

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**2017/HPC/0092**

**BETWEEN:**

**ACKIM CHIRWA**

**LEVY JOSEPH NGOMA**

**U-FUEL (Z) LIMITED**

**AND**

**MINI MART DEVELOPMENT CORPORATION  
COMPANY LIMITED**

**1<sup>ST</sup> PLAINTIFF**

**2<sup>ND</sup> PLAINTIFF**

**3<sup>RD</sup> PLAINTIFF**

**DEFENDANT**

**CORAM: Hon. Madam Justice Dr. W.S. Mwenda in Chambers at  
Lusaka on the 16<sup>th</sup> day of October, 2017**

For the Plaintiffs: Mr. F. Besa of Messrs. Besa Legal  
Practitioners

For the Defendant: Mr. C. Siamutwa appearing with Mr. M.  
Nkulukusa, both of Charles Siamutwa  
Legal Practitioners

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**RULING**

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**Cases referred to:**

- 1. Twampane Mining Co-operative Society Limited v. E and M Storti Mining Limited, S.C.Z. Judgment No. 20 of 2011*
- 2. Jamas Millings Company Limited v. Imex International Limited (Pty) Limited, S.C.Z. No. 20 of 2001*



3. *Stanley Mwambazi v. Morester Farms* (1977) Z.R. 108 (S.C.)
4. *Ladd v. Marshall* (1954) 3 All ER 745
5. *Brown v Dean* [1910] A.C. 373
6. *The Mortgage Corporation Limited v. Sandoes, Blinkhorn & Co. and Gibson* (1996) *The Times*, December 27
7. *D. E. Nkhuwa v Lusaka Tyre Services Limited* (1977) Z.R. 43 (S.C.)
8. *Sipalo v Mundia* (1966) Z.R. 105 (H.C.)
9. *Ratnam v Cumerasamy* [1964] 3 All E.R. 933
10. *Palata Investments Ltd and others v Burt & Sinfield Ltd and others* [1985] 2 All ER 522

**Legislation referred to:**

1. Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia
2. Order 53 Rules 8,9 and 10 of the High Court Rules, Chapter 27 of the Laws of Zambia
3. Order 29/L/ 1 of the Rules of the Supreme Court, 1999 Edition (The White Book)
4. Order 3/5/4 of the Rules of the Supreme Court, 1999 Edition (The White Book)

**Publications referred to:**

1. James Fitzjames Stephen, et.al, *A Digest of the Law of Evidence*, 12<sup>th</sup> Edition (London: Macmillan & Co, 1936), Article 1
2. *Halsbury's Laws of England*, 4<sup>th</sup> Edition [London: Butterworths & Company, 1976], Vol. 17 paragraphs 5 and 27

This is the Defendant's application for leave to file a Supplementary Affidavit in Opposition to an Order for Mandatory Injunction and for leave to extend time to file written submissions (the "Application"). The Application is made pursuant to Order 3 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia (the "High Court Rules").

The Application is supported by an affidavit (the "Affidavit in Support"), sworn by one Victor Makuza, a director in the Defendant company, dated 24<sup>th</sup> August, 2017 and Skeleton Arguments of even date.

The Plaintiffs have opposed the Application and in so doing, have filed an Affidavit in Opposition sworn by Ackim Chirwa and Levy Joseph Ngoma, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, respectively, dated 5<sup>th</sup> September, 2017. The Plaintiffs also filed a List of Authorities and Skeleton Arguments in Opposition, also dated 5<sup>th</sup> September, 2017.

According to Victor Makuza, it has come to the Defendant's attention that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have been taking huge sums of money and company property from the 3<sup>rd</sup> Plaintiff Company whilst this matter is in court and it is the deponent's belief that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs intend to take as much money as they can for their benefit before this matter is decided. That in light of this new information, it is important that a supplementary affidavit is filed to enable the court to have all the facts necessary to make a proper decision. To support this allegation, the deponents have exhibited the intended Affidavit of Mwenya Chibalani, the Station Manager of a Filling Station owned by the 3<sup>rd</sup> Plaintiff, whose majority shareholder is the Defendant.

Mwenya Chibalani makes the allegations against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and 3<sup>rd</sup> Plaintiff's accountant of forcibly removing the 3<sup>rd</sup> Plaintiff's money and motor vehicle, its keys and a company laptop.

The deponent deposes that he has been advised that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are neither directors nor shareholders in the 3<sup>rd</sup> Plaintiff company and therefore, have no lawful justification for taking any monies from the 3<sup>rd</sup> Plaintiff company. Further, that the enquiry made with the Bank on the bank account that the 3<sup>rd</sup> Plaintiff keeps with Finance Bank Zambia Limited revealed that the monies are not being deposited in the company account and to this effect, exhibited a copy of the statement of account from the Bank as exhibit "MC1".

The deponent averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have been reported to the Zambia Police for theft by servant, on account of the asportation of the money and other properties belonging to the 3<sup>rd</sup> Plaintiff.

The Affidavit in Support is augmented by Skeleton Arguments in which it is contended that it has come to the attention of the Defendant that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have been forcibly obtaining money and company property from the 3<sup>rd</sup> Plaintiff without reasonable justification or authority; and that the 3<sup>rd</sup> Plaintiff and the Defendant fear that it is the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' intention to take as much money as they can for their own benefit and to the detriment of the 3<sup>rd</sup> Plaintiff before the matter is concluded by this court.

In the said Skeleton Arguments, Counsel for the Defendant cited the Supreme Court case of *Twampane Mining Co-operative Society Limited v. E and M Storti Mining Limited (1)*, to establish the principle that applications for extension of time should be made promptly; and also cited Order 3 rule 2 of the High Court Rules as justification for

the Defendant's prayer that this Application be granted. The said Order provides as follows:

*"Subject to any particular rules, the court or a judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."*

It is the Defendant's Counsel's final submission that the Defendant believes that allowing this Application will ensure that the interests of justice are served as all matters will be presented before the court for adjudication and will ensure that the 3<sup>rd</sup> Plaintiff's assets are not dissipated before the conclusion of this matter on the merits, by this court.

Counsel for the Defendant further submitted at the hearing of this Application, on 8<sup>th</sup> September, 2017, that Counsel, as an officer of the court, has a duty to bring to light, facts that will enable the court to exercise its jurisdiction, especially taking into account that the relief of injunction is equitable, and that in exercising that jurisdiction the court cannot be deprived of information that the parties have in their possession.

In response, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs deposed in their Affidavit in Opposition that they are the majority shareholders in the 3<sup>rd</sup> Plaintiff company and that they are opposing the Defendant's Application for the following reasons, namely, that it is not true that they are taking huge sums of money out of the 3<sup>rd</sup> Plaintiff company while the matter is still in court; and that the truth of the matter is that the Defendant,

through Victor Makuza, forged minutes that purported to remove them as directors and signatories to the Bank in the 3<sup>rd</sup> Plaintiff company and uttered the said minutes to Banc ABC, formerly, Finance Bank, where the 3<sup>rd</sup> Plaintiff has a bank account. The Defendant averred that the minutes are forged in the sense that whilst one set of the minutes that purported to remove them as directors clearly shows that they protested and walked out of the illegal meeting, the second set of minutes are a forgery, in that one Victor Makuza removed the paragraph that showed that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs walked out of the meeting to signify a dispute between the Plaintiffs and the Defendant. To support their allegation, the Plaintiffs have exhibited the two sets of minutes relating to the same meeting as "AC1" and "AC2", respectively.

The Plaintiffs further averred that the Defendant exhibited "AC1" in its Affidavit in Opposition to Mandatory Injunction, which was marked "VM5", but still went ahead to forge and utter a different set of minutes to Banc ABC (formerly Finance Bank) in their attempt to remove the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs as directors and signatories.

The deponents deposed further that when they went to Banc ABC, they were informed about the development and since the 3<sup>rd</sup> Plaintiff's nature of business involves daily taking and banking of huge sums of cash money, they immediately opened another account at a different bank where they started depositing the money as they had been temporarily prevented from transacting on the account at Banc ABC. To back up this assertion, the deponents exhibited a copy of a

bank statement from Stanbic Bank as exhibit "AC3". That in the premises, it is not true that they have been taking huge sums of money for their benefit, but have simply started banking the money with a different bank in reaction to the Defendant's forgery and uttering of fake minutes to Banc ABC, as the business of the 3<sup>rd</sup> Plaintiff needed to continue running smoothly.

The deponents averred in addition that the Legal Counsel, as per exhibit "AC4", declined to effect the instruction to change the signatories after being presented with the correct picture. Exhibit "AC4" is the letter from Banc ABC dated 1<sup>st</sup> September, 2017.

In further averment, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs stated that the Defendant had no basis for attempting to remove them as directors and shareholders in the 3<sup>rd</sup> Plaintiff Company in that following their purported change of shareholders which is subject of the mandatory injunction application, the Patents and Companies Registration Agency ("PACRA"), after conceding that they erred in effecting the change when the matter was still in court, went on to expressly state that there would be no change to anything relating to the 3<sup>rd</sup> Plaintiff until the matter is determined by this court. That therefore, to all intents and purposes, they are the directors of the 3<sup>rd</sup> Plaintiff, a fact which even the Banc ABC has acknowledged after conducting a search at PACRA. To support this contention, the deponents exhibited a letter from PACRA and a printout showing that they are still on record as directors, as per exhibits "AC5" and "AC6", respectively.

The deponents deposed further, that the conduct of the Defendant is not only desperately illegal but that its attempts to file the Affidavit of Mwenya Chibalani is a mere attempt to add on record falsehoods which are not even relevant to the determination of the mandatory injunction. That given that the contents of the Defendant's affidavits are falsehoods and irrelevant to the determination of the mandatory injunction, the deponents believe that the same should not grace the court record.

With regard to the Defendant's application for leave to extend time to file written submissions, the deponents averred that the same should be refused as the court at the last sitting expressly directed the parties to comply with the dates of filing their respective submissions since the application before court is extremely urgent. That while the Plaintiffs filed and served their submissions on time as directed, no good reason has been advanced by the Defendant for failing to file its submissions on time. Further, that the deponents have been advised by their advocates and verily believe that even the Skeleton Arguments and List of Authorities that were supposed to accompany the Affidavit in Opposition to the Mandatory Injunction were not filed. It was the deponents' averment that the Defendant's habitual defaults and this Application are therefore intended to waste the court's time and delay the delivery of the ruling on the Mandatory Injunction. Finally, that they were advised and verily believe that this Application overall is full of falsehoods, misconceived and without merit.

The Affidavit in Opposition is augmented by Skeleton Arguments, the essence of which is that there is no merit in this Application and that the same ought to be dismissed with costs, since primarily, the evidence which has been sought to be admitted is irrelevant to the grant of a mandatory injunction.

It is Counsel for the Plaintiffs' argument that when submitting with the view to having additional evidence admitted for the grant of a mandatory injunction, the principles to consider, as regards the relevance of the evidence, remain those governing the grant of injunctions in general and those governing the grant of mandatory injunctions in particular. In this respect, Counsel has referred to the explanatory notes in Order 29/L/1 of the Rules of the Supreme Court, 1999 Edition (the White Book); and further submitted that, in seeking to adduce evidence that is intended to dissuade the court from granting an order of mandatory injunction, the Defendant needed to show how the information in the supplementary affidavit was relevant.

With respect to the Defendant's application for leave to extend time to file written submissions, Counsel for the Plaintiffs submitted that the same was a ploy to waste the court's time and delay the ruling on the mandatory injunction. Counsel contended that the Commercial Court is a fast track court and that tolerating defaults would undermine the essence of Order 53 of the High Court Rules.

Counsel for the Plaintiffs, also stated that failure to file written submissions as directed by this court is not the only default that the

Defendant has committed, but that earlier in these proceedings, the Defendant failed to file its Skeleton Arguments and List of Authorities at the same time it filed an Affidavit in Opposition to Affidavit in Support of Ex Parte Summons for an Order of Mandatory Injunction, on 11<sup>th</sup> August, 2017, and attempted to file the said Skeleton Arguments and List of Authorities eleven (11) days later. Counsel for the Plaintiffs stated that this court refused to admit the said documents which had been filed in breach of Order 53 of the High Court Rules and in this respect, cited the case of *Jamas Milling Co. Limited v. Imex International Limited (Pty) Limited (2)*, which he contends, best elucidates the tone and expectations of the parties in a commercial list.

In reply, the Defendant filed an affidavit accompanied by Skeleton Arguments and a List of Authorities, on 7<sup>th</sup> September, 2017.

The Affidavit in Reply was sworn by Victor Makuza and it was his testimony, in paragraph 5 of the said affidavit, that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs forfeited their shares in the 3<sup>rd</sup> Plaintiff pursuant to the Share Pledge Agreement, which is on the court record.

Further, the deponent averred that the allegation that the minutes were uttered and forged is a lie and that the fact of the matter is that the second set of minutes alleged to have been forged, was an excerpt of the minutes and was prepared as a requirement for the new directors in the company to use when opening the bank account, as banks usually request for an excerpt as opposed to full minutes.

The deponent deposed that the minutes show that the Plaintiffs were removed from being directors in the 3<sup>rd</sup> Plaintiff company and that the same is not in dispute.

It was the deponent's further testimony that exhibit "AC3" in the Plaintiffs' Affidavit in Opposition is a secret bank account which is entirely in the control of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and that they are not accounting to the shareholders. That this was kept secret until the police started investigating the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's for theft.

With regard to paragraph 5 of the Plaintiffs' Affidavit in Opposition, which alludes to the assertion that Legal Counsel for Banc ABC declined to change the signatories on the basis that the documents the Defendant presented to the bank were questionable, the deponent deposed that the Defendant is in the process of clarifying its position with the Bank.

In reply to paragraph 6 of the Plaintiffs' Affidavit in Opposition, wherein the Plaintiffs averred that the Defendant had no basis to attempt to remove the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs as directors and shareholders; the deponent deposed that the removal of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs as directors is not one of the issues before this court.

The deponent also deposed that the Plaintiffs removed an estimated K340,000.00 from the 3<sup>rd</sup> Plaintiff, which sum they have not accounted for as what is reflecting in the new bank account is less than the money they took. Further, that when the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were managing the filling station, they embezzled

approximately K4.48 million, which has not been accounted for to date and that this was one of the reasons that led to their removal as directors and that the company has issued instructions to its lawyers to recover the said amount.

In the Skeleton Arguments and List of Authorities augmenting the Affidavit in Reply, Counsel for the Defendant cited Order 3 rule 2 of the High Court Rules (already cited and quoted above), and the cases of *Jamas Milling Co. Limited v. Imex International Limited (Pty) Limited (2)* and *Stanley Mwambazi v. Morester Farms (3)*.

The crux of the Skeleton Arguments is that there is information that has come to the attention of the Defendant and that the filing of the supplementary affidavit is for the purpose of interrogating whether, in light of the said information, this is a proper case for granting the Plaintiffs' application for a mandatory injunction. Further, that the filing of the supplementary affidavit goes to the core of the said application and that it is in the interest of justice that the Defendant be allowed to file the said supplementary affidavit.

Submitting in response to the Plaintiff's contention that the Defendant should be refused leave to extend time to file its written submissions, Counsel for the Defendant said that for the Plaintiffs to rely on the case of *Jamas Milling Co. Limited v. Imex International Limited (Pty) Limited (2)*, they must satisfy the court that the Defendant has delayed the court process, caused prejudice and inconvenienced the Plaintiff. Counsel for the Defendant submitted further, that it is precisely because the Defendant wants this matter

to be disposed of as quickly as possible that it wishes to bring all material facts before this court.

To further buttress his submission, Counsel for the Defendant cited the case of *Stanley Mwambazi v. Morester Farms (3)*, and submitted that the said authorities in support are still good law unless it can be shown that the Defendant has prejudiced and inconvenienced the Plaintiff by causing unnecessary delay. It was also Counsel's submission that the Stanley Mwambazi case modifies, rather than reverse the Jamas Milling case, as regards the commercial list; and that the only consideration in the application for leave to extend time to file written submissions should be whether or not the Defendant has sufficient grounds to merit the granting of its application.

Finally, Counsel for the Defendant submitted that sufficient grounds have been advanced by the Defendant and that it has shown that there are matters which ought to be brought to the attention of the court. In light of this, Counsel for the Defendant prayed that this court grants the Defendant's Application.

At the hearing, Counsel for the Defendant submitted that on the issue of whether the evidence the Defendant intends to bring to the court has some shortcomings, as argued by Counsel for the Plaintiffs, it is for the court to evaluate the said evidence and make its own decision. In the premises, Counsel submitted that it is in the interest of justice that the Defendant is accorded the opportunity to present to the court evidence that has the effect of affecting the court's decision.

It was Counsel's further submission that there was no default on the part of the Defendant, but that the Defendant acted promptly as soon as the supervening event occurred and that there is no evidence of *mala fides* or improper conduct on the part of the Defendant, so as to warrant a denial of an opportunity to present evidence that is material to the application for injunction and also for extension of time to submit the Defendant's Skeleton Arguments in opposition to the application for mandatory injunction.

I have carefully considered this Application and Affidavit in Support thereof; the Affidavit in Opposition and the Affidavit in Reply; as well as the Skeleton Arguments and List of Authorities filed in support of and in opposition to the Application. I have also carefully considered the plethora of judicial authorities that Counsel have brought to this court's attention.

In my view, with respect to the supplementary affidavit, the issue for determination boils down to whether or not the new evidence in the said supplementary affidavit is relevant to the injunction application.

The principles governing the reception of new evidence, by a court, were laid down in the case of *Ladd v. Marshall* (4), where it was stated as follows:

*"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case,*

*although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.”*

In an earlier case of *Brown v Dean* (5), Lord Loreburn LC stated that new evidence must at least be “such as is presumably to be believed.”

The provisions above clearly provide some direction to the court on the issues to consider when entertaining an application for leave to file a supplementary affidavit, which amounts to the adducing of fresh evidence. In these proceedings the parties are at the point when they are supposed to have filed in their submissions in respect of the Plaintiffs’ application for an order of Mandatory Injunction and it can safely be said that the hearing of the said application had come to its close; thus the Defendant is in effect, seeking leave of court to re-open the said application.

The principles enunciated above are subject to the court's general discretionary power to control the evidence. In pursuit of determining the relevance of the supplementary affidavit, it is imperative for this court to put the said new evidence through a test that would reveal whether or not the Defendant’s fresh evidence satisfies the conditions in *Ladd v. Marshall* (4), so as to justify the reception, by this court, of the said evidence.

I have perused the intended supplementary affidavit and observed that the dates of the allegations on which the fresh evidence is based are clearly post the hearing of the Plaintiffs’ application for an order of Mandatory Injunction. The hearing of the application for an order

of Mandatory Injunction was held on 14<sup>th</sup> August, 2017 while the events constituting the new evidence in the intended supplementary affidavit occurred between 20<sup>th</sup> August, 2017 and 23<sup>rd</sup> August, 2017. I am therefore, satisfied that the said evidence could not have been obtained with reasonable diligence for use at the date of hearing of the said application because it was not available.

Turning to the requirement that the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive, my examination of the intended supplementary affidavit satisfies me that the issues deposed therein are likely to have an influence on the outcome of the application for an order of Mandatory Injunction.

Finally, on the requirement that the evidence must be such as is presumably to be believed, I am satisfied, upon examining the deponent's testimony in the intended supplementary affidavit that, that seems to be the case.

The Plaintiffs contended, in their Skeleton Arguments, that the Defendant needed to show how the information in the supplementary affidavit is relevant to warrant the reopening of the process of giving evidence.

The learned authors of Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 17, paragraph 5 on 'Evidence' state as follows:

*"The prime requirement of anything sought to be admitted in evidence is that it is of sufficient relevance. What is relevant (namely what goes*

*to the proof or disproof of a matter in issue) will be decided by logic and human experience, and facts may be proved directly or circumstantially. But while no matter should be proved which is not relevant, some things which are relevant by the normal tests of logic may not be proved because of exclusionary rules of evidence.”*

According to Article 1 of Stephen's Digest of the Law of Evidence, 12<sup>th</sup> Edition, a fact may be relevant to an issue, or to the weight to be afforded to evidence, or to the admissibility of other evidence.

The learned authors of Halsbury's Laws of England, Vol. 17, further state in paragraph 27 that the weight to be given to a particular item of evidence is a matter of fact which will be decided, largely on the basis of common sense, in the light of the circumstances of the case and of the view formed by the judge on the reliability and credibility of the witnesses and exhibits.

I have examined the intended supplementary affidavit, while being alive to the facts alleged in the other affidavits on the record, and am of the view that the deponent therein has raised issues that are relevant to the Plaintiffs' application for a mandatory injunction. Further, I am also of the view that the facts deposed to in the intended supplementary affidavit are not captured under any exclusionary rule of evidence in that they do not appear to have any public policy issues, professional privilege issues or indeed lack of leave of court, to file the said supplementary evidence.

In light of the above, it is my considered view that the fresh evidence which the Defendant is seeking to adduce ought to be considered in

determining the Plaintiffs' application for a mandatory injunction. In my opinion, it would not be in the interests of justice to prevent the Defendant from bringing the said evidence before this court.

With regard to the second limb of the Application (being leave for extension of time to file written submissions), Order 3 Rule 5(1) of the White Book provides as follows:

*"The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings."*

The said Order clearly suggests that the court, in such an application, should exercise its discretion in arriving at its decision. Therefore, in terms of the criterion a court may adopt in establishing whether or not to grant an application for extension of time, the explanatory notes in Order 3/5/4 of the White Book, citing the case of *The Mortgage Corporation Limited v. Sandoes, Blinkhorn & Co. and Gibson (6)*, provide guidance as follows:

*"The master of the Rolls and the Vice Chancellor, as Head of Civil Justice, have approved the following guidance as to the future approach which litigants can expect the court to adopt to the failure to adhere to time limits contained in the rules of directions of the court:*

1. Time requirements laid down by the rules and directions given by the Court are not merely targets to be attempted; they are rules to be observed.

2. At the same time the overriding principle is that justice must be done.

3. Litigants are entitled to have their cases resolved with reasonable expedition. Non-compliance with time limits can cause prejudice to one or more of the parties to the litigation.

4. In addition the vacation or adjournment of the date of trial prejudices other litigants and disrupts the administration of justice.

5. Extensions of time which involve the vacation or adjournment of trial dates should therefore be granted as a last resort.

6. Where time limits have not been complied with the parties should co-operate in reaching an agreement as to new time limits which will not involve the date of trial being postponed.

7. If they reach such an agreement they can ordinarily expect the court to give effect to that agreement at the trial and it is not necessary to make a separate application solely for this purpose.

8. The court will not look with favour on a party who seeks to take tactical advantage from the failure of another party to comply with time limits.

*9. In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions.*

*10. In considering whether to grant an extension of time to a party who is in default, the court will look at all the circumstances including the considerations identified above."*

The object of Order 3 rule 5 (1) of the White Book is to give the court a discretion to extend time with a view to the avoidance of injustice to the parties. The guidelines above merely suggest issues that the court may consider in applying its discretion. Although the court has discretion to consider applications for extension of time, the said discretion ought to be exercised within the confines the law.

The Plaintiffs pointed out in their Skeleton Arguments that this is not the first time, in these proceedings, that the Defendant has failed to file its documents into court within the required time. In this regard, the Plaintiff referred this court to its previous ruling, wherein it refused to accept the Plaintiffs' documents in opposition to an application by the Defendant for an order to stay proceedings pending arbitration, which were filed eleven (11) days after the hearing. However, the two scenarios are distinguishable in that in the Plaintiffs' application, Counsel for the Plaintiffs decided to file the documents in opposition, not only eleven (11) days after the hearing, but without seeking leave of court to file the same out of time. In this Application, Counsel for the Defendant has sought leave of court and made this Application just one (1) day after the written submissions were due for filing.

Indeed our own case law has addressed the issue of Counsel ensuring that rules of procedure regarding time are followed and this cannot be emphasized enough. The Supreme Court in the case of *D. E. Nkhuwa v Lusaka Tyre Services Limited* (7), stated that:

*“It is a regrettable fact that in recent years legal practitioners in this country have approached the need to comply with the rules as to time with complete nonchalance. This court has had occasion in the past to comment adversely on the attitude of legal practitioners to compliance with other rules of procedure, but it is time that all legal practitioners were made to understand that where the rules prescribe times within which steps must be taken these rules must be adhered to strictly and those practitioners who ignore them will do so at their own peril. The provisions in the rules allowing for extensions of time are there to ensure that if circumstances prevail which make it impossible or even extremely difficult for parties to take procedural steps within prescribed times relief will be given where the court is satisfied that circumstances demand it. It must be emphasised that before this court is able to exercise this discretion to grant such relief there must be material before it on which it can act.”*

In the case of *Sipalo v Mundia* (8), Ramsay, J. had the following to say:

*“I adopt the following extract from the opinion of the Privy Council in *Ratnam v Cumerasamy* (9):*

*‘The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court*

*can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation.'*

*Where the court has discretion to enlarge time for a procedural step, it will not exercise that discretion in favour of the applicant unless there is some material on which the discretion can be exercised."*

It is clear from the holding of Ramsay J, which I find persuasive and indeed the Supreme Court authority of *Nkhuwa v. Lusaka Tyre Services Limited* (7) case above that the courts frown upon laxity on the part of Counsel in complying with procedural rules, and further, for the court to allow the extension of time within which a procedural rule should be complied with, there must be some material on which the court can exercise its discretion.

I have examined both the Affidavit in Support and Affidavit in Reply and in neither affidavit has the Defendant advanced any cogent reason(s) for seeking the extension of time. In fact, in both affidavits, the deponent has not made any mention of the issue of extension of time, such that the Application seems to be concerned only with the issue of the supplementary affidavit. Counsel for the Defendant did, however, contend in the Skeleton Arguments that the Defendant was making the application for extension promptly and to this end, cited the case of *Twampane Mining Co-operative Society Limited v. E and M Storti Mining Limited* (1). This, in my view, does not remedy the fact that the deponents in the Affidavit in Support and Affidavit in Reply,

omitted or neglected to state facts to justify the Defendant's decision to seek an extension of time. However, I am cognizant of the fact that at the hearing of this Application, Counsel for the Defendant objected to the Plaintiffs' Counsel's submission that this Application was before court so as to remedy the Defendant's default to file its Skeleton Arguments. Counsel for the Defendant, to this end, submitted that the delay in filing the Skeleton Arguments was due to the discovery of the fresh evidence, on which the Skeleton Arguments were to be predicated. In my view, this should have been mentioned in the deponents' testimony in the affidavits accompanying this Application.

As already alluded to, Counsel for the Defendant has contended in the Skeleton Arguments that this Application was made promptly. The record shows that the court order made on 14<sup>th</sup> August, 2017, stipulated that Counsel for the Plaintiffs was to file written submissions by 17<sup>th</sup> August, 2017 while Counsel for the Defendant was to file written submissions by 23<sup>rd</sup> August, 2017. Counsel for the Defendant, however, did not file any submissions by 23<sup>rd</sup> August, 2017, but instead made an application, on 24<sup>th</sup> August, 2017, for an extension of time to file submissions, alongside an application to file a supplementary affidavit which is based on facts that transpired until the date on which the submissions were to be filed. This means that Counsel for the Defendant made the application for extension of time a day after the Defendant's submissions fell due. What falls for determination in this regard, therefore, is whether the conduct by Counsel for the Defendant to make this Application a day after the

final day of filing the submissions, may be regarded as prompt and/or reasonable.

Guidance on what may amount to reasonable delay is given in the case of *Palata Investments Ltd and others v Burt & Sinfield Ltd and others (10)*, where three (3) days was held to be reasonable delay for purposes of allowing an application for extension of time. Ackner LJ, thus stated as follows:

*“The whole of this matter, it seems to me, depends on whether or not we can properly look on the delay in this case as being an exceptional one. In my judgment I would so classify it. I have already referred to the shortness of the period involved: three (3) days.”*

It is clear from the authority above that an application made three (3) days after the expiration of a period within which the said application was supposed to be heard was considered to be reasonable delay for purposes of the court entertaining that application. This can be distinguished from the case of *Twampane Mining Co-operative Society Limited v. E and M Storti Mining Limited (1)*, where the Supreme Court rejected an application for extension of time made thirty-nine (39) days after expiration of a period within which an appeal was to be made. In that case, the ruling intended to be appealed against was delivered on 16<sup>th</sup> April, 2009. Leave to appeal to the Supreme Court was granted by the court below without formal application at the time the ruling was delivered. The respondent had thirty (30) days from that day to file the appeal but failed to do so. The application for leave to appeal out of time was only filed on 24<sup>th</sup> June, 2009.

In view of the foregoing, I find that the Defendant's delay in making the Application is reasonable, thus warranting this court to exercise its discretion in the Defendant's favour. However, as Counsel for the Plaintiffs has pointed out, this is not the first time the Defendant is failing to comply with a court order as to time. I will, therefore, not grant the whole seven (7) days prayed for by the Defendant's Counsel.

Considering all the circumstances, of the case, and in the interest of justice, the Defendant's application to file the supplementary affidavit is granted. Leave is also granted for extension of time within which to file written submissions. The supplementary affidavit and submissions shall be filed into court by 25<sup>th</sup> October, 2017. The Plaintiffs shall file their affidavit in response and submissions, if any, by 1<sup>st</sup> November, 2017 and the Defendant shall file its reply thereto, if any, by 6<sup>th</sup> November, 2017.

Costs shall be in the cause.

**Dated at Lusaka the 16<sup>th</sup> day of October, 2017.**

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