

IN THE HIGH COURT FOR ZAMBIA

2016/HP/0047

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Commercial Registry)



BETWEEN:

FIRST NATIONAL BANK ZAMBIA LIMITED

APPLICANT

AND

PRO-FAB ZAMBIA LIMITED

1st RESPONDENT

ALEXANDER ZIMBA

2nd RESPONDENT

MICHAEL ZULU

3rd RESPONDENT ✓

WINNFRIDAH CHITONDO

4th RESPONDENT

Before the Honourable Justice B.G. Lungu on the 8th day of February, 2017 in Chambers.

For the Applicant : Mr. Moonga, In - house Counsel

For the Respondents: Mr. E Khosa, Messrs Nganga Yalenga & Associates

R U L I N G

CASES REFERRED TO;

1. *Commonwealth Development Corporation vs. Central African Power Corporation (1968) Z.R 70;*
2. *Michael Chilufya Sata v. Chanda Chiimba III Zambia National Broadcasting Corporation, Muvi TV Limited, Mobi TV International Limited;*

3. *Nida Properties Limited vs. Omnia Fertilizer Limited, Appeal No. 164 of 2013.*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *Section 10, High Court Act, Chapter 27 of the Laws of Zambia;*
2. *Order 28, Rule 1A, Rules of the Supreme Court, 1965 (1999 edition), the White Book;*
3. *Order LIII, Rule 10, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia*

This is an application on the part of the Applicant for an order that the 4th Respondent's Further Affidavit, 2nd Further Affidavit and Skeleton Arguments be expunged from the record.

The application was made by way of Summons, filed together with an Affidavit in Support, sworn by Theophilus Tukwayo Gausi, and Skeleton Arguments, all of which were filed on 25th November, 2016.

In order to clothe this application with perspective, I find it necessary, at this juncture, to pen the chronology in which documents were filed as between the Applicant and 4th Respondent:

- i. On 3rd February, 2016, the Applicant commenced proceedings against the Respondent by way of Originating Summons and a supporting Affidavit;

- ii. On 4th April, 2016, the 4th Respondent filed her Affidavit in Opposition to the Originating Summons;
- iii. On 2nd June, 2016 the 4th Respondent filed a Further Affidavit in Opposition to the Originating Summons;
- iv. On 7th June, 2016, the Applicant file an Affidavit in Reply to the 4th Respondent's Affidavit in Opposition to the Originating Summons; and
- v. On 8th September, 2016 the 4th Respondent filed a 2nd Further Affidavit in Opposition to the Originating Summons together with Skeleton Arguments of even date

It is the filing of the 4th Respondent's Further Affidavit, 2nd Further Affidavit and associated Skeleton Arguments that the Applicant takes issue with.

In their Skeleton Arguments, Counsel for the Applicant submit that **Order 28 rule 1A of the White Book** prescribes the procedure for the reception of affidavit evidence in any cause or matter begun by originating summons. The procedure was articulated to commence with an affidavit in support of the originating summons, on the one hand; to be countered by an *{opposing}* affidavit on the other hand; which in turn was to be countered by an affidavit *{in reply}* from

first hand. Moreover, that once the affidavit *{in reply}* was filed, no other affidavit could be received in evidence without leave of Court.

The Applicant observed that the 4th Respondent neither sought nor obtained leave of Court to file its supplementary affidavits in opposition and skeleton arguments. Consequently, it was contended that the said documents were irregularly before Court and ought to be expunged, with costs to the Applicant.

The 4th Respondent opposed the application to have its further affidavits and accompanying skeleton arguments expunged. The opposition was premised on an Affidavit in Opposition and Skeleton Arguments filed on 7th February, 2017.

In opposing the application, the 4th Respondent did not attempt to rebuff having filed extra affidavits without leave of Court. Instead, a justification was tendered on the proposition that it was not a mandatory requirement for leave of Court to be obtained before an excess number of affidavits could be filed into Court. The proposition was anchored on the case of ***Commonwealth Development Corporation vs. Central African Power Corporation (1968) Z.R 70¹***, where the High Court held that "***Affidavits in excess of the number normally submitted under the High Court Rules and Practice may be admitted into evidence in the discretion of the Judge especially when neither side objects to their inclusion.***"

Given the holding in the *Commonwealth Development Corporation*, Counsel for the 4th Respondent beseeched the Court to exercise its discretion to admit the supplementary affidavits and skeleton arguments in question in order to achieve justice.

Aside the appeal to the Court to exercise its discretion in favour of its client, Counsel for the 4th Respondent, in a rather glib manner, attempted to introduce evidence in the Skeleton Arguments to show that the Applicant was without clean hands. I will not consider that line of argument as there is nothing in the Affidavit in Opposition to this application to supports that contention.

I now move to consider the law governing the reception of affidavit evidence in the High Court in cases begun by originating summons. In this regard, I noticed that the Applicant placed significant reliance on the White Book to aid it in identifying the procedure to be adopted. This compelled me to journey into the erudition of the status of the White Book on High Court practice and procedure. I recalled that Section 10 of the High Court Act clearly makes reliance on the practice and procedure contained in the White Book a default reference in circumstances where our rules are deficient.

Section 10 (1) reads as follows:

"The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, ..., and in

default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England ..."

My Learned brother, Justice Dr Patrick Matibini, SC (as he then was), had occasion to explicate the use of section 10 (1) of the High Court Act in the case of *Michael Chilufya Sata v. Chanda Chiimba III Zambia National Broadcasting Corporation, Muvi TV Limited, Mobi TV International Limited*², where he held that "*The Rules {of the White Book} are to be resorted to, only when it is necessary to fill a lacuna or gap in our own rules of procedure.*" I am persuaded by this interpretation of section 10 (1) of the High Court and adopt it.

Given the interpretation of section 10, I thoroughly examined the High Court Act and attendant Rules, which examination revealed that there appeared to be no comprehensive procedure expressly provided therein. The absence of granular prescription exposes our Rules to lacuna, thereby giving way to the use of the default mechanism afforded by of the White Book. Consequently, I am persuaded by the Applicant to adopt the procedure articulated in Order 28, rule 1A of the White Book to the extent that substantial conformity will reasonably permit.

In view of the foregoing, it is clear that in the ordinary scheme of practice in the High Court, where a case is commenced by an originating summons, the affidavit evidence must flow from an affidavit in support to an affidavit in opposition, if any, to an

affidavit in reply, if any. The affidavit in reply marks the close of reception of affidavit evidence except with the leave of Court.

I adopt the principal that the reception of additional affidavit evidence must be preceded by the grant of leave of Court on the back of the case of ***Nida Properties Limited vs. Omnia Fertilizer Limited, Appeal No. 164 of 2013***³. In that case, the Supreme Court declined to fault the learned trial judge for ignoring the additional and further affidavit filed by the plaintiff because no leave was obtained to permit the plaintiff to file the said affidavits.

Coming to the Respondent's contention that the Court has a discretion to permit extra affidavits in the interest of justice, I hasten to agree that such jurisdiction in fact exists. However, there are Rules of Court which exist to facilitate an application by a party who seeks to move the court to exercise such jurisdiction. In the Commercial Court, ***Rule 10 of Order LIII of the High Court Rules*** facilitates such interlocutory applications.

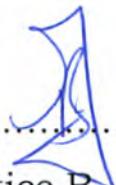
A party can not of its own accord disregard the Rules of Court on the basis that the party considers that it is justified in so doing. That, in my view, would bring chaos to the Rules of practice and procedure as we know them.

For the foregoing reasons, I agree that the absence of leave of Court permitting the 4th Respondent to file the Further and 2nd Further Affidavit renders the said Affidavits irregularly before Court. Consequently, the Affidavits in question are expunged from the record.

Costs of this application are awarded to the Applicant, to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 31st day of August, 2017



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Lady Justice B. G. Lungu

HIGH COURT