

THE TRUSTEES FOR THE TIME BEING OF THE PHOENIX TRUST N.O.

versus

GIDEON HWEMENDE

and

VALENTINE MUSHORE

and

ALFRED CHADEMANA

and

JOEL TENDERERE

and

OLIVER CHIBAGE

and

FARAI MUTIZWA

and

CALISTO VENGESAI

and

OLIVER MASOMERA

(In his capacity as Executor Dative of the Estate late Brian James Rhodes)

and

THE REGISTRAR OF COMPANIES N.O.

and

THE MASTER OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE

CHIGUMBA J

HARARE, 3, 12, November 2015, 22 January 2016

Opposed Application-Exception

D. Tivadar, for the applicant

S. Hashiti, G. Sithole, for the 8th respondent

CHIGUMBA J: This is an exception filed on behalf of the plaintiff to the 8th defendant's plea and counterclaim. The plaintiff's contention is that the 8th defendant's plea is vague and lacks the averments necessary to sustain a defence. The plaintiff contends, further, that this exception goes to the root of the 8th defendant's case, and is thus properly taken. If the plaintiff's

contentions are correct then the exception will be upheld. The court must ask itself whether the 8th defendant's plea and counterclaim contain sufficient particulars to constitute a valid defence and sustain a proper claim to the shareholding in the two Property Companies which is the main bone of contention between the parties. The Court must decide whether the exception is one of substance which goes to the root of the claim, and whether upholding the exception will dispose of the main matter without delving into the merits.

The background giving rise to the exception is that summons for a declaratur was issued against the ten defendants on the 31st of March 2015. The plaintiff sought a declaratur that the appointment of 1st-7th defendant as directors in Beverly East Properties Private Limited and Karoi Properties Private Limited (hereinafter known as the two Property Companies) was illegal, null and void. The plaintiff sought the nullification of all CR14 forms and all other statutory documents issued by the 9th defendant in confirming the appointment of the directors. The plaintiff sought a second declaratur that its appointment of directors to the two property Companies was lawful. The consequential relief sought was the reinstatement of the previous directors in the two property Companies and an order directing the 9th defendant to do all things necessary to give effect to such reinstatement. In the declaration to the summons, the plaintiff averred that it is a representative of the trustees for the time being of the phoenix trust in their official capacities. The 1st-8th defendants are all private citizens. The 8th defendant is cited in his official capacity as the *curator bonis* of the Estate of the late Brian Rhodes, who created the plaintiff. The 9th and 10th defendants are cited in their official capacities.

The plaintiff holds the entire shareholding in the two property Companies, which both own immovable property, in terms of a judgment of this court HH424-13, and various other judgments of this court, HC 3848-11, HH52-2013. The 1st defendant was one of the parties who had laid claim to the shareholding in the two property Companies prior to the determinations by this court that the entire shareholding vested in the plaintiff. As a result of the claim, the plaintiff contended that the 1st defendant unlawfully and fraudulently appointed himself and the 1st-7th defendants as directors of the two property Companies and proceeded to submit CR14 forms to the 9th defendant to confirm their directorship. The legitimate directors of the two property Companies were removed after the misrepresentation to the 9th defendant. No general meeting constituting a quorum of members as required in terms of the Companies Act [*Chapter 24:03*]

was convened to sanction these appointments. Confusion now reigns amongst the plaintiff's tenants and other stakeholders and presently there is no one in charge of the two property Companies. Unknown persons have been collecting the rentals from the two property Companies, to the plaintiff's prejudice.

On 16 April 2015, 8th defendant entered an appearance to defend to the summons; the 1st defendant entered its appearance to defend on the 22nd of April 2015. On 3 June 2015, the 8th defendant filed a plea to the plaintiff's claim in which he averred that he is the Executor dative of the Estate Late Brian James Jones; he holds the entire shareholding in the two property companies on behalf of that estate, he was not part of the court proceedings in which this court determined the shareholding in the two property Companies in favor of the plaintiff and is currently challenging those judgments HH424-13, HC617-15, it is the plaintiff and the other defendants who are misrepresenting facts to deprive the 8th defendant of its shareholding, it is plaintiff which fraudulently and illegally created documents purporting to donate the authorized share capital of the two property Companies to itself.

The 8th defendant filed a counterclaim in which he averred that the two property Companies each had two issued shares held by the late Brian James Rhodes, the shares accrued to his estate on his death, the plaintiff's claim to those shares is fraudulent and illegal, a declaratur should be issued in his favor that the plaintiff expropriated the issued shares in the two property Companies, and that the donation of the shares was null and void, a second declaratur that the entire issued shares in the two property Companies are held by the 8th defendant. On the 3rd of July 2015 the plaintiff filed an exception to the 8th defendant's plea and counterclaim in which it averred that; the 8th defendant's case is vague and lacks the averments necessary to sustain a defence or an action, more particularly, that; the 8th defendant failed to set out the legal basis on which he asserted that the entire shareholding of the two property Companies is held by the estate late Brian James Rhodes.

The plaintiff averred that the 8th defendant failed to set out which facts it misrepresented to deprive the estate of its shareholding, or of the date when the plaintiff became aware of this fact. Further the 8th defendant failed to identify the person who is alleged to have fraudulently and illegally created documents purporting to donate the authorized share capital of the two property Companies to the trust. The 8th defendant is challenged to specify the date on which the

shares were allocated to the late Brian James and to specify how the plaintiff fraudulently and illegally expropriated the issued shares and how plaintiff expropriated the issued shares. It is common cause that the plaintiff served a letter of complaint on the 8th defendant on the 29th of June 2015, in accordance with the requirements of rule 40 of the rules of this court, and that the 8th defendant did not respond to or attend to the complaints raised in that letter.

Turning to the law that applies in cases such as this one, it is well established that a litigant must know the case that it needs to meet. See *Trinity Engineering Private Limited v CBZ*¹, which relied on *Timesecurity Pty Ltd v Castle Hotel Private Limited*² as authority for this proposition. In one of my own judgments *Ritenote v A. Adam & Co*³ the circumstances in which an exception may properly be taken were said to be where the claims are not clear or concise in fact and in law. The plaintiff's summons and declaration must disclose sufficient particularity, and a cause of action which is appropriate at law and which is not contradictory or mutually destructive. The plaintiff contends that the failure to set out the basis on which 8th defendant avers that the late Brian James Rhodes held the entire shareholding in the two property Companies constitutes insufficient particularity to establish the 8th defendant's defence and cause of action in its counterclaim. The same complaint applies to the rest of the pleadings that the plaintiff excepts to.

Heads of argument on behalf of the 8th defendant were filed on the 2nd of November 2015. One of the main points of law raised was that the 8th defendant has an application filed in HC617-15 and set down for hearing on 20 November 2015 involving the same parties in which rescission is sought, of the judgment which gave the plaintiff rights over the two property Companies. It was contended that the Master of the High Court is aware of the plaintiff's fraudulent claims and that he appointed the 8th defendant to investigate these claims on behalf of the estate. 8th defendant contended that the summons is not properly before the court because they refer to a curator bonis which ceased to exist in 2014. The summons is excipiable on the basis that they disclose no cause of action against the 8th defendant. I find myself in agreement

¹ 2000 (2) ZLR 385(H)

²² 1972 (1) RLR 155

³ HH 83-14

with the proposition put forward on behalf of the 8th defendant that, when dealing with matters of exception, if evidence can be led which can disclose a cause of action on the facts as alleged in the pleading, then that pleading is not excipiable. See *Mckelvey v Cowan N.O.*⁴. See also *Levenstein v Levenstein*⁵, where it was held that:-

“No doubt, these are proper questions, but recognition of that fact does not mean that an exception can be founded upon every questionable allegation; the embarrassment must be such that it cannot be removed by a request for further particulars. (see the remarks of DAVIS J., in *Kahn v Stuart & Ors 1942 CPD 386 @ p392*) In my view there should have been a request for further particulars; had that been done the plaintiff’s difficulties might well have disappeared”.

A declaration must state lucidly each of the facts constituting the plaintiff’s cause of action. See *Koth Property Consultants CC v Lepelle-Nkupi Local Municipality*⁶. The learned authors *Herbstein & Van Winsen*⁷, state that where some essential element of the plaintiff’s cause of action is not pleaded, it is not disclosed, and that, where the pleading is contradictory or vague, the defendant would be prejudiced in his defence, and that an exception must be upheld in these circumstances.

The 8th defendant’s defence, and cause of action for the counterclaim, is premised on allegations of fraud. Fraud is a criminal offence, whose essential elements must be proved. It cannot, in my view, be said that the plaintiff does not know the case that it must meet. What the 8th defendant has done in essence is to turn the tables on the plaintiff and make similar averments to those made by the plaintiff in the summons and declaration. If the 8th defendant’s plea and counterclaim is vague and embarrassing, so is the plaintiff’s summons and declaration, premised as both sets of pleadings are, on the same set of facts between the same parties. The plaintiff did not state who in particular amongst 1st-7th defendants allegedly fraudulently caused their appointment as directors and the removal of the previous directors. On what basis does the plaintiff now seek to complain that the 8th defendant similarly has failed to disclose specific names of the alleged perpetrators of the fraud against the estate late Brian James Rhodes?

In my view, the paucity of particulars in both sets of pleadings can be cured by appropriately worded requests for further particulars. The plaintiff was fishing for information

⁴ 1980 ZLR 235

⁵ 1955 (3) SA 615 (SR)

⁶ 2006 (2) SA 25 (T) @ 30E-31D

⁷ The Civil Practice of the Superior Courts in South Africa (3rd ed) pp339-40

when it took this ill advised exception. It has remedies in terms of the rules. This finding is supported by the following set of cases; - *Rheeder v Spence*⁸, and *McKelvey v Cowan NO*⁹, where the court said that:

“It is a first principle in dealing with matters of exception that if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action”. See also *William & Taylor v Hitchcock*¹⁰, *Strand Meat Co. (Pty) v Smith*¹¹, *Fuxman v Brittain*¹², and *Schultz v Nell*¹³.

It cannot, in my view be said that the plaintiff does not know the case that it must answer. Evidence can be led which can disclose the names of the specific perpetrators of the fraud on the plaintiff, or on the 8th defendant in terms of its counterclaim. The taking of the exception was ill advised, and on shaky ground at law from the outset. It seems to me that taking an exception to the contents of the pleadings, as a tool of litigation is a strategy which must be carefully thought out, and which must be used only in those circumstances where the upholding of the exception is more likely than not, to dispose of the matter. The risk of wasting the court’s time, or incurring unnecessary costs, or causing unwarranted delay in the resolution of the main matter, is only justifiable, where a favorable result to taking the exception is likely. To discourage over litigiousness and a dereliction of duty as officers of the court on the part of legal practitioners, it has become vital for this court to award punitive orders as to costs as a shield against its process being abused by the taking of exceptions which either have no merit, or which are unlikely to dispose of the matter. In the circumstances of this case, the exception taken by the plaintiff had no merit from the outset.

For these reasons, the plaintiff’s exception is be and is hereby dismissed with costs on a legal practitioner and client scale.

Kevin J. Arnott, applicant’s legal practitioners
C. Nhemwa & Associates, 8th respondent’s legal practitioners

⁸ 1978 (1) SA 1041 (R)

⁹ 1980 ZLR 235(GD) @ 236B

¹⁰ 1915 W.L.D. 51

¹¹ 1930 CPD 24

¹² 1941 AD 273

¹³ 1947 (2) SA 1060 @ p1063