1. ZIMBABWE SPRING STEEL (PVT) LTD
versus
NESBERT BAKO
and
RAJAI ABASS AHMAD
and
MOHAMAD AHMAD
and
LAMASAT ZIMBABWE (PVT) LTD

2. ZIMBABWE SPRING STEEL (PVT) LTD
versus
ZIVAI BAKO
and
RAJAI ABASS AHMAD
and
MOHAMAD AHMAD
and
LAMASAT ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
KABASA J
HARARE, 18 November 2019 & 27 November 2019

Exception and Special Plea

E.R Samukange, for the plaintiff
Advocate L.Uriri, for the defendants

Kabasa J: The two matters, HC6800/19 and HC 6801/19 relate to the same plaintiff and same defendants, except the identity of the first defendant, who is Nesbert Bako in HC 6800/19 and Zivai Bako in HC 6801/19. They were set down for hearing on the same date.

The plaintiff's claim as against all the defendants is the same and the first, third, fourth and fifth defendants' exception to the summons raises exactly the same issues. So does the special plea which relates to the second defendant only.

The parties agreed to merge their arguments in both matters. The court therefore accepted the parties' consensual decision to make their submissions all at once, effectively consolidating

the matters. This also informed the decision to write one composite judgment for the two matters. It made no sense to me to write two separate judgments in the circumstances.

The plaintiff issued summons against the defendants on 20th August 2019 claiming as against them, jointly and severally the one paying the others to be absolved, payment of the sum of $100 000 under HC 6800/19 and $145 000 under HC 6801/19. The amounts claimed being money deposited into the first defendant's account at the fraudulent behest of the second defendant who was purportedly representing the fifth defendant, a company in which the third and fourth defendants are directors and liable for the loss suffered by the plaintiff as a result of the fifth defendant's fraud.

The plaintiff's declaration reads as follows:-

> "Sometime in June 2018, at Harare, the second defendant purportedly representing the fifth defendant as its Managing Director, approached the plaintiff's Director, Ryan Garizio who he knew before by virtue of previous dealings in the sale of water tanks, pipes, pumps and steel tank stands and misrepresented that he had some foreign currency at his disposal but however wanted some bank funds to offset a number of local debts.
>
> The second defendant indicated that should the plaintiff deposit the said sums into the instructed accounts, then plaintiff would be given the amount transferred as United States Dollars at the then prevailing official rate of 1USD:1 Bond Dollar which prevailed then in terms of the law.
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> Pursuant to the second defendant's misrepresentation, plaintiff on the 6th July 2018 then transferred the sum of US$100 000.00 into the first defendant's CBZ Bank account number 682611 23010018 held at Cripps Road Branch, Harare.
>
> When the payment of the US$100 000 became due by the fifth defendant as undertaken by the second defendant, the second defendant went into hiding and was not reachable. Plaintiff made a police report against the defendants, the matter of which is still pending. In denying liability the first defendant stated that even though the money was received into his account he was neither a creditor of the second defendant nor of the fifth defendant.
>
> There is no proof of the second defendant receiving the said amount from the first defendant and in fact, all the defendants have been involved in a number of transactions involving the same *modus operandi* that has seen various businesses being fleeced fraudulently of amounts close to US$3 000 000.00
>
> The fifth defendant's corporate standing in the business community was used to veil the fraudulent activities of the 2nd, 3rd and 4th defendants and therefore the corporate veil must be pierced in order for the natural persons involved in defrauding the plaintiff to face personal liability jointly and severally together with the fifth defendant.

> The first defendant's account was used as a conduit and the first defendant benefited from the fraudulent misrepresentation by way of commission. The first defendant did not alert the relevant authorities of the fraudulent activities but yet derived benefit from it and therefore he is liable to payment of the said amount.
>
> As a result of the defendants' misrepresentation, plaintiff has suffered a loss of US$100 000.00."

This declaration is a replica of the one in HC 6801/19 except in so far as the amount deposited and the account number into which it was so deposited.

After entering appearance to defend in both matters, counsel for all the defendants wrote to the plaintiff's counsel on 10th September 2019, registering complaints in respect of the summons and declaration. The complaint was to the effect that the summons and declaration did not disclose the nature and extent of the cause of action and was therefore bad at law.

Counsel further complained that the plaintiff had withheld the entire set of facts surrounding the transaction contrary to rule 104 of the High Court Rules, 1971, and that a police report made by the plaintiff referred to payment towards imports, not a simple exchange of money. The plaintiff was asked to attend to these complaints on pain of facing formal objections to the summons and declaration. The plaintiff was not moved and regarded the complaints as baseless. This reaction led to the filing of this exception and special plea.

The exception and special plea were filed on 23rd September 2019. The excipients' objection being that the plaintiff's claim does not disclose a cause of action because:-

a) The claim contravenes the Finance Act, Chapter 23:04 as amended, as it is in USD which is not legal tender in Zimbabwe
b) The essential requirements for liability for fraud as regards 1st, 3rd,4th and 5th defendants have not been pleaded with particularity
c) The date on which the payment of the money was to be effected is not stated and so there is nothing to show the defendants were placed in *mora*.

As regards the plea is bar, the contention is that

a) The plaintiff withheld facts which show that the transaction was illegal as they contravene the Exchange Control Laws of the country.

b) The 2nd defendant was not an authorised dealer in foreign currency and the plaintiff withheld to state this fact.
c) The plaintiff reported to the police that the money was for imports and yet in the summons it is said to have been a foreign currency deal. This reveals that the claim is false and therefore bad in law.
d) The plaintiff and second defendant entered into a compromise wherein the amount payable was set at ZW$1 400 000.00. The claimed amount, being in excess of the compromise amount is therefore bad in law.

Based on the exception and special plea taken, the defendants pray for the dismissal of the plaintiff's claim.

In response the plaintiff contended that no facts have been withheld. The declaration states the verbal agreement entered into by the parties. The second defendant however misrepresented that he would pay in foreign currency with intent to defraud the plaintiff. The reference to imports related to the foreign currency the second defendant had said he would be getting from Beirut and so there was nothing false about the claim as it appears on the summons and declaration. There is nothing illegal about it either.

As regards the compromise, the second defendant never intended to settle his indebtedness but it was all a ploy to perpetuate the fraud. There therefore can be no talk about a compromise in the circumstances, so the plaintiff contended.

Both counsel filed heads of argument, each persuading the court to find merit in their respective arguments. I must from the outset express my appreciation in the manner each counsel articulated their argument, very clear and easy to follow. I now have to determine whether the exception and special plea were properly taken. I propose to deal with each ground of exception in turn before turning to the special plea.

1. Does the plaintiff's claim disclose a cause of action?

The excipients' contention seeks to raise a point of law, which if successful, will dispose of the case without further ado. If a claim does not disclose a cause of action it effectively means that claim has nothing to stand on and ought not to have been made.

Herbstein and van Winsen in *The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* 5 ed at p 632 thereof wrote:

> "In *International Tobacco Co. of SA Ltd* v *Wollheim* 1953 (2) SA 603 (A) at 613 A-3, GREENBERG JA (CENTLIVRES CJ concurring) remarked; If it can be shown on exception that a declaration discloses no cause of action, an exception on this ground should be allowed…"

What therefore is a cause of action and has it been shown that the declaration in *casu* discloses no cause of action? Mr *E.R Samukange*, counsel for the first, third, fourth and fifth defendants referred to GOWORA JA's decision in *Jennifer Nan Brooker* v *Richard Mudhanda and Anor* SC 5/18 where the learned JA had this to say:

> "What constitutes 'a cause of action' was described in *Abrahams & Sons* v *SA Railways and Harbours*1933 CPD 626. At 637 WATERMEYER J stated:
> "The proper meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action."

A reading of the plaintiff's declaration, in my view, discloses a set of facts which gives rise to a claim. The contention by Mr *E R Samukange* is that it is not an enforceable claim because it contravenes the Finance Act, [*Chapter 23:04*].

Section 23 of the Finance (No. 2) Act of 2019 provides that:

> "1. For the avoidance of doubt, but subject to subsection (4), it is declared that with effect from the second effective date, the British pound, United States dollar, South African rand, Botswana pula and any other foreign currency whatsoever are no longer legal tender alongside the Zimbabwe dollar in any transaction in Zimbabwe.
> 2) Accordingly, the Zimbabwe dollar shall, with effect from the second effective date, but subject to subsection (4), be the sole legal tender in Zimbabwe in all transactions."

The second effective date being 24 June 2019 and the claim *in casu* having arisen in July 2018 and not exempt in terms of subsection (4), it offends against the law, so counsel argued.

To buttress the point, he relied on the decision in *Raad vir Kuratore vir Warmbad Plase* v *Bester* 1954 (3) SA 71 (T), where the learned judge said:

> "A claim which by reason of the provisions of a statute is unenforceable does not disclose a cause of action and can be excepted to because the courts take judicial cognizance of statutes and the validity of a statute cannot ordinarily be challenged---''

Advocate *Uriri* countered this argument and referred to the decision in *Chiraga* v *Chisimuko* 2002 (2) ZLR 368, a decision which followed the reasoning in *Makwindi Oil*

Procurement (Pvt) Ltd v *National Oil Company of Zimbabwe (Pvt) Ltd* 1988 (2) ZLR 482 (SC), that our courts are at liberty to give judgment sounding in foreign currency.

If therefore there is no bar to the court granting judgment sounding in foreign currency, can it be argued that a summons in which is claimed an amount in USD discloses no cause of action by reason of such claim being unenforceable? I think not. I am therefore persuaded by Advocate *Uriri*'s argument. And I am fortified in saying so regard being had to GUBBAY CJ's (as he then was) remarks in the *Makwindi* case (*supra*) at 490 C-F where he said:

> "I am firmly of the opinion that in the absence of any legislative enactments which require our courts to order payments in local currency only, the innovative lead taken both in Miliangos and the subsequent extensions to the rule there enunciated, and in the *Murata Machinery* case in South Africa, is to be adopted. This will bring Zimbabwe into line with many foreign legal systems."

I do no interpret s 23 of the Finance Act as barring the courts from giving judgments that sound in foreign currency. There is therefore no legislation which requires our courts to order payments in local currency only.

This dove-tails with GUBBAY CJ's decision, where he referred to the date of enforcement in the *Makwindi* case and said:

> "Since execution cannot be levied in foreign currency, there must be a conversion into the local currency for this limited purpose and the rate to be applied is that obtaining at the date of enforcement."

To read into s 23 of the Finance Act that courts are barred from granting judgments that sound in foreign currency is to read more into the provision than that which it expressly states.

> "The golden rule of statutory interpretation dictates that the words of a statute must be given their ordinary grammatical meaning unless to do so would lead to an absurdity (*per* PATEL J in *Kingdom Bank Workers Committee* v *Kingdom Bank Financial Holdings* HH-302-2011)".

That said I am not persuaded to hold that the summons and declaration *in casu* is bad at law justifying the dismissal of the claim as argued by counsel for the defendants.

I move on to the second rung of the argument which is that the essential requirements for liability for fraud as regards the first, third, fourth and fifth defendants were not pleaded with particularity.

Mr. *Samukange* relied on the decision by MAKARAU JP (as she then was) in *Chifamba* v *Mutasa and Others* HH-18/08, where she said:

> "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 pleading also serves 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."

Turning to the facts *in casu*, counsel argued that whilst the declaration states that the second defendant is the one who made the representations upon which the plaintiff acted, no allegation is made as to what representations the first, third, fourth and fifth defendants made to have a cause of action against them based on fraud.

My reading of the declaration clearly reflects that when the second defendant made the misrepresentations, he was purportedly acting as fifth defendant's representative, being the managing director. The money was deposited into the first defendant's account who gladly received it without raising any alarm when he was not expecting that money from that source. He then purportedly transferred the money to the second defendant who was representing the fifth defendant. The third and fourth defendants are directors in the fifth defendant, the company through which the second defendant was acting in order to get the plaintiff to come on board and transfer the money. It further states that since the fifth defendant's corporate standing in the business community was used to veil the fraudulent activities, the natural persons in fifth defendant must be held personally liable.

Counsel for the plaintiff buttressed this point when in the heads of argument reference was made to s 318 of the Companies Act [*Chapter 24:03*], a provision which allows a creditor to apply to the court to declare the directors of a company personally liable where there are allegations of fraud perpetrated on such creditor under the guise of company business. Whether the plaintiff's articulation of what transpired is the truth of what happened is not what is canvassed in an exception as that can only come out through evidence. Any claim remains but just a claim until and unless evidence is led to prove it. I am therefore not concerned with the truthfulness of the claim in these proceedings.

The issue therefore is whether there is no particularity in the declaration to enable the first, third, fourth and fifth defendants to answer the plaintiff's claim, in other words to file their plea? I am of the view that the particularity was provided and should there be need for more, the

defendants can easily request for further particulars and further and better particulars should there still be such need.

Counsel for the defendants further contended that the essential allegations for a claim based on fraud are missing as no representation was made by the first, third, fourth and fifth defendants which the plaintiff acted on.

On the face of it, I am of the view that the declaration laid a basis for joining the four defendants and that a distinction must always be made between that which is necessary to allow a defendant to plead with the benefit of a request for further particulars if need be and a complaint from a fastidious defendant whose quest for detail is not premised on a real desire to be able to plead but motivated by a desire to unnecessarily drag the matter.

To allow a defendant whose motivation is based on the latter to succeed, defeats the aim of an exception.

> "The aim of the exception procedure is to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost effective manner."
> (Herbstein and Van Winsen, 5th Edition at p 630.)

It follows therefore that when an exception is taken in circumstances where a party can easily seek further particulars and plead on the merits, the result is far from disposition of the matter in a cost effective and expeditious manner.

With that said, I do not find the argument that the summons and declaration are excipiable for want of particularity persuasive and I therefore reject it.

I turn now to the last rung of the complaint, which is that the date on which the payment of the money was to be effected is not stated and so there is nothing to show the defendants were placed in *mora*.

The plaintiff's declaration states that when the amount became due, the second defendant went into hiding and that despite demand; the defendants have failed, refused or neglected to pay the money.

Granted the declaration could have given detail as to when the money was due and when the defendants were placed in *mora*. It is however important to note that such detail would have provided dates, which dates could have easily been obtained by a request for further particulars.

I can do no more than respectively associate myself with the remarks in *Kahn* v *Stuart* 1942 CPD 386 at 391 (see Herbstein and Van Winsen p 631):

> "It used apparently, once to be thought that the object of an exception was to embarrass your opponent. That is not the true object of an exception at all. The true object of an exception is either, if possible, to settle the case, or at least 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 even of an exception. In my opinion, the court should not look at a pleading with a magnifying glass of too high power. If it does so, it will be almost bound to find flaws in most pleadings..... It is so very easy, especially for busy counsel, to make mistakes here or there, to say too much or too little, or to express something imperfectly. In my view, it is the duty of the court, where 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 and such as cannot be met by the asking of particulars, as the result of the faults in pleadings to which exception is taken, 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. Otherwise we shall be in danger, as Benjamin J points out, of bringing about in our own courts a return to the old days of the demurrers in England."

This is not to say objections should not be raised where they are warranted but equally objections ought not to be raised as a matter of course.

I also do not lose sight of the fact that even where an exception is upheld, the consequence thereof is not necessarily a dismissal of the claim.

> "If the exception is allowed, the court will usually give the respondent an opportunity to file an amended pleading within a stated time."(Herbstein and Van Winsen 5th Edition, p 646)

I therefore come to the conclusion that the exception was not properly taken in both cases, i.e. in HC 6800/19 and HC 6801/19.

I turn now to the special plea taken in respect of the second defendant only. The contention is that the plaintiff withheld facts which show that the transaction was illegal as they contravene the Exchange Control laws of the country as the second defendant, not being an authorized dealer in foreign currency, could not have assumed that role.

Secondly, so the argument goes, the plaintiff reported to the police that the money was for imports but in the summons suggests that it was to do with a foreign currency deal.

It is important to state from the outset that the plaintiff's story as revealed in its claim does not appear to be the same story the defendants have to tell judging from the papers filed. Can it therefore be said because your truth is not my truth it means you are not telling all? I think not.

As Advocate *Uriri* pointed out, the court is yet to determine the true nature of the transaction. The plaintiff does not speak of a foreign currency deal and the mention of imports is not as interpreted by the defendants. Only evidence will reveal where the truth lies and whether indeed the plaintiff is being economical with the truth.

Rule 104 of the High Court Rules, 1971 provide that

> "(1) The defendant or plaintiff, as the case may be, shall raise by his pleading all matters which show the action or claim in reconvention not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply as the case may be, as if not raised would likely be to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, prescription, release, payment, performance or facts showing illegality, either by statute or common law."

Counsel for the defendant's argument is that the plaintiff did not disclose that the transaction upon which it sues is illegal, that second defendant was not an authorised dealer in foreign currency and that a police report to the effect that the money given to the second defendant was for imports sought to camouflage the illegality of the transaction.

Had this truth been told, so he argued, it would be clear that the claim is based on an illegal transaction which the court cannot aid the plaintiff in pursuing. Reference was made to the decision in *Dube* v *Khumalo* 1986 (2) ZLR 103 and *Chioza* v *Siziba* SC 5/15.

Whilst these cases do speak to the truism that: "… the courts will not enforce an agreement prohibited by law'' (per ZIYAMBI JA in *Chioza* v *Siziba*), the point, as already alluded to, is that this is the defendant's version but not the plaintiff's. The court can therefore not accept that the defendant's version is what actually transpired and proceed to uphold the special plea. This could only be possible if the plaintiff was accepting that this is indeed the correct version of what transpired.

This puts paid to the defendant's contention in support of the special plea.

I move on to the last issue, that of compromise. The contention is that the plaintiff reached a compromise with the second defendant and so cannot sue on the basis of the initial claim which exceeds the compromise amount.

In reply counsel for the plaintiff argued that such compromise could only avail as a defence for the second defendant if it was shown that the parties did reach a compromise agreement. Counsel referred to CHIGUMBA J's decision in *Mahommed* v *Bredenkamp* 2016 (1)

ZLR 311 (H), where the learned Judge, in endeavoring to answer the question as to the liability of a debtor to pay a creditor based on his beliefs and not a true acknowledgement of indebtedness had his to say:

> "The court is entitled to look at extrinsic evidence of the behaviour of the parties, to determine whether it reveals evidence of an intention to be bound by the agreement. It all boils down to whether there was a meeting of the parties' minds."

Indeed in any agreement, the parties' minds must meet, there must be *consensus ad idem* for such an agreement to pass as such.

> "It is therefore in the public interest that agreements freely entered into must be honoured. And it is the unwavering duty of the courts to give effect to all lawful binding agreements, (*Warren Park Trust* v *Pahwaringira and Ors* HH 39-09).

The Supreme Court in *Delta Operations (Pvt) Ltd* v *Origen Corporation (Pvt) Ltd* SC 86/06 underscored the same hallowed principle. This is what the court said:

> "As *Jessel MR said in Printing and Numerical Registering Co* v *Sampson* (1875) LR 19 Eq 462 at 465.
>
> 'If there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice ….'"

This would hold true *in casu* were it to be shown that indeed there was a meeting of the minds and the parties agreed to a compromise. Counsel for the plaintiff's contention is that there is need for evidence to be led to establish whether such compromise was indeed reached and therefore binding on the parties. This is so because the plaintiff's argument is that the second defendant fleeced it after fraudulently enticing it with misrepresentations and perpetuated such fraud in falsely offering to pay a compromise amount. There was therefore deception and no meeting of the minds and consequently no compromise to talk about.

I would agree that such divergence in the parties' versions requires evidence so as to establish whether there was indeed a compromise which the plaintiff must be held to.

I can do no more than refer to the case cited by counsel for the plaintiff in his heads of argument, *Smith* v *Kay* (1859) 7 HLC 750 at 759 thereof, where the court posed the following question.

> "Can it be permitted to a party who has practiced a deception, with a view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth."

If therefore it is found that the second defendant perpetuated a deception in order to lull the plaintiff into the false hope that the debt was to be settled, should he then benefit from such deception and earn himself a "reprieve" in terms of the extent of his indebtedness? Can the plaintiff be held to such an agreement if it was not genuinely birthed?

I pose this as a question as, at this juncture, the court does not have the material to make such a finding. The need for evidence is therefore clear and equally clear is the fact that the matter cannot be disposed of by the special plea taken.

In conclusion I find that both the exception and special plea cannot succeed. The plaintiff prayed for the dismissal of both the exception and special plea with costs on a higher scale.

Costs are at the discretion of the court. Punitive costs are meant to punish a party for conduct the court finds is deserving of censure.

This matter exercised my mind to an extent where I am unable to say the defendants were bent on abusing the court and wasting time. I therefore find myself unable to accede to the prayer for punitive costs.

In the result, I make the following order:

1. The 1st, 3rd, 4th and 5th defendants' exception be and is hereby dismissed, with costs.
2. The 2nd defendant's special plea be and is hereby dismissed, with costs.

   For the avoidance of doubt, this judgment relates to both HC 6800/19 and HC 6801/19.

Jarvis Palframan, plaintiff's legal practitioners
Samukange Hungwe Attorneys, defendants' legal practitioners