

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

2011/HPC/0512

BETWEEN:

MPONGWE FARMS LIMITED

PLAINTIFF

AND

DAR FARMS LIMITED

DEFENDANT

**ZISC LIMITED (Formally known as Zambia
State Insurance Corporation Limited)**

1st Third Party

DEVELOPMENT BANK OF ZAMBIA

2nd Third Party

**NEDERLANDSE FINANCEIERINGS-MAATSCHAPPIJ VOOR
ONTWIKKELINGSLANDESE NV**

3rd Third Party

BEFORE HON. JUSTICE NIGEL K. MUTUNA THIS 8TH DAY OF APRIL, 2013

For the Plaintiff: Mr. Yalenga of Messrs Malambo and Company
For the Defendant: Mr. M. H. Haimbe of Messrs Malambo and Company
For the First Third Party: Mr. A. Mbambara of Messrs A. Mbambara Legal Practitioners
For the Second Third Party: Ms. N. A. Chisanga and Mr. A. M. Musukwa of Messrs AML
Legal Practitioners
For the Third Third Party: N/A

RULING

Cases referred to:

- (1) *Three Rivers District Council and others vs Governor and Company of the Bank of England (No.5) (2005) 4 ALL ER page 948*
- (2) *Jones vs Great Central Railways Company [1910] AC page 4*
- (3) *Webster vs James Chapman and Company (a firm) and others [1989] 3 ALL ER page 948*

Other authorities referred to:

- (1) *High Court Act, Cap 27*
- (2) *Phipson on Evidence, Sixteenth edition, London, Sweet and Maxwell, Page 602, paragraph 23-18*
- (3) *Black's Law Dictionary, eighth edition, by Bryan A. Garner, Thomson West, USA*

This is the Defendant's application to expunge a document from the bundle of documents filed by the Second Third Party. It is made by way of summons filed on 13th February, 2013 pursuant to Orders 30 rules 1 and 2, as read with Order 5 rule 21, of the **High Court Act**.

The document that the Defendant seeks to expunge from the record is the letter appearing at pages 67 to 68 of the Second Third Party's supplementary bundle of documents on the grounds that the documents is privileged and cannot be relied upon by the Second Third Party in these proceedings.

The application is supported by an affidavit sworn by one Demetre Vangelatos and skeleton arguments. The responses by the Plaintiff and Second Third Party are by way of affidavit sworn, respectively by 1 John William Kelly Clayton and Bernard Leigh Gadsden (B.L. Gadsden) and lists of authorities and skeleton arguments.

The evidence as it is revealed in the affidavit in support is that the deponent is the Managing Director of the Defendant and that sometime in 2001, he sought legal advice from Mr. J. M. Mwanakatwe, SC of Messrs J. M. M. Consultants. He was accordingly given legal advice in the form of a letter dated 26th September, 2001, a copy of which appears at pages 67 to 68 of the Second Third Party's supplementary bundle of documents. That he is advised by his lawyers that since the legal advice received and contained in the said letter was sought in confidence, it is privileged and as such it cannot be relied upon by the Second Third Party in these proceedings as part of its evidence. Further that, he had no prior opportunity to object to the intended use of the said document by the Second Third Party at discovery stage because the second third party's list and bundles of documents were filed at the same time and thereafter served on the Defendant's advocates without affording them an opportunity to object on his behalf.

The evidence in the affidavit in opposition filed by the Second Third Party reveals that the deponent is a witness called to testify on behalf of the Second Third Party in the impending trial having been an agent acting for the Third Parties at the material time. This was pursuant to a deed of appointment dated 8th July, 1996 as appears at page 1 of the Second Third Party's bundle of documents. That sometime, in 2001, the deponent as such agent, acting on behalf of the Third Parties 'engaged in negotiations with the defendant for purposes of disposing of the interest in the mortgage dated 14th July, 1997 by transferring the third parties interest to the Defendant. That the letter sought to be expunged from the record was therefore copied to him in his capacity as the agent acting for and on behalf of the Third Parties with the responsibility of negotiating the disposal of the Third Parties' interest in the mortgage for value. That he believes that the communication to the Defendant, by the said letter which was copied to him, was not only made to the Defendant in confidence but also meant for his information in furtherance of their negotiations. Further that, he is advised by counsel for the

Second Third Party and he verily believes that the letter was not exclusively sent to the Defendant in confidence and that the Defendant had acquiesced to the waiver of its privilege and cannot therefore claim it.

The evidence in the affidavit in opposition filed by the Plaintiff reveals that the deponent is the Managing Director of the Plaintiff's Company. That, whilst prima facie, it is true that the letter is in issue is privileged, he is advised by counsel for the Plaintiff and verily believes that the Second Third Party is in lawful possession of the said letter and can therefore, lawfully present the same in evidence.

The application comes up for hearing on 7th March, 2013. Counsel for the Defendant Mr. M. L. Haimbe stated that he relied on the affidavit in support and the skeleton arguments.

In the skeleton arguments, Mr. M. L. Haimbe quoted Order 30 rules 1 and 2 of the **High Court Act** and argued that the application is made pursuant to that Order which provides that application in chambers shall be made by summons. Further that it sets out the form that the summons should take. He also quoted Order 5 rule 21 of the **High Court Act** and argued and argued that it provides for objection to reception of evidence by a party affected thereby at the time the evidence is offered. It was argued that the letter being objected to was not brought to the Defendant's attention before it was filed into Court. There was therefore no earlier opportunity to object to the admission of the said letter as evidence.

Counsel went to argue on the general rule on legal advice privilege which he stated is that, legal advice given by a lawyer to the client is privileged. The rule he argued further is based on public policy consideration and the rationale for the rule is stated in case of the **Three Rivers District**

Council and Other vs Governor and Company of the Bank of England (No.5)(1). It was argued that the letter in dispute falls squarely within the contemplation of the principle in the said case. Counsel therefore prayed that the Court should order that the letter be expunged from the record.

In the verbal submissions by counsel for the Second Third Party, Ms. N. A. Chisanga and Mr. A. M. Musukwa, it was argued that the letter sought to be expunged from the record is relevant to the Second Third Party's case because it indicates the intention of the parties in the discussion stages relating to the transaction between them. The intention counsel argued further, is that the transaction related to the transfer of the mortgage to the Defendant from the Third Parties. It was argued further that the letter is copied to B. L. Gadsden who has been called to testify on behalf of the Second Third Party.

In the Skeleton arguments Ms N. A. Chisanga and Mr. A. M. Musukwa began by listing and quoting passages from the following authorities. ***Phipson on Evidence; Jones vs Great Central Railway Company (2); Webster vs James Chapman and Co. (firm) and others (3) and Blacks Law Dictionary***. It was argued that the letter in issue was expressly copied to Mr. B. L. Gadsden an independent Third Party who would himself have to consider and act on the contents of the letter. That it formed part of the correspondence culminating in the transaction giving rise to this action between the parties. Further that, it is clear from the tone of the letter, particularly paragraph 3, that the communication therein contained was made for purposes of being repeated to the Third Parties through the agent, the said B. L. Gadsden. Therefore, the Defendant's claim for privilege is rendered unsustainable.

Counsel went on to argue that the letter was voluntarily passed on to the Third Parties with the Defendant's full knowledge. The Defendant therefore acquiesced to the waive of its privilege and

that there is nothing in the letter to suggest that the letter was sent to the Defendant in confidence. As such the Defendant cannot claim privilege without the relevant confidentiality.

Counsel prayed that the application should be dismissed.

In his arguments counsel for the First Third Party Mr. Mbambara adopted the arguments advanced by the Second Third Party.

In the Plaintiff's arguments Counsel for the Plaintiff Mr. Yalenga cited a number of cases which I have not referred to because he did not provide citations for the said cases. It was argued that while the Plaintiff agrees that it is in the public interest that documents that pass between counsel and his client ought to be privileged, privilege is not absolute. Further that in the case at hand, the letter in question was copied to the Second Third Party's witness, B. L. Gadsden, and his possession of the letter is therefore lawful. This is because it was intended that he be made aware of the advice that counsel had rendered to the Defendant because he was the receiver of the Plaintiff at the time. Counsel prayed that the application be dismissed.

In his reply, Mr. M. L. Haimbe argued as follows. As regards the argument that the letter has lost the privilege attached to it, privilege belongs to a party and not a lawyer. In this case the letter was communicated to the Second Third Party by the lawyer on his own volition and not the Defendant. As such there was no waiver of privilege on the part of the Defendant.

As regards the argument that the letter has lost he privilege because it is in the possession of the Second Third Party, counsel made reference to the case of ***Webster vs James Chapman and Company (a firm) and others (3)***. Particularly at pages 943 to 944 and page 947 paragraph (a). He

argued that there must be authorization for the use of the document if privilege is still going to apply. Further that, he was alive to the fact that this Court may in its discretion allow the use of a confidential document in evidence but that the discretion must be exercised sparingly. It was argued that the Court must strike balance and that the necessary conditions for within the balance in favour of the Second Third Party do not exist in this case Counsel argues that one of the questions of whether indeed to transfer was properly and entered into by the two parties inter se. He argued that the letter whose production is objected to relates to the latter question and not the former. Therefore its use in these proceedings by the Second Third Party is not relevant.

I have considered the affidavit evidence and the arguments by counsel. By this application the Defendant seeks an order to expunge from the Second Third Party's supplementary bundle of documents the letter that appears at pages 67 and 68. The said letter is a letter authored by Messrs J. M. M. Consultants, Advocates and Commissioners for Oath and addressed to one D. Vangelatos in this capacity as Managing Director of the Defendant. At page 68 which is the second page of the letter, it shows that it was copied to one B. L. Gadsden, Chartered Accountant, who is a witness for the Second Third Party in the impending trial.

The contents of the letter reveal that the said D. Vangelatos consulted Mr. J. M. Mwanakatwe, S.C. of Messrs J. M. M. Consultants regarding the mortgage which is the subject of this dispute. The letter also refers to B. L. Gadsden in three of its six paragraphs.

The grounds upon which it is sought to have the letter expunged from the record is that it is confidential communication passing between the Defendant's officer and this counsel and as such privileged. Reliance was made on Order 5 rule 21 of the *High Court Act*. The Order states as follows:

“In every case and at every state thereof, any objection to the reception of evidence by a party affected thereby shall be made at the time the evidence is offered.”

It is the Defendant contention that I must invoke the provisions of the foregoing Order and expunge the letter in issue from the Second Third Party’s supplementary bundle of documents on account of the objection raised by the Defendant.

This issue that arises from the foregoing that I have to determine is whether the letter is privileged and if so whether or not it can be used by the Second Third Party. The Privilege that it is sought to be invoked by this application is legal advice privilege. This is because it stems from advice sought by the Defendant from counsel which culminated in the letter in dispute. The purpose of the said privilege has aptly been summed up by Phipson and Evidence at paragraph 23-19 page 602 as follows:

“It protects communication between client and lawyer which are part of the continuum of the giving and getting of legal advice.”

Whilst the rationale for the privileged has been stated in the case referred to me by counsel for the Defendant of Three Rivers District Council and others vs Governor and Company of Bank of England (1) as follows at page 948:

“The rationale underlying legal advice privilege was that it was necessary in a society in which the restraining and controlling frame work was built upon a belief in the rule of law, that communication between clients and lawyers by which clients were hoping for assistance of the lawyer’s legal skills in the

management of the client's affairs should be secured against the possibility of any scrutiny from others."

This rationale allows a client to purge unhindered when he instructs his lawyers, so that the lawyer is left in no doubt as to the nature of the instructions he had to undertake. This enables the lawyer explore all the available options open to the client.

Having outlined the purpose and rationale for legal advice privilege I now turn to consider the issue of whether or not the letter in issue is privileged. I have already stated in the earlier part of this ruling that the letter in issue followed legal advice sought by the Defendant from Counsel. The letter therefore, and using a portion of the quote from ***Phipson on Evidence***, is "*Communication between client and lawyer which [is] part of the continuum of giving and getting legal advice....*" The letter is, in my considered view, privileged. The matter however, does not end there because there is to be determined the issue whether or not the Second Third Party can use the letter as evidence in advancing its case. The Second Third Party has contended that the letter has lost its confidentiality and as such, its privilege as well because it is copied to the Second Third Party's witness one B. L. Gadsden. In articulating the said argument counsel for the Second Third Party referred to ***Phipson on Evidence*** pages 602 paragraphs 23-18 which states as follows:

"There can be no privilege without confidentiality. If, therefore, an otherwise privilege document has lost its confidence there can be no claim for privilege..... There can be no privilege unless the communication is confidential"

The Defendant's response was that, the revelation of the contents of the letter was made by the Defendant's counsel and not the Defendant. It is the Defendant who owns the privilege and as such only it and not its counsel can successfully waive the privilege.

It is clear from the contents of the letter that it was copied to B. L. Gadsden by counsel who authored it. The contents also suggest that the Defendant's quest to take instructions from counsel. This is evident from the contents of the paragraphs 1, 3 and 6 of the letter. In paragraph 1 the author states in part as follows:

"... You gave me for perusal a copy of the mortgage deed relating to the aforementioned property with the accompanying letter to you from Mr. B. L. Gadsden, the agent for the joint mortgages..."

Whilst paragraph 3 states in part as follows:

"Ordinarily, I would not give an option before receiving your details (or Mr. Gadsden's) instructions in writing. A person advising you needs clear instructions in writing relating to the terms of your offer in any given transactions and your expectations from such offer."

The last paragraph, 6, reads in parts as follows:

"Mr. Gadsden has told me that this matter is very urgent. You also last night told me the urgency of this matter."

In my considered view, these portions of the letter looked at collectively, coupled with the fact that the letter was copied to B. L. Gadsden. To this extent the confidence and privilege attached to the letter does not extend to B. L. Gadsden, and since he is a witness for the Second Third Party for whom he was agent, the confidence and privilege does not also extend to the Second Third Party as

well. It is to this extent only that I endorse the argument by counsel for the Second Third Party which refers to the citation from Phipson on Evidence.

In arriving at the finding, I have made in the preceding paragraph, I have considered the argument made by counsel for the Defendant with reference to the case of Webster vs James Chapman And Company (firm) and others (3). Counsel's argument was to the effect that this is a case fit for the restoration of the privilege lost. In doing so he referred to pages 943, 944 and 947, all at paragraph (a). The passages at these pages and paragraph state respectively, as follows:

“He relies also on a decision by Sir Nicolas Browne Williamson and English and American Insurance Company Limited vs Herbert Smith and Company (1997) 137 NJ 148. These authorities, he submitted, established that if a privileged document is disclosed by mistake the courts will turn the page back and restore the status quo ante by ordering the return of the document and by restraining any use being made of it.”

“Once a privileged document or a copy of a privileged document passes into the hands of some other party to the action, prima facie the benefit of the privilege is lost: the party who has obtained the document has in his hands evidence which pursuant to the principle in Calcroft vs Guest, can be used at trial. But it will almost invariably be the case that the privileged document will almost be a confidential document and as such, eligible for protection against unauthorised disclosure or use.”

“Suppose a case where the privileged document has come into possession of the other side because of carelessness on the part of the party entitled to keep the document confidential and has been read by the other party or by one of his legal advisers, without realise that a mistake has been made. In such a case the future conduct of the litigation by the other party would often be inhibited or more difficult were he to be required to undertake to shut out from his mind the contents of the documents. It seems to me that it would be thoroughly unfair that a carelessness of one party should be allowed to put the other party at a disadvantage.”

The first passage from the **Webster (3)** case contains arguments advanced by counsel. It is not a decision of the Court on any one of the issues in contention. I shall therefore not comment on it. The second passage is a decision of the Court on one of the issues in contention. It is infact the holding of the Court. Its effect is that a privileged document will be protected from unauthorised use even though it passes to a third party as long as it is a confidential document. The third passage is also a decision of the Court which by the large sets out a common sense position. The position is that to an action who intently has sight of a privileged document which has carelessly been brought to the attention cannot be expected to shut his mind to the contents thereof. Further that, the carelessness of one party to an action should not be allowed to perpetrate an unfairness to the other party.

In my considered view, these two latter passages by the Court in the Webster (3) case are good law. They are however, nor relevant to this case because the facts of the Webster (3) case demonstrate that it is distinguished from case. The facts are as follow. The Plaintiff, who, had been injured

while unloading a lorry at his employer's premises, brought an action against his employer claiming damages for negligence and alleging that his accident had been caused by an unsafe system of work. Before trial of the action his solicitors commissioned a report from a firm consulting engineer on the circumstances in which the accident had occurred. The engineers prepared a report which in certain respects was adverse to the Plaintiff's case. The solicitors decided to refer the report back to the engineers to reconsider their adverse conclusions in the light of further instructions, but before doing so they wrote to the employer's solicitors to notify them that they intended to rely on the consulting engineers' report at the trial. By mistake the copy of the report intended for the Plaintiff was enclosed with the letter to the employer's solicitors. When informed of the mistake the Plaintiff's solicitors sought the return of the copy inadvertently sent to the employer's solicitors and an undertaking that they would make no use of it. The employer's solicitors refused both requests and the plaintiff brought an action against, inter alia, the employer's solicitors, seeking orders for the return of the copy of the report and the restraining them from making use of it in the personnel injures action. The engineers which was more favourable to the Plaintiff and as required by RSC Order 25, Rule 8 (I) a copy of that report was disclosed to the employer's solicitors as being a report which would be relied on at trial.

I have already found as a fact that the Defendant intended B. L. Gadsden to be privy to the contents of the letter in dispute. This is evident from the fact that it was copied to him and the contents of the passages of the letter I have quoted in the earlier part of this ruling. Further, the deponent to the affidavit in support of this application did not allege that the letter was sent to B. L. Gadsden by mistake. It is Counsel for the Defendant who made this allegation in his submissions. Such evidence is not acceptable on account of being evident being tendered from the Bar. It is therefore safe to conclude as I have done, that the letter was genuinely meant to be sent to B. L. Gadsden.

Therefore, the foregoing facts clearly distinguish this case from the Webster (3) case because in the latter case the document in issue was sent to the Defendant by mistake. The arguments by counsel for the Defendants as regards the Webster (3) case, therefore have no merit.

By way of conclusion and for the reason I have stated in the proceedings paragraphs, I find no merit in the Defendant's application and I accordingly dismiss it with costs

DELIVERED IN CHAMBERS THIS 8TH DAY OF APRIL, 2013

**NIGEL K. MUTUNA
HIGH COURT JUDGE**