

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

2013/HP/1213

BETWEEN:

CELLNET COMMUNICATIONS (Z) LIMITED

PLAINTIFF

AND

SAVENDA MANAGEMENT SERVICES LIMITED DEFENDANT

Before: The Hon. Mr. Justice Charles Zulu.

For the Plaintiff: Mr. Chitundu and Mr. M. Kunga, Messrs. Barnaby, Chitundu & Advocates.

For the Defendant: Mr. N. Mulemba, Messrs. Andrew Musukwa & Advocates, & Ms. D. Chisengalumbwe, Messrs. Kapungwe Nchito Legal Practitioners.

RULING

Case referred to:

- 1. *Vernon v Bosley (NO. 2) [1997] 1 ALL E.R. 614.***

Legislation referred to:

- 1. *The High Court Rules (HCR), Chapter 27 of the Laws of Zambia.***
- 2. *Rules of the Supreme Court (RSC) 1965, White Book 1999 Edition.***

This ruling is in respect of the Plaintiff's application for leave to file a supplementary bundle of documents out of time made pursuant to Order III r. 2 of the **High Court Rules (HCR), Chapter 27 of the Laws of Zambia.**

The application was supported by an affidavit in support. The Defendants equally filed an affidavit in opposition and skeleton arguments.

A brief background to this application is that, an order for direction was issued dated January 16, 2014. The Plaintiff filed its bundle of documents and pleadings dated March 23, 2016, and supplementary bundle of documents dated February 3, 2017. Equally, the Defendant filed its bundle of documents and pleadings dated May 2, 2018. Finally, trial took off on May 15, 2019. During trial the Plaintiff's witness, Simon Njuguna (PW2), did lead evidence in respect of issues relating to the counter-claim, and aspects of his evidence touched on documents that were not part of the Plaintiff's bundle of documents. Consequently, the present application was made seeking to file a supplementary bundle of documents, and the nature of the documents allegedly relate to *Inter- Site – Transfere*, which PW2 referred to in his evidence in chief.

In an affidavit in support of the application deposed to by Mr. Simon Njuguna, it was deposed that at the time the Defendant's filed its counter-claim, the Plaintiff had already filed its bundle of documents, which was filed on March 23, 2015, and that by then issues regarding the *Inter- Site-Transfere* documents were not in contention.

An affidavit in opposition was deposed to by Clever Siame Mpho, it was deposed that following the Defendant filing its amended defence and counter-claim on February 8, 2016, the Plaintiff was already aware of the

said counter-claim. He alleged that the Plaintiff's application was an afterthought to remedy their case, following the cross examination of PW1.

The gist of the submissions by the Plaintiff's Counsel, Mr. Chitundu, was that prior to the parties complying with the order for direction, the Defendant amended its defence, with the inclusion of a counter-claim, seeking *inter alia* an order to return the equipment/tools or the value of the equipment/tools alleged to be in the Plaintiff's possession. It was submitted that the said tools or equipment were collected by the Defendant, and recorded on a document dubbed *Inter- Site-Transfere* allegedly executed between the parties. According to Counsel it was the same document the Plaintiff was seeking to produce.

Before I proceed to give a summary of submissions by the Defendant, it is opportune to state that post the hearing of this application, which took place on May 30, 2019, the Plaintiff's Counsel, filed written submissions dated May 31, 2019, without the leave of the Court. This was certainly unacceptable, and I find it intolerable. I will disregard those submissions so as not to prejudice the other party.

In opposing the application, Mr. Mulemba contended that the Plaintiff's application was offensive to the rules of court, and a departure from the ordinary and acceptable practice. That rules of the court ought to be adhered to strictly. It was added that the Court should not entertain the inordinate and inexcusable delay by the Plaintiff to file the said supplementary bundle of documents.

Mr. Mulemba further argued that the Plaintiff was aware of the Defendant's counter-claim since February 8, 2016. And that to allow the Plaintiff to file a supplementary bundle of documents during trial would be prejudicial to the Defendant as the Plaintiff had closed its examination

in chief with two of its witnesses. And that the defendant would not have the chance to cross examine the first witness (PW 1) on the said documents.

I have carefully considered the application, the arguments for and against. It cannot be overstated that having regards to the functions of pleadings, discovery and inspection; when an order for direction has been issued, parties must comply with the time lines given. And all relevant documents must be made available for inspection and produced in the respective bundles of documents. This is desirable so that when the matter is set down for trial, time is not wasted on going back to discovery and inspection of documents via supplementary bundle of documents during trial. Notwithstanding, the fact that the time lines ordered in the order for direction has passed and the trial of the matter is fully fledged. There is nothing that procedurally stops a party to apply for leave to file supplementary bundle of documents at any stage of the trial, as the ends of justice in every case may dictate.

Above all, when a matter is pending litigation there is a continuing obligation imposed on the parties to produce all relevant documents in their custody. Practice Direction recorded under paragraph 24/2/17 of the **White Book 1999 Edition** is instructive, the same provides:

Continuing obligation to give discovery

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 (cf. O.18, rr.8 (»text) and 9), 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 (Mitchell v. Darley Main Colliery Co. (1884) Cab. & Ell. 215). 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. (emphasis supplied)

In consolidation of the above principle, I find sure comfort in the English case of **Vernon v Bosley (NO. 2) [1997] 1 ALL E.R. 614**, wherein Evans LJ, stated that:

A party to civil litigation was under a continuing obligation under RSC Ord. 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.

Therefore, considering the perpetual obligation subject to the pendency of the matter that the parties hereto have towards the Court, that is to, disclose all relevant documents in their possession, I am of the settled opinion that it is imperative to allow the Plaintiff's application to file the said supplementary bundle of documents. Further, I do not discern any prejudice that will be occasioned to the Defendant by allowing this application.

All in all, leave is granted to the Plaintiff to file the supplementary bundle of documents, same to be filed within fourteen days from the date of this Ruling.

Costs hereof to be borne by the Plaintiff.

DATED THIS 7TH DAY OF FEBRURAY, 2020.

A handwritten signature in dark ink, consisting of several overlapping, horizontal, wavy lines that form a stylized, somewhat illegible name.

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THE HON. MR. JUSTICE CHARLES ZULU