

MASHONALAND TURF CLUB
versus
SUSAN PETERS
and
GIBSON INVESTMENTS

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 7 DECEMBER 2020

Application for amendment

Advocate R Goba, for the plaintiff
Advocate T Magwaliba, for the defendants

DUBE-BANDA J: This court is presently in the process of hearing plaintiff's evidence in this trial. Three witnesses of the defendant have testified and concluded their testimonies, and have been excused as witnesses by this court. At this stage, *Advocate Goba*, counsel for the plaintiff, informed the court that plaintiff intends to lead evidence from two more witnesses. Before the fourth witness was called in to testify, I was informed that defendants had an application to make. It turned out that it is an application for amendment and defendants now wish to amend their plea by inserting a new defence to the claim. The notice of amendment to the defendant's plea is couched as follows:

Be pleased to take notice that at the continuation of the trial in the above matter on the 7th December 2020, then defendants shall apply to amend their plea filed of record on the 31st March 2014, by introducing the following paragraphs after paragraph 16 of the plea:-

17. In addition, the defendants plead that the lease agreements or the subsequent renewals thereof were illegal and are not enforceable on account of them being in contravention of section 39 (1) (b) (ii) and (iii) of the Regional Country and Town Planning Act [Chapter 29:12].

18. The agreements related to an undivided portion of the property in dispute and granted the right of occupation for a period of more than 10 years.

19. Consequently, the plaintiff claim being a claim for rentals and other amounts alleged to be owing, arising from illegal agreements which are void cannot be granted.

Wherefore the defendants pray for the dismissal of the plaintiff's claim with costs of suit on attorney and client scale.

Advocate Magwaliba, counsel for the defendants made an oral application in support of the notice of amendment. The application was opposed. After hearing counsel for both parties, I refused the application for an amendment and indicated at the time that the reasons for the refusal would be handed down in due course. These are the reasons.

Background

Litigation in this case commenced on the 9 October 2013, it is the date plaintiff sued out a summons against the defendants. On the 14 October 2013, defendants filed a notice of appearance to defend. On the 5th November 2013, defendants filed a request for further particulars. Plaintiff supplied the particulars on the 27 November 2013. On the 16 December 2013, defendants filed a request for further and better particulars. Further and better particulars were supplied on the 27 February 2014. Defendants filed their plea on the 31st March 2014. Both parties filed discovery affidavits, and discovered numerous documents. The parties attended a pre-trial conference, and on the 13 February 2018, filed a joint pre-trial conference minute. The matter was referred to trial on the basis of the joint pre-trial conference minute.

The trial commenced on the 16 January 2020. Plaintiff has presented oral evidence from three witnesses, i.e. Clever Mushangwe, Haward Mukundu, and Llyod Mugabe. On the 1st September 2020, the matter was adjourned. The proceeding re-commenced on the 7 December 2020, and that is the date defendants' filed their notice of amendment. The amendment sought is opposed by the plaintiff.

Submissions on behalf of the defendants

Advocate Magwaliba, for the defendants made an oral application in support of the notice of amendment. It is argued that the amendment sought is in relation to ongoing proceedings. It can be heard and determined by the presiding judge. It is contended that Order

32 rule 226 (1) of the High Court Rules, 1971 (Rules), permits an oral application to be made during a hearing. It is contended that the other party, i.e. the plaintiff has refused to consent to the amendment sought, and that in such a situation rule 132 of the Rules permits a court or a judge, at any stage of the proceedings to allow either party to alter or amend its pleadings, in such a manner and on such terms as may be just, for the purpose of determining the real question in controversy between the parties.

It is submitted that the amendment is sought during the plaintiff's case. It is argued that the granting of the amendment would not cause any prejudice to the plaintiff. It is contended that the granting of the amendment would allow plaintiff to lead evidence from its remaining witnesses factoring in the contents of the amendment. It is submitted that it would be an ambush to raise the issue of illegality, sought to be introduced by the amendment, during the defendants' case or closing submissions. In fact, it is contended that rule 104 (1) of the Rules requires a defence of illegality to be specifically pleaded. It is argued that plaintiff may, if it so wishes file further pleadings to answer the amendment sought.

Finally, counsel submits that the granting of the amendment would not require plaintiff to re-open its case, because it has not been closed. Again, the granting of the amendment would not mean that the defence sought to be introduced would succeed. It is argued that the plethora of case authorities cited by the plaintiff are irrelevant in this matter, as they deal with the filing of further affidavits, which is not the case now before court.

Submissions on behalf of the plaintiff

Advocate Goba submits that the oral application for amendment must be dismissed. A proper written application should have been filed. It should have been filed timeously to enable plaintiff to respond in a proper manner. Counsel gave a chronology in respect of filing of pleadings in this matter, starting with the date of the issue of the summons, i.e. the 9 October 2013, to show that there has been a substantial delay in bringing this application for the amendment.

In essence, counsel submits that the plaintiff would be prejudiced if the amendment were to be allowed. It is submitted that it would require the opening of the plaintiff's case, witnesses who have already testified and excused would have to be re-called to deal with the new defence. The witnesses who have testified are the key witnesses of the plaintiff. It would

mean returning the matter back to the pleadings stage and the pre-trial conference to deal with the defence belatedly raised. It is argued that this would offend the principle of finality of litigation.

It is argued that the defence sought to be raised by this amendment has always been available to the defendants. If the amendment is granted, plaintiff would suffer serious prejudice, as it would mean that the defence introduced by the amendment is accepted by this court. Finally, counsel submits that an amendment is not for the mere asking. Defendants have to provide an acceptable explanation why the defence sought to be raised by this amendment was not raised timeously. An explanation has not been provided. An affidavit should have been filed explaining why the defence sought to be raised by this amendment was not raised timeously. The granting of an amendment is in the discretion of the court.

Applicable legal principles and the facts

There are only two possible methods of procuring an amendment to process or pleadings after the issue of summons. One is by consent of the parties and the other is by order of court. Whenever it is desired to amend such a pleading, the first step, therefore, is to approach the other party to consent to the amendment. Failing consent then it is necessary to make an application for amendment, either to court or a judge in chambers, depending upon the criteria set out in rule 226 of the Rules. The application must be served upon the opposing party; be supported by affidavit showing good cause; and must be accompanied by a draft order. See *ZFC Ltd v Taylor* 1999 (1) ZLR 308 (HC).

It is trite that the granting of an application for the amendment of a pleading is a matter for the discretion of the court to be exercised judicially in light of all the facts and circumstances of the case before it. The court has such a discretion to allow a litigant to amend his or her pleadings at any stage prior to judgment. See: *Fanny Abednigo Ncube v Thabani Dube and Elton Dube and National Insurance Company of Zimbabwe* HB-106-04. This is in sync with rule 132 of the High Court Rules, which provides that a court or judge may, at any stage of the proceedings, allow a party to amend or alter its pleadings. The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. Overall, however, it is a vital consideration that no amendment will be allowed in circumstances which will cause the other party such prejudice as cannot be

cured by an order for costs and, where appropriate, or a postponement. See: a *Whittaker v Roos and Another*, 1911 T.P.D. 1092 at p. 1102.

The principles that guide this court in the determination of whether or not it will grant leave to amend a pleading have been spelled out in a number of cases. In *UDC Ltd v Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (HC), the court examined a number of cases dealing with amendments to pleadings. At 77F-I, the court summarised the principles enunciated in the cases as being:

1. The court has a discretion whether to grant or refuse an amendment.
2. An amendment cannot be granted for the mere asking; some explanation must be offered therefor.
3. The applicant must show that prima facie the amendment 'has something deserving of consideration, a triable issue'.
4. The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties'.
5. The party seeking the amendment must not be *mala fide*.
6. It must not cause an injustice to the other side which cannot be compensated by costs.
7. The amendment should not be refused simply to punish the applicant for neglect.
8. A mere loss of time is no reason, in itself, to refuse the application.
9. If the amendment is not sought timeously, some reason must be given."

An amendment cannot be for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay. Of course if the application to amend is *mala fide* or if the amendment causes an injustice to the other side which cannot be compensated by costs, or in other words, if the parties cannot be put back for

the purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted. See: *Hercules v Brown* (HC-MD-CIV-ACT-OTH-2016/2857) [2019] NAHCMD 359 (20 September 2019); *Gecko Salt (Pty) Ltd v The Minister of Mines and Energy and Others* (HC-MD-CIV-MOT-REV-2017/307) [2019] NAHCMD 187 (12 June 2019).

In casu, there is no evidence anchoring the explanation as to why the amendment is required. There has been a substantial delay in bringing the application for the amendment. If the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay. The pleadings sought to be amended was filed on the 31st March 2014. The notice to amend was filed on the 7 December 2020. This is a delay of approximately six years eight months. Again, this is after the trial has commenced and three witnesses of the plaintiff have testified. Furthermore, a reasonable satisfactory account has not been given for this delay. No evidence was placed before court to explain the cause of the delay. I hold the view that such an explanation must be placed before court by way of evidence. It cannot be by mere submissions from the bar.

There must be evidence before court to show that the other party will suffer no prejudice if the amendment is granted. *Advocate Goba*, submits that plaintiff would be prejudiced if the amendment were to be allowed. I agree. For counsel just to shoot from the bar, that there shall be no prejudice to the other litigant serves no useful purpose. In fact, in this case I see prejudice to the plaintiff if the amendment sought is granted. Plaintiff might have to seek leave to amend its pleadings, apply to recall three witnesses who have already testified and have been excused. If this amendment sought is permitted, defendants will introduce a new defence to the claim, i.e. defence of illegality. Plaintiff may have to apply to file a replication to the new defence. This will take this matter back to the pleadings stage. Parties might even seek to file supplementary discovery affidavits to meet the new defence. The amendment sought by the defendants at the eleventh hour upset the issues for trial which had been settled by the parties at a pre-trial conference held before a judge. Again, plaintiff has led three witnesses, whom according to *Advocate Goba*, are its key witnesses. This might necessitate an application to re-call these witnesses to again testify in view of the new defence. They will again have to be cross-examined in view of their new evidence. A trial cannot be run in circles like this, this is unattainable. Such will violate to the core the principle of finality in litigation. See: *S v Franco & Ors* 1974 (2) RLR 39 (AD).The

application to amend points to a strategy to adjust the defendants' case as the matter progresses and this in my view is tantamount to *mala fides* by the defendants.

In conclusion, my view is that the high water mark of defendants' case is that an application to amend may be made at any stage before judgment, and can accordingly be granted at different stages of the proceedings. This is correct, but each case must be decided on its own merits. I hold the view that this application exhibits *mala fides*, and if permitted would cause an injustice to the plaintiff, which injustice cannot be ameliorated by an order of costs, or even a postponement. An amendment of the nature sought by the defendants at this late stage of the proceedings would necessarily result in the hearing commencing *de novo*, this violates the principle of finality to litigation.

Finally, and in passing, I comment on *Advocate Goba's* submission that plaintiff's attempt in *Mashonaland Turf Club versus Susan Peters and Gibson Investments (Private) Limited* HH 716-19 to amend its claim, was dismissed, and so if this court were to allow this amendment it will "*contradict and make a fool of itself.*" First, I take the view that such language is inappropriate and uncalled for, it serves no useful purpose in litigation. Second, the application in *Mashonaland Turf Club versus Susan Peters and Gibson Investments (Private) Limited* HH 716-19 was not dismissed, it was struck off the roll. Practice Directive 3 / 2013 explains the effect of an order striking off a matter from the roll and how such a matter may find its way back to the court roll.

It is for the above reasons, that the application to amend defendants' plea was refused.

Dube, Manikai and Hwacha, plaintiff's legal practitioners
Mawere and Sibanda, defendants' legal practitioners