

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

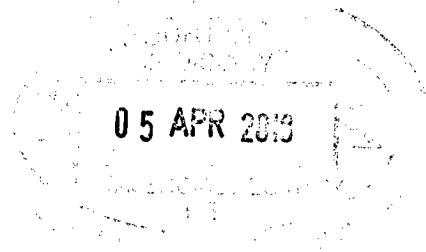
2017/HPC/0373

BETWEEN:

CHILUMBA FRANCIS NGOSA

AND

BERNARD ANGETILE



PLAINTIFF

DEFENDANT

Coram: The Hon. Lady Justice Dr. Winnie S. Mwenda in Chambers at Lusaka the 5th day of April, 2018.

For the Plaintiff: Mr. S. Lungu of Shamwana and Company.

For the Defendant: Mr. R. Mwanza and Mr. R. Mukuka, both of Robert and Partners.

RULING

Cases referred to:

1. *Mutantika and Another v. Chipungu*, Appeal No. 94/2012 [2014] ZMSC 127.
2. *Chief Mwanatete v. Lushato and Another*, 2014/HP/1043 (2014) ZMHC 100.
3. *Attorney General v. Edward Jack Shamwana, Valentine Shula Musakanya, Mundia Sikatana, Godwin Yoram Mumba, Anderson Kambwali Mporokoso, Macpherson Mbulo, Patrick Mkandawire. Matinanja Liswaniso, Thomas Mupunga Mulewa, Godfrey Miyanda, Deogratias Simba, Albert Chilambe Chimballe and Roger Kanyembu Kabwita* (1981) Z.R. 12 (H.C.).
4. *Ravindvanath Morargi Patel v. Rameshbhai Jagabhai Patel – SCZ Appeal No.– SCZ Appeal No.7 of 2012.*

Legislation referred to:

1. Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.
2. Order 5, rule 15 of the High Court Rules, Chapter 27 of the Laws of Zambia.
3. Order 33, rule 3 of the Supreme Court Practice, 1999 (the White Book).
4. Order 18, rule 11 (2) of the Supreme Court Practice, 1999 (the White Book).

This is the Plaintiff's application to raise a preliminary issue brought pursuant to Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia. The application is brought by way of a Notice to Raise Preliminary Issue. The issues raised are the following, namely:

1. Whether or not the Defendant can raise legal arguments in an Affidavit;
2. Whether or not the Defendant can raise a fresh issue in the Affidavit of Reply that was not raised in the initial Affidavit.

By agreement of the parties, no oral arguments were proffered, the parties having opted to rely on their written submissions and Skeleton Arguments. The gist of the Plaintiff's preliminary issue is that the Defendant's Affidavit in Reply to Affidavit in Opposition to Summons for Further and Better Particulars filed into court on 7th November, 2017, raises assertions that amount to legal arguments and further, that the said Affidavit in Reply raises assertions not previously raised by the Defendant in his Affidavit in Support. To prove the Plaintiff's claims, Counsel for the Plaintiff quoted the paragraphs referred to verbatim as follows:

"4. The insistence by the Plaintiff's advocates, in response/opposition to furnishing of further and better particulars through a letter exhibited as "SML1" in the Plaintiff's Affidavit in Opposition and through the Affidavit in Opposition itself, that the Plaintiff is unable to furnish further and better particulars because "the Statement of Claim is very specific and refers to clear facts that arise from an agreement signed by our respective clients" and furnishing of further and better particulars sought "would amount to evidence" cannot stand for the following factual reasons:

- (i) The Plaintiff wishes to hide and not reveal to me and this court the amount actually lent and thereby thrust on me a debt (an alleged outstanding amount) which from any angle be extortionist and unconscionable.**
- (ii) The Plaintiff wishes to hide and not to reveal to me and this court what interest the Plaintiff had been claiming/claims and how the borrowed amount which the Plaintiff appears uncomfortable mentioning could, slightly over one year,**

exponentially rise to a staggering ZMW 958,690.00 despite acknowledged payments over the period made by me.

- (iii) The Plaintiff wishes to hide and not reveal to me and this court the genesis of my alleged indebtedness (which indebtedness I deny) through, inter alia, not disclosing what payments I have made.**
- (iv) The Plaintiff wishes to hide and not reveal to me and this court that a company (Linber Enterprises Limited) in which I am director was the actual borrower though the company does not owe the Plaintiff anything.**
- (v) The further and better particulars sought are not evidenced out facts to clarify matters already pleaded by the Plaintiff such as "money borrowed", interest as per, inter alia, paragraph 7 (i) of the Statement of Claim.**

5. That it may be noted further that the Plaintiff cannot run away from disclosing particulars that open up the claimed debt not only from court scrutiny but to me so as to allow me to file a defence to deal conclusively with the Plaintiff's claim. The particulars sought by me in this application and my letter to the Plaintiff are: Shown and produced hereto marked "BA1" is a copy of the letter from my advocates to the Plaintiff's advocates requesting for further and better particulars."

6. That the Statement of Claim in its current form should be puzzling to anyone as one cannot wake up and claim that the basis of why a person is indebted to them is that they admit to owing some amount – this is claiming a debt in mid-stream a vacuum and is tantamount to starting a narrative/claim. It behoves the Plaintiff to come out over the claimed debt in court instead of being escapist and vague and denying opportunity to respondent for purposes of fairness."

It was the Plaintiff's Counsel's submission arguments that Order 5, rule 15 of the High Court Rules, proscribes the inclusion of legal arguments in an affidavit and therefore, the inclusion of legal arguments by Counsel for the Defendant offends the said Order. Order 5, rule 15 of the High Court Rules provides as follows:

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

According to Counsel, the above provision was highlighted in the case of *Mutantika and Another v. Chipungu*¹, where the Supreme Court expunged some paragraphs in the Affidavit in Opposition for containing legal arguments. Learned Counsel argued that it is clear from the foregoing authority that the paragraphs alluded to raise legal arguments and are conclusive in form. That this is in the real sense a departure from Order 5, rule 15 and therefore contravenes the requirements of Order 5, rule 15 and should not be entertained. It is Counsel's submission that the Court has the power to order that any affidavit which is not in compliance with the Order be expunged.

Learned Counsel for the Plaintiff submitted further, that paragraph 5 of the Defendant's Affidavit in Support of Summons for Further and Better particulars asserts as follows:

"That the further and better particulars required were thus:

(1) As regards paragraph 3 of the Statement of Claim:

- (i) The date(s) when borrowed money(s) was/were availed/advanced?***
- (ii) Amount of principal advanced?***
- (iii) The capacity in which the Plaintiff and Defendant are alleged to have entered into an agreement dated 10th November, 2016?***
- (iv) Prior understanding between the Plaintiff and Defendant which gave vent to the alleged 10th November, 2016 agreement?***
- (v) What material terms constituting the 10th November, 2016 agreement anchored the Defendant's alleged liability to the Plaintiff through alleged admission of the staggering ZMW 948,690.00?***
- (vi) What is this ZMW 948,690.00 and how did it come about or what is its breakdown as it is only alleged in paragraph 3 of the Plaintiff's Statement of Claim, without any foundation, that the Plaintiff admitted to owing ZMW 948,690.00?***
- (vii) Whether or not the Plaintiff has received any monies from the Defendant from the date of the alleged borrowing and before this court process and if***

so, how much and what the payments constitute this/such received payment(s)?

(viii) Who was the borrower?

(2) As regards paragraph 4 of the Statement of Claim:

(i) Which debt and amounting to what did the Defendant allegedly commit to settle?

(3) As regards paragraph 5 of the Statement of Claim:

(i) Which court judgment awarded costs to the Plaintiff's advocates enjoining the Defendant to pay costs?

Counsel submitted with regards to paragraph 7 of the Affidavit in Reply to the Affidavit in Opposition to Summons for Further and Better Particulars that the Defendant states as follows:

"7. That in any case in paragraph 7 (i) of the Statement of Claim, the Plaintiff actually renders credence to my apprehensions necessitating this application before this court by stating that the Plaintiff claims "an order for payment of the sum of ZMW 948,690.00 being the amount outstanding from the Defendants to the Plaintiff for money borrowed including interest thereon" when the Plaintiff appears averse to mention the money borrowed or interest agreed."

According to Counsel, the above paragraph is neither grounded upon the Summons before court nor can its source be traced back to the Affidavit in Support. That, therefore, it is clearly a new issue abruptly springing up in the Affidavit in Reply responding to the Plaintiff's Affidavit in Opposition. Counsel then asked whether it is permissible to raise new issues in an Affidavit in Reply and cited the High Court case of *Chief Mwanatete v. Lushato and Another²*, where Chali, J stated the following:

"In his Affidavit in Reply, the Plaintiff has raised new matters to which the Defendants will not have an opportunity to respond...For the foregoing reasons,

the Defendants' Counsel's objection to the Affidavit in Reply is upheld. That affidavit will accordingly be expunged from the record."

Whilst accepting that the above case was a decision of a court of equal jurisdiction to this Court, learned Counsel urged the Court to adopt it stating that the ratiocination in the said case is sound. Counsel submitted that they take the view that it is inconceivable that an affidavit in reply can do more than reply to an affidavit in opposition and assume the role of an affidavit in support, and that therefore, entertaining the Affidavit in Reply in its current form would not only prejudice the Plaintiff but also obstruct the ends of justice. It was thus the Plaintiff's prayer that the Affidavit in Reply be expunged from the record.

The Defendant filed a List of Authorities and Skeleton Arguments in Opposition to Notice to Raise Preliminary Issue on 14th February, 2018 in which it was submitted that the Defendant was opposing the Plaintiff's notice brought under Order 3, rule 2 of the High Court Rules on the following grounds, firstly, that it has been raised wrongly and on a wrong law which does not provide for raising of preliminary issues. According to Counsel for the Defendant, the Practice Direction of 1993 (whose number was not provided by the Defendant) enjoins parties to cite appropriate rules when bringing any issue to court; that a Notice to Raise Preliminary Issue is no exception. It is Counsel's argument that Order 3, rule 2 of the High Court Rules resorted to by the Plaintiff is not couched in a manner to substitute rules of court under which preliminary points of law can be raised. That the Plaintiff should instead have relied on Order 33, rule 3 of the Rules of the Supreme Court, 1999 Edition (White Book) which stipulates as follows:

"The Court may order any question or issue arising in a cause or matter whether of fact or law or partly of fact or law, and whether raised by pleadings or otherwise, to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which the question or issue shall be stated."

According to Counsel, a perusal of Order 33/3/1 shows that the Court has power to try a preliminary question of law at the outset. This rule may be conveniently employed in commercial cases for deciding preliminary issues. That therefore, the Plaintiff's concern should have been raised by an application supported by an affidavit. Further, that Order 18, rule 11 (2) of the White Book provides for application for trial of preliminary issue on a point of law. It is Counsel's contention that since the Plaintiff has not complied with the Rules by not filing a list of documents, the Notice to Raise Preliminary Issue ought to be dismissed. In response to the Plaintiff's argument that paragraphs 4, 5, 6 of the Affidavit in Reply have brought in legal arguments, Counsel for the Defendant submitted that the said paragraphs are merely responding to the Plaintiff's Affidavit in Opposition to Summons for Further and Better Particulars. Further, that paragraph 5 of the Affidavit in Support of the Summons for Further and Better Particulars was merely regurgitating the contents of the further and better particulars sought in the application for further and better particulars.

Counsel for the Defendant further distinguished the Supreme Court case of *Mutantika and Another v. Chipungu*¹ referred to by the Plaintiff stating that in that case the Supreme Court ordered that the offending paragraphs be expunged from the record because they cited and referred to rules of court. It was Counsel's submission that none of the paragraphs referred to in the present case refer to court rules. Counsel contended that in any event, nothing precludes the Plaintiff from seeking leave of court to respond to the matters in the Defendant's Affidavit in Reply.

The brief facts of the case relevant to the application at hand is that the Plaintiff commenced legal proceedings against the Defendant by way of Writ of Summons and Statement of Claim on 25th August, 2017. On 27th September, 2017 the Defendant filed into court a Conditional Memorandum of Appearance and

an application for further and better particulars which was supported by an affidavit and skeleton arguments. Before the application could be heard, the Plaintiff filed the Notice to Raise Preliminary Issue which is before Court.

To fully acquaint myself with the issues in contention, I have carefully examined the Affidavit in Support of Summons for Further and Better Particulars; the Affidavit in Opposition to Summons for Further and Better Particulars and the Affidavit in Reply. I have particularly scrutinised paragraph 5 of the Affidavit in Support of Summons for Further and Better Particulars and paragraphs 4, 5, and 6 of the Affidavit in Reply to the Affidavit in Opposition to Summons for Further and Better particulars quoted verbatim above and I have no doubt in my mind that the said paragraphs contain extraneous matter, contrary to Order 5, rule 15 of the High Court Rules which proscribes the inclusion of extraneous matter by way of objection or prayer or legal argument or conclusion in an affidavit.

Counsel for the Respondent have argued that the said paragraphs do not contain legal argument because they do not refer to any specific rules of court. In my opinion, an argument does not have to refer to specific rules of court to constitute a legal argument. The paragraphs alluded to clearly contain arguments relating to the legal positions of the parties and therefore, in my view, constitute legal arguments. Further, paragraphs 4 and 6 of the Affidavit in Reply contain some conclusions; for example, paragraph 4 states *inter alia*, that "The insistence by the Plaintiff's advocates, in response/opposition to furnishing further and better particulars through a letter exhibited as "SML1" in the Plaintiff's Affidavit in Opposition...that the Plaintiff is unable to furnish further and better particulars...cannot stand..." This statement is a conclusion. Paragraph 6 states, *inter alia*, that "The Statement of Claim in its current form should be puzzling to anyone as one cannot wake up and claim that the basis of why a person is indebted to them is that they admit to owing some amount – this is claiming a

debt in mid-stream a vacuum and is tantamount to starting a narrative/claim". Again this statement, in my view, amounts to a conclusion. (underlining by the court for emphasis only).

With respect to the claim by the Plaintiff that paragraph 7 of the Affidavit in Reply brings in a new issue which is not grounded upon the Summons before Court nor can its source be traced back to the Affidavit in Support, the Defendant has not denied this assertion but has merely stated that there is nothing to stop the Plaintiff from seeking leave of Court to respond to the matters raised in the Affidavit in Reply. In my opinion, the fact that the Plaintiff can seek leave of court to respond to the matters raised in the Defendant's Affidavit in Reply does not give the Defendant the leeway to introduce new evidence in the Affidavit in Reply when the rules with regard to the contents of an affidavit in reply restrict the matters or issues to which a response can be made to those raised in the affidavit in opposition. As learned Counsel for the Plaintiff correctly submitted, the case of Chief Mwanatete v. Lushato and Another, though handed down by a court of similar jurisdiction, is sound and I find it persuasive. I therefore, adopt the reasoning in the said case.

The Defendant's bone of contention with this application is that it was raised under a wrong law which does not provide for raising of preliminary issues. It is the Defendant's argument that since the Plaintiff has not complied with the rules, the Notice to Raise Preliminary Issue ought to be dismissed. I have considered this argument and I am of the view that even though the preliminary issue should, ideally, have been raised under the provisions of Order 33, rule 3 of the Rules of the Supreme Court, bringing the said application under Order 3, rule 2 of the High Court Rules is not a ground for dismissal of the said application because the said Order empowers the Court to make any order it considers necessary for doing justice on its own motion or on application by a party to the action. Our courts

have time and again ruled that the ends of justice should not be defeated by reason only that there has been a breach of procedural rules. Thus, in the case of *Attorney General v. Edward Jack Shamwana, Valentine Shula Musakanya, Mundia Sikatana, Godwin Yoram Mumba, Anderson Kambwali Mporokoso, Macpherson Mbulo, Patrick Mkandawire, Matinanja Liswaniso, Thomas Mupunga Mulewa, Godfrey Miyanda, Deogratias Simba, Albert Chilambe Chimbalile and Roger Kanyembu Kabwita*³, the Court held that rules of procedure need not be strictly adhered to where injustice would result, particularly bearing in mind that the court has wide discretion in matters of procedure. Admittedly, this is a ruling of a court of equal jurisdiction to this Court, but I find the reasoning persuasive and I adopt it. Our Supreme Court, in the case of *Ravindvanath Morargi Patel v. Rameshbhai Jagabhai Patel*⁴, stated that rules of procedure must be followed. However, the effect of breach of the rules will not always be fatal if the rule in question is merely directory or regulatory. I am of the view that Order 33, rule 3 of the Rules of the Supreme Court is merely regulatory and whose non-observance has not adversely affected the Defendant in any way. I, therefore, decline the prayer to dismiss the Notice to Raise Preliminary Issue.

Having found as above, I find that paragraph 5 of the Affidavit in Support of Summons for Further and Better Particulars contains legal arguments. I also find that paragraphs 4, 5, and 6 of the Affidavit in Reply contain legal arguments and/or conclusions. In addition, paragraph 7 thereof, introduces a new issue not grounded in the Summons before Court or Affidavit in Support of the Summons. For these reasons, the said paragraphs are expunged from the affidavits concerned, for offending Order 5, rule 15 of the High Court Rules and introducing a new issue, respectively.

The Defendant has expressed the concern that in the event that the Court expunges the paragraphs referred to above, the Plaintiff will in effect, be allowed

to keep under wraps details of how the claimed debt arose. I am of the view that to the contrary, the application for further and better particulars is yet to be heard and the issues that the Defendant brought up in the affidavits which the Court has found to be extraneous and expunged, can still be raised in his legal arguments to the Court.

The Notice of Intention to Raise Preliminary Issue is successful. Paragraph 5 of the Affidavit in Support of Summons for Further and Better Particulars and paragraphs 4, 5, 6 and 7 of the Affidavit in Reply are accordingly expunged from the affidavits. Costs of and incidental to the application are awarded to the Plaintiff, to be taxed in default of agreement.

Dated at Lusaka the 5th day of April, 2018.


W. S. Mwenda (Dr.)
HIGH COURT JUDGE