GUY MACILWAINE
versus
PITLOCHERY ESTATES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 18 and 22 June 2015

Opposed Application

T Zhuwarara, for the applicant
DM Zoroma, for the respondent

MAKONI J: The applicant approached the court seeking an order to allow an amendment it seeks in terms of notice filed under HC 3300/11 on 8 September 2014 and that costs be in the cause. The Notice of Intention to Amend Defendant's plea reads as follows:

"1. **AD PARA 4**

By the amendment of this paragraph to read as follows:

"This is denied. The insurance were not paid for on and behalf of the Defendant buy for and on behalf of the Defendant's company, Linkon Plantations (Private) Limited."

2. **AD PARA 5**

By the amendment of this paragraph to read as follows:

"This is denied. The premiums claimed were not paid for and on behalf of the Defendant but for and on behalf of his company, Linkon Plantations (Private) Limited.

3. **AD PARA 7**

By the amendment of this paragraph to read as follows:

"This is denied. The two suss were payment by Plaintiff in settlement of monies owed to the Defendant's company in the form of contractual bonuses."

4. **AD PARA 8.1**

By the amendment of this paragraph to read as follows:

"This is denied. The bullying heifers belong to and were taken by Linkon Plantations

> (Private) Limited. In any event, it was agreed between the Plaintiff and Linkon Plantations (Private) Limited to swap steers for heifers, which agreement Plaintiff admitted in assisting with original removal of the cattle to Chinhoyi."

The background to the matter is that the respondent issued summons against the applicant on 1 April 2011. The applicant filed its Plea and Claim in Reconvention on 29 June 2011. The applicant thereafter amended its pleadings on two occasions. Firstly he filed a Notice to Amend its plea on 26 October 2011. The respondent filed its amended plea on 31 October 2011. Secondly he filed a Notice to Amend its Claim in Reconvention on 10 April 2012. The respondent pleaded to the amendment on 17 August 2012.

Pleadings in the matter were closed and the matter was set down for a pre-trial conference where it was referred to trial in terms of a joint pre-trial conference minute filed on 25 March 2014.

The matter was set down for trial to be heard on 8 September 2014. On that date, the applicant filed another Notice of Intention to Amend Defendant's Plea. The respondent withheld its consent and the matter was removed from the continuous roll pending the finalisation of the applicant's application to amend its plea.

The effect of the amendment is as follows:

i) Ad para 4 of its plea: the applicant had partially admitted liability for half of the sums claimed by respondent. In the amendment, he seeks to deny liability completely and aver that the sums claimed were paid for and on behalf of his company Linkon Plantations (Pvt) Ltd. (the company).

ii) Ad para 5

Defendant had admitted liability. In the amendment he denies liability on the basis that whatever was paid was for and behalf of the company.

iii) Ad para 7

In the plea the applicant denied liability on the basis that the sums being claimed by the plaintiff were payments made by plaintiff in settlement of monies owed to him in the form of contracted bonuses.

In the amendment he is saying that the sums were payment by plaintiff in settlement of monies owed to the company as contracted bonuses.

iv) Ad para 8.1

The plaintiff, in his plea denied the plaintiff's claim for the return bullying heifers

on the basis that they belong to him in terms of an agreement with plaintiff to swop steers for heifers. In the amendment he denies liability for the claim on the basis that the bullying heifers belong and were taken by the company.

The law on this subject is settled. In terms of order 20 r 132 of the High Court Rules 1971, this court may at any stage, allow either party to amend his pleadings on such terms as may be just. Chinhengo J (as he then was) had this to say in *UDC Ltd* v *Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 at 216 E

> "The granting or refusal of an application to amend a pleading is a matter for the discretion of the court. The court has to exercise its discretion in a judicial way and in the light of all circumstances of the case"

Further down at p 216 H he stated

> "The 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 tired. 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 amendments are vague and embarrassing and therefore excipiable: *Levenstein* v *Levenstein* 1995 SR 91; 1955 (3) SA 615 (SR). 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 p 217 C he quoted with approval *Commercial Union Assurance Co Ltd* v *Waymark NO* 1995 (2) SA 73 (TK) where White J examined a number of cases dealing with amendments to pleadings and summarised the principles enunciated in the case as being:

> "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 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.'"

Mr *Zhangazha* for the applicant submitted that there was an error predicated on a misunderstanding of the law. The contract, the basis of the respondent's claim, was between the company and the respondent. He further submitted that the respondent's concern

regarding prescription of the claim would be cured by joinder of the company to the current proceedings.

Mr *Foroma* for the respondent contented that the respondent will be prejudiced in that it will not be able to successfully institute a claim against the company as the claim would have prescribed. He submitted that instead the applicant should have sought to join the company to the proceeding rather than seek to withdraw admissions he properly made. The fact that applicant opted to amend the pleas in circumstances were as a consequence. Respondent would be deprived of an opportunity to proceed against the company as a result of prescription proves the applicant's *mala fides*.

The main bone of contention is whether the amendment will cause an injustice to the other side which cannot be compensated by costs.

It is not in dispute that if the amendment is allowed, thereby allowing the applicant to withdraw the admissions he had made earlier on, the claim against the company would have prescribed. Mr *Zhangazha* suggested a joinder of the company as a defendant. He even tried to make an undertaking, from the bar, that if the amendment were to be allowed, the company would not raise the issue of prescription.

I agree with Mr *Foroma*'s submission that joinder of the company will not purge prescription and that Mr *Zhangazha* cannot make any undertakings on behalf of a company which he was not representing. The applicant could abandon its current lawyers and go to another lawyer who would not be bound by the undertaking made in court. The applicant culd have waived the issue of prescription in the answering affidavit and in the Heads of Argument.

The author Hebastein van Winsen: *The Civil Practice of the High Courts of South Africa* 5ed at 685summarise the position regarding the issue of an amendment involving a withdrawal of an admission as follows:

> "Where a proposed amendment involves the withdrawal of an admission, the court will generally require a satisfactory explanation of the circumstances in which the admission was made and the reasons for seeking to withdraw it. In addition, the court must consider the question of prejudice to the other party. If the result of allowing the admission to be withdrawn is to cause prejudice or injustice to the other party to the extent that a special order as to costs will not compensate him, then the application to amend will be refused."

In *casu*, there is no doubt that the respondent will be prejudiced or suffer an injustice if the amendment is allowed as it will not be able to prosecute its claim against the company as it would have prescribed. This prejudice cannot be compensated by an order of costs.

In light of the above I will refuse to allow the amendment and make the following order;

1) The application is dismissed with costs.
2) The applicant to pay the respondent's costs.

Coghlan, Welsh & Guest, applicant's legal practitioners
Sawyer & Mkushi, respondent's legal practitioners