NICOZ DIAMOND INSURANCE CO.
versus
MARIAN TIGERE
and
BENJAMIN TSANGAIDZO
and
ANTONIO IBRIHIM JIVA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 28 May 2010 & 22 September 2010

Mr *Mpofu,* for the applicant
Mr *Machingambi,* for the 1st respondent
Mr *Drury,* for the 2nd respondent

BHUNU J: Both plaintiffs are employees of the Reserve Bank of Zimbabwe. On 21 October 2008 they were traveling from Mutare to Harare in a Toyota Camry registration number ABF 9500 in the course of duty.

After the Mutare River Bridge and at the 235.5 kilometer peg their motor vehicle had a violent collision with a vehicle driven by the second defendant and insured by the first defendant.

Both plaintiffs sued both defendants for damages arising from the second defendant's alleged negligent driving. The first plaintiff's claim was for US$125 000.00 plus costs and interest whereas that of the second plaintiff was for US$190 000.00 as well as interest and costs of suit.

In its pleadings the first defendant omitted to plead that the plaintiffs' claims were limited to claims sounding in Zimbabwean Dollars only in terms of the second defendant's insurance policy cover.

The first defendant has now filed a chamber application for an amendment seeking to incorporate the plea limiting the plaintiffs' claims to the Zimbabwean Dollar currency only. The application is opposed mainly on the basis that the applicant is seeking to withdraw an admission. The applicant has not filed an affidavit from its then lawyers explaining the omission.

The applicant has however sought to explain the omission by saying that although they gave their erstwhile legal practitioners specific written instructions to incorporate the plea they inexplicably or inadvertently omitted to factor in the plea.

The question whether liability incurred in Zimbabwean Dollars before the advent of the multi foreign currency regime is convertible to foreign currency is an unsettled important moot point yet to be determined by the Supreme Court.

The general rule concerning amendments of this nature was spelt out in *Moolman v Moolman & Another 1927 CPD 27 @ 29* where WATERMEYER J observed that,

> "… the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendments would cause an injustice to the other side which cannot be compensated by costs or in other words unless the parties cannot be put back for the purposes of justice in the same position they were when the pleading it is sought to amend was filed."

WESSELS J had previously in *Rishton v Rishton 19 12 TPD 718* had quoted with approval the dicta in *Clarapette and Co. v Commercial Union Association (3 WR) 262 @ 263* to the effect that,

> "However negligent or careless may have been the first omission and however late the proposed amendment the amendment would be allowed if it can be made without injustice to the other side, there is no injustice if the other side can be compensated by costs."

It is clear to me that the object regarding the rules regulating the amendment of pleadings is to do justice without muzzling or prejudicing either part. R.133 seeks to give effect to that object by providing 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."

In this case the cardinal issue between the parties is the extent of the first defendant's liability towards the plaintiffs in terms of its indemnity insurance with the second defendant. In my view an amendment which seeks to assist in the determination of the extent of the plaintiffs' quantum of damages can hardly be said to be unjust or prejudicial to either party. On the contrary failure to factor in the amendment may result in gross injustice. This is for the

simple reason that there can be no justice in this case without determining the extent of the applicant's liability according to law.

That being the case the application can only succeed.

**It is accordingly ordered**:

1. That para 2 of first defendant's plea in case No: HC 2938/09 be and is hereby amended to read: "Admitted, to the extent that the Insurance Cover extended to second defendant {the insured) was in Zimbabwean Dollars. The policy will cover any third party liability arising and sounding in Zimbabwean Currency. The contract between first and second defendants did not extend to covering liability sounding in foreign currency. Wherefore, in the circumstances, first defendant denies liability as plaintiffs' claims are in United States Dollars.

2. Costs are to be costs in the cause.

……..
By the Judge