

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Commercial Jurisdiction)

2013/HPC/0767

BETWEEN:

GREENBELT FERTILIZERS LIMITED

PLAINTIFF

AND

HYGROTECH ZAMBIA LIMITED

DEFENDANT



Before the Hon. Mr. Justice Justin Chashi in Chambers on the 7th day of August, 2015.

For the Plaintiff: N Sikombe (Ms), Messrs Theotis Mataka & Sampa Legal Practitioners

For the Defendant: E. K. Mwitwa, Messrs Mwenye & Mwitwa- Advocates

R U L I N G

Cases referred to:

- 1. Mutatika and Another v Chipungu – SCZ/ 13/2014*
- 2. Sobek Lodges Limited v Zambia National Wildlife -2008/ HP/ 668*

Legislation referred to:

- 3. The High Court Act, Chapter 27 of the Laws of Zambia*
- 4. The Supreme Court Practice (White Book) 1999*

When this matter came up on the 30th day of august 2015 for hearing of the application for confirmation of the ex parte Order for

stay of execution, Counsel for the Defendant drew the attention of the Court to the fact that the Defendant had on the 28th day of July 2015 filed a notice of intention to raise preliminary issues.

The issues relate to the Plaintiff's affidavit in opposition to the ex parte summons for an Order to stay execution of the Judgment pending the determination of the Defendant's appeal to the Supreme Court, which affidavit was filed on the 20th day of July 2015 and was deposed to by Mandy Donald.

The issues being raised are as follows:

1. *Whether the contents of paragraph 6 and all the subparagraphs thereunder and paragraphs 7, 8, 9 and 10 of the aforestated affidavit are contrary to Order 5 rule 15, 16 and 17 of **The High Court Rules**³*
2. *Whether the said paragraphs ought to be expunged from the affidavit and from the record.*

According to the Defendant's skeleton arguments, the Defendant has taken issue with the said paragraphs and seeks this Court's determination pursuant to order 33 Rule 3 of **The Supreme Court Rules**⁴ and Order 5 Rule 15, 16, and 17 of **The High Court Rules**³.

It is the Defendant's contention that a perusal of paragraphs 6 to 10 of the affidavit leads to the inescapable conclusion that the

deponent is advancing legal arguments and conclusions which are the preserve of the Court.

At the hearing of the preliminary issues, Counsel for the Defendant placed reliance on the skeleton arguments and added that the paragraphs in question are not statements of facts but amount to legal arguments and conclusions and prayed that they be expunged from the record.

In response, Counsel for the Plaintiff made oral submissions and denied that the affidavit contains legal arguments and conclusions. That in any case, an affidavit containing evidence can be presented in the form of information, knowledge and belief that the deponent has in relation to the subject matter. It was Counsel's submission that paragraph 6 of the affidavit merely states the facts of the deponent on the subject matter.

As to what amounts to legal arguments, Counsel placed reliance on the case of **Mutatika and Another v Chipungu**¹.

It was Counsel's contention that paragraphs 7 to 10 do not contain legal arguments as they do not cite and reflect the Rules of the Court. Further reliance was placed on the case of **Sobek Lodges Limited v Zambia National Wildlife**².

According to Counsel for the Plaintiff the purpose of paragraphs 6 to 10 is to show that the Defendant has not advanced good and sufficient grounds for an application for stay of execution to be sustained.

In determining the preliminary issues, I have taken into consideration the affidavit in issue in particular paragraphs 6 to 10, the notice to raise preliminary issues and the accompanying skeleton arguments as well as the oral submissions by both Counsel.

Order 5 Rule 15 of ***The High Court Rules***³ states as follows:

“An affidavit shall not contain extraneous matters by way of objection, prayer or legal argument or by conclusion”.

Order 5 Rule 16 states that:

“Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true”.

Whilst Order 5 Rule 17 states as follows:

“When a witness deposes to his belief in any matter of fact and his belief is derived from any source other than his personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief.

A careful perusal of paragraphs 6 with its sub paragraphs reveals that indeed the contents amount to legal arguments and therefore contravenes the provision of Order 5 Rule 15 of the **High Court Rules³**.

However as regards paragraphs 7, 8, 9 and 10, although the deponent of the affidavit is not a Legal Practitioner, the paragraphs contain statement of facts which can be deposed to by anyone with basic legal knowledge and therefore do not contravene the provisions of the **High Court Rules³**.

In the view that I have taken, paragraph 6 of the affidavit in opposition is in its entirety expunged from the affidavit.

Costs of the application shall be in the cause.

Delivered at Lusaka this 7th day of August 2015.


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JUSTIN CHASHI
HIGH COURT JUDGE