MEIKLES LIMITED

versus

ZIMBABWE STOCK EXCHANGE

and

ALBAN CHIRUME

HIGH COURT OF ZIMBABWE

MAKONI J

HARARE, 2 July 2015 and 13 January 2016

**Opposed Application – Exception and Special Plea in Bar**

*T Magwaliba*, for the excipients (the defendants)

*T Mpofu*, for the respondent (the plaintiff)

 MAKONI J: The plaintiff (Meikles) issued summons against the two defendants Zimbabwe Stock Exchange (ZSE) and Alban Chirume (Chirume) claiming a declaratur and damages in the sum of $50 000 000-00.

 The background to the matter is that on 16 February 2013, the defendants suspended the trading of Meikles shares on the Zimbabwe Stock Exchange. The suspension was done without affording Meikles an opportunity to make representations before such a serious adverse action was taken. On 26 February the defendants placed an advert in the Herald Newspaper cautioning the public to “exercise caution in dealing with the plaintiff’s shares.” The suspension was eventually lifted.

 The defendants entered appearance to defend and filed an exception on behalf of both defendants and a special plea in bar in respect of Chirume.

 I must at the onset, deal with the nature of pleadings before me. The plaintiff’s summons and declarations is ten pages and to it is attached two letters as annexures. The defendants’ exception is three pages and the second defendant’s plea in bar is one page. Order 3 r 11 of the High Court Rules 1971 on this issue provides:

 “Before issue every summons shall contain

1. ----------
2. ----------
3. A true and concise statement of the nature, extent and grounds of the cause of action and the relief or remedies sought in the action.”

The author Isaacs in *Beck’s Theory and Principles of Pleading* *in Civil Actions* 5 ed at p 32 had this to say:

“**17**.

Before the court is asked to decide any question which is in controversy between litigants it is in all cases necessary (except as hereinafter indicated that the matter to be submitted to it for decision shall be clearly ascertained. “The plaintiff shall state in concise terms what facts he intends to rely on and to prove and the defendant shall do the same so that on the day of trial neither party shall be taken by surprise and that it may not be necessary to have the case adjourned, thereby causing wasted expense both litigants from which the State and the lawyers alone derive profit. It has therefore often been stated by our courts and it cannot be too often stated that the object of requiring the parties to file leadings is to enable each side to come to trial prepared to meet the case of the other.””

The authors Herbastein and van Winsen in *The Civil Practice of the High Courts of South Africa* 5th ed p 565 stated the following about pleadings:

“The requisites of good pleading are said to be that it should contain a statement of (1) fact, not law, (2) material facts only, (3) facts not evidence, and (4) facts stated in a summary form and that “material facts” are all facts which must be proved in order to establish the ground of claim or defence.”

Mathonsi J, in *Fungai Nhau*  v *Memory Kipe and Anor* HH 73/15 confronted with what he terms long winding special plea in bar/abetment had this to say:

“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. Pleadings which are long winding and argumentative should not find their way to these courts. It is a serious dereliction of duty for legal practitioners to continue, presenting such offensive pleadings when they have the aid of literature guiding the drafting pleadings. I associate myself fully with the sentiments of MAKARAU JP (as she then was) in *Chifamba* v *Mutasa & Ors* HH 16/08 (unreported) that:-

“Legal practitioners are urged to read on the law before putting pen to paper to draft pleadings in any matter is that what they plead is what the law requires their clients to prove to sustain the remedy they seek ----. Litigation in the High Court is serious business and the standard of pleadings in the court must reflect such.””

 I associate myself fully with the above remarks. Maybe if legal practitioners in this matter had taken heed of the advice, the present application might not have made. Turning to the issues at hand, I will deal first with the special plea in bar.

The Special Plea in Bar

 Chirume avers the claim against him in his personal capacity is bad in law and ought not to have been instituted. This is based on the fact that it is common cause that Chirume is employed by ZSE as its Chief Executive officer (CEO). At all times relevant to the plaintiff’s claim, he acted as an official on behalf of his employer ZSE.

 In response the plaintiff contends that Chirume does not object to misjoinder in his official capacity. In his personal capacity, he acted ridiculously in breach of the plaintiff’s right. After the consent to the upliftment of the suspension, he went on to place an advert cautioning the public regarding trading in Meikles’ shares.

The Law

The authors o Herbastein and Van Winsen in *The Civil Practice of the High Court of South Africa* 5th ed p 598 statedthat a special plea is one that does not raise a defence on the merits of the case but, as its name implies, sets up some special defence which has as its object either to delay the proceedings (a dilatory plea) or to object to the jurisdiction of the court (a declaratory plea) or to quash the action altogether (a peremptory plea).

 The defendants, in *casu*, are raising a peremptory plea. The question is whether the issues or defenses that they have raised can quash the action in respect of the second defendant altogether.

 Mr *Mpofu*, made a correct observation that Chirume is not taking issue with the joinder of the second defendant in his official capacity. A reading of the special plea will confirm that position. He is only taking issue with the claim against him in his personal capacity.

 In para 22 of the declaration Meikles sets out the basis of Chirume’s liability. In summary Meikles’s complaint is that it was suspended in breach of their common law right to be dealt with in accordance with the rules of natural justice. In so doing the defendants were negligent. The defendants breached a duty of care arising from both statute and administrative law that they discharge.

There is no allegation that Chirume acted willfully, maliciously and deliberately ignored the law which he must uphold. There are no facts pleaded that suggest that he went beyond the scope of his calling of the CEO of the ZSE. He is therefore entitled to protection in his personal capacity.

 In the result, the special plea, in as far as it relates to Chirume, in his personal capacity is upheld.

The Exception

The defendants contend that the plaintiff failed to establish a cause of action against the defendants in that it failed to aver, with particularity, all the essential requirements for liability in a delictual claim. They further contend that there is no link between the alleged negligence and the loss suffered by the plaintiff. The declaration does not state the manner in which the patrimonial loss arose. The claim for the alleged fail in that share price of plaintiff’s shares cannot be made by the plaintiff as it does not own the shares.

The defendants contend that there is no recognizable cause of action which is contained in the plaintiff’s declaration both in respect of the declaration and the claim for damages. The plaintiff’s relies on s 14 of the High Court Act [*Chapter 7:06*] for the issuance of a declaration. No right has been identified. Instead the plaintiff’s seeks a declaration on a state of affairs which are factual and are in the past. He relied on *MDC* v *The President of the Republic of Zimbabwe* 2007(1) ZLR 257 (H) for his submissions.

 The plaintiff also alleges a breach of administrative law duties in terms of Administrative Justice Act [*Chapter 10:28*] in order to justify the declaration and the claim for damages. The relief provided for in terms of s 4 of Administrative Justice Act does not include a declaratory order.

 The plaintiff seeks to rely on s 66 of the Act on the basis that once it establishes a breach, it must be granted the relief that it seeks. That is a misreading of the rules. Section 66 follows s 65 which provides that the Zimbabwe Stock Exchange has power to make rules regulating the conduct of their members. The plaintiff cannot rely on s 66 as it gives power to Zimbabwe Stock Exchange to control its own members. The power is not available to a member.

 Mr *Mpofu* submitted that at this stage the plaintiff has to set up a framework for the court to go by. Whether it can prove facts is another issue.

The Declaratur

 He submitted that many grounds were pleaded *viz*

(i)That the defendants acted outside the law

(ii) That the defendants did not accord the plaintiff the right to be heard

(iii) That was in breach of s 3 of the Administrative Justice Act.

 He further submitted that there is a concrete controversy between the parties. The action is not in the past and the grant of the declaratur raises the question of whether the defendant must pay damages or not.

The Damages Claim

 Mr *Mpofu,* submitted that s 66 is binding upon both the plaintiff and the defendants. The question would be whether the defendants are capable of breaching the rules in s 66. If so, then they caused damage to the plaintiff. Whether they did so or not is a matter of evidence.

 He further submitted that if one attack’s the reputation of a company, shares of the company will suffer loss. The price at which a share trades is directly linked to how the company performs. The question of quantum is an actuarial issue. Paragraph 22 of the declaration makes the allegation that the illegality has affected the plaintiff. Plaintiff claims for purely economic loss.

The Law

 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 a specific cause of action or the specific defence relied upon. See Herbastein and van Winsen (*supra*) at p 63. The learned authors at p 631 continue by saying:

“In order to disclose a cause of action, the pleading must set out every fact (material fact) which it would be necessary for the plaintiff to prove, if traversed in order to support his right to judgment of the court.”

 See also *Peebles* v *Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H), *Dube* v *Banana* 1998 (2) ZLR 92 (H) and *Abrahamse & Sons* v *SA Railways & Harbours* 1933 CPD 626.

 The fundamental question to ask is whether the plaintiff had pleaded every material fact to be proved to entitle it to succeed in its claim.

 The material facts are the *facta probanda* (the facts which are required to be proved in order to succeed pin the cause of action) and not the *facta probantia* (the facts which would serve to prove the *facta probanda*) see *Jowel* v *Bramwele Jones & Ors* 1998 (1) sa 836 w AT 903 A-B.

The Declarator

 In *MDC*  v *The President of Zimbabwe & Ors* 2007 (1) ZLR 257 (H) and at 268 A-C Makarau JP (as she then was) set out the legal principles applicable when a declaratur is sought and the mental steps that the court must follow in determining whether to issue a declarator. These principles include that the plaintiff must show that there is a right or obligation which becomes the object of enquiry.

 At p 269 C she made the following observation:

“It appears to me, from a reading of the above authorities, that what is required to be contended is a legal right and not the factual basis upon which a right may be found.”

 The defendants contend that the plaintiff in its pleadings did not identify any right. In *casu* there can be no doubt that the legal right, subject to the claim, has been identified and properly articulated. The plaintiff pleaded that the defendants did not accord the plaintiff the right to be heard. This is a principle established in the Constitution, Administrative Law and in terms of common Law. The plaintiff has therefore established that, there is a right whose existence has been pleaded. Whether the plaintiff will be able to establish that right, it is a different issue.

The Damages Claim

My view is that the plaintiff has pleaded the essential elements of a delictual claim. If it were to succeed in obtaining a declaratur, then it could have established a link between the defendant’s conduct and its loss. As Mr Mpofu correctly pointed out, the issue of quantum is a matter of actuarial evidence.

 The plaintiff pleaded that as a result of the unlawful activities of the defendants, which affected its share price, certain losses were caused to it which are recoverable from the plaintiff. This is purely delictual claim whereby the plaintiff alleges that its patrimony has been diminished by the conduct of the defendant and that it should be restored.

 The concerns by the defendants, of lack of particularity, can be cured by making a request for further particulars.

 I want to conclude by saying that one can sympathise with the position taken by the defendants in that although one can discern a cause of action for the summons and declaration, it is a long winding and inelegantly drafted pleadings. For this reason, although the plaintiff has succeeded, I will depart from the norm that costs follow the cause. This is due to the fact that had the pleadings been drafted in terms of the rules, the exception would not have been taken.

 My view is that the plaintiff’s pleading disclose a cause of action.

 In the result I will make the following order:

1. The exception is hereby dismissed.
2. The special plea in bar is upheld in respect of the second defendant in his personal capacity.
3. There is no order as to costs.

*Mutamangira & Associates*, plaintiff’s legal practitioners

*Dube, Manikai & Hwacha*, defendant’s legal practitioners