

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

2020/HP/0108

BETWEEN:

ZACHARIA ZULU

AND

**MTN ZAMBIA LIMITED
ATTORNEY GENERAL**



PLAINTIFF

**1st DEFENDANT
2nd DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 15th
DAY OF MAY, 2025**

For the Plaintiff : Mr P. Zulu, Mesdames M. Wamunyima Legal
Practitioners
For the 1st Defendant : Mr M.J Chituplia Gill & Seph Advocates
For the 2nd Defendant : Mr K Chipulu, Senior State Advocate

R U L I N G

LEGISLATION REFERRED TO:

1. The Rules of the Supreme of England, 1965, 1999 Edition

1. INTRODUCTION

1.1 During continued trial on 26th February, 2025, objection was raised to the admission of the witness statement for Mildred Bwalya Chicha, the witness who was called by MTN Zambia Limited, by Counsel for the Attorney General.

2.0 OBJECTION

**SUBMISSIONS BY COUNSEL FOR THE ATTORNEY
GENERAL**

- 2.1 Counsel for the Attorney General in raising the objection, stated that the witness statement offended the Rules of the Court, particularly ***Order 38/2A/7 of the Rules of the Supreme Court of England, 1965, 1999 Edition.***
- 2.2 It was further submitted that the said provision proscribes the inclusion of expression of opinion or legal arguments in a witness statement, as well as anticipating the evidence of a party or contradicting it.
- 2.3 It was also Counsel's submission that the said Rule speaks to the exclusion of statements of belief.
- 2.4 Narrowing it down to this matter, Counsel's submission was that paragraphs 19-37 of Mildred Bwalya Chicha's witness statement were at best, expressions of opinion, and at worst, legal arguments.
- 2.5 Counsel stated that what is supposed to be included in a witness statement, is a statement of facts as perceived by the witness, which can be proved by their personal knowledge. Therefore, as the said impugned paragraphs were expressions of opinion and legal arguments, they should be expunged from the witness statement.

SUBMISSIONS BY COUNSEL FOR ZACHARIA ZULU

- 2.6 Counsel for Zacharia Zulu, concurred with the submissions which had been made by Counsel for the Attorney General, and stressed that a witness cannot give their opinion, as they are not qualified to do so. It was added that a witness cannot give a legal opinion, as that is the preserve of the Court.

2.7 In conclusion, Counsel stated that a witness should only attest to facts, which are within their peculiar knowledge.

RESPONSE BY COUNSEL FOR MTN ZAMBIA LIMITED

2.8 It was Counsel's submission in response, that a critical examination of the impugned witness statement, confirmed that it spoke to facts which the witness perceived personally.

2.9 In that regard, Counsel stated that for example in paragraphs 24 and 25 of the witness statement, the witness had stated that Zacharia Zulu was prosecuted in the Subordinate Court, which was a fact.

2.10 Then thereafter, the witness had referred to the bundle of documents in stating who prosecuted Zacharia Zulu before the Subordinate Court, adding that the witness also testified as a witness before the Subordinate Court. Thus, she had spoken factually.

2.11 Still in submission, Counsel stated that when it came to paragraphs 28 and 29 of the witness statement, those paragraphs also spoke to the same facts, and to the statement of claim. It was further submitted that paragraphs 33 and 34 of the witness statement were linked to Court documents as were paragraphs 29 and 30.

2.12 Counsel noted that the witness statement was filed on 15th March, 2023, and surely the objections could have been raised then. His view was that the objection had come too late in the day, especially at the hearing.

2.13 Further submission was made, that the High Court Rules as amended by **Statutory Instrument No 58 of 2020** provide

that an application should be made ten or fourteen days before trial. Counsel accordingly prayed that the objection raised be dismissed.

REPLY BY COUNSEL FOR THE ATTORNEY GENERAL

- 2.14 In reply, Counsel submitted that this Court is a repository of procedural rules, and under **Order 38/2A/7 of the Rules of the Supreme Court of England**, the Court has authority to consider the admission of witness statements. That in doing so, the Court has power to ask the other party if they have any objections to the production of a witness statement.
- 2.15 Thus, objection in this matter was raised, after an application was made to admit the witness statement into evidence. Counsel further stated that it was not true that objection to a witness statement had to be made Ten (10) days before trial, as such would offend **Order 38/2A/7 of the Rules of the Supreme Court of England**.
- 2.16 In still replying, Counsel submitted that the witness in the witness statement from paragraph 24 had itemized things stating that Hussein Khan had knowledge of them in relation to the case. It was also stated that in paragraph 25, the witness had drawn a conclusion by stating that it was clear.
- 2.17 Further, in paragraph 27, the witness had stated that her testimony was corroborated, while in paragraph 38, she had expressed opinion or drawn a conclusion, as had been done in paragraph 35.

3.0 **DECISION OF THIS COURT**

- 3.1 I have considered the objection. It is to paragraphs 19-37 of the witness statement for Mildred Bwalya Chicha on the basis that those paragraphs contain opinions, conclusions and legal arguments, which are proscribed by **Order 38/2A/7 of the Rules of the Supreme Court of England, 1965, 1999 Edition.**
- 3.2 In response, it was stated that those paragraphs in fact contain assertions of fact, adding that the witness Mildred Bwalya Chicha was a witness during the prosecution of Zacharia Zulu before the Subordinate Court.
- 3.3 Counsel for MTN Zambia Limited also opposed the objection on the basis that it had been made too late in the day, as it should have been made Ten (10) to Fourteen (14) days before trial.
- 3.4 In terms of the timing of the objection, indeed **Order 19 Rule 3 (3) of the High Court Rules**, provides that an interlocutory application should be brought not less than Fourteen (14) days before trial.
- 3.5 However, what was made, was an objection to the admission of evidence, and not an interlocutory application. Thus, **Order 19 Rule 3 (3) of the High Court Rules** is not applicable with regard to objections to the admission of evidence.
- 3.6 The Rule that is applicable, when it comes to the objection to the admission of evidence, is **Order 5 Rule 21 of the High Court Rules Chapter 27 of the Laws of Zambia.**

3.7 That Rule provides that:

“21. In every case, and at every stage thereof, any objection to the reception of evidence by a party affected thereby shall be made at the time the evidence is offered:

Provided that the Court may, in its discretion, on appeal, entertain any objection to evidence received in a subordinate court, though not objected to at the time it was offered.”

3.8 Going by the above provision, the objection having been raised at the time the witness statement was offered as evidence by the witness, it was made timely, and the objection based on when the objection was raised cannot stand.

3.9 Coming to the objection itself, the impugned paragraphs in the witness statement for Mildred Bwalya Chicha read as follows:

19. Firstly, the 1st Defendant did not play a role in the prosecution of the Plaintiff. The 1st Defendant’s role began and ended at reporting the Plaintiff to both the Zambia police and DEC.

20. The 1st Defendant did not direct or influence DEC to arrest, charge or arrest the Plaintiff. This is confirmed when reference is made to the Plaintiff’s bundle of documents and the evidence produced before this honourable Court.

- 21. An examination of the evidence of the documents produced by the Plaintiff will readily demonstrate that there is no document (evidence) that the 1st Defendant prosecuted the Plaintiff or alternatively, any documents to show that the 1st Defendant directed and influenced arrest, charge and subsequent prosecution.**
- 22. There is a crucial gap and in the absence of such evidence it cannot be claimed or indeed proved that the 1st Defendant prosecuted the Plaintiff let alone directed and influenced arrest and subsequent prosecution.**
- 23. Secondly, the 1st Defendant is not the party that prosecuted the Plaintiff in the Subordinate Court. As stated above, the 1st Defendant's role began and ended at reporting the Plaintiff to the Zambia Police and DEC. Thereafter, DEC acted independently when it decided to arrest, charge and prosecute the Plaintiff with the offences of theft by servant, fraudulent false accounting and money laundering. The Plaintiff was prosecuted in the Subordinate Court by DEC.**
- 24. I refer to page 37 of the 1st Defendant's bundle of documents which confirms the following information:**

- (a) Hussein Khan was at the time, a Senior Investigations Officer of DEC who was part of the team that handled various cases of financial crimes, including serious frauds in the public and private sectors;*
- (b) Hussein Khan had knowledge of the case (the prosecution of the Plaintiff and Shadreck Lungu) and was aware of the investigations in respect of the case;*
- (c) Investigations were undertaken by DEC and that the investigations revealed that Spargris' 13 cheques of ZMW100, 000.00 each amounting to ZMW1, 300, 000.00 were fraudulently posted to accounts of Kazipalilie Wholesalers and Pan African Distributors;*
- (d) Interviews were conducted by DEC in respect of the witnesses and that these interviews revealed that the suspects (including the Plaintiff) prosecuted in the Subordinate Court were behind the fraud with specific reference being made to the Plaintiff collecting cheques from Spargris, taking them to the 1st Defendant's warehouse and posting the cheques to Pan African Distributors and Kazipalilie and*

(e) That following the investigations, the Plaintiff was warned, cautioned and subsequently charged for the offences of theft by servant, fraudulent false accounting and money laundering.

25. It is clear from the above that after the 1st Defendant reported the Plaintiff to DEC, DEC independently proceeded to investigate, interrogate and later arrest and charge and prosecute the Plaintiff.

26. It is further clear that at no point did the 1st Defendant direct or influence DEC to arrest, charge and prosecute the Plaintiff for the offences of theft by servant, fraudulent false accounting and money laundering;

27. Thirdly, my testimony above is corroborated by the Plaintiff's own statement of claim which when read holistically, reveals that the Plaintiff was arrested, charged and prosecuted for the offences of theft by servant, fraudulent false accounting and money laundering by DEC.

28. Reference is specifically made to paragraphs 11 and 21 of the Plaintiff's statement of claim which succinctly reveal claims against DEC for interrogation, arrest, charge and prosecution of the Plaintiff for the offence of theft by

servant, fraudulent false accounting and money laundering.

- 29.** *Crucially, the Plaintiff's statement of claim does not make any claim against the 1st Defendant for having influenced or participated in interrogating, arresting, charging and prosecuting the Plaintiff for the offence of theft by servant, fraudulent false accounting and money laundering.*
- 30.** *Even the 2nd Defendant's defence while confirming that DEC did prosecute the Plaintiff did not at all claim that the 1st Defendant influenced or actively participated in the interrogation or prosecution of the Plaintiff.*
- 31.** *That with respect to the particulars of malice against the 1st Defendant, it will be noticed that none of those allegations relate to the arrest, charge and prosecution of the Plaintiff for the offences of theft by servant, fraudulent false accounting and money laundering.*
- 32.** *If anything, the claim for malice (under the particulars of malice) is against the 2nd Defendant when the Plaintiff clearly identifies DEC as the party that arrested and prosecuted the Plaintiff without basis or cause.*
- 33.** *The allegations referenced in the particulars of malice (in the statement of claim) instead*

relate to the claims surrounding the Plaintiff's employment with the 1st Defendant.

34. Paragraph 31 above is confirmed when reference is made to the letter of demand contained at pages 67 and 68 of the Plaintiff's bundle of documents. The Plaintiff's grievance as revealed in the letter of demand is not with malicious prosecution but rather with his dismissal from employment. This is clearly evident when the Court's attention is drawn to the following wording contained in the last paragraph of page 67:

"You pay to our client the sum of ZMW10, 000, 000.00 as compensation for our clients' loss of earnings, damage to reputation and mental anguish."

35. The Plaintiff's claim for malicious prosecution against the 1st Defendant is therefore misplaced and directed at the wrong party. The Plaintiff's action and claims for malicious prosecution if any, should have been directed at the party that arrested, charged and prosecuted him. In this case, the Plaintiff should have directed his claim for malicious prosecution if any at DEC through the 2nd Defendant.

36. With regards to the 1st Defendant's report of the Plaintiff to both Zambia Police and DEC there was no malice as the 1st Defendant was legally entitled to report the Plaintiff to the investigative wings which in this case included both the Zambia Police and DEC. There is nothing illegal or improper about reporting a complaint (and in this case the Plaintiff) to both the Zambia Police and DEC.

37. That as a consequence of all the above, the 1st Defendant is not liable for any of the claims that he has advanced as per the writ of summons and statement of claim.

3.10 Order 38/2A/7 of the Rules of the Supreme Court of England is as follows in provision:

"The overriding features of the written statements of the witness which may be served pursuant to the direction of the Court under para. (2) are: -

(1) That they are intended for use at the trial itself; and

(2) That they relate to issues of fact to be adduced at the trial.

Accordingly, the written statement of such a witness must contain only such material facts as the witness is able to prove of his own knowledge (cf. O.41, r.5 (1) as to the content of an affidavit). The written statement of the witness is the

equivalent of the oral evidence which that witness will give if called, in his evidence in chief at the trial. Indeed, the trial Judge may direct that the statement served or part of it should stand as the evidence in chief of that witness or part of it (para. 7 (a) cf. O.38, r.43, putting expert reports in evidence). Like the oral evidence of the trial witness, the written statement served must be full and complete; it must be "the truth, the whole truth and nothing but the truth." It must be emphasised that the party serving the witness statement may not lead evidence from his witness, the substance of which is not included in the statement served, except as to new matter or with the consent of the other parties or the leave of the Court (see para. (7)).

Again, like the oral evidence of the trial witness, his written statement must not contain any inadmissible evidence (para. (8)). It must not therefore contain any hearsay evidence or any statement of information or belief even if the grounds and reasons thereof are given (see O.41, r.5 (2) as to the contents of affidavits for interlocutory proceedings). Unless so stated by the party serving it, the written statement of the witness will not be treated as evidence under the rules relating to hearsay evidence (para. (6) and

see O.38 Pt.III). In the Official Referees' Courts, the general practice is that any objection as to the admissibility of all or part of a witness statement will normally be heard after the witness has produced his statement and sworn to its truth.

Like the oral evidence of the trial witness, a written statement must not contain any expressions of opinion, but be confined to matters of fact.

The written statement of a witness should not seek to anticipate the evidence of a witness of the opposite party and to contradict it or otherwise to deal with it. It is not the function of the written statement of a witness to answer questions that may be put in cross-examination, but only to answer such questions as would be asked in his examination in chief. However, the witness statement should contain all the evidence which he might be expected to give, were he to be examined orally at the trial."

3.11 These explanatory notes are self-explanatory on what a witness statement should contain. Therefore, the witness statement for Mildred Bwalya Chicha should only contain material facts which are within her personal knowledge.

3.12 As such, paragraph 19 of her witness statement, should not make an averment that MTN Zambia Limited did not direct or influence DEC to arrest, charge or prosecute Zacharia

Zulu. That statement draws a conclusion, and it is accordingly expunged from the paragraph.

- 3.13 Then for paragraphs 20, 21 and 22 they draw conclusions, and they are accordingly expunged from the witness statement. Paragraph 24 gives a basis for paragraph 23, with averments being made relating to Hussein Khan of DEC, having investigated the matter, and his knowledge of the matter. Hussein Khan's knowledge of the matter is not within the peculiar knowledge of Mildred Bwalya Chicha.
- 3.14 It was argued that Mildred Bwalya Chicha was a witness before the Subordinate Court when Zacharia Zulu was prosecuted. If she had knowledge of the evidence that Hussein Khan gave before that Court she should have made particular reference to such evidence. There being no such reference, the statement is hearsay, and it is expunged from the paragraph.
- 3.15 Paragraphs 25 and 26 are mere repetitions while paragraph 27 justifies Mildred Bwalya Chicha's contentions in paragraphs 25 and 26 by drawing conclusions which is not allowed. Paragraph 27 is accordingly expunged from the witness statement.
- 3.16 Paragraphs 28 -37 are also conclusions as to why the witness believes that MTN Zambia Limited is not liable to Zacharia Zulu and they are accordingly expunged from the witness statement.

4.0 **CONCLUSION**

4.1 The offending statements for the witness statement having been expunged, the matter shall come up for continued trial on 20th September 2025 at 09:00 hours. Costs shall be in the cause and leave to appeal is granted.

DATED AT LUSAKA THE 15th DAY OF MAY, 2025

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

