

**IN THE COURT OF APPEAL OF ZAMBIA** Appeal No. 128/2023  
**HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**BETWEEN**

**ROBERT MWANZA**

**APPELLANT**

**AND**

**MTN (ZAMBIA) LIMITED**

**RESPONDENT**

27 JAN 2026

**CORAM: Kondolo, SC, Majula and Muzenga, JJA**  
**on 19<sup>th</sup> June 2025 and 27<sup>th</sup> January 2026**

For the Appellant: In Person

For the Respondent: M. J. Chitupila, Messrs Gill & Seph Advocates

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## **J U D G M E N T**

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**Muzenga, JA, delivered the Judgment of the Court.**

Cases referred to:

- 1. Malik v. Birmingham City Council and Another**  
**UKEAT/0027/19/BA.**
- 2. Zia and Hossan v. Secretary of State for the Home**  
**Department [2017] UKUT 123.**
- 3. Irish v. Irish [2012] IEHC 464.**
- 4. Fraser v. London Borough of Richmond Upon Thames**  
**[2003] UKEAT.**
- 5. Drummond Jackson v. British Medical Association [1970]**  
**1 WLR 688.**

6. **Chisata v. Attorney General (SCZ Judgment 3 of 1992) [1992] ZMSC 77.**
7. **Standard Chartered Bank Plc v. Banda – SCZ Judgment No. 18 of 2014.**
8. **Zambia Revenue Authority v. Jayesh Shah – SCZ Judgment No. 10/2001.**
9. **ZESCO Limited v. Harrison Tembo – SCZ Appeal No. 71 of 2016.**
10. **Intermarket Banking Corporation Zambia Limited v. Priscilla Kasonde – SCZ Judgment No. 44 of 2014.**
11. **Wise v. E. F. Harvey Limited (1985) ZR 179.**
12. **Megha Engineering and Infrastructure Limited, Attorney General v. Marks Industries Limited – Appeal 270 of 2021.**
13. **Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 175.**
14. **Yangst Jiang Enterprises Limited (In Receivership) v. Society House Development Company Limited – CAZ Appeal No. 64/2022.**

Legislation referred to:

1. **The High Court (Amendment) Rules, S. I. No. 58 of 2020.**
2. **Rules of the Supreme Court of England, 1999 Edition.**

Other works referred to:

1. **Ogders on Civil Court Actions Practice and Procedures, 24<sup>th</sup> Edition.**
2. **Ogders Principles of Pleading and Practice in Civil Actions in the High Court of Justice.**

## **1.0 INTRODUCTION**

- 1.1 This is an appeal against the ruling of the Honourable Justice P. K. Yangailo delivered on 17<sup>th</sup> February 2023, in which she found

that the plaintiff's pleadings did not disclose a cause of action and consequently dismissed it.

## **2.0 BACKGROUND**

2.1 The background to this appeal is that the appellant alleged that the respondent acted negligently by unleashing an incompetent employee on his case. The appellant sued the respondent with the following reliefs endorsed on the writ:

- i) damages for inconvenience;**
- ii) damages for misrepresentation of the time it would take to carry out a sim replacement;**
- iii) damages for infraction of the plaintiff's right to expect and be provided with good, satisfactory and efficient service;**
- iv) Interest**
- v) Costs.**

2.2 The appellant was desirous of having his analogue simcard replaced with a 4G simcard supplied by the respondent which was trumpeted as having superior, uninterrupted connectivity. The appellant arrived at the respondent's outlet at Mukuba Mall in Kitwe on 2<sup>nd</sup> September 2022 around 10:40 hours understanding that the process of sim replacement took only about 10-15 minutes. He was however treated to an unwillingly long and unbearable wait from 10:40 to 16:00 hours on the basis that his old sim card has been removed and kept by the respondent's

novice and incompetent employee, who was using a wrong code hence occasioning the failure and delay in the process.

2.3 The appellant was later around 16:00 hours advised to go home on the assurance that he would receive a call to confirm completion of the process around 17:00 hours. The appellant did not receive any call and when he called the respondent's employee, he was told that his issue was for another day. When the appellant visited the respondent's outlet on 3<sup>rd</sup> September 2023, he was told that the person to resolve his issue would be around on 5<sup>th</sup> September 2022. Infuriated, the appellant requested to be attended to by the senior most person in the outlet who replaced his sim card within 15 minutes.

2.4 In its defence, the respondent denied the plaintiff's claims and filed a summons for an order to strike out writ of summons and statement of claim and dismiss the action for failure to disclose a cause of action, being frivolous, vexatious and an abuse of court process pursuant to **Order 14A** and **Order 18 Rule 19 of the White Book**. The application was supported by an affidavit in which it was avowed that the appellant's action was premised on a claim for damages for inconvenience, damages for misrepresentation and damages for infraction of his right to be

provided with good, satisfactory and efficient service and further referenced negligence on the part of the respondent.

- 2.5 That an action that referenced negligence must always give particulars of the alleged negligence, that is, it must be clearly stated and pleaded facts that demonstrate the basis upon which there was a supposed duty owed by the defendant to the plaintiff. That a thorough examination of the pleadings showed that the appellant had not, as per requirement and detail referred to the negligence or pleaded facts or given particulars of the alleged negligence. Further that the appellant failed and/or omitted to specifically plead, with proper particularity, facts relating to misrepresentation. It was avowed that the pleadings had not disclosed that the appellant suffered any loss or damage or support the claim for inconvenience.
- 2.6 It was contended that the pleadings were devoid of merit and did not reveal a grievance or a cause of action that would entitle him to judgment against the respondent and thus frivolous, vexatious and an abuse of court process.
- 2.7 The appellant opposed the application by contending that he had supplied facts necessary for the plaintiff to prove his case and the action could not fail for want of cause of action. It was averred

that the respondent could not expect the appellant's pleadings to contain evidence as same should only contain facts and not evidence. That the claimed lack of particularity concerning negligence or misrepresentation cannot be relied on to establish that there are no facts disclosed in this case which have been traversed by the respondent and on which liability can attach.

### **3.0 DECISION OF THE COURT BELOW**

3.1 The learned trial judge considered the respondent's application and found that the pleadings did not disclose a reasonable cause of action in respect to the claim for misrepresentation and did not disclose facts upon which liability for negligence can be reasonably attributable to the respondent. That the appellant had not complied with the requirements for pleading his claims and had not made the necessary application to cure the shortcomings. The learned trial court consequently dismissed the appellant's cause of action.

### **4.0 APPEAL**

4.1 Aggrieved with the decision of the lower court, the appellant has appealed, advancing the following grounds of appeal:

- 1) The court below erred in law and fact under the circumstances of this case having noted striking out pleadings is a draconian action and having**

framed the question for determination as being whether or not the appellant's suit should be struck out and/or dismissed on the ground that originating process instituting the case was incurably defective to have proceeded to dismiss the appellant's case as framed granted the case was not incurably defective and in the absence of any demonstration of prejudice or reference to prejudice to have been suffered by the respondent.

- 2) The court below erred in law and in fact in not considering that there was nothing in the appellant's statement of claim which begged to be included and which could have made the respondent fail to file defence as the respondent's filed defence sufficiently answered to all issues raised by the appellant.
- 3) The court below erred in law and in fact in dismissing the appellant's case without considering that one of the claims by the appellant namely, the claim for inconvenience stood unscathed entailing that at worst the appellant's case was still salvageable and not amenable to dismissal.
- 4) The court below erred in law and fact to have dismissed the appellant's case on the ground of lack of disclosure of particulars of negligence and on the ground of lack of particulars of misrepresentation in light of the fact that there was no claim made in negligence and as the facts needed to found damages for misrepresentation had in the statement of claim been supplied and responded to.
- 5) The court below erred in law and fact in proceeding to dismiss the appellant's case on the ground that the appellant did not make an

**application to cure the alleged shortcomings in the statement of claim.**

## **5.0 APPELLANT'S HEADS OF ARGUMENT**

5.1 In support of ground one, it was argued that in dismissing the appellant's action, the court below only relied on the reason of **"failure to disclose a cause of action"** and not **"failure to disclose a reasonable cause of action."** That the respondent in making their application relied on **Order 18 Rule 19 of the RSC.** It was argued that the court acknowledged that its dismissal of the appellant's case was draconian as dismissal of a case on, *inter alia* the ground that it does not disclose a cause of action or let alone the admitted draconian ruling dismissing the appellant's action is not to be resorted to willy nilly as did the court below. The appellant placed reliance on the case **Malik v. Birmingham City Council and Another.**<sup>1</sup>

5.2 The case of **Zia and Hossan v. Secretary of State for the Home Department**<sup>2</sup> was also referred to where it was stated that: **"taking into account particularly the draconian character of a strike out and refusal to reinstate decisions, I am inclined to forgive the omission in the circumstances."**

- 5.3 The appellant referred to several authorities including the cases of **Irish v. Irish<sup>3</sup>** and **Fraser v. London Borough of Richmond Upon Thames<sup>4</sup>** for the submission that the exercise of the draconian power to dismiss an action is proscribed in many respects.
- 5.4 Relying on **Drummond Jackson v. British Medical Association,<sup>5</sup>** the appellant argued that his case had some chance of success as it did not just disclose some reasonable cause of action but did raise some question fit to be decided by the judge. We were also referred to the case of **Chisata v. Attorney General.<sup>6</sup>**
- 5.5 It was contended that a look on the record and in particular the proceedings or even the ruling of the court below does not hint to any prejudice suffered or which was to be suffered by the respondent. We were referred to the case of **Standard Chartered Bank Plc v. Banda<sup>7</sup>** for the proposition that the dismissal of the appellant's action by the court was unwarranted as there was no prejudice to the respondent and should therefore be set aside.
- 5.6 In support of ground two, it was argued that the respondent made its application to dismiss the appellant's action in the alternative

after having already answered fully to the appellant's writ of summons and statement of claim. That had the court below focused on the appellant's statement of claim and as well as the respondent's defence, the court should have found that there was nothing in the statement of claim which begged to be included and which could have made the respondent fail to answer anything or fail to file a defence. That it is trite that for a party seeking particulars as was the respondent, they should have made an application in court for further and better particulars as provided for under **Order 18/12/39 of the RSC.**

5.7 The appellant relied on the case of **Zambia Revenue Authority v. Jayesh Shah<sup>8</sup>** and **Standard Chartered Bank Zambia v. Chanda** *supra* and urged us to reverse the ruling of the court below.

5.8 Ground three of the appeal was abandoned.

5.9 In support of ground four, the appellant argued that the court below was wrong to conclude as it did because a look at paragraph 15 of the statement of claim reveals no claim for or based on negligence having been made by the appellant. It was further contended that the court below should not have dismissed the appellant's case for lack of particulars of misrepresentation as

the facts needed to found damages for misrepresentation had in the statement of claim been supplied and responded to.

5.10 Ground five, was withdrawn vide the appellant's notice dated the 29<sup>th</sup> May 2024.

## **6.0 RESPONDENT'S HEADS OF ARGUMENT**

6.1 In response to ground one, it was argued that the failure to disclose a cause of action was sufficient enough reason for the lower court to dismiss the appellant's pleadings. It was argued that the appellant's pleadings made a claim for negligence against the respondent in breach of **Order 18 rule 8(16) of the RSC** with respect to the requirement to plead with utmost particularity in what respects the respondent was negligent. That the pleadings failed to demonstrate the facts on which the supposed duty is founded, the duty to the appellant with the breach of which the respondent was charged. The case of **ZESCO Limited v. Harrison Tembo**<sup>9</sup> was referred to in this regard.

6.2 It was argued that the appellant's pleadings also made a claim for misrepresentation against the respondent in breach of **Order 18 Rule 12(29) of the RSC** as the same was not properly particularised contrary to the **Intermarket Banking**

**Corporation Zambia Limited v. Priscilla Kasonde**<sup>10</sup> where the Supreme Court guided as follows:

**“We agree that the appellant did not plead fraud or misrepresentation with sub heads stating particularities of fraud or misrepresentation as provided under Order 18 rule 8(16) of the Rules of the Supreme Court which states that, misrepresentation should always be pleaded with proper particularity.”**

- 6.3 The respondent further argues that the appellant references loss and damage in paragraph 15 of the pleadings but failed to clearly state the particulars of the loss and damage in the statement of claim, the failure thus flying in the teeth of the requirements discussed in **Odger’s Principles of Pleading and Practice in Civil Actions in the High Court of Justice** where it is guided that in a claim for loss, injury or damage the particulars must be clearly stated in the statement of claim.
- 6.4 That the overall impact of the appellant’s failures is that the pleadings fail to disclose a cause of action as described in **Wise v. E. F. Harvey Limited**.<sup>11</sup>
- 6.5 It was further contended that in respect of the pleadings being defective and in the absence of an amendment, they were incurably defective. That **Order 18 Rule 12 of the RSC** which

speaks to the requirement to apply for particulars is inapplicable to this case as **Order 18 Rule 8(16) and Rule 12(29) of the RSC** provide for clear mandatory requirements with respect to the claims that the appellant made against the respondent.

- 6.6 In response to the appellant's argument that the respondent did not suffer any prejudice and as such the lower court should not have dismissed the matter, the respondent submitted that in light of the pleadings being defective, even without the argument of prejudice, the court was left with no other option but to dismiss the appellant's pleadings.
- 6.7 In response to ground two, the respondent argued that the appellant's argument lacked merit and demonstrated a total failure to understand **Statutory Instrument No. 58 of 2020** and specifically **Order 11 rule 1**. We were referred to our decision in **Megha Engineering and Infrastructure Limited, Attorney General v. Marks Industries Limited**.<sup>12</sup> It was argued that when it first entered its defence and thereafter filed its application to challenge the pleadings, they were merely complying with **Order 11 rule 1 of the High Court Rules** and the precedent set in **Megha Engineering *supra***.

- 6.8 In relation to ground 4, it was argued that this ground is incorrectly based on the argument that there was no claim made for negligence and that the facts needed for misrepresentation had been supplied and responded to by the respondent. That contrary to the appellant's assertions, he did make a claim for negligence in paragraph 14 of the statement of claim, albeit that the claim was poorly made and in clear breach of the requirements of pleading. That paragraph 15 of the statement of claim also clearly makes a claim of negligence on the part of the respondent which claim was not supported by particulars. It is contended that the lower court was thus on firm ground when it dismissed the pleadings on grounds that the claim for negligence did not disclose particulars of negligence.
- 6.9 The respondent further argued that the appellant's claim only goes as far as claiming a general and bare claim for damages for misrepresentation and does not disclose or supply facts needed for misrepresentation.
- 6.10 We were urged to dismiss this ground of appeal for lack of merit.
- 6.11 All in all, counsel prayed that we uphold the ruling of the lower court and dismiss the appellant's appeal.

## **7.0 THE HEARING**

7.1 At the hearing of the appeal, the parties relied on their respective arguments and briefly augmented.

## **8.0 DECISION OF THE COURT**

8.1 We have carefully considered the record, the ruling appealed against, as well as the written and oral submissions advanced by the parties.

8.2 Our question for determination is whether, based on the evidence on record, it can be said that the appellant's pleadings did not comply with the requirements for pleading his claims and liable to be struck out. We shall, in this regard, consider grounds one and four together as they are interrelated.

8.3 The requirement to plead with utmost particularity has its root in the general principles on pleadings well expressed under **Order 18/12/2 of the RSC** as follows:

**"The requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises and, as far as possible, so as to minimise costs..."**

8.4 Every pleading must therefore contain the necessary particulars of any claim, defence or other matter pleaded. In relation to negligence, **Order 18/12/29 of the RSC** provides as follows:

**"Negligence — Particulars must always be given in the pleading, showing in what respects the defendant was negligent. The statement of claim ought to state the facts, upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged."**

8.5 On an allegation of misrepresentation, **Order 18/12/27 of the RSC** requires that **"misrepresentation must be pleaded with the utmost particularity..."**

8.6 Paragraph 14 of the appellant's statement of claim was couched as follows:

**"14. The Defendant in its above dealings with the plaintiff acted negligently with the particulars of the negligence being that:**

- i) The defendant unleashed an incompetent/novice servant/employee on the plaintiff.**
- ii) The defendant did not check on work delegated to junior staff or make inquiries when some customers take too long in an outlet.**
- iii) There was exhibited a general 'I don't care attitude' by the servants/employees of the defendant."**

- 8.7 A careful examination of the statement of claim, particularly paragraph 14 extracted above shows that negligence was, as a matter of fact particularised, albeit not in the manner that it is commonly particularised and headed but sufficiently showing in what respects the defendant was negligent, and the facts upon which the supposed duty which was breached, was founded.
- 8.8 While it is further apparent that misrepresentation must be pleaded with utmost particularity and distinctly alleged and proved, misrepresentation in this instant is merely a relief that the appellant was seeking in the court below and did not need to be specifically pleaded and particularised. It does not appear to us as a cause of action in the way it features in the pleadings.
- 8.9 A claimant is at large to endorse the writ with the reliefs sought and the onus to prove, on the balance of probabilities why the said reliefs should be granted is on them. The trial court thus had a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality as illustrated in **Wilson Masauso Zulu v. Avondale Housing Project Limited.**<sup>13</sup> The court should have therefore allowed triable issues proceed to trial and decide the matter on its

substance and merit and not strike it out on account of defective pleadings, as was in *casu*.

- 8.10 Besides, the learned authors of **Odgers on Civil Court Actions Practice and Procedures, 24<sup>th</sup> Edition** state regarding the court's power to strike out pleadings at page 207 that:

**"On an application based on this ground alone, no evidence is admissible. The application is analogous to a demurrer and the court can look only at the pleadings and particulars, not any at any affidavit. The court's power is exercisable at any stage of the proceedings, but it should only strike out a pleading in "plain and obvious cases" and where no reasonable amendment would cure the defect."**

- 8.11 Similarly, in **Drummond Jackson v. British Medical Association** *supra* the court intimated that the power to strike out a pleading for failure to disclose a reasonable cause of action was one which should be exercised only in plain and obvious cases, where the alleged cause of action, on consideration only of the allegations in the pleadings, was certain to fail.

- 8.12 It is quite clear from the foregoing that whilst the court has the inherent jurisdiction to strike out pleadings for being defective, such power should be exercised sparingly only in plain and obvious cases where no reasonable amendment would cure the defect therein or even the consideration of the allegations in the

pleadings was bound to fail. In our view, the pleadings were not defective as they disclose a reasonable cause of action. In any case, we hold the view that the trial court should have thoroughly interrogated the pleadings, and if it did, it would certainly have reached a conclusion that not every defect is incurably bad. We consequently find merit in grounds one and four.

8.13 The gist of the appellant's displeasure in ground two is that the respondent made its application to dismiss the appellant's action in the alternative after having already answered fully to the appellant's writ of summons and statement of claim.

8.14 In **Megha Engineering** *supra* we addressed the effect of the amendment of **Order 11 of HCR** that under the current **Order 11 Rule 1 of S. I. No. 58 of 2020**, there is no requirement for entering of a conditional appearance. We stated thus:

**"... for purposes of challenging the writ for irregularity, the filing of the defence will not amount to a "fresh step" taken to waive the irregularity as the law now requires that there must be a defence on the record before an application to challenge the writ maybe made."**

8.15 We further clarified this position in **Yangst Jiang Enterprises Limited (In Receivership) v. Society House Development Company Limited**<sup>14</sup> when we stated that:

**"A defendant who has been served with a writ and intends to apply by summons to the court to set aside the writ on grounds that the writ is irregular or that the court has no jurisdiction, where previously that defendant would have entered conditional appearance, now has no option but to enter a memorandum of appearance a defence."**

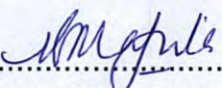
8.16 The respondent herein rightly entered its defence and subsequently filed an application challenging the pleadings, in compliance with **Order 11 Rule 1 of the HCR**. We thus find no merit in this ground and accordingly dismiss it.

### **9.0 CONCLUSION**

9.1 Having found merit in grounds 1 and 4, we allow the appeal. The matter is sent back to the High Court for trial before a different Judge.

9.2 Ground 2 is dismissed for want of merit. Costs will be in the cause.

  
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M. M. KONDOLO, SC  
**COURT OF APPEAL JUDGE**

  
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B. M. MAJULA  
**COURT OF APPEAL JUDGE**

  
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K. MUZENGA  
**COURT OF APPEAL JUDGE**