WAYNE PARHAM

and

CREDFIN (PRIVATE) LIMITED

versus

JAN FREDRICK KOTZE

IN THE HIGH COURT OF ZIMBABWE

MUREMBA J

HARARE, 16 February, 2018 & 6 June 2018

**Opposed Application**

*D. Ochieng,* for the applicants

*T. Zhuwarara,* for the respondent

MUREMBA J: This is an application for the amendment of the plea filed in HC 9063/14 in which the applicants herein are the defendants and the respondent is the plaintiff. In addition the applicants are applying for the substitution of the defendants’ summary of evidence with revised summaries of evidence.

In his founding affidavit the first applicant explained what happened in the matter and the defence he gave when he instructed his then legal practitioner, the now late Mr Carr of Coghlan, Welsh and Guest who in turn briefed an advocate to draw a plea which was then filed with this court. He averred that the respondent entered into an agreement of sale for the purchase of a farm from one D.A Hartman, which sale was being negotiated by Fox and Carney Estates Agents. Adele Rowe, a property negotiator employed by Fox and Carney approached him on behalf of D.A Hartman and asked him to be the custodian of funds D.A Hartman was receiving from the sale of the property. Since the first applicant knew D.A Hartman he agreed and he was told that the respondent would be bringing the funds to his office, which he did. At that time the first applicant was running a business, Inamo Investments (Pvt) Ltd, which was sharing premises with the second applicant at 9 Birchenough Road, Alexandra Park, Harare. The first applicant averred that he is also a non-executive director of the second applicant. The first applicant averred that the respondent paid US$149 000 to him and was given a signed slip by a Ms Hook who works for Inamo Investments (Pvt) Ltd as an acknowledgment of receipt of the money paid. The first applicant averred that in receiving the money he acted as D.A Hartman’s agent and he subsequently transferred the funds to Mr Hartman in New Zealand on Ms Rowe’s instructions. He further averred that although the respondent had promised to make further payment in terms of his contract with Mr Hartman which he (the first applicant) was not privy to, he never made further payments. The first applicant averred that the second respondent was never involved in this transaction as the agent of Mr Hartman and it had no knowledge of the transaction at all. He further averred that when a letter of demand was written to the second applicant by the respondent’s legal practitioners for the refund of the money after the sale agreement had been called off between the respondent and Mr Hartman, the second applicant’s Finance and Operations Director, Mr Cocksedge asked him if he knew anything about this money to which he explained that this was a matter which involved himself personally and had nothing to do with the second applicant. This formed the second applicant’s reply to the demand, which reply was to the effect that the second applicant knew nothing about the matter.

The first applicant contended that when the respondent then sued him and the second applicant in 2014 for the refund of the money he went to see his lawyer, Mr Carr of Coghlan, Welsh and Guest. When he instructed Mr Carr, Mr. Carr was already unwell and from this time onwards his health declined and he was often away from his offices and difficult to communicate with. He eventually died at the end of June 2017. The first applicant averred that as a result he never received copies of the defendant’s plea, the round table pre-trial conference minute and the defendant’s summary of evidence. He averred that the first time he saw these papers was in August 2017 when he was advised of the trial set down date which was 11 September 2017 upon attending the offices of Mr. Lane-Mitchell of Coghlan, Welsh and Guest who had taken over the handling of the case. On seeing the plea, he immediately noticed and highlighted some inaccuracies in it because it did not correctly reflect either his or the second defendant’s defence. On that very day of 10 August 2017, their new legal practitioner, Mr. Lane-Mitchell filed and served a notice to amend their plea and the first applicant’s revised summary of evidence, but the respondent refused to consent to the amendments thereby prompting the applicants to file the present application.

The first applicant averred that the plea in HC 9063/14 needs to be amended because it does not reflect the correct position or properly define the dispute between the parties. In short the first applicant averred that this is a dispute solely between himself and the respondent and does not involve the second applicant as is wrongly reflected in the plea filed in HC 9063/14.

The applicant averred that the application to amend the defendants’ plea and to amend the summary of evidence is a *bona fide* application which was timeously made in the circumstances. He averred that there was a monumental misunderstanding between himself and his former legal practitioner which he is now unfortunately unavailable to explain.

Russell Grant Cocksedge, the second applicant’s General Manager and Financial and Operations Director deposed to the founding affidavit on behalf of the second applicant. He averred that the first time the second applicant became aware of this matter was when it received the respondent’s letter of demand for the refund of the US$149 000.00 on 12 November 2012. On receipt of this letter, Mr Cocksedge contended that he made enquiries with the second applicant’s directors if any had any knowledge of the respondent and his claim to which the first applicant said that the claim involved himself personally and had nothing to do with the second applicant. Mr Cocksedge averred that he then responded to the demand on 16 November 2012 denying that the second applicant had any liability in respect of the alleged claim. He attached the letter in question as annexure H. Mr Cocksedge averred that on 15 January 2013 he received an email from the respondent’s then legal practitioners Muzangaza Mandaza & Tomana repeating the same demand to which he replied again by way of a letter dated 17 January 2013 advising that the second applicant had nothing to do with the respondent’s claim, had not received any funds from the respondent and advised the respondent to make any alleged claim he had against the first applicant. He attached his second letter as annexure J. Mr Cocksedge contended that in October 2014 the respondent issued summons against both the first and the second applicants claiming a refund of the said money. Together with the first applicant, they met with the now late Mr Carr. His averments were the same as those of the first applicant about what happened in respect of the instructions that were given to the late Mr Carr about the two applicants’ defences. He averred that it was explained that the second applicant knew nothing about the claim and Mr Carr was provided with copies of correspondence attached as annexures H and J to the opposing affidavit. Mr Carr went on to instruct an advocate to draw a plea which plea they later discovered to be inaccurate. He averred that he was unable to explain why there was a misunderstanding by Mr Carr of the second defendant’s defence. He averred that in the absence of Mr Carr this anomaly cannot be explained.

Andrew Paul Lane Mitchell a legal practitioner of 30 years standing and in practice under Coghlan, Welsh and Guest which firm represents both applicants in this matter filed a supporting affidavit to the applicants’ application. He averred that Mr Carr a legal practitioner of 30 years’ experience by the time of his death was a conscientious and ethical practitioner who held himself to a high standard. He had the conduct of the main matter from inception until his demise. In the last years of his life, Mr Carr faced chronic health challenges that occasionally affected his fitness and availability for work in the office. It was only after his death that Andrew Paul Lane-Mitchell took over the main matter.

Andrew Paul Lane–Mitchell averred that on reading the file he noted that the respondent had initially filed a claim against the first applicant and Ms Rowe. Mr Carr instructed an advocate who drew a special plea and an exception. The respondent reacted by withdrawing that claim. The respondent then brought a further claim against the two applicants. Mr Carrinstructed an advocate who drew an exception to that claim also. This was upheld and the claim was struck out. It was only on his third attempt that the respondent filed a claim to which the applicants were able to plead. Andrew Paul Lane-Mitchell averred that he noted from the file that he inherited that Mr Carr instructed an advocate to draw a plea on the terms appearing from the plea filed in HC 9063/14. Andrew Paul Lane-Mitchell averred that the correspondence now annexed to the present application by the second applicant was omitted from the advocate’s brief. As to the reason why the correspondence was omitted, Andrew Paul Lane-Mitchell averred that he could not comment.

Andrew Paul Lane-Mitchell averred that the matter proceeded through pre-trial before Mr Carr’s death, but was only set down for trial thereafter. This was around the time he took over the matter. In order to brief the advocate for trial, Andrew Paul Lane-Mitchell averred that he met with the first applicant and the second applicant’s deponent in order to record witness statements and prepare them for trial. He averred that it was in the process that he noted that their instructions were at odds with the plea. He showed them the plea and sought an explanation, but they were unable to give one because they were convinced they had made themselves clear in their instructions to Mr Carr.

Andrew Paul Lane-Mitchell averred that in light of this unusual development, he briefed the advocate who had drawn the plea. The advocate too, was unable to explain the anomaly. He had never discussed the matter with the first applicant or Mr Cocksedge and so knew even less than Andrew Paul Lane-Mitchell. Andrew Paul Lane-Mitchellaverred that the pleadings do not reflect the full reality of the applicants’ defence and ought to be amended. He averred that the source of Mr Carr’s error remains mysterious and it is that error that accounts for the applicants’ plea not reflecting the facts of the matter. He averred that it is on that basis that the applicants seek to amend their pleas.

In his opposing affidavit, the respondent contended that this application was but a petition to withdraw admissions. He averred that the petition was inordinately late, *mala-fide*, irregular at law and ought to be dismissed with costs on a higher scale. He averred that the applicants had not satisfactorily explained why they entered the confessionary plea which they now sought to resile from. He averred that the plea was made under the hand of their legal practitioners, a circumstance which demonstrates that the said plea was settled for after the provision of legal advice. He averred that it is quite incredible for anyone to believe that the applicants did not review or enquire about any of the pleadings filed on their behalf from the day they gave instructions in 2014 up to the eve of the trial in August 2017. He averred that this demonstrates a lack of diligence or care that cannot inspire this court to grant leave to amend the alleged erroneous pleading. The respondent averred that the inordinate delay and the lack of any cogent explanation for such delay lead to the conclusion that this application is *mala fide*. He further averred that he finds it difficult to accept that the late Mr Carrsuch a well-regarded, experienced and respected legal practitioner could have made a manifestly rudimentary error in filing a plea totally divorced from his instructions and thereafter concoct facts and file a summary of evidence not in keeping with anything he was told by his clients.

The respondent averred that the applicants having attended the pre-trial conference, he found it laughable that the applicants now seek to feign ignorance of their own plea and summary of evidence. He averred that if there was any error such would have been realised by any diligent litigant much earlier or at the very least during the pre-trial conference. The respondent averred that the only reasonable conclusion is that the applicants’ position was untenable to their late legal practitioner who then rightly made confessions and admissions which the applicants now seek to depart from. The respondent averred that the present application is *mala-fide* having been brought at the eve of trial and seeking to raise issues that have always been in the knowledge of the applicants and long abandoned through their plea and pre-trial conference issues filed of record.

The respondent averred that the applicants have since realised that they filed a confessionary plea and now seek to foist the blame on a departed practitioner whom the court cannot interrogate. He further contended that admissions were well made and cannot now be avoided in a manner that is so prejudicial to him. He further averred that the applicant’s pre-trial papers again affirmed the admissions that the applicants now seek to disassociate themselves from. The respondent contended that he will suffer immeasurable prejudice if leave to withdraw is granted as once the admissions were made, and repeated by the applicants in subsequent pleadings, he was by operation of law excused from having to prove the same. The respondent averred that the applicants are seeking to recast their whole defence and recommence proceedings afresh.

The respondent averred that the inordinate delay in motivating the amendment apart from activating great legal costs to him, it had also exposed him to the dangers of prescription. He further averred that had the applicants petitioned timeously, a proper investigation into the filing of the erroneous plea would have been carried out before Mr Carr’s demise. The respondent averred that what is even more curios is the fact that the applicants have not even tendered costs which is a clear indication of their attitude of disdain to his plight and the obvious difficulties they introduced by their late request at amendment. However, it must be noted that the respondent did not mention in his opposing affidavit what admission the applicants had made. The admission was only disclosed in the heads of argument by his counsel.

In response to the respondent’s opposition, the applicants had their legal practitioner, Andrew Paul Lane-Mitchell depose to their answering affidavit for the reason that the respondent had presented extensive argument rather than fact and the response to many of his averments turns largely on matters of law, legal practice and pleading.

Andrew Paul Lane-Mitchell contended that the application is not for the withdrawal of admissions, but for the amendment of the plea and the substitution of the summary of evidence. He averred that the first paragraph of the original plea filed for the applicants states that they “deny each allegation of fact made and each conclusion of law urged in the plaintiff’s amended declaration.” Andrew Paul Lane-Mitchell contended that the respondent’s repeated reference to the plea making admissions is therefore incorrect. He averred that from his experience as a legal practitioner it is normal for litigants, being untrained in the law, to rely on the advice of their attorneys and accept assurances that pleadings have been filed in accordance with their instructions and in a timely manner. He further averred that in all previous litigation between the parties and for the first two years or so, no plea was filed because the respondent’s declaration did not disclose a cause of action and as such those proceedings are irrelevant. Andrew Paul Lane-Mitchell contended that the proposed amendments do not change the issues as framed at the pre-trial conference. The pre-trial conference therefore would not have highlighted the error, because the outcome was consistent with their understanding of the matter. Andrew Paul Lane – Mitchell contended that the original plea is not concessionary. He averred that the proposed amendment was initiated immediately the applicants became aware of the anomaly. He further contended that the proposed amendment will not alter the issues but seeks to lay before the court an accurate outline of the facts that the applicants will seek to prove. He averred that the original plea does not reflect reality and the summary of evidence does not state what the witnesses will testify. He contended that this ought to be corrected if the pleadings are to serve their function. He averred that the original plea merely fails to record accurately certain aspects of the applicants’ defence. He averred that in the case of the second applicant, the essence of its defence has been known to the respondent since 2012 when the correspondence between the parties began. No new issues would arise from the amended plea. There is no prejudice to the respondent. The respondent only served summons days before his claim would have prescribed. The contention that the amendment will somehow alter this position is incorrect in both fact and law. Andrew Paul Lane-Mitchell averred that the applicants acted as soon as they discovered the need to do so. He averred that the demise of Mr Carr is a circumstance which was entirely outside anybody’s control. He averred that any costs incurred or which have been occasioned arose from the respondent’s decision to resist the amendment for no apparent reason.

The position of the law with regards to amendment of pleadings in general is as follows. In terms of Order 20 rule 132 of the High Court Rules, 1971,

“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 amendment shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.”

The rule means that amendments can be made before close of pleadings, after close of pleadings, during the hearing of evidence, after the hearing of evidence, but not after judgment. See Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* 5th ed vol 1 p 675. 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.

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.

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,

“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.”

Herbstein and Van Winsen in *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed at p 685 say the following about amendments involving the withdrawal of admissions.

“Where a proposed amendment involves the withdrawal of an admission, the court will generally require a satisfactory explanation of the circumstances in which the admission was made and the reasons for seeking to withdraw it. In addition the court must consider the question of prejudice to the other party. If the result of allowing the admission to be withdrawn is to cause prejudice or injustice to the other party to the extent that a special order as to costs will not compensate him then the application to amend will be refused.”

This type of amendment cannot therefore be treated as an ordinary amendment designed to bring to the fore the real dispute between the parties. Before granting an amendment to such a pleading the court requires a satisfactory explanation of both the circumstances in which the admission was made and the reasons why a withdrawal of it is being sought. The onus rests on the applicant to prove the *bona fides* of the withdrawal. He or she must give a satisfactory explanation for the intention to withdraw the admission of fact. The application must therefore be properly motivated and justified. In the absence of any acceptable motivation and justification the assumption is that the attempt to withdraw the admission is *mala fide*. The court has discretion to allow an admission to be withdrawn, for example, where the admission is clearly contrary to the facts. In such a situation an injustice will result from adherence to the admission. See *Chimutanda Motor Spares (Pvt) Ltd* v *Musare & Anor* 1994 (1) ZLR 310 (H). The fact that the amendment might lead to the defeat of the other party is not the kind of prejudice which should weigh with the court. See *Copper Trading Co. (Pvt) Ltd* v *City of Bulawayo* 1997 (1) ZLR 134 (S).

In *casu*, in suing the applicants, the respondent averred in its amended declaration that he entered into an agreement with the second applicant in terms of which he deposited the sum of US$149 000.00 with the second applicant. He averred that he paid the money through the first applicant who represented the second applicant for the second applicant to hold the funds in trust for him.

In the plea that Mr Carr caused to be drawn the applicants state in the first paragraph that:

“Save for the identity of the parties set out in paras 1, 2 and 3 of the amended declaration, the defendants deny each allegation of fact made and each conclusion of law urged in the plaintiff’s amended declaration.”

In the succeeding paragraphs the plea narrates what happened in the matter by

explaining that the respondent purchased a farm from Daniel Hartman and that it was a term of the agreement that the respondent would pay to the second applicant, (the second applicant acting only as an agent of the said Hartman) the sum of US$149 000 in part payment of the purchase price of the farm. It was averred that the first applicant acted only as an officer of the second applicant.

It was Mr *Zhuwarara*’s argument that in the plea the second applicant made an admission that it was acting as an agent of the person from whom the respondent was buying an immovable property. The respondent contended that this is a confessionary plea which lends credence to the respondent’s contentions that the second applicant is liable to answer the claim and it confirms the respondent’s cause. Mr *Zhuwarara* argued that once an admission was made that the second applicant was acting as the agent of the seller, the respondent then did not need to gather any information in proof of its assertion that the second applicant was directly involved in the transaction that gives birth to the claim. He further argued that the attempt at withdrawing this admission prejudices the respondent in a manner that cannot be compensated by an order for costs.

Looking at the amended declaration the applicants pleaded to, it can be said that the

whilst the second applicant do not make an admission to liability, it admitted to having been involved in the transaction. It admitted to having received the money albeit on behalf of a third party, Daniel Hartman. The first applicant also admitted to having acted as a representative of the second applicant. In light of this admission, the respondent had no need to lead evidence to prove that the second applicant was directly involved in the transaction involving the payment of the money in question.

However, despite this admission, I will allow the applicants to amend their plea for the following reasons. The applicants gave a satisfactory explanation for the circumstances in which the admission was made and why they are seeking to withdraw it. They explained that there must have been a misunderstanding by Mr Carr when he took instructions, because the plea is not a correct reflection of their instructions to him. Mr Carr being no longer available to explain what happened, the applicants’ averments remain unchallenged. The applicants contended that they brought the inaccuracies in the plea to the attention of their new legal practitioner as soon as they saw the plea as the parties were now preparing for trial about a month before trial commenced. The respondent did not adduce any evidence to rebut this. Even if it is said that the applicants were negligent in that they did not get to know the contents of their plea until after the pre-trial conference and at the time the trial was about to commence, that alone cannot be justification or reason to deny them the amendment they are seeking.

The correspondence which Mr Cocksedge wrote to the respondent’s erstwhile legal practitioners as far back as 2012 and 2013 denying the second applicant’s knowledge of the respondent, his claim and transacting with him is consistent with the amendment the applicants now seek to make. The applicants said this has always been the true position of what transpired. They said that they could not explain how the now late Mr Carr got it wrong when he took instructions from them. The applicants stated that in seeking an amendment, they want an accurate outline of their defence placed before the court since this is what their witnesses will testify to. For the court to do justice between the parties, it is only proper to allow the applicants to place before it a true account of what they say actually took place. To a greater extent what they are saying is what happened is corroborated by the correspondence they have attached to their application. They cannot be punished for a misunderstanding which they say happened with their then legal practitioner who is now late. There is no basis for saying that they are lying about the misunderstanding because the correspondence they wrote to the respondent’s erstwhile legal practitioners in 2012 and 2013 vindicates them. Consequently, their application to amend the original plea cannot be said to be *mala fide*. The application is properly motivated and justified. The amendment will enable the court to decide the real issues between the parties.

The delay in bringing the application to amend i.e. about a month before trial commenced, after the pleadings had been closed and after the pre-trial conference had been held was sufficiently explained by the applicants. They stated that that was the first time they noticed the inaccuracies in the plea and it was after the demise of their then legal practitioner. There is nothing incredible about this explanation because as Andrew Paul Lane – Mitchell contended, it is normal for litigants being untrained in the law to rely on the advice of their lawyers and accept assurances that pleadings have been filed in accordance with their instructions. A sufficient explanation warranting this court to condone the delay was therefore given.

Mr *Zhuwarara* argued that if the amendment is allowed the respondent will now be forced to recast his witness testimony and to gather evidence that may very well be inaccessible to him due to passage of time. This cannot be true. I say this because the respondent averred in his amended declaration that it is him who entered into the contract with the second applicant as it was being represented by the first applicant. Since the person who entered into the agreement is the respondent himself, the evidence about the contract is readily available to the respondent. There is no other evidence he needs to gather. The complexion of the case will not change much because all the respondent needs to show is that he contracted with the second applicant as he averred in his amended declaration. In the original plea the second applicant never admitted that it had contracted with him. It averred that it only acted as an agent of D.A Hartman. So even if the trial was to proceed on the basis of the original plea, the respondent would still need to adduce evidence to show that he contracted with the second applicant being represented by the first applicant and that the second applicant was the principal party and not an agent. The amendment will therefore not change anything in respect of the evidence the respondent ought to lead in order to prove his case or claim against the applicants.

The amendment will not cause any prejudice to the respondent because once he proves that it contracted with the second applicant, then it will automatically follow that the first applicant acted in the whole transaction as the second applicant’s representative and not as the agent of D.A Hartman. In light of the foregoing, I will allow the applicants to amend their plea in HC 9063/14.

In respect of amendments to the summaries of evidence, the law does not require an application to amend to be made. This is because a summary of evidence is not a pleading. All that the party needs to do is to file a supplementary summary of evidence.

I will order the applicants to pay the respondent’s costs occasioned by the amendment because the respondent has been unnecessarily put out of pocket by their house not being in order.

In the result it is ordered that:

1. The defendants’ plea in case no. HC 9063/14 is amended in terms of first defendant’s amended plea and in terms of second defendant’s amended pled filed together with the notice to amend defendants’ plea on 10 August 2017.
2. The plaintiff in HC 9063/14 shall file his replication within 10 days of this order.
3. Thereafter the proceedings in the matter shall follow the rules of procedure of this court.
4. The applicants in the present application shall meet the respondent’s costs occasioned by the amendment.

*Coghlan, Welsh & Guest,* applicants’ legal practitioners

*Scanlen & Holderness,* respondent’s legal practitioners