REFERENCE No. 2/2001

IN THE COMESA COURT OF JUSTICE

LUSAKA, ZAMBIA.

Coram: **Akiwumi, Lord President, Kalaile, Sakala, Ogoola and Mutsinzi LJJ,**
Delivered in Open Court on Monday, the 22nd day of October, 2001

Registrar: **S. H. Zwane, Esq.**

KABETA MULEYA .....APPLICANT

Versus

COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA .....1ST RESPONDENT

ERASTUS MWENCHA.....2ND RESPONDENT

For the Applicant: **Masauso Ndhlovu, Esq. – Chifumu Banda & Associates**

Sebastian Zulu, Esq. – Zulu & Company

For the Respondents: **John Sangwa, Esq. – Simeza, Sangwa and Associates**

Brian Chigawa, Esq. - COMESA

JUDGMENT OF THE COURT

Lord Justice James Ogoola delivered the Judgment of the Court.

The Applicant in this matter, Kabeta Muleya, is a former employee of the 1st Respondent ("COMESA"). Upon indication of non-renewal of his initial 3-year contract of employment, the Applicant filed a Reference in this Court dated 26/06/01 ("the Original

Reference"), seeking the following (summarized) reliefs against the Respondents, namely a declaration:

(a) to invalidate the Applicant's Staff Performance Appraisal Report;

(b) to continue the Applicant in his post; and

(c) to order a new Staff Performance Appraisal Report, which should be subjected to the "bottom-up approach" of the COMESA policy organs meetings.

As stated in the Applicant's Original Reference, the above reliefs were based on the Respondents' non-compliance with the prescribed procedures governing the non- renewal of employment contracts of COMESA employees. In particular, the Applicant highlighted Respondents' failure to comply with the procedures relating to the evaluation of his Appraisal Report; illegality of the "special leave" that was forced upon him contrary to the Staff Rules of COMESA; and irregularities, unfairness and non-transparency in the Council of Ministers' decision-making process (in Cairo) not to have his contract renewed.

From all the above, the Court concludes that the Applicant's primary **cause of action** as pleaded in the Original Reference was the alleged illegality of the various procedural steps taken by Respondents in processing the Applicant's Appraisal Report under the then existing contract. Similarly, the **reliefs** sought by the Applicant were limited only to certain declarations, the cumulative effect of which sought to reinstate the Applicant's employment *status quo ante*.

During the pendancy of the Original Reference, the Applicant filed two preliminary applications that seek to amend his Original Reference. The First Preliminary Application (filed on 26/06/01) sought to correct certain cross-references in the Original Reference. That was a purely technical matter on which more need not be said. The Second Preliminary Application (dated 29/08/01) seeks to amend the Original Reference, as well as the Reply to that Reference. The proposed amendment comprises the addition of a prayer for **Damages** (both special and general), including: (a) salary, allowances,

and gratuity, to be computed on the basis of the 4 – year period of the non-renewed contract; (b) general damages for disappointment, distress, annoyance and frustration; and (c) general damages for future loss of earnings.

It is conspicuously evident that quite apart from introducing a completely new element in the **reliefs** hitherto pleaded by the Applicant, the proposed amendment would most likely introduce a new **cause of action**, based on failure to renew his contract. In the course of the oral hearings of this Application, Applicant's counsel expressed their intention to abandon two elements of their present amendment, namely:

(i) the prayer to compute salary, emoluments, etc, based on the 4-year period. Instead those computations would now relate only to the 3-month period of notice that should have been given to the Applicant prior to the expiry of his contract of employment;

(ii) the prayer for general damages for disappointment, distress, annoyance and frustration – since this element is intertwined with the 4-year period of the non-renewed contract.

At the time of the oral hearings, however, the Applicant had not as yet consummated his expressed intention to abandon those elements, in as much as the formal application in that behalf was still to be filed in the Court. In any event, notwithstanding the abandonment of the above prayers, the Court would still be left with an amendment that seeks to introduce matters that are completely new, in the sense that they were not at all pleaded in the Original Reference. More importantly, "a new claim raised subsequently to the application cannot be saved by severing it and treating it as a separate action" – see the decision of the European Court of Justice in the case of **Weisserfels v European Parliament, 26 October 1993, Case T-22/92, paras 27 – 29.**

The Rules of Procedure of the Court do not provide directly for amendments of pleadings. Nonetheless, guidance is to be had from at least three sources. **First**, the

Court takes guidance from Rule 35, subrule 2 of its own Rules of Procedure, which mandates, *inter alia,* that:

> *"2. No new point of fact may be introduced in the course of proceedings unless it is based on matters of fact which come to light in the course of the proceedings".*

Second, the Court may also take guidance from Rule 2, subrule 2 of its Rules of Procedure, to the effect that:

> *"2. Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court".*

Thirdly, the Court may take guidance especially from the rich jurisprudence of the European Court of Justice. The jurisdiction and the Rules of Procedure of our Court are modeled on those of the European Court of Justice. Indeed, the COMESA Court is the second court of its kind in the world after the European Court of Justice. While decisions and judgments of the European Court of Justice do not bind our Court, they are of enormous persuasive value. In this regard, the jurisprudence of the European Court of Justice on the matter of amendment of pleadings has been described by LENAERTS & ARTS' **Procedural Law of the European Union (Sweet & Maxwell, 1999)** at p. 368 (hereinafter "**Lenaert's Procedural Law**") as follows:

> *"The form of order sought must be unequivocal so that the Court is spared from either giving judgment* ***ultra petita*** *or from failing to give judgment on one of the heads of the form of order sought. This also protects the rights of the defence.... Since the form of order sought flows from the subject-matter of the proceedings and the pleas in law which have to be summarized in the application, it may not be amended in the course of the proceedings* (see ***Case 232/78 Commission v France [1979] ECR at 2736–2737, paras 2-4, ECJ; and Case T-398/94 Kahn Scheepvaart v Commission [1996] ECR, II-485, para 20, CFI).*** *The applicant is not even entitled to amend the form of order sought where new matters of law or fact have come to light in the course of the proceedings, allowing it to introduce*

new pleas in law. Accordingly, it cannot alter the nature of the proceedings by amending the form of order sought ***(Case 125/78 Gema v Commission [1979] ECR 3173 at 3191, para 26, ECJ; and Case T-28/90 Asian Motor France v Commission [1992] ECR, II-2302-2303, paras 43-44, CFI)"*** [emphasis added].

As will be seen, the above European law very closely echoes this Court's Rules of Procedure. Indeed, the parallelism, between European law and our law, extends even to the "exceptions" that are allowed to the general rule of exclusion of new amendments. Under this Court's Rule 35, subrule 2, no amendment can be introduced by a Party except when such amendment is *"based on matters which come to light in the course of the proceedings"*. By no stretch of the imagination can it be said that the proposed inclusion of **damages** in the instant amendment is a matter that has come to light only in the course of these proceedings. It is an element that goes hand in glove with the fact of any litigation, and especially so in contractual disputes. Like day follows night, so do damages follow alleged breaches of contract (and particularly so, contracts of employment). Indeed, the issue is so elementary to legal practitioners, that it begs no gainsaying, whatsoever. In the jurisprudence of the European Court of Justice, the exception is stated at p. 368 of **Lenaert's Procedural Law** (*supra*) thus:

"In the exceptional circumstance where the institution concerned replaces the contested act by an act which does not essentially diverge from it, the applicant may adjust its form of order sought accordingly. It would not be in the interests of the proper administration of justice or of the requirements of procedural economy to oblige the applicant to make a fresh application to the Court against the new act. This is because the actual subject-matter of the proceedings is not changed ***(Case 14/81 Alpha Steel Ltd v Commission [1982] ECR 749 at 763, para 8, ECJ).*** *It is also possible for the applicant to amend the form of order sought in this way where a contested implied decision is replaced by an express decision with the same content".*

The European jurisprudence quoted above has been expressed even more starkly and more emphatically by K.P.E. LASOK'S **The European Court of Justice: Practice and Procedure (Butterworths, 2nd Edn., 1994),** at pp. 315 – 316, as follows:

> *"The inclusion of a form of order in the application is an essential condition of its admissibility and omission of the form of order cannot be cured by subsequent amendment* ***(Case 48/70 Bernardi v European Parliament [1971] ECR 175, ECJ).*** *The form of order defines the relief sought by the application (not the pleas relied on) and is usually expressed as setting out the order which the applicant wishes the Court to make. The relief sought should be set out unequivocally and precisely for two reasons: (i) if it is ambiguous or obscure the Court may be led to give judgment* ***ultra petita*** *or to fail to give judgment on one of the heads of claim; and (ii) the defendant must be in a position to know exactly the case which he must answer.*
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> ...
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> *There is no provision for amendment of the form of order and while, in some cases, the Court has not excluded entirely the possibility of amendment, the furthest it has gone is to allow a change in the wording, but not the subject matter, of the order sought* ***(Case 232/78 Commission v France, para 3 (supra); Case 124/81 Commission v United Kingdom [1983] ECR 203, para 6;*** *and* ***Case T-41/89 Schwedler v European Parliament [1990] ECR II-79, para 34).***
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> ...
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> *In such cases the amplification or particularization of the form of order is not an extension of its true scope* ***(Case C-243/89 Commission v Denmark [1993] ECR I-3353, para 20)"*** [emphasis added].

In respect of the recent **Reference No. 1B/2000 (Martin Ogang v PTA Bank and Gondwe)**, heard by the Court on 16/10/01, the Court granted an Application to amend the Reference, but that amendment only sought to amplify and particularize damages already pleaded in the main reference. Moreover, counsel for both Parties mutually agreed the

prior existence in the main reference of the element of wrongful dismissal. That case is wholly distinguishable from the instant Application of Kabeta Muleya.

In light of all the above, the conclusion is inescapable that the rule to be followed by the Court is that an amendment to a Party's pleadings will be allowed if the amendment seeks only to amplify, elaborate, particularize or elucidate on a matter that is already contained in the pleading that is sought to be amended. Conversely, an amendment that seeks to introduce a brand new matter altogether (such as a new cause of action, or a new relief), is to be denied.

In the instant application, the element of damages, based especially on the fact of non-renewal of the Applicant's contract of employment, would introduce a brand new relief, which was not pleaded in the Original Reference. Such amendment must be and is hereby rejected by this Court.

The Application is denied. Costs will be in the cause.

It is so ordered.

Dated and delivered at Lusaka this 22nd day of October, 2001.

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A. M. Akiwumi
Lord President

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J. B. Kalaile
Lord Justice

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E. L. Sakala
Lord Justice

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James Ogoola
Lord Justice

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J. Mutsinzi
Lord Justice

Certified as true copy
of the original
Sipho H. Zwane
Registrar
Comesa Court of Justice