REPORTABLE (5)

JAYESH SHAH
v
KINGDOM MERCHANT BANK LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GUVAVA JA & MAVANGIRA JA
HARARE, FEBRUARY 1, 2016 & JANUARY 31, 2017

T Mpofu, for the applicant appellant
T Magwaliba, for the respondent

GWAUNZA JA: This is an appeal against the whole of the judgment of the High Court, handed down on the 22 May 2013. This was a matter in which the court granted the respondent leave to further amend its declaration.

The background to the matter may be summarised as follows.

On 6 July 2004, the respondent issued summons against the appellant and Saturn Trading and Investments Limited ("Saturn Trading") jointly and severally and *in solidum* for payment of US$900 000-00 [Nine Hundred Thousand United States Dollars]. The respondent alleged that this amount represented overpayment of a loan advanced to Saturn Trading for onward lending to third parties. In terms of their alleged agreement, the respondent purported that Saturn Trading would receive repayments directly from the third parties concerned and if any overpayment occurred, such would be refunded to the respondent.

Allegedly in breach of the parties' agreement, Saturn Trading failed to refund money which had been overpaid to it. The respondent then sued Saturn Trading in the High Court, claiming in its declaration that it had been unjustly enriched by the overpayment at the respondent's expense. Further in that suit, the respondent sued the appellant on the grounds that as director, agent or *alter ego* of Saturn Trading, he was fully aware of the transactions in question and hence, had a duty of care towards the respondent. In breach of that duty, the respondent charged that the appellant had carried out Saturn Trading's business negligently, recklessly, fraudulently and without due care resulting in the respondent suffering loss in the amount claimed.

It is common cause that both Saturn Trading and the appellant defended the suit, disputing the existence and terms of the alleged loan agreement, the alleged overpayment and any duty of care whatsoever towards the respondent, on the part of the appellant.

At the pre-trial conference which was held on 26 September 2006, the Respondent obtained leave, with the consent of the appellant, to amend its declaration by the deletion of a certain paragraph and its substitution with another. After the pre-trial conference the matter was set down for trial on 29 January 2007 but for reasons which are not apparent from the papers, it was postponed *sine die*.

Some ten months later, on 30 November 2007, the respondent's legal practitioners wrote to the appellant's legal practitioners requesting their consent to further amend its declaration. The appellant's legal practitioners did not accede to the request. This prompted the respondent to file an application for leave to amend its declaration in terms of Order 20 r 132 of the High Court of Zimbabwe Rules, 1971. According to the respondent, this was in order to clarify the existing causes of action.

The appellant opposed the application on the basis that the amendment had come late in the day, since it was being made four (4) years after the action was originally instituted and as such the new causes of action which the amendment sought to bring had prescribed. The court *a quo* granted the respondent leave to amend its declaration and any other pleadings which they wished to have amended. The appellant was aggrieved by this decision and filed this appeal.

Before I turn to address the issues raised by the appeal, it is important to note that in this appeal, the Court is being called upon to interfere with the exercise of a discretion by the judge *a quo*. The judge correctly stated as follows in this respect:

> "In our law granting or refusal of leave to amend is a matter entirely in the discretion of the court."

That the court has this discretion is evident in r 132 of Order 20 of the High Court Rules. The rule provides that the court may allow a party, at any stage of the proceedings, to amend his pleadings and that:

> "…… all such amendments shall be made as may be necessary for purposes of determining the real question in controversy between the parties"

While r 132 is made subject to r 134, I do not find the latter rule to be applicable to the circumstances of this case, since it specifically deals with an amendment to the pleadings, that has the effect of including or substituting a cause of action arising after the issue of summons. This has not been claimed *in casu*

This court however, has the power to interfere with the exercise of the court *a quo's* discretion in appropriate circumstances, as aptly explained as follows in Herbstein & Van Winsen 5th ed, p 1009;

> "The court on appeal will interfere where the exercise of the discretion has not been proper, or has been based upon a wrong principle, or upon a wrong view of the facts; where the court has purported to exercise its discretion without sufficient legal grounds for doing so……"[1]

The appellant contends that the court *a quo* improperly exercised its discretion in granting the respondent leave to amend its declaration. This is because, he further contends, the court relied not only on wrong principles of the law, it also failed to take into account a crucial and relevant factor, that is, the issue of prescription.

As is evident from the appellant's grounds of appeal, the two issues on the basis of which it is alleged that the court *a quo* improperly excercised its discretion relate to the question of whether or not the proposed amendment raised new causes of action and if so whether, in the circumstances of the case, the new causes of action had prescribed.

Whether or not the amendment brings about new causes of action

Mr *Mpofu* for the appellant argued that the court *a quo* should not have granted leave to amend the declaration for the reason that the amendment has the effect of introducing unjust enrichment, fraudulent misrepresentation and theft, as new causes of action. Mr *Magwaliba* for the respondent on the other hand, contends that leave to amend was correctly granted by the court *a quo* in terms of r 132, which permits amendments in respect of any cause of action. Despite his initial submission that all the allegations had been pleaded in the original declaration and that the amendment merely sought to clarify these allegations, Mr *Magwaliba* during the hearing conceded that theft was indeed sought to be introduced as a new cause of action. He argued, in respect of personal unjust enrichment of the appellant, and

[1] See also Barrows & Anor v Chimphonda 1999 (1) ZLR 58 (S) 62G-63A

fraud, that the proposed amendment was aimed only at clarifying the claims originally made in the initial declaration.

The court *a quo* was persuaded by the submissions made in this respect for the respondent, as is evident from the following remarks on p 6 of its judgment:

> "The first respondent (appellant *in casu*)…… submitted that the averment that he was unjustly enriched personally was not contained in the original declaration and that its introduction at this stage is prejudicial to him because that claim has prescribed. I do not agree.
> The applicant's claim has always been for payment of $900 000-00 against the second respondents (*sic*) jointly and severally. The first respondent had already been roped in on the allegation of negligence, fraud and acting without due care. Unjust enrichment had already been pleaded and it is the clarity of that pleading which was lacking. To my mind, there is therefore a pressing need to effect an amendment that would properly ventilate the real dispute between the parties." (*my emphasis)*

A closer look at the disputed claims of fraudulent misrepresentation and unjust enrichment as articulated in the original declaration would in my view assist in the determination of whether or not they constituted new causes of action. The respondent (as plaintiff) in its declaration pleaded as follows:

> "By reason of the said overpayment the first defendant has been unjustly enriched in the sum of US$900 000.00 at the expense of the plaintiff.
> At all material times the second defendant (appellant *in casu*) was the director and/or agent for the first defendant and was fully aware of the aforesaid contract between the plaintiff and the first defendant.
>
> In the exercise of his duties the second defendant was negligent in one or more of the following:
>
> (a) He carried first defendant's business recklessly; and/or
>
> (b) He carried first defendant's business negligently; and/or
>
> (c) He carried first defendant's business fraudulently; and/or
>
> (d) He carried first defendant's business without due care.
>
> By reason of the said negligence of the second defendant:
>
> (a) The plaintiff suffered loss/damages in the sum of US$900 000.00 being overpayment to the first defendant; and/or

(b) The first defendant was unjustly enriched in the sum of US$900 000. 00 being overpayment to the first defendant." (my emphasis)

Fraudulent misrepresentation

What is evident from this claim, on a strict interpretation of the simple meaning of the words employed, is that the basis for suing the appellant jointly and severally with Saturn Trading in so far as the alleged fraudulent representation is concerned, was the perception that he was negligent by virtue of having 'fraudulently' run the business of Saturn Trading. Further one may understand the words to evince a perception that the appellant was also 'negligent' by virtue of 'negligently' running the affairs of Saturn Trading. There is in my view no doubt that this part of the claim was clumsily drafted. It not only seeks to define fraudulent behaviour as 'negligence', it also nonsensically seems to suggest that one may be 'negligent' by acting negligently! The respondent itself conceded this shortcoming on its part when it stated in its application in the court *a quo* that the claims had been 'insufficiently and imperfectly' pleaded in its original declaration. Be that as it may, it is apparent that the question of fraudulent representation linked to the appellant was one that exercised the minds of both the respondent and the appellant, although it was not succinctly and clearly articulated in the declaration. Evidence of the appellant's appreciation of the issue is found in the joint plea of the appellant and Saturn *a quo,* where the former categorically denied that he had acted 'recklessly, negligently or fraudulently' in carrying out Saturn Trading's business, 'as alleged or at all'. Also evident from the papers is the fact that, consequently, the respondent sought to hold the appellant jointly liable with the respondent, for the amount sought. This much is particularised firstly in para 13 of the respondent's declaration, and secondly, in the relief sought therein.

Paragraph 13 read in relevant part as follows:

> "By reason of the said breach of the term(s) of the contract by the first defendant and/or negligence of the second defendant and the consequential loss/damages and/or unjust enrichment the first defendant and the second defendant became liable to the plaintiff in the sum of ……." (my emphasis)

The import of this paragraph as well as of the relief sought could not have been lost on the appellant. The relief sought read as follows:

> "WHEREFORE, the plaintiff herein claims, against the first defendant and the second defendant, jointly and severally and *in solidum* the one paying the other to be absolved:
>
> (a) Payment of the sum of US$900 000.00;
>
> (b) Interest thereon at the rate of the Treasury Bills of the Federal Bank of the United States of America calculated from the 1st day of October, 2002 to date of payment, both dates inclusive; and
>
> (c) costs of suit."

Viewed from this whole perspective I find there is little if anything to fault in the judge *a quo's* finding that the appellant had already been 'roped' in on the allegation of, among others, fraudulent misrepresentation. Consequently, I do not find fault with the judge's finding that there was need to effect an amendment in this particular respect, in order to facilitate a proper ventilation of the real dispute between the parties. The evidence before the court shows that the real dispute between the parties concerned the alleged joint liability of the appellant and Saturn Trading - arising from the appellant's performance of his duties as director of the latter - for the payment of the sum claimed.

Unjust enrichment

As already indicated, the learned judge *a quo* took the view that unjust enrichment (of both the Appellant and Saturn Trading') had 'already' been pleaded and all that remained was to clarify the said pleading. The basis of this finding was para 10 of the joint plea of the appellant and Saturn Trading, which was a response to the respondent's allegation (in its declaration) that the second Defendant - Saturn Trading – had been unjustly enriched as

a consequence of the appellant's conduct in running its affairs. The appellant and Saturn Trading responded as follows in their plea:

> "10. Ad Para 8 (Alternative Claim)
>
> This is disputed. The defendants deny that they were enriched as alleged in the sum of USD 900 000 or at all. The 2nd Defendant denies this and puts the Plaintiff to the proof thereof" (*my emphasis*)

While on the face of it, one may conclude that the appellant pleaded to a claim not made against him, I find the real significance of his response to be the insight it gave as to what in the appreciation of the parties, was the real dispute between them. As in the case of the alleged fraudulent misrepresentation, this appreciation could only have been buttressed by the relief that the respondent sought jointly against the appellant and Saturn Trading, which I have already cited above.

Mr *Magwaliba* invited the court to draw an inference that the claim of unjust enrichment against the appellant was pleaded in the first declaration, from the fact that the parties agreed that the issues to be put before the trial judge included the personal liability of the appellant. He contends that such an agreement, reflected in the parties' joint pre-trial conference minute, ('PTC minute') suggests that the appellant had knowledge that the allegation of unjust enrichment was being made against him together with Saturn Trading. I find there is merit in this contention but only to the extent that it gives an insight into what the appellant's perception of what the case confronting him, was. The specific issue sought to be determined in relation to unjust enrichment, as set out in the PTC minute read:

> "5 (a) whether the Defendants have been unjustly enriched in anyway and whether the Plaintiff is entitled to recover any amount from them on the basis of unjust enrichment?" (my emphasis)

A joint pre-trial conference minute is not meant to form part of the evidence to be considered by the court in determining the matter before it. Agreements reached and

recorded in a pre-trial conference minute are primarily concerned with what issues the parties have agreed the trial judge should consider and determine at the trial. Thus a PTC minute's value lies in streamlining the issues relevant for a proper determination of the dispute between the parties. While the agreed issues should and must, arise from the facts alleged and/or disputed in the pleadings, the written evidence tendered, and the law that is said to be applicable, I find that implicit in the contents of the PTC minute *in casu,* was the suggestion that the parties were *ad idem* as to the seemingly expanded nature of the real dispute between them. This is because on the basis of that minute, which they have not abandoned, the parties expected the court *a quo* to consider and determine aspects of the dispute that had not been properly articulated in the respondent's declaration. While the need to address this anomaly between the PTC minute and the respondent's declaration may further justify the amendment sought, I find that that the amendment would also serve to properly align the PTC minute to the declaration and other evidence before the court, thereby facilitating a proper ventilation of the issues in dispute.

It appears to me that in respect of both the claim of fraudulent misrepresentation and unjust enrichment levelled against the appellant personally, the parties appear to have enlarged the scope of the dispute between them in a manner not matched by the specific issues alleged and pleaded to. To bridge this gap, I find that the respondent properly resorted to r132 whose purpose clearly is to give the court the discretion to allow the amendment of pleadings for purposes of having the real dispute between the parties properly ventilated and determined.

I find in this respect that the following remarks are apposite:

> "In this regard, NEWTON THOMPSON J remarked as follows in the case of *Vos v Cronje and Dumminy*;

> 'That the court is not bound by strict pleadings when the parties themselves have enlarged the issues is beyond argument….'"[2]

Applied to the circumstances of this case, I find that the parties' expansion of the issues for determination, in the manner outlined above, was properly taken into account by the court *a quo*. To the extent that one does not 'expand' on what is not already in existence, I am satisfied that these two claims did not constitute new causes of action. Thus, the question of prescription in so far as the fraudulent misrepresentation and unjust enrichment of the appellant were concerned, did not arise. The claims were neither new causes of action, nor were they prescribed. I am satisfied that the learned judge correctly applied r 132 of Order 20 of the High Court Rules, cited above and that in doing so, he did not make any error in exercising the discretion imposed on him.

The court *a quo* in addition properly considered other principles governing amendments to pleadings, among them[3]-

i. Whether the amendments sought raised a triable issue
ii. Existence or otherwise of *mala fides* on the part of the respondent in seeking the amendments in question,
iii. The possibility or lack thereof of prejudice being visited on the appellant by virtue of the amendment sought
iv. The timeliness or otherwise of the application.

I respectfully agree with the court's reasoning in determining these factors in favour of the respondent and against the appellant. The fact that the parties, through their

[2] See Power Coach Express (Pvt) Ltd v Martin Millers and Engineers HH 121-2010,
[3] As set out in Commercial Union Assurance Co. Ltd v Waymark NO -1995 (2) SA 73 T

pleadings, evinced the common misconception that the scope of the dispute was wider than had actually been articulated in such pleadings, in my view clearly justified such a determination. I find in particular that the amendment concerned was not one that would have caused the appellant any prejudice, given that he had already demonstrated a readiness to defend himself against claims, *albeit* poorly articulated, that sought to impute to him personal liability for the amount claimed.

South African authorities suggest that a certain relaxation of the rules relating to amendments of pleadings is now evident in that country's courts. This approach is captured in these remarks[4], which also address the question of prejudice to the respondent:

> "Decisions in the reported cases tend to show that there has been a gradual move away from an overly formal approach. It is a development which is to be welcomed if proper ventilation of issues in a case is to be achieved, and if justice is to be done. In line with this approach courts should therefore be careful not to find prejudice where none really exists"

I find these remarks to be fully apposite to a determination based on the circumstances of this case. The approach enunciated therein is one that I find to be commendable and worthy of emulation by our courts.

Thus when all is told, I am satisfied that the court *a quo* properly granted leave for the respondent's declaration to be amended so as to better define the two claims of fraudulent representation and unjust enrichment alleged against the appellant. In that way, a proper ventilation of the real dispute between the parties would be facilitated.

Theft

[4] Taken from the case of Four Tower Investments (PTY) Ltd v Andres 2005 (3) SA 39 (N) at 44

I turn now to deal with the allegation of theft levelled against the appellant. I have indicated already that Mr *Magwaliba* for the respondent conceded that this indeed constituted a new cause of action, sought to be introduced for the first time through the amendment applied for by the respondent. The allegation of theft, direct or indirect, is conspicuous by its absence from the respondent's original declaration. The question that arises now is whether the introduction of a new cause of action in circumstances such as these, is allowed in terms of the rules of the High Court. The respondent contends that r 132 (already cited) did not rule out the introduction of a new cause of action in the circumstances stipulated therein. Mr *Mpofu* for the appellant, correctly contends that the provisions of r 132 are subservient to those of r 134 which provides as follows:

> "A summons or declaration may with the leave of the court or a judge be amended to substitute or to include a cause of action arising after the issue of summons.
>
> Provided that in the opinion of the court or judge such an amendment does not change the action into, or add to it, an action of a substantially different character which would more conveniently be the subject of fresh action."

My reading of the two provisions together suggests that while r 132 relates to proposed amendments generally, r 134 refers specifically to proposed amendments seeking to substitute causes of action arising after the issue of the summons in question. It would thus appear, as correctly contended for the respondent, that there is no provision that specifically prohibits or qualifies proposed amendments that seek to introduce a new cause of action that would have arisen before the summons were issued.

In casu the fact that the alleged theft occurred before the summons in question was issued, is not disputed. The issue rather is that the claim had, as of the date of the filing of the application to amend the declaration, prescribed. One can envisage a cause of action which, *albeit* arising before the summons in question are issued, has nevertheless not prescribed at the time an amendment is sought to include it in the same summons. This in my view is the type

of amendment that may appropriately be considered in terms of r 132. Different considerations come into play, however, where the new cause of action sought to be introduced, has prescribed as of the date of the filing of the application. Rule 132 is not to be read as allowing a court to order amendments to pleadings in a manner that would effectively resuscitate a cause of action that has, by law, prescribed. Clearly subsidiary legislation cannot undermine or alter substantive law.

Mr *Mpofu* in this respect correctly cites the following apposite *dictum* from the case of *In Coutts & Co v Ford & Anor* 1997(1) ZLR 444(H) at 443B where CHIDYAUSIKU J (as he then was) stated as follows:

> "Thus the clear intention of the legislature as expressed in the above provision is to make prescription a matter of substantive law as opposed to procedural law. The above provision clearly extinguishes the debt as opposed to merely barring the remedy."

The same point was aptly articulated by the court as follows in the case of *Evins v Shield Insurance Co Ltd* 1980(2) SA 814(A) at 836C-E;

> "Where the plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run ……."

On the basis of the law and authorities on prescription, it was clearly not open to the respondent *in casu* to seek an amendment to its declaration, whose effect would have been to introduce a prescribed cause of action that is theft. It follows that the judge *a quo* misdirected himself in disregarding this relevant fact and ordering the amendment in question. This court can therefore properly interfere with the judge's discretion in this respect.

In the final result, the appeal ought to succeed only to that extent, while the rest of the appeal, having no merit, ought to be dismissed. However, since the appellant has

partially been successful in its appeal, I consider it fair and just that it be ordered to pay only a part of the costs.

It is accordingly ordered as follows:

1. The appeal is allowed in part.
2. Paragraph 1 of the order of the court *a quo* is amended by the addition of the following:

   "Provided that all reference to the claim of theft against the second defendant personally, is expunged from the said annexure 'D'."
3. The rest of the appeal be and is hereby dismissed.
4. The appellant shall pay only two thirds of the costs of this appeal.

GUVAVA JA: I agree

MAVANGIRA JA: I agree

Mtetwa & Nyambirai, applicant's legal practitioner
Mbidzo, Muchadehama & Makoni., respondent's legal practitioners