

LEOPOLD WALFORD (Z) LIMITED v UNIFREIGHT (1985) Z.R. 203 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J., AND MOWO, J.S.
25TH SEPTEMBER, 1985
(S.C.Z. JUDGMENT NO. 23 OF 1985)

Flynote

Civil Procedure - Writ - Plaintiff's address - Necessity for - High Court Rules O. VII r. (1)(a) and O.X. r.16 - Effect of non-compliance with the rules.

Civil Procedure - Writ - service abroad - Leave to issue for - Steps to be followed.

Headnote

The plaintiff issued a writ for service outside the jurisdiction. The advocates for the plaintiff did not endorse on the writ the plaintiff's address as required by O.VII r. (1) (a); neither was leave of the court obtained under O.X. r. 16. The District Registrar struck out the writ. On appeal to the Supreme Court, the issues were whether the plaintiff's address was also required to be endorsed in addition to the advocate's address and whether leave to issue a writ for service out of the jurisdiction had to be obtained before or after such writ had been issued. The question arose whether a failure to comply with the rules was fatal or not.

Held:

(i) It is necessary for the plaintiff's address, as well as that of his advocate, to be endorsed on the writ;

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(ii) As a general rule, breach of regulatory rule is curable and not fatal, depending upon the nature of the breach and the stage reached in the proceedings;

(iii) Before a writ can be issued out of the jurisdiction, leave of the court must be obtained;

(iv) The steps to be taken before a writ can be issued out of the jurisdiction are: first the writ should be prepared, second an application to issue the writ out of the jurisdiction must be made to the court; with the writ attached the application. Only after the court's leave has been obtained shown the writ be issued.

Legislation referred to:

High Court Rules of Zambia. Cap. 50, O.VII r. (1)(a.) and O.X. r.16.

For the appellant: N. Kawanambulu, of Shamwana and Company.

For the respondent: M. Lwatula, of Ellis and Company.

Judgment

SILUNGWE, C.J.: delivered the judgment of the court.

In this case, there are two issues raised, namely, non-compliance with Order VII, rule (1) (a) and Order X, rule 16 of the High Court Rules, Cap.50 (hereinafter referred to as O.VII,r.1, etc.).

The case first came before the District Registrar of the High Court and it was there argued that the writ issued by the plaintiff (now the appellant) was not in conformity with O.VII, r.1 in that the plaintiff's address was not endorsed thereon.

Mr Kawanambulu's argument, on behalf of the plaintiff, was that, where a plaintiff represented by an advocate, it is unnecessary for the plaintiff's address to be endorsed on the writ, on the ground

that the address required for purposes of service and that it is, therefore, enough to give the address of the plaintiff's advocate.

The District Registrar ruled against the plaintiff and ordered that the writ be struck out for non-compliance with O.VII, r. (1)(a). There was an appeal against that order before a judge in chambers but the appeal was dismissed. The matter is now before us and the question is whether the District Registrar's ruling order can stand.

In our view O.VII r.1 is clear in its terms and requires, not only that the address of the plaintiff's advocate shall be endorsed on the writ, but also that the address of the plaintiff shall similarly be endorsed thereon. The relevant part of the Order reads as follows:

- "1. (1) The solicitor of the plaintiff suing by solicitor shall endorse upon the writ of summons-
- (a) The address of the plaintiff;
 - (b) His own name or firm and his own place of business and the postal address thereof;

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As can be seen from what has been set out above, it is necessary for the plaintiff's address, as well as that of his advocate, to be endorsed on the writ.

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.

The second issue is as to the construction and effect of O.X, r.16. In part, this rule reads as follows:

"16. An application for leave to issue for service out of the jurisdiction a writ of summons, originating summons, or originating notice of motion or a concurrent writ of summons, originating summons or originating notice of motion may be made *ex parte* to the Court or a judge on deposit of the writ, summons or notice with the Registrar together with an affidavit in support of such application. "

The rule then goes on to set out certain conditions that must be observed but with which we are not here concerned. This rule has the same effect as O.6, r.7 of the Supreme Court Rules of England, the relevant part of which reads as follows:

"7 (1) No writ which, or notice of which, is to be served out of the jurisdiction shall be issued without the leave of the Court."

The question is whether leave of the High Court is required to issue a writ, etcetera, before or after the writ has been issued. The rule as set out above is quite explicit and the procedure to be followed is that, before a writ can be issued, leave of the court must be obtained. The procedural steps to be taken, therefore, are that a writ must be prepared but that before it can be issued, an application must be made, with the writ attached thereto, for leave to issue the writ for service out of the court's jurisdiction; but, even then, only after the court's leave has been obtained shall the writ be issued.

In this case, there was no compliance with r.16 or O.X. since the writ was issued before the court's leave could be obtained. However, as we have said in relation to breach of (1)(a) of O.VII, contravention of that rule was not fatal but curable. Moreover, an application was made by the plaintiff's advocate for the amendment of the writ so as to have the plaintiff's address reflected thereon. There is, however, nothing on record to show that the application was considered.

For the reasons given above, the appeal is allowed and the District Registrar's order striking out the writ is set aside. We direct the amendment of the writ by the endorsement thereon of the plaintiff's address.

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Thereafter, the court's leave must be sought and obtained for the issue of the amended writ and the service thereof outside the court's jurisdiction. In the circumstances of this appeal, we propose to make no order as to costs.

Appeal allowed
