

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

CAZ APPLICATION NO. 7³/2019

IN THE MATTER OF: AN APPLICATION RENEWING THE APPLICATION FOR AN
INTERLOCUTORY INJUNCTION FILED INTO COURT ON 4TH
OCTOBER, 2018.

IN THE MATTER OF: ORDER VII RULES 1 AND 2 OF THE COURT OF APPEAL
RULES.

IN THE MATTER OF: SUPREME COURT SELECTED JUDGMENT NO. 11 OF 2019

BETWEEN:

AFRICAN BANKING CORPORATION
ZAMBIA LIMITED (T/A Atlas Mara)

OUR OF

APPLICANT

AND

19 JUN 2020

MATTANIAH INVESTMENTS LIMITED
(In Receivership)
DEVELOPMENT BANK OF ZAMBIA
JOHN PETER SANGWA
LEASING FINANCE COMPANY LIMITED
AGRIFOODS AND ALLIED INDUSTRIES LIMITED

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1ST RESPONDENT
2ND RESPONDENT
3^R RESPONDENT
4TH RESPONDENT
5TH RESPONDENT

CORAM: KONDOLO SC, MAKUNGU, SIAVWAPA JJA

On 22nd January, 2020 and on 11th June, 2020

For the Applicant : Mr. L. Phiri of Messrs C. Chonta Advocates and
Mr. M. Desai- Legal Counsel African Banking
Corporation Zambia Limited

For the 1st, 3rd and 5th Respondents : Mr. J. Chimankata of Messrs Simeza Sangwa and
Associates

For the 2nd Respondent : Ms. C. Mwambazi and Mr. L. Yeta of Messrs
Central Chambers

RULING

KONDOLO SC, delivered the Ruling of the Court

CASES REFERRED TO:

1. Phillip Mutantika and Another v Kenneth Chipungu
2. Maggie Mulela v Alick Kaira Court of Appeal/72/2017

LEGISLATION REFERRED TO:

1. **Rules of the Supreme 1999 Edition (The Whitebook)**
2. **Court of Appeal Rules, 2016, Statutory Instrument No. 65 of 2016**

The rules affecting the form and substance of Affidavits have been interrogated in a preliminary objection raised by the Applicant. The background to the objection stems from the Notice of Motion to discharge and reverse a renewed interlocutory Injunction ("Notice of Motion") which was heard by our learned brother Chashi JA sitting as a single judge of this Court on ^{3rd} October, 2019.

Chashi JA granted the Order of injunction earlier refused by the High Court. Disgruntled by the single judge's decision, the Respondent on 17th October, 2019 filed a Notice of Motion together with an Affidavit in Support to discharge and reverse the single judge's order.

The Applicant filed a Notice of Motion to raise a Preliminary Objection ("**Preliminary Objection**") pursuant to **Order VII rule 1 of the Court of Appeal Rules together with Order 2 Rule 2, Order 33 Rule 3 and Order 41 Rule 5 of the Rules of the Supreme (1999) Edition**. The application was supported by an Affidavit in which it was averred that paragraphs 16-19, 21 and 24 of the Affidavit in support contain extraneous matters.

The ^{2nd} Respondent, on 20th January, 2020, filed an Affidavit in opposition deposed to by Mwape Mwelwa, deposing that the Affidavit in contention it did contained neither extraneous matters nor legal arguments but only contained facts relevant to the Notice of Motion and merely states, in chronological order, the particulars and reasons why the motion is being raised.

On behalf of the Applicant, Mr. Desai argued in both his skeleton and oral submissions that a Notice of Motion was an interlocutory proceeding within the meaning of Order 41/5/2 of the Rules of the Supreme Court (1999) ("Whitebook") and the Court of Appeal Rules do not provide any guidance as to the contents of affidavits. He placed reliance on the holding in the case of Phillip Mutantika and Another v Kenneth Chipungu' in which the Supreme Court expunged extraneous matters from an affidavit.

He further argued that the Notice of Motion to vary the decision of the single judge was not an interlocutory proceeding under Order 41/5/1 of the Whitebook because the explanatory note shows that where the issue to be determined concerns the rights of the parties, it cannot be an interlocutory proceeding. He submitted that the

¹ Phillip Mutantika and Another v Kenneth Chipungu (SCZ Judgment No. 13 of 2014)

Notice of Motion sought to discharge an injunction and such an application did not permit the inclusion of extraneous matters in an affidavit. The question that this Court was urged to determine is whether or not the paragraphs in contention contained extraneous issues in terms of the exception which relates to interlocutory applications. Further, counsel submitted that the explanatory note indicated that just because an application is interlocutory in form does not mean it is interlocutory in substance. We were urged to expunge the paragraphs from the Affidavit with costs.

In response to these arguments, the ^{2nd} Respondent also filed skeleton arguments dated 20th January and submitted *viva voce*. Ms. Mwambazi submitted that the Applicant seeks equity despite not having done equity themselves because paragraph 10 of the Affidavit in opposition to the Notice of Motion to discharge and reverse the injunction, cited and interpreted the law meaning that, the paragraph, ought to be expunged.

It was submitted that Order 41/5 of the Whitebook provides that an affidavit may contain only such facts as the deponent is able, of his own knowledge, to prove. Counsel opined that the provision was not mandatory in nature which suggested that there may be

instances when an Affidavit can contain a few more facts that the deponent is able to prove. Order 4⁵/ 1/2 of the Whitebook was cited to reinforce the argument, the provision allows affidavits to contain statements of information or belief supported by the sources and grounds thereof where the affidavit is intended for use in interlocutory proceedings.

We were invited to examine the explanatory note under Order 41/5/3 of the Whitebook which defines interlocutory proceedings in relation to the contents of affidavits. The 2nd Respondent contended that the Notice of Motion does not in any way decide the rights of the parties but seeks to maintain the status quo and therefore falls within the meaning of the explanatory note.

She pointed out the paragraphs the Applicant seeks to expunge contain statements of beliefs which are not extraneous as they allege facts that ought to be heard by this Court. That striking them out could constrict the 2nd Respondent's ability to clearly set out the basis of their grievances. We were urged to dismiss the preliminary objection.

We are grateful for the spirited arguments advanced by Counsel for the respective parties. The objection as we see it is quite elementary in that affidavits should not contain extraneous matters

or legal arguments. The **Court of Appeal Rules, 2016**, as rightly observed by Counsel for the Applicant, do not provide for the contents of affidavits but in the absence of any explicit provision, recourse is made to the **WhiteBook** which has an entire Order on affidavits, **Order 41**. Of importance is Order **41 Rule 5** which states as follows:

"Subject to—

(a) Order 14, rule 2(2) and 4(2);

(b) Order 86, rule 2(1) and 4(1A);

(c) Order 88, rule 5(2A);

(d) Order 113, rule 3;

(e) paragraph (2) of this rule, and

(f) any Order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. (emphasis)

The 2nd Respondent engaged in a discourse to explain the nature of affidavits in interlocutory proceedings as suggested by Order 41/5/2 of the Whitebook. To allow a clear flow of this ruling, the explanatory note states as follows:

"4¹/5/2 "Interlocutory proceedings"—Proceedings are not "interlocutory proceedings" within this rule merely because they are seeking an interlocutory order and not a final order. A distinction is drawn between interlocutory proceedings generally and interlocutory proceedings where an issue has to be determined, the latter class falling outside this rule. "For the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause of the purpose of enabling the court ultimately to decide upon the rights of the parties"

The meaning of this provision in our view is that proceedings that seek to maintain the status quo until the rights of the parties are determined or made for the purpose of obtaining direction from the Court on how the cause should be conducted fall within the exception envisaged by Order 41/1/2. Therefore, a Notice of Motion to discharge an Injunction is not a general interlocutory proceeding but a [special] interlocutory proceeding under this provision because it seeks to maintain the *status quo* or seeks a direction from the Court on how the matter should be conducted here onwards. This means that as dictated by Order 41/1/2 an affidavit in support of the Notice of Motion, in *casu*, is permitted to contain information or beliefs together with the sources or grounds thereof.

Our considered view of the import of Order 41 Rule 5 of the Whitebook is that as a general rule, an affidavit *may contain only such facts as the deponent is able of his own knowledge to prove*. However, where the circumstances demand and as provided by the exception, it can have information of beliefs that the deponent is able to prove but not of his own knowledge. We are fortified by our finding by the explanatory note at Order 41/5/3 which states that:

"With the sources and grounds thereof—Although in practice the grounds of the witness's information or belief are frequently not stated, a deponent should never state that he believes something unless he has applied his mind to the matter and concluded that there are good grounds for his belief: the widely-used formula "I am informed by A and believe that . . . should not be used without care. Further, a party against whom an affidavit of information or belief which omits the relevant grounds is made is entitled to take the objection and if the objection is one of substance, the Court is bound to pay regard to it and the C.A. has commented strongly on the irregularity of an affidavit founded upon information and belief merely, without giving the source of such information and belief"

It is not enough to only state that *'I have been informed and belief it be true that ...'* the deponent must name the source of that information and must state the facts that form the basis of the ground on which the statement is made or believed. We have come

to the inescapable conclusion that the provision is limited to facts alone and that these facts must not be extraneous, meaning irrelevant or unrelated to the issue at hand.

The paragraphs in the 2nd Respondent's affidavit in support which are in contention, 16, 19, 21 and 24 read as follows:

16. That I am advised by the 2nd Respondent's Advocates and verily believe it to be true that the effect of the Ruling pre-empts the decision of the lower court as a result of the comments on the substantive matter in the absence of a full-trial.
17. That I am further advised by the 2nd Respondent's Advocates and verily believe it to be true that the effect of the Ruling is misdirecting in that it implies that the only considerations to take into account in dealing with an application under Order 27 Rule 4 is whether the right to relief is clear.
18. That I am further advised by the ^{2nd} Respondent's Advocates and verily believe it to be true that the effect of the Ruling in restricting the Receiver from acting as such

and yet leaving the 1st Respondent in Receivership does not preserve the status-quo but rather is detrimental to the 1st Respondent as there will be no one to run the company whose assets would go to waste.

19. That I am further advised by the 2nd Respondent's Advocates and verily believe it to be true that in granting the injunction the single judge of the honourable court ignored the principles that govern the grant injunctions.

21. That I am further reliably advised by my Advocates and verily believe it to be true that the present circumstances forming the basis of this motion warrant the discharge of the relief granted by the single judge to avoid prejudice to the 2nd Respondent that is not present in the Applicant.

24. That I am further advised by the 2nd Respondent's Advocates and verily believe it to be true that in granting the injunction the single judge of the honourable court ignored the cardinal principles for granting and refusing to grant an injunction thereby prejudicing the 2nd Respondent.

A perusal of the paragraphs quite clearly shows that they do not contain the kind of information allowed by the exception to the rule on extraneous matters. In summary, the evidence found in an affidavit is equated to oral evidence given in Court such that anything that deponent cannot allude to while giving evidence, must not grace an affidavit.

We therefore expunge paragraphs 16,17,18,19 21 and 24 of the 2nd Respondents affidavit in support of notice of motion.

With regard to Ms. Mwambazi's submission that paragraph 10 of the Affidavit in Opposition should also be expunged for containing extraneous material, Mr. Desai reacted by submitting that she was trying to orally cross appeal without filing a formal application.

The said paragraph 10 reads as follows:

10. That in addition to paragraph 5 of the within affidavit I wish to state the following in the alternative:

a) That I have been advised by the Applicant's Advocates and verily believe the same advice to be

true and correct that the Ruling of the single judge does not pre-empt the decision of the lower court on the merits as any comments made were made in passing.

- b) That the single judge in his Ruling applied Order 27 Rule 4 of the High Court Rules in concluding that the same takes the case out of the realm of the ordinary consideration of injunctions by stating at page R 1 as follows:

"... Order 27/4 HCR on which the application by the Applicant is anchored, deals with Orders to restrain breaches of contract or tort. Its effect is that in considering the granting of an injunction, there is no need to consider the issue of irreparable injury which cannot be atoned for by damages, whether one of the reliefs being sought is for damages or not. Order 27/4 HCR takes the case out of the realm of the ordinary consideration of injunctions".

- c) That I have been advised by the Applicant's Advocates and verily believe the same advice to be

true and correct that the single judge in his Ruling therefore did not ignore the principles that govern the grant of injunctions but instead applied Order 27 Rule 4 of the High Court Rules I concluding that the same takes the case out of the realm of the ordinary consideration of injunctions. The learned single judge's remarks at page 11 of the Ruling confirm this, wherein he stated:

"... Order 27/4 HCR on which the application by the Applicant is anchored, deals with Orders to restrain breaches of contract or tort. Its effect is that in considering the granting of an injunction, there is no need to consider the issue of irreparable injury which cannot be atoned for by damages, whether one of the reliefs being sought is for damages or not. Order 27/4 HCR takes the case out of the realm of the ordinary consideration of injunctions".

d) That the ^{2nd} Respondent is not laboring under any prejudice as the said ^{2nd} Respondent is a secured

priority creditor as per the Deed of Priority exhibited as "ZM2" hereto.

We agree with Mr. Desai that the neater way to do this was for Ms. Mwambazi to have raised her argument by filing a formal application.

We do note however that the issue was raised in paragraph 2.8 of the of the 2nd Respondents skeleton arguments. The Applicant was therefore aware of that the argument would be raised. We borrow from what we said in the case of **Maggie Mulela v Alick Kaira**:

"The issue has also been raised in the Appellants Heads of Argument meaning that the Respondent was well aware that the Appellant considered the issue as a matter for determination. We thus exercise our power under Order 10 Rule 9 (3) Court of Appeal Rules which states as follows;

10 (9) (3) The Appellant shall not therefore without leave of the Court put forward any grounds of objection other than those set out in the memorandum of appeal, but the Court in deciding

the appeal shall not be confined to the grounds put forward by the appellant."

We note that Mr. Desai did not hazard any argument with regard to the content of the said paragraph 10. We have taken the liberty to peruse the contested paragraph and find that it does in fact contain extraneous material and is likewise expunged from the record.

Costs are in the cause.

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE

.....
C.K. MAKUNU
COURT OF APPEAL JUDGE

.....
M.J. SIAVWAPA
COURT OF APPEAL JUDGE