BRIDGET ANNE FIELD (NEE PARHAM)
versus
CLIVE ROBERT FIELD

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 27 July 2018 and 31 January 2019

Opposed Court Application

M.T. Rujuwa, for the applicant
F Girach, for the respondent

MANZUNZU J: There has been quite some inordinate delay in the delivery of this judgment. The reasons being chiefly that the court has been inundated with a lot of work compounded with the fact that I was one of the duty judges in the past vacation period. I apologize to the parties for this delay.

This is an opposed court application in which the applicant seeks an order in the following terms:

> "It is ordered that:
>
> 1. The Applicant's plea in Case No. HC 12315/16 be amended by substituting it with the amended plea filed on the 27th February, 2018.
>
> 2. The Applicant be and is hereby granted leave to file her claim in reconvention in Case No. HC 12315/16.
>
> 3. The Respondent be and is hereby granted leave to filed any necessary amendments in his pleadings necessitated by the amendment to the Applicant's pleadings.
>
> 4. Costs be costs in the cause."

BACKGROUND

The background to this matter is that the parties are husband and wife who are embroiled in a divorce action under case No. HC 12315/16. The applicant herein is the defendant in that matter and the respondent stands as the plaintiff.

The following is a chronology of events in the divorce matter. The summons was filed with the Registrar on 5 December 2016. The plaintiff was represented by Messrs Matizanadzo & Warhurst legal practitioners with the defendant being represented by Messrs Atherstone & Cook as appears on the appearance to defend.

The plaintiff identified in the summons the matrimonial property and proposed how the same should be distributed between the parties. The summons were served personally on the defendant on 27 January 2017. The defendant through her legal practitioners, Atherstone and Cook filed an appearance to defend on 9 February 2017.

On 2 March 2017 the plaintiff filed a notice to plead with the defendant filing a plea on 13 March 2017. The plaintiff replicated on 16 March 2017. On 5 April 2017 the plaintiff filed a notice to make discovery with a discovery affidavit together with the schedule of documents. On this same date of the 5th April 2017 the plaintiff filed his pre-trial conference minute. The plaintiff's summary of evidence was also filed that same date together with a notice requesting for a pre-trial conference date.

On 11 September 2017 the plaintiff filed an amended summary of evidence. This was in response to the letter by the defendant's legal practitioners which pointed out the inadequacy of the originally filed summary of evidence. On 27 September 2017 the plaintiff's legal practitioners wrote a letter to the Registrar asking why the matter has not received a set down date for a pre-trial conference. The same latter drew the attention of the Registrar to the fact that the defendant had not filed pre-trial conference papers and that the defendant was not forthcoming for the round table conference. This letter was copied to the defendant's legal practitioners for the attention of Mr Bull who was handling this matter for the defendant. The matter was set down for a pre-trial conference on 28 February 2018.

On 12 May 2017 the plaintiff had filed a notice of intention to amend the summons at the pre-trial conference. The intended amendment relates to the issue of costs.

On 14 February 2018 the defendant wrote a letter to the Registrar in which she said she was engaging new lawyers as she had parted ways with Mr Bull of Atherstone & Cook. I did not see any renounciation of agency from Messrs Atherstone and Cook but on 26 February 2018 Messrs Mtetwa & Nyambirai assumed agency on behalf of the defendant. On 27 February 2018 the defendant's pre-trial conference minute and the intended amended plea and counter-claim were also filed. An expression was also made in the defendant's papers that defendant will apply at the pre-trial conference to amend her plea and to file a counter- claim.

The defendant's summary of evidence was filed on the day of the pre-trial conference. At the pre-trial conference on 28 February 2018 before my sister Judge MATANDA-MOYO J the matter was removed from the roll to allow defendant to make the present application for amendment.

The application:

This application seeking to amend the plea and file a counter-claim is fiercely contested by the respondent. The contestation reveals a deep seated matrimonial conflict between the parties as they trade on a war of words.

The reason for the intended amendment according to the applicant, is that it will assist in adequately identifying the properties of the parties and to assist the court in determining a fair and equitable distribution of the same. She described the plea earlier own filed by her erstwhile legal practitioner as "woeful". In fact she blames the position in which she finds herself in on her erstwhile legal practitioner. She squarely puts the blame at his doorstep. Without apportioning blame on either the applicant or her erstwhile lawyer, what is apparent is that the two's professional relationship was not cordial. There was a distasteful relationship. The court will not be judgmental to say who caused it because that is not the issue before this court.

The respondent raised a number of grounds in opposing the application and sought a dismissal of the same with costs at a higher scale.

Before I deal with the specific grounds in opposition I need to point out that amendment of pleadings can be done at any stage of the proceedings.

The court has a discretion to grant or refuse any proposes amendments.

Rule 132 of the Rules of this Court provides that:

> "132. Court may allow amendment of pleading.
> 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."

This rule is clear as to what is intended to be achieved by an amendment. The purpose of allowing an amendment is to assist the court in determining the real question in controversy between the parties. The court will at all times ask itself if the intended amendment will achieve this purpose.

In exercising its discretion to grant or refuse the amendment the court is guided by certain basic principles. There is a liberal approach to amendment of pleadings by the courts. In the case of *UDC Ltd* v *Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 H e 216 G CHINHENGO J, as he then was, states that; "The approach of our courts has been to allow amendments to pleadings quite liberally in order to avoid any exercise that may lead to wrong decisions and also to ensure that the real issue between the parties may be fairly tried." The central issue is to do justice to the parties unless there are factors, recognised at law, which call for the refusal to grant the amendment. The learned Judge in the *UDC* case (*supra*) cited with approval the summarized principles by WHITE J in the case of *Commercial Union Assurance Company Ltd* v *Waymark NO*, 1995 (2) 73 (TK)

These 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."

Having stated the general principles I now move to deal with the specific grounds raised by the respondent.

Whether Amendments Will Introduce A New Cause of Action

The respondent's position is that the intended amendments raise a new cause of action. In respect to the plea, he said while the original plea admitted to the issue of his domicile in Zimbabwe the new plea now raises issue. It has also been alleged that the new plea now raises the issue of abusive acts. Rule 132 does not prohibit an amendment that will introduce a new cause of action. Counsel for the respondent relied on Herbstein and Van Winsen on *Civil Practice of the High Courts in South Africa* 5th Edition at 685 to 688. He specifically relied on the following passage;

> "There is some authority for the view that such amendments should not be allowed, but no general rule to that effect has been laid down, and it is submitted that the same test is applicable in coming to a decision as to whether such amendments should be allowed as is applicable to

> any other amendment i.e. will the amendment cause such prejudice to the opposite party as cannot be remedied by an appropriate order as to costs."

This passage did not add credence to the respondent's position. In our own jurisdiction the Supreme Court in the case of *Shah* v *Kingdom Bank*, SC 4 – 2017 stated that r 132 deals with amendments generally. Rule 134 refers to proposed amendments seeking to substitute causes of action arising after issue of summons. There is no provision which prohibits amendments seeking to introduce a new cause of action which arose before summons were issued.

In *casu* the proposed amendments are not prohibited in law. I agree with submissions for the applicant that in fact the amendments introduce no new cause of action. Principally it is an action for divorce and the distribution of the parties' assets. This is what is also contained in the counterclaim. The applicant has explained that the breakdown of communication with her erstwhile legal practitioner contributed to her failure to adequately deal with her plea and file a counter-claim. That explanation cannot be said to be unreasonable.

Whether Amendments will rescind admissions made in the Plea

The respondent alleged the amendments will have the effect of rescinding admissions made. Examples were given to show that in the distribution of property the applicant is now claiming 90% of the matrimonial assets. In respect to this ground the applicant relied on a passage from Herbstein. The passage is to the effect that an amendment which resiles from the admission made is difficult to achieve. It does not say its prohibited in law. The case of *Kettex Holdings (Pvt) Ltd* v *Kencor Management Services (Pvt) Ltd* HH 236 – 2015 was relied on with the allegation that the amendments sought were *mala fides*. It was necessary for the respondent to show with clarity as to what was admitted and how it was rescinded by the amendment. It seems it was only the issue of respondent's domicile which was alluded to earlier own. The applicant's counterclaim revolves more or less on the same property as pleaded by the respondent in the summons.

Even if the withdrawal of such admissions were shown, the court has a discretion to grant the amendment. There are two considerations in the exercise of that discretion. The first is that there must be an explanation for the withdrawal. Secondly such withdrawal must not cause prejudice to the other party. See *DD Transport (Pvt) Ltd* v *Albert* 1988 (2) ZLR 92 SC at 98 where it was held that:

> "An amendment which involves the withdrawal of an admission will not be granted by the court simply for asking, for it is an indulgence and not a right. See *Zarug* v *Paravathie N.O* 1962 (3)

> SA 872 (D) at 876 C. 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 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 for costs will not compensate him, it will refuse the application."

In *casu* the applicant's explanation is that due to the breakdown of communication between her and her erstwhile legal practitioner a plea was filed without proper engagement. Not only that but because of her position as a lay person she could not know the need to file a counterclaim in the absence of legal advice.

The object of the court is to do justice between parties. This is a matrimonial case where parties do not seem to agree as to what constitutes their matrimonial property and secondly how the same should be distributed. In the exercise of its discretion the court must not heavily rely on technicalities.

The respondent relied on the case of *Ryan Anthony Cheney* v *Katie Pearce Cheney* HH 78-18 with similar facts to the present case. The case is distinguishable from the present case in that, in that case the application to amend was based on a change of mind and that amendment was *mala fide*.

In *casu*, I was not convinced that there was *mala fides* on the part of the applicant. The mere fact that Mr Bull was not afforded an opportunity to put up an explanation, such absence does not *prima facie* make the application *mala fide.* This is a matter where both parties are equally guilty of throwing missiles at each other and as a result have become regular customers of the courts because of their continued misunderstandings.

Whether Amendment will Cause Prejudice to the respondent

The respondent said will suffer prejudice if such amendments were allowed in that he will suffer wasted legal costs as the respondent will be forced to re-do the papers. He also cited the issue of delay as it affects the need for finality to litigation.

It is trite that delay occasioned by an amendment is not a basis to refuse an application which otherwise has merit. See *UDC* v *Shamva Flora (Pvt) Ltd, supra*, *Angelique Enterprises (Pvt) Ltd* v *Albco (Pvt) Ltd* 1990 (1) ZLR 6 (HC)

It is also trite that an amendment will not be granted by the court if it causes an injustice that cannot be compensated with an order for costs. See *Hutchinson & Anor NNO* v *Logan* (2001) ZLR 1 H, *Kettanan & Others* v *Hausel Properties Ltd & Others*, 1987 AC 189 (HL).

In *casu* the respondent has not shown that he will suffer prejudice which cannot be compensated by an award of costs.

Whether the amendments are necessary, an additional clarity or prima facie deserve consideration as a triable issue:

The respondent said the amendments sought were not clarifying anything rather is an attempt to claim 90% of the matrimonial assets. I do not see anything wrong with that. A counter claim is a claim by the defendant. It need not be the same with the plaintiff's claim. These are two separate claims which will be dealt with at the same hearing. The fact that a counter claim appear to weaken the plaintiff's claim is no basis to refuse the amendment.

In totality I find merit in the applicant's application which is basically guided by the need to do justice to the parties. Consequently I am inclined to grant this application.

Costs:

I agree with the respondent's observation that the amendments sought are at the instance of the applicant and that no fault lies with the respondent. The parties accuse each other for wastefully filing voluminous documents.

Verbosity is common to the pleadings by both parties. Respondent seeks costs at a higher scale for all attendances between date when defendant's plea was filed and the date of the application for amendment.

Applicant instead claims for costs at a higher scale against the respondent. This is on the basis that the opposing papers were not only unnecessarily voluminous but in many instances irrelevant. As I have pointed out before, we are dealing with parties who are embroided in deep seated matrimonial conflict. Legal practitioners are advised to keep their clients within the limits of relevance, to be short and precise where it is achievable and vocabularily keep themselves within the decency of the language.

The justice of this case in respect to costs calls for the respondent to be awarded costs which will place him in a position he occupied before the plea was filed.

However, the costs of this application must be in the cause.

The application therefore succeeds to the following extent:

IT IS ORDERED THAT:

1. The applicant's plea in case no. HC 12315/16 be amended by substituting it with the amended plea filed on the 27th February 2018.

2. The applicant be and is hereby granted leave to file her claim in reconvention in case No. HC 12315/16.
3. The respondent be and is hereby granted leave to file any necessary amendments in his pleadings necessitated by the amendment to the applicant's pleadings.
4. The applicant shall pay respondent's costs on an attorney / client scale incurred between the date of filing the plea to the date when this application was filed.
5. Costs of this application shall be in the cause.

Mtetwa & Nyambirai, applicant's legal practitioners
Matizanadzo & Warhurst, respondent's legal practitioners