

BENJAMIN JOHN FREETH
versus
LAURA SYBL FREETH (Nee CAMPBELL)

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 17 & 20 July 2023

Opposed Application (Interlocutory)

Ms F Mahere, for the applicant
Mr D Ochieng, for the respondent

TSANGA J: This an application by the defendant, as applicant herein, for amendment of his pleadings in an ongoing matrimonial matter under HC 3490/21. For ease, the parties will simply be referred to herein by the terms plaintiff or defendant save in the order granted. This application is against the backdrop of the following context. The parties are presently embroiled in a divorce trial in which at issue, as a starting point referred to trial, is the standing of a consent paper which the defendant signed. The consent paper gave plaintiff all the property. The defendant later refused to advance it further as the basis for having a divorce granted on the unopposed roll by steadfastly refusing to sign the affidavit of waiver for this purpose. It is common cause that the matter having failed to progress to the unopposed roll, it was deemed opposed. The defendant then filed his defence and plea. When pleadings closed, the matter advanced to pre-trial and was then referred to trial which is ongoing. That trial is the context in which the present application for amendment is sought.

On why the consent paper should be discarded, the defendant assumed the burden to start and is in the midst of his evidence regarding the issue of that consent paper. He wishes to amend his plea on the strength of r 41(10) of the High Court Rules, 2021 which allows an amendment of pleadings at any time before judgment, if the requirements therein are met. He is also buoyed by established legal principles that an amendment should be granted where it will enable the court to determine the real dispute between the parties. In his founding affidavit he says that the amendment sought aims at making it clear upon what terms the consent paper was departed from particularly since the plaintiff suggested at the start of the

trial that it was unclear on what basis the consent paper is being departed from. In his heads of argument, the defendant also clarifies that the amendment seeks to elucidate upon the plea which departs from the consent paper. The amendment is thus said to be intended to ensure that the issues before the court are clear and produce a fair outcome in so far as to why the defendant departs from the consent paper. The defendant says he was not represented at the time of the consent paper and also that he was suffering from depression and unable to negotiate properly.

The amendments sought to be incorporated into the plea are, firstly, that the consent paper is not reasonable, fair or just. Secondly, the defendant seeks to include an averment that the consent paper was not arrived at fairly because the defendant was not represented and also was not in the right state of mind to negotiate a bargain. Thirdly, he seeks to add an averment that the plaintiff did not disclose her income which tainted the fairness of the negotiating process.

He argues that no prejudice which cannot be remedied by an order of costs, will be suffered by the plaintiff from these amendments. The plea which the defendant filed currently reads as follows in para 6 which he seeks to amend:

“6. The contents of these paragraphs are denied. At the time that the consent was given, the Defendant was not legally represented. The consent had only been granted on the premise that the assets would be preserved for the children which the Plaintiff agreed to on the 20th of July 2021. This consent has since been withdrawn as it came to the attention of the Defendant in late September 2021 that moveable and immovable property that forms part of the matrimonial estate was already being disposed of by the Plaintiff.

The applicant seeks to amend that paragraph by augmenting it with others so that it would now read more fully as follows:

- ‘6.1 The contents of these paragraphs are denied. At the time that the consent was given, the Defendant was not legally represented. The consent had only been granted on the premise that the assets would be preserved for the children which the Plaintiff agreed to on the 20th of July 2021. This consent has since been withdrawn as it came to the attention of the Defendant in late September 2021 that moveable and immovable property that forms part of the matrimonial estate was already being disposed of by the Plaintiff.
- 6.2 In the circumstances, the defendant denies that:
- a) the consent paper is reasonable, fair just or equitable
 - b) that the consent paper is consistent with the principles set out in section 7 (4) of the Matrimonial Causes Act [Chapter5:13] including but not limited to the requirement to take into account the direct and indirect contributions made by the defendant to the family and procurement of all the properties; the financial needs, obligations and responsibilities the defendant is likely to have in the future and the duration of the marriage.

- c) the consent paper was properly and fairly arrived at, regard being had to the fact that inter alia the plaintiff was legally represented yet the defendant had no legal representation and was mentally unfit to negotiate a fair bargain.
- d) The defendant avers that there has been a material change of circumstances in that the plaintiff did not make full disclosure of her business and additional sources of income before the consent paper was negotiated.
- e) The defendant denies in any event that the consent paper accurately reflects the full agreement between the parties.”

Through his counsel, the defendant draws attention to cases such as *UDC Ltd v Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (HC) p 217 C-E which relied on the South African case of *Commercial Union Assurance Co Ltd v Waymark N.O.* 1995 (2) SA 73 (TK) to comprehensively set out the liberal legal principles that generally permit amendments. These encompass the court’s discretion whether or not to grant; that it is not for the mere asking; there must be something deserving of consideration; that the modern tendency is to grant to allow a proper ventilation of issues; the party seeking must not *mala fide*; that loss of time is not a reason to refuse; and that if not sought timeously some reason must be given.

Copper Trading Co (Pvt) Ltd v City of Bulawayo 1997 (1) ZLR 134 (S), a Supreme Court case, is equally highlighted to emphasise that amendments are permitted in order to allow the real issue between the parties to be tried. *Butau v Butau* HH 165/2011 is drawn on to illustrate an amendment which was allowed even though it had been counter argued that it was coming late in the day and that the applicant was aware of the issue at the time she filed her original pleadings.

The plaintiff, who is the respondent in this application, is resolutely opposed to the proposed amendments. Through her counsel, the plaintiff says that there is no basis why the defendant should not be held to the terms of the consent paper. More particularly, her counsel states that there is no explanation on why the amendment or why the applicant drew his plea in the manner that he did in the initial instance. In essence, the plaintiff argues that an account must be given on why the matters now sought to be included by way of amendment were not included in the original pleading. Moreover, the plaintiff stresses that an amendment cannot be granted for the mere asking or change of mind and also cites *Commercial Union Assurance Company Ltd v Waymark* for this principle. Especially relied on is *Ryan Anthony Cheney v Katie Pearce Cheney* HH 78/18 where an amendment was denied on the basis that its motivation was a simple change of mind. Plaintiff argues through her counsel that this application is akin to the case of *Cheney* on steroids in that here too the motivation of the amendments is simply a change of mind.

The timing of the application is also said to be inconsistent with it being *bona fide*. It is said to come after the defendant has already pleaded and is in the process of testifying against the backdrop of pleadings he submitted almost 18 months ago. Also not explained is said to be why the application is being made “so far outside the normal course” given that that 18 months has lapsed since the filing of his plea. In addition, the plaintiff says that if the defendant has always held the position he seeks to assert in his amendment, it boggles the mind why he simply did not articulate those sentiments at the time of his plea.

The plaintiff therefore argues that prejudice would result and queries why the application is being sought now unless its averments are a recent invention or stem from a ruse which got her to prepare on a wrong basis. In expanding on the issue of resultant prejudice, the plaintiff highlights that the defendant’s input was sought and obtained in the framing of the declaration and that this compromised her tactical standing. As such, it is argued that the amendment, as sought, introduces new issues that would shift the entire matrix of the litigation causing it to run in circles. This is because the amendments would require further enquiry on issues that plaintiff had been led to believe were water under the bridge such as an inquiry into defendant’s mental health, the parties lifestyle, earning capacity, and marital misconduct, which are all issues the plaintiff says she had been led to believe were water under the bridge. The quest to amend is thus said to resemble an ambush.

Plaintiff also argues that the amendment would read as if the original plea was never filed against a backdrop where no tangible explanation is said to have been given for seeking the amendment. It is argued that what the defendant has advanced is simply the position he intends to seek to prove, as opposed to explain, why the plea was drawn as it was. For the above reasons he plaintiff urges this court to dismiss the application and says that to refuse to do so would be tantamount to pressing the reset button.

Lastly, if the amendment of the plea is allowed, the plaintiff seeks special costs in that the defendant ought to be ordered to bear the plaintiff’s cost from the time of filing of the original plea.

Analysis

Rule 41(10) of the High Court Rules 2021 upon which this application rests provides as follows:

“41. Amendment of pleadings and matters arising pending action

(10) The court or a judge may, notwithstanding anything to the contrary in this rule, at any stage of the proceedings before judgment, allow either party to alter or amend any pleading or document, in such manner and on such terms as may be just, and all such amendments shall

be made as may be necessary for the purpose of determining the real question in controversy between the parties.”

The purpose of r 41 as it stands (and indeed as it previously stood as r 132 under the repealed 1971 Rules), is as stated therein, to allow an opportunity for a case to be decided on its merits by permitting amendment of pleadings where the justice of the case so requires. See *Kenmark Builders (Pvt) Ltd v Girdlestone & Anor* 2019 (1) ZLR 658 (H) where the import of the rule under the High Court Rules 1941, was discussed extensively.

Fundamentally, there is generally nothing wrong with concise pleadings particularly as further particulars can be sought and in some cases the discovery and pre-trial processes play a role in fleshing out issues. But there are instances where in the unfolding of the trial, it becomes necessary to amend pleadings in order to fully address an issue at hand.

Whether it is to add something that was overlooked or expand on something that was stated or even to permit that which was not stated as long as it is not mala-fide or will result in injustice to the other party, courts generally grant amendments where justice requires.

It is crucial to also appreciate that r 41(10) plays an important role in a wider constitutional context. It ensures that the fundamental principle of the right to a fair hearing, and, access to the courts in the resolution of any dispute as enshrined in s 69(3) of the Constitution, is not hampered procedurally by denying a party to put forward the issue that is really at the heart of a dispute. Allowing amendments, where merited, permits parties to access justice effectively and meaningfully within the context of their dispute that they want the court to resolve.

I do not believe that the defendant is seeking an amendment merely to have a second bite of the apple because he failed to plead his case with particularity or for purposes of throwing the plaintiff off course. The argument that at this stage, when evidence has been led, the defendant only has himself to blame for not having a comprehensively pleaded case from the onset when he had knowledge of the facts which he now seeks to put forward, is flawed. This is because it ignores the crucial point that in terms of the applicable rule, amendments can, as a general rule, be applied for at any time before judgment. Much rests on the explanation for seeking the amendment. The amendment must help to decide the matter on the merits and also it must not be prejudicial or *mala-fide*.

The defendant’s explanation for seeking the amendments is that he seeks to provide a more complete picture of his complaint regarding the consent paper. This is so that the plaintiff and needless to say the court, can better understand and appreciate the totality of the

circumstances leading to the issue of the consent paper. The amendments would also help the court to better assess if the relief sought should be granted. No doubt there is some tactical advantage in fully telling one's story but in this instance not in a way that would disadvantage the plaintiff in any way. The defendant, for example, attached correspondence which shows that the plaintiff was fully cognisant of the alleged state of depression at the time. Indeed the defendant would have been aware of his depressed state at the time that he filed his pleading. However, one's mental health especially issues of depression is not an easy issue to immediately thrust in the public domain more so in the context of a divorce case. There is no prejudice whatsoever in allowing the amendment to speak to this issue even if it is coming late in the day. The issue that has to be first addressed is that of the consent paper. It is at the heart of the trial. An amendment of pleadings which allows the parties to fully engage with the circumstances of its birth and disputed demise would allow the court to come to an informed conclusion. The factual circumstances in the case of *Cheney v Cheney* are in my view totally distinguishable from the case herein. There the amendment seeking to place ownership of identified assets in the hands of the applicant was refused in circumstances where it was within a context of an "unforeseen and regrettable and unintentional miscommunication between applicant and his practitioner. Herein the court is placed with a situation of needing to fully grasp the unusual situation relating to why the defendant would simply have given up claim to all assets of the matrimonial union which had lasted nearly 27 years.

The other issues that the plaintiff also says would now require enquiry and which she had been led to believe were water under the bridge such as life style, earning capacity or marital misconduct affecting proprietary consequences are normal issues that constitute a divorce trial. Should the court find that the consent paper cannot stand there would therefore be no prejudice in the plaintiff being expected to traverse these kind of issues in a context where the matter was referred trial.

It is also not true that the amendments the defendant seeks to introduce would usher in an entirely new claim. Firstly the original paragraph 6 in the plea is retained and more are added within the context of the divorce to further explain issues deemed of relevance. In other words, it is not like the defendant has thrown out his entire plea. He has simply added or further explained the totality of the circumstances at the time. But even assuming that they introduce what the plaintiff deems to be a new cause of action, which this court finds they do not, in examining the import of the old r 132 which is now r41 in the amended rules of 2021,

in *Field v Field* 2019 (1) ZLR 184 (H) at p 188 A, it was stated that “there is no provision which prohibits amendments seeking to introduce a new cause of action which arose *before the summons were issued*”. Therefore, even if the amendments are allowed the matter still remains essentially a matrimonial case in which the issue is about the sharing of property.

What is justifiable in terms of cost is that the defendant pays the costs of amendment of the plea as opposed to the plaintiff’s costs from the time of the plea.

Accordingly the order to amend the defendant’s plea is granted as follows:

It is ordered that:

1. The applicant is granted leave to amend his plea in accordance with the terms of the notice of amendment filed on 9 March 2023.
2. The amendment shall take effect from the date of this order.
3. The respondent is granted leave to amend her replication if need be within ten days of this order.
4. The applicant shall pay respondent’s costs on an ordinary scale occasioned by the amendments to the plea.

Scanlen and Holderness, applicant’s legal practitioners
Atherston and Cook, respondent’s legal practitioners