

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

**2017/HPC/0036**

*(Civil Jurisdiction)*

**BETWEEN:**

**MELISSA SUPERMARKET LIMITED** PLAINTIFF

**AND**

**STANBIC BANK ZAMBIA LIMITED** DEFENDANT



*Before the Honourable Justice B.G. Lungu on the 7<sup>th</sup> day of September, 2017 in Chambers.*

*For the Plaintiff, Messrs Ellis & Co and Messrs Makebi Zulu Advocates  
For the Defendant, Messrs Eric Silwamba, Jalasi & Linyama Legal Practitioners*

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**R U L I N G**

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**CASES REFERRED TO:**

- 1. *Castro v. Murray (1875) 10 Ex. 213;***
- 2. *Dawkins v. Prince Edward of Saxe Weimar;***
- 3. *Willis v. Earl Beauchamp (1886) 11 P. 59, per Bowen L.J. at 63;***
- 4. *Zambia Revenue Authority and Jayesh Shah (2001) Z.R. 60***

**LEGISLATION AND OTHER WORKS REFERRED TO:**

- 1. *Order III, Rule 2; High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;***

2. **Order XV, Rule 1, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;**
3. **Order 18, Rule 19 (1) (a), (b), (c) and (d), Rules of the Supreme Court, 1965, Supreme Court Practice, (White Book) 1999 Edition, Vol. 1;**
4. **Order 6, Rule 2 Sub Rule 5, Rules of the Supreme Court, 1965, Supreme Court Practice, (White Book) 1999 Edition, Volume 1.**
5. **paragraph 1198, Halsbury's Laws of England, fourth edition**
6. **Order 18 rule 19 sub rule 18 of the Rules of the Supreme Court, 1965, Supreme Court Practice, (White Book) 1999 Edition, Vol. 1**

By Summons dated 11<sup>th</sup> July, 2017, the Defendant applied to strike out portions of the pleadings associated with the Writ of Summons taken out by the Plaintiff on 27th January, 2017.

The application was made pursuant to the provisions of **Order III, Rule 2** and **Order XV, Rule 1 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia** as read together with **Order 18, Rule 19 (1) (a), (b), (c) and (d)** and **Order 6, Rule 2 Sub Rule 5 of the Rules of the Supreme Court, 1965, Supreme Court Practice, (White Book) 1999 Edition, Volume 1.**

The application is supported by an Affidavit deposed to by Doris Chomba Tembwe, which was filed together with the Summons, and Skeleton Arguments.

The Defendant's application is that (i) references in paragraphs 15 and 16 of the Statement of Claim ought to be struck out on the basis that they contain liquidated damages (ii) that the Plaintiff has



alleged defamation and injury to its corporate character in paragraph 13 without pleading the ingredients of either defamation or injury to corporate character; and (iii) that the Plaintiff has pleaded in paragraphs 9 and 10 an alleged breach of statutory duty without specifying the particular section of the Act giving rise to the duty, nor the breach.

The gist of the argument presented on behalf of the Defendant is that a claim for negligence attracts relief in the form of damages and that if the Plaintiff's claim were to succeed damages would be assessed before the Deputy Registrar. As a result, the Defendant took the position that the Plaintiff prematurely stated liquidated amounts in the originating process prior to the determination of the claim in the Plaintiff's favour.

The Defendant drew the Court's attention to Paragraph 15 of the Statement of Claim which articulates the loss allegedly suffered by the Plaintiff, particularly: (i) the sum of US\$2, 000, 000.00 being the estimated replacement costs of Supermarket infrastructure; (ii) the sum of K300, 000.00 being the cost of removal of debris from Stand 194, Lusaka; (iii) the sum of US\$1,500, 000.00 being the value of stock in trade; and (iv) the sum of US\$1, 000, 000.00 being the estimated cost of replacement machinery and equipment.

Paragraph 16 of the Statement of Claim was also illumed. It speaks to the loss allegedly suffered by the Plaintiff in respect of (i) loss of

profits from the date of destruction to the date of operation; (ii) loss of good will; and (iii) defamation of character.

When the application came up for hearing, Counsel for the Defendant submitted that paragraph 7 and 14 of the Plaintiff's Statement of Claim indicate that the Plaintiff's cause of action is anchored on the tort of negligence. It was contended that the relief of damages, in the form of unliquidated amounts, was the only relief that could yield from an action founded in negligence. Claims for liquidated amounts were cast outside the net of reliefs appropriate in cases of negligence.

In addition, Counsel for the Defendant invited the Court to gaze upon Order 6, Rule 2, Sub Rule 5 of the White Book in order to acquire the definition of liquidated and unliquidated damages. Order 6, Rule 2 , Sub Rule 5 reads, in part, as follows:

*"A liquidated demand is in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a "debt or liquidated demand", but constitutes "damages."*

The Court was also referred to **paragraph 1198 in the fourth edition of Halsbury's Laws of England** which partially reads as follows:

*"although minute accuracy is not expected the pleadings should make clear what measure of damage is relied on, and if the Plaintiff is able to base his claim on a precise calculation he must give the Defendant access to the facts which make the calculation possible"*

In view of the foregoing, it was contended that the incorporation of liquidated claims in an action for damages was at odds with the principle that litigants ought to make clear what measure of damages or calculations they have relied upon to enable a party to defend itself.

In conclusion, Counsel for the Defendant submitted that the rightful forum for determining damages, in the event of success, would be before the Deputy Registrar during assessment of damages. In that forum, it was argued, the Defendant would also be given an opportunity to test the figures claimed by the Plaintiff.

The application excited opposition from the Plaintiff, who filed an Affidavit in Opposition and Skeleton Arguments in Opposition on 4<sup>th</sup> September, 2017.

The Affidavit was deposed by Charalambos Petsas who attested that the Defendant had filed a Defence confirming its intention to defend the Plaintiff's action.

The brief legal argument that the Plaintiff aligned with the Affidavit in Opposition was that the Defendant, having filed a Defence before

making the application under consideration, had already taken fresh steps in the matter.

It was argued that by taking such fresh steps, the Defendant ought to be precluded by estoppel from revisiting issues that it has covered in the defence.

In presenting their arguments, Counsel for the Plaintiff illumed that Order 18, Rule 19 of the Rules of the Supreme Court guides that notwithstanding the express indication that the order to strike out may be made at any stage of the proceedings, the application should always be made promptly, and as a rule before the close of pleadings.

Counsel propounded that Order 18, Rule 19 emphasised that not only should the application be made before close of pleadings, but that where the Statement of Claim is under attacked, the application should be made before the defence is served. It was observed that *in casu*, the defence was already served.

Given the circumstances, the Plaintiff took the view that the delay by the Defendant in making its application resultantly offended the requirement of promptness under Order 18, Rule 19. The Court was accordingly beseeched to dismiss the application given the coincidence of the delayed application and fresh steps having been taken.

Moreover, it was averred that the Plaintiff's claims were not solely founded on negligence but comprised what was captivatingly referred to as a cocktail of causes of actions that presented estimates. Thus, it was submitted that the Defendant's application was an abuse of process set on delaying trial.

The proposition that the Defendant's application was an abuse of process carried with it a plea to the Court to dismiss the application in pursuit of preventing the improper use of its machinery.

The plea was premised on **Order 18 rule 19 sub rule 18 of the Rules of the Supreme Court** which explains the connotation of the term abuse of process. Sub rule 18 reads, in part, as follows:

*"the term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation"*

The aforementioned explication was aligned with the English cases of **Castro v. Murray (1875) 10 Ex. 213<sup>1</sup>**; **Dawkins v. Prince Edward of Saxe Weimar<sup>2</sup>**; and **Willis v. Earl Beauchamp (1886) 11 P. 59, per Bowen L.J. at 63<sup>3</sup>**.



In summation, the Plaintiff drew the Court's attention to the case of ***Zambia Revenue Authority and Jayesh Shah (2001) Z.R. 60<sup>4</sup>*** where the Supreme Court reiterated the principle that cases should be decided on their substance and merit.

I have carefully considered all the affidavit evidence, submissions and legal arguments before Court. To that end I thank the parties for their industry.

I will begin by examining Order 18, Rule 19 of the Rules of the Supreme Court, upon which this application is premised. My considered understanding of Order 18, Rule 19 is that it gives the Court discretionary power to, amongst other things, order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement on any one or more of four specific grounds, namely, that:-

- i. it discloses no reasonable cause of action or defence, as the case may be; or
- ii. it is scandalous, frivolous or vexatious; or
- iii. it may prejudice, embarrass or delay the fair trial of the action; or
- iv. it is otherwise an abuse of the process of the Court;

Having perused the Defendant's application, legal arguments and submissions, my first observation is that the application is founded

on the ground that the Plaintiff has sought a liquidated amount as opposed to damages. No attempt seems to have been made by the Defendant to fit or align the purported irregularity into any one of the four aforementioned well laid out categories that can form a basis for the exercise of this Court's discretion under Order 18, rule 19.

In view of the Defendant's omission, I must guard against taking an escapade into conjecture or advocacy by purporting to place the application in any one of the permissible grounds. I therefore find that the ground being relied upon as a basis for the invitation to Court to order that the pleadings be struck out falls outside the permissible grounds prescribed under Order 18, Rule 19 of the Rules of the Supreme Court. Thus, I will refrain from further considering the other arguments anchored on Order 18, rule 19 of the Rules of the Supreme Court.

My second observation is that Order 6, Rule 2 , Sub Rule 5 of the Rules of the Supreme Court distinguishes a liquidated demand from damages. In so doing, the sub rule elucidates that *"if the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a "debt or liquidated demand", but constitutes "damages."*

I have examined the Plaintiff's claims and in particular those that the Defendant takes issue with. Although some of the claims specify figures, those figures are only estimated figures which, in my view, will clearly require ascertainment and investigation beyond mere calculation. That being the case, although figures have been expressed, the fact that further investigation will be required places the claims within the definition of damages as ascribed under Order 6, Rule 2 , Sub Rule 5. Consequently, I find that the Defendant's conclusion that liquidated demands have been made is incorrect. Resultantly, the basis of the Defendant's application is rendered redundant.

In view of the above, I find that this is not appropriate case to exercise my discretion to strike out the pleadings. I accordingly decline to exercise my discretion on the ground that the application not only falls outside Order 18, rule 19 of the Rules of the Supreme Court, but that it has been rendered untenable on account of the fact that the claim is indeed one for damages.

Needless to say, I am mindful of and agree that in the event that the Plaintiff succeeds in the main matter, the damages that have been claimed will have to be assessed by the Registrar.

For the reasons stated above, the application to strike out portions of the pleading is dismissed.

With respect to the omission by the Plaintiff's to plead the ingredients of either defamation or injury to corporate character; and the failure to specify the particular section of the Act underpinning the claim for breach of statutory duty, I note that the Plaintiff has not tendered any substantive opposition or justification for the omissions. Accordingly, on the strength of Order III, rule 2 of the High Court Rules, the Plaintiff is ordered to give further and better particulars of the defamation and breach of statutory duty within 14 days of the date of this Ruling.

Each party shall bear its own costs.

Leave to appeal is granted.

**Dated this 16<sup>th</sup> day of January, 2018**



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Lady Justice B.G.Lungu  
**HIGH COURT JUDGE**