ZVIKOMBORERO MURAHWI

Versus

PAM GOLDING PROPERTIES ZIMBABWE

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE 18 March & 19 October 2022

Adv T. *Zhuwarara* for defendant- excipient
T. *Gombiro* for plaintiff- respondent

Exception and special plea

CHILIMBE J

BACKGROUND

[1] Defendant took a special plea and exception to intercept plaintiff`s suit for a declaratur, pleaded alternatively with contractual damages claim. The backdrop to the dispute is as follows; -plaintiff is an information technology consultant based in the Republic of South Africa. He appointed defendant, a firm of estate agents, to sell his immovable property situate in Harare and remit the sale proceeds cross-border to his base in South Africa.

[2] The property was indeed sold at a price of USD$190,000; but the funds were not transferred as per plaintiff`s instructions. Unresolved disagreements over this issue saw plaintiff issuing summons in this court on 15 October 2021 seeking a declaratur as well as alternative and ancillary relief based on a capital sum of USD$168,000.

THE DEFENDANT`S SPECIAL PLEA AND EXCEPTION

[3] Despite the resultant irony, it is necessary to set out in detail, (and at length), the defendant`s complaint that plaintiff`s declaration is, among other defects, too long. The exception taken attacks plaintiff`s summons and declaration for failure to comply with the r 36 (1) (d) and r 13 (1) (e) of the High Court Rules 2021. Defendant details the defects in the summons and declaration concerned using the following descriptors; -they are prolix and lack concision. They are long-winded and convoluted. A total of 30 averments are loaded into 25

paragraphs in the declaration. They are also incoherent and confusing as they are long and "rumbling". The pleadings do not reflect a conscious effort to distil the plaintiff`s story into a concise presentation. They are a "twisted affair" that will demand a reader to forage through. They are copious and bury the "nub and essence" of the matter. They lack conciseness, lucidity, logic, clarity and precision. They are long, generously padded with irrelevant, superfluous, verbose and unnecessarily argumentative averments. They are anomalous and offensive. In the end, defendant dismisses the summons and declaration using the infamous term- "*a dog`s breakfast*"[1].

[4] The attacks continue. The summons and declaration failed to propound the material facts upon which the claim was premised. Defendant was prejudiced and did not know what to respond to and what to ignore. As a result, the defendant argued that it was handicapped, precluded and embarrassed in responding to the claim against it. Additionally, the defendant`s position was that the basis of the United States Dollar claim was not set out neither did the summons support the averments in the declaration. It was unclear to defendant why plaintiff sought payment for its claim in United States Dollars when, by operation of law, the obligation to pay ought to have automatically defaulted to RTGS Dollars. Thirdly, defendant raised the objection that having specifically admitted that he granted defendant as an agent, prior ratification of its conduct, defendant was estopped from claiming damages for breach of contract arising from the acts previously validated.

[5] Finally, the defendant argued that as it was not in dispute that the cause of action arose on 28 August 2018.On that basis, the claim had, in terms of section 14 of the Prescription Act *[Chapter 8:11]* atrophied.

[6] The plaintiff recriminated in the following terms; -he disputed that his claim was excipiable. The defendant`s criticisms that his declaration suffered from prolix were baseless and generalised. In fact, plaintiff argued that the detail borne out in the exception in fact demonstrated a full appreciation by defendant of the claim brought against it. It was a spirited

[1] A phrase applied to describe, by MAKARAU JP (as she then was), a tortuously complex set of estate claims in *Mwanyisa v Jumbo & Anor* HH 3-10. The same statement was applied to a similarly contested estate dispute by MAWADZE J in *Nigel Morris v Chiquita Morris & Anor* HH 71-2011.In neither case was the phrase "*dog`s breakfast*" used by the Learned JP nor Judge to describe faulty pleadings.

commentary which attempted to address the claim on the merits. It was also plaintiff`s contention that the challenges on the legality of currency obligations were matters to be dealt with at trial. In any event, an excipiable claim could always be cured by directions to address the defects. The purpose of an exception was to ensure that parties pleaded with clarity and assisted each other identify and respond to the causa. The special plea of prescription was answered by reference to the COVID 19 Chief Justice`s Practice Directions which suspended the normal operations of courts. In that respect, process could not be timeously filed but was filed all the same, at earliest opportunity.

THE LAW ON EXCEPTIONS AND SPECIAL PLEAS

[7] Special pleas and exceptions, are distinguishable versions within a species and largely serve a similar purpose[2]. Herbstein and van Winstein set out with simplicity, the nature and purpose of an exception, stating as follows at page 630 of the 5th edition of their seminal The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa; -

> "An exception is a pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action or the specific defence relied upon. The taking of an exception is a procedure which is interposed before the delivery of a plea on the merits by a defendant or before the delivery of a replication or the joinder of issue by a plaintiff. It is designed to dispose of pleadings which are so vague and embarrassing that an intelligible cause of action or defence cannot be ascertained or to determine such issues between the parties as can be adjudicated upon without the leading of evidence. The aim of the exception procedure is thus to avoid the leading of unnecessary evidence and to dispose of a cause of a case in whole or in part in an expeditious and cost-effective matter."

[8] An exception is therefore a special implement in the rules of court`s tool box. Its purpose is to deliver convenience and pragmatism through disposition of matters in a speedy, cheap and easy manner. This it achieves by (a) persuading the court to strike off claims that are irreparably defective in that they reflect no valid causa supportable at law. Secondly (b) by so doing, the

[2] See *Blooming Lily Investments (Pvt) Ltd & Anor v Ontage Resources (Pvt) Ltd* & 2 Ors HH 1-21

exception relieves a defendant from the agony of answering a claim suffocated by the overburden of prolix and imprecision.[3] (c), But an exception can also deliver a reprieve to a befuddled plaintiff whose summons and declaration may be salvaged by the deletion or correction of any offending portions therefrom. In the same respect, the same authorities that demand unstinting adherence to pristine standard in pleadings have also demonstrated qualified tolerance to certain instances of forgivably inadequate drafting[4]. But there is a limit to the extent to which such shortcomings may be accommodated. The principal consideration is that the causa must be unfailingly discernible from pleadings for any inelegance in the same pleadings to be deemed pardonable. To this extent, the exception is a procedure which must be taken only in appropriate circumstances and for the right reasons. Our courts have regularly chastised improper and insincere resort to use of the exception[5].

[9] It must, at all times be remembered that exceptions and special pleas raise a complaint of failure to adhere to the rules. And in that respect, it must also be noted that the rules of court can be clustered, for purposes of compliance, into two main categories. These may be labelled as (a) the qualitative or subjective, and (b) the technical, quantitative or objective. In the former group lie r 36 (1) (d) and r 13 (1) (e) of the High Court Rules 2021.In the latter category one may identify those other rules of court particularising various matters ranging from specifying the *dies induciae* within which process ought to be filed, manner of service of process or the prescriptions of r 36 under Part V of the rules. The latter r 36 sets out, to the detail all the specifications to be adhered to when preparing documents for filing; -paragraphing, numbering, indexing, pagination, binding and related matters.

[10] A hybrid of the two categories could (arguably) be exemplified by r 36 (7) of the Commercial Court Rules 2020 which provides thus; -

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[3] See *Cavin Chifamba v Norbert Mutasa & 2 Ors* HH 16-08 per MAKARAU JP (as she then was), and *Nhau v Kafe & Anor* HH 73-15 where MATHONSI J (as he then was), reminded, at page 3, parties to plead with precision "*By definition, pleadings must be concise and to the point. They must identify the branch of the law under which the claim or defence to it is made and should not contain evidence."*

[4] There is a plethora of authorities on this point starting with the famous dictum of DAVIES J in *Kahn* v *Stuart* 1942 CPD 386 at 391 cited with approval by MATHONSI J in *Matewa v ZETDC* (supra). See also the accommodation extended to badly drafted pleadings or papers in decisions starting with *Matewa v ZETDC*, MAFUSIRE J`s reprieve in *Main Road Motors & Ors v ZIMRA & Ors* HMA 01-18,

[5] See the remarks of MATHONSI J in *Matewa v ZETDC* (supra)

> (7) Heads of argument filed before the court shall comply with all of the following requirements—
> (a) be no more than ten pages long, and;
> (*b*) not contain any factual averments or repetition of the averments made in the affidavits filed of record, and;
> (*c*) be restricted to the presentation of a short summary of the party's case on the facts and at law accompanied by the correct citation of the relevant pages of the record, case law or other legal writings relied on including the specific page and section references relied upon. [underlined for emphasis]

APPLICATION OF THE LAW TO THE FACTS

[11] Unfortunately, the declaration is not subjected to a similar specific document length restriction prescribed for heads of argument by r 37 (7) (a) of the Commercial Court Rules. This means an objective assessment must be conducted to ascertain adherence with the rules, especially in casu where defendant has issued the most profuse of protests. I indeed took the trouble to set out as much as possible in [1] to [5] above, these nature of defendant`s objections. I must however express my amazement at the vehemence in defendant`s exception. Undoubtedly, the declaration is quite long. Plaintiff himself admits to that fact. But the plaintiff`s summons and declaration did not, in my view, deserve the vituperation (brimming with luxuriant hyperbole) directed at them by the exception. The authorities, as noted, demand that pleadings be reviewed from a pragmatic perspective that recognises the inevitable deviation from perfection. Particularly relevant on the aspect of prolix is the fact that the High Court Rules 2021 rules have not, unlike r 36 (7) of the Commercial Court Rules, set a length limit so as to put to bed, subjective quarrels such as the one forming backbone of the present legal broil between the parties

[12] The test remains whether or not the causa is identifiable and, in this case, the exception itself carries vestiges of a commentary of the claim on the merits. Plaintiff`s claim derives in a contract of agency. The averment from the summons and declaration is that defendant was instructed to sell plaintiff`s house and remit the proceeds to South Africa. The cause of action is premised on the terms of the contract and alleged breach thereof. The legal basis of plaintiff`s claim is breach of contract. A critical aspect of the breach alleged is that (a) defendant was

under specific instruction not to proceed with the sale if the purchase price was to sound in a currency other than the United States Dollar and (b) there is the allegation that defendant acted improperly if not deliberately malignant in "fast tracking" the transfer of the property to plaintiff`s detriment.

[13] The defendant dwelt extensively on the fact that the claim was couched in United States Dollars. The argument being that plaintiff ought to have pleaded the legal basis upon which he sought payment in such currency when the regulatory regime had effectively outlawed transactions in such currency. This argument cannot sustain for the following grounds;-(a) the plaintiff set out the background to the claim as being a contract with specific terms relating to currency as well as an abort provision if such performance could not be guaranteed. As (b), plaintiff seeks a declaratur based on the same circumstances and it becomes the function of the trial court to dispose of that matter. Thirdly as (c), the question of applicable currency regime to apply in transactional or contractual relationships, has generated considerable debate leading to much caselaw. MAFUSIRE J stated as follows in *Sabina Altaf Ahmed v Joina Development Co (Pvt) Ltd* HH 242-20; -

> "[26] I see nothing in the provisions above that may be construed as to mean that a claim cannot be stated in the currency of the agreement, or that a loss cannot be presented in the value that properly represents it. But I shall not, as urged upon me by the plaintiff, go into a discussion of cases such as *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC) and *AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S), among others, which held, among other things, that a court order may be expressed in units of foreign currency but convertible to local currency at the date of payment or enforcement of payment. I shall not do that because the monetary dispensation obtaining at the time of such cases is different from the one obtaining now.

[14] The effect of the above dictum is a recognition of the transition in currency regimes in recent years. It is a further recognition of the fact that each matter will be decided on its circumstances. Such circumstances entail travelling a timeline of events in the parties` contract or transaction against the statutory and judicial milestones to establish the particular currency applicable. This is what transpired in *Zambezi Gas (Pvt) Ltd v N.R. Barber (Pvt) Ltd. & Anor* SC 3-20; *Manica Zimbabwe Ltd v Windmill (Pvt) Ltd* HH 705-20*; Lunat v Patel & Anor* HB

66-20; *Zimbabwe Leaf Tobacco v Cooke* HH 412-21 and many others. These cases various recognised the advent and examined the impact of SI 33/19.SI 212/19, the Finance Act Number 2 of 2019 among others.

[15] The approach to currency disputes by the courts has been a plain application of the relevant law to facts. Translating this approach to the present case, the question is; -has plaintiff sufficiently articulated the cause of action for the parties to then traverse the issues by laying and testing of evidence at trial? In the matter before me, I am satisfied that a legally identifiable cause of action has been set out and it remains for the trial court to test its veracity.

THE SPECIAL PLEA OF PRESCRIPTION

[16] Similarly, the validity that plaintiff`s claim was saved from prescription through interruption by the Chief Justice`s COVID 19 Practice Directions on the operation of the courts, becomes a matter of evidence to be led at trial and that disposes of the matter.

DISPOSITION

[17] The summons and declaration were not as egregious as alleged. A coherent story issues out of these pleadings to present the cause of action and case that defendant must answer. The call for an exception and special plea against plaintiff`s claim was ill taken and must be refused.

It is accordingly ordered that;

The application for a special plea and exception be and are hereby dismissed with costs.

Chimwamurombe Legal Practice-defendant/excipient`s legal practitioners
Matsika Legal Practitioners-plaintiff`s legal practitioners

CHILIMBE J----------19/10/2022