ARROLA TENDAI TAKUNDWA IDEHEN
and
OMOSOGINE RUDO IDEHEN
and
OSARETIN TANAKA FEMI IDEHEN
and
MAVIS SHORAI NZARA
versus
CECILIA KASHUMBA
and
TAFIRENYIKA KAMBARAMI

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 01 June & 22 September 2021

Opposed Matter

T. Magwaliba, for the plaintiffs
T.L Mapuranga with M Mutiro, for the defendants

MUZOFA J: The plaintiffs issued summons against the defendants claiming the sum of US$402 000-00 being 'excess of costs that the plaintiffs will pay for the construction of 3 villas on stand number 553 Quinnington Township Borrowdale'. The plaintiff further claimed interest on the above sum calculated at the prescribed rate plus costs of suit.

The second defendant gave notice in terms of the rules that, unless the summons were withdrawn, it would except thereto. The summons not having been withdrawn, the second defendant duly filed the exception simultaneously with a special plea. The second defendant excepted on the grounds that the summons disclosed no cause of action and it did not set out a concise statement of the nature, extent and grounds of the cause of action. The summons and the declaration disclosed no causal link between any conduct by the second defendant and the plaintiff's failure to erect their villas in 2006 and disclosed no recognisable cause of action at law. The special plea taken is that the claim is prescribed.

Factual background

The fourth plaintiff who is mother to the first, second and third plaintiffs was a holder of title in properties known as stand numbers 552 and 553 Quinnington Township Borrowdale Estate, 'the property'. In 1999 she sold the property to one Dzingai Kashumba 'Dzingai' who is now deceased. In terms of the agreement of sale the purchase price was payable over a period of time. Dzingai allegedly breached the terms of agreement. The fourth plaintiff then cancelled the agreement. The late Dzingai did not accept the purported cancellation. He sued the fourth plaintiff. Thereafter protracted litigation ensued.

Under HC 10065/00 the late Dzingai was granted leave to remedy the breach and thereafter title to pass to him. True to the court order, transfer of title was effected from the fourth plaintiff to the late Dzingai. The plaintiffs allege this was fraudulently done. When Dzingai died the first defendant was appointed the executrix dative the his estate. The first defendant who was well aware that the property was subject to litigation sold stand 552 Quinnington to the second defendant and transferred title to him. The second defendant made some improvements on the property by building three double storey houses. The first defendant also built some houses on stand 553.

The fourth defendant filed an appeal against the judgment of this court granting the late Dzingai leave to remedy the breach. The protracted ownership dispute between the parties was finally settled under SC18/18. The Supreme Court confirmed the cancellation of the agreement of sale between the fourth plaintiff and the late Dzingai. The judgment reversed all the transfers in title. Title in the property was restored to the fourth plaintiff. As the dispute took its twists and turns, the plaintiff donated the property to the first, second and third plaintiffs. This is how first, second and third plaintiffs became owners of the property.

I shall address the exception first as it relates to the cause of action. This is because, if there is no cause of action the court cannot even consider the special plea on prescription. So the determination on the exception will guide the course of the judgment.

At this stage l may explain the delay in writing the judgment. The court was of the view that the parties must led evidence in respect of the special plea on prescription. During the proceedings I drew the attention of the legal practitioners to this point and they insisted that it was unnecessary to lead evidence. When I was preparing the judgment I was convinced that it was necessary to hear evidence. I held the case in abeyance until the lockdown was eased and I invited the legal practitioners. I drew their attention to the need for evidence without necessarily alluding to the required evidence .I even directed the legal practitioners to the

Brooker v *Mudhanda & Anor*[1] case where GOWORA JA (as she then was) clearly set the approach to be taken in such cases. On the authority of that case where prescription is disputed the court must hear evidence in order to properly determine on the issue. The legal practitioners were adamant that there was no need for evidence since the second defendant's plea is premised on the dates as alleged by the plaintiffs.

In my view in this case evidence is necessary as parties are not agreed on when the cause of action arose. The declaration sets out various dates when the cause of action possibly arose. In their replication the plaintiffs deny that the claim has prescribed. They aver that during the Covid 19 induced lockdown, Practice Directions were issued curtailing the business of the court effectively extending the period of prescription. In view of this assertion evidence would be necessary from the plaintiffs as to the relevant Practice Direction. The need for evidence is inescapable. I could have simply issued an order for evidence to be led. However I decided not to issue the order in view of my findings that make the evidence unnecessary.

The exception

In their heads of argument the plaintiff raised issue on the filing of the defendant's heads of argument and the setting down of the special plea and the exception. The point made is that the second defendant's heads of argument were filed before the plaintiff's *dies indiciae* to file the replication had not expired. The point taken is correct. In respect of the set down, the plaintiff allege that the second defendant prematurely set the matter for hearing. The plaintiff relied on the case of *Ngani* v *Mbanje & Another*[2] for the point made. The case referred to does not deal with the rule in question, the court dealt with a situation where summons were issued when the cause of action had not risen. In my view the procedural irregularities raised were not prejudicial to the plaintiff's case and none was alleged .I am prepared to condone the non-compliance in the interest of justice in terms of r7 (a) of the Rules, 2021.

Two issues arise for determination firstly whether the summons disclose a cause of action. Secondly whether the summons as read together with the declaration disclose a cause of action. In respect of the summons the point taken is that the summons does not set out the cause of action .It simply states the relief sought.

The issues taken in respect of the declaration are inelegantly set out, they are inundated with repetitions and at times lacking in clarity. I summarise what l could make of the objections as follows,

[1] 2018 (1) ZLR 33(S)
[2] 1987 (2)ZLR 111(S)

i. It does not disclose a recognisable cause of action against the second defendant a *bona fide* possessor.
ii. It does not disclose a cause of action based on the *actio legis acquiliae* or any *actio* for delict.
iii. It does not disclose a causal link between the second defendant and the failure by the plaintiffs to erect their buildings.
iv. It alleges fraud but does not give details how the fraud was committed.
v. The damages claimed are remote and not recognisable at law.

The law

In terms of the repelled Rules of 1971, Order 3 r 11 a valid summons must contain:

> "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."

The cause of action must therefore appear *ex facie* the summons. Where the summons do not disclose the cause of action *ex facie*, the practice of the courts is not to dismiss the claim but to give the plaintiff some time to correct the summons if so minded.

A cause of action is a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person. It is now settled that a cause of action relates to facts a plaintiff must prove to support his/her//its claim[3]. Besides the factual basis requirement, the cause of action must be based on some recognised branch of law in order for the claimant to obtain legal recourse. This position was succinctly stated in *Chifamba* v *Mutasa and Ors*[4] that,

> "The purpose of pleadings is not only to inform the other party in concise terms of the precise nature of the claim they have to meet but pleadings also serve to identify the branch of law under which the claim has been brought. Different branches of the law require different matters to be specifically pleaded in the claim to be sustainable under that action".(*my emphasis*)

Pleadings must thus be brief and to the point covering the necessary averments to alert the other party as to the case he/she faces.

In a claim under delict there must exist a causal element .The plaintiff must allege some factual situation which in principle cause the damage or has caused the damage[5].The defendant

[3] See *Peebles* v *Dairibord Zimbabwe (Private) Limited* 1999 (1) ZLR 41(H),Evins v Shield Insurance Co Ltd 1980 (2) SA 814
[4] HH 16/08
[5] Visser and Potgieter's Law of Damages,2nd Ed,2003

must therefore be the direct cause or by some alleged nexus be the proximate cause of the damages claimed.

Analysis of the case

There is no doubt that the summons do not disclose the cause of action. It contains no factual basis for the relief sought. The summons sets out the relief sought only. Despite the clear defect in the summons, the plaintiff's legal practitioner for some unintelligible reasons insisted that the summons were not defective. My finding is that the summons is defective as it does not comply with the rules.

The next consideration is whether the declaration discloses a cause of action as against the second defendant. The declaration is just a mixed bag of averments which is commonly referred to as a dog's breakfast. The declaration throws in everything for the court to process. The plaintiffs aver that the fourth plaintiff donated the property to them in 2003.They obtained architectural drawings for the construction of 3, 4 bedroomed villa units. They do not state when the drawings were made. They claim they could have built the villas and completed them in 2006 at US$50 000-00 per unit. They could not do so because of the unlawful occupation by the defendants. As a result of the defendants' unlawful conduct each villa would cost US$184 000-00.We are not told which year this cost relates to. I set out the last paragraph which appears to be the summation of the defendants' liability

> "15.It is averred that the defendants are jointly and severally liable to the first, second and third plaintiffs for the damages that they would suffer to put up 3 villas with respect to stand 553 Quinnington Township of Borrowdale Estate because of (sic) they failed to construct the villas in 2002 due to the unlawful occupation of the property by the defendants"

From that summary the plaintiffs would have no cause of action in 2002 against the second defendant. According to the declaration the property was donated to them in 2003. It therefore follows that in 2002 they were not the owners of the property .They had no rights and interest to protect in the property**.**

As if that was not enough, the plaintiffs also throw in another spanner in paragraph 13 of the declaration that 'If the construction had been done and had been completed by December 2006, each villa could have costed about US $50 000-00.However, because of the unlawful action by the defendants, the first, second and third plaintiffs would construct the same villa at about US$184 000-00'. Going by this averment the plaintiff's case is still without a cause. By 2006 the second defendant had not purchased the property. By then the late Dzingai was still alive. Although it is unclear from the declaration when the second defendant took transfer the

facts point to the reasonable conclusion that he took transfer after 2007 after Dzingai's death. The first defendant sold the property to the second defendant in her capacity as the executrix dative. If by 2006 the second defendant had not acquired title to the property, there can be no way he could be liable to the plaintiff's inability to build the villas as set out.

There is no causal link between any conduct by the second defendant and the failure to build in 2006.The second defendant was not yet part of the dispute in the matter. In my view the failure by the plaintiffs to build in 2006 has nothing to do with the second defendant. To that extent the value of US$50 000-00 being the alleged cost of building one villa has nothing to do with the second defendant. There is no factual situation to show the nexus between the second defendant and the damages claimed.

The plaintiff's claim falls under prospective damages. They are defined as a total or partial frustration of an expectation that a patrimonial asset will accrue. They involve the non-realisation of futuristic profit or earnings including increased future expenses[6].The damage is relative to time. Time is of essence in a claim for such damages. In this case the time frame set out by the plaintiffs do not create any causa as against the second defendant. From the two dates provided by the plaintiff as the time they could have built the said villas but for the unlawful conduct of the defendants, the second defendant had not entered into the fray. In other words at that time the second defendant had not done any wrongful conduct to disturb the plaintiffs from constructing their villas.

It is trite that the basis of a claim must be related to the effect. There must be a nexus between the cause of action and the relief sought. It does not appear so in this case. There is no causal connection between the second defendant and the plaintiff's claim. No cause of action can be plucked from the air and be sustainable.

Disposition

Consequently, it is ordered as follows:

1. The exception to the summons is upheld.
2. The plaintiff shall pay costs of the exception.

[6] Visser supra @ 117

Madanhi,Mugadza and Co Attorneys, plaintiff's legal practitioners.
Rubaya and Chatambudza, second defendant's legal practitioners.