

STANBIC BANK ZIMBABWE LIMITED
versus
THALGY INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE,
MUTEVEDZI J
HARARE 4 April 2023 & 18 May 2023

Opposed application

T Mpofo with M Tshuma, for the applicant
E. Mubayiwa, for the respondent

MUTEVEDZI J: Barrack Obama in his work titled “*The Audacity of Hope: Thoughts on Reclaiming the American Dream*”, 2007 Canongate Books at p.48, posited that:

“The legal profession tends to place a premium on winning an argument rather than resolving the problem or arriving at the truth.”

The above is properly called being eristic. Depending on one’s persuasion, it can be either a trait or a virtue. There were times in the course of reading the papers in this application and during argument that I couldn’t help but think that one or the other of the parties was being eristic. Both counsel traded barbs. In the way that legal practitioners do it of course. Professionally. They always preface the reproaches with an atonement through the phrase *with respect*. The credit which however must always be accorded to legal practitioners is that in the midst of the sometimes unnecessary debates, they never betray their allegiance to precedent. For instance in this case Mr *Mpofo* for the applicant directed me to the age old case of *Whittaker v Roos and Anor* 1911 TPD 1092 in which that court’s dictum at pp. 1102-1103 still holds sway in modern day practice and procedure. It held that:

“The court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties. It is not a game we are playing, in which if some mistake is made the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts.”

The above admonition rings true in the instant case.

I heard argument in this case and made an order in favour of the applicant on 4 April 2023. On 5 April 2023, the respondent’s legal practitioners directed correspondence to the registrar of this court. They requested, as is their entitlement, the basis for my decision. The

registrar for reasons which I am advised have been communicated to the respondent's legal practitioners, only brought that request to my attention on 8 May 2023. Soon thereafter, I set out to draft the reasons. The following are they.

The applicant is Stanbic Bank Zimbabwe Limited, a commercial bank registered in compliance with the laws of Zimbabwe. The respondent is Thalgy Investments (Pvt) Ltd, a corporate with limited liability. The background of their dispute is that on 19 July 2021, the respondent sued out summons against the applicant. It prayed for an order compelling the applicant to transfer to its creditor the sum of USD \$187 171.00. The allegation was that the respondent pursuant to a contract was obliged to pay that sum to the creditor. The respondent further averred that at some point the Reserve Bank of Zimbabwe (RBZ) initiated a process of registration of debts owed by Zimbabwean companies to foreign entities for goods, services or dividends which the Zimbabwean corporates had failed to pay or service owing to a shortage of foreign currency in the country. The respondent took the view that the debt which it owed its said creditor was a legacy debt. For it to assume the respondent's debt, the RBZ required it, like all others in comparable situations, to make an application for its benefit. The obligation was unfortunately not registered by the RBZ. The respondent was displeased and held the applicant culpable for that failure. It alleged that the applicant had either not made the application or had done so imperfectly. On 21 July 2021, a few days after the summons were served on it, the applicant entered appearance to defend the action. Further, on 10 September 2021 it requested for further particulars of the respondent's declaration. After these were supplied, the applicant requested for further and better particulars. The respondent refused to give such particulars. It viewed the applicant's request as an abuse of court process designed to delay proceedings and to expose it to unnecessary legal expenses. Following on that refusal, the respondent required the applicant to plead to its declaration. The applicant however remained aggrieved. To vindicate what it believed were its rights, it then filed an application to compel the provision of the further and better particulars. That application was contested. The applicant pursued it until a request for a set down date was filed. Whilst waiting for the date, the applicant then decided to abandon the application and opted to plead to the summons and declaration in the 'defective' state which it had earlier objected to. A plea was consequently filed. But no sooner had that plea been filed than the applicant's representatives turned round to reconsider it. They were of the view that it did not adequately cover the essential facts and address the legal position so as to fully answer the respondent's claim. The applicant thus

decided that more needed to be done. Its legal counsel advised that if the matter proceeded to trial on that basis, the real controversy between the parties would not be determined. A notice to amend the applicant's plea in terms of r 41 of the High Court Rules, 2021 (the Rules) was mooted and filed on 30 August 2022. The respondent formally objected to the notice of amendment on 5 September 2022. That stalemate birthed the applicant's court application for leave to amend its plea on 22 September 2022. Once again, the respondent opposed it.

The applicant's founding affidavit was deposed to by *Simba Mawere*, a legal manager in its employ. His authority to do so was initially challenged. He later produced a resolution by the applicant's board of directors to prove it. In the affidavit, he set out the background of how he became involved in the matter and how the necessity to apply for leave to amend the plea arose. Particularly he submitted that the applicant's desire to amend its plea was informed by the advice of its legal practitioners, counsel whom they had retained and his own understanding of the current legislation relating to external borrowings, the implications of statutory instrument 33/2019 and the existing blocked funds arrangements of the Ministry of Finance and Economic Development (the Ministry). He then attached to his founding affidavit the supporting affidavit of *Pilate Mordecai Mahlangu* who is a legal practitioner in the law firm *Messrs Gill, Godlonton & Gerrans*. It is the applicant's legal practitioners. Mahlangu provided fuller detail in relation to the amendment being sought. He repeated the chronology of events as explained in earlier paragraphs of this judgment. In addition, he said when the matter was finally referred to him, he examined the pleadings filed including the plea. He became concerned among other issues that the respondent's summons and declaration disregarded critical provisions of the Finance Act No. 7 of 202. They ignored the practices through which both the RBZ and the Ministry addressed matters to do with the issue in question. He further noted that the summons and declaration were based on erroneous assumptions of fact and law. In addition he submitted that the manner in which the respondent's claim had been phrased sought to place it in a better position than it would have been in even if the registration of the loan it had sought had been allowed by the RBZ. On that basis he came to the conclusion that if the applicant's plea was not amended, the trial court would proceed to render judgment on incorrect issues. As a result a decision to file a notice to amend the applicant's plea was made.

The deponent added that the above decision was taken from the view point that the object of pleadings is to spell out and clarify the real controversy which the court will adjudicate on; that there is no prejudice that will be occasioned on the respondent by reason of the proposed amendment which cannot be addressed if need be, by an order of costs.

As already said, the respondent opposed the application. The first point it took was that the deponent to the founding affidavit *Simba Mawere* had no authority from to represent the applicant. Realising its futility, the respondent aborted the argument at the hearing. It is therefore inconsequential. Further the respondent argued that the applicant was not raising facts but legal arguments which counsel ought to have raised from the onset. Put bluntly, the applicant was simply blaming its previous counsel for legal ineptitude. If it did, the right course was to obtain an affidavit from that counsel admitting to that dereliction of duty. It added the contention that the applicant was seeking to raise an exception to its claim through the backdoor. Yet it was aware that it was way out of the time to do so.

Concerning the supporting affidavit of *Modercai Pilate Mahlangu*, the respondent attacked it on the basis that the deponent was not privy to the issues stated therein. He had no personal knowledge of the facts. As such all his averments constituted hearsay evidence.

It was also the respondent's contention that the matters raised in the proposed amendment did not create any triable issues. They therefore could not be the subject of a plea. They were purely questions of law. Any proposed amendment must seek to place before a court, facts upon which the applicant seeks to rely for his/her/its defence and not the law on which it relies. The respondent further contended that the proposed amendment raised points *in limine* in that it alleged that the respondent's claim was invalidly pleaded because the declaration told a story and must therefore be struck out. The second objection in *limine* was that the claim disclosed no cause of action recognized under our law.

An additional argument by the respondent was that the proposed amendment was not related to the original plea. Without that relationship it was not an amendment because it sought to withdraw all the factual admissions which the applicant had made in its original plea. The respondent would therefore be left embarrassed in the prosecution of its claim.

In relation to prejudice, it was the respondent's view that it would suffer prejudice which is incurable by an award of costs essentially because the applicant was now seeking to resile from the factual admissions it had made in its original plea. The effects of such admissions was that the respondent was excused from gathering and adducing evidence on such admitted facts.

On the issue of costs, the respondent submitted that the applicant was seeking an indulgence. It was incumbent upon it to pay costs for the indulgence. It could not be heard to

argue that costs for its tardiness be costs in the cause or in the discretion of the court. The application, so the argument went, was an abuse of process meant to delay the prosecution of the main matter. The respondent prayed for a dismissal of the application with punitive costs.

In its answering affidavit, through *Simba Mawere*, the applicant remained adamant that the rules of this court allow for amendment of pleadings without limitation. The qualifications and limitations which the respondent sought to introduce are not part of the law in this jurisdiction. The explanation behind the amendment only serves to persuade the court to exercise its discretion in the applicant's favour. The critical and underlying justification for any amendment is that it must strive to place before the court, the real issues and controversy which it must deal with. Further, it asserted that its answer to the claim against it necessarily had to deal with both matters of law and fact.

Through the answering affidavit of *Mordecai Pilate Mahlangu* the applicant further contented that it was preposterous for the respondent to allege that all that which appeared in his supporting opposing affidavit was hearsay. That is so because all the averments made in that affidavit were a summary of the contents of the case file. The actions and interactions taken by other legal practitioners who previously handled the case were fully recorded therein. He added that the merits or otherwise of the amended plea cannot be debated at this stage because what the applicant is seeking is an opportunity to amend its plea by including the matters stated in the notice of amendment.

Mahlangu denied that the amendment was intended to supplant the original plea. He said from its form it is evident that the original plea remained unscathed. The question of prejudice to the respondent which could not be cured by an award of costs therefore did not arise. The rules of court are clear that a party giving notice to amend will be liable for costs incurred by the other party unless the court or judge directs otherwise. The court is therefore given discretion to deal with the issue of costs.

Both parties filed heads of argument. The court is truly grateful for counsels' assistance and the guidance derived from the heads of argument. At the hearing nothing new was raised. Both counsel were content with emphasizing their positions as stated in the papers.

The law on amendment of pleadings

The court derives its power to allow any party to litigation to amend or alter any pleading or other document from r 41(10) of the High Court rules, 2021 (the Rules) which provides as follows:

(10) The court or a judge may, notwithstanding anything to the contrary in this rule, at any stage of the proceedings before judgment, allow either party to alter or amend any pleading or document, 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.

The first notable issue from the above rule is that it reposes in the court unrestricted discretion to allow or refuse the amendment or alteration of pleadings. That it is so is evident from the use of the word *may* in the rule. If my understanding of the court's powers needed any support, it was provided by the Supreme Court in the case of *Jayesh Shah v Kingdom Merchant Bank Limited* SC 4/17 wherein GWAUNZA DCJ remarked at p. 3 of the cyclostyled judgment that:

“Before I turn to address the issues raised by the appeal, it is important to note that in this appeal, the Court is being called upon to interfere with the exercise of a discretion by the judge *a quo*. The judge correctly stated as follows in this respect:

“In our law granting or refusal of leave to amend is a matter entirely in the discretion of the court.”

That the court has this discretion is evident in r 132 of Order 20 of the High Court Rules. The rule provides that the court may allow a party, at any stage of the proceedings, to amend his pleadings...”
(My underlining)

The word discretion as used in the above context means that the court is granted the freedom to either allow or refuse an application to amend or alter pleadings by a party. The rider which binds it is that, as with all discretionary power, it must be exercised judiciously. In doing so the court is guided by set principles which I will endeavour to illustrate later. I however wish to first deal with one other small aspect which appears from r 41(10).

Whilst a lot of authorities have dealt with the interpretation of the word *amend* there is a dearth of similar clarification of the word *alter* which is conspicuous in the provision. Admittedly, the use of the two words in the same provision appears innocuous. Their definitions however show a material difference between them. They are deployed in the provision as alternatives. In my view, the legislature did so deliberately. R 41(10) seems to be in *pari materia* with r 28 (10) of the South African Uniform Rules which provides that:

(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.

It is significant that the South African provision speaks to amendment only and not alteration. The omission of the word *alter* from their rules convinces me that its inclusion in our rules was intended to allow more than the making of minor changes to a pleading. The precedents in Zimbabwe have interpreted r 41(10) and its predecessor in O 20 r 132 of the High

Court Rules, 1971 borrowing wholesale from how South African cases have interpreted their r 28(10). In the process our authorities seem to have proceeded oblivious of the distinction between the two provisions. That distinction cannot be lost. What I find intriguing is that on one hand *The Law Insider Dictionary* defines the word *alter* to mean the marking or changing of the terms, meaning or legal effect of a document in a **material way**.¹ On the other hand *The Oxford English Dictionary* denotes the word amend as meaning the making of **minor changes** to (a text, piece of legislation, etc.) in order to make it fairer or more accurate, or to reflect changing circumstances.² The similarity in the above definitions in relation to pleadings is that in both instances there is a making of changes to the affected pleading. The difference lies in the intensity of the changes. An alteration is more profound than an amendment. My understanding of an amendment remains in harmony with the definitions previously ascribed to it by the courts. For instance it is because of the restriction imposed by the definition of an amendment that DUBE J (as she then was) in the case of *Kenmark Builders (Pvt) Ltd (In Liquidation) v James Arthur Colin Girdlestone And Ljumberg Investments (Pvt) Ltd* HH 2019(1) ZLR 658 (H) held at 662 B-C that:

“The amendment sought should not have the effect of **altering** the real issues between the parties. The court has no power to allow an amendment that has the effect of introducing a new cause of action. An amendment to pleadings will be permitted only if it does not introduce a new cause of action, seek to **alter** the nature of the suit or cause of action or **alters** the foundation or character of the case. What determines the character of a suit is its foundation or cause of action and not the relief sought. If this course were to be permitted, the other party would require to be given an opportunity to rebut the new cause of action, resulting in a different trial.” (Bolding is mine for emphasis)

What cannot be ignored however, is that a party has a choice to either alter or amend his /her/its pleadings. If an alteration were to be allowed the repercussions are more extensive than those of an amendment because the other party would have to be given opportunity to deal with the materially changed pleading. I emphasise these issues because there is argument in this case that the applicant, in its notice of amendment seeks to materially change its original plea.

I alluded in earlier paragraphs to the fact that the exercise of a court’s discretion to allow or refuse an amendment to a pleading is guided by set principles. The cardinal test which guides that determination is that the amendment must be necessary to enable the court to

¹ <https://www.lawinsider.com/dictionary/alter-or-amend>

² <https://www.google.com/search?q=amend+meaning&oq=amend+&aqs=chrome.1.69i57j0i512j69i59j0i512i7.10165j1j15&sourceid=chrome&ie=UTF-8>

adjudicate on the substantial dispute between or amongst the parties. The dictum in the case of *Lourenco v Raja Dry Cleaners and Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 SC at 159 E-F is pertinent in that regard. The Supreme Court held that:

“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 his 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.”

In the case of *UDC LTD v Shamva Flora (Pvt) Ltd* 2000(2) ZLR 210 (H) this court emphasised the same principle in equal measure when it said:

“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. 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 amendment are vague and embarrassing and therefore excipiable.”

A number of requirements are noticeable from the above principle. One of them is that a court may refuse to allow an amendment where such amendment substantially disadvantages the other party in circumstances where the injury caused is not curable by the court awarding costs against the applicant. While a court can certainly not fully describe such prejudice, the aspects alluded to by this court in the *Kenmark Builders* case (supra) can be used as guidance. There is incurable prejudice where an amendment seeks to reconstruct the real issues between the parties or where it introduces a fresh cause of action or entirely modifies the structure of the claim. In such circumstances no award of costs can remedy the disadvantage that the party against whom the amendment is sought is placed in. The other requirements which appear self-explanatory are that the point raised in the amendment must not be groundless or hopeless and that the matters set out in the amendment must be clear and concise. In other words they must be communicated with the necessary clarity and brevity.

In the case of *Lamb v Beazely NO* 1988(1) ZLR 77 (H), the court emphasised the point that an application for an amendment must not be made in bad faith. Put differently it must not be motivated by malice such as where the sole objective is to badger the other party. The same point was central in the case of *Drakensburg Bank Ltd (under Judicial Management) v Combined Engineering (Pvt) Ltd and Anor* 1967(3) SA 632 (D) at 641 A where it was held that:

“Having made his case in his pleading, if he wishes to change or to add to this he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation.”

In *UDC Ltd v Shamva Flora* (supra) CHINHENGO J cited with approval a summary of the principles which a court must resort to when determining applications for amendment of pleadings drawn up by WHITE J in the case of *Commercial Union Assurance Co Ltd v Waymark NO 1995(2) SA 73 (Tk)* at 77F-I as being:

1. The court has 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 not 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

Application of the law to the facts

It is on the basis of the above requirements that I turn to apply the law to the facts at hand. I intend to deal with only those requirements where the respondent has raised issue. I have not heard for instance, the respondent to argue about the discretion of the court to allow or refuse an amendment.

a. Applicant must provide some explanation for the amendment

I have already indicated that the respondent was of the view that the applicant's explanation for seeking the amendment is flimsy if there is any. In its founding and supporting affidavits however, the applicant detailed the circumstances which led to its decision to seek the amendment. Paraphrased the explanation is that after its plea had been filed, the applicant became apprehensive that among other issues:

The respondent's summons and declaration deliberately overlooked the essential clauses of the Finance Act No. 7 of 2021 and the traditions employed by both the RBZ and Treasury when dealing issues such as the one between the parties. In addition, the applicant was concerned that the summons and declaration were grounded on faulty assumptions of fact and law. The entire claim sought to place the respondent in a position better than it would have been in had the registration of its loan gone through as anticipated. If those issues were not corrected and placed before the court its determination would be based on wrong facts.

As is apparent, there is nothing flimsy about the above explanation. I agree with the respondent that intrinsic in the applicant's allegation is that the legal practitioners who initially dealt with the matter saw the issues differently from those who examined the pleadings after the plea had been filed. That however is inconsequential because the law as stated in *Lourenco v Raja Dry Cleaners and Steam Laundry* (supra) is that the error or even carelessness of one of the parties in the process of placing the issues before the court and on record will not be a hindrance to an application to amend a pleading. It can only be so in circumstances where the amendment will precipitate prejudice to the other party which cannot be counteracted by an award of costs to that party.³ In any case my reading of the requirement for an explanation by the applicant is that it is more necessary in cases where the amendment is sought late than where it is brought timeously.⁴ The lateness, as I understand it, is not only time related but is also gauged by the stage of the proceedings in question. For instance it is regarded as seeking an amendment late where an applicant applies to amend its declaration when the matter is already at trial stage. In this case, the respondent had not taken the case any further after the applicant had filed its plea. There is therefore no issue of the applicant not having filed its application for an amendment timeously. My further view is that the explanation being referred to is one which is intended to motivate the court to exercise its discretion in favour of granting the application. I am satisfied that the explanation which the applicant tendered for seeking the amendment is satisfactory.

b. Applicant must show existence of a triable issue

Where there is no prospect of the point(s) raised in the amendment succeeding or where matters set out are incomprehensible, clumsy and winding or where there is no triable issue the amendment may be refused. The respondent's apprehension in this case is that the issues raised by the proposed amendment are purely legal and cannot therefore create triable issues. A triable issue in my opinion is a material dispute which a court is called upon to resolve in order to determine the truth or the correct position and consequently administer justice. In the case of *Jai Ambe Investments (Pvt) Ltd v Golden Horse Trading Company (Pvt) Ltd T/A Food King* HH 350/16 MATANDAMOYO J held at p. 3 of the cyclostyled decision that:

³ See also *Macduff & Co. (In liquidation) v Johannesburg Consolidated Investment Co. Ltd* 1923 TPD 309 which cited with approval an excerpt from *Rishton v Rishton* 1912 TPD718 at 720 that:

"However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should 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."

⁴ See *Ciba-Giegy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA) at 462-464

“The issue which falls for determination is whether referral to trial is upon asking or whether referral should be made where there are triable issues. An issue is triable if it is in dispute. No genuine issue of fact or law exists in this matter. The purpose of a pre-trial conference is for the judge to formulate issues for trial, both factual and legal.” (Underlining is mine for emphasis)

The requirement is that a good pleading must not contain statements of law. See Herbstein & van Winsen, *The Civil Procedure of the High Courts of South Africa, 5th Edition, Vol 1* at p. 556. A statement is a question of law when its resolution is solely dependent on applying legal principles. The fact that a party makes a factual allegation and in it makes mention of a law as its basis for alleging so does not make that statement a statement of law. For instance in *Lamb v Beazely* (supra) part of the defendant’s plea was that:

“Defendant denies that plaintiff owned the tobacco crop, averring that the insolvent was prevented from selling it to plaintiff and plaintiff from buying it from the insolvent by s 44(1) and 36(1) of Tobacco Marketing and Levy Act 1977 respectively. In the circumstances, if there was an agreement in the form alleged, it is an illegal agreement.”

Equally in this case, I do not read any statements of law from the amendments sought by the applicant as will be illustrated below. In addition it is not in doubt as shown in *Jai Ambe Investments* (supra) that a triable issue can either be factual or legal. I hold therefore that the respondent’s view that the issues raised by the amendment sought are not triable because they are solely legal arguments is incorrect. A plea is not defined in the rules but a basic understanding of it is that it is a formal response by the defendant to the allegations stated by the plaintiff in his summons and declaration. In it the defendant sets out the reasons why judgment should not be granted in favour of the plaintiff on the claim made. Those facts may stem from a legal basis. Where a defendant raises legal arguments which amount to a special plea, he/she/it specifically pleads so. Facts which derive from a legal position which are raised to deal with the merits of a claim must not be confused with a special plea. It is entirely the choice of a defendant to seek to raise a special plea or to plead to the merits of the claim. Equally, a defendant who wishes to except to the summons or to apply to strike out anything from a pleading specifically chooses to do so. It is the reason why r 42 (1) of the Rules is couched in the permissive manner that a party may take a plea in bar or in abatement or except to the pleading or apply to strike out any paragraphs of the pleading which should properly be struck out. A plaintiff cannot dictate to a defendant what that defendant must or must not include in his/her/its defence. The respondent here cannot foist on the applicant an exception

or an application to strike out as it argues. If the amendment is allowed it will have to deal with it as the defendant's plea and nothing more.

The applicant's notice of amendment is broken down into two parts namely parts a. and b. In part a. the applicant's allegation is that there is no contract which exists between it and the respondent. Whether there is or there isn't a contract is a factual issue. It is a triable issue. In part b. the applicant prefaces its plea with the allegation that it cannot succeed under the law of delict. It then specifically makes averments in b. 3. i –iii and b. 4, 5 and 6 in the following manner:

- i. Defendant pleads that under the scheme it could only repatriate foreign currency deposited with it by the plaintiff and that the scheme could not have entitled plaintiff upon making a local currency deposit to have its obligations acquitted in foreign currency
 - ii. Registration of a debt would not in and of itself entitle plaintiff to transfer any funds offshore but such transfer would be on the basis of availability of funds
 - iii. Accordingly, plaintiff impermissibly seeks relief that places it in a better position than that provided by the legal situation in Zimbabwe
4. Moreover statutory instrument 33/2019 and the legislation that was promulgated subsequent to it not having converted actual USD to local currency (RTGS), the plaintiff's claim is bad at law
5. The failure to register under the blocked funds/legacy debts scheme does not give rise to a monetary obligation neither does it entitle a customer of the bank to have their financial obligations acquitted by a banking institution
6. defendant pleads at any rate, that it exercised all due diligence in the registration process, that such diligence was however not enforced by contractual or statutory fiat, that plaintiff's claim is based on surmise and conjecture and is accordingly bad in law

In my view all the above are material disputes on which a court can be called to resolve in order to determine the truth and render justice. They are therefore triable issues. To me the fact that both parts a. and b. of the proposed amended plea are introduced by some superfluous preamble cannot detract from the real plea. It conforms to the general requirements of pleadings.

Another issue which stands out is the allegation by the respondent that the amendment which the applicant seeks to add to its original plea has six paragraphs. Because of that, so the argument continues, the applicant's plea would contain repetitive paragraphs in violation of sub rules 36(d) and (e) of the Rules which require every pleading to contain clear and concise statements of material facts. By making that argument, the respondent is being disingenuous because the declaration attached to its own summons runs into thirty (30) paragraphs. The applicant is expected to address each of those averments in its plea. In its original plea it attempted to do so in twenty three (23) paragraphs. I do not see how the addition of six (6)

more paragraphs would make the length of the applicant's plea outrageous when it corresponds with the length of the declaration it has to face. The point is without merit.

c. Prejudice- In that the amendment seeks to withdraw all the factual admissions which the applicant had made in its original plea

This complaint in essence speaks to the question of **prejudice** to the respondent. There is no yardstick by which to measure prejudice. It thus remains difficult to say what constitutes prejudice in any particular case. Beck, in his work titled *Beck's Theory and Principles of Pleadings in Civil actions, 5th Edition* at p. 189 posits that:

“In one sense there can be no prejudice whatever if the amendment is timeously applied for.”

In paragraphs 2.7 and 2.8 of its opposing affidavit, the respondent argues that the proposed amendment does not make reference to the factual allegations made by the respondent in its declaration; that it is not related to the original plea because it seeks to withdraw all the factual admissions made in the original plea. As such it would embarrass the respondent in the prosecution of its claim. The respondent supported those allegations by making reference to para 11 of the applicant's original plea which was in answer to the averments made in para 13 of the respondent's declaration. It alleged that the applicant therein admitted that the respondent submitted all documentation that was required for a successful application to the RBZ; that the applicant further confessed it received instructions from the respondent to make an application to the central bank on the legacy debt scheme. The effect, so the argument continued, was that the respondent is excused from gathering and adducing evidence on the admitted issues.

The starting point when determining the existence or otherwise of prejudice to a party opposing the grant of leave to amend a pleading can be no further than the remarks of the Supreme Court in *Jayesh Shah v Kingdom Bank* (supra) which cited with approval at p. 11 of the cyclostyled judgment, the dicta in *Four Tower Investments (PTY) Ltd v Andres* 2005(3) SA 39 (N) at 44 that:

“Decisions in the reported cases tend to show that there has been a gradual move away from an overly formal approach. It is a development which is to be welcomed if proper ventilation of issues in a case is to be achieved, and if justice is to be done. In line with this approach courts should therefore be careful not to find prejudice where none really exists.”
(Underlining is mine for emphasis)

The amendment of a plea at a stage where the case has not progressed further than the filing of the original plea itself cannot be heard to cause irremediable prejudice to a plaintiff except in very exceptional circumstances. I hold this view because when a plaintiff makes a claim, he/she/it does not know the defence which a defendant is likely to raise. The plaintiff is

therefore deemed ready to deal with anything that is thrown at him/her/it. My opinion is that where a defendant files a plea and soon thereafter seeks to amend it the plaintiff is placed squarely in the same position it would have been had the plea originally been filed in the form of the amended version. A party who has been hauled to court cannot be restrained from putting before the court the ammunition that is at his/hers/its disposal to defend the claim. It has been suggested in some authorities that the issue is different where the defendant such as in this case would have made a factual admission in the original plea and wishes to withdraw the admission. The argument is that it is so because in essence the withdrawal entails a total change of tact. A fuller explanation for that is therefore required to convince the court that the party seeking the withdrawal is doing so in good faith.⁵ An additional reason is that a fact admitted or deemed to be admitted stands eliminated from the list of contentious issues in the action. The other party may therefore be prejudiced in that he/she/it would have neglected gathering evidence necessary to prove it. Authors Herbstein and van Winsen⁶ after reviewing a number of authorities however put the argument to rest when they indicate that the same general principles governing all amendments are of equal application where a party seeks to withdraw admitted facts. Withdrawal will be allowed except where it causes prejudice not curable by an award of costs. See also the case of *Cuthbert v Frenkel, Wise and Co. Ltd* 1946 CPD 735. I find the latter view more convincing than the former because for instance, where the withdrawal of an admitted fact is sought at plea stage that amounts to nothing more than the general amendment of a plea.

Whichever side one picks in the debate, what obtains in the instant case is that I do not discern any withdrawal of the allegedly admitted facts by the applicant. The applicant's position is that in all the processes which were done, its relationship with the respondent was bound neither by contract nor by statute. It did not seek to withdraw anything from the plea previously filed. I am vindicated in my finding by the fact that the applicant did not recall its original plea. It only seeks to add to it. A party can only withdraw that which is before the court if he/she/it expressly seeks and is granted leave to do so. The application for leave to amend does not seek that relief. The allegation that the applicant's defence is weak is premature. The requirement is not that the issues raised in an amendment must not be weak. It is that the issues must be shown to be hopeless and without any prospect of success. The court at this stage is

⁵ See *Rishton v Rishton* (supra)

⁶ *The Civil Procedure of the High Courts of South Africa, 5th Edition, Vol 1* at p. 684

not required to ventilate on the efficacy or otherwise of the applicant's plea and whether it makes sense. If it is weak it does not mean it is hopeless. The defendant will deal with that at the appropriate stage because the weaknesses and strengths of a plea are the domain of the trial court. The respondent's complains in relation to prejudice, appear to me to be all rolled up in the issue of the alleged withdrawal of admissions of fact which appear in the original plea. Prejudice grounded on conjecture and unfounded conclusions is not the kind of harm contemplated by the authorities discussed above. It does not warrant the court to withhold its discretion to allow the amendment. In conclusion therefore my holding is that there is no incurable prejudice that can be occasioned to the respondent if the amendment were to be allowed.

d. Mala fides and Placement of real controversy before the court

Mala fides simply means in bad faith. In some quarters it has been equated to deception. *Black's Law Dictionary, 2004, 8th Edition* ascribes to bad faith the elements of malice and ill will. It further defines a decision made in bad faith as one that is grounded, not on a rational connection between the circumstances and the outcome, but on antipathy towards the individual for non-rational reasons. I therefore understand the presence of non-rational justifications to suggest the making of a decision using factors outside those relevant for grounding such decision. A decision taken in bad faith necessarily encompasses unreasonableness and arbitrariness. *In casu*, I have already expressed the view that the applicant adequately explained the reasons why it seeks the envisaged amendment. Those reasons are far from being spurious. If anything they show the applicant's genuine desire to ensure that the real controversy between it and the respondent is placed before the court. The respondent rightly referred the court to the case of *Zimbabwe United passenger Company v Shah and Anor* HH 238/17 where this court held that:

“The overall purpose of allowing amendment of pleadings at any stage prior to judgment is to facilitate a judgment on the merits. This is the fundamental basis upon which a court will exercise its discretion especially in a case such as this where evidence has been led. What is important is that the quest for amendment should not be made in bad faith.” (Underlining for emphasis).

The above dictum actually supports the thinking that *mala fides* can be detected from the timing of the application for leave to amend. Where a party waits until the late stages of the proceedings to seek an amendment it may, unless there are cogent reasons, betray the lack of *bona fides* on its part. Although neither the applicant nor the respondent attached any of the pleadings from the original case they both made extensive references to it. The court is however

always entitled to refer to its own records. See the case of *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC) at 173A-BI.⁷ I had occasion to check the cross referenced file in HC 3592/21 in order to contextualise some of the arguments made. I conclude that there is no malice or ill will exhibited by an applicant who raises issues that concern the mechanisms that inform the legacy debt scheme and wishes them to be added to its plea to defend a claim that is predicated on that same principle. Both the respondent's declaration and the applicant's original plea are replete with the same allegations and counter-contentions. I also have no doubt that the issues which the applicant raises in its proposed amendment as indicated above go to the root of the dispute between the parties. They can only therefore have been intended to ensure that the real controversy between them is placed before the court so that it is not side tracked to make a determination on wrong facts.

For the above reasons I am inclined to find as I hereby do that the application for leave to amend its plea by the applicant was not actuated by malice or ill will.

Costs

The respondent was adamant that the law requires an applicant who is seeking an indulgence to pay costs. It said a further reason why costs should be borne by the applicant on the higher scale is that the applicant in its papers, was haughty and arrogant in tone and in language. The applicant on the other hand argued that the respondent's opposition of the application was wholly unnecessary and indubitably vexatious. As a result its prayer was that the court in its utmost discretion must order costs to be costs in the main action.

It is correct that a party who proposes an amendment must pay costs which are incurred by the other party as a result. See r 41(9). But that is as far as it goes. That rule only applies to instances where a party gives notice to amend and the other party does not object to it. The principle which is inherent in r 41(9) is that an opponent's objection to a proposed amendment must be taken sensibly and responsibly. If it is intended to vex the party seeking the amendment or to plague that party with legal expenses without raising *bona fide* grounds of objection, the court is at liberty to depart from the general rule and order the objecting party to pay costs sustained from instituting the application. In *Van Os v Breda* 1911 TPD 165 the court held that

⁷ In that case MCNALLY JA said:

"It seems clear from the judgment in which the learned judge a quo granted summary judgment that he made reference to the papers in case number HC 3406/84. In so doing he was undoubtedly right. In general the court is always entitled to make reference to its own records and proceedings."

even where the opposition is reasonable it does not take away the right of the party seeking the amendment as a winning party to be recompensed by an award of costs. In the end each case must depend on its own circumstances. The court's discretion to order costs in that regard remains unrestrained. In this case and from the discussion above the opposition to the amendment sought was unnecessary. It should have been clear to the respondent that it would not incur any prejudice if it acquiesced to the notice of amendment. It chose to be petulant instead. It objected to the notice in language which was as unmeasured as that it accused the applicant of using. As already said, the applicant was magnanimous in victory and prayed that costs be in the main cause. I do not see any reason why that course must not be taken given that the applicant is the winning party.

It was for the reasons above that at the end of the hearing I exercised my discretion and directed that:

- 1. The applicant is granted leave to amend its plea in accordance with the notice of amendment filed on 30 August 2022**
- 2. Costs shall be in the main cause**

.....,applicant legal practitioner
.....,respondent legal practitioner