

IN THE HIGH COURT FOR ZAMBIA

2019/HP/0121

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

ROMANS MVULA *(Suing as Administrator of the estate of the late January Mvula)*

PLAINTIFF

AND

LUSAKA CITY COUNCIL

DEFENDANT

BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN CHAMBERS, ON 2ND JULY, 2020.

For the Plaintiff: N/A

For the Defendant: N/A

RULING

CASES REFERRED TO:

1. *Investrust Bank Plc vs. Chick Masters Limited and Dr. Mwilola Imakando* (2011) ZR 58;
2. *J. S. Wardell vs. Universal Engineering Limited and NCCM Limited* (1977) ZR 62;
3. *Cropper vs. Smith* (1884) 26 Ch. D. 700; and
4. *Tildesley vs. Harper* (1878 - 79) 10 Ch. D. 393 at 396 - 397.

LEGISLATION REFERRED TO:

1. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia; and*
2. *The Supreme Court Practice, 1999 Edition, Volume 1, London Sweet & Maxwell.*

1 INTRODUCTION

1.1 This is the Defendant's application to amend Defence brought pursuant to **Order XVIII** of **The High Court Rules**¹ and **Order 20** of **The Rules of the Supreme Court**². The application is made by way of Summons filed on 5th June, 2020. The application is supported by an Affidavit, deposed to by one Bwalya Francis Kasonde, a Legal Assistant employed by the Defendant.

2 AFFIDAVIT EVIDENCE

2.1 It is deposed *inter alia* that at the time that the Defendant filed its Defence in this action, certain facts and evidence were not available, thus the Defendant did not fully and properly instruct Counsel. That the Defendant has now properly and fully instructed its Counsel based on the new facts and evidence that has come to light in relation to this action. As a result of the above, the Defendant needs to amend its Defence in order for it to properly defend this action. The proposed amendments are shown in exhibit attached marked "BFK1".

2.2 On the return date on 10th June, 2020, the Plaintiff requested for five (5) days within which to file his response. The Court directed the parties to file their respective Affidavits and Skeleton Arguments, within a specified period, upon which the Court would proceed to render its Ruling.

2.3 At the time of writing this Ruling, none of the parties had complied with the Court's directives. Accordingly, this application is unopposed and I have now proceeded to render the Ruling based on the Affidavit in Support of the application.

3 THE LAW

3.1 The application is made pursuant to **Order XVIII** of **The High Court Rules**¹, which empowers the Court to amend pleadings. It is couched 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 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." (Court's emphasis)

3.2 The Defendant further cited **Order 20** of **The Rules of the Supreme Court**². The Defendant did not cite the specific rule, but the relevant rule is **Rule 5**, which is couched as follows: -

"Amendment of writ or pleading with leave

(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. (Court's emphasis)

4 ANALYSIS & FINDINGS

- 4.1 I have considered the application and Affidavit evidence. By this application, the Defendant seeks to have the Defence amended. There was no Affidavit in Opposition filed herein nor arguments in support or opposition submitted by the parties. It is the Defendant's averment that the amendments that it seeks will give the Court an opportunity to determine the real issues in controversy between the parties and wholly determine the dispute.
- 4.2 I have drawn my attention to the case of ***Investrust Bank Plc vs. Chick Masters Limited and Dr. Mwilola Imakando***¹, where the Court stated that: -
- "As a general rule, however late the amendment is sought to be made, it should be allowed if it will not do the opponent party some injury or prejudice him in some way that cannot be compensated by costs."*
- 4.3 I have further drawn my attention to the case of ***J.S. Wardell vs. Universal Engineering Limited and NCCM Limited***², where the Court held that: -
- "Amendments to pleadings may be allowed at any stage in the proceedings and amendments may be allowed before or at or after the trial or even after judgment on appeal. As a general rule, however late the amendment*

is sought to be made, it should be allowed if it will not do the opponent party some injury or prejudice him in some way that cannot be compensated for by costs or otherwise... It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments be made which ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings."

4.4 A consideration of the authorities set out above, reveals that a Court or a Judge has power, *inter alia*, to allow any proceedings to be amended at any stage of such proceedings in order to allow the real question in controversy between the parties to an action to be determined.

4.5 Furthermore, I refer to the case of **Cropper vs. Smith**³, where Bowen L. J. observed that: -

"It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings."

4.6 I also refer to the case of **Tildesley vs. Harper**⁴, where Bramwell L. J. observed as follows: -

"My practice has always been to give leave to amend unless I have been satisfied that a Plaintiff applying was acting malafide or that by his blunder he has done

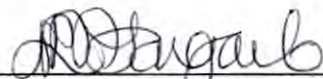
some injury to his opponent which could not be compensated for by costs or otherwise."

4.7 Being guided by the foregoing authorities and in view of the facts presented herein, I find that this is a proper case for me to grant leave to the Defendant to amend its Defence so that the real question in controversy between the parties to this action can be determined. The Plaintiff did not oppose this application. It is therefore my considered view that allowing the amendments will not prejudice the Plaintiff in any way.

5 CONCLUSION

- 5.1 Accordingly, leave to amend the Defence is granted as prayed. The Defendant shall file the amended Defence within the next seven (7) days from the date of this Ruling and the Plaintiff is at liberty to file an amended Reply within three (3) days after the service of the amended Defence.
- 5.2 Since the application was not opposed, I make no order as to costs.
- 5.3 Leave to Appeal is granted.

Delivered at Lusaka on 2nd day of July, 2020.



**P. K. YANGAILO
HIGH COURT JUDGE**