

OASIS CONSTRUCTION (PVT) LTD  
and  
THOMAS D'ACQUIN MOUAFO  
versus  
YARNFIELD ENTERPRISES (PVT) LTD

HIGH COURT OF HARARE  
PHIRI J  
HARARE, 2 February 2018 & 12 September 2018

**Court Application for Interlocutory Relief Pursuant to Amendment  
Of Pleadings and Matters Arising Pending Action**

*J.C. Muzangaza*, for the applicants  
*I. Ndunzo*, for the respondent

PHIRI J: This was a court application for interlocutory relief in respect of which the applicants sought the following order:

“IT IS ORDERED THAT:

1. The following documents as filed by the plaintiff under case no HC 11503/16 shall be expunged from the record.
  - 1.1 Notice of Amendment of Summons, as filed on 23 January, 2018
  - 1.2 Index as filed on 26 January, 2018; and
  - 1.3 Plaintiff's Bundle of Documents filed on the 26<sup>th</sup> January, 2018
2. The Registrar of this Honourable Court is hereby ordered to remove the aforesaid documents from the record to return same to the respondent's legal practitioners, and to endorse on the record that this has been done.
3. The costs of this application shall be paid by the respondent.”

The application was opposed.

The factual background to the application

The court action between the parties was set down for hearing on the continuous court roll for Wednesday the 31<sup>st</sup> January and Thursday the 1<sup>st</sup> of February 2011.

It is pertinent to note that a Joint Pre-Trial Conference minute had been filed of record and signed by both parties' legal representatives.

The matter was referred to trial by HUNGWE J on 28 June, 2017.

As for this court was concerned all the issues for trial had been settled by and between the parties.

#### Notice of Amendment of Summons

On 23 January, 2018 the respondent (plaintiff) in the main cause of action) issued and filed of record a “Notice of Amendment of Summons.”

In the said notice the plaintiff sought to amend the original summons in para (a) which read as follows:

#### “Original

- (a) Payment of damages for breach of contract in the sum of one hundred and ninety-five thousand seven hundred and thirty-three United States Dollars, and thirty one cents (USD195 733-31) to be paid by the first and second defendants jointly and severally the one paying the other to be absolved;

#### To be substituted with

“Payment of damages for breach of contract in the sum of Three hundred and twenty seven thousand, six hundred and ninety five United States Dollars and fifty cents (US\$327,695-50) to be paid by the first and second defendants jointly and severally the one paying the other to be absolved.”

The plaintiff (respondent) also sought in its notice to amend para 10.1 of the original summons and the original prayer.

This notice to amend was issued and filed without the consent of the applicant (defendants in the main cause). Nor without leave of this court being sought.

#### Bundle of documents

The respondent (plaintiff) also issued and filed an Index and bundle of documents on 26 January 2018.

This included the “Notice to amend summons” and various documents which the plaintiff, presumably intends to produce at the forthcoming trial.

#### The Court Application

The first and second applicants filed the present interlocutory application raising issue that the aforementioned documents were filed irregularly in the main Case No. HC 11503/16.

Applicants mentioned that the documents were improperly before this court because they were filed without the applicants’ consent and also without leave of this honourable court.

In para 7 of their founding papers the applicants itemized the documents which they s alleged hid been improperly filed before the court.

Applicants took issue with the fact that just some six days before the set down date for trial the respondent filed the aforesaid notice of amendment of summons. Applications also took issue with the filing of “An Index” and “plaintiff’s bundle of documents: “Comprising ninety-nine (99) pages of documents that include without prejudice communication as between the parties, and a revised schedule for the works to be done, compiled as recently as 17 January 2018 (at pp 76 – 83 of the bundle).”

Applicants contended, in their application, that the mere placement of the aforesaid documents onto the record, ..”without following due process, is demonstrative of disdain for the rules, if not contemptuous of this honourable.

They also contended that the proposal amendments so sought introduce extensive voluminous and far reaching change’s to the respondent case and by extension to applicant’s defence (See paras 9 and 10 of applicant’s founding affidavit).

Further applicants averred that the proposed amendments were not part of the pleadings or even issues raised at the Pre-trial conference minute.

#### Notice of Opposition

The respondents opposed this present application.

Essentially respondent’s argued that “the Notice of Amendment of the summons and bundle of documents had all been properly served on the applicant’s legal practitioners on 25 and 26 January 2018 respectively. (See para 7.16 of opposing affidavit).

Respondents further argued that they gave the court and the applicant a notice of amendment three (3) days before the trial date. Respondents also challenged applicant’s contentions in respect of the bundle of documents which had been filed of record on the basis that their relevance weight or admissibility is a process that happen at trial.

#### Decision of this court

It is the decision of this court that this application is not frivolous and vexatious as alleged.

Clearly the respondent has not complied with the rules of this court.

#### The Law

The rules of this court as regards amendment of pleadings and matters arising pending action are clearly spelt in Order 20 rr 134 to 136 of the High Court Rules, 1971.

Rule 134 states that following;

“Subject to rr 134 and 151, failing consent by all the parties, the court of 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.”

Further s 134 of the Rules, on amendment of summons or declaration after issue of summons states the following;

“(1) a Summons or declaration may with the leave of the court or a judge be amended to substitute or to include a cause of action arising after the issue of summons. Provided that in the opinion of the court or a judge such an amendment does not charge the action into or add to it, an action of a substantially different character, which would more conveniently be the subject of a fresh action.”

In the view of this court the rules of this court are crystal clear that in the absence of consent from the other party in this case the applicants, the respondents must seek a leave of this court or a judge to amend its summons.

In this particular case paragraph 1.3 of the Joint Pre-Trial Conference Minute (Annexure “A”) defines the issue for trial as follows;

“1.3 Whether or not the first and second defendants are either jointly and severally, or at all liable to pay damages to the plaintiff in the sum of one hundred and ninety-five thousand and seven hundred and thirty three United States dollars (US\$195 733) together with three thousand United States dollars (US\$3 000) per month in rentals calculated from the 22<sup>nd</sup> February 2013 the date of full and final payment.”

This issue is substantially different from the amendment sought by respondent which states that;

“Plaintiff requires the sum of three hundred and twenty seven thousand, six hundred and ninety five United States dollars and fifty cents (US\$327 695.00) to complete the outstanding works to the standard as envisaged by clause 6.3 of the agreement.

In this court’s view mere filing of a document entitled “Notice of Amendment of Summons” (Annexure “B”) without seeking consent from the applicants or leave of the court is clearly and bluntly in violation of the aforesaid court rules.

The substantial different in the aforesaid pre-trial conference issue and the amendment sought should be obvious. In the case of *ZFC 1991 (1) ZLR 308 (H) GILLESPIE J*, as he then was, stated that:

**“There is a practice prevalent, born of indolence and ignorance of the rules, whereby parties purport to effort an amendment of process and pleadings by the unilateral issue of a so-called ‘notice of amendment’ .... There are only two possible methods of procuring an amendment to process or pleadings after issue of summons. One is by consent of the parties and the other is by order of court. Whenever it is desired to amend such a**

document, the first step, therefore, is to approach the other party for consent to the amendment. That given, then the documents delivered and filed may be amended, either by written alterations, by interleaved pages or by replacement with copies of the document as amended whichever is more appropriate ..... Manuscript alterations by consent should be initiated by both parties, written amendments should be filed under copy of a signed notice of consent.

**Failing consent then it is necessary to make application for amendment, either to the court or a judge in chambers, depending upon the criteria set out in Rule 226. The application must be served upon the opposing party; be supported by affidavit showing good cause; and must be accompanied by a draft order. Only once an order has been given can process or a pleading be considered to be amended, and only after its amendment is the amended document susceptible of response by way of pleading or requests for particularity. A notice of amendment such as I have earlier described is not provided for in the rules and is an irregular proceeding.”**

The same approach was adopted in GOWORA J in *Agricultural Bank of Zimbabwe Ltd T/A Agribank v Nickstate Investments (Pvt) Ltd & Ors* HH 23-10 where she concurred with the sentiments expressed by GILLESPIE J to the effect that an amendment made other than by a written application, is irregular.

There is no justification whatsoever, given the circumstances of the present matter, for this court to depart from the approach adopted in the cases referred herein.

In addition this court finds that the respondent has failed to also address the issues and concerns raised by the applicants, that the subsequent unilateral approach of filing an index and bundle of documents containing even without prejudice correspondence and, or documents not listed in respondent’s discovery schedule, was highly irregular.

This court also finds that it was improper given the issues raised by the applicants in this matter to insist in opposing the present application on the grounds, that it was frivolous and vexatious or was a delaying tactic on the part of the applicants.

In the circumstances this court holds that the applicants are entitled to the interlocutory relief sought and hereby grants an order in terms of the draft filed of record.

*Muzangaza Mandaza & Tomana*, applicant’s legal practitioners  
*Mutamangira & Associates*, respondent’s legal practitioners