ZIMBABWE ALLIED GROUP LTD
versus
MILDRED AND MATHIAS (PVT) LTD

Mr. *Zhou*, for the applicant
Mr. *Gama*, for the respondent

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 25 March 2008 and 1 April 2008

Opposed Matter

MAKONI J: The applicant seeks an order to amend its summons, particulars of claim and its prayer in case B6619/07 as particularized in the Draft Order. The Application is contested.

The background to the matter is that on 22 November 2007 the plaintiff issued summons, out of this court. The plaintiff's claim is reflected as follows, on the face of the summons

"(1) Delivery of diesel and petrol fuel
(2) Costs of suit".

Paragraph 3 of the particulars of claim states that the plaintiff purchased and paid in full for 150 000 litres of petrol and 25 000 litres of diesel. The applicant received 129 189 litres of petrol and 23 280 litres of diesel thereby leaving a balance of 20 811 litres of petrol and 1720 litres of diesel. In the prayer the applicant prayed for delivery of 129 289 litres of petrol instead of the balance of 20 811 litres.

The respondent entered an appearance to defend and requested for further particulars on 17 January 2008. The applicant did not provide the particulars and on 18 February 2008 went on to file an application for Summary Judgment. The respondent opposed the application on 26 February 2008 and raised, inter alia, some concerns about the applicant's particulars as pleaded in the summons. On 7 March 2008, the applicant filed the requested particulars. On 13 March 2008 the applicant filed a notice of withdrawal of the application for Summary Judgment.

In paragraph 2 of the further particulars, filed on 7 March 2008 the applicant conceded that there was an error in paragraph 5 of the particulars of claim. In that the amount of petrol claimed by the applicant from the respondent was supposed to be 20 811 litres. The applicant went on to state that at the pre-trial conference the plaintiff will apply

to amend paragraph 5. The applicant set out in paragraph 2 of the particulars, the amendment that they will seek. It concluded the particulars by requesting the respondent to plead over to the merits on the basis that the amendment sought will be granted.

The parties then exchanged numerous correspondence on the issue of costs of the application for Summary Judgment. Applicant in the notice of withdrawal of the Summary Judgment did not tender costs.

On 3 July 2008, four months after being provided with the particulars, the respondent filed an exception to the applicant's summons and declaration. The plaintiff opposed the exception and at the same time consented to the matter being set for hearing. On the 18 July 2008 the respondent applied for set down of the matter. The exception did not proceed further and it is still outstanding. On the same date the applicant filed the present application and served it on the respondent.

In its Heads of Argument, the respondent raised three points *in limine*. The first point was that the application for summary judgment was still pending on the basis that applicant had not tendered costs. The second one was that the present application was not supported by a founding affidavit but by a supporting affidavit. The third point was that it is not proper for the applicant to file a court application to amend summons when an exception to the summons has been filed. These issues were not pursued with in argument at the hearing and I will take it that they were abandoned and in my view properly so. Turning to the merits it was submitted on behalf of the applicant that the applicant was entitled to amend its pleadings in order to reflect the correct issues. The incorrect figure in respect of quantity of petrol claimed was clear a bona fide mistake. The omission to state the purchase price was not fatal to the pleadings. The amendment was essentially in to two respects; namely by correcting the number of the litres of petrol being claimed and stating the amount of the purchase price.

It was further submitted that the opposition to the amendment was vexatious as no prejudice would be occasioned by the granting of the amendment. It was further submitted that this was an appropriate case for a special order of costs. Costs should be on the attorney-client scale by the respondent and the *bonis propris* by its legal practitioners.

It was submitted on behalf of the respondent that the application is not *bona fide*. An exception was filed on 3 July 2008. The applicant waited until 18 July 2008 to file the present application. It did not explain the delay in filing the application. It was further submitted that the amendment being sought relates exactly to the issues raised in the exception. There is therefore an attempt to "dilute" the effects of the exception by seeking to remove the cause of complaint while the exception is pending in court. Such an

application is *mala fide*. Mr *Gama* referred the court to the case of *Michael d Adler* v *John Ellio* HCH 135/88 where the application for amendment to pleadings was dismissed on the basis that it was made in bad faith

It was further submitted that the respondent will suffer incurable prejudice as an order of amendment will be tantamount to a dismissal of the exception without a hearing.

The position adopted by our courts in respect of applications for amendment in terms of order 20 Rule 132 of the High Court Rules 1971 is that an amendment will be granted unless the application to amend is mala fide or would cause prejudice to the other side which cannot be compensated by a postponement or by an order for costs or both. See *UDC Ltd* v *Shamva Gora* (*Pvt*) *Ltd* 2000(2) ZLR 210H at 216, *Angeline Enterprises* (*Pvt*) *Ltd* v *Albco* (*Pvt*) *Ltd* 1990 (1) at p 8 ZLLR 6, *Ruesen* v *Mmeyes* 1957 R & N 616 at 620.

In *UDC supra* CHINHENGO J quoted WHITE J in *Commercial Union Assurance Co Ltd* v *Waymark* No 1995(2) SA 73 at 776-J where he summarized the principles to be considered in cases dealing with amendment to pleadings. CHINHENGO J went on to remark that these principles were derived from decided cases in South Africa as well as in Zimbabwe.

The intention behind rule 132 and the simple logic why our courts adopted the above approach was summarized in Lourenco v Raja Dry Cleaners and Steam laundry (Pvt) Ltd 1984 (2) ZLR 15 1(sc) at 15a E-F follows:

> "The main aim and object in allowing an amendment to pleadings is to do Justice to the parties by deciding the real issues between ……."

The same point was made in *UDC supra* at 216 C where CHINHENGO J remarked:

> 'The approach of our courts has been to allow amendments to pleadings quite Liberally in order to avoid an exercise that may lead to a wrong decision and also to ensure that the real issue between the parties may be fairly tried.'

It is a practice of our courts that an exception is dealt with as an opposed matter. Once the matter is set down, as was the case in the present matter, the defendant must file Heads of Argument and prepare the record in terms of R 227. Thereafter the Registrar will refer the file to a Judge for a hearing. *In casu*, the respondent did not do so and as a result the exception remains outstanding

The respondent concedes that the amendment cures the defects if complained of in the exception. In my view, the respondent will not suffer any prejudice of the amendment is granted as it can still set down the exception on the issue of costs.

Litigants and legal practitioners, in particular, must bear in mind that litigation is not a battle of wits whereby they strive to outwit each other. They should know that the object of the litigation is to do justice. I can do no better than to quote WESSELS J in *Whittaker* v *Ross & Anor* 1911. TPD 1092 at 1102 -1103 as quoted in *DD Transport* (*Pvt*) *Ltd* v *Abbot* 1988 (2) ZLR 92.

> 'This 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. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleading by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties.'

Although Wessels J was dealing with an amendment to withdraw an admission made in error, his remarks apply with equal force to the present matter. The error regarding the litres of petrol was an arithmetic issue. The omission to state the purchase price cannot be described as fatal to the pleadings.

Both parties prayed for costs on an attorney & client scale and *de bonis propris*. The applicant contends that the opposition to the above amendment was vexations. In my view this cannot be correct. The applicant is seeking the indulgence of the court after having filed papers, which, upon a cursory reading, the errors would have been detected and corrected by the draftsman. The respondent would not be in this situation had the applicant filed the summons with paragraph 5, in the form of the amendment it now seeks. The applicant has not therefore established a basis to be awarded a special order of costs.

.I will therefore grant the application with costs.

Accordingly I made the following order

1) The application is granted.
2) There will be no order as to costs

*Madzivanzira, Gama & Associ*ates, respondent's legal practitioners

Atherstone & Cook, applicant's legal practitioners.