

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*



**2013/HP/0976**

BETWEEN:

**JEFF MUREBWA AND 223 OTHERS**

**PLAINTIFFS**

AND

**DANGOTE QUARRIES (ZAMBIA) LIMITED**

**1<sup>st</sup> DEFENDANT**

**ZAMBIA ENVIRONMENTAL MANAGEMENT AGENCY**

**2<sup>nd</sup> DEFENDANT**

**MAJALIWA MUWAYA**

**3<sup>rd</sup> DEFENDANT**

*(Sued in his capacity as Senior Chief Chiwala)*

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 13<sup>th</sup> DAY OF MARCH, 2018**

*For the Plaintiffs : Mr W. Mubanga SC with Mrs V. Mulenga, Chilupe and Permanent Chambers*

*For the 1<sup>st</sup> Defendant : Ms J. Mutemi, Theotis Mataka and Sampa Legal Practitioners*

*For the 2<sup>nd</sup> Defendant : No appearance*

*For the 3<sup>rd</sup> Defendant : Ms N. Nambao, Mulungushi Chambers*

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## **R U L I N G**

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CASES REFERRED TO:

1. ***Chikuta V Chipata Rural District Council 1974 ZR 241***
2. ***Shell and BP Zambia Limited V Conidaris and others 1974 ZR 281.***
3. ***New Horizon Printing Press Limited V Waterfield Estates Limited and Commissioner of Lands 2005/HP/0748***
4. ***Post Newspapers Limited V Rupiah Bwezani Banda SCZ No 25 of 2009***
5. ***Kalusha Bwalya V Chadore Properties 2009/HPC/0294 (unreported)***

LEGISLATION REFERRED TO:

- 1. *The High Court Rules, Chapter 27 of the Laws of Zambia***
- 2. *The Rules of the Supreme Court, 1999 edition***

This is a ruling on a preliminary issue raised by the 1<sup>st</sup> Defendant to the application made by the Plaintiffs, to expunge paragraphs 6-9 of the affidavit in reply to the affidavit in opposition for an order of injunction.

Counsel for the 1<sup>st</sup> Defendant stated that they relied on the notice to raise preliminary issues as well as the list of authorities, and skeleton arguments filed in support of the said notice. That it was their submission with regard to the cross preliminary issue that it was not in order for State Counsel to swear the affidavit in support of the summons to expunge paragraphs 6-9 of the affidavit in reply, as the same raised contentious issues, which were likely to cause argument, as the contents were disputable.

With regard to the second issue, Counsel submitted that the contents of paragraphs 11-14 of the affidavit in support of the summons to expunge the paragraphs were not in compliance with Order 5 to 15 of the High Court Rules, and that in particular paragraph 11 contained conclusions as it was premised on the previous paragraphs.

On the 3<sup>rd</sup> preliminary issue, it was stated that the wrong provision of the law had been used to make the application, the same being Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, and Order 14A of the Rules of the Supreme Court, 1999 edition. Counsel stated that Order 14A deals with disposal of a matter or an application on a point of law, and the effect is once an application is successfully raised pursuant to that Order, it would finally dispose of a matter. That

the application to expunge paragraphs 6-9 of the affidavit in reply in this matter would not have the effect of finally determining the 1<sup>st</sup> Defendant's application for an interim injunction, as the same would simply result in the affidavit in reply being challenged. It was further submitted that the irrelevance of Order 14A to this application left Order 3 Rule 2 of the High Court Rules.

Counsel stated that this Order is not a stand-alone provision, and is used where no specific provision of the law is available for the interlocutory relief sought, as the Order commences with the words "*subject to any particular rules*". That Order 5 of the High Court Rules is the law that governs affidavits, and in the event that it does not have provision to expunge the contents of an affidavit, by virtue of Section 10 of the High Court Rules, Chapter 27 of the Laws of Zambia, Order 41 Rule 6 of the Rules of the Supreme Court of England which provides for the expunging of affidavits should have been resorted to. Therefore the use of Order 3 Rule 2 of the High Court Rules was wrong, and the application was irregular, and that the affidavit sworn by State Counsel Mr Mubanga should be expunged from the record.

In response, Mr W. Mubanga, SC stated that they opposed the application, and relied on the list of authorities and skeleton arguments filed on 20<sup>th</sup> February, 2018. With regard to the first preliminary issue raised that the affidavit that he had sworn in support of the application to expunge paragraphs 6-9 of the affidavit in reply on the basis that it contains contentious matters, his submission was that the said affidavit relates to matters of procedure, as stipulated by the law and rules of evidence on the production and authentication of documents, as stipulated in Order 5 Rule 16 of the High Court Rules.

Therefore it did not offend the rules of the court, and the cases relied on by the 1<sup>st</sup> Defendant were distinguishable, as in those cases the Supreme Court frowned upon Counsel taking out affidavits on behalf of their clients on the basis that certain facts deposed to by Counsel were not within Counsel's personal knowledge, thereby making the affidavit hearsay evidence. It was further submitted that the authorities relied on by the 1<sup>st</sup> Defendant did not impose a blanket ban on Counsel swearing affidavits, if the same related to procedural matters, as in this case.

Reference was made to the case of **POST NEWSPAPERS LIMITED V RUPIAH BWEZANI BANDA SCZ No 25 of 2009**, stating that the case was instructive in that the Supreme Court in that matter refused to expunge the affidavit on the basis that the facts deposed to, related to procedure, and not the facts of the matter. Further that in the High Court case of **NEW HORIZON PRINTING PRESS LIMITED V WATERFIELD ESTATES LIMITED AND COMMISSIONER OF LANDS 2005/HP/0748** which was of persuasive value to this court, the Hon Judge refused to expunge the affidavit sworn by Counsel as the essential facts relating to the application were not contentious. It was argued that the preliminary issue in this matter was misconceived and ought to be dismissed, as it was meant to delay the trial.

As regards the second issue, it was stated that it related to the procedure regarding the exhibits to paragraphs 6-9 of the affidavit in reply, and the Plaintiff's application was properly before the court. On whether paragraphs 11-14 of the affidavit in support of the application to expunge paragraphs 6-9 of the affidavit in reply contained extraneous matters, State Counsel stated that the paragraphs did not contain

conclusions, but facts relating to matters of law and procedure on authentication of documents.

Mrs Mulenga in response to the submission by Counsel for the 1<sup>st</sup> Defendant that the Plaintiff's application would not have the effect of determining the application for the injunction, as the same simply challenged the affidavit in reply, stated that the Plaintiff's application would have the final effect of determining the production of exhibits to the 1<sup>st</sup> Defendant's affidavit in reply, as well as the contents of paragraphs 6-9 of the affidavit in reply, and that if the same were to be expunged, this would be subject of an appeal. Therefore the Plaintiff's application was properly before the court, and the 1<sup>st</sup> Defendant's application ought to be dismissed. Like State Counsel, she submitted that the cases relied on by the 1<sup>st</sup> Defendant banned Counsel from swearing affidavits in contentious matters that were not within Counsel's knowledge and amounted to hearsay, which was not the case in this matter, as State Counsel had deposed to procedural issues.

That paragraphs 11-14 of the affidavit in support of the summons to expunge paragraphs 6-9 of the affidavit in reply did not contain extraneous matters, as they related to the law on production and authentication of documents, and the affidavit was therefore properly before the court. She prayed that the 1<sup>st</sup> Defendant's preliminary issued be dismissed with costs.

Counsel for the 3<sup>rd</sup> Defendant had nothing to say.

In reply, it was stated that the cases that they had cited banned Counsel from swearing affidavits on contentious matters, and adducing hearsay evidence, and their contention was that the affidavit in support of the

summons to expunge paragraphs 6-9 of the affidavit in reply, particularly paragraphs 8-10 were contentious, as they were disputable. That Order 3 Rule 2 of the High Court Rules, only empowers the Court to grant interlocutory relief subject to the rules of the court, and Counsel maintained that Order 14A of the Rules of the Supreme Court was inapplicable in this matter, as the application before the court was for an injunction which once determined, would not dispose of the whole matter, and therefore the submissions by Counsel for the Plaintiffs were misconceived. She reiterated her earlier prayers.

I have considered the preliminary issues raised. The first issue raised relates to whether it was in order for State Counsel W.Mubanga, as Counsel for the Plaintiffs, to execute an affidavit in support of summons to expunge paragraphs 6-9 of the affidavit in reply to the affidavit in opposition to summons for an injunction dated 6<sup>th</sup> February, 2018. Counsel for the 1<sup>st</sup> Defendant stated that in the case of **CHIKUTA V CHIPATA RURAL DISTRICT COUNCIL 1974 ZR 241**, the court expressed its misgivings about Counsel swearing affidavits where the matters were contentious. Counsel for the Plaintiffs on the other hand argued that the affidavit in issue had not deposed to contentious matters, but rather procedural issues relating to the authentication of documents, which was not prohibited as held in the case of **POST NEWSPAPERS LIMITED V RUPIAH BWEZANI BANDA SCZ No 25 of 2009**.

Indeed the case of **CHIKUTA V CHIPATA RURAL DISTRICT COUNCIL 1974 ZR 241** expressed concerns about counsel swearing affidavits in contentious matters. It was held in that case that;

***“The increasing practice amongst lawyers conducting cases of introducing evidence by filing affidavits containing hearsay evidence is not merely ineffective but highly undesirable, particularly where the matters are contentious. This view was upheld in the case of SHELL AND BP ZAMBIA LIMITED V CONIDARIS AND OTHERS 1974 ZR 281. However as rightly submitted by Counsel for the Plaintiffs the case of POST NEWSPAPERS LIMITED V RUPIAH BWEZANI BANDA SCZ No 25 of 2009 held that the “Chikuta case, did not impose a blanket ban on the swearing of affidavits by counsel even in procedural applications.”***

In this case, the application by the Plaintiffs is to expunge paragraphs 6-9 of the affidavit in reply to the affidavit in support of summons for an order of injunction filed on 12<sup>th</sup> February, 2018, relates to the procedure on how the 1<sup>st</sup> Defendant has introduced video recordings as exhibits to the affidavit in reply. It does not relate to contentious issues being deposed to. Counsel for the 1<sup>st</sup> Defendant argued that paragraphs 8-10 of the affidavit in support of the summons to expunge sworn by State Counsel contains contentious matters, but did not demonstrate what the contentious issue were.

Whilst it is true that the compact disks themselves may contain contentious matters, the manner in which they have been introduced has been challenged, and this is the procedural issue in dispute. I therefore find that the 1<sup>st</sup> Defendant’s application relating to whether State Counsel can swear the affidavit to expunge paragraphs in the affidavit in reply is misconceived, as State Counsel deposed to procedural requirements for the admission of evidence, and I dismiss it.

The second issue relates to whether paragraphs 11 -14 of the affidavit in support of the summons to expunge paragraphs 6-9 of the affidavit in reply are in compliance with the Provisions of Order 5 Rule 15 of the High Court Rules, Chapter 27 of the Laws of Zambia. Order 5 Rule 15 of the said High Court Rules, provides that ***“An affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion”***.

The 1<sup>st</sup> Defendant submitted that paragraphs 11-14 of the affidavit in support of the summons to expunge contain extraneous matters by way of conclusions, and arguments, contrary to Order 5 Rule 15 of the High Court Act. The Plaintiffs on the other hand denied that the said paragraphs contravened Order 5 Rule 15 of the said High Court Act as they were paragraphs relating to the law on authentication and production of documents, and were premised on the paragraphs before them. A perusal of the said paragraphs shows that paragraph 11 relates to the Plaintiffs being prejudiced if the compact disk is admitted in evidence, as it had not been authenticated, while paragraph 12 states that the compact disc should be expunged. Paragraph 13 states that the compact disc offends the rules of evidence, and should be expunged and paragraph 14 also states that the compact disc should be expunged from the affidavit.

Clearly by stating that the compact disc should be expunged, is a legal argument which contravenes Order 5 Rule 15 of the High Court Rules. What was supposed to be stated are the facts relating to why the compact disc should be not be admitted in evidence, and I agree with Counsel for the 1<sup>st</sup> Defendant that paragraphs 11-14 of the affidavit in support of the summons to expunge paragraphs 6-9 of the affidavit in



reply contains legal arguments and conclusions, and I accordingly expunge them from the affidavit.

The last issue raised relates to the provisions pursuant to which the affidavit in support of summons to expunge paragraphs 6-9 of the affidavit in reply has been brought. The caption of the summons filed on 12<sup>th</sup> February, 2018 shows that the application was brought pursuant to Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia as read with Order 14a of the Rules of the Supreme Court, 1999 edition. Counsel for the 1<sup>st</sup> Defendant submitted that Order 14A of the Rules of the Supreme Court Rules, 1999 edition can only be invoked where the application will dispose of a matter subject only to an appeal, and that Order 3 Rule 2 of the High Court Rules is not a stand-alone provision, but is subject to any particular rules.

Counsel for the Plaintiff on the other hand argued that the application to expunge would dispose of the admission of the exhibits to the affidavit in reply, and therefore determine that issue, so the application was properly before the court. The application to expunge paragraphs 6-9 of the affidavit in reply is premised on the fact that the rules relating to authentication and production of documents were not complied with by exhibiting compact discs to the affidavit, which had not been authenticated. Therefore the argument was that the affidavit did not comply with the law. As rightly submitted by Counsel for the 1<sup>st</sup> Defendant, Order 14A of the Rules of the Supreme Court, 1999 edition would only have been relied on when making the application if once the application was made and successfully determined, it would determine the matter, subject only to an appeal. The said Order provides and I quote;

***“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -***

***(a) such question is suitable for determination without a full trial of the action, and***

***(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.***

***(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.***

***(3) The Court shall not determine any question under this Order unless the parties have either -***

***(a) had an opportunity of being heard on the question, or***

***(b) consented to an order or judgment on such determination.”***

Going by the above provisions, the expunging of paragraphs 6-9 of the affidavit in reply would not determine the injunction application, as the court would still consider the merits of the application for the injunction on the rest of the affidavit evidence, apart from the expunged paragraphs. Further the matter before court would not have been disposed of by expunging paragraphs of the affidavit in reply. Therefore, the reliance on Order 14A of the Rules of the Supreme Court, 1999 edition in making the application was misconceived and irregular, and the question is whether the application can stand based on Order 3 Rule 2 of the High Court Rules?

Order 3 Rule 2 of the High Court Rule states that;

***“Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”***

Counsel for the 1<sup>st</sup> Defendant submitted that this Order is not a stand-alone provision, and should be used in conjunction with any particular rules. As she rightly observed Order 5 of the High Court Rules, Chapter 27 of the Laws of Zambia provides for what affidavits should and should not contain. Reference was made to the case of ***KALUSHA BWALYA V CHADORE PROPERTIES 2009/HPC/0294 (unreported)*** where Hon Mr Justice N.K. Mutuna erstwhile opined that ***“although the two courts in the Chikuta and Shell and BP Zambia Limited expressed their misgivings about counsel swearing affidavits based on hearsay evidence and in contentious matters, they did not give a direction as to the fate of such evidence and or affidavits. However it is safe to say such evidence would be inadmissible because Doyle CJ in the Chikuta case states that it is ineffective for counsel to swear an affidavit in those circumstances.”***

Order 5 of the High Court Rules does not provide for what happens to the irregular affidavits, and Counsel for the 1<sup>st</sup> Defendant submitted that Order 41 Rule 6 of the Rules of the Supreme Court, 1999 edition should have been invoked when making the application, pursuant to Section 10 of the High Court Act, Chapter 27 of the Laws of Zambia. Section 10 of the High Court Act as amended by Act No 3 of 2011 provides for the practice and procedure in the High Court. It states that;

***“(1) The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or any other written law, or by such rules, orders or directions of the Court as may be made under this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or such written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England and subject to subsection (2), the law and practice applicable in England in the High Court of Justice up to 31st December, 1999.***

***(2) The Civil Court Practices, 1999 (Green Book) of England and any civil court practice rules issued in England after 31st December, 1999, shall not apply to Zambia.”***

Therefore as Order 5 does not provide for the expunging of affidavits or any parts thereof, resort should have been had to Order 41 Rule 6 of the Rules of the Supreme Court, 1999 edition which states that; ***“The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.”*** Counsel for the Plaintiff however relied on Order 3 Rule 2 of the High Court Rules when making the application. The Order as already seen empowers the court to make any interlocutory order necessary for doing justice, subject to any particular rules.

While Counsel for the 1<sup>st</sup> Defendant submitted that the order is not a stand-alone provision, as it is subject to any particular rules of the court, and to which I totally agree, my understanding is that is that if there is a particular rule relating to the subject of the application, that

rule should be used. Where however there is no specific provision, that rule may be invoked. As Order 5 of the High Court Rules does not provide for expunging for affidavits, Order 3 Rule 2 of the High Court Rules gives this court jurisdiction to consider such an application.

This is so even in light of the fact that Order 41 Rule 6 of the Rules of the Supreme Court may have been invoked, as this rule is only applicable where there is default in our rules. On that basis I find the application is properly before me pursuant to Order 3 rule 2 of the High Court Rules, and I will proceed to hear it. The application shall come up on 13<sup>th</sup> April, 2018 at 08:30 hours. Costs shall be in the cause. Leave to appeal is granted.

**DATED THE 13<sup>th</sup> DAY OF MARCH, 2018**

S. Kaunda  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**