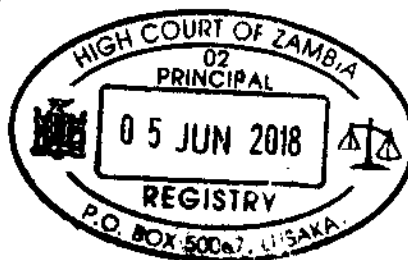


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

2015/HP/2147

**BETWEEN:**

CITIBANK ZAMBIA LIMITED

**PLAINTIFF****AND**

SUHAYL DUDHIA

**DEFENDANT**

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 5<sup>th</sup> day of  
June, 2018**

*For the Plaintiff* : *Mr. R. Peterson, Messrs Chibesakunda & Co.*  
*For the Defendant* : *Ms. S. Kalima, Messrs J & M Advocates*

## **R U L I N G**

**Cases Referred To:**

1. *William David Carlisle Wise v E. F Harvey Limited (1985) ZR 179 (S.C)*
2. *Alice Nkonde v Sunday Nkonde Appeal No. 104 of 2010*
3. *Drummond Jackson v British Medical Association (1970) 1 ALL ER*

**Legislation Referred To:**

1. *Rules of the Supreme Court*

**Other Works Referred To:**

1. *Odgers on Civil Court Actions Practice and Procedures, 24<sup>th</sup> Edition by  
Simon Goulding, Sweet and Maxwell, 1996*

This is the Plaintiff's application to strike out the Defendant's defence pursuant to Order 18 Rule 19 (1) of the Rules of the Supreme Court. It is supported by an Affidavit sworn by **Suzyo Akatama** who deposes that the defence herein does not disclose reasonable grounds. Further, that it is scandalous, frivolous, vexatious and an abuse of the process of Court. The deponent avers that the defence consists of nine paragraphs and in three of those, the Defendant makes unsubstantiated assertions on the legality of the termination of his contract of employment. At paragraph 2 of his defence, the Defendant avers that *'the said termination was unfair, wrongful and unlawful'* and at paragraph 5, *'he shall aver at trial that his employment having been terminated unlawfully.'*

It deposed that the defence discloses the ongoing proceedings in the Industrial Relations Division where the Defendant has challenged the legality of the termination of his contract of employment. That the proceedings before that Court have not concluded and there is no decision on the issues raised therein.

It is further deposed that in addition to the Defendant's unsubstantiated assertions on the legality of termination of his contract of employment, the defence contains at paragraph 7 an assertion, that the Plaintiff is not entitled to relief because the Defendant might be awarded damages if he succeeds in the other case. That in paragraph 7 of the defence, the Defendant avers that *'the Plaintiff is not entitled to lay claim to any immediate payment from the Defendant until the High Court delivers its judgment in the Industrial Relations Division.'* The deponent contends that the defence has no reasonable prospects of success in its entirety.

It is further deposed that the Defendant previously obtained a stay of these proceedings in this Court on facts that mirror those set out in his defence in the Industrial Relations Division. That the Court of Appeal discharged the order of stay in its judgment delivered on 14<sup>th</sup> December, 2017, as shown in exhibit "SA1." The deponent avers that if the matter were to proceed to trial on the defence filed herein, the issues decided by the Court of Appeal will be re-opened and there will be a risk of producing conflicting

decisions. The deponent prays to Court to strike out the defence and enter judgment on admission for the Plaintiff.

In response, the Defendant **Suyahl Dudhia** filed an Affidavit in Opposition. He deposes that his defence in this Court traverses the issues claimed by the Plaintiff and it goes to the root of the action. That his defence discloses reasonable grounds contrary to the Plaintiff's assertion. Further, that his defence addresses the issue of interest chargeable on the loan, which has a bearing on the unlawful termination of his contract of employment. He concedes that the Industrial Relations Division has not made a decision in that case.

The deponent states that his defence herein is on the quantum of interest and it can only be determined at trial. That the Plaintiff's reference to the stay of proceedings and subsequent Court of Appeal decision, has no bearing on this application. He avers that the Court of Appeal did not pronounce itself on his defence but on the stay. That the issues before this Court are different and the judgment of the Court of Appeal does not preclude him from raising

his defence, which challenges the calculation of interest payable on the loan.

The deponent also avers that by this application, the Plaintiff is requesting for summary judgment, which is wrong because it denies him the opportunity to be heard on their merits. Further, that the Plaintiff is not entitled to evaluate the efficacy of his defence at an interlocutory stage as suggested in paragraphs 4-8 of its Affidavit because that is preserve of the Court after trial. That the Plaintiff has misapprehended Order 18 Rule 19 of the Rules of the Supreme Court (RSC) and its application amounts to an abuse of the process of Court.

The matter came up for hearing on 18<sup>th</sup> May, 2018 where both Learned Counsels relied on the Affidavits filed herein. Counsel for the Plaintiff supplemented with oral arguments and submitted that Order 18 Rule 19 (1) of the RSC allows a Court to strike out a pleading when it discloses no cause of action or where the pleading may embarrass an opponent or delay the course of trial. He further submitted that the defence in casu revealed no cause of action and

variance with the Court of Appeal judgment, which stated at J13 that:

**"...As earlier stated the issue of the loan does not arise in any way in the IRC. If the Respondent succeeds in the IRC he will, at best, be awarded damages for unfair or wrongful termination which will not affect the loan. The issue of the loan especially the interest rate does not arise in any way in the IRC."**

Counsel contended that the defence in its entirety was captured by estoppel and to permit it would be creating prejudice to the Plaintiff, which would embarrass it or delay the trial. Counsel prayed to Court to strike out paragraphs 2-7 of the defence, the result of which would lead to admissions by the Defendant and no defence at all. He also prayed for judgment to be entered for the Plaintiff with costs.

In response, Counsel for the Defendant submitted that the defence disclosed a reasonable cause of action. In as much as the Court of Appeal stated that the issue of interest chargeable on the loan could only be determined at trial and not at an interlocutory stage. She prayed to Court to allow the defence to stand because it addressed the root of this cause and disclosed issues, which were suitable for trial.

In rejoinder, Counsel for the Plaintiff submitted that parties were bound by their pleadings. Paragraphs 4 and 6 of the defence, which dealt with the issue of interest, rehashed a settled argument by the Court of Appeal that the action in this Court was not dependent on the outcome of the Industrial Relations Division's decision. Counsel contended that the Defendant did not challenge the interest rate chargeable on the loan on any basis, except to aver that the Plaintiff was excluded from charging it on account of the unlawful termination of his contract of employment. Counsel concluded by reiterating his earlier prayer to Court.

I have seriously considered this application, the Affidavits filed herein and arguments tendered by Learned Counsels. This application is anchored is on Order 18 Rule 19 (1) RSC, which says:

- "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that -**
- (a) it discloses no reasonable cause of action or defence, as the case may be; or**
  - (b) it is scandalous, frivolous or vexatious; or**
  - (c) it may prejudice, embarrass or delay the fair trial of the action; or**
  - (d) it is otherwise an abuse of the process of the Court;**

**and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."**

The *explanatory note* of Order 18 Rule 19 (1) RSC states that not every writ or pleading which offends the Rule is subject to sanction. A person who relies on Order 18 Rule 19 (1) of the Rules of the Supreme Court should show that he/she is likely to encounter some prejudice by the breach.

In order to set this matter in context, I find it is necessary to briefly reprise the background facts. The Plaintiff employed the Defendant on 10<sup>th</sup> December, 2018 till 4<sup>th</sup> July, 2013. As part of his conditions of service, the Defendant was provided a personal loan of K121,004.82. The loan became due after the Defendant's contract of employment was terminated. He failed to pay back the loan and was eventually sued in this cause. The Defendant equally sued the Plaintiff in the Industrial Relations Court under Complaint No. 211/2013 claiming damages for unfair, wrongful and unlawful termination of employment.



As the matter progressed, the Defendant asked this Court to stay proceedings pending the outcome of the matter in the Industrial Relations Division. I granted the application on 21<sup>st</sup> February, 2017, which was reversed by the Court of Appeal on 14<sup>th</sup> December, 2017. The Court of Appeal held that the actions in the divisions of the High Court were different and not dependent on each other. It also emphasized that the loan facility, which is the subject of these proceedings arises from a separate agreement, which has no bearing on the Defendant's case in the other division of Court. The Court of Appeal remitted this matter to this Court for trial and the next action taken by the Plaintiff was to issue summons on 19<sup>th</sup> March, 2018, to strike out the Defendant's defence pursuant to Order 18 Rule 19 RSC.

In my view, the issue before this Court is ring-fenced and it only relates to the loan agreement between the parties. It does not extend to the question of legality of termination of the Defendant's contract of employment. The question that arises for determination therefore, is whether the Defendant's defence has offended Order 18 Rule 19 (1) RSC?

According to **Odgers on Civil Court Actions Practice and Procedure** at page 206, the remedy of striking out should only be resorted to in instances where:

**“The attack may be directed at the whole of an opponent’s pleading or upon certain objectionable portions of it; the objective may be to expose the entire action or the defence to it as sham, or one which cannot possibly succeed in law, and to obtain judgment accordingly; or it may be to force an opponent to amend the whole or some part of an embarrassing pleading under pain of having it struck out if he does not...**

**The provisions of Order 18, r. 19(1) and C.C.R. Order 13, r. 5 afford a prompt and summary method of disposing of groundless actions and of excluding immaterial issues. Under this rule the Court has power at any stage to strike out or order the amendment of the whole or part of any pleading or endorsement which discloses no reasonable cause of action or defence, or which is scandalous, frivolous or vexatious, or which may prejudice, embarrass or delay the fair trial of action, or which is otherwise an abuse of the process of the court. The court also has power on these grounds to stay or dismiss any action or to order judgment to be entered accordingly.”**

In the case of **Drummond Jackson v British Medical Association**<sup>3</sup>, the Court stated at page 1094 that:

**“The summary 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 pleading, was certain to fail.”**

The Plaintiff in its Affidavit contended that the defence herein does not disclose reasonable grounds. It is also scandalous,

frivolous, vexatious and an abuse of the process of Court. On the other hand, the Defendant argued that his defence disclosed a reasonable cause of action and the rate of interest chargeable on the loan could only be determined by the Court at trial and not at an interlocutory stage.

A careful perusal of the defence reveals that there is no contest from the Defendant that he received a loan from the Plaintiff. However, his dispute is that the rate of interest chargeable on the loan depends on the outcome of the case in the Industrial Relations Division. This issue was settled by the Court of Appeal and there is no need to ignore the guidance given.

I am therefore inclined to agree with Counsel for the Plaintiff that the Defendant's defence does not challenge the fact that interest is chargeable on the loan. Rather, the defence rests on the fact that the interest chargeable on the loan is tied to the outcome of the case in the Industrial Relations Division. This in my considered view does not attach any liability to the Plaintiff and departs from the principles espoused in the case of **William David**

**Carlisle Wise v E.F. Hervey Limited**<sup>1</sup>, where the Supreme Court held that:

**"(ii) A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other."**

Therefore, the parallel the defence creates of tying the dispute in casu to the determination of the action in the Industrial Relations Division is unsustainable. By not challenging that interest is chargeable on the loan, the Defendant has conceded that the Plaintiff is entitled to charge interest. In other words, there is no defence to the Plaintiff's claims because the Defendant has inadvertently admitted them.

Accordingly I strike out the defence and enter judgment for the Plaintiff with costs to be taxed in default of agreement.

Dated this 5<sup>th</sup> day of June, 2018.

*M. Mapani*  
M. Mapani-Kawimbe  
**HIGH COURT JUDGE**