

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

2005/HPC/0199

(Civil Jurisdiction)

B E T W E E N:

OTK LIMITED

PLAINTIFF

AND

AMANITA ZAMBIANA LIMITED

1st DEFENDANT

DIEGO GAN-MARIA CASILLI

2nd DEFENDANT

AMANITA PREMIUM OILS LIMITED

3rd DEFENDANT

AMANITA MILLING LIMITED

4th DEFENDANT

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA, ON 12th DAY OF APRIL, 2011.

For the Plaintiff : Mr. S. Chisenga, Mr. Chama and Ms. S. Chocho of Corpus
Legal Practitioners

For the Defendants : Mr. A. A. Dudhia of Musa Dudhia and Company

R U L I N G

Cases referred to:

- 1. *R -VS- Shephard (1993) 1 ALL ER page 224.***
- 2. *Greene -VS- Associated Newspapers Ltd (2004) EWCA Civ. 1462.***
- 3. *Galaunia Farms Limited -VS- National Milling Company Ltd (2004) ZR 1.***
- 4. *New Plast Industries -VS- The Commissioner of Lands and The Attorney General (2001) ZR page 51.***
- 5. *Stamp Duty Commissioner -VS- African Farming Equipment Co. Ltd (1969) ZR 32.***
- 6. *Ruth Kumbi -VS- Robinson Kaleb Zulu, SCZ No. 19 of 2009.***

7. Setrec Steel and Wood Processing Ltd and Others –VS- Zambia National Commercial Bank Plc, Appeal No. 39 of 2007.

Other authorities referred to:

- 1. Supreme Court Practice, 1999, Volume 1.**
- 2. The Evidence Act, Chapter 43 of the Laws of Zambia.**
- 3. Edward J. Imkwinkelried, Evidentiary Foundations 4th edition, Lexis Law Publishing, Charlottesville, Virginia, 1998.**
- 4. The Electronic Communications and Transactions Act, No. 21 of 2009.**
- 5. High Court Act, Chapter 27 of the Laws of Zambia.**
- 6. English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia.**
- 7. English Law (Extent of Application) (Amendment) Act, No. 14 of 2002.**
- 8. Criminal Evidence Act, 1984, of the England.**

This is the Defendants' application for directions pursuant to Order 25 rule 1 and Order 72 rule 8 of the **Supreme Court Practice**, 1999, (**white book**). It is made by way of summons and supporting affidavit, both filed on 24th January, 2011. The application is also supported by a list of authorities and skeleton arguments.

The Plaintiff's response is by way of an affidavit in opposition and skeleton arguments, filed on 7th March, 2011.

The affidavit in support was sworn by one Arshad Abdulla Dudhia, counsel for the Defendants. It revealed that, the Plaintiff filed its bundle of documents on 15th January, 2009; the said bundle contains, *inter alia*, emails purportedly exchanged by it and the First Defendant's representative; the Defendants object to the production of the said emails into evidence on the ground that they have not undergone the normal procedure of a foundation being laid before their production into evidence; further that, the emails have not been authenticated and in the absence of the Plaintiff showing that the integrity of the purported emails was maintained, the Defendants will be unfairly prejudiced; and the

Defendants request for the exclusion of the alleged emails from evidence in the interests of justice.

The affidavit in opposition was sworn by one Sidney Chisenga, counsel for the Plaintiff. It revealed that, the Defendants failed to object to the emails at discovery stage of the action which was by way of list, pursuant to the order for direction issued by this Court; the objection raised is not representative of settled law; at discovery stage there is no determination of any foundational issue; the Plaintiff's witness statement has laid sufficient foundation for the emails in issue; no evidence has been rendered by the Defendants to show that the emails are a fabrication or that they were altered; and there is no prejudice that will be occasioned to the Defendants by the production of the said emails.

The matter came up for hearing on 18th March, 2011. Along with making verbal submissions, counsel for the parties indicated that they relied upon the skeleton arguments filed herein.

In arguing the application, Counsel for the Defendants, Mr. A. A. Dudhia, began by giving a background to the matter in respect of the dates when the Plaintiff filed the bundle of documents. He went on to highlight that the emails that are in dispute are at pages 27 to 47 and 15 to 157 of the Plaintiff's bundle of documents and pages 28 to 47 of the supplementary bundle of documents. It was argued further that although the Plaintiff has purported to tender the emails into evidence by making reference to some of them in the witness statement of François Smit, no foundation for production of same was laid for purposes of authenticating them. The Defendants therefore object to the production of the said emails along with the unsigned contract.

Counsel, proceeded to justify the application by reference to Order 25 rule 1 of the *white book* and to define the word *document*, by reference to Section 2 of the *Evidence Act*. It was argued, in this respect that, emails are also

documents by virtue of the said definition and as such, they needed to be authenticated before their production into evidence, as is the case with a tape recording or transcript made by a device. The test, it was argued, is that the proponent must present proof that the article is what the proponent claims it to be, and, whether sufficient evidence had been produced to support a rational jury finding that the letter is genuine. My attention in this respect was drawn to the learned author **Edward J. Imwinkelried, Evidentiary Foundations**. Counsel proceeded to emphasize the need for authentication of the emails by reference to Section 7 of the **Electronic Communications and Transactions Act** and the cases of **R -VS- Shephard (1)** and **Greene -VS- Associated Newspapers Ltd (2)**. In summing up on the argument on admissibility of email evidence, counsel argued that the need for authentication arose from the corruptible nature of data messages.

On the issue of the unsigned contracts, counsel referred me to pages 43 to 46 of the Plaintiffs bundle of documents. It was argued that the same were not executed and are mere templates, as such they can not be deemed to be in existence. My attention in this respect was drawn to the case of **Galaunia Farms Limited -VS- National Milling Company Limited (3)**.

Mr. S. Chisenga, counsel for the Plaintiff, opposed the application on two limbs, namely, that the application is untenable at law as pleadings have closed, and that the emails referred to are admissible. Regarding the first limb, he argued that at discovery stage the Defendants did not object to the production of any documents. He argued further that Order 25 rule 1 and Order 72 rule 8 of the **white book**, pursuant to which the application is made, prescribe a time limit within which to make such an application. In the case of the former Order, within one month after the close of pleadings and in the latter, before the pleadings are deemed to be closed. He contended that the pleadings in the matter were closed in accordance with Order 18 rule 20 of the **white book**. This fact notwithstanding, the Defendants had failed or neglected

to comply with the order for directions issued on 10th October, 2008, which the Plaintiff had complied with in full. Counsel argued further that by citing Orders 25 rule 1 and 72 rule 8, of the **white book**, the Defendants had commenced the application using the wrong law. He argued in this respect that the Order that makes provision for directions is Order 53 rule 8 of the **High Court Act**. The said Order, he argued, catered sufficiently for directions and as such there was no need to resort to the **white book**. He justified the said argument by alleging that resort to the **white book** should only be made where the **High Court Act** is silent or not fully comprehensible. My attention in this respect was drawn to the case of **New Plast Industries -VS- The Commissioner of Lands and The Attorney General (4)**.

The second limb related to the admissibility of emails. In arguing this limb, Mr. S. Chisenga began by highlighting the difference in the mode of receipt of evidence on the commercial list and general list. He stated in this respect that on the commercial list there is use of witness statement which were not in the form of questions and answers. This was unlike the general list which required questions and answers with receipt of *viva voce* evidence. There was therefore no oral examination-in-chief on the commercial list. Notwithstanding the said distinction, counsel argued further, the Plaintiff's witness had laid more than sufficient foundation in his witness statement filed into Court on 14th July, 2010. Further that, the Defendants have failed to clearly show which documents have not had any foundation. Counsel proceeded to argue that the Defendants can not equate rules of oral examination to a witness statement. It was also argued, that all the rules and the authority of **Edward J. Imwinkelried, Evidentiary Foundations**, relied upon by the Defendants, relate to oral examination of witnesses in-chief and not evidence tendered by way of witness statement as done on the commercial list.

Regarding the authentication of evidence, counsel argued that the Defendants' counsel had relied upon common law principles. It was argued in this respect

that the case of **R –VS- Shephard (1)** was not applicable as there was Zambian legislation on the issue. He, therefore, urged me to have sight of Zambian legislation and referred me to Sections 2 and 8 of the **Electronic Communications and Transactions Act**. The said **Act** at Section 2, he argued, defined email, while at Section 8, highlighted application of rules of evidence to emails and how same should be authenticated. With regard to the latter, counsel argued that, the emails can be authenticated at trial by an officer of the Plaintiff as he testifies. He proceeded to argue that the Defendants did not deny that they sent the emails and that there is nothing to show that the Plaintiff did not use its computers appropriately which distinguishes the case of **R –VS- Shephard (1)**. He ended arguments on this issue by stating that the Defendants did not object to production of the emails at discovery stage, the application was therefore an after thought which had no basis.

On the issue of the unsigned contracts, it was argued that, the same were attachments to the emails and they are admissible. The law he argued, permits unsigned contracts to be operative. My attention in this respect was drawn to the case of **Stamp Duty Commissioners –VS- African Farming Equipment Company Limited (5)**.

In reply to the Plaintiff's arguments, Mr. A. A. Dudhia began by referring the Court to the Defendants' notice to produce and object to documents filed on 4th September, 2009. He proceeded to argue as follows; the pleadings had not closed, therefore it was not too late to raise the objection as a Court can entertain any interlocutory application at this stage; the parties were still going through the discovery process hence the filing of the notice to object; and a party can not merely file bundles of documents without first sending the list of documents to the other party and subsequently, inspecting the documents. It is at this stage of inspection that objection is raised.

Regarding, admissibility of the emails, counsel argued that the same are only admissible if the Plaintiff can prove their authenticity. This, he argued further, is done by bringing an expert witness who will verify that he has examined the computer, the emails and IP address and found that the emails have not been altered. In this respect, counsel likened email evidence to evidence of a tape recording which he stated is easy to tamper with. He argued further, that the Plaintiff's witness statement has no expert report and there is no notice by the Plaintiff to the effect that it intends calling an expert. It was also argued, that no proper foundation has been set by the Plaintiff's witness for the introduction of the emails. He ended by stating that the Defendants objected to the production of the unsigned draft contracts in the Plaintiff's bundle of documents.

I have considered the affidavits and arguments by counsel for the parties. Before I highlight and determine the issues in contention, it is important that I first make a determination on Mr. S. Chisenga's objection to Mr. A. A. Dudhia's reliance on Orders 25 rule 1 and 72 rule 8 of the **white book**, in prosecuting this application. I also intend making a determination on Mr. S. Chienga's distinction of the commercial list from the general list and application of the authorities articulated by the Defendants to the former list. It was argued in respect of application of the **white book** that, the law is to the effect that where the **High Court Rules** provide sufficient recourse, then a party to an action should rely on the **High Court Rules**. Resort to the **white book** should only be made where the **High Court Rules** are silent or deficient. This, it was argued, is as per the principle laid down in the case of **New Plast Industries – VS- The Commissioner of lands and Attorney General (4)**. It was argued further that directions on the commercial list are given at the scheduling conference pursuant to Order 53 rule 8 of the **High Court Rules**.

The ***New Plast Industries (4)*** case, as Mr. S. Chisenga argued, laid down the principle for the application of the ***white book*** in Zambia. It states in this respect at page 51 as follows;

“The English White book could only be resorted to if the Act was silent or not fully comprehensive”

Subsequent to the Supreme Court handing down of this decision, in 2002, the ***English Law (Extent of Application) Act***, which ***Act*** defines the extent to which the Law of England applies to Zambia, was amended. The amendment was by way of the ***English Law (Extent of Application) (Amendment) Act, 2002***, which states, *inter alia*, under Section 2 as follows;

“The principal Act is amended in section two by –
(a) The insertion, at the end of paragraph (d) of the word “and”
(b) The insertion after paragraph (d) of the following new paragraph:
(e) the Supreme Court Practice Rules of England in force until 1999: ...”

Flowing from this amendment, Section 2 of the ***English Law (Extent of Application) Act*** states, *inter alia* as follows;

“Subject to the provisions of the constitution of Zambia and to any other written law -
(a) The common law; and
(b) The doctrines of equity; and
(c) The statutes which were in force in England on 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and
(d) Any statutes of later date than mentioned in paragraph (c) in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or otherwise; and
(e) The Supreme Court Practice Rules of England in force until 1999: ...

Shall be in force in the Republic.”

(The underlining is the Court’s for emphasis only).

By virtue of this amendment, the ***white book*** is now part of Zambian law and is no longer to be resorted to only where the ***High Court Act*** or any other civil laws are deficient. This fact was restated by the Supreme Court in the case of ***Ruth Kumbi –VS- Robinson Kaleb Zulu (6)*** in which it was held at page R 13 as follows;

“As argued by State Counsel, before Section 2 of the English Law (Extent of Application) Act (5), cap 11 was amended by Act No. 14 of 2002, the Rules of the Supreme Court only filled gaps in our own Practice and Procedure, with the insertion of e) in Section 2 of the English Law (Extent of Application Amendment) Act, Cap 11 (5), the whole of 1999 edition of the white book has been incorporated in our Rules of Procedures. Now by statute, the Zambian Courts are bound to follow all the Rules and procedure followed in England as stated in the 1999 edition of the white book. The entire provisions of the Rules of the Supreme Court as expounded in the White Book, 1999 edition including the decided cases, are now Zambian law by statute and as such binding on the Zambian Courts.”

In view of the foregoing, I find no merit in Mr. S. Chisenga’s argument and accordingly dismiss it. The Defendants are therefore on firm ground in relying upon the provisions of the ***white book***.

Regarding the perception by Mr. S. Chisenga that the practice on the commercial list is distinct from the general list, the basis for the argument was that, directions on the commercial list are issued by way of Order 53 rule 8 of the ***High Court Rules*** and that evidence is given by way of witness statements and not *viva voce*. In addressing this issue it is important to restate the

rationale for the introduction of the commercial list. The said list was introduced as a fast track section of the High Court to assist in the speedy disposal of commercial matters. It is not a separate Court from the High Court, general list, hence its being referred to as the commercial list and not commercial court. The requirement for an order for directions to be issued by the Judge pursuant to Order 53 rule 8 of the **High Court Rules** is not a significant departure from the **High Court Rules** as they apply to the general list, it is merely intended to ensure the Judge takes charge of the matter at an early stage and tracks it to its logical conclusion. The same is true of the requirement for witness statements. These are just a way of ensuring that the evidence-in-chief is received with ease and speed to ensure speedy disposal of the matter. The procedure as it relates to reception of evidence-in-chief on the commercial list is therefore not distinct from that on the general list. Therefore, the same rules of evidence apply to both lists. Further, the **High Court Rules** as they apply on the general list are not to be ignored on the commercial list. This position was restated by the Supreme Court in the case of **Setrec Steel and Wood Processing Limited and Others -VS- Zambia National Commercial Bank (7)** where it was held at page J11 as follows;

“Thus, the rules for Commercial Actions must not be read in isolation from, or in derogation from the Rules of the High Court general list”.

In view of the foregoing, whereas it is true that Order 53 rule 8 of the **High Court Rules** makes provision for directions on the commercial list, it does not mean that the Defendants can not have recourse to directions under Orders 25 and 72 of the **white book**, in appropriate instances as I shall highlight in the latter part of this ruling.

I now turn to determining the application as argued by counsel. The issues for determination in this application as I see them are as follows; is the application

properly conceived in terms of timing and purpose?; and is the objection raised by the Defendants tenable?

Regarding issue 1, the Defendants have anchored their application on the provisions of Order 25 rule 1 and Order 72 rule 8 of the **white book**. It has been argued in this respect that the Court has power to issue directions whether or not pleadings have closed. The Plaintiff's Counsel has argued that directions can not be issued after pleadings have closed.

Order 25 rule 1 of the **white book** states as follows;

“(1) With a view to providing in every action to which this rule applies, an occasion for the consideration by the Court of the preparations for the trial of the action, so that –

(a) All matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with, and

(b) Such directions may be given as to the future course of the action as appear best adopted to secure the just, expeditious and economical disposal thereof,

The Plaintiff must, within one month after the pleadings in the action are deemed to be closed, take out a summons (in these rules referred to as a summons for directions) returnable in not less than 14 day.”

On the other hand order 72 rule 8 (1) states as follows;

“Notwithstanding anything in Order 25, rule 1 (1) any party to an action in the commercial list may take out a summons for directions in the action before the pleadings in the action are deemed to be closed.”

The Order ends by referring the reader to Part XII of the guide, which appears at Order 72 rule A 15 of the **white book** which states at 12.1 as follows;

“The summons for directions in the Commercial Court is governed by 0.25. The summons may under 0.25, r. 1 (7) and 0.72, r. 8 (1) be issued by any party at any time after any defendant has given notice of intention to defend and whether or not pleadings are closed. In the ordinary way, however the appropriate time to issue the summons in a commercial action is after inspection of documents has been completed. The reason is that the main purpose of the summons is to give directions for trial and, usually, at any earlier stage insufficient is known of the actual issues which will have to be tried and the witnesses to be called and an adequate estimate of the length of trial can not be given”

It is clear from these two provisions of the law that the directions envisaged by the said Orders can be issued at any time by the Court on an application by any of the parties. It is therefore not restricted to a month after pleadings have closed or prior to their closure. Further, not only does such an application serve the purpose of giving directions for trial, but also to deal with any interlocutory application that has not been dealt with. The application before me is an interlocutory application which arises from the Defendants’ notice to object to documents filed on 4th September, 2009. It comes in the wake of failure by the parties to convene for inspection of documents, at which stage the Defendants would have raised the objection. It has become common practice now for counsel to ignore or neglect to inspect documents, and proceed straight to filing bundles of documents. This is what happened in this case, and the practice is not only wrong, but is frowned upon by the Courts. Further, the fact that the parties have deliberately ignored taking certain steps set out in the order for directions, does not take away a party’s right to object to certain documents that are included in the bundle of documents. I therefore

find that the Defendants are on firm ground in moving this motion at this stage of the proceedings and for the purpose it is sought to achieve.

Regarding issue 2, the Defendants in raising the objection have stated that the Plaintiff has not authenticated the emails to eliminate the possibility of compromising them and that there is no indication that an expert witness will be called to testify on the workings of the computer and that the possibility of corrupting the emails has been eliminated. Reliance was made on **Edward J. Imwinkelried, Evidentiary Foundations**, the cases of **R –VS- Shephard (1)**, and **Greene –VS- Associated Newspapers Limited** and Section 7 of the **Electronic Communications and Transactions Act**. It was argued further, that the Plaintiff has purported to tender the email into evidence by making reference to them in the witness statement of Francois Smit. This it was argued, is in the absence of having laid a foundation for the production of the same, which foundation, entails an important and necessary element of authenticating the evidence to be adduced.

Edward J. Imwinkelried, Evidentiary Foundations, at page 2, states as follows in respect of laying a foundation prior to offering a document into evidence;

“For our purpose, the most important procedural rule is that the proponent of an item of evidence must ordinarily lay the foundation before formally offering the item into evidence. For example, the proponent of a letter must present proof of its authenticity before offering the letter into evidence. Proof of the letter’s authenticity is part of the letter’s “foundation” or “predicate”. Substantive Evidence Law makes proof of authenticity a condition precedent to the letter’s admission into evidence.”

On the question of authenticity the same author at page 41 had this to say;

“The common law generally requires that the proponent of evidence prove the evidence’s authenticity as a condition to the admission of the evidence. To authenticate an item of evidence the proponent must present proof that the article is what the proponent claims that it is.”

The foregoing clearly demonstrates the need for laying a foundation before offering a document into evidence. It also emphasizes the fact that it is a condition precedent to offering the document for production.

In respect of emails, the relevant statute is the ***Electronic Communications and Transactions Act***. The said ***Act*** on “production of document or information,” states in Section 8 as follows;

“(1) In any legal proceedings, the rules of evidence shall not be applied so as to deny the admissibility of a data message in evidence –

(a) on the mere grounds that it is constituted by a data messages;

or

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message shall be given due evidential weight.

(3) In assessing the evidential weight of a data message, regard shall be had to-

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained;

(c) the manner in which its originator was identified; and

(d) any other relevant factor.”

(4) A data message made by a person in the ordinary course of business, or a copy or printout of, or an extract from, the data message certified to be correct by an officer in the service of such person, shall on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law, be admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”

The ***Evidence Act*** under Section 3 states as follows;

“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say:

(a) If the maker of the statement either –

(i) Had personal knowledge of the matters dealt with by the statement; or

(ii) Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) If the maker of the statement is called as a witness in the proceedings:”

It is clear from all the authorities cited above, that it is condition precedent that certain conditions should be met before a document is produced. These

conditions are akin to laying a foundation, which invariably leads to the authentication of the document. It is also clear that a person in the service of the person or entity intending to rely on the data message may produce it.

The Plaintiff in opposing the application has among other things, argued that in the evidence, Francois Smit, for the Plaintiff, has laid down sufficient foundation for the production of the emails in his witness statement. This is at paragraphs 25 and 28 of his witness statement. A perusal of the said paragraphs reveals that the witness merely states the contents of the emails. There is no foundation laid for their production which properly authenticates them. I therefore find that their introduction falls far short of the requirements laid down by the common law as articulated by **Edward J. Imkwinkelried** and Section 8 of the **Electronic Communications and Transactions Act**.

In view of my findings the question that remains to be determined is what is the consequence of the Plaintiff's omission. The Defendants' counsel has argued, in this respect and relying on the cases of **R -VS- Shephard (1)**, and **Greene -VS- Associated Newspapers Limited (2)** that in the absence of the Plaintiff bringing an expert witness to prove that he has examined the computer, and the emails and found that they were not tampered with the evidence is not admissible. In response, the Plaintiff has argued, among other things, that the Defendants have not denied that the emails represent communication passing between the parties.

The main holding in the case of **R -VS- Shephard (1)** is at page 226 and it is as follows:

"If the prosecution wished to rely on a document produced by a computer they had to comply with S69 of the 1984 Act in all cases; the operation of S69 was not limited to cases falling within S24 of the Criminal Justice Act 1988 relating to hearsay evidence. However, for the purposes of S69(1) of the 1984 Act, proof that a computer was reliable could be provided by calling a witness who

was familiar with its operation in the sense of knowing what the computer was required to do and who could say that it was doing it properly, and as such a witness need not be someone responsible for the operation of the computer within para 8(d) of sch 3 to the 1984 Act or a computer expert. Accordingly, since the store detective had been fully familiar with the operations of the store's computer, she had been fully qualified to give the evidence required by Section 69 and in the light of her evidence the till rolls were properly admitted as part of the Crown's case."

In arriving at the said holding, the Court in the ***R -VS- Shephard (1)*** case was interpreting the provisions of Section 69 of the ***Criminal Evidence Act 1984 of England***. The said Section is reproduced in full at page 228 of the said case and it states as follows;

"(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown (a) that there are no reasonable grounds for believing that the statement is accurate because of improper use of the computer; (b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and (c) that any relevant conditions specified in rules of Court under subsection (2) below are satisfied.

(2) Provision may be made by rules of Court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided as may be so required."

It is evident from the foregoing two quotations that the ***R -VS- Shephard (1)*** case lays down the principle for reception of computer generated evidence in criminal and not civil matters. Further, in doing so it interprets Section 69 of the ***Criminal Evidence Act, 1984***, of the England, which said ***Act*** is not applicable to Zambia. To that extent the ***R -VS - Shephard (1)*** case is irrelevant in as far as what the law is in Zambia on the issue. Further, even if I

were for a minute to assume that the case is relevant, it contradicts the argument advanced by counsel for the Defendants, that there is need for an expert to testify as to the workings of the computer prior to authenticating computer generated evidence. My finding is based on the fact that, in the **R – VS- Shephard (1)** case, the Court allowed reception of computer generated evidence from a witness who is not an expert in computers and without testimony of an expert as to the workings of the computer. This is the situation in Zambia as well, because Section 8(4) of the **Electronic Communications and Transactions Act**, allows for receipt and admission by the Court of a data message from a person other than an expert. The Section states in part, in this respect, as follows;

“A data message made by a person in the ordinary course of business, or a copy or printout of, or an extract from, the data message certified to be correct by an officer in the service of such person, shall on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law, be admissible in evidence...”

I therefore do not accept the argument by counsel for the Defendants that there is need in the authentication process for the Plaintiff to parade an expert witness.

It is also important to note as counsel for the Plaintiff has argued, that the Defendants do not unequivocally deny that the emails actually did pass between the parties. The Defendants have also not alleged that the emails were fabricated or in any way altered by the Plaintiff. This is what distinguishes the facts in this case from the facts in the case of **Greene –VS- Associated Newspapers Limited (2)**, as in that case the email in issue was challenged on the basis of being a forgery. 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 witness's 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 as per **Edward J. Imwinkler**. He states in this respect at page 41 that;

“To authenticate an item of evidence, the proponent must present proof that the article is what the proponent claims that it is”

This is what the Plaintiff's witness needs to do, and the defect in the witness statement having been identified as such can be cured without the Defendants being prejudiced in the defence of the matter. This is especially so, because trial has not yet commenced.

By Order 38 rule 2 A subrule 9, of the **white book**, a witness statement is a document in the proceedings and can be amended. The said Order states in this respect as follows;

“The written statement of a witness served pursuant to the direction of the Court under para. (2) constitutes “a document” in the proceedings, and falls within the amending power of the Court under O.20, r. 8(1).”

Further, Order 20 rule 8(1) cited above states as follows;

“For purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.”

Pursuant to the said Order, I hereby order that the Plaintiff do amend the witness statement of one Francois Smit, to provide a foundation for the production of the emails. The Plaintiff to file the amended witness statement within 14 days of the date hereof.

Regarding the unsigned contract it was argued on behalf of the Defendants that the same can not be deemed to be in existence. As such they can not be submitted into evidence as they are not valid. My attention in this respect was drawn to the case of ***Galania Farms Ltd –VS- National Milling Company Ltd (3)***. The holding in the said case at page 10 was as follows;

“...there was no contract as the Appellant had, by making a counter offer of 2500 metric tons rejected, and so terminated, the original offer of 2000 metric tons.”

The said case discusses at length the effect of a counter offer. It also, to a large extent, states the effect of an unsigned contract. It does not state that an unsigned contract can not be produced in evidence. I therefore find that the said case does not aid the Defendants in their argument on this issue. Further, the holding in the case of ***Stamp Duty Commissioner –VS- African Farming Equipment Company Limited (5)*** referred to me by counsel for the Plaintiff, has a contrary view. The said case states at page 32 as follows;

“It is not necessary that an agreement should be signed by both or all the parties for it be operative against a party who has signed it.”

The contracts will be produced, except that when I render my judgment I shall state what their effect is.

In conclusion, the Defendants’ application succeeds, to the extent I have stated above and I accordingly uphold it. I also award the Defendants costs of and incidental to this application.

The matter to come up for a Status Conference on 24th May, 2011 at 14:10 hours, by which date I expect the parties to have complied with the order for directions in full.

Leave to appeal is granted.

Delivered at Lusaka this 12th day of April, 2011.

Nigel K. Mutuna
HIGH COURT JUDGE