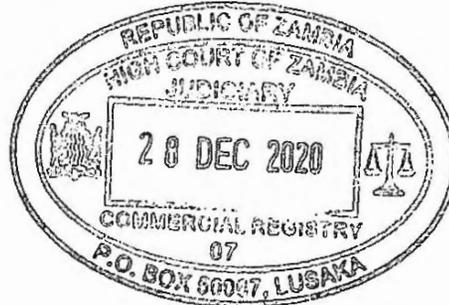


IN THE HIGH COURT FOR ZAMBIA
IN THE COMMERCIAL DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2020/HPC/0551

BETWEEN:

GABRIEL MUYINDA



PLAINTIFF

AND

MENOX PROPERTY MERCHANTS LIMITED

DEFENDANT

CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at
Lusaka the 28th day of December, 2020.

For the Plaintiff:

Mr. H. Mulenga of Messrs. Philsong and
Partners

For the Defendant:

Mr. C. J. Musonda of Messrs. Jonah and
Partners

RULING

Cases referred to:

1. Access Bank (Z) Limited v. Group Five/Zcon Business Park Joint Venture, SCZ/8/52/2014.
2. Twampane Mining Corporation Society Limited v. E. M. Storti Mining Limited (2011) Z.R. 76.
3. Republic of Botswana, Ministry of Works Transport and Communication, Rinceau Design Consultants (Sued as a firm previously T/A K.Z. Architects) v. Mitre Limited, S.C.Z. Judgment No. 20 of 1995.
4. Leopold Walford (Z) Limited v. Unifreight (1985) Z.R. 203 (S.C.).

5. *African Life Financial Services Limited v. Zambia Revenue Authority*, S.C.Z Appeal No. 140 of 2014.

Legislation referred to:

1. Order 6, rules 1 and 2 of the High Court Rules, Chapter 27 of the Laws of Zambia (High Court Rules).
2. Order 11, rule 21 of the High Court Rules.
3. Order 2, rule 1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book).
4. Article 118 (2) (e) of the Constitution.

Publication referred to:

Bryan A. Garner (Ed), Black's Law Dictionary, 8th Edition [Thomson Reuters, 2004].

1. INTRODUCTION

- 1.1 This is an application by the Defendant for an Order to Set Aside Writ of Summons and Statement of Claim for Irregularity (hereinafter referred to as the "Application"). The Application is made pursuant to Order 11, rule 21 and Order 6, rule 1 (as amended by S.I. 58 of 2020), of the High Court Rules, Chapter 27 of the Laws of Zambia.
- 1.2 The Application is supported by an affidavit (hereinafter referred to as the "Affidavit in Support"), dated 13th July, 2020 and sworn by one Chola Jonah Musonda, Counsel seized with conduct of this matter on behalf of the Defendant.

2. DEFENDANT'S EVIDENCE AND ARGUMENTS

- 2.1 It is Mr. Musonda's testimony that the Writ of Summons and Statement of Claim herein, was not accompanied by a copy of the demand letter, the description of the Plaintiff's documents to be relied on at trial, as well as the Plaintiff's list of witnesses.
- 2.2 The Affidavit in Support is augmented by Skeleton Arguments of even date; the core of which is that this Court should grant an order to set aside the Writ of Summons and Statement of Claim for irregularity.
- 2.3 To fortify his contention, Counsel for the Defendant cited Order VI of the High Court Rules as amended by rule 4. 1. (1) of Statutory Instrument No. 58 of 2020 as well as rule 4 (2) of the same. Counsel submitted that from the said provisions, it is clear that the Writ of Summons and Statement of Claim on record are irregular and, thus, should be set aside.
- 2.4 Counsel for the Defendant also relied on Order 11, rule 21 of the High Court Rules to justify the Application herein.

3. PLAINTIFF'S EVIDENCE AND ARGUMENTS

- 3.1 The Application is opposed and to this end, an affidavit (hereinafter referred to as the "Affidavit in Opposition"), was filed into court on 31st July, 2020, on behalf of the Plaintiff.

The Affidavit in Opposition was sworn by one Henry Mulenga, Counsel seized with conduct of the matter on behalf of the Plaintiff.

- 3.2 It was Mr. Mulenga's testimony that contrary to the Defendant's contention, the failure to file the Plaintiff's Originating Process together with the copy of the letter of demand, description of witnesses and list of documents, was not deliberate, but was due to having been informed by the Commercial Registry that the Registry had not yet started implementing the new amendment.
- 3.3 The Affidavit in Opposition is supported by Skeleton Arguments of even date in which Counsel for the Plaintiff conceded that, indeed, the amendment to the High Court Rules require the accompanying documents to be filed along with the Originating Process, but that the penalty for non-compliance of this procedural requirement is not to set aside the court process for irregularity; but for the Registry to deny the filing of such court process.
- 3.4 It was also submitted by Counsel for the Plaintiff that Order 11, rule 21 of the High Court Rules, as relied on by the Defendant in this Application, relates to the setting aside of service of the Writ on a Defendant and cannot be relied on to apply for setting aside a Writ and Statement of Claim on grounds of irregularity. That, the Defendant is relying on wrong law. Further, Counsel argued that the Defendant has

not pointed out any irregularity on either the Writ of Summons or Statement of Claim, and a failure to attach the accompanying documents does not amount to an irregularity on the Writ or Statement of Claim.

- 3.5 Citing Order 2, rule 1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (hereinafter referred to as the "White Book"), Counsel for the Plaintiff contended that non-compliance with the rules does not amount to a nullity of proceedings and that this Court can order that such non-compliance be amended to cure any irregularity so that matters can proceed to be determined on their merits. In further support of this, Counsel for the Plaintiff cited Article 118 (2) (e) of the Constitution of Zambia Act (As amended by Act No. 2 of 2016) and the case of *Access Bank (Z) Limited v. Group Five/Zcon Business Park Joint Venture*¹.
- 3.6 Counsel for the Plaintiff contended that there would be no prejudice occasioned to the Defendant as the demand letter was properly served on the Defendant and a warning was sounded to the Defendant that failure to satisfactorily respond to the Plaintiff's demand would result in the Plaintiff's proceedings now before this Court.
- 3.7 Finally, Counsel for the Plaintiff submitted that the question for determination is whether the Writ and Statement of Claim were accepted and actually filed. That, once the Writ is not accepted it cannot be filed and once it has been

accepted for filing it cannot be set aside in the manner proposed by the Defendant.

4. DEFENDANT'S ARGUMENTS IN REPLY

- 4.1 In reply, Counsel for the Defendant contended that Order 11, rule 21 of the High Court Rules provides for setting aside the process served on the Defendant for irregularity, and further, that the Application herein is anchored on Order 11 and Order 6, rule 1 (as amended), which sets out the requirements which must be complied with by the Plaintiff when contemplating to issue a Writ of summons from the High Court. That, the rule is couched in mandatory terms and thus, must be complied with.
- 4.2 In response to the Plaintiff's Counsel's explanation that he was advised by Registry staff that the Commercial Registry had not yet started implementing S. I. No. 58 of 2020, Counsel for the Defendant submitted that the said amendment bears the effective date of the Order, being 19th June, 2020; and that the Registry staff have no authority to suspend the effective date of the law.
- 4.3 Responding to the Plaintiff's position as regards Article 118 (2) (e) of the Constitution, Counsel for the Defendant submitted that the said Article is only to be invoked in circumstances where there is a likelihood of manifest injustice being occasioned to a litigant by adherence to the rules of procedure; and that there is no manifest injustice

that will be occasioned to the Plaintiff by this Court directing that the Plaintiff complies with the requirements of Order 6 of the High Court Rules and setting aside the process before this Court for irregularity. That, setting aside the process in this matter will not deny the Plaintiff an opportunity to have its claim decided on the merits as the Plaintiff will still be able to commence the process in compliance with the rules. Counsel emphasised the importance of adhering to rules of court in order that matters are heard in an orderly and expeditious manner and in this regard, cited the case of *Twampane Mining Corporation Society Limited v. E. M. Storti Mining Limited*².

5. THE LAW, ANALYSIS AND COURT'S FINDINGS

- 5.1 I have carefully considered the parties' affidavits on record; the authorities cited and the arguments advanced in respect of their respective positions.
- 5.2 In my view, there are two issues for determination in this Application, namely:
- (i) whether the failure by the Plaintiff to file the list and description of documents to be relied on at trial; the list of witnesses to be called by the plaintiff at trial; and the letter of demand receipt of which the Defendant duly acknowledged, along with the Writ of Summons and

Statement of Claim, amounts to an irregularity warranting the setting aside of the Plaintiff's Originating Process; and

- (ii) whether once the Registry accepts originating process filed in breach of Order 6, rule 1 of the High Court Rules, such acceptance waives the need for a party to comply with Order 6, rule 1 of the High Court Rules and precludes such process from later being set aside.

5.3 It has been contended by Counsel for the Defendant that the Defendant is challenging the failure by the Plaintiff to have the Writ of Summons be accompanied by a Statement of Claim, List and Description of Documents to be relied on at trial, List of Witnesses to be called. That, this is an irregularity warranting the setting aside of the originating process and that the contention is premised on Order 11, rule 21 and Order 6, rule 1 (as amended by S.I. 58 of 2020), of the High Court Rules, which are the basis of the Application.

5.4 The said Orders provide as follows:

Order 11, rule 21

"A defendant before appearing shall be at liberty, without obtaining an order to enter or entering a conditional appearance, to take out a summons or serve notice of motion to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorising such service."

Order 6, rule 1

"1. (1) Except as otherwise provided by any written law or these Rules, an action in the High Court shall be commenced, in writing or electronically by writ of summons endorsed and accompanied by-

- (a) a statement of claim;*
- (b) list and description of documents to be relied on at trial;*
- (c) list of witnesses to be called by the plaintiff at trial; and*
- (d) Letter of demand whose receipt shall be acknowledged by the defendant or an affidavit of service attesting to the service of the letter of demand, which shall set out the claim and circumstances surrounding the claim in detail."*

5.5 In opposition, the Plaintiff has contended that the Defendant has relied on the wrong law in this Application and, further that the Defendant has not pointed out any irregularity on either the Writ of Summons or Statement of Claim, and a failure to attach the accompanying documents does not amount to an irregularity on the Writ or Statement of Claim.

5.6 The learned authors of Black's Law Dictionary have defined an irregularity as:

"Something irregular; especially an act or practice that varies from the normal conduct of an action"

5.7 From the approach taken by the Plaintiff, it appears that Counsel for the Plaintiff conceives an irregularity narrowly as a wrong that should be identifiable on either the writ or the statement of claim, in order for a party to apply to have

the said writ or statement of claim dismissed. I do not agree with this position because according to Black's Law Dictionary, an irregularity is clearly broadly perceived.

- 5.8 The question to be asked, therefore, is 'has the practice adopted by Counsel for the Plaintiff of filing a Writ of Summons and Statement of Claim without the list and description of documents to be relied on at trial; the list of witnesses to be called by the plaintiff at trial; and the letter of demand, varied from the normal conduct of the action?' In order to answer this question, it first must be established what normal conduct of the action is. It is not in dispute that the practice of filing originating process has long been regulated by the High Court Rules, which said Rules have recently undergone amendment by virtue of Statutory Instrument No. 58 of 2020. The said amendment took effect on 19th June, 2020 and the expected practice under the new law is that a Writ of Summons will be filed along with a statement of claim, a list and description of documents to be relied on at trial, a list of witnesses to be called by the plaintiff at trial, and a letter of demand whose receipt has been acknowledged by the defendant. This, according to Order 6, rule 1 of the High Court Rules, is the current standard set for commencement of proceedings or the normal conduct of the action.

5.9 In light of the above, the answer to the question whether the practice adopted by Counsel for the Plaintiff in *casu* varied from the normal conduct of the action is in the affirmative. In my opinion, therefore, there is definitely an irregularity in the Plaintiff having commenced these proceedings by filing just the Writ of Summons and Statement of Claim, without the rest of the accompanying documents prescribed under Order 6, rule 1 of the High Court Rules.

5.10 Order 6, rule 2 goes on to provide that:

“A writ of summons which is not accompanied by the documents under sub-rule (1) shall not be accepted.”

5.11 Counsel for the Plaintiff has advanced an argument that the question for determination is whether the Writ and Statement of Claim were accepted and actually filed. That, once the Writ is not accepted it cannot be filed and once it has been accepted for filing it cannot be set aside in the manner proposed by the Defendant. This is coupled with Counsel’s explanation that they were advised by Registry staff that the practice under the new law has not yet been implemented in the Commercial Registry. It has already been stated that the new law took effect on 19th June, 2020 and has been the law since then. This matter was commenced on 2nd July, 2020 which clearly is way past the date on which the new law took effect. Counsel for the Plaintiff ought to be aware that Registry staff has no

authority to alter procedure set by law and if indeed, Counsel had been advised as alleged, he ought to have probed the issue further and avoided breaching the law. It simply is not an acceptable excuse for Counsel for the Plaintiff to say that they were advised that the law has not yet taken effect. With regard to the argument by Counsel that because the Registry staff accepted the Writ of Summons and Statement of Claim, the proceedings herein have been commenced regularly, I am of the view that the acceptance of the Writ and Statement of Claim by the Registry staff does not, in any way, regularise the irregularity in *casu*.

5.12 Further, while alleging that he attempted to file the accompanying documents along with the Writ of Summons and Statement of Claim, Counsel for the Plaintiff has not even exhibited the said documents in his Affidavit to prove that, indeed, the said documents were prepared and are in place, and ready for filing. All that Counsel for the Plaintiff expects this Court to proceed on is his word that he was advised by Registry staff not to file the accompanying documents. However, this alone is simply not compelling enough.

5.13 It has also been submitted by Counsel for the Plaintiff that non-compliance with the rules does not amount to a nullity of proceedings and that this Court can order that such non-

compliance be amended to cure any irregularity so that matters can proceed to be determined on their merits. In support of this position, Counsel for the Plaintiff has cited Order 2, rule 1 of the White Book, Article 118 (2) (e) of the Constitution of Zambia Act (As amended by Act No. 2 of 2016) and the case of *Access Bank (Z) Limited v. Group Five/Zcon Business Park Joint Venture*¹.

- 5.14 It is trite that the High Court Rules are regulatory in nature and the tendency by the courts, when such rules are breached, is to allow the breaching party to regularise the breach so as to allow the matter to proceed to be heard on its merits. In this regard, the Supreme Court in the case of *The Republic of Botswana, Ministry of Works Transport and Communication, Rinceau Design Consultants (Sued as a firm previously T/A K.Z. Architects) v. Mitre Limited*³ guided as follows:

“The High Court Rules were rules of procedure and were therefore regulatory and any breach should be treated as a mere irregularity which was curable.”

- 5.15 However, the stance that a breach of High Court Rules is an irregularity which is curable is not absolute. To this end, it was stated by the Supreme Court, in *Leopold Walford (Z) Limited v. Unifreight*⁴, when the question whether a failure to comply with the rules was fatal arose, that:

“There has been an alternative argument put forward by Mr. Kawanambulu, namely, that non-compliance with O.VII, r. (1)

(a) is not fatal because the rule is merely regulatory or directory. In accepting this argument, we wish to add that, 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.” (Emphasis the Court’s)

5.16 Therefore, the fatality or curability of a breach of a rule of procedure largely depends on the nature of the breach and the stage of the proceedings reached. In relying on Article 118 (2) (e) of the Constitution of Zambia Act (As amended by Act No. 2 of 2016) to fortify his argument that these proceedings should be allowed to proceed to be heard on their merits, Counsel for the Plaintiff is, in effect, suggesting that the breach is not really touching on the merits of the case. However, one of the documents, for instance, expected to be filed along with the Writ of Summons is a letter of demand. A letter of demand has been defined and described as follows, by the learned authors of Black’s Law Dictionary:

“A letter by which one party explains its legal position in a dispute and requests that the recipient take some action (such as paying money owed), or else risk being sued. Under some statutes, a demand letter is a prerequisite for filing a lawsuit.”

5.17 From the way Black’s Law Dictionary has defined and described a letter of demand, my inference is that it seems to create the basis on which the very merits of the case will

be hinged and perhaps even form part of the facts to be included in a plaintiff's pleadings needing proof to substantiate their claim. Similarly, a list and description of documents and list of witnesses to be called at trial, are all indicative of the plaintiff's intent to substantiate their claim. In my view, therefore, these documents cannot be trivialised to the level of procedural technicality, as suggested by Counsel for the Plaintiff. In any event, the Supreme Court did state, in the case of *Access Bank (Z) Limited v. Group Five/Zcon Business Park Joint Venture*¹, on the obligation of litigants to adhere to rules of procedure, that:

"We do not intend to engage in anything resembling interpretation of the Constitution in this judgment. All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts."

- 5.18 It seems to me, that the new law as amended is meant to enhance the need for a plaintiff to define the parameters of their case and what the defendant should meet, at the earliest possible time, so as to allow the defendant prepare for his case as well.
- 5.19 In my view, therefore, a breach that would warrant a cure to be ordered would be one that touches, for instance, on the substance and form of the documents filed before a court, such as was the case in *Leopold Walford (Z) Limited v. Unifreight*⁴ where the plaintiff did not endorse the

plaintiff's address on the writ as required by Order 7, Rule (1) (a) of the High Court Rules. The same would not be the case as regards the breach in *casu*.

5.20 Further, the stage of proceedings reached herein is such that no great injustice or prejudice will be suffered by the Plaintiff if these proceedings are set aside, for the irregularity already pointed out, as they will still have the option to re-commence their proceedings, in compliance with the law. Justice, in my view, does not only affect the substantive issues of a case, but also how the substantive issues are brought and articulated before a court. It is imperative that Counsel should be guided on the importance of adhering to rules and as the amendments to the rules have recently been enacted, the responsibility is even greater on Counsel to follow the said rules, so that the object for amending the rules is not undermined.

5.21 The Supreme Court has made it clear, in the case of *African Life Financial Services Limited v. Zambia Revenue Authority*⁵, that the courts have an ineradicable inherent power to control the proceedings before them. In this respect and in view of the foregoing, I find that the failure by the Plaintiff to file the list and description of documents to be relied on at trial; the list of witnesses to be called by the plaintiff at trial; and the letter of demand

along with the Writ of Summons and Statement of Claim, when commencing the proceedings herein, is breach that warrants the setting aside of the originating process.

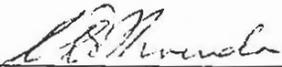
6. CONCLUSION

5.18 In view of the foregoing, the Application herein is successful and the Writ of Summons and Statement of Claim are set aside forthwith.

5.19 Costs are awarded to the Defendant, to be agreed by the parties or taxed in default thereof.

5.20 Leave to appeal is denied.

Dated at Lusaka the 28th day of December, 2020.



W.S. MWENDA (Dr.)
JUDGE