

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

2011/HP/1227



BETWEEN:

GRIVER CHOLA SIKASOTE

PLAINTIFF

AND

SOUTHERN CROSS MOTORS LIMITED

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 20th DAY
OF JANUARY, 2017.**

For the Plaintiff : Mr. K. Kaunda, Ellis & Company

*For the Defendant : Mr. A. D. Mumba, A. D Mwansa Mumba &
Partners*

R U L I N G

CASES REFERRED TO:

- 1. Zesco Limited V Redlines Haulage Limited 1990 – 1992 ZR 170*
- 2. Attorney General V Roy Clarke 2008 Vol. 1 ZR 38*

LEGISLATION REFERRED TO:

- 1. The High Court Act, Chapter 27 of the Laws of Zambia*

This is a Ruling on an application made the Defendant for leave to file supplementary bundle of documents, made pursuant to Order 19 Rules 3 and 4 of the High Court Rules, Chapter 27 of the Laws of Zambia.

Counsel relied on the affidavit filed in support of the application, as well as the affidavit in reply. He submitted that the documents sought to be filed into Court, are necessary for disposing of the matter fairly, and would also go towards saving costs, as the parties had made reference to the movement of the motor vehicle between the Defendant and Mecurious Motors Limited, and also Zambezi Source Investments Motors.

It was also submitted that the documents sought to be filed are not prejudicial to the Plaintiff, and on that basis it was prayed that the application be granted.

In response Counsel for the Plaintiff objected to the application and relied on the affidavit in opposition filed on 25th November, 2016, especially paragraph 4 of the said affidavit. Counsel's argument was that the pleadings do not refer to Zambezi Source Investments Limited, but only Mecurious Motors. That the two are different entities, and moreover the documents sought to be filed in so far as they relate to Zambezi Source Investments Limited, are irrelevant to the proceedings before Court, whether they are prejudicial or not.

Further in the submissions, Counsel argued that it is trite that any evidence must be supported by pleadings and the case of **ZESCO**

LIMITED V REDLINES HAULAGE LIMITED 1990 – 1992 ZR 170

where the Supreme Court held that failure to object to the admission of evidence led on issues that were not pleaded, may lead to the consideration of such evidence.

Thus as the Plaintiff had objected to the filing of the evidence on the unpleaded defence, the application should not be granted. Counsel stated that if the Defendant wanted to file these documents, it should have applied to amend the defence, which it had not done.

It was submitted that in any event, the documents sought to be filed do not contain a judgment on the matter, but are pleadings, and would not help the Court in any way.

Counsel for the Defendant in reply agreed that matters relating to Zambezi Source Investments Limited had not been pleaded. That by producing the documents, the Defendant wished to explain the movement of the vehicle from the Plaintiff to the Defendant, and also to amplify on the Plaintiff's assertions as to where the vehicle was being held. It was his view that not only was this evidence relevant, but that it was also necessary to assist the Court to determine the matter fairly.

Further that whilst Counsel agreed that there was no judgment on the pleadings sought to be produced, that was the more reason why they sought to produce the said documents, as had there been a judgment, they would have asked the court to take judicial notice of

that judgment. Counsel reiterated the prayer that the application be granted.

I have considered the application. The gist of the application as outlined in the affidavit in support of the application is that the Defendant is desirous of filing copies of writ of summons and the statement of claim as well as the defence relating to cause number 2010/HP/421 between Zambezi Source Investments Limited as the Plaintiff and Griver Sikasote as the Defendant.

In the affidavit in opposition the Plaintiff deposes that the documents sought to be filed are not relevant to these proceedings as they relate to Zambezi Source Investments Limited, and not the Defendant. The affidavit in reply states that the Plaintiff in the statement of claim makes reference to the vehicle having moved from the Defendant to Mecurious Motors, but that the Defendant also wishes to adduce evidence to show how the vehicle moved.

Order 19 Rules 3 and 4 of the High Court Rules Chapter 27 of the Laws of Zambia, as amended by Statutory Instrument No 27 of 2012 provides that;

“3. (1) The Court or trial Judge may, at the scheduling conference, refer parties to mediation in accordance with rule 4 of Order XXXI, or where applicable, to arbitration.

(2) Where a matter is referred to mediation and it is not settled or mediated within forty-five days, the matter shall be referred back to the trial Judge who shall summon the parties

within fourteen days to a scheduling conference to chart the events.

(3) If the failure of mediation is due to non-attendance of any of the parties to the dispute, the Court may order the defaulting party to be liable for all the costs of the litigation whatever the outcome

(4) A Judge may, after a scheduling conference, summon parties to a compliance or status conference and make any order as to costs against any defaulting party”.

The provision does not refer to the filing of supplementary bundles of documents. Be that as it may, there was no issue raised as to the provision pursuant to which the application was made, and I will proceed to consider the substantive application.

The application is for an order to file supplementary bundle of documents. The objection that has been raised is that the documents sought to be filed relate to issues that were not pleaded in the defence. Therefore on the authority of the case of **ZESCO LIMITED V REDLINES HAULAGE LIMITED 1990 – 1992 ZR 170** where it was held that “*failure to object to the admission of evidence led on issues that were not pleaded, may lead to consideration of such evidence*” as the defence pertaining to the vehicle having gone to Zambezi Source Investment Limited, was not pleaded by the Defendant, the documents should not be allowed to be filed.

The other limb of the opposition, is that the said documents sought to be filed are in fact just pleadings and not a judgment, and they would therefore not help the Court in any way. If the Defendant wished to file the said documents, it would have to amend its defence.

It is trite that pleadings define the issues in dispute between the parties, and that parties are bound by their pleadings. Therefore any evidence sought to be tendered during trial must relate to the pleadings. It is also trite that where evidence that is not pleaded is led, and it is not objected to, the Court is not precluded from considering it. This position was also reiterated in the case of ***ATTORNEY GENERAL V ROY CLARKE 2008 Vol 1 ZR 38.***

Counsel for the Defendant conceded that the defence in so far as it relates to Zambezi Source Investment Limited was not pleaded. That being the position, and the fact that the Plaintiff objects to the production of evidence in relation to it, such evidence cannot be allowed to be tendered. It is immaterial that such evidence would enable the court to arrive at a just decision and save on costs, as argued by Counsel for the Defendant. What the Defendant should have done as rightly submitted by Counsel for the Plaintiff, was to apply for leave to amend the defence, and then apply to file the supplementary bundle of documents.

This was not done, and even assuming that the defence had done so, the documents sought to be filed are mere pleadings that would have had no value, unless a pronouncement had been made upon

them in the form of a judgment, as then the court would have made findings on them. Pleadings are just assertions of fact, which need to be proved by evidence being adduced. Thus I do agree that the said pleadings are irrelevant, as they do not prove any defence that this court can rely on.

In view of the fact that the documents sought to be filed relate to unpleaded matters, and have been objected to by the Plaintiff, the application fails and it is dismissed. Costs shall be in the cause. Leave to appeal is granted.

DATED THE 20th DAY OF JANUARY, 2017.

S. Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE