

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2022/CCZ/006

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

**IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, CHAPTER 1,
VOLUME 1 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: ARTICLE 1(5), 128, 173(1)(a)(c)(g), 180(7), 216(c)
AND 235 OF THE CONSTITUTION OF ZAMBIA,
CHAPTER 1 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: THE STATE PROCEEDINGS ACT, CHAPTER 71,
VOLUME 6 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: SECTION 8 OF THE CONSTITUTIONAL COURT
ACT, 2016**

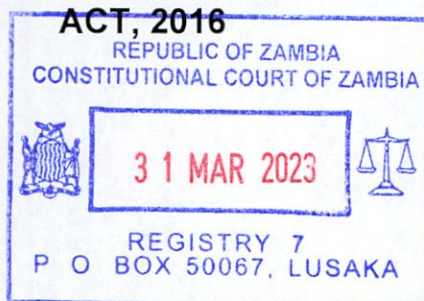
BETWEEN:

MILINGO LUNGU

AND

ATTORNEY-GENERAL

ADMINISTRATOR-GENERAL



PETITIONER

1ST RESPONDENT

2ND RESPONDENT

**Coram: Sitali, Mulonda, Mulenga, Musaluke and Chisunka, JJC on 21st
February, 2023 and 31st March, 2023**

**For the Petitioner : Mr. M. Chitambala of
Lukona Chambers**

**For the 1st Respondent : Mr. Simeza, SC and Mr. S. Nalumino
of Simeza Sangwa and Associates**

**For the 2nd Respondent : Ms. A. Chisenga, Acting Principal State
Advocate, Attorney-General's Chambers
No appearance**

R U L I N G

Sitali, JC delivered the Ruling of the Court.

Cases cited:

1. **Rosemary Bwalya and Others v Mwanamuto Investments Limited (2012) ZR vol 1 473**
2. **Matilda Mutale v Emmanuel Munaile (2007) ZR 118**
3. **Manharial Harji Patel v Sturma Stationers Limited (2009) ZR 167**
4. **Letang v. Cooper (1890) 41Ch.D 563**
5. **Eshelby v Federated European Bank Limited (1932) 1 KB 432**
6. **Original Hartlepool Collieries Co. v Gibb (1877) 5 Ch.D at 721**
7. **Zambia Safaris Limited v Jackson Mbao (1985) ZR 1**
8. **Raleigh v Goschen (1896 R.2095)**
9. **Development Bank of Zambia & KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited (1995/1997) ZR 187**
10. **Alliance Craton Explorer P/L v. Quasar Resources P/L and Another (No.2) Quasar Resources P/L v. the Mining Registrar (2011) SASC 92**

Legislation referred to:

1. **The Constitutional Court Rules, Statutory Instrument No. 37 of 2016, Order IX rule 19**
2. **The Rules of the Supreme Court 1965, 1999 edition, Order 18 rule 9 and Order 20 rules 5, 7 and 8**

1. This is the Petitioner's application for leave to amend petition made by way of notice of motion filed on 31st January, 2023. The application was made pursuant to Order IX rules 19 and 20 of the Constitution Court Rules, Statutory Instrument No. 37 of 2016 (the CCR). In his affidavit in support of the application, the Petitioner,

Milingo Lungu, essentially averred that he had commenced the action herein by petition seeking specific reliefs but that on 22nd December, 2022, the incumbent Director of Public Prosecutions (DPP), Mr Gilbert Andford Phiri, purportedly revoked the immunity agreement by way of pronouncement. He stated that the DPP's action was not anticipated as it occurred after he had filed the petition and at a time when the matter was about to be heard and has therefore made it necessary for him to amend his petition.

2. The Petitioner averred that a refusal to grant him the application to make the amendments sought will prejudice him and may cause embarrassment, delay the proceedings or lead to abuse of court process.
3. In the skeleton arguments filed in support of the application, the Petitioner submitted that the unambiguous import of Order IX rule 19 of the CCR is that a party can amend the process or any document, with leave of the Court, before the conclusion of the matter and that the application is therefore competently before this Court. To reinforce his submission, the Petitioner cited the persuasive case of **Rosemary Bwalya and Others v Mwanamuto Investments**

Limited⁽¹⁾ wherein the Supreme Court held that an amendment may be granted at any stage of the proceedings so long as it is before judgment. The Petitioner submitted that this is a fit and proper case for this Court to grant him leave to amend the petition to include all relevant issues in order to enable the Court to adjudicate upon the real matters in controversy between the parties.

4. At the hearing of the application, Mr. Chitambala, Counsel for the Petitioner in augmenting the Petitioner's skeleton arguments submitted that the Court's power to grant an application to amend is discretionary and is exercisable pursuant to Order IX rule 19 of the CCR. He submitted that the intended amendments are fundamental to the determination of the issues in dispute between the parties in this matter and further, that one of the grounds for the amendment arose after the filing of the petition. He contended that nothing in Order IX rule 19 of the CCR prevents this Court from allowing the amendments as they have been made before the hearing of the matter.
5. Counsel went on to submit that the authorities cited by the 1st Respondent, in opposing the application, to support the contention

that an amendment cannot be granted in relation to matters that have arisen after commencement of an action, are inapplicable to this case, as they relate to matters commenced by way of pleadings while the petition before this Court is not a pleading as was held by the Supreme Court in the case of **Matilda Mutale v Emmanuel Munaile**.⁽²⁾

6. Counsel argued that the principles that apply to pleadings, such as the requirement that an action must disclose a cause of action, and the principles that attend to amendments in actions commenced by pleadings do not strictly apply to petitions such as the one before this Court. Counsel therefore contended that it was a gross misdirection on the part of the 1st Respondent to oppose the Petitioner's application to amend his petition based on authorities which are founded on pleadings.
7. Counsel further argued that even if the principles which apply to amendment in actions commenced by pleadings were to be applied to this matter, a reading of Order 18 rule 9 of the RSC and the explanatory notes at paragraph 18/9/2 of the RSC reveals that matters arising after the issue of a writ can still be pleaded.

8. He added that as demonstrated in the Petitioner's supporting affidavit, the exhibited intended amendments touch on matters in dispute between the Petitioner and the 1st Respondent and that as seen in the intended amendments, the Petitioner seeks to assert the existence of a legitimate expectation arising from circumstances that gave rise to the grant of indemnity from prosecution; that he also seeks that this Court determines whether or not having acquired the right of indemnity from prosecution, a person subsequently appointed as DPP and exercising the powers of that office, has power to purport to revoke or reverse the indemnity granted to him.
9. It was contended that the 1st Respondent will not be prejudiced if the Petitioner is granted the application to amend the petition as the 1st Respondent will be at liberty to amend his answer to the petition. He urged us to allow the application to amend the petition to include issues that had arisen after the filing of the petition especially as trial in the matter has not commenced.
10. The 1st Respondent opposed the application by way of skeleton arguments in opposition to the notice of motion for leave to amend petition filed on 3rd February, 2023 on two grounds. It was argued

that the Court has no jurisdiction, firstly, to allow the Petitioner to amend the petition to add a cause of action that did not exist when the petition was filed; and secondly, to allow an amendment that substantially changes the action before Court. The 1st Respondent argued that although the Rules permit the Petitioner to amend his petition; and although an application for amendment may be granted at any stage of the proceedings before judgment, the nature of the Petitioner's proposed amendments go beyond the scope of what is permissible under the Rules.

11. The 1st Respondent further submitted that while Order IX rule 19 of the CCR on which the Petitioner's application is anchored allows for the amendment of any document upon obtaining leave of court, it does not fully prescribe the practice and procedure including the circumstances when an amendment may be effected. The 1st Respondent therefore submitted that since there's a gap in Order IX rule 19 of the CCR, resort should be made to the Rules of the Supreme Court of England 1965, 1999 edition (the RSC) by virtue of Order I of the CCR.

12. The 1st Respondent cited Order 20 rule 5 of the RSC and submitted that the Petitioner may bring an application for leave to amend his petition as long as such an amendment falls within the categories of amendments permitted by the RSC. It was submitted that the editorial note 20/8/50 of the RSC is instructive as it provides that rule 5 equally applies to amendments to a petition.
13. It was argued that the Petitioner's proposed amendment constitutes an attempt to introduce a cause of action which did not exist at the date of commencement of this action; and that the application, if granted, will have the effect of substantially altering the character of this action and will essentially create a new case away from what currently stands for determination before this Court. In support of that position, we were referred to editorial note 20/8/28 of the RSC which reads:

The Court will not refuse to allow an amendment simply because it introduces a new case (Budding v Murdoch (1876) 1 Ch. D. 42; Hubbuck v Helms (1887) 56 L.J Ch. 536). But it will do so where the amendment would change the action into one of a substantially different character which would more conveniently be the subject of a fresh action (Raleigh v Goschen [1891] 1 Ch) or where the cause of action sought to be introduced by the amendment did not exist at the date of the writ (Eshelby v Federated European Bank [1932] 1 K.B. 245 (Emphasis by 1st Respondent)

14. The 1st Respondent submitted that the import of this provision is clearly that whereas a party is not necessarily precluded from introducing a new case by way of amendment of the party's originating process, a party cannot by way of such an amendment change the action into one of a substantially different character which ought to be the subject of a fresh action and further cannot by the party's amendment introduce a cause of action which did not exist at the time of commencement of the action.
15. Turning to the second ground of opposition, the 1st Respondent submitted that the revocation of the purported immunity agreement did not arise at the time the Petitioner commenced this action as it occurred on 22nd December, 2022, long after the petition was filed. It was contended that in his own words, the Petitioner seeks to introduce a new cause of action which did not exist at the time of filing his petition. The case of **Manharial Harji Patel v Sturma Stationers Limited**⁽³⁾ was cited wherein the Supreme Court referred to the case of **Letang v. Cooper**⁽⁴⁾ in which case Lord Diplock defined a cause of action as "simply a factual situation the existence

of which entitles one person to obtain from the court a remedy against another person.”

16. The cases of **Eshelby v Federated European Bank Limited**⁽⁵⁾ and **Original Hartlepool Collieries Co. v Gibb**⁽⁶⁾ were cited in support of the submission that an amendment need not go further than making amendments that are necessary for the proceedings, and in so doing it must not bring into an existing action an entirely fresh cause of action arising after the proceedings have started without the consent of the defendants or respondents to the said action.
17. The 1st Respondent further submitted that the Petitioner’s proposed amendments will change the action into one of a substantially different character and cited the cases of **Zambia Safaris Limited v Jackson Mbao**⁽⁷⁾ and **Raleigh v Goschen**⁽⁸⁾ to press the point that an application for leave to amend an action ought not to be granted if the amendments would change the action into another of a substantially different character.
18. It was argued that the issue for determination in this petition is whether the DPP has power to grant immunity under the Constitution. That, however, what the Petitioner was now attempting to do is to

introduce a completely new dimension to the action by essentially asking this Court to make a determination as to whether the DPP can revoke an undertaking not to prosecute the Petitioner; and further, whether such revocation constitutes a breach of the Constitution, which is a totally different case to that pleaded.

19. The 1st Respondent submitted that that being the case, the Petitioner's proposed amendments are unsustainable as they are a complete departure from the case which the petition had earlier put forward. That they are neither a variation nor a modification nor a development of the case as pleaded but that in direct opposition to the rules, they would change the action into one of a substantially different character. It was reiterated that such an outcome is prohibited by the Rules and cannot be permitted by this Court. It was submitted that the intended case would more conveniently be a subject of fresh action. The 1st Respondent thus implored us to dismiss the Petitioner's motion with costs.

20. In augmenting the skeleton arguments, State Counsel Simeza reiterated that the application to amend is opposed on two grounds as submitted in the skeleton arguments which he relied upon. He

went on to submit that the notice of motion was improperly before the Court as it was not endorsed and further that the certificate of exhibit attached to the affidavit in support of motion was not commissioned by a Commissioner for Oaths on page 9 of the record of motion as required by Order VI rule 17(8) of the CCR thereby rendering the affidavit defective and unavailable to the Court.

21. State Counsel proceeded to state that contrary to the Petitioner's submissions that Order 20 rule 5 of the RSC and the rest of the rules referred to in opposition apply only in respect of pleadings, the said rules equally apply to the amendment, with leave, of all forms of originating process namely, a petition, originating summons and originating notice of motion, as clearly stipulated in paragraph 20/8/50 of the RSC. State Counsel Simeza submitted that the 1st Respondent conceded that the law is that a party has a right to amend its pleadings at any stage before judgment; and further that a Court will not refuse to allow an amendment simply because it introduces a new case.
22. It was contended, however, that the rules specifically stipulate that the Court's power to amend is fettered where the amendment would

change the action into one of a substantially different character; and which would more conveniently be the subject of a fresh action. Further, that the Court's powers are fettered where the cause of action sought to be introduced by the amendment did not exist at the date of the writ.

23. It was argued that in this case, the proposed amendments are intended to introduce a fresh cause into the action or issues which arose nearly a year after the petition was filed. It was conceded that the issue the Petitioner intended to introduce regarding the DPP's decision to revoke the purported immunity agreement may in itself give rise to certain claims as evidenced by the proposed amendment; and that the Petitioner will be within his rights to seek any remedies he may wish but not within this action. It was submitted that the decision to revoke the immunity agreement is a new cause of action which ought to be litigated afresh.

24. It was further argued that although the Petitioner in his arguments in reply contended that commencing a new action would lead to a multiplicity of actions and in support of that submission cited the case of **Development Bank of Zambia v KPMG Peat Marwick**⁽⁹⁾, that

case talked about commencing another action when there is another action pending. It was submitted that since the rules themselves demand that a matter such as this one requires a fresh action, there will be no multiplicity of actions in the present case as this action would have come to an end and a fresh action commenced to litigate the cause that has arisen. It was submitted that while the Court has discretion to allow an amendment, that discretion should be exercised judiciously based on sound legal principles. That in this case, the principles do not allow an amendment.

25. In response to Mr. Chitambala's submission that the 1st Respondent will not suffer any prejudice if the amendment is allowed because the 1st Respondent will be at liberty to amend its answer, State Counsel Simeza cited the Australian case of **Alliance Craton Explorer P/L v. Quasar Resources P/L and Another (No.2) Quasar Resources P/L v. the Mining Registrar**⁽¹⁰⁾ wherein the Supreme Court of Australia was quoted as having discussed the question of prejudice occasioned by an amendment and stated that:

An injustice may arise from a variety of circumstances. It may arise, for example, from the change of position by a party in reliance on the

existing pleadings or form, or from a party being deprived of the benefit of some essential procedural step before proceedings could be commenced or for the potential for delay to the determination of an existing dispute.

26. The 1st Respondent submitted that allowing the amendment will delay the determination of the petition as an amendment of the petition will require the amendment of the answer and opposing affidavit and perhaps of the reply.
27. State Counsel went on to submit with regard to the second ground that through his proposed amendment, the Petitioner is trying to steer the action in a different direction. That the issue for determination before this Court is whether the DPP has power to grant immunity from criminal prosecution under the Constitution. It was submitted that the Petitioner was now trying to move the Court away from that question to determine whether the DPP is bound by the decision of his predecessor not to prosecute and secondly, whether the DPP is estopped from revoking the immunity agreement. It was argued that the proposed amendments will make the petition substantially different in character from what currently exists. State Counsel reiterated that the Petitioner is not left without a remedy as he may

say all that he wants to say but not in this action. State Counsel thus urged us to decline the application for leave to amend the petition.

28. In reply, Mr. Chitambala submitted that contrary to the 1st Respondent's assertion, the question whether the DPP has the power to grant immunity from prosecution is not the sole issue for determination in the petition as there are other issues as demonstrated by the reliefs sought. Counsel submitted that a perusal of paragraphs 29 to 32 of the intended amended petition reveals that all the proposed amendments relate to matters that arose before the petition was filed, except for the amendment which relates to the purported revocation of the immunity agreement between the Petitioner and the State which is a matter that cannot be divorced from the issues to be determined by this Court. It was argued that the 1st Respondent's contention that the intended amendments seek to change the course of the action before this Court is without foundation as the intended amendments are directly or incidentally connected to the subject matter of the dispute.

29. It was submitted that even where a new issue has been raised in paragraph 32 of the intended amended petition, the 1st Respondent

did not cite any provision of the CCR to support its contention that an amendment which seeks to introduce a new cause of action cannot be made in an action commenced by way of petition before this Court. It was stressed that Order IX rule 19 of the CCR which grants the Court discretionary jurisdiction to amend process places no restriction to that effect.

30. Turning to the alleged defect in the affidavit in support of the application, Mr Chitambala submitted that the omission to sign the certificate of exhibit cannot render the entire affidavit defective and that the objection to the use of the affidavit had been raised too late as Order VI rule 19 of the CCR provides that an objection to the reception of evidence by the affected party should be made at the time the evidence is offered. That the motion is therefore properly and competently before this Court.

31. It was argued that Order 20 rule 5 and paragraph 20/8/50 of the RSC which the 1st Respondent relied upon in opposing the application are default provisions to be resorted to only where there is no provision made in the CCR. That these provisions cannot be relied upon in this case as Order IX rule 19 of the CCR provides for amendment of

process at any stage before conclusion of the hearing. In the alternative, Counsel argued that if the Court takes the view that Order 20 rule 5 and paragraph 20/8/50 of the RSC apply, Order 18 rule 9 of the RSC allows the introduction of a new cause of action at any stage of the proceedings, whether that cause of action arose prior to the filing of the originating process or after, regarding the events of 22nd December, 2022.

32. It was further submitted that Order IX rule 19 of the CCR, which is the guiding principle to this Court in exercising its jurisdiction to amend process, does not fetter the Court from allowing an amendment which introduces a cause of action which did not exist when the process was filed nor does it prescribe a time limit within which an amendment to originating process can be made, the only requirement being that the application to amend should be made before the hearing of the matter is concluded, which the Petitioner has done.
33. Lastly, Counsel submitted that the 1st Respondent has not availed any evidence on oath before this Court of what prejudice will be occasioned to it if the Court grants the application to amend. That reliance on the Australian case of **Alliance Craton Explorer**⁽¹⁰⁾ was

therefore speculative. Counsel thus submitted that this is a proper case for this Court to exercise its discretion to grant the application to amend the petition in the interest of justice.

34. We have considered the application and supporting affidavit as well as the skeleton and oral arguments advanced and the authorities cited by the parties. The Petitioner seeks leave to amend his petition on the grounds that there are new issues that have arisen relating to this matter which ought to be included in the petition and which were not anticipated at the time he filed the petition; and that some issues contained in the petition require additional and unanticipated material particulars to be included in the petition. The proposed amendments are set out in paragraphs 29 to 32 of the intended amended petition.

35. The application is made pursuant to Order IX rule 19 of the CCR which provides for amendment of process in the following terms:

“A party that wishes to amend the process or any document may do so with leave of the Court before the conclusion of the hearing.”

36. We wish to state at the outset that while Order IX rule 19 of the CCR provides for amendment of originating process, the provision does not adequately or comprehensively provide for the practice and

procedure relating to amendment of originating process and related documents. That being the case, as the 1st Respondent rightly submitted, resort should be had to the RSC as stipulated by Order I of the CCR.

37. In this regard, Order IX rule 19 of the CCR should be read together with Order 20 rules 5, 7 and 8 of the RSC which generally confer power on the Court to allow amendments to be made to originating process and other documents, where necessary. Order IX rule 19 of the CCR and Order 20 rule 5 of the RSC when read together confer power on this Court to grant leave to amend originating process or any document on such terms as to costs or otherwise as may be just or on other matters as it may direct at any stage of the proceedings before the conclusion of the hearing. Order 20 rule 7 of the RSC extends the effect of rule 5 to the amendment of other originating process, including a petition. These are the provisions we have considered in determining this application.
38. In the present case, the Petitioner seeks to amend his petition following the DPP's decision on 22nd December, 2022 to revoke the immunity agreement which is the subject of the petition filed on 19th

April, 2022. The amendment is sought on the premise that the revocation of the immunity agreement midstream has brought about a set of facts which ought to be included in the petition. That the issue of the validity or otherwise of the immunity/indemnity agreement is at the centre of this matter and therefore ought to form part of the Petitioner's claim to avoid commencing another action.

39. The 1st Respondent has opposed the application on the basis that the proposed amendment will introduce a new cause of action which did not exist at the date when the action was commenced. It is contended that if allowed, the amendment will create a new cause of action which will alter the character of the action from what currently stands for determination. The 1st Respondent further contends that rather than be allowed to amend the petition in this way, the Petitioner should commence a fresh action relating to the revocation of the immunity/indemnity agreement.

40. We have examined the arguments on both sides.

41. We begin by addressing the 1st Respondent's preliminary submissions that the notice of motion is improperly before us as it was not endorsed with a date of hearing; and further, that the affidavit

in support of the application is defective and therefore not available for use by the Court as the certificate of exhibit attached to the affidavit in support of the summons was not commissioned by the Commissioner for Oaths on page 9 of the record of motion.

42. Regarding the effect of the non-endorsement of the date of hearing on the notice of motion, our short answer is that the record of motion at page 133 will show that the date of hearing of the motion, being 9th February, 2023, was given to the parties in open Court on 31st January, 2023 when we issued directions relating to the motion which was only filed on 30th January, 2023, a day before the date of hearing. The oversight by the Court officials to endorse the date of hearing on the notice of motion before it was included in the record of motion is therefore not fatal. The motion is therefore properly before us.
43. As regards the objection to the use of the affidavit in support of the application on the ground of the defect caused by the omission by the Commissioner for Oaths to commission the certificate of exhibit on page 9 of the record of motion, Order VI rule 19 of the CCR is indeed instructive as submitted by Mr. Chitambala. That order stipulates that

an objection to the reception of evidence by the affected party must be made at the time the evidence is offered.

44. In this case, the 1st Respondent did not object to the use of the affidavit at the time the evidence was offered by the Petitioner as there was no affidavit in opposition filed by the 1st Respondent. Thus, the 1st Respondent could not object to the alleged defect in the affidavit by way of oral submissions made by State Counsel on behalf of the 1st Respondent at the hearing of the motion. In the circumstances, the submission that the affidavit ought not to be used by the Court lacks merit. The affidavit is therefore available for use by the Court.
45. With that said, in determining the application, we have examined the proposed amendments set out in paragraphs 29, 30, 31 and 32, the additional alleged constitutional breaches stated in paragraphs 6, 7 and 8 and the additional reliefs set out in paragraphs (a) and (g) on pages 17 to 18, 19 to 20, and 21, respectively, of the intended amended petition against the contents of the petition.
46. We note that the facts set out in paragraphs 29 and 30 of the intended amended petition are in addition to the facts stated in

paragraphs 18 to 28 of the petition. Paragraph 31 refers to the ratification of the DPP while paragraph 32 sets out the fact of the DPP's decision to revoke the immunity/indemnity/undertaking by the former DPP not to prosecute the Petitioner for acts or omissions arising from his carrying out of functions as Provisional Liquidator of Konkola Copper Mines Plc (KCM). Related to paragraph 32 are alleged constitutional breaches set out in paragraphs 6 and 7 and the relief at paragraph (g) of the intended amended petition.

47. It is the reference to the revocation of the immunity agreement by the DPP on 22nd December, 2022 that the 1st Respondent has objected to on the grounds that it introduces a new cause of action which did not exist when the action was commenced and that granting the application will substantially alter the character of the current action.
48. It is settled law that an amendment to originating process will be allowed even if it introduces a new cause of action as long as the new cause of action arises from the same facts or substantially the same facts, if the justice of the case requires it. To that effect, Order 20 rule 5(5) of the RSC states that:

“An amendment may be allowed under paragraph (2), notwithstanding that the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.”

49. In deciding whether the new cause of action in the present case arises out of the same or substantially the same facts as those originally set out in the petition, we have examined the facts relating to the immunity agreement as set out in the petition and those set out in the intended amended petition. It is evident that the immunity agreement signed between the Petitioner and the erstwhile DPP comprising an undertaking by the DPP not to prosecute the Petitioner for matters arising out of acts and omissions committed in the performance of his duties as Provisional Liquidator for KCM is at the centre of the dispute between the parties to the petition.
50. Based on that agreement, the Petitioner contended that he ought not to have been investigated, arrested and arraigned before the Subordinate Court on criminal charges related to his role as Provisional Liquidator of KCM. The Petitioner contended that the decision to investigate, arrest and prosecute him for matters

connected to KCM contravenes Articles 180 (7) and 216 (c) of the Constitution. Following the alleged revocation of the immunity agreement, the Petitioner through the proposed amendment in paragraph 32 of the intended petition is questioning whether the incumbent DPP can revoke the agreement and whether he is not estopped from proceeding in that manner. In short, the Petitioner's application to amend the petition has been occasioned by the 1st Respondent's action, through the DPP, on 22nd December, 2022 to announce the revocation of the immunity agreement, which is the subject of the petition and cross petition after the petition had already been cause listed for trial.

51. Thus, in our view, the proposed amendments though introducing a new cause of action stem from substantially the same facts. The justice of the case therefore dictates that the application for amendment be allowed in order for the real dispute between the parties to be determined, particularly as the new cause of action arises substantially from the same facts as we have already stated.
52. The 1st Respondent in opposing the application contended that allowing the Petitioner to amend his petition will delay the

determination of the petition and that rather than seek to amend his petition, the Petitioner should instead commence a fresh action to prosecute the new cause of action brought about by the DPP's action. That argument in our view is untenable in light of the 1st Respondent's own application by notice of motion filed on 30th January, 2023 to dismiss the petition on the ground that the DPP's revocation of the immunity agreement had rendered the petition academic.

53. The 1st Respondent having created a situation which has brought about the present application, cannot be heard to argue that the Petitioner's application, if granted, will lead to delay in the determination of the petition. For us to accept the 1st Respondent's argument that the Petitioner should not be permitted to amend his petition and that, instead, he should file another petition related to the revocation of the immunity agreement, would entail our acquiescence to a proliferation of actions on the same subject matter.
54. We are alive to the 1st Respondent's argument that the filing of a fresh action by the Petitioner is sanctioned by the RSC and therefore, that there would be no multiplicity of actions if the Petitioner were to

file a fresh petition relating to the DPP's action to revoke the immunity agreement on 22nd December, 2022. The 1st Respondent's main bone of contention in respect of that argument is that the cause of action contained in paragraph 32 of the intended amended petition did not exist at the time of filing of the petition herein on 19th April, 2022.

55. However, Order 18 rule 9 of the RSC provides as follows:

“Subject to rule 7(1), 10 and 15(2), a party may in any pleading plead any matter which has arisen at any time, whether before or since the issue of the writ.”

56. Thus, Order 18 rule 9 read with Order 20 rule 5(5) of the RSC empower this Court to allow an amendment to originating process to include a matter which has arisen before or after the issue of originating process. That being the case, the *Zambian*, *English* and *Australian* cases cited by the 1st Respondent, in opposing the application, have not assisted the 1st Respondent in making out its case against the grant of leave to amend the petition.

57. In our view, the justice of this case dictates that rather than expect the Petitioner to commence a fresh action, he should be permitted to

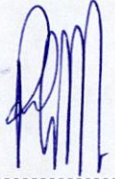
amend his petition to include the issue relating to the pronounced revocation of the immunity agreement so that all issues in dispute between the parties relating to the immunity agreement can be determined in finality in the present case.

58. With that said, we find that this is a proper case in which we should exercise our discretion in favour of the Petitioner and grant his application for leave to amend the petition. Leave to amend the petition is accordingly granted.
59. The Petitioner shall file the amended petition and amended affidavit together with amended skeleton arguments and witness statements, if any, within six days of today's date that is by 6th April, 2023. The 1st and 2nd Respondents shall file their respective amended answer and opposing affidavits and skeleton arguments and witness statements, if any, within 14 days of service of the amended petition, that is by 21st April, 2023.
60. The Petitioner shall file an amended reply and skeleton arguments in reply, if any, by 2nd May, 2023. The Petitioner shall file a supplementary record of proceedings by 5th May, 2023. The amended petition shall be set down for trial thereafter.

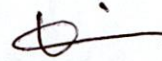
61. Each party shall bear their own costs of this application.



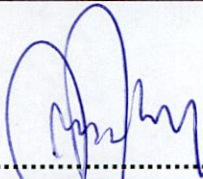
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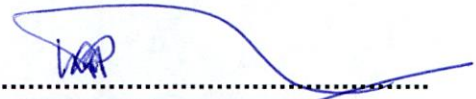
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