ZIMBABWE MINING DEVELOPMENT CORPORATION
and
MARANGE RESOURCES (PVT) LTD
versus
GRANDWELL HOLDINGS (PVT) LTD
and
MINISTER OF MINES AND MINING DEVELOPMENT
and
ZIMBABWE CONSOLIDATED DIAMOND COMPANY
and
MBADA DIAMONDS (PVT) LTD

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 4 October 2023 & 23 May 2024

Opposed Application

J R Tsivama, for the applicants'
T Magwaliba, for the respondent
No appearance for the second to fourth respondents

TAKUVA J: The applicants move this court to exercise its discretion in terms of Rule 41(4) of The High Court Rules 2021 to grant it leave to amend their plea. The rule in terms of which the applicants seek to rely upon states that:

> "41(1) Any party wishing to amend a pleading or a document other than a sworn statement, filed in connection with any proceedings shall, notify all other parties of his or her intention to amend and shall furnish particulars of the amendment.
> (2) ……
> (3) ……
> (4) If an objection which complies with subrule (3) is filed within the period set out in subrule (2) the party desiring to amend may, within ten days, lodge an application for leave to amend."

Background

On 8 May 2023, the applicants' legal practitioners served the first respondent with the notice of intention to amend a plea in accordance with Rule 41(1). An objection in accordance

with Rule 41(3) was filed on behalf of the first respondent on 9 May 2023. The amendment not having been granted by consent or in default of objection by the first respondent, the applicants now require to satisfy this court that they deserve the indulgence of being permitted to amend their plea filed in 2020.

The Law

The legal principles regulating the grant or refusal of an amendment are now settled. These were summarized in *Commercial Union Assurance Co. Ltd* v *Waymark N.O.* 1995 (2) SA 73 (TK) at 7 F – I as follows:

> "1.1 The court has a discretion whether to grant or refuse an amendment.
> 1.2 An amendment cannot be granted for the mere asking.
> 1.3 The applicant must show that *prima facie* the amendment has something deserving of consideration, a triable issue.
> 1.4 The modern tendency lies in favour of an amendment if such facilitates the proper ventilation of the disputes between the parties.
> 1.5 The party seeking the amendment must not be *mala fide*.
> 1.6 The amendment must not cause an injustice to the other side which cannot be compensated by costs.
> 1.7 The amendment should not be refused simply to punish the applicant for neglect.
> 1.8 A mere loss of the opportunity of gaining time is no reason, in itself, for refusing the application.
> 1.9 If the amendment is not sought timeously, some reason must be given for the delay."

In *UDC* v *Shamva Flora* 2000 (2) ZLR 210 (H) the court stated that:

> "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 tried. The liberality is only affected where to allow the amendment would cause considerable inconvenience to the court or prejudice to a party where there is no prospect on the point raised in the amendment succeeding or where matters set out in the amendment are vague and embarrassing and therefore excipiable."

Applicants' Case

Applicants seek leave to amend their plea filed under case number HC 6281/20. The basis upon which this application is made is that in their original plea they did not raise the point that they considered the joint venture agreement signed with the first respondent to be unconstitutional and contrary to public policy of Zimbabwe on account of their intention to allow the first respondent to mine in perpetuity thus depriving future generations of a right to also share and benefit from the country's natural resource.

Secondly, it was contended that it has since come to the applicant's knowledge that the first respondent has known since 2013 that the special grants which form the basis of their claim had since expired but did not do anything about that.

As regards the unconstitutionality of first respondent's claims, applicants submitted that where an allegation of unconstitutionality is made and a party wishes to raise it as a defence, the court is obliged to at least consider it. The same applies to the argument on public policy. Applicants relied on the principle set out in *Makani & Ors* v *Arundel School & Ors* 7/16 at p 24 - 25 where it was stated:

> "It is trite that a contract concluded in contravention of the written or unwritten law, or one that is contrary to public policy, is susceptible to being struck down and rendered of no force or effect. The doctrine of sanctify of contracts is obviously subject to constitutional limits. As was observed in *Bredenkamp & Ors* v *Standard Bank of South Arica Ltd* 2010 (4) SA 468 (SCA) at para 39, every contract or institutional rule must pass Constitutional muster.

Again in *Bark Huizen* v *Napier* 1997 (5) SA 323 CC) at para 15, it was emphasised that:

> "All law including common law of contract, is now subject to Constitutional control. The validity of all laws depends on their consistency with provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda* is therefore, subject to constitutional control."

The point being emphasised is this that *in casu,* the argument relating to violation of the Constitution and the public policy of Zimbabwe certainly deserves consideration as one is looking at an agreement which sought to give one private company, the right to mine diamonds in the Chiyadzwa area in perpetuity to the exclusion of every other person and all future generations and yet the legislature had specifically provided through the Mines and Minerals Act, that a special grant should be issued for a specified period.

Applicants further argued that first respondent's objections based on the delay in finalising the matter and in bringing forward the amendment are without merit as these cannot stand in the way of an amendment unless the prejudice caused to the first respondent cannot be compensated by an order of costs. For this position, reliance was placed on *Lourenco* v *Raja Dry Cleaners and Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 157 (SC) at 159 E – F where the court stated as follows:

> "The main aim and object in allowing an amendment to pleadings is to do justice to the parties by deciding the real issues between them. The mistake or neglect of one of the parties in the process of placing the issues before the court and on record will not stand in the way of this unless the prejudice caused to the other party cannot be compensated for in an award of costs. The position

> is that even where a litigant has delayed in bringing forward this amendment, as in this case, this delay in itself, in the absence of prejudice to his opponent which is not remediable by payment of costs, does not justify refusing the amendment."

Finally, on this first proposed amendment it was submitted by the applicants' that first respondent will not suffer any prejudice which cannot be compensated through an award of costs. That said, first respondent will still have an opportunity at the trial to demonstrate that the agreements did not violate the Constitution or public policy of Zimbabwe. On these reasons, it was submitted that no valid reason has been advanced for resisting the intended amendment.

The second amendment sought, relates to first respondent's claims having prescribed. The factual basis is the allegation that first respondent got to know as far back as 2013 that the special grant that entitled it to carry out mining activities and which the applicant, would also want to specify in the amendment, had expired and not been renewed. As for the explanation for the delay in pleading the fact that the first respondent came to know about the expiry of the special grants in 2013 the applicants pointed out that this is something they picked up from the fourth respondent's bundle of documents for trial, more specifically the financial statements by its auditors as the applicants were now preparing for trial. Applicants contend that this explanation is not disputed by first respondent and it is a reasonable one given the quantity and sheer size of the first respondent's bundle of documents for trial running into at least four volumes of thousands of pages.

As regards the first respondent's assertion that the applicants want to introduce a new cause of action, applicants submitted that this is not a valid ground for opposing an amendment because the first respondent would still have an opportunity to replicate to such defence and even lead evidence in rebuttal at the trial. Applicants denied that the issue of prescription was *res judicata* arguing that what was dismissed was an application for condonation of late filing of a special plea and not the defence itself. Therefore, there is nothing that prevents the applicants from relying on the defence of prescription in line with the terms of s 20 (2) of the Prescription Act [*Chapter 8:11*].

Reliance was also placed on *Aimler's Precedents of Pleadings* 9 ed (2018) at p 305 where it was stated that:

> "The proper way of raising prescription in action proceedings is by way of a plea or special plea, and not by way of exception. The reason is that the plaintiff may have a valid answer (such as delay or interruption) to the plea of prescription, which may be raised in replication."

It matters not whether the document raising prescription is a special plea or ordinary plea or even an opposing affidavit, so the argument went.

Finally, it was applicants' case that the first respondent's resistance to the proposed amendments is influenced by a desire to prevent valid defences from being considered by the court and nothing else. Therefore the application for an amendment should be granted as prayed for.

In casu, the original plea in para 5 admitted the terms of the joint venture agreement but averred that the parties overlooked the fact that the special grants could only be issued for a specific period and not in perpetuity. The amendment seeks to state that the joint venture agreement was unconstitutional and contrary to the public policy of Zimbabwe to the extent that it sought to grant the fourth respondent the right to carry out mining activities in perpetuity.

First Respondent's Case

The first respondent and the applicants are agreed on the legal principles regulating the grant or refusal of an application to amend pleadings. They relied on more or less the same precedents to support their submissions. Essentially they agreed on the approach of our courts when dealing with amendments to pleadings. However, first respondent considered the factors mentioned in *UDC Ltd* v *Shamva Flora (Pvt) Ltd* 2000 (2) and argued as follows:

1) **There is no explanation for the amendment**

   The submission is that since there is no cogent explanation in the founding affidavit why the plea did not raise the defences at the relevant time, the applicants seek the amendment for the mere asking. The applicants have therefore failed to set out the basis upon which the court may exercise its discretion.

2) **The intended defences have no prospects of success**

   The argument here is that the applicants must demonstrate a *prima facie* defence. It was submitted that in a plea, a party is restricted to pleading defences and cannot plead a cause of action. In that regard, a plea has been likened to a shield and not a sword.

   The amendment on the other hand seeks to state that the joint venture agreement was unconstitutional and contrary to the public policy of Zimbabwe to the extent that it sought to grant the fourth respondent the right to carry out mining activities in perpetuity. According to the first respondent, this amendment has no prospects of success as it introduces a new issue and the court has no power to allow such an amendment. The

amendment is alleged to be incompetent as the court cannot declare the agreements unconstitutional or contrary to public policy on the basis of a plea as opposed to a separate claim.

Equally incompetent is to declare special grants 5244, 5247 and 5249 invalid in an intended plea. That can only be done in support of a separate cause of action declaring them as such. In any event so argument goes, the said special grants are no longer in existence having been unprocedurally and unlawfully cancelled and replaced by special grants in favour of the third respondent which is currently mining at the area formerly by special grants 5244, 5247 and 5249.

Further, it was submitted that the intended defence is simply spacious in that it cannot succeed where the authority that issued the special grants has not been cited as a party to the proceedings – see *Rose* v |*Arnold & Ors* 1995 (2) ZLR 17 (H). Finally first respondent submitted that as a consequence of the above, the intended defence is academic and purely meant to have the court deal with a matter of no practical consequence.

As regards the defence of prescription, first respondent argued that it is *res judicta* in that the applicants raised it before CHILIMBE J and lost – see HH 636/22 in which the court found that the special plea was improper and condonation was denied. First respondent further submitted that according to the authorities cited in the heads of argument for the applicants, a plea of prescription may either be taken in a plea or in a special plea. This does not mean that a party who has elected to take it in a special plea but fails is entitled to a second bite at the cherry and raise the same through an amendment to the plea. According to first respondent doing so is a "patent abuse of court processes." In the result, all the judgments cited by applicants are inapplicable.

(3) **The position in favour of granting amendments**

First respondent's contention is that the modern trend in favour of granting amendments does not apply in the present ease. This is so because the amendments sought have nothing to do with the real dispute between the parties.

(4) **The *mala fides* of the applicants**

The argument here is that applicants are not entitled to the indulgence which they seek because they did not disclose the fact that the attempt to introduce the defence of prescription

was rejected by the court. It is alleged the applicants' intention was to deceive this court. Since a party who seek an indulgence must be candid with the court, the applicants have failed – *Grapeak Investments (Pvt) Ltd* t/a *Faffy Bar* v *Delta Operations (Pvt) Ltd* t/a *National Breweries* 2001 (2) ZLR 551 (H).

(5) **The Prejudice to the first respondent**

The prejudice was said to arise from the following factors:

(a) the intended amendment will result in a new trial;

(b) a new replication will have to be filed;

(c) a new pre-trial conference will have to be conducted;

(d) further discovery may be necessary;

(e) new issues for trial will have to be defined; and

(f) a new trial date will only then be applied for.

Further, it was submitted that a three year delay is enormous especially where there is no meritable reason why it is being sought so late. Applicants simply seek to replead a defence that previously failed. This will render this court's judgment in HH 623/22 irrelevant. No order of costs can ever compensate for that.

(6) **No punishment to the applicants**

The contention is that the refusal of an amendment will not result in a punishment to the applicants for their neglect because they have indeed been tardy and not candid. For that reason they do not deserve the exercise of a discretionary power in their favour.

(7) **Costs**

Since the application for the amendment is motivated by oblique purposes, it was submitted that it must be dismissed with an order for costs on a punitive scale.

Analysis/Application of Law to the Facts

In such cases, the court is required to apply the legal principles enunciated in the Commercial Union Assurance Co. case (*supra*). This should be done in such a way that all the first respondent's objections are considered. As regards the submission that there is no explanation for the delay in pleading that the first respondent knew about the expiry of the special grants in 2013. I take the view that this submission has no merit. The explanation was proffered and it is that the applicants' lawyers stumbled upon this information from the fourth respondent's bundle of documents for

trial. Specifically these documents were fourth respondent's financial statements by its auditors. This discovery occurred as applicants were preparing for trial. Noteworthy is the fact that this explanation was not disputed by the first respondent. In my view this explanation is a reasonable one.

The applicants in my view have demonstrated the existence of *prima facie* defences which carry good prospects of success. The constitutional and public policy argument arises from facts of the matter. It enjoys bright prospects of success as the agreement is apparently contrary to constitutional provisions that bar the granting of rights to mine in perpetuity. Therefore, the issue deserves to be considered. As was stated in *Makani*'s case, the doctrine of sanctity of contracts is obviously subject to constitutional limits. Every contract or institutional rule must pass "Constitutional muster." It is trite that the validity of all laws depends on their consistency with provisions and the values that underlie the Constitution.

I am not in agreement with the first respondent's submission that this amendment introduces new issues in that in the applicant's Summary of Evidence, it was mentioned that the applicants would lead evidence demonstrating that the agreements in issue were contrary to public policy. Further, applicants later realized that for that evidence to be of any value, the defence had to be properly pleaded. I find such an explanation to be genuine and reasonable.

In any event, the main aim and object in allowing an amendment to pleadings is to do justice to the parties by deciding the real issues between them. A *mistake* or *neglect* of one of the parties in the process of placing the issues before the court will not stand in the way of this unless the prejudice caused to the other party cannot be compensated for in an award of costs. See *Lorenco*'s case (*supra*).

The factors outlined by the first respondent as constituting prejudice are all misplaced. Fundamentally, first respondent complains about the delay to finalise the trial. In my view, this type of prejudice can clearly be compensated by an award of costs. It must be noted that this court has the greatest latitude in granting amendments. After all, the first respondent will still have an opportunity at the trial to demonstrate that the agreements did not violate the Constitution or public policy of Zimbabwe.

The first respondent's objections to the intended amendment on the ground that it will introduce a new cause of action and is an attempt to bring back the defence of prescription which

the applicants had previously unsuccessful sought to raise through a special plea when their application for condonation of the special plea was dismissed by this court (per CHILIMBE J) are not valid grounds for opposing an amendment.

The reasons for this position are not difficult to find. An examination of CHILIMBE J's judgment referenced HH 636/22 reveals that what was dismissed was an application for condonation as it had been taken out of time. Therefore, it is inaccurate to state that "the question of prescription was subject to extensive debate between the parties and the pronouncement by CHILIMBE J …." Further, I disagree with the first respondent that applicants cannot take the defence of prescription as they are barred from doing so. The defence of *res judicata* is inapplicable as what was dismissed was an application for condonation of late filing of a special plea and not the defence itself.

In terms of s 20(2) of the Prescription Act [*Chapter 8:11*] a party can plead prescription in its plea on the merits. The section provides:

> "A party to litigation who invokes prescription shall do so in the relevant documents filed of record in the proceedings provided that a court may allow prescription to be raised at any stage of the proceedings."

Accordingly, a special plea is not the only procedural device that can be used to raise the defence of prescription.

As was stated in Aimler's Pleadings (*supra*) the proper way of raising prescription in action proceedings is by way of a plea or special plea, and not by way of exception. It is to be noted that prescription may be raised at any stage of the proceedings. It is neither here nor there that the document through which prescription is raised is a "special plea or ordinary plea. See *Muteswa Wholesalers (Pvt) Ltd & Ors* v *Delta Zimbabwe Ltd* 2019 (3) ZLR 779 (S).

In my view, the fact that the defence of prescription was initially raised as a special plea that was deemed not to be properly before the court does not in itself preclude the applicants from raising it in any other manner that does not run fowl to the rules of the court as long as that defence was not disposed of on the merits. It is not *res judicata* and as long as it raises a triable issue it cannot be said to be *mala fide*.

Further, *in casu*, a factual averment is being made to the effect that the first respondent became aware of the expiry of the special grants in 2013 but only issued summons claiming

damages arising from the failure to carry out mining activities through these same special grants in 2020. *Prima facie* first respondent's claim has prescribed and it would be free to replicate by either alleging interruption of such prescription or any other defence available to it. Accordingly, there is no prejudice to talk of in these circumstances.

I find also that the proposed amendments call upon the court to deal with the real or entire dispute between the parties. This the court should do in order to do justice between the parties. Granting these amendments is consistent with the modern trend as they deal with the real issues between the parties. I find that applicants are *bona fide* as their failure to disclose facts relates to the application for condonation and not the defence of prescription. They failed to disclose a non-material fact in my view. Therefore, they cannot be described as not being candid with the court and therefore *mala fides*.

I take the view that to refuse these amendments would simply amount to punishing the applicants for their tardiness or neglect. This is contrary to the law regulating amendments.

As regards costs, I disagree with the submission that this application has been motivated by oblique purposes warranting an order for costs on a punitive scale.

Disposition

In the result it is ordered that:

1) The applicants be and are hereby granted leave to amend their plea in case number HC 6281/20.
2) The applicants shall file their amended plea in HC 6281/20 within (48) hours of the issuance of this order.
3) The respondents may make any consequential adjustments to their pleadings within twelve days of this order and the applicants shall be liable for such costs.
4) There shall be no order as to costs in respect of this application.

Messrs Swayer & Mkushi, first & second applicants' legal practitioners
Messrs Magwaliba & Kwirira, first respondent's legal practitioners