CARRACK INVESTMENTS (PVT) LTD

Versus

SOI LING JULIANA MEADLEY

And

CARL CYRIL CHICKSEN

And

THE REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 24 JUNE & 23 SEPTEMBER 2021

Opposed Application

Advocate P. Dube for the applicant
T. Moyo-Masiye for 1st respondent
J. Sibanda for 2nd respondent

MOYO J: This is an application to amend pleadings. The founding affidavit refers to the notice of intention to amend as the one that gives the nature of the amendments sought. The founding affidavit goes further to state that the court has a wide discretion to grant an amendment to pleadings where such amendment is not *mala fide* and will not lead to an incurable prejudice to the other party. Applicant further states that the amendment will allow a proper ventilation of the issues between the papers. The applicant further states that the delay in seeking the amendment is not great.

The reason for seeking the amendment is at paragraph 13 of the founding affidavit where it is stated that the amendment is being sought after confidential consultations with the applicant and its legal team which now includes instructed counsel who were not present previously.

Both 1st and 2nd respondents have opposed the application. 1st respondent avers that the notice of amendment was filed after pleadings had been closed and the matter had already gone past a pre-trial conference between the parties. At

the pre-trial conference the judge handling the matter advised the applicant to first dispose of its application for amendment.

1st respondent contends that applicant seeks to introduce an alternative claim. 1st respondent contends that a sufficient explanation must be given for seeking an amendment and that where it is not sought timeously an account must be given for failure to seek to amend timeously.

1st respondent contends that this application to amend was brought 8 months after applicant had filed its plea and counter claim. 1st respondent also contends that the explanation given by the applicant as the reason for seeking an amendment lacks a detailed explanation which is fatal to the application.

1st respondent also attacks the detail given in the answering affidavit and contends that an application stands and falls by its founding affidavit being the foundation of the application. 1st respondent also contends that applicant wants to file an exception after having pleaded and that the exception will then be heard first at trial which position is not supported at law.

1st respondent also contends that the 2nd and 3rd proposed amendments are not motivated at all in the founding affidavit. The 1st respondent also attacks what applicant has stated in its answering affidavit that the full amendment is yet to be pleaded and yet for the court to grant the amendment it must be aware of the full nature and extent of the amendment.

1st respondent also contends that applicant contradicts itself and that the proposed amendment will leave the pleadings in a worse position.

1st respondent further argued that the application is born out of *mala fides* and should be dismissed with punitive costs. 2nd respondent contends that as an agent he could not have been sued personally and that is what the proposed amendment seeks to do. 2nd respondent also attacks the basis and the rationale for the amendment and avers that it is unfounded.

It is my considered view that there are numerous problems with this application as it stands. The founding affidavit seems to have been drafted with the mind that an amendment will be granted for the mere asking. Applicant's affidavit seems to paint a picture that an amendment will be granted at any time it is sought and at the convenience of the litigant seeking to amend. This is clearly not the position of the law.

A case must be made for the amendment and a reasonable explanation must be given as to why the amendment was not sought timeously.

The founding affidavit simply refers to the notice of intention to amend and its contents. It does not explain the nature, extent and the necessity of the amendments in order to get the court's confidence.

In fact the founding affidavit does not try to make a case for or motivate for the amendment at all. The court is not even told in the founding affidavit what necessitates the amendment. No reasonable explanation is given in motivation for the amendment neither is it reasonable explanation given for the delay in seeking to amend. There is no sufficient detail in the founding affidavit as to the nature and extent of the amendment being sought. The founding affidavit does not tell the court why the amendment was not sought earlier and in fact paragraph 13 of the founding affidavit shows that applicant does not seem to care about the delay and does not find it necessary to explain itself to the court.

Other than emphasizing the court's discretion in such matters, applicant does not state why in this case the court should exercise its discretion in its favour. No motivation at all has been made for the amendment being sought on the alternative claim.

Applicant just plays down the prejudice that could be suffered by the respondents and simply in 2 sentences wishes it away. It is my considered view that no proper foundation has been laid by the applicant for the relief it seeks. Amendments are not granted simply because a litigant has told the court in not so many words that it seeks to amend its pleadings. A sound case must be made and strong motivation given for an amendment so that the court is satisfied that a proper case has been made for the bid to amend. It is trite that the avenue to amend pleadings is not there for the mere asking.

A discretion must be exercised by the court after due consideration of a proper case having been made for such amendment. The court cannot exercise its discretion in favour of a litigation who rather than pleading for a cause to amend, seems to be instructing the court that it wants to amend and is entitled to. That kind of application does not pass the test for making a case for an amendment. A case must surely be made for any cause or relief that a litigant seeks and failure to make such a case means that the applicant's case should fail.

I accordingly find that applicant has failed to make a case for the relief that it seeks.

I accordingly dismiss the application with costs.

Malinga & Mpofu Legal Practitioners, applicant's legal practitioners
Messrs Masiye Moyo & Associates, 1st respondent's legal practitioners
Job Sibanda & Associates, 2nd respondent's legal practitioners