MASHONALAND TURF CLUB
versus
SUSAN PETERS
and
GIBSON INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 17 October 2019 and 6 November 2019

Notice of amendment

R Goba for the plaintiff
T. Magwaliba for 1st and 2nd defendants

DUBE-BANDA J: Plaintiff is a voluntary membership association and in terms of its constitution, it has capacity to sue and be sued in its own name. First defendant is a business person and second defendant is a company incorporated in terms of the laws of Zimbabwe.

In preparation for trial, I set-set down this matter for a pre-trial hearing in terms of r 183 of the High Court Rules, 1971 (Rules). At this hearing I raised with counsel the issue of the two processes filed by the plaintiff, being a process with the heading "notice of withdrawal of notice of amendment," filed on the 1st October 2019 (1st October Notice) and a "notice of amendment to plaintiff's summons and declaration filed on 9 October 2019 (9 October Notice). Counsel for the parties agreed that I deal with the issues raised by the notices filed by the plaintiff. I then heard submissions on the notices and at the conclusion of argument, I reserved my ruling. This is my ruling.

Background

To put the two notices into proper context, I need to give a detailed background that precedes these notices. On 9 October 2013, the plaintiff caused a summons to be issued out of this court against the first and second defendants seeking their eviction from stand number 19260 of stand number 14908 Borrowdale (Borrowdale Race Course); arrears for rent, electricity, water and rates in the sum of US$155 726-33; holding over damages in the sum of US$17 155-00 per month and further rent, rates, water and electricity charges as may be due on the date of eviction and costs of suit. Defendants filed a notice to defend, a request for

further particulars and a request for further and better particulars. These requests were duly answered by the plaintiff. Defendants' plea was filed on the 31st March 2014. In their plea, the defendants put in issue plaintiff's averments and prayed for the dismissal of the action with costs.

On 10 October 2016 plaintiff filed with this court a "notice of amendment to plaintiff's summons and declaration" (10 October 2016 Notice). The notice opens with the following statement:- "Be pleased to take notice that unless a contrary position is adopted by the defendants, plaintiff hereby amends its summons and declaration as follows," by deleting para (a) of the prayer in its summons and declaration." Paragraph (a) deals with the claim of the eviction of the defendants from Borrowdale Race Course. The notice deletes para (c) of the prayer in the summons and declaration which reads "holding over damages in the sum of US$ 17 155 00 per month and further rent, water and electricity charges as may be due on the date of eviction," and inserting the following para (c) in the place thereof "arrear rentals in the sum of US$17 155 00 per month calculated from the 1st July 2013 and such rates, water and electricity charges as may be due on the date of the order." The notice further deletes para(s) 9 and 10 of the declaration, which reads, (para 9) "accordingly, the plaintiff has on account of defendants adverse conduct aforesaid the unjust enrichment, and the absence of a lease agreement terminated the arrangements on notice. Plaintiff is entitled to the eviction of defendants and all persons claiming title through them from its premises." (Para 10) It is fair, just and equitable that the defendants be evicted from plaintiff' property."

Defendants did not oppose the 10 October 2016 Notice. I deal with this notice later in this judgment.

The 1st October 2019 Notice and the 9th October 2019 Notice were both filed for the purpose of withdrawing the 10 October 2016 amendment.

In support of the 10th October 2019 Notice, the plaintiff filed an affidavit deposed to by one Chido Marian Mashanyare, an admitted legal practitioner and Senior Associate at Dube Manikai & Hwacha Legal Practitioners. Her affidavit gives an insight as to the reasons behind plaintiff's actions of filing notices of amendment one after the other. I can do no better than quote her affidavit in *extensio.*

> "I CHIDO MARIAN MASHANYARE do hereby make oath and swear that:
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> 1. I am an admitted legal practitioner, and a Senior Associate at the firm of Dube Manikai & Hwacha, the Plaintiff's legal practitioners of record.

2. The facts to which I depose are within my personal knowledge and are, to the best of my knowledge and belief, true and correct.

3. The Plaintiff has filed a notice of its intention to apply for certain amendments to its Summons and Declaration, namely to reinstate its claim for eviction and holding over damages against the Defendants, following an amendment to the Summons to remove these claims. This explanatory affidavit is filed in support of such application and to provide this Honourable Court with the background as to why the Summons was initially amended, and why it has become necessary to withdraw the amendment and reinstate the claims in the original Summons and Declaration.

   3.1 On 9 October 2013, the Plaintiff issued its Summons and Declaration ('the Summons") against the Defendants claiming for the eviction of the Defendants from its premises at Stand 19260 of Stand 14908 Borrowdale (known as Borrowdale Race Course), as well as arrear rentals, operating costs and holding over damages.
   3.2 The Defendant's filed their plea to the Summons on 31 March 2014
   3.3 On 26 October 2016, and pending the resolution of the current action proceedings, the Plaintiff decided to institute a court application under case number HC 10875/16 ("the Court Application") for the eviction of the Defendants in terms of section 22(2) of the Commercial Premises (Rent) Regulations, 1983, which allows a statutory tenant to be evicted where the landlord can demonstrate good and sufficient cause to do so. The basis for the application was that the Defendants are currently statutory tenants and the Plaintiff requires the leased premises to enable the redevelopment of the premises and the construction of an office park thereon.
   3.4 In order to avoid duplication of the claims for eviction and the Defendant's raising the objection of *lis pendens*, the Plaintiff had previously filed a Notice of Amendment to the summons ("the First Notice of Amendment") on 10 October 2016 to remove the claim for eviction.
   3.5 The court application was heard before the Honourable Mrs Justice Matanda-Moyo on the 10th of October 2017. Despite the filing of the First Notice of Amendment, her Ladyship dismissed the Court Application on the basis that the present action is still pending before this Honourable Court. A copy of the court order and written judgement are attached hereto as Annexures 1 and 2.
   3.6 In light of the dismissal of the Court Application, it has become necessary for the Plaintiff to reinstate its original claim for eviction and holding over damages against the Defendants. The Plaintiff accordingly filed a Notice of Withdrawal of the First Notice of Amendment on the 1st of October 2019.
   3.7 Out of an abundance of caution, the Plaintiff has filed a further Notice of Amendment ("the Second Notice of Amendment") in order to reinstate its claims for eviction and holding over damages in the Summons. A copy of the Second Notice of Amendment is attached hereto.
   3.8 It is submitted that the Defendants will suffer no prejudice if this second amendment to the Summons is allowed, given that the Defendants had already pleaded to the Summons in its original form prior to the first amendment. It is further submitted that a second Pre-trial Conference will not be necessary for the same reasons, and that the Joint Pre-trial Conference Minute can easily be amended to take into account the claim for eviction and holding over damages."

The law on amendments

They are only two possible methods of procuring an amendment to process or pleadings after the issue of summons. One is by consent of the parties and the other is by order of court or a judge.[1] See *ZFC* v *Taylor* 1999(1) ZLR 308 (H) @ D-E. Whenever it is desired to amend a pleadings, the first step is to approach the other party to seek its consent to the amendment. Failing consent then it becomes necessary to make an application for an amendment, either to court or to a judge in chambers, depending on the criteria set out in r 226 of the Rules.[2] The application must be served upon the opposing party, be supported by affidavit showing good cause and must be accompanied by a draft order. See *ZFC* v *Taylor* 1999(1) ZLR 308 (H) and also *UDC Ltd* v *Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (H).

The 10 October 2016 Notice

The notice of amendment filed on 10 October 2016, according to Mr *Magwaliba* was allowed by consent, *albeit* not express. It was argued that once a notice of amendment is filed, and no word is received from the opposing party, it is deemed that there being no objection to its filing, it is accepted by consent. In fact, the Notice says "be pleased to take notice that unless a contrary position is adopted by the defendants, plaintiff hereby amends its summons and declaration as follows." Mr *Goba* for the plaintiff agrees with this position, that once no objection is made to the amendment sought by the plaintiff, the pleadings are deemed to have been amended by consent. Therefore, plaintiff summons and declaration were amended as per the 10th of October 2016 Notice. This position is supported by what transpired at the pre-trial conference before a judge. The claim for eviction, which was deleted by this amendment was no longer as an issue at the pre-trial conference.

The 1 October and 9 October 2019 Notices

What plaintiff seeks to achieve by these Notices is to revert to the status of the pleadings as before the 10 October 2016 amendment. This appears *ex facie* the Notices and is what Mr *Goba* emphasised in his submissions.

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[1] Rule **132. Court may allow amendment of pleading** "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." See ZFC v Taylor 1999 (1) ZLR 308 (H) @ D-E.

[2] Order 20 rule 132 of the Rules.

Following the filing of the 1st October 2019 Notice, MawereSibanda Commercial Lawyers, legal practitioners for the defendants', addressed a letter to plaintiff's legal practitioners, protesting the procedural irregularity of the notice. The letter was copied to the Registrar of this Court and is part of the record. The significance of this letter is that it made it clear that the proposed amendment is opposed and that it had to be prosecuted by way of an application.

Preliminary point

Mr *Magwaliba* for the defendants argued that there is no application before court to consider. He argued that the Notices purporting to amend the summons and declaration are fatally defective. He contended that the Notices are so irregular and do not amount to an application in terms of the Rules of Court.

The first issue that has to be determined is whether the plaintiff filed an application motivating a court or a judge to grant the amendments sought. The second issue is whether in the event it is found that the Notices are irregular, are they fatally defective warranting their total rejection?

An application has to be made to court or a judge for an amendment of pleadings. Application procedure is governed by r 226 of the Rules which requires that "all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, *shall* be made as a court application in writing to the court on notice to all interested parties or as a chamber application in writing to a judge." (My emphasis). In terms of r 230 of the Rules a court application must be in Form no. 29 and shall be supported by an affidavit and in terms of r 241of the Rules a chamber application must be in Form 29B and shall be supported by an affidavit. The 1st October 2019 Notice is neither in Form no. 29 nor 29B, furthermore it is not supported by an affidavit. It does not have a draft order. It therefore does not meet the peremptory requirements of an application. The 9th October Notice is neither in Form no. 29 nor 29B, it does not have a draft order, it also does not meet the peremptory requirements of an application.

In Form 29 the applicant gives notice to the respondents that he or she intends to apply to the High Court for an Order in terms of an annexed draft and that the accompanying affidavit/s and documents shall be used in support of the application. It goes on to inform the respondent, if he or she so wishes, to file papers in opposition in a specified manner and within a specified time limit, failing which the respondent is warned that the application would be

dealt with as an unopposed application. In Form 29B an application is made for an order in terms of an annexed draft on grounds that are set out in summary as the basis of the application and affidavits and documents are tendered in support of the application. See *Zimbabwe Open University* v *Dr. O Mazombwe* HH 43- 2009. By contrast, the unique formats used by the plaintiff are not provided for in the Rules.

Now, the format adopted by the plaintiff does not contain the plethora of procedural rights that the defendants are alerted to in Form 29 nor the summary of the grounds of the application required in Form 29B. See *Zimbabwe Open University* v *Dr. O Mazombwe* HH 43-2009. This is a substantial departure from the rules of court. Plaintiff proceeded on the premise that the amendments were by consent, when in fact it had been advised that such amendments sought were opposed, and even advised of the procedure of prosecuting such amendments.

To compound the problems, the 1st October 2019 has not been formally withdrawn, it is still before court. The 9th October 2019 Notice is filed, seeking substantially the same relief as the 1 October Notice. Which of the two notices should this court to relate to? A party cannot be allowed to throw parallel processes before court seeking substantially the same relief. You chose one process and stand or fall by it. This procedure which is akin to a fishing expedition must be not be allowed. I accept that the procedure adopted is irregular. The same approach was adopted in *Agricultural Bank of Zimbabwe Ltd T/A Agribank* v *Nickstate Investments (Pvt) Ltd & Ors* HH 23-10 where court concurred with the sentiments expressed in *ZFC* v *Taylor* 1999 (1) ZLR 308 (H) to the effect that an amendment made other than by written application, is irregular.

Are the notices fatally irregular that they must be totally rejected? My view is that an irregular pleading maybe condoned, depending of the circumstances. See *Agricultural Bank of Zimbabwe Ltd T/A Agribank* v *Nickstate Investments (Pvt) Ltd & Ors* HH 23-10. It has always been recognised that each case must be considered on its own facts. In *casu*, plaintiff was not taken by surprise by the opposition. Defendants indicated their position timeously. It must have been apparent to the plaintiff as early as 2 October 2019 that the amendments were opposed. Defendants took issue with the procedure followed in seeking the amendments. In fact, plaintiff was alerted to the correct procedure, that is, to file an application. Plaintiff did not heed the advice and persisted with irregular notices. It had ample time to regularise its position by withdrawing the irregular notices and to file an application that answers to the Rules. Plaintiff is legally represented. As if the non-compliance with the mandatory rules noted above was not bad enough, plaintiff has not applied for condonation of its failure to comply with the rules. I

accept that the rules are made for the court and not *vice versa*, and that the court must thread with care, and avoid placing form over substance, but there must be a limit to the use of r 4C, particularly where it has not been applied for.

There is prejudice to the defendants. There are two irregular notices before court. Defendants have a right to answer to a regular pleading, particularly were it has brought it to the attention of the plaintiff that the pleading filed is irregular, in that it does not comply with the Rules of court.

This is a civil matter, it is litigant driven, and a court must be very slow to authorise or condone a departure from the provisions of the rules where no such requests has been made. In my view, where the errant party has not applied for condonation in spite of its awareness of its non-compliance, depending on the facts of the case, the matter must be struck off.

Costs

Plaintiff's failure to even recognize the need to apply for condonation shows a cavalier approach to compliance with rules of court, which must be met by order of costs. It is trite that the issue of costs falls within the discretion of the court. The court's discretion must be exercised judicially, upon the consideration of all the facts of the case, and in essence it is a matter of fairness to both sides. In light of the fact that defendants have been successful in this matter and that plaintiff prosecuted it notices of amendment in a rather cavalier manner, I see no reason to depart from the general rule that costs follow the cause and consequently defendants are entitled to their costs.

Disposition

In the result the following order will issue:

1. The Notice of withdrawal of Notice of amendment filed on the 1st October 2019 is struck off of the roll.
2. The Notice of Amendment to plaintiff's summons and declaration filed on the 9 October 2019 is struck off the roll.
3. Plaintiff to pay the costs.

Dube-Manikai & Hwacha, plaintiff's legal practitioners
Mawere & Sibanda, defendants' legal practitioners