

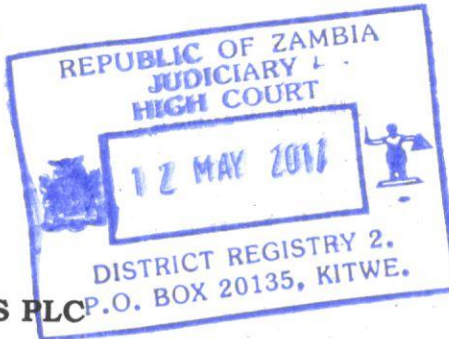
IN THE HIGH COURT FOR ZAMBIA

2013/HK/316

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)



BETWEEN:

KONKOLA COPPER MINES PLC

PLAINTIFF

AND

**ELMET MINING AND TECHNICAL SERVICES (Z)
LIMITED**

DEFENDANT

**Before Hon. Mrs. Justice C. B. Maka-Phiri in Chambers this 11th day of
May, 2017**

For the Plaintiff: Mr. F. Chibwe of Messrs ECB Legal Practitioners

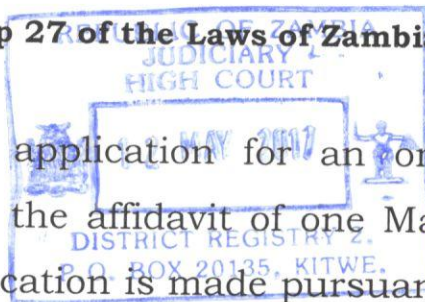
**For the Defendant: Mr. R. Mandona of Messrs Chilupe &
Permanent Chambers**

R U L I N G

Legislation referred to:

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

This is the defendant's application for an order to strike out paragraphs 8 to 11 from the affidavit of one Matyola Ndulo dated 23rd April 2015. The application is made pursuant to the provisions



of order 41 Rule 5 of the Rules of the Supreme Court, 1999 edition. The application is supported by an affidavit deposed to by counsel for the defendant. The plaintiff filed an affidavit in opposition on 4th October 2016 deposed to by one Matyola Ndulo.

At the hearing of the application counsel for the defendant informed the court that he was relying on the affidavit in support and the list of authorities both filed into court on 23rd April, 2015. The gist of the defendant's affidavit evidence is that the affidavit deposed to by one Matyola Ndulo and in particular paragraphs 8 - 11 contained quotes from another affidavit contrary to order 41 Rule 5 of the Rules of the Supreme Court. In his submission counsel contended that affidavits must contain facts which should be attested to by the deponent. That it would be impossible for the defendant to challenge quotations lifted from another affidavit. Counsel argued that the plaintiff's application for summary Judgment is flawed as the plaintiff is relying on information deposed to by a person who was not going to be available for examination.

Secondly counsel submitted that the plaintiff's application for summary Judgment was poised to fail in view of section 52 of the Mines and Minerals Act No. 11 of 2015 which empower the Minister of Mines to issue a licence in respect of property owned by another person provided the licence holder cannot start any operations under the licence without the consent of the land owner. Counsel submitted that there is no evidence before court to show that the

defendant had approached the plaintiff concerning its operation under the licence and further that there is in fact no evidence that the defendant had started operating on the land in question pursuant to the licence granted to it by the Minister. Counsel was of the view that to grant the plaintiff the application would amount to challenging the Minister of Mines and the law as contained in the Mines and Minerals Act that it was wrongful to have granted the defendant a mining right over the plaintiff's portion of land. Counsel concluded that the plaintiff's application for summary Judgment was premature and premised on affidavit evidence which is flawed. Counsel prayed that the application be dismissed with costs.

On behalf of the plaintiff, Mr. Chibwe submitted that order 41 Rule 5 of the Rules of the Supreme Court has exceptions one of which is that if a party is not able to depose to matters within his own knowledge, then he must disclose the source of the information and belief he relies on. Counsel submitted that the affidavit of Matyola Ndulo which the defendant seeks to impugn shows that the deponent had disclosed the source of information as well as the grounds upon which he had anchored his belief. Further that the affidavit from which the deponent Matyola Ndulo had based his information was in fact part of the record which the defendant had an opportunity to challenge at the hearing of the Attorney General's application for misjoinder. That the defendant's argument that the affidavit was at that time not directed at it is a serious misconception especially that the court had specifically asked the

defendant to respond to the said affidavit and the defendant's reply was that they were in total agreement with the contents of that affidavit.

With regard to the defendant's submission that there was no evidence before court that it had undertaken exploration activities, counsel referred the court to the pleadings on record where the defendant clearly stated that there was no need for them to obtain consent from the plaintiff. Counsel agreed with the defendant that the Minister of Mines had authority to grant licence over a portion of land owned by the plaintiff but argued that there is nowhere in the pleadings where the defendant has shown that it obtained consent from the plaintiff.

In reply, Mr. Mandona admitted that the affidavit of Billy Chewie was on record but contented that the Attorney General and defendant were on the same side at the hearing of the Attorney General's application for misjoinder. Counsel submitted that he was not aware of any procedure or practice at law which provided for parties on the same side to comment on the affidavit filed by a co-defendant. Counsel noted the defendant had in any case no objection to the Attorney General's application. With regard to the exceptions under Order 41 Rule 5 of the Rules of the Supreme Court, counsel submitted that the exception do not provide for quotations of a person who is not a deponent and could not be challenged as to the assertions. That consequently the defendant

was unable to respond to the plaintiff's application of 23rd February, 2015.

I have considered the application and the affidavits filed by both parties. I have also considered the submissions made by both parties at the hearing of application. The issue for determination in this application is whether or not paragraphs 8-11 in the affidavit of Matyola Ndulo should be expunged from the affidavit for offending the rules that guide the contents of an affidavit. The said paragraphs 8-11 contains direct quotations from the affidavit of one Billy Chewa dated 25th November 2014.

Order 5 Rule of the High Court Rules on contents of affidavits enacts that;

"Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true."

Order 41 Rule 5 of the Rules of the Supreme Court pursuant to which this application is made has similar provisions as those in the High Court Rules. Order 41/5 enacts that subject to the exceptions stated therein, **an affidavit may contain only such facts as the deponent is able of his own knowledge to prove or statements of information or belief with the sources and grounds.**

In the case in casu, it is my considered view that the paragraphs in contention are in compliance with the law as cited above. Clearly the quoted statements are not within the personal knowledge of the deponent as they contain information from another affidavit or source which the deponent believes to be true. The deponent has however disclosed the source of his information and the grounds for his belief. The fact that the statements are direct quotes does not in my considered view render the statements any different to those which are paraphrased by a deponent but from another source. What is important is for the deponent to disclose the source of the information.

I further wish to note that the defendant's submission that it could not challenge the affidavit of Billy Chewie at the hearing of the Attorney General's application for misjoinder because the parties were on the same side is misleading. The correct position is that nothing stops co-defendants to challenge each other. The practice is that a co-defendant can in fact cross examine another co-defendant in a matter if they do not agree with them and or to clarify issues. The submission cannot therefore be sustained.

The defendant's submission that the plaintiff's application for summary Judgment was poised to fail in view of section 52 of the Mines and Minerals Act and was an attempt to challenge the Minister of Mines powers under the Mines and Minerals Act was in

my considered view outside the scope of this application. I will therefore not pronounce myself on the said submissions.

With the foregoing, I come to the conclusion that the defendant's application has no merit and it is hereby dismissed with costs to the plaintiff.

Leave to appeal granted.

Delivered in Chambers at Kitwe; this 11th day of May, 2017.

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C. B. Maka-Phiri (Mrs.)
Judge