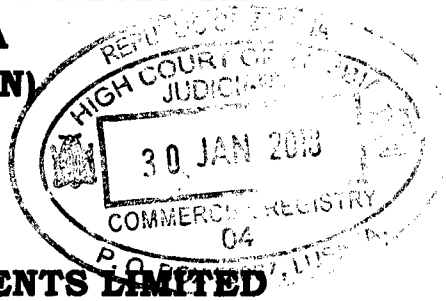
IN THE HIGH COURT FOR ZAMBIA **2017/HPC/0141**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)



BETWEEN:

PROSPER INVESTMENTS LIMITED **1ST PLAINTIFF**

CHILUFYA DAINESS BWALYA SILWAMBA **2ND PLAINTIFF**

AND

STANBIC BANK ZAMBIA LIMITED **DEFENDANT**

CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at Lusaka on the 30th day of January, 2018

For the Plaintiffs: Mr. R. Musumali of Messrs. SLM Legal Practitioners

For the Defendant: Mr. A. Siwila appearing with Mr. E. Bwalya, both of Mambwe Siwila & Lisimba Advocates

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RULING

Cases referred to:

1. *Kajimanga v. Chilemya (SCZ No. 50 of 2014).*
2. *John W.K. Clayton v. Hybrid Poultry Farm Limited (2006) Z.R. 70.*
3. *Mwanza and Kuwani v. Sable Transport Limited3, (2008/HP/0383).*
4. *Seabrook v. British Transport Commission (1959) 2 All E.R. 32.*
5. *Ladd v. Marshall (1954) 3 All ER 745.*

6. *Brown v Dean [1910] A.C. 373.*
7. *Wallace Smith Trust Co. Ltd (in liquidation) v. Delloitte Haskin & Sells (A Firm) (1996) 4 All E.R. 403, CA.*

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, Chapter 27 of the Laws of Zambia.*
3. *Order 53, Rule 7 (1) and (2) of the High Court Rules, Chapter 27 of the Laws of Zambia.*
4. *Order 53, Rule 7 (6) of the High Court Rules, Chapter 27 of the Laws of Zambia.*
5. *Order 53, Rule 7 (5) of the High Court Rules, Chapter 27 of the Laws of Zambia.*
6. *Editorial Notes in paragraph 24/2/17 of Order 24 of the Rules of the Supreme Court, 1999 Edition (The White Book).*
7. *Order 24, Rule 13 (1) and (2) of the Rules of the Supreme Court, 1999 Edition (The White Book).*
8. *Editorial Notes in paragraph 24/13/2 of Order 24 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, 12th Edition (London: Macmillan & Co, 1936), Article 1.*
2. *Halsbury's Laws of England, 4th Edition [London: Butterworths & Company, 1976], Volume 17 paragraphs 5 and 27.*

This is the Defendant's application for leave to file Additional Witness Statements and Supplementary Bundle of Documents (hereinafter referred to as the "Application"). The Application is made 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 (hereinafter referred to as the "High Court Rules").

The background to this Application is that, following commencement of this matter and in line with Order 53, Rule 7 (1) and (2) of the High Court Rules, the parties herein, attended a Scheduling Conference before this Court, on 2nd May, 2017, at which an Order for Directions was issued. In the said Order and in accordance with Order 53, Rule 7 (6) of the High Court Rules, it is stated that parties were to attend a Status Conference on 5th July, 2017, where the parties' compliance with the Order would be gauged and a trial date was to be set.

At the said Status Conference Counsel for the Plaintiffs indicated that they had complied with the Order for Directions, while Counsel for the Defendant indicated that they had not fully complied with the order as they were yet to finalise the Defendant's Witness Statements and Skeleton Arguments. Counsel for the Defendant thus, made an undertaking that they would be done within the two weeks that followed.

In pursuance of Order 53, Rule 7 (5) of the High Court Rules, the matter was accordingly set down for trial to be held on 25th September, 2017. Further, Counsel for the Defendant, accordingly proceeded to file the Defendant's Skeleton Arguments and Witness

Statement, on 22nd July, 2017, bringing the pleadings to a close, in readiness for trial. However, before the trial could take place, the Defendant made this Application for Leave to File Additional Witness Statements and Supplemental Bundle of Documents.

The Application was filed into court on 22nd August, 2017 and is supported by an affidavit (the "Affidavit in Support"), sworn by Reuben Matale Malindi, a Manager, Specialised Recoveries in the Defendant Bank, dated 22nd August, 2017 and Skeleton Arguments of even date.

It is Mr. Malindi's testimony, as adduced in the Affidavit in Support, that by an Order for Directions of 23rd May, 2017, this Court directed, *inter alia*, that the parties file the respective Bundles of Documents by 30th May, 2017 and exchange Witness Statements by 13th June, 2017; and that both parties have complied.

The deponent further deposed that it has become apparent and necessary for the Defendant to file an Additional Witness Statement and Bundle of Documents and that a court order permitting the same will not be prejudicial to the Plaintiff, but will assist in achieving justice.

In the Skeleton Arguments augmenting the Application, Counsel for the Defendant submitted that this Court is empowered by Order 19, Rule 2 and Order 3, Rule 2 of the High Court Rules to grant the leave sought by the Defendant.

The Plaintiffs have opposed the Application and in so doing, have filed an Affidavit in Opposition dated 6th September, 2017 and sworn by Chela Silwamba, a shareholder and director in the 1st Plaintiff Company.

It is the deponent's testimony that the 1st Plaintiff has been advised and verily believes that at this stage of the action, no further documents from either party should be allowed by the Court, as the Pleadings have since been closed and the matter is already set down for trial.

The deponent avers that the 1st Plaintiff has been advised and verily believes that the Defendant has not shown the materiality or relevance of the intended additional documents it is desirous of relying on.

It is the deponent's further testimony that the 1st Plaintiff has been advised and verily believes that the Defendant has also not demonstrated the circumstances that have made it expedient to allow additional witnesses and documents.

Finally, the deponent deposes that the 1st Plaintiff has been advised and verily believes that the intended documents might be prejudicial to the Plaintiffs' case as the Plaintiffs will not be accorded an opportunity to inspect or object to their production in evidence.

The Plaintiffs also filed a List of Authorities and Skeleton Arguments in Opposition, also dated 6th September, 2017; the gist of which is that the Defendant's Application is misconceived and has no legal

basis, as the deponent to the Affidavit in Support has failed to state the facts and circumstances upon which this Court should allow the intended documents.

Counsel for the Plaintiffs further submitted that the Court cannot allow any party to an action to call further documents as evidence, once pleadings are closed and the matter has been set down for trial.

Citing Order 24 of the Rules of the Supreme Court, 1999 Edition (hereinafter referred to as the "White Book"), Counsel for the Plaintiffs submitted that allowing the Application will be prejudicial to the Plaintiffs as they will not be accorded the opportunity for discovery and inspection of the intended documents; and that in civil matters, documents cannot be introduced and adduced by ambush. Counsel, thus, referred the Court to the case *of Kajimanga v. Chilemya*[1], to explain the role of discovery in procedure.

Counsel for the Plaintiffs also submitted that allowing the Application would amount to a dilution of Order 53 of the High Court Rules as regards its spirit that commercial matters should be adjudicated expeditiously by strict compliance with the said order. Counsel, in this respect, contended that there is an order of court stipulating the time within which documents were to be filed and which said order is to be followed strictly. To fortify this contention, Counsel for the Plaintiffs referred the Court to the case of *John W.K. Clayton v. Hybrid Poultry Farm Limited*[2].

Citing the case of *Mwanza and Kuwani v. Sable Transport Limited*[3], Counsel for the Plaintiffs submitted that the Defendant has not satisfied the legal requirements that the documents sought to be introduced into evidence are relevant to the proceedings. Counsel for the Plaintiffs, in this respect, further referred the Court to the case of *Seabrook v. British Transport Commission*[4].

Counsel for the Plaintiffs, therefore, contended that the Defendant's Application is an attempt to take the Plaintiffs by surprise and has been made without any concrete basis.

Referring to the deponent's testimony in the Affidavit in Opposition that the Defendant has failed to exhibit the intended documents, Counsel for the Plaintiffs submitted that the Defendant has willfully positioned the Court at sea in deciding whether or not the intended additional evidence is relevant to this matter. In light of this, Counsel submitted that it is fatal for the Defendant's Application that it has not availed, to the Court and the Plaintiffs, the intended additional documents.

In reply, the Defendant filed an affidavit accompanied by Skeleton Arguments, on 13th September, 2017.

The said Affidavit in Reply was again sworn by Reuben Matale Malindi and it is his testimony that he has been advised by his advocates and that he believes that where documentation relevant to the dispute has come to the attention of a party, it is in the interest of justice that the court and the other party has sight of the same.

The deponent further avers that, contrary to the assertion of the Plaintiffs that the intended documents might be prejudicial to their case, no injustice shall be occasioned to the Plaintiffs as they are still at liberty to inspect. Further, that the Defendant has never had issue with inspection of the documents and in fact had arranged for the same to be done in the interest of justice. To support this assertion, the deponent produced exhibit "RMM2", being a letter from the Defendant to the Plaintiffs scheduling an inspection of the documents.

It is the deponent's further testimony that the Plaintiffs did not respond favourably to letter exhibited as "RMM2", in the Affidavit in Reply.

Finally, the deponent testified that the intended documents are necessary for the Defendant to prove its case; and that no prejudicial effect or harm shall be occasioned to the Plaintiffs by an order allowing their production.

In the Skeleton Arguments augmenting the Affidavit in Reply, Counsel for the Defendant relied on Order 3, rule 2 of the High Court Rules (already cited and quoted above), and the case of *Seabrook v. British Transport Commission* (already cited above by the Plaintiffs).

The gist of the said Skeleton Arguments is that the Plaintiffs' position that they will be prejudiced as they will not have a chance to inspect the documents, is misconceived as trial in a civil suit can never be by ambush. Further, that one of the imperatives in a trial is to ensure

that the court has maximum relevant documentation available to it and that the court has powers to exercise its discretion in favour of an application to bring such documentation before it.

Referring to the deponent's testimony in the Affidavit in Reply, it is the contention of Counsel for the Defendant that the Defendant has never been averse to the Plaintiff inspecting the intended documents.

At the hearing of the Application, on 18th September, 2017, Counsel for the Defendant and the Plaintiffs, both indicated that they would rely on the affidavits filed in respect of the Application. Counsel for the Plaintiffs, in addition, submitted that the Defendant has not demonstrated why the intended documents were not exhibited in the Defendant's Bundle of Documents at the time they were required to do so.

Counsel for the Defendant added, in reply, that regarding the issue of prejudice, there is no law that prevents a party from inspecting a List of Documents which the other party wants to produce as part of the party's evidence.

Counsel for the Defendant further submitted that, in any event, the Plaintiffs still had an opportunity at trial to object to the production of any documents that they deemed prejudicial, irrelevant and immaterial.

Finally, Counsel for the Defendant submitted that the fact that pleadings have closed does not stop this Court from allowing a party to produce documents which will be helpful in the prosecution of the

matter, in the interest of justice. On the same issue, Counsel submitted further that, in any event, the Order for Directions issued by this Court has provision for the parties to make any application before trial and that the Defendant has exercised that right.

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 judicial authorities that Counsel have brought to this Court's attention.

In my view, the issue for determination boils down to whether or not the Defendant has satisfied the requirements preceding the production of new evidence after the close of pleadings.

The Orders on which this Application is founded are Order 19, Rule 2 and Order 3, Rule 2 of the High Court Rules. The said Order 19, Rule 2, relating to the liberty of a party to make any application after a court Order for Directions issued under Rule 1 of the same Order, provides as follows:

> *"Notwithstanding rule 1, the Court may, for sufficient reason, extend the period within which to do any of the acts specified in rule 1."*

For context, Rule 1 of Order 19 of the High Court Rules provides as follows:

'The Court or trial Judge shall, not later than fourteen days after appearance and defence have been filed, give directions with respect to the following matters:

(a) reply and defence to counter claim, if any;
(b) discovery of documents;
(c) inspection of documents;
(d) admissions;
(e) interrogatories; and
(f) place and mode of trial:

Provided that the period for doing any of these acts shall not exceed 14 days."

Further, Order 3, Rule 2 of the High Court Rules 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 not in dispute that the parties, in these proceedings are at the point where they closed their pleadings as per the Order for Directions of 23rd May, 2017; and were ready to go to trial. It is therefore, clear from the provisions above that the Defendant seeks the exercise of this Court's discretion to grant this Application in its favour.

Counsel for the Plaintiffs submitted that allowing the Application would amount to a dilution of Order 53 of the High Court Rules as

regards its spirit that commercial matters should be adjudicated expeditiously by strict compliance with the said order. On the other hand, Counsel for the Defendant advanced the argument that this Application was made within the parameters of Order for Directions, particularly under paragraph 6, which gives the parties liberty to apply; and that the courts are availed maximum relevant documentation as they sit to determine matters.

Indeed, there is, in the interest of justice, a continuing obligation to give discovery of material and relevant information; and in this regard, the editorial notes in paragraph 24/2/17 of Order 24 of the White Book, provide as follows:

> *"Although one reading of O.24, r.1 may suggest that discovery need be given only of documents which have come into a party's possession before the date of his list of documents, this is not the limit of a party's obligation to give discovery imposed by the rule. The obligation is general, and requires the disclosure of all relevant documents whenever they may come into a party's possession. This requirement is supported by the linked principle that a party must not seek to take his opponent by surprise and that he must not, by withholding relevant documents, mislead his opponent or the Court into believing that the statement in his list that he has given full discovery continues to be true... An obvious example is where a plaintiff, who is claiming damages for prospective loss of earnings, obtains new lucrative employment during the course of the action; this fact must be communicated to the defendant and further discovery must be made (or, at all events, offered). In*

default, the plaintiff may be ordered to pay any costs occasioned by the failure to give discovery promptly... a party to civil litigation was under a continuing obligation under RSC, O.24, r.1 until the conclusion of the proceedings to disclose all relevant documents whenever they came into his possession, unless they were clearly privileged from disclosure, notwithstanding that discovery by list or affidavit had already been made. Where, therefore, a document was disclosed to a party after he had closed his case, or the evidence as a whole was concluded, he should apply to the court to reopen the case in the light of the disclosure if the document was of real significance and there was otherwise a risk of injustice."

It is clear that courts are inclined to admit relevant evidence that can aid the prosecution of a matter at any possible stage of the matter, provided the said evidence was not available at the time evidence of the parties is scheduled to be exchanged. I would, thus, disagree with the submission by Counsel for the Plaintiffs that this Application, on the face of it, dilutes Order 53 of the High Court Rules. This Application however, is subject to specific guidelines on admission of evidence.

As witness statements and bundles of documents constitute evidence-in-chief, it is true that the intended additional Witness Statements and Bundle of Documents are being sought to be introduced as fresh evidence.

The principles governing the reception of new evidence, by a court, were laid down in the case of *Ladd v. Marshall*[5], 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*[6], Lord Loreburn LC stated that new evidence must at least be "such as is presumably to be believed."

Further, the learned authors of Halsbury's Laws of England, 4th 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, 12th 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, 4th Edition, 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.

The provisions above clearly provide some direction to the Court on the issues to consider when entertaining an application such as the one currently under consideration, which amounts to the adducing of fresh evidence. It is not in dispute that the parties, in these proceedings are at the point where they closed their pleadings as per the Order for Directions of 23rd May, 2017.

The principles enunciated above are subject to the courts' general discretionary power to control the evidence. Therefore, in pursuit of determining the relevance of the additional Witness Statements and supplementary Bundle of Documents, 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*, so as to justify the reception, by this Court, of the said evidence.

Courts are further, clothed with the discretion to gauge the value of evidence adduced before them. This general control exercised by the courts, over evidence produced by the parties, is provided for under Order 24, Rule 13 (1) and (2) of the White Book, 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 opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

Where on an application under this Order for production of any document for inspection or to the Court, or for the supply of a copy of any document, privilege from such production or supply is claimed or objection is made to such production or supply on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid."

Speaking to the requirement that the evidence intended to be produced should be necessary, the editorial notes in paragraph 24/13/2 of Order 24 of the White Book, state as follows:

"Under this rule, in contrast to r.8, it is for the party applying for the order for production to satisfy the court that the order for production and inspection is necessary either for disposing fairly of the cause or matter, or for saving costs... 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 of the purposes mentioned in the rule..."

In this regard, the case of *Wallace Smith Trust Co. Ltd (in liquidation) v. Delloitte Haskin & Sells (A Firm)*[7] is very instructive, and it was held in the said case that:

"Where an application was made to the court for an order for the production of documents pursuant to RSC Ord 24, r 13 and the

applicant showed that such production might be necessary for the fair disposal of the action, the court should inspect the documents and should only refuse an order if, after considering them in the light of the material already in the applicant's possession... In considering the application, the court should examine the facts of the case and in particular should consider the central issues of the action, the nature of the documents and the information they were likely to contain; it could also take into account whether the documents were confidential and, if so, whether the information sought could be obtained by some other means." (underlining mine for emphasis only).

The Plaintiffs contend that the Defendant failed to exhibit the intended supplementary documents in its affidavits, so as to enable the Court examine the materiality of the said documents.

The implications of a court's failure to examine documents sought to be introduced into evidence can clearly be seen from the case of *Wallace Smith Trust Co. Ltd (in liquidation) v. Delloitte Haskin & Sells (A Firm)* (already cited above), where the trial judge failed to inspect tapes and transcripts that were undoubtedly likely to contain material necessary for the fair disposal of the action. The Court of Appeal in that case, found that the judge had misdirected himself in failing to inspect the said documents.

I have examined both the Affidavit in Support and Affidavit in Reply and indeed, in neither affidavit, has the Defendant exhibited the intended additional Witness Statements and Supplementary Bundle of Documents. Further, the Defendant has not advanced any cogent

reason(s) for failing to do so. In fact, in both affidavits, all that the deponent has said is that the intended documents are material and relevant to this matter.

I hold the view that it would be impossible for this Court to decide whether the intended documents are necessary for fairly disposing of these proceedings without examining the said documents. It is not enough for the Defendant to merely allege that they are necessary.

Moreover, the Court cannot inspect the documents itself unless a *prima facie* case has been made out that the documents are necessary for the fair disposal of the action. Therefore, the Defendant being the applying party is also the party bearing the burden to satisfy this Court that it has fulfilled the conditions set out in *Ladd v. Marshall* and that it has facilitated the examination of the intended documents, by the Court. In this respect, however, the Defendant failed to assert any facts that, *prima facie*, demonstrate that the intended documents are relevant to these proceedings; or indeed, any reasons showing why it had become apparent to file the alleged documents.

In light of the above, it is my considered view that the Defendant has failed to satisfy this Court that the purported fresh evidence it seeks to further adduce in this matter is relevant and material. It would, therefore, not be in the interest of justice to allow the same, solely on the allegation of the deponent in the Affidavits in Support and in Reply that they are relevant, without addressing my mind to the said documents.

It would have been prudent of the Defendant to exhibit the intended supplementary documents in its affidavits and allow the Court the chance to evaluate the intended fresh evidence, not in a vacuum, but with a point of reference.

In view of the foregoing, the Defendant's application for leave to file additional witness statements and supplementary bundle of documents is dismissed with costs to the Plaintiffs.

Dated at Lusaka the 30th day of January, 2018.

W.S. MWENDA (Dr)
HIGH COURT JUDGE