

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

2024/HP/1025



BETWEEN:

INDE CREDIT COMPANY LIMITED

PLAINTIFF

AND

GM LEGAL PRACTITIONERS (Sued as a Firm)

DEFENDANT

BEFORE HON. JUSTICE E. P. MWIKISA

**FOR THE PLAINTIFF: MR. M.S CHUNGU OF MESSRS MWAMBA AND MILAN
ADVOCATES**

**FOR THE DEFENDANT: MR. MANDO AND MR. CHULU OF MESSRS MANDO AND PASI
ADVOCATES AND MR. CHISHIMBA OF MESSRS GM LEGAL PRACTITIONERS. ✓**

RULING

Cases Referred To:

- 1) *Finsbury Investments Limited vs. Antonio Ventriglia and Others Selected judgment No. 42 of 2016*
- 2) *Grace Zulu vs. Elemesi Zulu 2017/HP/2205*
- 3) *Horizon Properties Zambia Limited and Another vs. Jaguar Overseas Limited 2016HP/ARB/13*
- 4) *African Banking Corporation Limited vs. Mubende Country Lodge Appeal No. 116 of 2016*
- 5) *Chazyia Silwamba vs. Lamba Simpito (2010) 1 Z.R. 475*
- 6) *Zambezi District Council vs. Zolick Kazanda Chanyika III CAZ Appeal No. 149 of 2018*
- 7) *March Corporation Limited vs. Development Bank of Zambia and Another SCZ judgment No. 3 of 1999*

- 8) *JCN Holdings Limited vs. Development Bank of Zambia Appeal No. 22 of 2013*
- 9) *Leopold Warfold (Z) Limited vs. Unifreight (1985) Z.R. 203 (S.C).*
- 10) *Zambia Revenue Authority vs. Jayesh Shah (2001) Z.R. 60.*
- 11) *Lily Drake vs. M.B.L Mahtani and Another (1985) Z.R 236 r*

Legislation Referred To:

1. *Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court of England, 1999 edition.*

This is the Plaintiff's application for an order to strike out defence and set aside Defendant's application to raise a preliminary issue on a point of law and for an order to enter judgment on admission pursuant to **Order 30 Rule 8** as read with **Order 2 Rule 4** as read with **Section 13** of the High Court Act, Chapter 27 of the Laws of Zambia and **Order 14A Rule 2** as read with **Order 27 Rule 3** of the Rules of Supreme Court of England, 1999 Edition, Whitebook.

The said application is dated 18th September, 2024, and is supported by an affidavit and skeleton arguments of even date. The affidavit was deposed to by one Milan Dipakkumar Desai, Counsel seized with the conduct of the matter on behalf of the Plaintiff herein.

It was deposed therein that the Plaintiff commenced this action against the Defendant by way of a Writ of Summons and Statement of Claim filed on 19th July, 2024, seeking damages for professional negligence.

That on 8th August, 2024, the Michaelmas vacation commenced and the Defendant proceeded to enter an appearance by filing their memorandum of appearance and defence dated 12th August, 2024.

It was deposed further that the Defendant applied to raise a preliminary issue on a point of law dated 22nd August 2024. The deponent conducted a search on the record on or about 12th September 2024, to establish whether the Defendant had obtained leave to file its defence since the defence was filed about 4 days into the Michaelmas vacation. The deponent stated that the search revealed that the Defendant had not obtained leave from the Court to file its defence during the Michaelmas vacation. A copy of the search form was exhibited and marked as "MDD1."

Furthermore, it was deposed that the Defendant's defence is improperly before this Court on the basis that leave was not obtained to file the defence during the Michaelmas vacation. That there is no valid defence to the Plaintiff's Originating Process. This is an appropriate case to enter judgment on admission against the Defendant.

In the skeleton arguments filed in support, Counsel cited **Section 13** of the High Court Act and relied on the case of **Finsbury Investments**

Limited vs. Antonio Ventriglia and Others¹ which reinforced the position that the Court can rely on **Section 13** of the High Court Act to dispose of a matter at an interlocutory stage.

With regards to filing pleadings during the Michaelmas vacation, Counsel relied on **Order 2 Rule 4** of the High Court Rules and the case of **Grace Zulu vs. Elemesi Zulu**² wherein it was stated that it is a mandatory requirement under the High Court Rules for leave of Court to be obtained before filing pleadings during the Michaelmas vacation. Counsel argued that the failure to comply with the above-mentioned provision of the law is fatal as held in the cases of **Horizon Properties Zambia Limited and Another vs. Jaguar Overseas Limited**³.

Additionally, Counsel argued that the Defendant's defence was improperly before Court as leave from Court was not obtained, thus, the Court has no jurisdiction to consider it and that it ought to be struck out accordingly.

Furthermore, Counsel cited **Order 14A** of the Rules of the Supreme Court and the case of **African Banking Corporation Limited vs. Mubende Country Lodge**⁴ and argued that the Defendant has no valid

defence as per the preceding argument. Thus, the Defendant cannot invoke the provisions of Order 14A as they have not satisfied one of the four requirements for invoking the provisions of the said Order. On that basis, Counsel submitted that the Defendant's application to raise a preliminary issue on a point of law is improperly before the Court and ought to be set aside.

With regards to judgment on admission, Counsel relied on **Order 27 Rule 3** of the Rules of the Supreme Court and cited the cases of **Chazya Silwamba vs. Lamba Simpito⁵** and **Zambezi District Council vs. Zolick Kazanda Chanyika III⁶** which fortify the position of Order 27 Rule 3 above-mentioned. Counsel argued that this Court has the power to enter judgment on admission on the basis that a defence has been struck out and the allegations of fact in the Statement of Claim are deemed to be admitted. In fortifying his argument, Counsel argued that the defence dated 12th August 2024 is improperly before this Court and that this entails that the Defendant's defence ought to be struck out and subsequently, the Court ought to enter judgment on admission against the Defendant.

Furthermore, Counsel cited the case of **March Corporation Limited vs. Development Bank of Zambia and Another**⁷ to reinforce the position that lower Courts are bound to follow the latest decisions of Superior Courts on a point. Counsel concluded by buttressing that the latest decision of **Zambezi District Council vs. Zolick Kazanda Chanyika III**⁽⁶⁾, the Court of Appeal makes it clear that where a defence is struck out, the Court may accordingly enter judgment on admission in favour of the Plaintiff under **Order 27 Rule 3** of the Rules of the Supreme Court.

When the matter came up for hearing on 23rd September 2024. Mr. Mando, Counsel for the Defendant made a viva voce application to withdraw the Defendant's defence and preliminary issue, that they would refile the said documents within three (3) days. Counsel submitted that the basis of the application is that it will save a lot of judicial time in writing a ruling over an error that is not in dispute.

Mr. Chungu, Counsel for the Plaintiff opposed this application and stated the following grounds;

- 1) The rules are clear on how interlocutory applications are made.

That the Defendants were aware of the hearing date as far back

as 16th August 2024, thus, they ought to have filed the requisite application unlike ambushing the Plaintiff.

- 2) That the Plaintiff has filed an application that raises three (3) pertinent issues which require the Court's consideration, thus, this application by the Defendant should have been brought before the Plaintiffs' application.
- 3) They do not oppose an adjournment to allow the Defendant to file their affidavit in opposition.

In reply, Counsel Mando submitted that filing documents during the Michaelmas period is a curable defect but not fatal and the Court can either strike off the offending documents with leave to refile the documents.

I have carefully considered the affidavit evidence as well as the list of authorities and skeleton arguments on the record. I note that the Defendant herein has not filed its affidavit in opposition.

This Court is moved pursuant to **Order 2 Rule 4** as read with **Section 13** of the High Court Act, Chapter 27 of the Laws of Zambia. The Plaintiff has raised the following issues;

The first issue raised is that the defence filed on 12th August 2024 be struck off on account of the Defendant's failure to obtain leave of Court to file it during the Michaelmas period. The Plaintiff contends that as per **Order 49 Rule 3(1)** of the High Court Rules, the Michaelmas vacation period commences on 8th August and concludes on 6th September every year. Therefore, a party who seeks to file pleadings between the 8th of August and the 16th of September, must obtain leave of Court before doing so. That failure to do so renders the same to be dismissed as per **Order 2 Rule 4** of the High Court Rules.

Counsel for the Defendant on the other hand orally submitted that filing documents during the Michaelmas period is a curable defect but not fatal and the Court can either strike off the offending documents with leave to refile the documents.

I have examined the provisions of **Order 2 Rule 4** which Mr Chungu relied on. For the avoidance of doubt, the said provision reads as follows;

“Summonses may be issued and pleadings may be amended, delivered or filed during the last eleven days of the Michaelmas and Christmas vacations respectively, but pleadings shall not be amended, delivered or filed during any other part of such vacations unless by the direction of the Court or a Judge”

It is very clear from the above provision that before pleadings are filed, amended, or delivered during any part of the Christmas and Michaelmas vacations excluding the last eleven days of such vacations, leave of the court should be obtained. In the present case, there is no evidence that leave was obtained before filing the defence on 12th August 2024. In determining the first issue raised, I find that the defence was not properly launched by the Defendant as no leave of Court was obtained as per **Order 2 Rule 4** of the High Court Rules.

In relation to the second issue, the Plaintiff urged this Court to set aside the Defendant's application for want of notice of intention to defend. Mr Chungu argued that since the Defendant failed to obtain leave before filing of its defence, they do not have a valid defence. Counsel submitted that the Defendant has not satisfied the requirement for giving notice of intention to defend. Furthermore, since the Defendant have not satisfied the requirement for giving notice of intention to defend, the Defendant have not satisfied one of the four requirements for invoking the provisions of Order 14A of the Rules of the Supreme Court. Thus, the preliminary issue raised by the Defendant ought to be set aside. Counsel relied on the cases of **African Bnaking Corporation Limited**

vs. Mubende Country Lodge Limited⁽⁴⁾ and JCN Holdings Limited vs. Development Bank of Zambia⁸.

There was no submission on the part of the Defendant on this issue.

I am guided by the Supreme Court decision held in the case of **Leopold Warfold (Z) Limited vs. Unifreight⁹** where it was held that;

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

Although there was no compliance with rule 16 of Order X, since the writ was issued before the court's leave could be obtained, the Supreme Court in the above case found that the contravention of that rule was not fatal but curable. The Supreme Court took a similar approach in the case of **Zambia Revenue Authority vs. Jayesh Shah¹⁰** when it held that;

“Cases should be decided on their substance and merit. The Rules must be followed but the effect of a breach will not always be fatal if the rule is merely regulatory or directory”.

Furthermore, the approach that the Supreme Court took in the case of **Lily Drake vs. M.B.L Mahtani and Another¹¹** a matter which was

incorrectly commenced thereby raising the issue of the jurisdiction of the court, was to order an amendment of the originating process and not to dismiss the action on the ground that no injustice was done to the other party.

In the present case, I have already made a finding that the Defendant did not comply with **Order 2 Rule 4** of the High Court Rules as leave was not obtained before the filing of the defence. However, I am guided by the above authorities, I consider the defect or irregularity to be that of a regulatory nature that is not fatal but can be cured.

I have considered that this matter is still in its preliminary stages. I note that there are contentions issues that can only be determined at trial. Therefore, I am of the considered view that no prejudice or injustice will be occasioned to the Plaintiff if the defect is cured.

In relation to the third issue, Counsel for the Plaintiff urged the Court that the Plaintiff be at liberty to enter judgment on admission for the reliefs claimed in the Writ of Summons and Statement of Claim after striking out the Defendant's defence. I do not think this issue is worth addressing because I found that the defect in question is curable.

For the foregoing reasons, I invoke the provisions of **Order 3 Rule 2** of the High Court Rules, Chapter 27 of the Laws of Zambia, and in the interest of justice order that the Defence be deemed to have been issued with leave of the court as provided for under **Order 2 Rule 4** of the High Court Rules. By this order, the defect of not obtaining leave of the court before filing the defence has been cured.

I will not consider the issue pertaining to the application to raise a preliminary issue by the defendant as the defendant submitted that it had withdrawn the said application with a view to applying afresh.

This application is misconceived and it is dismissed accordingly. I make no order as to costs

Dated at Lusaka the^{21st} day of *January*....., 2025

Elita Phiri Mwikisa
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ELITA PHIRI MWIKISA
HIGH COURT JUDGE