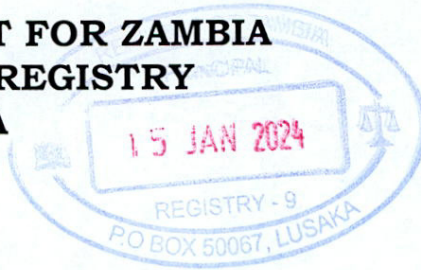


File

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

2023/HP/1363



BETWEEN:

HAULLOADS AFRICA ZAMBIA LIMITED

PLAINTIFF

AND

BEYOND CARRIERS

DEFENDANT

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 15TH JANUARY, 2024 - IN CHAMBERS**

For the Plaintiff : *Mr. M. Thole – In-House Counsel*
For the Defendant : *Mrs. E.T. Changufu – Messrs. Robson Malipenga & Company*

RULING

CASES REFERRED TO:

1. *OTK Limited V Amanita Zambiana Limited and Others (HPC 199 of 2005 (2011)*
2. *Environmental Investigations Agency INC and ORS V Lubinda and Others (Appeal, 77 of 2020) [2021] ZMCA 113 (7th October, 2021)*
3. *Hacker v Access Financial Services Limited (in liquidation) and Others (Appeal 101 of 2020) [2021] ZMCA 122 (202)*
4. *Charsesworth V Relay Roads Limited (2000) 1 WLR 230*
5. *Mwale V Mhanga and Another (SCZ Judgment Number 25 of 2015 (unreported) J22-J23*
6. *Mazoka and Others V Mwanawasa and Others (2005 ZR 138)*
7. *Mundia V Senter Motors Limited (1982 ZR 66, 69)*
8. *Chikuta V Chipata Rural Council (1983) ZR 26*
9. *Patel V Suma Stationers Limited*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *Order 20, Rule 1 & Order III Rule 2 of the Rules of the Supreme Court*

This matter was commenced by way of a writ and statement of claim on the 11th January, 2023 in Kitwe. The plaintiff's claims are for –

- 1) *An Order that the plaintiff was negligent and caused the seizure of goods.*
- 2) *Damages for negligence for the seizure of the goods from the plaintiff.*
- 3) *Loss of business in the sum of USD50,000.00.*
- 4) *Interest*
- 5) *Legal costs; and*
- 6) *Any other relief that the court may deem necessary.*

On the 26th July, 2023 consent summons for an order to transfer the matter from the Kitwe District Registry to the Lusaka Principal Registry pursuant to Order III Rule 2 of the Rules of the High Court Chapter 27 of the Laws of Zambia was filed.

The file was transferred.

On the 1st September, 2023 when the matter came up before me Counsel for the plaintiff informed the court that there were errors that were observed and that in accordance with Order 3 Rule 2 of the High Court rules, they would like to amend the originating process.

Mrs. Changufu for the defendant had no objections to the application provided that they were given an opportunity to have a look at the amendments intended so that they too, if need be, can amend their pleadings. Leave to amend the writ of originating process was granted and was filed on the 8th September, 2023.

On the 11th September, 2023 an affidavit in service was filed, attached was a letter from Counsel to the plaintiff indicating that the Amended Writ of Summons and Statement of Claim was served on Counsel for the defendant.

On the 21st September, 2023 summons to raise a preliminary issue pursuant to **Order 20 Rule (1) 3 and Order 20/1/5 of the Rules of the Supreme Court** was filed by Counsel for the defendant. The reason given was that the applicant's application was to expunge amendments made by the plaintiff without leave of court.

I have taken the contents of the affidavit in support to raise a preliminary issue deposed to by one Ethel Thelma Z. Changufu into consideration that:

1. *That on the 1st day of September when the matter came up for hearing, the plaintiff's Counsel asked the court for leave to amend some typographical errors which the court duly granted as the record will show.*
2. *That the said amendment was done and duly served on the defendant's Counsel.*
3. *That upon perusal of the said amended originating process, the amendments went further than just typographical errors and introduced a completely new claim and cause of action.*
4. *That she verily believes that this Honourable Court only granted leave for amendment of typographical error and not the introduction of a new claim.*

5. That she verily believes that the plaintiff requires leave of court to specifically introduce a new cause of action.

I have also considered the list of Authorities and skeleton arguments referred to and in particular Order 20 rule 1, the dates stamped on those documents was the 21st September, 2023. This was after I met with the parties on the 15th September, 2023. During the sitting Mr. Thole informed the court that they had adhered to the Order of the court and had filed their Amended writ of summons and statement of claim and had accordingly served them on the other side. Mrs. Changufu acknowledged that that was the position. That they had an objection to the amendments made. That she was seeking an adjournment to put in a formal application to object to the amendments made by the plaintiff.

The matter was adjourned.

On the 3rd October, 2023 an affidavit in opposition to summon to raise preliminary issue was filed. The same was deposed to by Marvin Thole and Chisala Chisala that:

1. That they have read what purports to be the defendant's affidavit in support of summons to raise preliminary issue filed into this Honorable Court of the 21st September, 2023 and wish to respond as set out hereinunder;

2. *That the mode in which the preliminary issue is raised before this Honourable Court is highly irregular as the proper procedure has been provided under the Rules of Court, in cases of determination of a matter on a point of Law or fact arising therefrom;*
3. *That the contents of paragraph 3 are disputed on the grounds that the plaintiff's application was to amend the originating process on grounds that the matter had been taken over by its In-House Counsel from Messrs. ECB Legal Practitioners and as such in line with the rule of Court seeks to amend the Writ of summons and Statement of claim, to which the defendant's Advocates maintained NO objection and sought to amend its pleadings if any novel issues arose from the amendment aforementioned. There is now produced and marked before me "MTCC 1" a copy of a search form conducted on the 18th September, 2023;*
4. *That further to the preceding paragraph, this Honourable Court granted the application made the plaintiff's Advocates and extended to the defendant's Advocates leave to amend its defence "if the need arose";*
5. *That the contents of paragraph 5 are disputed on grounds that it would be academic for the defendant's Advocates to be given liberty to respond on mere typographic errors and amending its defence, if the plaintiff's application before this Honourable Court was*

merely to the extent claimed in the aforementioned paragraph;

- 6. That the spirit in which the application was made and couched before this Honourable Court was to extend to the amendment of the originating process (Writ of Summons and Statement of Claim) and capture ALL issues both typographic and the introduction of claims not covered by our prior Advocates Messrs. ECB Legal Practitioners so as to give this Honourable Court a substantiated background of the matter arising before it;*
- 7. That the raising of this application by the defendant is a clear demonstration of the defendant's deliberate action to evade justice and delay the setting down of trial by this Honourable Court;*
- 8. That they crave the indulgence of this Honourable Court to dismiss the application filed into this Honourable Court as no rules of Court have been offended and this Honourable Court's Ruling delivered on the amendment of Court process is clear.*

In the skeleton arguments in support of affidavit in opposition to summons to raise preliminary issue I was referred to **Order 14 A Rule 1(5) of the Rules of the Supreme Court.**

I was also referred to the case of **OTK Limited V Amanita Zambiana Limited and Others (HPC 199 of 2005 (2011))¹** where the court held as follows:

“As argued by State Counsel, before (section 2 of the English Law Extent of Application) Act (5), Cap 11 was amended by Act No. 14 of 2002, the Rules of the Supreme Court only filled gaps in our own practice and procedure, with the insertion of e) in section 2 of the English Law (Extent of application Amendment) act, Cap 11 (5), the whole of 1999 edition of the white book has been incorporated in our Rules of procedures. Now by statute, the Zambian Courts are bound to follow all the Rules and procedure followed in England as stated in the 1999 edition of the white book. The entire provisions of the rules of the Supreme Court as expounded in the White Book, 1999 edition including the decided cases, are now Zambian Law by statute and as such binding on the Zambian Courts.”

Another case I was referred to is *Environmental Investigations Agency INC and ORS V Lubinda and Others (Appeal, 77 of 2020) [2021] ZMCA 113 (7th October, 2021)*², the court held as follows:

“In the view that we take what constitutes a notice of intention to defend, in the context of our rules, is the filing of a memorandum of appearance which is accompanied by a defence. It, therefore, follows that the filing of a memorandum of appearance with a defence is a prerequisite of launching an application to raise a preliminary issue to have the matter determined on a point of law or fact.”

The last case I was referred to was the case of *Hacker v Access Financial Services Limited (in liquidation) and Others (Appeal 101 of 2020) [2021] ZMCA 122 (202)*³ wherein the court stated as follows:

“It is clear by proceeding in the manner they did the respondents overlooked a vital step of procedure and in the process shot themselves in the foot...”

It is a fact that Counsel for the plaintiff took over the file from Messrs. ECB Legal Practitioners based in Kitwe. It is a fact that Mr. M. Thole is in-house Counsel for Hauloads Africa Zambia Limited. It is also a fact that the matter was transferred from Kitwe High Court to Lusaka High Court. It is a fact that it was when the matter was transferred to Lusaka that the need was seen to amend the writ and statement of claim by Counsel for the plaintiff.

It is a fact that on 1st September, 2023 Mr. Thole informed the court that he noticed that there were errors and sought the indulgence of the court to amend the originating process. Leave to amend process was granted this was after Counsel for the defendant did not raise objections. Counsel however asked for an opportunity to amend their pleadings if the need arose.

Normally an application for amendment is made by summons informing the opposing party about the terms or particulars of the proposed amendment.

In this case the application was made without disclosing the terms or particulars of the proposed amendment. The opposing side did not bring up the issue of what the terms or particulars of the proposed amendment would be. The opposition only came up after the filing of the amended writ of summons and statement of claim were filed on the 8th September, 2023.

Order 20 Rule 1 provides for the amendment of a writ without leave before it has been served on a party to the action. In this case there is an affidavit of service filed on the 31st January, 2023 as proof of service effected on the defendant through courier services on the 13th day of January, 2023. Meaning the writ of summons and statement of claim filed is the one dated 11th January, 2023.

There was a further affidavit of service filed by the then Counsel for the plaintiff Messrs. ECB Legal Practitioners that after the January, 2023 affidavit of service effected on the defendant on 1st February, 2023, the defendant wrote a letter to the plaintiff's Advocates informing them that they had no instructions in this matter.

Exhibited was the letter from Tresford Chali Legal practitioners informing the then Advocates for the plaintiffs that they had received the documents namely the writ of summons, the statement of claim, plaintiff's list of documents, plaintiff's list of witness and the affidavit of service for a new case where they had no instructions to receive process.

It was on the 26th April, 2023 when a notice of appointment as agents was filed by Messrs. Robson Malipenga and Company as Advocates for the defendant.

On the same day Messrs. Robson Malipenga and Company filed a memorandum of appearance. Reference, defendant's list of

witnesses as well as defendant's list of documents which I note is titled plaintiff's list of documents. On the 23rd June, 2023 Advocates for the plaintiff filed defence to counter claim. On 20th July, 2023 Counsel to the defendant filed a reply to defence.

The notice of change of Advocates who applied to the court for the amendment was filed on the 21st June, 2023. **Order 20, Rule 1** is clear as to when the Amendment of writ with leave is made that this does not apply in relation to an amendment which consists of-

- a) *The addition, omission or substitution of a party to the action or an alteration of the capacity in which a party to the action sues or is sued or*
- b) *The addition or substitution of a new cause of action or*
- c) *Without prejudice to rule 3(1), an amendment of the statement of claim (if any) endorsed on the writ.*

Order 20(1) applies to amendments the object of which is to correct mere or accidental mistakes, errors slips or omissions.

Order III Rule 2 provides as follows:

"Subject to any particular rules, the court or Judge may, in all causes and matters make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."

The decision to grant or refuse to grant an amendment requires a balancing exercise. In **Charesworth V Relay Roads Limited**⁴ Newberger J observed:

“As is so often the case where a party applies to amend a pleading or to call evidence for which permission is needed, the justice of the case can be said to involve two competing factors. The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired. A party prevented from advancing evidence and or argument on a point (other than a hopeless one) will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted.

On the other hand, even where, in purely financial terms, the other party can be said to be compensated for a late amendment or late evidence by an appropriate award of costs, it can often be unfair in terms of the strain of litigation, legitimate expectation, the efficient conduct of the case in question and the interests of other litigants whose cases are waiting to be heard, if such an application succeeds.”

I have carefully considered two issues. The first being what the justice of the case before me demands. Secondly whether or not this is a case in which I should exercise my discretion bearing in mind that a party to a suit must not be allowed to amend pleadings if the proposed amendments will make out a new case after the amendment.

I have studied with care the contents of the affidavit in support to raise a preliminary issue deposed to by Ethel Thelma Z. Changufu.

A careful study of the amendment in paragraph one was the addition of the word **Private** so that we all understand that we were dealing with a **Private** Limited Company.

Paragraph four included the inclusion of the words in the Copperbelt Province of the Republic of Zambia and the words Democratic Republic of Congo in order for us to understand that the plaintiff's warehouse was located in Chingola in the Copperbelt Province and the purchaser was in the Democratic Republic of Congo.

The other amendments served to step by step give a clear and accurate statement of the material facts on which the pleader relies for the defence. At least from the defence's point of view. I have considered whether or not each statement consists of sufficient particularity to allow the opposing party to understand the alleged facts to be able to reply. I note that dates amounts and premises were referred to.

I agree with the plaintiff that that if indeed the application sought was merely to amend typographical errors that it would be academic for the defendant's Advocates to be given liberty to respond to typographical errors and amending their defence.

In my view the application made and couched before this court was to extend to the amendment of the originating process that is the writ of summons and statement of claim.

It is also my considered view that the amendments seek merely to clarify, perfect or refresh the already existing cause of action. It is worth pointing out that even if it were to be that the amendment seeks to introduce a new cause of action this is not ground for refusal of an amendment if it is bona fide and in the absence of prejudice. A new cause which results in a change in the nature of the original action may be allowed especially when the amendment has the effect of setting out the true dispute between the parties as is the case in this matter.

I have been guided by a judgment of the Supreme Court delivered by Ngulube DCJ (as he was) of *Chikuta V Chipata Rural Council (1983) ZR 26^s* in which the court held as follows:

“Although generally the trial court should not radically depart from the case pleaded, in exceptional circumstances it would be incompatible with a Judge’s duty to dispense justice on the merits of any given case for him to allow evidence to be suppressed on the ground that a relevant issue was omitted from the pleadings; in this case, the learned trial Judge could hardly have justified his discretion to grant the declaration sought on a fiction that the resignation did not take place and had not effected any fundamental change to the relationship between the parties.”

In yet another case of *Patel V Suma Stationers Limited⁹* Sakala CJ (as he was) held as follows:

“That an amendment may be allowed notwithstanding that the effect of the amendment will be to add or substitute a new cause of action, of the new cause of action arises out of the same facts (or substantially the same facts ((as in this case)) 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.”

For avoidance of doubt the justice of this case demands that the amendments be allowed. Secondly in exercising my discretion judiciously I find that the proposed amendments do not in any way make out a new case. That the amendments seek merely to clarify, perfect or refresh the already existing cause of Action. The defendant is at liberty to amend their pleadings if need be. This should be within twenty-one (21) days of the delivery of this ruling. If need be, the plaintiff also has twenty-one (21) days within which to amend their pleadings.

The day for granting the Orders for Direction will be 7th February, 2024 at 09:30 hours.

Costs in the cause and leave to appeal is hereby granted.

DELIVERED AT LUSAKA THIS 15TH DAY OF JANUARY, 2024.


G.C. CHAWATAMA
HIGH COURT JUDGE