

IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
AT LUSAKA  
(Civil Jurisdiction)

2015/HPC/0522



BETWEEN

SILVER SPRING SECONDARY SCHOOL LIMITED PLAINTIFF

AND

TIMOTHY KAFA NYIRENDA

1<sup>ST</sup> DEFENDANT

GRANDVIEW INTERNATIONAL LIMITED

2<sup>ND</sup> DEFENDANT

*Delivered in Chambers before the Hon. Mr. Justice Sunday B. Nkonde, SC at Lusaka this 10<sup>th</sup> day of January, 2017.*

*For the Plaintiff : Mr. L. Chikuta of Messrs Mumba Malila & Partners  
For the Defendants : Mr. B. Moshia of Messrs Moshia & Company*

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## RULING

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### LEGISLATION REFERRED TO:

- 1) *High Court Rules, Chapter 27 of the Laws of Zambia.*

This is a Ruling on the 1<sup>st</sup> Defendant's application by way of Summons filed on 23<sup>rd</sup> November, 2016 pursuant to **Order 3 Rule 2** of the **High Court Rules** and supporting Affidavit sworn by the 1<sup>st</sup> Defendant, TIMOTHY KAFA NYIRENDA for an Order for leave to file additional Witness Statement and Supplementary Bundle of Documents.

The relevant paragraphs of the supporting Affidavit are re-produced here below:

- “
4. *That my Advocates forwarded to me the Plaintiff's Bundle of Documents for my perusal and instructions.*
  5. *That upon perusal of the documents in the Bundle, I have found that it is necessary that I call an additional Witness Statement to rebut some issues that have arisen therefrom*
  6. *That I intend to rebut the misleading evidence touching on the inflated number of pupils the Plaintiff alleges to have been at the School.*
  7. *That I further wish to rebut some of the evidence touching on the Lease Agreement and how it was prepared and arrived at.*
  8. *That it is imperative this evidence is adduced to correct the misleading impression created by the evidence and documents produced by the Plaintiff.”*

The proposed Witness Statement of one VICTORIA NYIRENDA was exhibited to the supporting Affidavit.

In the accompanying Skeleton Arguments, the 1<sup>st</sup> Defendant cited **Order 3 Rule 2** of the **High Court Rules** as anchoring the application. This Rule provides that:

***“Subject to any particular rules, the Court or a Judge may in all cases and matters make any interlocutory Order which it or he considers necessary for doing justice, whether such Order has been expressly asked by the person entitled to the***

***Benefit of the Order or not."***

It was, thus, contended that this Court ought to consider all evidence relevant to the determination of a cause in order to arrive at a just decision and further that the contents of the proposed Witness Statement revealed that the maker of the statement had an active role to play in the events that culminated in the herein matter. The evidence in the Witness Statement was argued to be relevant and having a bearing on the outcome of this matter.

The application was opposed. In the Opposing Affidavit sworn by CHRINE HAPOMPWE, a Director and Chairman of the Plaintiff's Board of Directors, filed into Court on 28<sup>th</sup> November, 2016, it was deponed that all matters intended to be led in evidence in the proposed Witness Statement were either determined by Nyambe, J in Cause 2015/HP/2013 or by Chashi, J in the application for an Order of injunction earlier made by the Plaintiff herein or were those matters that can be referred to assessment when and if Judgment is delivered in the Plaintiff's favour.

In the Skeleton Arguments, the Plaintiff contended that the application lacked merit as the 1<sup>st</sup> Defendant had failed to demonstrate that he was entitled to be granted the application. And specifically on the filing of a Supplementary Bundle of Documents, the Plaintiff contended that neither the need or relevance of the Supplementary Bundle of Documents and/or documents to be produced had been demonstrated by the 1<sup>st</sup> Defendant. The Plaintiff, thus, urged this Court to dismiss the 1<sup>st</sup> Defendant's application with costs in favour of the Plaintiff.



At this point, in my view, in order to appreciate the competing arguments, it is necessary to briefly wade into the history of these proceedings.

This matter was commenced by Writ of Summons and Statement of Claim on 20<sup>th</sup> November, 2015. Appearance with Defence was entered by the 2<sup>nd</sup> Defendant on 4<sup>th</sup> December, 2015 and the 1<sup>st</sup> Defendant on 17<sup>th</sup> December, 2015. On 6<sup>th</sup> April, 2016, a Scheduling Conference was held at which the Court ordered as reproduced here below:

***“ IT IS HEREBY ORDERED as follows:***

1. *The Plaintiff’s Advocates shall deliver a Reply to the Defence on or before 14<sup>th</sup> day of April, 2016.*
2. *.....*
3. *Discovery by List and Inspection of Documents shall be Completed on or before the 28<sup>th</sup> day of April, 2016.*
4. *The parties shall file Bundle of Pleadings and Documents on or before 12<sup>th</sup> day of May, 2016.*
5. *The parties shall file and exchange Witness Statements on the 26<sup>th</sup> day of May, 2016.*
6. *The parties shall file their respective Skeleton Arguments and List of Authorities on or before 9<sup>th</sup> day of June, 2016.*
7. *A Status Conference shall be held on the 21<sup>st</sup> day of June, 2016 at 09:00 hours.*
8. *Each party shall be at liberty to apply.*
9. *The costs of Scheduling shall be in the Cause.*

Dated at Lusaka this 6<sup>th</sup> day of April, 2016.

(Signed)

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Hon. Mr. Justice Justin Chashi

To : Messrs Mumba Malila & Partners

To : Messrs Mosho and Company “

Due to the elevation of Chashi, J to the Court of Appeal, the Status Conference that was scheduled for 21<sup>st</sup> June, 2016 did not take place and a new date of 19<sup>th</sup> July, 2016 was set.

At the time of the Status Conference held on 11<sup>th</sup> July, 2016, both parties had not complied with the Order for Directions and on application, the parties were given up to 18<sup>th</sup> July, 2016 to comply and another Status Conference was set for 19<sup>th</sup> July, 2016. On this day, it became evident to this Court that the Plaintiff had substantially complied with the Order for Directions of 6<sup>th</sup> April, 2016 while the Defendants had not as their Bundle of Pleadings, Bundle of Documents, Skeleton Arguments and Witness Statements had not been filed. On application and in the interest of justice, I then allowed the Defendants to fully comply by 29<sup>th</sup> July, 2016 and set 19<sup>th</sup> August, 2016 as the date for the commencement of the trial.

After a further adjournment occasioned by the Defendants, trial finally commenced on 16<sup>th</sup> September, 2016 and one Witness gave evidence in-chief and

was cross-examined by Learned Counsel for the Defendants. The matter was then adjourned for continued trial on 2<sup>nd</sup> December, 2016. It is in between the first hearing and the next date of hearing that on 23<sup>rd</sup> November, 2016, the 1<sup>st</sup> Defendant launched the current application.

Now, there is no contention between the parties that the Court retains the discretion whether to allow additional Witness Statement and/or Supplementary Bundle of Documents before or after the commencement of the trial if the interest of justice allow and this has to be done upon due consideration of the circumstances.

However, it should at the same time be borne in mind that when it comes to allowing additional Witness Statements and/or Supplementary Bundle of Documents after the commencement of the trial, what must be shown is not just any circumstances. It must be exceptional circumstances in view of the principle that there must be an end to litigation. With this in mind, perhaps then the question that the application raises for determination is:

- 1- *Whether there are exceptional circumstances shown to allow the additional Witness Statement and Supplementary Bundle of Documents after the commencement of the trial.*

The above also raises the question; what is meant by exceptional circumstances? In my view, by exceptional circumstances is meant such circumstances as would satisfy the trial Court that in spite of due diligence, the party seeking to be



allowed to file the document could not have made the application before the commencement of the trial.

Therefore, coming to the application before me, I have carefully perused the Summons and supporting Affidavit of the 1<sup>st</sup> Defendant. The salient paragraphs are those I have already referred to or re-produced herein but I have not found anything stated by the 1<sup>st</sup> Defendant or showing to the effect that despite due diligence, the 1<sup>st</sup> Defendant could not have made the current application before the commencement of the trial.

Further, the Order for Directions of 6<sup>th</sup> April, 2016, enjoined the parties to have discovery and inspection by 28<sup>th</sup> April, 2016 and Witness Statements exchanged on 26<sup>th</sup> May, 2016 and no party applied for variation of the Order for Directions.

There was also ample time between the date of 16<sup>th</sup> August, 2016 when - as the record shows - the Plaintiff's Bundle of Documents and Plaintiff's Witness Statement were served on the 1<sup>st</sup> Defendant and the trial date of 16<sup>th</sup> September, 2016 for the 1<sup>st</sup> Defendant to have made the application.

In essence, when the application is considered in the context of the history of the proceedings in this matter, I am left totally unsatisfied that the 1<sup>st</sup> Defendant has shown exceptional circumstances to be allowed to file the additional Witness Statement and Supplementary Bundle of Documents after the commencement of the trial.

All in all, I have found no merit in the 1<sup>st</sup> Defendant's application and the same wholly fails and is accordingly dismissed with costs to the Plaintiff. As the matter is now 'a backlog', I also order that trial continues on 30<sup>th</sup> January, 2017 and 2nd February, 2017 at 09:00 hours in the forenoon.

In ending, I must remind litigants in the Commercial Court that the Commercial Court in this jurisdiction was established to principally serve the demands of the business world's desire that commercial disputes be determined expeditiously and no Commercial Court in its case management can overlook this important historical fact. In the same vein, litigants that without justifiable reason fail to timeously comply with Order for Directions can only do so at their own peril.

Dated at Lusaka this 10<sup>th</sup> day of January, 2017.

  
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Hon. Mr. Justice Sunday B. Nkonde, SC  
**HIGH COURT JUDGE**