

IN THE HIGH COURT FOR ZAMBIA

2020/HP/0537

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BEARVEN MENGGO

AND

ANDERSON SITUMBEKO

THE ATTORNEY GENERAL



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

Before the Honourable Mrs. Justice R. Chibbabbuka on the 12th day of February, 2024

For the Plaintiff: Ms. A. Chibale, Messrs Mushipe & Associates

For the 1st Defendant: No appearance

For the 2nd Defendant: Ms. G.M Muyunda, Principle State Advocate and Ms. L. Hamweemba, State Advocate

RULING

Cases referred to:

1. *Rosemary Bwalya, The Attorney General and The Commissioner of Lands Vs Mwanamuto Investments Limited [2012] ZMSC 16*
2. *Tillesley Vs Harper (1878) 10Ch D 393*
3. *Zambia Seed Company Vs Wes Co-op Haulage Limited & Western Province Cooperative Union Limited Appeal No. 112 of 2013 page J15*
4. *Bowmaker Finance Limited Vs Buck (1976) Z.R 79*
5. *Investrust Bank Plc Vs Chick Masters Limited & Dr Mwilola Imakando (2011) Z.R 58*
6. *J.S Wardell Vs Universal Engineering Limited & NCCM Limited (1977) Z.R 62*
7. *Cropper Vs Smith (1844) Ch. D. 700*

Legislation referred to:

High Court Act, Chapter 27 of the Laws of Zambia

Rules of the Supreme Court (The White Book), 1999 Edition

Other works referred to:

Pleadings, Principles and Practice, Sir Jack Jacob and Ian S. Goldrin's, 1990 Edition, page 189

Zambian Civil Procedure Commentary and Cases, Volume 1, Patrick Matibini, LexisNexis, 2017

Takwani Civil Procedure with Limitation Act, 1963 222

Malik, The Code of Civil Procedure, page 163

1.0 INTRODUCTION

This is an application filed on the 23rd March, 2023 by way of summons by the plaintiff for an order for leave to amend statement of claim and writ of summons. The application is made pursuant to *Order 3 Rule 2* of the *High Court Rules*, and *Order 18 Rule 1* of the *High Court Rules, Chapter 27* of the *Laws of Zambia*.

2.0 PLAINTIFF'S AFFIDAVIT IN SUPPORT

The plaintiff filed an affidavit in support sworn to by Martha Mushipe counsel for the plaintiff who avers as follows:

On the 27th May, 2020 the plaintiff's commenced this action against the defendants which process lacked some material information which will allow the court to arrive at a just conclusion. That for the purpose of determining the real issues in controversy between the parties the matter leave be granted to amend the proceedings. The said amendments will not in any way prejudice the parties.

2.1 THE PLAINTIFF'S SKELETON ARGUMENTS

In their skeleton arguments counsel made reference to *Order 3 Rule 2* and *Order 18 Rule 1* of the *High Court Rules*, in the *High Court Act Chapter 27* of the *Laws of Zambia*, for the argument that this Court has jurisdiction to allow corrections to be done to the pleadings in order to allow the plaintiff clearly demonstrate his interest in the matter. Reference was also made to *Order 20 Rule 8 Sub-rule (1)* of the *Rules of the Supreme Court 1965 (White Book) 1999 Edition* for the argument that for the purpose of determining the real question in controversy

between the parties to any proceedings the court may order any document to be amended either of its own motion or on the application of a party.

To buttress this argument further the court was referred to the case of **Rosemary Bwalya, The Attorney General and The Commissioner of Lands Vs Mwanamuto Investments Limited**¹ where the court held:

“It is trite law that pleadings may be amended at any state of the proceedings before Judgment is passed as provided by Order 18 of the High Court Rules and by Order 20/5 of the Rules of the Supreme Court (RSC) the law is very clear. That is an amendment may be granted at any stage of the proceedings as long as it is before Judgment.”

Counsel argued that in *casu* the writ of summons and statement of claim are defective in that they do not state the facts which gave rise to the claim with requisite clarity and elucidation. It was counsel’s considered view that once these amendments are made they shall provide this Court with precise and conclusive material facts necessary for the fair administration of justice. Counsel was of the firm view that there exists no form of prejudice against the defendants should the plaintiff’s application be granted. For this argument this Court was referred to the learned authors of **Pleadings, Principles and Practice, Sir Jack Jacob and Ian S. Goldrin’s, 1990 Edition, page 189** where they state:

“The wide and extensive powers of amendment vested in the Courts are designed to prevent the failure of justice due to the procedural errors, mistakes and defects and they are exercised to further and serve the aims of justice. The power of amendment is intended to make more effective the function of the power of the Courts to determine the true substantive merits of the case, to have more regard to substance than form, and this is to free the parties and the Court from the technicalities or formalities of procedure and to correct errors and defects in proceedings.

PRACTICE: *The object of the amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of facts or the true relief or remedy which the parties really and finally intend to rely on or to claim.”*

The Court was also referred to the case of **Tillesley Vs Harper**² where it was stated as follows:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by cost or otherwise.....However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injury to the other side.”

On the basis of the foregoing arguments counsel prayed that this Court grants the application for leave to amend the writ of summons and statement of claim.

3.0 THE 2ND DEFENDANT’S AFFIDAVIT IN OPPOSITION

The 2nd defendant filed an affidavit in opposition on the 8th May, 2023 sworn to by Lucie Amanda Hamweemba co-counsel from the Anti-Corruption Commission who avers as follows:

This Court re-issued an order for directions on the 15th July, 2022 and both the plaintiff and the defendants have complied with the said re-issued order for directions. Subsequently the matter was set down for trial on the 1st, 2nd and 3rd August, 2023. The originating process is not lacking any material information as is demonstrated by the pre-trial set dates and if anything, the so-called ‘material information’ is an afterthought by the plaintiff. Given the advanced stage of these proceedings, this Court has already been provided with all the precise and

conclusive material facts needed hence the setting of trial dates. That this matter was commenced in May 2020, the trial is yet to begin three years later and now this application for amendment at this stage will definitely be prejudicial to the defendants as there will be further delay in the administration of justice more so that the defendants have already complied with the order for directions.

3.1 THE 2ND DEFENDANT'S SKELETON ARGUMENTS

In their skeleton arguments, counsel strongly opposed this application by the plaintiff on the basis that the sought amendments are an afterthought as well as delaying tactics on the part of the plaintiff especially as the trial dates had been set. Counsel argued that a perusal of the intended amended statement of claim and writ of summons does not reveal any such significant issue that would warrant granting this application and that what the plaintiff seeks to amend is particularized facts that already exist in the statement of claim in its current form. It was counsel's considered view that the defendants will suffer prejudice as they have complied with the order for directions and await trial so that this matter which was commenced three years ago can be finally determined.

The court was referred to the case of **Zambia Seed Company Vs Wes Co-op Haulage Limited & Western Province Cooperative Union Limited**³ where the following principles were outlined for the Court to consider in an application for an amendment:

- a) The attitude of the parties in relation to the amendment
- b) The nature of the amendment sought in relation to the suit;
- c) The question in controversy; and
- d) The time when the amendment is sought.

Counsel contended that in relation to the attitude of the parties, the plaintiff is now being represented by the third set of advocates and only when the matter was close to trial has the plaintiff decided to bring this application, which in counsel's view goes to show the attitude of the plaintiff to be delaying tactics.

With regard to the nature of the amendment sought, counsel argued that the court process reveals that the amendment is not material at all and does not change the initial originating process in any way whatsoever. In relation to the question in controversy, counsel argued that the same is whether or not the plaintiff was falsely imprisoned and maliciously prosecuted and the proposed amendment does not address the question in controversy. Last but not the least in relation to the time the amendment is sought, counsel argued that granting this application would subject the defendants to indefinite litigation. That it is trite law that litigation must come to an end at some point.

Counsel argued that that at some point the plaintiff made an application to enter judgment in default of appearance and defence but that the delay in the 2nd defendant's filing its defence was based on the process involved to obtain instructions. As such, if this court grants the application, the 2nd defendant will suffer more prejudice in obtaining the instructions as it might even take longer and in the process the plaintiff might be forced to make an application to enter judgment in default of appearance. It was counsel's view that the plaintiff had not met the principles enunciated in the **Zambia Seed Company** case and that this application should be dismissed with costs to be paid before this matter can proceed which costs must be taxed in default of agreement. For this argument on costs reliance was placed on the case of **Bowmaker Finance Limited Vs Buck⁴** as well as *Order 20 Rules 5 and 8 of the Rules of the Supreme Court*.

It was also submitted that prejudice will be occasioned to the defendants herein as they will not have an opportunity to amend their defence and the intended amendment is not essential and or necessary for the fair and final determination of this matter.

On the foregoing arguments counsel prayed that this court declines to grant the plaintiff's application for leave to amend the statement of claim and writ of summons so as to allow this matter proceed to trial.

4.0 PLAINTIFF'S AFFIDAVIT IN REPLY

The plaintiff filed an affidavit in reply on the 10th May, 2023 sworn to by Martha Mushipe, counsel for the plaintiff who avers as follows:

The originating process still lacks some material information which will allow the Court to arrive at a just conclusion. A perusal of the drafted amendments dated 23rd March, 2023 shows that precise and conclusive material facts needed are lacking in the writ of summons and statement of claim. That granting the application sought will not prejudice the defendants but will in essence allow precise and conclusive material facts to be brought before the court will accordingly enable all issues in controversy to be determined on merit.

4.1 THE PLAINTIFF'S SKELETON ARGUMENTS IN REPLY

In their skeleton arguments counsel strongly opposed the 2nd defendant's assertion that the application sought by the plaintiff is an afterthought and delaying tactics simply because the trial dates had already been given. Counsel reiterated that this court has power to grant the order to amend the writ of summons and statement of claim at any stage of the proceedings.

It was counsel's further argument that the amendments sought by the plaintiff are significant and will assist to determine the real question in controversy. For this argument reference was made to the cases of **Investrust Bank Plc Vs Chick Masters Limited & Dr Mwilola Imakando⁵, (2011) Z.R 58, J.S Wardell Vs Universal Engineering Limited & NCCM Limited⁶, Cropper Vs Smith⁷**

Counsel submitted that declining to grant the plaintiff's application for leave to amend the writ of summons and statement of claim as proposed by the 2nd defendant in their affidavit in opposition will prejudice the plaintiff as the precise and conclusive material facts necessary in the matter will be left out. It was

counsel's prayer, that leave to amend the writ of summons and statement of claim be granted.

5.0 THE HEARING

At the hearing counsel for the plaintiff placed reliance on the affidavit in support and skeleton arguments filed into court on the 23rd March, 2023 and the affidavit in reply filed on the 10th May, 2023 respectively together with supporting skeleton arguments. Counsel prayed that the costs be in the cause.

In opposing the application counsel for the 2nd defendant placed reliance on the affidavit in opposition and skeleton arguments filed on the 8th May, 2023. Counsel more or less reiterated their arguments as presented in the said documents and prayed that the application be dismissed.

By way of reply, counsel for the plaintiff argued that the reasons advanced for the opposition lack merit and that this court grant the application sought in the interest of justice. I am indebted to all counsel for their arguments which this court has carefully considered.

6.0 THE DECISION OF THE COURT

It is trite law that the main reason for allowing an amendment to pleadings is to facilitate the determination of the real question in controversy between the parties to the proceedings. The writ of summons reveals the first claim as follows:

“Damages for false imprisonment and malicious prosecution arising from the plaintiff's arrest by the defendants on 6th September, 2018 and the continued imprisonment or detention of the plaintiff by the defendants up to the 17th March, 2020.”

A perusal of the proposed amendments to the writ of summons and in particular the statement of claim reveals that the plaintiff's amendment consists of

particularization in more detail of the claims with regard to the said claims of damages for false imprisonment and malicious prosecution.

The learned author of **Zambian Civil Procedure Commentary and Cases Volume 1, LexisNexis, 2017 Patrick Matibini** at page 699 cites **Takwani Civil Procedure with Limitation Act, 1963 222** for the principles that should be borne in mind by the court in exercising its 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 was issued;

(c) Inconsistent and contradictory allegations, in negation to the admitted position of facts, should not be allowed to be incorporated by means of 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 to due to the opposite party on account of lapse of time;

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

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

(i) An error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendments of pleadings.

The preceding principles are simply illustrative, and not exhaustive.”

In applying the foregoing principles as well those alluded to by the plaintiff and the 2nd defendant, it is apparent that the main bone of contention by the 2nd defendant is that it will suffer prejudice as it will have to be subjected to obtaining further instructions from its client which may result in further delay to this matter. The 2nd defendant is also of the view that the amendments are not material and do not justify this application. The plaintiff on the other hand insists that the amendments are necessary as they are more precise and will enable this court to determine the real issues in controversy and arrive at a just decision.

Malik, The Code of Civil Procedure, page 163 emphasizes that the general rule of pleadings is that all material facts and necessary particulars must be stated in the pleadings and a decision cannot be based on grounds outside the pleadings. As such it is of importance that pleadings are not only particular but all-encompassing so that the opponent is fully aware of all issues in contention that are being raised. Hence the reason why amendments are allowed so as to enable a party to fully appreciate the nature of the claim raised against it, him or her. On this basis I agree with the authorities cited by the plaintiff in this regard.

That being said however, I also agree with the 2nd defendant that the said application has come rather late in the day but be that as it may the principles guide that where such an application occasions a delay in the proceedings and trial of the matter the party prejudiced by the same should be compensated for in costs. Further the 2nd defendant has intimated that it will not be given an opportunity to file a defence, a curious argument as it goes without saying that an amendment to the writ of summons and statement of claim may necessitate an amendment to the defence which necessitation is as of right and this court

being alive to that fact will allow the parties time to make the said amendments. I say may, because the 2nd defendant has already expressed its view that the amendments are not material and that implicitly indicates that there may not be need on its part to obtain further instructions from its client. However, the court will not deny the 2nd defendant an opportunity to adequately respond to all claims made out against it as that it an inherent right.

The upshot of this matter therefore is that the plaintiff's application is allowed which amendment must be filed and on the defendants by the 29th February, 2024. The defendants are given up to the 28th June, 2024 to file and serve a defence on the plaintiff and the plaintiff is given leave to reply to same by the 31st July, 2024. A status conference is set for the 8th August, 2024 at 08:30 to set the matter down for trial.

Costs of this application are for the 2nd defendant to be taxed in default of agreement.

Delivered at Lusaka this 12th day of February 2024



R. Chibbabbuka
HIGH COURT JUDGE