IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1405 OF 1996

BETWEEN

LESOTHO HAPS DEVELOPMENT……..PLAINTIFF
CO. (PVT) LIMITED

AND

PRESS & SHIRE CLOTHING LIMITED……..1ST DEFENDANT

PRESS CORPORATION LIMITED……2ND DEFENDANT

CORAM: **D.F. MWAUNGULU(JUDGE)**

Plaintiff, absent, unrepresented
Njobvu, Legal Practitioner, for the Defendant
Machila, Official Interpreter

Mwaungulu, J.

ORDER

This is an appeal by Press and Shire Clothing Limited, the first defendant, and Press Corporation Limited, the second defendant, against the Assistant Registrar's Order of 23rd of January 2002 rejecting the defendant's application to dismiss the plaintiff's action for want of prosecution. The defendant's application based on the plaintiff's failure to amend pleadings after Justice Mzikamanda on 17th March 2000 ordered amending the plaintiff's name.

The Assistant Registrar thought, of course, after a problem which appears later, correctly in my judgment that the plaintiff should not have done what the defendants requested the plaintiff to do. On that basis the Assistant Registrar, correctly in my judgment, for reasons which will appear shortly dismissed the defendant's application on the hearing of this appeal the plaintiff did not appear. The defendants served the notice of appeal on the plaintiff. Apparently, Mbendera, Chibambo and Associates, who were legal practitioners for plaintiff all along and during the hearing of the matter in contention before the Registrar, were discharged as legal practitioners by this court. The plaintiff has not applied for change of a legal practitioner. The plaintiff could not, on the authority of order 5, rule 6(2) of the Rules of the Supreme Court and Arbuttinot Leasing International Ltd v Havelet Leasing Ltd [1991] 1 All ER 591, appear in this Court in person but by a Legal practitioner. The matter can now only proceed therefore on the basis that the plaintiff has not appeared on a date set for hearing. The matter will therefore proceed on that score and, under the rules of this court, I can hear the defendants on their appeal.

The question is whether this Court should dismiss the plaintiff's action for want of prosecution. That, of course, on what proceeded before the Registrar, depends on whether the plaintiff should have, after introducing a new party, amended the pleadings too. Of course, if the plaintiff should, as the defendant contends, have amended the pleadings, the defendant, on the plaintiff's failure, was entitled, to enforce the courts order and facilitating the case's movement, to apply for dismissal of the plaintiff's action for want of prosecution. Conversely, this Court should dismiss the appeal if, contrary to what the defendant says, the plaintiffs should not have amended the pleadings.

The facts and events to the present appeal are not complex and, if they help to determine this appeal are as follow. On 17th March 2000, the plaintiff successfully obtained an order before Justice Mzikamanda to amend the plaintiff's name from 'HAPS Development Company (Pvt.) Limited' to 'Lesotho HAPS Development Company Property limited.' Nothing happened until 16th January 2001 when Messrs Savjani and Company, the defendant's legal practitioners, wrote Messrs Mbendera, Chibambo and Associates to serve the amended writ and pleadings. On 18th January 2001, Messrs

Mbendera, Chibambo and Associates wrote Messrs Savjani and Company admitting the amended writ and statement of claim should have been served sometime back. Messrs Mbendera, Chibambo and Associate only enclosed the amended writ. On 29th January 2001 Messrs Savjani and Company acknowledged receipt. They requested the plaintiff to serve the amended pleadings by 9 of February 2001. The plaintiff did nothing.

On 4th July 2001, the defendants applied, under Order 19, rule 1 and Order 20, rule 9 of the Rules of the Supreme Court, to dismiss the action for want of prosecution. The court set the application for 24th July 2001. The Assistant Registrar eventually heard the application on 23rd January 2002. The Assistant Registrar's order, delivered the same day, was brief. The first part is cancelled. The cancelled part suggests the Assistant Registrar ordered the plaintiff to amend the pleadings within seven days failing which the action would be dismissed for want of prosecution. The Registrar, as the defendant correctly, mentions, cancelled the earlier order. The Registrar replaced the order with a brief order "no need for amendment of pleadings and serving on the defendants." The order does not necessarily say the plaintiffs' action is dismissed for want of prosecution.

The three ground of appeal the defendants raise can be categorized into two groups. The first category, relating to ground (a), questions the Assistant Registrar's order's legality. The second, in grounds (b) and (c), unimportant for reasons appearing later, relates to the Assistant Registrar's conduct when giving the order. The defendant alleges that the Deputy Registrar, after concluding one way, namely, that the plaintiff's action should be dismissed unless the plaintiff within seven days amended and served the pleadings as the defendants requested, following the plaintiff's legal practitioner's protest the order's propriety, substituted the earlier.

On the Order before me nothing confirms the defendant's allegation that the Registrar cancelled the order because the plaintiff's legal practitioner intervened. Examining the record of proceedings of that day, the Registrar went at great length to record intelligently and concisely the interesting arguments and submissions the legal practitioners made.

This is not to suggest that what the defendant now alleges never occurred. It is only that, because it is not recorded, this Court should be slow, without affidavit evidence on what the defendant says, to conclude that is what actually happened. It is possible the Registrar altered the record without indication to counsel or, if with indication to counsel, without circumstances the defendants allege. It would have made quite some difference, in my judgment, if these matters were on affidavit. A counter affidavit would not be possible now that Messrs Mbendera, Chibambo and Associates discharged themselves. I do not think I should decide on this aspect.

On the most important ground of appeal, namely, that the Registrar erred in holding it

unnecessary for the plaintiff to amend its name in the pleadings the plaintiff having amended the writ, in the absence of the Assistant Registrar's reasons, I should proceed based on arguments Registrar recorded. Unfortunately, the Assistant Registrar passed away, may his soul rest in peace. It was necessary at this stage to require reasons. As said, it is possible to resolve this matter by reference to arguments legal practitioners raised before the Registrar recorded in the proceedings.

The defendant before the Registrar raised several points they thought important to resolving the application. One such point was that it is a requirement that parties to the action on a writ correspond with on the statement of claim or subsequent proceedings. The defendant relied, of course, on a passage in the Supreme Court Practice, 1995 ed. paragraph 20/1/4:

"The statement of claim and the writ should correspond in the names of the parties, in the number of parties, and in the capacities in which they sue or are sued; a mere misnomer may be corrected in the statement of claim but the writ should be amended before judgment."

This passage, in my judgment, scarcely assists the defendant's cause. The passage clearly requires an amendment of the writ, mind you, not immediately, but before judgment. About the statement of claim, a pleading, this statement requires a correction of the statement of claim not an amendment as the defendant suggest. The defendant's counsel only read that aspect of the paragraph. From the last paragraph in that paragraph, it is not compulsory for the plaintiff to amend the pleading as well:

"If either parties desires to add a new plaintiff or a new defendant, he must apply under Order 15 rules 6 and 7…. And if an Order be made adding any new party the writ should be amended accordingly. If such new party be a defendant the amended writ must be served on him…. If any pleadings have been already served they will probably also need amendment to show title in the new plaintiff or reliability in the new defendant."

The learned authors cite Ashley v Taylor (1878) 10 Ch D 768, p 772 and Seear v Lawson (1881) 16 Ch D 121.

The other point the defendant takes bases on Order 20, rule 9:

"Where the court makes an order under this order giving any party leave to amend a writ, pleading or other document, then, if that party does not amend the document in accordance with the order before the expiration of the period specified for that purpose in the order or, if no period is so specified, of a period of 14 days after the order was made,

the order shall cease to have effect, without prejudice, however, to the power of the court to extend the period."

The defendant contended before the Registrar that under this rule the plaintiff should have served the amended pleading within 14 days after the Judge's order. The defendant derided the plaintiff for not serving the amended statement of claim two years on. The defendant contended the plaintiff actually admitted inaction. The defendant's legal practitioner, therefore, relying on Re Jokan T Holdings Ltd [1993] 1 All ER 630, thought the plaintiffs willfully neglected to obey the order and were guilty of delay and contumely necessitating dismissing the action for want of prosecution.

I read this order very closely. Nothing in this order suggests the plaintiff should serve the amended statement of claim on the defendants. In my judgment, the rule only requires the amending party to comply within the time specified or, where not specified, within a period of 14 days after the order. The rule does not require service of the amended process or pleading. Since the rule requires the applying party to amend, it must be read with Order 20, rule 8 of the Rules of the Supreme Court covering the manner of amendment and, as we see shortly, the rule implies no service of amended pleadings.

Even if Order 20, rule 9 required service, from the rule, failure to comply does not result in dismissing the action for want of prosecution as the defendant suggest. The rule makes the proposed amendment ineffective with the result that the action proceeds as if there was no amendment. Consequently, the action proceeds as with the parties in the original action. The court cannot dismiss the action for want of prosecution for failure of an amending party to effect an order of an amendment. This of course seems to create problems where, as here, the party has either changed capacity or is a wrong party. This however is no reason for striking the proceedings for want of prosecution. It still remains to the defendant to strike off the plaintiff under Order 15 of the Rules of the Supreme Court.

Before the Registrar the plaintiff argued she need not amend or serve the statement of claim because she amended the writ. The plaintiff was right in the submission on the effect amendment to any document. Where amended, the writ replaces one originally issued. The effectiveness of the amended writ dates, as it should, from when the action was commenced. Lord Justice Collins, M. R., in Sneade v Wotherton, etc [1904] 1 KB 295 at 297, said:

"It appears to me that the writ as amended becomes for this purpose the original commencement of the action, notwithstanding the fact that the writ originally claimed a larger sum. The reason why the judges have always held that the question on what terms such an amendment should be allowed requires very careful consideration, is that, except in so far as such terms may provide to the contrary, the leave to amend involves that the

claim as amended may be treated as if it were the original claim in the action. In this case the amendment was allowed on such terms as the learned judge thought would meet all the equities of the case. Upon that amendment being allowed, the writ as amended becomes the origin of the action, and the claim thereon indorsed is substituted for the claim originally indorsed."

Amendment has same consequences on pleadings. Lord Justice Hodson's in Warner v Sampson [1959] 1 QB 297 at 321, said:

"Moreover, the defence was amended before the reply claiming forfeiture, on which the plaintiff now relies, came into existence. I do not think that this amendment can be ignored. Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried. Here the defendant has obtained leave to amend, and there has been no appeal against that order; and, whatever may have taken place at the hearing of the application to amend, the court must, I conceive, regard the pleadings as they stand, the purpose of amendment being to determine the real question in controversy between the parties:…

It appears to me that the writ as amended becomes for this purpose the original commencement of the action."

Order 20, rule 10, however, prescribes how amendments should be made and resolves, in my judgment, the question whether to introduce or serve fresh amended documents:

"(1) Where the amendments authorized under any rule of this Order to be made in a writ, pleading or other document are so numerous or of such nature or length that to make written alterations of the documents so as to give effect to them would make it difficult or inconvenient to read, a fresh document amended as so authorized must be prepared and, in a case of a writ or originating summons, re issued, but, except as aforesaid and subject to any direction given under rule 5 or 8, the amendment so authorized may be effected by making in writing the necessary alterations of the document and, in the case of the writ or originating summons, causing it to be refilled and filling a copy thereof.

(2) A writ, pleading or other document which has been amended under this order must be indorsed with a statement that it has been amended, specifying the date on which it was amended, the name of the Judge, Master or Registrar by whom the order (if any) authorizing the amendment was made and the date thereof, or, if no such order was made, the number of the rule of this order in pursuance of which the amendment was made."

From this rule, fresh documents are necessary where amendments under any rule of the order to be made in a writ, pleading or other document are so numerous or of such a nature or length that to make written alterations of the documents so as to give effect to them would make it difficult or inconvenient to read. Otherwise, fresh documents or even service of them is unnecessary as long as the amendments are according to the rule. In the later case, the rule requires each party make in writing necessary alterations to the documents with the necessary certificates. This rule is now subject to a practice direction. (Practice Directions: Queens Bench; 20, volume 2 part 3A 733.)

The Practice Directions concentrate on amendments to originating processes. In one it provides that, where there has been amendment to a writ of summons or an originating summons, an amended copy of such of writ or summons should be filed showing amendments according to the prescription in that rule. Paragraph 2 deals with re-issued writs of summons or originating summonses. Paragraph 3 deals with amendments to statements of claim endorsed on the writ, specially endorsed writs. To the extent that the statement of claim is part of the writ, paragraph 3 requires filing of a new writ and appropriate amendment. Paragraph 4 repeats contents of Order 20, rule 10 of the Rules of the Supreme Court as to time when to make amendments. It is clear from the Practice Direction, that there is no necessity for serving of the amended process so long as the order of the court has been made. The Practice Directions do not require introduction of fresh pleadings once amended. In full compliance with the spirit of the original rule, all the Practice Directions require is a party make appropriate alterations on the particular document.

There are two reasons, in my judgment, why the Rules require, at least at this initial stage, a party only to file amendments to the writ without service of the process. The first reason bases on the practice when applying to amend an originating process or a pleading, a practice based on the remarks in Lawrance v Lord Norreys (1890) 15 App.Cas No 210. There the court adjourned for the amending party to specify the intended amendment in the application. Hyams v Stuart King (1908) 2 KB 696 confirms the practice and Farwell, L.J., said at 724:

“But in my opinion it is the duty of the plaintiff’s counsel, a duty which ought to be enforced by the judge, when he asks for an amendment which raises a fresh issue on a fresh course of action, to formulate and state in writing the exact amendment that he asks, injustice to the defendant, in order that he may know exactly the new case that he has to meet, to the judge in order that he may know exactly what he asked to trial, and to the court of appeal in order that they may know what has been tried and decided. This is in accordance with order XXVII., rr8 and 9 and the usual practice in the Chancery division. Order XXVIII., r. 12 does not mean that an order may be made in general terms, but gives a general power to make proper orders in all cases for determining the real questions. While, therefore, I think that the amendment should be allowed I think that the plaintiff’s counsel did not ask for or obtain it in proper form, the respondent should not in any case have the costs of the appeal. It appears from this statement that the amending

party must introduce to the defendant and to the court the proposed amendment. If that amendment is not so proposed, while the court may still grant the amendment, the amending party may be contend in costs."

Once the proposed amendments are introduced to the other party and the court, as suggests, it sounds unusual to me, at this stage to insist there should be fresh processes and these processes should be served on the other party. In my judgment, at this stage, while it may be desirable to have fresh processes it is not necessary to have them and have them served on the other party.

The reason for this is that, at least in relation to proceedings where pleadings are part of the process, the amending party can introduce the altered processes when setting down the case and proffering the bundle of pleadings. At that stage all pleadings and prepared as final documents for purposes of trial. For these reasons, I think that the plaintiff in this particular case should not have introduced fresh documents except, of course as to the amendment of the writ, and served them on the other party. Where a party amends the writ or summons or originating summons there is a duty to file fresh documents with the court. While it might be desirable to serve the other party with the amended processes, it is unnecessary because at that stage, on the basis of the practice for amending originating processes or pleadings, the other party is aware of those amendments.

The plaintiff need not have introduced fresh pleadings let alone served them. On that basis this action could not be dismissed for want of prosecution. The plaintiff, having amended the writ all subsequent documents already served or with the court, which in this case included the statement of claim, were thereby amended and could be actually be altered t o that effect by the parties. The proposed amendments were not that detailed as, if alterations were made on the documents, to make the documents difficult to read. In any case, even if the plaintiff had not amended, the plaintiff's action could not have been struck out for want of prosecution. Rather the amendments would have been ineffective. I, therefore, dismiss the appeal with costs.

MADE IN CHAMBERS this 28th day of April, 2003.

D.F. Mwaungulu

JUDGE