

RYAN ANTHONY CHENEY
versus
KATIE PEARCE CHENEY (nee TURNER)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, February 1 and 15, 2018

Opposed Application

P Jonhera, for the applicant
Adv. F Girach, for the respondent

CHITAKUNYE J: This is an application to amend the applicant's plea. At the beginning of the hearing respondents counsel asked for the expunging of the applicant's answering affidavit as it was filed late and after respondent's heads of argument had been filed. Upon hearing arguments on the point I granted the request as clearly applicant's answering affidavit had been filed un-procedurally and without seeking condonation for the late filing of the affidavit.

The basic background relevant to this application is as follows:

The applicant and respondent were joined in holy matrimony on the 1st May 2010. Their marriage was blessed with two children who are still minors. During the subsistence of the marriage parties acquired some movable properties.

On the 6th October 2015 the respondent sued applicant for a decree of divorce, custody of the minor children, distribution of assets of the spouses in terms of Annexure 'A' to her declaration and other ancillary relief.

The applicant duly pleaded to the summons and declaration. As the parties were preparing for a pre-trial conference the applicant sought to amend his plea. The aspects of the respondent's declaration to which applicant pleaded and now wished to have amended are paragraphs 6 and 10.

In paragraphs 6 and 10 of her declaration respondent stated as follows:

"6. It is in the best interests of the said minor children that their sole custody and sole guardianship upon divorce be awarded to plaintiff.

10. It is fair and reasonable and practical and just that in settlement of proprietary matters pertaining to a division of the matrimonial assets acquired by the parties during the course of their marriage by their joint endeavour and contribution that:

10.1. Plaintiff be awarded, as her sole and exclusive property, the items listed on Annexure 'A' hereto;

10.2. Plaintiff shall retain, as her sole and exclusive property, the Mercedes C200 Kompressor motor vehicle (Reg. No. ADP 4941) and which asset was a gift by defendant to plaintiff on the occasion of Plaintiff's 30th birthday and is, as such, Plaintiff's sole and exclusive property and which has been possessed, owned and driven by Plaintiff since its delivery to Plaintiff on 24 January 2015.

10.3 Each party shall retain as their respective sole and exclusive property their respective personal items of property and items owned by them respectively prior to their marriage to each other."

In his plea filed on the 15th January 2016, the applicant pleaded as follows to the above paragraphs:-

"Ad Paragraph 6

This is denied. It is in the best interests of the minor children that their custody upon divorce be awarded to the defendant and the plaintiff be accorded reasonable access rights.

Ad paragraph 10

7. Save to deny that the Mercedes Benz Kompressor motor vehicle (Registration Number ADP 4941) was a gift to the Plaintiff, instead the defendant states that:

7.1 The vehicle was purchased by Tiger Construction (Private) Limited, a family company and the Defendant's former employer.

7.2 The vehicle is not part of the matrimonial wealth and must be returned to Tiger Construction.

8. **The rest of the contents of the paragraphs are admitted.**" (my emphasis)

The pleadings were duly closed. On the 13th September 2016 the applicant filed a notice to amend his plea in respect of custody and guardianship of the minor children and distribution of the assets at the pre trial conference. The proposed amendment pertained to guardianship and movable property.

It would appear that upon realising that respondent would not consent to the proposed amendments, the applicant then filed this application on the 24th November 2016.

In paragraph 5 of the founding affidavit the applicant lay the basis for the amendment as that:-

"5. Due to an unforeseen, regrettable and unintentional miscommunication between myself and my legal practitioner, my Plea, dated 15 January 2016, contains the following errors and omissions:-

a. Paragraph 2(two) does not correctly indicate the words "and guardianship" after the word "custody".

b. Paragraph 8 (Eight) incorrectly indicates that I admit the rest of the declarations made by the Plaintiff in her Plaintiff's Declaration(Paragraph 10.1). I hereby assert, as stated above, this error was a result of a miscommunication between myself and my legal representation."

He thus provided the proposed amendment which is basically that he be awarded custody and guardianship of the minor children and that he be awarded about 52 items enumerated in the amendment.

The respondent opposed the application. In her opposition respondent denied that there was any miscommunication between applicant and his legal practitioner. To buttress her contention she alluded to other correspondence between the parties' respective legal practitioners showing that the applicant had acceded to the respondent being awarded all the property as itemised in Annexure 'A' to her declaration. The item disputed was the Mercedes motor vehicle. Some of this correspondence was before the applicant had filed his plea and the other was after he had filed his plea. According to the respondent the applicant had personally supervised the loading of some of the property for delivery to her. The property had been duly delivered to her. As far as she was concerned the applicant simply wanted to withdraw his admission and not that there was any miscommunication.

As regards guardianship respondent contended that by virtue of being the biological father the applicant was by law the guardian of the children so the proposed amendment in this regard would be of no consequence. The real issue between the parties is on custody and the applicant had already stated his stance which is that he wanted to be awarded custody.

From the submissions made the issue is whether the amendment should be granted or not.

Order 20 Rule 132 of the High Court Rules 1971 as amended states that:-

"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."

Where, as in this case, the circumstances and the nature of the amendment especially on the property, is in the mould of a withdrawal of an admission the provisions of rule 189 are pertinent. In his plea applicant had clearly admitted that respondent can have the movable property listed except the Mercedes Benz which he said belonged to a company. In that regard rule 189 provides that:

"The court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just."

Though both r 132 and r 189 allow for amendment at any time, there are basic requirements court has to consider in exercising its discretion to grant or not to grant the amendment.

In *Eastern Highlands Electrical (Private) Limited v Gibson Investments (Private) Limited* 2002(1) ZLR 417(SC) at 420E-H EBRAHIM JA aptly stated that:

“The grounds on which an admission made in error may be withdrawn have been stated many times, most recently in this jurisdiction by Gubbay JA(as he then was) in *DD Transport (Private) Limited v Abbot* 1988(2) ZLR 92(S) at page 98 where he said:-

‘An amendment which involves the withdrawal of an admission will not be granted by the court simply for the asking, for it is an indulgence and not a right. See *Zarug v Paravathie* NO 1962(3) SA 872(D) at 876C. 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 is 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.”

A litigant can thus amend or alter their pleadings at any stage before judgement. The court or judge is granted wide discretion on whether to grant the amendment or not. Such discretion is guided by the need to ensure that the real issue between the parties is resolved and that the amendment does not prejudice the other party which may not be compensated by an order of costs.

In *Agricultural Bank of Zimbabwe Ltd v Nickstate Investments (Pvt) Ltd & Others* 2010(2) ZLR 419(H) at 421C-E GOWORA J (as she then was) aptly stated that:-

“The law is abundantly clear on the question of amendments to pleadings, and the court has a very wide discretion not only in regard to the scope of the amendment but also with regard to the time when an amendment can be applied for. In the exercise of its discretion the court will generally be guided by the principle that such amendment should not be seen to cause prejudice to the other litigant which cannot be cured by an order of costs necessitated by the need to further postpone the matter. Invariably, therefore courts have been liberal in allowing amendment of pleadings, and it is trite that pleadings can be amended at any time before judgment is issued. It is also a general rule that the courts will grant an amendment to pleadings unless the application to amend is *mala fide*.”

The liberal approach to the amendment of pleadings was also alluded to in *UDC LTD v Shamva Flora (Pvt) Ltd* 2000(2) ZLR 210(H) at 216G- 217B wherein CHINHENGU J succinctly stated the position as follows:

“The general approach of our courts has been to allow amendments to pleadings quite liberally in order to avoid any exercise that may lead to a wrong decision and also to ensure that the real issue between the parties may be fairly tried. This liberality is only affected where to allow the

amendment would cause considerable inconvenience to the court or prejudice a party or where there is no prospect of the point raised in the amendment succeeding or where matters set out in the amendment are vague and embarrassing and therefore excipiable;..... Thus, the question of prejudice to the other party if the amendment is allowed is a paramount consideration. It is singularly important where such prejudice cannot be compensated for by an appropriate order of costs.”

At 217 C- F, the learned judge cited with approval the considerations court must have regard to in applications for amendments as stated in *Commercial Union Assurance Co. Ltd v Waymark NO 1995(2) SA 73* wherein at 77F-I WHITE J summarised the principles as follows:-

- “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.”

The applicant’s counsel argued that the application meets the basic requirements as outlined above whilst respondents counsel contended otherwise.

In *casu*, it is pertinent to examine the reasons advanced by the applicant. The explanation proffered by the applicant for the error in the pleading or the admission is stated as – ‘an unforeseen, regrettable and unintentional miscommunication between applicant and his legal practitioner.’ As a result of that miscommunication the plea ended up stating that he admitted to the respondent being awarded all the movable property in her Annexure ‘A’ serve for the motor vehicle.

This explanation is highly unsatisfactory. It is in fact no explanation at all. The applicant does not explain what this miscommunication is and how it came about or why it was not noticed soon after the plea was filed. As clearly contended by the respondent, the admission was not just in the plea. Even before the plea was filed applicant had admitted that respondent can have her movable property.

In this regard it is apposite to note that after being served with the respondent’s declaration and prior to preparation of applicant’s plea the defendant’s legal practitioner had on 7 January 2016 written a letter to respondent’s legal practitioners stating, *inter alia*, that:-

“we still maintain that this matter is capable of a settlement, the only issue from our end relates to Custody, access & Maintenance.”

In turn the respondent’s legal practitioners responded with a letter dated 14th January 2016 stating, *inter alia*, that: “we have noted the issues are limited to custody, access and maintenance.”

After the filing of the plea, further correspondence continued in the same line. For instance, on 15th July 2016 respondent’s legal practitioners wrote another letter to applicant’s legal practitioners in which they stated, *inter alia*, that:

“On another note, and again as we have already requested, please prevail upon your client to permit ours to attend in order to collect her items of movable property as already requested in prior correspondence and in respect of which your client has already pleaded as agreeing that they belong to her.”

The applicant’s legal practitioners responded on the 29th July 2017 stating, *inter alia*, that: -

“Our client advises that he has never refused yours to collect her personal belongings. He advises that her personal belongings are safely stored in a warehouse in Chinhoyi awaiting collection. This, she has been made aware of. Yours can always make arrangements with ours for collection.”

It was only after the above exchange that the applicant filed a notice to amend and later this application to amend his plea.

In view of the above it is clear that applicant has not been candid with the court on the reasons for seeking to amend his plea. If it is a change of mind, such was not a result of some ‘unintentional miscommunication’. In any case had there been a misunderstanding between applicant and his lawyer an appropriate explanation from the lawyer would have been in order. Having made an admission, applicant cannot resile from the admission at the mere say so. He must give a reasonable explanation of both the circumstances under which he made the admissions and the reasons why he now seeks to resile from the admissions. This he failed to do.

The suggestion by respondent’s counsel that the amendment is *mala fide* and is intended to harass the respondent appears probable. The delay that has been occasioned and may continue to be occasioned has the effect of delaying finality to litigation on matters applicant had admitted to.

Besides the lack of a reasonable explanation, there is also the issue of prejudice to be suffered by respondent. Both r 132 and r 189 allude to the need to consider the circumstances

the amendment is being sought and whether prejudice will be occasioned to the other party which cannot be compensated by an award of costs.

In terms of prejudice the respondent contended that she will suffer prejudice in that the respondent has already taken delivery of some of the items in annexure 'A' yet the same are now being claimed by applicant. I did not hear applicant to deny that some of the items he now seeks to bring into the fray had in fact been delivered to respondent.

Further the applicant is well aware of respondent's limited financial means and in her view the need for the parties to lead evidence on items that had been admitted as hers will most likely encompass a significant amount of evidence and time which will in turn give additional rise in costs of trial which she cannot afford.

All in all I am of the view that the application is not bona fide but is intended to harass and torment or traumatise the respondent.

Accordingly the application is hereby dismissed with costs.

A B & David, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners