Selected Judgment No. 20 of 2017

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IN THE SUPREME COURT OF ZAMBIA **SCZ/8/265/2016**
HOLDEN AT LUSAKA **Appeal No. 7/2017**

(Civil Jurisdiction)

BETWEEN:

SUN COUNTRY LIMITED **APPELLANT**

AND

CHARLES KEARNEY **1ST RESPONDENT**

ROSLYN KEARNEY **2ND RESPONDENT**

Coram: **Hamaundu, Malila and Musonda, JJS**
on 10th May, 2017 and 19th May, 2017

For the Appellant: *No appearance*

For the 1st and 2nd Respondents: Mrs. P. T. M. Ngoma-Mudwara, Messrs Chibesakunda & Co.

JUDGMENT

Malila, JS, delivered the judgment of the Court

Cases referred to:

1. *Leopold Walford (Z) Limited v. Unifreight (1985) ZR 203.*
2. *Mwambazi v. Morrester Farms Limited (1977) ZR 108.*
3. *Attorney-General v. Edward Jack Shamwana and Others (1981) ZR 12.*
4. *Indo Zambia Bank Ltd. v. Amazon Carriers and Another, 2014/HPC/0141.*
5. *Access Bank (Z) Ltd. and Group Five/Zcon Business Park Joint Ventures.*

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Other legislation referred to:

1. *Commissioner for Oaths Act, Cap. 33 of the Laws of Zambia.*
2. *Order 5 Rule 13 of the High Court Rules chapter 27 of the Laws of Zambia.*
3. *Constitution of Zambia Act No. 2 of 2016.*

The parties to the present appeal have been enmeshed in legal proceedings since about 2008. A painful dispute had arisen between the parties to this appeal and others regarding shareholding in the appellant company, culminating in court proceedings that ultimately birthed this appeal. Rodger Pedin Savory and Shirley Margaret Fawcett Savory were both directors in the appellant company. It was alleged that as of January 1999 Rodger Pedin Savory also held 50% equity in the company. It was further claimed that on the 30th December, 1998, an annual meeting of the members of the appellant company was supposedly held at a specified place and time. That meeting, chaired by J. T. Michelson, recorded those present as including Rodger Pedin Savory and Shirley Margret Fawcett Savory. At the said meeting Rodger Pedin Savory and Shirley Margaret Fawcett Savory were also recorded to have resigned from the appellant company. A copy of the minutes of

that meeting was registered at the Patents and Companies Registration Agency (PACRA). Share sale and transfer documents were subsequently signed and filed at PACRA indicating that the first respondent had purchased from J. T. Michaelson 425,000 shares in the appellant company and that those shares were all fully paid for.

Upon discovering all this, Rodger Pedin Savory and Shirley Margaret Fawcett Savory claimed that a fraud had been perpetrated in regard to the shareholding and their directorship in the company as they never attended any meeting which the filed minutes purported to reflect, nor did they at any time cease to hold shares and directorship in the company.

Consequent upon these developments, on the 2nd April, 2008, the appellant company commenced an action in the High Court for rectification of the register of members of the company kept at PACRA. An order was granted by the court on 30th September, 2008 for rectification of the register of members. The appellant company proceeded to have the register rectified, reflecting an amendment in the ownership of

shares and hence the membership in the appellant company. The rectified member's register of the appellant company excluded the 1st respondent. This, notwithstanding, the respondents refused to recognize the new membership structure and declined to vacate the farm belonging to the appellant company and went to the extent of locking up the assets of the appellant company, thereby denying the appellant company or its agents access to its properties. The appellant company then returned to court and obtained an *ex-parte* interim injunction restraining the respondents, their servants or agents from committing any further acts of trespass on, or entering upon, the land forming part of Farm 72 (a), 800, 1853, 1083 situate near Kalomo in Southern Province, and from cultivating the said farm, erecting structures thereon or otherwise dealing in the land. That injunction was obtained on 13th October, 2008.

Meanwhile, on 8th October, 2008, the court stayed execution of its order of 30th September, 2008 pending hearing of an *inter-partes* application to set aside the said order.

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It would appear that many other developments, not immediately relevant to the present appeal, occurred. These include the issuance by the appellant of a warrant of distress directing the eviction of the respondents from the said property. That warrant of distress is dated 9th October, 2008.

On the 15th October, 2008, the High Court vacated the *ex-parte* interim injunction granted on 13th October, 2008 and dismissed the originating notice of motion and warrant of distress with costs.

On 30th November, 2008, the appellant filed an application for special leave to review the ruling of the court embodied in the order of 15th October, 2008 setting aside the interim injunction. The application was, of course, supported by an affidavit. That affidavit was sworn by Shirley Margaret Fawcette Savory as director in the appellant company.

Matters apparently went quiet for a period of over twelve (12) months. However, a notice to proceed was filed on behalf of the appellant on the 23rd September, 2015. On the 10th November, 2015, the appellant once again filed an application

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for special leave to review the court order dated 15th October, 2008. That application was supported by an affidavit, again, sworn by Shirley Margaret Fawcett Savory as director in the appellant company.

When the matter came up for hearing on 23rd March, 2016 counsel for the appellant pointed to some confusion in the cause number of the action following a consolidation of causes. The court directed that the appellant's advocates refile the application within seven days. On 29th March, 2016, another application for special leave to review, supported by an affidavit was filed in court. The affidavit was once again sworn by Shirley Margaret Fawcett Savory. That affidavit was substantively the same as the one filed in court on 10th November, 2015.

The application for special leave to review was resisted by the respondent, and an affidavit in opposition sworn by the respondents' counsel, Mr. Chikosola Patrick Chuula, was filed on 29th July, 2016. There was an affidavit in reply which was

filed on the 8th August, 2016. That affidavit was sworn by Linus Eyotia Eyaa, counsel for the appellant company.

When the application for special leave to review came up for hearing before the High Court, the parties relied on their respective affidavits for their positions. The learned High Court judge thereafter reserved his ruling. He delivered that ruling on the 22nd August, 2016. In his ruling, the learned judge observed that the affidavit in support of the application for special leave, which was sworn by Shirley Margaret Fawcett Savory and the affidavit in reply which was sworn by Linus Eyotia Eyaa, were both defective in a way that was, in his view, incurable as both affidavits were not dated in the jurat as to when they were sworn before a Commissioner for Oaths. This, according to the learned judge, offended the mandatory requirements of Order 5, Rule 20(a) of the High Court Rules and section 6 of the Commissioner for Oaths Act, chapter 33 of the Laws of Zambia. The judge proceeded to expunge the two affidavits for irregularity and refused to determine and grant the applicant's application for special leave to review the order dated 15th

October, 2008 as, in his words, the application was not properly before him.

Befuddled by that ruling, the appellant has now appealed flagging three (3) grounds of appeal couched as follows:

GROUND ONE

The learned judge erred in law and fact when he ordered that the affidavit in support of the application for special leave to review the order sworn by Shirley Margaret Fawcett Savory be expunged from the record as it did not state the date when it was sworn before the Commissioner for Oaths when the initial affidavit in support of the application for leave sworn by the same Shirley Fawcett Savory filed on 3rd November, 2008 has a date stamp for the Commissioner for Oaths which indicated the date it was sworn. [sic!]

GROUND TWO

The learned judge erred in law and fact when he ordered that the affidavit in reply sworn by Linus Eyotia Eyaa filed on 8th August, 2016 be expunged from the record as it did not state the date when it was sworn before the Commissioner for Oaths when the Commissioner for Oaths had fixed a date stamp which indicated the date when it was commissioned and place. [sic]

GROUND THREE

The learned judge erred in law and fact when he refused to determine and grant the applicant's application for special leave to review stating that the application was improperly

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before him when the application was properly brought before the court.

At the hearing of the appeal, Mrs. Ngoma-Mudwara appeared for the respondents. There was no appearance for the appellant. Our attention was drawn to the notice of motion to adjourn and the supporting affidavit. These were filed by the appellant's advocates. The affidavit in support was sworn by Lucy Maymebe who described herself as "counsel seized with the conduct of this matter on behalf of the appellant." She deposed in that affidavit that she would not be available on the date scheduled for the hearing of the appeal as she would, together with other advocates in her firm, be travelling for the burial of a late work colleague.

In reacting to that notice of motion, Mrs. Ngoma-Mudwara indicated to us that she had no objection to the matter being adjourned for the perfectly understandable reason that was given in the affidavit in support of the motion to adjourn. In any case, she went on, she had filed a notice to raise a preliminary objection in regard to the form of the appellant's heads of

argument which she perceived as non-conforming with the rules. She was of the view that it would only be proper for the appellant's counsel to be present to respond to her preliminary objection

We allowed Mrs. Ngoma-Mudwara to explain her preliminary objection for our appreciation. Her argument was that the heads of argument did not comply with the provisions of rule 58(5) and rule 70(1) of the Supreme Court Rules, chapter 25 of the laws of Zambia, in that they merely set out the authorities relied upon and were deficient on the actual narration and articulation of the arguments in support of the grounds of appeal. This, according to the learned counsel, made the heads of argument bad in law. Accordingly, the whole appeal should be dismissed.

We considered both motions and came to the conclusion that the heads of argument as crafted did have a sufficient indication as to the grievance on the points of law that the appellant was raising in its grounds of appeal. We were satisfied that the substance of the matters set out in the

appellant's heads of argument did indeed, as far as the appellant's counsel understood the law, point us to the alleged errors and misdirections under each ground of appeal. We considered therefore, that it was unnecessary to hear the appellant on the preliminary objection as it was, in any event, bound to fail for the reason we have given. We accordingly dismissed the motion to raise the preliminary objection.

We turned next to the motion to adjourn. We have stated time and again that adjournments of appeals scheduled for hearing will only be made in the most exceptional of circumstances. In the present case, we sympathise with the reasons given by counsel for the appellant for seeking an adjournment. Given that the appellant had already filed its heads of arguments and there was no notice on the appellant's part of a desire to raise any other issue at or before the hearing of the appeal, we were content to proceed on the basis of the heads of argument filed. We therefore dismissed the motion to adjourn, and indicated that we would take full account of the appellant's heads of argument in considering the appeal.

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The learned counsel for the appellant filed their heads of argument on the 10th February, 2017. These were very brief and comprise quotations of passages from the Constitution, case authorities and legislation. Article 118(2)(e) of the Constitution of Zambia Act No. 2 of 2016 was reproduced. This is the provision which enacts that one of the principles that the courts have to follow in the exercise of judicial authority is that justice shall be administered without undue regard to procedural technicalities. Counsel also quoted the case of **Leopold Walford (Z) Limited v. Unifreight**[1] where the court stated, among other things, that breach of a regulatory rule is curable. Passages from the cases of **Mwambazi v. Morrester Farms Limited**[2] and **Attorney-General v. Edward Jack Shamwana and Others**[3] were also reproduced. More purposefully perhaps, the learned counsel quoted Order 5 Rule 13 of the High Court Rules chapter 27 of the Laws of Zambia.

The respondents filed their heads of argument on 3rd May, 2017. They responded to grounds 1, 2 and 3 compositely. In agreeing with the learned lower court judge, counsel for the respondent quoted Order 5 rule 20(g) of the High Court Rules

and section 6 of the Commissioner for Oaths Act before posing the questions as to what the jurat was and where in the jurat must the date be. These two questions were considered by the learned counsel to be the two issues for determination in this appeal. As we shall show later in this judgment, we do not agree that these are the central issues determinative of this appeal.

The learned counsel devoted a considerable amount of space in her heads of argument explaining her understanding of the law with regard to the jurat and the positioning of the date. It was submitted that a Commissioner for Oaths' date stamp is not sufficient to satisfy the requirements under order 5 Rule 20(g) of the High Court Rules. The learned counsel quoted the judgment of Chashi J. in **Indo Zambia Bank Ltd. v. Amazon Carriers and Another**[4], where he stated that:

> **"[a]n affidavit that does not show in the jurat the date the oath or affirmation was taken as is the case in the affidavit in this cause, offends the mandatory provisions of Order 5 rule 20(g) of the High Court Rules and section 6 of the Commissioner for Oaths Act and is to that extent incurably defective. In the view that I have taken, the affidavit in support of the originating**

summons is expunged from the record and consequently the cause if accordingly dismissed."

The learned counsel for the respondents also contended that courts of equal jurisdiction bind other courts of equal jurisdiction unless there exists good reason/s to depart from and not follow such decisions. In this case, the appellants have not shown any good reasons for the court below to have deviated from an earlier similar decision on the same subject matter by a court of equal jurisdiction.

As regards the reliance by the appellant on Article 118(2)(e) of the Constitution of Zambia Act No. 2 of 2016, counsel for the respondent relied on our judgment in **Access Bank (Z) Ltd. and Group Five/Zcon Business Park Joint Ventures**[5] where we stated that the Constitution never meant to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts. Counsel also dispelled as inapplicable, the case of **Leopold Walford (Z) Ltd. v. Unfreight**[1] relied upon by the appellant. The learned counsel prayed that we dismiss the appeal.

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It is clear that the three grounds of appeal are all closely related and speak but to one grievance.

We had earlier on stated that we do not agree with the appellant's counsel as regards the issues that are raised in this appeal. In our view, the real question for determination is whether an affidavit that does not comply with the formal requirements for affidavits as prescribed in the High Court Rules and the Commissioner for Oaths Act and indeed any other law, can be discountenanced in the way the learned High Court judge did. Conversely, is there room under the law for a judge to allow laxness in form in the presentation of affidavit evidence?

Until the learned counsel for the respondent disclosed in her submission before us that a different High Court judge had held in much the same way as the judge whose appeal is before us, we had pretty much assumed that the position taken by the lower court in this appeal was an isolated instance and did not warrant us to give, by way of guidance to lower courts, an elaborate judgment in excess of two folios – which is the space

the judgment being assailed covered. This judgment inevitably now has to read like an academic treaties as it flags up an important matter that should always be borne in mind by trial courts when they consider affidavit evidence.

The law regarding affidavits is chiefly to be found in the Commissioner for Oaths Act, chapter 33 of the Laws of Zambia, Order 5 rule 20 of the High Court Rules, chapter 27 of the Laws of Zambia and the Interpretation and General Provisions Act, chapter 2 of the Laws of Zambia. There is also a fall back position provided by Order 41 of the Supreme Court Practice (White Book) 1999 edition. In our considered opinion, a consideration of these laws should help us resolve the issue in this appeal without being drawn into attempting to interpret article 118(2)(e) of the Constitution.

Order 5 Rules 11 to 20 of the High Court Rules set out in considerable detail the rules applicable in taking affidavits, the contents of affidavits; and the form in which affidavits are to be presented. Those rules are fairly elaborate and instructive. Equally, Order 41 of the Supreme Court Practice (White Book)

is devoted to affidavits, their content, form and presentation. There are also set out in those rules the consequences for any deviation from the prescribed form.

Section 6 of the Commissioner for Oaths Act stipulates that:

> **"Every Commissioner for Oaths before whom an affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and what date the oath or affidavit is taken or made."**

For completeness, and in answer to the question posed by counsel for the respondents in her submission, we must mention that the jurat is the section of the affidavit in which it is stated where the same was sworn and the date on which it was sworn. The attestation clause, on the other hand, is that portion where the Commissioner for Oaths declares that the affidavit was sworn in his/her presence according to the formalities required by law.

The rationale for having the place and date indicated in the affidavit is to ensure that affidavits signed outside

jurisdiction are restricted from being sworn in Zambia; that the affiant is not also the client of the Commissioner for Oaths; that the affidavit was actually signed before such Commissioner for Oaths etc. In a nutshell, that the affidavit was properly taken by a qualified person at the place and date indicated. The requirement for a date ensures that the opposite side can raise issues as to possible forging of the signature where it can be shown that the deponent was not at the place stated at the date indicated for the swearing, or that all circumstances considered the affiant could not have sworn the affidavit on the date stated. All these considerations enhance the credibility of affidavit evidence.

From the provision of section 6 of the Commissioner for Oaths Act, it seems to us that the date and place where the affidavit is made can be stated either in the jurat or in the attestation clause. How it is to be stated in the attestation clause is not clear. What readily comes to mind here is whether the stamp of the Commissioner for Oaths reflecting the address and date is not in fact a sufficient indication of the place where the affidavit was made, and the date on which it was sworn.

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And this is precisely the point raised by the appellant in grounds one and two, and to which the respondent has raised curt objection.

On a wider canvas, there is no doubt that the use of affidavits is often an effective method of presenting information critical to the court's evaluation of the merits of a case or an application before it. The significance of properly compliant affiant submitted evidence and the maintenance and enforcement of the standards established for sworn statements such as affidavit, is as important as the integrity of the justice system itself.

The requirements for a sworn statement or affidavit as prescribed in the Commissioner for Oaths Act do not exist merely to irritate legal practitioners and affiants with inconsequential formalities. In this jurisdiction, it has become too commonplace for legal practitioners to ignore the requirements for a properly prepared and sworn affidavit and for some courts to avoid enforcing the requirements for fear of being perceived as too hyper-technical. As we have stated

already the requirements for sworn affidavits exist to protect the truth-seeking process and to guard the legal process from abuse. Failure of legal practitioners and courts to strictly enforce the requirements undermine the legitimacy of the justice system itself.

To revert to the situation before us, in the lower court, the learned judge based his rejection of the affidavit on the deficiency or the perceived deficiency of the jurat of both the affidavit in support and the affidavit in reply. As was revealed by counsel for the respondent, a similar conclusion was reached by a different High Court judge in **Indo-Zambia Bank v. Amazon Carriers and Another**[4], though there is no evidence that the judge whose judgment is being assailed in this appeal had relied on that earlier case.

It is clear to us that the requirements under Order 5 rule 20 of the High Court Rules and section 6 of the Commissioner for Oaths Act are in respect of the form of the document as opposed to the substance. In our understanding, section 47 of the Interpretation and General Provisions Act, chapter 2 of the

Laws of Zambia sheds some light on the practical consequences of defects in form on one hand and in substance on the other. That section provides as follows:

> **"Save as otherwise expressly provided, whenever any form is prescribed by any written law, an instrument or document which purports to be in such form, shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document, or which is not calculated to mislead."**

The import of the above section is that if the defect in an instrument or document is in form, it is not a fundamental defect or irregularity and is thus curable. An affidavit afflicted by such a defect is receivable in proceedings under Order 5 rule 13 of the High Court Rules which counsel for the appellant quoted. That rule authorizes courts to receive affidavits despite irregularities in form. It states as follows:

> **"The court or a judge may permit an affidavit to be used notwithstanding it is defective in form according to the Rules, if the court or judge is satisfied that it has been sworn before a person duly authorized."**

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In the present case there was no issue raised regarding the authority of the Commissioner of Oaths before whom the affidavits which the lower court deemed to have fallen foul of the law were sworn.

To further confirm that an affidavit which is defective in form only is not a minefield for a party desiring to rely on it, Order 5 rule 14 of the High Court Rules provides that:

> **"A defective or erroneous affidavit may be amended and re-sworn by leave of court or a judge, on such terms as to time, costs or otherwise as seems reasonable."**

Order 41 rule 4 of the Rules of the Supreme Court (White Book) 1999 edition, states that:

> **"An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof."**

The explanatory notes in the White Book on the effect of that rule read as follows:

> **"This rule is permissive. If the irregularity can be cured without undue hardship, or it is not a matter of substance or affects its actual content, then it should be put right. Any costs will fall on the solicitor responsible."**

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Taking the argument further, and for good measure, the contention against expunging the affidavits premised on Order 5 rule 13 of the High Court Rules, would, of course, be open to challenge on grounds that since Order 5 rule 13 of the Rules appears to contravene a statutory provision in the name of section 6 of the Commissioner for Oaths Act, the High Court Rules, which are subsidiary legislation, have to give way to a principal provision of the statute. That, in our view, would be a decent argument to make. However, even if Order 5 Rule 13 were to be discounted from application, section 47 of the Interpretation and General Provisions Act which we have quoted, would still be sufficient to save the affidavits in question.

We are at a loss as to why the lower court had requested the appellant to refile the application for special leave when the same application with a fully compliant affidavit was already on the record. There was, in our view, already sufficient material that the judge could have used without resorting to the technical issue arising from the refilled affidavits.

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In conclusion, we hold that there was no defect in the two affidavits to merit striking them out. Neither the learned judge in his rationcination nor the learned counsel for both the appellant and the respondent in their heads of argument appear to have addressed their mind to section 47 of the Interpretation and General Provisions Act. Had the learned judge done so, he would no doubt have concluded that the affidavits that he expunged from the proceedings were, after all, receivable despite the alleged irregularity.

There is equally no reason why the court would not arrive at the same decision, at least in the case of the affidavit in reply, where the stamp of the Commissioner for Oaths states the date and place when the affidavit was attested to, although the jurat lacks one.

Despite the apparently mandatory rendition of section 6 of the Commissioner for Oaths Act, therefore, courts can under the law as we have explained it, overlook a minor irregularity such as an omission of the date when the affiant appended his signature to the affidavit. Omission of a date does not go to the

jurisdiction of the court, nor does it prejudice the adverse party in any fundamental respect. It ought not to be treated as nullifying an affidavit. In these circumstances we are persuaded that the learned High Court judge ought to have risen to the higher calling to do justice by saving the application before him and ultimately the proceedings in issue. Being of that persuasion, we think that the ends of justice would best be served by sustaining the proceeding in the lower court.

The upshot of our judgment is that the appeal succeeds on all grounds. The application should be determined by the learned High Court judge on its merits.

Granted that it is the lower court that has caused the present predicament, we order costs to be in the cause.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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DR. M. MALILA, SC
SUPREME COURT JUDGE

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M. C. MUSONDA
SUPREME COURT JUDGE