APPEAL NO. 181/2015

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 181/2015**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

MIDLANDS BREWERIES (PVT) LIMITED **APPELLANT**

AND

NATIONAL BREWERIES PLC **RESPONDENT**

Coram : **Mambilima CJ, Mwanamwambwa DCJ, and Mutuna JS**

On 5th June 2018 and 8th June 2018

For the Appellant : **Mr. L. Linyama of Messrs Eric Silwamba Jalasi and Linyama**

For the Respondent : **N/A**

J U D G M E N T

Mutuna, JS. delivered the judgment of the court.

Cases referred to:

1) **Zambia Consolidated Copper Mines Limited v Chileshe (2002) ZR 86**
2) **Good v Parry (1963) 2 QB 418**
3) **City Express Services Limited v Southern Cross Motors Limited 2006/HPC/0026 (unreported)**
4) **William David Carlisle Wise v E.F. Harvey Limited (1985) ZR 179**
5) **Mukumbuta Mukumbuta and others v Nkwilimba Choobana Lubinda and other SCZ judgment No.8 of 2003**

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6) **Abel Mulenga and others v Mabvuto Adan Avuta Chikumbi and others SCZ judgment No.8 of 2006**
7) **Millington v Loring (1880) 6 QBD 190**
8) **Wildon v Neal (1887) 19 QB 394**

Statutes referred to:

1) **Supreme Court Practice, 1999, volume 2**
2) **High Court Act, Cap 27**
3) **The Limitation Act, 1939 (of England)**

Introduction

1) The orderly course of a matter prior to a trial is usually hampered by applications to amend pleadings filed before the Court. These applications are prompted by, among other things, omissions by counsel to plead the client's case as instructed and failure by clients to fully instruct counsel. The ends of justice demand that such omissions should not be unduly penalised, hence the provision for amendment of pleadings.

2) Our law provides for application for amendment of pleadings through Order 18 of the ***High Court Act*** and Order 20 of the ***Supreme Court Practice, 1999*** (***White Book***). Counsel, as in this case, often times resorts to Order 20 of the ***White Book*** because it is more detailed than Order 18 of the ***High Court Act***.

3) This appeal, as presented through the two grounds, seeks an interpretation of Order 20 rule 5 of the ***White Book*** on amendment of pleadings and it is a challenge by the Appellant to the ruling of the Learned High Court Judge delivered on 27th May 2015, dismissing the Appellant's application to amend the defense to include a counter claim. The basis upon which the Learned High Court Judge dismissed the application was that the

cause of action in the intended counter claim was statute barred and, as such, was a stale claim.

4) The appeal also addresses the issue whether or not an amendment of pleadings can be allowed for purposes of including a counter claim.

Background

5) The facts of this case are fairly straight forward and not disputed. The Respondent to this appeal, which is the Plaintiff in the matter in the High Court, took out an action against the Appellant as Defendant in the High Court on 11th September 2009.

6) The action was by way of writ of summons and statement of claim to which the Appellant responded by way of an appearance and defence.

7) Subsequently in 2015, the Appellant filed a summons for leave to amend the defence

pursuant to Order 18 rule 1 of the ***High Court Act***. In support of the summons was an affidavit, sworn by one Hendrix Shamainda, and skeleton arguments. By the said application, the Appellant sought the leave of the Court to amend its defence to include a counter claim in respect of a cause of action which was outside the limitation period.

8) The response by the Respondent was by way of an affidavit in opposition and skeleton arguments to which the Appellant replied by way of an affidavit in reply.

Contentions by the parties and arguments in the High Court

9) The Appellant's contentions in relation to the application for amendment of the defence as contained in the pleadings before Court were as follows:

9.1 It had inadvertently omitted to include pertinent facts and issues in the defence which were relevant to the determination of the action;

9.2 It sought an order to amend the defence to include a counter claim: for the sum of K56,898.00 being the value of three hundred and forty eight crates belonging to the Appellant but withheld and concealed by the Respondent; and damages for loss of use of the crates.

9.3 There would be no prejudice occasioned to the Respondent if the amendments were allowed. To the contrary, the amendments would serve the ends of justice; and

9.4 The amendments would ensure that all matters in dispute in the case are determined at once.

10) In response, the Respondent contended as follows:

10.1 The rules do not permit the amendment of pleadings by introduction of a new claim in the form of a counter claim; and

10.2 The amendment would prejudice the Respondent because the claim sought to be included was statute barred as it accrued over six years ago.

11) In its reply to the Respondent's contentions, the Appellant disputed the position advanced by the Respondent. It also contended that there was a break in the limitation period because the

Respondent admitted liability in respect of the claim sought to be introduced by the amendment.

12) In the arguments in support of the two positions, counsel for the parties focused on the interpretation of Order 20 rule 5 of the ***White Book*** and various case law on the subject of amendment of pleadings.

Decision by the High Court

13) The Learned High Court Judge considered the evidence and arguments by counsel and found that the law relating to amendment of pleadings is to be found in Order 18 of the ***High Court Act***. She also found that in terms of Order 20 rule 5 of the ***White Book***, a party can apply to amend pleadings even where the effect of the amendment is to introduce a new cause of action or substitute an old one with a new one, as long as the causes

of action arise from the same facts. The Judge found further that we affirmed the rule under Order 20 rule 5 in our decision in the case of ***Zambia Consolidated Copper Mines Limited v Chileshe[1].***

14) After making the foregoing findings, the Learned High Court Judge examined the draft pleadings filed by the Appellant containing the intended amendment and held that it fell within the provisions of Order 20 rule 5 of the ***White Book***. She then considered the argument by the Respondent that the counter claim was statute barred, in the light of the provisions of Order 20 rule 5 sub-rule 2, and found that the rule allows amendment of pleadings by introduction of a new claim even where the same is statute barred.

15) The Learned High Court Judge, however, found that in interpreting the provisions of Order 20 rule 5 of the ***White Book*** in the ***Chileshe*** case, we held that an amendment which has the effect of introducing a fresh cause of action which is statute barred, cannot be allowed. Consequently, she found that since the cause of action upon which the intended action accrued fell outside the limitation period, she could not allow the application.

16) In the second part of her determination, the Learned High Court Judge considered the Appellant's contention that the Respondent had admitted and acknowledged the claim by a written minute dated 4th March 2010 and as such, the limitation period stopped running. She considered the provisions of section 23(4) of the

Limitation Act 1939, of England and referred to the cases of ***Good v Parry***[2] and ***City Express Services Limited v Southern Cross Motors Limited***[3] on what constitutes an acknowledgement of a claim, and concluded that the minute in issue, whilst revealing the Respondent's willingness to negotiate, contained no specific admission. Therefore, in the Court's view, the cause of action in the intended amendment introduced a stale claim which would prejudice the Respondent. She accordingly dismissed the application with costs.

The grounds of appeal to this Court and arguments by the Appellant

17) The Appellant is aggrieved by the decision of the Learned High Court Judge and has launched this

appeal advancing two grounds of appeal as follows:

17.1 The learned Puisne Judge misdirected herself at law when she declined the amendment sought without due adherence to the provisions of Order 20 rule 5 of the Rules of the Supreme Court (RSC) 1999 Edition;

17.2 The Learned Trial Court erred in law by proceeding to determine the substantive issue of Limitation of Actions at the stage of the matter without having heard the parties and reviewing the evidence.

18) To support the ground of appeal, the Appellant filed heads of argument prior to the hearings which were augmented with *viva voce* arguments at the hearing.

19) Despite being served with the record of appeal, heads of arguments and cause list, the Respondent did not file heads of argument and was not represented at the appeal. We proceeded to hear the appeal in the Respondent's absence because no explanation was given for its absence.

20) In relation to ground 1 of the appeal, the Appellant's argument focused on setting out the purpose of pleadings and contended that in her interpretation of Order 20 rule 5 of the ***White Book***, the Learned High Court Judge misdirected herself because she did not comprehend the purpose of pleadings as this is what the intended amendment sought to achieve. Our attention was drawn to our decisions in the cases of ***William David Carlise Wise v E.F. Harvey Limited***[4], ***Mukumbuta Mukumbuta and others v Nkwilimba Choobana Lubinda and others***[5] and ***Abel Mulenga and others v Mabvuto Adan Avuta Chikumbi and others***[6] where we set out the purpose which pleadings serve.

21) The Appellant also referred to section 13 of the ***High Court Act*** in so far as it compels a Judge of

that Court, in the exercise of the adjudicative functions, to ensure that all issues in controversy in a matter between the parties are determined completely and with finality.

22) The Appellant argued further that a Court will only refuse to grant an order to amend pleadings where the intended amendment tends to prejudice, embarrass or otherwise delay the fair conduct of a trial as was held in the case of ***Millington v Loring***[7]. That the Respondent did not demonstrate that the intended amendment had any of these effects, therefore, the Learned High Court judge should not have refused the application.

23) In relation ground 2 of the appeal, the Appellant challenged the finding by the Learned High Court Judge that the intended amendment as presented

sought to introduce a stale claim. According to the Appellant, the finding amounted to the Learned High Court Judge determining a contentious issue reserved for a full trial at interlocutory stage without affording the parties an opportunity of being heard. Our attention was drawn to a plethora of authorities which set out the undesirability of a trial Court determining contentious issues reserved for trial at interlocutory stage. We have not reproduced these authorities because they have no bearing on the decision we have arrived at in the latter part of this judgment.

24) In *viva voce* arguments, counsel for the Appellant Mr. L. Linyama, contended that the thrust of the Appellant's grievance was that the Learned High Court Judge dismissed the application to amend

solely on the ground that the cause of action intended to be introduced by the counter claim was stale. According to counsel, this was a misdirection because Order 25 rule 5 of the ***White Book*** does allow for amendment of pleadings even where a claim sought to be introduced is statute barred. Further, the correct step the Learned High Court Judge should have taken was to allow the amendment and afford the Respondent an opportunity to plead in its defence to counter claim that it was statute barred. Consequently, the Learned High Court Judge determined the issue of the cause of action being caught up in the limitation period prematurely.

25) Counsel also argued that in terms of Order 20 rule 8 sub-rule 8 of the ***White Book***, an amendment may be allowed even if its effect is to

introduce a new claim as long as the opposite party is not prejudiced.

Consideration of the arguments advanced by the Appellant and the decision of the Court

26) We have carefully considered the record of appeal, heads of argument filed by the Appellants and the *viva voce* arguments by Mr. L. Linyama. The determination of this appeal hinges on the interpretation given by the Learned High Court Judge to the explanation we gave of the effect of Order 20 rule 5 of the ***White Book*** in the case of ***Zambia Consolidated Copper Mines Limited v Chileshe***[1]. This is the position we have taken because the appeal as presented through ground 1 questions this finding. The fate of ground 2 of the appeal is determined by our

decision in the first ground as we have explained in the latter part of this judgment.

27) The explanation we gave which the Learned High Court Judge relied upon is in two parts at pages 92 and 93 of the ***Chileshe*** case. In the first part we quoted Lord Esher M.R. in the case of ***Wildon v Neal***[8] as follows:

> **"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 thereof 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."**

28) The second portion is at page 93 and it is our decision which was as follows:

> **"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."**

29) These two passages essentially restate the settled practice on amendment of pleadings that: an application to amend pleadings will not be allowed if it has the effect of prejudicing the rights of the other as at the date of the amendment; as a general rule the amendment of a writ or any other pleading will not be allowed where it seeks to introduce a fresh cause of action, which if it were commenced by a fresh writ on the date of the amendments would be statute barred; and the Court will allow such an amendment only in

exceptional cases and where the amendment is sought to add or substitute an existing claim in a cause of action arising from the same facts or substantially the same facts as those for the existing claim sought to be amended. The rationale for the foregoing is that the Court must at all times ensure that the rights of the opposite party as they are at the material time are not prejudiced and must be seen to be just.

30) To the extent that the Learned High Court Judge did not consider our decision that in exceptional cases an amendment will be allowed even if the amendment seeks to introduce a fresh cause of action which is statute barred, she misdirected herself. Further, she erred in her interpretation of Order 20 rule 5 when she dismissed the Appellant's application on the ground that,

although the facts upon which the intended counter claim was based were similar to those of the Respondent's claim, the amendment could not be allowed because they arose over six years ago and thus fell outside the limitation period. The Learned High Court Judge was in effect saying that an amendment to add or substitute a cause of action will be allowed if it arises out of the same or substantially the same facts as the cause of action before the Court, on condition that the said facts arose within the limitation period. We are of the firm view that this was a misdirection on the part of the Learned High Court Judge because Order 20 rule 5 of the ***White Book*** contains no such condition as we have hereinafter demonstrated.

31) The relevant portion of Order 20 rule 5 of the ***White Book*** is as follows:

> **"(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 pleading, 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) and (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 ...**
>
> **(3) ...**
>
> **(4) ...**
>
> **(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 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 an action by the party applying for leave to make an amendment.**

32) It is clear from the portion of Order 20 rule 5 sub-rules 5 which we have set out in the preceding

paragraph that a Court will only allow an amendment to introduce a new claim by way of substitution or addition to an existing one where:

31.1 Firstly, there is a pre existing claim before Court by way of a claim or counter claim, and

31.2 The intended variation to the cause of action arises out of facts similar or substantially similar to the claim already before Court.

The foregoing reveals that a person making the application to amend must already have a pre existing claim before the Court. Further, the amendment will be allowed in exceptional cases even if the effect is to introduce a cause of action which is statute barred as long as it arises from facts similar or substantially similar to those already placed before Court by a claim commenced by the Applicant.

33) The facts as presented before us reveal that there was no counter claim filed by the Appellant at the time of filing the defence. As such, there was no pre existing claim by the Appellant to qualify for the condition we have set out under paragraphs 31.1 and 31.2. It was, therefore, a misdirection on the part of the Learned High Court Judge to even consider the conditions under Order 20 rule 5 sub-rule 5 of the ***White Book.***

34) Further, although our holding is on point with the argument by Mr. L. Linyama that in accordance with Order 20 rule 5 sub-rule 5 of the ***White Book***, a court can allow an amendment to add to or a substitute a claim with one which is statute barred, and, therefore, the Judge erred when she found otherwise, we do not think that this case

qualified under the rule because it sought to introduce a totally new claim.

35) We also do not agree with Mr. L. Linyama's argument that Order 20 rule 8 sub-rule 8 of the ***White Book*** allows for the amendment of a defence to introduce a counter claim simply because it is titled *"Amendments to allow new claims"*. Our reading of the said Order reveals that it is subject to Order 20 rule 5 sub-rule 5 which we have explained and as such, sets out the same condition of the need for a pre existing claim by an applicant.

Conclusion

36) Our decision aforestated arises from the fact that what the Appellant sought to do is to introduce a new claim. This cannot be done by way of amendment of pleadings already before Court.

Further, Order 20 rule 5 of the ***White Book*** pronounces itself as being subject to Order 15 rules 6, 7 and 8 of the ***White Book*** which provide for counter claims. In doing so, the Order makes it clear that a counter claim is a standalone claim and can be prosecuted independent of the main claim.

37) Finally, the determination we have made in the preceding paragraphs effectively deals with the appeal as a whole rendering the determination of ground 2 of the appeal nugatory because, even if we were to uphold the ground, it would not affect the outcome of the appeal. The appeal, therefore, fails and we dismiss it with costs, both in this Court and the Court below in relation to the application which is the subject of this appeal. The same are to be agreed, in default taxed. We

also remit the matter back to the High Court for continuation of the action in that Court.

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I.C. MAMBILIMA
CHIEF JUSTICE

.....

M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

.....

N.K. MUTUNA
SUPREME COURT JUDGE