

IN THE HIGH COURT FOR ZAMBIA
 AT THE PRINCIPAL REGISTRY
 HOLDEN AT LUSAKA
 (Civil Jurisdiction)

2023/HP/1616



BETWEEN:

DOMINIC CHANDA

PLAINTIFF

AND

DANNY YENGA

DEFENDANT

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
 ON 21ST JUNE, 2024 - IN CHAMBERS

For the Plaintiff : Miss. T. Twambo from Messers. Masha and Company
For the Defendant: Miss. M. Phiri from Messers. Makebi Zulu Advocates

RULING

CASES REFERRED TO:

1. *Stanley Mwambazi v Morester Farms Limited* (1977) Z.R. 108
2. *Savenda Management Services Limited and Stanbic Bank Zambia Limited Gregory Chifire Selected Judgment No. 47 of 2018*
3. *William David Carlisle Wise v E.F Hervey Limited* (1985) Z.R 179
4. *Christopher Lubasi Mundia v Sentor Motors Limited* (1982) Z.R 66
5. *Sikatana v Attorney General* (1982) Z.R. 109
6. *Amanita Zambia and Others v Otk Limited Appeal No. 06 of 2006*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The High Court Rules Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court of England* (1999) Edition

1.0 INTRODUCTION

- 1.1 This is a Ruling on an application by the Plaintiff for an order to set aside the Order for further and better particulars dated the 24th November, 2023. The application is made pursuant to **Order 3 Rule 2 read together with Order 35 Rule 5 of the High Court Rules**. The said Order provides that:

Order 3 Rule 2

Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.

Order 35 Rule 5

1. *Where a civil cause on the cause list has been called, if neither party appears, the Court shall, unless it sees good reason to the contrary, strike the cause out of the cause list.*
2. *If the plaintiff does not appear, the Court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counter-claim by the defendant), and make such order as to costs, in favour of any defendant appearing, as seems just:*

Provided that, if the defendant shall admit the cause of action to the full amount claimed, the Court may, if it thinks fit, give judgment as if the plaintiff had appeared.

3. *If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer*

when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.

4. *Where the defendant to a cause which has been struck out under rule 2 has a counter-claim, the Court may, on due proof of service on the plaintiff of notice thereof, proceed to hear the counter-claim and give judgment on the evidence adduced by the defendant, or may postpone the hearing of the counter-claim and direct notice of such postponement to be given to the plaintiff.*
5. *Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as may seem fit.*
6. *Any civil cause struck out may, by leave of the Court, be replaced on the cause list, on such terms as to the Court may seem fit.*

2.0 **HISTORICAL BACKGROUND**

- 2.1 A brief historical background leading to this application was that on the 14th September 2023, the Plaintiff commenced this action claiming among others; an order for replacement of the damages on the car or payment of money equivalent to the value of repairing the motor vehicle; damages for the inconvenience caused for loss of use of the motor vehicle; compensation for the use of car by the third party; interest on the money found due.

3.0 **AFFIDAVIT EVIDENCE**

3.1 The Plaintiff's application was by summons and was accompanied by an affidavit in support deposed by Plaintiff himself.

3.2 It was averred in the affidavit in support that on the 12th October, 2023, the Defendant filed *inter-partes* application for further and better particulars accompanied by an order. That he was advised by his counsel and verily believe the same to be true that the record before this Court will confirm that this Court issued a notice of hearing returnable on the 27th November 2023 at 14:30 hours in the afternoon. A copy of the notice of hearing was exhibited and marked "DCM1". That he was very shocked and surprised to be told by his counsel that this Court had signed an order for further and better particulars dated 24th November, 2023 which order stated that it was issued after hearing Counsel for the Defendant yet there was a pending inter parte hearing date for 27th November, 2023 which had not yet fallen by the time the order was signed.

3.3 That he was further informed by his counsel and verily believe the same to be true that there had been no notice issued by this Court abridging the date of hearing.

3.4 It was averred that the Plaintiff filed an opposition replete with arguments as he desired to be heard on the matter. A

copy of the letter of service as well as the documents served on the Defendant's advocates were exhibited and marked "DCM2".

3.5 It was further deposed that it is the Plaintiff's firm belief that this Court may have signed the said Order in error as it is not uncommon for documents not be placed on Court files in a timely manner. That he was informed by his previous advocate Nganga Yalenga and verily believe the same to be true that he has never attended any hearing of the Defendant's application before this Court.

3.6 In the Skeleton arguments filed in support of the application, it was argued that the Plaintiff commenced this action on the 14th of September, 2023 and on the 15th September, 2023 physically served the Defendant, the originating court process of which the Defendant acknowledged receipt. That by a letter dated the 19th August 2023, the Defendant advocates indicated that they needed the Plaintiff to avail them with further and better particulars. That the Plaintiff's advocates responded to the forestated letter by availing the documents that support the statement of claim for their better understanding. On the 12th October 2023, the Defendants Advocates filed an application for further and better particulars to which a notice of hearing was issued returnable on the 27th November, 2023.

3.7 It was then argued that it is in the interest of justice for the Court to allow this Order for further and better particulars to be set aside. Citing *Order 35 Rule 5 of the High Court Rules* reproduced above and *Stanley Mwambazi v Morester Farms Limited (1977) Z.R. 108¹* which case gave an understanding of what is meant by “*sufficient cause*” when the Court stated that:

“It is the practice in dealing with bona fide interlocutory applications for Courts to allow triable issues to come to trial despite the default of the parties, where a party is in default he may be ordered to pay costs but it is not in the interest of justice to deny him the right to have his case heard”.

Counsel submitted that the Plaintiff has not had the opportunity to submit its defence and that the Defendant will not be prejudiced in any way if the Court sets aside the Order for further and better particulars.

3.8 In opposing the application, the Defendant filed list of authorities and skeleton arguments in support of affidavit in opposition to affidavit in support of summons to set aside order for further and better particulars. The Defendant made concession that on the 12th October, 2023, the Defendant filed an application for further and better particulars before Justice Wina. That the summons was served on the Plaintiff for a returnable date of 8th November, 2023. That the matter did not take off on the scheduled date and was adjourned to 27th November, 2023. That subsequently on the 17th November, 2023 while awaiting the adjourned hearing, the

Plaintiff's appointed advocates received a notice of change of advocates. On 29th November, 2023 the Defendant's advocates were surprised to receive an application from the Plaintiff seeking to set aside the order for further and better particulars. That upon investigation, it was discovered that the Court had signed the Order on 24th November 2023, initially leading the Plaintiff to believe it was granted in error when the Court often reserved the power to expediently address certain applications without a hearing, particularly when no substantial opposition is present and when the Court sees it fit

- 3.9 That the Court may exercise its inherent jurisdiction to make an Order that justice demands in any given case. That the extent of the inherent powers of the Court was eloquently explained by the authors of *Halsbury's Laws of England, 4th Edition, Vol 37 Para 14* as follows:

"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfill itself, properly and effectively, as a court of law. The overriding feature of inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings but in relation to anyone, whether a party or not and in relation to matters not raised in litigation between the parties, it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over the process by regulating its proceedings by preventing the abuse of the process by regulating its proceedings by preventing the abuse of the process and by

compelling the observance of the process... in sum, it may be said that the inherent jurisdiction of the Court is a virile and viable doctrine and has been defined as being the reserve or fund of powers. A residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them”.

3.10 It was submitted that the inherent jurisdiction is a residual intrinsic authority which the Court may resort to putting that which would otherwise be an injustice and secure a fair trial for the parties. The case of ***Savenda Management Services Limited and Stanbic Bank Zambia Limited Gregory Chifire²*** was cited, where the Supreme Court in explaining the inherent jurisdiction of the Court stated... ***it is the unlegislated ancillary power of this Court in the exercise of its duty in the administration of justice. Put differently, it is the power of the Court which is incidental to its day-to-day functions which is intended to ensure that the wheels of justice do not grind to a halt.***

3.11 Counsel submitted that the Court did not err in granting the order for further and better particulars on 24th November, 2023 as established by the Halsbury’s laws of England, that the court possesses inherent jurisdiction encompasses the authority to control proceedings, prevent abuse of process and ensure due process of law. That it allows the Court to make decisions based on filed documents, without the need for a full trial, particularly when no cogent opposition is

presented. Counsel then submitted that in exercising of this jurisdiction, the Court acted within its powers to address the matter expediently and uphold the interest of justice.

3.12 As regards the application being anchored on Order 35 Rule 5 of the High Court Rules, Defence counsel submitted that a closer examination of the provision reveals that the Court will exercise its discretion to set aside the Order only when sufficient cause is demonstrated. That the Plaintiff has failed to present sufficient cause to warrant the Court's discretion to set aside the Order for further and better particulars. Also, that neither party was heard during the initial proceedings and the Court based its decision on the evidence presented through written submissions. That the reliance on the provision by the Plaintiff does not support their argument, as they have not met the requirements to move the Court in their favor by demonstrating sufficient cause.

3.13 Furthermore, as regards the Plaintiff's reliance on the case of *Stanley Mwambazi v Morester Farms Limited*¹, it was argued that the Plaintiff's application does not fall within the realm of *bona fide* interlocutory applications. Instead, it seeks to obstruct the Defendant from obtaining better particulars to adequately inform their defence. The cases of *William David Carlisle Wise v E.F Hervey Limited*³ and *Christopher Lubasi Mundia v Sentor Motors Limited*⁴ was cited in support of the proposition. Further that if an opponent's pleading is so vague that it leaves uncertainty regarding their line of attack or defence at

trial, it becomes necessary to seek particulars to clarify the issues at hand. That allowing the order for further and better particulars to be set aside would defeat the objective entirely. It would leave the Defendant in a state of uncertainty, unable to fully comprehend the allegations against them and adequately prepare their defence. That the Plaintiff's motive in seeking to set aside the Order granted by this Court is to perpetrate injustice and subject the Defendant to respond to pleadings that are not only unclear but also scandalous in nature.

- 3.14 The second thrust of the Defendant's argument was that this Court has no authority to set aside an order granted by another Court of equal jurisdiction. Citing the case of *Sikatana v Attorney General (1982) Z.R. 109^s*, counsel argued that it was evident that a Judge of the High Court lacks jurisdiction to reopen, reconsider, interfere with or comment upon a matter already determined by another Judge of equal jurisdiction. That the principles enunciated in *Sikatana* case underscores the importance of judicial finality and respect owed to decisions made by judges of equal jurisdiction. That this Court to entertain an application to set aside the Order for further and better particulars would effectively amount to reopening and reconsidering a matter already determined by Justice Wina.

4.0 HEARING IN COURT

4.1 At the hearing of this matter, learned counsel for the parties relied on the affidavit in support and skeleton arguments filed into Court.

5.0 ANALYSIS AND THE DECISION OF THIS COURT

5.1 Having perused all the documents filed herein and having considered the arguments advanced by Counsel for the parties, I am in no doubt as to the gist of the Plaintiff's application. The Plaintiff merely want the order of better and further particulars set aside as it was granted accordingly to the Plaintiff "**inadvertently**". The supposed accidental grant of an order of further and better particulars stems from the fact that Counsel for the Defendant did not or was not in attendance when my learned Sister Justice Wina granted the Order therefore according to the Plaintiff, the Defendant's application was never heard.

5.2 The issue for determination is whether, in the light of the above foregoing, the order for further and better particulars in question is irregular and ought to be set aside. Contrary to the position advanced by the Plaintiff, the defendant have contended that the Court was on *terra firma* in issuing the order as the court was exercising its inherent jurisdiction. The Defendant have vehemently argued that this Court cannot set aside an Order made by a Judge of equal jurisdiction.

5.3 I will start by addressing the question of jurisdiction raised by the defendant, as jurisdiction is paramount for any Court in adjudication of matters presented before it. Where a Court lacks jurisdiction its decision amounts to nothing.

5.4 It is common cause that this matter was re-allocation to this Court after the Order to furnish further and better particulars was issued by my learned sister Justice Wina. The Plaintiff has applied to set aside the Order for further and better particulars contending that the Court when granting, did not hear the applicant and as such the Court was not well founded when granting the Order. It is my considered view that, the challenge by the Plaintiff in this application before me is in essence inviting this Court to consider whether or not the order granted by my learned sister is sound in light of the fact that the matter was scheduled for hearing and hearing did not take place but nevertheless my learned sister granted the Order to furnish the Defendant with further and better particulars. It is my firm view that the Plaintiff's application to set aside the order for further and better particulars will require this Court to delve into and set aside the Order of my learned sister of equal ranking on the question whether the Order granted is sound.

5.5 It is my firm view that the question of whether the Order was not well-founded ought to be dealt with by the Court of Appeal and cannot be a matter of consideration before this Court. The Jurisdiction of this Court under section 4 of the High

Court Act does not extend to review of Orders of Court of equal jurisdiction.

5.6 In any case, the Order for further and better particulars as guided by the Supreme Court in the case of *Amanita Zambia and Others v Otk Limited*⁶ is merely an Order to the Plaintiff to furnish the Defendant with adequate information to enable the Defendants prepare their defence on the information provided, without difficulty. The Plaintiff still retains the onus to adduce evidence during trial to support the claims and substantiate the reliefs sought even after furnishing the defendants with better and further particulars.

5.7 The net effect is that the plaintiff's application is devoid of merit and the same is dismissed.

5.8 Since costs are in the discretion of the Court, I make no Orders as regards costs.

5.9 Leave to appeal to the Court of Appeal is hereby granted.

5.10 This matter shall come up on the 16th August, 2024 at 10:00 hours for status conference.

DELIVERED AT LUSAKA THIS 21ST DAY OF JUNE, 2024.


G.C. CHAWATAMA
HIGH COURT JUDGE