

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

2017/HP/0552

BETWEEN:

NATHAN KABWITA MULONGA
(Suing in his capacity as National
Secretary of the Forum for Democracy
and Development)



PLAINTIFF

AND

**CHIFUMU BANDA
LAWRENCE MWELWA
YOTAM MUTAYACHALO**

**1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 8th DAY OF
MAY, 2017.**

For the Plaintiff : Mr M. Sitali, Milner and Paul
Legal Practitioners

For the 1st Defendant : In person

For the 2nd and 3rd Defendants : Mr M. M. Munansangu, AMC Legal
Practitioners

R U L I N G

CASES REFERRED TO:

1. *Chikuta V Chipata Rural Council* 1974 ZR 241
2. *Leopard Ridge Safaris Limited V Zambia Wildlife Authority* 2008 VOL 2 ZR 97
3. *Post Newspapers Limited V Rupiah Bwezani Banda* SCZ No 25 of 2009
4. *Ody's Oil Company Limited V The Attorney General, Constantinos James Papoutsis* 2012 Vol 1 ZR 164

**5. *Genesis Finance Limited V Longridge Commodities Limited*
2012/HPC/144**

LEGISLATION REFERRED TO:

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***
2. ***The Rules of the Supreme Court, 1999 Edition***
3. ***The Legal Practitioners Act, Chapter 30 of the Laws of Zambia***

On 4th April 2017, the Plaintiffs filed an application for an order of interim injunction, which application was supported by an affidavit. On 18th April 2017 the 2nd and 3rd Defendants filed a notice of intention to raise preliminary issues pursuant to Order 14A of the Rules of the Supreme Court, 1999 Edition, as well as Order 3 Rule 2 of the High Court Act, Chapter 27 of the Laws of Zambia. The notice is supported by an affidavit.

The Plaintiff filed an affidavit in opposition to the said application on 19th April, 2017, and on 20th April 2017 filed a notice to raise preliminary issues to the affidavit filed in support of the notice raised by the 2nd and 3rd Defendants. The notice is also supported by an affidavit.

When the matter came up for hearing on 21st April 2017, guidance was sought on how the applications would be heard. I directed that all the preliminary applications be made, and I rule on them.

Counsel for the 2nd and 3rd Defendants stated that they had filed a notice to raise preliminary issues, whose main thrust is that this court has no jurisdiction to hear matters that have arisen within the party. This is because the constitution of the party dictates that where there are disputes, they ought to be referred to arbitration.

Counsel referred to paragraph 5 of the affidavit that had been filed in support of the notice stating that it refers to the constitution that had been exhibited as 'MM1'. That article 16 of the said constitution is the article that provides that disputes must be resolved through arbitration.

It was Counsel's argument that the said article makes reference to any matters arising, being referred to arbitration.

It was stated that the affidavit was sworn by Counsel for the 2nd and 3rd Defendants, with the justification for doing so being given that as an officer of the court, Counsel is duty bound to assist the court on matters of law and procedure, as provided in Section 85 of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia. Counsel also stated that he was also guided by Section 10 (1) of the Arbitration Act, No 19 of the Laws of Zambia.

Reliance was placed on the case of **LEOPARD RIDGE SAFARIS LIMITED V ZAMBIA WILDLIFE AUTHORITY 2008 VOL 2 ZR 97** where it was held that where an application to stay proceedings is made under Section 10 of the Arbitration Act, the Judge has no choice but to stay the proceedings.

Therefore in this matter this court has no choice but to refer the dispute to arbitration. That exhibits 'LM3' and 'LM4' on the joint affidavit in opposition to the injunction are clear that the 3rd Defendant made efforts to inform the National Secretary of the Forum for Democracy and Development (FDD) that there was a dispute, and that the same be referred to arbitration.

State Counsel who is the 1st Defendant agreed with the submissions given by Counsel for the 2nd and 3rd Defendants and reiterated the provisions of Section 10(1) of the Arbitration Act, No 19 of 2000. He stated that where litigants are involved in an action which is centered on an agreement between themselves that provides for arbitration as the preferred mode of resolving their disputes, the court is under an obligation to refer the dispute to arbitration.

That in this case the constitution of the FDD provides for arbitration, and it is the obligation of members of the party to ensure that the agreements

of the party are honoured and respected, as the constitution regulates the members of the party and the party itself. He stated that the constitution of the party is not an ordinary document but a constitutive document of the party. Therefore the court should refer the matter to arbitration.

In response, Counsel for the Plaintiff submitted that Section 10(1) of the Arbitration Act, No 19 of 2000 provides exceptions to the reference to arbitration. Thus it was their submission that for there to be an event requiring reference of the matter to arbitration, two ingredients have to be satisfied. He named the first as there being in existence an agreement between the parties, and secondly the agreement being operative and capable of being performed.

Reference was made to the case of **ODYS OIL COMPANY V THE ATTORNEY GENERAL AND ANOTHER 2012 ZR 164**, and Counsel stated that the said case interpreted Section 10 of the Arbitration Act. That it was stated in that case that for a court to refer a matter to arbitration, the first thing that ought to be determined is whether there is a valid agreement between the parties.

His submission was that paragraphs 4-6 of the affidavit in opposition to the notice show that the Defendants are no longer members of the FDD, and they therefore cannot enjoy the benefits of article 60 of the party's constitution. Thus by that very fact, this matter cannot be referred to arbitration, and it can only be heard by this court.

In reply Counsel for the 2nd and 3rd Defendants stated that Section 10 of the Act refers to matters being referred to mediation as long as there is a subsisting agreement governing the relationship between the parties which provides for arbitration. Counsel also stated that the Defendants are members of the FDD until the court declares otherwise. His view was that commencing this action was premature, and that the disagreements

between the Plaintiff and the Defendants ought to have been dealt with through arbitration, before the court can come in.

State Counsel in reply stated that the constitution of the FDD is very valid, as the party would not have been in existence. He further submitted that the constitution of the FDD provides for an avenue of appeal with regard to membership to the party. This is because if a decision is taken by the national policy committee, it must be confirmed by the National Convention, which the FDD had not had for twelve years.

His reply with regard to the submission on the case of **ODYS OIL COMPANY LIMITED V THE ATTORNEY GENERAL, CONSTANTINOS JAMES PAPOUTSIS 2012 Vol 1 ZR** was that it is distinguishable from this case, as the agreement providing for arbitration in that case only bound two parties, that is Odys Oil and Constantinos James Papoutsis, and the Attorney General was not a party to it.

It was found that as the case affected three parties, one of which was not a party to the arbitration agreement, the court erred in referring the matter to arbitration. That in this case however all the parties subscribe to the FDD constitution, and therefore the provisions of the constitution must be honoured.

With regard to the second preliminary issue Counsel for the Plaintiff stated that they had raised two issues pursuant to Order 14A of the Rules of the Supreme Court. The first was whether the affidavit filed in support of the notice by the 2nd and 3rd Defendants was properly before court, when it does not comply with the provisions of Order 5 Rule 20 of the High Court Rules, Chapter 27 of the Laws of Zambia.

The second issue raised was whether the said affidavit was properly before court in view of the fact that it was sworn by Counsel and contains contentious issues.

In the arguments in support of the first issue raised, Counsel submitted that Order 5 Rule 20 (g) of the High Court Rules, Chapter 27 of the Laws of Zambia is couched in mandatory terms as it uses the words shall. He added that Section 6 of the Commissioner for Oaths Act is equally couched in mandatory terms, and emphasises the need for the jurat to be endorsed with the date when such affidavit is sworn.

Counsel referred to the case of **GENESIS FINANCE LIMITED V LONGRIDGE COMMODITIES LIMITED 2012/HPC/144 unreported** where it was held that ***“therefore an 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 case, it offends the mandatory provisions of Order 5 Rule 20 (g) of the High Court Act and Section 6 of the Commissioner for Oaths Act, and to that extent is incurably defective”***.

Counsel stated that in that case the court directed that the affidavit be expunged from the record. That in that case as the affidavit was expunged, and the application had no limb to stand on and it was dismissed.

He stated that in this case the Defendant's affidavit in support of the preliminary issue particularly the jurat is not dated, showing the date when the affidavit was sworn. That such defect is incurable, and the affidavit ought to be expunged from the record.

In relation to the second issue raised, Counsel submitted that Order 5 Rules 17 and 18 of the High Court Rules provide that in the event that a witness deposes to a belief that has been acquired from another source, the source must be stated and reasonable particulars of the informant stated as well.

Counsel told the court that paragraphs 5 and 6 of the affidavit in support of the notice to raise preliminary issue refers to Counsel being advised but does not state the source of his advice. The case of **CHIKUTA V CHIPATA RURAL COUNCIL 1974 ZR 241** was referred to, and Counsel stated that the court in that case had disapproved of advocates filing affidavits containing hearsay, as well as those containing contentious matters.

That by paragraph 5 of the affidavit in support of the notice to raise preliminary issues referring to the constitution, and in particular to article 60 of the said constitution, contentious issues had been raised. Therefore the Defendants should have sworn the affidavit, and the affidavit ought to be expunged from the record, and that was their prayer.

In response Counsel for the 2nd and 3rd Defendants stated that the even though the affidavit filed in support of the notice to raise preliminary issues is not dated, it means it was sworn on the date on which it was commissioned. His argument was that the absence of the date in the jurat was curable, and not fatal.

With regard to the second issue raised, Counsel submitted that the reference in paragraph 5 of the affidavit in support of the notice to article 60 of the FDD constitution was not disputed, therefore the affidavit should not be expunged. He further submitted that as Counsel he is an officer of the court, and he is bound by the Legal Practitioners Act to assist the court in matters of law and procedure, so that it arrives at just and fair decisions.

State Counsel in response stated that if the said affidavit was defective, which was denied, this court has power to order amendment or re-swearing of the affidavit, as provided in Order 5 Rule 14 of the High Court Rules.

As regards the argument that Counsel for the 2nd and 3rd Defendants should have disclosed the source of information, it was his argument that the source of information had been disclosed as the FDD constitution. That there was no dispute that article 60 of the FDD constitution exists, but that what was in dispute was its interpretation.

With regard to the jurat of the affidavit being defective, it was submitted that the deponent had signed the affidavit and the Commissioner for Oaths had indicated when the affidavit was commissioned. Thus it was known when the affidavit was commissioned. State Counsel stated that in the event that the court found that the affidavit was defective, the same could be cured, going by the provisions of Order 5 Rule 14 of the High Court Rules.

It was also State Counsel's submission that Rule 16 of the High Court Rules states that when a witness deposes his belief on any matter of fact, and the belief is derived from a fact other than from his personal knowledge, he shall disclose the source. That the source had been disclosed as the constitution, and Rule 17 supports this position.

That in this case that the belief was derived from the constitution of the FDD was not in contention.

Counsel for the Plaintiff in reply maintained that Order 5 Rule 20 (g) of the High Court Rules is couched in mandatory terms, and that the case he had referred to was persuasive and not authoritative. However in that case the preliminary issue regarding the defective jurat was successful.

With regard to the second preliminary issue Counsel's reply was that Order 5 Rules 17 and 18 of the High Court Rules state that the name of the informant shall be stated, and in paragraphs 5 and 6 of the affidavit in support of the notice, the deponent had stated that he had been

advised, but had not stated the source of his advice. He maintained that the affidavit was incurably defective.

I have considered the application. I will begin with the second preliminary issue. It has been raised pursuant to Order 14A of the Rules of the Supreme Court 1999 Edition which provides that;

"1. - Determination of questions of law or construction

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either -

(a) had an opportunity of being heard on the question, or

(b) consented to an order or judgment on such determination".

In this case the Plaintiff seeks determination of the following questions:

1. *Whether the affidavit is properly before the court in view of the fact that it does not comply with the mandatory provisions of Order 5 Rule 20 of the High Court Rules, Chapter 27 of the Laws of Zambia?*
2. *Whether the affidavit is properly before court in view of the fact that it is sworn by Counsel?*

The arguments advanced by Counsel for the Plaintiff in the first question is that the affidavit filed in support of the notice to raise preliminary issues is not dated in the jurat, contrary to the provisions of Order 5 Rule 20 (g) of the High Court Rules, Chapter 27 of the Laws of Zambia, as well as Section 6 of the Commissioner for Oaths Act, Chapter 33 of the Laws of Zambia, which are couched in mandatory terms.

That going by the case of **GENESIS FINANCE LIMITED V LONGRIDGE COMMODITIES LIMITED 2012/HPC/144**, the defect is incurable, and the affidavit ought to be expunged from the record.

Counsel for the 2nd and 3rd Defendants as well as State Counsel's argument was that even though the jurat is not dated, the said affidavit has a date when the Commissioner for Oaths commissioned it, and that is therefore the date when the affidavit was commissioned.

Order 5 Rule 20 (g) of the High Court Rules states that;

"20. The following rules shall be observed by Commissioners and others before whom affidavits are taken:

- (g) The jurat shall be written, without interlineation, alteration or erasure (unless the same be initialled by the Commissioner), immediately at the foot of the affidavit, and towards the left side of the paper, and shall be signed by the Commissioner.***

It shall state the date of the swearing and the place where it is sworn.

It shall state that the affidavit was sworn before the Commissioner or other officer taking the same. In presence of Commissioner

Where the witness is illiterate or blind, it shall state the fact, and that the affidavit was read over (or translated into his own language in the case of a witness not having sufficient knowledge of English), and that the witness appeared to understand it”.

Where the witness makes a mark instead of signing, the jurat shall state that fact, and that the mark was made in the presence of the Commissioner.

Where two or more persons join in making an affidavit, their several names shall be written in the jurat, and it shall appear by the jurat that each of them has been sworn to the truth of the several matters stated by him in the affidavit”.

Section 6 of the Commissioner for Oaths Act, Chapter 33 of the Laws of Zambia provides that;

“6. Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”.

Both the provisions quoted above are couched in mandatory terms as they use the word “shall” in requiring that the jurat is dated by the Commissioner for Oaths when commissioning the affidavits. A perusal of

the affidavit filed in support of the notice dated 18th April 2017 shows that the jurat is not dated, a fact which is not disputed by the Defendants.

Thus the question that arises is what is the fate of the said affidavit? It has been seen that Counsel for the Plaintiff argued that the affidavit is incurably defective, and to support this position reliance is placed on the case of **GENESIS FINANCE LIMITED V LONGRIDGE COMMODITIES LIMITED 2012/HPC/144** where the court held that the defect was incurable, and accordingly expunged the said affidavit from the court record.

The Defendants on the other hand argued that Order 5 Rule 14 of the High Court Rules empowers the court to order amendment or re-swearing of defective affidavits, and therefore the defective affidavit can be cured. Order 5 Rule 14 of the said High Court Rules states that;

“14. A defective or erroneous affidavit may be amended and re-sworn, by leave of the Court or a Judge, on such terms as to time, costs or otherwise as seem reasonable”.

The law cited above allows for the swearing or amendment of defective affidavits, and it is my considered view, that the defective of the jurat not being dated is curable by re-swearing, and I accordingly order that the said affidavit be re-sworn and that the date of the said re-swearing be reflected in the jurat of the affidavit, The 2nd and 3rd Defendants shall file the re-sworn affidavit within seven days from today.

As regards the second issue under the second preliminary issue raised, Counsel for the Plaintiff contended that reference to article 60 of the FDD constitution by Counsel for the 2nd and 3rd Defendants in paragraph 5 of the affidavit in support of the notice to raise preliminary issues, which

affidavit is deposed by counsel, raises contentious issues. Thus the affidavit should have been sworn by the 2nd and 3rd Defendants.

The other limb of the argument is that Counsel has in fact sworn the said affidavit, and despite deposing that he has been advised, he has not stated the source of his advice.

With regard to the propriety of Counsel swearing affidavits the case of **CHIKUTA V CHIPATA RURAL COUNCIL 1974 ZR 241** was relied on by Counsel for the Plaintiff. The case held that;

“the increasing practice amongst lawyers conducting cases of introducing evidence by filing affidavits containing hearsay evidence is not merely ineffective but highly undesirable, particularly where the matters are contentious”.

In the case of **POST NEWSPAPERS LIMITED V RUPIAH BWEZANI BANDA SCZ No 25 of 2009** where Counsel swore the affidavit in support of committal proceedings, the Supreme Court held that;

“the Chikuta case does not apply to an affidavit in support of an application for leave to institute contempt proceedings. Further, the Chikuta case, did not impose a blanket ban on the swearing of affidavits by counsel even in procedural applications”.

It was stated in that case that the **CHIKUTA** case did not apply as that case had involved Counsel on both sides swearing affidavits on matters which were not within their personal knowledge, and therefore hearsay. In the Post Newspaper's case it was noted that Counsel could swear affidavits that related to procedural matters.

The notice to which the affidavit was filed in support is whether this court has jurisdiction to determine this matter in view of the fact that

constitution of the FDD in article 60 provides for the resolution of disputes within the party by arbitration. The view held by Counsel for the 2nd and 3rd Defendants is that Counsel swore the affidavit himself because as an advocate, he is an officer of the court, and Section 85 of the Legal Practitioners Act binds him to assist the court to arrive at a fair and just decision.

The other argument is that the provision in article 60 of the FDD constitution is not contentious, but its interpretation is. Counsel for the 2nd and 3rd Defendant in paragraph 3 of the said affidavit states that he has conduct of the matter on behalf of the 2nd and 3rd Defendants, and in that capacity he swears the affidavit.

In paragraph 5 of the affidavit he states that he is advised that the matter is improperly before this court as article 60 of the FDD constitution provides that all disputes should be resolved by arbitration.

While I do agree that the fact that article 60 of the FDD constitution provides for reference to arbitration, of any matter arising in the party, Counsel deposed that he had been advised, but did not disclose the source of the advice. This goes against the provisions of Order 5 Rules 17 and 18 of the High Court Rules which provide as follows:

“17. When a witness deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief.

18. When the belief of a witness is derived from information received from another person, the name of his informant shall be stated, and reasonable particulars shall be given respecting the informant, and the time, place and circumstances of the information”.

The affidavit sworn by Counsel clearly does not reflect the source of his advice, and if indeed the advice is from the FDD constitution, he should have so deposed. Seeing that such defects are curable, I direct that the affidavit is amended and re-sworn to cure the defects, and the amended affidavit shall be filed within seven days from today.

In relation to paragraph 5 of the affidavit containing contentious matters as it refers to the arbitration of disputes, my view is that the existence of the said article is not in contention, and what is, is its interpretation or meaning. That being the position I would not entirely agree that the paragraph is contentious, but in view of the fact that the meaning of the article is a question for the court to determine, it is undesirable that Counsel should depose the affidavit.

Counsel referred me to the provisions of Section 85 of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia, as the basis for his swearing the affidavit. The said section provides that;

“85. Any person duly admitted as a practitioner shall be an officer of the Court and shall be subject to the jurisdiction thereof”.

It is trite that Counsel is expected by virtue of being an officer of the court, to assist the court arrive at fair and just decisions. In doing so Counsel is expected to among other things refer the court to relevant cases and other authorities. However in doing so Counsel must guard against being caught up in issues that may involve him being cross examined, in order to protect his position.

It is on that basis that I find that it is undesirable for Counsel to swear affidavits, though not contentious per se as in this matter, but where the construction of the it's contents or documents referred thereto, raise issues. On that basis I direct that persons with personal knowledge of the

facts swear the affidavit, and that such sworn affidavit shall be filed within seven days from today.

The first preliminary issue having been made, and the fact that the second preliminary issues on which I have ruled, have a bearing on the first, I will deliver the ruling on the first preliminary issue raised after the elapse of the seven days which I have given to the Defendants to cure the defective affidavits. The Ruling shall be delivered on 26th May, 2017.

Costs shall be in the cause.

DATED THE 8th DAY OF MAY, 2017.

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE