

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA**
(Civil Jurisdiction)

APPEAL NO. 31/2022

BETWEEN:

THOMSON PHIRI



APPELLANT

AND

TOYOTA ZAMBIA LIMITED

RESPONDENT

CORAM: CHASHI, SIAVWAPA, AND BANDA-BOBO, JJA

On 15th November, 2022 and 12th December, 2022.

For the Appellant: Mr. M. Chitundu of Messrs. Barnaby, Chitundu and Khunga Advocates

For the Respondent: N/A

JUDGMENT

BANDA-BOBO, JA, delivered the Judgment of the Court.

Cases referred to:

1. *African Banking Corporation Zambia Limited v Copper Harvest Foods Limited and Others CAZ Appeal No. 18 of 2021*
2. *Standard Chartered Bank PLC v John M.C. Banda (SCZ) Appeal No. 94 of 2015.*
3. *Charles Mambwe and Others v Mulungushi Investments Limited (in Liquidation and another) SCZ Selected Judgment No.36 of 2016*
4. *Guardall Security Group Limited v Reinford Kabwe Appeal 44 of 2019*
5. *Zambia Revenue Authority v Jayesh Shah (2001) Z.R. 61*
6. *NFC Africa Mining Plc v Techro Zambia Limited, SCZ Judgment No.22 of 2009*
7. *Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R. 172*
8. *JCN Holdings Limited v Development Bank of Zambia, SCZ Judgment No.22 of 2009*

9. *Dar Farms Transport Limited v Moses Nundwe and 3 Others*, SCZ Judgment No.22 of 2013
10. *Access Bank Zambia Limited v Attorney General*, CCZ Judgment No.21 of 2019
11. *Jason Yumba and 22 Others v Luanshya Municipal Council*, SCZ Judgement No.73 of 2017
12. *Hakainde Hichilema and Others v The Government of the Republic of Zambia*, SCZ Judgment No.37 of 2020
13. *Lusaka West Development Company Limited, B.S. K. Chiti (Receiver), Zambia State Insurance Corporation v Turnkey Properties Limited (1990) S.J. (S.C.)*.

Legislation referred to:

1. *The High Court Rules Chapter 27 of the Laws of Zambia*
2. *The Constitution of Zambia Act No. 2 of 2016*
2. *Black's Law Dictionary Ninth Edition*,

1.0. INTRODUCTION

1.1 This is an appeal against the Judgment of the Honourable Mrs. Justice M. Mapani-Kawimbe, given in the High Court at Lusaka on 8th September, 2021.

2.0. BACKGROUND

2.1 The brief background to this matter is that the Appellant was employed on permanent and pensionable conditions and held various positions in the Respondent company, the last being Finance Manager/Chief Financial Officer. The Appellant commenced an action in the lower court on 3rd August, 2021 against the Respondent citing among other issues, the manner in which the Respondent's Manager and the Chief Executive Officer of East and Southern Africa Region, conducted

themselves and handled the Appellant's appeal among other incidences, confidence and trust between the Appellant and the Respondent having been eroded, thus making it difficult for the Appellant to discharge his duties to the Respondent's satisfaction. That on account of the accumulative claim of events, the Plaintiff, not voluntarily, but compelled by circumstances was forced to resign from the Defendant's employment and as such considered this to be constructive dismissal, as the Defendant's action compelled the Plaintiff to resign. That he had suffered loss and damage at the hands of the Defendant, hence being compelled to resign. The Appellant claimed the following reliefs:

- i. A declaration that the Appellant was constructively dismissed;
- ii. Payment of 36 months salary with all allowances as damages for constructive dismissal;
- iii. Damages for loss of earnings;
- iv. Damages for mental anguish suffered;
- v. Damages for loss of expectation of remaining in employment;
- vi. An Order for payment of 3 months pay in lieu of notice;
- vii. Any other relief the Court may deem fit; and

viii. Costs for and incidental to this action.

2.2 The Respondent was served with the above process and filed an application to set aside the action for irregularity on account that the Writ of Summons was not accompanied with the letter of demand as required by law.

3.0. **DECISION OF THE LOWER COURT**

3.1 The Judge in the Court below in her Ruling dated 8th September, 2021, dismissed the entire matter for non-compliance with **Order 6 Rule 1 (1) (d) of the High Court Rules, Chapter 27 of the Laws of Zambia (HCRs)**¹. In her Ruling, the Judge found that the word “*shall*” in **Order 6 Rule 1 (1) (d) of the HCRs**¹ spelt out a mandatory obligation whereby a Plaintiff who institutes an action by way of Writ of Summons must file a letter of demand together with the process. She further found that the letters of demand attached to the process by the Appellant did not amount to a demand which connected to his claim before the Court. The Judge therefore found that the Appellant had failed to comply with the mandatory provision and dismissed the application with costs to the Respondent.

4.0. **THE APPEAL**

4.1 The Appellant, dissatisfied with the Ruling has now appealed to this Court on the following three grounds:

1. The Learned Judge in the Court below erred in both law and fact when she held at page R5 paragraph 13 that “As far as the Court is concerned, the two letters do not amount to a demand, which is connected to his claims before Court”, when clearly the two letters speak to the claim for constructive dismissal and in particular the last paragraph in the letter dated 28th May, 2020 clearly demanded for compensation for constructive dismissal;
2. That the Court below erred in both law and fact in holding that: “the Plaintiff’s failure to comply with the mandatory provision of **Order VI Rule 1 (1) (d) HCRs** invalidates this suit when the purported default is curable at law; and
3. The Court below erred in both law and fact when she failed in the interest of justice, to invoke the provisions of **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia**¹ to direct the Plaintiff to cure the purported default but instead dismissed the entire Plaintiff’s action for non-compliance with **Order VI Rule (1) (d) of the HCRs as amended by Statutory**

Instrument No.58 of 2020¹ when the Rule is merely regulatory whose default is amenable to cure.

5.0. **ARGUMENTS IN SUPPORT**

5.1 Counsel for the Appellant filed heads of argument on 11th February, 2022. He argued that the thrust of the argument in ground one was that the letters of 23rd March, 2020 and 28th May, 2020 constitute demand letters as required by **Order 6 Rule 1(1) (d) of the HCR**¹. Counsel argued that the foregoing law requires a letter of demand to specify the claim and detail the circumstances surrounding the claim, apart from serving the same on the Respondent and a copy of the acknowledgment of receipt of the demand letter to accompany the Writ of Summons. The Appellant submits that he satisfied the requirements of **Order 6 Rule 1 (1) (d) HCRs**¹, and that the Writ of Summons dated 3rd August, 2021 was accompanied by letters of demand whose receipt was duly acknowledged by the Respondent and a reading of these letters reveal the detailed circumstances leading to the claim for constructive dismissal for which the Appellant demanded compensation, failure to which he would seek legal redress of the matter.

- 5.2 In addition, Counsel submitted that the Managing Director issued a final written warning letter against the Appellant without according the Appellant an opportunity to answer the charges subject of the Final Written Warning. Further that the Managing Director acted as the charging officer/prosecutor, jury, and Judge in the issuance of the said Final written letter in a breach of Toyota Zambia Limited 2018 Human Resource Guidelines and basic rules of natural justice.
- 5.3 Counsel submitted that the Respondent did not respond to the letter issued on 23rd March, 2020. Thus the Appellant deemed himself constructively dismissed forthwith as indicated in the letter dated 28th May, 2020. Counsel submitted that the contents of the aforementioned letter clearly underscores the Appellant's claims for constructive dismissal and compensation from the Respondent Company in no uncertain and unequivocal terms. He submitted that the letter dated 28th May, 2020 was serving two purposes, namely, that of notice of resignation and demand for compensation for constructive dismissal.
- 5.4 Counsel submitted that the Appellant had satisfied the main purpose of the demand letter as required by **Order 6 Rule 1 (1) (d) HCRs¹** in that the Respondent was given the opportunity to know the full claim against it and that in this case he did,

because the demand letters were accompanied by the Writ of Summons dated 3rd May, 2021.

- 5.5 Counsel submitted that the Appellant duly complied with **Order 6 Rule 1 (1) (d) HCRs¹** and that the Respondent's application ought to have failed and dismissed for want of merit with costs to the Appellant. His submission was that this court ought to set aside the Ruling dated 8th September, 2021 and Order the Respondent to file its defence to the subject claim, if any, in the Court below so that the matter can proceed to trial.
- 5.6 Counsel argued grounds two and three together because the two were interrelated into one substantive issue being the consequence for non-compliance with **Order 6 Rule 1(1) (d) of the HCRs¹**. Counsel cited the above order and submitted that in *casu*, the Appellant's writ of summons was accepted after the Registry was satisfied that the Court process was duly accompanied with the required documents, including the letter of demand. It was Counsel's submission that the acceptance of the Court Process by the Registry staff signified that the Appellant had satisfied the requirements of **Order 6 Rule 1 (1) (d) of the HCRs¹**.
- 5.7 Counsel submitted that in the unlikely event that this Court is of the view that the Appellant breached **Order 6 Rule 1 (1)(d) of**

the HCRs¹ and that the letters of demand attached to the writ of summons does not constitute demand letters, it was Counsel's submission that the default does not warrant dismissal of the entire matter as a consequence of non-compliance with the said rule. In buttressing the above, Counsel submitted that a plain reading of **Order 6 Rule 1(2) of the HCRs¹** does not provide for such a consequence or indeed a penalty where a Writ of Summons that is unaccompanied by a letter of demand and has been accepted by the Registry. Counsel submitted that this Court has guided that non-compliance with the rule is not fatal but curable as per the case of **African Banking Corporation Zambia Limited v Copper Harvest Foods Limited and Others¹**. Further that in line with the guidelines proffered, the Appellant submits that the dismissal of the entire matter for want of letter of demand is harsh and is not in the interest of justice as the default is curable at law and that non-compliance should not have been used to terminate the action prematurely as per the case of **Standard Chartered Bank PLC v John M.C. Banda²**. Counsel contended that the Court below should have allowed the Appellant to cure the defect so that trial could continue as per the case of **Charles Mambwe and Others v Mulungushi Investments Limited (in Liquidation and**

another)³. Counsel submitted that the foregoing authorities demonstrate that the Court below should not have dismissed the matter on a mere technicality. That is also supported by **Article 118 (2) (e) of the Constitution of Zambia, Act No. 2 of 2016**².

5.8 In conclusion, Counsel urged this Court to make a finding that the letters dated 23rd March, 2020 and 28th May, 2020, that accompanied the Writ of Summons, together with the accompanying documents constituted demand letters as required by **Order 6 Rule 1 (1) (d) of the HCR's**¹ and that in the interest of justice this Court should set aside the impugned Ruling dated 8th September, 2021 with costs in favour of the Appellant and order the Respondent to file its defence if any so that the matter proceeds to trial and be determined on its merits.

6.0. **ARGUMENTS IN OPPOSITION**

6.1 The Respondent filed heads of argument on 11th March, 2022, and contended that the lower Court did not err in law and in fact when it held that the two letters dated 23rd March 2020 and 28th May 2020 did not constitute letters of demand. Further, that the Court was on firm ground when it held, at page R5, paragraph 13 of its Rulings that the finding of fact was not supported by both law and facts on record.

6.2 It was submitted that the relevant statute on commencement of proceedings in the High Court is **Order VI Rules 1 of the High Court (Amendment) Rules, 2020¹**, and that this Order requires the Plaintiff's originating process to be accompanied by *inter alia* a letter of demand which shall be acknowledged by the Defendant or an Affidavit of service attesting to the service of the letter of demand which sets out the claim and circumstances surrounding the claim in detail. Counsel submitted that the Appellant in this instance did not comply with **Order VI Rules 1(1)(d) of the HCRs¹** and should therefore not be allowed to circumvent this mandatory requirement of the law and that **sub rule (2) of Order VI¹** imposes a penalty for breach, namely, that, a writ of summons which is not accompanied by the documents under sub rule (1) **shall** not be accepted. That the remedy for non-compliance is specified; vis, that the documents shall not be accepted and therefore the action is a nullity, leaving the Court without jurisdiction as per the case of **Guardall Security Group Limited v Reinford Kabwe⁴**.

6.3 Counsel contended that the Appellant did not send a letter of demand to the Respondent Company relating to a claim of constructive dismissal immediately before commencing this action. Counsel submitted that the Respondent did not dispute

receiving the letters in contention but that the letters the Appellant had exhibited did not amount to a letter of demand as envisaged by **Order VI Rules 1(1)(d) of the HCRs¹**.

6.4 Counsel submitted that in the case of **Zambia Revenue Authority v Jayesh Shah⁵**, it was clarified that the breach of regulatory or directory rules of Court and not mandatory rules, shall not be fatal. Counsel's argument was that in the present case **Order VI Rules 1(1)(d) of the HCR's¹** was mandatory because the filing of a Writ of Summons that is accompanied by a letter of demand is not only mandatory and unwaivable but that **sub rule (2) of Order VI** also stipulates that the punishment for non-compliance is that the documents shall not be accepted by Court. The argument by Counsel was that failure to follow those rules compromised the validity of the Court process itself, in that such process is not to be accepted by the Court Registry staff. Therefore, that, that being a mandatory requirement, the act of filing Court process that is not accompanied with a letter of demand does not cure the irregularity, and the originating process filed, being a nullity deprives the Court of jurisdiction.

6.5 The case of **NFC Africa Mining Plc v Techro Zambia Limited⁶** was cited to illustrate the point that the **"Rules of Court are**

intended to assist in the proper and orderly administration of justice and as such they must be strictly followed.”

Counsel submitted that the Court should indulge them with what should constitute a letter of demand, as well as the duration over which a letter of demand should be sent before Originating process follows. Counsel contended that the Respondents company did not receive any letter of demand setting out the Appellant’s claim in detail and this caused prejudice to the Respondent as it robbed them of an opportunity to consider an out of court settlement. Counsel submitted that this Court should uphold the decision of the Court below and dismiss this appeal with costs.

- 6.6 Counsel reiterated his position that the two letters did not amount to a demand letter which is connected to the Appellant’s claims before Court and the finding of fact made by the trial Judge which this Court may not interfere with, is in line with the current law. Counsel referred to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**⁷ and submitted that the finding of fact by the Court below regarding the letters of demand was neither perverse nor made in the absence of any relevant evidence because the letter of demand related to the Plaintiff’s request for revocation of the final written warning.

Secondly that the letters of demand were written before the High Court (Amendment) Rules, 2020 came into effect in June 2020 and thus could not have followed the new **Order VI** which was then nonexistent. Thirdly, that the first letter dated 23rd March, 2020 was written on a “*without prejudice*” basis and was therefore not meant to accompany the originating process as a letter of demand. Fourthly, that Counsel for the Respondent courteously contacted Counsel for Appellant to rectify the anomaly which the Appellant’s Counsel rejected prompting the Respondent to make application to set aside the originating process for irregularity.

6.7 As regards grounds three and four, Counsel contended that since **Order VI Rule 1(2)**¹ has stipulated a penalty for non-compliance, then the non-compliance invalidates the Originating process. It was Counsel’s position that **Order VI Rule 1 (1) and (2)**¹ provides mandatory requirements that are not capable of discretion. With regard to the need to comply with mandatory rules, Counsel cited **Black’s Law Dictionary, 8th Edition at page 981**³ on the definition of mandatory, and further cited the cases of **NFC Africa Mining Plc v Techro Zambia**⁶, **JCN Holdings Limited v Development Bank of Zambia**⁸ for the proposition that includatory rules must be strictly followed.

Additionally, Counsel relied on the case of **Dar Farms Transport Limited v Moses Nundwe and 3 Others**⁹ on what ought to occur where there is non-compliance with mandatory rules. Counsel submitted that the Courts have inherent power, discretion or jurisdiction to cure a procedural defect but that this must be done within the confines of the law. Further, that in *casu*, the rules provided a mandatory requirement for a letter of demand to accompany the originating process, which the Appellant failed to abide by. Counsel argued that in effect, the Appellant was asking this Court to disregard a clear and mandatory rule which he implored this Court not to abide by.

6.8 It was Counsel's further submission that **Article 118(2)(e) of the Constitution of Zambia**² and the case of **Access Bank Zambia Limited v Attorney General**¹⁰, highlight the consequences of what occurs where parties do not comply with rules. Counsel submitted that whereas it is true that the impact of **Article 118 (2) (e) of the Constitution of Zambia 2016**² is that justice ought to be done without undue regard to procedural technicalities, this provision does not provide *carte blanche* for parties to do as they please and flout Court rules at will. He submitted that the Rules are there for a purpose, namely to guide parties in proceedings and must be adhered to strictly.

That in the present case, the Appellant chose to ignore mandatory rules and in so doing they did it at their own peril. Furthermore, Counsel relied on the case of **Jason Yumba and 22 Others v Luanshya Municipal Council**¹¹ to illustrate the consequences of not complying with the rules of court.

6.9 Counsel submitted that the Appellant's argument that the Court should have invoked **Order 3 Rule 2 of the HCRs**¹ to direct the Appellant to cure the default was untenable because the said Order only applied to interlocutory and not final orders, as per the case of **Hakainde Hichilema and Others v Government of the Republic of Zambia**¹².

6.10 Counsel submitted that it was clear from the above cited cases that the Court should be guided and must act within the confines of the law even when making orders under **Order 3 Rule of the HCRs**¹. He reiterated his position that **Order VI Rule 1 (1) (d) and (2)**¹ is a mandatory rule and that the Court has no discretion to circumvent that requirement. Further, that the Court below acted within the provision of the law by not invoking **Order 3 Rule 2**¹ to direct the Appellant to cure the default. Counsel further submitted that **Order 3 Rule of HCRs**¹ does not apply to final orders but only to interlocutory Orders.

6.11 In conclusion, Counsel submitted that this Court ought to dismiss the Appellant's appeal with costs to the Respondent. In addition, that this Court should take this opportunity to make pronouncements on what exactly constitutes a letter of demand and how long a party should institute legal proceedings after sending a letter of demand. He argued that this was because in *casu*, a total of over 15 months elapsed between the Appellant's sending of the purported letters of demand to the Respondent and the institution of legal proceedings.

7.0. **THE HEARING**

7.1 At the hearing, Mr. Chitundu, Counsel for the Appellant, relied on the Appellant's heads of argument filed on 11th February, 2022 and prayed that costs for this appeal should be in the cause. There was no appearance from the Respondent.

8.0. **DECISION OF THIS COURT**

8.1 Having perused the Record of Appeal, and the Ruling of the Court below and the submissions filed by learned Counsel for the Appellant and Respondent, we are of the view that the issue to be resolved in this Appeal is whether the letters dated 23rd March 2020 and 28th May, 2020 amounted to letters of

demand as envisioned by **Order VI Rule 1 (1) (d) of the HCRs¹**.

We further opine that when the first issue is resolved, grounds two and three will fall off.

8.2 The Appellant in ground one contends that the letters of demand attached to the Writ of Summons fulfilled the requirement that there must be a letter of demand accompanying the Writ of Summons as envisaged in **Order VI Rule 1 (1) (d) of the HCRs¹**. The Respondent on the other hand did not dispute having received the letters in contention but argued that the said letters do not amount to a letter of demand as envisaged by **Order VI Rules 1(1)(d) of the HCRs¹**.

8.3 **Order 6 Rule 1 (1) (d) of the HCRs¹** provides as follows:

1. *(1) Except as otherwise provided by any written law or these Rules, an action in the High Court shall be commenced, in writing or electronically by writ of summons endorsed and accompanied by:*
 - (a) a statement of claim;*
 - (b) list and description of documents to be relied on at trial;*
 - (c) list of witnesses to be called by the plaintiff at trial; and*
 - (d) letter of demand whose receipt shall be acknowledged or an affidavit of service attesting to the service of the letter of*

demand, which shall set out the claim and circumstances surrounding the claim in detail.

(2) a writ of summons which is not accompanied by the documents under sub-rule (1) shall not be accepted.

8.4 It is patent that in **Order 6 Rule 1 (1)(d) of the HCRs¹**, a letter of demand must be one of the documents to be attached to the Writ of Summons. This is in order to help the Court ascertain what the action instituted encompasses as well as alert the Defendant what action he would face if the matter ends up in court.

8.5 According to **Black's Law Dictionary 9th Edition at page 495³** it states regarding the letter of demand, that:

“demand letter. (1911) A letter by which one party explains its legal position in a dispute and requests that the recipient take some action (such as paying money owed), or else risk being sued. Under some statutes (esp. consumer-protection laws), a demand letter is a prerequisite for filing a lawsuit.”
(emphasis by this Court)

8.6 It is clear from the above that a demand letter is a letter requesting the recipient to do something and if the action requested is not performed, the recipient runs the risk of facing

legal action. We have perused the record of appeal and have read the letter dated 23rd March, 2020 and note and agree with the Respondent as outlined in the supplementary record of appeal and its heads of argument, that this particular letter of demand cannot be accepted and should not have been accepted by the Court below because it is a “*without prejudice*” letter. As a general rule, without prejudice communication or correspondence is inadmissible on grounds of public policy. This was illustrated in the case of **Lusaka West Development Company Limited, B.S. K. Chiti (Receiver), Zambia State Insurance Corporation v Turnkey Properties Limited**¹³.

8.7 However, we note that the letter dated 28th May, 2020, though referenced as “*Resignation from Employment as Chief Financial Officer*”, actually sets out the history of employment and how the dispute between the parties arose. The letter further explains the legal position in the dispute being constructive dismissal. In this regard we agree with the Appellant that the letter clearly underscores the Appellant’s claims for constructive dismissal and demands compensation from the Respondent Company in no uncertain and unequivocal terms. In the letter it is also clear that the Appellant states that he will seek legal redress if there is no response from the Respondent.

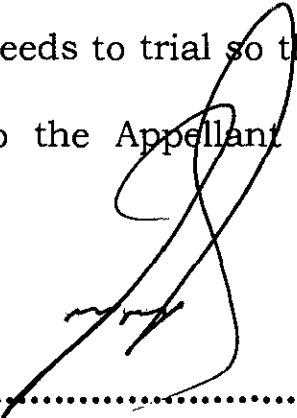
8.8 In addition, we have perused **Order 6 Rule 1 (1) (d) of the HCRs¹** and note that the said Order does not specify what form a letter of demand must take. Therefore, in our view we do not agree with the Respondent that the letter dated 28th May, 2020 does not suffice as a letter of demand to accompany the writ of summons as provided for under **Order 6 Rule 1 (1) (d) of the HCRs¹**. Our view is that the letter dated 28th May, 2020 does qualify to be classified as a letter of demand as defined in **Black's Law Dictionary³** and **Order 6 Rule 1 (1) (d) of the HCRs¹** above. In addition, we have perused the reliefs in the statement of claim on record and we note that the reliefs therein are connected to the Appellant's claim before Court below in unequivocal terms.


8.9 Further we also note that the Respondent in the Supplementary Record of Appeal argues that the letter of demand dated 23rd March, 2020 is inadmissible because the letter was written last year in 2020 before the new Rules came into force on 19th June, 2020. Be that as it may, it is our view that the requirement under **Order 6 Rule 1(1)(d) of the HCRs¹** that the Writ of Summons must be accompanied by a letter of demand is nothing less and nothing more, as seen above in the letter dated 28th May, 2020. This letter in our considered view, meets the criteria


of what constitutes a letter of demand as already stated and whether or not the letter was written before the Rules came into being is immaterial.

8.10 We find that ground one of the Appeal has merit. This being the case, it is our view, that the issue of compliance in grounds two and three fall off because we have determined that the Writ of Summons was accompanied by a demand letter as per **Order 6 Rule 1(1)(d) of the HCRs¹**.

8.11 In conclusion, we find that this appeal is meritorious. We therefore set aside the Ruling of the lower Court dated 8th September, 2021 and we Order that the Respondent file its defence, if any, within 14 days from the date of this Order and that the matter proceeds to trial so that it can be determined on its merits. Costs to the Appellant to be taxed in default of agreement.


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J. CHASHI
COURT OF APPEAL JUDGE


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M. J. SIAVWAPA
COURT OF APPEAL JUDGE


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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE