

FORGIVENESS MANIKA
versus
MARY SIOBHAN MAPOSA SIBINDANI N.O.
and
JOHN ZACHARY MAPOSA N.O.

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE; 14 March & 10 April 2025

Application for amendment

M A Ruwitah, for the applicant
V Mkwachari, for the 1st and 2nd respondents

DUBE-BANDA J:

[1] This is an opposed application for the amendment of the plaintiff's declaration in the main matter in HC 2048/18. For convenience, the parties shall be referred to as in the main matter, i.e. the applicant as the "plaintiff" and the respondents as the "defendants."

[2] In the main case the pleadings have been closed and at a pre-trial conference the matter was referred to trial.

[3] On 5 March 2018, the plaintiff filed a summons and declaration claiming damages in the sum of US\$662 000.00 against the late James Maposa ("the deceased"). The deceased filed his plea on 21 May 2018. The defendants are the executors in the estate of the late James Maposa – the deceased.

[4] What can be located in the papers is that the plaintiff and the deceased were neighbouring farmers, i.e., the plaintiff at Farm 26 and the deceased at Farm 27, both of Battlefields Block, Kadoma. The claim arises from a contention by the plaintiff that the deceased dug gravel from his farm, refused to make compensation for the dug gravel, refused to rehabilitate the land from which the gravel was removed, and damages allegedly for loss of business.

[5] The plaintiff seeks to amend the declaration in the main matter. In support of his case, the plaintiff contends that the declaration sought to be amended reflects the claim as it was six years ago. It no longer reflects the actual damages he alleges he has suffered as a result of the

actions of the deceased. It was submitted that he seeks to amend the declaration to depict a true computation of his damages so that the trial turns on the real dispute between the parties.

[6] The plaintiff's case is that the original claim of US\$ 662 000.00 encompassed prospective losses of profits stemming from *inter alia* a lease agreement which he was precluded from executing due to the ongoing boundary dispute. It was averred that as the dispute remains unresolved, the plaintiff continues to incur losses which have accrued from 2015 to the present day, exceeding the initial amount claimed. It was contended further that the determination of the accurate quantum of damages suffered by the plaintiff is the substantive issue that lies at the heart of the dispute, and it is this question that the court is tasked to resolve.

[7] The plaintiff submitted that the progression of the main case was inevitably hindered by a complex array of factors, including the COVID-19 pandemic and *bona fide* negotiations to settle the matter. It was submitted that the amendment sought will not prejudice the defendants, in that it does not introduce new claims, but seeks to clarify the existing claim. It was argued that the amendment sought stems from the same cause of action, thus, it will not prejudice the defendants in any manner but ensures the true merits of the case are subject to adjudication.

[8] *Per contra*, the defendants submitted that the amendment is *mala fide*, in that the plaintiff was aware, as far back as 21 May 2018 when the deceased filed his plea, that the issue of boundary correction and movement was never disputed. The plaintiff is said to have undertaken to move the boundary to its correct position and to date he has not done so. Further, it was submitted that the amendment sought is prejudicial to the estate of the deceased and ought to be refused in that, the draft amended declaration introducing a purported lease agreement is objectionable and prejudicial to the estate. In that the alleged lease agreement shows that it was made on 1 January 2015 and was therefore in existence before the summons was issued on 5 March 2018. It was submitted further that there is no explanation why it was not pleaded in the declaration sought to be amended. Further, it was submitted that the delay in pleading the lease agreement cannot be attributed to the disruptions caused by the Covid 19 pandemic or any settlement negotiations between the parties. It was submitted further that amendment sought is *mala fide* and prejudicial to the estate in that it seeks to extend liability to the estate for the period the plaintiff was advised to move the boundary to its correct position *per* paragraph 10 of the defendants' plea filed on 21 May 2018. Further, that if the amendment is allowed the defendants will be required to file an amended plea, this will delay the finalisation of the main matter. It was further argued that the amendment sought is vague and embarrassing

in that it does not state the period of the alleged loss. The delay in finalising the main matter is prejudicial to the winding up of the deceased estate.

[9] It was further submitted that the summons was issued in 2018, and a pre-trial conference was finalised in August 2024. The matter has been in *limbo* for a long time, and allowing this application will further delay the finalisation of main matter, thus offending the principle of finality to litigation. The defendants sought that this application be dismissed with costs on a legal practitioner and client scale.

[10] The law on amendments is settled. NDOU J in *Ncube v Dube & Ors* HB 106-04 at p 3 of the cyclostyled judgment said:

“... 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 the light of all the facts and circumstances before it. The court has a discretion to allow a litigant to amend his or her pleadings at any time prior to judgment.”

[11] In *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) CORBETT CJ stated at 565G:

“Although the decision whether to grant or refuse an application to amend a pleading rest in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles.”

[12] The basic principles referred in *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another* (*supra*) were outlined in *UDC v Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (H), where CHINHENGO J set out the guiding principles as follows:

- i. The court has a discretion whether to grant or refuse an amendment;
- ii. an amendment cannot be granted for the mere asking; some explanation must be offered therefore;
- iii. the applicant must show that *prima facie* the amendment has something deserving of consideration, a triable issue;
- iv. the modern tendency lies in favour of granting the amendment if such facilitates the proper ventilation of the dispute between the parties;
- v. the party seeking the amendment must not be *mala fide*;
- vi. it must not cause an injustice to the other side which cannot be compensated by costs;
- vii. the amendment should not be refused simply to punish the applicant for neglect;
- viii. a mere loss of time is no reason, in itself, to refuse the application; and

ix. if the amendment is not sought timeously, some reason should be given.

[13] In *Agricultural Bank of Zimbabwe Ltd v Nickstate Investments (Pvt) Ltd & Ors* 2010 (1) ZLR 419 (H) the court said:

“Courts of superior and inherent jurisdiction, both here and in South Africa have adopted a liberal approach, whereby an amendment to pleadings will be allowed where the amendment will not cause prejudice which cannot be cured with an award of costs or unless the court is of the view that the application is *mala fide*. It must be noted that the overriding consideration in the consideration of an amendment to pleadings is that the parties are as far as is possible able to place all the issues in contention between them before the court and enable the court to ventilate all aspects between the parties.”

[14] The first question is to consider whether the amendment introduces new claims, or seeks to clarify the existing claim. In other words, whether the amendment sought seeks to introduce a new cause of action. In the main claim, the substance of the claim is that the deceased unlawfully dug gravel from the plaintiff’s farm, refused to compensate the plaintiff for the gravel, and further refused to rehabilitate the land from which he removed the gravel. The value of gravel allegedly extracted by the deceased from the plaintiff’s farm is put at \$12 000.00; the cost of rehabilitating the land from which the gravel was allegedly extracted is put at \$40 000.00; and it is further contended that the deceased interfered with the plaintiff’s operations such that the plaintiff has not been able to sell or let out land that he subdivided for that purpose, leading to losses in the sum of \$610 000.00 being lost business revenue.

[15] In the amendment sought, the plaintiff seeks to claim \$12 000.00 for the gravel; \$40 000.00 for the rehabilitation of the land; and \$1 991 481.79 being the loss arising from the cattle project.

[16] It is clear that the plaintiff does not seek to introduce a new claim, and the cause of action has not changed. The plaintiff has merely elaborated and provided some detail on what he referred to in the main claim as the loss arising from failing “to sell or let out land that he subdivided for that purpose, leading to losses in the sum of \$610 000.00 being lost business revenue,” and substituting the amount of \$610 000.00 with the amount of \$1 991.481.79. therefore, the contention that the plaintiff seeks to introduce a new cause of action is not borne out by the facts on record. In addition, I take the view that *prima facie* the amendment sought has something deserving of consideration by the court, i.e., a triable issue.

[17] It is important to consider whether the granting of the amendment would cause prejudice to the defendants. I do not think so. It seems to me that the type of prejudice that must be shown

in such a case is prejudice that will hamper the defendants in the presentation of their defence in the main claim. In other words, it is prejudice that may be caused to the defendants at the trial or at the hearing of the main claim. For example, if a claim is delayed for so long that documentary evidence useful to the defendants is lost or destroyed, witnesses die or witnesses can otherwise no longer recall the facts to which the defendant needs them to testify, then the defendants would suffer prejudice. To me the prejudice that the defendants allude to, that if the amendment is granted it will delay the finalisation of the administration of the estate of the deceased, is not the kind of prejudice that would prevent the granting of an amendment. It is my considered view that the granting of the amendment sought would not cause the type of prejudice envisaged in such a matter.

[18] It is clear that there has been a delay in seeking this amendment. It is trite that if the amendment is not sought timeously, some reason should be given. In *casu*, the plaintiff gives reasons for the delay. In addition, it is trite that an amendment should not be refused simply to punish the litigant for neglect, and a mere loss of time is no reason, in itself, to refuse the application. In this jurisdiction amendments have been sought and granted on the date of the trial. See *Coltart v Min of Home Affairs & Ors* 2006 (1) ZLR 543 (H); *Agricultural Bank of Zimbabwe Ltd v Nickstate Investments (Pvt) Ltd & Ors* 2010 (1) ZLR 419 (H). I am inclined to accept the reasons proffered by the plaintiff.

[19] It is trite that the modern tendency lies in favour of granting the amendment if such facilitates the proper ventilation of the dispute between the parties. The amendment sought would ensure that the court adjudicates the real dispute between the parties, as opposed to leaving part of the dispute outstanding. In addition, I perceive no *mala fides* in this application. It is for these reasons that this application ought to succeed.

[20] There remains to be considered the question of costs. Good grounds exist for a departure from the general rule that costs follow the event. The plaintiff is not entitled to costs, nor the defendants. I say so because on one hand the plaintiff delayed in applying for this amendment until the eleventh hour. On the other hand, it does not appear to me that the vigorous opposition to this application was clearly thought out. This is a case where a no costs order is warranted.

In the result, I order as follows:

- i. The plaintiff's declaration in HC 2048/18 be and is hereby deleted from the record and substituted by the plaintiff's amended declaration on p 21 of this record case number HCH 5592/24.

- ii. There is no order as to costs.

DUBE-BANDA J:.....

Coghlán, Welsh & Guest, applicant's legal practitioners
T H Chitapi & Associates, respondents' legal practitioners