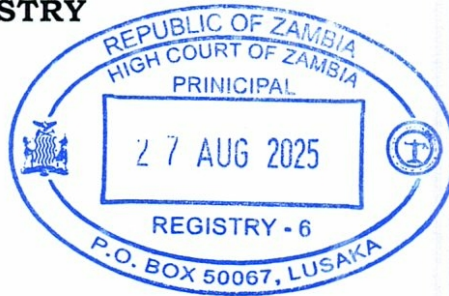


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2025/HP/0679



BETWEEN:

ESTHER PHIRI

PLAINTIFF

AND

GAVI BEVERAGES LIMITED

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 27th
DAY OF AUGUST, 2025**

For the Plaintiff : Mr K. Kalimbwe, Messrs Charles Siamutwa Legal
Practitioners

For the Defendant : Mr M. Sakala, Messrs P.H. Yangailo & Co

R U L I N G

CASES REFERRED TO:

1. *Emmanuel Nkhata Chirumba v Union Bank Zambia Limited (in liquidation)* SCZ No 7 of 2003
2. *Credit Africa Bank Limited (in liquidation) v Elias Namo Kundiona* SCZ No 9 of 2003
3. *Access Bank v Group Five Zcon Business Park Venture (Suing as a firm)* 2016 ZMSC 24
4. *The People v Henry Kapoko* CCZ/43/2017
5. *Edesi Kasanzale Crehan v New Future Financial Company Limited & two others* 2020/HP/216
6. *Alfred Chilinda v KCM (in liquidation)* (COMP/IRDLK/398/2018) 2024 ZMHC 32

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England, 1965, 1999 Edition*
2. *The Corporate Insolvency Act No 9 of 2017*

1. INTRODUCTION

- 1.1 By summons which were filed on 21st May, 2025, pursuant to **Section 66 of the Corporate Insolvency Act No 9 of 2017** and **Order 2 Rule 2 of the Rules of the Supreme Court of England, 1965, 1999 Edition**, the Defendant herein, Gavi Beverages Limited seeks an Order of this Court, to set aside the proceedings against it, as they were commenced without the leave of the Court.
- 1.2 The application was supported by an affidavit and a List of Authorities and Skeleton Arguments.
- 1.3 In opposing the application, the Plaintiff, Esther Phiri, filed an affidavit in opposition and a List of Authorities and Skeleton Arguments on 3rd June, 2025.
- 1.4 An affidavit in reply and a List of Authorities and Skeleton Arguments in reply were filed on 6th June, 2025.

2. BACKGROUND

- 2.1 Esther Phiri, suing by Writ of Summons which is accompanied by a statement of claim and the other requisite documents, which were filed on 16th May, 2025, commenced this action against Gavi Beverages Limited.
- 2.2 She claims:
 - i. *An Order of injunction restraining Gavi Beverages Limited from using her image and likeness;*
 - ii. *Damages for breach of contract;*
 - iii. *Costs of and incidental to these proceedings; and*
 - iv. *Any other relief that the Court may deem fit.*

- 2.3 Gavi Beverages Limited filed the application which is the subject of this Ruling.

3. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR GAVI BEVERAGES LIMITED

- 3.1 Counsel for Gavi Beverages Limited, submitted that they had applied to set aside the proceedings, and that in doing so, they relied on the affidavit which was filed in support of the application together with the List of Authorities and Skeleton Arguments in support.
- 3.2 In augmenting, Counsel stated that **Section 66 of the Corporate Insolvency Act** is couched in mandatory terms, as it uses the word shall. Therefore, leave was a must before Esther Phiri could commence this action.
- 3.3 As further authority, the case of **Credit Africa Bank Limited (in liquidation) v Elias Namo Kundiona** ⁽²⁾ was relied on, stating that in that matter, the Court stated that the purpose of obtaining leave, is to ensure that the assets of a company are administered in an orderly fashion for the benefit of all the creditors.
- 3.4 It was also submitted that the said case held that creditors should not be able to obtain unfair advantage by bringing separate actions against a company in order that the affairs of a company are wound up in a dignified and orderly way.
- 3.5 Thus, by Esther Phiri not having obtained leave to commence proceedings against Gavi Beverages Limited, she would gain unfair advantage against all the Creditors of the

company, which would prevent the Court from ensuring that all the affairs of the company were wound up in a dignified and orderly way.

RESPONSE BY COUNSEL FOR ESTHER PHIRI

- 3.6 In response, Counsel conceded that leave to commence these proceedings was not obtained. However, his submission was that Esther Phiri was not aware that Gavi Beverages Limited was in liquidation. Counsel noted that while that was not a defence, they placed reliance on the case of ***Alfred Chilinda v KCM (in liquidation)*** ⁽⁶⁾, stating that Hon Lady Justice Mikalile faced with the same situation, as in this case, stated that the High Court had discretion to stay the proceedings until such leave was obtained.
- 3.7 Therefore, Counsel asked this Court to stay the proceedings pending leave being obtained, adding that Esther Phiri is a retired athlete, who is currently not earning any income, as she is still tied to Gavi Beverages Limited.
- 3.8 Counsel added that dismissing the matter would be advancing the injustice that Esther Phiri was facing at the hands of Gavi Beverages Limited.

REPLY BY COUNSEL FOR GAVI BEVERAGES LIMITED

- 3.9 It was submitted in reply, that Counsel relied on the affidavit in reply and the List of Authorities and Skeleton Arguments in reply. He stated that as evidenced by the affidavit in reply, Esther Phiri was aware of the appointment of the Liquidator, and that the letter of demand which was filed into Court was copied to the Liquidator.

3.10 Thus, it was reiterated that the proceedings be set aside with costs.

4. DECISION OF THIS COURT

4.1 I have considered the application.

4.2 **Section 66 of the Corporate Insolvency Act** provides that:

“66. Where a winding-up order is made or a provisional liquidator is appointed, an action or proceeding shall not be proceeded with, or commenced against, a company except by leave of the Court and subject to such terms and conditions as the Court may impose.”

4.3 **Order 2 Rule 2 of the Rules of the Supreme Court of England, 1965, 1999 Edition** on the other hand, states that:

“(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.”

4.4 Marvin Sakala, Counsel who is seized with conduct of the matter on behalf of Gavi Beverages Limited, deposed in the

affidavit which was filed in support of the application, that a Winding Up Petition was filed in the Commercial Registry at the Kitwe High Court, under cause number 2024/HKC/ 064 on 6th November, 2024, for winding up Gavi Beverages Limited.

- 4.5 Then as shown by the Ex-Parte Order and the Ruling of the Court, which were exhibited as 'MS1a' and 'MS1b', a Provisional Liquidator was appointed to preserve the assets of Gavi Beverages Limited.
- 4.6 Martin Sakala deposed that the winding up proceedings in Kitwe were still subsisting. However, Esther Phiri commenced these proceedings on 16th May, 2025.
- 4.7 In the List of Authorities and Skeleton Arguments which were filed in support of the application, Gavi Beverages Limited, citing **Section 66 of the Corporate Insolvency Act**, contended that Esther Phiri could not commence these proceedings against it, as it was a company for which a Provisional Liquidator had been appointed, and no leave of the Court had been obtained to commence the proceedings.
- 4.8 The case of **Emmanuel Nkhata Chirumba v Union Bank Zambia Limited (in liquidation)** ⁽¹⁾ was stated as where the Supreme Court, with reference to **Section 281 of the Companies Act Chapter 388 of the Laws of Zambia**, which is similar in provision to **Section 66 of the Corporate Insolvency Act** stated that:

“Under Section 281 of the Companies Act, Chapter 388 of the Laws, it is mandatory upon a party

wishing to commence or proceed with an action against a limited liability company in liquidation to obtain such leave from the High Court.”

- 4.9 The case of ***Alfred Chilinda v KCM (in liquidation)*** ⁽⁶⁾ was further relied on, in which the High Court stated that under ***Section 66 of the Corporate Insolvency Act***, where a Provisional Liquidator is appointed, an action or proceedings shall not be proceeded with against a company, except with leave of the Court.
- 4.10 In opposition, Esther Phiri deposed in the affidavit in opposition, that as shown by exhibit ‘EP1’, the Writ of Summons, statement of claim and the application for an Order of injunction, indeed she commenced this action against Gavi Beverages Limited on 15th May, 2025.
- 4.11 She also exhibited as ‘EP2’ the application that Gavi Beverages Limited filed to set aside the proceedings as leave was not obtained to commence them.
- 4.12 Esther Phiri stated that failure to obtain leave to commence the proceedings was inadvertent, and that she did so as a client had approached her, who would like exclusively to use her image and likeness, which she would like to accept, as Gavi Beverages Limited had not been adequately compensating her, as she had retired from professional boxing, and she needed to earn a living.
- 4.13 In the List of Authorities and Skeleton Arguments in opposition, relying on the provisions of ***Article 1(1) of the Constitution***, it was argued that the Supreme Court is the

supreme law of the land. It was also stated that **Article 118 (2) (e) of the said Constitution** provides that justice must be administered with undue regard to procedural technicalities.

- 4.14 The case of **Henry Kapoko v The People** ⁽⁴⁾ was stated as also having reiterated this position.
- 4.15 It was argued that while this is the position, it did not in any way mean that the Court must disregard the Rules of procedure when handling cases. The argument was that the overarching objective must be to ensure that justice is dispensed without excessive focus on rigamarole, that serves to stymie the efficient dispensation of justice, and the disposal of Court cases.
- 4.16 It was noted that **Section 66 of the Corporate Insolvency Act** provides that leave of the Court must be obtained to commence proceedings where a winding up order has been made by the Court or where a Provisional Liquidator has been appointed by the Court.
- 4.17 However, it was argued that Esther Phiri was not aware of the appointment of the Provisional Liquidator. Various authorities, among them, **Access Bank v Group Five Zcon Business Park Venture (Suing as a firm)** ⁽³⁾ were cited in support of the argument that justice should be seen to be done.
- 4.18 Also relied on, was the case of **Alfred Chilinda v KCM (in liquidation)** ⁽⁶⁾, stating that the Court in that matter, stayed the proceedings pending the obtaining of leave.

- 4.19 The affidavit in reply reiterated that leave to commence the proceedings was not obtained. It was stated that Esther Phiri was either aware that a Provisional Liquidator had been appointed or of the winding up order which appointed the Liquidator, as the letter of demand which was exhibited as 'MS1', which Esther Phiri filed through her advocates, was expressly copied to the Liquidator.
- 4.20 The skeleton arguments in reply reiterated the provisions of **Section 66 of the Corporate Insolvency Act** and that it uses the word shall, entailing that is a mandatory requirement.
- 4.21 In arguing that Esther Phiri was aware that a Provisional Liquidator had been appointed to ensure that the assets of Gavi Beverages Limited were preserved, the definition of constructive notice as given by **Black's Law Dictionary** was stated.
- 4.22 It was also argued, citing **Order 5 Rule 15 of the High Court Rules**, that paragraphs 10 and 11 of the affidavit in opposition, contained extraneous matters by way of prayers. The case of **Edesi Kasanzale Crehan v New Future Financial Company Limited & two others** ⁽⁵⁾ was relied on, as where the Court expunged paragraphs 14, 14, and 19 of an affidavit, as they contained legal arguments and prayers.

DECISION

- 4.23 A perusal of paragraphs 10 and 11 of the affidavit which was filed in opposition shows that read as follows:

“10. That the application made by the Defendant to set aside the writ for irregularity and or want of jurisdiction is not one that fatally jeopardises any court action against it and I beseech this Court to grant a stay of proceedings.

11. That I seek the indulgence of this Honourable Court to grant the Order to stay proceedings pending an application for leave to commence court process against a company with a provisional liquidator filed alongside this affidavit.”

4.24 ***Order 5 Rule 15 of the High Court Rules, Chapter 27 of the Laws of Zambia***, states the following:

“15. An affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion.”

4.25 The above provision is very clear, that an affidavit shall not contain extraneous matters by way of objection, or legal argument or conclusion.

4.26 A reading of the impugned paragraphs, shows that they are clearly legal arguments and a prayer. As such they are expunged from the affidavit in opposition.

4.27 Coming to whether these proceedings can be sustained in the absence of leave having been obtained to commence them, the Ruling of the Court dated 20th November, 2024 under cause number 2024/HKC/064, in which the parties are Trident Packaging Limited against Gavi Beverages

Limited and is exhibited as 'MS1a' to the affidavit which was filed in support of the application, confirmed the appointment of Maaya Chipwayambokoma as the Provisional Liquidator for Gavi Beverages Limited, and directed that the Petition would come up on 23rd January, 2025.

- 4.28 Gavi Beverages Limited argued that Esther Phiri was aware of the appointment of the Provisional Liquidator or of the Winding Up Order, as through her advocates, she served the letter of demand which is on the Court record, on Gavi Beverages Limited, which was copied to the Liquidator.
- 4.29 A perusal of the said letter of demand, which is on the Court record, shows that it was written to Gavi Beverages Limited on 25th April, 2025, and it was copied to the Liquidator, KMPG Zambia by the advocates Charles Siamutwa Legal Practitioners.
- 4.30 Therefore, Esther Phiri having instructed her advocates to write and serve the letter of demand on Gavi Beverages Limited, which was copied to the Liquidator, she was aware that there were winding up proceedings or that a Liquidator had been appointed to manage the affairs of Gavi Beverages Limited.
- 4.31 Having commenced these proceedings through an advocate, Esther Phiri ought to have been aware of the provisions of **Section 66 of the Corporate Insolvency Act.**
- 4.32 In the case of ***Emmanuel Nkhata Chirumba v Union Bank Zambia Limited (in liquidation)*** ⁽¹⁾ the Supreme Court on

appeal against the refusal by the Judge to grant leave to commence proceedings against a company which was in liquidation, noted as follows:

“In disposing of an application for leave under the Act, one has to be mindful of the fact that the wording of Section 281 is not of our own creation, but rather something that we have borrowed from the English Companies Acts that have evolved over the years. Bearing this in mind we have ventured to find out from the English authorities in what circumstances such applications (for leave) have been disposed of. The learned authors of Palmer’s Company Law, Twenty-first Edition, at page 771, under the sub-heading “Liberty to proceed,” assert that the court often exercised power to allow actions and other proceedings to be brought, taken or proceeded with, notwithstanding a winding up order. As for secured creditors, the liberty to proceed with any action for enforcing their securities is a matter of course. With regard to an outsider, such as, is the case in the present appeal, the learned authors assert that the liberty to proceed against a company in liquidation is often given where the outsider or individual is “involved in some dispute with the company and it is desirable that the dispute should be decided in an action by the ordinary tribunals: For instance,

in the case of an action against the company ... for specific performance or for trespass ...". In our view, the principle is that if there is a dispute involving a company in liquidation, that ought to be settled through a trial. It is immaterial to argue that leave should not be granted because the liquidator has taken full charge of the matters affecting the company. We say so because in this kind of arrangement one of the matters a liquidator inherits, apart from known assets and liabilities, are pending suits for and against the company."

- 4.33 While this is not an application for leave to commence proceedings against a company that is in liquidation, but one to stay such proceedings pending the obtaining of leave to do so, the factors that a Court should consider when granting leave are applicable in deciding whether I should stay the proceedings pending the obtaining of leave.
- 4.34 In the case of ***Alfred Chilinda v KCM (in liquidation)*** ⁽⁶⁾ which has been relied on by Esther Phiri, the Court observed that the Complainant commenced proceedings before the Industrial Relations Division of the High Court on 19th May, 2019, six months before the Respondent, KCM (in liquidation) was placed under liquidation.
- 4.35 On that basis, the Court stayed the proceedings pending the obtaining of leave to proceed against a company in liquidation.

4.36 In this matter however, Esther Phiri was aware that there were winding up proceedings against Gavi Beverages Limited and that a Liquidator had been appointed to manage its' affairs, at the time that she commenced the proceedings. However, without obtaining leave before commencing these proceedings, the matter was commenced.

4.37 Therefore, the case of ***Alfred Chilinda v KCM (in liquidation)*** ⁽⁶⁾ is distinguishable from this case on that basis.

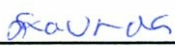
5. CONCLUSION

5.1 The Rules of the Court exist for the orderly conduct of litigation, and those who disobey them, do so at their own risk.

5.2 As such, Esther Phiri having been aware of the winding up proceedings, and that a Provisional Liquidator had been appointed to manage the affairs of Gavi Beverages Limited, commencing these proceedings without the leave of the Court in breach of ***Section 66 of the Corporate Insolvency Act***, was irregular.

5.3 The proceedings are accordingly set aside for irregularity with costs to Gavi Beverages Limited, which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THE 27th DAY OF AUGUST, 2025


S. KAUNDA NEWA
HIGH COURT JUDGE

