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**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

2019/HPC/0151



BETWEEN:

DING CONSULT SERVICES LIMITED

PLAINTIFF

AND

TOP STAR COMMUNICATIONS CO. LTD

DEFENDANT

Before Hon. Judge B. C. Mbewe in Open Court.

For the Plaintiff : *Mr. E. M. Kamwi with Miss A. Muyumbana
From Messrs. EMK and Associates*

For the Defendant : *Mr. L. Linyama with Mr. M. Chileshe from
Messrs. Eric Silwamba, Jalasi and
Linyama Legal Practitioners*

RULING

CASES AND AUTHORITIES REFERRED TO:

- 1. Amanita Zambiana Ltd, Diego Casili, Amanita Premium Oils Ltd,
Amanita Milling Ltd 2005/HPC/199*

2. *Kajimanga v. Chilemya (Appeal No. 50/2014) [2016] ZMSC 189 (2 August 2016)*
3. *Evidence Act Section 3*
4. *Article 118 (2) (e) of The Constitution of Zambia*

BACKGROUND AND ARGUMENTS

This ruling was necessitated, when during hearing of the matter, an objection was raised by Counsel for the Plaintiff against a question posed to PW1 by Counsel for the Defendant during cross examination regarding the documentary evidence that the witness had or had not produced before Court. An objection was raised by Counsel for the Plaintiff, Mr. Kamwi, regarding the line of questing that Counsel for the Defendant, Mr. Linyama directed towards PW1, which the record shows went as follows;

CROSS EXAMINATION OF PW1 BY MR LINYAMA

- Q.** Can you tell the Court what documents you have produced in aid of your case?
- A.** My Lord, we have produced bank statements, as well as contracts and we have also added proof of money transfers which are stamped by the banks.
- Q.** Today, in Court, when you were being led in evidence-in-chief, did you produce any documents?

A. No.

Mr. Linyama: My Lord, let the record reflect that the plaintiff has not produced a bundle before this Court and the only documents that the witness has produced are the two witness statements.

Mr. Kamwi : My Lord, though this is cross examination and Counsel is at liberty to ask any question, he is asking now the witness to answer a question of law. My Lord, the parties had discovery and inspection and exchanged documents and the documents therefore that were filed before the Court makes reference to those documents. So the question being posed and the answer being solicited, the witness is not competent to state because that is a question of law for determination by the Court and if the defendant has any issue with any of the documents, that is a matter for submission by Counsel.....

Mr. Linyama: My Lord,....PW1 was asked, "*have you produced any documents this morning?*" and his answer was "*No. I have not produced any document*". That is not a legal issue, we submit, My Lord, It's a factual issue.....My Lord, you guided and consistent with your guidance the plaintiff this morning opted to produce two witness statements, as their evidence and omitted to make an application to produce their bundle of documents. It is this omission that has led to PW1 to confirm that he has not laid before this Court any document. My Lord,....it is incumbent on a litigant on the Commercial List to apply that the witness statement together with the bundle of documents be considered as what the litigant

intends to rely upon in aid of his case. My Lord, that is what we call satisfying the foundation for production. My Lord, it might look like a very petty issue, but this matter has arisen in litigation in this jurisdiction. Your learned senior brother who at the material time was Mutuna J, as he then was, determined this matter or a matter of similar principles of law. In the case of **OTK Limited V Amanita Zambiana Ltd, Diego Casili, Amanita Premium Oils Ltd, Amanita Milling Ltd** the citation is **2005/HPC/199**, the Court, faced with a similar situation stated or held that, *“the steps to producing a document on the Commercial List is similar as the steps to be taken on the General List, there is no exception to procedural steps.”* Holding No. 12 in that case, My Lord, reads as follows and with your leave, I wish to quote, My Lord, *“the laying of a foundation before offering a document in evidence is a condition precedent to offering a document for production.”* The question is, has the plaintiff done this morning? The answer is “no”. It is incumbent on the plaintiff to show familiarity of the bundle and offer it to the Court, like he did with the witness statements....My Lord, from the **OTK case** which we have referred to, the mere filling of a bundle is not production. Production is at the trial. If the plaintiff has elected or omitted or refused to lay before this Court his bundle of documents, the records will show.....

RULING

After hearing the arguments by both Counsel on the objection raised by Mr. Kamwi, I adjourned the matter and informed the parties that I would deliver my Ruling thereon on resumption of trial on 16th July, 2020. The question that the Court is faced with in dealing with the Plaintiff's objection to the question posed to their witness relates to production of documents in a matter before the Commercial List in a civil matter. What amounts to production? Can discovery be construed to be production?

I will first contrast production in criminal matters from civil matters. It is standard procedure in criminal cases to lay a foundation of the document orally at trial by referring the witness to the document, the witness referring to its essential features as well as the author of the document, as criminal proceedings will typically not have gone through discovery or have a bundle of documents. Therefore, because of such 'ambush' it is necessary that documents that are placed on record are well known and well identified for reference's sake. In civil matter the process of discovery and inspection of documents is necessary to give the other side the liberty to inspect documents of the other party and raise objections where they perceive such objection is justifiable.

Halsbury's Laws of England 3rd Edition at Paragraph 643 states;

“Production of documents at trial. *When the authenticity of a document which is in possession of one of the parties is not in dispute, it is usual to take steps to secure the production and admission of it, or evidence of its contents, at trial by means of notices to produce and admit, followed after inspection by an agreement between the parties to admit the originals or copies for purposes of the trial.”*

From my reading of the learned treatise, Halsbury’s Laws, it is clear that the need to lay a foundation to the production of a document in a civil trial comes about where the existence of a document or its contents are in dispute or where a party cannot produce an original or best or primary evidence of the document. The process of discovery is clearly a means by which a document not in dispute is produced.

The Supreme Court in the case of **Kajimanga v. Chilemya (Appeal No. 50/2014) [2016] ZMSC 189 (2 August 2016)** highlighted the following:

1. The procedural rules relating to documentary evidence in civil matters are different from those applicable to criminal matters. This is essentially because the standard of proof in criminal matters is proof beyond reasonable doubt while proof in civil matters is on a balance of probabilities. For this reason, the rules relating to documentary evidence in criminal matters

require that each document must be specifically identified and produced by the relevant witness during trial before its contents can be publicized and relied upon to support a party's case.

2. It is trite law that, there is no discovery and inspection of documents and the filing of bundles of documents in criminal matters, unlike the position in civil matters where civil procedure rules provide for parties to have access to all documents in possession of their opponent and raise any objections that they may have to such documents.
3. Discovery of documents enables a party to see all material documents in the possession of his or her opponent and if need be, to take copies of the documents.
4. An objection to a document must be made timely to allow the opposing party to respond and, if possible, to make any relevant application. The objection cannot be validly made after the trial of the matter has closed. In the absence of an objection the Court is not precluded from taking into account documents contained in a bundle.

In the absence of a dispute or an objection to the production of a document during discovery and inspection, the document is

produced and becomes part of the Court record when it is filed in Court in a bundle and in the matter *in casu*, Counsel for the Defendant clearly raised legal issues with PW1 when he asked him;

Q. *Can you tell the Court what documents you have produced in aid of your case?*

A. *My Lord, we have produced bank statements, as well as contracts and we have also added proof of money transfers which are stamped by the banks.*

Q. *Today, in Court, when you were being led in evidence-in-chief, did you produce any documents?*

A. No.

The witness's first answer was not a straight "no" and he listed several documents which he believed he had produced showing his layman understanding of produce. When re-asked, that is when he simply answered "no". This is something Counsel should have left for his submissions and left it to the Court to determine at that time.

I have carefully read the **OTK Case** cited by Counsel for the Defendant, which issue I note, related to the authentication of e-mails and unsigned contracts in the bundle and not all documents

in that bundle, which the Defendant's Counsel therein objected to, hence the Courts statement that *"The objection, as is reflected in paragraph 9 of the affidavit in support is that the emails have not been authenticated. The lack of authentication as I have found earlier arises from the Plaintiff's witness' failure to lay a proper foundation prior to the introduction of the emails. I have in the earlier part of this judgment highlighted the test for authentication...."* In the matter *in casu*, it has not been submitted at any time that the Defendants are disputing or objecting to any of the documents produced by the Plaintiff and we do not have a need to authenticate any of the documents in the Plaintiff's bundle of document. Therefore the Defendant's line of questioning and arguments advanced against the objection raised by Counsel for the Plaintiff is misplaced.

In any event **Article 118 (2) (e)** of **The Constitution of Zambia** states the following:

"118 (2) in exercising judicial authority, the courts shall be guided by the following principles:

(e) Justice shall be administered without undue regard to procedural technicalities;...."

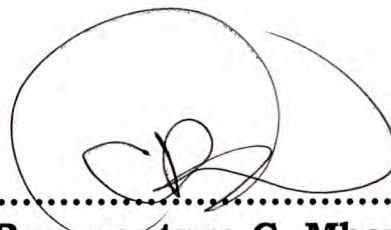
Even where the Court finds that procedural error has been occasioned in a matter and the same does not go to the substance

of the matter, such justifiable error can itself be rectified to allow that justice is rightly administered.

Therefore, even if Counsel for the Plaintiff made a procedural error in not asking PW1 whether he wished his bundle of documents to form part of his evidence, the said bundle is already before the Court and is part of the record filed into Court and such error can be rectified which it hereby is as it will not cause the Defendant any injustice or prejudice the defending of the claim as the documents in question already underwent discovery and were not disputed or objected to at the time.

From the foregoing I therefore sustain the objection by Counsel for the Plaintiff and shall strike out the questions and answers asked so far in cross examination.

Delivered in Open Court at Lusaka this 16th day of July, 2020.

A handwritten signature in black ink, consisting of several loops and a central vertical stroke, positioned above a horizontal dotted line.

**Bonaventure C. Mbewe
HIGH COURT JUDGE**