VICTOR MATEMADANDA
versus
AMOS SIGAUKE
and
WAR VETERANS PRESSURE GROUP

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 18 May 2021 & 23 March 2022

Application for Amendment of Plea

S Dhlomo, for the applicant
T Shadreck, for the respondent

CHITAPI J: The applicant applies to amend his plea to a summons claim made against him in case number HC9608/19 by the first and the second respondents in a claim for damages for defamation. The first and second respondents oppose the application. The prayer sought by the applicant is crafted as follows in the draft order:-

IT IS ORDERED THAT

1. The application for amendment of plea be and is hereby granted.
2. The defendants' plea filed on 17 January 2020 be and is hereby be (*sic*) amended by its removal from the record and substitution thereof with "Annexure D".
3. Costs shall be in the cause.

The background facts to this application are not in contention. The first respondent is the first plaintiff and the second respondent herein is the second plaintiff in case number HC 9608/19 in which they jointly claim payment of $400 000 as defamation damages and ancillary relief. The respondents' basis for the defamation damages claim arose from the publication on 1 July 2019 which appeared in the Daily News, a newspaper which circulates nationally in Zimbabwe and is accessible on the newspaper's website. The respondents are described in the declaration as:-

1. The first plaintiff is Amos Sigauke, an adult male whose address or service (*sic*) for the purposes of this matter is care of that (*sic*) of his undersigned legal practitioners of record. Messrs Kanoti and Partners, Public Interest Lawyers, ZA Abington Avenue, Greencroft, Harare.
2. The second plaintiff is the War Veterans Pressure Group, an informal politically unaffiliated grouping of heroic war veterans of the Second Chimurenga/Umvukela national liberation struggle, whose address for service is Messrs Kanoti and Partners, Public Interest Lawyers, ZA Abington Avenue, Greencroft, Harare.

As is apparent from the description of the parties, no connection between them is pleaded save that the alleged defamatory publication is said the have defamed both of them.

It is also necessary to restate the precise details of the defamation as appears in para 5.9 of the declaration. It reads as follows:-

"5. On the 1st of July, 2019 at Harare the defendant stated to the Daily News, the said publication circulating nationally in hardcopy and accessible worldwide on its website of and concerning the 1st and 2nd plaintiff that:-

5.1 Sigauke (1st Plaintiff) and his group (2nd plaintiff) are being sponsored to distabilise (*sic*) (His Excellency the President and Head of the Government of the Republic of Zimbabwe Mr Emmerson) Mnangagwa's government by making absurd demands.

5.2 They are also financed by a war veteran who is bitter that I refused to protect him from his rape case when he wanted to be an MP.

5.3 The rapist pours a lot of money for anything against me.

6. These statements were published on an article entitled "War Veterans demand psycho-social support". A copy of the article is annexed hereto marked "Annexure B".
7. The statements by the defendant are wrongful and defamatory of plaintiffs.
8. The statements were understood by the addresses and were intended by the defendant to mean that plaintiffs are dishonest and without morale fibre in that they associate themselves with rapists. Additionally, the statements by the defendant were understood by the ordinary reader to depict the plaintiffs as engaging in acts to subvert a constitutionally elected government through unconstitutional means.
9. The statements were made with the intention to defame plaintiffs and to injure their respective reputations. As a result of the defamation, plaintiffs have jointly and severally the one being injured the other to suffer been damaged in their reputation and they have suffered damages in the sum of $400 000.

WHEREFORE plaintiffs claim against the defendant:-

(i) Payment of defamation damages in the sum of $400 000.
(ii) Interest at the presented rate from the date of judgement to the date of full and final payment.
(iii) 10% collection commission in terms of the Law Society of Zimbabwe Regulations.
(iv) Costs of suit".

Just in passing I could not help but marvel at the prayer for collection commission. I will leave it at that for comment in the appropriate forum. I must however warn that it is important for the legal practitioner to revise the pleadings and correct spellings and grammar before filing pleadings. The legal practitioner who prepared the summons and declaration herein did not edit the pleadings as shown by mistakes some of which I highlighted. For example in para 9 the declaration the expression "…..*jointly and severally the one injured the other one to suffer* ….." presented a hilarious moment for me. It provided real comical relief.

To the above declaration the applicant filed a plea. The plea filed on 17 January 2018 reads as follows and I reproduce it.

DEFENDANT'S PLEA

The defendant hereby pleads to first and second plaintiff's declaration as follows:

"1. **Ad paragraph 1-3**
No issues arise save to state that defendant's address for service is care of his legal practitioners Messrs Mutumbwa, Mugabe & Partners of 151 Kwame Nkrumah Avenue, Harare.

2. **Ad paragraph 4-5**
2.1. The defendant denies defaming the plaintiffs as alleged nor in any manner. Plaintiffs are put to the strictest proof thereof.
2.2. The defendant's statement was a fair comment, and was justified.

3. **Ad paragraph 6**
Plaintiffs have not attached a copy of the alleged article to their declaration.

4. **Ad paragraph 7**
This is denied *in toto*. Plaintiffs are put to strictest proof thereof.

5. **Ad paragraph 8-9**
This is denied. Defendant denies liability for the alleged damages in the amount claimed nor in any amount.

Wherefore, defendant prays for dismissal of plaintiffs claim with costs of suit on a legal practitioner and client scale".

It is apparent from the plea that the applicant denied that the article complained of was defamatory. He pleaded that the article constituted "fair comment and was justified". The applicant however pleaded that the article complained of was not attached to the declaration. By not requesting for copy of the article before pleading, one can only assume that the plaintiff was aware of the article and could as he did, plead to it without the article being attached to the declaration.

The applicant has attached a copy of what is headed, "DEFENDANT'S AMENDED PLEA". I reproduce it as follows:

"**TAKE NOTICE THAT** the defendant hereby files his special plea to the plaintiff's summons and declaration.

No locus standi in judicio

1. Second plaintiff has no locus standi in judicio.
    1.1. Second plaintiff is described as the War Veterans Pressure Group.
    1.2. It has been pleaded that 2nd plaintiff is an informal politically unaffiliated grouping of the heroic war veterans of the Second Chimurenga/Umvukela national liberation struggle.
        (b) Second plaintiff has not pleaded its capacity to sue and be sued in a court of law. Accordingly, the 2nd plaintiff has no capacity to institute proceedings.
    1.3. Accordingly, the defendant prays for a dismissal of 2nd plaintiff's claim with costs of suit on a legal practitioner and client scale.

On the Merits

2. **Ad Paragraph 1-3**
   No issues arise save to state that defendant's address for service is care of his legal practitioners Messrs Mutumbwa, Mugabe & Partners of 151 Kwame Nkrumah Avenue, Harare.
3. **Ad Paragraph 4-5**
    3.1. Defendant denies having given a press conference or interacted with the journalist, Nokuthaba Nkomo as alleged nor is any way and puts plaintiff to the strictest proof thereof.
    3.2. Defendant did not say the words attributed to him in the article.
    3.3. Defendant denies mentioning 1st plaintiff's name as alleged or at all.
4. **Ad Paragraph 6**
   Plaintiffs have not attached a copy of the alleged article to their declaration.
5. **Ad Paragraph 7**
   This is denied. Defendant denies liability for the alleged damages in the amount claimed nor in any amount.
6. **Ad paragraph 8-9**
   This is denied. Defendant denies liability for the alleged damages in the amount claimed nor in any amount.

WHEREFORE, the defendant prays for dismissal of first and second plaintiffs' claim with costs of suit on a legal practitioner and client scale.

The proposed amended plea is a complete shift from the first plea in the following respects:-

a) It introduces a special defence that the second respondent herein does not have *locus standi* in that it is not a legal *persona* but an informal group of war veterans and that the second respondent did not plead its *locus standi* to sue in these proceedings.

b) On the merits the plaintiff seeks to resile from its position of confession and avoidance in which the plaintiff described the statement complained of as

defamatory as having been justified and a fair comment. The plaintiff seeks to deny having uttered the words attributed to him, as being defamatory.

In para II of his founding affidavit, the applicant stated:-

> "11. I pray that the Defendant's Plea filed of record on the 17th January, 2020 be amended by its removal from the record and substitution thereof with Annexure D".

From the above statement, it is clear that the applicant does not seek an ordinary amendment. The applicant did not explain the circumstances of how the first plea was drafted and filed. The applicant only deposed as follows in para 7 and 8 of the founding affidavit:-

> "7. My legal practitioners filed a plea to the declaration on the 17th of January 2020. A copy which is attached hereto in Annexure C.
> 8. I have since noticed that the plea contains the following material omission and incorrect statements of the facts (*sic*).
> a) The plea does not mention that I did not give a press conference, nor a press statement to the journalist Nokuthaba Nkomo.
> b) The plea omits to take issue with the status of second respondent, in particular that second respondent is not a legal *persona* with capacity to institute legal proceedings".

The applicant then averred that "the proposed amendments will not cause the respondents any prejudice which cannot be cured by a postponement or an appropriate order as to costs". In the replying affidavit, the applicant stated as follows in para 6.2. thereof:-

> "6.2. It is denied that I have no reasonable explanation to seek the amendment. I became aware, after the filing of the plea, that the plea was silent on the fact that I neither gave a press conference nor a press statement to Nokuthaba as alleged. It is then that I instructed my legal practitioners to seek an amendment of the plea".

Firstly, the founding affidavit does not contain an explanation as to why the admissions were made in relation to the existence of the second respondent and secondly as to uttering the words contained in the declaration and commenting that the words constituted fair comment and were justified. In the proposed amended plea, the applicant seeks to plead as shown in paragraphs 3.1 and 3.2 thereof that, he did not convene a press conference or interact with the journalist who penned the article. He further seeks to deny having uttered the same words which he admitted to have made and that the words constituted fair comment. In short, as properly noted by the respondents, the applicant seeks to withdraw an admission. The law in relation to seeking an amendment of a plea by withdrawing an admission has been well documented.

In the case of *Cheney* v *Cheney* HH 78/18, CHITAKUNYE J (as then he was) had to determine an application for an amendment to a plea which involved the withdrawal of an admission. The applicant in that case averred that there had been an "unforeseen, regrettable and unintentional miscommunication" between the applicant and his legal practitioner. The learned judge found that the explanation proffered was not only unsatisfactory as expressed but was in fact no explanation to all. *In casu*, the applicant has not proffered any explanation on why the first plea contained admissions which are now sought to be withdrawn. The legal practitioner who drew up the plea has not bothered to explain the disconnect in preparing and filing the first plea between him and his client, the applicant. The first plea was unequivocal in its admission. What was admitted was that the words pleaded as being defamatory constituted fair comment. The applicant was not handicapped to make the admission by the fact that the newspaper article was not attached. The non-attachment of the article would not invalidate a claim because the article would constitute evidence in support of the claim. A party does not as a general rule plead evidence.

In the *Cheney* case (*supra*) the learned judge extensively dealt with the legal principles that guide the court. The learned judge stated as follows on page 3 of the cyclostyled judgment by reference to the old High Court Rules (1971).

> "From the submissions made the issue is whether the amendment should be granted or not. Order 20 rule 132 of the High Court Rules 1971 as amended states that:-
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> > 'subject to rules 134 and 151, failing consent by all the parties, the court or a judge may, at any stage of the proceedings, allow either party to alter or amend his pleadings, 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'.
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> Where as in this case, the circumstances and the nature of the amendment especially on the property, is in the mould of a withdrawal of an admission, the provisions of r 189 are pertinent. In his plea applicant had already admitted that respondent can have the movable property listed except the Mercedes Benz which he said belonged to a company. In that regard r 189 provides that:-
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> > "The court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just".

Though both r 132 and r 189 allow for amendment at anytime. There are however basic requirements which the court has to consider in exercising its discretion to grant or not to grant the amendment. In *Eastern Highlands Electrical (Private) Limited* v *Gibson Investments (Private) Limited* 2002 (1) ZLR 417 (SC) AT 420 (E.H) EBRAHIM JA aptly stated:-

"The grounds on which an admission made in error maybe withdrawn have been stated many times, most recently in this jurisdiction by GUBBAY JA (as he then was) in *DD Transport (Private) Limited* v *Abbot* 1988 (Z) ZLR 92 (S) page 98 where he said:-

> An amendment which involves the withdrawal of an admission will not be granted by this court simply for the asking, for it is an indulgence and not a right. See *Zarug* v *Paravathie* N.O. 1962 (3) SA 872 D at 876C. Before the court will exercise its discretion in favour of the desired amendment, it will require a reasonable explanation of both the circumstances under which the pleader came to make the admission and the reasons why it is sought to resile from it. If persuaded that to allow the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order of costs will not compensate him, it will refuse the application".
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> "A litigant can thus amend or alter their pleadings at any stage before judgment. The court or judge is granted a wide discretion on whether to grant the amendment or not. Such discretion is guided by the need to ensure that the real issue between the parties is resolved and that the amendment does not prejudice the other party which may not be compensated by an order of costs" see *Agribank Zimbabwe* v *Nickstate Investments (Pvt) Ltd & Ors* 2010 (2) ZLR 419 at 421.

The learned judge also referred to the liberal approach adopted by CHINHENGO J in *UDC Ltd* v *Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (H) at 216-217 B where it is stated:

> "The general approach of our courts has been to allow amendments to pleadings quite liberally in order to avoid any exercise that may lead to a wrong decision and also to ensure that the real issue between the parties may be fairly tried. This liberality is only affected where to allow the amendment would cause considerable inconvenience to the court or prejudice a party or where there is no prospect of the point raised in the amendment succeeding or where matters set out in the amendment are vague and embarrassing and therefore expiable. Thus the question of prejudice to the other party if the amendment is allowed is the paramount consideration. It is singularly important where prejudice cannot be compensated by an appropriate order of costs".

At page 217 C-F, the learned judge listed factors to consider in determining an application for amendment as set out in *Commercial Union Assurance Co. Ltd* v *Waywash N.O.* 1995 (2) SA 73 at page 77F-1 per WHITE J. They are:-

"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 therefore.
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 season, in itself to refuse the application.
9. If the amendment is not sought timeously some reason must be given.

CHITAKUNYE J described the approach of CHINHENGO J as quoted as the liberal approach. I assume that there is the conventional approach which I would say is expressed in the Supreme Court authorities which I have cited. I respectfully disagree with the *dicta* by CHINHENGO J in the *UDC Ltd* v *Shamva Flora (Pvt) Ltd* case to the effect that "the question of prejudice to the other party if the amendment is allowed is the paramount consideration. It is singularly important where prejudice cannot be compensated by an appropriate order of costs". I have not read any Supreme Court or other High Court authority to set the principle that prejudice is the paramount consideration in an application for amendment or that prejudice becomes singularly important where prejudice cannot be compensated by an appropriate costs order.

In my view, it will set a dangerous precedent if the factors to consider in granting or refusing an application for amendment were to be classified in order of importance. If prejudice was to be singled out as the prime and singular factor to consider in instances where a costs order cannot compensate for the prejudice, this would mean that important factors such as the need for a reasonable explanation of the circumstances under which the pleaded matter sought to be amended was made and why the applicant seeks to resile from the amendment would take the backstage in the consideration of factors to be properly taken into account when exercising a discretion to grant or refuse the application for amendment. The correct approach in my reasoning should be that, where a court is required to consider listed factors when determining a matter, then unless expressed that the factors are not of equal importance, then such factors must be accorded equal recognition and must be considered cumulatively in determining whether the interests of justice will be served by allowing or refusing the amendment sought.

Another important factor to consider in considering an application for amendment of a pleading is that it is not given upon a mere asking. An amendment to a pleading does not come on a platter. As already indicated, a pleading saves the purpose of bringing to the attention of the court the issues on which the action filed is based. See *Durbach* v *Fairway Hotel Ltd* 1949 (3) SA 1081 (SR), a case quoted by GARWE JA (as he then was) in the very instructive Supreme Court judgement namely, *Medlog Zimbabwe (Pvt) Ltd* v *Cost Benefit Holdings (Pvt) Ltd* SC 24/18 which deals with principles of pleading in actions. It is important in my view that the court should not adopt an approach to applications for amendment of pleadings which has the effect of undermining the importance of pleadings. The pleader should always approach the process of pleadings with

focus and the seriousness which is deserved, for, it is the pleadings which defines issues and informs the parties of what case they have to answer so that they take necessary steps to deal with the issues. The liberal approach in this regard becomes a threat to the need for qualitative pleading because a party who has clumsily pleaded his or her case is not bothered because he or she then simply takes the attitude that a pleading can always be amended. The attitude would be more like, "I apply to amend, there is no problem because there is no prejudice to the respondent. I will pay the wasted costs". Since amendments can be sought at any stage before judgment, if prejudice were the singular important consideration which determines whether the amendment be granted, the litigation will be prolonged. The principle that an amendment to a pleading is not there for the mere taking must be emphasized. Pleading is a specialized art in litigation by action procedure. Legal practitioners need to take it seriously. *In casu*, the approach I adopt is that the factors which the court must consider are as set out by the Supreme Court. They must be considered cumulatively without one being treated as singularly of paramount importance. Ultimately the question is whether in all the circumstances of the case taking into consideration the factors aforesaid, the interests of justice will be served by either the refusal or grant of the amendment sought.

The applicant seeks to raise the issue of *locus standi* in the proposed amendment. Whether or not a litigant has *locus standi in judicio is a lis* a matter of mixed fact and law. A point of law can be raised at any stage of the proceedings including an appeal. However, the point of law should be raised in a formal manner. In this case the applicant has sought to raise the point through applying to amend the plea. The applicant having followed the formalities has properly and is entitled to raise the point at this stage. See *Allied Bank Limited* v *Celeb Dengu & Wilson Tendai Nyabonda* SC 503/15; *El Elion Investments (Pvt) Ltd* v *Auction City (Pvt) Ltd* SC 241/15. I am inclined to and will grant the amendment to the plea to the extent that the applicant is granted leave to plead the want of *locus standi in judicio* on the part of the respondents.

The same indulgence however does not extend to the amendments wherein the applicant seeks to resile from the admissions which it made that the article complained of was justified and constituted fair comment. The applicant did not proffer an explanation of the circumstances under which the admissions were made or why the applicant should be indulged to resile from the admission. The applicant must therefore be deemed to have knowingly and deliberately prepared the plea. The applicant cannot in the absence of any explanation of the circumstances surrounding

the drawing of the plea sought to be resiled from. There is no justification to allow the amendment merely because the applicant has offered to compensate with costs the applicant's prejudice. A pleading is a formal document filed in action proceeding. It sets out a party's basic position on an issue. A claim or defence should not be made up as the matter progresses. Any amendment to a pleading should be justified before it is earned. The applicant did not proffer any explanation for taking a position and seeking to change it. The allegation that the applicant only saw the allegedly defamatory article in the answering affidavit and decided to amend the plea is clearly untenable because the applicant was content to plead to the declaration as it was without asking to be furnished with a copy of the article. I was not satisfied that the applicant justified the prayer for the amendment of the plea and to resile from his admissions. The applicant will be prejudiced by the withdrawal of the admission because the applicant seeks to completely change his defence. I am not satisfied that a costs order cures the prejudice. In fact the situation in this matter is that there is no explanation given to explain the circumstances of making the admissions and why the admissions must be vacated. In my judgement a failure to explain the circumstances of the making of the admission and why it is now resiled from is fatal to the application. The absence of prejudice does not singularly justify the exercise of the discretion to grant the amendment. The other factors must be considered cumulatively with the prejudice factor.

That being, I determine the application as follows:-

1) The application succeeds in part.
2) The applicant is given leave to amend his plea by pleading the issue of *locus standi in judicio* and must file the amended plea within 10 days of the date of this order.
3) The respondents are given leave to file their replication if advised within 10 days of service of the amended plea.
4) Thereafter the matter shall be subject to the rules in relation to advancing its progress.
5) In respect of the rest of the amendments sought, the application be and it is hereby dismissed.
6) The costs of this application shall be in the cause in case number HC 9608/19.

Mutumbwa Mugabe & Partners, applicant's legal practitioners
Kanoti & Partners, respondents' legal practitioners