IN THE HIGH COURT FOR ZAMBIA **2014/HP/0578**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

ISAAC CHIBALE MUSONDA **PLAINTIFF**
(T/A Coolers Supermarket)

AND

THE ATTORNEY GENERAL **1ST DEFENDANT**

TRISHUL LIMITED **2ND DEFENDANT**

BEFORE HONOURABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff:	*Mr. Isaac Chibale Musonda (In Person)*
For the 1st Defendant:	*Ms. L. Shula (Senior State Advocate)*
For the 2nd & 3rd Defendant:	*Mr. D. Jere of Messrs Mvunga & Associates*
For the 4th Defendant:	*N/A*

R U L I N G

Cases Referred to:

1. *Damailes Mwansa v. Ndola Lime Company limited (2012) 3 ZR 268*
2. *Twampane Mining Co-operative Limited v. A.M Storti Mining Limited (2011) 3 ZR 67*

3. *Access Bank Zambia Limited and Group Five / Zcon Business Park Ventures (suing as a firm) SCZ/8/52/2014*
4. *Henry M. Kapoko v. The People (2016)/CC/0023*
5. *Waterwells Ltd v. Wilson Samuel Jackson (1984) ZR 123*

Legislation Referred to:

1. *High Court Rules Chapter 27 of the Laws of Zambia*
2. *Supreme Court Rules of England, 1999 edition White Book*
3. *Constitution of Zambia Act No. 2 of 2016*

This is an application by the Plaintiff for leave to amend pleadings namely the writ of summons and statement pursuant to *Order 18 Rule 1 of the High Court Rules*[1].

The application is supported by an affidavit deposed to by the Plaintiff, the essence of which is that it has become necessary to amend the pleadings so as to bring claims against the 4th Defendant as the person who was the owner of the property where events took place leading to the alleged damage and loss suffered by the Plaintiff.

It was deposed that unless granted the amendment, the Plaintiff will not be able to enforce any Judgment that the Court may grant against the 4th Defendant.

There was no affidavit in opposition.

At the hearing, Mr. Musonda informed the Court that he was relying on his affidavit in support of his application. Learned Senior Counsel Mr. Jere opposed the application *in limine* on points of law.

Firstly, it was submitted that the proposed amendments do not show that the amendment is a second amendment. He pointed out that Order 20 of the Supreme Court Rules clearly states that the first amendment must be underlined in red and subsequent amendments in different colours. He explained that rationale was to assist the Court to track the amendments.

Secondly, it was submitted that the Plaintiff has introduced a new claim for damages. It was his argument that special damages must be pleaded so that the Defendant can respond adequately to the claims. In his view the amendments do not conform to the rules of the Court.

He concluded by inviting the Court to deny the sought amendments and to condemn the Plaintiff in costs to be paid to the 3rd Defendant.

Learned Senior Counsel Mr. Kasote adopted the submissions of Senior Counsel Mr. Jere. Mr. Musonda countered the submissions.

In respect of the complaint about the failure to use different colours, it was his argument that in fact he had complied with Order 20 of the *Supreme Court Rules of England* by using not a red pen but a blue one to show that it is a second amendment and as such the Court would easily track the amendments.

In respect of the complaint that new claims were introduced in the proposed amendments, he denied that that was the position. In his view there were no new claims that had been introduced or sought to be introduced. His reasoning was that the initial pleadings included the substantive claims and the proposed amendments related to a few things taking into account that a 4th Defendant had been enjoined to the proceedings and inevitably clear claims ought to be leveled against him and as such no fresh action had been introduced.

As to the incident of costs, pleaded with the Court to use its judicious discretion and not condemn him in costs.

I will now delve in the issues raised in the application and in response thereto.

(1) Amendment of pleadings

The starting point is *Order XVIII of the High Court Rules*[1], it provides as follows:-

> *"The Court or Judge may at any stage of the proceedings order any proceedings to be amended whether the defect or error be that of a party applying to amend or not, and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass or delay the fair trial of the suit, and for the purposes of determining, in the existing suit, the real question or questions in controversy between the parties, shall be so made.*

Every such order shall be made upon such terms as to costs or otherwise or shall seem just"

The above order is crystal clear and need no further investigation as to the Courts jurisdiction and power to grant and order amendments to the pleadings.

(1a) Role of pleadings

Dr. Matibini, SCJ (as he then was) had occasion to pronounce himself on the subject. This was in the case of ***Damailes Mwansa v. Ndola Lime Company Limited***[1]. He put it this way:-

"***Holding 1*** *The function of pleadings is very well known. It is to give fair notice of the case which has to be met, and to define the issues which the Court will have to adjudicate in order to determine the matters in dispute between the parties.*

Holding 2 *Once the pleadings have been closed, the parties are bound by them and the Court has to take them as such. The bounds of the action cannot be extended without leave of the Court and consequential amendment to the pleadings.*

Holding 3 *It is one of the cardinal rules of pleadings for the party to tell his opponent what he is coming to Court to prove, and to avoid taking the opponent by surprise. If he does not do that,*

the court will deal with him in one of the two ways. It may say that it is not open to him that he has not previously raised, and will not be allowed to rely on it, or it may give him leave to amend by raising it, and protect the other party by letting the case stand down"

I agree therefore with Mr. Jere Learned Senior Counsel's submissions that one of the functions of pleadings is to warn the other party as to what is being alleged it so that it can adequately prepare the case it has to meet.

2. (a) **Non compliance with the procedural impositions (or Order or Rules of the Court**

It is trite that Rules and orders of the Court are to be complied with. The Court of final resort had occasion to pronounce itself on the matter in the case of ***Twampane Mining v. AM Storti Mining Limited***[2] where it was held as follows:-

"It is important to adhere to Rules of the Court in order to ensure that matters are heard in an orderly and expeditious manner and that those who choose to ignore Rules of the Court do so at their own peril"

The above legal position needs no further propounding. It is simply that non compliance with Rules and Orders of the Court have their own consequences and may be visited with sanctions.

(b) **Effect of non compliance with procedural impositions**

Flowing from the position as stated in the immediate preceding paragraph, litigants and their Advocates should heed the pronouncement by the Court of final resort (the Supreme Court) heralded in the case of ***Access Bank Zambia Limited and Group Five/Zcon Business Park Ventures(suing as a firm)***[5], where Malila, JS (as he then was) put it this way:-

> *"In conclusion we are mindful that the issue regarding Article 118 (2) (3) of the Constitution of Zambia3, by Mr. Silwamba, SC and was not part of his written arguments before. We do not intend to engage in anything resembling interpretation of the Constitution in the Judgment. All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the Courts"*

The Constitutional Court which is the Court of final resort in interpretation of constitutional provisions put to rest and terminated all debate on the meaning and application of ***Article 118 (2) (a) (e)*** which provides as follows:-

> *"118 (2) In exercising judicial authority, the Courts shall be guided by the following principles:-*
>
> *(a).....*
>
> *(b)Justice shall not be delayed*
>
> *(c) .....*

(d).....

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

(f) ....."

Munalula, JC delivering the Judgment of the Court in the case of ***Henry M. Kapoko v. The People***[4], put it this way at pages J38 – J39

"To be absolutely clear, we wish to point out that even if we had come to the conclusion that sections 207 and 208 of the CPC are technicalities, the applicant still have had to convince the Court that the provisions are only technicalities that hinder due process to the extent that they ought to be disregarded in the interest of justice.

Although the Applicant did not argue this point in any significant way, this is the full and correct meaning of Article 118 (2) (e). Article 118 (2) (e) does not direct Courts to technicalities. It enjoins courts not to pay undue regard to technicalities that obstruct the course of justice. It is the courts' decision that Sections 207 and 208 of the Criminal Procedure Code are not technicalities and do not offend Article 118 (2) (e). They are rules of procedure which are necessary for the just disposition of criminal matters before the courts.

The trial court's adherence to them is therefore correct and does not in any way constitute undue regard. In enacting Article 118

(2) (e) the framers of the Constitution did not intend to throw out rules of procedure or indeed technicalities in a situation where such undue regard prevents gratuitously the just disposition of cases before the courts. Sections 207 and 208 are still good law.

A final word on costs, since the case has raised important matters of interpretation necessary for the development of our procedural law, each party shall bear their own costs"

In the case in casu, Mr. Jere's argument is that since there was no compliance with the underlining of the proposed amendments in proper colours, so as to enable the Court to track the number of amendments, the amendments were fatally flawed and on that score alone ought to be dismissed.

This was countered by Mr. Musonda who pointed out that his first amendments were in red. The present application was in respect of a second proposed amendment and was done in a different colour, therefore according to him, the Court will easily track the amendments which take care of Mr. Jere's concerns.

There is force in Mr. Musonda's argument. In my view the non compliance with Order 20 of the Rules of the Supreme Court of England is not fatal and cannot be termed as incurable. Undue regard should not be given to that regulatory procedural requirement. Terminating the Plaintiffs application on that score will run in the teeth of *Article 118 (2) (e)* which mandates court in

adjudicating to factor in that matters should not be terminated on procedural technicalities but on substance and merit.

The denial or sustaining of an objection premised on procedural truancy or breach interfere in the exercise of judicious discretion which inheres in a Judge. In the ***Access Bank (Z) Limited*** referred to herein, the Supreme Court is recorded as having stated as follows:-

> *"Although at first blush our decision on when or not to dismiss an appeal for failure to comply with rules of Court appear to be contradictory, they are in truth not. In our estimation, the wording of Rule 68 (2) is not a panacea for allowing all procedural shortfall. It is plain that whether or not an appeal is to be dismissed under that rule is to be taken on a case to case basis.*
>
> *As counsel for the applicant has rightly submitted, this invariably implicates the exercise of judicial discretion. Since facts of two cases are never always the same, a Court cannot be bound by a previous decision to exercise discretion in a regimented way because that would be, as it were, putting an end to discretion" (**underlining mine for emphasis only**)*

3 (a) **Introduction of a new cause of action**

Following the enjoining of the 4th Defendant to the proceedings, it has to follow that a cause of action has to be pleaded in respect of the new entrant. This may be in addition to the subsisting claims

or in addition depending on the circumstances of the case. Otherwise how else would the Plaintiff plead his case so that the 4th defendant will know what is being alleged against him so that he can know what type of case he has to meet so that he can retreat to plan his defence. The objection under this limb is dissolute of merit.

4. (a) **Special damages to be pleaded**

It is settled law that special damages must be pleaded. In the case in casu, the Plaintiff has placed certain figures in the proposed amended pleading that is writ of summons and statement of claim.

The settlement of pleadings is the preserve of a litigant. However, if the pleadings are vague or incomprehensible, the opponent can apply for an order for delivery of further and better particulars under *Order 18 Rule 12 (2a) of the Rules of the Supreme Court of England*.

In my view, even if it were to be the position that the special damages have not been pleaded, it is not for the Defendant at this stage to argue that special damages have not been pleaded and on that score alone the Court ought to terminate the Plaintiffs application to amend the pleadings. Such an objection is coming too early in the day.

The timely point is at trial, when an attempt is made to lead evidence on unpleaded issues. The Plaintiffs objection under this limb is destitute of any merit.

(b) **Danger of multiplicity / dublicity of actions**

Denying an application for leave to amend the pleadings at this stage which though may tend to introduce a fresh claim will not be in the interest of justice. Firstly, such an approach will have the effect of providing room and encouraging multiplicity and or dublicity of actions which the Courts frown upon. All issues arising out of the same set of facts at the same point in time and point in space and where the same set of laws apply ought to be dealt with in one Court of competent jurisdiction.

Secondly, if the plaintiffs application were to be dismissed at this stage he will have the options of appealing to the superior Courts or commencing fresh proceedings to pursue his perceived claims to their logical conclusion in the courts, which is his right. The net effect is to delay the conclusion of matters expediently contrary to the spirit of *Article 118 (2) (b)*.

On the foregoing, I find that the 2nd, 3rd and 4th Defendants' application to torpedo the Plaintiffs application for leave to amend pleadings fails; it is not well anchored and I dismiss it.

It follows that the Plaintiff is granted leave to amend the pleadings as sought. Ordinarily, the successful litigant harvests the fruits of his litigation that includes costs. Costs however are granted in the discretion of the Court. But in exercising its discretion, the Court should do so judiciously.

In the case in casu, the facts reveal that the Plaintiff omitted to diligently investigate the true identity of the person or legal entity he was dealing with in respect of the business premises where the alleged tortious acts were allegedly committed.

His act of omission cannot pass unvisited with the attending costs caused by his inanition which has caused a late application in the proceedings when trial was just about to commence.

The justice of the case is that the Plaintiff be and is hereby condemned to pay the costs of the application, even if it has been resolved in his favour.

I am fortified in this position following the path taken by the Court of last resort in the case of ***Waterwells Ltd v. Wilson Samuel Jackson***[5], it was held as follows:-

> ***"Holding 7*** *If no prejudice will be caused to a Plaintiff by allowing the Defendant the claim, then the action should go to trial.*
>
> ***Holding 8*** *Where a respondent has been put to a great expense and inconvenience all traceable to the appellants default, even though the appeal succeeds costs need not follow the event"*

The case related to an appeal. The principle however is of universal application in respect of situations where a defaulting party has

succeeded but has caused inconvenience and costs on the other party.

For purposes of clarity, the costs are for the 2nd, 3rd and 4th Defendants to be paid by the Plaintiff which costs are to be taxed in default of agreement.

Leave to appeal to Superior court of Appeal granted.

Under my hand and seal this 2nd day of October, 2017

Mwila Chitabo, SC

Judge