DAVID CHIMBETETE
versus
JEPHATER BAKO

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE 25 November 2024 & 27 January 2025

Application for an amendment

Ms N. Chiota for the applicant
M. Muzaza for the respondent

DUBE-BANDA J:

[1] This is an application for the amendment of a plea. The amendment is sought in terms of r 41(4) of the High Court Rules, 2021. The applicant seeks to amend his pela in case number HC 7833/22 ("main matter"). The respondent opposes the amendment. For purposes of this judgment, and in order to avoid confusion, I will refer to the parties, were the context permits by their names i.e. the applicant as 'Chimbetete' and the respondent as 'Bako.'

BACKGROUND FACTS

[2] On 18 November 2022 the plaintiff sued out a summons seeking the eviction of the defendant, and all those claiming the right of occupation through him from No. 6 Lauchlan Avenue, Meyrick Park, Mabelreign, Harare ("property"). It was averred that the plaintiff was the duly authorised representative of one Mr Abed-Nego Tsikayi the owner of the property. It was averred further that the defendant was in occupation of the property without the consent or authority of the owner, and that despite demand, he has refused or neglected to vacate the property.

[3] In his plea filed on 16 December 2022 the defendant averred that No. 6 Lauchlan Avenue, Meyrick Park, Mabelreign, Harare which the said Mr Abed-Nego Tsikayi owns is adjoining No. 6B Lauchlan Avenue, Meyrick Park, Mabelreign, Harare owned by the defendant. It was averred further that the defendant was not occupying No. 6 Lauchlan Avenue, Meyrick Park, Mabelreign, but 6B a subdivision duly deducted from No. 6 some five years prior to the purchase of the remainder of No. 6 by Mr Abed-Nego Tsikayi. It was averred that the

plaintiff was labouring under a mistaken view that the portion of the land occupied by the defendant is part of stand No. 6 Lauchlan Avenue, Meyrick Park, Mabelreign, whereas it is No. 6B. It was averred further that the defendant did not require the consent of the plaintiff to occupy No. 6B. The defendant sought that the main claim be dismissed.

[4] The main matter was prosecuted until it reached the pre-trial stage, at pre-trial it was first removed from the roll. The pre-trial was re-set down for 23 July 2024, wherein it was again removed from the roll pending the filing and determination of this application. Subsequent to the second removal from the roll, the defendant on 25 April 2024 filed a notice of intention to amend his plea in the main matter. Thereafter the plaintiff filed a notice to object to the amendment.

In the notice the defendant stated that he sought to amend his plea by the inclusion of a special plea of prescription. The plaintiff in the notice of objection contended that since the main matter is no longer pending on the premise that at the pre-trial it was removed from the roll, and had not been set down within three months thereof and in terms of r 66(3) of the High Court Rules, it was regarded abandoned and deemed to have lapsed. In the alternative, it was contended that a claim for *re vindicatio* does not prescribe after three years, and therefore the amendment sought had no legal basis. Pursuant to the objection filed to the notice to amend, on 26 July 2024 the defendant launched this application seeking to amend his plea in the main action.

[5] While the main matter was pending, the defendant now as plaintiff sued a summons seeking *inter alia* the registration of stand No. No.137 Mayrick Park Township of 31 Mayrick Park of Mabelreign a.k.a. 6B Lauchlan Avenue, Meyrick Park, Mabelreign, Harare into his name; and the cancellation of the deed of transfer number 10463/99 registered in favour of Mr Abed-Nego Tsikayi. Plaintiff as defendant field a special plea contending that the cause of action was grounded on an illegal agreement made in violation of s 39 of the Regional Country and Town Planning Act [Chapter 29:12]. This court (Per CHITAPI J) in *Chimbetete v Phenias & Ors* HH-02-24 upheld the special plea and dismissed the action.

SUBMISSIONS MADE BY THE PARTIES

[6] In this application, in the founding affidavit the defendant avers that prescription is dispositive of the main matter. In addition, the defendant sought to amend the plea by introducing a plea of enrichment lien. It being borne from the contention that the defendant effected certain improvements on the property he is sought to be evicted from.

[7] Defendant contends that the amendments sought would not cause prejudice to the plaintiff, because it is said there are two stands created from the subdivision of what used to be stand No. 6 Luachlan Avenue, Meyrick Park, being stands 6 and 6B. It is averred that the defendant took occupation of stand 6B in 1995, and plaintiff took occupation of stand 6 in 1999. The defendant contends that to the knowledge of the plaintiff he made improvements to stand 6B.

[8] The defendant submitted that the amendments sought in this application are necessary, in that if not allowed, the real issues between the parties would remain unresolved. It was submitted further that the defendant is *bona fide* in seeking these amendments. In that in his plea he alluded to the facts which establishes the grounds which he intends to be incorporated by the amendment. The amendment is said to be sought to crystallise issues and present them in a manner that assists the court in resolving the dispute between the parties. It was argued that the amendment was sought timeously.

[9] The defendant disputes that it is a requirement of the law that an amendment sought must present an issue that has prospects of success in the main matter. It was argued that in any event, the amendment sought presents issues that have prospects of success in the main matter.

[10] The plaintiff in his opposing affidavit averred that this application is not *bona fide*, it is calculated to delay the finalisation of the main matter. It is averred that before the pre-trial conference, the defendant sued out a summons in case number HCH 3751/23, seeking *inter alia* the registration of title in stand 6B. The plaintiff raised a special plea of illegality which was upheld in *Chimbetete v Phenias & Ors* HH-02-24. The defendant sought to appeal this decision, and the appeal was dismissed by the Registrar for want of payment of security for the costs of the appeal.

[11] It is averred further that an amendment cannot be granted where the issue raised has no prospects of success. It was argued that the defences of prescription and compensation of improvements have no prospects of success, in that an action for *rei vindicatio* is based on ownership of a thing and that it cannot be described as a claim for satisfaction of a debt, and does not prescribe after three years. Further, it was argued that whatever improvements were made to the property were pursuant to an illegal agreement, and therefore such claim has no prospects of success. Further, it was submitted that it was incompetent to seek to raise a defence of compensation for the first time in this application, when it was not raised in the notice.

[12] The plaintiff submitted that the application is not *bona fide*. There is no explanation for the delay in the application. That the issue of compensation for the improvements was improperly raised. The proposed amendments have no prospects of success, and if allowed the plaintiff will suffer prejudice. The plaintiff sought that the application be dismissed.

THE LAW AND THE FACTS

[13] In *Caxton Ltd and Others v Reeva Forman (Pty) Ltd D 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 rests in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles."

[14] The jurisprudence is that a court has a wide discretion whether or not to allow the amendment provided the discretion is exercised judicially. The court will adopt a liberal approach to such applications. The main consideration in the exercise of the discretion is allowing the issues between the parties to be fairly tried. See *Nyemba & Ors v Alshams Building Materials* S-58-13; *Mashonaland Turf Club v Peters & Anor* 2019 (3) ZLR 928 (H). The possibility that an amendment might lead to the defeat of the other party's claim is not the kind of prejudice that should weigh with the court. See *Bilboes Holdings (Pvt) Ltd v Mlauzi Syndicate & Ors* 2020 (1) ZLR 974 (H). In addition, an amendment may be refused if the issue sought to be introduced by the amendment has no prospects of success. In fact, it became clear during argument that issue in this matter turns on a narrow ambit, i.e., it is, whether the amendments sought to be introduced have any prospects of success in the main matter. In *Bankorp Ltd v Anderson-Morshead* 1997 (1) SA 251 (W) the court said:

> "An amendment is refused when it is certain that the new view is untenable and will not assist the party or because of prejudice to another party or to the administration of justice which cannot be adequately averted by, for example, standing a case down, postponing it, reimbursing wasted costs." (My emphasis)

[15] Regarding prescription, the issue is whether a claim under the *actio rei vindicatio* is a 'debt' as contemplated in s 2 of the Prescription Act [Chapter 8: 11]. Because it is only a debt as defined in the Act, that can prescribe after three years. See *Ndlovu v Ndlovu & Anor* 2013 (1) ZLR 110 (H). In terms of s15 of the Prescription Act, a debt other than one secured by a mortgage bond, or a judgment debt, or a tax debt under an enactment or one owed to the State in the circumstances prescribed by that section, or a debt arising from a bill of

exchange, becomes prescribed after the lapse of a period of three years. The term "debt" is defined in s 2 to include anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise. If the claim under the *actio rei vindicatio* is not a debt as contemplated by the law, it then follows that the amendment sought to introduce a plea of prescription has no prospects of success.

[16] In my view, there is merit in the argument that a claim under *rei vindicatio,* because it is a claim based on ownership of a thing, cannot be described as a debt as contemplated in the Prescription Act. If it were so, it would mean a possessor would, by extinctive prescription acquire ownership of a thing outside the provisions of s 4 of the Act, which says:

> "4 Acquisition of things by prescription
> Subject to this Part and Part V, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for—
> (*a*) an uninterrupted period of thirty years; or
> (*b*) a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years."

[17] The law requires that a party claiming acquisitive prescription of movable or immovable property must allege and prove civil possession – that is, possession with the intention to possess and control as if he or she were the owner; possession for an interrupted period of 30 years; and that possession was exercised openly. If a vindicatory action is defined as a debt, it would mean the possessor would become an owner after the expiry of three years, not thirty years as provided in s 4. In addition, the requirements of the law to anchor a successful plea of acquisitive prescription would fall away. Such cannot be correct. The Supreme Court in South Africa dealing with a similar provision like the one in our Prescription Act, had this to say in *Absa Bank v Keet* (817/13) [2015] ZASCA 81 (28 May 2015) at para 25 the court said:

> "In the circumstances, the view that the vindicatory action is a 'debt' as contemplated by the Prescription Act which prescribes after three years is, in my opinion, contrary to the scheme of the Act. It would, if upheld, undermine the significance of the distinction which the Prescription Act draws between extinctive prescription, on the one hand and acquisitive prescription on the other. In the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action vested in the creditor, which is a corollary of a 'debt', becomes extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right. The creditor does not lose a right to a thing. To equate the vindicatory action with a 'debt' has an unintended consequence in that by way of extinctive prescription the debtor acquires ownership of a creditor's property after three years instead of

> 30 years that is provided for in s 1 of the Prescription Act. This is an absurdity and not a sensible interpretation of the Prescription Act."

[18] Not all rights of action give rise to debts. See *Sun Marine Shipping (Pty) Ltd v Alpha Omega Dairy (Pvt) Ltd* 2020 (1) ZLR 1008 (H). Otherwise, any other interpretation would make useless the distinction between acquisitive prescription and extinctive prescription. Therefore, a claim for *rei vindicatio* is not a debt as contemplated in the Prescription Act, and does not prescribe after three years.

[19] It is trite that prescription being a point of law can be raised at any stage as long as it is not prejudicial to the party it is directed at. See *Draw Card Enterprises (Private) Limited v Nashcrystal Motors (Private) Limited & Ors* SC 81/24; *ZIMASCO v Marikano* SC 6/14. In *casu*, no useful purpose would be served by allowing an amendment to introduce an issue that no prospects of success. Even if allowed, the plea of prescription is doomed to fail in the main action.

[20] The amendment sought regarding an enrichment lien, must first be considered in the context of, whether it is competent to seek an amendment not raised in a r 41(1) notice? Rule 41 sets out the procedural steps that must be followed in seeking an amendment. It says:

> 41. (1) "Any party wishing to amend a pleading or document other than a sworn statement, filed in connection with any proceedings shall, notify all other parties of his or her intention to amend and shall furnish particulars of the amendment.
> (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is filed and delivered within ten days of delivery of the notice, the amendment will be effected."

[21] A party seeking an amendment must first issue a r 41(1) notice, which must provide the particulars of the proposed amendment. The purpose of the notice is to inform the other party or parties to the litigation of the details of the proposed amendment. It is on the premise of the r 41 (1) notice that the other party or parties would make an informed decision whether to consent or oppose the amendment. This is an important procedural step in seeking an amendment. Granted that rules are not strictly peremptory, but they are there to regulate the practice and procedure of the court, in general, strong grounds have to be advanced to persuade the court or judge to act outside them. See *Medical Investments Ltd v Daka NO & Anor* 2012 (1) ZLR 600 (H). In *casu*, no strong and acceptable grounds have been advanced to sidestep the express provision of r 41(1) and proceed to file this application seeking an amendment. Rule 41(1) cannot just be disregarded. It serves an

important purpose. It is clear as to what a party seeking an amendment must do. Its purpose is to facilitate the expeditious prosecution of amendments and the minimisation of costs involved, in that a litigant served with a notice may consent to the amendment thus facilitating the movement of main matter without a delay. I take the view that in this case side-stepping r 41(1) is prejudicial to the plaintiff. In this case, I disapprove the route taken by the defendant in side stepping r 4(1). The enquiry must end here, however, for the purposes of completeness, I turn to whether the proposed amendment has any prospects of success.

[22] In any event, the amendment sought has no prospects of success. Mr *Muzaza* submitted that the amendment should not be granted because it is doomed to failure anywhere. For completeness, the basis of this amendment is the contention that Chimbetete effected some improvements from the property he sought to be evicted. In *Chimbetete v Phenias & Ors* HH-02-24 this court (per CHITAPI J) found that there was no subdivision permit in place at the time the agreement between the defendant and one Phenias was concluded. In addition, the court found that the agreement was illegal and unenforceable.

[23] The aspects that a party must allege and prove to rely on a salvage lien, are comprehensively set out in Ambler's Precedents of Pleadings 8th ed. LexisNexis at 240, *inter alia* that he or she is in lawful possession of the object. In *Singh v Santam Insurance Ltd* 1997 (1) SA 291 (A) at 297 (C) the court said: "The possession upon which reliance is placed to establish a lien must have been lawfully acquired." See *Roux v Van Rensburg* 1996 (4) SA 271 (SCA).

[24] In this case the occupation and whatever improvements made on the property are sitting on an illegality. The possession upon which reliance is placed to anchor the amendment to introduce a plea of lien is itself unlawful. Because to rely on a lien the defendant must allege and proof lawful possession of the property. In view of the extant judgment in *Chimbetete v Phenias & Ors* HH-02-24 the defendant cannot even begin to allege lawful possession of the property. In the circumstances, even if the amendment is allowed the plea of lien has no prospects of success. It is doomed to fail.

[25] I take the view that it would be prejudicial to the plaintiff to have to contend with issues that are destined to fail. I say so because pleadings have been closed and the matter is ready for a pre -trial conference. If these amendments are allowed, the plaintiff would have to replicate and the issues for trial be redefined, such would clearly delay the finalization of the main matter, merely caused by issues that is still-bone. Such prejudice cannot be cured

by a postponement of payment of wasted costs. A proposed amendment that has no prospects of success cannot be said to be necessary for the purpose of determining the real question in controversy between the parties. It is for these reasons that the amendments sought to introduce a plea of prescription and lien must be refused.

[26] There remains to be considered the question of costs. No good grounds exist for a departure from the general rule that costs follow the event. The respondent is clearly entitled to his costs.

In the result, it is ordered as follows:

The application be and is hereby dismissed with costs.

DUBE – BANDA J: ……

DNM Attorneys, applicant's legal practitioners
Wintertons, respondent's legal practitioners