

IN THE HIGH COURT FOR ZAMBIA

2016/HPC/0132

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

BELL EQUIPMENT ZAMBIA LIMITED

PLAINTIFF

AND

FOVEROS MINING LIMITED

DEFENDANT

Before the Hon Lady Justice Irene Z Mbewe in Chambers

For the Plaintiff:

*Ms L. Maboshe of Messrs Corpus Legal
Practitioners*

For the Defendant:

Mr. Chebeleka of ECB Legal Practitioners

R U L I N G

Cases Referred To:

1. *Chief Mwanatete v Innocent Munyika Lushato and Another*
2014/HP/1043
2. *Commonwealth Development Corporation v Central African Power (1968)*
ZR 90

Legislation Referred To:

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

Other Works Referred To:

1. *John Hatchard and Muna Ndulo, "The Law of Evidence in Zambia: Cases and Materials"*

This is a Ruling on the Defendant's Notice of Motion to raise a preliminary issue on a point of law. The Defendant applies for the Plaintiff's affidavit in reply to notice of motion to enter Judgment on admission (hereinafter referred to as "affidavit in reply") to be expunged from the record on the following grounds:

1. That the affidavit in reply raises new issues to which the Defendant will have no opportunity to respond to.
2. Alternatively, if the Court is inclined to accept the affidavit as it stands, leave be granted to the Defendant to respond to the fresh allegation.

In its skeleton arguments, the Defendant contends that the Plaintiff filed an affidavit in support on 17th February 2017 and in response the Defendant filed an affidavit in opposition on 16th March 2017 and the Plaintiff filed a reply on 4th May 2017. The Defendant contends that the affidavit in reply raises new issues which the Defendant will not have an opportunity to respond to therefore

defeating the ends of justice. That paragraph 11 exhibits a letter allegedly authored by the Defendant and the said affidavit continues to speak to the same in paragraph 12 and 13. In paragraph 15 a new allegation is raised against the Plaintiff as to having received money from Kagem between June and October yet no evidence is provided. That in paragraph 19 and 20 of the Plaintiff's affidavit in reply, a new issue is raised that the total debt owed for which the Plaintiff seeks judgment on admission, is not in respect of one contract but in relation to three separate agreements. The Defendant argues that it is trite that a Plaintiff ought to raise its issues in one application so that the Defendant is given an opportunity to respond. That the Plaintiff ought to have framed its initial affidavit in support in such a way that it takes into account and covers all facts relevant to its application. Counsel for the Defendant cited the case of **Chief Mwanatete v Innocent Munyika Lushato and Another**¹ 2014/HP/1043 (unreported) in support of the proposition concerning the practice of affidavits in interlocutory application. In the alternative, Counsel for the Defendant seeks an alternative remedy that if the Court is inclined to accept the affidavit in reply as it stands, the Defendant prays for leave to file a

further affidavit in opposition to respond to the new issues raised by the Plaintiff and to file further documents if any.

The Plaintiff filed skeleton arguments in opposition to the preliminary issue. It submits that the issue for determination is whether the Plaintiff has introduced new evidence in its affidavit in reply to which the Defendant will have no opportunity to respond as alleged. Counsel for the Plaintiff argues that the Plaintiff has not introduced any new evidence at all as the affidavit in reply to the notice of motion to enter Judgment on admission is in response to the depositions in the affidavit in opposition. This was equated to re-examination which seeks to clarify issues raised in cross-examination. In this respect, the Court's attention was drawn to the learned authors of **The Law of Evidence in Zambia: Cases and Materials, John Hatchard and Muna Ndulo.**

Counsel for the Plaintiff contends that there is no new evidence as alleged by the Defendant in that the letter exhibited in paragraph 11 of the Plaintiff's affidavit in opposition clarifies the point raised in paragraph 8 of the Defendant's affidavit in opposition. That the Defendant's preliminary issue be dismissed as it is misconceived.

The Defendant's preliminary issue is predicated on *Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition* as read with *Order 3 Rule 2 High Court Rules, Cap 27 of the Laws of Zambia*. *Order 33 Rule 3* reads as follows:

"(3) The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

The Court therefore has the jurisdiction to determine a preliminary issue. The main bone of contention is the allegation by the Defendant that new evidence has been raised by the Plaintiff in its affidavit in reply filed into Court on 4th May 2017.

I have perused the affidavit in opposition to notice of motion to enter Judgment on admission filed on 16th March 2017 wherein the Defendant avers as follows:

"7. That in or around September 2015 the Plaintiff switched off and immobilised or disabled the equipment under the

Rental Agreement such that the Defendant was unable to make use of the said trucks.

8. *That this action was in breach of the Rental Agreement between the parties as it rendered the Defendant incapable of enjoying the benefits of the Agreement and generating income from the said equipment.*
9. *That at the time of the signing of the Acknowledgment of debt, it was understood by both parties that the Plaintiff would switch on and enable the equipment again and the Rental Agreement would resume.*
10. *That in consequence of the above, clause 2 of the said acknowledgment was clear as to the source of the money, from which the Plaintiff was to be paid, that is from receivables from a three year mining contract.*
11. *That further, clause 4 (i) of the same acknowledgment of debt made it clear that the Defendant was not to assume any liability for the rentals in respect of the period from December 2015 to date of resumption of the rental of the equipment.*

The paragraphs in contention in the Plaintiff's affidavit in reply dated 4th May 2017 reads as follows:

- "11. That further due to the accrual of rentals by the Defendant, the Defendant proposed to the Plaintiff that it suspends the provisions of its services to the Plaintiff. There is now produced and shown to me a letter acknowledging the Defendant's indebtedness, exhibit "SC 1".*
- 12. That the Plaintiff therefore switched off the equipment in accordance with the Defendant's proposal to suspend the provisions of services due to the delay in paying the Plaintiff the rentals, and also in line with its option to protect its rights under the Agreement.*
- 15. That paragraph 12 of the affidavit in opposition is correct, however, the debt assumed by the Defendant accrued between June and October 2015 and the Defendant was paid by Kagem for use of the equipment on the contract but neglected to pay Bell for use of the equipment.*

19. *That further to the above, even though the Defendant alleges to have a defence, it owes the Plaintiff a total outstanding amount of USD1,094,626.12 arising from three different agreements that were entered into between the Plaintiff and Defendant, namely a Memorandum of Agreement, a Rental Agreement and a Short Term Rental Agreement.*

20. *That therefore the total debt owed to the Plaintiff is not in respect to one contract, but to the said three agreements.*

It is trite that the primary purpose of the affidavit in reply is to put up evidence which serves to refute the case made out by the Defendant in the affidavit in opposition. Its purpose is not to be used to bring fresh allegations against the Defendant as the door would have been closed to the Defendant for any further response. I am persuaded by the case of **Commonwealth Development Corporation v Central African Power**² (1968) ZR 90 where it was held that an answering affidavit should not contain new material or bring fresh allegations against the Defendant, and I adopt the principles therein.

An analysis of the above clearly shows the Plaintiff responding to the averments in respect to the issue of switching off the equipment and tenders an explanation as to why this was done and its consequences. Counsel for the Defendant argues that paragraph 11 of the Plaintiff's affidavit in reply exhibits a letter allegedly authored by the Defendant and the said affidavit continues to speak to the same in paragraph 12. In my considered view, there is no issue here as the Defendant has not made any further arguments to support this assertion.

However, I concur with Counsel for the Defendant that the Plaintiff in its affidavit in reply not only clarifies issues but in paragraph 15, 19 and 20 it introduces new evidence. In paragraph 15, it introduces new evidence relating to the contract with Kagem for the use of the equipment and the Defendant neglecting to pay the Plaintiff for use of the equipment. In paragraph 19 and 20 it introduces new evidence relating to two other agreements namely the Memorandum Of Agreement, and a Short Term Rental Agreement. The evidence in paragraph 15, 19 and 20 of the

Plaintiff's affidavit in reply are not stated in the Plaintiff's supporting affidavit nor in the Defendant's opposing affidavit.

After considering all the circumstances of this matter, paragraph 15, 19 and 20 of the Plaintiff's affidavit in reply are accordingly expunged from the record. Arising from the aforesaid, the Defendant's alternative argument for leave to file a further affidavit is redundant.

The summons to enter Judgment on admission shall be heard on 4th December 2017 at 8.30 hours.

Costs to the Defendant to be taxed in default of agreement.

Dated this 21st day of November, 2017.

A handwritten signature in dark ink, appearing to read 'Irene Mbeve', is written over a horizontal dotted line.

HON IRENE ZEKO MBEWE
HIGH COURT JUDGE