ZAMBIA CONSOLIDATED COPPER MINES LIMITED *v* JOSEPH DAVID CHILESHE.

Supreme Court.
Ngulube, C.J., Sakala and Chitengi J.J.S.
4th June, 2002 and 3rd September, 2002.
(SCZ JUDGMENT NUMBER 21 OF 2002).

Flynote

Civil Procedure – Amendment of writ – When amendment to be allowed.
Civil Procedure – Statute barred - Cause of Action introduced by amendment when available.

Headnote

On 9th January, 1992, the respondent was dismissed from the employment of the appellant. After his dismissal the respondent commenced an action against the appellant in the Industrial Relations Court. Notwithstanding, there were some negotiations between the parties on 13th September, 1995. the meeting was allegedly called at the instance of the appellant to attempt a settlement between the appellant and the respondent in relation to the respondent's claim for wrongful termination of employment, damages for trespass to his person and goods. From November, 1992, the respondent had been in constant communication with the appellant over his claims. In consideration of an alleged promise by the appellant's representatives that a settlement between the appellant and the respondent would be executed, the respondent agreed to withdraw the court proceedings he had commenced against the appellant in the Industrial Relations Court. The appellant, it is alleged by the respondent, breached the agreement of 13th September, 1995, to settle the respondent's claim. On 22nd June, 1998, the respondent commenced proceedings, against the appellant. The appellant denied the claim and filed a defence. The proceedings continued in the normal way. At a subsequent stage, the respondent obtained a judgment because the appellant did not attend court. Some three weeks after the respondent obtained judgment in default, the appellant took out summons to set aside the default judgment. The default judgment was set aside. On 6th September, 2001 the respondent made an application to court for leave to amend the writ of summons and statement of claim. The court below granted the respondent the leave sought to amend the writ of summons and statement of claim. The appellant appealed against the decision of the learned judge arguing that the court below erred in law in granting leave to amend the statement of claim after the limitation period.

Held:

(i) 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 or substantially the same facts as a cause of action in respect of which relief has already been claimed in the

action by the party applying for leave to make the amendment.

(ii) Amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments.

(iii) Where an action is statute barred at the time of amendment of the statement of claim, the amendment can only be made if there are peculiar circumstances justifying the limitation period.

Works referred to:

1. Halsbury's Laws of England 4th Edition Volume 28 Paragraph 608 at page 267.
2. Chitty on Contracts 26th Edition General Principles Paragraph 1949 Page 1267, 27th Edition Volume 2 Para. 37-134.
3. Rules of the Supreme Court Order 20 r. 5.

Legislation referred to:

Law Reform (Miscellaneous Provisions) Act Cap. 74.

Cases Referred to:

(1) *Fletcher and Sons v Jubb Brooth and Helliwell* [1920] 1 KB 275 CA
(2) *Weldon v. Neal* [1887] 19 Q.B. 394, 395
(3) *Pontim v. Wood* [1961] ALL E.R. 992
(4) *Hall v Meyrick* [1957] 2 All E.R. 728
(5) *Chatsworth Investments Limited v Cussins (Contractors) Limited (*1969) 1 ALL E.R. 143
(6) *Broniff v Holland and Hannen and Cubits (Southern Limited) and Another* 3 ALL E.R 959.

P. Chamutangi, Zambia Consolidated Copper Mines Limited Legal Counsel for the appellant.
M. Forrest of Forrest Price and Company for the respondent.

Judgment

CHITENGI, J.S., delivered the Judgment of the Court:

In this appeal we shall refer to the appellant as the defendant and the respondent as the plaintiff which is what they were in the court below. The facts of this case can be briefly stated. On 9th January, 1992, the plaintiff was effectively dismissed from the employment of the department of the defendant. It appears that after his dismissal the plaintiff at some stage, before 1995, commenced an action against the defendant in the Industrial Relations Court. We do not intend to go into any details of the case before the Industrial Relations

Court because the determination of this appeal does not turn on any of those details. What appears material, from the pleadings, is that there were some meetings or negotiations between the parties on 13th September, 1995.

The meeting was allegedly called at the instance of the defendant to make a settlement between the plaintiff and the defendant about the plaintiff's claim for wrongful termination of employment, damages for trespass to his person and goods etc. From November 1992 to 1995, the plaintiff had been in constant communication with the defendant over his claims. In consideration of an alleged promise by the defendant's representatives that a settlement between the plaintiff and the defendant would be executed, the plaintiff agreed to withdraw the court proceedings he had commenced against the defendant in the Industrial Relations Court.

The defendant, it is alleged by the plaintiff, breached the agreement of 13th September, 1995, to settle the plaintiff's claims. On 22nd June, 1998, the plaintiff commenced this action against the defendant. The endorsement on the Writ reads as follows:-

"The plaintiff's claim is for damages for breach of contract against the defendant for a contract entered into by the plaintiff and the defendant in or about the month of September, 1995, in respect of losses sustained by the plaintiff for wrongful termination of employment, trespass to his property at Plot No. 89 Vanadium Avenue, Itimpi and to his motor vehicle Mitsubishi truck and consequential loss following there from full particulars whereof have been supplied by the plaintiff to the defendant and exceed three folios in length.

AND the plaintiff claims damages, consequential loss and interest under the provisions Law Reforms (Miscellaneous Provisions) Act until the date of actual payment and for costs.

The defendant denied this claim and filed a defence. In the defence, the defendant admitted that the meeting of 13th September, 1995, took place but denied that the defendant promised the plaintiff an out of court settlement or having entered into any agreement whatsoever with the plaintiff on any matter. So far so good. The proceedings continued in the normal way. At one stage the plaintiff obtained a judgment in default because the defendant did not attend. Some three weeks after the plaintiff had obtained the judgment in default, the defendant took out a summons to set aside the default judgment. Although the record is silent, it is clear that the judgment in default was set aside because on 31st October, 2000 the plaintiff gave evidence in support of his claim. On 1st March, 2001, the plaintiff's witness also gave evidence.

After some adjournments, the hearing took place on 6th September, 2001. On that day, trouble started. The plaintiff made an application to Court pursuant to Order 20 Rule 5 of the Rules of the Supreme Court (1) for leave to amend the Writ of Summons and the Statement of Claim. The amended Writ of Summons and Statement of Claim, in addition to the claim for damages for breach and contract against the defendant for a contract entered into by plaintiff and the defendant in or about the month of September, 1995, also

included a claim in following terms:-

".....AND ALSO IN THE ALTERNATIVE FOR DAMAGES for wrongful termination and summary dismissal from employment on 4th November 1991, 6th January, 1992, trespass to his property at Plot No. 89 Vanadium Avenue Itimpi and other assets and business.

AND the plaintiff claims damages for breach of contract and wrongful termination and summary dismissal from employment and related matters as set out above, consequential loss, and interest under the provisions of the Law Reforms (Miscellaneous Provisions) Act until the date of actual payment and for costs."

The defendant opposed the application to amend the writ of summons and the statement of claim. From the affidavit filed by the plaintiff in Support of the application for leave to amend the writ of summons and the statement of claim, it is clear to us that the plaintiff justified the amendment to include the claim in the alternative on the ground that negotiations were still going on from 1992 to 1995, and so time did not start running until failure of the 1995 agreement, a position which the defendant did not agree with.

The defendant's affidavit in opposition dwelt on many issues concerning what happened in the Industrial Relations Court. We have already stated that in the view we take of this matter, the determination of this appeal does not turn on any of the matters that took place in the Industrial Relations Court. As we see it, the only parts of the affidavit in opposition which are relevant to this appeal are those dealing with the issue of the matters pleaded in the alternative being statute barred. The defendant complained that the amendment deprived it of its right to plead statutory limitation.

After considering the affidavit evidence and submission of Counsel, the court below granted the plaintiff leave he sought to amend the writ of summons and the statement of claim. The Court below held that Order 20 Rule 5 (1) was rather wide and gave the court power to grant amendment to the writ and statement of claim at any stage of the proceedings, even if the trial has already began.

On the argument by Counsel for the defendant that the application for leave to amend the writ of summons and the statement of claim was substantially different from the current claim, the court below held that what was material were the facts relied upon and not the initial endorsement on the writ. If the facts were the same or substantially the same, the amendment would be ordered. Further, the Court below held that it was immaterial even if the amendment would add or substitute a new cause of action. As authority for these propositions the court below cited Order 20/5 - 8/7 and 20/5/1 (1). The court below ended its ruling by stating that the purpose of allowing amendments under Order 20/5 was to determine the real question of controversy between the parties or correcting any defect or error in the proceedings.

The defendant filed heads of arguments and two grounds of appeal. The gist of the two grounds is that the Court below erred in law in granting leave to amend the statement of claim after the expiry of the limitation period of six years and in not considering that the original writ of summons was issued after the limitation period of six yeas had expired.

In arguing these grounds of appeal, Mr. Chamutangi for the defendant submitted that in granting the leave to amend, the court below did not exercise its discretion properly because at the time the writ of summons was filed in June, 1998, the action was already statute barred. The plaintiff's employment was terminated in January, 1992, but the Writ of summons was filed in June, 1998, well after six years. The endorsement on the Writ was for the alleged breach of contract between the plaintiff and the defendant entered into in 1995.

There was no claim for wrongful dismissal. It was also Mr. Chamutangi's submission that in granting the order to amend the court below relied on Order 20/8/7 of RSC 1999 Edition, when the defence of statutory limitation was already available to the defendant. It was Mr. Chamutangi's submission that the plaintiff is sneaking in a new and fresh action which arose more than six years before he commenced his action on 22nd June, 1998.

With respect to the effect of negotiations, Mr. Chamutangi argued and submitted that negotiations would not and do not stop the time from running. For this proposition Mr. Chamutangi cited Chitty on Contract 26th Edition General Principles paragraphs 1949, Page 1267 (2); Halsbury's Laws of England 4th Edition Volume 28, Para. 608, at P. 267 (2); *Fletcher and Son v Jubb Brooth and Helliwell* (1). Paragraph 1949 in Chitty (Supra) reads in part:-

"The general principle is that once time has started to run, it continues to do so until proceedings are commenced or the claim is barred. The principle (if any is possible in so technical a matter) is that a plaintiff who is in a position to commence proceedings, and neglects to do so, accepts the risk that some unexpected subsequent event will prevent him from doing so within the statutory period. The principle is illustrated by a famous group of seventh-century cases deciding that the closing of the courts during the Civil War did not suspend the running of time..."

Paragraph 608 Halsbury's (supra) reads:-

Effects of negotiations between parties. The mere fact that negotiations have taken place between a claimant and a person against whom a claim is made does not debar the defendant from pleading a statute of limitation, even though the negotiations may have led to delay and caused the claimant not to bring his action until the statutory period has passed. It seems, however, that the defendant will be debarred from setting up the statute if, during the negotiations, he has entered into an agreement for good consideration not to do so, or, if he has represented that the desires that he plaintiff should delay proceedings and that the plaintiff will not be prejudiced by the delay, and the plaintiff has acted on the faith of his representation".

In reply, Mr. Forrest for the plaintiff submitted that this case has been very vexed from the outset. The plaintiff was removed from office in unpleasant manner by the former Head of State. Mr. Forest then referred to the proceedings in the Industrial Relations Court, matters we have already referred to. It was Mr. Forrest's submission that with the case continuing in the Industrial Relations Court and the negotiations between the parties continuing, it meant that the parties held the entire matter in abeyance and the plaintiff's claim was still alive. As authority for this statement Mr. Forrest referred us to Chitty on Contract, 27th Edition Volume 1 Para. 28-089; Volume 2 Para.37-134 (2).

We have considered the facts of this case and the submissions of Counsel. The 'determination of this appeal turns on the interpretation of Order 20 Rule 5 of the RSC. Leaving out what is irrelevant, Order 20 Rule 5 reads as follows:-

"5. -(1) Subject to Order 15 Rules 6,7, and 8 and the following provisions of the rule, the Court may at any stage of the proceedings, allow the plaintiff to amend his writ, or any Party to his pleadings, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the court for leave to make the amendment mentioned in Paragraphs (3), (4) or (5) is made after any relevant period of limitation current as the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks just to do so.

Paragraphs (3) (4) and (5) (supra) deal with amendment to correct name of a party, amendment to alter the capacity in which a party sues and amendment to add or substitute a new cause of action e.t.c. respectively Order 20 rule 5 has its root in the rule of practice regarding amendments; Lord Esher M.R. in Weldon V Neal (1887) 19QBD 394 at P. 395 formulated the rule that amendments should not be allowed if they would prejudice the rights of the opposite party as existing at the time of amendment.

In that case the plaintiff commenced an action for slander on 1st September, 1883. at the trial, the Judge no suited the plaintiff because the plaintiff had not alleged special damages and refused to give leave to amend. Subsequently, the plaintiff obtained from the Court of Appeal, an order for a new trial with leave to amend her statement of claim. On 6th April 1887, she amended her statement of claim. The amended statement of claim set up in addition to the claim for slander, fresh claims in respect of assault, false imprisonment and other causes of action which at the time of such amendment were barred by the statute of limitations. The Divisional Court ordered that the paragraphs stating the fresh causes of action to be struck out on the ground that amendments ought not to be allowed which would deprive the defendant of the benefit of the Statute of Limitations.

On appeal to the Court of Appeal Lord Esher M.R, with whom Lindley and Lapes L.J.J. agreed said:

“We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which if the Writ were issued in respect there of at the date of amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the Statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.”

The dictum of Lord Esher wad considered in *Pontin v Wood (6)* where it was held, inter alia , that where an action is statute barred at the time of amendment of the statement of claim, the amendment can only be made if there are peculiar circumstances justifying amendment despite the expiry of the limitation period.

An example of what might amount to peculiar circumstances was given by *Hudson LJ in Hall v Meyrick (4) as:-*

“...That the plaintiff was tricked by the defendant or lulled into a sense of security that the statute would not be pleaded against him”In *Chartsworth Investments Limited v Cussins (Contractors) Limited* (8) 1969 1 ALLER 143 Lord Denning M.R. sitting with Sacks and Wiggery LJJ expressed the opinion that the rule of practice in *Weldon v Neal (supra)* was applied rigidly and strictly and worked injustice in many cases. He went on to say that the

new RSC Order 20 Rule 5 (2) (3) (4) and (5) had specifically overruled a series of cases which worked injustice. Further, he said that the rule of practice in *Weldon v Neal (supra)* should be discarded and that the Courts should allow the amendment whenever it was just to do so, even though it may deprive the defendant a defence under the Statute of Limitations.

In that Chatsworth, although the amendment would deprive the defendant a defence under the Statute of Limitations, the amendment was allowed to take advantage of the confusion which they had produced themselves. The confusion came about because the defendant took a confusing name which misled even their own solicitors as to who the defendants were. But in *Branif Vs Holland and Hannen and Cubbits (Southern Limited and Another* (6) 3 All ER 959 Court of Appeal, Davies LJ sitting with Wiggery and Cross LJJ one year after Chatsworths (supra) was decided, refused to follow the dictum of Lord Denning in Chatsworths (supra) that the rule of practice in Weldon and Neal (Supra) be discarded. The Court held that the fact that under Order 20 Rule 5 amendments are permitted in special cases although the statutory limitation period has run, does not import any general relaxation of the strict rule in *Weldon v Neal (supra).*

On the totality of the authorities we have considered, we are of the firm view that although Order 20 rule 5 gives the court power to allow the plaintiff to amend his writ or any party to amend his pleadings, it does not provide a wide discretion and does not allow a general relaxation of the governing principle that any amendment after the expiry of the limitation period will not be allowed unless it is just to do so and it will be just to do so if there are peculiar circumstances which make the case an exceptional one.

The application to amend the Writ and the Statement of Claim was made under Order 20 Rule 5. By Paragraphs (1) and (2) of Rule 5, the amendments should relate to the circumstances mentioned in paragraphs (3) (4) and (5) of Rule 5. The onus is on the plaintiff to satisfy the Court that the application to amend relates to one or some or all the circumstances mentioned in paragraphs (3) (4) and (5).

We have looked at the amended writ of summons and statement of claim and the only paragraph we find might have been relevant to the application to amend was paragraph (5). Paragraph (3) deals with alteration of the name of a party, while paragraph (4) deals with alteration of the capacity in which a party sues, matters which did not apply to the application for leave to amend.

Therefore, to put the application in proper perspective it will be necessary to reproduce paragraph (5) in full. Its reads:-

"(5) An amendment may be allowed under paragraph (2) 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 or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

It is clear from these provisions that for the amendment to be allowed under paragraph 2 with respect to the circumstances in paragraph (5) the additional or substituted cause of action should arise out of the same facts or substantially the same facts as the cause of action in respect of which relief has been claimed in the action by the party applying for

leave to make the amendment.

The cause of action in the writ and statement of claim in respect of which the court below granted leave to amend was breach of contract allegedly entered into by their parties in 1995, regarding losses sustained by the plaintiff as a result of wrongful termination of employment and trespass to the plaintiff's properties.

The amendment allowed the plaintiff not to add a new cause of action as such but to plead in the alternative for damages for wrongful termination and summary dismissal etc. What the plaintiff is saying in other words is that if his claim for breach of contract fails, then the claim for wrongful dismissal should succeed. Properly read, paragraph (5) envisages a new or substituted cause of action which will modify, develop or vary the claim already filed and not the introduction of a new claim altogether.

In this case it is clear to us that the claim introduced by the plaintiff after the amendment was not a form of modification, development or variation of claim filed in 1998. It is clear to us that the amendment was applied for in order to defeat the statute of limitations. And contrary to what the court below said, the claim in the alternative cannot in terms of paragraph (5) be said to have arisen from the same or substantially the same facts as the claim for breach of contract. The claim filed in 1998 arises from alleged negotiations and contract between the parties as to paying the plaintiff for wrongful termination e.t.c. On the other hand, the new claim arises out of the alleged wrongful dismissal, assault and trespass that took place in 1991.

Mr. Forrest referred us to paragraph 37 -134, Chitty on Contract 27th Edition (supra) dealing with termination by wrongful dismissal e.t.c. We have read this lengthy paragraph which basically deals with issues of when an employee may be said to have been dismissed, an issue we are not concerned with in this appeal and which was irrelevant for leave to amend the writ of summons and statement of claim.

In the event, we accept Mr. Chamuntangi's submissions that the amendment could not be allowed because it brought in a claim which was at the time of amendment already statute barred.Our holding accords with the provisions of paragraph (2) which states that:-

"(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the Writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so. In this paragraph "any relevant period of limitation: includes a time limit which applies to the proceedings in question by virtue of the Foreign Limitation Periods Act 1984."

It is clear from these provisions that at the date of issue of the Writ which is to be amended, the relevant limitation period should have been current and not expired. In this case the cause of action for wrongful termination and summary dismissal arose at the latest on 9th January, 1992. The original writ was filed on 22nd June, 1998 and the Statement of claim, curiously and contrary to our Rules, was filed on 27th August, 1998, long after the expiry of the limitation period. The limitation period was therefore, not current at the date of the writ. The provisions of paragraph (2) did not therefore apply in this case.

In the event, the Court below fell in error when it held that as long as the plaintiff had complied with Order 20/5 – 8/7 and 20/5 – 8/16, which in fact are explanatory paragraphs, the plaintiff was entitled to the leave to amend.But this is not the end of the matter. It has been argued before us that in fact the limitation time did not start running until the failed negotiations of 1995 which led the plaintiff to commence this action in 1998.

Mr. Chamuntangi, counsel for the defendant, argued and submitted that negotiations cannot stop the time from running. As authority for this statement Mr. Chamuntangi cited Chitty on Contract 26th Edition Paragraph 1994 (supra), Halsbury Laws of England (supra) and the Case of *Fletcher and Son v Jubb,* Booth and Helliwell (supra). On the other hand, Mr. Forrest referred us to a passage on Chitty on Contract Volumes 1 & 2, 27th Edition Paragraphs 28 -089 and 37 – 134 respectively (supra) on undue influence. He said the plaintiff was prevented from taking up the proceedings due to political interference and political overtones and undue influence surrounding this case. It was Mr. Forrest's submission that up to the time the negotiations broke down, the parties had put the claim contained in the amended writ and statement of claim in abeyance. Mr. Forrest also referred to the fact that the matter was also in the Industrial Relations Court when the plaintiff applied for leave to file a complaint out of time. The ruling by the full bench refusing leave to file complaint out of time was not delivered until 1995. Because of these developments, Mr. Forrest argued, the matter was still alive at the time the plaintiff filed his writ in 1998.

We have looked at the passage referred to in Chitty and Halsburys Laws of England (supra) and the case of Fletcher and Son (supra) and we have considered the submissions by counsel. We have no doubt in our minds that on the authorities cited to us negotiations cannot stop time from running. As to undue influence and political interferences, we do not find it necessary to express an opinion whether undue influence or political interference can stop time from running because the plaintiff's own evidence shows that he was free to commence his action. He commenced the action in the Industrial Relations Court in 1992 when he was effectively dismissed. There is no evidence that the plaintiff was physically or otherwise prevented from filing his claim in the High Court. Nor is there any evidence to show that the defendant directly or indirectly contributed to the plaintiff's failure to file his claim in time. In order not to pre-empt the trial, we have refrained from saying much about the alleged promise made by the defendant to the plaintiff to settle out of court. All we can say now is that we have no evidence upon which we can make a finding on that issue. In the event, we find no peculiar circumstances in this case for us to hold that this case was an exceptional one and that it was, therefore, just to allow the amendment.

The case of Fletcher and Son (supra) is not a case in point here. Although this case touches on statute of limitation, its main theme is about negligence of a solicitor who did not bring to the attention of his client the effect of the Statute of Limitation. The claim in the alternative must be struck out from the writ and statement of claim.

In the result, we allow the appeal. Costs will be in the cause.

Appeal allowed.