

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 356/2023

BETWEEN:

GBM MILLING LIMITED

AND

GUARDALL SECURITY GROUP LIMITED



APPELLANT

RESPONDENT

CORAM: Ngulube, Muzenga and Chembe, JJA
On 27th March 2024 and 5th April 2024

For the Appellant: Mr. K. Kaunda of Messrs Kaunda Kaunda and Mwila Legal Practitioners

For the Respondent: Mr. V. Kayawe, In-House Counsel

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Citi Bank Zambia Limited v. Suhayl Dudhia – SCZ Appeal No. 6 of 2022**
- 2. Director of Public Prosecutions v. Brown – SCZ Judgment No. 10 of 1974**
- 3. Minos Panel Beaters Limited v. B. Chapasuka (1986) ZR 1**

Legislation referred to:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia.**
- 2. The Rules of the Supreme Court of England (RSC) 1999 Edition.**

1.0 INTRODUCTION

1.1 This is an appeal against a Ruling by Maka, J, delivered on 22nd May 2023, in which she struck out the appellant's defence and counter-claim for irregularity. This was following an *ex-parte* application by the respondent, which the lower court heard *ex-parte*.

2.0 BACKGROUND

2.1 The background to this appeal is that the respondent commenced a matter against the appellant by way of writ of summons accompanied by statement of claim, seeking the following reliefs:

- (i) Payment by the defendant of ZMK175,296.00 being the principal sum owed;**
- (ii) Interest;**
- (iii) Any other relief that the court may deem fit, and**
- (iv) Costs.**

- 2.2 The appellant entered appearance and filed a defence and counter-claim.
- 2.3 This prompted the respondent to file an *ex-parte* application to strike out the appellant's defence and counter-claim for violation of **Order 11 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia (HCR)**, which required, in mandatory terms, a defendant to file a defence and counter-claim, if any, together with a list of description of documents to be relied on by the defendant at trial and a list of witnesses to be called by the defendant at trial.
- 2.4 The application was made pursuant to **Order 2 Rule 2 of the Rules of the Supreme Court of England (RSC)** and **Order 11 Rule 1 of the High Court Rules**.

3.0 DECISION OF THE COURT BELOW

- 3.1 The learned court below, after hearing the application *ex-parte*, found that the defence and counter-claim could not be struck out on the strength of **Order 2 Rule 2 of the Rules of the Supreme Court**, as the respondent had already taken a step further in the proceedings by filing a reply and a defence to the appellant's counter-claim.

- 3.2 However, the lower court in placing reliance on **Order 11 Rule 1**, was satisfied that the appellant did not file a list of a description of the documents they would rely on at trial and also the list of witnesses they would call at trial. The lower court went further to find that the requirement to do so is couched in mandatory terms and as such, the violation thereof makes the filed documents irregular, leading to the same being struck out.
- 3.3 The lower court therefore struck out the appellant's defence and counter-claim for irregularity, with costs.

4.0 GROUNDS OF APPEAL

- 4.1 Unsettled by the decision of the court below, the appellant sought solace in this court on the following grounds:

- 1. The court below erred both in law and fact by striking out the appellant's defence and counter-claim as Order 11 of the High Court Rules Cap 27 does not provide for the striking out of pleadings or any penalty generally on account of the non-filing of the lists of witnesses and documents.**
- 2. The court below erred both in law and fact by hearing or determining the respondent's *ex-parte* application, leading to the Ruling herein, without according the appellant an opportunity to be heard or give its side of the story, and that the stated application is not one that may be heard *ex-parte*.**

5.0 APPELLANT'S ARGUMENTS

- 5.1 In support of ground one, learned counsel contended that **Order 11 of the High Court Rules** does not provide for the striking out of pleadings or any penalty generally on account of non-filing of the list of witnesses and documents. Counsel submitted that the only time defence documents cannot be filed is when there is entered a judgment in default.
- 5.2 Learned counsel contended that in contrast to **Order 6 Rule 4(3) of the High Court Rules**, which empowers the proper officer not to accept a writ of summons that is not accompanied by a statement of claim, list of documents and witnesses; and a letter of demand or an affidavit of service. Counsel referred to the aforementioned **Sub Rule 3** which reads:

"A writ of summons which is not accompanied by the documents under Sub Rule 1 shall not be accepted."

- 5.3 We were further referred to the case of **Citi Bank Zambia Limited v. Suhayl Dudhia**¹ in which the Supreme Court stated *inter alia* that:

"Where as in this case, the statutory provision being considered is silent or unclear as to what the consequences of its breach will be, the judge has the duty to interpret the provisions of the statute to fit the purpose for which the statute was drafted"

and thereby avert reading into the statute unintended consequences for its non-observance.”
(their emphasis)

- 5.4 It was learned counsel’s submission that if the drafters of **Statutory Instrument No. 58** intended to clothe the court with the power to strike out pleadings as did the court below, this intention would have expressly been stated in the Rules, as is the case with **Order 6 Rule 4(3) and Order 11 Rule 5(3) of the High Court Rules**. On this score, we were referred also to the cases of **Director of Public Prosecutions v. Brown**² and **Minos Panel Beaters Limited v. B. Chapasuka**.³
- 5.5 Learned counsel prayed that this ground of appeal be allowed.
- 5.6 In support of ground two, learned counsel contended that the court below erred when it heard and determined the respondent’s application *ex-parte*, without giving the appellant an opportunity to be heard, especially that the application was not urgent.
- 5.7 It was counsel’s submission that the Rules of natural justice dictate that the *ex-parte* hearing be followed by an *inter-partes* hearing but this was not done in *casu*.
- 5.8 Learned counsel prayed that the appeal be allowed on this ground.

5.9 All in all, counsel urged us to allow the appeal with costs.

6.0 RESPONDENT'S ARGUMENTS

6.1 Learned counsel for the respondent in opposing ground one argued that the appellant violated mandatory provisions of **Order 11 Rule 1 of the HCR** by not filing additionally, a list of documents and a list of witnesses they intended to call at trial. It was learned counsel's contention that the learned trial court was on firm ground when she struck off the offending documents. Reliance was also placed on the **Citi Bank** case *supra* in arguing that the purpose of the statutory provision in **Order 11 Rule 1**, was to strike out documents filed in violation.

6.2 We have not referred to the written arguments by the respondent as they largely attacked the defendant's process in the court below as being irregular by virtue of the entry of a Conditional memorandum of appearance, when the same no longer exist. This is because this issue was never raised in the court below and is not the reason the court below struck out the memorandum of appearance, defence and counter claim. We thus found it unnecessary to reproduce those arguments.

6.3 In response to ground two, learned counsel for the respondent contended that the trial court had a discretion to hear the matter ex-parte and cannot be faulted for doing so. We were urged to dismiss the appeal with costs.

7.0 THE HEARING

7.1 At the hearing of the appeal, learned counsel for the parties placed reliance on their respective arguments and briefly augmented.

8.0 DECISION OF THE COURT

8.1 We have carefully considered the record and the arguments advanced by the parties.

8.2 Learned counsel for the appellant in support of ground one, argued that the trial court erred when it struck out the appellant's defence and counter claim on account of not filing a list of documents and witnesses, as no penalty or sanction is provided in the rules. Learned counsel for the respondent on the other hand argued that even though there is no clear penalty or sanction for default, the trial court had the power to strike out the offending documents.

8.3 We must state that the **High Court (Amendment) Rules 2020, Statutory Instrument No. 58 of 2020 (HCR)** are relatively new

and it is the first time this Court is dealing with the issue raised in this appeal of what the effect of failing to file the list of documents and list of witnesses by the defendant at the time of filing a defence; and counterclaim if there is any.

8.4 In order to resolve this issue, we have found it necessary to look at the relevant and related new introductions in the **HCR**. One of such is **Order 6 Rule 1**. The relevant portion of **Order 6 Rule 1** reads:

"1. (1) Except as otherwise provided by any written law or these Rules, an action in the High Court shall be commenced, in writing or electronically by writ of summons endorsed and accompanied by —

(a) a statement of claim;

(b) list and description of documents to be relied on at trial;

(c) list of witnesses to be called by the plaintiff at trial; and

(d) letter of demand whose receipt shall be acknowledged by the defendant or an affidavit of service attesting to the service of the letter of demand, which shall set out the claim and circumstances surrounding the claim in detail.

(2) A writ of summons which is not accompanied by the documents under sub-rule (1) shall not be accepted." (emphasis ours)

8.5 What is clear from the foregoing is that when a writ of summons is presented before the High Court for filing, which is not accompanied by the Documents listed in **Sub-Rule 1**, the writ shall not be accepted.

In an event that the documents are inadvertently received by the court registry, the defect is not curable because they should not have been accepted in the first place.

8.6 In terms of **Order 11 Rule 1 of the HCR**, the relevant portion provides that:

- "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.**
- (2) The proper officer shall –**
- (a) seal the memorandum of appearance and the defence;**
 - (b) stamp the accompanying documents with the official stamp; and**
 - (c) return copies of the memorandum of appearance, defence and accompanying documents to the person filing them for service on the plaintiff.**

(3) The Court shall not accept an appearance after the entry of judgment in default of appearance, unless the judgment in default of appearance is set aside.

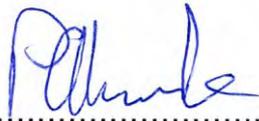
- 8.7 What is clear from the foregoing is that, in contrast with **Order 6 Rule 1, Order 11 Rule 1** does not provide what would happen if the defendant presents a memorandum of appearance, defence and counter claim for filing before court in the absence of the list of documents and a list of witnesses, whether the court should accept them or not. Therefore, although couched in mandatory terms, there is no clear provision prohibiting the receipt thereof or any clear sanction provided.
- 8.8 What is abundantly clear however, from **Order 11 Rule 1(3)** is that where a memorandum of appearance, defence and counter-claim is presented for filing in the High Court, after the entry of judgment in default of appearance, the documents shall not be accepted by the court. If inadvertently received by the Registry, the defect is not curable as they should not have been accepted in the first place, just as the prohibition in **Order 6 Rule 1** considered above.
- 8.9 It is not in dispute that the appellant did not file the lists as required by **Order 11 Rule 1**. The trial Court, after the application by the

respondent, struck out the appellant's defence and counter claim. We hold the view that the defect herein is curable. We agree with learned counsel for the appellant that if the Legislature intended the lower court's decision to flow from the violation, it would have stated so in no unclear terms as it did in the relevant portions discussed above in **Orders 6 and 11**. The intention of the Legislature must be deduced from the exact words used in a Statute. If no penalty or sanction for violation is provided, a court should not infer such penalty or sanction as doing so will be tantamount to usurping the powers of the Legislative wing of Government. Therefore, the learned trial court should not have taken a drastic measure of striking out the appellant's defence and counter-claim. The court below should have instead given the appellant a time frame in which to file the lists of documents and witnesses in order to comply with **Order 11 Rule 1**. The appellant having been in default could then have been ordered to pay costs of the application to the respondents. In the circumstances, we find merit in ground one of the appeal and we allow it.

8.10 We find it unnecessary in the circumstances to consider ground two of the appeal, as it is rendered otiose.

9.0 CONCLUSION

- 9.1 Having allowed the appeal, we quash the Ruling of the court below striking out the appellant's defence and counter claim.
- 9.2 We restore the appellant's defence and counter claim and direct that the appellant complies with **Order 11 Rule 1 of the High Court Rules** within 21 days from the date of this Judgment.
- 9.3 We award costs of the application in the court below to the respondent on account that the same were incurred as a result of the appellant's non compliance. The costs are payable forthwith and to be taxed in default of agreement.



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P. C. M. NGULUBE
COURT OF APPEAL JUDGE



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K. MUZENGA
COURT OF APPEAL JUDGE



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Y. CHEMBE
COURT OF APPEAL JUDGE