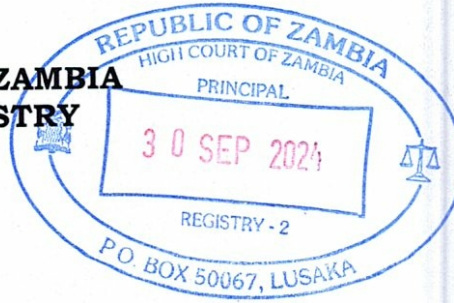


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2023/HP/1845

BETWEEN:

DIPAK PANCHAL**PLAINTIFF**

AND

SURYA BIOFUELS LIMITED**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 30th
DAY OF SEPTEMBER, 2024**

For the Plaintiff : Mr. N. Bwalya, Messrs Chonta Musaila & Pindani Advocates
For the Defendant : Ms. P.S Maluti, Messrs Ituna Partners

R U L I N G

CASES REFERRED TO:

1. *Cropper v Smith* [1884] 26 QBD 710 710-711
2. *Stewart v North Metropolitan Tramways Company* 1886 16 QB
3. *GL. Baker v Medway Building & Suppliers* 1958 1WLR 1216
4. *Joseph Gereta Chikuta v Chipata Rural Council* 1983 ZR 26
5. *William David Carlisle Wise v E.F. Hervey Limited* 1985 ZR 179
6. *Katleman and others v Hansel Properties Limited and others* 1987 AC 189
7. *Zambia Consolidated Copper Mines Limited v Joseph David Chileshe* SCZ No 21 of 2002
8. *Anderson Kambela Mazoka and two others v Levy Patrick Mwanawasa and two others* 2005 ZR 38
9. *Rosemary Bwalya, Attorney General and Commissioner of Lands v Mwanamuto Investments Limited* 2012 ZMSC 16
10. *Zambia Seed Company Limited v West Co-op Haulage Limited and Western Province Co-operative Limited* SCZ Appeal No 112 of 2013
11. *Cellnet Communications (Z) Limited v Savenda Management Services* 2013/HP/1213
12. *Access Bank Z Limited v Group Five Zcon Business Park Joint Venture* SCZ/18/52/2014

• LEGISLATION REFERRED TO:

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***
2. ***The Rules of the Supreme Court of England, 1965, 1999 Edition***

OTHER WORKS REFERRED TO:

1. ***Odgers on Civil Court Actions: Practice and Precedents, 24th Edition***
2. ***Zambian Civil Procedure: Commentary and Cases Vol 1, by Patrick Matibini, Lexis Nexis, 2017***

1. INTRODUCTION

- 1.1 In an application which was filed on 24th May, 2024, the Defendant, Surya Biofuels Limited seeks an Order of this Court to amend its' defence. The application was filed pursuant to ***Order 18 Rule (1) of the High Court Rules, Chapter 27 of the Laws of Zambia*** as read with ***Order 20 Rule 5 of the Rules of the Supreme Court of England, 1965, 1999 Edition*** and was supported by an affidavit and a List of Authorities and Skeleton Arguments.
- 1.2 An affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition were filed on 26th June, 2024, by the Plaintiff, Dipak Panchal, while an affidavit in reply was filed on 17th July, 2024.

2. BACKGROUND

- 2.1 Dipak Panchal commenced these proceedings on 19th October, 2023, by Writ of Summons which was accompanied by a statement of claim and the other requisite documents, in which he claims:
- i. *Payment of the sum of US\$5, 000.00 being withheld salary arrears from January, 2023 to February, 2023;*
 - ii. *Interest thereon;*

iii. Costs of and incidental to the action.

- 2.2 Surya Biofuels Limited entered appearance and filed its' defence on 6th November, 2023, and on 22nd January, 2024 Orders for Directions were issued. When the matter came up for a scheduling conference on 8th May, 2024, Counsel for Dipak Panchal informed the Court that they had complied with the Orders for Directions.
- 2.3 Counsel for Surya Biofuels Limited on the other hand informed the Court that they had not complied with the Orders for Directions as their client had been out of jurisdiction. It was stated that the client had since returned and had given instructions that the defence which was earlier filed be amended. Thus, Counsel asked the Court for Two (2) weeks to file that application.
- 2.4 The application was granted, and as already seen the application to amend was filed on 24th May, 2023.

3. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR SURYA BIOFUELS LIMITED

- 3.1 At the hearing, Counsel for Surya Biofuels Limited stated that they relied on the affidavit which was filed in support of the application, together with the List of Authorities and Skeleton Arguments. Further reliance was placed on the affidavit in reply.

RESPONSE BY COUNSEL FOR DIPAK PANCHAL

- 3.2 In response, Counsel for Dipak Panchal submitted that in opposing the application, they placed reliance on the

affidavit in opposition together with the List of Authorities and Skeleton Arguments in opposition.

- 3.3 In augmenting, Counsel stated that the reason for the opposition, was that the reasons advanced for making the application as set out in paragraph 6 of the affidavit in support and paragraph 7 of the affidavit in reply were not compelling, and neither did they offer any justification as to why the General Manager for Surya Biofuels failed to provide his lawyers with full instructions at the material time.
- 3.4 This it was stated, was because there are various modes of communication that are available which could have been used, such as e-mail, WhatsApp and messages.
- 3.5 Further reason for the opposition was stated as being that reliance was placed on the case of **Zambia Consolidated Copper Mines Limited v Joseph David Chileshe** ⁽⁷⁾ in which the Supreme Court held that amendments are not admissible if they prejudice a party as at the date of amendment.
- 3.6 It was stated that Dipak Panchal as at the date of the amendment, had accrued a right of admission, as shown in paragraph 11 of the affidavit in opposition, and in compliance with the Orders for Directions, he had filed and served witness statements and a scheduling conference brief, which Surya Biofuels Limited had had occasion to study and structure its' defence accordingly.
- 3.7 With respect to the proposed defence which was exhibited as 'SK1', Counsel submitted that it showed that it was a

complete overhaul of the initial defence. Contention was made that this was contrary to the decision in the case of ***In Re Chipata Rural Council***, in which it was stated that amendment under ***Order 18 of the High Court Rules*** is justified in recasting a case, and not introducing a new defence.

- 3.8 Note was made that in the Skeleton Arguments in reply, it had been argued that the matter should be decided on its' merits and not on technicalities. However, authority was sought from the case of ***Access Bank Z Limited v Group Five Zcon Business Park Joint Venture*** ⁽¹²⁾, stating that in that matter, the Supreme Court held that justice also required that the Court, and indeed all Courts, should never provide succor to litigants and their Counsel who display scanty regard for the rules of procedure.
- 3.9 It was also stated that it was noted in the said case, that rules of procedure and timelines serve to make the process of adjudication fair, just, certain and even handed. That under the guise of doing justice through hearing matters on their merits, Courts cannot aid in bending and circumventing the rules, for laxity in the application of the rules aids one side, and harms the innocent party who abides by the Rules.
- 3.10 Counsel submitted that the above held true for Surya Biofuels Limited, as it had not adhered to the Orders for Directions. Therefore, the prayer was that the application be dismissed with costs.

REPLY BY COUNSEL FOR SURYA BIOFUELS LIMITED

3.11 In reply, Counsel submitted that **Order 3 Rule 2 of the High Court Rules** vests this Court with jurisdiction to grant Orders in the interests of justice. It was also stated that **Articles 1 and Article 118 (2) (e) of the Constitution** in particular, do not intend that we do not do away with existing Rules and procedures even if they constitute technicalities. On that basis, the prayer was that the application be granted.

4. DECISION OF THIS COURT

4.1 I have considered the application. **Order 18 Rule 1 of the High Court Rules** provides that:

“1. The Court or a Judge may, at any stage of the proceedings, order any proceedings to be amended, whether the defect or error be that of the 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 purpose 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 as shall seem just.”

4.2 **Order 20 Rule 5 of the Rules of the Supreme Court of England** states that:

“(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the Plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.”

AFFIDAVIT IN SUPPORT

4.3 In this matter, the reasons advanced for the application as set out in the affidavit which was filed in support of the application, are that the defence which was filed was not exhaustive and comprehensive, as the deponent of the affidavit Sanjay Kumar Sharma, the General Manager of Surya Biofuels Limited, had not communicated full instructions to the lawyers at the time.

4.4 Therefore, amendment was sought to amend the defence as shown on exhibit ‘SKS1’, the proposed amended affidavit.

LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN SUPPORT

4.5 In the List of authorities and Skeleton Arguments in support the case of ***Rosemary Bwalya, Attorney General and Commissioner of Lands v Mwanamuto Investments Limited*** ⁽⁹⁾ was relied on, as having held that:

“It is trite law that pleadings may be amended at any stage of the proceedings before Judgment is passed as provided by Order 48 of the High Court

Rules and by Order 20/5 of the Rules of the Supreme Court (RSC)...”

- 4.6 Further authority was sought from the case of ***Cropper v Smith*** ⁽¹⁾ stating that the Court in that matter, held that there is no kind of error or mistake which if not fraudulent, the Court ought not to correct, if it can be done without prejudice to the other party.
- 4.7 It was also argued that the Supreme Court in the case of ***Zambia Seed Company Limited v West Co-op Haulage Limited and Western Province Co-operative Limited*** ⁽¹⁰⁾, in a similar manner, held that it is a policy of the law that amendments to pleadings before hearing should be freely allowed, if they are made without injustice to the other side.
- 4.8 Other authorities which were relied in that regard were the case of ***Cellnet Communications (Z) Limited v Savenda Management Services*** ⁽¹¹⁾.

AFFIDAVIT IN OPPOSITION

- 4.9 In the affidavit in opposition, Dipak Panchal averred that over Six (6) months had passed since Surya Biofuels Limited settled its' defence, and the reasons advanced in making the application did not justify the granting of the application. It was also stated that the fact that General Manager of Surya Biofuels Limited had admitted that he neglected to give exhaustive and comprehensive instructions showed that he lacked concern about the case.

4.10 It was also deposed that the amendments as proposed were a complete overhaul of the initial defence and therefore, the application had not been taken out in good faith.

LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN OPPOSITION

4.11 In the List of Authorities and Skeleton Arguments in opposition, ***Odgers on Civil Court Actions: Practice and Precedents, 24th Edition at page 221 in paragraph 11.08*** was cited as stating the following:

“Leave can be given to amend after commencement of the hearing, but it will not be given if the necessary amendment was clear long before trial and was not asked for. Either party is ordinarily for the due presentation of his case on payment of the costs of and occasioned by the amendment provided that there has been no undue delay on his part...

Further, the House of Lords has expressed a less liberal view that amendments will not be allowed to permit a new defence to be raised for the first time....”

4.12 Other cases cited of persuasive authority, was ***Katleman and others v Hansel Properties Limited and others*** ⁽⁶⁾ stating that in that matter, it was held that:

“Whatever may have been the rule of conduct a thousand years ago, today it is not the practice invariably to allow a defence which is wholly

different from that pleaded to be raised by amendment at the end of trial even on terms that an adjournment is granted and that the Defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify issues and those that permit a distinct defence to be raised for the first time.”

4.13 It was also argued that the learned author, **Patrick Matibini** in the book, **Zambian Civil Procedure: Commentary and Cases, Volume 1, Lexis Nexis, 2017 at page 699 in paragraph 18.5** states that:

“While the Courts allow amendment at any stage of the proceedings, the Court may be increasingly reluctant, as the case proceeds, to allow amendments that are made late. Late amendment could undermine the just resolution of a dispute rather than advance it. They delay the final resolution, cause confusion or waste litigant and Court resources.”

4.14 The case of **Joseph Gereta Chikuta v Chipata Rural Council** ⁽⁴⁾ was also cited as having held that:

“An amendment under 0.18 is justified only where it results in mere recasting of the case in order to agree with the evidence, and without the introduction of any new cause of action or defence. 0.18 of the High Court Rules, is not a directive to the courts spontaneously to raise further issues

where the issues have already been clearly pleaded and joined by the parties nor is it an open invitation to the parties to withhold issues and only attempt to raise them after a trial run on the evidence.”

4.15 The explanatory notes in **Order 20 Rule 8 (10) Practice Note 20/8/10) of the Rules of the Supreme Court of England** were also referred to, which state that:

“There will be difficulty, however, where there is ground for believing that the application is not made in good faith. Thus, if either party seeks to amend his pleading, by introducing for the first-time allegations of fraud, or misrepresentation or other such serious allegation, the Court will ask why this new case was not presented originally; and may require to be satisfied as to the truth and substantially of the proposed amendment.”

AFFIDAVIT IN REPLY

4.16 In reply, the averments in the affidavit, reiterated what was deposed to earlier in the affidavit, which was filed in support, that the defence which was filed was not exhaustive, with Sanjay Kumar Sharma contending that he was not available to give instructions at the time, as he was at Arubhi Farms in Chibombo, tending to work that Dipak Panchal had left.

4.17 He deposed that when he was finally available, the lawyers had already filed the defence. It was also his position, that the averments that had been made in the proposed amended

defence, were merely responses to the contentions that had been made by Dipak Panchal in his statement of claim. Therefore, they had been brought in good faith.

DECISION

- 4.18 A perusal of the pleadings as laid out in the statement of claim, and the initial defence, show that Dipak Panchal claims he was employed on a Two (2) year contract by Surya Biofuels Limited on 1st December 2022, and he was deployed at Arubhi Farms in Chibombo. He also states that he was on probation for a period of Three (3) months, and his salary was UD\$2, 500.00 a month. Further, that each party could terminate the contract of employment on giving Twenty-Four (24) hours' notice to terminate.
- 4.19 He alleges that he was paid a salary of US\$2, 500.00 for the month of December, 2022, but he was not paid for the months of January and February, 2023. Therefore, after several engagements with Surya Biofuels Limited, as he was facing hardship, he resigned at the month end of February, 2023. He states that Surya Biofuels Limited accepted the resignation.
- 4.20 In the defence which was filed, Surya Biofuels Limited denies that it owes Dipak Panchal US\$5,000.00 as claimed.
- 4.21 Then in the proposed amended defence, the contention is that Dipak Panchal failed and neglected his duties as Farm Manager at Arubhi Farms in Chibombo, as he was not reporting for work and residing at the residence which was provided at the farm.

4.22 Further allegations are made, that Dipak Panchal was asked to surrender his work permit, as he was listed as still working for the company which was listed as his employer on his work permit, so that change of employer could be submitted at Immigration. However, he did not do so. Therefore, he was still working for Soharusha Farms Limited as indicated on his work permit.

4.23 It is contended that failure to surrender his documents to process the change of employer, constituted breach of the employment contract. The allegations relating to the reasons for his resignation are denied, and the claim for payment is further denied.

4.24 When it comes to amendment of pleadings, **Order 18 Rule 1 of the High Court Rules** provides for the amendment of pleadings for purposes of eliminating all statements which may tend to prejudice, embarrass or delay the fair trial of the suit, and for the purpose of determining, in the existing suit, the real question or questions in controversy between the parties.

4.25 It will also be seen that the function of pleadings was ably stated in the case of **William David Carlisle Wise v E.F. Hervey Limited** ⁽⁵⁾ where it was held that;

“Pleadings serve the useful purpose of defining the issues of fact and of law to be decided; they give each party distinct notice of the case intended to be set up by the other; and they provide a brief summary of each party's case from which the

nature of the claim and defence may be easily apprehended;

4.26 This position was also reiterated in the case of ***Anderson Kambela Mazoka and two others v Levy Patrick Mwanawasa and two others*** ⁽⁸⁾ which was relied on by Dipak Panchal.

4.27 The Supreme Court in the case of ***Zambia Seed West Company Limited v West Co-Op Haulage Limited and Western Province Co-operative Limited*** ⁽¹⁰⁾ with regard to applications for the amendment of pleadings, held that;

“the policy on the law is that amendments to pleadings sought before hearing should be freely allowed if they are made without injustice to the other side. In other words, our adjectival law leans heavily in favour of amendments, and is generally against the refusal of amendments”.

4.28 However, while the Court has power to Order amendment of pleadings at any stage of the proceedings, it is guided by principles in doing so.

4.29 The learned author Patrick Matibini, in the book, ***Zambian Civil Procedure Commentary and Cases, Vol 1 Lexis Nexis, 2017 at page 698*** states that the grounds in deciding whether or not to grant or refuse an amendment is dependent on whether-

(a) The proposed amendment is made mala fide or bona fide;

(b) *The amendment will cause prejudice to the opposing party; or*

(c) *Such prejudice may be cured by an Order for costs, or where appropriate, an adjournment.*

4.30 He goes on to further state at page 699, citing *Tawkin Civil Procedure with Limitation Act 1963* 222, that:

“The following specific principles should be borne in mind in the exercise of discretion to amend pleadings;

(a) All amendments should be allowed which are necessary for determination of the real controversies in the suit;

(b) The proposed amendments should not alter and be a substitute for the cause of action on the basis of which the original lis was issued;

(c) Inconsistent and contradictory allegations, in negation to the admitted position of facts or mutually destructive allegations of facts, should not be allowed to be incorporated by means of the amendment;

(d) Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;

(e) An amendment of a claim or relief barred by time should not be allowed;

(f) No amendment should be allowed which amounts or results in defeating a legal right

due to the opposite party on account of lapse of time;

(g) No party should suffer on account of technicalities of the law and the amendment should be allowed to minimize the litigation between the parties;

(h) The delay in filing applications for amendment of pleadings should be properly compensated by costs; and

(i) An error or mistake, which if not fraudulent, should not be good ground for rejecting the application for amendment of pleadings.”

4.31 In this matter, the contention is that the defence as proposed is a completely new one, which prejudices Dipak Panchal. Therefore, it should not be allowed, as no justification has been given by the Managing Director of Surya Biofuels Limited, as to why he could not properly instruct Counsel when the defence was being settled, there being various modes of communication that could have been used such as e-mail, WhatsApp and even ordinary messages.

4.32 The case of ***GL. Baker v Medway Building & Suppliers*** ⁽³⁾ was relied on, as having held that the guiding principle when allowing amendments, is that it ensures the determination of all the issues in controversy.

4.33 In the case of ***Stewart v North Metropolitan Tramways Company*** ⁽²⁾, the plaintiffs argued that leave to amend must

be denied where it introduces a totally different, new, or inconsistent case, or changes the character of the defence.

4.34 In that case, the plaintiff sued the tramway company for damages caused by the negligence of the company, in allowing the tramway to be in a defective condition. The company denied the allegation of negligence, and contended that the company was not the proper party to be sued.

4.35 More than six months later, the company applied for leave to amend the defence, proposing the addition of the plea that under the contract entered into between the company and the local authority, the liability to maintain the roadway in a proper condition was of the latter, and therefore, the company was not liable.

4.36 The amendment was refused, and in so refusing, *Pollock B* observed that;

“The test as to whether the amendment should be allowed is, whether or not the defendant can amend without placing the Plaintiff in such a position that he cannot be recouped as it were by allowance of costs or otherwise. Here the action would be wholly displaced by the proposed amendment, and I think it would not be allowed.”

4.37 The defence in this matter as filed, merely denies that Dipak Panchal is entitled to the claims, while the proposed amended defence changes the character of the defence by bring in allegations of breach of contract. That has been argued as being prejudicial to Dipak Panchal.

- 4.38 I do note that a reason has been advanced for the failure to initially instruct Counsel for Surya Biofuels Limited, as being that the Managing Director was at Arubhi Farms when the defence was settled. As such, full instructions could not be given.
- 4.39 As rightly argued by Dipak Panchal, we live in a technological world, where communication has advanced, and as a result there are numerous modes of communication, such as via phone call, WhatsApp, e-mail, messages etc.
- 4.40 Consequently, proper instructions could have been given to Counsel prior to settling the defence. The defence as proposed to be amended is prejudicial, as it recasts the entire defence, and it does not clarify the issues in controversy for determination.
- 4.41 As even seen from the case of ***Zambia Seed Company Limited v West Co-op Haulage Limited and Western Province Co-operative Limited*** ⁽¹⁰⁾ amendments to pleadings before trial should be readily granted where they do not cause injustice to the other party. However, in this case, it has been demonstrated that injustice will be occasioned if the amendment is allowed, as it will introduce a new defence.
- 4.42 On that basis, I decline to grant the application to amend with costs to Dipak Panchal, which shall be taxed in default in agreement.

4.43 The matter shall come up on 21st October, 2024 at 08.45 hours for a status conference. Leave to appeal is granted.

DATED AT LUSAKA THE 30th DAY OF SEPTEMBER, 2024

Saunda
S. KAUNDA NEWA
HIGH COURT JUDGE

