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**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Commercial Jurisdiction)

2019/HPC/0430



BETWEEN:

UNILEVER SOUTH EAST AFRICA ZAMBIA LTD **PLAINTIFF**

AND

AQUAGUARD INSUSTRIES ZAMBIA LIMITED **DEFENDANT**

CORAM: Hon. Mr. Justice Bonaventure C. Mbewe in Chambers on the 11th day of March, 2020.

Marshall : **Esther Nguni**
Research Advocate : **Mwiche Ntinda**

For the Plaintiff : *Mr. C. Salati of Messrs Mulenga
Mundashi Legal Practitioners*

For the Defendant : *Mr. S. Bwalya Jnr of Messrs
Christopher Russell Cook and Co.*

R U L I N G

Cases Referred to:



1. *Rosemary Bwalya and Others v. Mwanamuto Investments Limited*, SCZ Judgment No. 8 of 2012
2. *Wilson Masauso Zulu v. Avondale Housing Project Limited*, (1982) ZR 172
3. *Corpus Legal Practitioners v. Mwanandani Holdings Limited* (Appeal No. 134 of 2010)
4. *Zambia Seed Company v. Wes Co-op Haulage Limited & western province Cooperative Union Limited* (Appeal No 112 of 2013)

Other Authorities Referred to:

5. *High Court Rules, Chapter 27 of the Laws of Zambia*
6. *Rules of the Supreme Court of England, 1999 Edition*

BACKGROUND OF THE CASE

By an amended Writ of summons with the accompanying statement of claim filed on the 12th of November, 2019 the Plaintiff's claim against the Defendant is for the following:

- a) *Damages for breach of contract;*
- b) *Further or alternatively, an order of specific performance of the Contract of Sale in addition to or in lieu of damages for breach of contract;*
- c) *Special damages in the sum of **ZMW3,529,812.00***
- d) *Interest*

e) Costs; and

f) Any other relief that the court may deem fit

Both the Plaintiff and Defendant are companies incorporated under the Companies Act of Zambia.

The Plaintiff in its statement of claim states that; the Defendant and itself entered into a contract of sale of property on the 8th of April 2019 in which it was agreed by both parties that the Plaintiff would sell to the Defendant, the property at **Stand No. 7136** in the extent of 1.5694 hectares situate in Lusaka for the sum of (United States Dollars) USD1,315,000.00. The Plaintiff through its Statement of Claim provides that clause 8 of the said Contract of Sale of 8th April 2019 stated that the Defendant would pay the Plaintiff an initial deposit of (United States Dollars) USD131,500.00 upon exchange of contracts and that Clause 10 of the contract further provides that that the defendant (purchaser) would pay the Plaintiff (vendor) the balance of (United States Dollars) USD1,183,500.00 upon completion by way of bank transfer to the Plaintiffs Advocate's client account net of all transfer costs.

It is the plaintiff's assertion through its originating process that the defendant did remit the amount of (United States Dollars) USD 131,450.00 toward the purchase price on or around 23rd April 2019 to the account of Messrs. Mulenga Mundashi Legal Practitioners.

Further, the Plaintiff states that Clause 13 of the Contract of Sale for the property provided that the purchase was to be completed within 25 business days from the date of procurement of all the following;

- a) *a valid directors and shareholders resolution by the Vendor authorizing the transaction outlined in this contract as well as authorizing the signing of the contract by the representative mentioned in the attestation clause and which resolution should be provided upon signing the Contract of Sale;*
- b) *a valid director's and shareholder's resolution by the Purchaser authorizing the transaction outlined in this contract as well as authorizing the signing of the contract by the representative mentioned in the attestation clause and which resolution should be provided upon signing of the Contract of Sales;*
- c) *all regulatory approvals required to give effect to the transaction contemplated in this Contract being obtained by the parties (including the state's consent being obtained by the Vendor) and where required, approval of the transaction by the CCPC being obtained by the Purchaser on behalf of both parties;*
- d) *the Purchaser obtaining a valid investment license from the Zambia Development Agency;*
- e) *Property transfer tax certificate and receipt being obtained by the Vendor; and*
- f) *Duly executed assignments by the parties*

It is asserted in the Plaintiff's statement of claim that; the obligations provided under the contract of sale in Clause 7 (a) – (e) reproduced above have been fulfilled save for item 7 (f) which was not achieved as a result of Defendant's alleged neglect, refusal or ignoring to execute the assignment despite the same having been delivered to the Defendant's Advocates on 8th July, 2019 for execution. The Plaintiff further states that both parties were represented by able Counsel who guided them from the time of commencement of negotiations until execution of the contract of sale and that through a Notice to Complete dated 22nd August, 2019 the Defendant was reminded of its obligations under the contract of sale which contract of sale gave fourteen (14) days within which the party must complete its obligations which the defendant allegedly neglects to comply with. The said neglect resulted in, according to the Plaintiff, hindrance to the completion of the transaction under the contract of sale and by reason of the Defendants alleged breach of the contract of sale the Plaintiff claims to have suffered loss and damage and expects recoupment of the sum of (United States Dollars) USD1,315,000.00 from the sale of the property as contemplated under the contract of sale together with special damages categorized as : Legal fees, Estate Agent fees, Property Transfer Tax, and Property Surveyor Valuation Fees.

The Defendant through its Defence on record, provides that it is inaccurate for the Plaintiff to state that all obligations under clause 13 (a) – (e) have been fulfilled by the parties as they allegedly remain unfulfilled and the Defendant further argues that condition 13 (f) as stipulated required the

assignment to be duly executed by both the Plaintiff and Defendant in order for the said condition to be deemed completely fulfilled. The Defendant states that condition 13(f) of the subject contract of sale is ambiguous in that it does not expressly provide when the Plaintiff and Defendant were respectively expected and/or required to sign or execute the assignment. The Defendant also puts forward the argument that: special condition number 14(f) of the subject matter contract of sale defined completion as the time when the purchaser or its advocates would: confirm in writing that it received the title deeds and that the same were in order. The Defendant therefore emphasizes in its defence that it was the Plaintiff itself that drafted the said contract of sale and that the said contract should be construed *contra proferentum* against the Plaintiff to the extent of its ambiguity.

Further, the Defendant denies ever been reminded of its obligations through the Notice to Complete and also denies having been given 14 days within which to complete its obligations under the said contract. The Defendant only admits through its defence that it was on the 23rd of August 2019 served with a Notice to Complete dated 22nd August, 2019. The Defendant entirely denies the allegation of it having at any point neglected, refused or ignored to sign or execute the assignment or take any steps to the completion of the subject contract of sale. The Defendant states that it is actually the Plaintiff that did not fulfill the conditions precedent for the completion of the subject contract of sale.

The Defendant rejects the notion of the Plaintiff that the Defendant has breached the contract of sale and that Plaintiff has suffered loss and damage as a result of the alleged breach. The Defendant admits the purchase price of the property having indeed been pegged at (United States Dollars) USD1,315,000.00 and that it did pay to the plaintiff the initial deposit of (United States Dollars) USD131,450.00 as stated. What is in contention among others according to the Defendant is the Plaintiffs claim for special damages and other fees categorized by the Plaintiff. The Defendant states that in relation to the claim for legal fees categorized by the Plaintiff; the subject Contract of sale in relation to the property at **Stand No. 7136** has within it special condition No. 16, which condition obliges each party to bear their own legal fees and/or costs incidental to the transaction and/or subject to the contract of sale. The Defendant further asserts in argument that it is an instructing client or one that has retained legal counsel that is primarily liable to pay their legal counsel.

The Defendant provides in its statement of claim that it is the performance of the Plaintiff that is required to allow for completion of the subject contract of sale and that the Defendant itself has been desirous and willing to complete its obligations under the contract but for the commencement of the action herein. The Defendant states finally that it denies the assertion that the Plaintiff suffered loss and damage occasioned by the Defendant.

The Court handed out an Order for Directions in the matter on the 4th of December, 2019 which order scheduled a date for a status conference on the 25th of February, 2020 and a trial in the month of March 2020.

THE APPLICATION BEFORE ME

At the Status Conference on the 25th February, 2020 at which both parties were in attendance; the Plaintiff's Counsel informed the Court of their intention to lodge an application into court on behalf of their client to amend the Writ of Summons as per the client's instructions. The Plaintiffs' Counsel sought to bring this intended application to the Courts attention because essentially the bundle of pleadings and documents as well as some witness statements were already settled in the matter and amendment of the Writ in the cause would have a high likelihood of affecting the documents already settled as the matter had progressed greatly. The Court as a result instructed the Plaintiff to file for leave to file its application by the 4th of March 2020 and that the pre-set trial date was going to be utilized to hear the said application while trial was put on hold until further notice.

On the 4th of March 2020, the Plaintiff herein filed Summons an affidavit and skeleton arguments for leave to amend the amended writ of summons and the amended statement of claim. In its Affidavit in support sworn by one MILIMO MUTINTA a duly authorized representative of the Plaintiff, the deponent states that there are serious issues and reliefs sought by the

Plaintiff in the cause herein that have to be determined and the same were unintentionally omitted in the Plaintiff's originating process at the start of the cause now before Court. The deponent also deposed that it became necessary to make amendments to the Writ and Statement of claim so as to enable the Court to administer justice to both parties by considering the material or pertinent issues outlined in the said intended amended process. The Plaintiff through its affidavit exhibits the said intended amended originating process whilst maintaining that no prejudice would be occasioned if leave to amend the originating process in the cause were to be granted.

The proposed amended process exhibited within the application and marked 'MM1' contains the following relief and amendments:

AND the Plaintiff claims:

- (a) A declaration based on the Law Association of Zambia General Conditions of Sale 1997, the Contract of Sale be deemed to have validly been rescinded on the Defendant's failure to comply with the Notices to Complete dated 22nd August 2019 and 6th September 2019, respectively, alternatively rescission of the Contract of Sale;*
- (b) An Order of the Court that the Caveat entered by the defendant, on the 10th April, 2019, over Stand No. 7136 in extent of 1.5694 hectares situate in Lusaka be removed;*
- (c) Damages for breach of Contract of Sale;*

*(d) Special damages in the sum of **ZMW3,529,812.00***

(e) Interest;

(f) Costs; and

(g) Any other relief that the court may deem fit

In their intended amended Statement of Claim also exhibited as 'MM1' within the application for leave, the Plaintiff Company intends to bring forth that argument that:

It entered into a contract of sale for the property with the defendant on the 8th of April 2019 to sell the property at Stand No. 7136 situate in Lusaka for the amount of (United States Dollars) USD1,315,000.00 and following the execution of the said contract of sale, the purchaser acting through its advocates Messrs Solly Patel Hamir and Lawrence placed a caveat over the property on the 10th of April 2019. The Plaintiff further asserts in argument within the intended amended pleadings that by Clause 8 of the subject contract of sale the Defendant was to pay the Plaintiff an initial deposit of (United States Dollars) USD131,500.00 upon exchange of contracts. The Plaintiff acknowledges the Defendant having remitted the amount of (United States Dollars) USD131,450.00 on or around the 23rd April 2019 to the account of Advocates: Messrs Mulenga Mundashi Legal Practitioners. The Plaintiff states that clause 10 of the contract of sale provided that the purchaser would pay the vendor the balance of (United

States Dollars) USD1,183,500.00 upon completion by way of bank transfer to the plaintiff's Advocates client account net of all transfer costs.

Further, the Plaintiff contends within its intended statement of claim that per clause 13 of the contract of sale of the property the purchase was to be completed within 25 business days from the date of procurement of all the following;

- a) *a valid directors and shareholders resolution by the Vendor authorizing the transaction outlined in this contract as well as authorizing the signing of the contract by the representative mentioned in the attestation clause and which resolution should be provided upon signing the Contract of Sale;*
- b) *a valid director's and shareholder's resolution by the Purchaser authorizing the transaction outlined in this contract as well as authorizing the signing of the contract by the representative mentioned in the attestation clause and which resolution should be provided upon signing of the Contract of Sale;*
- c) *all regulatory approvals required to give effect to the transaction contemplated in this Contract being obtained by the parties (including the state's consent being obtained by the Vendor) and where required, approval of the transaction by the CCPC being obtained by the Purchaser on behalf of both parties;*

- d) the Purchaser obtaining a valid investment license from the Zambia Development Agency;*
- e) Property transfer tax certificate and receipt being obtained by the Vendor; and*
- f) Duly executed assignments by the parties*

The Plaintiff maintains that all except for item 7 (f) have been performed, which lack of performance arises out of the Defendant's alleged neglect, refusal or ignoring to execute the assignment despite the assignment been delivered to its advocates on 8th July 2019 for execution. The Plaintiff further asserts in its intended process that by a Notice to complete dated 22nd August, 2019 the Defendant was reminded of its obligations under the contract of sale and given fourteen (14) days within which to complete its obligations under the contract of sale which period elapsed with no prompt action from the Defendant. It is further alleged that the Plaintiff further issued another Notice to Complete dated 6th September, 2019 following the Defendant's initial failure to perform its obligations under the contract of sale, and the Defendant to this date neglects to take any steps toward the completion of the contract of sale subject of this dispute. The Plaintiff claims to have suffered Loss and damage excepted to be recouped: in the sum of (united States Dollars) USD 1,315,000.00 as well as special damages categorized as : *(a) Legal Fees in the amount of (United States Dollars) USD91,524.00, (b) estate Agent Fees in the amount of (United States Dollars) USD180,000.00, (c) Property Transfer Tax in the amount of ZMW887,625.00 and (d) Property Surveyor Valuation fees in the amount of*

ZMW9,000.00. Based on the foregoing the Plaintiff seeks from the Court: a declaration that the contract of sale deemed to have been validly rescinded in the circumstances, an order that the caveat entered by the Defendant on Stand No. 7136 situated in Lusaka be vacated together with the reliefs sought under the Writ.

In its skeleton arguments in support of the Affidavit in Support of summons for leave to amend the amended writ of summons and the amended statement of claim the Plaintiff citing **Order 18** of the **High Court Rules, Chapter 27 of the Laws of Zambia, Order 20 Rule 5 and Rule 8** of the **Rules of the Supreme Court of England, 1999 Edition** as well as the cases **Zambia Consolidated Copper Mines Limited v. Joseph David Chileshe SCZ Judgment No. 21 of 2002** and **Rosemary Bwalya and Others v. Mwanamuto Investments Limited SCZ Judgment No. 8 of 2012** provides in argument that this Court is vested with jurisdiction to grant the plaintiff leave to amend its originating process and prays that the said application be upheld to accord the Plaintiff permission to make amendments accordingly.

On the 10th of March, 2020 the Defendant filed an Affidavit and Skeleton Arguments in opposition to the affidavit in support of summons for leave to amend the amended writ of summons and the amended statement of claim. In Its Affidavit sworn by one JAGADHEESWARAN KRISHNAN who is a Director in the Defendant company, the Defendant states that the

proposed amendments sought to be included in paragraphs 11 and 12 of the proposed statement of claim are ones already captured in the Plaintiffs pleadings in the cause and supported by the documents at pages 57-59 of the Plaintiff's bundle of documents. The deponent further deposes that the Plaintiff could have prayed for the reliefs listed in paragraphs 16 (a) and (b) of its proposed originating process at the time of commencement of the proceedings or at the time it first amended its originating process. The deponent also states in his affidavit that the record will show that the Plaintiff already included or listed the relief enumerated at paragraph 16 (c) in both its first and amended originating process.

The deponent further contends that a party purportedly in breach of a contract of sale ought to be issued a Notice of default to make good any default or breach the Defendant may have made as opposed to being issued a Notice to complete which itself carries a different instruction. The deponent further goes on to state that it never received a completion statement in accordance with Clause 14 of the Contract of sale which clause compels the purchaser to remit the balance of the purchase price to the vendors client account upon receipt of the completion statement.

The Defendant through the affidavit further provides that the order sought for removal of caveat cannot be granted by this Court in this cause and the proposed amendments resulting in the elimination of a relief for specific performance and addition instead of rescission and removal of

caveat are inspired by the Plaintiffs desire to deprive the Defendant of the property subject of sale and sell to another buyer. The deponent in conclusion states that no explanation for the delay of making the application herein has been given by the Plaintiff.

In its skeleton arguments in opposition to the Plaintiffs application for leave to amend the amended Writ of summons and the amended statement of claim the Defendant does acknowledge citing the relevant laws of **Order 18** of the **High Court Rules, Chapter 27 of the Laws of Zambia, Order 20 Rule 5 and Rule 8** of the **Rules of the Supreme Court of England, 1999 Edition** and the case of **Rosemary Bwalya** afore cited, that; the Court does have the power, discretion and jurisdiction to determine the Plaintiffs application which is competently before the Court however that the said discretion is subject to certain conditions. The Defendant further argues in its skeleton arguments that the purpose for granting an Order for leave to amend pleadings as outlined under **Order 20 Rule 8** of the **Rules of the Supreme Court of England, 1999 Edition** is to determine : *“... the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings...”* and invites the Court to consider the case of **Zambia Textiles Limited (in Liquidation) v. Progress Kalemba and 29 others Appeal No 187 of 2014** in which Justice M. Malila SC, as he then was, considered whether or not an amendment was properly sanctioned.

According to the Defendant, the factors to consider when determining whether or not to grant an order for leave to amend pleadings were outlined in **Zambia Seed Company v. Wes Co-op Haulage Limited & western province Cooperative Union Limited Appeal No. 112 of 2013 at page J15**. The principles or factors to consider include (a) the attitude of the parties in relation to the amendment, (b) the nature of the amendment sought in relation to the suit, (c) the question in controversy; (d) the time when the amendment is sought which according to the Defendant, the Plaintiff's application has not met. It is therefore the defendant's prayer that the plaintiff's application be dismissed with costs to be paid by the Plaintiff to the Defendant and to be taxed in default of agreement.

At the hearing of the 11th of March, 2020 at which both parties were in attendance the Plaintiff relied on the summons, affidavit, skeleton arguments and list of authorities in support of its application filed into court on the 4th of March, 2020. The Plaintiffs advocate citing the case of **Corpus Legal Practitioners v. Mwanandani Holdings Limited SCJ No. 50 of 2014** sought to emphasize that the request made by itself to amend its pleadings; particularly in regard to the request for an order that the caveat entered by the Defendant on 10th April, 2019 over the property of the Plaintiff, is permissible at law.

In opposing the Plaintiff's application, the Defendant's Advocates also placed reliance on its affidavit in opposition, list of authorities and skeleton

arguments filed into court on the 10th of March 2020 and augmented its arguments with brief oral submissions. The Defendants Counsel stated in argument that **Order 20 Rule 8 (6) of the Rules of the Supreme Court of England, 1999 Edition** cited in the skeleton arguments enjoins the court to briefly look at the merits of the case in determining the application for amendment, which merits of the case are reproduced in paragraph 16 to 23 of the Defendants affidavit in opposition. Finally in response to the inclusion of the remedy sought by the Plaintiff for an order for removal of a caveat, the Defendant's Counsel emphasized that the facts of the **Corpus Legal Practitioners Case** may be distinguishable to the current case in that the caveat in the cited case was sought to be included, therefore the parties in that case could have possibly satisfied all the conditions necessary for the Court to have granted the order for inclusion as opposed to the desired order for removal of a caveat in the case herein. The Defendant maintained its prayer that by reason of the Plaintiff not having fulfilled all the conditions outlined in case law to allow leave for amendment to be granted, their application be dismissed and costs awarded to the Defendant herein.

DECISION OF THE COURT

It is not in contention that the application for leave to amend the amended writ of summons and statement of claim is properly before me and can be considered by this Court as prescribed by the enabling laws which laws are **Order 18** of the **High Court Rules, Chapter 27 of the Laws of**

Zambia, Order 20 Rule 5 and Order 20 Rule 8 of the Rules of the Supreme Court of England, 1999 Edition which provide as follows:

ORDER XVIII HIGH COURT RULES, Chapter 27:

“AMENDMENT

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 RULES OF THE SUPREME COURT OF ENGLAND, 1999 EDITION:

“5. - Amendment of writ or pleading with leave

(1) Subject to Order 15, rules 6 (text), 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.”

**ORDER 20 RULE 8 RULES OF THE SUPREME COURT OF ENGLAND,
1999 EDITION:**

“8. - Amendment of certain other documents

(1) 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, the Court may at any stage of the proceedings and either of its own motion or on the 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.”

It now follows to consider whether the said application before me possesses merit and should be allowed as prayed by the Plaintiff.

It is necessary to note that the pertinent issue herein to be considered is the application for leave to amend the amended Writ of Summons and Statement of Claim. With that said, I opine that the assertions therefore brought forth in the Defendants affidavit in opposition at paragraphs 19 – 22 which arguments posit among other things: the Defendant stating that

a party purportedly in breach of a contract of sale of property ought to be issued a Notice of Default and not a Notice to Complete and that the Defendant was never issued a Notice of Default or even a completion statement are arguments hinging on the underlying substance or facts (merits) of this case and concern themselves more with arguments in rebuttal to the said facts (a defence on merit) as opposed to rebuttal to the application for leave.

According to law: the grant or denial of leave to amend the process as prayed for herein will be influenced by the need to eliminate any statements with prejudicial effect, eliminate delay of fair trial of the matter and encourage the need to determine the real question or questions in controversy.

From my reading and as deduced from the record, the most fundamental intended amendment to the pleadings is where; the Plaintiff seeks to replace the relief (initially) sought for an order of specific performance of the Contract of Sale to the relief of a declaration of rescission of the contract and additionally the relief of an order for removal of caveat on the property subject to the contract of sale of the property. Other amendments to the process pose little or minor variance to prior submissions. Though the intended amended sections did not contain any prejudicial effect, the need to determine the real question in controversy is highlighted through this amendment as such determination is what accords a party a fair hearing or trial of the matter.

The trite and established law concerning the right to be heard within the Zambian Jurisdiction, contains within it the right of parties or a party to seek reliefs desired by them in so far as it is permissible and most importantly lawful. The Court cannot influence or prescribe what relief a party should pursue as that takes away from the parties properly established right to be heard. The Court seeks to ensure that all evidence is presented and all matters in controversy are pleaded on their merit and decided in finality.

In the case of **Wilson Masauso Zulu v. Avondale Housing Project Limited(X)** it was held that:

“I would express the hope that trial Courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality.

A decision which became of uncertainty or want of finality, leaves the doors open for further litigation over the same issues between the same parties can and should be avoided.”

Denial of amendment of process in the current case would be disallowing the Plaintiff pursue of its desired reliefs which reliefs stem from the same facts involving the same parties and this would be a fundamental example of the denial of the right to be heard. The right to be heard attaches to the

right to be awarded the reliefs sought as lack of requisite relief is what results in litigation ending up as an 'academic exercise.' Such denial of amendment could also result in the Plaintiff's perusal of the same through a different cause which can result in forum shopping or multiplicity of actions if attempted; which practice the Court frowns upon. The same was similarly addressed in the matter case of **Corpus Legal Practitioners v. Mwanandani Holdings Limited (X)**.

Although the law empowers judges to grant leave for amendment of process, it does not specifically determine the expected or prescribed substance allowable or befitting to be added an amendment. This I posit, is due to the varying and unique nature of cases as well as the vast options of what may be amended. Nevertheless, it must be stated that amendments must not carry any prejudicial effect to either party and the practical object of amending pleadings envisaged by the law is to ensure that litigation between parties is conducted based on the right, proper and factual arguments brought before the court and not incoherent, or insufficient or misdirecting facts.

I am fortified by the case of **Zambia Seed Company v. Wes Co-op Haulage Limited & western province Cooperative Union Limited (X)** also cited by the Defendant in its pleadings in which the Supreme Court after considering the flexible time frame within which an application for amendment could be filed into Court as well as the absence of improper attitude on the part of the appellant, held that:

“... we are inclined to apply the dicta of Brett M. R. in **Clarapede v. Commercial Union Association** that:

However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be done without injustice to the other side. There is no injustice if the other side can be compensated by costs.”

In seeing that an amendment is not prejudicial and evaluating whether or not it can be allowed the issue of compensation is one of persuasive nature. If the Plaintiff's amendment can be compensated by costs in that no damage has been done to the initial status in argument of the parties (save for having to amend and re-file pleadings) or no prejudice has been placed on the other party such they cannot be accorded just relief/compensation even in the event of a 'fair hearing' of the matter, it must be allowed. I find that an example of one such case is the current case, I find that the Defendant's status would not be prejudiced by the said amendment and in any event costs can adequately compensate inconvenience occasioned by amendments and just relief would be available to the Defendant in the event the entire matter was decided in its favour.

In further evaluating whether or not the application for leave to amend the amended Writ of Summons and Statement of Claim will stand, it is also

necessary to consider the holding of Supreme Court in the case of **Zambia Seed Company** aforementioned at **J15** in which the Supreme Court provided that:

“Although the pendulum tilts in favour of granting amendments... Trial courts must examine the application for amendment very carefully in light of the affidavit evidence. In the process the courts should consider the peculiar facts of each case. In doing so the court is enjoined to take into account a number of principles or factors including: (a) the attitude of the parties in relation to the amendment; (b) the nature of the amendment sought in relation to the suit (c) the question in controversy; (d) the time when the amendment is sought.”

In consideration of the above requirements in relation to the case in *casu*. I find the attitude of the Plaintiff's counsel toward amendment to be *bona fide* and not designed to abuse court process but to instead make lawful application under the law in light of the varied instruction of their client. I also find that the nature of the amendment sought is one that still maintains the subject matter of the dispute and does not seek to introduce an entirely different cause of action or set of facts through the back door. I find that variation of the relief sought is a right of the Plaintiff as the same is available considering the facts of the case as well as its right to fair trial and I also find that the real question in controversy between the parties, which in my opinion has not been obliterated is; whether or not

there was a breach of the contract of sale relating to the purchase of Stand No. 7136 and whether remedies may be granted or denied in consideration of the alleged breach. Finally concerning time; I find that the time within which the amendment herein is sought is appropriate and within the confines prescribed by the law.

It is settled law and that pleadings may be amended at any stage of the proceedings as stated within the law and upheld in the celebrated case of **Rosemary Bwalya and Others v. Mwanamuto Investments Limited (X)**. Ideally in an imperfect world with imperfect men amendments, changes, retractions, replacements, corrections and actions of a similar nature are expected and must not be restrained or prevented as long as they are just.

I find that the proposed intended amendments to the Writ of Summons and Statement of Claim if allowed would not be of any prejudicial effect to the Defendant and hereby allow amendment of the same in accordance with the proposed amendments. I further grant leave to both parties to file or settle any process or amendments occasioned by the granting of this application.

Regarding the issue of costs, the law under **Order 20/8/52 of the Rules of the Supreme Court, 1999 Edition**, provides:

“Costs (rr.5, 7 and 8)

The usual penalty imposed as a term for giving leave to amend is that the party seeking the amendment should pay in any event all the costs incurred and thrown away by the amendment and the costs of any consequent amendment.”

In light of the application success of this application on the part of the Plaintiff and in exercise of judicial discretion, I award costs to be paid to the Defendant by the Plaintiff as *the costs incurred and thrown away by the amendment and the costs of any consequent amendment* are occasioned by the actions/omissions of the Plaintiff. I hereby order that the same be taxed in default of agreement.

Delivered under my hand at Lusaka this 20th day of June, 2020.

A handwritten signature in black ink, consisting of a large, stylized 'B' and 'M' intertwined, positioned above a horizontal dotted line.

**Bonaventure C. Mbewe
HIGH COURT JUDGE**