

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

2022/HP/1467



BETWEEN:

KOPANO MUFAYA**PLAINTIFF**

AND

ZAMBIA NATIONAL COMMERCIAL BANK PLC**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 19th
DAY OF FEBRUARY, 2024.**

For the Plaintiff : Mr M. Lisimba, Messrs Mambwe Siwila & Lisimba Advocates
For the Defendant : Mrs M. Chakoleka and Mr G. Malipilo, Messrs Nchito & Nchito

R U L I N G

CASES REFERRED TO:

1. *Clapede and Company Commercial Union Association 1883 32 WR 262*
2. *Cropper v Smith [1884] 26 QBD 710 710-711*
3. *Stewart v North Metropolitan Tramways Company 1886 16 QB*
4. *William David Carlisle Wise v E.F. Hervey Limited 1985 ZR 179*
5. *Leopold Walford (Z) Limited v Unifreight 1985 ZR 203*
6. *Katleman and others v Hansel Properties Limited and others 1987 AC 189*
7. *Zambia Consolidated Copper Mines (ZCCM) v Joseph David Chileshe 2002 ZR 21*
8. *NFC Africa Mining Plc v Techro Zambia Limited SCZ No 22 of 2009*
9. *Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited 2011 Vol 3 ZR 67*
10. *Zambia Seed West Company Limited v West Co-Op Haulage Limited and another Appeal No 112/2013*
11. *Standard Chartered Bank v John M.C Banda Appeal No 94 of 2015*
12. *Dr Michael Mwanga v Sililo Mutaba Appeal No 6 of 2017*
13. *Lupiya Peter Sakala and 80 others v Zambia National Commercial Bank Plc 2021/HP/0787*

LEGISLATION REFERRED TO:

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

OTHER WORKS REFERRED TO:

1. *Zambian Civil Procedure: Commentary and Cases Volume 1, by Patrick Matibini, Lexis Nexis 2017*

1. INTRODUCTION

- 1.1 In an application that was filed on 6th June, 2023, the Plaintiff, Kopano Mufaya, seeks the leave of this Court, to amend the Writ of Summons and statement of claim. The application which was made pursuant to **Order 18 of the High Court Rules, Chapter 27 of the Laws of Zambia**, was supported by an affidavit.
- 1.2 In opposition to that application, the Defendant, Zambia National Commercial Bank Plc filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in Opposition, on 7th December, 2023.

2. BACKGROUND

- 2.1 Kopano Mufaya, commenced this matter by Writ of Summons that is accompanied by a statement of claim and the other requisite documents on 20th September, 2022, seeking:
 - i. *Payment of the outstanding sums of underpayment of terminal benefits.*
 - ii. *Damages for constructive dismissal.*
 - iii. *Interest on all amounts found due thereon.*
 - iv. *Costs of and incidental to the proceedings.*
 - v. *Any other relief that the Court may deem fit.*

- 2.2 Zambia National Commercial Bank Plc entered appearance and filed its' defence and the other documents on 10th October, 2022. Then on 16th November, 2022, Zambia National Commercial Bank Plc filed a Notice of Motion raising preliminary issues, pursuant to **Order 14A** and **Order 33 Rules 3 and 7 of the Rules of the Supreme Court of England, 1999 Edition**, as read together with **Section 2 of the Limitation Act, 1939**.
- 2.3 On record, is an Order referring the matter to mediation. I was reallocated the matter on 20th July, 2023, and the matter came up for hearing of the Notice of Motion on 28th August, 2023. However, as there was a Notice to vary the hearing date for the said Notice of Motion, which was filed on 2nd August, 2023, I adjourned the hearing to 29th September, 2023.
- 2.4 On that date, Counsel for Zambia National Commercial Bank Plc made submissions on the Notice of Motion. In response, Counsel for Kopano Mufaya indicated that Kopano Mufaya had amended the Writ of Summons and statement of claim on 6th June, 2023. Counsel for Zambia National Commercial Bank Plc stated that as they had already submitted on the application, and they were not served the amended Writ of Summons and statement of claim, Counsel for Kopano Mufaya could file a response to the Notice of Motion, and the Court could thereafter deliver the Ruling on the Notice of Motion.

- 2.5 That application was granted, with directions to file the opposition by 9th October, 2023, and a reply to be filed by 17th October, 2023. Thereafter, I would deliver my Ruling based on the documents that would have been filed.
- 2.6 On 23rd November, 2023, I issued an Order directing that before I could deliver the Ruling on the Notice of Motion, the application to amend the Writ of Summons and statement of claim should be served on Zambia National Commercial Bank Plc, so that it could respond to the said application, as there was no Order granting leave to amend the Writ of Summons and statement of claim on the record.
- 2.7 Thereafter, I would deliver a Ruling on that application. I further adjourned the hearing of the application to amend the Writ of Summons and statement of claim to 24th January, 2024.

3. AFFIDAVIT IN SUPPORT

- 3.1 Kopano Mufaya, as affiant of the affidavit, deposed that he commenced these proceedings on 26th September, 2022, claiming among other reliefs, damages for constructive dismissal. It was also his averment, that in the statement of claim, he had pointed to the allegation that he was declared redundant, when in fact there was no redundancy, and the relief sought ought to have been wrongful and unlawful redundancy, and not constructive dismissal, as he did not resign or quit.
- 3.2 Therefore, as shown on exhibit 'KM1' and 'KM2', the proposed amended statement of claim and Writ of

Summons, he wished to correct the reliefs sought. He averred that Zambia National Commercial Bank Plc would not be prejudiced by the amendment.

4. AFFIDAVIT IN OPPOSITION

- 4.1 Ngawo Nakamba, the Head Litigation and Advisory at Zambia National Commercial Bank Plc, in deposing to the affidavit, stated that the amendment that Kopano Mufaya sought to make, was not bona fide, and was prejudicial to the case for Zambia National Commercial Bank Plc, as Kopano Mufaya would be withdrawing his original claim, and substituting the same with additional facts that were not contained in the original claim.
- 4.2 It was further deposed that Kopano Mufaya had not advanced any reasons why he had delayed in making the application to amend the Writ of Summons and statement of claim. It was also stated that Kopano Mufaya had not filed Skeleton Arguments to accompany the affidavit filed in support of the application, and neither had he advanced sufficient grounds upon which the application could be granted by the Court.

5. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN OPPOSITION

- 5.1 It was argued that the application should be dismissed, as Kopano Mufaya had not filed Skeleton Arguments and a List of Authorities together with the summons and the affidavit in support of the application. In that regard, the provisions of ***Order XXX Rule 3A (1) (2) and (3) of the High Court***

Rules as amended by Statutory Instrument No 58 of 2020 were referred to.

- 5.2 The argument was that the said Rules are couched in mandatory terms on the requirement to file Skeleton Arguments and List of Authorities together with the summons and an affidavit in support. Therefore, litigants who failed to comply, did so at their own peril.
- 5.3 Reliance was placed on the case of **Dr Michael Mwanga v Sililo Mutaba** ⁽¹²⁾, stating that the Court in that matter noted as follows:

“We wish to borrow from the words of the Supreme Court in the cases of NFC Mining Plc v Techpro Zambia Limited and D.E Nhuwa v Lusaka Tyre Services Limited that Rules of the Court are intended to assist in the proper and orderly administration of justice, and as such, they must be strictly followed by all litigants, and that those who choose not to comply, do so at their own peril.”

KOPANO MUFAYA HAD NOT MADE THE APPLICATION IN GOOD FAITH

- 5.4 On this limb of opposition, reference was made to **Order 18 Rule 1 of the High Court Rules**, as well as **Order 20 Rule 5 (1) of the Rules of the Supreme Court of England, 1999 Edition**. Further reference was made to the explanatory Note **20/8/10 of the Rules of the Supreme Court of England**

as regards applications that are not made in good faith. That provision states 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.”

5.5 It was argued that Kopano Mufaya was aware of the manner in which he separated from employment with Zambia National Commercial Bank Plc, and he ought to have presented his original case earlier, which he did not do.

5.6 It was further argued that Kopano Mufaya had not given sufficient and credible reasons, as to why he sought to introduce a new cause of action, with additional facts at this stage in the proceedings. Therefore, the application had not been made in good faith, and was not bona fide.

APPLICATION TO AMEND THE WRIT OF SUMMONS AND STATEMENT OF CLAIM DID NOT INTEND TO AMEND A DEFECT

5.7 It was also argued that while ***Order 18 Rule 1 of the High Court Rules*** gives this Court discretion to Order amendment of pleadings at any stage of the proceedings, such amendment should be to fix a defect or an error in Order to

eliminate delay in the determination of a matter, or aid in the determination of the real issues in controversy between the parties.

- 5.8 Reliance was placed on the learned author, **Patrick Matibini**, in the book, **Zambian Civil Procedure: Commentary and Cases Volume 1, Lexis Nexis 2017 in paragraph 18.11 at page 706**, stating that he states therein that:

“First, leave to amend will be refused where the amendment does not aid the determination of the real question or questions between or among the parties.”

- 5.9 In line with the above, the contention was that Kopano Mufaya had not shown this Court, the defect that the proposed amendment would fix, or the issues that would be eliminated to avoid delay in the fair trial of the matter, or how the amendment would aid in the determination of the real questions between the parties. Rather, Kopano Mufaya sought to merely withdraw his original claim and insert a new claim, and add new reliefs, which were not stated in the original claim.

KOPANO MUFAYA HAD NOT GIVEN ADEQUATE REASONS FOR THE DELAY IN APPLYING TO AMEND THE WRIT OF SUMMONS AND STATEMENT OF CLAIM

- 5.10 The case of **Lupiya Peter Sakala and 80 others v Zambia National Commercial Bank Plc** ⁽¹³⁾ was cited, as where this Court, guided that an application to amend must be brought

at the earliest opportunity in the proceedings, and the Court should consider the reasons for the delay. That where the delay is occasioned by an important issue coming to the attention of the applicant, that should weigh in their favour.

5.11 However, a Court should not be prepared to grant an application, if an applicant is indolent in the process of searching for relevant evidence for the amendment, as equity does not aid the indolent.

5.12 Therefore, it was argued, that as Kopano Mufaya had not advanced any reasons for the delay in bringing the application, and more so, that he only made the application after Zambia National Commercial Bank Plc had filed the application raising preliminary issues, Kopano Mufaya was indolent, and the application should be denied.

KOPANO MUFAYA INTENDED TO CHANGE THE FUNDAMENTAL CHARACTER OF THE CAUSE OF ACTION

5.13 It was also argued, relying on the learned author, ***Patrick Matibini***, in the book ***Zambian Civil Procedure, Commentary and Cases, Lexis Nexis 2017 Volume 1 in paragraph 18.11 at page 706*** where he states that leave to amend may be refused, if it introduces a totally different, new and inconsistent case or changes the fundamental character of the cause of action.

5.14 It was contended that the amendment sought to insert a new claim for no reason at all, which would change the fundamental character of the cause of action, and not aid in the determination of the real issues in controversy.

ZAMBIA NATIONAL COMMERCIAL BANK PLC WOULD SUFFER PREJUDICE IF THE PROPOSED AMENDMENT WAS GRANTED

- 5.15 Again, citing the learned author, **Patrick Matibini**, in the book, **Zambian Civil Procedure, Commentary and Cases, Lexis Nexis 2017 Volume 1**, this time in **paragraph 18.9 at page 704** where he states that an application to amend may be refused where the amendment will possibly cause prejudice or injustice, and that where the opposing party may be compensated in costs, there will be no prejudice.
- 5.16 He further states that however, an amendment should not be allowed, simply because the opposing may be compensated in costs, and there is an onus on the Court to ensure that the amendment will ensure the determination of the real issues in controversy, and will not cause injustice or prejudice to the other party. That an amendment will not be allowed if the other party will not be able to defend the fresh allegation.
- 5.17 As authority, the case of **Zambia Consolidated Copper Mines (ZCCM) v Joseph David Chileshe** ⁽⁷⁾ was cited as having held that:
- “(ii) Amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments.”**
- 5.18 The argument was that the proposed amendments would prejudice Zambia National Commercial Bank Plc’s defence, as Kopano Mufaya intended to insert a new claim with new

reliefs and additional facts, which were not inserted in the original claim. Therefore, Zambia National Commercial Bank Plc would be prejudiced, in that it would have to change its' entire defence. The argument was that on that basis, the application to amend the Writ of Summons and statement of claim should not be granted.

6. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR KOPANO MUFAYA

6.1 At the hearing, Counsel for Kopano Mufaya, stated that they relied on the affidavit that was filed in support of the application.

RESPONSE BY COUNSEL FOR ZAMBIA NATIONAL COMMERCIAL BANK PLC

6.2 Counsel in response, submitted that in opposing the application, they relied on the affidavit in opposition and List of Authorities and Skeleton Arguments in opposition, which were filed on 7th December, 2023. In augmenting, his submission was that the application should be dismissed, as no List of Authorities and Skeleton Arguments were filed in support of the application.

6.3 Reference was made to **Order 30 Rule 3A (1) and (2) of the High Court Rules**, stating that the said Rules are couched in a mandatory manner, that the summons must be accompanied by an affidavit and a List of Authorities and Skeleton Arguments. It was further Counsel's submission that failure to comply with the provision was fatal, adding

that litigants who fail to comply with the Rules of the Court, do so at their own peril.

- 6.4 The submission in the alternative, was that should the Court not dismiss the application, then reliance was placed on the affidavit in opposition and the List of Authorities and Skeleton Arguments in opposition.

REPLY BY COUNSEL FOR KOPANO MUFAYA

- 6.5 It was submitted in reply, that the Court should not be stifled into looking at the merits of a matter, on account of mere procedural omission. It was Counsel's view, that amendment should be Ordered to ensure that all the issues in controversy are determined. Further submission was made, that the Constitution of Zambia, states that all disputes must be heard on their merits.
- 6.6 Counsel also stated that the failure to file a List of Authorities and Skeleton Arguments in support of the application was not fatal, as the Court may disregard the Skeleton Arguments. He added, that there is a plethora of authorities where the Courts proceeded to determine matters even in the absence of submissions. The prayer, was that in the circumstances of the case, leave be allowed to file the List of Authorities and Skeleton Arguments, so that all the issues in controversy could be determined.

7. DECISION OF THIS COURT

- 7.1 I have considered the application to amend the Writ of Summons and statement of claim. It was made pursuant to

Order 18 of the High Court Rules, Chapter 27 of the Laws of Zambia, which provides as follows:

“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.”

7.2 From the above, it can be seen that the Court, at any stage of the proceedings, may grant an Order to amend the 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.

THE APPLICATION TO AMEND WAS NOT SUPPORTED BY A LIST OF AUTHORITIES AND SKELETON ARGUMENTS

7.3 In opposing the application, Zambia National Commercial Bank Plc argued that the application to amend the Writ of Summons and statement of claim should be dismissed, as it was not supported by a List of Authorities and Skeleton

contrary to the provisions of **Order 30 Rule 3A (1) (2) and (3) of the High Court Rules, as amended by Statutory Instrument No 58 of 2020.**

- 7.4 It was argued that the failure to file the List of Authorities and Skeleton Arguments was fatal.
- 7.5 Counsel for Kopano Mufaya in submission, stated that the failure to file the said List of Authorities and Skeleton Arguments was not fatal, as the Courts have proceeded to determine matters in the absence of submissions being filed. Further, that this Court can Order for the filing of the said List of Authorities and Skeleton Arguments.
- 7.6 The provisions of **Order 30 3A (1) (2) and (3)** are as follows:
- “3A (1) At the time of filing the summons, the applicant shall file skeleton arguments of their case and list of authorities.**
- (2) The skeleton arguments shall set out as concisely as possible the-**
- (a) Issue arising in the application**
- (b) Brief arguments that will form the basis of the case by the party filing it and authorities in support; and**
- (c) Reasons for and against the application.**
- (3) On receipt of the affidavit in support of the application, skeleton arguments and list of authorities, the respondent shall file an affidavit in opposition with skeleton arguments and list of authorities.”**

7.7 It will be noted that the provisions use the word “*shall*”, entailing that it is a mandatory requirement. There is a plethora of authorities that have held that those who fail to comply with the Rules of the Court, do so at their own peril. In the case of ***NFC Africa Mining Plc v Techro Zambia Limited*** ⁽⁸⁾ the Supreme Court held that:

“Rules of the Court are intended to assist in the proper and orderly administration of justice and as such they must be strictly followed.”

7.8 Then in the case of ***Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited*** ⁽⁹⁾, the holding was:

“Those who choose to ignore Rules of Court will do so at their own peril.”

7.9 In the case of ***Leopold Walford (Z) Limited v Unifreight*** ⁽⁵⁾ it was held by the Supreme Court that:

“(ii) As a general rule, breach of regulatory rule is curable and not fatal, depending upon the nature of the breach and the stage reached in the proceedings;”

7.10 Then in the case of ***Standard Chartered Bank v John M.C Banda*** ⁽¹¹⁾, an application was made to set aside the Writ of Summons and statement of claim on the basis that the electronic address for the appellant and the appellant's advocates were not endorsed on the writ of summons. The appellant's advocates' electronic address was, however,

included in the statement of claim. The Supreme Court in that matter, observed as follows:

“We have stated in a number of case authorities that rules of court ought to be complied with and a party who breaches them does so at his or her own peril. We, of course, will be doing no one in this appeal any favour it we attempted to recite those case authorities. Suffice it to state that we did in the case of Access Bank (Z) Limited v. Group Five/ZCON, review those authorities, indicating when and when not a party that may have fallen foul of the rules of court may be allowed to proceed as if no breach had occurred and/or be directed to effect appropriate amendments. Yet we were also firmly alive to the fact that rules should generally not be used as a minefield for parties who make fairly inadvertent mistakes that translate into no tangible prejudice to the other party. If an irregularity can be cured without undue prejudice then it is desirable that such irregularity be put right subject to an order as to costs against the erring party.”

7.11 In this matter, the failure to file a List of Authorities and Skeleton Arguments, is curable by Ordering the filing of the same to cure the defect. However, due to the fact that the application has already been argued, it would be pointless to make such an Order. The fact that Kopano Mufaya has not

filed a List of Authorities and Skeleton Arguments in support of his application, just goes to the merits of his application, and I will proceed to determine the application.

MERITS OF THE APPLICATION TO AMEND THE WRIT OF SUMMONS AND STATEMENT OF CLAIM

7.12 The power that is granted to the Court to Order amendment of pleadings, is premised on the rule that pleadings should state the material facts and the necessary particulars of a case. In the case of *William David Carlisle Wise v E.F. Hervey Limited* ⁽⁴⁾ 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;”

7.13 The Supreme Court in the case of *Zambia Seed West Company Limited v West Co-Op Haulage Limited and another* ⁽¹⁰⁾ as regards 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”.

7.14 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. 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.*

7.15 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.”*

7.16 In this matter, Kopano Mufaya, in the affidavit filed in support of the application to amend, merely stated that in the Writ of Summons and statement of claim as originally filed, he had claimed for constructive dismissal among other claims. Then in the facts as laid out in the statement of claim, they point to the allegation that Kopano Mufaya was

declared redundant, when in fact there was no redundancy and the relief ought to have been wrongful and unlawful redundancy, and not constructive dismissal, as he did not resign.

7.17 The Writ of Summons, statement of claim and the other requisite documents were filed on 20th September, 2022. Zambia National Commercial Bank Plc entered appearance and filed its' defence on 10th October, 2022. Thereafter, on 16th November, 2022, it filed a Notice of Motion seeking the determination of whether this Court can entertain Kopano Mufaya's action for underpayment of terminal benefits when the same is subject to a plea in bar on the part of Zambia National Commercial Bank Plc, or in the alternative, that Kopano Mufaya's action is statute barred.

7.18 Then on 6th June, 2023, Kopano Mufaya applied to amend the Writ of Summons and statement of claim.

7.19 A perusal of the Writ of Summons and statement of claim as originally filed, shows that Kopano Mufaya seeks underpayment of terminal benefits and damages for constructive dismissal. In the proposed amended Writ of Summons and statement of claim, which is exhibited as 'KM1' and 'KM2' to the affidavit filed in support of the application to amend, the claim is for damages for wrongful and unlawful redundancy, among other reliefs, as well as payment of the outstanding sums due to underpayment of terminal benefits.

7.20 Zambia National Commercial Bank Plc in its' List of Authorities and Skeleton Arguments, argued that Kopano Mufaya had not advanced reasons for his failure to plead the claim as proposed to be amended, initially. Therefore, he has not acted in good faith, as he knew the manner in which he separated from Zambia National Commercial Bank Plc.

7.21 Further, the amendment that he seeks to make, does not intend to cure or fix a defect, but rather will change the cause of action fundamentally. Thus, Zambia National Commercial Bank Plc will suffer great prejudice as a result of this new cause of action being admitted. It was also argued that Kopano Mufaya did not give sufficient reasons for the delay in making the application.

DELAY IN BRINGING THE APPLICATION

7.22 As regards the delay in bringing the application, I note that on record is an undated Order that was made by the then Judge in Charge, referring the matter to mediation. There is nothing on the record that shows how long the matter was at mediation, before it was returned to the Court. Therefore, in view of that, it cannot be said that there was delay in bringing the application.

FAILURE TO ADVANCE REASONS FOR MAKING THE APPLICATION TO AMEND

7.23 It was argued by Zambia National Commercial Bank Plc that Kopano Mufaya was aware of how he separated from Zambia National Commercial Bank Plc, and therefore, he could have

pleaded what he now seeks to do in the amended Writ of Summons and statement of claim, initially.

7.24 In submission, Counsel for Kopano Mufaya did not address that limb of opposition. That being the position, this Court was not given the benefit of understanding how the initial Writ of Summons and statement of claim were arrived at. I am alive to the fact that in the case of **Cropper v Smith** (2), *Bowen LJ* stated that:

“It is a well-established principle that the object of the Court is to decide the rights of the parties, and not to punish them for the mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights..... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without prejudice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace.....It seems to me that as soon as it appears that the way in which a party has framed their case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can done without injustice, as anything else in the case is a matter of right.”

7.25 However, no reason having been advanced, there is no material upon which the Court can properly exercise its' discretion in favour of Kopano Mufaya that there was a mistake or error in the pleadings as originally filed.

WHETHER THE PROPOSED AMENDED WRIT OF SUMMONS AND STATEMENT OF CLAIM DOES NOT SEEK TO CURE A DEFECT BUT INSTEAD WILL BRING ABOUT A NEW CAUSE OF ACTION

7.26 I have already highlighted that no reasons why the Writ of Summons and statement of claim were crafted as filed, was given. Thus, I cannot determine whether the amendment seeks to cure a defect. It is however clear that the claim for underpayment of terminal benefits is to be maintained should the amendment be granted. If the amendment is granted, the claim for constructive dismissal will be replaced by a claim for wrongful and unlawful redundancy.

7.27 Clearly constructive dismissal and wrongful and unlawful redundancy, are two distinct claims, which on the face of it, can be said that if the amendment is granted, a new cause of action would have been instituted. However, when one peruses the initial statement of claim and the proposed one, they will note that the facts that are averred, giving rise to the cause of action are essentially the same.

7.28 The only addition is that Kopano Mufaya contends in the proposed amended statement of claim, that when he separated from Zambia National Commercial Bank Plc his position was not removed from the Bank structure. He

further contends that there was no program to declare him redundant, as no redundancy occurred.

7.29 In the case of ***Katleman and others v Hansel Properties Limited and others*** ⁽⁶⁾, the defendant had defended the claims on its' merits, and during the closing speech at trial, amended the defence to plead that the claim was statute barred. *Lord Griffiths* in deciding, commented on the decision in the case of ***Clapde and Company Commercial Union Association*** ⁽¹⁾ where the Court held that however negligent or careless the first omission may have been, however late the proposed amendment was, the amendment should be allowed if it could be made without injustice.

7.30 He stated that:

“Whatever, may have been the rule of conduct a hundred years ago, today it is not invariably the practice to allow a defence that 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 of the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.”

7.31 Then in the case of the case of ***Stewart v North Metropolitan Tramways Company*** ⁽³⁾, the plaintiffs argued that leave to amend must be denied where it introduces a

decision by the Supreme Court in the case of **Zambia Seed West Company Limited v West Co-Op Haulage Limited and another** ⁽¹⁰⁾, in this jurisdiction, amendments are readily granted before trial, if they do not cause injustice to the other party. Thus, an amendment will not be granted where it will cause injustice to the other party.

7.36 Based on that, while Zambia National Commercial Bank Plc argued that if the amendment were to be granted, it would suffer prejudice, as a new claim would have been filed, it did not argue that it would not be able to defend the claim as amended. Thus, it did not demonstrate that it would suffer prejudice which would weigh against the Order for amendment being made.

7.37 This matter is yet to proceed to trial, and the interests of justice, demand that all the issues in controversy in a matter are decided in one matter.

8. CONCLUSION

8.1 In view of the fact that the proposed amendment would allow for the proper determination of all the issues in controversy in this matter, I allow the application to amend the Writ of Summons and statement of claim. The amended Writ of Summons and statement of claim shall be filed by 4th March, 2024.

8.2 However, seeing that no reasons were advanced for why the initial Writ of Summons and statement of claim were not crafted, as now amended, Kopano Mufaya shall bear the

costs of and incidental to the application. Leave to appeal is granted.

DATED AT LUSAKA THE 16th DAY OF FEBRUARY, 2024

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

