

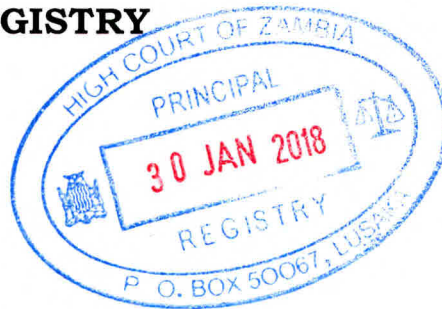
**+IN THE HIGH COURT FOR ZAMBIA**

**2017/HP/ 2256**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

**MOYA MULIKITA (Suing as  
Administrator of the Estate  
of the late Joseph Mando Mulikita)**

**APPLICANT**

**AND**

**HORIZON PROPERTIES LIMITED**

**RESPONDENT**

***BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO  
IN CHAMBERS AT LUSAKA, THE 30<sup>TH</sup> DAY OF JANUARY 2018.***

*For the Applicant: Mr. M. Banda - Nanzila Advocates*

*For the Respondent: Ms. C. M. Mwansa - Messrs. EBM Chambers*

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## **RULING**

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**CASES REFERRED TO:**

1. *Commonwealth Development Corporation vs. Central African Power Corporation (1968) ZR 90;*
2. *Laurent vs. Williams (1963 - 1964) ZR 5; and*
3. *Bank of Zambia vs. Vortex Refrigeration Company and Dockland Construction Limited - SCZ/8/361/2012.*

**LEGISLATION AND OTHER WORKS REFERRED TO:**

1. *The Supreme Court Practice 1999 Edition (The White Book).*

On 27<sup>th</sup> December, 2017, the Applicant commenced an action by way of Originating Summons accompanied with Affidavit in Support. I scheduled the matter for hearing on 29<sup>th</sup> January, 2018. On 22<sup>nd</sup> January, 2018, the Applicant filed herein a Further Affidavit in Support of Originating Summons. The Respondent entered Appearance and filed herein an Affidavit in Opposition on 23<sup>rd</sup> January, 2018.

Subsequently, on 25<sup>th</sup> January, 2018, the Respondent filed herein an application to strike out the Applicant's Further Affidavit in Support of Originating Summons filed on 22<sup>nd</sup> January, 2018, which was accompanied by Affidavit in Support deposed by Chisunke Mary Mwansa, an Advocate practicing under the name and style of EBM Chambers. It is averred by Ms. Mwansa, *inter alia*, as follows: -

1. *That the Applicant commenced an action against the Respondent by way of Originating Summons and Affidavit in Support of Originating Summons on the 27<sup>th</sup> December, 2017 and served the same on the Respondent on the 9<sup>th</sup> January, 2018;*
2. *That on the 22<sup>nd</sup> January, 2018, the Applicant filed a Further Affidavit in Support of Originating Summons;*
3. *That she verily believes that the Applicant filed the said Further Affidavit without leave of this Honourable Court to do so;*
4. *That she verily believes that it is procedural practice for a party to apply for leave of the Court before filing a Further Affidavit; and*

5. That in the premise, she verily believes that this is a proper case in which this Honourable Court ought to exercise its inherent power by ordering that the Further Affidavit filed on the 22<sup>nd</sup> January, 2018, be struck out in the interests of justice.

On the return date on 29<sup>th</sup> January, 2018, in her *viva voce* submissions, the Respondent's Learned Counsel, Ms. Mwansa applied to strike out or expunge the Applicant's Further Affidavit filed on 22<sup>nd</sup> January 2018, which application was brought pursuant to **Order 57 Rule 4 (2)** of **The Rules of the Supreme Court**<sup>1</sup>, which states that: -

***"Affidavits***

***A respondent may file affidavits in opposition to a motion, but these should be filed, and included in the indexed and paginated bundles, before the hearing. Additional affidavits may be filed by any party if leave is obtained at the hearing..."***

Ms. Mwansa, argued that the Applicant had filed a Further Affidavit in Support of the Originating Summons without the leave of the Court, and that as such, it ought not to be allowed on the record. She invited this Court's attention to the case of **Commonwealth Development Corporation vs. Central African Power Corporation**<sup>1</sup> and submitted that this case clearly emphasises that a party is allowed or entitled to file an Affidavit as of right, but however, can only file a Further Affidavit with leave of the Court. My attention was further drawn to the case of **Laurent vs. Williams**<sup>2</sup>, which Ms. Mwansa submitted, clearly indicates that a

party has to request for permission before filing a further Affidavit into Court.

On the basis of the cited authorities, Ms. Mwansa prayed that this Court strikes out or expunges the Applicant's Further Affidavit that was filed on 22<sup>nd</sup> January 2018, with costs.

In response, Learned Counsel for the Applicant, Mr. Banda, opposed the application on the basis that the Applicant has made the substantive application before the Court pursuant to the provisions of **Order 28 Rule 1A (5)** of **The Rules of the Supreme Court**<sup>1</sup>, which he argued, clearly entitles the Applicant to file a further Affidavit in Reply after its initial Affidavit in Support. The said Order states that: -

***"Affidavit evidence***

***A plaintiff on whom a copy of a defendant's affidavit evidence has been served under paragraph (4) may within 14 days of such service file in Court further affidavit evidence in reply and shall in that event serve copies thereof on that defendant."***

He submitted that his argument was fortified by the decision that was made by the Court in the case of **Bank of Zambia vs. Vortex Refrigeration Company and Dockland Construction Limited**<sup>3</sup> and emphasised that laxity in presenting Court documents as prescribed is not to be supported but, the overriding interests of justice should be our concern. He further submitted that if an Affidavit is required so that full disclosure of facts is going to help in dispensation of justice, it would not be doing justice to bar or

preclude evidence simply because there is a procedural matter that has come to the fore.

In reply, Ms. Mwansa argued with emphasis that **Order 28 Rule 1A (5)** of **The Rules of the Supreme Court**<sup>1</sup>, which was cited by Mr. Banda, is a grave misapplication to the application before this Court and is very misleading for reasons being that in as much as the Respondent concedes that the Applicant has the right to file an Affidavit in Reply, the Further Affidavit filed by the Applicant on 22<sup>nd</sup> January, 2018, is not an Affidavit in Reply, but is a Further Affidavit in Support of Originating Summons. She submitted that the record will show that at the time that the said Further Affidavit was filed herein by the Applicant, the Respondent had not even filed any Affidavit in Opposition that would have required the Applicant to file an Affidavit in Reply and as such, it is misleading for Mr. Banda to state the Further Affidavit in Support filed on 22<sup>nd</sup> January 2018, is an Affidavit in Reply.

Lastly, Ms. Mwansa emphasised that the case of **Commonwealth Development Corporation vs. Central African Power Corporation**<sup>1</sup> that she earlier cited, makes it very clear that a party is not barred from filing a Further Affidavit, but however, it ought to seek leave before filing the said Affidavit in the interest of justice, so as not to cause a *mala fide* or injustice to the other party. She submitted that in the interest of justice and for the proper administration of justice, the rules of the Court must be upheld. She reiterated her prayer that the Applicant's Further Affidavit of

22<sup>nd</sup> January, 2018 be struck out or expunged with costs to the Respondent.

I have considered the application raised by the Respondent, the Affidavit evidence of the Respondent, the authorities which this Court was referred to and the *viva voce* submissions by both Counsel for the Applicant and Respondent, for which I am grateful.

I will start by referring to the High Court decision of Magnus, J in the case of **Commonwealth Development Corporation vs. Central African Power Corporation**<sup>1</sup>, which the Applicant cited. It was held in that case as follows: -

***“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.”*** (Court's emphasis)

In the said case, the learned Judge observed in paragraph 3 at page 96 of the law report as follows: -

***“In the previous action, no affidavits in opposition had been filed at the time the matter first came before the learned Deputy Registrar and only two were before him when he finally decided the matter, and, so far as I can gather, when it came before the learned Chief Justice on appeal. In the present action there has, if anything, been a superabundance of affidavit evidence. Not only was there the statutory affidavit in support of the application filed by the Plaintiff and a later affidavit, ...dealing with the stamp duty claim, but no less than four affidavits filed by the defendant in opposition, the first alone..., exhibiting, in addition to the usual***

*exhibits, two further affidavits. This means that I had, in effect, before me, six affidavits sworn in support of the defendant's case... The practice on application of this sort is, in general, to limit the number of affidavits - usually to one affidavit in opposition, which the defendant is entitled to put in as of right, and, with leave, on affidavit in reply on behalf of the Plaintiff. As, however, neither side objected to the inclusion of these affidavits, and as most of them had already been prepared by the time that the matter came before me, I decided to allow them to be put in. In any case, ...they were of assistance to the Court."*

I also refer to **Order 28 Rule 1A (5)** of **The Rules of the Supreme Court**<sup>1</sup>, which the Applicant cited. Indeed, the substantive matter before me, being an Originating Summons, was to be supported by an Affidavit in Support of the Originating Summons issued by the Applicant; an Affidavit in Opposition issued by the Respondent; and an Affidavit in Reply issued by the Applicant. These are the least statutory affidavits allowed under **Order 28 Rule 1A** of **The Rules of the Supreme Court**<sup>1</sup>. **Order 28 Rule 1A (6)** of **The Rules of the Supreme Court**<sup>1</sup> goes on further to state that: -

*"No other affidavit shall be received in evidence without the leave of the Court."* (Court's emphasis)

It is clear from the cited provision that the Applicant was entitled to put in, at least, the statutory Affidavit in Support of the Originating Summons and Affidavit in Reply to the Respondent's Affidavit in Opposition. However, thereafter, a party had to apply for leave to file a Further Affidavit. The rationale for this is simply that an Applicant putting in the Affidavit in Support of the Originating

Summons ought to frame it in such a way that it takes into account and covers all the facts relevant to his case. Further, the Affidavit in Reply ought to address the facts raised in the Affidavit in Opposition and not to advance the case further. Equally, a Respondent ought to do likewise to his Affidavit in Opposition.

*In casu*, the Applicant filed the Further Affidavit in Support of the Originating Summons without first having sought leave of the Court. And Counsel for the Respondent had taken issue with that Further Affidavit.

I have perused the Further Affidavit in Support of Originating Summons filed herein by the Applicant on 22<sup>nd</sup> January, 2018 and I find that the issues or matters raised therein could have been easily covered by the Applicant in his first supporting Affidavit and indeed in the Affidavit in Reply to the Affidavit in Opposition, which he has not yet filed. In his Further Affidavit in Support of the Originating Summons, the Applicant has raised new matters to which the Respondent will not have an opportunity to respond as it already filed its Affidavit in Opposition.

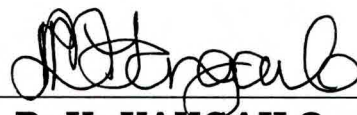
For the foregoing reasons, the Respondent's Counsel's objection to the Further Affidavit in Support of the Originating Summons is upheld and accordingly, the Further Affidavit in Support of the Originating Summons filed on 22<sup>nd</sup> January, 2018, is expunged from the record. The Applicant is free to exercise his right to file an Affidavit in Reply, which will address the facts raised in the Respondent's Affidavit in Opposition. The hearing of the



substantive matter will be held on 30<sup>th</sup> March, 2018 at 09:00 hours.  
I order that costs of and occasioned by this application be borne by  
the Applicant, to be taxed in default of agreement.

Leave to appeal is granted.

**Delivered in Chambers, the 30<sup>th</sup> day of January, 2018.**



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