

IN THE HIGH COURT FOR ZAMBIA

2015/HPC/0496

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

KEREN MOTORS LIMITED

PLAINTIFF

AND

ALIOS FINANCE ZAMBIA LIMITED

1ST DEFENDANT

BUPALO INVESTMENT LIMITED

2ND DEFENDANT

Before the Honourable Mr Justice W.S Mweemba at Lusaka in Chambers.

For the Plaintiff:

Mr J.C. Kalokoni- Messrs Kalokoni & Company.

For the 1st Defendant:

Mrs P. Ngoma Mdwara – Chibesa Kunda & Company.

RULING

LEGISLATION REFERRED TO:

1. RULES OF THE SUPREME COURT OF ENGLAND 1965, (WHITE BOOK) 1999 EDITION.

CASES REFERRED TO:

1. NATIONAL JUSTICE COMPANIA NAVIERA SA V PRUDENTIAL ASSURANCE (1993) 2 LLOYD'S REP. 68.
2. SPE INTERNATIONAL PROFESSIONAL PREPARATION CONTRACTORS LTD (2002) EWHC 881.
3. ZAMBIA REVENUE AUTHORITY V JAYESH SHAH (2001) ZR 60.

This is a Ruling on an application by the 1st Defendant to Strike out the Plaintiff's 1st Witness Statement Filed on 12th May 2016. It is supported by an Affidavit sworn by Edward Mwachipata the Recovery Manager of the 1st Defendant and Skeleton Arguments filed into Court on 17th May, 2016.

It was deposed by Mr Mwachipata that on 12th May, 2016 the Plaintiff filed its 1st Witness Statement, deposed to by Masauso Lungu into Court which is already on the record.

Further that a perusal of the Plaintiff's 1st Witness Statement showed that the evidence being adduced therein was opinion evidence, as in fact the deponent purported that the evidence in the statement was a report on a lease account review that he had submitted before this Court stating:

“after analysing the same, my team came up with a Lease Account Review Report which has been submitted before this Court.”

Mr Mwachipata further deposed that the deponent to the Plaintiff's 1st Witness Statement appeared to be setting out the background to his qualifications demonstrating the witness to be of sufficient experience and qualification to be considered an Expert of his field entitling him to give opinion evidence.

Moreover that a perusal of the content of the 1st Witness Statement at paragraphs 16 to 22 purports to be the deponents opinion on the legality of the finance leases entered into between the Plaintiff and the 1st Defendant.

He also stated that opinion evidence could only be adduced before Court if leave to produce such evidence had first been obtained. That he had further been advised that the Plaintiff was yet to obtain or attempt to obtain an Order from this Court allowing opinion testimony into evidence.

That he had also been advised that expert witnesses ought to be independent parties to proceedings and Masauso Lungu who was the head of Finance of the Plaintiff Company and could not purport himself to be independent.

There is also an Affidavit in Opposition filed into Court on 24th June, 2016 sworn by Mr. Masauso Lungu the Finance Manager in the employ of the Plaintiff Company.

He stated that his lawyers advised him that the Affidavit sworn by Edward Mwachipata who was not an Advocate had not disclosed the source of his information for the matters of Law on which he was commenting in his Affidavit.

That his Lawyers told him that only Lawyers could depose to matters of law and not their client.

Moreover that he had disclosed the capacity in which he deposed the Affidavit being challenged and the information stated therein was based on his personal knowledge as the Finance Manager of the Plaintiff Company.

Further that nowhere in his Affidavit did he state that he was giving expert evidence but merely that he had personal experience arising from being called as a witness in matters of

this nature besides being an employee of the Plaintiff Company with knowledge of the facts of this case.

That he therefore denied that his Affidavit evidence was presented as that of an expert or at all.

Counsel for the 1st Defendant filed Skeleton Arguments into Court to support its application on 17th May, 2016. He stated that on the 12th May, 2016 the Plaintiff filed before Court a Witness Statement deposed to by Masauso Lungu who purports to be the Head of Finance with the Plaintiff.

Further that a perusal of paragraphs 3 – 9 of the Witness Statement will show that the deponent was setting out his professional background and at paragraph 10 he even stated that he was giving expert testimony before court.

The deponent states that the Plaintiff submitted its Finance Lease Agreements to him for his review; and that he conducted a review. In paragraph 16 he proceeded to set out the *“Findings of the Report on Interest Rates Booked and Charged, at paragraph 17 he purports to give “Findings on Value Added Tax (VAT)”* he purports to give commentary at paragraph 18 on *“Extension Charges”* and *“Findings on Late Charges”* at paragraph 19, and finally at paragraph 20 the deponent gives recommendations in light of his findings.

Further that from a perusal of this Witness Statement it is clear that the deponent was attempting to adduce expert opinion evidence.

He also stated that an expert was one with a high degree of skill and knowledge in a particular subject, who had relevant and up to date expertise with regard to issues in a case, and sufficient education and communication skills to produce a clear written report, and if necessary, provide helpful oral evidence.

Moreover that in order to admit evidence extracted from such a witness it was mandatory for the requesting party to obtain the Court's permission pursuant to Order 38 rule 36 of the Rules of the Supreme Court (the White Book) 1999, unless both parties agreed to adduce the evidence. That in this case there had been no such agreement and the Plaintiff had not made an application for leave to adduce expert evidence in this matter.

Counsel also cited the case of **National Justice Compania Naviera SA v Prudential Assurance (1)** where Cresswell J outlined the following as the duties and responsibilities of expert witnesses in civil cases:

- 1. "Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.**
- 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an Advocate.**
- 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to**

consider material facts which could detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report."

Counsel also contended that Mr Lungu failed requirements 1 and 2 of Cresswell J's criteria and further to this, the case of **SPE INTERNATIONAL V PROFESSIONAL PREPARATION CONTRACTORS LTD (2)** persuasively ruled that an employee of a company that is party to proceedings (even on a temporary basis) cannot be considered an independent witness and can therefore not produce expert evidence.

Counsel therefore prayed that the Plaintiff's 1st Witness Statement be struck out and that the costs be borne by the Plaintiff.

Counsel for the Plaintiff also filed Skeleton Arguments to oppose the application of the Defendants on 24th June, 2016. He stated that the Defendants were confusing two documents that can be filed in Court in matters of this nature- A Witness Statement and Affidavit evidence.

According to him, a Witness Statement is governed by Order 38 Rule 2A of the White Book whereas Affidavit evidence is governed by Order 38 Rule 2 of the White Book and also by Order V of the High Court Rules on the Contents of Affidavits.

He also stated that under Order 38/2A/4, a Witness Statement, first stands as his evidence in chief and second, the Plaintiff witness **“may not adduce evidence which is not in his statement without leave of the Court.”**

Further that on contents of a Witness Statement, Order 38/2A/8 allows including information on one’s **“profession, business or other occupational capacity.”**

According to Counsel for the Plaintiff, the challenged evidence related to the Witness’s background information on his experience on matters of this nature. That what he was called to give was evidence in court in matters of this nature. This does not mean, and he had not stated, that he is an expert.

Further that in the case of **Zambia Revenue Authority v Jayesh Shah (3)** the Supreme Court held that matters should be determined on their substance and merit and not on procedural lapses. Further that under Article 118 (2) of the current Zambian Constitution, the Law provides that: **“in exercising judicial authority the courts should be guided by the following principles:**

(e) Justice shall be administered without undue regard to procedural technicalities”

It was therefore Counsel's prayer that the application be dismissed.

During the hearing on 28th June, 2016, both Counsel for the Plaintiff and the 1st Defendant were before Court. Counsel for the 1st Defendant relied on the Affidavit in Support and Skeleton Arguments filed into Court on 17th May, 2016. Counsel for the Plaintiff also relied on Affidavit in Opposition and Skeleton Arguments filed into Court on the 24th June, 2016.

I have carefully considered the Affidavit evidence, the Skeleton Arguments, and the authorities cited by both learned Counsel for the 1st Defendant and the Counsel for the Plaintiff.

The main issue for determination by this Court is whether or not the Plaintiff's 1st Witness Statement filed into Court on 12th May, 2016 should be struck out.

The 1st Defendant in summary argued that a perusal of the Witness Statement of Masauso Lungu the Head of Finance of the Plaintiff showed that the Deponent was setting out his professional background and he even stated that he had given expert testimony before in Court.

Moreover that he stated that the Plaintiff submitted its Finance Lease Agreements to him for Review and in paragraph 16 he proceeded to set out the *"Findings of the Report on Interest Rates Booked and Charged, at paragraph 17 he purported to give Findings on Value Added Tax (VAT)"* he purported to give commentary at paragraph 18 on *"Extension Charges"* and *"Findings on Late Charges"* at paragraph 19, and finally at

paragraph 20 the deponent gave recommendations in the light of his findings.

According to Counsel for the 1st Defendant a perusal of this Witness Statement showed that the Deponent was attempting to adduce expert opinion evidence.

Moreover that for a Court to admit evidence from such a witness it was mandatory that the requesting party should obtain leave of Court under Order 38 Rule 36 of the Rules of the Supreme Court of England (The White Book) 1999 unless both parties agree to adduce the evidence.

A summary of the arguments of the Plaintiff in opposing the application was that under Order 38/2A/4 a Witness Statement stood as his evidence in Chief and Second the Plaintiff Witness may not adduce evidence which is not in his Witness Statement without leave of Court.

Moreover, that in this case, the challenged evidence related to the Witness background information on his experience on matters of this nature and this did not mean that he was an expert.

Order 38/2A/8 of the Rules of the Supreme Court of England 1965 (The White Book) 1999 Edition prescribes the Form of Witnesses' Statements. It provides that:

“The statement should be expressed in the first person and should state:

- (i) the full name of the witness;**

- (ii) his place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer.”**

I find and hold that the details given at paragraph 3 to paragraph 11 of Mr. Masauso Lungu's Witness Statement go beyond what is required of a witness of fact by Order 38/2A/8 of the White Book. I am of the considered view that the details in paragraphs 3 to 11 of the Witness Statements and particularly paragraph 10 were designed to set him up as an expert witness.

Apart from the criteria of an expert witness set out by Cresswell J in the **NATIONAL JUSTICE COMPANIA NAVIERA SA** case, Order 38/2A/8 of the White Book 1999 Edition prescribes the contents of witnesses' statement. It provides *inter alia* that:

“The overriding features of the written statement of the witness which may be served pursuant to the direction of the Court under para. (2) are:-

- 1. that they are intended for use at the trial itself;
and**
- 2. that they relate to issues of fact to be adduced at the trial.**

Accordingly, the written statement of such a witness must contain only such material facts as the witness is able to prove of his own knowledge.

... Like the oral evidence of the trial witness, a written statement must not contain any expression of opinion, but be confined to matters of fact.

The written statement of a witness should not seek to anticipate the evidence of a witness of the opposite party and to contradict it or otherwise deal with it.”

A Perusal of the Witness Statement of the Plaintiff's First Witness Mr Masauso Lungu shows that although he is the Head of Finance for the Plaintiff the issues he has given his views on are critical to the determination of the case and would require a person that cannot be suspected of being biased.

Mr Lungu in the said Witness Statement said that **“the scope of the assignment was to investigate the alleged overcharge of 64 leases given by Alios Finance Limited to Keren Motors Limited from 5th March, 2014 to 31st December, 2015.”**

This led him to render an opinion on the Offer Letters, the Interest Rates Booked and Charged, the Provisional Account Statement, the Tenor of the Facility, the Exchange Rate Differential, The Interest Rate Adjustments, make Findings on the Value Added tax, Extension Charges, Findings on late Charges, Repossession of the Tankers, Pre payment of the First Lease Rental and Cheques as a form of security.

After doing so, he found that the Plaintiff had overpaid Alios Finance Ltd by K8,942,692.082 or US\$ 1,089,009.66 by 31st December, 2015.

All this information which is technical in my view should have come from an independent expert witness brought before Court after seeking leave in the absence of agreement by both parties.

It is crystal clear that the written statement filed by Mr. Masauso Lungu contains expressions of opinion contrary to the provisions of Order 38/2A/7 of the White Book.

I agree with Counsel for the 1st Defendant that Mr Lungu was giving expert opinion evidence and that he did not meet the criteria of Cresswell J in the case of **NATIONAL JUSTICE COMPANIA NAVIERA SA V PRUDENTIAL ASSURANCE (1)** who stated that *“the duties and responsibilities of an expert witness in a civil case are that the expert evidence should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*

Further that an expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an Advocate.”

I am of the considered view that Mr. Lungu as an employee of the Plaintiff Company cannot be considered to be an independent witness who can give objective unbiased opinion in relation to matters in dispute in the action herein.

In the circumstances, I order that the Witness Statement filed into Court on 12th of May, 2016 by Mr. Masauso Lungu be struck off the record and that another person be brought as a witness to come and give evidence on behalf of the Plaintiff.

The Plaintiff is to file the Witness Statement(s) within 14 days from date hereof.

Costs are to be borne by the Plaintiff.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 12th day of May, 2017.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE