SIKHANGELE MAGURA
and
MALVERN & LISA CHITATE
and
EPHRAIM NYAMBAWARO
and
TAFADZWA TAMANGANI
and
MICHAEL NYAMAREBVU
and
FRATERNITY NDHLELA
and
DORIS MUCHADA
and
CLARA MURANDA
and
GERALD MUTEVERA
and
PROSPER UTSEYA
and
THOMAS JAMES MEKE
and
CLIFFORD MTEMERI
and
ALBERT & GETRUDE MUTSINZE
and
MOSLINE FARAWU
and
ANDREW MUVIRIMI
and
ENIPHER MADOKA
and
JAMES JUTAS
and
WILSON MAMINIMINI
and
BLESSING GOREMUSANDU
and
CHRISTOPHER JENA
and
BESTER & CHIPO MUKOMANA
versus
HERBERT MUKARAKATE
and
MIRRIAM JOYCE CHIWONISO MUKARAKATE
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 22 July 2015 & 14 October 2015

Exception and special plea

K. Kachambwa, for the first and second defendants/excipients
Adv. T. Zhuwarara, for the plaintiffs/respondents

MAFUSIRE J: In this matter I dismissed, soon after oral argument, first and second defendants' exception to the plaintiffs' claim in the declaration. However, on the draft order which was subsequently typed and issued, the dismissal was of both the exception and the special plea which had been filed together. The dismissal of the special plea was a mistake. It was meant to dismiss the exception only. In my brief *ex tempo* judgment it was clear that the dismissal would only relate to the exception and not the special plea, especially given the nature of the concessions made by the defendants' counsel. Among other things, evidence needed to be led on the special plea. None had been led. That would be done at the main trial.

Therefore, following that mistake, I resolved to correct my *ex tempo* order by reinstating the special plea. The correction was in terms of Order 49 r 449 of the Rules of this Court. The relevant portion of that rule permits, *inter alia*, the correction or rescission or variation by a judge of any judgment in which there is a patent error. Sub-rule (2) commands that before a judge can do that, he has to be satisfied that all the parties whose interests may be affected thereby have had notice of the order proposed. I duly dispatched the relevant notice to the parties and called for submissions, if any, within seven days. None came. In the meantime, the defendants had sought my leave to appeal against the dismissal of the special plea. But given that the dismissal was an error, and given that I had moved to correct it, the application for leave to appeal automatically fell away.

The details of this case were as follows. The twenty one plaintiffs sued, on one summons, for the transfer to themselves, of certain undivided shares in a certain piece of land. In the alternative, they claimed payment of a sum of money that they said represented the total value of those individual shares. In summary, the basis of the claim, as set out in the declaration, was that the plaintiffs had bought those undivided shares from the first and second defendants following representations by them, *inter alia*, that they had obtained a permit from the local authority for the subdivision of the immovable property. It was averred in the declaration that the plaintiffs had paid the purchase price and the attendant costs but

that in breach of the agreement, the defendants had failed or refused to effect transfer. The declaration also averred that should transfer not be possible, then the defendants would be obliged to pay the plaintiffs the value of the shares bases on the market value of the individual stands to which those shares related, otherwise the defendants would be unjustly enriched at the expense of the plaintiffs.

The defendants did not plead over to the merits. It seems that all they ever wished to bring out was that the so-called subdivision permit that the plaintiffs were basing their suit on, was in fact not a sub-division permit or a consolidation permit, but merely a developmental permit that merely allowed the defendants to apply for the consolidation permit and, subsequently, the subdivision permit. It also seems that what the defendants further wished to bring out was that since, or if, the properties had been sold without a subdivision permit, then the agreements had been in *fraudem legis* by reason of a contravention of s 39 of the Regional, Town and Country Planning Act, [*Chapter 29:12*]. As such, the agreements would be unenforceable. Section 39 of that Act is, of course, the one that prohibits or voids any agreement for a change of ownership of any portion of a property without a subdivision permit. It also prohibits the consolidation of two or more properties into one without a consolidation permit.

But instead of simply pleading over to the merits, the defendants went on a charade. First, they filed a request for further particulars. But the request was so clumsy as to distract attention from its substance. Question 2 was probably the worst example. It read:

> "**2. Ad paragraph 4 (b)**
>
> 2.1 Permit C/03/03 was a Development Permit which was granted in terms section 26 of the Regional Town and Country Planning Act [*Chapter 29:12*] and not a Subdivision Permit. Please find attached the Development permit for your convenience.
>
> 2.2 Was there a:
> (a) A subdivision permit; and
> (b) A consolidation permit
> in existence which was issued in terms of section 40 of the Regional Town and Country Planning Act [*Chapter 29: 12*] at the time the plaintiffs bought the subdivided stands from the 1st and 2nd defendants?
>
> 2.3 If there was, may you kindly provide the details of the subdivision permit, including the subdivision permit number?
>
> 2.4 May you also provide details of the consolidation permit, including the consolidation permit number?

2.5 May you also provide a copy of both the subdivision permit and consolidation permit?"

There was everything bad, vague and embarrassing about the defendants' request as a whole, not just the paragraph highlighted above. Question construction was crude. Evidence was either solicited for or, as in question 2 above, supplied. In effect question 2 was partly a substantive plea on the merits.

What triggered the request for further particulars was undoubtedly nothing said, or not said, by the plaintiffs in their declaration. Plainly, it was something that was within the knowledge of the defendants themselves. It would form the basis of their plea on the merits. All that the plaintiffs had ever said in their declaration was that the defendants had represented that they had obtained a subdivision permit from the town planning department of the City of Harare and that the parties had proceeded to enter into an agreement on that basis. The plaintiffs did not say they had bought subdivided stands from the defendants. They said they had bought undivided shares in an immovable property owned by the defendants. From the plaintiff's declaration, the Regional, Town and Country Planning Act seemed to have nothing to do with the parties' agreement. But if the defendants thought otherwise, all they had to do was to plead over to the merits and let the issues be canvassed at the trial. What the defendants did, as demonstrated by their question 2 above, was to first supply the evidence that they thought backed up their exception, and then went on to purport to request further particulars. That was irregular.

In response to the request for further particulars, the plaintiffs went on to supply detailed information, plus elaborate evidence, not least attaching several copies of the minutes of certain numerous meetings by the parties. It became a bog. In that bog the defendants launched their exception and special plea.

Secondly, if the request for further particulars was bad, the exception was worse. Among its myriad of ills, the exception misread or misquoted or misinterpreted the plaintiff's declaration. For example, the very first paragraph of the defendants' exception alleged that the plaintiffs' claim was based on an agreement of sale of certain pieces of land when there were no subdivisions. That was false. The plaintiffs' claim was based on an agreement for undivided shares in a certain piece of land. The exception also claimed that the plaintiffs had admitted that there had been no subdivision permit or a consolidation permit. That too was false. No such admission had been made. But it was from such false premises that the

defendants charged that the plaintiffs' claims were void *ab initio* and therefore unenforceable because of the *ex turpi causa non oritur actio* rule. This rule precludes the enforcement of illegal agreements because they are void *ab initio*.

The defendants also invoked the maxim *in pari delicto potior est conditio defendentis,* which says in case of equal guilt, the loss stays where it falls. In this regard, the defendants' argument was that the plaintiffs bought subdivisions when the subdivision permit had not been obtained and that therefore, the contracts of sale had been illegal. But, as demonstrated above, this was not the plaintiffs' case.

The plaintiffs' alternative claim for unjust enrichment was attacked on two grounds. The first was said to stem from the root of the exception, namely that the contract of sale was void for illegality and that therefore if it was unenforceable, the plaintiff could not claim unjust enrichment. The second ground was that in any event, the claim lacked the relevant elements of unjust enrichment, not least the fact that for unjust enrichment to succeed the claim must not come under the scope of one of the classical enrichment actions and that there should be no positive rule of law which voids an action by the impoverished person.

It was argued that *in casu*, the plaintiffs' claim fell under the scope of one of the classical enrichment actions, namely the *condictio ob turpem vel iniustam causam* and that therefore, they were precluded from claiming under the general enrichment action as they had allegedly done. It was also argued that there was a positive rule of law that precluded the plaintiffs from claiming under the enrichment claim, namely, the *in pari delicto* rule.

Thirdly, the defendants' heads of argument filed in support of the exception and special plea completed the charade. A large portion of them gave detailed evidence under the guise that it was the background to the whole deal. Yet such evidence touched on the very aspects which were germane to the dispute. The evidence was not even presented in the format for pleadings. It was just a story told in prose. None of that story had been in the plaintiffs' declaration. It had not been in the exception. It was largely a chronicle and lamentation of the defendants' own misfortunes at the hands of the property negotiators that they had allegedly engaged to execute the deal. The dispute had been taken to arbitration where the defendants had been successful. However, it seems it had been a pariah victory because soon after the award, the estate agency firm had become defunct. Of course, none of this was relevant to the plaintiffs' claims.

It is not the function of heads of argument to present fresh evidence. Heads of arguments should merely outline and summarise the oral argument to be made in court.

Apart from giving evidence, the defendants' heads of argument went into some detail, citing numerous case law in the process, about the *ex turpi causa* and *in pari delicto* concepts. They went into detail about the illegality of the agreements that allegedly had been made in breach of the Regional, Town and Country Act. The heads also attacked the alleged impropriety or inadequacy of the plaintiffs' alternative claim for unjust enrichment.

Furthermore, quietly sneaked into those heads was a new ground of exception. It was that the plaintiffs had paid the purchase price in the old Zimbabwean currency. It was argued that despite the introduction of the multi-currencying system, the Zimbabwe dollar was still legal tender. Therefore, the plaintiffs having suffered damages in the local currency, they were precluded from claiming in foreign currency as they had purported to do.

Plainly, the defendants were mistaken. The exception was ill-conceived. It had no foundation because it misinterpreted or misunderstood the plaintiffs' claim as set out in the declaration. There was no suggestion that this was purposeful. But whatever it was, the exception was badly cast and could not be the basis for stopping or stalling the progress of the plaintiffs' case towards trial. The plaintiffs' claim was very simple. It was for specific performance, failing which damages for unjust enrichment. Whether or not one required a subdivision permit in a sale of undivided shares in a piece of land was not the focus. The plaintiffs' claim was that the defendants had said they had a subdivision permit. They were saying the defendants had received their money. They now wanted the defendants to deliver what they had received their money for. If for some reason the defendants were no longer able to deliver, then they had to refund the money. The quantum of that refund would be the equivalent, in value, of the individual units of land to which the shares related. In my view, there was nothing excipiable about the way the plaintiffs' claim was laid out. In my view, the defendants needed to have properly pleaded to the merits.

An exception is a legal objection to a pleading. It complains of a defect inherent in the pleading: see H J ERASMUS *Superior Court Practice*[1]. For the purposes of an exception the facts pleaded must be accepted as correct: see *Marney* v *Watson & Another*[2]. The main purpose of an exception is to obtain a speedy decision upon a point of law apparent on the face of the pleading attacked so as to settle the dispute in the most economical manner by

[1] At pp B1 - 151
[2] 1978 (4) SA 140 @ p 144F - G

having the faulty pleading set aside: see *City of Harare* v *D & P Investments (Pvt) Ltd & Anor*[3].

In *McKelvey* v *Cowan NO*[4] it was held that in dealing with matters of exception, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.

In casu, because the exception was completely ill-founded, the defendants found themselves having to prop it up by supplying their own evidence. They did this in the request for further particulars. They did it in the exception itself. Finally, they did it in the heads of argument. That was highly irregular and most wasteful of the court's time. It was on that basis that I dismissed the exception.

The special plea was on prescription. The defendants alleged that the plaintiffs' claims had arisen from agreements entered into way back in 2004 the payments in respect of which had been made in 2008. It was argued that upon completing paying the purchase prices, the plaintiffs had become entitled to transfer immediately. More than three years having elapsed between the time of that entitlement and the time of their summons, their claims had become prescribed by virtue of the Prescription Act, [*Chapter 8: 11*].

Mr *Kachambwa,* who appeared for the defendants, readily conceded that evidence on prescription was clearly required to be led. At some stage he suggested that this could be done separately and ahead of the trial. However, I saw no justification for the matter to be heard in instalments when all the issues could conveniently be heard at the same time at the trial. So the aspect of prescription would be one of the issues for determination at the trial.

In the premises, the order that I intended to make, and which is now hereby being made, reads:

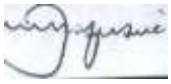
1. The first and second defendants' exception is hereby dismissed.

2. The first and second defendants' special plea of prescription is hereby referred to trial.

3. Costs shall be in the cause

14 October 2015

[3] 1992 (2) ZLR 254 (S) @ p 257
[4] 1980 (4) SA 525 (Z)



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