

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2019/HP/1648

(Civil Jurisdiction)

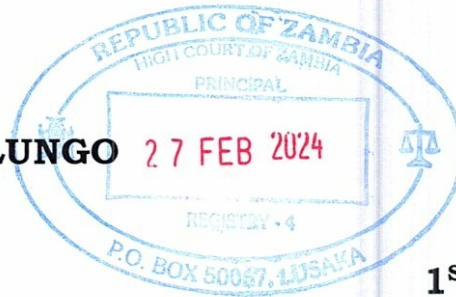
BETWEEN:

EMELDAH MICHELO MALUNGO

AND

OSWARD SAKATEMA

ATTORNEY GENERAL



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON 21ST AND 27TH FEBRUARY, 2024.**

For the Plaintiff: Mr. P. H. Namangala & Mr. C. Chikuni –
Messrs. N & P Advocates.

For the 1st Defendant: Mrs. H. C. Musa – Messrs. Milner & Paul
Legal Practitioners.

For the 2nd Defendant: No Appearance.

RULING

CASES REFERRED TO:

1. *NFC Africa Mining Plc v Techro Zambia Limited* (2009) Z.R. 236;
2. *Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited* – S.C.Z. Judgment No. 20 of 2011; and
3. *Juldan Motors Limited & July Danobo v Nasser Ibrahim & Olypa Sibongile Danobo* – 2015/HP/0678.

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia; and*
2. *Zambian Civil Procedure: Commentary and Cases, Dr. Patrick Matibini, Lexis Nexis.*

1. INTRODUCTION

1.1 This is the Ruling on the Application to expunge the Plaintiff's submissions on record, which Application is launched by the 1st Defendant.

2 BACKGROUND

2.1 The genesis of this Application is that trial herein concluded on 6th December, 2023 and I directed the Parties to file herein their written Submissions within 30 days thereof. I further granted the Parties leave to file during the Christmas Vacation. Accordingly, the 1st Defendant filed his Submissions on 5th January, 2024, while the Plaintiff filed her Submissions on 15th January, 2024, outside the timeframe given by the Court, and without leave of Court. It is against this backdrop that the 1st Defendant, who has taken issue with this, filed this Application.

3. THE APPLICATION TO EXPUNGE THE PLAINTIFF'S SUBMISSIONS

3.1 The 1st Defendant filed his Application for an Order to expunge the Plaintiff's Submissions from the Record on 2nd February, 2024. The Application is made pursuant to

Order III, Rule 2 of **The High Court Rules**¹, which provision of the law empowers the Court to make any interlocutory Order which it considers necessary for doing justice.

2.2 **AFFIDAVIT EVIDENCE**

2.2.1 The Application is supported by Affidavit sworn by Harriet Chama Musa, in which it is averred, *inter alia*, that trial herein ended on 6th December, 2023, and the Court ordered the Parties herein to file their written Submissions within 30 days thereof. The Court further directed the 1st Defendant to inform all the parties to the action of the said timeframe for filing written Submissions, as the Plaintiff and 2nd Defendant were absent on that day.

2.2.2 It is further averred that the Deponent notified all the Parties in writing of the said timeframe. It is also averred that on 24th January, 2024, the Plaintiff served on the 1st Defendant her written Submissions. A perusal of the said Submissions revealed that they were filed on 15th January, 2024, which is a period of 10 days outside the 30 days' timeframe given by the Court.

2.2.3 Additionally, it is averred that the Deponent conducted a Search of the Court Record, which

revealed that the Plaintiff had not obtained leave of Court to file her Submissions out of time.

2.2.4 Moreover, the Deponent averred that the Plaintiff's Submissions ought to be expunged from the Court's Record as no leave was sought to file out of time. The Deponent asserts that the said Submissions show that the Plaintiff has made allegations and personal attacks on Counsel for the 1st Defendant, which allegations prejudice the 1st Defendant as he will not have an opportunity to address them.

2.2.5 The Application is opposed by the Plaintiff, who filed herein an Affidavit in Opposition, sworn by Clement Chikuni, in which it is averred, *inter alia*, that the late filing of the Submissions by the Plaintiff was mainly attributed to the inadvertent miscommunication of the 30 days' period and inevitable circumstances arising from misinformation that the date for continued hearing was 8th December, 2023, but turned out to be 6th December, 2023.

2.2.6 It is avowed that when the Court gave the 30 days' timeframe for filing Submissions, it never ordered that late submissions were not to be accepted and that the 1st Defendant has not demonstrated the

prejudice that he will suffer by the late filing of the Plaintiff's Submissions.

2.2.7 It is also averred that the Plaintiff is not averse to the Defendant being given more time to file a reply, if any, if it is in the interest of justice. Additionally, it is averred that the Plaintiff's Submissions do not contain personal attacks on Counsel for the 1st Defendant but a mere statement of facts as they are.

2.3 **SKELETON ARGUMENTS**

2.3.1 Counsel for the 1st Defendant filed herein Skeleton Arguments, in which it is submitted, *inter alia*, that it was incumbent upon the Plaintiff to seek leave of this Court to file her Submissions out of time, which step was not taken when the Plaintiff filed her Submissions out of the timeframe given by the Court. Counsel argued that the Plaintiff ought to have strictly followed the Order given by the Court and by choosing to ignore the timeframe directed by the Court, the Plaintiff did so at her own peril.

2.3.2 To fortify her submissions, Counsel cited the case of ***NFC Africa Mining Plc v Techno Zambia Limited***¹ for its holding that rules of Court are intended to assist in the proper and orderly administration of justice and as such, they must be strictly followed.

She further cited the case of ***Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited***², where the Supreme Court stressed the importance of adhering to rules of Court and that those who choose to ignore rules of Court do so at their own peril.

2.3.3 On the basis of the foregoing, Counsel contended that the Plaintiff's Submissions are irregularly before Court and ought to be expunged from the Record with costs to the 1st Defendant.

2.3.4 Counsel for the Plaintiff also filed herein Skeleton Arguments, in which it is submitted, *inter alia*, that the 1st Defendant's Application must be dismissed for being frivolous, vexatious and misconceived. Counsel reiterated that the 1st Defendant has lamentably failed to demonstrate the prejudice he might suffer by the late filing of the Plaintiff's Submissions.

2.3.5 Counsel implored the Court to exercise its discretion under ***Order III, Rule 2*** of ***The High Court Rules***¹ and accept the Plaintiff's Submissions on the basis that they will assist the Court in gaining the utmost clarity of the position of the Parties herein. To fortify his submissions, Counsel called in aid the case of ***Juldan Motors Limited & July Danobo v Nasser***

Ibrahim & Olypa Sibongile Danobo³, where my learned sister, Justice Mapani-Kawimbe (then High Court Judge), in dismissing an application to set aside Submissions for irregularity, had the following to say: -

“It is trite law that submissions are only meant to assist the Court in shaping a judgment and not substitute the opinion of the Court. The Court can only make a decision after independently reviewing and analysing the evidence presented in a case... therefore, I see no need to set aside the Defendants’ submissions.”

2.3.6 Finally, Counsel submitted that the 1st Defendant cannot seek to challenge a procedural irregularity which is not fatal and asking the Court to expunge Submissions from record on account of a procedural irregularity is ambitious. He prayed that the Court exercises its power and admit the Plaintiff’s Submissions.

2.4 **THE HEARING**

2.4.1 At the hearing of this matter, Counsel for 1st Defendant augmented the Application with *viva voce* submissions. She submitted that the 1st Defendant has shown in his Affidavit in Support of this Application that the Plaintiff was aware that this

Court issued an Order with regards to the filing of Submissions within 30 days. She further submitted that she was aware that the Court is not mandated to consider submissions but that rules of Court are intended to assist in the proper and orderly administration of justice. She argued that the Plaintiff has not tendered any explanation as to why the Submissions were not filed within the time directed by this Court.

2.4.2 Counsel contended that a perusal of paragraph 14 of the 1st Defendant's Affidavit in Support reveals that the Plaintiff in her Submissions has made personal attacks that go to the character of Counsel for the 1st Defendant, which in itself is prejudice that the 1st Defendant will suffer as he has no right of reply to the Submissions.

2.4.3 Finally, Counsel submitted that she is aware that **Order III, Rule 2** of **The High Court Rules**¹ empowers this Court to make any Order which is in the interest of justice, therefore, she prayed that if this Court uses its discretion and allows the Plaintiff's Submissions to remain on Record, the Court should use its discretion to Order the Plaintiff withdraws the said Submissions that are on Record

and refile Submissions without personal attacks made against Counsel for the 1st Defendant.

2.4.4 In response to the *viva voce* Submissions, Counsel for the Plaintiff submitted that contrary to what the 1st Defendant's Counsel submitted, the Plaintiff has presented before this Court an Affidavit in Opposition that clearly state two major reasons for the late submission and goes further to state that it was not in disregard of this Court's directives.

2.4.5 In addressing the contention by Counsel for the 1st Defendant that the 1st Defendant will suffer prejudice, Counsel for the Plaintiff submitted that the Plaintiff had addressed that aspect by stating that she is not averse to the 1st Defendant replying to the Plaintiff's Submissions, therefore, the 1st Defendant's assertion flies against the argument that the 1st Defendant on account of the late Submissions has no opportunity to reply. He further contented that if the Court exercises its discretion to Order a re-filing of the Submissions, that in itself entails an opportunity for the 1st Defendant to reply if he so wishes.

2.4.6 Finally, Counsel submitted that the Submissions from Counsel for the 1st Defendant go to show that

the 1st Defendant does not seem to have any grounds for making this Application in the first place.

2.4.7 In reply, Counsel for the 1st Defendant submitted that the reason that the Plaintiff has advanced in paragraph 4 of her Affidavit in Opposition, for failure to file the Submissions in time, are misplaced. She argued that the reason advanced by the Plaintiff of inadvertent miscommunication of the 30 days' period is not true as the 1st Defendant has shown in his Affidavit in Support that the communication of the 30 days' period was effected on 7th December, 2023, which is only a day when the 1st Defendant closed his case.

2.4.8 Counsel further contended that the other reason given by the Plaintiff in her Affidavit evidence that there was a miscommunication on the date set for continued hearing cannot stand as it has nothing to do with the filing of Submissions on time and the Notice of Hearing on record clearly shows that the continuation of trial had been on 6th December, 2023 and not 8th December, 2023, as alleged.

2.4.9 In reply to the Plaintiff's submission that she is not averse to the 1st Defendant replying to her Submissions, Counsel submitted that unfortunately it is not up to the Plaintiff to make that decision as

the 1st Defendant has no right of reply. Counsel further replied to the Plaintiff's assertion that the 1st Defendant has no ground to make this Application, by submitting that the 1st Defendant's Application is anchored on the basis that the Plaintiff disobeyed an Order of the Court without any convincing reasons as to why she could not file within time. She prayed that the Application be allowed with costs to the 1st Defendant and/or in the alternative the Court Orders the Plaintiff to withdraw her Submissions, which contain three pages of attacks on Counsel for the 1st Defendant and refiles a proper format of Submissions.

4. CONSIDERATION AND DECISION OF THE COURT

- 4.1 I have considered the Application before me and Affidavit evidence. I have also considered both written and *viva voce* submissions by both Learned Counsel, and authorities cited, for which I am grateful.
- 4.2 The 1st Defendant has taken issue with the Plaintiff's final Submissions, which were filed out of time and without leave of Court. He has further taken issue with three pages of the said Submissions, which he deems to be personal attacks on his Advocates and will prejudice him as he has no right of reply. Therefore, he has applied to have the said Submissions expunged from the Court record and/or

in the alternative, the three pages to be withdrawn from the Record.

- 4.3 On the other hand, the Plaintiff has opposed the Application on the basis that the cause of her filing the Submissions out of time was due to inadvertent miscommunication of the 30 days' timeframe that was given by the Court and that there will be no prejudice caused to the 1st Defendant as the Plaintiff is not averse to the 1st Defendant replying to her Submissions.
- 4.4 Having analysed the documents before me and the submissions by Counsel, the issue for determination is whether or not the Plaintiff's final Submissions, filed herein out of time and without leave of Court, should be expunged from the Record.
- 4.5 As a starting point, I wish to put it on record that when this matter came up for continued trial on 6th December, 2023, the Plaintiff and 2nd Defendant were absent and no just cause was advanced for their absence. Accordingly, I proceeded with the continuation of trial and after the 1st Defendant closed his case, I deemed the matter closed. I then reserved the delivery of Judgment on 29th April, 2024, and Ordered the Parties to file their written Submissions within 30 days thereof. I also granted the Parties leave to file during the Christmas Vacation and directed the 1st

Defendant's Counsel to notify the other Parties that were absent.

- 4.6 The 1st Defendant notified the Parties that were absent of the timeframe for filing of final Submissions and filed his final Submissions on 5th January, 2024. The Plaintiff disregarded the Court's Order and filed her final Submissions, out of time and without leave of Court, on 15th January, 2024.
- 4.7 I will begin by considering and determining the alternative relief sought by the 1st Defendant, which is that the Plaintiff withdraws three pages of her Submissions as they are personal attacks on the 1st Defendant's Counsel.
- 4.8 I have perused the Plaintiff's Submissions and it is obvious to me that, pages 3 to 5, contain personal attacks on the 1st Defendant and disparaging remarks against this Court. Further, it is obvious that the Plaintiff has been dissatisfied with prior decisions made herein by the Court and yet she failed and/or neglected to take the necessary steps where one is dissatisfied with a Court's decision. Instead, the Plaintiff wants to have a second bite of the cherry by bringing up issues that have been considered and determined by the Court.
- 4.9 Needless to say, the behaviour exhibited by the Plaintiff herein saw the Court being forced to determine motion

after motion, thus delaying the conclusion of this matter. The Record will show that the Plaintiff was engrossed in having the matter proceed at her pace that the substance of prosecuting her case became forgotten. I have in that regard had to determine Summons for an Order to re-open the Plaintiff's case; Summons for leave to amend pleadings made a long way after the matter was launched; Summons for an Order of enlargement of time within which to file amended Pleadings; Motion to adjourn scheduled trial; and Summons for Stay of Execution of Ruling dated 14th November, 2023, which application was abandoned. The Plaintiff has also caused the 1st Defendant's present motion, which is now under consideration.

- 4.10 While Parties are at liberty to contest every issue under the earth, spending time on all manner of motions is not the best way for the Court to determine suits before it on their merit and expeditiously so.
- 4.11 This motion has been necessitated by the Plaintiff's filing Submissions out of time, which Submissions contain three pages of attacks on the 1st Defendant's Counsel. I note that the Plaintiff maintained in her Affidavit and Submissions that the period prescribed for filing Submissions was miscommunicated and goes on to issue disparaging remarks against the 1st Defendant's Counsel, which remarks run on three pages of the Submissions.

4.12 On my part, having reflected on the matter, the present motion must be looked at in its context and not in the context of other and unrelated proceedings. In my view, whether the Plaintiff is disparaging the 1st Defendant's Counsel, is a matter not presently before me but the 1st Defendant has argued that he does not have a right of reply. As has been rightly submitted by the Parties, the Court is not bound to consider Counsel's Submissions as they are only meant to assist the Court in shaping a Judgment and not to substitute the opinion of the Court.

4.13 Accordingly, the Court is not bound to consider Submissions that cast unfounded aspersions on one party. The question I now ask myself is what should I do with the impugned parts of the Plaintiff's Submissions. It is obvious to me that the references to the 1st Defendant's Counsel and this Court, were unnecessary and I am certain that by striking out these paragraphs, the Plaintiff will not be prejudiced in any way or driven from the seat of justice. By personalising her Submissions, the Plaintiff steered her case away from her intended goal, which is not an issue before me. Her case, I am certain, can stand without Submissions being directed at the 1st Defendant's Counsel.

4.14 Having stated so, I shall not expunge the Submissions in its entirety. Instead, I shall consider the Submissions on

its merits, but strike out the three pages that attack the 1st Defendant. Therefore, the excerpts at pages 3 to 5 of the Plaintiff's Submissions, under the heading "**The Proceedings in this Matter**", are hereby struck out, expunged and wholly obliterated from the Record.

4.15 I will now address the issue of filing Submissions out of time and without leave of Court. The Plaintiff filed her final Submissions on 15th January, 2024, which is 10 days outside the timeframe prescribed by this Court and without leave of Court. Clearly, the failure by the Plaintiff to seek leave of this Court before filing Submissions on 15th January, 2024, was a violation of this Court's Order.

4.16 Notwithstanding the breach of this Court's Order, in determining this issue, I have considered whether or not the Submissions which the 1st Defendant seeks to be expunged from the Record are relevant to resolving the matter herein. In doing so, I had sight of the book **Zambian Civil Procedure: Commentary and Cases**², where the learned author, Dr. Matibini, opined that: -

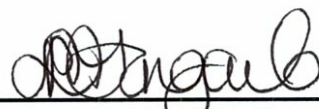
"The Court has power to receive any document at a later stage if the genuineness of a document is beyond doubt and it is relevant or material to decide the real issue in controversy."

4.17 Being persuaded by the above authority, I have carefully perused the parts of the Submissions that address the

issues in controversy herein. It is my view that these parts of the Submissions are relevant in assisting this Court to shape its Judgment and expunging these parts from the Record would not save the best interest of justice. Accordingly, I will not expunge the Plaintiff's entire Submissions but strike out the offending parts which are on pages 3 to 5. Consequently, I have exercised my discretion under **Order III, Rule 2** of **The High Court Rules**¹ and hereby deem the Plaintiff's Submissions to have been filed within the prescribed time.

4.18 Since this Application was necessitated by the Plaintiff's violation of the Order of this Court, Costs are for the 1st Defendant as against the Plaintiff, to be taxed in default of agreement.

**SIGNED, SEALED AND DELIVERED AT LUSAKA ON THE 27TH
DAY OF FEBRUARY, 2024.**



**P. K. YANGAILO
HIGH COURT JUDGE**

