

IN THE HIGH COURT FOR ZAMBIA

2008/HP/0383

AT THE PRINCIPAL REGISTRY

AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

JONES MWANZA

1ST PLAINTIFF

MICHAEL KUWANI & OTHERS

2ND PLAINTIFF

AND

SABLE TRANSPORT LIMITED

DEFENDANT

**BEFORE HON. MADAM JUSTICE P. K. YANGAILO ON 21ST
AUGUST, 2017.**

For the Plaintiffs:

*Mrs. M. Zaloumis, Ms. I. Chabe & Mr. J.
Katati - Dove Chambers*

For the Defendants:

*Mr. L. Mwanabo - L. M. Chambers & Mr. F.
Mutale - F. M. Legal Practitioners*

RULING

LEGISLATION REFERRED TO:

1. *High Court Act, Chapter 27 of The Laws of Zambia; and*
2. *The Rules of the Supreme Court (White Book) 1999 edition.*

This is an application by the Defendant for leave to file the Defendant's Supplementary Bundle of Documents out of time brought pursuant to **Order III Rule 2** of **The High Court Rules**¹. The application was supported by an Affidavit sworn by one FELIX MUTALE, Co-Counsel for the Defendant and filed herein on 14th July, 2017. On the said date, the Defendant also filed herein the Defendant's Supplementary Bundle of Documents. Trial herein commenced on 7th December, 2016 after closure of pleadings and the Plaintiff has already called three (3) witnesses, who gave evidence in chief, were cross-examined and re-examined.

In the Affidavit in Support of the application, it was deposed that at the time of closure of pleading Mr. Mutale was co-opted as a Co-Advocate for the Defendant. That from the time he was co-opted as Co-Advocate and after perusal of the record, it became apparent to him that he needed more information necessary for the prosecution of the Defendant's case. That he has since been availed with information which would be of relevance to the fair determination of this matter by this Court. That the said document which he wishes to produce does not introduce any new matters apart from what the parties are deliberating on. He exhibited the document as "FM 1" attached to the Affidavit in Support of the application. The said document is a copy of a report from the Mines Safety Department.

The Plaintiffs filed into Court an Affidavit in Opposition sworn by one JOSEPH KATATI, Counsel for the Plaintiffs filed herein on 15th August, 2017. It was deposed that trial in this matter commenced

on 7th December, 2016 after closure of pleadings and so far 3 Plaintiffs being PW1, PW2 and PW3 have already testified and there are only 3 Plaintiffs remaining to testify. That if the application is allowed, injustice would be occasioned to the Plaintiffs who have already testified as they will have no opportunity to comment on the documents that will be in the Supplementary Bundle. That the document that the Defendant intends to introduce in evidence was not left out at the time the Defendant's Bundle of Documents was filed into Court and that it is something that has been obtained and solicited by the Defendant to address the evidence that is already before the Court. That the application for leave to file the Supplementary Bundle of Documents is out of time and if allowed will occasion injustice to the Plaintiffs.

At the hearing of the application, the Defendant's Learned Counsel Mr. Mutale relied on the Affidavit in Support of the application, in particular paragraphs 6, 7 and 8 of the said Affidavit.

In response, Learned Counsel for Plaintiffs, Mrs. Zaloumis relied on the Affidavit in Opposition and robustly opposed the application by making *viva voce* submission. It was her submission that the fact that Co-Counsel for the Defendant was instructed to join the Defendant's team of Advocates cannot pull back the process. That Counsel can only work on what is before the Court filed by Counsel who was on record and that even if Counsel for the Defendant talks of the document being relevant to a fair determination of this matter, fair determination of the matter equally applies to the

Plaintiffs. She further submitted that the document exhibited by the Defendant was solicited and meant to cure the evidence or testimony of PW1, PW2 and PW3, which is before the Court and that these witnesses who have already testified will not have an opportunity to address the issues raised in the document. It was also her submission that the document is an opinion of a person requested by the Defendant to comment on this matter, which makes it *sub judice* and is meant to sway the Court's opinion on this matter. Mrs. Zaloumis argued that contrary to what the Defendant states in paragraph 8 of its Affidavit in Support of the application, the document introduces new and cardinal issues to this case, which ought to have been dealt with by the 3 Plaintiffs' testimony and that it is too late in this trial for such an opinion to be introduced. She concluded by submitting that allowing the application would be an injustice to the witnesses who have already testified and whose evidence has been tested through cross-examination.

In reply, Mr. Mutale submitted that the witnesses who have already testified are not expert witnesses who can argue as to the contents of the document that the Defendant seeks leave to file herein and that therefore, there will be no injustice that will be caused to the witnesses who have already testified. It was his submission that Counsel for the Plaintiffs will have an opportunity to cross-examine the witness who will testify on the contents of the document and therefore, no injustice will be caused to the Plaintiffs if this Court allows the application. Learned Co-Counsel of the Defendant, Mr.

Mwanabo, submitted that the Defendant's application is brought pursuant to **Order III Rule 2** of **The High Court Rules**¹, which gives power to this Court to grant any interlocutory application in the interest of justice even where a party has not asked for it. He further submitted that this application is made in the interest of justice so that this Court is availed with all the necessary documents relevant to the issues in dispute in order to arrive at a just decision. He argued that the evidence of an expert in this matter is very cardinal and the Court can even at its own instance call for such evidence. That therefore, there is no prejudice to the Plaintiffs as they have not yet closed their case and if it is their intention to contradict the evidence in issue, the doors are still open for them to seek expertise elsewhere. He also submitted that the Plaintiffs at the beginning of the trial on 7th December, 2016 made an application to file a Supplementary Bundle of Document, which document was prepared while the matter was in Court and the Defendant did not object. He therefore prayed that in the interest of justice, the application be granted.

I have considered the application by the Defendant for leave to file a Supplementary Bundle of documents. I have further considered the Affidavits, the authority and submissions advanced by all Counsel, for which I am grateful.

The record will show that on 26th February, 2009, the Court issued an Order for Directions, which provided for Discovery by List and Inspection of Documents to be completed within the period specified

therein. I refer to the Order for Directions issued by Judge C. B. Phiri. Upon the record being re-allocated to this Court, I issued a trial date of 7th December, 2016. On the said date, before trial could commence, the Plaintiffs applied to file a Supplementary Bundle of documents. According to the Plaintiffs' Counsel, the said document had been prepared in 2010, but could not be filed because after Judge C. B. Phiri retired, the matter went through a few Judges but did not take off for some reason or other. This application was granted as there was no objection raised by the Defendant. Trial commenced with PW1, PW2 and PW3 giving evidence.

Subsequently, on 14th July, 2017, the Defendant filed a Supplementary Bundle of documents, together with Summons for leave to file the Defendant's Supplementary Bundle of documents, which application was supported by an Affidavit. Before I consider the application, I will first deal with the Supplementary Bundle of Document which is on the record. The Supplementary Bundle of documents was filed without leave of Court and no application has been made before this Court to cure this irregularity. Accordingly, the Supplementary Bundle of documents filed herein on 14th July, 2017 is expunged from the record by order of the Court.

I will now consider the application by the Defendant. It is trite that a Party that wishes to file an additional bundle of documents, which come to their attention or custody later may apply for leave to do so. I have perused the document intended to be filed as supplementary

bundle of documents attached to the supporting Affidavit. In my view, the issue is the relevance of the said evidence sought to be filed as Supplementary Bundle of documents. The issue is simply whether the document is relevant and whether the Plaintiffs would be prejudiced if leave to file a Supplementary Bundle of documents is granted.

The Defendant contends that the evidence is material to the proceedings and necessary for the determination of issues in controversy. The Plaintiffs on the other hand contend that they would be prejudiced as the said document has been solicited by the Defendant to cure the evidence of the 3 witnesses who have testified before this Court.

It is trite law that a party may apply to produce documents at any time before conclusion of the trial. Where documents are not included in the bundle of documents filed into Court, leave of Court must be obtained before filing a Supplementary Bundle of documents. The Court may grant leave to produce a document if it has been discovered and where its production will not cause an injustice.

Order 24 Rule 1 of *The Rules of the Supreme Court*², provides for Discovery of documents, which are or have been in a party's custody or powers relating to the matters in issue in the proceedings. The document that the Defendant seeks to produce, which is subject of this application, relates to the impact of blasting activities on surrounding dwellings at the Shimabala Quarry. Both

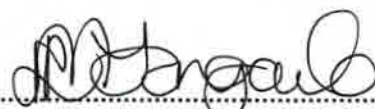
the Plaintiffs' and Defendant's pleadings on the record have raised allegations surrounding the blasting at the quarry in Shimabala. In my view, the document sought to be filed as a supplementary document is relevant to the issue in dispute. On the issue of prejudice to the Plaintiffs, it is my view that no prejudice will be occasioned as the Plaintiffs have not yet closed their case and can choose to re-call their witnesses.

The document sought to be filed was exhibited and attached to the Affidavit in Support by the Defendant. There is no doubt that the Plaintiffs have had sight of this document, as they had filed herein an Affidavit in Opposition. Having deemed the document as being relevant to the issues before this Court, it is my view that no prejudice will be occasioned to the Plaintiffs.

For the foregoing reasons, I accordingly grant leave to the Defendant to file the Supplementary Bundle of documents. The same must be served on the Plaintiffs. Trial shall be continued on the 1st September, 2017 at 09:00 hours. Costs to the Plaintiffs against the Defendant for the occasioned delay to the proceedings, to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka the 21st day of August, 2017.



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P. K. YANGAILO
HIGH COURT JUDGE