

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2024/HP/0529



BETWEEN:

AYDIN INVESTMENTS LIMITED

AND

NAMS DISTRIBUTORS LIMITED

DEFENDANT

Before:

The Hon. Mr. Justice Charles Zulu.

For the Plaintiff:

Ms. C.Z. Chifita & Ms. L. T. Chilimba of
Messrs D. Kalima & Company.

For the Defendant:

Mr. J. Tembo of Messrs Bancroft Legal
Practitioners.

R U L I N G

Case referred to:

- 1. Jones Mwanza and Another v Sable Transport Limited (2008/HP/038).***
- 2. Cellnet Communication Zambia Limited v Savenda Management Services Limited (2013/HP/121).***
- 3. Vernon v Bosley (NO. 2) [1997] 1 ALL E.R. 614.***

Legislation referred to:

- 1. High Court Rules Chapter 27 of the Laws of Zambia***
- 2. White Book 1999 Edition.***

1.0 INTRODUCTION

- 1.1 This ruling is in respect of the Plaintiff's application dated January 7, 2025 to file a supplementary bundle of documents.

The application was made pursuant to Order III r. 2 of the **High Court Rules (HCR), Chapter 27 of the Laws of Zambia.**

2.0 BACKGROUND

- 2.1 The Plaintiff took out a writ of summons and statement of claim dated April 17, 2024, against the Defendant, Mary Banda, essentially seeking the payment of K2, 298,053.60, allegedly being the cost for the transportation of goods and demurrage, based a contract the Plaintiff had with the Defendant.
- 2.2 The Defendant entered appearance and defence on April 30, 2024. And on August 21, 2024, orders for directions were issued. Consequentially, the parties filed their respective bundles of documents and pleadings, as well as scheduling briefs and witness statements. A status conference was scheduled on January 17, 2025 to ascertain, if the parties had complied with the said order for directions.
- 2.3 On January 7, 2025, the Plaintiff filed the present application.

3.0 AFFIDAVIT EVIDENCE

- 3.1 An affidavit in support of the application was deposed to by Faizer Master, the Managing Director in the Plaintiff Company. He stated that following the filing of the Plaintiff's bundle of documents, the Plaintiff had come in possession of vital information which would assist the court in determining the dispute herein. And that the Plaintiff was not privy to the said information at the time of commencing the present action. The document sought to be placed on the record was exhibited.

3.2 An affidavit in opposition was deposed to by Benjamin Kawangu, the Managing Director in Defendant Company. The gist of the opposition is that the document sought to be filed by the Plaintiff was not part of the list of documents filed by the Plaintiff at the commencement of the present action. And that the said document had no bearing on the Plaintiff's claim because, the same was mere communication intended to settle the matter *ex curia*.

4.0 THE PARTIES' ARGUMENTS

4.1 The Plaintiff's Counsel argued that the application should be granted because, the parties have a continuing duty towards the Court to produce all documents relevant to the case. The cases of **Jones Mwanza and another v Sable Transport Limited¹** and **Cellnet Communication Zambia Limited v Savenda Management Services Limited²** were cited.

4.2 I was urged to grant the said application.

4.3 The Defendant's Counsel reiterated the averments in the affidavit in opposition and argued that, the Plaintiff did not include the said document sought to be produced in his list of documents at the start of the action. That the said failure deprived the Defendant an opportunity to be put on notice to settle his defence.

4.4 Additionally, Counsel contended that the said document had no bearing on the Plaintiff's case because, the same was a mere communication intended to settle the matter *ex curia*. I was urged to dismiss the application for lack of merit.

5.0 DETERMINATION

5.1 I have carefully considered the parties' affidavit evidence, and the arguments for and against the application.

5.3 I am mindful that there is a continuing obligation imposed on the parties to produce all relevant documents in their custody. In addition to the authorities adverted to by the Plaintiff's Counsel, practice direction recorded under paragraph 24/2/17 of the **White Book 1999 Edition** is primarily instructive. The same provides:

5.3.1 Continuing obligation to give discovery

Although one reading of O.24, r.1 may suggest that discovery need be given only of documents which have come into a party's possession before the date of his list of documents, this is not the limit of a party's obligation to give discovery imposed by the rule. The obligation is general, and requires the disclosure of all relevant documents whenever they may come into a party's possession. This requirement is supported by the linked principle that a party must not seek to take his opponent by surprise (cf. O.18, rr.8 (»»text) and 9), and that he must not, by withholding relevant documents, mislead his opponent or the Court into believing that the statement in his list that he has given full discovery continues to be true (Mitchell v. Darley Main Colliery Co. (1884) Cab. & Ell. 215). An obvious example is where a plaintiff, who is claiming damages for prospective loss of earnings, obtains new lucrative employment during the course of the action; this fact must be communicated to the defendant and further discovery must be made (or, at all events, offered). In default, the plaintiff may be ordered

to pay any costs occasioned by the failure to give discovery promptly. (emphasis supplied)

5.4 The above position was affirmed in the English case of **Vernon v Bosley**³ cited by the Plaintiff's Counsel, wherein Evans LJ, stated as follows:

5.4.1 ***A party to civil litigation was under a continuing obligation under RSC Ord. 24, r. 1 until the conclusion of the proceedings to disclose all relevant documents whenever they came into his possession, unless they were clearly privileged from disclosure, notwithstanding that discovery by list or affidavit had already been made. Where, therefore, a document was disclosed to a party after he had closed his case, or the evidence as a whole was concluded, he should apply to the court to reopen the case in the light of the disclosure if the document was of real significance and there was otherwise a risk of injustice.***

5.5 In the present case, the Defendant's opposition was that the document sought to be filed was not listed on the Plaintiff's list of documents. I agree with the Defendant's Counsel to the extent that in the case of the Plaintiff, ordinarily discovery is simultaneously done with the filing of the originating process by list of document. This was done by the Plaintiff, except the document sought to be produced herein as part of the record was not listed in the list of documents.

5.2 Notwithstanding that the document was not disclosed or listed at the time the action was taken out for the reasons stated herein, nothing procedurally stops the Plaintiff to make the present application at any stage of the proceedings. And the manner of discovery for a party intending to produce a

document post the filing of pleadings or the filing of the initial bundle of documents, is to exhibit the document in the supporting affidavit to file a supplementary bundle of documents. Otherwise, it is inconceivable to suggest that the document should have been disclosed in the list of documents, when the awareness or existence of the document was only manifest post the filing of pleadings.

- 5.6 As to whether the document is relevant or not, I reckon the documents sought to be relied on or intended to be produced is *prima facie* material to the proceedings. And I do not discern any prejudice that will be occasioned to the Defendant by allowing this application, because an award of costs to the Defendant can atone for whatever prejudice that the Defendant may suffer thereof.

6.0 CONCLUSION

- 6.1 In the light of the foregoing, leave is granted to the Plaintiff to file the supplementary bundle of documents, same to be filed within fourteen (14) days from the date of this ruling.
- 6.2 Costs in the cause to the Defendant to be taxed in default of agreement.
- 6.3 Leave to appeal is granted.

DATED THIS 12TH DAY OF FEBRUARY, 2025



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THE HON. MR. JUSTICE CHARLES ZULU