MICHAEL ANDREW CHATIKOBO
and
AUDREY SIBUSISIWE CHATIKOBO
(Nee Mangezi)

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 7 February and 18 March 2022

Opposed Matter

A Chimhofu, for the applicant
R Kadani, for the respondent

MUCHAWA J: This is an application for leave to amend pleadings filed in case HC 8835/18, which is made in terms of Rule 60 (1) as read together with Rule 41 (4) of the High Court Rules, 2021.

The applicant and respondent are husband and wife, married in terms of the Marriage Act, Chapter 5:11. The respondent instituted divorce proceedings under case number HC 8835/18. The matter has gone up to a pre-trial conference held before a judge and in terms of the joint pre-trial conference minute, the only issue referred to trial for determination is "the constitution and distribution of matrimonial assets." This was filed on 21 October 2021. Two immovable properties were put up for distribution by the respondent in her particulars of claim, namely;

i. Unit 2 of stand 38 Newlands Township known as 17 Windsor Avenue, Newlands, Harare
ii. Lot 2 of subdivision E of subdivision B of Quinnington of Borrowdale Estate.

She proposed that the applicant retain, as his sole and exclusive property, the Borrowdale property whilst she would retain the Newlands property as her own sole and exclusive property.

In his plea, the applicant stated that it was just and equitable that the two properties be sold and the net proceeds be shared equally between the parties. He did not disclose that the Borrowdale property was inherited from his late father. After a change of legal practitioners, the applicant then

sought to amend his plea. This was opposed and this application has been brought in compliance with the procedures set out in Rule 41(4) as read with Rule 60(1) of the High Court Rules.

The applicant's submissions

The applicant explains that he inherited the Borrowdale property in 1993 when his late father's estate was registered with the Master of the High Court under DR number 345/93 and that he got married on 3 September 1994. The said property is said to have been fully transferred to him through deed of transfer number 7162/96. This property is said to have particular sentimental value to the applicant. He states too that they lived in the Borrowdale property as their matrimonial home, but that does not change that it was inherited property. He avers that he sold a property which he owned, stand 452A Salisbury Township to Mass Engineering Private Limited on 2th October 1994, about two months after his marriage, in order to develop the Borrowdale property. The issue of how the improvements came about and who contributed what, was said to be a matter which would be properly ventilated in matter HC 8835/18 as a triable issue in the divorce on division of matrimonial property and not on papers in this application for amendment of pleadings.

In explaining how the initial plea came about, the applicant states that he did not consent to the proposed distribution of the properties of the parties. He claims not to have had sight of the plea filed in case HC 8835/18 which, he says, was filed without his having had sight of same. In order to support this, the applicant pointed to the error in paragraph 2 of the plea where one of the children to the parties is referred to as Munatsi Chatikobo instead of Munesu Chatikobo. He says that if he had had sight of the plea he would surely have picked this error and had it rectified. In short, it is applicant's case that the plea was filed without his participation and consent. Further, the applicant states that his position has always been that the Borrowdale property is not part of the matrimonial property due to it being inherited property of great sentimental value to him. This is why, he says, at the pre-trial conference before TAGU J on 12 October 2021 the parties failed to agree and he requested a postponement as his erstwhile legal practitioner had made concessions to the other party without his instructions, consenting to the distribution of property. At the second pre-trial conference on 20 of October 2021, when applicant had engaged new legal practitioners, it was recorded that the parties failed to agree on what constitutes matrimonial property for

distribution upon divorce where there is inherited property used to acquire matrimonial property. The single issue referred to trial is the constitution and distribution of matrimonial assets.

Mr *Chimhofu* submitted that the applicant's plea did not place before the court dealing with the divorce matter that the Borrowdale property was inherited from his father, the late Jethro Claudius Tabvanei Chatikobo and would therefore not be subject to distribution as matrimonial property as provided for in section 7 (3) of the Matrimonial Causes Act (Chapter 5:13) which excludes inherited property and property of a sentimental value from distribution.

It was contended that allowing the amendment would ensure that the real issues between the parties are placed before the court handling the divorce on the distribution of the matrimonial property. See *Cheney v Cheney* HH 78-18. The fact that the respondent concedes that the property was indeed inherited is said to be significant and that her averment that it was inherited as a vacant piece of land on which they then made improvements was said to justify the placing of these factors before the divorce court seized with the sharing of the property. Mr *Chimhofu* argued that the amendment is not likely to cause any prejudice that cannot be cured by an appropriate order of costs, which prejudice the respondent was said not to have pointed out at all.

Rule 41(10) was said to give a right to a litigant such as the applicant, to amend any pleading filed in connection with any proceedings, save for sworn statements.. The applicant's plea as it is not a sworn statement, it was submitted, is capable of being amended. Such amendment can be effected at any stage of the proceedings before judgment as it may be necessary for the purpose of determining the real question in controversy between the parties. Mr *Chimhofu* contended that the application is therefore justified by operation of law and by the dictates of natural justice.

The court's attention was drawn to the fact that in her notice of opposition, the respondent had not complied with Rule 36 (14) as she denied evasively the averments in the applicant's founding affidavit and had not answered on the points of substance. The court was urged to take the application as unopposed.

The respondent's submissions

It was submitted by Mr *Kadani* that the applicant should not be allowed to amend his plea as it would be sanctioning the withdrawal of an admission. The fact that in the plea, the applicant had initially stated that it was just and equitable that the two properties be sold and the net proceeds be shared equally, it was argued, was an admission given under the advice of applicant's erstwhile legal practitioners. Further, it was averred that the applicant had always been aware that such property was inherited but had elected not to disclose this fact up to the pre-trial stage. It was argued that the applicant should not be allowed to have a change of attitude at will and blame it on his erstwhile legal practitioners for making concessions without his instructions and consent.

The opposition to the amendment is firstly on the basis that it is an attempt to withdraw an admission without giving a reasonable explanation as to the circumstances under which the admission was made and why he now seeks to resile from same. Secondly, the respondent believes that the intended amendment is just meant to harass and torment her.

In explaining the history of the pleadings, the respondent's case is that she proposed, in her declaration, that the applicant should retain as his sole and exclusive property, the Borrowdale property whilst she would retain the Newlands property. She says that her position was based on her knowledge that the Borrowdale property was registered in applicant's name in 1996 after he had inherited it and their marriage was in 1994. The Borrowdale property is alleged to have been inherited as a vacant stand. The court was referred to correspondence between the parties' legal practitioners in which there is talk of the improvements on the Borrowdale property which respondent says consist of a dwelling house and a two bedroomed cottage. It is conceded that the issue of improvements is not a deciding factor but the applicant's plea which stated that it was just and equitable that the two properties be sold and the net proceeds be shared equally. It was argued that the applicant cannot resile easily from such a plea which was made with the assistance of counsel.

The applicant's reason for the amendment sought is said to be a change of attitude by reference to the minutes of the round table conference in which it is recorded,

> "Mr *Nkomo* (applicant's then legal practitioner) indicated that there was a change of attitude in respect of one of the properties which was said to be inherited."

It was submitted that the applicant's explanation is "nonsensical", given that Mr Nkomo is a senior legal practitioner who would not have filed a plea without the applicant's instructions. The applicant's conduct was said to border on harassment as he has demonstrated a lack of interest in finalizing the divorce matter, particularly as the respondent's legal practitioners had great difficulty to hold the round table conference.

Mr *Kadani* lamented that the applicant has taken too long to attend to amending his plea and has not given a reasonable explanation for such delay. It was noted that the plea was filed on 27 March 2019 and the round table conference was held on 24 March 2021 and applicant has not explained why it took him so long to discover the "error" in the plea. The further inaction from that date to 2 September 2021 when the applicant filed the defective notice of amendment to his plea is also said to be unexplained as is the further to months to 9 November 2021, when the current application was then filed.

On the merits, the applicant states the application should be dismissed for lack of merit and she denies everything contained in the applicant's affidavit which is inconsistent with her own averments.

Whether this application is not opposed

Mr *Chimhofu* relies on Rule 36 (14) of the High Court Rules, 2021, to argue that the respondent has only denied that applicant's allegations evasively and has not answered on the points of substance, so there is no proper response. It was argued that the court should proceed on the basis that the matter is not opposed.

Mr *Kadani* counter argued that in paragraph 2 of the respondent's notice of opposition, there are answers to the points of substance as the respondent states that she is opposed to the application as it is in fact a withdrawal of an admission and also is bent on wasting time and delaying finality to litigation.

A reading of the respondent's notice of opposition does show that it cannot be classified as one where a party only denies the other's averments evasively. Points of substance having regard to the law on dealing with applications for amendment of pleadings are raised. I find therefore that

there is proper notice of opposition and find no merit in this preliminary point raised by the applicant's counsel. I hasten to lay out the relevant law.

The law on applications for amendment of pleadings and application to the facts

Rule 41 (1) of the High Court Rules, 2021, provides that any party wishing to amend a pleading or document other than a sworn statement which was filed in connection with any pleading, shall notify the other party of such intention. Rule 41 (10) provides that an application for such amendment may be allowed, at any stage of the proceedings before judgment as may be necessary for the purpose of determining the real question in controversy between parties.

The applicant has easily overcome the two first hurdles as he seeks to amend a plea which is not a sworn statement and the divorce matter is awaiting trial. The interpretation of what a judge should consider in a similar rule in the High Court Rules. 1971, has been before this court severally and there is no need to depart from the position of law already laid out.

In *Wayne Parham & Anor v Jan Fredrick Kotze* HH 312/18, MUREMBA J had occasion to extensively lay out the law. She starts off by quoting as follows:

> "In Whittaker v Ross & Anor 1911 TPD 1092 at 1102-3 it was held that;
> "This 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."
>
> What it means is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause injustice to the other side which cannot be cured by an appropriate order for costs. The mistake or neglect of the parties in the process of placing the issues before the court and on record will not stand in the way unless the prejudice caused to the other party cannot be compensated for in an award of costs. Even where a litigant has delayed in bringing forward his amendment, the delay in itself, in the absence of prejudice to his opponent which cannot be cured by payment of costs, does not justify refusing the amendment. The court has discretion to condone any delay that is sufficiently explained. See *Angelique Enterprises (Pvt) Ltd* v *Albco (Pvt) Ltd* 1990 (1) ZLR 6 (H). See also *Butau* v *Butau* 2011 (2) ZLR 74 (H) at 76G – 77B. The application to amend should only be refused if the amendment is not objectively necessary or if the amendment would cause the respondent some sort of prejudice. See *Chikadaya* v *Chikadaya & Anor* 2001 (1) ZLR 421 (S) at 425A-B. An amendment to pleadings cannot therefore be granted for the mere asking. "

In *casu,* it is without doubt that the issue of the Borrowdale property having been inherited from the applicant's father is a fact which is missing from the particulars of claim and the plea

before the court which will determine the divorce and ancillary issues. However, the Deed of Transfer for the Borrowdale property which is part of respondent's bundle of documents page 31 of record HC 8835/18, records as follows, "the undermentioned property has been awarded to Michael Andrew Chatikobo in terms of the Laws of Intestate Succession Act Chapter 302 and the Redistribution Agreement---"This true account of what transpired is important, given the legal provisions of the Matrimonial Causes Act which provides in section 7 (3) as follows;

> "(3) The power of an appropriate court to make an order in terms of paragraph (*a*) of subsection (1) shall not extend to any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during the marriage—
> (*a*) by way of an inheritance; or
> (*b*) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
> (*c*) in any manner and which have particular sentimental value to the spouse concerned"

The above facts are pertinent given that the issue referred to trial is that of the constitution and distribution of matrimonial assets .I am inclined to allow the amendment sought even though there is a clear delay in bringing this application. The law is clear that the mistake or neglect of the parties in the process of placing the issues before the court and on record will not stand in the way unless the prejudice caused to the other party cannot be compensated for in an award of costs. Even where a litigant has delayed in bringing forward his amendment, the delay in itself, in the absence of prejudice to his opponent which cannot be cured by payment of costs will not stand in the way of granting the amendment sought.

The only prejudice pointed to by the respondent is the delay in finalizing the divorce matter and the incidental time wasted in the process. However, delay itself has been held not to be a good basis for refusing an amendment as it can be addressed by an appropriate order as to costs.

The respondent's position is that the applicant's plea in respect to the distribution of immovable property is in the form of an admission and the law is different limiting the court's discretion in the granting of amendments to pleadings. I quote once again from the Wayne Parham supra case;

> "With amendments involving the withdrawal of admissions in pleadings, the position of the law is somewhat different. An admission is a voluntary concession of fact that is made by a party that concedes any element of a claim or defence. Its effect is to determine the issue conclusively and to dispense entirely with the need for further evidence. It narrows or eliminates issues. Once an

> admission is made it has serious consequences which ought not to be undone without a cogent and acceptable explanation. This is because an admission in a plea is conclusive and renders it unnecessary for the other party to adduce evidence to prove the admitted fact. It also renders it incompetent for the party making it to adduce evidence to contradict it. See *DP Transport (Pvt) Ltd* v *Abbot* 1988 (2) ZLR 92 (SC) and *Copper Trading Co (Pvt) Ltd* v *City of Bulawayo* 1992 (1) ZLR 134 (S) at p 144G. In *President – Varsekeringsmaats Kappy Bpk* v *Moodley* 1964 (4) SA 109 (T) (at page 110H -111A) it was held that,
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> "An amendment that involves the withdrawal of an admission is treated somewhat differently in the sense that it is usually more difficult to achieve because (i) it involves a change of front which requires full explanation to convince the court of the *bona fides* thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence."

Though the applicant's counsel argued that what the applicant pleaded in his plea was just a mere proposal for distribution of property, and not a concession of fact because it was not reduced to a deed and there was no consent to judgment, this cannot be true. In her particulars of claim, the respondent stated that there were two immovable properties for distribution. In his plea, the applicant did not deny this. He simply made a counterproposal for distribution. In the amendment, he now seeks to withdraw the Borrowdale property from those properties available for distribution. He is clearly trying to withdraw an earlier admission. Such an application must be treated differently as it clearly involves a change of front and there is need for a full explanation to convince the court of the *bonafides* thereof.

The applicant's case is that he did not have sight of the plea before its filing and his legal practitioner gave concessions without his consent. To buttress this point, he points to the error in the name of one of his children, which he says he would have picked out, had he had sight of the summons.

On the other hand, the respondent takes issue with the lack of explanation for the delay from 27 March 2019, when the plea was filed to September 2021, when the defective notice of amendment of plea was filed. A further delay to the filing of the present application on 9 November 2021, is also highlighted as unexplained. The explanation given is said to be unreasonable in the circumstances. It was argued that the applicant should have attached a supporting affidavit from his erstwhile legal practitioner in support of his explanation. The proposed amendment is said to introduce new issues which had already been concluded on the distribution of the immovable assets and might require new evidence on the improvements to the Borrowdale property.

I am satisfied by the applicant's explanation as it appears in paragraphs 3.10 to 3.14 of his founding affidavit. The plea shows that the issue of the Borrowdale property being inherited property was not stated. In the round table conference minutes it is recorded on 24 March 2021 as follows;

> "Mr Nkomo indicated that there was a change of attitude in respect of one of the properties which he said was inherited"

The above statement does not say that the applicant only advised his erstwhile legal practitioner at this meeting that the property was inherited. This statement could very well mean that he had said this property was inherited and because of that he has changed his attitude. Mr Chagonda then said that the issue had not been pleaded and they should proceed. This is when the applicant refused to budge. It is not surprising that the applicant's summary of evidence in case HC 8835/18 filed on 8 October 2021, captured this very issue of the Borrowdale property being inherited property which would not form the matrimonial property subject for distribution. At the pre-trial conference held before TAGU J on 12 October 2021, the applicant requested a postponement in order to discuss the way forward with his counsel. His erstwhile legal practitioners' renounced agency on 18 of October 2021 and the new ones assumed agency on 19 October 2021, in time for the final pre-trial conference at which the matter was referred to trial on the issue of the constitution and distribution of matrimonial assets only. There was then an attempt to amend the plea and discovery schedule on 25 October 2021which the respondent objected to, leading to this current application. The time in between the round table conference and this application seems to be adequately accounted for. As for the time prior to this, the applicant should be given the benefit of the doubt that he had not had sight of the plea which was signed by his legal practitioners, before that time.

The applicant undoubtedly raises a very pertinent point and has proof already availed through the respondent's own bundle of documents that this property in issue was inherited. This fact is also admitted by the respondent. The court dealing with the divorce should interrogate this fact so as to decide whether the Borrowdale property constitutes matrimonial property in the light of section 7 (3) of the Matrimonial Causes Act. This would place before the court, the real question in controversy between the parties. Otherwise how would the court deal with the constitution of

the matrimonial assets without this? Thereafter the court will then deal with the distribution of the property and might then assess the respective contributions.

I close with the sentiments in *Rose* v *Whittake*r v *Rose supra;*

> "This 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."

Accordingly, I order as follows;

1. The application be and is hereby granted.
2. The applicant be and is hereby given leave to amend his pleadings in matter number HC 8835/18 within 10 days of this order.
3. There shall be no order as to costs

Matsikidze Attorneys-At-Law, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners