

**IN THE HIGH COURT FOR ZAMBIA**

2016/HPC/0165

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**



**BETWEEN:**

SYLVESTER NTHENGE (Suing as a Major Shareholder in and for the benefit of the 2 <sup>nd</sup> Defendant)	1 <sup>ST</sup> PLAINTIFF
DERRICK CHEKWE	2 <sup>ND</sup> PLAINTIFF
MONICA KALALUKA	3 <sup>RD</sup> PLAINTIFF
AND	
FRIDAY MWAMBA	1 <sup>ST</sup> DEFENDANT
NECOR ZAMBIA LIMITED	2 <sup>ND</sup> DEFENDANT
NAYLOR KOPA KOPA	3 <sup>RD</sup> DEFENDANT
SOLOMON DOKOWE	4 <sup>TH</sup> DEFENDANT
NECOR MULTISERVICE LIMITED	5 <sup>TH</sup> DEFENDANT

**CORAM:** Hon. Lady Justice Dr. W. S. Mwenda at Lusaka in Chambers this 7<sup>th</sup> day of June, 2017.

For the Plaintiffs: Mrs. N. Simachela of Messrs Nchito and Nchito Advocates

For the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants: Ms. M. C. Kaoma standing in for Mr. Mainza of Messrs. Mainza and Company

For the 2<sup>nd</sup> and 5<sup>th</sup> Defendants: Ms. W. Ng'ombe of Messrs KMG Chisanga Advocates

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## **RULING**

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**Case referred to:**

*Wallace Smith Trust Company Limited (In Liquidation) v. Delloitte Haskin & Sells (A Firm) (1997) 1 W.L.R. 257.*

**Legislation referred to:**

1. *Order 19 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Order 3 rule 2 of the High Court Rules*
3. *Order 24 rule 13 (1) of the Rules of the Supreme Court, 1999 (The White Book)*

This is the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' application for an order for leave to file supplementary documents. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants (hereinafter referred to as "the Defendants") are relying on the Summons for an Order for Leave to File Supplementary Documents pursuant to Order 19 rule 2 as read with Order 3 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia; the Affidavit in Support of Summons for an Order for Leave to File Supplementary Documents; List of Authorities and Skeleton Arguments, all filed in Court on 24<sup>th</sup> April, 2017.

The Defendants are also relying on the Affidavit in Reply to Affidavit in Opposition to Summons for an Order for Leave to File Supplementary Documents filed in Court on 12<sup>th</sup> May, 2017. At the hearing of the application, Ms. Kaoma, learned Counsel for the Defendants, supplemented the documents with a *viva voce* submission to the effect that the Defendants had shown that the additional documents they intend to file are necessary for disposing of this matter, the need having arisen in response to matters that had been raised by the evidence of the Plaintiffs in their Witness Statement. It was Counsel's submission that the Plaintiffs would not suffer any prejudice as the documents are relevant and necessary for the determination of all matters in dispute.

In the Affidavit in Support of Summons for an Order for Leave to File Supplementary Documents deposed to by Friday Mwamba and Solomon Dokowe, the 1<sup>st</sup> and 4<sup>th</sup> Defendants, respectively, their evidence is that on 22<sup>nd</sup> February, 2017 the 1<sup>st</sup> Plaintiff filed into this Court a Witness Statement in which he raised a number of issues against the Defendants including the following: -

- “1. That the 1<sup>st</sup> Plaintiff is still a Director in the 2<sup>nd</sup> Defendant;
2. That he did not receive any Notice of the Meeting at which a Resolution for the incorporation of the 5<sup>th</sup> Defendant was passed; and
3. That the information showing that the 5<sup>th</sup> Defendant was incorporated on behalf of the shareholders is not captured in the Financial Statements for the year ending 31<sup>st</sup> December, 2015.

The affidavit further discloses that upon perusal of the Plaintiffs' Witness Statement it became apparent to the Defendants that there was a need to file additional documents that were not initially included in the Agreed Bundle of Documents which would address the issues raised by the Plaintiffs. The deponents exhibited the following as the additional documents they desire to produce:

1. Exhibit “FMSD1”, being a true copy of the consolidated profit and loss summary for the period ended 31<sup>st</sup> December, 2015;
2. Exhibit “FMSD2”, being a true copy of the email sent to the 1<sup>st</sup> Plaintiff notifying him of the Board Meeting to be held on 15<sup>th</sup> July, 2015 with the Minutes and Notice attached thereto;

3. Exhibit "FMSD 3", being a true copy of the Notice of Adjournment of the Meeting to 19<sup>th</sup> February, 2015;
4. Exhibit "FMSD 4", being a true copy of the Notice of Meeting for 15<sup>th</sup> April, 2015;
5. Exhibit "FMSD 5", being a true copy of the Agenda of the Meeting for 15<sup>th</sup> April, 2015;
6. Exhibit "FMSD 6", being a true copy of the Notice of Adjournment of the Meeting to 29<sup>th</sup> April, 2015;
7. Exhibit "FMSD 7", being a true copy of the Notice of Adjournment of the Meeting to 9<sup>th</sup> October, 2014;
8. Exhibit "FMSD 8", being a true copy of the Agenda of the Meeting for 9<sup>th</sup> October, 2014; and
9. Exhibit "FMSD 9", being a true copy of the Board Resolution for the removal of the 1<sup>st</sup> Plaintiff as Director in the 2<sup>nd</sup> Defendant.

The deponents deposed that the said documents have been in the possession of the 2<sup>nd</sup> Defendant at all times prior to and at the time of these proceedings.

In addition, the Defendants averred that they have been advised by their advocates of record that they are out of time for discovery of documents and also that in accordance with the Orders for Directions, they are at liberty to make this application before Court.

It is the Defendant's further averment that the failure to include the said documents in the initial Bundle of Documents was neither deliberate nor meant to either delay proceedings or bring this Court into disrepute. It is their contention that the production of the said documents is in the interests of justice as the said documents would

assist this Court in the interpretation of the issues raised by the Plaintiffs in their Statement of Claim and Witness Statement before this Court and consequently, the Plaintiffs would not be prejudiced by the production of the documents in evidence before this Court.

The Defendants deposed further that in the premises, the Plaintiffs would not be prejudiced by an order for leave to produce the supplementary documents but it would ensure that the parties are both heard on their respective cases.

The Plaintiffs opposed the application before Court and indicated that they would rely on the Affidavit in Opposition to Summons for an Order for Leave to File Supplementary Documents and Skeleton Arguments both filed on 9<sup>th</sup> May, 2017.

In response to the Plaintiffs' advocates' *viva voce* submission, Ms. Kaoma stated that the issues in this case do not only comprise of the relief set out in the Statement of Claim but also the allegations of facts made by the Plaintiff in the Witness Statement and that the documents which the Defendants are trying to produce respond to and counter the said allegations and therefore, it would be in the interests of justice that the Court has an opportunity to consider the said documents in the determination of the action.

The Defendants filed an Affidavit in Reply to Affidavit in Opposition to Summons for an Order for Leave to File Supplementary Documents on 12<sup>th</sup> May, 2017 deposed to by Friday Mwamba and Solomon Dokowe, the 1<sup>st</sup> and 4<sup>th</sup> Defendants, respectively. The deponents admitted in the affidavit in reply that the parties filed an Agreed Bundles of Documents following inspection of documents by

respective Counsel but that the need for supplementary documents only arose after such inspection was conducted and specifically upon perusal of the Plaintiffs' Witness Statement which was filed after the said inspection of documents. The deponents deposed further, that the supplementary documents merely counter the allegations that have been raised by the Plaintiffs' Witness Statement filed in this Court, particularly the following statements: -

1. Paragraph 1 in which the 1<sup>st</sup> Plaintiff alleges that he is a Director in the 2<sup>nd</sup> Defendant;
2. Paragraph 6 in which the Plaintiff alleges that he found that a new company had been incorporated without the knowledge of the shareholders. Further, that a decision to incorporate the 5<sup>th</sup> Defendant was not done in a general meeting;
3. Paragraph 9 in which the Plaintiff alleges to have not received any notice of the meeting held on 19<sup>th</sup> February, 2015; and
4. Paragraph 10 in which the Plaintiff alleges that the information that the 5<sup>th</sup> Defendant was incorporated for the benefit of all shareholders of the 2<sup>nd</sup> Defendant is not captured in the financial statements of the 2<sup>nd</sup> Defendant.

It was the deponent's assertion that the said documents are not only necessary but also vital to the determination of the allegations raised by the Plaintiffs. The Defendants contend that production of the said documents is in the interests of justice as the documents shall assist the Court in the determination of the issues raised by the Plaintiffs in their Witness Statement before this Court.

As earlier stated, the Defendants filed a List of Authorities and Skeleton Arguments on 24<sup>th</sup> April, 2017 in support of the application for leave to file supplementary documents. However, I did not find the authorities cited therein or arguments relevant for purposes of this application.

The Plaintiffs also filed Skeleton Arguments in Opposition to Summons for Production of Documents on 9<sup>th</sup> May, 2017 where they argue that it is trite law that documents will only be produced when they are necessary for the disposal of a matter and to this end, cited Order 24 rule 13 (1) of the Rules of the Supreme Court, 1999 Edition which provides as follows: -

*“No order for the production of any documents for inspection or to the Court, or for the supply of a copy of any document, shall be made under any of the foregoing rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.”*

It is the Plaintiffs' argument that the documents that the Defendants seek to produce are not necessary for the disposal of this matter. The Plaintiffs submit that the editors of the White Book state the following at note 24/13/2: -

*“It is not enough for the applicant to show that the documents are relevant; he must also show that their production and inspection is necessary for one or more purposes mentioned in the rule.”*

According to the Plaintiffs, from their claim against the Defendants, it is clear that the documents that are being sought to be produced

as shown in paragraph 6 of the supporting affidavit are not necessary for the resolution of the issues. That this Court has been invited to make an order that the Defendants render an account of monies and pay damages for breach of fiduciary duties. Therefore, the documents sought to be produced will not assist in the resolution of those claims.

The Plaintiffs cited an English Court of Appeal decision in ***Wallace Smith Trust Company Limited (In Liquidation) v. Delloitte Haskin & Sells (A Firm)*** where the Court of Appeal held as follows: -

“In considering the application, the Court should examine the facts of the case and in particular should consider the central issues in the action ...” (underlining the Plaintiffs).

The Plaintiffs submitted that if the Court considers the central issues in this matter, the documents sought to be produced are of no relevance and are not necessary at all and that the Defendants are at this stage concerning themselves with peripheral issues.

The Plaintiffs contended that in light of the authority above and the central issues for resolution in this matter, the Defendant's application is without merit and should accordingly be dismissed with costs.

Sylvester Nthenge, the 1<sup>st</sup> Plaintiff swore the Affidavit in Opposition to Summons for Leave to File Supplementary Documents which was filed in Court on 9<sup>th</sup> May, 2017, wherein he deposed that after the Court gave Orders for Directions in this matter, the parties conducted discovery and inspection of their respective documents. That through this process, the parties discovered that they had documents



in common and proceeded to file an Agreed Bundle of Documents. He stated further, that the issues for determination of this Court are as presented in the Writ of Summons and Statement of Claim and these include an order that the Defendants render an account of all monies received by them since the incorporation of the 5<sup>th</sup> Defendant for breach of fiduciary duties. The deponent further averred that the documents that the Defendants seek to produce at this juncture are neither relevant to the Plaintiffs' cause of action nor necessary in order for the Defendants to defend themselves and further, that the documents sought to be produced will simply serve to cloud the issues that are before this Court for determination.

In her *viva voce* submissions at the hearing, Mrs. Simachela, learned Counsel for the Plaintiffs, stated that the gist of the Plaintiffs' arguments is that the documents sought to be produced are not necessary in order for the Court to determine the central issues of the action. Counsel submitted that if the Court examines the pleadings, particularly, the Plaintiffs' claims against the Defendants, the Court will note that the claims are for an account and payment of damages for breach of fiduciary duties. That the documents being sought to be produced will not assist the Court in the resolution of these claims and that the documents are neither relevant nor necessary. It is therefore, the Plaintiffs' prayer that the Defendants' application be dismissed for lack of merit and that costs be awarded to the Plaintiffs.

I have perused all the documents filed by the parties both in support of and in opposition to the application for leave to produce supplementary documents. I have also considered the *viva voce*

submissions by learned Counsel for parties. I concur with the Plaintiffs' submission that it is a requirement under Order 24 rule 13 (1) of the Rules of the Supreme Court that for documents to be produced, they must be necessary for the fair disposal of the matter or for saving on costs and further, that the Court should examine the facts of the case and in particular should consider the central issues of the action. However, in my opinion, contrary to the Plaintiffs' contention that the documents sought to be produced will not assist the Court in the resolution of the claims as the documents are neither relevant nor necessary, the said documents are necessary as they will assist this Court in determining all the matters in dispute.

I have reached this conclusion after examining all the relevant documents, including the Plaintiffs' Witness Statement and the documents marked "FMSD 1" to "FMSD 9" referred to by the Defendants for they are seek leave to produce.

While acknowledging that the parties filed Agreed Bundles of Documents, the Defendants have seen the need to file the additional documents in response to the Plaintiffs' Witness Statement which was filed after the Agreed Bundle of Documents were prepared and filed.

The Plaintiffs' Witness Statement contains the evidence which the Plaintiffs intend to rely on in support of their case. Therefore, the additional documents which the Defendants wish to produce in response to allegations contained in the Witness Statement cannot serve to cloud the issues that are before this Court for determination. On the contrary, the said documents will serve to illuminate the issues.

I am of the further view that since production of the additional documents is aimed at addressing issues raised by the Plaintiff in their Witness Statement, the additional documents are relevant within the meaning of Order 24 rule 13 (1) of the Rules of the Supreme Court, 1999 in that they are necessary for disposing fairly of the cause and will assist the Court in the resolution of the claims before Court. In addition, the granting of leave to the Defendants to file the additional documents will not in any way prejudice the Plaintiffs

For the above reasons, I find the application to be meritorious. The application is allowed. Leave to produce the documents marked "FMSD 1" to "FMSD 9", referred to by the Defendants in their Affidavits in Support of Summons for an Order for Leave To File Supplementary Documents, is granted. The said documents shall be filed in Court and served on the other parties to the cause by 12<sup>th</sup> June, 2017.

Costs in the cause

Leave to appeal is hereby granted.

Delivered at Lusaka this 7<sup>th</sup> day of June, 2017.

  
W. S. Mwenda (Dr)  
**HIGH COURT JUDGE**