

TAKESURE CHEMUGARIRA
and
GABRIEL CHIDZIVA
and
ACKIM CHIGARIRO
and
KILLIAN CHIKWIRAMAKOMO
and
JOHN ZVINGAREHWANI CHIROMBO
and
RICHARD CHISEDZI
and
DANIEL CHITENDERU
and
OLIVER DAPIRA
and
LANGTON DUNGA
and
WASHINGTON FERENDENDE
and
JOHN GUTUKUNHUWA
and
CHARLES MAKADZANGE
and
WILLE MASIYA
and
CEPHAS MUCHINGAMI
and
ALOIS MUDIMU
and
LANGTON MUGARI
and
HERBERT MUJAJI
and
MATIKI MUKOTO
and
EDMOND MUNDONDE
and
LUKE MUTARE
and
ARTWELL MUTARI
and
ONEKAI MWAUNZIRENI
and
FARAI TARANGANAI
and
RAFARAPHAEL GADZIRA
and

WICKSON SHUPIKAI CHIUNDA
and
EDGAR TSHUMA
and
FRANCIS MARIMA JAKARASI
and
CRISPEN MAJONI VEREENGERA
and
ISIAIH MACONDI CHAMUNORWA
and
OBERT NCUBE SHOKO
and
PHILLIP NGOSHI
and
FEDNARD NDLOVU
and
NACEAL CHIDANHIKA CHIDINDI
and
SABELO NDLOVU
and
LEONCE PAUL SIYAPHI
and
ELIAS MOYO
and
PHILLIP TARUVINGA SITHOLE
and
DAVID TENDAYI DZINGIRE
and
LAWSON DEMA DEMA
and
JONA SABURUTSWA
and
LOVERIDGE SHAYAMANO
and
DENNIS MPOFU
and
JOHN MATSVERU
and
LUCKSON MUTENGWA
and
ADM SIBANDA
and
ANDREW GUMWE
and
CANAAN MACHONA
and
SMART TECHU MUROMO
and

JEFIAS CHIMEDZA
and
LUCKISON CHIKWANDA
and
LUKE DABULAMANZI NDLOVU
and
LUKAS MUNYIKA
and
GILSON MANENJI
and
JOHN NYANGANI
and
PETTER SITHOLE
versus
ZIMBABWE UNITED PASSENGER COMPANY LIMITED PENSION AND LIFE
ASSURANCE FUND
and
THE BOARD OF TRUSTEES ZIMBABWE UNITED PASSENGER COMPANY LIMITED
PENSION AND LIFE ASSURANCE FUND
and
ZIMBABWE UNITED PASSENGER COMPANY
and
FIDELITY LIFE ASSURANCE COMPANY OF ZIMBABWE LIMITED
and
INSURANCE AND PENSION COMMISSION OF ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 2 June 2023 & 6 August 2024

Opposed Application-Declaratur

Mr *Mukanganwi*, for the plaintiffs
Mr *C J Mahara*, for the 4th defendant
Mr *H Mutasa*, for the 5th defendant

MUSITHU J: The plaintiffs instituted action proceedings against the defendant's seeking relief set out in the summons as follows:

1. That the 1st Defendant, 2nd Defendant, 3rd Defendant, 4th Defendant and 5th Defendant shall be liable jointly and severally one paying the other to be absolved to pay the Plaintiffs' a total of US\$12,811.36 or equivalent in Zimbabwe dollars at the prevailing official exchange rate, effective 1st August 2017, being Plaintiffs' aggregated capital value, transferrable to a registered Pension Fund of each Plaintiff's choice, for securing pension benefits consisting of a cash lumpsum equal to a proportion of respective Plaintiffs' capital value dependent on mode of

- Plaintiffs' mode of exit and/or b) monthly pension from balance of Plaintiffs' capital, for each Plaintiff. Each Plaintiff claim is for the various amounts stated in the summons.
2. Interest on the aforesaid sum at the prescribed rate calculated from the day of summons to the day of full payment.
 3. Costs of suit on Attorney and Client scale.”

The prayer in the plaintiffs' declaration is worded differently. It is set out as follows:

- “a) Payment by 1st Defendant, upon calling on the lawful responsibilities of 2nd, 3rd, 4th and 5th Defendants, lumpsum cash benefits and/or monthly payments effective 1st August 2017 and commencement of monthly pension, were due, effective 1st August 2017, as per lawful agreements, to each Plaintiff as stated in the Summons.
- b) Interest on the aforesaid sum at the prescribed rate calculated from the date of summons to date of full payment.
- c) Cost of suit on Attorney and Client scale.”

Background to the Plaintiffs' Case

The plaintiffs are former employees of the third defendant who either retired, resigned, got retrenched or dismissed or were asked to proceed on leave until they were called back to work. The ex-employees are members of the first defendant, a pension fund in which they participated as employees of the third defendant. The plaintiffs were entitled to some pension benefits from the first defendant on termination of employment. The second defendant is a Board of Trustees, which oversees the operations of the pension fund on behalf of both the plaintiffs and the first defendant. The fourth defendant was sued as the entity responsible for the administration and underwriting of the first defendant in terms of the relevant law which regulates the administration of pension funds. It is also responsible for the computation of pension benefits due to the plaintiffs as specified in pension fund rules and regulations. The fifth defendant is a regulatory commission which oversees the operation and administration of pension funds in Zimbabwe.

According to the plaintiffs, over periods spanning from the dates of their engagements as employees, their contracts of employment were terminated by the third defendant for diverse reasons. When this happened, the first and second defendants would not process their benefits when they became due in accordance with the law. The plaintiffs contend that during their employment, they religiously contributed to the pension scheme. Following the termination of their employment contracts for whatever reason, they were now entitled to their pension benefits. All the defendants were accused of failing, refusing or ignoring their obligations to deliver those benefits to the plaintiffs.

According to the plaintiffs, when they realised that the defendants were not complying with their obligations in terms of the rules and regulations regulating pension benefits, they sought advice from pension experts on the computation of their pension benefits which were due from the first defendant. The plaintiffs were advised that the benefits due to them were in the form of a cash lumpsum and/or a monthly payment for life. These benefits were supported by the plaintiffs' capital accumulation over the period they made contributions to the first defendant. Further, according to the plaintiffs, their capital accumulation, the lumpsum benefit payable and the monthly payments due to each plaintiff were shown in the summons and the effective date of such payments was 1 August 2017.

The plaintiffs claimed to have engaged the defendants who despite demand, had refused or failed to re-compute and honour their pension benefits, or those pension benefits as computed by the experts.

The plaintiffs summons and declaration were issued and filed on 1 December 2022. By notice of amendment issued and filed on 20 December 2022, the plaintiffs sought to amend their summons and declaration as follows. They sought the deletion of paragraph (1) of the summons and had it replaced with the following:

“That the 1st Defendant, 3rd Defendant, 4th Defendant and 5th Defendant shall be liable jointly and severally, one paying the other to be absolved to pay the Plaintiffs' a total of USD1, 281, 136..... or equivalent in Zimbabwe dollars at the prevailing official exchange rate, effective 1st August 2017, being Plaintiffs' aggregated capital value, transferrable to a registered Pension Fund of each Plaintiff's choice, for securing pension benefits consisting of a cash sum equal to a proportionate of respective Plaintiffs' capital value dependant on mode of Plaintiffs' mode of exit and/or b)monthly pension from balance of Plaintiffs' capital, for each plaintiff. Each Plaintiff claim is for the various amounts stated in the various rows against each Plaintiff's name as shown in Annexure “A” of the Plaintiffs' Declaration.”

The other amendment was the insertion of the following words to para 7 of the declaration so that it would read as follows:

“Over periods spanning from the date each Plaintiff was engaged, 3rd Defendant has retrenched, retired, dismissed or accepted resignations, or asked Plaintiffs' to go on leave without specifying when Plaintiffs should report for work. 1st Defendant and 2nd Defendant would not act to pay benefits when they became due from the 1st Defendant in accordance with the law, and various agreements, as shown in the Table in Annexure ‘A’.”

A further amendment was made to para 11 of the declaration through the following insertion:

“The pension benefits experts compiled a comprehensive report whose summary is in the Table of Annexure “A””

The last amendment was the deletion of paragraph “a” of the prayer in the plaintiff’s declaration and substituting it with the following:

“That the 1st Defendant, 2nd Defendant, 3rd Defendant, 4th Defendant and 5th Defendant shall be liable jointly and severally one paying the other to be absolved to pay the Plaintiffs’ a total sum of USD1,281, 136 (One million, two hundred and eighty-one thousand, one hundred and thirty-six United States Dollars) or equivalent in Zimbabwe dollars at the prevailing official exchange rate, effective 1st August 2017, being Plaintiffs’ aggregated capital value, transferable to a registered Pension Fund of each Plaintiff’s choice, for securing pension benefits consisting of a cash lumpsum equal to a proportion of respective Plaintiffs’ capital value dependent on mode of Plaintiffs’ mode of exit and/or b) monthly pension from balance of Plaintiffs’ capital, for each Plaintiff. Each Plaintiff claim is for the various amounts stated in the various rows against each Plaintiff’s name as shown in Annexure “A” of the Plaintiffs’ Declaration.”

The fourth and fifth defendants reacted to the summons and declaration by raising exceptions and special pleas.

The Fourth Defendant’s Case

In response to the summons and declaration, the fourth defendant raised an exception and a plea in bar. The basis of the exception was that the summons and declaration was vague and embarrassing and did not disclose a cause of action. It was vague and embarrassing because the claim was not properly pleaded in the summons and declaration. The basis upon which the fourth defendant was sued was not concisely set out as the plaintiffs had not identified the law which the said defendant had contravened or the agreements that had been breached. No cause of action was established against the fourth defendant save to allege a relationship between the fourth defendant and the first defendant. There was no causal link between the fourth defendant and what was being claimed.

The plea in bar was that the plaintiffs claim was before the wrong forum. The nature of the claim fell within the ambit of a commercial dispute, and the plaintiffs ought to have approached the Commercial Court instead of the General Division of the High Court.

The Fifth Defendant’s Case

The fifth defendant’s special plea was that the debt which formed the plaintiffs’ cause of action fell due on 1 August 2017. Three years had lapsed by the 1st December 2022 when the plaintiffs issued summons and declaration. The plaintiffs claim had therefore prescribed.

The exception was that the summons and declaration did not disclose a cause of action against the fifth defendant.

The Submissions

At the hearing, Mr *Mahara* submitted that no allegation of any wrongdoing was being attributed to the fourth defendant. It was clear from the claim that the alleged breaches were being attributed to the first and second defendants. The fourth defendant's duties were statutorily provided and there was no averment that the fourth defendant had failed in its statutory duties. The fourth defendant had also raised a complaint through a letter to the plaintiffs as required by rules of court. For that reason, the court was urged to uphold the exception and dismiss the claim with costs on the punitive scale.

As regards the special plea, it was submitted that from a reading of the Commercial Court Rules, insurance claims fell under the ambit of commercial disputes as defined in those rules. The claim therefore ought to have been placed before the Commercial Court.

Mr *Mutasa* appearing for the fifth defendant abandoned the special plea of prescription. As regards the exception, Mr *Mutasa* submitted that the fifth defendant was merely a regulator of pension funds and there was no legal basis upon which it was being required to meet the plaintiffs' monetary obligations. The defects in the summons and declaration were brought to the plaintiffs' attention but no attempts were made to regularise the anomalies. Counsel urged the court to dismiss the plaintiffs claims with costs on the punitive scale.

In his response, Mr *Mukanganwi* for the plaintiffs argued that the plaintiffs had clearly set out their claims against the fourth defendant. He pointed to paragraphs 8 and 13 of the declaration as illustrating the basis upon which the said party was sued. The court was also referred to para 21 of the plaintiffs' heads of argument against the fourth defendant where it was submitted that the fourth defendant had failed, refused and ignored the plaintiffs' demands to deliver their benefits. It was also submitted that the fourth defendant was charged with the administration and underwriting of the first defendant as per the law and for the computation of benefits due to the plaintiffs as specified by the law.

Mr *Mukanganwi* accused the fifth defendant of failing to enforce the laws and regulations governing the payment of benefits to the plaintiffs. The court was urged to have regard to s 46(2) of the Constitution in enforcing the fifth defendant's obligations.

The analysis

I must dispose of the question of jurisdiction raised by the fourth defendant at the outset. The submission on behalf of the fourth defendant was that this court lacked jurisdiction by virtue of r 3(1)(j) of the High Court (Commercial Division) Rules, 2020 (the Commercial Court

rules), which placed the current matter within the ambit of a commercial dispute and therefore resolvable by the Commercial Court.

The court determines that the objection is without merit because the creation of specialised divisions of the High Court did not have the effect of stripping those divisions of their original jurisdiction to determine all disputes placed before them. This position is supported by s 171(3) of the Constitution which states that:

“An Act of Parliament may provide for the High Court to be divided into specialised divisions, but every such division must be able to exercise the general jurisdiction of the High Court in any matter that is brought before it.”

The referral of matters to specific divisions of the High Court is an administrative arrangement that does not have the effect of stripping other divisions of their original jurisdiction to preside over such matters.

The fourth defendant’s exception is taken on two bases. The first is that the summons and declaration is vague and embarrassing to such an extent that the fourth defendant is not sure what it is being called to respond to. Rule 12(5)(d) of the High Court Rules, 2021, requires that every summons shall set forth “*a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action*”. Put differently, a plaintiff’s claim must be set out with sufficient clarity to inform the defendant of the exact nature of the case that he or she is required to respond to. The plaintiff is required to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely in motivation of the claim.

From a reading of the summons and declaration, even as amended, it is not clear on what basis the fourth defendant has been sued. The plaintiffs’ claims are based on the unpaid pension benefits that accrued to them in the course of their employment with the third defendant. In paragraph 8 of the declaration, the fourth defendant together with the other four defendants is accused of having failed and ignored to deliver the plaintiffs’ pension benefits. In paragraph (a) of the amended prayer, the fourth defendant, together with the other four defendants are required to pay the plaintiffs the sum of US\$1,281, 136, or the equivalent in Zimbabwe dollars at the prevailing official exchange rate, being what the plaintiffs’ called their aggregated capital value, transferable to a registered Pension Fund of each Plaintiff’s choice, for securing pension benefits consisting of a cash lumpsum equal to a proportion of respective Plaintiffs’ capital value dependent on mode of Plaintiffs’ mode of exit.

The causal link between the plaintiffs' claims and the fourth defendant's culpability is clearly missing. I agree with counsel for the fourth defendant that the plaintiffs' claim against the fourth defendant is too vague and embarrassing to such an extent that the fourth defendant does not even know why it has been sued or what case it is expected to answer to.

The second leg of the fourth defendant's exception is that the summons and declaration do not disclose a cause of action against it. In *Chiwawa v Mutzuris & 4 Others*¹, MAKARAU JP (as she was then), dealt with the principle of cause of action as follows:

“..... It is now the settled position in our law, in my view, that the term refers to when the plaintiff is aware of every fact which it would be necessary for him or her to prove in order to support his or her prayer for judgment. It is the entire set of facts that the plaintiff has to allege in his or her declaration in order to disclose a cause of action but does not include the evidence that is necessary to support such a cause of action. (See *Shinga v General Accident Insurance Co (Zimbabwe) Ltd* 1989 (2) ZLR 268 (HC) at 278 A- C).

In asserting a cause of action, a plaintiff is required to set out the entire facts and material averments which give rise to an enforceable claim against a defendant. The factual and legal basis of the claim against the fourth defendant ought to have been clear from a reading of the summons and declaration. It is not clear why the fourth defendant should be held liable for the alleged pension benefits that the plaintiffs claim to be due to them. It is not clear whether the fourth defendant owed the plaintiffs any contractual or legal obligation to pay the alleged benefits. There is therefore merit in the fourth defendant's special plea.

As regards the fifth defendant, its position is not different from that of the fourth defendant. Its exception was confined to the failure by the summons and declaration to disclose a cause of action against it. It is common cause that the fifth defendant is a statutory body that regulates insurance and pensions business in Zimbabwe. It is not clear how as a regulator, the fifth defendant is liable for the delivery of the plaintiffs' pension benefits. Even from a perusal of the summons and declaration nothing is said about whether the fifth defendant has through its conduct or by omission, failed in its regulatory mandate to the prejudice of the plaintiffs. In short, the plaintiffs have failed to lay out a basis for dragging the fifth defendant into these proceedings.

In their heads of argument, the plaintiffs argued that the present matter raised constitutional questions more particularly sections 46(2) and 71(4). Section 46(2) provides that when interpreting an enactment, and when developing the common law and customary law, every court, must promote and be guided by the spirit and objectives of Chapter 4 of the

¹ HH 7/09

Constitution which deals with fundamental human rights and freedoms. Section 71(4) provides that where a person has a vested or contingent right to the payment of a pension benefit, a law which provides for the extinction or diminution of that right is regarded, for the purposes of subsection (3), as a law providing for the compulsory acquisition of property. These provisions are not relevant to the determination of the issue before the court. The question before the court is whether the plaintiffs summons, and declaration was excipiable on the basis of the deficiencies alleged by the fourth and fifth defendants.

Where an exception is upheld, the approach of the courts is to give the plaintiff an opportunity to file an amended pleading within a stipulated time.² As regards the question of costs, counsels for the fourth and fifth defendants urged the court to dismiss the plaintiffs' claims with costs on the attorney and client scale, for the reason that the plaintiffs had been given prior written warnings in terms of r 42(3) of the High Court rules. The alleged letters of complaint were not part of the record before me, and I had no way of telling whether such prior written complaints were made as required by the rules.

Resultantly it is ordered that:

1. The fourth and fifth defendants' exception to the plaintiffs' summons and declaration is hereby upheld.
2. The plaintiffs shall amend their summons and declaration within ten days of the service of this order, failing which the fourth and fifth defendants shall be entitled to approach the court for the dismissal of the plaintiffs' claims.
3. The plaintiffs shall pay the fourth and fifth defendants' costs of suit on the ordinary scale.

Mugiya & Muvhami Law Chambers, legal practitioners for the 1st to 55th plaintiffs
Mvingi & Mugadza, legal practitioners for the 4th defendant
Gill, Godlonton & Gerrans, legal practitioners for the 5th defendant

²² See Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, Fifth Edition, Vol 1 at p 646