of the Application. In opposition, Counsel for the 1<sup>st</sup> Respondent basically reiterated her arguments in the Skeleton Arguments and added that in accordance with Practice Direction No. 1 of 2002, a party is mandated in his summonses to state the relevant law pursuant to which he seeks an order of the court. That, Order 3, rule 2 is not a blanket provision to bring any application that a party pleases to make as an application should be supported by a specific rule or law. Counsel for the 1<sup>st</sup> Respondent, thus, prayed that in the circumstances at hand, there being no law supporting the 2<sup>nd</sup> Respondent's Application to file a Defence and Counterclaim where a matter is commenced by originating summons and affidavit, the said Application should be dismissed with costs.

In reply, Counsel for the 2<sup>nd</sup> Respondent stated that this Court had guided on 11<sup>th</sup> September, 2019, on page R8 of the Ruling by this Court, that a defence and counterclaim which is a pleading can be filed except leave has to be sought first. That, it was on this basis that that the Application herein was brought before this Court, and pursuant to Order 3, rule 2 of the High Court Rules which gives power to this Court to make any order which the Court deems fit, in the interest of justice. Counsel for the 2<sup>nd</sup> Respondent, thus,

submitted that if the 2<sup>nd</sup> Respondent is not granted the order to file his Defence and Counterclaim, substantial injustice will be occasioned to the 2<sup>nd</sup> Respondent.

In further reply to the 1<sup>st</sup> Respondent's contention on what should happen assuming leave is granted, Counsel for the 2<sup>nd</sup> Respondent submitted that this Court has got power to issue directions in the circumstances.

I have carefully considered the documents filed on behalf of the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent, in support of their respective positions. In my view, the issue for determination is whether the 2<sup>nd</sup> Respondent's Application to file his Defence and Counterclaim in this matter which was commenced by Originating Summons and Affidavit, is tenable and sustainable.

It is not in dispute that this matter was commenced by Originating Summons and supported by affidavit evidence. The law providing for procedure as regards Originating Summons is laid out in Order 28 of the White Book. Order 28, rule 1, on application of the Order, thus provides as follows:

*"The provisions of this Order apply to all originating summonses subject, in the case of originating summonses of any particular class, to any special provisions relating to originating summonses of that class made by these rules or by or under any Act; and, subject as aforesaid, Order 32, rule 5, shall apply in relation to originating summonses as it applies in relation to other summonses."*

Order 28, rule 1A (1), on the evidence to accompany originating summonses, in turn, provides as follows:

*“In any cause or matter begun by originating summons (not being an ex parte summons) the plaintiff must, before the expiration of 14 days after the defendant has acknowledged service, or, if there are two or more defendants, at least one of them has acknowledged service, file with the office of the Court out of which the summons was issued the affidavit evidence on which he intends to rely.”*

Read together, the provisions above clearly outline the general and basic scope of procedure relating to originating summonses, which is that matters commenced by originating summonses are to be supported by affidavit evidence, and Counsel for the 1<sup>st</sup> Respondent, did contend in this manner and relied heavily on the provisions cited above, in opposing the 2<sup>nd</sup> Respondent’s application herein. However, as will be observed from further provisions of Order 28 of the White Book quoted below, rules 1 and 1A of Order 28 of the White Book are not unqualified. To this end, rule 8 of Order 28 of the White Book provides as follows:

*“(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.*

*(2) Where the Court decides to make such an order, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7 (1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings and that order were one of the orders to be made thereon.*



*(3) This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.*

*(4) Any reference in these rules to an action begun by writ shall, unless the context otherwise requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this rule to continue as if the cause or matter had been so begun.*

*(5) The Court may at any stage of the proceedings order that any affidavit, or any particulars of any claim, defence or other matter stated in any affidavit, shall stand as pleadings or that points of claim, defence or reply be delivered and stand as pleadings.”*  
(Emphasis mine)

It is clear from rule 8 above that the law does recognise that there may be instances where a matter, although commenced by originating summons, will not fit perfectly within the rule that matters commenced by originating summons should be accompanied by affidavit evidence, in which case it may be necessary for the court to proceed to order that the matter be treated as one commenced by way of writ and statement of claim. Further, rule 8 gives the court wide powers to consider and determine, at any stage of proceedings, whether such proceedings initially commenced by way of originating summons should proceed as if begun by writ of summons.

An instance where an order under rule 8 of Order 28 may be necessitated is where the Defendant seeks to file a counterclaim to the plaintiff's claims. In this regard, Order 28, rule 7 of the White Book provides as follows:

*“(1) A defendant to an action begun by originating summons who has acknowledged service of the summons and who alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of any matter (whenever and however arising)*

*may make a counterclaim in the action in respect of that matter instead of bringing a separate action.*

*(2) A defendant who wishes to make a counterclaim under this rule must at the first or any resumed hearing of the originating summons by the Court but, in any case, at as early a stage in the proceedings as is practicable, inform the Court of the nature of his claim and, without prejudice to the powers of the Court under paragraph (3) the claim shall be made in such manner as the Court may direct under rule 4 or rule 8...*

It has been contended on behalf of the 1<sup>st</sup> Respondent that there is no legal basis upon which a defence and counterclaim can be filed, where a matter is commenced by originating summons, and therefore there is no law that allows this Court to entertain the 2<sup>nd</sup> Respondent's Application herein.

Practice Note 28/7/1A of the White Book, in this regard, shades some light on the effect rule 7 of Order 28, as follows:

*"This rule lays down no procedure for these cases. It is suggested that the defendant should serve on the plaintiff (and in the Ch.D. lodge in Chambers) proposed points of counterclaim before the hearing of his application. The Court can then give such directions as may be appropriate. Probably there would have to be an order under r.8, but in some cases the matter could be dealt with on affidavits."*

Upon reading the above, it is clear that while rule 7 of Order 28 of the White Book provides for the defendant to inform the court, of his counterclaim at the earliest possible stage in the proceedings, the rule does not prescribe a particular procedure on how to go about it. There is merely a suggestion that a defendant should serve on the plaintiff, the proposed points of the counterclaim before the hearing of his application. However, it is not clear what manner of application

this ought to be. In my view, it seems to me that the application would logically be one to file his counterclaim.

In light of the above, I wish to disagree with Counsel for the 1<sup>st</sup> Respondent that there is no legal basis upon which a defendant can file a defence and counterclaim where a matter is commenced by originating summons. Assuming for a moment that Counsel for the 1<sup>st</sup> Respondent was right in her contention that a defence and counterclaim could only be filed where a matter is commenced by writ of summons and not where a matter is commenced by originating summons, what then would Counsel for the 1<sup>st</sup> Respondent say is the relevance of rules 7 and 8 of Order 28 of the White Book?

The fact that Order 28, rule 7 does not lay down any procedure does not translate to there being no legal basis upon which a defendant can file a defence and counterclaim in a matter commenced by originating summons, and it is a misapprehension on the part of Counsel for the 1<sup>st</sup> Respondent to completely ignore the exceptions created in rules 7 and 8 of Order 28 of the White Book and insist that there is absolutely no way a defendant can file his defence and counterclaim in a matter commenced by originating summons. What is key is that the defendant informs the court at as early a stage as is practicable, of the nature of his claim, and in my view, the Application herein seems to be the most feasible means to go about it, in light of the fact that rule 7 of Order 28 does not prescribe any procedure.

Once the court is informed, it is then up to the court to proceed as guided under Order 28, rule 8, cited above, or Order 28, rule 4 of the White Book which provides as follows:

*“(1) The Court by whom an originating summons is heard may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing, the order may be varied or revoked by a subsequent order of the Court on such terms as it thinks just.*

*(2) In any case where the Court does not dispose of any originating summons altogether at a hearing or order the cause or matter begun by it to be transferred to a county court or some other Court or make an order under rule 8, the Court shall give such directions as to the further conduct of the proceedings as it thinks best adapted to secure the just, expeditious and economical disposal thereof.*

*(3) Without prejudice to the generality of paragraph (2), the Court shall, at as early a stage of the proceedings on the summons as appears to it to be practicable, consider whether there is or may be a dispute as to fact and whether the just, expeditious and economical disposal of the proceedings can accordingly best be secured by hearing the summons on oral evidence or mainly on oral evidence and, if it thinks fit, may order that no further evidence shall be filed and that the summons shall be heard on oral evidence or partly on oral evidence and partly on affidavit evidence, with or without cross-examination of any of the deponents, as it may direct.*

*(4) Without prejudice to the generality of paragraph (2) and subject to paragraph (3) the Court may give directions as to the filing of evidence and as to the attendance of deponents for cross-examination and any directions which it could give under Order 25 if the cause or matter had been begun by writ and the summons were a summons for directions under that Order.*

(5) The Court may at any stage of the proceedings order that any affidavit, or any particulars of any claim, defence or other matter stated in any affidavit, shall stand as pleadings or that points of claim, defence or reply be delivered and stand as pleadings."  
(Emphasis mine)

In this respect, I tend to agree with Counsel for the 2<sup>nd</sup> Respondent who submitted in reply to the 1<sup>st</sup> Respondent's contention on what should happen assuming leave is granted, that this Court has got power to issue directions in the circumstances. It is, therefore, not true, as argued by Counsel for the 1<sup>st</sup> Respondent that the other parties will not have the opportunity to be heard if the 2<sup>nd</sup> Respondent is granted leave to file his Defence and Counterclaim. Most importantly, no prejudice would befall the other parties if the 2<sup>nd</sup> Respondent were to be granted leave to file his Defence and Counterclaim.

I have perused the 2<sup>nd</sup> Respondent's Application herein and the allegations raised therein, namely fraud and breach of certain duties allegedly owed to the 2<sup>nd</sup> Respondent. It is apparent that the same are contentious and it would be a complete disservice for this Court, being aware of the same, to turn a blind eye and proceed to determine this matter as one commenced by originating summons *stricto sensu*.

It was thus guided by the Court of Appeal, in the case of *Collum Coal Mining Industries Limited v. Frontline Financial Services Limited, Yangst Jian Enterprises Limited and Xu Jian Xue*<sup>5</sup>, that:

*"...once the court below realised that the issues raised were potentially contentious or in fact contentious, it ought to have deemed the matter to have been commenced by way of writ of summons to allow for the parties to settle pleadings distinctly and*

*call witnesses... we are of the view that issues of fraud become apparent at any stage of the proceedings and it is clear that the matter should for this reason be continued as if begun by writ. The lower court ought to have exercised its powers under Order 28, rule 8 of the White Book and have deemed the matter begun by writ and proceeded to order that any affidavits stand as pleadings with or without liberty to the parties to add or apply for particulars thereof.”*

In view of the foregoing and on the strength of Order 28, rule 8 of the White Book, I am satisfied that the circumstances in *casu* have raised enough contention to justify the deeming of these proceedings as having been begun by writ of summons and I deem them accordingly. Therefore, the 2<sup>nd</sup> Respondent's application to file his Defence and Counterclaim has succeeded and is granted. The Affidavits of 13<sup>th</sup> November, 2017 filed in respect of the Originating Summons shall stand as pleadings and the 2<sup>nd</sup> Respondent shall deliver a Defence and Counterclaim on the Applicant's, 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' advocates on or before 13<sup>th</sup> July, 2020. The Applicant, 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents shall deliver a Reply to the 2<sup>nd</sup> Respondent's Defence and Defence to Counterclaim, if any, on the 2<sup>nd</sup> Respondent's advocates on or before 20<sup>th</sup> July, 2020. The 2<sup>nd</sup> Respondent shall deliver a Reply to Defence to Counterclaim, if any, on or before 27<sup>th</sup> July, 2020. Further directions regarding the future conduct of the matter shall be given at a Scheduling Conference to be held on 28<sup>th</sup> July, 2020 at 09:45 hours.

Costs shall be in the cause.

I further deny leave to appeal, and in this respect, I am fortified by Order 10, rule 4 (1) of the Court of Appeal Rules, Statutory

Instrument No. 65 of 2016 (the Court of Appeal Rules), which states as follows:

*“The High Court or a quasi-judicial body may grant or refuse leave to appeal to the Court without formal application at the time when judgment is given, and in that event the judgment shall record that leave has been granted or refused accordingly.”*

**Dated at Lusaka the 2<sup>nd</sup> day of July, 2020.**

  
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**W.S. MWENDA (DR.)  
HIGH COURT JUDGE**