

IN THE HIGH COURT FOR ZAMBIA

2023/HP/979

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

VISION FUND ZAMBIA

AND

ROUGUE ZAMBIA LIMITED

LAWRENCE ZYAMBO



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

***Before the Honorable Mr Justice C. Kafunda in Chambers on
the 22nd day of April, 2024***

For the Plaintiff : Ms B Chisenga- Lumbwe – J.B. Sakala & Company

For the 1st Defendant : G Mileji – Malambo & Company

For the 2nd Defendant : T. Msimuko with Mr P. Phiri – Andrew & Partners

RULING

CASES REFERRED TO;

1. **Morris v Mahfouz (No 3) (1994)**
2. **Mazoka and Others v Mwanawasa and Others (2005) Z.R 135**
3. **Lyons Brooke Bond (Z) Limited v Zambia Tanzania Road Services Limited (1997) Z.R 317**
4. **Wang Ying v Youjoun Zhuang & 4 Others [2021] ZMCC 3**
5. **Leopold Walford (Z) limited v Unifreight (1985) ZR 203 (SC)**

6. **Indo Zambia Bank Limited v Amazon Carriers and Kimberly Aretha Antosha Baines 2014/HPCZ/0141**
7. **Charled Mambwe & Others v Mulengushi Investment Limited (In Liquidation) & Mpelembe Properties Limited⁷ (Selected Judgement No 36 of 2016)**

LEGISLATION REFERRED TO;

1. **Constitution of the Zambia**
2. **Rules of the Supreme Court of England (White Book) 1999 Edition.**
3. **High Court Rules, High Court Act Chapter 27 of the Laws of Zambia.**
4. **Commission for Oaths Act Chapter 33 of the Laws of Zambia**

This is a ruling on an application to strike out the Defendant's defence. The application was filed by the Plaintiff who asserts that the Defendants' defence is irregular and therefore should be struck out.

The application is made by way of summons pursuant to **Order 18 Rule 19 (1)(c)(d) of the Rules of the Supreme Court of England (White Book) 1999 Edition ("RSC")** which provides 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—

(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 is supported by an affidavit filed on 6th March, 2024 and sworn by Simon Ziba, the Chief Executive Officer in the Plaintiff company. It was averred that after the commencement of the action against the Defendants, on 29th June, 2023, the 1st Defendant filed its defence and that the Plaintiff thereafter filed a reply and defence to counter claim.

It was further averred that on 4th December, 2023, both Defendants filed a defence that also pleaded a defence for the 1st Defendant, who at the time, had already filed a defence.

In opposing the application, an affidavit was filed on 6th March, 2024 and was sworn by the 2nd Defendant herein. It was admitted that indeed a defence was filed on 4th December, 2023 but that the term “Defendants” was erroneously used in the said defence. It was averred that it is clear from the facts pleaded by the said defence that the defence was inclined to the defence of the 2nd Defendant. It was further averred that 2nd Defendant has a valid and legitimate defence

to the Plaintiff's claim. An amended defence filed on 4th March, 2024 was produced in the affidavit as exhibit marked "**LZ4**".

The Plaintiff filed skeleton arguments in support of the application on 15th February, 2024. The case of **Morris v Mahfouz**¹ was cited in support of the position that a Court can hear a striking out application in relation to non-compliance of the rules of pleadings.

It was submitted that pleadings are not just mere formalities, but vital tools for ensuring fairness, efficiency and clarity in the legal system. Reliance was placed on the cases of **Mazoka and Others v Mwanawasa and Others**² and **Lyons Brooke Bond (Z) Limited v Zambia Tanzania Road Services Limited**³, authorities which speak to the function of pleadings as being meant to give fair notice of the case to the parties and assist the Court to appreciate the parameters of the action.

Furthermore, the Plaintiff cited the case of **Wang Ying v Youjoun Zhuang & 4 Others**⁴ wherein the Court stated that, even if the pleading or endorsement do not offend any specified grounds for striking pleadings out, where the facts show that the pleadings constitutes an abuse of the process of the Court, the Court may be

justified in striking out the whole or part of the pleading or endorsement.

It was submitted that the Defendants have two contradictory defences, which is procedurally incorrect and therefore should be considered an abuse of the Court process because the two defences cause an embarrassment to the Court.

Skeleton arguments in opposition were filed by the 2nd Defendant on 6th March, 2024, wherein it was submitted that the Court has jurisdiction to treat an irregularity as one which is curable. Reliance was placed on **Order 2 Rule 1 RSC** which provides as follows;

“Where, in the 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 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, judgement or order therein”

It was further submitted that striking out the defence will not in any way ensure fairness. That a just remedy lay in allowing the 2nd Defendant to amend it's defence. In support of this proposition, the

case of case of **Leopold Walford (Z) limited v Unifreight⁵** was called in aid, wherein was held that;

“as a general rule, breach of a regulatory rule is curable and not fatal, depending upon the nature of the breach and the stage reached in the proceedings.”

The 2nd Defendant further relied on **Order 3 Rule 2 of the High Court Rules** and **Article 118 (2)(e) of the Constitution**.

HEARING

At the hearing of the matter held on 21st March, 2024, all the advocates for the parties herein were present. Learned Counsel for the Plaintiff relied on the affidavit in support and skeleton arguments filed on 15th February, 2024. Learned Counsel for the 2nd Defendant relied on the affidavit and skeleton arguments of 6th March, 2023. In addition, he submitted that the Plaintiff's affidavit should be dismissed because it offends Order 5 Rule 20(G) of the High Court Rules and the provisions of the **Commission for Oaths Act Chapter 33 of the Laws of Zambia** because the Plaintiff's affidavit is undated and hence irregularly before Court. Reliance was placed on the case of **Indo Zambia Bank Limited v Amazon Carriers and Kimberly**

Aretha Antosha Baines⁶. It was prayed that the Court expunges the Plaintiff's affidavit and dismisses the application.

Learned Counsel for the 1st Defendant submitted that it was notable from paragraph 8 of the Plaintiff's affidavit in support of the application that the Plaintiff was seeking to strike out the defence filed on 4th December, 2023. It was counsel's understanding that the application of the Plaintiff does not affect the 1st Defendant's defence filed on 29th June, 2023.

DETERMINATION

I have carefully considered the affidavit evidence, written skeleton arguments as well as the submissions made on behalf of the parties at the hearing.

Order 5 Rule 20(g) of the High Court Rules, High Court Act Chapter 27 of the Laws of Zambia provides as follows;

"The jurat shall be written, without interlineations, alteration or erasure (unless the same may be initialed by the commissioner). Immediately at the foot of the affidavit and towards the left-hand side of the paper and shall be signed by the commissioner."

Furthermore, **Section 6 of the Commissioners for Oaths Act**, provides as follows;

he filed an amended defence on 4th March, 2024, addressing the irregularity in issue.

For purposes of expediency and in the interests of justice, the Court will invoke, **Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia**, which vests authority in the Court to make orders necessary for doing justice.

I therefore order that the amended defence filed on 4th March, 2024, stands as the defence for the 2nd Defendant. The Plaintiff is at liberty to file in a reply, if any, within 7 days from the date of this Ruling.

I make no order as to costs.

DELIVERED THIS 22nd DAY OF April, 2024



C. KAFUNDA
HIGH COURT JUDGE