

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

2013/HP/0837

BETWEEN:

SET POINT ZAMBIA LIMITED**PLAINTIFF**

AND

**FIRST NATIONAL BANK ZAMBIA LIMITED
PETER MILOMO****DEFENDANT
THIRD PARTY**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 30th
DAY OF APRIL, 2024**

For the Plaintiff : Mr N.Nsapato, Mr B. Mwanza & Mr Z.M. Mubiana, Messrs
Nsapato & Co Advocates
For the Defendant : Mr V. Musabula, Messrs Ventus Legal Practitioners
For the 3rd Party : Mrs Z.C. Kakunka, Messrs Katongo and Company

R U L I N G

CASES REFERRED TO:

1. *Smith v Banjuli*
2. *Slatteries v Pooley 1840 6 M&W 664*
3. *Fibrosa Spolka Akcyinja v Paribairn Lawson Combe Barbour Ltd 1942 UKHL 4*
4. *Herbert Chankobe v The People 1977 ZR 126*
5. *Edward Jack Shamwana and others v The People 1985 ZR 41*
6. *William David Carlisle Wise v E.F. Harvey 1985 ZR 179*
7. *Zambia National Building Society v Ernest Mukwamataba Nayunda SCZ No 11 of 1993*
8. *Lumus Agricultural Services Company Limited v Gwembe Valley Development Company Limited (in receivership) 1999 ZR 1*
9. *Robert Mbonani Simeza and Finance Bank Zambia Limited v Ital Terrazo Limited Appeal No 144/2009*
10. *Otk Limited v Amanita Zambiana Limited and others 2011 Vol ZR*
11. *Anthony Mwanza v Kagurusu Farming Enterprises Limited, Kenani Musebo 2012 Vol 2 ZR*

12. *Gemstar Holding Limited v Afgri Corporations Limited SCZ Appeal No 183 of 2014*
13. *Oscar Chinyanta and others v Alesia Building Construction Limited and Tap Zambia Limited*
14. *Chinika Service Station Limited v Amanita Premier Oils Limited and others Appeal No 24/2016*
15. *Muwindwa Mutemwa Mufundi (married woman) v Meanwood General Insurance Appeal No 155/2020*
16. *Mushipe (T/A Mushipe Associates and suing as Executor and Trustee of the estate of the late Funny Lunga Yolamu) v Rossi (suing as executor and Trustee of the estate of the late Funny Lunga Yolamu) Appeal No 12/2022*
17. *Bentry Siamlambwa v Magna Mining Limited 2022/HPC/674*

LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England, 1999 Edition*
3. *The Legal Practitioners Act Chapter 30 of the Laws of Zambia*
4. *The Legal Practitioners (Practice) Rules Statutory Instrument No 51 of 2002*
5. *The Companies Act No 10 of 2017*
6. *The Authentication of Documents Act, Chapter 75 of the Laws of Zambia*
7. *The Electronic Communications and Transactions Act No 4 of 2021*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary, by Bryan A. Garner, 8th Edition*
2. *Halsbury's Laws of England, 4th Edition, Volume 16*

1. INTRODUCTION

1.1 This Ruling is on Two (2) applications, the first being on an application which was filed by Ventus Legal Practitioners, the Defendant herein, on 23rd January, 2024 pursuant to **Order 14A Rules 1 and 2 of the Rules of the Supreme Court of England, 1999 Edition** as well as **Order 33 Rule 3 of the said Rules of the Supreme Court of England.**

1.2 In that application, the following questions are raised:

1. *Whether Set Point Zambia Limited has a valid legal basis to pursue the claim against First National Bank Zambia Limited after they were indemnified by Etana Insurance Company Limited for the loss claimed. Consequently, whether any Judgment in favour of Set Point Zambia Limited would amount to unjust enrichment;*
2. *Whether the claim, if it is a subrogation claim, is properly pleaded for the purpose of determination by this Court, should this Court hold the view that the cause of action is properly pleaded;*
3. *Whether a subrogation claim can continue being pursued before this Court on behalf of an entity, whose legal existence was terminated;*
4. *Whether following the indemnification by Etana Insurance Company Limited and the notice of termination of registration of Etana Insurance Company Limited, Set Point Zambia Limited and Counsel have been acting without instructions since 26th March, 2019.*

1.3 The application was supported by an affidavit and a List of Authorities and Skeleton Arguments. In opposing the application, Set Point Zambia Limited filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition on 22nd February, 2024. An affidavit in reply and List of Authorities and Skeleton Arguments in reply were filed on 1st March, 2024.

1.4 The second application was filed by Set Point Zambia Limited on 22nd February, 2024 pursuant to **Order 3 Rule 2 of the High Court Rules**, and **Section 2 of the Authentication of Documents Act, 1914** to expunge paragraph 5 of the affidavit filed in support of the Notice raising preliminary issues. That application was supported by an affidavit and a List of Authorities and Skeleton Arguments. By way of opposition to the application, First National Bank Zambia Limited filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition on 14th March, 2024.

2. BACKGROUND

2.1 Set Point Zambia Limited commenced this action against First National Bank Zambia Limited on 13th June, 2013, by Writ of Summons which was accompanied by a statement of claim, seeking:

1. *Payment of the sum of ZMW2, 705, 083.54*
2. *Interest;*
3. *Any other relief that the Court may deem fit;*
4. *Costs.*

2.2 First National Bank Zambia Limited, entered appearance and filed its' defence on 28th June, 2013. Thereafter on 17th April, 2024, an application was made to inspect to the Banker's Books before the Deputy Registrar. In a Ruling dated 27th March, 2015, the Deputy Registrar directed that the application be made to the Hon Judge, as the nature of the application was in supplementation to the process of

discovery of documents, which should have formed part of the Orders for Directions.

- 2.3 The Deputy Registrar found that he had no mandate to issue Orders for Directions in the matter, and Ordered that the application be made before the Judge who had conduct of the matter. Thus, on 16th June, 2015, the application was re-filed before the Hon Judge, who in a Ruling dated 29th July, 2016, granted the application for inspection of the Bankers' Books.
- 2.4 First National Bank Zambia Limited on 17th August, 2016, applied ex-parte for leave to issue third party proceedings against Peter Milomo. Peter Milomo acknowledged service of the third-party proceedings on 16th September, 2016. Thereafter, on 17th March, 2021, First National Bank Zambia Limited filed an amended defence.
- 2.5 Trial dates were set, and the matter was struck off the active cause list on 1st November, 2022, with liberty to restore within Thirty (30) days, failure to which it would stand dismissed, as Set Point Zambia Limited did not attend trial. On 7th December, 2022, I dismissed the matter as it was not restored. On 10th February, 2023, an application was made to review the Order dismissing the matter, on the basis that in fact, an application to restore the matter was filed on 24th November, 2022.
- 2.6 I set aside the Order dismissing the matter on 9th March, 2023, on the basis that the application to restore the matter which was filed on 24th November, 2022, was not on the

Court record, when I made the Order dismissing the matter on 7th December, 2022. Trial in the matter commenced on 5th July, 2023, at which Set Point Zambia Limited called One (1) witness and closed its' case. Peter Milomo also testified and closed his case. The matter was adjourned to 6th October, 2023, for hearing of the witness for First National Bank Zambia Limited. I did not sit on that date, as I was in Solwezi doing the criminal session.

- 2.7 The matter was set for 7th February, 2024, for continued trial. On 23rd January, 2024, First National Bank Zambia Limited filed the Notice of Motion raising preliminary issues, which are subject of this Ruling.

3. SUBMISSIONS AT THE HEARING

APPLICATION TO EXPUNGE PARAGRAPH 5 OF THE AFFIDAVIT FILED IN SUPPORT OF THE NOTICE OF MOTION

SUBMISSIONS BY COUNSEL FOR SET POINT ZAMBIA LIMITED

- 3.1 At the hearing, Counsel for Set Point Zambia Limited, stated that they relied on the affidavit filed in support of the application together with the List of Authorities and Skeleton Arguments. His submission was that First National Bank Zambia Limited, had sought to challenge the affidavit filed in support of the application, on the ground that it was irregular on Two (1) grounds, being:

- i. The address for the deponent was not indicated in the affidavit;

- ii. Secondly, that the deponent was not the right person to depose to the affidavit.
- 3.2 However, Counsel's contention was that such arguments could not be made in an affidavit in opposition, as what was in fact sought, was that the affidavit should be disregarded. Counsel took the view that such issues should have been raised by way of an application in line with **Order 30 of the High Court Rules, Chapter 27 of the Laws of Zambia**.
- 3.3 Reliance was placed on the case of **Oscar Chinyanta and others v Alesia Building Limited and Tap Zambia Limited** ⁽¹³⁾, stating that the Supreme Court in that matter, guided that one cannot make an application in an affidavit in opposition.
- 3.4 The submission in the alternative, was that notwithstanding the inadvertent failure to indicate the deponents' address, the affidavit could competently be used by the Court without the need for an amendment, let alone re-swearing. As authority, **Order 5 Rule 13 of the High Court Rules, Chapter 27 of the Laws of Zambia** was cited, stating that it provides that a Court or a Judge, may permit an affidavit to be used, notwithstanding that it is defective, if the Judge is satisfied that it was sworn before a duly authorised person.
- 3.5 It was stated that the affidavit in issue, was sworn before a duly authorised Notary Public. Therefore, it fell within the ambit of **Order 5 Rule 13 of the High Court Rules**.

- 3.6 Coming to the merits of the application, Counsel stated that paragraph 5 of the Notice of Motion should be expunged, as it contained hearsay statements, and the exhibit thereto should be expunged, as it was not authenticated by the Rules. It was also submitted that First National Bank Zambia Limited, had argued that the information being a data message, that was received via email, could not be said to contain hearsay.
- 3.7 However, the position that Counsel took, was that, that could not be the basis that the exhibit was considered as hearsay, as any document that is produced by someone who is not the author, who seeks to rely on its' veracity, makes the document hearsay.
- 3.8 The dictum in the case of ***Edward Jack Shamwana and others v The People*** ⁽⁵⁾ was relied on as authority, and Counsel's contention was that the requirements of ***Sections 8 and 9 (4) of the Electronic Communications and Transaction Act*** had not been met. In that respect, Counsel stated that ***Section 8 of the Act***, requires that foundation is laid, as regards the integrity of the information from the time that it was generated. However, in this matter, there was nothing that spoke to the integrity of the information.
- 3.9 As for ***Section 9 (4) of the Electronic Communication and Transactions Act***, Counsel's submission was that it requires that a copy, print out or extract of a data message must be certified to be correct. It was stated that this provision of the law was confirmed in the case of ***Bentry***

Siamlambwa v Magna Mining Limited ⁽¹⁷⁾, the submission being that Hon Lady Justice I.Z. Mbewe guided in that matter, that the law clearly demands that a data message has to be certified in Order for it to be admissible in evidence.

3.10 Consequently, the argument that the exhibit was a data message, could not stand, as it had not met the criteria for admission. The prayer was that the exhibit be expunged from the affidavit.

3.11 In relation to the argument regarding authentication of the document, if it is a public one, that the said document did not need authentication, it was noted that as authority, ***Order 5 Rule 9 of the High Court Rules***, had been relied on, as guiding that if a document is of a public nature, it shall be admissible as evidence, if it is signed or certified as a true copy by the officer in whose custody it is entrusted.

3.12 The view taken by Counsel, was however that it had not been demonstrated that the officer who was in custody of the document had signed or authenticated the document. Reiteration was made, that the document required to be authenticated, and as this was not done, the document should be expunged from the record.

RESPONSE BY COUNSEL FOR PETER MILOMO

3.13 Counsel for Peter Milomo had nothing to say as regards the application.

**RESPONSE BY COUNSEL FOR FIRST NATIONAL
BANK ZAMBIA LIMITED**

- 3.14 In response, Counsel for First National Bank Zambia Limited relied on the affidavit which was filed in opposition to the application, together with the List of Authorities and Skeleton Arguments in opposition. He stated that as regards the contention that paragraph 5 of the affidavit filed in support of the Notice of Motion should be expunged from the record, their position was that it was an email, which contained information as regards the cancellation Etana's registration.
- 3.15 Counsel added that such information could be obtained by one conducting a google search. Therefore, the allegation that the email contained hearsay information could not stand. It was also Counsel's submission, that the argument that the email required to be authenticated was misconceived.

**REPLY BY COUNSEL FOR SET POINT ZAMBIA
LIMITED**

- 3.16 There was no reply.

NOTICE OF MOTION

**SUBMISSIONS BY COUNSEL FOR FIRST NATIONAL BANK
ZAMBIA LIMITED**

- 3.17 Counsel in submission, stated that they relied on the affidavit and List of Authorities and Skeleton Arguments which were filed in support of the application on 24th

January, 2024. Further reliance was placed on the affidavit in reply which was filed on 1st March, 2024.

RESPONSE BY COUNSEL FOR PETER MILOMO

3.18 Counsel submitted that in the event that the preliminary issue was upheld, they prayed that Peter Milomo's issue with First National Bank Zambia Limited be considered.

RESPONSE BY COUNSEL FOR SET POINT ZAMBIA LIMITED

3.19 In response, Counsel for Set Point Zambia Limited, submitted that they relied on the affidavit which was filed in opposition together with the List of Authorities and Skeleton Arguments in opposition, which documents were filed on 24th January, 2024, in opposing the application. Counsel noted that several issues had been raised in the affidavit in support of the application, as well as in the affidavit in reply, which he wished to respond to.

3.20 In that regard, his submission was that there is a plethora of jurisprudence on the issues of insurance, and whether an insurer can sue in its' name or in the name of the insured. One such case was named as **Smith v Banjuli**, a South African case, with Counsel stating that the Court in that matter, made it very clear that the insurer can opt to sue in the name of the insured.

3.21 The further submission was that the learned authors **Sweet and Maxwell** have put it clearly, that any award that is made to the insured, will inevitably go the insurer, despite

the fact that the name appearing on the suit is that of the insured.

- 3.22 On the question of the subrogation claim having been properly pleaded, Counsel's submission was that reliance was placed on the case of **Smith** and the book, in which it states that in such instances, where the insurer opts to sue in the name of the insured, there will be no need to plead subrogation.
- 3.23 Still in submission, the response as regards the contention that had First National Bank Zambia Limited known that this is a subrogation claim, it would have preferred a different defence, Counsel stated that First National Bank Zambia Limited had known that Etana would sue using their insured Set Point Zambia Limited, as could be seen from the affidavit in support, which was deposed to Melody Nyendwa Mayaka.
- 3.24 It was added that exhibited to that affidavit, as 'MNM1', was an email that was written to First National Bank Zambia Limited, which showed that Etana, through Set Point Zambia Limited would bring the claim. Further in submission, Counsel stated that exhibit 'MNM3' was a letter that showed that First National Bank Zambia Limited was aware through the letter, which was a precursor to the litigation, that Etana would make a claim against it.
- 3.25 Counsel submitted that in any event, the action between Set Point Zambia Limited and First National Bank Zambia Limited is founded in negligence, and not subrogation, so

there was no need for Set Point Zambia Limited to prove subrogation.

- 3.26 In respect of the contention that Counsel for Set Point Zambia Limited had been acting without instructions, with reliance being placed on the document that showed the termination of registration of Etana, the insurer, Counsel stated they had shown in the affidavit in opposition, that Etana had since been acquired by Hollard, who through that acquisition, had acquired the rights and liabilities for Etana.
- 3.27 Counsel added that as an employee of Hollard had instructed them, they had been instructed by the client.
- 3.28 It was also Counsel's submission, that the application for payment of security for costs did not arise, as Set Point Zambia Limited has a registered office in Zambia. Therefore, should First National Bank Zambia Limited succeed in this matter, it would be able to recover its' costs. Counsel noted that the issue of security for costs would only have arisen, if an application had been made. However, no such application had been made.
- 3.29 As regards the irregularities in the affidavit in opposition being raised in the affidavit in reply, the submission was that such issues could not be considered, as the law requires that where there are irregularities as to form or substance, the requisite application has to be made, before fresh steps are taken up in the action.
- 3.30 It was stated that by taking up fresh steps, First National Bank Zambia Limited had waived the right to raise the

irregularities. The case of ***Oscar Chinyanta and others v Alesia Building Limited and Tap Zambia Limited*** ⁽¹³⁾ was again cited as authority.

- 3.31 Reliance in the alternative, was placed on ***Order 5 Rule 13 of the High Court Rules*** and Counsel stated that the application within a reply should not be entertained. The prayer was the preliminary issues raised be dismissed.

REPLY BY COUNSEL FOR FIRST NATIONAL BANK ZAMBIA LIMITED

- 3.32 There was no reply.

4. DECISION OF THIS COURT

- 4.1 I have considered the preliminary issues. I will begin with the application which was filed by Set Point Zambia Limited to expunge paragraph 5 of the affidavit in support of the Motion to raise preliminary issues.

APPLICATION TO EXPUNGE PARAGRAPH 5 OF THE AFFIDAVIT IN SUPPORT OF THE NOTICE OF MOTION

- 4.2 The application was made pursuant to ***Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia*** and ***Section 3 of the Authentication of Documents Act, 1914.***

- 4.3 ***Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia*** provides that:

“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.”

4.4 **Section 3 of the Authentication of Documents Act** states that:

“3. Any document executed outside Zambia shall be deemed to be sufficiently authenticated for the purpose of use in Zambia if-

- (a) in the case of a document executed in Great Britain or Ireland it be duly authenticated by a notary public under his signature and seal of office;**
- (b) in the case of a document executed in any part of Her Britannic Majesty's dominions outside the United Kingdom it be duly authenticated by the signature and seal of office of the mayor of any town or of a notary public or of the permanent head of any Government Department in any such part of Her Britannic Majesty's dominions;**
- (c) in the case of document executed in any of Her Britannic Majesty's territories or protectorates in Africa it be duly authenticated by the signature and seal of office of any notary, magistrate, permanent head of a Government Department, Resident Commissioner or Assistant Commissioner in or of any such territory or protectorate;**

(d) in the case of a document executed in any place outside Her Britannic Majesty's dominions (hereinafter referred to as a "foreign place") it be duly authenticated by the signature and seal of office-

(i) of a British Consul-General, Consul or Vice-Consul in such foreign place; or

(ii) of any Secretary of State, Under-Secretary of State, Governor, Colonial Secretary, or of any other person in such foreign place who shall be shown by the certificate of a Consul or Vice-Consul of such foreign place in Zambia to be duly authorised under the law of such foreign place to authenticate such document."

4.5 The gist of the affidavit filed in support of the application, which was deposed to by Willie Jansen Van Rensburg, the Head of Claims at Etana Insurance Company Limited and who is currently employed by Hollard Insurance Company Limited, a company that has acquired Etana Insurance Company Limited, was that in the affidavit filed in support of the Notice of Motion, which was filed on 23rd January, 2024, Melody Nyendwa Mayaka, as affiant of that affidavit, had deposed that sometime in December, 2023, she came to learn that the South African Prudential Authority issued a Notice of Termination of the Registration of Etana Insurance Company Limited.

- 4.6 It was averred, that the said statement amounted to hearsay as it was not a fact, as purported in the affidavit. Willie Jansen Van Rensburg also stated that, a purported copy of the Notice of Termination of Registration of Etana Insurance Company Limited had been brought before this Court, which was executed in South Africa by the South African Prudential Authority, and it was not authenticated.
- 4.7 In the List of Authorities and Skeleton Arguments in support, the provisions of **Section 3 of the Authentication of Documents Act, Chapter 75 of the Laws of Zambia** was referred to. Based on that, the argument was that any document that is executed outside Zambia has to be authenticated in Order for it be used in Zambia. It was argued that the requirement is couched in mandatory terms, and the case of **Lumus Agricultural Services Company Limited v Gwembe Valley Development Company Limited (in receivership)** ⁽⁸⁾ was cited as authority.
- 4.8 Further authority was drawn from the definition of *authentication* in **Black's Law Dictionary, by Bryan A. Garner, 8th Edition**, stating that it is defined as follows at page 142:
- “Broadly, the act of proving that something (as a document) is true or genuine, esp so that it may be admitted as evidence.”**
- 4.9 Therefore, the argument was that, it was imperative to prove that the evidence that Melody Nyendwa Mayaka sought to rely on as being genuine, had to be authenticated. It was

contended that the document not having been authenticated, paragraph 5 of the affidavit in support of the Notice of Motion raising preliminary issues should be expunged.

- 4.10 In the affidavit in opposition to expunge paragraph 5 of the affidavit in support of the Notice of Motion, Melody Nyendwa Mayaka, a Legal Manager in First National Bank Zambia Limited, deposed that she learnt about the termination of Etana Insurance Company Limited's short term licence registration, through an email that was sent to her by Thelma Dimpho from First Rand Group Enterprises Risk Management, which was exhibited as 'MNM1'.
- 4.11 She averred that following receipt of that email, she proceeded to check the South African Reserve Bank website through a google search, where she found a Notice relating to the cancellation, which was issued by the South African Reserve Bank under the Prudential Authority, which was exhibited as 'MNM2'.
- 4.12 Melody Nyendwa Mayaka stated as advised by the Advocates for First National Bank Zambia Limited, the Notice of Termination of Registration does not require authentication, and that public documents and/or electronically received documents are admissible into evidence without authentication.
- 4.13 The arguments in the List of Authorities and Skeleton Arguments in opposition, were that First National Bank Zambia had demonstrated in the affidavit filed in support of

the application that the Notice of Termination of Etana Insurance Company Limited's registration was received via an email, which was exhibited as 'MNM1'. It was contended that the said email was admissible in evidence, as it was electronic evidence, and it was not hearsay.

4.14 In that regard, **Sections 8 and 9 of the Electronic Communications and Transaction Act** were relied on. Further reliance was placed on **Section 2 of that Act** as defining a *data message*, as including electronic mail. Further authority was sought from the case of **Otk Limited v Amanita Zambiana Limited and others** ⁽¹⁰⁾ stating that the Court in that matter held as follows as regard data messages:

"It is also clear that a person in the service of the person, or entity intending to rely on the data message may produce it."

4.15 Further argument was made that the Notice of Termination of Registration was a public document, and was therefore admissible. The definition of *public document* as given by **Black's Law Dictionary, by Bryan A. Garner, at page 555** was stated as:

"A document of public interest issued or published by a political body or otherwise connected with public business."

4.16 Also relied on, was **Order 5 Rule 9 of the High Court Rules**, which provides that:

“9. Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no Act or statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence, if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted.”

- 4.17 The argument was also that **Section 3 of the Authentication of Documents Act** provides exceptions to the requirement for authentication of documents that are executed outside Zambia, under subsection (c) of that Section, where the document is of public interest, published by an institution connected with public business.
- 4.18 Therefore, as the Notice of Termination of Registration of Etana Insurance Company Limited was published by the South African Reserve Bank, an institution that is connected with public business in that jurisdiction, it was a public document that was signed by the Deputy Governor and CEO under prudential authority. Consequently, it did not require authentication.
- 4.19 This Court was asked, relying on the authority of the case of **Herbert Chankobe v The People** ⁽⁴⁾ to take judicial notice of facts that are so notorious, that no formal evidence is necessary. In that respect, this Court was asked to take

judicial notice of the fact that the South African Reserve Bank is akin to the Bank of Zambia in this jurisdiction.

4.20 It was also argued that Set Point Zambia Limited had admitted that Etana Insurance Company Limited is no longer licenced to conduct insurance business. Therefore, the fact that its' insurance has been terminated should be admissible as evidence before this Court. Reliance was placed on the case of ***Slatteries v Pooley*** ⁽²⁾ as having held that an admission by an opponent as to the contents of a document, is also treated as primary evidence.

4.21 The case of ***Muwindwa Mutemwa Mufundi (married woman) v Meanwood General Insurance*** ⁽¹⁵⁾ was also cited as authority, stating that the Court of Appeal in that matter stated that:

“Issues of authentication should be determined on the merits of each case.”

4.22 Melody Nyendwa Mayaka, in deposing to paragraph 5 of the affidavit filed in support of the Notice of Motion, stated that in December, 2023, she came to learn that the South African Prudential Authority on 26th March, 2019, issued a Notice of Termination of the Registration of Etana Insurance Company Limited. She exhibited as ‘MNM2’, the Notice of Termination of the said registration.

4.23 Going by Melody Nyendwa Mayaka’s averment, her having coming to learn, was hearsay in the sense that she was not informed directly about the deregistration of Etana Insurance Company Limited. However, she exhibited as

proof of her knowledge, exhibit 'MNM2', the said Notice of Termination.

4.24 That Notice was signed by Kuben Naidoo, the Deputy Governor and CEO, Prudential Authority on 10th September, 2019. It was issued under the South African Reserve Bank Bank, Prudential Authority, under the Insurance Act 2017 of South Africa. The Notice stated that the registration of Etana Insurance Company Limited as a short-term insurer had been cancelled with effect from 26th March, 2019.

4.25 In short, the Notice was issued in the Republic of South Africa, and not in Zambia. The law governing use of documents that are executed outside Zambia is the ***Authentication of Documents Acts, Chapter 75 of the Laws of Zambia.***

4.26 A *document* is defined in ***Section 2 of the said Act*** as:

"document" means any deed, contract, power of attorney, affidavit, or other writing, but does not include an affidavit sworn before a Commissioner of the High Court."

4.27 *Authentication* is defined in ***Section 2 of the Authentication of Documents Act*** as:

"authentication", when applied to a document, means the verification of any signature thereon;"

4.28 For documents that are required to be authenticated under the Act, before they can be used in Zambia, only affidavits that are attested by a Commissioner of the High Court, need

not be authenticated, as provided in **Section 4 of the said Act.**

- 4.29 Therefore, exhibit MNM2' being a document that was executed outside Zambia, on the face of it, it required to be authenticated before it could be used here in Zambia.
- 4.30 First National Bank Zambia Limited argued that as the Notice of Termination of Registration of Etana Insurance Company Limited is a public document, having ben issued by an institution connected with public business, it is admissible in evidence and does not need to be authenticated. The argument was further that it falls under the exceptions of documents that are required to be authenticated in line with **Order 5 Rule 13 of the High Court Rules.**
- 4.31 A careful reading of **Order 5 Rule 13 of the High Court Rules** reveals that it applies to documents that are executed in Zambia. Further under that provision, a document will be admissible where no Act or statute exists which renders its' contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence, if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted.
- 4.32 This entails that such a document will only be admissible where no other law requires that the document be proved by means of a copy that is signed and certified as a true copy by the officer in whose custody, the original is entrusted.

Thus, where additional proof is required, those requirements must be satisfied.

- 4.33 The evidence on record shows that exhibit 'MNM2' to the affidavit in support of the Notice is not authenticated, it being a document that was executed outside Zambia. While it may be a public document, the **Authentication of Documents Act** regulates how documents that are executed outside Zambia can be used. They need to be authenticated to verify their genuineness.
- 4.34 It was also argued that exhibit 'MNM2' was electronic evidence, being a data message, in line with **Section 2 of the Electronic Communication and Transactions Act No 4 of 2021**. Therefore, having satisfied the requirements of **Sections 8 and 9 of that Act**, it was admissible. Much as exhibit 'MNM2' can be considered as an electronic document, being a data message, the fact that it was generated in South Africa made it subject to additional methods of proof before it could be used in Zambia.
- 4.35 Thus, exhibit 'MNM2' not having been authenticated, it is not admissible, and as such, it is expunged from the affidavit filed in support of the Notice of Motion.
- 4.36 However, as Set Point Zambia Limited has admitted that Etana Insurance Company Limited's registration was terminated, that is a fact that is admissible in this application.

NOTICE OF MOTION

4.37 Coming to the merits of the Notice of Motion, it was filed pursuant to **Order 14A Rules 1 and 2 and Order 33 Rule 3 of the Rules of the Supreme Court of England, 1999 Edition.**

4.38 **Order 14A of the Rules of the Supreme Court of England,** is as follows in provision:

“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or Judgment as it thinks just.”

4.39 **Order 33 Rule 3 of the said Rules of the Supreme Court of England** on the other hand states that:

“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried

before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”

4.40 The affidavit in support of the Notice, as deposed to by Melody Nyendwa Mayaka, stated that Set Point Zambia Limited commenced this action against First National Bank Zambia Limited claiming payment of ZMW2, 705, 083.54. However, as evidenced by exhibit ‘MNM1’, a letter from Messrs Kevin Cross and Affiliates, which was dated 30th August, 2012, Set Point Zambia Limited was indemnified by Etana Insurance Company Limited in respect of the claim. Her further averment was that Etana Insurance Company Limited is no longer an existing legal entity.

4.41 In the List of Authorities and Skeleton Arguments, reference was made to ***Order 19 Rule 3 (3) of the High Court Rules***, as amended by ***Statutory Instrument No 58 of 2020***, as providing that:

“A party shall not lodge and a Judge shall not consider any interlocutory application, fourteen days before commencement of trial.”

4.42 However, reliance was placed on ***Order 19 Rule 4 of the said High Court Rules*** as giving the Court discretion to still consider an application that is made Fourteen (14) days before trial, where such application could not have been made with reasonable diligence, before the time period specified in ***Order 19 Rule 3 (3)***. On that basis, I was urged to consider the Notice of Motion.

- 4.43 The argument was that Set Point Zambia Limited having been compensated on its' claims by Etana Insurance Company Limited, it does not have any valid legal claims, and that any award given to it, would amount to unjust enrichment. Authority was sought from the decision in the case of ***Fibrosa Spolka Akcyjna v Paribairn Lawson Combe Barbour Ltd*** ⁽³⁾ stating that the said case set out the rationale for unjust enrichment, as being to prevent a man from retaining money or benefiting from a service which is against conscience that he should keep.
- 4.44 Further reliance was placed on the case of ***Gemstar Holding Limited v Afgri Corporations Limited*** ⁽¹²⁾ stating that the Supreme Court, in that matter held that:

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep."

- 4.45 Also cited as authority, was the case of ***Anthony Mwanza v Kagurusu Farming Enterprises Limited, Kenani Musebo*** ⁽¹¹⁾ stating that *Hon Mr Justice P. Matibini* in that matter held that:

"Insurance is an agreement to confer upon the insured a contractual right which, prima facie, comes into existence immediately when loss is suffered by the happening of an event insured

against to be put by the insurer, into the same position in which the insured would have been had the event not occurred, but in no better position.

The indemnity principle underlies the whole of this area of the law of insurance.”

4.46 Further reliance was placed on the case of **Zambia National Building Society v Ernest Mukwamataba Nayunda** ⁽⁷⁾ stating that the said case, guided on the essence of an award of damages, as being to put the injured party in the position they would have been, had they not been injured.

4.47 Based on the above, the specific questions raised in the Notice were addressed as follows:

WHETHER THE CLAIM IF IT IS A SUBROGATION CLAIM IS PROPERLY PLEADED FOR PURPOSES OF DETERMINATION BY THIS COURT?

4.48 On this ground, First National Bank Zambia Limited contended that if the claim is a subrogation claim, that fact being material, it ought to have been specifically pleaded in the pleadings. In so arguing, reliance was placed on **Order 18 Rule 7 (1) of the Rules of the Supreme Court of England**, as providing that:

“every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim...”

4.49 On the function of pleadings, the case of **William David Carlisle Wise v E.F. Harvey** ⁽⁶⁾ was cited and **Halsbury’s Laws of England, 4th Edition, Volume 16 in paragraph**

1438 was stated as providing as follows as regards subrogation:

“Where one person has a claim against another, in certain instances a third person is allowed to have the benefit of that claim and the remedy for enforcing it, even though it has not been assigned to him, and he is then said to be subrogated to the rights of the first person.”

- 4.50 The argument was that if this is an action for subrogation, it had not been properly pleaded, as if it was Etana Insurance Company Limited that had brought the proceedings against First National Bank Zambia Limited, their right that they had accrued as the insurer, arising from the relationship that they had with Set Point Zambia Limited, should have been specifically pleaded.
- 4.51 In the affidavit in opposition to the Notice of Motion, which was deposed to Willie Jansen Van Rensburg, who deposed that he was employed as Head of Claims for Etana Insurance Company Limited, and who is currently employed by Hollard Insurance Company Limited, a company that has acquired Etana Insurance Company Limited, he agreed that Set Point Zambia Limited was indemnified by Etana Company Limited, as there was a policy of insurance No SPL/SLFG/000009229B, between Set Point Zambia Limited and Etana Insurance Company Limited, which was exhibited as ‘WJVEI1’.

- 4.52 He averred that Etana Insurance Company Limited on 17th February, 2011, paid out the claim that was submitted by Set Point Zambia Limited, to which it was entitled contractually by subrogating the claim. He also deposed that in 2013, Hollard acquired 100% shares in Etana Insurance Company Limited, including all its' assets and liabilities, and all the insurance policies, including that which Set Point Zambia Limited had with Etana Insurance Company Limited.
- 4.53 Exhibited as 'WJVE2', was a copy of the merger approval by the Competition Commission of South Africa. It was further stated that even though Etana Insurance Company Limited was acquired by Hollard, it is still in existence, although under voluntary liquidation, as evidenced by exhibit 'WJVE3', a copy of the Companies and Intellectual Property Print Out.
- 4.54 Willie Jansen Van Rensburg whilst deposing that the rights of ownership in any claim by Etana Insurance Company Limited on its' insurance policies remain with Hollard, as Head of Claims, he had instructed the advocates Messrs Nsapato & Co advocates to proceed with this matter. He stated that he had been advised by the advocates for Set Point Zambia Limited, Messrs Nsapato & Co advocates, which advice he verily believed to be true, that there was no need to plead subrogation, as the same does not constitute a cause of action.

- 4.55 It was further argued that the dispute concerned Set Point Zambia Limited, and not Etana Insurance Company Limited, and the issues of indemnification and subrogation did not arise. Therefore, Set Point Zambia Limited has locus standi in these proceedings.
- 4.56 Issue was taken with the affidavit in opposition that was deposed to by Willie Jansen Van Rensberg by Set Point Zambia Limited. The argument in that regard, was that it did not contain the address for the said Willie Jansen Van Rensberg and that he was not the right person to depose to the affidavit.
- 4.57 In response, it was stated that this Court has power to admit a defective affidavit, as long as it is sworn before duly authorised officer, as provided in **Order 3 Rule 13 of the High Court Rules**. It was also argued, citing the case of **Oscar Chinyanta and others v Alesia Building Company Limited and Tap Zambia Limited** ⁽¹³⁾ that an application should have been taken out, to raise the irregularities and not to raise an application in an affidavit.
- 4.58 A perusal of the affidavit deposed to by Willie Jansen Van Rensberg shows that it does not state his address. **Order 5 Rule 20 of the High Court Rules** provides in part as follows:
- “20. The following rules shall be observed by Commissioners and others before whom affidavits are taken:**

(a) Every affidavit taken in a cause or matter shall be headed in the Court and in the cause or matter.

(b) It shall state the full name, trade or profession, residence and nationality of the witness.....”

4.59 The affidavit clearly does not state the residence for Willie Jansen Van Rensburg. Therefore, the said affidavit is defective on that account. No application was made before the affidavit in opposition was filed, raising the irregularity.

4.60 In the case of ***Oscar Chinyanta and others v Alesia Building Construction Limited and Tap Zambia Limited*** ⁽¹³⁾, the Supreme Court held that:

“In this case, the appellant never applied under Order 2, rule 2 to set aside the proceedings for irregularity despite the many irregularities raised most of which did not touch on the issue of jurisdiction. Instead, the appearance filed affidavit in opposition to the originating summons and attended the hearing of the proceedings and then filed detailed submissions pointing out the alleged irregularities. We can say please say that the appellants had waived their right to object when they took fresh steps in the action after becoming aware of the irregularities.”

4.61 Thus, there having been no application that was taken out on the irregularity being brought to First National Bank Zambia Limited's attention, it waived the irregularity.

4.62 In any event, **Order 5 Rule 13 of the High Court Rules** provides that:

“13. The Court or a Judge may permit an affidavit to be used notwithstanding it is defective in form according to these Rules, if the Court or a Judge is satisfied that it has been sworn before a person duly authorised.”

4.63 The affidavit reveals that it was deposed to before a Notary Public in South Africa. Therefore, it was sworn before a duly authorised officer, and it is admissible, despite the defect with regard to the failure to state Willie Jansen Van Rensburg's residence. I will therefore consider it.

4.64 Set Point Zambia Limited argued that Willie Jansen Van Rensburg was not the right person to depose to the affidavit. In the case of **Robert Mbonani Simeza and Finance Bank Zambia Limited v Ital Terrazo Limited** ⁽⁹⁾, the Supreme Court stated as follows:

“At law, anybody can be a witness for a company or indeed any other litigant. He can be such a witness either as a deponent of an affidavit or in oral form. What matters mostly is that he should have personal knowledge of facts he is testifying on.”

- 4.65 The basis upon which it was argued that Willie Jansen Van Rensburg was not the right person to depose to the affidavit was not stated. Therefore, I can only speculate why this so, save to note that he introduced himself as having previously worked for Etana Insurance Company Limited. On that basis, he obviously had personal knowledge of the issues in contention, and was competent to depose to the same.
- 4.66 The gist of the first issue raised in the Notice of Motion is that Etana Insurance Company Limited, who was the insurer for Set Point Zambia Limited, indemnified said Set Point Zambia Limited the value of the loss that it suffered. Thus, if this is a subrogation claim, it should have been specifically pleaded, and that awarding any amounts to Set Point Zambia Limited, would amount to unjust enrichment.
- 4.67 The opposition was that the claims in this matter are not anchored on a subrogation claim. Therefore, there was no need to plead subrogation. The contention by Set Point Zambia Limited was that the claim is between itself and First National Bank Zambia Limited, which is founded in negligence.
- 4.68 ***Black's Laws Dictionary by Bryan A. Garner, 9th Edition Thomson Reuters West Publishing Co 2009 defines subrogation in insurance at page 1564 as:***
- “A provision in a property or liability insurance policy whereby the insurer acquires certain rights upon paying a claim for the loss under the policy. These rights include (1) taking legal action on***

behalf of the insured to recover the amount of the loss from the party who caused the loss and (2) receiving a full or proportionate amount of the benefits (such as disability compensation) paid to the insured under a statutory plan.”

4.69 *Halsbury’s Laws of England, 4th Edition, Vol 16 in paragraph 1439* states that:

“The doctrine of subrogation is applied at law in cases of insurance, where the insurance is a contract of indemnity only. The underwriter or the insurer, upon paying the insured his loss, is entitled to the benefit of all remedies of the insured against persons liable for the loss, whether in contract or in tort, and is entitled to sue in the name of the insured. The right arises in equity and does not depend on the contract between the insurer and the insured.”

4.70 The Writ of summons and statement of claim that were filed in this matter, show that Set Point Zambia Limited claims the sum of ZMW2, 705, 083.54 from First National Bank Zambia Limited, on the basis that CNNC Luanshya Copper Mines Plc was indebted to Set Point Zambia Limited in the sum of US\$508, 478.35.

4.71 However, on cheques being drawn into Set Point Zambia Limited’s name, and were deposited in First National Bank Zambia Limited, First National Bank Zambia Limited collected the payment on the cheques on behalf of Set Point

Mining Zambia Limited thereby causing Set Point Zambia Limited loss.

- 4.72 Exhibit 'MNM1' to the affidavit filed in support of the Notice of Motion raising preliminary issues, shows that Kevin Cross & Associates, wrote to a V.B Malambo SC of Malambo and Company on 30th August, 2012, advising that subsequent on a policy of insurance, Etana Insurance Company Limited had indemnified Set Point Zambia Limited for the damages that it had sustained, and they had been instructed to proceed in the name of Set Point Zambia Limited both in terms of the laws of subrogation and in terms of the policy of insurance.
- 4.73 It has been admitted by Set Point Zambia Limited, that it was indemnified by Etana Insurance Company Limited for the loss. The contention is that the claim in these proceedings is founded in negligence, and therefore, there was no need to plead subrogation.
- 4.74 The claim as pleaded is for the payment of the sum of ZMW2, 705, 083.54 by First National Bank Zambia Limited. The averments in the statement of claim allege negligence resulting in the loss. There is no pleading revealing that the action is founded in subrogation. Set Point Zambia Limited has admitted that it was indemnified for the loss by Etana Insurance Company Limited.
- 4.75 It is trite that an insurance policy indemnifies an insured to the extent of the amount of the loss covered by the insurance

cover. Any excess amount claimed beyond the insurance cover is claimed from the party that made the loss.

4.76 In this matter, exhibit 'WJVE1' to the affidavit in opposition shows that the insurance cover was for a loss of R3, 000, 000.00. The Kwacha equivalent of that amount has not been stated. Therefore, there is nothing to show the exact amount that was paid under the insurance cover, such that it can be said that Set Point Zambia Limited was paid the entire amount of the loss sustained.

4.77 On that basis, it would be premature to conclude that the entire amount paid under the insurance cover was paid to Set Point Zambia Limited by Etana Insurance Company Limited, thereby indemnifying it against the entire loss. Thus, any award paid, would amount to unjust enrichment.

IF THE COURT IS OF THE VIEW THAT THE CAUSE OF ACTION IS PROPERLY PLEADED, WHETHER A SUBROGATION CLAIM CAN BE PROPERLY BROUGHT BEFORE COURT ON BEHALF OF AN ENTITY THAT IS NO LONGER IN EXISTENCE?

4.78 The contention was that Set Point Zambia Limited has no right to pursue the claim, if it is premised on the exercise of the right of subrogation against Etana Insurance Company Limited. This, it was argued, was because Etana Insurance Company Limited settled Set Point Zambia Limited's claim, which arose from the alleged loss of the value of the cheques.

4.79 The argument was further that, as Etana Insurance Company Limited was deregistered as a legal body by the

South African Prudential Authority, on 26th March, 2019, Set Point Zambia Limited cannot not sustain the action, premised on the exercise of the right of subrogation, as Etana Insurance Zambia Limited paid Set Point Zambia Limited. Consequently, any Judgment award in favour of Set Point Zambia Limited would amount to unjust enrichment.

- 4.80 The legal status of a company that is incorporated under the **Companies Act No 10 of 2017** as provided in **Section 16** of that Act was cited, as well as it's capacity to sue and to be sued in its' own name, under **Section 22 of the Act**. Further reference was made to **Section 317 of the said Companies Act** on the effect of cessation of existence of a company, and the case of **Chinika Service Station Limited v Amanita Premier Oils Limited and others** ⁽¹⁴⁾.
- 4.81 Therefore, Etana Insurance Company Limited having been deregistered as a company, it had ceased to exist, and it could not be sued.
- 4.82 It has been seen that Set Point Zambia Limited has admitted that it was indemnified for the loss by Etana Insurance Company Limited. The exact amount of the payment was not stated. Set Point has denied that the claim that it has made in these proceedings, is in subrogation, but rather, the cause of action is founded in negligence.
- 4.83 While the letter exhibited as 'MNM1' to the affidavit filed in support of the Notice of Motion, shows that Kevin Cross & Associates wrote V.C. Malambo SC of Malambo & Company on 30th August, 2012, advising that they had been instructed to

proceed in the name of Set Point Zambia Limited in terms of the law of subrogation and in terms of the insurance policy, the pleadings in the Writ of Summons and Statement of claim are clear that the action is founded in negligence. Therefore, if that is the position, Set Point Zambia Limited is bound by its' pleadings, and the question is whether it will succeed at trial.

4.84 There being no pleading in subrogation, the question of whether Set Point Zambia Limited can proceed against Etana Insurance Company Limited, a company that has since been deregistered does not arise. Suffice to state that effects of deregistration of a company are stated in **Section 317 (6) of the Companies Act No 10 Of 2017** which provides that:

“(6) A company on being de-registered shall—

(a) cease to be entitled to the rights and benefits, conferred in this Act, with effect from the date of the deregistration;

(b) take down any certificate or licence on display in every place of business of the company; and

(c) if the de-registration is due to subsection 1(a) or (b), being a company which is not a dormant company, comply with the Corporate Insolvency Act, 2017.”

4.85 In the case of **Chinika Service Station Limited v Amanita Premier Oils Limited and others** ⁽¹⁴⁾ the Supreme Court held that:

“The company was struck off the register of companies, meaning it was deregistered and ceased to exist as a registered company. An action could not, therefore, be maintained or be continued against the company. At the beginning of this Judgment we stated that we were not surprised that the first Respondent company was not represented. The reason is not far to seek. It was deregistered as a company and effectively ceased to exist. It therefore lost one of the significant incidences of incorporation as given in section 22(I) of the Companies Act namely, “the capacity, rights, powers and privileges of a natural person of full age including the right to sue or be sued in its own name.”

4.86 That limb of the application fails and it is dismissed.

WHETHER SET POINT ZAMBIA LIMITED AND COUNSEL HAVING BEEN ACTING WITHOUT INSTRUCTIONS SINCE 26th MARCH, 2019 FOLLOWING THE INDEMNIFICATION BY THE INSURANCE COMPANY AND THE NOTICE OF TERMINATION OF REGISTRATION OF THE INSURANCE COMPANY?

4.87 On this question, the provisions of **Section 52 of the Legal Practitioners Act Chapter 30 of the Laws of Zambia** were highlighted, and further reliance was placed of **Rule 16 (3) of the Legal Practitioners (Practice) Rules 2002**, stating

that they bar Counsel from acting without instructions from a client.

- 4.88 The case of ***Mushipe (T/A Mushipe Associates and suing as Executor and Trustee of the estate of the late Funny Lunga Yolamu) v Rossi (suing as executor and Trustee of the estate of the late Funny Lunga Yolamu)*** ⁽¹⁶⁾, was also cited as authority.
- 4.89 It was repeated that if this action is a subrogation claim, and Etana Insurance Company Limited having indemnified Set Point Zambia Limited, and Etana Insurance Company Limited having been deregistered, then Set Point Zambia Limited and its' advocates had been acting without any instructions from the insurance company that they purport to be representing.
- 4.90 ***Section 52 of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia*** provides as follows:

52. No practitioner shall-

(a) take instructions in any case except from the party on whose behalf he is retained or some person who is the recognised agent of such party, or some servant, relation or friend authorised by the party to give such instructions; or

(b) mislead or allow any Court to be misled, so that such court makes an order which such practitioner knows to be wrong or improper; or

- (c) tender, or give or consent to the retention out of any fee paid or payable to him for his services of any gratuity for procuring or having procured the employment in any legal business of himself or any other practitioner; or***
- (d) directly or indirectly procure or attempt to procure the employment of himself or his partner or assistant as a practitioner, through or by the intervention of any person to whom remuneration for obtaining such employment has been given by him, or agreed or promised to be so given; or***
- (e) directly or indirectly hold himself out or permit himself to be held out, whether by name or otherwise, as being prepared to undertake professional business for any fee or consideration which shall be less than the scale of charges (if any) for the time being prescribed or approved by the Remuneration Committee; or***
- (f) agree with his client either before, during or after the conduct of any non-contentious professional business to undertake such business for any fee or consideration whatsoever that shall be less than that set out in the scale of charges (if any) for the time***

being prescribed or approved by the Remuneration Committee; or

(g) commit any breach of any of the provisions of Part VIII; or

(h) deceive or mislead any client or allow him to be deceived or misled in any respect material to such client; or

(i) commit any contempt of court; or

(j) contravene the provisions of section fifty-five”

4.91 ***Rule 16 (3) of the Legal Practitioners Rules, Statutory Instrument No 51 of 2002*** states that:

“(3) A practitioner shall not offer services without instructions from a client.”

4.92 As seen from the issues that were raised in the previous question, Set Point Zambia Limited has categorically stated that this claim is not in subrogation, but rather is founded in negligence, between itself and First National Bank Zambia Limited. That being the position, the question of Etana Insurance Company Limited which is no longer a legal entity at law being incapable of instructing Set Point Zambia Limited does not arise.

4.93 I do however agree, that Hollard having taking over the rights and liabilities of Etana Insurance Company Limited, it would have been the right party to instruct Set Point Zambia Limited’s advocates, had the claim been in subrogation, and not its’ employee Willie Jansen Van Rensburg, by virtue of him having been formerly employed by Etana Insurance

Company Limited, unless Hollard specifically authorised him to give instructions to the Advocates for Set Point Zambia Limited.

4.94 This not being a claim in subrogation, the last question raised fails, and it is dismissed.

5. CONCLUSION

5.1 All the questions raised having failed, the application fails. The application to amend the Writ of Summons shall come up on 28th May, 2024 at 08:30 hours. Costs shall be in the cause and leave to appeal is granted.

DATED AT LUSAKA THE 30th DAY OF APRIL, 2024

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**

