

IN THE CONSTITUTIONAL COURT OF ZAMBIA 2022/CCZ/006
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA,
CHAPTER 1, VOLUME 1 OF THE LAWS
OF ZAMBIA

IN THE MATTER OF: ARTICLES 1 (5), 128, 173 (1) (a), (c), (g),
180 (7), 216 (c) AND 235 (b) OF THE
CONSTITUTION OF ZAMBIA ACT,
CHAPTER 1, VOLUME 1 OF THE LAWS
OF ZAMBIA

IN THE MATTER OF: THE STATE PROCEEDINGS ACT,
CHAPTER 71, VOLUME 6 OF THE LAWS
OF ZAMBIA

IN THE MATTER OF: SECTION 8 OF THE CONSTITUTIONAL
COURT ACT, 2016

BETWEEN:

MILINGO LUNGU

PETITIONER

AND

THE ATTORNEY GENERAL

1st RESPONDENT

ADMINISTRATOR GENERAL

2nd RESPONDENT

CORAM: Munalula, P.C, Shilimi, DPC, Mulonda, Mulenga,
Chisunka, Mwandenga, Mulife, JJC on the 16thNovember, 2023
and 15th December, 2023

For the Petitioner:

Mr. S. Sikota, SC of Messrs.
Central Chambers appearing
with Mr. J Zimba of Messrs.
Makebi Zulu Advocates

For the 1st Respondent:

**Mr. R. M. Simeza, SC
appearing with Mr. C. Ngoma
both of Messrs Simeza
Sangwa & Associates**

For the 2nd Respondent:

**Mr. K. M. Kalumba, Assistant
Administrator General**

RULING

Mwandenga JC, delivered the Ruling of the Court.

Cases referred to:

- 1. Wymer v Dodds (1879) 11 Ch.D 436**
- 2. Busch v Stevens (1962) 1 ALL 412**
- 3. G. L. Baker Ltd v. Medway Building and Supplies Ltd (1958) 3 ALL ER 540**
- 4. Institute for Social Accountability and Another v Parliament of Kenya & 3 others (2014) eKLR**
- 5. Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited (1995 – 1997) Z.R. 187**

Legislation referred to:

- 1. The Constitution of Zambia Act No. 2 of 2016**
- 2. The Constitutional Court Rules, S.I. No. 37 of 2016**
- 3. Rules of the Supreme Court of England 1965**

Other works referred to:

- 1. Atkins Court Forms, Second Edition, 1992, Issue, Volume 32**
- 2. Halsbury's Laws of England, 4th Edition (re-issue), Vol. 36 (1)**

Introduction

1. On the 16th November, 2023 after hearing the 1st Respondent's Notice of Motion to strike out amendments improperly made to the Petition, we found that the application had merit and we said that we shall deliver our reasons in due course. We now give our reasons.

Background

2. On the 14th April, 2023 the 1st Respondent filed this Notice of Motion to strike out amendments improperly made to the Petition pursuant to Order IX Rule 20 (1) of the Constitutional Court Rules, 2016, Statutory Instrument No.37 of 2017 (CCR).
3. This Notice of Motion was accompanied by an affidavit in support sworn by Robert Mbonani Simeza (the affidavit in support) and Skeleton Arguments.
4. This Notice of Motion is a sequel to the Ruling by this Court made on the 31st March, 2023 granting leave to the Petitioner to amend the Petition following the hearing and determination of the Petitioner's Notice of Motion for leave to amend the Petition made pursuant to Order IX Rule 19 and 20 of the CCR.

5. The Petitioner opposed this Notice of Motion and on 27th April, 2023 he filed his affidavit in opposition and Skeleton Arguments.
6. On the 9th May, 2023 the 1st Respondent filed his affidavit in Reply and Skeleton Arguments in Reply.

The 1st Respondent's case

7. In the affidavit in support it was deposed:
 - 7.1 that following the motion to amend the Petition made by the Petitioner, this Court on the 31st March, 2023 allowed the Petitioner to amend his Petition in a manner set out in the proposed amended Petition which was exhibited to the affidavit in support of the application;
 - 7.2 that a perusal of the amended Petition showed that the Petitioner had generally amended the Petition by introducing allegations and reliefs beyond the scope of what was allowed in the Ruling of this Court;
 - 7.3 specifically, that the general title, paragraphs 3, 28 and 34 of the amended Petition, the alleged constitutional breaches under paragraph 6, and the reliefs sought under

(b), (c), (g) and (i) of the amended Petition, introduced amendments beyond the scope of what was sought and allowed by this Court; and

7.4 further that the Petitioner had amended the affidavit verifying the Petition without the requisite leave of Court.

8. It was on this basis that the 1st Respondent sought an Order that the said amendments may be disallowed and struck out accordingly.

9. In the 1st Respondent's skeleton arguments, it was submitted that it was not in dispute that this Court had allowed the Petitioner to amend his Petition in the manner that was set out in the proposed amended Petition. It was, however, contended that the Petitioner had gone beyond what he proposed to be the intended amendments which the Court had allowed by introducing allegations and reliefs not initially set out in the proposed Petition.

10. Reference was made to the explanatory notes to paragraph 20/8/4 of the Rules of the Supreme Court of England, 1965 (RSC) which read as follows:

“In practice, leave to amend is given only when and to the extent that the proposed amendments have been properly and exactly formulated, see Derrick v. Williams (1939) 55 T.L.R. 676; per Farwell L.J. in Hyams v. Stuart King (1908) 2 K.B. 696 at 724; J. Leavey & Co. v. Hirst (1944) K. B. 24, per Lord Greene M.R. at 27. In such case the order giving leave to amend binds the party making the application and he cannot amend generally. Sometimes, though rarely, leave may be given to amend a pleading generally, but in such case the party is not entitled to introduce in his pleading amendments which would not have been allowed if he had formulated and stated in writing the exact amendment that he was seeking to make; to do so would be an abuse of process and accordingly the Court has power in a proper case to strike out such amendments (Busch v. Stevens) [1963] 1.Q.B1;[1962] 1 ALL E.R 412)” (Emphasis theirs)

11. Reliance was also placed on the Learned Authors of **Atkins Court Forms, Second Edition 1992 Issue, Volume 32** where it was pointed out that:

“If an amendment is made otherwise than in accordance with the order, the other side may apply by summons to strike out the amendment.” (Emphasis theirs)

12. The 1st Respondent also referred to the cases of **Wymer v Dodds¹** and **Busch v Stevens²** where the Courts had frowned upon the act of making amendments which were not allowed after a party had specified which amendments were being sought.

13. In concluding the submissions, it was pointed out that a party was not at liberty to introduce other claims or allegations in the Petition beyond those permitted following the leave of Court and that an order for leave to amend did not give a party a *carte blanche* cheque to amend a document generally. Further, that where the amendments went beyond the scope of what was permitted, the Court had the duty to disallow such amendments on an application.
14. It was prayed that this Court should strike out the amendments made by the Petitioner that were beyond what was formulated in the proposed amendments.

The Petitioner's case

15. In the affidavit in opposition it was deposed that:
 - 15.1 a painstaking analysis of this Court's Ruling allowing the amendment to the Petition, revealed that this Court did permit amendments to include all issues arising substantially from the same facts, contrary to the allegations of the 1st Respondent;

15.2 the proposed amendments that were contained in the application for leave to amend the Petition were not a bar to include all necessary amendments stemming from substantially the same facts necessary to resolve the real dispute between the parties;

13.2 all facts were to be included to avoid a multiplicity or deployment of matters in a piecemeal manner;

13.3 the amendments that stem directly from the Petition introduced and birthed additional reliefs under paragraph (b), (c), (g) and (i) of the amended Petition and that the same was done to avoid a multiplicity of actions which is considered as an abuse of the court process;

13.4 the scope of the amendment allowed by the Court was to the extent that all matters that stem substantially from the same facts whether introducing a new cause of action were to be included and that that was what was done; and

13.5 the Court allowed the amendment to the affidavit verifying facts and that the same was filed within the period specified by this Court.

16. In the Skeleton arguments the Petitioner raised three issues as follows:

14.1 Do the amendments made to the Petition exceed the scope of amendments permitted by this Court?;

14.2 Did the Court grant leave to amend the affidavit?; and

14.3 The application as presented is a wanton abuse of the Court process, frivolous, vexatious and intended to embarrass the Court and legal process.

17. On the first issue, it was submitted that the amendments made to the Petition and the affidavit did not go beyond the allowable scope by this Court and remained within the ambit of the leave granted.

18. It was contended that the amendments made were not inconsistent with the subsisting cause of action which centred around the immunity agreement. It was added that at pages R28 and R29 of this Court's Ruling, the Petitioner was permitted to amend his Petition to include the issues relating to the pronounced revocation of his immunity agreement so that all issues could be resolved in one case.

19. The Petitioner referred to the case of **G. L. Baker Ltd v Medway Building and Supplies Ltd**³ where it was stated that all amendments ought to be made as may be necessary for the purpose of determining the real questions in controversy between parties.
20. This Court was further referred to the **Halsbury's Laws of England, 4th Edition (re-issue), Vol. 36 (1) at paragraph 76** which reads as follows:

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion...the person applying for the amendment must act in good faith.”

21. In light of the above, it was submitted that an amendment could be made at any stage of the proceedings even if it changed the cause of action. It was highlighted that the Petitioner only included those amendments that arose from the same set of facts that were initially pleaded, so as to avoid a multiplicity of actions. The Kenyan case of **Institute for Social Accountability and another v Parliament of Kenya & 3**

others⁴ was cited in which the Court held that it will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits.

22. It was emphasized that midstream this matter, the set of facts included in the amended Petition and affidavit arose, therefore it was proper for the Petitioner to include them for purposes of determination as opposed to having multiple actions.
23. It was pointed out that this Court in its Ruling allowing the amendment stated at pages R28 and R29 that:

“...the justice of this case dictates that rather than expect the petitioner to commence a fresh action, he should be permitted to amend his petition to include the issue relating to the pronounced revocation of the immunity agreement so that all the issues in dispute between the parties relating to the immunity agreement can be determined in finality in the present case...”

24. It was submitted that the issues introduced in the paragraphs that the Court was asked to strike out were all connected as they spoke to the same subject matter, being the immunity agreement. Further, that to commence a fresh action on the same set of facts would have led to a multiplicity of actions, an

act frowned upon by the Courts as elucidated in the case of **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited**⁵. It was therefore emphasised that the Petitioner was in order to introduce all the issues relating to the subject in this cause following the Ruling of this Court.

25. In addressing the second issue as to whether this Court did grant leave to amend the affidavit verifying facts, it was the Petitioner's contention that this Court did in fact grant the said leave when it stated on page R29 of its Ruling that:

“The petitioner shall file the amended petition and amended affidavit together with amended skeleton arguments and witness statements if any, within six days of today's date that is by 6th April 2023.”

26. The Petitioner submitted that the above holding allowed the amendment of the Petition and the affidavit thereof and added that it was trite law for each case to be heard on its own merits.
27. The Petitioner proceeded to address the third issue, that the application by the 1st Respondent was a wanton abuse of the Court process and was frivolous and vexatious and intended to embarrass the Court and legal process. It was submitted, that

the Court had already granted the Petitioner leave to amend the Petition and affidavit in support, therefore the application by the 1st Respondent was frivolous and irrelevant as it was meant to frustrate the course of justice and to embarrass the Petitioner. It was added that the said application was also an attempt to delay the trial of this matter and that there was nothing useful in the said application to warrant a plenary hearing.

28. In concluding his submissions, the Petitioner emphasised that the amendments made in the Petition and affidavit were within the scope of amendments allowed by this Court in its Ruling.
29. This Court was urged to dismiss the application by the 1st Respondent with costs.

The 1st Respondent's Reply

30. In the affidavit in Reply it was reiterated that the Ruling of this Court dated 31st March, 2023 granted leave to the Petitioner to amend the Petition in the manner set out in the proposed amended Petition which was exhibited in the application. It was added that a perusal of the amended Petition however showed

that the Petitioner had departed from the amendments he had proposed in his application and had proceeded to introduce other claims and sought reliefs beyond the scope of what was allowed by the Ruling of this Court.

The hearing of this Notice of Motion

31. At the hearing of this Notice of Motion by agreement the parties elected to rely on the filed documents and arguments.

Consideration of this Notice of Motion

32. We have considered this Notice of Motion, the affidavits and skeleton arguments filed by the 1st Respondent and the Petitioner. The 2nd Respondent did not file any process in relation to this Notice of Motion.
33. In our view the issue for determination is whether the Ruling of this Court dated 31st March, 2023 allowed the Petitioner to amend the Petition beyond the proposed amendments exhibited in the Petitioner's affidavit in support of the Notice of Motion to amend the Petition. A peripheral issue is whether the 1st Respondent properly raised the issue that the Petitioner

amended the affidavit verifying the Petition without the requisite leave of Court.

34. Before we delve into the issues, we wish to point out that the authorities cited by the Petitioner for the rationale for allowing amendments in his arguments are irrelevant in *casu*. This is because the Petitioner was granted leave to amend his Petition based on the proposed amended Petition that he produced before the Court as shall be made clear later in this Ruling. Equally irrelevant is the authority on multiplicity of actions/abuse of Court process. This is because the Petitioner is trying to use the same and wrongly so, to circumvent the fact that the leave that was granted to him to amend the Petition was limited in scope by pressing the point that the amendments complained of, were in order so that he could introduce all issues that relate to the subject of the Petition thereby averting a multiplicity of actions which according to the Petitioner is considered as an abuse of the Court's process.

35. In the affidavit in support of the Notice of Motion for leave to amend the Petition, the Petitioner at paragraph 12 deposed as follows:

“That I have since amended my petition and same is ready for filing. Now shown and produced is the said amended petition marked “ML1.”

36. Clearly therefore, the Petitioner produced before the Court the proposed amended Petition (which was ready for filing) and the Court accordingly had the same in mind when it ruled granting the Petitioner leave to amend the Petition. In this regard a perusal of the said Ruling particularly at page R23 reveals that what was pertinent in the consideration of the Notice of Motion for leave to amend the Petition was the proposed amended Petition that was exhibited by the Petitioner in the affidavit in support of the Notice of Motion for leave to amend the Petition. The excerpts at pages R23 and R24 of the Ruling are illustrative of that fact and read as follows:

“45.in determining the application, we have examined the proposed amendments set out in paragraphs 29, 30, 31 and 32, the additional alleged constitutional breaches stated in paragraphs 6, 7 and 8 and the additional reliefs set out in paragraphs (a) and (g) on pages 17 to 18, 19 to 20, and 21, respectively, of the intended amended petition against the contents of the petition.

46. We note that the facts set out in paragraphs 29 and 30 of the intended amended petition are in

addition to the facts stated in paragraphs 18 to 28 of the petition. Paragraph 31 refers to the ratification of the DPP while paragraph 32 sets out the fact of the DPP's decision to revoke immunity/indemnity/undertaking by the former DPP not to prosecute the Petitioner for acts or omissions arising from his carrying out of functions as Provisional Liquidator of Konkola Copper Mines Plc (KCM). Related to paragraph 32 are alleged constitutional breaches set out in paragraphs 6 and 7 and the relief at paragraph (g) of the intended amended petition.” (Emphasis supplied)

37. This Court further stated at page R26 of the Ruling that:

“51. Thus, in our view, the proposed amendments though introducing a new cause of action stem from substantially the same facts. The justice of the case therefore dictates that the application for amendment be allowed in order for the real dispute between the parties to be determined, particularly as the new cause of action arises substantially from the same facts as we have already stated.” (Emphasis supplied)

38. In view of the above quoted excerpts we are of the firm view that this Court was referring to the proposed amendments that were exhibited in the affidavit in support of the Notice of Motion to amend the Petition when it granted leave to amend the Petition. The proposed amendments as exhibited, limited how far the Petitioner could go in making the amendments. The Petitioner

was not granted the latitude to introduce further paragraphs that were connected or spoke to the same subject of the Petitioner's indemnity/immunity agreement. Therefore, the amendments made to the general title, paragraphs 3, 28, 34, the alleged constitutional breaches under paragraph 6 and the reliefs sought under (b), (c), (g) and (i) of the amended Petition filed on 6th April, 2023 were outside of the scope of the amendments allowed by this Court. In this regard therefore, we are of the firm view that the Ruling of this Court dated 31st March, 2023 did not allow the Petitioner to amend the Petition beyond the proposed amendments exhibited in the Petitioner's affidavit in support of the Notice of Motion to amend the Petition. We therefore, categorically find and state that the amendments complained of were improperly made.

39. At this point in time it is opportune for us to take a cue from **Atkins Court Forms, Second Edition 1992 Issue, Volume 32** where the learned authors pointed out that:

“If an amendment is made otherwise than in accordance with the order, the other side may apply by summons to strike out the amendment.”

40. In *casu* therefore, we are of the firm view that the 1st Respondent was on firm ground when he filed the Notice of Motion to disallow the amendments that were improperly made to the Petition.

41. With regards to the amended affidavit filed by the Petitioner dated 6th April, 2023 we shall allow it to stand as filed, as it was amended and filed apparently in keeping with the Ruling of this Court dated 31st March, 2023 which at page R29 reads:

“The Petitioner shall file the amended Petition and amended affidavit together with amended skeleton arguments and witness statements (if any) within six days of today’s date that is 6th April, 2023....”
(Emphasis supplied)

42. But more importantly we note, that the 1st Respondent raised the issue of the affidavit being amended without leave not as an issue for determination in this Notice of Motion but as an issue in paragraph 6 of the affidavit in support of this Notice of Motion where the deponent deposed:

“That further, the Petitioner has amended the affidavit verifying the Petition without the requisite leave of the Court.”

43. A perusal of this Notice of Motion will however, reveal that the 1st Respondent did not raise any issue about the affidavit being

amended without leave of the Court in the Notice of Motion. An affidavit merely serves to provide evidence for a matter before the court commenced in the manner provided for in the CCR and it is not one of the methods provided for commencing proceedings before this Court and therefore it cannot and should never be used to obtain or claim any relief or remedy from the Court. This issue was therefore not properly raised by the 1st Respondent.

44. As this issue was not properly raised we have dealt with it as a peripheral issue in this matter because the Ruling of this Court without doubt granted the Petitioner leave to amend the affidavit verifying the Petition. Therefore, we had to make a pronouncement on it for the sake of clarifying the position of the amended affidavit verifying the amended Petition.

Conclusion

45. It was for the foregoing reasons that we found that this Notice of Motion had merit. We make no order as to costs.
46. For the avoidance of doubt, these proceedings will proceed on the basis of the amended Petition being in the form of the

proposed amended Petition as was exhibited and marked exhibit "ML1" in the affidavit in support of the Notice of Motion for leave to amend the Petition which was filed by the Petitioner as well as the amended affidavit verifying the amended Petition.

Prof. M.M. Munalula
Constitutional Court President

A.M. Shilimi

Deputy President Constitutional Court

P. Mulonda

Constitutional Court Judge

M.S. Mulenga
Constitutional Court Judge

M.K. Chisunka
Constitutional Court Judge

M.Z. Mwandenga
Constitutional Court Judge

K. Mulife
Constitutional Court Judge