BITCON (PRIVATE) LIMITED t/a KUCHI CONSTRUCTION
and
TWO PENNY TRADING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 5 and 9 June, 2017

Opposed Matter

E Drury, for the applicant
T Muzana, for the respondent

MANGOTA J: A pre-trial conference is an integral component of proceedings which commence under Order 3 of the High Court Rules, 1971. It is at that conference that the parties to a case meet on their own or with the assistance of a judge to:

i. settle the case between them; or
ii. define issues and ancillary matters which the pre-trial conference judge refers to trial.

Rule 182 of the rules of this court is relevant. It makes provision for a pre-trial conference. It, in short, defines the rights and obligations of the parties to a case and the important role which a pre-trial conference judge assumes. He plays a very important role at that stage of a civil suit.

MAKARAU J (as she then was) brought out the role of the pre-trial conference judge in a clear and unequivocal manner. She remarked in *Marijeni* v *Mufudze and ors*, 2002 (2) ZLR 498 at 500 G – 501A as follows:

> "I consider it the role of a judge presiding at a pre-trial conference to engage the parties and their lawyers meaningfully and to assist towards a settlement. He or she can give directions in the matter. Judges presiding at pre-trial conferences often do. Instances when judges request that pleadings be amended, that summaries of evidence be supplemented or that further discovery be effected are all examples of directions given at the pre-trial conference. They are aimed at facilitating a settlement or, where such is not possible, at bringing to the fore the real dispute between the parties" [emphasis added].

The parties *in casu* held a pre-trial conference. MUREMBA J was the pre-trial conference judge. She, in my view, engaged the parties and their legal practitioners meaningfully. She, in the process, assisted the applicant to discover that the respondent's claim had prescribed. The applicant had overlooked that issue when it pleaded to the claim. The engagement of the parties by the learned judge brought the issue of prescription to the fore.

The discovered, but unpleaded, issue of prescription precipitated the present application. The applicant applied to amend its plea. It submitted that it was in the interest of justice for it to amend its plea to include a special plea which would read as follows:

> "It is submitted that the plaintiff's claim has prescribed. It is denied that the defendant made an undertaking to pay the plaintiff on 12 September 2012 and the plaintiff is put to the strict proof thereof. In the absence of an acknowledgement of debt, it is submitted that the plaintiff's summons, issued on 11 September 2015 is out of time.
>
> In addition, it is submitted that even in the event that the defendant did make an undertaking to pay the plaintiff on 12 September 2012, service of the summons ought to have been effected on or before 11 September, 2015. The defendant was only served with the summons on 15 September 2015, and therefore the plaintiff's claim has prescribed."

The respondent opposed the application. It insisted that the plea could not be raised as it had not been included in the applicant's plea. It stated that the amendment sought by the applicant must only be allowed for the purpose of determining the real issues between the parties. Its position was that the real issue which existed in the parties' case was whether or not the applicant paid for services which it rendered to the applicant.

The respondent's argument is misplaced. It did not state what its position would have been if the applicant had pleaded prescription at the time that it filed its plea. The issue which it defined as the only issue between the applicant and it was, or is, not exhaustive. It could be that issue alone, or that issue together with other issues one of which is that of prescription. Alternatively, the applicant could have raised prescription as a special preliminary issue and the one which the respondent defined as the issue which goes to the substance of the case.

It is at the pre-trial conference stage that the judge who is presiding over such gives directions to the parties, or to one of them, to amend their, or its, pleading. [See *Marijeni* v *Mufudza* (*supra*)].

When the issue of prescription came to the fore, MUREMBA J did not proceed with the pre-trial conference. She allowed the applicant to apply as it did. She remained alive to the

applicant's intention to raise prescription as one of the issues which would occupy the mind of the trial judge when the parties' case goes to trial.

The applicant anchored its application on r 132 of the High Court Rules, 1971. The rule reads:

> "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 questions in controversy between the parties." [emphasis added]

It is clear from the record that the respondent withheld its consent to the inclusion of the plea of prescription being raised by the applicant. That fact left the court to exercise its discretion to grant or refuse the application. The rule is, however, clear on the point that, in exercising its discretion, the court is at liberty to allow, or not to allow, the applicant to amend its pleadings at any stage of the case the application of which is before it.

Efroloa (Pvt) Ltd v *Muringani*, [2013] ZW HHC 112 restated the contents of r 132 of the High Court Rules, 1971 in a clear and succinct manner. It reads, in part, as follows:

> "The general rule is that an amendment of a pleading in an action will always be allowed unless the application is *mala fide* or the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order of costs." (emphasis added).

The applicant stated that its application to introduce the special plea by amendment was *bona fide*. The application, it said, was necessitated by a desire on its part to have all the issues which related to its case with the respondent defined and determined with a reasonable measure of finality. It denied that the amendment of the plea would prejudice the respondent. It insisted that the respondent would be accorded leave to respond to the amended plea prior to the matter being re-set down for hearing.

The respondent did not show, let alone allege, that the application was *mala fide*. All it did was to oppose the application. Its opposition was, however, premised on an erroneous view of the law as it relates to the current aspect of the case.

It is trite that prescription can be raised at any stage of civil proceedings. Reference is made in this regard to s 20 of the Prescription Act [*Chapter 8:11*]. The section reads:

> "1. No court shall of its own motion take notice of prescription.
>
> 2. Provided that a court may allow prescription to be raised at any stage of the proceedings" (emphasis added).

The applicant inadvertently overlooked the issue of prescription when it filed its plea.

It discovered that issue at the pre-trial conference. It, accordingly, made the current application with a view to doing justice to its case. The application unnecessarily put the respondent to unjustified expense. It is only fair that the applicant be ordered to pay the respondent's costs as they relate to the application.

The applicant proved its case on a balance of probabilities. The application is, accordingly, granted as per the applicant's draft order subject to the rider that the applicant shall bear the costs of this application.

Honey & Blankenberg, applicants' legal practitioners
Mushangwe & Company, respondent's legal practitioners