

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

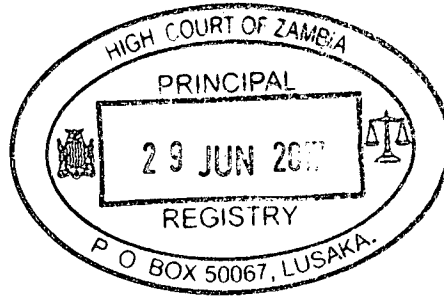
2013/HP/0470

BETWEEN:

FINGANI MBEBA

AND

BARCLAYS BANK ZAMBIA PLC



PLAINTIFF

DEFENDANT

Before the Honourable Mrs. Justice M. C. Kombe

For the Plaintiff : *Mr. L. Banda – Messrs T. S. Chilembo & Company.*

For the Defendant : *Mr. R.Mwanza– Messrs Roberts & Partners.*

R U L I N G

Cases referred to:

1. *Tildesley v Harper* (1876) 10 CH. N 343.
2. *Zambia Consolidated Copper Mines (ZCCM) v Joseph David Chileshe* (2002) Z.R 86.
3. *G.L Baker v. Medway Building & Suppliers* (1958) 3 ALL E.R 540.
4. *Manharial Hartji Patel v Surma Stationers Limited, Shashikanji Devraj Vaghela and Emmanuel Mwansa* (2009) Z.R. 112.

Legislation and other material referred to:

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

This is a Ruling on the Plaintiff's application to amend paragraph 3 of the Statement of Claim by deletion of the words '**between 2004 and 2005**' and insertion of the words '**In the year 2002.**'

The application was made viva voce pursuant to **Order 20 of the Rules of the Supreme Court (White Book RSC-1999 Edition)** and **Order 18 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

In making his application, learned counsel for the Plaintiff Mr. L. Banda submitted that he was aware that pleadings had since closed and that the matter was on going. However, he contended that the Defendant would not be prejudiced as the Plaintiff was still on the stand and was still being cross-examined.

Mr. Banda also relied on the case of **Tildesley v Harper** ⁽¹⁾ which gave birth to the guiding principles on amendments. He also relied on Article 36 of the Constitution to the effect that the courts could make any orders without being tied to the strict rules of procedure if the interest of justice so demanded.

In opposing the application, learned counsel for the Defendant Mr. R. Mwanza submitted that there were so many authorities which stated the principle that amendments of Statement of Claim could be granted with leave of court before trial. However, he submitted that counsel for the Plaintiff had not cited any authority which allowed for amendment of the Statement of Claim at this stage of the proceedings. He submitted that if the court were to allow an amendment of the Statement of Claim at this stage in the manner requested for by the Plaintiff, it would be tantamount to the Plaintiff re-casting his case depending on how he fared in cross-examination on salient points.

Mr. Mwanza argued that it was not in dispute that the paragraph which the Plaintiff sought to amend was one that had arisen as a result of the Plaintiff

giving two different versions of a very important aspect of his case under cross-examination. He added that the rights of the Defendant would be greatly prejudiced if the amendments were allowed as it had come too late in the day. Counsel referred the court to the case of **Zambia Consolidated Copper Mines (ZCCM) v Joseph David Chileshe** ⁽²⁾ which was one of the many authorities regarding when the court could allow an amendment.

Mr. Mwanza also submitted that the discretion to amend pleadings by a court was anchored on the fact or principle that the court must do so if it thinks it just. He argued that it would be unjust to allow the amendment as it would amount to the Plaintiff being given an opportunity to 'clean up' his evidence depending on what he encountered under cross examination.

Lastly, it was submitted that the Defendant in answering to the Plaintiff's claims had focused on the pleadings as they stood. Therefore it would be prejudicial to the Defendant to have to re-cast its case mid-way.

In reply, Mr. Banda submitted that paragraph 3 of the Statement of Claim did not speak to the whole cause of action and therefore an amendment of the same would not change the complexion of the cause of action as had been suggested.

He added that the case of **Zambia Consolidated Copper Mines (ZCCM) v Joseph David Chileshe** which had been cited by Mr. Mwanza did not state that amendments would only be disallowed when they were pre-judicial to the other party. He submitted that the Plaintiff was still under cross-examination, the evidence on record remained the same as contained in the respective bundle of documents and that the cause of action was not in any way prejudiced as the amendment would not even touch on the defence.

Those were the submissions by the parties which I have considered.

By this application, the Plaintiff seeks leave to amend paragraph three (3) of the Statement of Claim. As rightly pointed out by the parties, the relevant rules relating to amendments of pleadings are mainly to be found in Order 20 of the Rules of the Supreme Court (RSC). According to the editorial introduction under paragraph 20/0/2, amendments of pleadings and other documents is divided into two groups: in the first group which relates to rules 1, 3, 4 and 12, amendments are allowed to be made without leave; the second group relates to rules 2, 5, 7 and 8 which allow amendments to be made with leave of the court.

Thus under rule 1, the plaintiff may without leave of the court amend pleadings once at any time before the pleadings in the action are deemed closed. This rule applies only to amendments the object of which is to correct mere or accidental mistakes, errors, slips or omissions. So amendments which are generally formal in their character or effect are allowed without leave of the court.

In relation to amendments with leave, Order 20 rule 5 is pertinent and it provides that:

'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 pleadings on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.'

Under our own rules, Order 18 of the High Court Rules provides that:

'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.'

The overriding principle with regard to amendments with the leave of the court is that contained in rule 8 of Order 20 which reads as follows:

'For the purpose of determining the real controversy between the parties to any proceedings or correcting any defect or error in any proceedings, the court may at any stage of the proceedings and either of its own motion or an application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.'

The general rule was thus aptly stated by Jenkins J. in the case of G.L. Baker v. Medway Building & Suppliers³⁾ as follows:

'That the guiding principle of cardinal importance on this question is that generally speaking, all such amendments ought to be made as may be necessary for the purpose of determining the real questions in controversy between the parties.'

The generality of rule 8 applies it as well to writs and pleadings as to other documents that amendments will be allowed at any stage of the proceedings. This means that amendments may be allowed before or at or after the trial or even after judgment or on appeal.

Therefore, according to paragraph 20/8/10, leave is readily granted on payment of costs occasioned before the trial or hearing unless the opponent will be placed in a worse position than he would have been if the amended pleading had been served in the first instance.

In relation to an amendment at the trial or hearing, paragraph 20/8/11 provides the following:

'But the court will not readily allow at the trial an amendment the necessity for which was abundantly apparent months ago and then not asked for.'

The approach that has been taken in our jurisdiction can be discerned from the holding of the Supreme Court in the case of **Manharial Hartji Patel v Surma Stationers Limited, Shashikanji Devraj Vaghela and Emmanuel Mwansa⁽⁴⁾**.

It was held *inter alia* that:

'Order 20 rule 5 (5) of the Rules of the Supreme Court, states that an amendment may be allowed, notwithstanding that the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts 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.'

However, this general principle is subject to the countervailing rule of practice that an amendment will be refused or disallowed when if it were made, it would result in prejudice or injury which cannot be compensated for by costs. According to the explanatory note at paragraph 20/8/2, the difficulty of the rule arises when an amendment is sought which might prejudice the other party or deprive him of a defence which has already accrued to him. So if the application is made *malafide*, or if the proposed amendment is sought to be made after undue delay or will in any other way unfairly prejudice or cause detriment to the other party, leave to amend will be refused.

Thus in the case of ***Tildesley v. Harper*** which was cited by counsel for the Plaintiff, Bramwell L.J said:

'My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting malafide or that by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.'

Here at the home, the Supreme Court made this following pertinent observation in the case of ***ZCCM v Chileshe*** which has been cited by both parties. It stated that:

'On the totality of the authorities we have considered, we are of the firm view that although Order 20 rule 5 gives the court power to allow the plaintiff to amend his writ or any party to amend his pleadings, it does not provide a wide discretion and does not allow a general relaxation of the governing principle that any amendment after the expiry of the limitation period will not be allowed unless it is just to do so and it will be just to do so if there are peculiar circumstances which make the case an exceptional one.'

Having made the above observation, it held inter alia that:

'Amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments.'

It is clear from the authorities referred to above that the courts have the powers to allow amendments at any stage of the proceedings if no prejudice will be caused to the other party.

In order for this court to ascertain whether the amendment will prejudice the rights of the Defendant as existing at the date of such amendment sought, it is important to ascertain the nature of the proposed amendment. In this regard, I have carefully examined the original statement of claim and the amended defence in the present case and compared it with the proposed amended statement of claim.

As I have already alluded to, the Plaintiff seeks to amend paragraph 3 of the statement of claim so that it reads: **'In the year 2002'** and not **'Between 2004 and 2005'**. According to the statement of claim, this period relates to the time when the Plaintiff deposited a K9,000.00 in his account held with the Defendant bank and at a later date withdrew K4,000.00.

Reference has been made to this period because the Plaintiff has averred that the Defendant negligently failed to re-activate his account after it was closed on the ground that it had been dormant. As result of the failure to re-activate his account, the Plaintiff is claiming damages for loss of use of money and a refund of K5, 000.00 which the Plaintiff alleges the Defendant allowed to be withdrawn by third parties without his consent or authority.

The Plaintiff has argued that the proposed amendment will not prejudice the Defendant as the matter was still on going and the Plaintiff was still being cross-examined. Further that the amendment did not speak to the whole cause of action and therefore it would not change the complexion of the cause of action as had been suggested by the Defendant.

On the other hand, the Defendant in its amended defence denied that the Plaintiff made any deposit and withdrawal between the period of 2004 to 2005 and has put him to strict proof in terms of the evidence to confirm the transactions and the particular days the transactions were made.

The Defendant's position is that the Plaintiff's account remained idle from June 2003 and that it was closed because it was dormant for a long time. Therefore maintaining the account would have entailed creation of a huge overdraft on the part of the Plaintiff as inactivity meant the account had to go in red because of bank charges.

Based on the defence filed, the Defendant contends that its rights will be greatly prejudiced if the amendment was allowed as it came too late in the day and was tantamount to the Plaintiff re-casting his case depending on how he fared in cross-examination on salient points.

In view of what I have highlighted above, it is clear to me that the proposed amendment intends to show the period that the Plaintiff's account was active as a result of the transactions effected on his account by way of deposit and withdrawal. With the proposed amendment, the transactions took place in the year 2002 and not between 2004 and 2005.

The Defendant has denied that the above transactions took place between the year 2004 and 2005 and has put the Plaintiff to strict proof in terms of the actual dates when this was done.

The question I ask myself therefore is this: Will this proposed amendment prejudice the rights of the Defendant existing at the time when the application for the amendment was made?

According to the amended defence, the right of the Defendant that existed at the time when the application was made was that the Plaintiffs bank account was inactive from July 2003 up to the time it was closed in May, 2004. Furthermore, that there was no transaction in relation to the deposit of K9, 000.00 and the withdrawal of K4, 000.00 between 2004 to 2005. The defendant's contention therefore is that the claim for a refund of K5, 000.00 does not arise since the Plaintiff's account was closed for being dormant for about a year.

Based on the foregoing, I am of the view that since the Plaintiff made this application to amend his statement of claim after questions were put to him during cross examination in relation to paragraph 3 of the statement of claim and his evidence in court, this application has delayed. I say so because the Defendant's defence is based on the facts as pleaded by the Plaintiff in his statement of claim. Furthermore, the lateness of the application has not been properly explained or justified by the Plaintiff.

In this regard, I find that the Defendant's rights will be prejudiced if the amendment is allowed as the defence to the Plaintiff's claims will no longer be available.

I am fortified in my findings because it is very clear from the pleadings that the Plaintiff has been very categorical in relation to the period when the deposit and the withdrawal was made on his bank account. This is because even after the Defendant put him to strict proof in its defence regarding the proof as to the dates when the transactions were made, the Plaintiff did not make any attempt to amend the statement of claim that the actual period was in the year 2002.

In addition, the letter of demand at page 5 of his bundle of documents also alludes to the period between 2004 and 2005. As a result, the response by the

Defendant to the Plaintiff's letter was based on the period that was provided by the Plaintiff and on that account it denied liability.

Therefore, given the position that the Defendant has taken even at the earliest stage when the demand was made, I am of the view that the proposed amendment is one which could have been raised by the Plaintiff by due diligence at an earlier stage in the proceedings.

It is on this basis that I am inclined to agree with counsel for the Defendant that the application has come too late in the day as the Defendant's defence focused on the pleadings as they stood and all the issues had been settled as at the time trial commenced. Therefore I find that it would be prejudicial to the Defendant as it will be put under great pressure to have to re-cast its case midway because of the answers given by the Plaintiff in cross examination.

For the reasons I have highlighted above, I find that this is not a proper case in which I can exercise my discretion to grant leave to the Plaintiff to amend the statement of claim because the proposed amendment will prejudice the rights of the Defendant existing at the time when the application for the amendment was made. Accordingly, the application is dismissed with costs to the Defendant.

DELIVERED at Lusaka this 29th day June, 2017



M. C. KOMBE
JUDGE