

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

2013/HP/0841

BETWEEN:

STICHING MACHA WORKS



PLAINTIFF

AND

**BRETHREN IN CHRIST CHURCH ZAMBIA
CONFERENCE AND 10 OTHERS**

DEFENDANTS

*Before Hon. Mr. Justice Mathew L. Zulu, at Lusaka the ^{21st}.....day
of June, 2018*

For the Plaintiff: Mr. L. Mwanabo, Messrs. LM Chambers.

✓ *For the Defendants: Mr. C.M. Sianondo, Messrs. Malambo and Co.*

RULING

Cases referred to:

1. Tembo and others v. International Drug Company Ltd (2013)
Z.R. Volumel at page 88.
2. K.B.F and Partners v. Idris Suleman Patel (2012/HP/1363).
3. Khanna v. Lovell White Durrant [1994] 4ALL E.R at page 267.

4. *Ibrahim S. Jasat v. Mohamed Wali Adam Patel* (1978) Z.R. 208(H.C).

List of Authorities referred to:

- 1. *The Constitution of Zambia Amendment Act No. 2 of 2016.***
- 2. *Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.***
- 3. *Order 21 Rule 2 and Order 34 Rule 10 (3) (a) of the Rules of the Supreme Court, 1965 (White Book).***

Other materials referred to:

- 1. *Dr. Matibini Patrick. Zambia Civil Procedure Commentary and Cases (Volume 1). New York City: LexisNexis, 2017.***
- 2. *Paul Mathews et al. Disclosure (2nd edition). London: Sweet & Maxwell, 2001.***

This is the plaintiff's application for leave to file a supplementary bundle of documents.

The brief background to this application is that this matter came up for commencement of trial on 12th July 2017. The plaintiff opened its case by calling its first witness and at the close of his evidence the matter was adjourned for continued hearing to the 2nd of October and the 13th of December 2017. However, trial did not proceed on both dates and the matter was adjourned to 28th March, 2018. In the interim, on 28th

February 2018, the plaintiff filed into court an application to file a supplementary bundle of documents.

The application is made pursuant to **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia and Order 34 Rule 10 (3)(a) of the Rules of the Supreme Court, 1965 (White Book)**. It is supported by an affidavit deposed by Laston Mwanabo, Counsel for the plaintiff, dated 28th February, 2018. The gist of the affidavit evidence is that counsel is in receipt of relevant documents from the plaintiff which documents were not available at the time of filing the bundle of documents. Counsel avers that it is in the interest of justice for the said documents to be produced before this court.

The application is opposed by the defendants by way of an affidavit deposed by Clavel Mbone Sianondo, counsel for the defendants, dated 7th March, 2018. His contention is that this matter was commenced about 5 years ago and that pleadings have been closed and some witnesses have already testified. The deponent avers that the plaintiff has previously made a similar application which was allowed as trial had not yet commenced. He asserts that allowing the application at this late stage of the proceedings will be prejudicial to the defendants.

In an affidavit in reply dated 14th March, 2018 also deposed by counsel for the plaintiff, it is averred that trial has not yet concluded and the defendants has not opened their case. Counsel deposes that the fact that a similar application was made is not a bar to a subsequent application of a similar nature as the court should be availed all the necessary documents. He avers that the defendants will not be ambushed as the documents will be served on the defendants once filed.

When the matter came up on 28th March, 2018, the parties were ordered to file into court their written arguments by 13th April, 2018, after which this court would proceed to make a ruling. The plaintiff filed into court his skeleton arguments on 6th April, 2018 and the thrust of its arguments was that this court has the inherent jurisdiction to entertain this application and reference was made to **Order 3 Rule 2 of the High Court Rules and Order 34 Rule 10 (3)(a) of the White Book**. It was submitted that the issue raised in the matter was a procedural technicality and reliance was placed on **Article 118 (e) of the Constitution amendment Act, number of 2016**. It was also submitted that matters must be heard on their merits and that where the merits of the case demand the production of certain documents, the court has no option but to order the production of those documents. This court was urged to grant the application sought as it was in the interest of justice

for the court to be availed all the necessary documents to arrive at a just decision.

The defendants filed into court their skeleton arguments on 13th April, 2018 and in a nutshell, the defendants contend that civil litigation is premised on principles of avoiding surprises. The defendants argue that the court should not allow evidence of matters that have not been included in the list of documents and reliance was placed on the case of **Tembo and others v. International Drug Company Ltd¹**. It was also submitted that in the case of **K.B.F and Partners v. Idris Suleman Patel²**, the court declined to allow an application to file a supplementary bundle of documents in similar circumstances, after the plaintiff had testified as doing so would open a Pandora's box which was akin to allowing the plaintiff to have a second bite at the cherry. It was also submitted that the court in that case stated that a party cannot provide documents in piece meal.

I have considered the affidavit evidence before me and the arguments by counsel for which I am grateful. The issue for determination is whether this is a proper case to grant the plaintiff leave to file into court a supplementary bundle of documents after trial has already commenced.

The plaintiff contends that the documents he intends to file into court in his supplementary bundle of documents are relevant to proving his case and that without the said documents his case will be imperiled. It is also Submitted that the documents will be served on the defendants once they are filed into court thus, negating the element of surprise and ambush on the part of the defendants. The defendants on the other hand contend that the application should not be allowed at this stage of the proceedings. It is submitted that a party should not be allowed to produce documents in piecemeal in reaction to cross examination. This court has therefore, been urged to dismiss the application for discovery at this stage of the proceedings.

I must begin by stating that the process of discovery serves a number of important purposes. Among them is that it enables litigants to have access to relevant documents which may be in the opponent's possession, it ensures that the court has all the pertinent evidence in order to determine the truth of the matter and also helps avoid surprises among the parties during trial. **See: a book by Dr. P. Matibini titled Zambia Civil Procedure Commentary and Cases, Volume 1 at page 629 and a book by Paul Mathews et al, titled Disclosure, 2nd edition, at paragraph 1.02.**

In the case of **Khanna v. Lovell White**³, it was observed that court procedures are designed to require production of evidential material at an earlier rather than a later stage of the proceedings. It was emphasized that parties ought to know the strengths and weaknesses of each other's case as soon as possible, and not being kept in the dark until the trial, by which time increased costs would have been incurred on both sides. The court in this case held that the court has a wide measure of control over the manner in which a trial would be conducted, including the manner in which it would receive evidence.

While I concur with the argument advanced by the defendants' advocates that the documents the defendant intends to file into court ought to have been filed earlier in the proceedings and in particular within the time stipulated in the order for directions and that a party should not be allowed to produce documents piece meal as was held in the case of **K.B.F and Partners v. Idris Suleman Patel**, I am further persuaded by the decision of Sakala J, as he then was, in the **Ibrahim S. Jasat v. Mohamed Wali Adam Patel**⁴ which is also insightful on the issue of discovery during trial. In allowing the production of fresh evidence during trial, the following was stated:

....It has been said that in preparing for trial solicitors bear a great responsibility and a heavy burden. Not the least of these

burdens is that of discovery (see Practice Note [1968] 2 All E.R. 98).

One of the purposes of discovery as I understand it is to eliminate surprise at or before the trial in relation to documentary evidence by providing to each party to the case with the relevant documents. I do not understand the law to be that a vital and relevant document if not included on the list of documents cannot and should not be produced in evidence. If that were the law then a lot of injustice than justice would be done to would-be litigants. Megarry, J, in the Practice Note supra at p. 99 observed as follows:

"No doubt last-minute disclosure is better than none at all; but the Plaintiffs were entitled to see the documents and consider their effect in advance of the hearing, and not be reduced to prising information out of the witnesses under cross-examination..."

I entirely agree with this observation. For my part therefore, I am satisfied that non-disclosure in itself cannot be a ground for excluding of a document in particular where the documents cannot on the evidence as in the present case be seriously challenged. It is, however, desirable that relevant documents must be disclosed to the other party in advance.
(the underlining is for emphasis only).

In the light of the foregoing, I have carefully perused the pleadings filed into court by both parties. Among the issues in contention as may be discerned from the pleadings are the questions relating to the legal existence of Sticking Macha Works, the existence if any, of the relationship of landlord and tenant between the said Sticking Macha Works and the 1st defendant and the ownership and interference with

certain properties. On a perusal of the documents the plaintiff intends to file into court marked as **"LM2"**, I am of the considered view that the said documents are relevant to the issues in dispute and as such, I am inclined to allow the production of the same even at this stage of the proceedings. On the issue of relevance of a document for purposes of discovery see: **Order 24 Rule 2 and paragraph 24/2/11 of the White Book.**

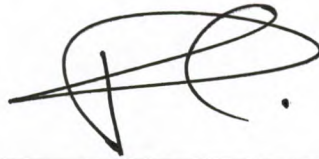
I further find that there is no serious challenge to the production of the said documents by the defendants apart from the contention that the documents ought to have been filed into court earlier. I am of the considered view that as the documents will be served on the defendants before the continued hearing of the plaintiff's case, the defendants' apprehension of being ambushed or surprised at trial will be eliminated.

In the light of the foregoing, I allow the plaintiff's application and grant the plaintiff leave to file into court a supplementary bundle of documents consisting the documents exhibited in his affidavit in support marked as **"LM2"**. I further order that the same be filed into court and served on the defendants within 7 days from the date hereof. I must however hasten to mention that litigants and their representatives must ensure that all the documents they intend to rely on in a matter are filed into

court within the time frames stipulated by the rules and orders of court.
In the circumstances of this case and in view of the delay by the plaintiff
in making this application, I award costs to the defendants same to be
taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka the 21st day of June 2018



**MATHEW. L. ZULU
HIGH COURT JUDGE**

