

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

**2018/HP/1510**

**BETWEEN:**

**EDESI KASANZALE CREHAN**

**AND**

**NEW FUTURE FINANCIAL COMPANY  
LIMTIED  
CHINA HUA SHUN GROUP ZAMBIA  
INVESTMENTS COMPANY LIMITED  
WANG LIANG**

**1<sup>ST</sup> DEFENDANT**

**2<sup>ND</sup> DEFENDANT**

**3<sup>RD</sup> DEFENDANT**

**Before Honourable Mr. Justice M.D. Bowa on 17th of April  
2020.**

*For the Plaintiff: Miss D Kapitolo of Makabi Zulu and Company*

*For the Defendant: Mr. M Bah of Nkulukusa and Company*

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## **RULING**

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### **Cases referred to:**

- 1. Ram Aurbatch v Alex Kafwata Appeal No 65 of 2000*
- 2. NFC Africa Mining PLC vs. Techno Zambia Limited (2009) ZR p236*
- 3. Access Bank (Zambia) Limited and group five Zcon Business Park Joint venture (2016) SCZ 52*
- 4. Mwambazi v Morrester Farms Limited (1977) Z.R. 108*

### **Legislation referred to**



*1. The High Court Act Cap 27 of the Laws of Zambia Order 5 r 14 and 15*

The considerable delay in the delivery of this ruling is regretted.

This is the Plaintiffs application to set aside an affidavit in opposition dated 2<sup>nd</sup> October 2018 for irregularity pursuant to order 2 rule 2 of the White Book 1999 edition as read with order 5 rule 15 of the High Court rules Cap 27 of the laws of Zambia. The application was filed into court by summons dated 11<sup>th</sup> October 2018 accompanied by an affidavit in support of even date sworn by Edesi Kasanzale Crehan the Plaintiff herein.

She deposed that the Defendant's through their advocates did file into court an affidavit in opposition to affidavit in support of summons for an order of interim injunction dated 3<sup>rd</sup> day of October 2018. That upon perusal of the said affidavit, it was discovered that it contained extraneous matters particularly from paragraph 8 to 19 of the said affidavit. It was contended that amongst other things, the cited paragraphs include a prayer seeking the indulgence of this court to dismiss the Plaintiff's application. The deponent had been advised by her advocates and believed to be true that under these circumstances, she could make an application to set aside the said affidavit for irregularity.

The Defendants filed an affidavit in opposition sworn by Musa Bah counsel seized with conduct of the matter on their behalf. He deposed that the paragraphs frowned upon by the Plaintiff do not contain extraneous matters but merely state what the Plaintiff seeks from this court and why the court should not grant the sought relief. That a fact at law constitutes a fact that may be stated in an affidavit. It was averred further that the Plaintiff's application is absurd because in the context of the Plaintiff's argument paragraphs 6, 7 and 8 of the affidavit in support of this application constitute legal arguments. That furthermore, the paragraphs do not contain a prayer as a statement must seek a specific relief to constitute a prayer.

At the hearing which was held on the 5<sup>th</sup> of May 2019, counsel for the Plaintiff Miss Kapitolo relied on the affidavit in support and skeleton arguments both filed into court on 11<sup>th</sup> October 2018. In the skeleton arguments counsel referred me to order 2 rule 2 of the White Book 1999 edition which provides that:

***“(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and***

***before the party applying has taken any fresh step after becoming aware of the irregularity.***

***(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.”***

It was submitted that the record will show that the application was made timely upon discovery of the irregularities alluded to in the affidavit in support of this application, and only 6 days after receiving the affidavit on the 3<sup>rd</sup> of October 2018. Therefore the application was properly before the court. I was also referred to order 5 rule 15 of the High Court rules cap 27 of the laws of Zambia which states that:

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

However that the affidavit in opposition particularly from paragraphs 8 to 18 contain legal arguments relating to contract law, common law etc. Further that the paragraphs also contain conclusions stating amongst other things that the contract was binding and lawful even before the full determination of the matter. In addition that paragraph 19 also includes a prayer seeking the

indulgence of the court to dismiss the Plaintiffs application. That all of this equate to extraneous matter as envisaged in the rules as such makes the affidavit defective to that extent which should not be entertained by the court.

I was referred to the case of **Ram Aurbatch v Alex Kafwata**<sup>1</sup> in which it was held that:

***“Litigants default at their own peril since any rights available as of course to a non-defaulter are usually jeopardized.”***

I was also referred to the case of **NFC Mining v Technopro Zambia Limited**<sup>2</sup> in which the Supreme Court held that:

***“Rules of the court are intended to assist in the proper and orderly administration of justice and as such must be strictly followed.”***

Also relied on was the case of **Access Bank (Zambia) Limited and group five Zcon Business Park Joint venture**<sup>3</sup> in which the court held that:

***“Justice also requires that this court, indeed all courts, must never provide succor to litigants and their counsel who exhibit can’t respect for rules of procedure. Rules of procedure and timelines serve to make the process of adjudication fair, just, certain and even handed. Under the guise of doing justice through hearing matters on their merit, courts***

*cannot aid in the bending or circumventing of these rules and shifting goal posts for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. In our considered view, it is in the even handed and dispassionate application of the rules that courts can give assurance that there is a clear method in which things should be done so that outcomes can be anticipated with a measure of confidence, certainty and clarity. This is regardless of the significance of the issues involved or questions to be tried.”*

Based on the above, counsel prayed that the affidavit having been in breach of the rules should be set aside with costs to the Plaintiff.

In response, Mr. Bah relied on the Defendant’s affidavit in opposition filed into court on 15<sup>th</sup> of November 2018 with particular emphasis on paragraphs 5, 6, and 7. He added that the court has the power to order an amendment of the affidavit or to expunge particular paragraphs that were offensive. He argued that the Plaintiff’s application was thus merely meant to suppress evidence that the Plaintiff does not wish the court to have sight of. It was therefore his prayer that the application be dismissed with costs.

In reply, Miss Kapitolo submitted that the affidavit in support clearly pointed out the offending paragraphs and as such the

Plaintiff had not in any way tried to avoid any evidence that the Defendants were alluding to. She reiterated her prayer for the affidavit to be set aside accordingly.

I have carefully considered the application before me and the party's respective arguments. The Defendant seeks to have the Plaintiff's affidavit in opposition to the application for an injunction set aside for being in breach of order 5 rule 15 of the High Court rules on content of affidavits.

I am satisfied that the application is properly before me in terms of order 2 rule 2 of the RSC as it was brought in a timely manner and at the earliest opportunity after being served with the affidavit complained about. As pointed out, order 5 rule 15 regulates what can and cannot be contained in an affidavit and in this case that the affidavit must be free of extraneous matter, objection or prayer. The rule is expressed in mandatory terms so a failure to adhere to the rule can lead to the setting aside of the affidavit if found wanting. The paragraphs in the affidavit in opposition complained about filed into court on the 2<sup>nd</sup> of October 2018 read:

8. That the application is misconceived as it actually seeks to prevent the Defendant from relying on a lawful and binding contract.

9. That the facts as narrated in the Plaintiff affidavit do not disclose a breach that warrants the grant of an interim injunction.

10. That moreover any damage suffered by the Plaintiff in this matter is easily redeemable by an award of damages.

11. That granting an injunction to the Plaintiff in this matter would result in an absurdity as this honourable court would be granting an injunction against the parties herein abiding by a lawful and binding contract duly executed by both parties herein.

12. That the Plaintiff herein executed a contract and assignment fully knowing the consequences thereon.

13. That I am duly advised by my advocates that this honourable court cannot grant an injunction that seeks to prevent two consenting parties from relying on terms of a contract freely executed by those parties.

14. That granting an injunction would be an affront to the rules of common law and the principles of freedom of contract.



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15. That is a fundamental principle of the law of contract that parties must be held to contract that they freely execute unless there is fraud.

19. That it is for this reason that I seek the indulgence of this honourable court to dismiss the Plaintiffs application.

A careful read does reveal to me that paragraphs 14, 15 and 19 in particular offend the rules by containing what are clearly legal argument and a prayer. I find nothing offensive about the other averments as they allude to the existence of a contract which the Defendant believes to be binding. Whether it is or not is of course the subject of determination at trial.

That said the question to be addressed is, are the identified defects fatal to the Defendants opposition to the injunction application? The answer is to be found in Order 5 of the High Court rules itself. Order 5 rule 14 provides that:

***“A defective or erroneous affidavit may be amended or resworn by leave of the court or a judge on such terms as to time, costs or otherwise as may seem reasonable.”***

This provision makes clear the permissive legal environment to allow an affidavit that does not meet the standard set in the rules to

stand. I would further seek recourse to the Supreme Court decision in **Mwambazi vs. Morster Farms Limited** <sup>4</sup> in which the court held:

***“It is the practice in dealing with bonafide interlocutory applications for courts to allow triable issue to come to trial despite the default of the parties. Where a party is in default, he may be ordered to pay costs but it is not in the interests of justice to deny him the right to have his case heard.”***

I would accordingly order that only the offending paragraphs 14, 15 and 19 be expunged from the affidavit. Costs are for the Plaintiff to be taxed in default of agreement.

Dated at Lusaka this <sup>17<sup>th</sup></sup>.....day of <sup>April</sup>.....2020

  
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**JUDGE**