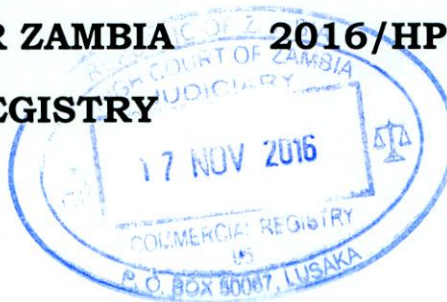


IN THE HIGH COURT FOR ZAMBIA 2016/HPC/0276
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



B E T W E E N:

CMA CGM ZAMBIA LIMITED

PLAINTIFF

and

INTERFOOD ZAMBIA LIMITED

DEFENDANT

Before the Hon. Madam Justice Irene Z. Mbewe in Chambers
on the 17th November 2016

For the Plaintiff:

*Mr. S. Bwalya of Messrs
Christopher Russell & Cook*

For the Defendant:

*Mr. J. Zimba of Messrs Makebi
Zulu & Company*

R U L I N G

Cases Referred to:

1. *Standard Chartered Bank v Wisdom Chanda SCJ*
18/2014
3. *NFC Mining Plc v Techpro (Zambia) Limited [2009] ZR 236*
3. *Leopold Walford v Unifreight [1985] ZR 203*
4. *Jayesh Shah v Zambia Revenue Authority [2001] ZR 63*
5. *Ram Auerbach v Alex Kafwata (5) Appeal No 65 of 2000*

6. *Jamas Milling Company Limited v Imex International Limited* [2002] ZR 79
7. *Access Bank Zambia Limited v Group Five/ZCON Joint Venture* SCZ/8/52/2014
8. *Petch v Gurney* [1992] STC 892

Authorities Referred to:

1. *Blacks Legal Dictionary, 9th Edition, Thomas*

Legislation referred to:

1. *High Court Rules Cap 27 of the Laws of Zambia.*
2. *Supreme Court Rules, 1999 Edition.*
3. *Commissioner for Oaths Act, Cap 33 of the Laws of Zambia*
4. *Constitution of Zambia Act No 2 of 2016*

This is an application by the Defendant for misjoinder made by way of summons pursuant to **Order 14 Rule 5 (2) of the High Court Rules, Cap 27 of the Laws of Zambia.** The summons is accompanied by an affidavit deposed by Hani Ezeddine and skeleton arguments filed into Court on 8th July 2016.

The background to this application is that the Plaintiff commenced an action by way of Writ of Summons on 6th June, 2016, for the sum of US\$22,672.80 plus interest being a reimbursement to the Plaintiff arising from a payment made by the Plaintiff on behalf of the Defendant.

I have perused the Defendant's affidavit in support of the application for misjoinder, and find that the jurat does not state the place where it was sworn nor does it state the date the Affidavit was sworn. According to **Black's Legal Dictionary** a jurat:

"is the clause written at the foot of the affidavit stating when, where and before whom such affidavit was sworn."

An Affidavit must contain a verification clause, jurat and signature of the deponent. **Order 5 Rule 20 (g) of the High Court Rules, Cap 27 of the Laws of Zambia** provides as follows:

"The following rules shall be observed by Commissioners and others before whom affidavits are taken:

(g) *The jurat shall be written, without interlineations, alteration or erasure (unless the same shall be initialed by the Commissioner) immediately at the foot of the affidavit, and towards the left side of the paper and shall be signed by the Commissioner.*

It shall state the date of the swearing and the place where it is sworn.

The **Commissioner For Oaths Act, Cap 33 of the Laws of Zambia** under Section 6 provides that:

"Every Commissioner For Oaths before whom any oath or affirmation is taken or made under this Act shall state truly in

the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

From the two sections cited of the respective law, it follows that an Affidavit that fails to show in the jurat the date the oath was taken or the place it was sworn or affirmed, is contrary to the mandatory provisions and requirements of **Order 5 Rule 2 (g) of the High Court Rules** and **Section 6 of the Commissioner For Oaths Act, Cap 33 of the Laws of Zambia**. I therefore find that the affidavit filed on 8th July, 2016 is not a valid affidavit as the Jurat is defective.

In support of this position, there is a plethora of authorities on the failure to follow court rules such as the case of **Standard Bank v Wisdom Chanda, Christopher Chanda (1), NFC Mining Plc v Techpro (Zambia) Limited (2)**. I have also considered the case of **Leopold Walford v Unifreight (3)** where the Supreme Court held that:

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

Similarly in the case of **Zambia Revenue Authority and Jayesh Shah (4)**, it was held by the Supreme Court that:

"Cases should be decided on their substance and merit. The Rules should must be followed but the effect of a breach will not always be fatal if the rule is merely regulatory or directory. However, guided by the above authorities, I consider the defect or irregularity to be that of a regulatory rule which is not fatal

but can be cured depending on the stage of the proceedings and whether the breach or irregularity causes prejudice to the Respondents."

In the case of **Ram Auerbach v Alex Kafwata (5)** the Supreme Court held as follows:

"litigants default at their own peril since any rights available as of course to a non-defaulter are usually jeopardised"

In the case of **Jamas Milling Company Limited v Imex International Limited (6)**, the Supreme Court stressed as follows:

"While we agree that rules of procedure are meant to facilitate proper administration of justice, we do not accept that in all cases rules cannot be made mandatory, and that their breach cannot be visited by unpleasant sanctions against a party who breaches them it is not in the interest of justice that parties by their shortcomings should delay the quick disposal of cases and cause prejudice and inconvenience to other parties."

I concur with the principles set out in the cited authorities, and the need for litigants to obey court procedure. It is imperative that Rules of procedure on the one hand should not be ignored, and conversely, errors and lapses should not disadvantage the other party. In the administration of justice, **Article 118 (2) (e) of the Constitution of Zambia Act No 2 of 2016** states that justice shall be administered without undue regard to technicalities. More often than not, whenever procedural deficiencies arise, a number of Counsels seek

solace in Article **118 (2) (e) of the Constitution of Zambia Act No 2 of 2016**. In my view, **Article 118 (2) (e) of the Constitution of Zambia** should not be used by defaulting litigants like a magic wand where a stroke of the wand will make lapses and errors go away in total disregard of court rules.

I take the position elucidated by the Supreme Court in the case of **Access Bank Zambia Limited v Group Five/ZCON Business Park Joint Venture (4)** where it was succinctly stated as follows:

"Article 118 (2) (e) of the Constitution of Zambia never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts."

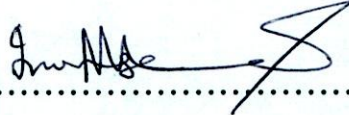
In the present case, the language of **Order 20 of the High Court Rules and Section 6 of the Commissioner For Oaths Act** is mandatory and not directory. I find that the Affidavit is rendered incurably defective and the said affidavit is therefore expunged from the record. In view of my finding that the Affidavit is defective, it means that there is no evidentiary value to the Defendant's application for misjoinder as it lacks foundational and evidentiary support and has no leg to stand on.

Therefore, the sum total is that the Defendant's application for misjoinder is struck off. The Defendant is at liberty to re-file a proper Affidavit that meets the requirements of the law.

Costs are awarded to the Plaintiff and in default of agreement to be taxed.

Leave to appeal is granted.

Delivered at Lusaka the 17th day of November 2016.

A handwritten signature in black ink, appearing to read 'Irene Z. Mbeve', is written over a horizontal dotted line.

HON IRENE Z. MBEWE
HIGH COURT JUDGE