

BETWEEN:

**CELTIC FREIGHT ZAMBIA LIMITED**

**APPELLANT**

AND

**KASHY INTERNATIONAL LIMITED**

**RESPONDENT**

**CORAM : Kondolo, Chishimba and Ngulube JJAs**

**On the 19<sup>th</sup> May, 2021 and 23<sup>rd</sup> July, 2021**

For the Appellant : Ms. J.R Mutemi & Ms. M. Kapotwe of Messrs  
Theotis Mutemi Legal Practitioners

For the Respondent : Mr L. Mushota S.C of Messrs Mushota &  
Associates

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## **JUDGMENT**

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**Chishimba JA, delivered the Judgement of the Court.**

**CASES REFERRED TO:**

1. Photo Bank (Z) Limited v Shengo Holdings Limited (2008) 1 ZR 108
2. Zambia Consolidated Copper Mines v Joseph David Chileshe (2002) Z.R. 86
3. Weldom v Neal (1887) 19 QBD 394
4. The Attorney General v Aboubacar Tall And Zambia Airways Corporation Ltd (1995) ZR 53
5. Bwalya, Attorney General and Another v Mwanamuto Investments Limited (2012) 1 ZR 473
6. Baker Limited vs Medway Building and Supplies Limited (1958) IWLR 1236

7. Chilambwe v Tembo & Others 2016 ZMHC 75
8. Tillesley v Harper (1897) 10 Ch D393
9. Clarapede and Company v Commercial Union Association (1883) 32 WR 262
10. Zambia Seed Company Limited v West Co-op. Haulage Limited and Another SCZ Appeal No. 112/2013
11. Allen v Sir Alfred McAlpine and Sons Limited (1968) 1 All ER 543
12. Chinyanta and Others v Alasia Building Construction LTD and Another Appeal 158/ 2015
13. Nevers Mumba v Muhabi Lungu S.C.Z Appeal 200/2014
14. Isaac Lungu v Mbewe Kalikeka Appeal No. 114/2013

### **LEGISLATION CITED:**

1. The High Court Rules Chapter 27 of the Laws of Zambia
2. The Rules of the Supreme Court of England, 1999 Edition.

### **OTHER WORKS REFERRED TO:**

1. David Barnard. 1977. The Civil Court in Action. Butterworths, London.
2. Pleadings Principles and Practice, 1999 edition.

### **1.0 INTRODUCTION**

1.1 This is an interlocutory appeal against the ruling of Justice E. P. Mwikisa dated 4<sup>th</sup> December, 2019 in which she dismissed the appellant's application for an order for leave to amend defence and counterclaim and to file supplementary bundle of documents.

### **2.0 BACKGROUND**

2.1 The respondent and appellant were plaintiff and defendant respectively in the court below. On 15<sup>th</sup> August, 2016, the

respondent commenced an action by way of writ of summons against the appellant which was subsequently amended by leave of court. The respondent sought damages for loss of business and for wrongful detention of its goods. Thereafter, the appellant filed its defence and counterclaim on 25<sup>th</sup> October, 2016, claiming the sum of K79,650.00 being in respect of demurrage, storage or truck detention charges.

- 2.2 On 30<sup>th</sup> August, 2019, the appellant issued summons for an order for leave to amend defence and counterclaim and to file supplementary bundle of documents pursuant to Order 18 Rule 1 of the High Court Rules Chapter 27 of the Laws of Zambia and Order 20 Rule 5(1) and (5) of the Rules of the Supreme Court, 1999 Edition (hereinafter referred to as 'HCR' and 'RSC' respectively).
- 2.3 In his affidavit in support of the application, counsel for the appellant deposed that in November 2017, the appellant filed a defence and counterclaim, claiming inter alia, the sum of K79,650.00 being the amount payable as demurrage, storage and/or truck detention charges under its Standard Terms and Conditions of Carriage. After new directors were appointed to the appellant company they discovered documents that showed

that the truck detention charges were in fact K167, 562.00 as opposed to K79, 650.00. The appellant being desirous to have the correct amounts owed to it by the respondent included in the pleadings, sought the discretion of the lower court to allow the appellant to amend the defence and counterclaim with the correct amounts due.

- 2.4 In opposing the application in the lower court, the respondent filed an affidavit in which it stated that the dispute related to only one truck, namely WB14540/No. 3092/T024, that was detained, and not the other trucks indicated by the appellant. The counterclaimed sum of K167, 562.00 arising from the other trucks was refuted as being malicious, false and improperly before court because there was only one container that was detained due to the decision of the appellant to scatter the cargo in three different trucks instead of one truck as agreed. In any event, there was documentary evidence from the appellant showing that the truck in issue was already in Lusaka when the other trucks were detained. For this reason, it was deposed that the appellant is not entitled to claim anything from the respondent.

- 2.5 The appellant in the lower court, submitted that there is no procedural requirement that precludes the admission of any documents relevant to the matter if such documents are not initially contained in the bundle of documents. Further that the appellant, having a counterclaim against the respondent, needed to prove the same and relied on the case of **Photo Bank (Z) Limited v Shengo Holdings Limited**<sup>(1)</sup> that a counterclaim is a set off and has to be proved.
- 2.6 In their arguments before the lower court, counsel for the respondent contended that the application to amend the defence and enlarge the counterclaim after which fresh bundles of documents will be filed, is a delaying tactic. That trial commenced in 2016 and if the appellant was owed so much money by the respondent and if the subject documents existed at the time, the appellant would have brought or filed the documents much earlier. The argument that the documents were discovered after a change of directors could not hold as a company is a person at law and its directors come and go.

### **3.0 DECISION OF THE LOWER COURT**

- 3.1 The lower court considered the application for leave to amend pleadings and skeleton arguments before her. Judge Mwikisa

was of the view that it was too late in the day for the appellant to file the supplementary bundle of documents especially that the whole essence of discovery is to ensure that parties are not taken by surprise at trial. She observed that two witnesses had already testified on behalf of the plaintiffs (respondents herein), and that a perusal of the application showed that the documents sought to be produced, were available at the time the previous directors filed their initial defence. She stated that the appellant ought to have included them in their bundle of documents if they felt that the said documents were important to be produced in these proceedings.

- 3.2 The court below considered the provisions of Orders 18 and 15 Rule 3 of the HCR and was of the considered view that the appellant was attempting to take the respondents by surprise, and thereby undermine the whole purpose of discovery and inspection of documents, thus defeating the whole purpose of parties complying with orders for directions.
- 3.3 The court below referred to the case of **Zambia Consolidated Copper Mines v Joseph David Chileshe** <sup>(2)</sup> in which the Supreme Court cited the case of **Weldom v Neal** <sup>(3)</sup> on the formulated rule that amendments should not be allowed if they

would prejudice the rights of the opposite party as existing at the time of the amendment. In this regard, the learned Judge took the view that the sought amendments were delaying tactics on the part of the appellant especially that trial dates had already been given for January 2020.

- 3.4 The learned judge then took note of the respondent's application to abridge time on account of a published article that stated that the appellant company had notified the government of Zambia of its intended exit from the country which would leave 100 workers jobless. On the above basis the court abridged the time for continued trial and dismissed the application by the appellant to amend pleadings.

#### **4.0 GROUNDS OF APPEAL**

- 4.1 The appellant, being dissatisfied with the judgment, has appealed raising the following grounds of appeal:

- 1) The learned High Court Judge erred in law and in fact when she held that the application for leave to amend the pleadings has been filed late in the day, contrary to the provisions of Order 18 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia; and*
- 2) The learned High Court Judge erred in law and in fact when she held that the application for leave to amend the defendant's defence and counterclaim and to file supplementary bundle of documents was intended to delay*

*proceedings when in fact the defendant has a counterclaim (which) is claim in its own right which has to be proved in accordance with the case of Photo Bank (Z) Limited v Shengo Holdings Limited (126/2006). (sic)*

## 5.0 **APPELLANT'S ARGUMENTS**

- 5.1 The appellant relied on the amended heads of argument dated 5<sup>th</sup> January, 2021. In arguing ground one, the appellant submits that even though the matter is scheduled for continued trial, this should not preclude the appellant from being permitted to amend its pleadings. The appellant contended that in terms of Order 18 Rule 1 of the HCR and Order 20 Rule 5(1) of the RSC, amendments to pleadings can be allowed at any stage of the proceedings, even when trial has commenced. In support of this position, we were referred to the case of **The Attorney General v Aboubacar Tall And Zambia Airways Corporation Ltd**<sup>(4)</sup> where the court joined the Attorney General to the proceedings after trial had concluded and the matter adjourned for judgment.
- 5.2 The appellant also called in aid the case of **Bwalya, Attorney General and Another v Mwanamuto Investments Limited**<sup>(5)</sup> for the principle that an amendment may be granted at any stage of the proceedings before judgment.

5.3 In citing Order 20 Rule 8(9) and (11) of the RSC, the appellant argued that an amendment, however late in the day, should be allowed where no prejudice will be occasioned to the other party for purposes of formulating the real issues in controversy between the parties which did not appear in the original pleadings, and where no injustice or prejudice would be occasioned. In this case, the real issue in controversy is to have the correct amounts reflected in the appellant/defendant's pleadings and allow the court to determine all matters in dispute between the parties herein in one suit. The appellant seeks to have corrected the amounts reflected in the pleadings from the sum of K79,650 to K167,652=00. These documents were discovered afterwards by the new management of the company. The case of **Baker Limited vs Medway Building and Supplies Limited**<sup>(6)</sup> was cited on amendments that are of a vital point in the determination of the real matter in issue. Reference was made to the object of pleadings quoted by the learned Authors of **Pleadings, Principles and Practice, 1999 edition**, namely to ensure that the litigation between parties is conducted on the basis of the true state of facts.

- 5.4 It was submitted that the proposed amendments are necessary for the painting of a true reflection of the facts in the matter. The fact that the said documents came to the appellants notice late should have been considered by the court below as stated in the **Zambia Seed Company** case. Further, that allowing the amendments would avoid a multiplicity of actions, which is frowned upon by the courts.
- 5.5 It was in the second instance submitted that the respondent would not be prejudiced by the amendment, despite the fact that two of its witnesses had already testified as the amendment sought was in respect of the appellant's counterclaim. The respondent would have the opportunity to cross-examine the appellant's witnesses or to recall any of them and to interrogate the documents sought to be produced. It was further submitted that the respondent was not ambushed or taken by surprise by the application as it was accorded the opportunity to scrutinize the documents sought to be produced. The cases of **Aboubacar tall (Supra)** and **Chilambwe v Tembo & Others**<sup>(7)</sup> were cited
- 5.6 In the alternative, it was submitted that the appellant should have been at the most, penalized in costs, as there is no injustice if the other side can be compensated in costs. The

cases of **Tillesley v Harper**<sup>(8)</sup> and **Clarapede and Company v Commercial Union Association**<sup>(9)</sup> were cited as authority for this argument.

5.7 It was contended that the amendment sought by the appellant was not punctuated by mala fides or designed to be an abuse of court process but rather that the documents forming the basis of the appellant's application only came to the notice of the appellant late in the day. Therefore, the application ought to be allowed. As authority, the appellant relied on the case of **Zambia Seed Company Limited v West Co-op. Haulage Limited and Another**<sup>(10)</sup> where the Supreme Court stated as follows:

*“Although the attitude of the respondent may in certain circumstances be an important consideration, the attitude of the applicant is the major consideration. In this regard, the court must be satisfied that the application is brought bona fide or in good faith and not designed to abuse the court process. ...”*

5.8 It was submitted that in deciding whether or not to grant an application to amend, the justice of the case must be taken into account at the discretion of the court. In this instance, justice required that the appellant be allowed to amend the pleadings.

5.9 With respect to ground two, it was submitted that a counterclaim, is a claim in its own right as held in the case of

**Photo Bank (Z) Limited v Shengo Holdings Limited** <sup>(1)</sup>.

Therefore, the application to amend the pleadings cannot be said to be a delaying tactic as it is in the interest of the appellant to have the matter prosecuted, as it has a counterclaim to prove.

The appellant reiterated the fact that the documents which form the basis of the appellant's application to amend its pleadings only came to the notice of the appellant later in the day owing to a change in management.

5.10 We were urged to reverse the decision of the learned trial Judge and allow the appellant to amend its defence and counterclaim, and to file a supplementary bundle of documents.

## **6.0 RESPONDENT'S ARGUMENT**

6.1 The respondent filed heads of argument in response to the appellant's amended heads dated 17<sup>th</sup> March, 2021. The respondent submits that while an amendment may be granted at any stage as decided in **Bwalya, Attorney General and Another v Mwanamuto Investments Limited** <sup>(5)</sup>, the important factor is the prejudice which the opposing party must show, and not just claiming it. With respect to Order 20/8/14

and Order 2 Rule 1 of the RSC which apply to situations after trial namely that there is no reason in principle precluding the grant of an amendment in an appropriate case, the respondent contended that the court below did take into consideration the circumstances of this 5 year old case and applied Order 15 Rule 3 of the HCR.

- 6.2 It was submitted that the prejudice to the respondent in this case is abundantly clear as it has been deprived of its source of income; has incurred loss of business and customers of its goods; and that the fact of the appellant remaining in the jurisdiction of the court is in doubt.
- 6.3 As regards the argument that there is no specific period for a party to apply for leave to amend a pleading, the respondent contends that this is relative as in every civil litigation, there is limitation of time. Citing the learned author, **David Barnard. 1977. The Civil Court in Action. Butterworths, London**, it was submitted that rules relating to orders for directions provide a timetable for parties to follow from the moment the writ is served to the time the action is set down for trial. The principles underlying such a timeframe were pronounced in **Allen v Sir Alfred McAlpine and Sons Limited** <sup>(11)</sup> as being to

guard against prolonged delay which is inexcusable; prejudice to a fair trial; and after the limitation of time has expired. Further, that time also becomes of the essence where it is prejudicial to the other party's interests as in this case where the appellant has given notice of intention to exit the jurisdiction. The appellant only reacted by making the application to amend after the respondent had filed an application for abridgment of time.

- 6.4 Therefore, in the exercise of her discretion, the learned Judge properly refused the amendment as she found that prejudice would be occasioned to the respondent as opposed to the cited case of **Bwalya, the Attorney General and Another** <sup>(5)</sup>, where discretion was exercised to allow amendment of pleadings there being no prejudice.
- 6.5 With respect to the formulation of real issues in controversy, it was in the first instance submitted that the affidavit in support of the application to amend deposed and filed by counsel for the appellant contains hearsay as the source of the belief was not disclosed contrary to Order 5 Rules 16, 17 and 18 of the HCR. Secondly, that the respondent demonstrated in its opposition that the application to amend was unnecessary as the real

issues in controversy were already in the initial pleadings before court.

- 6.6 As regards the issue of no injustice, injury or prejudice being occasioned, it was submitted that the lower court had taken note of the fact that the appellant had given notice of its intended exit from Zambia and that the respondents would suffer prejudice if the appellant was allowed to amend its defence and counterclaim. That the application for amendment was, in the circumstances, a delaying tactic, as is this appeal.
- 6.7 On the question of costs being awarded to compensate the respondent if the application to amend is allowed, it was contended that this is not a case where justice would be done by an award of costs for the reason that once the appellant leaves Zambia, the respondent would have no recourse if the appeal were to be dismissed. The respondent would suffer injustice and loss as the judgment would be rendered nugatory.
- 6.8 The respondent maintained that the agreement was to transport its cargo as one consignment in one truck with three containers. Therefore any delay that arose was due to the appellant's decision to scatter the cargo contrary to the agreement. Therefore, the claim ought to be for one truck and not three that

the appellant is adding. The respondent proceeded to present in graphic detail per amended record of appeal, the various emails between the parties in respect of invoices and amounts alleged not to tally or supported by any documentation.

6.9 The respondent contends that it is not correct for the appellant to state that the documents it seeks to rely on could not be found by the former directors, despite a diligent search when it was the same directors that were dealing with the respondent, and were thus better placed to know the claim brought against the parties.

6.10 With respect to ground two, the respondent maintained that the application by the appellant was intended to delay proceedings so as to allow the appellant to leave the country before the determination of the matter, and that the appellant was clearly willing in the process to abandon its counterclaim. This was evident from the fact that the appellant had not mentioned anything in its appeal to counter the fact that it had given an exit notice.

6.11 While conceding that the **Photo Banks Limited Case** spelt out the law as regards a counterclaim, the respondent argued that

the facts in casu are peculiar and must be decided on their own merit.

6.12 With respect to the argument that the respondent could be compensated with an award of costs as opposed to denying the application to amend the defence and counterclaim, it was submitted that should we be inclined to grant the application, the respondent applies for security for costs in terms of Order 10 Rule 8(1) of the Court of Appeal Rules, 2016 and Order 59/10/32 of the RSC, 1999. This was based on the fact that the appellant had given notice of exit in the Zambia Daily Mail and elsewhere, announcing their intention to leave before the matter in the High Court was determined.

6.13 The respondent contended that it would defeat the ends of justice if the respondent succeeded on appeal with costs, only to find that the appellant was no longer within the jurisdiction of the court. The respondent submits that if the appeal is allowed, the appellant must be ordered to pay into court, security equivalent to the sum of K550, 000.00.

6.14 It is the respondent's prayer that the appeal be dismissed with costs and that the appellant be ordered to pay security for costs into court in the event that it is condemned in costs.

## 7.0 **HEADS OF ARGUMENTS IN REPLY**

- 7.1 The appellant in response to the arguments raised by the respondent contends that Order 18 Rule 1 of the High Court Rules and Order 20 Rule 5 (I) of the Rules of the Supreme Court do not stipulate a specific period for any party to apply for leave to amend a pleading. Further that orders for directions issued by the court do not usually make reference to any interlocutory applications that may arise. Contrary to the contention that the application to amend came after the respondent's application to abridge time, the correct position is that the former was filed on 30<sup>th</sup> August 2019 and the abridgment of time lodge on 8<sup>th</sup> of October 2019. In any event, the application for abridgment of time is not material to this appeal and leave was obtained to file an amended record of appeal.
- 7.2 As regards the exercise of discretion by the court below, to refuse the amendment sought, it was submitted that a perusal of the ruling shows that the judge did not state that prejudice would be occasioned to the respondent. The basis of refusal being that the applicant was attempting to take the opponent by surprise and was a delaying tactic. The appellant reiterated that no prejudice will be occasioned. In respect of the issue

raised by the respondent i.e the swearing of an affidavit by counsel which was entertained by the court below, it is contended that the respondent did not appeal against the issue and cannot be raised on appeal. In any event, the fact that an affidavit in opposition was filed, the respondent waived their right to raise the issue of defectiveness. The case of **Chinyanta and Others v Alasia Building Construction LTD and** <sup>(12)</sup> was cited as authority.

7.3 As regards the alleged prejudice suffered, it is contended that the same was not expressed or stated in the affidavit in opposition in the court below and cannot be raised on appeal as held in the case of **Nevers Mumba v Muhabi Lungu** <sup>(13)</sup>

7.4 In respect to the interrogating of evidence at pages 10 to 13 contained in the heads of arguments by the appellant, it is submitted that the respondent are delving into the merits of the case below, subject of the main matter which can be brought out in cross examination at trial.

7.5 The appellant refutes that its' intention is to delay proceedings as the application was filed two months before the exit notice to leave the country. As regards the prayers by the respondent of security costs in the sum of K550 000= to be paid by the

appellant, it is contended that no formal application was made. In any event, it would stifle a meritorious and genuine claim. The learned author Patrick Matibini's book titled **Zambia Civil Procedures: Commentary and Cases** at pages 520 was cited particularly on the issue of counter claim and giving of security for costs. We were implored to decline an order for security of costs as the same is excessive, exaggerated and oppressive as stated in the case of **Isaac Lungu v Mbewe Kalikeka** <sup>(14)</sup>.

7.6 In conclusion it was submitted that allowing the appeal would enable every aspect of the suit to be adjudicated and determined in finality. Therefore, the appeal should be allowed.

#### **8.0 DECISION OF THE COURT**

8.1 We have considered the record of appeal, the heads of argument and the authorities cited. We shall deal with both grounds simultaneously as they are interlinked.

8.2 The decision of the lower court refusing leave to the appellant to amend its defence and counterclaim is being challenged on two fold basis; the first being that it was filed late in the day and the second being that it was intended to delay proceedings. It is common cause that the appellant sought to amend its pleadings with regards to the quantum sought in the counterclaim on the

basis that the new management of the appellant company had discovered documents showing that the truck in issue had incurred more detention charges than previously thought. That the actual amount owing is K167,562 instead of K79,650.

8.3 Before we address the issues for determination, we will start with the argument raised relating to the affidavit in support of the summons to amend deposed to by the appellant's Counsel which is alleged to contain hearsay as the source of belief and which was not disclosed contrary to Order 5 Rules 16, 17 and 18 of High Court Rules. We are of the view that this issue was not raised in the court below and thus not dealt with and for that reason we are thus not going to consider it. We will therefore restrict ourselves to the issue arising from the refusal of the court below to grant leave to amend the appellant's defence and counter claim and to file a supplementary bundle of documents and not delve into the actual substantive issues for determination at trial.

8.4 The issues for determination are whether the court below erred in law and fact by refusing to grant leave to the appellant to amend the defence and counter claim and to file a

supplementary bundle of documents. Whether the sought amendments were made late and intended to delay proceedings.

8.5 The general rule on amendment of pleadings is that they can be sought at any stage before or during trial, if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. Further, the court will not permit an amendment that is inconsistent with original pleadings and alters the nature of the defence or plaint. It is trite that where the party applying was acting malafide, amendments will not be granted.

8.6 Though not exhaustive, the parameter or principles under which courts may grant leave to amend the pleadings are as follows: that the power of the court to allow amendments is intended to determine the true substantive dispute of case, the amendments should be timely applied for, the power to amend can be exercised by the court at any stage of the proceedings and however late the desired amendment is sought it should be allowed, if made in good faith provided costs can compensate the other side. The discretion to grant leave to amend pleadings is exercised within the ambit of the principles of natural justice.

8.7 The respondent contends that the previous management of the company were better placed to make the discovery of the documents subject of amendments; that it would suffer prejudice if the appeal is unsuccessful as the appellant has given notice of its intention to relocate to South Africa as per the affidavit in support of summons to abridge time dated 30<sup>th</sup> October, 2019 and that the agreement between the parties was for its cargo to be conveyed on one truck being WB14540/No. 3092/T024, and not three.

8.8 The law as regards amendment of proceedings is to be found in Order 18 Rule 1 of the HCR which provides as follows:

***“1. 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.”***

Further, Order 15 Rule 3 of the HCR provides that:

***3. Particulars of claim shall not be amended except by leave of the Court or a Judge, but the Court or a Judge may, on any application for leave to amend, grant leave, on its***

*appearing that the defendant will not be prejudiced by the amendment:*

*Provided that the Court or a Judge may refuse leave or grant it, on such terms as to notice, adjournment or costs as justice requires."*

8.9 From the above, it is apparent that the general rule as regards amendment of pleadings, is that courts are called upon to exercise their discretion in favour of granting the application whether the defect or error sought to be amended has been occasioned by the party applying to amend or not. Courts are further required to favourably consider all such amendments as may be necessary for the purpose of determining the substantive dispute in issue. In addition, an amendment may be granted at any stage of the trial provided it is before judgment. This was the position taken by the Supreme Court in the case of **Bwalya, Attorney General and Another**<sup>(5)</sup> cited by the appellant.

8.10 It is not in issue that the appellant applied to amend its defence and counter claim during trial after two of the respondent's witnesses had testified. The reason advanced was that the new management of the company had discovered documents showing that the truck detation charges were in fact K167,562

instead of the counter claimed sum of K79,650, which it wished to correct by seeking the amendment.

8.11 We are of the view that the sought amendments were made as soon as new documentation was discovered showing that a higher sum was allegedly owed than previously claimed. Further, that the application for amendment was made in good faith. The amendments sought in the lower court cannot be considered to be reframing the case or a departure from the original pleadings. It is not introducing a new claim but merely seeking to amend the sum being counter claimed. It is trite that a counter claim is a separate independent action. The amendment sought in our view ought to have been allowed for the purpose of determining the real question in controversy between the parties in the case i.e the actual sum being counter claimed in respect of demurrage, storage and truck detention charges. The application in our view was filed on bona fide grounds and no prejudice will be caused to the respondent.

8.12 We say so because the case in the lower court is still at trial stage. The respondent had not closed its case. Though two of the plaintiff's witnesses had testified, it is trite under the provisions of High Court Rules, that the court may any stage of

the suit recall any witness who has been examined albeit subject to the law of evidence; and put such questions to him.

8.13 The pleadings for which amendments is sought relate to a counter-claim which is a separate suit. Therefore the respondent will be at liberty to cross examine the appellant's witness on the sum in issue relating to demurrage, storage and truck detention charges.

8.14 The alleged notice of intention to exit from Zambia cannot be a basis for refusing the sought amendments. Permitting an amendment of pleadings would allow the court below to determine the greater interest of justice, that the suit be determined on the merits in respect of the real disputes in issue.

8.15 We find that the court below misdirected itself in law and fact when it held that the application was made late in the day.

8.16 In ground two, we have no difficulties accepting that a counterclaim is a claim in its own right and that it must be proved just like any other claim. The issue is whether the application to amend the defence and counterclaim was meant to delay proceedings and prejudice the respondent. In other words, will the respondent suffer any prejudice if the applicant

is granted leave to amend the pleadings and file supplementary bundle of documents?

8.17 The respondent contends that the matter has been running for five years and that it has lost business and customers as a result of the dispute. It is also submitted that the appellant has informed the government of its intentions to wind up operations in Zambia and relocate to South Africa, hence respondent is of the view that once the appellant relocates, if it has not already done so, any judgment in its favour will be rendered nugatory. Therefore, the respondent holds the view that this application/appeal is a delaying tactic on the part of the appellant.

8.18 In **Zambia Seed Company Limited v West Co-op. Haulage Limited and Another**<sup>(10)</sup> the Supreme Court guided that:

*“Although the attitude of the respondent may in certain circumstances be an important consideration, the attitude of the applicant is the major consideration. In this regard, the court must be satisfied that the application is brought bona fide or in good faith and not designed to abuse the court process. ...”*

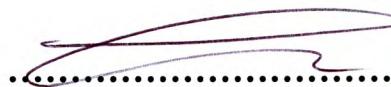
8.19 We have perused the record of appeal and held that there was alluded to the aspect of the appellant's intention to relocate to

South Africa as far back as 2019. This came to light when the respondent filed an application to abridge time so as to expedite trial and the conclusion of the matter. The appellant filed the application to amend its' defence and counterclaim, and to file supplementary bundle of documents prior to the abridgment of time. In view of these circumstances, the anxiety, fear and apprehension by the respondent of likely prejudice is not imaginary. This issue can be adequately addressed by the question of security of costs. The respondent argued that in the event that we are inclined to uphold the appeal and grant the amendments sought, security of costs in earlier stated should be granted. An application for security of costs must be made formally by way of summons and the respondent is at liberty to pursue that course of action.

## 9.0 **CONCLUSION:**

9.1 In conclusion, having stated that the sought amendments of pleadings were vital to the determination of the real dispute between the parties and was made in good faith, without prejudice to the respondents, we reiterate that the court below erred in law and fact by refusing to allow the amendment.

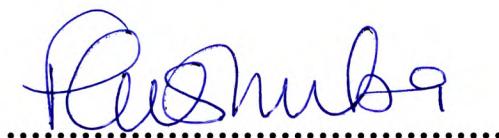
- 9.1 We accordingly uphold the appeal and hereby set aside the ruling of lower court and allow the appellant to amend its' defence and counter-claim and file a supplementary bundle of documents within 21 days from date of judgment.
- 9.2 Costs follow the event.



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M. M. Kondolo

**COURT OF APPEAL JUDGE**



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F. M. Chishimba

**COURT OF APPEAL JUDGE**



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P. C. M. Ngulube

**COURT OF APPEAL JUDGE**