

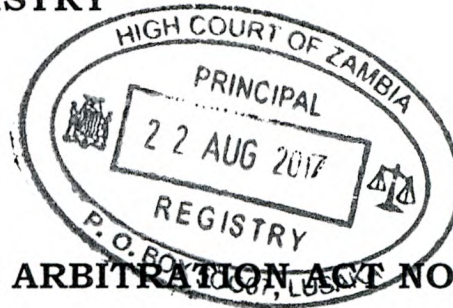
IN THE HIGH COURT FOR ZAMBIA

2017/HP/ARB/007

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Arbitration Jurisdiction)



IN THE MATTER OF THE ARBITRATION ACT NO. 19 OF 2000

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:

AFRICAN ALLIANCE AFRICAN PIONEER
MASTER FUND

PLAINTIFF

AND

VEHICLE FINANCE LIMITED

DEFENDANT

**BEFORE THE HON. MADAM JUSTICE P. K. YANGAILO ON 22ND
AUGUST, 2017.**

For the Plaintiff:

Mr. M. Sakala - Corpus Legal Practitioners

For the Defendant:

*Mr. M. Mwenye SC & Ms. P. Tembo -
Mwenye & Mwitwa Advocates*

RULING

LEGISLATION REFERRED TO:

1. *The Arbitration Court Proceedings Rules 2001 SI No. 75 of 2001; and*
2. *The High Court Act, Chapter 27 of the Laws of Zambia;*

This matter was scheduled for hearing of the application by the Defendant for stay or to suspend Court proceedings pending the conclusion of the Arbitral proceedings on 17th August 2017, but on the scheduled date of hearing, it was brought to my attention that Counsel for the Defendant had on 15th August 2017, filed an application to expunge the Affidavit in Opposition to the Affidavit in Support of Summons for an Order to stay or suspend Court proceedings pending the conclusion of the Arbitral Proceedings. I thus gave priority to hearing the application to expunge the Affidavit in Opposition. The application was supported by an Affidavit in Support deposed by one PRECIOUS TEMBO, in which she avers, *inter alia*, as follows: -

1. *That the Affidavit in Opposition offends the rules on Affidavit evidence, which proscribe the inclusion of objections, legal arguments and conclusions in Affidavits; and*
2. *That in paragraph 5 of the Affidavit in Opposition, Mr. Sakala clearly states that the Affidavit in Opposition is partially based on points of law. That further, paragraphs 7 to 13 of the Affidavit in Opposition advances legal arguments.*

The Defendant's learned Counsel Mr. Musa Mwenye SC., made the application and relied on the Affidavit in Support filed herein on 15th August, 2017. The application was made pursuant to **Order 38** of **The Arbitration Court Proceedings Rules**¹, as read together

with **Order V Rules 15** and **16** of **The High Court Rules**². **Order 38** of **The Arbitration Court Proceedings Rules**¹, provides that: -

"General application of High court or Subordinate Court rules

- (1) ***Where these Rules do not provide for any particular matter or do not make sufficient provision enabling a court to dispose of a matter before it or to enable a party to prosecute its case, the Rules of the High Court or of the subordinate court, as the case may be, relating to civil proceedings with these Rules.***
- (2) ***Parties to legal proceedings shall also be entitled to make ancillary and incidental applications and to invoke other necessary court processes, available under the High court Rules, in dealing with applications under these Rules."***

Order V Rules 15 and **16** of **The High Court Rules**², provides that:-

"No extraneous matter

15. ***An affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion.***

Contents of affidavits

16. ***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." (Court's emphasis)***

Mr. Mwenye SC., also made oral submissions that the use of an Affidavit is clearly to place facts before the Courts and that the rules

proscribe deponents from advancing legal arguments in Affidavits. It is the Defendant's contention that a perusal of the Plaintiff's Affidavit in Opposition leads to the inescapable conclusion that the deponent Mr. Sakala, Counsel for the Plaintiff, is advancing extraneous matters by way of legal arguments. He therefore prayed that the said Affidavit be expunged off the record in order to fulfil the procedural righteousness.

In response, Learned Counsel for the Plaintiff, Mr. Sakala, made oral submissions that the facts to which the Affidavit relates are legal in nature and can competently be deposed to by a lawyer as has been done *in casu*. He admitted that in paragraphs 7 to 13, the deponent was stating the facts of law as verily believed by the deponent. He contends that **Order V Rule 16** and **17** of **The High Court Rules**², allows a deponent of an Affidavit to swear to facts which are within his or her personal knowledge, as well as, to depose to a belief provided the basis of a belief is set out in the Affidavit. He further contends that the Plaintiff's Affidavit in Opposition, which he swore on behalf of the Plaintiff, complies with the above cited rules because Counsel in this matter was deposing to facts of law as well as other evidence within his personal knowledge. He also contends that a perusal of paragraphs 10 to 11 of the Affidavit in Opposition will show that the deponent was deposing to facts relating to the arbitral hearing in which he personally participated and that those paragraphs cannot be said to dealing with the law. He referred this Court to **Order V Rule 13** of **The High Court Rules**², which he contends allows the Court to

admit Affidavit evidence if it has been properly sworn irrespective of other defects in it in order to ensure that justice is done. The said order provides that: -

"Defective in form

The Court or a Judge may permit an affidavit to be used notwithstanding it is defective in form according to these Rules, if the Court or a Judge is satisfied that it has been sworn before a person duly authorised."

Counsel argued that the statements and facts that are set out in the Affidavit in Opposition would not cause prejudice to the Defendant as these facts can safely be repeated in the *viva voce* submissions of Counsel. He prayed that the Plaintiff's Affidavit in Opposition or parts of it be retained on record.

In reply, Mr. Mwenye submitted that only two paragraphs of the Plaintiff's Affidavit in Opposition deal with facts. He argued that contrary to what Mr. Sakala submitted in reference to ***Order V Rule 13*** of ***The High Court Rules***², the said order permits this Court to admit into evidence an Affidavit that is defective in form and not substance, if it is properly sworn. Mr. Mwenye contends that the Affidavit in Opposition is defective in substance because it substantially canvases the law and it must therefore be expunged, as the provisions of ***Order V Rule 15*** of ***The High Court Rules***², are mandatory in nature as can be seen by the use of the mandatory word "*shall*". He reiterated his prayer that the

application to expunge the Affidavit be granted with costs to the Defendant.

In determining the application to expunge the Affidavit in Opposition, I have taken into consideration the Affidavit in Opposition which is in issue, the Affidavit in support of the Application to expunge, the authorities referred to and submissions by both Counsel, for which I am grateful.

Order V Rules 15 and **16** of **The High Court Rules**², state as follows: -

"No extraneous matter

15. An affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion.

Contents of affidavits

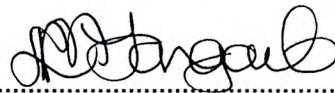
16. Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true." (Court's emphasis)

A careful perusal of paragraphs 7 to 13 of the Plaintiff's Affidavit in Opposition reveals that indeed the contents amount to legal arguments as they cite and refer to the Rules of Court. This offends **Order V Rule 15** of **The High Court Rules**². For that reason, the application by the Defendant is valid and accordingly, the Affidavit in Opposition is in its entirety expunged from the record, with costs to the Defendant to be borne by the Plaintiff and to be taxed in

default of agreement. The Court will proceed to hear and determine the application for an order to stay or suspend Court proceedings pending the conclusion of the Arbitral proceedings on Monday 11th September, 2017 at 10:30 hours.

Leave to appeal is granted.

Delivered at Lusaka this 22nd day of August, 2017.



**P. K. YANGAILO
HIGH COURT JUDGE**