

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**2021/HP/0346**



**BETWEEN:**

**PETRODA ZAMBIA LIMITED  
AND  
YASSER ABDALLAH HAMZA**

**PLAINTIFF**

**DEFENDANT**

**BEFORE THE HONOURABLE LADY JUSTICE A. MALATA-  
ONONUJU IN CHAMBERS ON THIS 19<sup>TH</sup> DAY OF JUNE 2024.**

*For the Plaintiff:*

*W. Simutenda – Messrs. TMB  
Advocates.*

*For the Defendant:*

*M. Mwanga – Messrs. MAK  
Partners Legal Practitioners.*

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**RULING**

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**CASES REFERRED TO:**

- 1. Access Bank (Zambia) Group Vs Group Five/ZCON Business Park Joint Venture (SCZ 8 52 of 2014) [2016] ZMSC 24 (26 February 2016); and*
- 2. Yogesh Kuntawala Vs Chirundu District Counsel Appeal No. 57 of 2020;*

**LEGISLATION AND WORKS REFERRED TO:**

- 1. The Rules of the Supreme Court, White Book. (1999) Edition;*
- 2. The High Court Rules, High Court Act, Chapter 27 of the Laws of*

*Zambia;*

3. *Statutory Instrument No. 58 of 2020 of the Laws of Zambia; and*
4. *Patrick Matibini, Zambian Civil Procedure: Volume 1 (LexisNexis, 2017).*

## **1. INTRODUCTION**

1.1 This Matter came up for Status Conference on 13<sup>th</sup> June, 2024, having been re-allocated to this Court on 3<sup>rd</sup> May, 2024. Present were Counsel for both the Plaintiff and the Defendant.

## **2. BACKGROUND**

2.1 The Plaintiff commenced this action against the Defendant on 30<sup>th</sup> March, 2021, by way of Writ of Summons accompanied by a Statement of Claim seeking the following reliefs:

- i. *An Order for forthwith vacation by the Defendant from the Plaintiff's residential property and premises situate at and known as F/40a/88A, Lilayi, Lusaka;*
- ii. *An Order for Ex-Parte Reparative Injunction directing the Defendant whether by himself, his agents, servants, employees or otherwise to forthwith vacate the Plaintiff's residential property and premises;*
- iii. *An Order for payment of mesne profits by the Defendant to the Plaintiff at the rate of USD500.00 per month arising from the illegal and continued stay in the Plaintiff's residential property and premises from the 8<sup>th</sup> March, 2021, to date and continuing;*

- iv. *Exemplary and aggravated damages for loss of use of the said residential property and premises by the Plaintiff to be assessed by the Court;*
- v. *Damages for inconvenience suffered by the Plaintiff as a result of the blatant refusal by the Defendant to vacate the Plaintiff's residential property and premises for no cogent reason(s) or at all;*
- vi. *Interest at current Bank of Zambia Lending Rate on (iii), (iv) and (v) above;*
- vii. *Costs of the action herein; and*
- viii. *Any other relief the Court may deem fit under the circumstances.*

**2.2** The case as pleaded by the Plaintiff in its Statement of Claim is that it is a limited company by shares duly incorporated in the Republic of Zambia under the provisions of the Companies Act No. 7 of 2017 of the Laws of Zambia and a former employer of the Defendant.

**2.3** That by a contract of employment dated 24<sup>th</sup> January, 2014, the Defendant was employed by the Plaintiff as a Property Maintenance Officer on a permanent and pensionable basis and as an incidence of his employment, the Plaintiff provided the Defendant with residential accommodation at the Plaintiff's property situate at F/40a/88A, Lilayi, Lusaka.

2.4 Following the termination of the Defendant's employment with the Plaintiff, the Plaintiff demanded that the Defendant vacates the said premises within 30 days up to the 28<sup>th</sup> February, 2021. However, the Defendant refused, failed and/or neglected to

- vacate the Plaintiff's premises. The Plaintiff, by letter dated 1<sup>st</sup> March, 2021, exercised maximum leniency and afforded the Defendant a further grace period of up to 8<sup>th</sup> March, 2021 to vacate the said residential property and premises.
- 2.5 By a further letter dated 5<sup>th</sup> March, 2021, the Plaintiff demanded that the Defendant vacates the property strictly and before 8<sup>th</sup> March, 2021 but the Defendant has to date refused, failed and/or neglected to do so.
- 2.6 It was submitted that the Plaintiff's said residential property and premises is intended for accommodation by the Plaintiff's serving employees and that by reason of the Defendant's illegal continued stay and occupation in the said property, the Plaintiff's employee who has since replaced the Defendant is not accommodated by the Plaintiff and that the Plaintiff is paying rentals for the accommodation of the said employee to third party landlords when the Plaintiff has its own property.
- 2.7 That by reason of the Defendant's acts and conduct above, the Plaintiff has suffered loss and damage as a result thereof.
- 2.8 The Record shows that the Defendant has not, to date, filed Memorandum of Appearance and Defense in this Matter.
- 2.9 The Plaintiff, on 30<sup>th</sup> March, 2021, filed *Ex-Parte* Summons for an Order of Interim Reparative Injunction pending the hearing and determination of the main Matter pursuant to **Order 29 Rule 1** of the **Rules of the Supreme Court 1999 Edition (White Book) Volume 1** as read together with **Order 27 Rule 1** of the **High Court Rules, Chapter 27 of the Laws of Zambia**.

The Summons were filed with an Affidavit and List of Authorities and Skeleton Arguments in Support of Even date.

- 2.10 The Record shows that a Hearing was held on an unknown date wherein the presiding Judge ordered that the Matter come up for *Inter-Parte* hearing on 16<sup>th</sup> April, 2021. None of the Parties were present at this Hearing.
- 2.11 The Defendant filed Affidavit in Opposition to the Application for an Order for Interim Reparative Injunction pending the Hearing and determination of the main Matter on 14<sup>th</sup> April, 2021. There are no List of Authorities nor Skeleton Arguments in Opposition on the Record.
- 2.12 The *Inter-Parte* Hearing was held on 16<sup>th</sup> April, 2021. Counsel for both Parties were present and submitted accordingly.
- 2.13 The presiding Judge delivered the Ruling stamped and dated 7<sup>th</sup> December, 2023 and found as follows:

***“In dealing with these two questions, I bear in mind that irreparable damage is such as can not be atoned for by an award of monetary damages. Though the Defendant will suffer grave inconvenience if removed from the Plaintiff’s accommodation, I do not find that such inconvenience will in actual fact amount to irreparable damage. Secondly, I have no hesitation an award of damages will atone whatever damage the Defendant will suffer.*”**

***Following from above, I find and hold that the Plaintiff before me has on the preponderance of probabilities shown that the Defendant is not entitled to an***

**injunction over its property and I allow the application with costs to the Defendant.**

***Informed Right to Appeal.***” (Emphasis mine)

- 2.14 Following the above Ruling, the Plaintiff, on 14<sup>th</sup> December, 2023, filed Praecipe to Writ of Possession and Writ of Possession commanding the Sherriff of Zambia to enter the property and premises and cause the Plaintiff company to have vacant possession thereof.
- 2.15 On 14<sup>th</sup> December, 2023, the Defendant filed *Ex-Parte* Summons for an Order to Stay Execution of the Judgment dated 24<sup>th</sup> November, 2023 pending determination of Application to Discharge Interim Reparative Injunction for non-disclosure of facts. The Summons was accompanied with an Affidavit in Support and Skeleton Arguments and List of Authorities in Support.
- 2.16 The Record does not have a Judgment dated 24<sup>th</sup> November, 2023, however, I cautiously assume that the Judgment referred to is the one stamped and dated 7<sup>th</sup> December, 2023 determining the Application for Injunction.
- 2.17 I have further taken note that on the Affidavit in Support of Ex-Parte Summons for an Order to Stay Execution of the Judgment dated 24<sup>th</sup> November, 2023 pending determination of Application to discharge Interim Reparative Injunction for non-disclosure of facts, is an endorsement by the then presiding Judge signed and dated 15<sup>th</sup> December, 2023, which states as follows:

***“The Injunction was discharged & not granted.”***

- 2.18 The Defendant on 20<sup>th</sup> December, 2023, further filed Summons for an Order to set aside Writ of Possession pursuant to **Order 45 Rule 3(5)** of the **Rules of the Supreme Court of England (White Book) 1965** and an Ex-Parte Summons for an Order to Stay Execution of Writ of Possession dated 14<sup>th</sup> December 2023 pending determination of Application to set aside the Writ of Possession for Irregularity. Both Summons were accompanied with a Combined Affidavit in Support of Summons to for an Order to set aside Writ of Possession and Summons of Stay of Execution of Writ of Possession.
- 2.19 The presiding Judge did not Rule on the Defendant's Applications above.
- 2.20 There is on Record, an Interlocutory Judgment in Default of Appearance and Defence against the Defendant pursuant to **Order XII Rule 1** of the **High Court Rules, Chapter 27 of the Laws of Zambia**, drawn and filed by Advocates for the Plaintiff. However. Despite bearing the High Court of Zambia Registry stamp dated 28<sup>th</sup> April, 2021, the same was never signed by the then presiding Judge, Justice Katanekwa, as he was then.

### **3. HEARING**

- 3.1 Following the re-allocation of the Matter to this Court on 3<sup>rd</sup> May, 2024, a Status Conference Hearing was held on 13<sup>th</sup> June, 2024. Counsel for both Parties was present.
- 3.2 Counsel for the Defendant, Mr. M. Mwango submitted that they wished to abandon all of the Defendant's Applications save for the Application to Discharge the Reparative Injunction filed on

14<sup>th</sup> December 2023 as well as the Application to set aside Writ of Possession filed on 20<sup>th</sup> December, 2023.

- 3.3 Counsel for the Plaintiff submitted that without preempting the determination or hearing of those Applications, particularly the Application to Discharge the Reparative Injunction, the Reparative Injunction was granted by the High Court and it being an Order of the High Court, the appropriate method of challenging it would be through an Appeal as the High Court is *functus officio* with respect to that Application.
- 3.4 Counsel further submitted that with respect to the Application to set aside the Writ of Possession, the said Writ was long executed over 6 months ago and that there was no reason challenge it at this stage other than to waste scarce Judiciary resources and time.
- 3.5 It was Counsel's submission that in the interest of progress in this Matter which commenced in 2021, and a Matter which the Defendant has never filed Defense, it would be in the interest of justice that the matter is heard on its substance and merits for progress as opposed to hearing Applications that would have no consequence.
- 3.6 That a Judgment in Default was filed as far back as April 2021 which has been pending execution or signature by the Court.
- 3.7 Counsel submitted that it was for the above reasons that they now seek the guidance of this Court in the interests of justice.
- 3.8 Counsel for the Defendant in Reply submitted that **Order 29/1A/33 of the Rules of the Supreme Court of England** does grant this Court the jurisdiction or powers to discharge an

Order of Injunction granted by the Court as guided by the same Rule. That it was the Defendant's wish for this Court to determine the Application filed on 14<sup>th</sup> December, 2023 to discharge the Injunction.

3.9 In Reply to their Application to set aside the Writ of Possession, which Writ Counsel for the Defendant contended was obtained irregularly, it was argued that this Court still has the powers to set it aside and to further guide on the status quo that ought to exist between the Parties pending determination of the main matter.

3.10 Counsel argued that this was pertinent considering that some of the claims or some of the reliefs the Plaintiff is making or seeking in its Statement of Claim relates to whether the Defendant is properly in the house or should vacate the house and that therefore, not determining the Applications prejudices the Defendant.

3.11 With regards to the Judgment in Default, Counsel contended that the said Judgment has not been signed by this Honorable Court and therefore, the Plaintiff cannot rely on the same in its arguments.

#### **4. ANALYSIS AND DECISION OF THE COURT**

4.1 I am grateful to the submission given by Counsel for Parties during the Status Conference.

4.2 Having perused the Record and having taken into consideration the oral submissions by Counsel for the Parties, it is my considered view that there are two issues that must be dealt with and these are as follows:

1. The Defendant's failure to file a Memorandum of Appearance and Defence;
2. Whether this Court is indeed *functus officio* with regard to the Defendant's Application to Discharge the Reparative Injunction.

4.3 It is trite that a Defendant must file Memorandum of Appearance and Defence in an action commenced by way of Writ of Summons. **Rule 5/1 of Statutory Instrument No 58 of 2020** which amended **Order XI** of the Principle Rules states as follows:

***"1. (1) A defendant shall enter appearance to a writ of summons by delivering to the proper officer, in writing or electronically, sufficient copies of the—***

***(a) memorandum of appearance dated on the day of delivery and stating, as the case may be—***

***(i) the name of the defendant's advocate; or***

***(ii) that the defendant is defending in person;***

***and***

***(b) defence and the counterclaim, if any, together with a list of—***

***(i) description of documents to be relied on by the defendant at trial; and***

***(ii) list of witnesses to be called by the defendant at trial".*** (Emphasis mine)

4.4 The Defendant's failure to adhere to the mandatory rules of procedure above has an impact on applications made by summons or motion. **Order 14A** of the **Rules of the Supreme**

**Court (White Book) 1999 Edition (RSC)** is clear on this aspect. **Order 14A/2/3** gives the requirements of **Order 14A** and states that a Court's ability and jurisdiction to determine questions of law and construction are restrained by the Defendant's failure to give notice of intention to defend.

4.5 **Order 14A/2/4** of the **RSC** states as follows:

*“The wording of para. 1(3) makes it clear that the determination of any question of law or construction under this Order can only be made if the defendant has given notice of intention to defend. It precludes the Court from determining any such question unless the parties i.e. both the plaintiff and the defendant, have had any opportunity of being heard on the question or have consented to an order or judgment being made on such determination. This requirement underscores the importance of the procedure under this Order in ensuring that both parties have participated or have had the opportunity to participate in the final disposal of the case on a point of law or construction. If the defendant fails to give notice of intention to defend, the plaintiff will be entitled to proceed to judgment in default under Order 13.”*

4.6 The amendment of **Order XII** of the **High Court Act** as contained in **Statutory Instrument No. 58 of 2020** above must be read together with **Order 14A, r1, r 2/3** and **r 2/4** of the **RSC**. The consequences of the Defendant's failure to give

notice of intention to defend by filing Memorandum of Appearance and Defense in the manner prescribed, is clear.

- 4.7 The consequences of non-adherence to mandatory provisions of the law was pronounced in the Supreme Court case of **Access Bank (Zambia) Group Vs Group Five/ZCON Business Park Joint Venture** <sup>(1)</sup> in which Malila JS (as he was then) in delivering the judgment of the court stated as follows:

***“In NFC Mining Plc Vs Techpro Zambia Limited we warned that failure to comply with rules by litigant could be fatal to their case, we dismissed that appeal in that case on account of the appellant’s failure to comply with the rules. We stated among other things that Rules of Court are intended to assist in the proper and orderly administration of justice and as such must be strictly followed”.*** Emphasis mine)

- 4.8 As regards the second issue above, Counsel urged this Court to hear the Defendant’s Application to Discharge the Reparative Injunction filed on 14<sup>th</sup> December 2023 as well as the Application to set aside Writ of Possession filed on 20<sup>th</sup> December 2023.

- 4.9 In response, Counsel for the Plaintiff submitted that the Reparative Injunction was granted by the High Court and it being an Order of the High Court, the appropriate method of challenging it would be through an Appeal as the High Court is *functus officio* with respect to that Application.

- 4.10 Justice Patrick Matibini, the learned author of **Zambian Civil Procedure Commentary and Cases**, states at page 1135 that:

***“As a matter of general principle, once a Judgment or order has been made, the court is functus officio and no longer has Jurisdiction over the matter in controversy”.***

4.11 The Order was granted by the High Court Judge by a Ruling followed by an endorsement signed and dated by the said Judge discharging the Reparative Injunction made, renders this Court *functus officio*. I am buttressed by the Court of Appeal in the case of **Yogesh Kuntawala Vs Chirundu District Counsel** <sup>(2)</sup> wherein it was stated:

***“As such, we are inclined to agree with the appellant to the extent that the lower court became functus officio as regards the question of jurisdiction when it rendered the first ruling.”***

4.12 With regards to the two issues I have addressed above, Counsel for the Parties have clear recourse should they wish to employ them to ensure the substantive Matter is heard on its merits.

**DELIVERED AT LUSAKA THIS 17<sup>TH</sup> DAY OF JUNE 2024**



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**A. MALATA-ONONUJU  
HIGH COURT JUDGE**