

IN THE HIGH COURT FOR ZAMBIA

2015/HPC/0026

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

RYAN ZALOUMIS

PLAINTIFF

AND

BUKS HAULAGE LIMITED

DEFENDANT

Before Hon. Mr. Justice Nigel K. Mutuna at Lusaka this 8th day of February 2016

For the Plaintiff: Ms R. J. Mutemi of Messrs Theotis Mataka & Sampa Legal Practitioners

For the Defendant: Mr. Yosa G. Yosa of Messrs Simeza Sangwa & Associates

R U L I N G

Cases referred to:

- 1) *Wallace Smith Trust Co. Ltd (in Liquidation) vs Deloitte Haskins and Sells (a firm) and another (1996) 4 ALL ER 403*

Other authorities referred to:

- 1) *Supreme Court Practice, 1999, vol 1*
- 2) *Atkin's Encyclopaedia of Court Forms (1994 issue) vol 15*
- 3) *Halsbury's Laws of England, 4th edition, volume 13, by Lord Hailsham of St. Marylebone, Butterworth, London, 1975*
- 4) *Black's Law Dictionary, by Bryan A. Garner, eight edition, Thomson West, 2004, USA*

This is the Plaintiff's application for an order for production for inspection of the agency agreement contained under paragraph 3 of the Defendant's list of documents. The said document is at page 5 of the Defendant's bundle of documents. The application also seeks an order of extension of time within which to comply with the order for directions. The application is supported by two affidavits and skeleton arguments.

The background leading up to this application is as follows. On the 23rd June 2015, this court issued out directions for trial which, *inter alia*, ordered discovery of documents to be by list to be followed by inspection. The directions also made provision for the filing of bundles of documents. Pursuant to the said directions the Defendant intimated its intention to rely on the agency agreement by way of listing it in the list of documents and including it in the Defendant's bundle of documents. The Plaintiff has raised objection by way of insisting on the Defendant producing the original copy of the agency agreement.

The evidence in support of this application is contained in the affidavits of one Joy – Rachel Mutemi, counsel for the Plaintiff. It revealed that the Defendant's advocates served the Defendant's list of documents upon the Plaintiff's advocates on 27th July 2015. Upon receipt of the said documents, the deponent requested the Defendant's advocates to produce the original agency agreement contained in the list and bundle of documents. See exhibit "JRM 1". Despite the said request the Defendant's advocates have not responded.

As regards the application for extension of time within which to comply, the evidence revealed that the Plaintiff had failed to comply with the order for directions on account of a bereavement which necessitated his travelling out of the country. As a consequence of this, the Plaintiff's advocates have not been able to get instructions to enable them prepare the witness statement.

The affidavit in opposition was deposed by one Yosa Grandson Yosa, counsel for the Defendant, acting upon the instructions of the Defendant's managing director. The gist of his evidence was that the Defendant has never been in possession of the original copy of the agency agreement because soon after its

execution the Plaintiff took possession of all the originals. This left the Defendant in possession only of the photocopies. The evidence revealed further that the Plaintiff had not revealed any reasons for demanding inspection of the document which has already been produced in the Defendant's bundle. Further that neither has it been shown that the order for production and inspection is necessary for disposing of the action fairly, and or, saving on costs.

In the affidavit in reply deposed to be Joy – Rachel Mutemi, the evidence revealed that the Plaintiff required production of the original agency agreement because he has never been in possession of the alleged agency agreement and only came to know of it on 13th August 2011 and had sight of its contents on 29th October 2011. See exhibit “*JRM 1*”. It revealed further that the Plaintiff requires inspection of the alleged agency agreement to enable him decide whether or not to object to production of the document at the trial in the event that the original copy of the document is not produced.

The evidence went on to reveal that the Plaintiff's evidence in chief will show that he denies having ever signed the agency agreement. Further that by letter dated 6th October 2015, the Plaintiff wrote to the Defendant rejecting the bundle of documents for want of inspection of the original agency agreement. See exhibit “*JRM 2*”.

The application came up for hearing on 14th October 2015. Counsel for the Plaintiff Ms J.R. Mutemi indicated that she relied on the affidavit in support, skeleton arguments, list of authorities and the affidavit in reply. She argued that the Plaintiff has not been given an opportunity to object to any of the documents in the Defendant's list and bundle of documents.

In the skeleton arguments, counsel argued that by this application the Plaintiff sought the production for inspection of the agency agreement contained in the Defendant's list of documents and bundle of documents and an extension of time within which to comply with the order for directions. Counsel argued that she relied upon order 24 rule 11(1) of the **Supreme Court Practice**, (*white book*), order III rule 2 of the **High Court Rules** and

order 24 rule 9 of the **white book**. It was argued that a party which has served a list of documents on any other party, whether in compliance with Rule 2 or 6 or with an order under Rule 3, must allow the other party to inspect the documents referred to in the list of documents. That the evidence clearly shows that on 4th August 2015, the Plaintiff requested for inspection of the agency agreement but the Defendant failed to respond to the said letter by appointing a date and time for inspection. It was argued that the said failure by the Defendant amounts to objecting to produce the said document for inspection. The case is therefore fit for this court to exercise its jurisdiction to compel production of the said document for inspection in accordance with the orders for direction.

As regards the issue of extension of time within which to comply, counsel argued that the Plaintiff was outside jurisdiction and as such counsel was unable to take instructions. Counsel prayed that the application should be granted.

Counsel for the Defendant, Mr. Y.G. Yosa indicated that in opposing the application he relied on the affidavit in opposition and the skeleton arguments. He argued that the affidavit in reply suggests that the Plaintiff challenges the authenticity of the document in the Defendant's bundle of documents. If this be the case, he argued, the Plaintiff must make an appropriate application challenging the authenticity of the document.

In the skeleton arguments, counsel argued that an order for production of documents will only be made if the applicant satisfies the court that it is required in order to ensure a fair disposal of the case or for saving on costs. It was argued that this is the threshold that the Plaintiff needs to prove and that the onus is upon him to prove it in order for this court to grant the order. He, in this regard, referred me to order 24 rule 13(1) of the **white book**, the explanatory notes to the order and the case of **Wallace Smith Trust Co. Ltd vs Delloitte Haskins and Sells (a firm) and another (1)**. Counsel also referred to **Atkin's Encyclopaedia of Court Forms**. It was argued that the Plaintiff has not disclosed the reasons for demanding production for inspection of the document and as such this court cannot grant the order.

Further that the document sought to be produced is already on record and the contents thereof known to both parties. That, the order for inspection would therefore serve no useful purpose. He prayed that the application be dismissed.

In her reply submissions, counsel for the Plaintiff argued that the law applicable to discovery and inspection allows a party, which has not been accorded an opportunity to inspect documents referred to in the list, to apply to court for inspection of the said documents. That it is the said inspection which forms the basis for an application to object to production of a document referred to in the list.

I have considered the affidavit evidence and arguments by counsel. I will begin my determination of this application by first considering the application for production of the document for inspection. I will thereafter deal with the application for extension of time.

In dealing with the first application it is important that I set out the history of this case thus far. As I have already stated in the earlier part of this ruling, the directions for trial in this matter were issued on 23rd June 2015. Direction (b) provided for discovery of documents to be by list and inspection to be completed by 14th July 2015. What this means is that the parties were to begin by exchanging lists of documents, thereby revealing the documents in their respective custody, care and control and along with such revelation, either party was at liberty to request, by notice, for inspection to be done on or before 14th July 2015. This procedure that I have set out has the support of order 24 rule 9 of the **white book** which states as follows:

“A party who has served a list of documents on any other party, whether in compliance with rule 2 or 6 or with an order under rule 3, must allow the other party to inspect the documents referred to in the list (other than any which he objects to produce) and to take copies thereof and, accordingly, he must when he serves the list on the other party also serve on him a notice stating a time within seven days after the service thereof

at which the said documents may be inspected at a place specified in the notice”.

The issuing of an order for directions by the court is to ensure that there is an orderly conduct of the proceedings in the case leading up to the trial. It is therefore important for the parties to perform the tasks assigned to them in the order for directions to ensure that the proceedings are not interrupted. Often times counsel do not follow the order for directions and usually skip a stage or stages in the directions. The most popular stage to be skipped is direction (b) requiring discovery by list and inspection. The High Court, and in particular, this court has frowned upon such conduct by counsel because it inevitably results in counsel making interlocutory applications, such as this one, to remedy a situation that has been caused by the parties' own failure to abide by the directions for trial. The parties in this matter have also neglected to comply with direction (b) because, and as the record will show they did not comply with order 24 rule 9. I say this because the record shows that they both filed their respective lists of documents and served them upon each other without a notice inviting the other party for inspection. Subsequently, they both filed their respective bundles of documents, that is, on 21st July 2015 by the Defendants and 4th August 2015 by the Plaintiff. It was only after the bundles of documents were filed that the Plaintiff arose from his slumber and requested, by letter dated 4th August 2015, (as per exhibit “JRM 1”) for inspection. This in my considered view, was too late a stage to request for inspection because the documents were already before the court and had been revealed to both parties.

The procedure the parties should have followed was to exchange lists of documents by way of discovery and, either or both of them, requesting for inspection of documents by way of a seven day notice requesting the same, accompanying the list of documents. As a consequence of the parties' failure to comply, there has been a breach of the order for directions (b) because both parties filed both lists of documents and bundles of documents without first considering each other's lists to ascertain if there was need for inspection of

documents. The parties have therefore themselves to blame for such breach and must suffer the consequences that arise therefrom.

I now turn to determine the substance of the application and in doing so it is important that I define two terms being, discovery of documents and inspection of documents and also state the relevance and effect of both.

Halsbury's Laws of England defines discovery at page 2 as follows:

"... the process by which parties to a civil cause or matter are enabled to obtain, within certain defined limits full information of the existence and the contents of all relevant documents relative to the matters in question between them. The process of the discovery of documents operates generally in three successive stages, namely (1) the disclosure in writing by one party to the other of all the documents which he has or has had in his possession, custody or power relating to the matters in question in the proceedings; (2) the inspection of the documents disclosed, other than those for which privilege from or other objection to production is properly claimed or raised; and (3) the production of the documents disclosed either for inspection by the opposite party or to the court".

As regards the practical steps, order 24 rule 2 of the **white book** defines the process of discovery as follows:

"Subject to the provisions of this rule and of rule 4, the parties to an action between whom pleadings are closed must make discovery by exchanging lists of documents and, accordingly each party, must within 14 days after the pleadings in the action are deemed to be closed as between him and any other party, make and serve on that other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action".

While inspection is defined by **Black's Law Dictionary** by Bryan A. Garner, at page 812, as follows:

"A careful examination of something, such as goods (to determine their fitness for purpose) or items produced in response to a discovery request (to determine their relevance to a law suit)".

(The underlining is the court's for emphasis only).

One can discern from the definitions of these phrases that the law and practice compels a party to reveal to the other the documents he has in his possession which relate to the action. This is for purposes of ensuring that there is a fair trial by eliminating the possibility of surprise by the other party or what is proverbially termed, trial by ambush. Further, as a second step to this, the opposite party is also afforded an opportunity to see the documents revealed by the other party for purposes of determining their relevance to the action. In doing so, the process allows for elimination of documents that are not relevant to the suit, which are scandalous or those that enjoy privilege. This process ensures that there is a speedy disposal of the matter as the court's attention is limited only to relevant documents.

Having, defined the phrases, and their effect, I now turn to consider the Plaintiff's application. The application is for an order for production for inspection. In view of the definitions that I have given to the two phrases, of discovery and inspection, I find that the application is misconceived. The reason for this is that the Plaintiff seeks to compel the Defendant to produce a document which is already in the Defendant's bundle and as such he has had opportunity to view it and inspect it, albeit, in a manner that is in contravention of order 24 rule 9 of the **white book**. Put simply, the Plaintiff, in my considered view, cannot ask this court to compel the Defendant to produce a document which he has already seen. The fact that such sighting is in contravention of the rules of practice in this court does not absorb the Plaintiff of liability for the blunder he has made by making this application, because in any event, and as I have demonstrated in the earlier part of this ruling, he was an active participant in omitting to comply with order 24 rule 9 of the **white book**. Further, the Plaintiff's predicament is compounded by the fact that his request for production for inspection is made in a manner that contradicts practice. I have demonstrated that the purpose of inspection is to allow the party opposite to ascertain the relevance of the document to the suit. The evidence in the affidavit in reply reveals that the Plaintiff requires the production for inspection for purposes of challenging the authenticity of

the document. Whilst a party is permitted on inspection to challenge the authenticity of a document, he may not, in my considered view, do so at so late a stage and by way of an application for production of a document which is already before the court. The Plaintiff's remedy now lies in testing the veracity of the person seeking to rely on the document, at trial through, cross examination.

I now turn to consider the aspect of the application that relates to extension of time within which to file witness statement. A perusal of the record reveals that the Plaintiff's witness statement was filed on 8th September 2015. This being the case, the application for an extension of time falls away because its intended purpose has already been achieved.

By way of conclusion, having found that this application has no merit in as far as it relates to production for inspection of the document, I accordingly dismiss it with costs.

I further order that the matter come up for a status conference on 18th February 2016 at 9:00 hours.

Dated at Lusaka this 8th day of February 2016.



**NIGEL K. MUTUNA
HIGH COURT JUDGE**