

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

2011/HP/0257

BETWEEN:

**PANKAJ PARMER
(T/A Mugodi Drillers and Building)**

PLAINTIFF

AND

ALBIDON ZAMBIA LIMITED

DEFENDANT

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 7th DAY OF MARCH, 2012

For the Plaintiff : Mr. D. Tembo of Messrs Dumisani Tembo &
Company
For the Defendant : Ms Shamwama of Corpus Legal Practitioners

RULING

Cases referred to:

- 1. *Chocoladefabriken Lindt & Sprungli A.C. -VS- Nestle Co. Ltd (1978) R.P.C. 287.***
- 2. *Lusaka West Development Company Limited, B.S.K. Chiti (Receiver), Zambia State Insurance Corporation -VS- Turnkey Properties Limited (1990/92) Z.R. page 1.***
- 3. *Ruth & Tompkins Ltd -VS- Greater London Council and another 91989) A.C. 993.***
- 4. *Re Danitrey Ex Parte Holt (1893) 2QB page 116.***
- 5. *Zulu -VS- Avondale Housing Project Ltd (1982) ZR page 172.***

6. Woods -VS- Martins Bank Limited (159) 1QB 55.

Other authorities referred to:

- 1. High Court Act, Chapter 27.**
- 2. Supreme Court Practice 1999 Volume 1.**
- 3. Halsbury's Laws of England, 4th edition, Volume 17, paragraph 212.**
- 4. Cross on Evidence, 7th edition, page 452.**
- 5. Phipson on Evidence, The Common Law Library, 5th edition, Sweet and Maxwell 2003.**

This is the Defendant's application for an order to expunge documents from the record pursuant to Order 53 rule 10 of the **High Court Act** as read with Order 24 rule 5(45) of the **Supreme Court Practice 1999 (white book)**. It is made by way of summons supported by an affidavit, filed on 22nd December, 2011. The Defendant has also filed skeleton arguments and list of authorities.

The Plaintiff's response is by way of a cross application made by summons and supported by an affidavit. The summons and affidavit were filed on 13th January 2012 along with skeleton arguments and list of authorities.

In the summons, the prayer by the Defendant is that the documents at page 20 to 25 and 28 to 29 of the Plaintiff's bundle of documents be expunged from the regard on the ground that they prejudice the Defendant in the defence of this action. On the other hand, the Plaintiff seeks an order to expunged from the Defendant's bundle of documents the documents at pages 8 to 18.

The applications have been prompted by the fact that the parties did not comply with the order for direction in respect of discovery and inspection of documents. Instead they both filed their respective lists of documents and

bundles of documents without going through the motion of inspection and agreeing on which documents would be produced.

The affidavit in support of this application is sworn by one Auxila Kangwa a superintendant in the Defendant company. His testimony reveals that the Defendant's advocates were not given an opportunity to object to any of the documents in the Plaintiff's bundle of documents through discovery by list. This was on account of the fact that, the Plaintiff's advocates filed their bundle of documents without such discovery and proceeded to serve the bundle and list of documents simultaneously upon the Defendant's advocates. He averred further that, the bundle of documents contains correspondence and documents exchanged between the parties which relate to an attempt at an *ex curia* settlement. The documents were therefore made on a "without prejudice" basis and as such can not be used in these proceedings.

The affidavit in opposition to the Defendant's application and in support of the cross application filed by the Plaintiff was sworn by one Pankaj Parmar, the Plaintiff. It revealed the following facts namely; that there was no point for discovery in respect of the documents in issue as they were produced during the application for judgment on admission; the documents in issue contain an agreement already reached by the parties and implementation of the said agreement. The same were therefore not executed in contemplation of an *ex curia* settlement and it was before the Plaintiff decided to seek legal redress; and the documents at pages 28 to 29 are a refinement of the agreement entered into by the parties on 1st November, 2010 and those at pages 22 to 24 are an assertion of the Defendant's desire to settle according to the agreement of the parties.

The matter came up for hearing on 19th January, 2011. In advancing submissions on behalf of the Defendant Ms Shamwana began by defining the term "without prejudice" and what constitutes "without prejudice"

documents. This is with reference to ***Halsbury's Laws of England 4th Edition, Volume 17, Cross on Evidence, 7th Edition*** and the case of ***Chocoladefabriken Lindt & Sprungh A.C. -VS- Nestle Co. Ltd (1)***. She went on to articulate the rationale for the inadmissibility of without prejudice communications or correspondence being public policy and for the sake of protecting genuine negotiations between the parties. My attention in this respect was drawn to the case of ***Lusaka West Development Company Limited, BSK Chiti (Receiver), Zambia State Insurance Corporation - VS- Turnkey Properties Limited (2)***. Counsel argued further that the fact that the documents or correspondence were not marked "without prejudice" is irrelevant, as what was important was the fact that they were aimed at achieving an *ex curia* settlement between the parties. As such, the documents are inadmissible in line with the case of ***Ruth & Tompkins Ltd - VS- Greater London Council & another (3)***.

In advancing submissions on behalf of the Plaintiff Mr. D. Tembo began by arguing that the documents that the Defendant sought to expunge from the Plaintiff's bundle of documents were presented before Court during the Plaintiff's application to enter judgment on admission. Further that, the Defendant did not object to the Plaintiff's reliance upon the said documents at that stage. As such, if the documents are privileged, which the Plaintiff denies they are, the Defendant slept on its rights and cannot now raise objection to the Plaintiff's production of the same. Counsel proceeded to critically examine each document beginning with the document at pages 22 to 24 which is titled '*minutes of a meeting held between Albidon Zambia Limited and Mugodi Drilling Contractor at Munali Nickel Mine*'. It was argued that by the said minutes the parties agreed by mutual consent to vary some aspects of the initial contract dated 1st November, 2010. The parties having reached an agreement, the without prejudice documents (which it was argued they were not) are admissible. This was in line with the case of ***Ruth***

& Tompkins -VS- Greater London Council and another (3) and **Phipson on Evidence, 5th Edition.**

As regards the document at page 25, counsel argued that it is merely an email attaching the minutes requesting the Plaintiff to confirm that the minutes are correct. The application in relation to the said document is therefore misconceived.

Counsel proceeded to consider the document at pages 28 and 29. This document, he argued, is the Defendant's response to the Plaintiff's letter of demand at page 26 of the Plaintiff's bundle of documents. It was argued that the document is not a genuine attempt to compromise on the part of the Defendant but merely that the Defendant was asserting its rights. My attention in this respect was drawn to the cases of **Ruth & Tompkins -VS- Greater London Council and another (3)** and **Re Daintrey Ex Parte Holt (4)**. Counsel argued further that, the Plaintiff's position is strengthened by the fact that there were no proceedings pending at the time the document was prepared. He concluded arguments on this issue by stating that if this application is granted it will inflict an injustice on the Court as it will not be able to consider all matters in dispute in this case as per the principle in the cases of **Zulu -VS- Avondale Housing Project Ltd (5)** and **Woods -VS- Martins Bank Ltd (6)**.

As regards the Plaintiff's application for an order to expunge documents at pages 8 to 18 of the Defendant's bundle of documents, counsel argued that the said documents had no relevance to this action. The basis being that they related to an old contract for the drilling of boreholes for the community called RAP. It was argued that only evidence that is relevant to the matter in dispute is admissible and that since the evidence in issue is not relevant, it must therefore be expunged from the record.

I have considered the affidavits, arguments by counsel and the authorities that counsel have cited. As I have stated earlier, the two parties to this action have both, by this application sought orders to expunge certain documents from the bundles of documents filed in this matter. The arguments being respectively that the particular documents are prejudicial to the Defendant and irrelevant as they relate to the action.

As a starting point I wish to revisit the history of this matter which is as follows. On the 3rd day of November, 2011, the Court issued orders for directions following a scheduling conference. The said scheduling conference was attended by counsel for the both the Plaintiff and the Defendant and its purpose was to chart the orderly course of this matter leading up to the trial.

By direction (b) in the said order for directions, discovery was to be by list and inspection was to be completed on or before 17th November, 2011. A perusal of the record indicates that both parties did not comply with the said direction. The parties also failed to initiate inspection of documents and both proceeded to file their respective lists of documents and bundles of documents. It was at the stage of discovery and inspection that the parties were required to raise objection against a document or documents that either of them were not comfortable with. Therefore, if they had abided by the orders for directions they would have avoided the predicament they both find themselves in and there would have been no need for this application. I therefore, find that the parties having on their own motion neglected or refused to abide by the order for directions in respect of discovery and inspection of documents, can not now, by this application, seek to object to documents filed by the other and an order to expunge the objectionable documents. By their actions, the parties are taken to have waived their liberty to object and I accordingly find that the two applications are misconceived. In arriving at the foregoing finding, I have considered the

liberty of the parties to apply contained in direction number (h) and find that the same is applicable prior to the close of pleadings. In this case therefore, it is not applicable because pleadings have been closed.

Further, even assuming that pleadings were not closed, a party can not, in my considered view, avail itself to the said liberty to apply by making an application such as the one before me. My finding is based on the fact that liberty to apply is available for purposes of enlarging or abridging time set in the order for directions or for making interlocutory applications. The interlocutory applications that are perceived under the liberty to apply are such as applications for amendments, to name but one, and not an application such as this one that seeks to remedy a default by the parties.

I have also considered the argument by counsel for the Defendant to the effect that it is the Plaintiff who did not comply with the direction on discovery as he just filed the list of documents and bundle of documents. The said argument is untenable because directions for trial require both parties to comply meaning that, the Defendant's compliance is not subject to the Plaintiff's compliance. The Defendant advocates should therefore have, notwithstanding the breach of the direction by the Plaintiff's advocate, gone ahead to serve the Plaintiff with the Defendant's list and insisted on a meeting for purposes of inspection.

Despite my findings in the preceding paragraph I am inclined to make a determination as to whether or not the documents in issue are privileged or relevant respectively. My decision to make the said determination is for purposes of closing the issues once and for all so that the parties do not raise them again at trial.

The case of *In Re Daintrey Ex Parte Holt (4)* has indicated an instance where a document marked “without prejudice” will be inadmissible. It states in this respect at page 119 as follows;

“In our opinion the rule which excludes documents marked “without prejudice” has no application unless unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist.

The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no application.”

It is clear from the foregoing definition of “without prejudice” documents that same are inadmissible only where there is negotiation between the parties and an offer made for settlement of the dispute.

In the Plaintiff’s applications, the documents that it is sought to be expunged from the record for being “without prejudice” documents are at pages 20 to 25 and 28 to 29. A perusal of the document at pages 20 to 21 of the Plaintiff’s bundle of documents indicates that it is an agreement on the numbers of the boreholes, the amount for drilling same, the amount paid and amount outstanding. By the said document, the Defendant was by no means making an offer to settle nor was its position compromised. The parties do not even appear to have been negotiating a settlement.

I therefore find that the document is not a document that can be said to have been made on a “without prejudice” basis. The same is the case with document at page 22 to 24 which are minutes of a meeting held between

officials of the Plaintiff and Defendant. In my considered view, the said minutes indicate the work done in pursuance of the contract, the mode of payment for the said works and deadline for executing the outstanding works. There is no offer for settlement made by the Defendant nor do the parties seek a negotiated settlement.

As regards the document at page 25, the same is as counsel for the Plaintiff has argued, merely a covering minutes or email. This is the email pursuant to which the minutes I have referred to in the preceding paragraph were forwarded to the other party and indicate a response there to. It is not in, my considered view, a document made on a "without prejudice" basis.

The last documents for consideration in respect of the application by the Defendant are those at pages 28 to 29. The said documents are a letter from the Defendant to the Plaintiff and a contract works completion certificate. The former is a response to the letter of demand sent to the Defendant by the Plaintiff's Advocates. It, in effect, restates the Defendant's willingness to abide by the agreement of the parties as contained in the minutes and seeks to clarify the computation of any moneys that may be owing. The letter also indicates the Defendant's disagreement with the Plaintiff's claim for interest and collection charges.

In my considered view, the said letter can not be said to have been made on a "without prejudice" basis because the Defendant does not in any way compromise its position. The letter was also not seeking a negotiated or compromised settlement on the part of the Defendant.

As regards the document at page 29, it is an appendix to the letter at page 28 which merely highlights the Defendant's position as to the status of the contracted works and their prices. It is not, in my considered view, a document to which can be attached "without prejudice".

I now turn to determine whether or not the documents at pages 8 to 18 of the Defendant's bundle of documents are relevant. In advancing the application in relation to the said documents, the Plaintiff has argued that the matters in contention in this matter relate to the purchase order dated 1st October, 2010. On the other hand the documents produced by the Defendant at pages 8 to 18 relate to a purchase order dated 20th August, 2010 in which works were done by the Plaintiff for and on behalf of the Defendant. The documents it was argued have therefore no relevance to this action.

I have difficulties accepting the Plaintiff's argument because in the statement of claim there is no indication whatsoever as regards which purchase order the matters in dispute in this matter relate. The only thing that is indicated in the statement of claim is that the contract from which the dispute arose was made on or about November 2010. Further, the determination of whether or not a document is relevant is the preserve of the Court as such, it is an issue that should be reserved for the trial upon taking evidence.

By way of conclusion and in view of my finding in the preceding paragraphs I find that both the Defendant's and Plaintiff's applications lack merit. I accordingly dismiss them.

I further order that the matter came up for a status conference on 19th April, 2012 at 14 00 hours. By that date my expectation will be that the parties will have complied in full with the order for directions.

Leave to appeal is granted.

Delivered on the 7th day of March, 2012.

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Nigel K. Mutuna
HIGH COURT JUDGE