BAUPLANT SERVICES (PRIVATE) LIMITED
versus
SICON AFRICA (PRIVATE) LIMITED
and
C.T. BELTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
HARARE
HUNGWE J, 31 January 2002 and 8 October 2003

Opposed Application

Mr *A.P. de Bourbon*, for the Applicant
Mr *E.T. Matinenga*, for the 1st Respondent

HUNGWE J: In this application applicant seeks leave to withdraw admissions it made in its pleadings in case No: HC 324/97 and to amend that plea accordingly with the consequent amendment of the pre-trial conference minutes, summary of evidence and the Discovery Affidavit.

The facts giving rise to this application may be summarized as follows.

The first respondent issued and served summons on the present applicant in June 1997 who is first defendant in case No: HC 324/97 and the present second respondent who is second defendant in that case. First defendant (present applicant) in the main case, entered an appearance on 12 June 1997 and its present counsel drew a plea which was filed on 31 July 1997.

The late Mr Granger states in the first defendant's founding affidavit that previous correspondence with plaintiff's legal practitioners disclosed that action was taken on instructions of Zimnat Insurance Company who insured the plaintiff. At that stage neither counsel for applicant nor the instructing legal practitioner (i.e. himself) saw any reason to query the alleged ownership of the crane.

On 4 June 1998 Messrs Atherstone & Cook advised that 2nd Defendant's exception had been dismissed. Applicant then made an application seeking an order that

the issue between it and 2nd defendant be determined at the trial of the new action which application was granted on 11 March 1999.

Up to that stage, Mr Granger says that because he had no reason to doubt the allegation of ownership by plaintiff, he concentrated on the 1st Defendant's claim against 2nd Defendant. In that regard he had interviewed Mr Erwin Fauska, first defendant's workshop manager on 17 January, 2001. It was in that interview that Fauska stated that the crane was the property of John Sisk and Son and not Sicon the plaintiff. There were no dealings between 1st Defendant and Sicon, the plaintiff, according to Fauska.

Annexure "F" to the founding papers dated 17 January 1995 is a letter from 1st defendant to Campbell & Prevost (Pvt) Ltd. It is written a day after the accident in which the crane collapsed. It gave the owner of the crane as John Sisk & Son.

According to Mr Granger any initial prejudice that plaintiff may have suffered was due to the failure of either the assessors Campbell and Prevost or plaintiff's legal practitioners to note 1st defendant's statement that the crane was the property of Sisk & Son and not Sicon. In his interview with the author of Annexure "F", Mr Lang, Mr Granger was furnished with this report Annexure "A" but since his attention was focused on the issues before the 1st and 2nd defendants, he did not consider the letter but only the sketch annexed to it.

Mr *de Bourbon* for the 1st defendant argued that plaintiff's only further prejudice is in respect of abortive pre trial conference and the necessity to amend its replication.

He argued that as the first respondent does not deny that it made an incorrect allegation in its declaration, it is necessary now to have the correct facts placed before the Court to enable the Court to determine the matter on the true facts.

The thrust of the 1st defendant's opposition to this application is that ownership of the crane has never been an issue. In any event, the argument went, by making a blanket admission of the averment in plaintiff's declaration, 1st respondent accepted that the

question of ownership of the crane was not an issue.

Generally the Court leans towards the granting of amendments. WESSELLS J expressed this power of the Court thus in *Whittaker* v *Ross & Another* 1911 TPD 1092 at 1102-3 -

> "The Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties ... We are not going to give a decision upon what we know to be wrong facts."

The relevant principles applicable to the question of amendments were extensively discussed by HENOCHSBERG J in *Zarug* v *Parvathie NO* 1962(3) SA 872. Those same principles were followed in *President Versekeringsmaatskappy Bpk* v *Moodley* 1964(4) SA 109 where the rules for granting an amendment with the effect of withdrawing an admission were set out as;

(a) There must have been a *bona fide* mistake on the part of the party seeking to amend;

(b) The amendment must not cause prejudice to the other side, which cannot be cured by an appropriate order of costs.

Whilst the approach to amendments is the same whether it be an ordinary amendment or, as here, one that has the effect of withdrawal of an admission it is now recognised that the withdrawal of an admission is usually more difficult to achieve because firstly it involves a change of front which requires full explanation to convince the Court of the *bona fides* thereof, and secondly it is more likely to prejudice the other party who had by that admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather necessary evidence.

Applying the above principles to the facts I am unable to reject out of hand the *bona fides* of the late Mr Granger. Yet again the fact is that he was seized with all the relevant information from the time of his interview with Mr Fauska in January 1997. That information has always been available to applicant for a long time. The fact that the application to withdraw an admission is being made late in the day is a factor which must

redound against the *bona fides* of the applicant.

What has moved me to give the order that I will give is the serious prejudice that respondent is likely to suffer should I grant the application for the withdrawal of an admission. Mr *de Bourbon* attempted to minimize this prejudice by reducing it to being restricted to amendment of pleadings. It seems to me that the effect of the grant of the admission goes beyond that. Without first respondent (plaintiff) having been afforded an opportunity to explain circumstances leading to the drawing up of certain documents, it would suffer immense prejudice in the prosecution of its case. Its claim may be met with the defence of prescription. Besides it appears to me that an investigation of the issue of ownership may still reveal that first defendant is entitled to launch the action. I however do not base my ruling on that aspect.

In the premises the application for withdrawal of an admission made by applicant in its pleadings is hereby refused.

Costs will be costs in the cause.

Granger & Harvey, legal practitioners for applicant
Atherstone & Cook, legal practitioners for first respondent