OMNIA FERTILIZERS ZIMBABWE (PRIVATE) LIMITED
versus
KETTEX HOLDINGS (PRIVATE) LIMITED
and
IAN COOMER
and
MIKE WEEDEN
and
ADAM SELBY

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 17 July 2014, 30 July 2014

Opposed Application-Exception

E. T. Moyo, for plaintiff
D. Ochieng, for respondents

CHIGUMBA J: The raising of an exception that certain pleadings are vague and embarrassing requires an exercise of judicial discretion to review the pleadings complained of and decide whether there is any prejudice that will be visited on the excipient if the pleadings are allowed to stand. The defendants excepted to the plaintiff's declaration to its summons (as amplified by further particulars) as vague and embarrassing, and moved that plaintiff's claim be dismissed with costs, or alternatively, that para 8,11.2-11.6 of the declaration and the further particulars filed of record be struck out with costs. At the hearing of this matter, counsel for the defendants conceded that the appropriate relief if the exception was upheld was to allow the plaintiff leave to amend its declaration.

The plaintiff issued summons against the defendants on 17 April 2013, claiming payment of USD$118 434-77, as well as interest on that sum at the prescribed rate, calculated from the date of service of the summons to the date of payment in full, and costs of suit. The plaintiff is a duly registered company whose main business is the supply of fertilizer and crop chemicals. The

first defendant is a company registered under number 7708-2001 and second, third and fourth defendants are its directors. In April 2011 the plaintiff and first defendant entered into an agreement in terms of which plaintiff sold and delivered fertilizer and crop chemicals to the first defendant at its special instance and request during the period 1 April 2011 and 20 March 2012.

The plaintiff averred in its declaration that the first defendant has avoided its obligation to settle its outstanding indebtedness by making a false claim that it was under liquidation. The plaintiff averred further, that at all material times second, third and fourth defendants were directors of the first defendant, who in terms of s 318 of the Companies Act [*Cap 24:03*] may be declared personally liable for any debts incurred by the company if it appears that the business of the company was being knowingly carried on recklessly or with gross negligence. The particulars of alleged negligence and recklessness were set out in the plaintiff's declaration. Summons was served on the defendants on 25, 28, 29 and 30 May 2013. Notice of entry of appearance to defend was filed of record on 30 May 2013. Further particulars were requested on 18 June 2013 and supplied on 10 September 2013. A notice to plead and intention to bar was filed of record on 1 October 2013. The exception and motion to strike out was filed of record on 8 October 2013.

The defendants averred that the plaintiff's declaration as amplified by further particulars was vague and embarrassing in that:

1. The plaintiff's averments in the further particulars as regards the existence and terms of a consignment sale agreement between it and the 1st defendant are in irreconcilable conflict with the allegations in ad paragraphs 7 and 11.1, as to there having been a credit sale.
2. The averments in paragraphs 7 and 11.1 alleging a credit sale conflict with the contention that 2nd, 3rd, and 4th defendants were obliged to take measures to preserve and document stock as though 1st defendant were a consignment stockiest and not a purchaser.
3. The plaintiff contradicted itself regarding the causa of the 1st defendant's indebtedness to it, and as regards the basis of the 2nd, 3rd and 4th defendants' alleged negligence.
4. The contents of paragraph 8 are ambiguous, redundant and confusing, and embarrass the defendants.

The defendants (excipients) filed their heads of argument and submitted that the plaintiff cannot have *locus standi* under s318 of the Companies Act unless it alleges that it is a creditor of the first defendant. They relied on the case of **Ex parte Lebowa Development Corporation Ltd**[1] I did not find support for this proposition in my reading of the Lebowa case. I am in agreement with the excipients, however, that the first defendant is entitled to be furnished with 'the nature, extent and grounds of the cause of action', as stipulated by **Order 17 r 109 of the Rules of the High Court 1971.** The question that the court must determine is whether, the plaintiff's declaration, as amplified by its further particulars, contain bare allegations as to the existence of a debt, and is vague and embarrassing. The excipients referred the court to the case of *Luttig* v *Jacobs* [2]**,** which is authority for the proposition that, if there is any doubt as to the cause of action, and then the declaration is excipiable. .

The complaint in this case is that plaintiff alleges that the transaction was both a consignment stockiest agreement (in the further particulars), and a credit sale (in paragraphs 7 and 11.1 of the declaration). The excipients take the view that these allegations are in irreconcilable conflict because alleged deliveries to the first defendant in terms of a consignment stockiest agreement would be no sales at all. They would constitute the first defendant as plaintiff's agent for possible subsequent sales to third parties. On the converse, a credit sale to the first defendant would constitute the first defendant as a buyer in its own right. It was submitted that the rights and obligations of the parties under each contract are substantially different, as are the elements of the two causes of action and the attendant defenses.

The court was referred to the case of *Levitan* v *Newhaven Holiday Enterprises CC* [3]as authority in support of this proposition. The court in this case found that, an excipient must

[1] 1989 (3) SA 71 (T) @ 109F

[2] 1951 (4) SA 563 (O) @ 571A-B where Plaintiff's declaration in an action for an order declaring that a valid written contract had been entered into was found to be excipiable, and the court said: "…It is essential for defendant to know what the contract is on which plaintiff is relying and I am of the opinion that the declaration as supplemented by the further particulars leaves this matter in doubt. For these reasons the declaration is in my opinion vague and embarrassing.

[3] 1991 (2) SA 297 (C) @ 2981-299D. The court found that an exception that a pleading is vague or embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged. The court found that: "A plaintiff's particulars of claim or declaration must be framed in such a way that

satisfy the court that he will be substantially embarrassed, i.e. prejudiced, if the offending pleading is allowed to stand, and relied on **Herbstein and Van Winsen Civil Practice of the Superior Courts in South Africa 3rd ed at 339; Joubert (ed) Law of South Africa vol 3 para 199**.)

It was contended on behalf of the excipients that, these two transactions, a credit sale or a consignment sale, could have been pleaded in the alternative, and plaintiff's failure to do so renders the declaration excipiable. See *Hopday* v *Adams* 1949 (2) SA 645 ©**,** *and Credit Corporation of South Africa Ltd* v *Brown* 1970 (1) SA 18(C). These two cases are authority for the proposition that every count or separate cause of action in a declaration must be set out in proper form and with due precision. In other words, if the plaintiff's declaration is taken as a bow, or an instrument of aggression, used to establish plaintiff's cause of action, then, every string of the plaintiff's bow must be justified otherwise the arrow that it shoots will not be able to find its target. I accept the submission that it is the plaintiff's duty, in drafting its declaration to its summons, where it intends to rely on alternative causes of action, to make a case as clear as if the alternative claim stands alone.

To further buttress this point, regard may be had to the case of *Metallon Corporation Ltd* v *Stanmaker Mining (Pvt)* [4] In the plaintiff's heads of argument, it was submitted that the true purpose of an exception is not to embarrass your opponent, but to either settle the case or part of it in a cheap and easy fashion, or to protect oneself against an embarrassment which is so serious as to merit the costs of an exception. See *Khan* v *Stuart* 1942 CPD 386 @ 391[5]. So let's look at

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an admission by the defendant of the crucial allegations in it contributes to the success of the plaintiff's claim, not to its failure. So, even though it might be possible to draft an unobjectionable plea to an objectionable declaration, this might lead nowhere because the pleadings, read together, must contain the outlines of a triable case. It is the resolution of the parties' dispute that matters. If the effect of the plea is that no intelligible dispute remains there is nothing on which a court can sensibly adjudicate. If a defendant pleads to a plaintiff's particulars of claim in such a way that the remaining disputed facts no longer sustain the plaintiff's claim, there is something seriously wrong with the particulars of claim. This creates embarrassment for a defendant who is now obliged to proceed to trial on a claim which he knows to be bad in law, but to which he cannot except as disclosing no cause of action.

[4] 2007 (1) ZLR 296 (H) @ 299G where it was held that a defendant must comprehend the case against him in order to formulate and put forward his defence.

[5] "… the court should not look at a pleading with a magnifying glass of too high power. If it does it will almost always find flaws in most pleadings…it is so very easy, especially for busy counsel, to make mistakes here or there,

the pleadings, and avoid using a powerful magnifying glass, and be cognizant of the fact that busy counsel often make mistakes here or there. In paragraph seven plaintiff avers a simple agreement of sale in terms of which goods were sold and delivered to the first defendant between 1 April to 20 March 2012, which goods were partially paid for, leaving a balance outstanding, which is claimed in the summons. In paragraph nine comes the allegation against the second, third and fourth defendants, of negligence, and recklessness in dealing in the affairs of the first defendant. The particulars of negligence include purchasing on credit for resale massive stock from the plaintiff (paragraph 11 of declaration) to third parties and failing to remit the money to plaintiff upon payment by the third parties, and failing to take stock checks, or failing to collect payment from third parties.

These particulars formulate the cause of action against the second, third and fourth defendants for personal liability in terms of s 318 of the Companies Act. I can see how, as a matter of law, there is a cause of action which the first defendant should answer to, and a separate and second cause of action that the second, third and fourth defendants should answer to, that of personal liability in terms of the Companies Act. If the first defendant admits liability in terms of para 7 of the declaration, then the second, third, fourth defendants will be prejudiced in their defence to the second cause of action, which seeks to impute personal liability for the conduct of the affairs of the first defendant on them. The point of law in my view is that, if the sale was a credit sale, liability starts and ends with the first defendant. If the sale was a consignment sale, then the directors of the first defendant may have acted negligently in failing to check stock regularly and to collect payments from third parties. The two causes of action are indeed mutually exclusive, and ought to have been expressly averred, in the alternative. I find that there is a point of law to be decided which would dispose of the case in part. The case against the second, third, and fourth defendant could be disposed of if the declaration specifies whether there was a credit sale or a consignment sale. For this reason, I find the plaintiff's

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to say too much or too little, or to express something imperfectly…it is the duty of the court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is any embarrassment, which is real such as cannot be met by the asking of particulars…and unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed".

declaration excipiable, and hereby strike out para(s) 7, and para 11.1. In the result, IT IS ORDERED THAT:

1. The plaintiff is given leave to amend its declaration within fourteen days of the date of this order.
2. The defendants are given four days within which to plead to the amended declaration, calculated from the day after the date of service of the declaration on them, in terms of the rules of this court.
3. Costs shall remain in the cause.

Scanlen & Holderness, plaintiff's legal practitioners
Coghlan, Welsh & Guest, Respondents' legal practitioners