NKOSANA NCUBE **PLAINTIFF**

AND

BUTHOLEZWE MOYO **DEFENDANT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 8 SEPTEMBER AND 9 SEPTEMBER 2010

C. Nunu for applicant
M. Ndlovu for respondent

Opposed Matter

MATHONSI J: The Applicant in this matter instituted proceedings against the Respondent under case No. HC 2600/07 on the 8th November 2007 seeking adultery damages of $4 billion Zimbabwe dollars alleging that the Respondent had committed acts of adultery with his wife. On the 5th December 2007 the Respondent entered appearance to defend that action.

On the 1st February 2008, the Respondent filed a plea in response to the claim which plea, with respect, does not articulate any position whatsoever as it neither denies not admits the adultery. The closest the Respondent comes to pleading meaningfully is in paragraph 2 of the plea. In answer to the averments in the declaration that he used to teach with Applicant's wife at Dombodema High School in Plumtree, was aware that Gratitude Nkosithandile Ncube was Applicant's lawfully wedded wife and that despite such knowledge, he "instigated and commenced an adulterous relationship with the plaintiff's wife", the Respondent merely says:-

"Defendant denies that he instigated the relationship."

This may be taken as an admission of the adultery by implication.

Regarding the quantum of damages claimed by the Applicant the Respondent pleaded as follows:-

> "The Defendant offers as full and final settlement the sum of $250 000 000-00 damages due to the Defendant (sic)"

The fact that the Respondent makes an offer in respect of adultery damages due to the Applicant means that the only issue between the parties to the extent of the claim is the quantum of adultery damages due to the Applicant. The Applicant did not accept the offer made and in his replication filed on 3rd March 2008 he states categorically that the offer is inadequate.

Subsequent to the filing of the plea and replication inflation played havoc to the Applicant's claim. This was at the time of the economic meltdown which literally changed the value of money on a daily basis. Obviously taking advantage of that situation and realizing that the claim of $4 billion Zimbabwe dollars filed by the Applicant had virtually been obliterated by inflation, the Respondent filed a consent to judgment in that sum of money "as full and final payment."

The Respondent did not amend or withdraw his plea filed earlier. The Applicant did not accept the consent to judgment and by letter dated 12th May 2008 his legal practitioners advised the Respondent's legal practitioner as follows:-

> "We refer to your Consent to Judgment filed on 30th April 2008. Please note that the writer was on leave during the month of April. We regret to advise that it is our respectful opinion that the Consent to Judgment does not comply with the Rules and is

> therefore invalid. It is vague and embarrassing in that on the one hand it seems to Consent to Judgment as claimed in Summons, yet in the same vein tenders payment of $4 billion in full and final payment, meaning that the claim for interest and costs is not being consented to by yourselves even though contained in the Summons. Further a tender in settlement must comply with Rule 144 of the Rules. Yours does not."

The Applicant then filed a proposed amendment to increase the claim to $500 billion Zimbabwe dollars on the 14th May 2008. The Respondent promptly opposed the proposed amendment by notice filed on the 15th May 2008 and it was abandoned.

In February 2009, the Zimbabwe dollar became moribund with the government introducing multiple currencies. When that happened, this matter was still pending and no judgment had been given either way. On the 18th September 2009, the Applicant filed the present application seeking an order amending his claim from a total of $4 billion Zimbabwe dollars to a total of US$40 000-00. The reason given for seeking the amendment was that hyper inflation eroded the original claim and that the Zimbabwe dollar was eventually abolished before the matter was finalized.

The Respondent has again opposed the application arguing inter alia that:-

(a) The application is uncalled for as the issue of the amendment should be dealt with at the pretrial conference or at the commencement of the trial;

(b) The application ignores that there is another proposed amendment of the claim to ZW$ 500 billion which was not finalized,

(c) A Consent to judgment in the sum of ZW$4 billion was filed and that consent settled the matter.

Order 20 Rule 132 of the High Court Rules provides:-

> "Subject to rules 134 and 151, failing consent by all 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."

The approach of the courts to an application for an amendment which has been followed time without number is aptly captured in a judgment of WESSELS J in *Whittaker v Roos and Another* 1911 TPD 1092 at 1102 -1103 which was quoted with approval by GUBBAY CJ in *DD Transport (Pvt) Ltd v Abbot* 1988(2) ZLR 92(S) 98 G-H. It reads as follows:-

> "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."

The guiding principle in considering an application for an amendment is always the attainment of justice. Of course an application for an amendment which is mala fide or will result in an injustice will not be granted.

See *C. F Hutchison and N. Atkinson NO v Logan* HH 91-98 at 19 where it is stated:-

> "The modern practice is in favour of granting applications for leave to amend whenever the amendment facilitates the proper ventilation of the dispute between the parties."

It matters not that the application for an amendment is brought before the pretrial conference or before the commencement of trial because Rule 132 allows the court or a judge to grant an amendment at any time during the proceedings. I do not agree with *Mr Ndlovu* who appeared for the Respondent that the use of the word "proceedings" in Rule 132 limits the power to grant an amendment only to the time after commencement of trial. Indeed

proceedings are commenced by the filing of the summons and an amendment can be granted at any time before the conclusion of those proceedings.

See *UDC Ltd v Shamva Flora (Pvt) Ltd* 2000(2) ZLR 210.

The argument that the application for an amendment should not be granted because Applicant once gave notice of an intention to seek an amendment of the claim to ZW$500 billion cannot be taken seriously. In the first place no application for that amendment was made at all. Only a notice was filed. In the second instance, to attempt to defeat this application by reference to an attempt to increase the Zimbabwe dollar claim long after the use of that currency was discontinued in favour of multiple currencies, is simply disingenuous and cannot be taken seriously at all.

It remains for me to deal with the Respondent's consent to judgment filed on 30th April 2008. Respondent did not consent to the entire claim of the Applicant and that consent was a conditional one in the sense that it was in "full and final payment." If the Applicant had accepted it and submitted an application for judgment in terms of Rule 55 it would have meant that he would have had to abandon the rest of his claim relating to interest and costs of suit. I must also state that the purported consent to judgment was not an honest one and was clearly made in order to gain an unfair advantage over the Applicant. As pointed out earlier, when filing his plea the Respondent had admitted liability in the sum of ZW$250 million only which was a fraction of what Applicant claimed. When hyper inflation eroded the claim such that even the ZW$4 billion was meaningless 3 months later, Respondent filed a limited consent to judgment.

What he therefore sought to do was to replace a dishonest denial of liability with an admission of liability in an even less valuable amount which was hardly less dishonest see *DD Transport (Pvt) Ltd v Abbot (supra)* at 1010 D-E.

I am satisfied that the application for an amendment is made in good faith and it has not be shown that the Respondent will suffer any prejudice at all as a result of the amendment being granted. What the Respondent seems to be saying is that he would have preferred the amendment to come at the pretrial conference or at the commencement of the trail.

As already stated the granting or refusal of an amendment is at the discretion of the Court and that discretion has to be exercised judiciously.

See *Copper Trading Co (Pvt) Ltd v City of Bulawayo* 1997(1) ZLR 134(S) at 143H-144B and 144G where it was stated that:-

> "It is paramount that the discretion reposed in the Court in respect of amendments be exercised in a manner which allows the issues between the parties to be fairly tried. The fact that the amendment might lead to the defeat of the other party is not the kind of prejudice which should weigh with the Court."

In *casu,* it is the opposition to the amendment which is legendary by its lack of merit raising the suspicion that it was embarked upon merely to delay the finalization of the matter. Accordingly, an appropriate order for costs would have to be made to register the courts displeasure at such abuse of process.

In the result, the order is granted in terms of the draft order attached to the application, to wit, that:-

1. The Applicant's claim in matter No. HC 2600/2007 be and is hereby amended by the deletion of $2 000 000 000-00 and $4 000 000 000-00 respectively wherever they

appear and substituted by the figures of US$20 000-00 and US$40 000-00 respectively.

2. The Respondent shall bear the costs of this application.

Mathonsi J……..

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Messrs. Mlweli Ndlovu and Associates, respondent's legal practitioners