

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 263/2021

HOLDEN AT KABWE AND LUSAKA

(Civil Jurisdiction)

BETWEEN:

SYLVIA MADAWAKI



APPELLANT

AND

AFRICAN BANKING CORPORATION LIMITED

RESPONDENT

Coram: Mchenga DJP, Banda-Bobo and Muzenga, JJA

On 10th October 2023 and 6th August 2024

For the Appellant: C. Siyanondo, Malambo & Company

For the Respondent: Nchito & Nchito

JUDGMENT

Mchenga DJP, delivered the judgment of the court

Cases referred to:

1. G.L. Baker Ltd v. Medway Building & Suppliers Ltd
[1958] 3 All ER 540
2. Development Bank of Zambia & Another v. Sunvest
Limited & Another [1995-1997] Z.R. 187
3. BP Zambia PLC v. Interland Motors Limited [2001] Z.R.
37
4. Zambia Consolidated Copper Mines Limited v. Joseph
David Chileshe [2002] Z.R. 86

5. Bwalya and Others v. Mwanamuto Investments Limited
[2012] Z.R. 473
6. Zambia Seed Company Limited v. West Co-op Haulage
Limited and Another [2018] Z.R. 183
7. Allen v. Sir Alfred Mc Alpine & Sons Limited [1968]
2 Q.B. 229
8. D. E. Nkhuwa v. Lusaka Tyre Services Limited [1977]
Z.R. 43

Legislation referred to:

1. The Industrial and Labour Relations Act, Chapter 269
of the Laws of Zambia
2. The Industrial and Labour Relations Act No. 8 of 2008

Works referred to:

1. The Rules of the Supreme Court of England, 1999
Edition
2. Zambian Civil Procedure: Commentary and Cases

0.1 INTRODUCTION

1.1 This appeal arises from an order of the High Court (Mwansa, J.), rendered on 27th July 2021.

1.2 By that order, the High Court declined to grant the appellant leave to amend her complaint; leave to extend time within which to file the amended complaint; and leave to produce a document, on the ground that the applications were out of time.

2.0 **BACKGROUND**

2.1 On 24th January 2019, the appellant filed a notice of complaint, against the respondent, her former employer, over the termination of her employment. The respondent filed their response to the complaint, on 27th February 2019.

2.2 On 27th July 2021, the appellant made an application for leave to amend her complaint. In the same application, she applied for an extension of the time within which to file the amended complaint. She also applied for leave to produce a document.

2.3 The appellant sought to amend the complaint so that she could add one more relief, which she believed would reveal the cause of action against the respondent.

2.4 By an order dated 27th July 2021, the High Court declined to grant the appellant the leave she sought, "for want of time" (sic).

3.0 **GROUND OF APPEAL AND ARGUMENTS IN SUPPORT**

3.1 The sole ground of appeal is that the trial Judge erred in law when he declined to grant the appellant leave to amend the complaint, extend time within which

to file the amended complaint and allow her to produce a document.

3.2 It was submitted that the High Court had the power to grant the appellant's applications by virtue of **Rules 33, 36 (a), 37 and 55 of the Industrial Relations Court Rules.**

3.3 In addition, **Sections 85 (1) and (5) of the Industrial Relations Act, Rule 47 of the Industrial Relations Court Rules** and cases of **G.L. Baker Ltd v. Medway Building & Suppliers Ltd¹, Development Bank of Zambia & Another v. Sunvest Limited & Another²** and **BP Zambia PLC v. Interland Motors Limited³**, were referred to, and it was submitted that the appellant's applications ought to have been granted because the court had the power to allow an amendment, at any stage of the proceedings.

3.4 It was pointed out that the applications were premised on the need to avoid a multiplicity of actions. It was then submitted that allowing the applications, would not have prejudiced the respondent in any way.

4.0 **RESPONDENT'S ARGUMENTS IN RESPONSE**

4.1 On behalf of the respondent, it was submitted that the High Court rightly declined to grant the appellant's applications. It was pointed out that the appellant only sought leave to amend the complaint, two years after commencing the proceedings against the respondent.

4.2 Our attention was also brought to pages 697, 698 and 699 of **Zambian Civil Procedure: Commentary and Cases**, where the authors have set out the effects of late amendments, and the considerations and principles surrounding such amendments.

4.3 It was pointed out that through the proposed amendment, the appellant seeks to introduce a new claim, that she was underpaid and her terminal benefits require recomputation, but at the same time, she indicates that she is unsure of what was due to her.

4.4 Reference was then made to **Order 20 of the Rules of the Supreme Court of England (White Book)** and the case of **Zambia Consolidated Copper Mines Limited v. Joseph David Chileshe⁴**, and it was submitted that the

introduction of a new claim, 2 years after the complaint was filed, was justly declined, as it is likely to prejudice the respondent.

5.0 APPELLANT'S ARGUMENTS IN REPLY

5.1 In reply, the appellant submitted that the document that she intends to produce was only availed to her by the respondent, after proceedings had already commenced. Reference was made to the cases of **Bwalya and Others v. Mwanamuto Investments Limited⁵**, **Zambia Seed Company Limited v. West Co-op Haulage Limited and Another⁶**, and it was submitted that this being the case, the applications should have been allowed because it is in the interests of justice that the appellant be heard on the issue.

5.2 It was also submitted that the intended amendment does not raise any inconsistencies, as all the appellant prays for, is that the respondent clarifies how the benefits were calculated.

6.0 CONSIDERATION OF APPEAL AND DECISION OF THE COURT

6.1 **Rules 33, 36 (a), 37 and 55 of the Industrial Relations Court Rules**, provide as follows:

"33. (1) Without prejudice to rule 36, an interlocutory application may be made by giving notice in writing to the Court, specifying the directions or order sought."

"36. (5) Without prejudice to the generality of sub-rule (4), the Court may give such directions as it thinks fit as to-

(a) The amendment of any notice, statement of claim, answer or other document."

"37. Without prejudice to rule 36, the Court may, at any stage of the proceedings, of its own motion give any party to the proceedings directions as to any steps to be taken by him in relation thereto."

"55. Nothing in these Rules shall be deemed to limit or otherwise affect the power of the court to make such order as may be necessary for the ends of justice or to prevent the abuse of the process of the Court."

6.2 From the forgoing provisions, it is clear that the High Court had the jurisdiction to amend the appellant's complaint. In fact, what we can discern from the submissions by the parties, is that it is

not in dispute that the court had the power to amend the complaint.

- 6.3 The issue for determination, as we see it, is whether the applications were preceded by an inordinate delay at the instance of the appellant, which delay prejudiced her applications.
- 6.4 According to the appellant, the need to amend has arisen because of a document served on her after proceedings had commenced. There is no indication of when this document came to her attention.
- 6.5 We note that the appellant filed her complaint on 24th January 2019. The appellant only made the application to amend the complaint on 27th July 2021; which was two years and five months, later.
- 6.6 From the record of proceedings, it is also apparent that no action was taken to prosecute the matter from the date the respondent filed their answer, until the contentious application was made.
- 6.7 In the case of **Allan v. Sir Alfred McAlpine & Sons Limited**⁷, the English Court of Appeal, held, *inter alia*, that:

"When the delay in the conduct of an action is prolonged or inordinate and is inexcusable, the natural inference in the absence of a credible excuse, and there is substantial risk by reason of that delay that a fair trial of the issues will no longer be possible or that grave injustice will be done to one party or the other or to both parties, the Court may in its discretion dismiss the action straight away. In order to exercise this discretion justly, the Court will consider the circumstances of the particular case, and among other factors, whether the blame is really the defendant's."

6.8 In addition, in the case of *D. E. Nkhuwa v. Lusaka Tyre Services Limited*⁸, the Supreme Court, held, *inter alia*, that:

"In addition to the circumstances of the delay and the reasons therefore which provide the material on which the court may exercise its discretion another most important factor is the length of the delay itself."

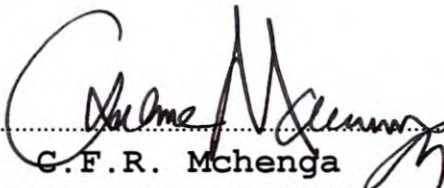
6.9 The appellant having assigned no reasons for why it took over two years to attempt to amend the complaint, points to an inordinate delay on her part. In the circumstances, we are satisfied that the trial Judge


was on firm ground when he declined to grant the appellant's applications.

6.10 It is very likely that the respondent would have been prejudiced by such an amendment, as they would have been required to file a new answer, more than two years after they had filed their answer.

6.11 Consequently, we find that this appeal lacks merit. and we dismiss it.

6.12 The parties will bear their own costs.


.....
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


.....
A.M. Banda-Bobo
COURT OF APPEAL JUDGE


.....
K. Muzenga
COURT OF APPEAL JUDGE