

STABISO JANE MAZONDE (NEE BAYANA)
versus
DESIRE MAZONDE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE; 19 & 24 March 2025

Ms *T E Mazarura*, for the Applicant
Mr *A Mtima*, for the Respondent

TSANGA J

This is an opposed application for amendment of summons and declaration with costs sought on a higher scale. The applicant alleges that she had been given the impression that the respondent does not have any source of income until she came across his bank statement. She had a claim for maintenance of children and sharing of property on divorce and hence deems the amendment crucial to those claims.

Applicant wants summons amended to claim R2500.00 per month per child; to reflect that they acquired property in South Africa and also to capture that the respondent was paid a lump sum disability benefit of R500 000.00. The Respondent had a stroke and receives disability benefit. She also wants all three immovable properties that they own sold and shared 50-50 and wants an insurance fund liquidated and shared between them.

Respondent is opposed to the amendment of summons. He says he cannot afford the maintenance sought and that he in fact relocated to Zimbabwe to cut costs. He is willing to pay fees for children in Zimbabwe. He says the South African property is under mortgage and likely to be repossessed given that he has relocated and is unable to finance the mortgage. He says the R500 000.00 was used to buy a Mercedes Benz car for the applicant which was later repossessed to finance the Tynwald property which is still being constructed. He says they have no title in the Kwekwe property.

At the hearing of the matter Ms *Mazarura* the legal practitioner for the applicant mentioned that the South African property has since been sold and his insurance fund paid out but maintained that the issues were yet to be fully determined in the divorce matter. She also emphasised that the amendments sought to the summons are unaffected in their essence and do

not introduce a new cause of action as this remains in principle a divorce matter with proprietary consequences.

Mr *Mtima*'s submissions for the Respondent were that with the property in South Africa having been disposed of would mean that the Applicant will be making amendments that were not pleaded. He further submitted that the Respondent has not had a chance to respond to new evidence opposing the averments. He suggested that the applicant ought to withdraw her summons and file fresh summons. It was his view that the amendment introduces a new cause of action being the claim for proceeds. In terms of prejudice, he stated that legal costs would be incurred by the Respondent should Applicant be allowed to introduce new facts as the Respondent would be required to rebut with evidence or documents which are in South Africa. This would entail travel to South Africa to engage legal practitioners to retrieve the rebuttal evidence. He emphasised that the Respondent is ill and suffers from paralysis and would suffer from attempting to retrieve evidence to rebut the alleged facts. These injustices, according to him, would not be cured by an order of costs and in any event the Applicant was not capable of meeting an order of costs as she is represented by the Legal Aid Directorate. In answer to these submissions, Ms *Mazarura* highlighted that he need not travel to South Africa as the evidence required can easily be retrieved through electronic mail.

The legal position

Rule 41 (10) clearly states as follows with regards to amendment of pleadings

“(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.”

What is evident from the above is that amendments can be allowed to be made any time even as a trial unfolds and before judgment. See for example, *Agribank v Nickstate Investms (Pvt) Ltd & Ors* 2010 (1) ZLR 419. This as long as the purpose is to allow the real dispute between the parties to be addressed. Prejudice and injustice do, however, have to be considered in applications for amendment. In other words, it is prejudice and injustice that could give a court restraint in allowing an amendment as otherwise the position is that amendments will generally always be allowed to permit the full ventilation of issues. See *Butau v Butau* 2011 (2) ZLR 74 (H); *Efrolou (Pvt) Ltd v Muringani (I)* 2013 (1) ZLR 300 (H).

This is a matrimonial matter in which proprietary and financial consequences are key and need to be fully put on the table. It cannot be a question of hide and seek or imagined inconveniences or prejudices simply because a party does not wish to divulge critical financial information. There is no new cause of action whether the South African property in particular has been sold or not. Even with the amendments, the substantive issue remains that of sharing of matrimonial property upon divorce and ensuring that the children's requirements for maintenance are addressed. Critically. The respondent would still need to put forward evidence at trial on his financial status. He is not being asked to go off any beaten path in acquiring this information for trial. There is therefore zero deviation from this requirement to prepare evidence for trial that results from the amendment sought. The financial consequences will be dealt with through evidence which the respondent can easily access or in fact already has. Whether the South African property has since been repossessed or the insurance paid out does not affect the amendment that has been filed.

The Applicant has sought costs on a higher scale but is now represented by legal aid having been previously represented by a law firm. She has obviously incurred legal costs on an issue where the respondent should have been honest instead of playing hide and seek with information critical to the divorce action. The Legal Aid Department has only just assumed agency. Even then, costs incurred need to be met. The issue of costs could have been avoided had the Respondent pleaded in good faith from the onset regarding his real financial status instead of waiting to be found out or to be caught in the act of misrepresentation. However, there has been no motivation as to why costs in the order are sought on a higher scale.

Accordingly, the application to amend is granted as follows:

1. The application succeeds with costs.
2. Leave be and is hereby granted to the Applicants to amend their summons and declaration under HC 2665/21 in accordance with the notice to amend filed with this court on the 7th day of February 2022.

TSANGA J:.....

*Mukome Legal Practitioners, Plaintiff's Legal Practitioners
Jiti Law Chambers, Defendants Legal Practitioners*