HAUSEN (PVT) LTD
versus
CMA CGM ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 9 February 2022 & 27 July 2022.

Opposed application for an exception

Mr.H. Muza for the plaintiff.
Ms A.S. Ndhlovu for excipient

CHILIMBE J

BACKGROUND

[1] I am required to rule on a point *in limine* raised by plaintiff in objection to defendant`s exception. In doing so, I will need to determine which rules of court apply between the repealed High Court Rules 1971, ("the old rules") and the current High Court Rules SI 202/20 ("the new rules"). The background to the dispute goes thus; -plaintiff issued summons on 29 September 2020 claiming restitution in the sum of USD$100,000,00, and contractual damages of USD50,000,00 following alleged defective performance by defendant. Defendant`s appearance to defend, entered on 7 December 2020 was accompanied by a simultaneous request for further particulars.

[2] When the particulars so requested were (eventually, on 11 October 2021) supplied, defendant then excepted to plaintiff`s claim on 9 November 2021 and filed heads or argument supporting the exception. In its replication filed on 23 November 2021, plaintiff raised a point *in limine* and attacked the defendant`s exception as incurably defective. It is necessary to state at this stage that as matters stand, defendant has not pleaded over to plaintiff`s claim. I will return to these issues, but first, further details about the dispute

ALLEGED BREACH OF CONTRACT

[3] Plaintiff is in the business of exporting fresh (and therefore perishable) meat products from Zimbabwe to various foreign destinations. An efficient and reliable transport service provider with specialised refrigerated containers is an indispensable enabler to plaintiff`s business.

According to plaintiff in its declaration, defendant touted itself as imbued with the requisite attributes, equipment and expertise meeting plaintiff`s specialised transport needs. In particular, defendant held itself as possessing special refrigerated containers called "reefers". Plaintiff also described defendant as a provider of shipping services to and from Zimbabwe through the Durban, Maputo, Walvis Bay and Beira corridors.

[4] Plaintiff contends that it contracted defendant in November 2019 to transport a consignment of meat from Zimbabwe to Vietnam via the Beira corridor. Plaintiff contended further, that two reefers were ordered for the purpose. Defendant carried out the necessary inspections of the reefers at Beira port to ascertain suitability and assured plaintiff to that effect. It was plaintiff`s averment that contrary to its obligations in terms of the contract, defendant in fact, failed to supply functional reefers. As a result, the consignment of meat went bad, lost its commercial value and with that, caused loss to plaintiff.

THE OBJECTION *IN LIMINE* TAKEN AGAINST THE EXCEPTION.

[5] The defendant`s exception was set out as follows; -

> "1.1 The summons are bad at law as it discloses no cause of action. It does not comply with Order 3 r 11 (c) of the High Court Rules, 1971.This rule is now under rule 12 (5) of the High Court Rules,2021.
>
> 1.2 The Exception has merit and must be upheld with the Plaintiff ordered to pay Defendant`s costs at the scale of legal practitioner and client."

[6] The plaintiff`s preliminary objection to this exception went thus; -

> "1. The exception was filed out of time. An exception filed outside the timelines prescribed by the rules of this Honourable Court is so fatally defective as to warrant dismissal without further ado. This is especially so where condonation for late filing of an exception has not been sought, as in casu. The exception is therefore not properly before the court and ought to be dismissed with costs on a legal practitioner and client scale."

[7] This progressive escalation of intractability was only abated by the parties` ironic "consensus" that costs be awarded against the other side on a higher scale. When it came to which rules to adopt in resolving whether the exception was timeously filed, the parties unsurprisingly took irreconcilable positions. Plaintiff argued that the old rules applied whilst the excipient moved for the adoption of the new rules.

ARGUMENTS BY THE PARTIES

[8] Mr. *Muza f*or the plaintiff submitted as follows; -the exception was filed well outside (in fact six months after) the twenty (20) day period set out in Order 18 r 119 of the old rules which prescribed that; -

> ***"119 Time for filing plea, exception or special plea***
>
> The defendant shall file his plea, exception or special plea within ten days of the service of the plaintiff's declaration:
>
> Provided that where the plaintiff has served his declaration with the summons as provided for in rule 113 there shall be added to the period of ten days above referred to the time allowed a defendant to enter appearance as calculated in terms of rule 17."

[9] Mr. *Muza* argued that the above rule was interpreted by the Supreme Court in *Sammy's Group (Pvt) Ltd v Meyburgh NO and Others SC 45-15,* as a mandatory requirement that demanded strict adherence. In support of his submissions. Mr. *Muza* also relied extensively on the case of *Ecobank v Pearson Chitando and Another HH 787-16.* (For some reason, Mr. *Muza* repeatedly submitted that the Ecobank decision was *per coram* TAKUVA J, when it was in fact the, matter was decided by TSANGA J. The record is accordingly adjusted to rectify that mis-citation).

[10] It was also Mr. *Muza*`s submission that the request for further particulars filed by defendant did not interrupt the *dies* within which the exception ought to have been filed in terms of the rules. A request for further particulars did not constitute a pleading which answered plaintiff`s claim as contemplated in r 119.On that basis, Mr. *Muza* argued that the court was bound to follow the approach taken in *Sammy`s Group* and *Ecobank Zimbabwe* (*supra)* and dismiss the exception.

[11] Ms. *Ndhlovu* for the defendant responded with the argument that the decisions of *Sammy`s Group* and *Ecobank* were distinguishable from the facts in the instant case. It was also submitted by counsel that there was no automatic bar which operated against defendant. Plaintiff ought to have issued defendant with a notice to plead if it was plaintiff`s desire to effect a bar against defendant. Ms *Ndhlovu* further submitted that contrary to Mr. *Muza*`s argument that a request for further particulars did not constitute a pleading, r 137 of the old rules stated otherwise.

[12] For that reason, the *dies* for filing an exception should be reckoned, even on the basis of the old rules, from the date defendant received the further particulars sought. Lastly, I was urged to recognise that the present exception was filed on 9 November 2021 under the new

rules of court. On that basis, the new rules ought to be applied in adjudging whether defendant`s exception was improperly before the court. The new rules introduced, by rule 42, a different framework for the filing of exceptions which superseded that provided for by the old Order 18 r 119.

ANALYSIS OF THE SUBMISSIONS BY COUNSEL

[13] In my view, the position laid down in *Sammy`s Group* and *Ecobank* is as clear as it is also unassailable. The authorities declared that (a) an exception ought to be filed within a maximum period of twenty (20) days from the date of service of summons and (b) that a defendant who failed to file their exception within that period would be improperly before the court. The court held as follows at [19] in *Sammy`s Group*; -

> "It is true, as the learned Judge remarked, that there is no sanction for the late filing of an exception or special plea. However, the provision in the Rules is mandatory and the documents filed in contravention thereof cannot, in the absence of condonation of the non-compliance with the Rules, have any legal validity. The sanction must, in my view be, that the pleading is invalid by virtue of its non-compliance with the Rules. First respondent's exception was filed 15 days out of time. Second respondent's special plea and exception were filed 6 and a half months out of time. Both applications were in violation of the Rules without explanation, without condonation, sought or granted. There was, therefore, no legal basis on which they were entertained by the court *a quo*." [Emphasis on marked sections]

[14. In that respect, the position laid down in *Sammy's Group* and *Ecobank* deals a fatal blow to Ms. *Ndhlovu*`s argument that a request for further particulars interrupted the reckoning of the period for filing an exception in terms of the old rules. It mattered not that r 137 did recognise that a request for further particulars may have amounted to a pleading. The simple conclusion was that the defendant who chose to pursue further particulars beyond the twenty (20) days risked forfeiting its opportunity except. Suffice to say, *Sammy's Group* and *Ecobank* were both decided before the advent of the new rules and therefore dealt with an excipient`s obligations as defined by the old rules of court.

[15] As stated, Mr. *Muza* argued that the old rules ought to be applied in establishing the propriety of the excipient`s conduct. Counsel`s reasoning was that the exception ought to have been filed in January 2021 when the old rules still applied. Ms *Ndhlovu* took the position that since the new rules SI 202 /21 came into effect on 23 July 2021, they necessarily applied to the present exception which was filed in November 2021.

[16] I am inclined toward Mr. *Muza*`s argument. Its import is that *Sammy`s Group* should be read as having imposed a bar on that defendant who missed the opportunity to file its exception within the period prescribed by r 119 after service of summons. Effectively, by this principle, all defendants who had been served with summons during the currency of the old rules were

obligated to except to such summons within twenty (20) days of service. Never mind that the twenty (20) day period may have straddled and overlapped beyond 23 June 2021.

[17] This bar could not be considered as having been uplifted by the promulgation of the new rules in July 2021 and I say so for two reasons; -firstly, rule 108 in the new rules (the repeals and savings clause), offers no specific reprieve to litigants in defendant`s position. Secondly, Part IV of the Interpretation Act [Chapter 1:01] which deals with repeals, replacement and amendment of legislation, provides as follows by section 17; -

> "Section 17- Effect of repeal of enactment
>
> 1) Where an enactment repeals another enactment, the repeal shall not—
> a) revive anything not in force or existing at the time at which the repeal takes effect; or
> b) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or
> c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed; or
> d) affect any offence committed against the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect thereof; or
> e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy shall be exercisable, continued or enforced and any such penalty, forfeiture or punishment may be im-posed as if the enactment had not been so repealed." [emphasis on the marked parts]

[18] It is clear from section 17 (a) to (c) that the parties` respective rights, privileges and obligations as they stood as at the date of retirement of the old rules were not neutralised by the cross-over. The "*Sammy`s Group* bar" invested plaintiff with certain rights under the old rules. In the same vein, it eliminated as an option, defendant's choice to except to plaintiff`s claim. I also note that this court, per DUBE J (as she then was), adopted this reasoning in determining which set of rules governed a party`s special plea [at 6], in *Fungai Munyorovi v Weston Sakonde HH 467-21*, where it was held; -

> "The High Court Rules 2021, Statutory Instrument 202 of 2021 [hereinafter referred to as the new rules], have replaced the High Court Rules, 1971. The special plea which is the subject of these proceedings was filed in terms of the old rules and hence the preliminary points raised herein will be determined in terms of the old rules."

[19] In *General Leasing (Pvt) Ltd versus Allied Timbers (Pvt) Ltd*, HH 76-15, MATHONSI J (as he then was) expressed the position of a defendant who missed the bus in the following terms [at page 3]; -

> "In the event that the party pleading specially has not secured the consent of the other party to the special plea, exception or application and has not made an application to the registrar of this court for a set down, that party loses the opportunity to have the special plea, exception or application to strike out determined at that early stage of the filing of pleadings. As they say time waits for no one. In that event, the party has to plead over to the merits and the special plea, exception or application shall only be determined at the trial."

The court described, in the above excerpt, the fate and options of an excipient who has lost his opportunity to except upon service of summons. It thus underscores my conclusion that the rules variously created privileges and opportunities, or obligations and disadvantage which section 17 (a) to (c) of the Interpretation Act endorsed.

DISPOSITION

[20] Having found that the exception was not filed in compliance with the applicable rules of court being the repealed High Court Rules 1971, it is accordingly ordered that; -

1. The plaintiff`s point *in limine* be and is hereby upheld,
2. The defendant`s exception be and is hereby dismissed with costs.

Rusinahama-Rabvukwa Attorneys -plaintiff`s legal practitioners,
Gill, Godlonton and Gerrans-defendant`s legal practitioners.