



**CASES REFERRED TO:**

1. *Zambia National Holdings and UNIP vs. The Attorney-General (1993-1994) ZR 115; and*
2. *Commonwealth Development Corporation vs. Central African Power Corporation (1968) ZR 90.*

**LEGISLATION REFERRED TO:**

1. *The Supreme Court Practice 1999 Edition (The White Book); and*
2. *The Arbitration (Court Proceedings) Rules Statutory Instrument No. 75 of 2001.*

The genesis of this application is that the Plaintiff commenced an action by way of Originating Summons for an application to set aside arbitral award which was accompanied with Affidavit in Support. In response to the application, the Defendant filed herein an application to stay or suspend Court proceedings pending the conclusion of the arbitral proceedings, which was accompanied by an Affidavit in Support. The Plaintiff filed herein an Affidavit in Opposition to Summons for an Order to suspend Court proceedings pending the conclusion of the arbitral proceedings. Subsequently, the Defendant filed herein a Further Affidavit in support of Summons for an Order to suspend Court proceedings pending the conclusion of the arbitral proceedings. In response, the Plaintiff filed herein a Notice to raise preliminary issue pursuant to **Order 14A** and **Order 33 Rule 3** of **The Rules of the Supreme Court**<sup>1</sup> as read together with **Rule 38** of **The Arbitration (Court Proceedings) Rules**<sup>2</sup>. The preliminary issue that has been raised is that the Further Affidavit in support of Summons for an Order to suspend Court proceedings pending the conclusion of the arbitral

proceedings is incompetently before this Court for want of leave of Court to file the same and that it should be expunged from the record. The Plaintiff filed an Affidavit in Support of the Notice to raise preliminary issue deposed by Kelly Kapianga, where he avers, *inter alia*, as follows: -

1. *That the Plaintiff filed an application to set aside the Final Arbitral Award issued in arbitration proceedings between the parties herein by Originating Summons and an Affidavit in Support;*
2. *That the Defendant filed an application to stay or suspend Court proceedings pending the conclusion of the arbitration proceedings between the parties (the "Stay Application") by Summons supported by an Affidavit deposed to by Mr. Ganapati Narasimha Pai;*
3. *That the Defendant served the Stay Application on the Plaintiff;*
4. *That the Plaintiff filed an Affidavit in Opposition to the Stay Application, but this Affidavit was later expunged from the record by a ruling of this Court;*
5. *That following this, the Defendant filed a Further Affidavit in support of the Stay Application deposed by Precious Tembo (the "Further Affidavit");*
6. *That no leave of this Court was sought prior to filing the Further Affidavit; and*
7. *That in view of what is stated in the above paragraphs, he informed the Defendant's Advocates that the Plaintiff objected to the filing of the Further Affidavit as it was filed in violation of the provisions of the law.*

The Plaintiff also filed herein a List of Authorities and Skeleton Arguments in support of Notice of Motion to raise a preliminary issue. In its Skeleton Arguments, the Plaintiff draws the Court's

attention to **Rule 35** of **The Arbitration (Court Proceedings) Rules<sup>2</sup>**, which states as follows: -

**"Additional Affidavits, other than those specified in these Rules, shall not be filed in legal proceedings without the leave of the Court or a Judge."**

The Plaintiff argues that the above provision is self explanatory and makes it mandatory for a party seeking to file an Affidavit outside those expressly set out in the Arbitration Rules to obtain prior leave of this Honourable Court. It is the Plaintiff's contention that since the Defendant did not obtain leave of this Court to file the Further Affidavit prior to filing it, the same is incompetently before this Court and should, accordingly, be expunged. The Defendant did not file any written response to the Plaintiff's preliminary issue.

At the scheduled hearing on 2<sup>nd</sup> February, 2018, Learned Counsel for the Plaintiff, Mr. Sakala proceeded to raise the preliminary issue to expunge the Defendant's Further Affidavit. In addition to the Affidavit in Support to raise preliminary issue and skeleton arguments, Mr. Sakala submitted *viva voce*, that the Further Affidavit is legally incompetent before this Court in terms of **Rule 35** of **The Arbitration (Court Proceedings) Rules<sup>2</sup>**, because it was filed without leave of the Court. Mr. Sakala contends that **Rule 35** of **The Arbitration (Court Proceedings) Rules<sup>2</sup>** is mandatory and prescribes that any further affidavits must be filed with the leave of the Court. He argued that in the circumstances where no such leave has been obtained as *in casu*, such an Affidavit is incompetent

and cannot stand. It was the Plaintiff's prayer that the Further Affidavit filed herein be expunged from the record and that the costs of this application be borne by the Defendant.

In response, Learned Counsel for the Defendant, Mr. Mwenye SC. conceded that in fact **Rule 35** of **The Arbitration (Court Proceedings) Rules**<sup>2</sup> provides that leave of the Court should be obtained before the filing of the Further Affidavit and that clearly leave was not obtained. However, Mr. Mwenye SC. argued that **Rule 35** of **The Arbitration (Court Proceedings) Rules**<sup>2</sup> makes it very clear that this Court has latitude to exercise its inherent jurisdiction to allow the Affidavit, as the contents of the Affidavit shed light on the current stage of the Arbitral proceedings and if not admitted, that vital piece of evidence will be lost to the Court. He further argued that the job of both Counsel on both sides is to place before the Court all available material that will assist this Court in reaching a just decision and that no discernible prejudice will suffered by the Plaintiff if the Further Affidavit is allowed. He prayed that the Court exercises its discretion in favour of allowing the Further Affidavit.

In reply, Learned Counsel for the Plaintiff, Mr. Kapianga argued that contrary to Mr. Mwenye's *viva voce* submissions in opposition, **Rule 35** of **The Arbitration (Court Proceedings) Rules**<sup>2</sup> does not give any discretion to the Court to allow affidavits filed without leave. The Court's attention was drawn to the case of **Zambia National Holdings and UNIP vs. The Attorney-General**<sup>1</sup>, where

the Supreme Court held that the jurisdiction of this Court must be exercised in compliance with the procedural laws. He contends that since the procedural law relevant to this motion does not confer on the Court discretion to allow an affidavit filed without prior leave, the Further Affidavit should be expunged from the record.

I have considered the preliminary issue raised by the Plaintiff, the Affidavit evidence of the Plaintiff, the authorities which this Court was referred to and the *viva voce* submissions by Counsel for the Plaintiff and Defendant, for which I am grateful.

I will start by referring to **Rule 38** of **The Arbitration (Court Proceedings) Rules**<sup>2</sup>, pursuant to which the Plaintiff has raised this preliminary issue, which states as follows: -

***"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."***

I will further refer to the to the High Court decision of Magnus, J in the case of **Commonwealth Development Corporation vs. Central African Power Corporation**<sup>1</sup>, where the Court held 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 **Rule 35** of **The Arbitration (Court Proceedings) Rules<sup>2</sup>**, which the Plaintiff cited. Indeed, the application to stay to suspend Court proceedings pending the conclusion of the arbitral proceedings, which is currently pending before me, being an incidental application brought pursuant to **Section 17 (4) The Arbitration (Court Proceedings) Rules<sup>2</sup>**, was to be supported by at least one statutory Affidavit. As of right, the Defendant was entitled to put in at least the one statutory affidavit it is entitled to. However, thereafter, the Defendant had to apply for leave to file a further affidavit in accordance with **Rule 35** of **The Arbitration (Court Proceedings) Rules<sup>2</sup>**, which states that: -

***"Additional affidavits, other than those specified in these Rules, shall not be filed in legal proceedings without the leave of the court or a Judge.."*** (Court's emphasis)

It is clear from the cited provision that the Defendant had to apply for leave to file a Further Affidavit. The rationale for this is simply that a party putting in the Affidavit in Support of its application ought to frame it in such a way that it takes into account and covers all the facts relevant to its case. He ought not to anticipate being given a second opportunity to advance his case, except possibly for arguments on the evidence before Court.

*In casu*, the Defendant filed the Further Affidavit in Support without first having sought leave of the Court. And Counsel for the Plaintiff



had taken issue with that Further Affidavit. I have perused the said Further Affidavit in Support of Summons for an Order to Stay or Suspend Court proceedings filed herein by the Defendant on 8<sup>th</sup> September, 2017 and I find that the issues or matters raised therein could have been easily covered by the Defendant in its first supporting Affidavit. The said Further Affidavit in Support, raises new matters to which the Plaintiff will not have an opportunity to respond as it already filed its Affidavit in Opposition on 13<sup>th</sup> July, 2017.

For the foregoing reasons, the Plaintiff's Counsel's objection to the Further Affidavit in Support is upheld and accordingly, the Further Affidavit in Support filed on 8<sup>th</sup> September, 2018, is expunged from the record. The hearing of the Application to stay or suspend Court proceedings pending the conclusion of the arbitral proceedings will be held on 13<sup>th</sup> March, 2018 at 12:00 hours. I order that costs of and occasioned by this application be borne by the Defendant, to be taxed in default of agreement.

Leave to appeal is granted.

**Delivered in Chambers, the 5<sup>th</sup> day of February, 2018.**



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