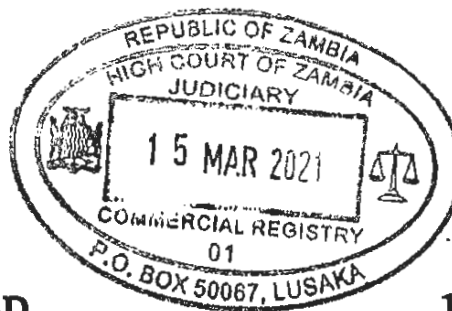


**IN THE HIGH COURT FOR ZAMBIA  
COMMERCIAL DIVISION  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**2016/HPC/0509**



**BETWEEN:**

**ZAMSORT ZAMBIA LIMITED**

**1<sup>ST</sup> PLAINTIFF**

**MUMENA MUSHINGE**

**2<sup>ND</sup> PLAINTIFF**

**AND**

**CONSOLIDATED ADVISORY SERVICES  
LIMITED**

**1<sup>ST</sup> DEFENDANT**

**EDWARD SEFUKE**

**2<sup>ND</sup> DEFENDANT**

**Before the Honourable Lady Justice Dr. W. Sithole Mwenda in  
Chambers at Lusaka this 15<sup>th</sup> day of March, 2021.**

For the Plaintiffs: Mr. C. Magubbwi of Magubbwi and Associates

For the Defendants: Mr. M. Ndalameta of Musa Dudhia and Associates

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**RULING**

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**Case referred to:**

1. *Republic of Botswana, Ministry of Works Transport and Communications and Another v. Mitre Limited* (1995-1996) Z.R. 115.

**Legislation referred to:**

1. Order 33, rule 3 and Order 14A of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book).
2. Order 19, rule 3 (3) and (4) of the High Court (Amendment) Rules, Statutory Instrument No. 58 of 2020.
3. Practice Note 38/2A/9 of the White Book.

4. *Order 20, rule 8 (1) of the White Book.*
5. *Order 18, rule 1 of the High Court Rules.*

## **1. Introduction**

- 1.1 This is the Defendants' Notice of Motion to Raise Preliminary Issue pursuant to Order 33, rule 3 and Order 14A of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book) and the Court's inherent jurisdiction. The Notice of Motion was filed into court on 26<sup>th</sup> October, 2020 and the preliminary issue which the Defendants want this Court to determine is whether or not the Plaintiffs can make an interlocutory application after trial has already commenced.

## **2 The Application**

- 2.1 The Notice of Motion is accompanied by an Affidavit in Support and Skeleton Arguments in Support both filed into Court on 26<sup>th</sup> October, 2020.
- 2.2 The Affidavit in Support was sworn by one Mulopa Ndalameta, Counsel seized with the conduct of this matter on behalf of the Defendants and thus, according to him, competent to depose to the facts in the affidavit based on facts that are purely procedural in nature and hence beyond the competence of the Defendants.
- 2.3 It was the deponent's averment that on 19<sup>th</sup> June, 2020, there was a sweeping wind of change to the way proceedings are conducted in the High Court through the promulgation of the

High Court (Amendment) Rules, Statutory Instrument No. 58 of 2020, which was followed by a widely publicised launch on 27<sup>th</sup> august, 2020 at which Her Ladyship the Chief Justice hailed the statutory instrument as it would expedite the conclusion of civil matters in the High Court. As evidence of this assertion, a press release confirming the position was produced as exhibit “MN”.

2.4 The deponent stated that trial in this matter commenced on 5<sup>th</sup> August, 2020 at 10:00 hours and the Court adjourned the matter to 10<sup>th</sup> and 11<sup>th</sup> September, 2020. On 10<sup>th</sup> September, 2020, the Court adjourned the trial of this matter to 23<sup>rd</sup> and 26<sup>th</sup> October, 2020 at the instance of the Plaintiff. On 20<sup>th</sup> October, 2020, the Plaintiff served the Defendants with an interlocutory application for leave to amend witness statement and/or to file supplementary statements and to file supplementary list and bundle of documents.

2.5 The Deponent averred that it was his belief that the Plaintiffs’ interlocutory application is prohibited by the Rules of this Court because:

- (i) *It was made during trial instead of at least 14 days before the first trial date;*
- (ii) *The Plaintiffs could have brought the application earlier if they had conducted themselves diligently in prosecuting this matter; the documents and evidence they are trying to introduce having been available since 2015.*

## 6. The Arguments

6.1 The Defendants submitted in their Skeleton Arguments that the Plaintiff's application for leave to amend witness statements and/or file supplementary witness statements and to file supplementary list of bundle of documents is misconceived and not supported by law. Further, that the application is prejudicial to the Defendant and could have been avoided had the Plaintiffs exercised reasonable diligence in prosecuting this matter.

6.2 It was argued that Order 19, rule 3 (3) and (4) of the High Court Rules as amended by Statutory Instrument No. 58 of 2020 provides as follow:

*(3) "A party shall not lodge, and a Judge shall not consider any interlocutory application fourteen days before commencement of trial.*

*(4) Subject to sub rule (3), a Judge may, in the Judge's discretion, which decision shall not be subject of an interlocutory appeal, entertain an interlocutory application which, with reasonable diligence, could not have been made before the time specified under sub rule (3)" (Emphasis by the Defendants)*

6.3 It was contended that the foregoing rules provide clear guidance on the lodging and hearing of interlocutory applications once trial has commenced. That, rule 3 (3) prohibits a party from lodging, and a Judge from considering an interlocutory application fourteen days before of commencement of trial. A party, therefore, cannot lodge an interlocutory application within 14 days of trial

and accordingly, a Judge ought not to entertain such an application. That, trial in this matter commenced on 8<sup>th</sup> August, 2020, therefore, the Plaintiffs' application is prohibited. It was argued, however, that rule 3 (4) allows Judges, in their discretion, to hear an interlocutory application filed within 14 days of trial but on condition that the application could not have been made within the prescribed time, being 14 days before trial, even where reasonable diligence was exercised. That, the Plaintiffs' application is not such an application.

6.4 It was further argued that the affidavits of Katambi Bulawayo and Brian Chisala in support of summons for leave to amend witness statements filed into court on 20<sup>th</sup> October and 22<sup>nd</sup> October, 2020, respectively, state at paragraph 4 that their application is as a result of inadvertence. That, in essence, the Plaintiffs themselves are stating on oath that there was no reasonable diligence on their part. It was submitted that this is fatal to their application being heard under Order 19, rule 3 (4) of the High Court (Amendment) Rules.

6.5 It was submitted, in addition, that the proposed supplementary list appearing in the affidavit of Brian Chisala as exhibit "BC2" lists 5 documents from 2015 and the 6<sup>th</sup> document is a Patent and Companies Registration Agency (PACRA) print out dated 17<sup>th</sup> March, 2020. That,

the only conclusion that the Defendants draw from this is that the Plaintiffs are not serious about their own case and this Court must take the Plaintiffs at their own estimation.

6.6 Further, that allowing the Plaintiff's application will result in the re-opening of discovery, a procedure that takes time and the Defendants will have to provide fresh instructions to Counsel at a great cost and most importantly, the Defendants will lose time. Further, that trial in this matter started on 5<sup>th</sup> August, 2020 and in light of this, the Plaintiffs' application ought not to be entertained by this Court. In conclusion, it was submitted that the Plaintiffs' application must be dismissed, firstly, because the rules of court prohibit it; secondly, because the Plaintiffs did not exercise reasonable diligence and therefore, the Court cannot exercise its discretion and allow the application and thirdly, the application is prejudicial to the Defendants to timely dispose of this matter. The Defendants prayed that costs be awarded to them.

6.7 The Plaintiffs filed their Skeleton Arguments in Opposition to Notice of Motion to Raise a Preliminary Issue on 28<sup>th</sup> October, 2020 wherein they argued that rule 3 (4) of Order 19 gives this Court the jurisdiction to entertain the current application provided the application meets the criterion set out in the sub-rule, namely, that the application could not, with reasonable due diligence, have been made within the

time specified. That, in short, the application before Court is one that, with reasonable due diligence could be made post the said 14 days.

- 6.8 It was argued that the Plaintiffs' application to amend witness statements is planted on the provisions of the Rules of the Supreme Court of England and Wales (the White Book) because our rules do not make provisions thereof. That, Order 38/2A/9 provides that:

*"The written statement of a witness served pursuant to the direction of the court under paragraph (2) constitutes "a document" in the proceedings, and falls within the amending power of the court under O20, r.8 (1). The amending power is likely to be exercised only in exceptional circumstances. The time for the witness to alter or withdraw part of his statement may best be left to when he comes to be asked about it in the witness box. Equally, any argument that the statement of a witness contains inadmissible evidence or other objectionable material should be left to be heard after the witness has produced it at the trial, as is the practice before Official Referees..."* (Emphasis supplied by the Plaintiffs)

- 6.9 The Plaintiffs submitted further, that domestically the power to amend resides in Order 18 of the High Court Rules. That, it was the Plaintiffs' contention that the said power was not eroded or in any way altered by statutory Instrument No. 58 of 2020. That, Order 18, rule 1 states 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."*

6.10 It was argued that the court's jurisdiction under the above Order has not been ousted by Statutory Instrument No. 58 of 2020 and thus, the Court retains its powers to allow or order an amendment at this stage. Further, that without allowing the amendments being sought to be effected to the witness statements, this Court may miss the opportunity to determine the real questions in controversy between the parties, namely, the questions relating to the shares of the 2<sup>nd</sup> Plaintiff.

6.11 That, from the above procedural provisions, it is the Plaintiffs' contention that with due reasonable diligence, the most opportune time to make an application for amendment of the witness statement is at the stage of trial, more particularly when the witness has taken the stand. That, in the premises the application made and filed into Court by the Plaintiffs on 20<sup>th</sup> October, 2020 is competent and does not in any way render itself improper under the provisions of Statutory Instrument No. 58 of 2020. That, in the most unlikely event that the Court agrees with the view posted by the Defendants, the Plaintiffs urge the Court to take the view that since the provisions of Order 19, rule 3 are



procedural, the Court should in the interest of justice, allow the application. It was submitted that in the case of *Republic of Botswana Ministry of Works Transport and Communications and Another v. Mitre Limited*<sup>1</sup>, Muzyamba JS stated the law as follows at page 116:

*"The High Court Rules, like the English rules, are rules of procedure and therefore, regulatory and any breach of these rules should be treated as mere irregularity which is curable."*

6.11.1 That, from the above position, this Court which is granted jurisdictional latitude under Order 19, rule 3 (4), should view the application less from the technicality view and more from the view point of the spirit of the justice of the case and which spirit endears itself to allowing the sought amendments. It was the Plaintiffs' prayer that the preliminary issue fails with costs.

## **7. Submissions at Hearing**

7.1 The Notice of Motion came up for hearing on 29<sup>th</sup> October, 2020. Mr. Ndalameta, learned Counsel for the Defendants submitted that the Defendants would rely on the documents filed in support of the motion but emphasised that with the amendment of the High Court Rules by Statutory Instrument No. 58 of 2020, there is now a difference in the way proceedings are conducted. That, if that were not the case, the amendment itself would be pointless.

- 7.2 In response, Mr. Magubbwi, learned Counsel for the Plaintiffs, submitted that the Plaintiffs would rely on the Skeleton Arguments and List of Authorities filed into Court on 28<sup>th</sup> October, 2020. He further submitted that by way of emphasis, Statutory Instrument No. 58 of 2020 did not wish away the other provisions of the High Court Rules or the provisions of the Rules of the Supreme Court of England and Wales which we rely upon for procedural aspects of the proceedings before this Court. That, in that spirit, it is the Plaintiff's submission that pursuant to Order 18, rule 1 of the High Court Rules and Order 38 of the White Book, Statutory Instrument No. 58 of 2020 does not take away the Court's powers to attend to the application that was filed by the Plaintiffs on 20<sup>th</sup> October, 2020. Counsel prayed that the preliminary objection should fail with costs.
- 7.3 In reply, Mr. Ndalameta submitted that sub-rule 3 of rule 3 of Order 19 of the High Court Rules does take away the power of the Court with its mandatory wording; that if the Court is still inclined to proceed with the interlocutory application, sub-rule 4 sets a threshold that should be met by the Plaintiffs. It was submitted that according to the Defendants, the threshold is diligence and that had not been met by the Plaintiffs. That, in that sense, the powers of the Court had been taken away. Counsel prayed that the interlocutory application be accordingly dismissed so that the parties can continue with the trial.

## **8. Consideration of the motion and decision**

- 8.1 I have considered the Notice of Motion, supporting affidavit and skeleton arguments in support. I have also considered the skeleton arguments in opposition to the motion and *viva voce* submissions by Counsel on both sides.
- 8.2 It is common ~~that~~ cause that trial in this matter commenced on 5<sup>th</sup> August 2020 and was adjourned to 10<sup>th</sup> and 11<sup>th</sup> September, 2020. On 10<sup>th</sup> September, 2020, the Court adjourned trial of this matter to 23<sup>rd</sup> and 26<sup>th</sup> October, 2020 at the instance of the Plaintiff and on 20<sup>th</sup> October, 2020, the Plaintiff served the Defendants with an interlocutory application for leave to amend witness statement and/or to file supplementary statements and to file supplementary list and bundle of documents. It is also not in dispute that Order 19, rule 3 (3) of the High Court Rules as amended by Statutory Instrument No. 58 of 2020, prohibits the lodging of an interlocutory application and the hearing of such an application by a Judge 14 days before trial. Clearly, the Plaintiffs' application was filed after commencement of trial. Therefore, the question for determination by this Court is whether or not the Plaintiffs could make the interlocutory application after trial had already commenced and whether or not the Court can hear the application in view of the provisions of the Order 19, rule 3 (3) of the High Court Rules.

8.3 The Defendants have argued that the Plaintiffs' application is not supported by law as it goes against Order 19, rule 3 (3) as amended by Statutory Instrument No 58 of 2020 and does not meet the requirements of sub-rule (4) to enable this Court exercise its discretion and hear the application notwithstanding that it was filed after commencement of trial. The Plaintiffs, on the other hand, are of the view that the power to amend resides in Order 38 of the White Book and Order 18 of the High Court Rules and that the Court's jurisdiction under the above provisions has not been ousted by Statutory Instrument No 58 of 2020 and thus the Court retains its power to allow or order an amendment at this stage. Further, that with reasonable diligence, the most opportune time to make an application for amendment of the witness statement is at the stage of trial, particularly when the witness has taken the stand. That, for the above reasons, the application filed by the Plaintiffs on 20<sup>th</sup> October, 2020 is competent.

8.4 It is factual that there has been a change in the way proceedings are conducted in the High Court brought about by the High Court (Amendment) Rules, S.I No. 58 of 2020, which amongst others, amended Order 19 of the High Court Rules to prohibit in rule 3 (3) the lodging of an interlocutory application and the hearing of such an application by a Judge fourteen days before trial. Clearly in this case the

Plaintiffs have not acted in accordance with the provisions of Order 19, rule 3 (3) of the High Court Rules which prohibits a party from lodging an interlocutory application fourteen days before commencement of trial. Furthermore, the application which the Plaintiffs have filed to amend witness statements is one which with reasonable diligence, could have been made fourteen days before commencement of trial, but the Plaintiffs failed to do that. Thus, the Plaintiffs have fallen short of the requirement of sub-rule (4) of rule 3 of Order 19 of the High Court Rules.

- 8.5 However, as correctly submitted by Counsel for the Plaintiffs, Statutory Instrument No. 58 of 2020 has not ousted the Court's power under Order 18, rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia to allow or order an amendment at any stage of the proceedings. Order 18, rule 1 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."* (Emphasis provided by the Court)

8.6 I am thus, of the view that this Court having been vested with the power by the above Order to order an amendment of any proceedings at any stage of the proceedings, it follows that the application for amendment can also be made at any stage, even after commencement of trial and the Court has the power to hear the said application.

8.7 Further, Practice Note 38/2A/9 of the White Book provides that a witness statement falls within the amending power of the Court under Order 20, rule 8 (1) of the White Book (which has provisions similar to those in Order 18, rule 1 of the High Court Rules). Order 20, rule 8 (1) provides as follows:

*“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.”*

8.8 Practice Note 38/2A/9 of the White Book states as follows:

*“The written statement of a witness served pursuant to the direction of the court under paragraph (2) constitutes “a document” in the proceedings, and falls within the amending power of the court under O20, r.8 (1). The amending power is likely to be exercised only in exceptional circumstances. The time for the witness to alter or withdraw part of his statement may best be left to when he comes to be asked about it in the*

witness box. Equally, any argument that the statement of a witness contains inadmissible evidence or other objectionable material should be left to be heard after the witness has produced it at the trial, as is the practice before Official Referees, rather than dealt with by way of a prior application to compel the statement to be amended. (Emphasis supplied)

8.9 I am of the view that even though the Plaintiffs could have made the application to amend the witness statements before commencement of trial had they exercised reasonable diligence in prosecuting the matter, the justice of the case demands that the application be heard and determined on the merits. Further, and in any case, as per the guidance in Practice Note 38/2A/9 above, “the time for the witness to alter or withdraw part of his statement may best be left to when he comes to be asked about it in the witness box.” This is precisely how the events have unfolded in this case.

8.10 For the reasons aforesaid, the Defendants’ motion has failed and is dismissed.

8.11 Costs shall be in the cause.

**Delivered at Lusaka this 15<sup>th</sup> day of March, 2021.**

  
**W. SITHOLE MWENDA (DR.)**  
**JUDGE**