

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

**2018/HP/1849**

BETWEEN:

**MNONOKI ZHOU MSEBENZI  
FADZAI MSEBENZI**



**1<sup>st</sup> PLAINTIFF  
2<sup>nd</sup> PLAINTIFF**

AND

**SARA NGWENYA**

**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 18<sup>th</sup>  
DAY OF AGUST, 2020**

*For the Plaintiffs : Messrs Leonard Lane Partners*

*For the Defendant : Messrs Ganje Mhango and Company*

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## **R U L I N G**

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CASES REFERRED TO:

- 1. Samuels v Linzi 1980 1 All ER 803*
- 2. Ruth Kumbi v Robinson Caleb Zulu 2009 ZR 183*
- 3. Country Pub Limited and Zensof Investment Limited v Tina Hadjipetrou and William Mzyece Appeal 17/2019*

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*

This is a ruling on an application made by the plaintiffs for an order for leave to amend the pleadings, that was filed on 19<sup>th</sup> March, 2020,

pursuant to Order 18 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia, and Order 20 Rule 5 of the Rules of the Supreme Court of England, 1999 edition.

Due the outbreak of the corona virus (covid 19), on 26<sup>th</sup> May, 2020, I directed the plaintiffs to serve the application on the defendant forthwith. The defendant was directed to file an affidavit in opposition by 12<sup>th</sup> June, 2020, and the plaintiff was to file an affidavit in reply by 30<sup>th</sup> June, 2020. I was to deliver my ruling after that.

To date, the plaintiffs has not filed any proof of service of that application on the defendant, by way of an affidavit of service. It will be noted that the plaintiffs commenced this action on 25<sup>th</sup> October, 2018 by way of writ of summons and statement of claim. The defendant entered appearance and filed a defence on 3<sup>rd</sup> December, 2020. Orders for directions were issued on 29<sup>th</sup> January, 2020, and they were complied with.

The matter came up for trial on 6<sup>th</sup> November, 2019 and during the testimony of the 1<sup>st</sup> plaintiff, and in particular in cross examination, Counsel for the plaintiffs applied for an adjournment of the matter to enable him amend the statement of claim, as it had errors. Counsel stated that the plaintiffs live in South Africa, and he had only had opportunity to have a pre trial conference with them a day before the hearing.

Counsel for the defendant raised objection to the application on the basis that they were deep in cross examination, and their view was



that the amendment would come too late in the day. I allowed the adjournment in the interests of justice.

On 22<sup>nd</sup> November, 2019, the plaintiffs filed the application to amend the pleadings, and on 29<sup>th</sup> January, 2020, when the application came up, Counsel for the defendant applied for an adjournment on the ground that they were only served the application the previous day, and they wished to file an affidavit in opposition to the application. The matter was adjourned to 19<sup>th</sup> February, 2020.

On that date, none of the parties were before court, and I struck out the application with liberty to restore within fourteen (14) days, failure to which it would stand dismissed for want of prosecution. On 11<sup>th</sup> March, 2020, I dismissed the application as it was not restored within fourteen (14) days of 19<sup>th</sup> February, 2020. The plaintiffs on 19<sup>th</sup> March, 2020 filed the application again, which is subject of this ruling.

As earlier noted, there is no proof that the said application has been served on the defendant. In making the application, the plaintiff has relied on ***Order 18 Rule 1 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”.*

**Order 20 Rule 5 of the Rules of the Supreme Court of England, 1999 edition** on the other hand states that;

*“(1) 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 pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct”.*

In the case of **Country Pub Limited and Zensof Investment Limited v Tina Hadjipetrou and William Mzyece** <sup>(3)</sup>, the Court of Appeal considered the fate of a matter where there was failure to comply with an “*unless order*” within the prescribed time. It was observed in that matter that in the case of **Ruth Kumbi Robinson Caleb Zulu** <sup>(1)</sup>, the Supreme Court stated that when there is failure to comply with an “*unless order*” within a specified time, it does not necessarily mean that the action is dead or defunct, or that the court is thereby deprived of the jurisdiction to extend time for doing a specified act within the specified time.

That the court has power to examine the reasons by the applicant for failing to comply with the “*unless order*”, and it can use its discretion



to grant leave or reject the application. That while previously failure to comply with an “*unless order*” resulted in an action being dismissed and as such, it was not capable of restoration to active cause list, in the English case of ***Samuels v Linzi Dress Limited*** <sup>(1)</sup>, that position was revisited.

Therefore, courts can extend time where an “*unless order*” has been made, but has not been complied with, but that it is a power that should be exercised cautiously. The Court of Appeal held that following the decision in the case of ***Ruth Kumbi v Robinson Caleb Zulu*** <sup>(2)</sup>, the procedure is that after failing to comply with an “*unless order*” within the time stipulated in the “*unless order*”, one has to apply for extension of time.

That this is also in line with ***Order 3/5/9 of the Rules of the Supreme Court of England, 1999 edition*** upon which the decision in ***Samuels v Linzi*** <sup>(1)</sup> was based, and which order provides as follows;


***“Where the court makes an “unless” or conditional order that a party is required to do an act within a specified time but the order to do that act is not complied with within the time specified, the court nevertheless retains the power to extend the time within which such act should be complied with”.***

In this matter, I made an “*unless order*” on 19<sup>th</sup> February, 2020, directing the plaintiff to amend the writ of summons and statement of claim within fourteen days (14) days of that date, failure to which the matter would stand dismissed for want of prosecution. On 11<sup>th</sup> March,

2020, I dismissed the matter for failure to comply with the unless order. The plaintiff on 13<sup>th</sup> March, 2020, applied to amend the pleadings after failure to comply with the unless order to do so.

In line with the case of ***Country Pub Limited and Zensof Investment Limited v Tina Hadjipetrou and William Mzyece*** <sup>(3)</sup> seen above, this is not the appropriate application to have been made, as the plaintiff was supposed to apply for an order of extension of time within which to comply with the “*unless order*”. That being the position, the application is irregularly before me, and I set it aside. The matter shall come up on 7<sup>th</sup> December, 2020 for continued trial at 09:00 hours.

**DATED AT LUSAKA THIS 18<sup>th</sup> DAY OF AUGUST, 2020**

  
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**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**