JEREMIAH HARUNAVAMWE
versus
MARVELOUS MUKATA

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 26 May & 24 August 2022

Civil Appeal

G Mambwe, for the appellant
Respondent in person

TSANGA J: This is an appeal against the Magistrate's decision allowing the respondent to amend her summons in the court below. The context is as follows: In 2014, the appellant accidentally damaged the respondent's car which he was driving without the respondent's consent. In November 2016, the parties entered into an agreement whereby the appellant accepted liability. A memorandum of agreement was then signed in which the appellant and one other undertook to replace the vehicle within three months. It was further agreed that the replacement vehicle should not exceed 100 000 km and that the value of the vehicle was US$4 500.00. The respondent was also to pay further US$350.00 being legal fees incurred in coming up with the agreement. The vehicle was to be in good working order or equivalent to a recent import vehicle from Japan. For clarity from the onset as to where the dispute now lies, that agreement read as follows:

> "Whereas the debtors unconditionally accept that they are jointly and severally liable to replace the creditor's vehicle, a Honda Fit registration no. ACX7052 damaged beyond economic repair on the 5th of October 2014 while being driven by Jeremiah Harunavamwe who had received it from Farai Weston Manezhu without the consent and knowledge of Marvelous Mukata.
>
> AND WHEREAS the debtors make an undertaking to replace the vehicle within 2 months of signing this agreement
> And whereas Marvellous Mukata has accepted the offer of restitution.
>
> IT IS FURTHER AGREED AS FOLLOWS:
> 1. The mileage of the replacement motor vehicle shall not exceed 100 000km
> 2. The agreed value of the vehicle USD4 500.00(Four Thousand Five hundred dollars
> 3. The vehicle shall be in good working order or equivalent to a recent import from Japan

> The debtors shall meet the costs of this agreement in the sum of USD350.00 (Three hundred and fifty dollars)."

The appellant having failed to deliver the vehicle as agreed, the respondent herein then issued summons in the Magistrate's Court on 18 July 2019 in which she claimed payment of the sum of US$4 850.00 and that this be paid in foreign currency together with interest at the stipulated rate from the 1st of March 2017 to the date of final payment.

An appearance to defend was entered whereupon the respondent had applied for summary judgment which was reversed on appeal in July 2021. Following the dismissal of summary judgment in January 2022, the respondent herein then sought to amend those summons to seek the replacement of a Honda Fit as per original agreement instead of the money she had claimed in the summons. In simple words, she resorted to the claim in agreement as originally captured having realised that the amount in the summons would be paid in the amount of RTGS or as ZW$4 500 which would be in sufficient to replace the motor vehicle.

The appellant opposed the application to amend in the court below on the basis that the respondent herein was now seeking specific performance of an agreement entered into in 2016 which by operation of the law, had prescribed. The appellant had also argued that the claim for specific performance would not have been entertained by the court for want of jurisdiction.

The respondent, as the applicant, argued that the matter was not yet prescribed on the basis that summons were issued in 2019 and that the matter had not yet been finalised. The respondent had further insisted that the court had jurisdiction by virtue of Statutory Instrument 227/2020 whereby the magistrate's courts can deal with actions for delivery up to the value of ZWL3 000 000.00.

The court below allowed the amendment of summons as sought by the respondent. In allowing the amendment of summons, it reasoned that the approach is to allow amendment of summons even at a late stage during trial unless the amendment would cause prejudice to a party. The court further noted that the cause of action emanated from the agreement which the parties had entered into and that the agreement was not in dispute. It concluded that the applicant would not suffer prejudice if the summons were amended in line with the agreement that the parties entered into which forms the basis of the respondent's claim.

The appellant appeals on the following grounds:

1. The magistrate grossly misdirected herself on the law when she concluded that the respondent sought the delivery of a motor vehicle when it is clear that respondent's amended prayer sought replacement of a Honda Fit.
2. The magistrate grossly misdirected herself on the law by the finding that the appellant will not suffer any prejudice when it is clear it was never contemplated by the parties that the appellant would be ordered to replace a motor vehicle without an option to pay an agreed amount.
3. The magistrate erred at law when she concluded that the amendment does not amount to a replacement of the claim before the court with a new one.
4. The magistrate erred at law when she avoided making a ruling on a pertinent issue that the new claim the respondent sought to bring up had prescribed.
5. The magistrate erred at law when she failed to address the issue that the court will not have jurisdiction if the relief sought by the respondent is granted.

The prayer sought is that the appeal succeeds with cost and that the ruling of the court *a quo* be substituted with a dismissal to amend the summons with costs.

Submissions by the parties

The appellant submitted that in terms of s 14 of Magistrates Court Act [*Chapter 7:10*], the magistrate's court does not have jurisdiction to order specific performance without an alternative payment of damages. The amendment sought was said to be seeking specific performance without that option for damages. Counsel for the appellant also submitted that delivering and replacement are not the same thing and that the court erred in concluding that it had jurisdiction on the basis that what was being sought was delivery when it was specific performance. Delivery was said to be surrender of possession, the handing over of a document or money whereas replacement has the connotation of putting something new in the place of. In this instance, the crux of the argument was that there was no merx to be delivered. Also argued was that the effect of the amendment would be to grant specific performance without the option of damages.

With regards to the second ground of appeal, being the alleged error that the appellant would not suffer prejudice, the submission was that the parties agreed to a value of the car precisely so that the replacement would be coupled with alternative damages. The appellant argued that he has always shown a willingness to pay the value agreed as the motor vehicle replacement value. The respondent having elected to seek the value of the motor vehicle, the

appellant's submission was that the respondent could not therefore seek to erode this right to honour the contract by either replacing the vehicle or by way of the replacement value.

In respect of the third ground that the error was in not finding that amendment amounted to a new claim, it was submitted that what was before the court was not an amendment but a substitute claim or essentially a new claim. It was said to amount to starting the matter afresh and to seeking a tactical advantage.

On the fourth ground regarding failure to make a ruling on prescription, the submission was that since the respondent had only sought damages only when she filed her summons, a period of three years had since lapsed from the date the claim became due. As such she could not launch what the appellant argued is a new claim having effectively abandoned that claim when summons were issued. It was argued that having abandoned the alternative claim she risked prescription and could not now escape the test of prescription.

Finally, on the fifth ground on lack of the court's jurisdiction due to seeking specific performance only, reliance was placed on s 14 of the Magistrate's Court Act which lays down the legal principle. The exception relating to delivery of immovable or movables was argued to be inapplicable since replacement and not delivery was said to have been sought herein. The order was therefore said to be a *brutum fulmen* on the basis that as a creature of statute, the court can only do what is permitted by law.

The respondent in return who was a self-actor stuck to the essence of what was agreed to in the agreement between the parties as having been the core to why she sought to amend her summons in the court below.

Law and Legal Analysis

The basic principle on amendment of pleadings are indeed that the court will grant such an application provided that there is no prejudice which cannot be cured by an order of costs occasioned by the need to postpone the matter. The courts consider whether the plaintiff has any prospects of success on the issue upon which the amendment is sought and secondly injustice would be occasioned to the defendant which cannot be remedied by an appropriate order of costs. The rationale for permitting amendments is at all times to ensure that all necessary issues in contention that require consideration to be considered by the court. See *ZDB Financial Services Limited v Farquest International (Pvt) Limited & Ors* HH-114-03; *Agribank* v *Nickstate Investments (Pvt) Ltd & Ors* HH-231-10; *Butau* v *Butau* HH-165-11. The court below found no prejudice and also found prospects of success regarding the proposed

ground of amendment in that the amendment was within the parameters of the agreement forming the cause of action.

On the first ground of appeal that the court erred in finding that the respondent sought delivery when what was sought was replacement, this ground of appeal makes little sense as the replacement was not in a vacuum. What the agreement sought to achieve for the respondent was of course delivery of a vehicle which would be sourced through the appellant by way of a replacement. The vehicle which would be ultimately put in the respondent's possession was specifically set out in the agreement. The ground of appeal merely seeks to split hairs and is accordingly dismissed.

The second ground is that the court erred in finding that appellant will not suffer any prejudice from the amendment when it is clear it was never contemplated by the parties that the appellant would be ordered to replace a motor vehicle without an option to pay an agreed amount. A reading of the agreement that the court relied upon clearly shows that issue of payment of money in the alternative was never couched as a fall-back position. The agreement was not couched as either/or. The value was clearly put in order to guide the appellant on how much was to be expended on the vehicle to be sourced and delivered to the respondent. Again, this ground of appeal does not take the appellant's grievance very far in the resolution of the actual dispute which is whether the summons can be amended without prejudice.

The third ground of appeal is in reality the core of the appeal. It is not in dispute that the parties entered into agreement where a vehicle was to be sourced and ultimately given to the respondent. The issue is whether that ground was abandoned. The third ground of appeal is that resorting to the agreement would be generating a new claim and not an amendment. What would make it a new claim is the assertion that the respondent no longer expected a vehicle but money at the time of the issuance of the summons in July 2019. The issue is therefore simply whether the respondent can be said to have signalled an abandonment of the claim for a vehicle when she issued summons for the value of the vehicle instead. Differently stated it is whether the lower court ought to have precluded her from resorting back to the agreement by denying the amendment of summons. The appellant's argument is that she deviated from the contract requiring specific performance and cannot be allowed to resile.

Non-performance by the appellant by failing to source and deliver the vehicle was evidently key to the issuance of summons for the value of the car even if the agreement had not been couched as either/or. It is the respondent who at the time of issuance of summons

deliberately then chose to claim the value. In a stable economic and monetary environment there would be no prejudice. The agreement was from 2016. It is trite that the prejudice to the respondent arises from the change in monetary policy in 2019 that turned values owed in United Stated dollars to their then RTGS equivalent. See the changes initially introduced by SI 33/2019. It was subsequently superseded by the Finance (No. 2) of 2019 (Act No. 7 of 2019). It is common knowledge that in the case of *Zambezi Gas Zimbabwe Pvt Ltd* v *NR Barber Pvt Ltd* SC 3/2020, the Supreme Court made it clear that the import of SI 33 of 2019 was to affect any value in United States dollar expressed as such before the effective date. Even though the agreement was not an either or agreement, the value of the replacement vehicle was expressed for purposes of guiding the appellant on the value of the vehicle to be purchased. The respondent then consciously chose to opt for the value of the vehicle when she herself issued summons. I do not see how the respondent can run away from her choice without causing prejudice to the appellant in light of the shifts in monetary policy and her own election to opt for a monetary value affected by that monetary policy. It matters not that she expressed a desire to be paid in foreign currency when she issued summons. Hers was not a foreign debt or obligation to be dealt with as an exception to the monetary policy. See *Breastplate Service (Private) Limited* v *Cambria Africa PLC* SC 66/2020 for a full discussion of the kind of debts that were contemplated as foreign debts and obligations.

Once she herself elected to issue summons for monetary compensation drawing on a value determined in 2016, then she herself undoubtedly chose to abandon her claim for the vehicle through specific performance. A resort back to the original claim for the replacement and delivery of the car by amending the summons would undoubtedly prejudice the respondent.

The fourth ground is closely related to ground three since if the claim had been abandoned it would indeed be affected by prescription which the magistrate would have considered had she not arrived at the conclusion that the agreement remained alive.

The fifth ground is that the magistrate erred at law when she failed to address the issue that the court will not have jurisdiction if the relief sought by the respondent is granted since the respondent would now be seeking specific performance without an alternative claim for damages. This is said to be contrary to s 14(d) of the Magistrates Court Act which reads as follows:

> **"14 When court has no jurisdiction**
> (1) No court shall have jurisdiction in or cognisance of any action or suit wherein—
> (*a*) is sought—

(i) ….
(ii)…..
(iii)…….
(*b*) ……
(*c*)……
(*d*) the specific performance of an act is sought without an alternative of payment of damages:
Provided that a court shall have jurisdiction to order—
(*a*) the rendering of an account in respect of which the claim does not exceed such amount as may be prescribed in rules; and
(*b*) the delivery or transfer of property, movable or immovable, not exceeding such amount as may
be prescribed in rules; or."

If the claim in the original agreement had not been signalled to have been abandoned in favour of a claim for money , then the appeal ground would lack merit based on the case of *Kunedzimwe* v *Musariri* 1999 (2) ZLR 205 (HC). Under similar circumstances, GARWE J as he then, was sitting in an appeal matter with CHINHENGO J, held that the court had jurisdiction where the value of certain cattle to be delivered had been indicated regardless of the absence of a claim for damages.

However, having found herein under the third ground of appeal that the amendment would effectively introduce a claim that had been abandoned to the prejudice of the respondent, this ground effectively falls away.

The appeal therefore succeeds on the third ground of appeal as to allow the amendment at this point would be prejudicial and would resuscitate a claim for specific performance which for all intents and purposes had been signalled to have been abandoned in favour of a monetary claim that had been legally affected by monetary policy at the time of the issuance of the summons.

This is however not a case where the respondent should be saddled with costs in a case clearly laced with contractual insincerity on the part of the appellant in the initial instance which has led the respondent to the courts.

Accordingly:

1. The appeal is up held with no order as to costs.
2. The judgment of the court *a quo* is overturned to read as follows:

(a) The application to amend summons be and is hereby dismissed with no order as to costs.

MAXWELL J, agrees……

Chikwangani Tapi Attorneys, appellant's legal practitioners