

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2014/HP/0504

BETWEEN:

SARAH NAAMBO CHIKONKA

PLAINTIFF

AND

**CAPTAIN MABVUTO PHIRI
& 73 OTHERS**



1ST DEFENDANTS

**CONTRACT HAULAGE LIMITED
ATTORNEY GENERAL
MOHAMED YOUSUF MUSA**

2ND DEFENDANT

3RD DEFENDANT

4TH DEFENDANT

Before: The Hon. Mr. Justice Charles Zulu.

For the Plaintiff:

Ms. E.C. Chiyenge, of
Mesdames C.C. Mwansa &
Associates.

For the Fourth Defendant:

Mr. K. Mainga, of Messrs
Milner & Paul Legal
Practitioners.

First, Second & Third Defendants: Not in Attendance.

R U L I N G

Cases referred to:

- 1. *D.E Nkhuwa v. Lusaka Tyres Services Limited (1997) Z.R. 43.***
- 2. *Denton & Others v. TH White Limited & Another, Decadent Vapours Limited v. Joseph Bevan & Others, Utilise TDS Limited v. Cranstorm & Others [2014] EWCA Civ 906.* (three appeal).**
- 3. *Mitchell v. News Group Newspapers Ltd [2013] EWCA Civ 1537.***

Legislation referred to:

- 1. *Rules of the Supreme Court 1965 (England) White Book 1999 Edition.***

This ruling is in respect of an application by the Plaintiff to set aside the fourth Defendant's defence filed on February 13, 2020 for irregularity. The application was made pursuant to Order 2 r. 1 (2) of the **Rules of the Supreme Court 1965 (England) White Book 1999 Edition.**

Brief facts leading to this application are that, on July 18, 2019, I issued an Order for Directions, in which I *inter alia* directed that the respective Defendants should file their defence on or before August 1, 2019. The fourth Defendant did not comply with this directive.

On August 23, 2019, the first Defendant raised preliminary issues, questioning the Plaintiff's *locus standi* in the matter, and sought to strike out portions of the Plaintiff's statement of claim. And by Ruling dated February 7, 2020, the application in respect of the preliminary issue was wholly dismissed. And on February 13, 2020, the fourth Defendant filed his defence, which the Plaintiff now seeks to set aside.

The present application was supported by an affidavit deposed to by the Plaintiff, stating that the defence filed on February, 13, 2020, was in breach of the Order for Directions, whereby the fourth Defendant was obliged to file his defence on or before August 1, 2019, but was in breach.

It must also be noted that on September 3, 2019, the Plaintiff filed its third application in the proceedings to amend pleadings, which application is still pending.

An affidavit in opposition to the present application was deposed to by Mr. Mainga, Counsel seized with conduct of the matter on behalf of the fourth Defendant. It was alleged that the first Defendant's application to raise preliminary issues and the Plaintiff's application to amend pleadings respectively dated, August 23, 2019, and September 3, 2019, legally frustrated the fourth Defendant from filing his defence as directed.

The Plaintiff's Counsel in her skeleton argument relied on the case of **D.E Nkhuwa v. Lusaka Tyres Services Limited (1997) Z.R. 43**, in which the Supreme Court held:

Rules prescribing time within steps must be taken, must be adhered to strictly and practitioners who ignore them will do so at their own peril.

In response Mr. Mainga maintained that the aforementioned applications by the first Defendant and the Plaintiff, to raise preliminary issues and to amend pleadings, legally frustrated the fourth Defendant from filing his defence. It was noted that if the Plaintiff was allowed to keep on amending her statement of claim, it was difficult for the fourth Defendant to answer to the allegations.

Mrs. Chiyenge rejoined, and submitted that there was no law that frustrated the fourth Defendant from complying with the Order for Directions, in particular to file the defence. I was therefore urged to set aside the fourth Defendant's defence.

I have carefully considered the application and the submissions made thereof. Indeed timelines stipulated in an Order for Directions within which certain acts must be performed as assigned to parties must be complied to, and a party who disobeys

the timelines, does so at his/her own peril. The timelines are not for cosmetic reason, and it is unacceptable for a party to elect at his/her own convenience when to comply with the same. Such a path certainly has the potential to undermine the administration of justice. In the case of **Denton, Decadent, and Utilise [2014] EWCA Civ 906**, which involved three appeals, the Court of Appeal (England and Wales) in a joint judgment held:

Litigation cannot be conducted effectively and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) cooperation between the parties and their lawyers.

The deadline by which the fourth Defendant was ordered to file his defence was on August 1, 2019, and this was not done as directed. The deadline was set before the preliminary issue was raised by the first Defendant, and it was even before the Plaintiff filed her application to amend pleadings. Therefore, the argument that the fourth Defendant was legally frustrated from filing his defence on or before August 1, 2019, is blatantly unfounded. In **Mitchell v. News Group Newspapers Ltd [2013] EWCA Civ 1537**, the Court of Appeal (England and Wales) had this to say regarding non-compliance with courts rules and orders setting a deadline, thus:

But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason.

Ordinarily, the fourth Defendant should have filed an application for leave to file his defence out of time. And without the leave of the Court for extension of time, the defence filed post the deadline is undoubtedly in breach of the Order for Directions. And as to whether the breach should attract the penalty of having the

defence set aside, I must primordially pay regard to the seriousness and significance of the breach (see **Denton** case) (supra).

The breach thereof is not fatal, and may be pardonable subject to costs, because it is not so serious or significant to cause prejudice to the parties or/and the court, in the sense of delaying the matter for trial. Therefore, in the interest of expediting the matter to proceed to trial, which matter under the circumstances has already suffered undue delay due to some interlocutory applications, I will deem the fourth Defendant's defence to have been filed with the leave of the Court, subject to costs.

Costs to be borne by the fourth Defendants. I so direct in order to promote a culture of compliance with court rules and orders, otherwise the administration of justice will be a mockery.

DATE THIS 5TH DAY OF AUGUST 2020.



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THE HON. MR. JUSTICE CHARLES ZULU