DOUGLAS VHURUMUNDU
versus
PHINEAS MARIYAPERA
and
CHEGUTU MUNICIPALITY

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 2 June 2022 & 29 June 2022

Opposed Application

K Maeresera, for the applicant
T B Jonasi, for the 1st respondent
No appearance, to the 3rd respondent

BACHI-MZAWAZI J: On 22 June 2022, I handed down an extempore judgment in a contested application for leave to amend summons and declaration. The first Respondent through his legal representatives requested for the reasons for judgment through a letter dated the 3rd of June 2022 which I received in on the 16th of June 2022. This is the full judgment.

In summation on the 15th of July, 2011, applicant and the first respondent entered into an agreement of sale, in respect of stand 583 Charles, Chegutu. The purchase price in the sum of US $12 000.00 (twelve thousand United States Dollars) was paid and vacant possession was given. The property in question was purchased by the applicant for his two minor sons. Thus, he also acted as the guardian of his children, John and Ryan Vhurumundu. It is an agreed fact that at the time of the sale transaction the first respondent could not cede his rights and interests in the property in question as certain conditions had to be satisfied to enable the second respondent to affect the cession. As a common practice with most local council residential stands, the cession agreement held by the Municipality required the construction of a structure up to the window level as a prerequisite for the registration of cession and the cession of rights and interests in the mentioned property. After the Applicant had complied with the said conditions' precedent to cession sometime in 2020, he approached the first respondent for the facilitation of the cession with the third respondent in fulfilment of their agreement of sale. The first respondent refused to oblige and introduced a new agreement of sale with new terms altogether asking for a totally different purchase price of US$90.000 (ninety thousand United States dollars) on the same property, dated 30 October 2020. Applicant denied ever entering a second agreement varying the terms of the original 2011 agreement.

As a result on the 4th of June,2021 applicant caused summons to compel cession against both respondents to be issued in case number HC 2843/21. A notice of appearance to defend was resultantly, entered and a plea filed by both respondents, on 16 July 2021 and on 22 June 2021, respectively.

In the plea, special plea issues where raised termed preliminary points. These are lack of jurisdiction, *lis pendenis* and the non-joinder of the minor children and the *locus standi* the applicant. The respondents stated that the purchasers in the agreement of sale of 15 June 2011 where the applicant's children, therefore, it was wrong for him to bring an action only in his name. The first respondents attached a counterclaim to their plea followed by a supplementary notice of amendment on 1 July 2021.

Subsequently, the applicant filed a notice of Amendment of summons and declaration dated 9 July 2021, correcting the issue of *locus standi* and amending names from that of the applicant to that of a representative and guardian of his minor children. The amendment was also done to all the paragraphs that had made reference to the applicant in his personal capacity including in the relief sought. In turn, the first respondents, on 17 September 2021, filed a notice of intention to oppose the applicant proposed amendments on the ground that the amendment would defeat their special plea amongst other objections. The applicant then filed second notice of amendment of the same, summons and declaration in terms of r 41(1) of the High Court Rules, 2021. As the rend that had developed, this was responded to by the first respondent through a document titled "Notice of opposition to the Plaintiff proposed Amendments".

The first respondent's main ground for objection in the applicant's new notice of amendment was that it was a replica of their first one, save for the provisions in relation to r 42 of the High Court rules 2021. They stated as follows:

> "Ordinarily, the first defendant would have readily consented to any suggested amendments, if such amendments were made in good faith, with a view towards placing before the honourable court, all the pertinent" facts of a *bona fide* case.

As can be seen the filing of the notices of amendment to applicant's summons and declaration in the main matter caused a lot of counter objections which led the applicant to make this application court seeking an order granting inter alia, amendments stated in their notice to amend summons and declaration filed in HC 2843/21 on 19 October 2021.

In opposition the first respondent raised two preliminary points but abandoned the other. Nothing turns on the second preliminary point as in my view it addressed the merits of this application rather than a preliminary point.

The first respondent argued that the notice of amendment addressed the issues they had raised in their plea thereby defeating their argument to have the matter argued and dismissed on the special pleas they had raised. In that manner, they allege that the notice of amendment was prejudicial as it brought in a new dimension of the plaintiff. They further reiterated that the amendment was fatally defective and they urged the court that the best route the applicant was supposed to take is to withdraw the summons in total and re-issue new ones.

The applicants argued that there was no set down for the hearing of the special plea nor an application to that effect that was made as such it was within their rights to file an amendment to their summons to rectify the anomaly that had been correctly observed by the respondents. They submitted that the respondents will suffer no prejudice as they are the ones who had drawn the applicant's attention to his error and or omission in the non-citation of the actual purchasers, applicant's children. Applicants further counter argued that the withdrawal of the first notice of amendment of summons and declaration is a non-issue as the two are a carbon copy of the other save for the clause capturing the new rules.

In view of the foregoing, this court was left with one main issue. Whether or not the application by the applicants for the amendment of summons and declaration in case HC 2843/21 should be granted?

I have taken cognisance of the fact that Humans are fallible. Mistakes and errors though not encouraged are common to litigants and some cases the adjudicating officer. That is why there are rules of the court designed for the correction of such mistakes and exigencies. Rules 7 and 29 of the high court rules 2021 are some of the tools used by the courts to correct errors and rescue litigation.

On the merits, Rule 41 of the rules of the High Court S.I. 202 of 2021 provides for the amendment of summons. Order 20 r 132 of the 1971 rules explicitly dealt with the amendment of pleadings at any stage of the trial.

In our jurisdiction it is trite law that a litigant can amend or alter pleadings at any stage before judgment see *Cheney* v *Cheney (nee Turner)* HH 78 of 2018 – *Tachiona* v *Ndebele* & Ors, (HB 263 of 2018). In, *Lourenco* v *Raja Dry Cleaners and Steam Laundry (Pvt) Ltd* 1984(2) 151 SC, DUMBUTSHENA JA (as he then was) in considering the provisions of Order 20 Rule 132 of the High Court Rules of 1971, highlighted that in terms of that rule, it

was clear that a party can seek to amend his pleadings at any stage of the proceedings. In his cyclostyled judgment the enunciated that:

> "The main aim and object of allowing on amendment to pleadings is to do justice to the parties by deciding the real issues between them. The mistake or neglect of one of the parties in the process of placing issues before the court and a record will not stand in the way of this unless the prejudice caused to the other party cannot be compensated for in an award of costs"

See SA *Steel Equipment and Company (Pvt) Ltd & Ors* v *Lurelk (Pvt) Ltd* 1951 (4) SA 167 (TPD) at 1729, *Frenkel Wise and Company Ltd* v *Cuthbert* 1947(4) SA 715 (CPD)

CHINHENGO J, as he then was, in *Ltd* v *Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210(HC) emphasized that the approach the courts should follow when faced with an amendment even at a late stage during trial, is to allow such amendments liberally. The learned judge advanced three elements to the exception to that approach as follows:

a. where the amendment would cause considerable inconvenience to the court or prejudice to a party,
b. where there is no prospect of the point raised in the amendment succeeding or,
c. where the matters in the amendment are vague and embarrassing.

I readily associate myself with the reasoning in the cases cited above. In my *ex-tempore* ruling I indicated that there was no prejudice visited on the first respondents or both if the amendments sought are granted. It is the first respondent who aptly noted that the applicant as the guardian of the then two minors and had purchased the property on their behalf but had registered their names on the agreement of sale of 15 June 2011the ought not have left them out and include only his name. This was promptly taken up by the applicant who then filed the acquisition amendments capturing the vacuum that had been created in this initial summons and declaration.

This was an appropriate move as regards this point alone proper parties were placed before the court to allow the court to make an informed decision. The approach also had the effect of correcting the proceedings and promoting finality to litigation.

I did not see any *mala fide* as envisaged by the respondents.

GOWORA J (as she the was) in the case of *Agricultural Bank of Zimbabwe Ltd* v *Nickstato Investments (Pvt) Ltd and others* 2010 (2) ZLR 49 (H) noted that;

'It is also a general rule that the courts will grant on amendment to pleadings unless the application is *mala fide*.'

In my opinion the amendments sought by the applicants will enable the parties to ventilate all the issues raised in the main action. This court is not in position to comment on

anything to do with the application for a declarator. I will therefore ignore all submissions made to that effect. Those are the issues for a different forum. The court has also noted that there are a lot of procedural flaws made by the respondents which it will not turn a blind eye on but will mention in passing. Particularly on how the special plea and the exception where brought to the fore in a document headed plea and other several pleadings which were filed without the leave of the court. As these were not challenged and argued by the parties I need not elaborate any further.

In the judicious exercise of my discretion in granting this application I have taken into consideration that there are prospects of success in the points raised in the notice of amendment. The amendments are clear and straight forward, there is no need to withdraw the initial summons and declaration. There is no inconvenience on the part of the respondent even if the original notice, an identical twin to the second one is not withdrawn as it speaks to one and the same thing.*See UDC Ltd* v *Shamva Flora (Pvt) Ltd* 2000(2) ZLR (H)

KORSAH J in C*opper Trading Co (Pvt) Ltd* v *City of Bulawayo 1997(1) ZLR* at 134 H - 144 B and a 144 G Pronounced that,

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

I am glad that the first respondent is not denying the existence of 15 June 2011 agreement of sale as it is the one, he has made reference to. It is the one that bears the names of the applicant's sons with applicant acting as the guardian. The rest is up to the court in the main action. I am satisfied that the amendments sought should be granted. In light of the reasons highlighted herein I delivered the ex-tempore judgement of 2 June 2022. The following is the order I granted.

Applicant denied ever entering a second agreement varying the terms of the original 2011 agreement.

Accordingly:

IT IS ORDERED THAT

1. The Application to amend summons and declaration filed in HC 2843/21 be and is hereby granted.
2. The Summons and Declaration filed in HC 2843/21 by the Applicant be and are hereby amended in terms of a Notice of Intention to Amend Summons and Declaration issued by the Registrar of this Court on 19 October 2021 with effect from the date of this Order.

3. The Respondents shall, if they so wish, file any supplementary pleadings or documents within twelve (12) days from the date of service of this Order.
4. The Applicant's legal practitioners be and are hereby granted leave to serve the Respondents with copies of this Order.
5. Costs of this application shall be in the cause.

Chizengeya Maeresera and Chikumba, applicants' legal practitioners
E Gijima Attorneys, first respondents' legal practitioners