

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

**2016/HPC/0093
2011/HK/408
2013/HP/0346**

(Civil Jurisdiction)



BETWEEN:

**SHOPRITE HOLDINGS LIMITED
SHOPRITE CHECKERS PTY LIMITED**

**1ST PLAINTIFF
2ND PLAINTIFF**

AND

**LEWIS CHISANGA MOSHA
LEWIS NATHAN ADVOCATES**

**1ST DEFENDANT
2ND DEFENDANT**

(Sued as a Firm)

**SATURNIA REGNA PENSION TRUST
SCHEME LIMITED AND 24 OTHERS**

3RD DEFENDANT

Before The Hon Lady Justice Irene Zeko Mbewe in Chambers

For the 1st and 2nd Plaintiff: Mr Bota of Messrs William Nyirenda and Company
For the 4th, 11th, 12th, 13th, 14th and 27th Defendant: Mr Chakoleka of Messrs Mulenga Mundashi Kasonde
For the 9th and 17th : Ms L Maboshe of Messrs Corpus Legal Practitioners

RULING

Cases Referred To:

1. *Stanley Mwambazi v Morester Farms Limited* [1977] ZR 108
2. *Waters v Sunday Pictorial Newspapers Limited* [1961] 2 All ER 758
3. *Kemsley v Foot and Others* [1951] 1 All ER 331
4. *Otk v Amanita (Zambia) Limited* 2005/HPC/0199
5. *Genesis Finance v Longreach Commodities Limited* 2012/HP/0144
6. *Farrel v Secretary of State for Defence* [1980] 1 WLR 172
7. *Bailey v Federal Commissioner of Taxes* [1977] CLR 136
8. *Kariba North Bank Company Limited v Zambia State Insurance Corporation Limited* [1980] ZR 94
9. *Samuel v Linzi Dresses Limited* [1980] All E.R Vol 1 800
10. *Access Bank Zambia Limited v Group Five/ZCON Business Park Joint Venture* SCZ/2014
11. *Drummond Jackson v British Medical Association* [1970] 1 All E R 1094

Legislation Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*
3. *Commissioner for Oaths Act, Cap 33 of the Laws of Zambia*

This is the 1st and 2nd Plaintiff's (hereinafter referred to as the "Plaintiffs") application to strike out the 1st and 2nd Defendant's

defence and counterclaim for non compliance with the Court Order made pursuant to **Order 18 Rule 19 of the Rules of the Supreme Court, 1999 Edition**. The application is supported by an affidavit in support filed on 23rd March 2016 and skeleton arguments of even date.

The affidavit is deposed by Kennedy Bota Counsel seized with conduct of the matter on behalf of the Plaintiffs herein. It is deposed that on the 16th February, 2016, the Plaintiffs were granted an Order for further and better particulars. That it was specifically and expressly ordered that the 1st and 2nd Defendant avails the particulars within 14 days of the Ruling of 16th February, 2016 and compliance was to have been by 1st March 2016. That this was not done hence the application to strike out the 1st and 2nd Defendant's defence and counterclaim for non compliance with the Court's Order for further and better particulars.

The Plaintiff filed skeleton argument dated 23 March 2016 in which it was submitted that this is a proper case for this Court to grant the application to strike out the defence and counterclaim pursuant to **Order 18 Rule 19 of the Rules of the Supreme Court**. It was argued that the 1st and 2nd Defendant had relied heavily on the imputation or allegation of fraud which is scandalous, frivolous and vexatious and will tend to prejudice, embarrass, or delay the fair trial of the instant case. It was submitted that scandalous means any unnecessary matter in a pleading that contains any imputation on the opponent or makes any charge of misconduct or bad faith

against him or anyone else. It was the Plaintiffs prayer that the pleading of fraud which the 1st and 2nd Defendant has failed to particularise is fatal to the 1st and 2nd Defendant's whole cause.

In opposing the application, the 1st and 2nd Defendant filed an affidavit deposed by Lewis Chisanga Mosho the 1st Defendant herein. The deponent conceded that indeed the Court had on 16th February 2016 ordered the 1st and 2nd Defendant to furnish further and better particulars with respect to certain portions of the 1st Defendant's defence and counterclaim as requested by the Plaintiffs. That the same were to be filed within 14 days from the date of the Order. It was deposed that at the time when the Order was made, the 1st Defendant had a criminal trial at the Subordinate Court in Lusaka which critical and important witnesses were testifying against him in respect of 43 charges brought against him by the Plaintiffs herein. That on 1st July 2016, the 1st Defendant was acquitted of all the 43 criminal charges.

It was further deposed that the failure to comply with the Court Order was not out of disrespect but was on account of the 1st Defendant's busy schedule caused by the criminal trial. Also that the requisite further and better particulars have since been prepared which the 1st Defendant intends to furnish to the Plaintiffs a copy of which was exhibited and marked as "**LCM-1**" in the opposing affidavit. The 1st and 2nd Defendants prayed that the matter be determined on its merits.

An opposing affidavit was filed on the 9th September 2016, by the 4th, 11th, 12th, 13th, 14th and 27th Defendant deposed by Martha Namwila an Advocate seized with conduct of the matter on behalf of the said Defendants. The gist of the evidence was that the Court Order dated 16th February, 2016 which ordered the 1st and 2nd Defendant to avail the 1st and 2nd Plaintiff with the requested further and better particulars within 14 days of the Court Order was directed at only the 1st and 2nd Defendant's and not all the Defendants herein. As such only the 1st and 2nd Defendants have failed to comply with the said Court Order. It was deposed that the 1st and 2nd Defendant's part of the Defence and Counterclaim are linked and relevant to the 4th, 11th, 12th, 13th, 14th and 27th Defendant and prejudice will result if the Court grants the Plaintiffs application. It was deposed that the other Defendants in this action have a defence on the merits and that the Plaintiffs affidavit have not shown the prejudice they have suffered as a result of the failure of the 1st and 2nd Defendants to comply with the Court Order.

The 9th Defendant in opposing the application filed an affidavit deposed by David Ngandu the Chief Executive Officer in the employ of the 9th Defendant, whose deposition is the 9th Defendant has a defence on the merits and that this is not a proper case for the Court to exercise its discretion.

The 17th Defendant in opposing this application filed an affidavit deposed by Moses Nkumbu Simbeye an Investor Services Manager in the employ of the 17th Defendant. The gist of the evidence was

that the 1st and 2nd Defendant failed to comply with the Court Order of 16th February, 2016 to furnish the Plaintiffs herein with further and better particulars. Further that the other Defendants have a defence on the merits, and consequently, this is not a proper case for this Court to exercise its discretion to strike out the defence and counterclaim as respect of the other Defendants.

The Plaintiffs in response to the 9th Defendant's affidavit in opposition filed an affidavit in reply deposed by Kennedy Bota. It was deposed that the defence and counterclaim which the Plaintiffs have applied to set aside is a single document that is wanting in particulars and affects the 9th Defendant. That the 9th Defendant has not filed any other defence and counterclaim apart from the one that is wanting in particulars.

The 1st, 2nd, 3rd, 5th, 6th, 7th, 10th, 14th, 16th, 18th, 19th, 20th, 21st, 22nd and 23rd Defendant filed skeleton arguments into Court on 27th July, 2016 where it was argued that **Order 18 Rule 19 of the Rules of the Supreme Court** relied upon by the Plaintiffs, exclusively deals with the striking out of pleadings which offend the rules of pleadings and does not deal with failure to provide further and better particulars. It was submitted that this does not aid the Plaintiffs application to strike out the 1st and 2nd Defendant's defence on account of the failure to furnish further and better particulars. It was also reiterated that it would not be in the interest of justice to strike out the 1st and 2nd Defendant's defence when the Plaintiffs are only seeking further and better particulars with

respect to a few paragraphs of the said defence. It was further submitted that the affidavit in support of the application to strike out defence and counterclaim is defective and must be expunged from the record as it is not dated in the jurat, and dismiss the Plaintiffs application.

In its skeleton arguments, the 9th and 17th Defendants submitted that the law requires that where there are triable issues in a matter, those issues should proceed to trial even though there has been default by the parties. The case of **Stanley Mwambazi v Morester Farms Limited (1)** was cited in support of this proposition. Further that the striking out of a defence and counterclaim is a drastic measure unless the pleading does not disclose an arguable case. (**Waters v Sunday Pictorial Newspapers Limited (2)**). It was argued that the Defendants have an arguable case. The case of **Kemsley v Foot and Others (3)** was cited where it was held that to have the defence struck out was not appropriate, and should be employed only in plain and obvious cases. It was submitted that the defence and counterclaim do not in any way prejudice, embarrass or delay the fair trial of the matter. It was submitted that the 9th and 17th Defendant have been embarrassed and prejudiced by the Plaintiffs allegation that they are not bona fide purchasers of the Plaintiffs shares, and that the matter requires to be settled at trial.

At the hearing, Counsel for the Plaintiff relied on the affidavits, skeleton arguments and authorities filed into Court. Counsel also urged the Court to take cognisance of the rationale behind the

Commercial List as a fast track list as underscored in **Otk v Amanita (Zambia) Limited (4)**. It was submitted that the delay defeats the purpose of the commercial list as a fast track court. Further that as can be seen from the record, the request for further and better particulars was made on the 30th October 2015 and that an affidavit for the previous application of the same was filed on 15th January, 2016. That there is a semblance of a response which was only exhibited in the 1st and 2nd Defendant's affidavit in opposition filed on 27th July, 2016. That despite the fact that the 1st Defendant was defending himself in a criminal matter, the delay in complying with the Court Order is ordinate, and that ignoring the procedural rules is at the party's own peril.

In response, Counsel for the 4th, 11th, 12th, 13th, 14th and 27th Defendant submitted that the Order dated 16th February, 2016 was made in respect to the 1st and 2nd Defendant to furnish further and better particulars and was not an "unless" Order. Counsel submitted that the particulars sought have been set out in detail and urged the court in the spirit of determining the matters on its merits to decline the application sought by the Plaintiff. It was argued that the 1st Defendant is no longer burdened with the criminal proceedings and the particulars sought have actually been set out in detail in the affidavit in opposition.

Counsel drew the Court's attention to **Article 118** of the **Constitution of Zambia** which provides that the Court's when administering justice should not pay undue regard to procedural

technicalities. Counsel argued that this was a proper case to be heard on its merits considering that the particulars were only in relation to certain paragraphs of the defence and not the majority. Counsel submitted that striking out the defence as contended by the Plaintiffs would be tantamount to paying undue regard to procedural technicalities and is likely to delay the disposal of the matter.

Counsel for the 9th and 17th Defendant relied entirely on the affidavit and skeleton arguments filed into Court on 28th July 2016.

Counsel for the Plaintiff in reply to the assertion that it is only certain paragraphs of the defence and counterclaim, and not the majority sought to be expunged, submitted that as can be seen from the record the parts in issue are substantial and pervasive.

I have addressed my mind to the affidavit evidence of the parties, and I have also considered the skeleton arguments and various authorities, and viva voce submissions by Counsels.

Counsel for the 4th, 11th, 12th, 13th, 14th and 27th Defendant raised an issue that the Plaintiffs affidavit in support filed into Court on 23rd March 2016 is defective in that it does not state the date and place where affidavit was sworn and that it be expunged from the record. That consequently the Plaintiffs application be dismissed with costs to the affected Defendants, and in support cited the case of **Genesis Finance Limited v Longreach**

Commodities Limited and Others (5). I find that Counsel's application is not competently before the Court and is not in accordance with the rules of the commercial list.

Suffice to say, the Court observed that the said affidavit does not state at which place and on what date the affidavit was sworn. This is contrary to **Order 5 Rule 20 (g) of the High Court Act** and **Section 6 of the Commissioner for Oaths Act Cap 33 of the Laws of Zambia.**

Section 6 of the **Commissioner for Oaths Act** states as follows:

*“Every Commissioner for Oaths before whom any oath or affirmation is taken or made under this Act, **shall** state truly in the jurat or attestation at which place and on what **date** the oath or affidavit is taken or **made**”.*

Further, **Order 5 Rule 20 (g) of the High Court Rules** states as follows:

“The jurat shall be written, without interlineating, alterations and erasure (unless the same be initialed by the Commissioner) immediately at the foot of the affidavit, and towards the left side of the paper, and shall be signed by the commissioner. It shall state the date of the swearing and the place where it was sworn.”

The above provision is mandatory and I concur that an affidavit that does not show in the Jurat the date of the swearing and the

place where it was sworn, offends the mandatory provisions of **Section 6 of the Commissioner for Oaths Act and Order 5 Rule 20 (g) of the High Court Rules.**

In my considered view, as the omission in the Jurat to state the date of swearing is not in itself a deviation in substance but in its form, the defect is not fatal and is curable. I therefore invoke the provisions of **Order 5 Rule 14 of the High Court Rules** which is couched as follows:

"A defective or erroneous affidavit may be amended and re-sworn, by leave of the Court or a Judge, on such terms as to time, costs or otherwise as seem reasonable."

Leave is deemed to have been granted to the Plaintiffs pursuant to **Order 5 Rule 14 of the High Court Rules** to amend the defective affidavit. I further invoke **Order 3 Rule 2 of the Rules of the Supreme Court** which states as follows:

"(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."

Arising from the invocation of **Order 3 Rule 2 of the High Court Rules**, the amended affidavit shall be re-filed so as to have a

complete amended record. Further in this respect, I make no order as to costs.

I now turn to determine the Plaintiffs application to strike out the 1st and 2nd Defendants defence and counterclaim. The application is predicated on **Order 18 Rule 19 of the Rules of the Supreme Court** which is couched as follows:

" The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, 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."

It is not in dispute that by a Court Order dated 16th February 2016, the Court directed the 1st and 2nd Defendant to furnish the Plaintiffs with further and better particulars which were not complied with.

What I see as an issue to be determined is whether the failure to furnish further and better particulars is a ground to strike out the defence and counterclaim under **Order 18 Rule 19 (b) of the Rules of the Supreme Court.**

In addressing the issues, it is important to set out the function of pleadings, and the purpose of further and better particulars. I quote from the case of **Farrel v Secretary of State for Defence (6)** in which it was stated that:

"the primary purpose of pleadings, which is to define the issues and thereby to inform the parties in advance of the case that they have to meet and enable them to take steps to deal with it, still remains and can still prove of vital importance."

Pleadings must of necessity give such particulars as are necessary to enable the opposite party identify the case to be met. In other words, a pleading must give particulars as are necessary to enable the opposing party to identify the case to be met. In the case of particulars, these are set out in the pleadings and give specificity to assertions of a more general kind in the body of the pleadings.

As to particulars, the case of **Bailey v Federal Commission of Taxation (7)** is instructive where it was held that:

"Particulars fulfil an important function in the conduct of litigation. They define the issues to be tried and enable

parties to know what evidence it will be necessary to have available and to avoid taking up time with questions that are not in dispute."

In the case of **Kariba North Bank Company Limited v Zambia State Insurance Corporation Limited (8)** it sets out the most vital functions of particulars which are inter alia to limit the generality of the pleadings or the claim or the evidence; to limit and define the issues to be tried and as to which discovery is required and to tie the hands of the party so that he cannot leave go with any matter not fairly included in. Particulars must therefore be set out in the pleadings.

In respect to further and better particulars, the recipient of a request for further and better particulars should remember that a request or order for further and better particulars should be viewed as an opportunity to improve one's case and define the issues more clearly rather than as a chore. Giving the necessary particulars of pleading will not only assist a party in preparing its own case, but also ensure that its case is stated with certainty and confidence. This will convey the message to the other side and to the Court that the case is a strong one. On a more pragmatic level, if the claim is inadequately particularised, this may be the best chance to put it in better shape. From the functions of pleadings and purpose of particulars, I find that there is a symbiotic relationship between the two which cannot easily be separated as there is clearly interdependence between the two.

Since the Plaintiffs application is predicated on **Order 18 Rule 19 Rules of the Supreme Court**, the effect of this rule is that an application must show the ground that it either discloses no reasonable cause of action; it is scandalous, frivolous or vexatious; it may prejudice, embarrass or delay the fair trial of the action; it is otherwise an abuse of court process before a pleading can be struck out or amended.

The Plaintiffs have argued that there has been an inordinate delay of furnishing further and better particulars by the 1st and 2nd Defendant and consequently, their defence and counterclaim should be struck out. Further that the Plaintiffs are prejudiced by this inordinate delay by the 1st and 2nd Defendant to furnish further and better particulars. On the other hand, Counsel for the 4th, 11th, 12th, 13th, 14th and 27th Defendant argued that the Plaintiffs have not satisfied the conditions necessary for an applicant to succeed under an application to strike out such as proof of the Plaintiff prejudice by breach, whether it is scandalous, frivolous or vexatious and whether it tends to prejudice, embarrass or delay the fair trial of the action as required under **Order 18 Rule 19 of the Rules of the Supreme Court**.

A close examination of **Order 18 Rule 19 of the Rules of the Supreme Court** does not refer to furnishing of further and better particulars as a ground of striking out or amending a pleading. From the affidavit evidence, I find that the Plaintiffs application falls under **(b) and (c) of Order 18 Rule 19** which refers to the grounds

of the pleadings being scandalous, frivolous or vexatious, or that such pleadings may prejudice, embarrass or delay the fair trial of the action. It must be noted that from the Court's order for the furnishing of further and better particulars, it did so for the purpose of limiting the generality of the allegation in the pleadings, and for purposes of defining issues which have to be tried so as to prevent the requesting party from being taken by surprise. Counsel for the Plaintiffs argued that the alleged fraud by the 1st and 2nd Defendant necessitates the striking out of the defence and counterclaim as the 1st and 2nd Defendant have failed to particularise the alleged fraud despite a Court Order to that effect, and this tends to prejudice, embarrass or delay the fair trial. I find that the allegation of fraud is specifically pleaded, and though belatedly, the 1st and 2nd Defendant have since exhibited as **“LCM-1”** the further and better particulars to the alleged fraud which they intend to rely.

The 4th, 11th, 12th, 13th, 14th and 27th Defendant are relying to some extent on some of the facts stated in the 1st and 2nd Defendant's defence and counterclaim, and have urged the Court not to grant the Plaintiffs application. I am satisfied that striking out the 1st and 2nd Defendant's defence and counterclaim will prejudice a fair trial and the real issues between the parties will not be conclusively decided and effectively dealt.

In addressing the non compliance of the 1st and 2nd Defendant of the Court Order of 16th February 2016, it is trite that a Court order

cannot be ignored with impunity to the person to whom it is addressed and I concur with Roskill L.J in the case of **Samuels v Linzi Dresses Limited (9)** where he stated that -

“Orders as to time for delivery of pleadings and particulars, are made not to be ignored but to be complied with”

Counsel for the Defendant has argued that the earlier Court Ruling of 16th February, 2016 was not an "unless" order. Be that it may, it is conceded by Counsel for the 1st and 2nd Defendant, that there was noncompliance. I hasten to state that the non compliance of court rules and orders defeats the orderly manner of administering justice and chaos would prevail if every litigant was allowed to dictate their own rules and compliance time lines. I find the reason given by the 1st and 2nd Defendant for their delay in complying with the Court order inexcusable, and is strongly frowned upon and condemned by the Court.

Counsel for the 1st and 2nd Defendant drew the Court's attention to Article 118 of the **Constitution of Zambia** on procedural technicalities. I am inclined to associate myself with the position taken by the Supreme Court in the case of **Access Bank Zambia Limited v Group Five/ZCON Business Park Joint Venture (10)** where it was held as follows:

"Article 118 (2) (e) of the Constitution of Zambia never means to oust the obligations of litigants to comply with

procedural imperatives as they seek justice from the courts."

In my considered view, it is incumbent and a duty is placed on litigants to comply with the law.

As earlier stated in the preceding paragraphs, the Plaintiffs seek an order to strike out the 1st and 2nd Defendant's defence and counterclaim. Instructive and persuasive is the case of **Drummond Jackson v British Medical Association (11)**, where it was stated at page 1094 that -

"A Court must exercise power to strike out sparingly"

I concur with the principle espoused aforesaid that a Court must exercise the power to strike out sparingly. Counsel for the 9th and 17th Defendant argued that in exercising the jurisdiction to strike out an action, the Court must proceed with extreme caution. I concur with the principles set out in **Kemsley v Foot and Others (3)** that to have the defence struck out should only be employed in plain and obvious cases.

However, in my considered view, since the Plaintiffs application falls under **Order 18 Rule 19 (b) and (c)** of the **Rules of the Supreme Court**, these are issues which can best be attended to by amendment of the necessary pleadings rather than having the 1st and 2nd Defendant's defence and counterclaim struck out. This means that the issues of failure to furnish further and better

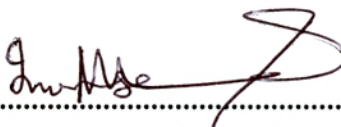
particulars on the allegation of fraud can be remedied by way of amendment.

In the view that I have taken, I direct and order the 1st and 2nd Defendant to amend their defence and counterclaim and incorporate the further and better particulars to be served on the Plaintiffs within twenty-one (21) days of the date of the Ruling. The Plaintiffs shall file their Reply and amended defence to the counterclaim within fourteen (14) days on receipt of the 1st and 2nd Defendant's amended defence and counterclaim.

The Plaintiffs are awarded costs, to be taxed in default of agreement. This is due to the 1st and 2nd Defendant's inordinate delay in complying with the Court Order of 16th February, 2016.

Leave to appeal is granted.

Delivered in Chambers this 23rd day of January, 2017



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HON IRENE ZEKO MBEWE
HIGH COURT JUDGE