HH 114/03
HC 4057/02

ZDB FINANCIAL SERVICES LIMITED
versus
FARQUEST INTERNATIONAL (PVT) LIMITED
ERROL JOHN CONQUEST
BATSIRAI JAMBGA
and
SAMUEL MHLANGA

HIGH COURT OF ZIMBABWE
PARADZA J,
HARARE, 13 September, 2002 and 3 September, 2003

Opposed Matter

Mr *A P de Bourbon SC* for the applicant
Mr *Chinake* for the respondents

PARADZA J: This is an application filed by the applicant to enable the applicant to introduce amendments to the previous summons already before this Court in Case No: HC 1515/99. Such applications are made in terms of Order 20 Rule 134 which provides as follows -

> **"134. Amendment of Summons or Declaration : Cause of Action arises after issue of Summons**
>
> **(1)** A summons or declaration may with the leave of the court or a judge be amended to substitute or to include a cause of action arising after the issue of summons:
> Provided that in the opinion of the court or a judge such an amendment does not change the action into, or add to it, an action of a substantially different character which would more conveniently be the subject of a fresh action.
> **(2)** The court or a judge granting such leave shall fix the times for the defendant's entry of appearance to the new cause of action and for the filing of all subsequent pleadings."

Before this matter was commenced by way of application in terms of Rule 134, plaintiff in the main action and applicant in this application sought to file a notice of amendment by the addition of a further paragraph to the plaintiff's declaration. That paragraph reads as follows -

"12. Plaintiff has recovered the goods and in terms of the agreement endeavoured to sell them.

12.1. The Boomer 282 Face Drill Rig and Hydraulic Rock Drill were placed in the hands of an auctioneer, Bill Hyland (Pvt) Ltd, who has been unable despite diligent efforts, to sell the same.

12.2. Only one of the Kia Ceres trucks was recovered and resold for a net sum of $64 440,00.

12.3. Consequently the balance of the rentals and interest as at the 19th December 2001 was in the sum of $13 113 533,61 as appears more fully from a copy of a statement of account attached hereto marked 'B' to which interest accrues at the rate of 37 per cent per annum from the 20th December 2001.

12.4. Plaintiff is in terms of the agreement entitled to the arrear rentals plus interests".

A further amendment was sought to be made to the prayer which simply repeated the new capital amount being claimed, namely $13 113 533,61 and the new interest figure in a sum of $11 686 470,89 which interest covers the period from 20 December, 2001 to the date of payment. The rest of the prayer remains the same.

Before the Notice of Amendment was filed the plaintiff's legal practitioners in the main action wrote a letter dated 18 February, 2002 advising the defendant's legal practitioners that the statement of account that had previously been furnished to them did not include arrear rentals that accrued after the summons had been issued. In the same letter the plaintiff sought to invite the defendant to plead to the new claim, clearly in disregard of the provisions of Order 20 of the Rules. That, however, is not important now as it has been cured by the present application which is before me.

In response to that letter the legal practitioners acting for the defendant in the main action responded to the plaintiff's legal practitioners letter as follows -

> **"We are in receipt of a letter dated 18 February 2002. Our *prima facie* view is that paragraph 2 of your letter would suggest that your client will seek to introduce a <u>new cause of action</u> (my emphasis).**
>
> Accordingly you will be required to comply with the provisions of Order 20 Rule 134.

We trust that an application made in terms of the above order and rule will be served on us in due course. Our client, for the avoidance of doubt, reserves the right to oppose such application on these merits.

Yours faithfully

KANTOR AND IMMERMAN"

What transpired thereafter was that a Notice of Amendment was filed of record on the 7 March, 2002. I have already referred to the contents of that Notice of Amendment. By way of a follow up of that Notice of Amendment the plaintiff's legal practitioners called upon the defendant in the main action to file the defendant's plea to the claim as amended within seven days. Clearly, as stated above, this was in complete disregard of the provisions of Order 20 which are clear and which plaintiff should have invoked at that stage before they called upon the defendant to plead to the claim.

Defendant's legal practitioners again reminded the plaintiff's legal practitioners of the need to obtain the sunction of the court when seeking to amend their summons. Nothing happened subsequently and quite some time lapsed. This application was finally filed on the 3rd May, 2002. The purpose of the application was to regularise the Notice of Amendment so that it complies with the rules.

I will deal with the substance of this application and with the merits thereafter.

Although the respondent is of the view that a new cause of action is being introduced by this amendment it is difficult to see and I understand the basis of that argument. A very comprehensive declaration in the main action was filed by the applicant. The cause of action was based on a lease agreement signed by the parties on 15 January, 1998. It involved certain property, namely, two Kia Ceres 4 x 4 trucks; l Boomer 282 First Drill Rig and a Hydraulic Rock Drill. A further cause of action as contained in the original summons relates to the hire charges in respect of the same goods stated above amounting to the sum of $11 939,694,18. In that summons the plaintiff was seeking to recover possession of the goods as well as payment of an amount of **$2069 158,04 in respect of arrear rentals up to the 31st December, 1998 which**

amount included arrear rentals and interest.

A Notice of Amendment filed of record seeks to increase those figures to cover the period upto 19 December, 2001 so that the claim becomes thirteen million one hundred and three thousand five hundred and thirty three dollars and sixty one cents in respect of the balance of the rentals and interest thereof and further interest upto the date of payment. I find nothing that would put those amendments into the category of a completely new cause of action. They come to be by virtue of the passage of time from the time summons was issued in February 1999 to the time the amendment was filed in March 2002 a period of approximately three years.

I found a lot of assistance from the argument presented on applicant's behalf by Mr *F Girach* who prepared the applicant's Heads of Argument. Indeed Rule 132 empowers this court to allow any amendment of pleadings in such a manner and on such terms as maybe just. The question one should ask oneself is under the circumstances as are described here is it expected that plaintiff should institute a new summons to recover the arrear rentals arising out of the same agreement from the period December 1998 to December 2001. The answer is clearly simple. It results in unnecessary multiplicity of actions arising out of the same set of circumstances.

I have taken note of the authorities referred to me by Mr *Girach* in particular the case of *Lourenco* v *Raja Dry Cleaners and Steam Laundry (Pvt) Ltd* 1984(2) 151 (SC). In that case DUMBUTSHENA CJ considered the provisions of Order 20 Rule 132 of the High Court Rules and concluded that in terms of that rule, it is quite clear that a party can seek to amend his pleadings at any stage of the proceedings. According to the learned Chief Justice he states the reason for so allowing such amendment in the following words;-

> **"The main aim and object of allowing an amendment to pleadings is to do justice to the parties by deciding the real issues between them. The mistake or neglect of one of the parties in the process of placing the issues before the court and on record will not stand in the way of this unless the prejudice caused to the other party cannot be compensated for in an award of costs. The position is that even where a litigant has delayed in bringing forward his amendment, as in this case, this delay in itself, in the absence of prejudice to his opponent which is not remediable by payment of costs, does not justify refusing the amendment. See *SA Steel Equipment and Company (Pty) Ltd & Ors* v *Lurelk (Pty) Ltd* 1951(4) SA 167 (TPD) at 172G ; *Frenkel, Wise and Company Ltd* v *Cuthbert* 1947(4) SA 715 (CPD) at 718; *Trans Drakensburg Bank Ltd (Under Judicial Management)* v *Combined Engineering (Pty) Ltd and Anor* 1967(3) SA 62(D& CLD) at 638 A-642 H; *Levenstein* v *Levenstein* 1955 SR. 91; 1955(3) SA 615 (SR); *Mabaso and Ors* v *Minister of Police and Anor* 1980(4) SA 319H (WLD)."**

I am also guided by the judgment of my brother CHINHENGO J in the case of *udc Ltd v Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (HC). In that case, emphasis

was made on the approach that the courts should follow in allowing amendments. Our approach, when faced with an amendment even at a late stage during a trial, is to allow such amendments liberally. The only exception that might affect such an approach is where the amendment would cause considerable inconvenience to the court or prejudice to a party, or where there is no prospect of the point raised in the amendment succeeding or where the matters in the amendment are vague and embarrassing.

I have noted that the same legal practitioners who were involved in this matter were also involved in the *udc Ltd* matter. The learned judge went a long way to emphasise and give clear directions as to when such an application for amendment should be made. It is important that legal practitioners, particularly those who are involved in similar disputes make a full appreciation of the principles and views of the judge who will deal with that dispute to avoid unnecessary repetition in future when a similar dispute arises.

In reading the respondent's basis of opposing the application it would appear that one of the reasons for so opposing is the fact that the procedure followed by the applicant in filing a Notice of Amendment and calling upon the defendant to plead was wrong. To me the Notice of Amendment gives an opportunity to the respondent either to consent to the amendment or to voice his desire to oppose the proposed amendment. As a way of procedure I would see nothing wrong in filing a Notice of Amendment and calling on the other party to decide whether to consent or to oppose that Notice of Amendment. That would seem to accord with the provisions of Rule 132 Order 20. That rule deals with a situation where the parties can either choose to consent to an amendment in which case it may not be necessary to make the necessary court application. Once the other party has voiced an intention to oppose it may be necessary to file that application. This point was well covered by CHINHENGO J in the *udc Ltd* matter referred to above.

Under the circumstances I make the following order -

1. The plaintiffs summons and particulars of claim in Case No: HC 1515/99 are amended in terms of the Notice of Amendment filed of record on 7 March, 2002;

2. The respondent is required to file his plea or other answer to plaintiff's claim within 7 days of service upon him of this order

subject to the respondent's right to seek further particulars or otherwise in terms of the Rules;

3. The costs of this application shall follow the outcome of the main cause.

***Gill Godlonton & Gerrans* , plaintiff's legal practitioners**
***Kantor & Immerman* , respondent's legal practitioners**