

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

**2016/HP/1807**

**BETWEEN:**

**AUSTIN CHISUPA**



**PLAINTIFF**

**AND**

**BORNIFACE MVULA a.k.a CHISUPA**

**DEFENDANT**

***BEFORE HONOURABLE JUSTICE MR. MWILA CHITABO, SC***

*For the Plaintiff:* Mr. J.M Chimembe of Messrs JMC & Associates

*For the Defendant:* Mr. N. Mulemba of Messrs Andrew Msukwa & Co.

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**R U L I N G**

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***Legislation referred to:***

1. *High Court Rules Chapter 27 of the Laws of Zambia*

***Cases referred to:***

1. *Tillesley v. Harper (1878) 10 ch D 390*

2. *Cropper v. smith (1884) 26 QB*

3. *Zambia Consolidated Copper Mines Limited v. Joseph David Chileshe SCZ Judgment No. 21 of 2002*

4. *Jacobs v. Schumalz (1880) 62 LT 121 at page 122*

This is an application by the Plaintiff to amend the statement of claim pursuant to Order XVIII of the High Court Rules<sup>1</sup>. The application is supported by affidavit in support deposed to by one **Joseph Mwila Chimembe**, the Plaintiffs Attorney.

The essence of the affidavit is that it has become necessary for the Plaintiff to amend the statement of claim to specifically plead duress as a prospective defence to a document reputedly authored by the Plaintiff which he now seeks to denounce and disown.

It was finally deposed that the proposed amendment will not in any way prejudice the Defendant's position.

The application was countered by the Defendant who filed in an affidavit in opposition deposed to by one **Andrew Musukwa**, the Defendant's Attorney.

The gravamen of the affidavit was that trial here in this matter commenced on 23<sup>rd</sup> May, 2017. That midway trial, the Plaintiff is now seeking to introduce matters which were not pleaded initially. That the matters sought to be introduced are completely new and ought to have been anticipated at the time of setting the pleadings.

That contrary to the Plaintiffs position that the Defendant will not be prejudiced by the amendment, it was deposed that infact the defendant will suffer prejudice as trial had commenced. It was further deposed that in the event that the amendments were allowed, then the Plaintiff ought to suffer the costs occasioned by the application.

At the hearing, Learned senior Counsel for the Plaintiff Mr. Chimembe augmented the affidavit evidence with brief oral submissions. He elected to rely on his skeleton arguments, the essence of which were that:-

1) That the Court had power to amend pleadings at any stage of the proceedings.

In support of this proposition, Counsel anchored it under Order 18 Rule 1 of the High Court Rules<sup>1</sup>. He also called in aid Order 20 Rule 5 of the Rules of the Supreme Court<sup>2</sup>.

Learned Counsel then buttressed his submission by placing foreign judicial precedence before the Court. He firstly referred to the case of **Tillesly v. Harper**<sup>1</sup> and **Cropper v. Smith**<sup>2</sup>. Turning to our jurisdiction, Counsel placed capital reliance on the case of **Zambia Consolidated Copper Mines Limited v. Joseph David Chileshe**<sup>3</sup> where it was held 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 of a cause of action".....

It was further held in that case that

"Amendment are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendment"

He pointed out that the issue of duress sought to be pleaded arises from the same facts already pleaded, it was his submission that the

Defendant will not suffer any prejudice if the amendment was allowed.

In respect of costs it was his submission that the costs ought to be in the cause. He informed the Court that the Plaintiff at one stage had been awarded security for costs to be paid by the Defendant, but the same have not been to give allowance for the proceedings impeded by the issue of costs.

The Defendant opposed the application by filing in an affidavit in opposition deposed to by one **Musenga Andrew Musukwa** an Advocate for the Defendant. The essence of which is that the Plaintiff had all the time to properly plead his case and all issues to be adjudicated.

That allowing the amendment will result in prejudice to the Defendant as there will be no fair trial; the trial having commenced and the matter would have to commence de novo at great cost. In the circumstances, he invited the Court to dismiss the Amendment application.

At the hearing, the Plaintiff's Advocates essentially relied on their clients affidavit and the skeleton arguments they had filed. It is therefore not necessary on account of brevity and Court's time to reproduce and replicate the submissions.

Learned Counsel for the Defendant in their brief submissions also adopted the affidavit in opposition.

Learned Counsel graciously conceded that an amendment can be made at any stage. He however pointed out that the amendment proposed to be anchored on duress is substantial. It was his submission that the Plaintiff has to be condemned in costs in the event that the Court was inclined to grant the highly sought amendment. To this end he placed before the Court the case of **Jacobs v. Schmalz**<sup>4</sup>, and quoted a favorable paragraph at page 124 to the effect that:-

*“Where the amendment asked for is a substantial one, such that the plaintiff could not succeed without it, he will in the proper case will only be allowed at trial on payment of all costs”*

It was Counsel’s further submission that they requires evidence from the Plaintiff that they would not with reasonable interrogation that they could not have discovered the new facts soon as held in the case of **Moss v. Mallings (1886) 33 644**. He concluded by submitting that costs in any event are in the discretion of the Court.

I am indebted to both Counsel for their helpful submissions.

## 1. JURISDICTION

The starting point in interrogating the amendment of pleadings application is Order 18 (1) of the High Court Act<sup>1</sup>. It provides as follows:-

*“The Court or a Judge may at any stage of the proceedings order any proceedings to be amended, whether the defect or error is that of a 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”*

It is obvious from the very clear proviso of Order 18 (10) the Court has jurisdiction to grant an amendment to the pleadings at any stage of the trial. This issue therefore need no further investigations.

## **2. FUNCTION OF AMENDMENT OF PLEADINGS**

One of the roles of amendment of pleadings is to ensure that all questions in controversy in a suit are brought on board for purposes of determining a suit. It is trite that all issues arising out of the same set of facts in space and time ought to be wholistically dealt with in one action, by one Court of competent jurisdiction to avoid temptations of relitigation which is frowned upon by the Courts.

In the case in casu, the record for example at page 40 in the Plaintiffs bundles of documents reveals that the Plaintiff alludes to having signed a letter on 1<sup>st</sup> October, 2014 (document number 40)

the Plaintiff alleges that he was forced to sign the letter of 1<sup>st</sup> October, 2014 and as such he had disowned the contents of the 1<sup>st</sup> October, 2014 letter.

It is obvious that the Plaintiffs' claims that he was forced to abdicate his throne under duress has been made clear in the very early stages of the case even before the suit was launched. In my view, it is just and right that the plaintiff be granted the sought amendment so that all grievances are investigated and interrogated at trial to resolve all the issues in contest.

### **3. COSTS**

Ordinarily a successful litigant ought not to be deprived of the fruits of its Judgment unless good cause is demonstrated why the same should not be awarded. The costs however are awarded in the discretion of the Court. But in exercising such discretion the Court should do so judiciously.

In the case in casu, it is common cause that the Plaintiff waited until the commencement of trial to launch his application to amend pleadings. That of course is within his perfect rights. However, "he who goes to equity must do so with clean hands". By launching his application on the eleventh hour, it should have become obvious to the Plaintiff that the Defendant would necessarily incur costs. I also agree with the Learned Advocate for the Defendant that the amendment may require the matter to be heard de novo with the immediate resultant effect of escalating costs. Someone has to suffer those costs.

The legal maxim "equity assists the vigilant and not the indolent" aptly applies to the case in casu.

3 (a) Costs awarded in favour of the Plaintiff on the security of costs application

It was canvassed by the Learned Counsel for the Plaintiff that the Court in the security for costs application had condemned the Defendant to pay costs. These costs according to them have not been paid so it was argued that the costs ought to be in the cause.

I disagree. The Plaintiff having been awarded costs was supposed to vigorously recover his well earned costs and in default of agreement to tax its bill.

Having by election omitted to recover what was awarded to them, is no answer to the Defendant's invitation to the Court to award it costs for the wasted day and costs incurred in the amendment proceedings.

The Plaintiffs plea that costs be in the cause is not attractive; it is destitute of any merit.

The justice of the case is that the costs of and incidental to the amendment proceedings be and are for the Defendants which costs are to be taxed in default of agreement. For purposes of clarity, the said costs are recoverable irrespective of the outcome of the main action.



In conclusion, the Plaintiff's application for amendment of the statement of claim is granted as appears in the proposed Amended Statement of Claim appearing as exhibit "JMC 1".

Separate Order for Directions have contemporaneously been issued following this Ruling.

Leave to appeal to the Superior Court of Appeal is granted.

**Delivered under my hand and seal this 31<sup>st</sup> day of October, 2017**



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**Mwila Chitabo, SC  
Judge**