

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

2017/HPC/0030

(Commercial Jurisdiction)

BETWEEN:

INTERTRADE SUPPLY LIMITED



PLAINTIFF

AND

IVESTRUST BANK PLC

DEFENDANT

Before the Honourable Justice B.G. Lungu on the 6th day of June, 2017 in Chambers.

R U L I N G

CASES REFERRED TO;

1. **Leopold Walford Zambia Limited v. Unifreight (1985) Z.R. 203;**
2. ***Inyatsi Construction Limited vs. Pouwels Construction Zambia Limited & Pouwels Hotel Resorts Limited, 2013/HPC/0265;***
3. ***William David Carlisle Wise vs. E.F. Hervey Limited (1985) Z.R.179 (S.C.);***
4. ***Sablehand Zambia Limited v Zambia Revenue Authority (2005) Z.R. 109;***

5. *The Republic of Botswana, Ministry of Works Transport and Communications, Rinceau Design Consultants (Sued As A Firm Previously T/A KZ Architects) V Mitre Limited, (1995)*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *Order VII, Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia Rules of the Supreme Court, 1965, 1999 Edition;*
2. *Order 18, Rule 19 of the Rules of the Supreme Court of England, 1965, Supreme Court Practice, Volume 1, 1999 Edition;*
3. *Order XI, Rule 1(4) of the High Court Rules, Chapter 27 of the Laws of Zambia;*
4. *Order 2, Rule 1 of the Rules of the Supreme Court, 1965;*
5. *Order XVIII of the High Court Rules, High Court Act, Chapter 27 of the Law of Zambia;*
6. *Order LVIII, Rule 6 of the High Court Rules, High Court Act, Chapter 27 of the Law of Zambia;*
7. *Halsbury's' Laws of England, volume 3 at p. 836*

On 24th January, 2017, the Plaintiff took out a Writ of Summons against the Defendant, claiming:

1. A declaration that the Defendant is not entitled to debit the Plaintiff's account with the amount of purported cheques for K42,300 and K48, 600 dated 19th August, 2016 and 24th August, 2016, respectively, and that the Plaintiff's account should be credited with interest;
2. Damages for loss of business;

3. Costs; and
4. Further or other relief.

The Defendant took issue with the Originating Process and entered Conditional Appearance on 3rd February, 2017. In contemplation of the Conditional Appearance, an application for an Order to Strike Out the Writ of Summons and Statement of Claim for irregularity was made by Counsel for the Defendant.

The application was made by Summons filed on 7th February, 2017, issued pursuant to **Order VII, Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia** and **Order 18, Rule 19 of the Rules of the Supreme Court of England, 1965, Supreme Court Practice, Volume 1, 1999 Edition**. The Summons was filed together with an Affidavit in Support, deposed to by the Defendant's in-house Assistant Legal Counsel-Litigation & Debt Recoveries, Mr. Brian Msidi, and Skeleton Arguments in Support.

The deponent of the Affidavit in Support deposed of two anomalies: Firstly, that neither the Plaintiff's physical registered office or email address are endorsed on the Writ of Summons; and secondly, that despite allegation of fraud in paragraph 3 of the Statement of Claim, the Plaintiff's omitted to furnish any particulars for the alleged forgery or fraud.

Resting on the case of *Leopold Walford Zambia Limited v. Unifreight (1985) Z.R. 203¹*, Counsel for the Defendant argued that it is a mandatory requirement to have the Plaintiff's address endorsed on the Writ of Summons and Statement of Claim. Counsel averred that in addition to the physical address, **Order VII, Rule 1 of the High Court Rules**, requires both postal and electronic addresses to be endorsed.

According to Counsel for the Defendant, the aforementioned requirements are not merely superfluous but quite significant. The significance was expressed to be reflected in the High Court Ruling in the case of *Inyatsi Construction Limited vs. Pouwels Construction Zambia Limited & Pouwels Hotel Resorts Limited, 2013/HPC/0265²*. In that case the Court opined that the true value of an electronic address in so far as litigation was concerned was for the sole purpose of service by electronic mail.

The Court went on to postulate that the postal address was equally useful only for the purpose of service. The Court held the view that the physical address, unlike the electronic and postal addresses, served multiple processes, including both service and execution. Consequently, the Court concluded that the physical address was the material address.

Counsel for the Defendant closed the argument relating to the first anomaly by contending that Order VII, rule 1 of the High Court

Rules is couched in mandatory terms and that failure to comply rendered the Originating Process defective and liable to be struck out.

The second area of dissension presented by Counsel for the Defendant was that the Statement of Claim fell short of meeting the rules applicable to pleadings.

The Defendant contended that the Statement of Claim, having articulated an alleged forgery, ought to have contained particulars of the said forgery or fraud so as not to offend the purpose of pleadings, which was to define the issues of fact and law to be decided. That proposition was made on the strength of the case of **William David Carlisle Wise vs. E.F. Hervey Limited (1985) Z.R.179 (S.C.)**³, where the Supreme Court pronounced as follows:

"Pleadings serve the useful purpose of defining the issues of fact and of law to be decided; they give each party distinct notice of the case intended to be set up by the other; and they provide a brief summary of each party's case from which the nature of the claim and defence may be easily apprehended."

Counsel for Defendant also drew the Courts attention to the case of **Sablehand Zambia Limited v Zambia Revenue Authority (2005) Z.R. 109**⁴, where the Supreme Court stated that a defendant who wished to

rely on the defence of fraud must ensure that it is clearly and distinctly alleged.

In summation, it was submitted that the Statement of Claim was liable to be struck out on the basis that the omission of the factual basis upon which fraud was pleaded rendered it as a defective pleading. Further, that the pleading failed to disclose a reasonable cause of action and thereby exposed the trial to prejudice, embarrassment or delay. The summation was premised on Order 18, Rule 19 (1) of the Rules of the Supreme Court, 1965 which reads as follows:

" The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that - (a) it discloses no reasonable cause of action or defence, as the case may be; or(b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the Court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

The application attracted opposition from the Plaintiff, articulated through an Affidavit in Opposition filed on 21st April, 2017, deposed to by Mr. Mutemwa Mutemwa (SC).

The deponent of the Affidavit in opposition confirmed that the electronic and postal addresses of the Plaintiff were not endorsed on the Writ of Summons.

As regards the Statement of Claim, it was attested that paragraph 3 of the Plaintiff's Statement of Claim referred to forgery and not fraud.

The Affidavit in Opposition was supported by Skeleton Arguments wherein it was contended that the Defendant wrongly entered Conditional Appearance.

According to the Plaintiff, **Order XI, Rule 1(4) of the High Court Rules, Chapter 27 of the Laws of Zambia** prescribed the only grounds upon which Conditional Appearance could be entered, being on account of an irregular Writ or the lack of Jurisdiction of the Court.

Order XI, Rule 1(4) of the High Court Rules, Chapter 27 of the Laws of Zambia reads as follows:

"any person served with a writ under Order VI of these rules may enter conditional appearance and apply by Summons to the Court to set aside the writ on grounds that the writ is irregular or that the Court has no jurisdiction."

The Plaintiff took the view that the Defendant's second ground, relating to forgery, took the application outside the realm of Order

XI, Rule 1(4). It was argued that by including the ground relating to forgery, the Defendant prematurely invited the Court to determine the matter on the merits, thereby waiving the irregularities in the institution of the proceedings.

The Plaintiff advanced the alternative argument that in terms of **Order 2, Rule 1 of the Rules of the Supreme Court, 1965**, the irregularity on which the Defendant's premised this application was curable. Order 2, Rule 1 of the Rules of the Supreme Court 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 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 therein."

The Plaintiff latched on to the **Leopald Walford** case that was relied upon by the Defendant and illumed that the Court in that case in fact articulated that breach of a regulatory rule, as a general rule is curable. Accordingly, the Plaintiff beseeched the Court to grant the Plaintiff leave to amend the Writ of Summons as opposed to striking out the Originating Process. The Plaintiff observed that the Court has jurisdiction, under **Order XVIII of the High Court Rules, High Court**

Act, Chapter 27 of the Law of Zambia, to order any proceedings to be amended.

I have given careful and deliberate consideration to the arguments before me and have discerned three inexorable issues to be addressed as regards the Writ of Summons. Firstly, whether the Plaintiff has failed to comply with Order VII, Rule 1 (1) (a) of the High Court Rules; secondly, whether the non-compliance constitutes an irregularity; and thirdly whether the irregularity is either fatal or curable.

In responding to the first question, I examined the requirements of Order VII, Rule 1 (1) (a) . The relevant part of the Order reads as follows:

"1. (1) The advocate of a plaintiff suing by an advocate shall endorse upon the writ of summons (a) the physical, postal and electronic address of the plaintiff;" (Court emphasis)

In my view, Order VII., Rule 1 (1)(a) is unambiguous in its terms. I am persuaded that the requirement placed on the advocate of a Plaintiff representing a Plaintiff suing by an advocate to endorse upon the Writ of Summons each type of address, namely the physical, postal and electronic address of the Plaintiff is mandatory. My persuasion is on account of the use of the word "*shall*" in the Order.

In casu, the omission of the Plaintiff's electronic address upon the Writ of Summons is not disputed. No reasons were advanced for the omission and this Court will not frolic on a journey into conjecture to find any justification. The evidence before Court is simply that the required endorsement is absent. Consequently, I find that the Plaintiff has failed to comply with Order VII, Rule 1 (1) (a) of the High Court Rules.

In probing whether or not the non-compliance equates to an irregularity, I sought direction from the Supreme Court in the case of ***The Republic of Botswana, Ministry of Works Transport and Communications, Rinceau Design Consultants (Sued As A Firm Previously T/A KZ Architects) V Mitre Limited, (1995)***.⁵ In that case, the Supreme Court distinguished regulatory rules, also referred to as directory, from mandatory rules. In so doing the Court interrogated ***Order 2 rule 1 (1) of the White Book*** and stated as follows:

"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...

0.2 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 Walford⁶ case (2) at page 205 we said:

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

Upon reciting the law above, the Supreme Court refined its position and pronounced and held that " *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...*"

In applying the position taken by the Supreme Court to this case, and bearing in mind Order 2, Rule 1 of the Rules of the Supreme Court, the syllogism is complete. That is, Order VII, Rule 1 (1) (a) of the High Court Rules is both mandatory and regulatory. It is mandatory in the sense that it must be complied with. However, it is a rule of procedure which is regulatory and a breach thereof is not fatal in that it can be cured into compliance by Order of the Court.

In view of the foregoing, I consider that it is in the interest of justice to have the defect remedied to facilitate a hearing on the merits. Accordingly, the application to set aside the Writ of Summons for irregularity fails. The Plaintiff is Ordered to cure the regulatory

irregularity by amending its Originating Summons to comply with Order VII, Rule 1 (1) (a) of the High Court Rules.

Moving to the Statement of Claim, it is my observation that the application to strike it out is founded on Order 18, Rule 19 (1) of the Rules of the Supreme Court, 1965 which gives the Court authority to, *inter alia*, either strike out or amend any pleading or anything in a pleading on the grounds contained therein.

I do not see how inviting the Court to consider exercising the authority granted under Order 18, Rule 19 in any way amounts to inviting the Court to delve into the main matter. That being the case, I am not persuaded to explore the argument that the Defendant waived the irregularities in the institution of these proceedings. I find the argument flawed and accordingly refute it.

I now consider whether paragraph 3 of the Statement of Claim is in fact defective. I have analysed the contentious paragraph which reads as follows:

"The Plaintiff neither drew nor authorised the drawing of the cheques and the signature on the cheques was a forgery"

Firstly, I agree that that the paragraph refers to the term forgery and not fraud. However, the common law definition of forgery ascribed in ***Halsbury's Laws of England, volume 3 at p. 836*** is "the

fraudulent making of a written instrument which purports to be that which it is not.."

Given that forgery involves the fraudulent making of a written instrument, I am of the settled view that forgery is a class fraud. That being the case, the law is that the fraud must be clearly and distinctly alleged.

Having examined the Statement of Claim, I am also satisfied that forgery has been distinctly alleged, albeit the particulars are not clear. For instance, it is not clear who is alleged to have forged the cheques in question.

In my view, the lack of clarity not only offends the requirement in respect of allegation of fraud as articulated by the Supreme Court in the ***Sablehand Zambia*** case, but also offends rule 6 of ***Order LVIII of the High Court Rules, High Court Act, Chapter 27 of the Law of Zambia*** which is the primary rule that governs pleadings in the Commercial Court. Rule 6 (1) specifically addresses the requirements with respect to a Statement of Claim by providing as follow:

"A statement of claim or counter-claim, as the case may be, shall state in clear terms the material facts upon which a party relies and shall show a clear cause of action, failing which the statement of claim or counterclaim may be struck out or set aside or the action dismissed by the Court, on its own motion or on application by a party. (Court emphasis)"

Notwithstanding the Plaintiff's failure in clearly detailing the allegation of forgery, I find that the failure is not fatal. My finding is made on the strength of my analysis of both Order 18, Rule 19 of the Rules of the Supreme Court as well as Order LVIII, rule 6 of the High Court Rules.

My observation is that Order 18, Rule 19 of the Rules of the Supreme Court gives the Court electives when dealing with defective pleadings. That is, the Court may order a defective pleading to either be struck out or amended. Similarly, Order LVIII, rule 6 does not compel the Court to strike out a defective pleading.

In casu, the anomalies were identified at an early stage, even before the first scheduling conference has been convened. Thus, the matter is in its infancy and amendments can, in my view, be made without prejudicing the Defendant so that the matter can be heard on the merits.

In view of the foregoing, the Plaintiff is ordered to amend its Statement of Claim to provide clearer particulars of the alleged forgery.

The Plaintiff shall serve the Amended Writ of Summons and Statement of Claim within fourteen days of the date of this Ruling.

In view of the Plaintiff's non-compliance, Costs of this application shall be borne by the Plaintiff, to be taxed in default of agreement.

Dated this 17th day of January, 2018



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Lady Justice B.G.Lungu

HIGH COURT