

ANGELA BLAZENKA GREY
and
URSULA THERESA ANN PRETORIUS
and
FARAI SIYAKURIMA N.O
versus
A. CARIDADE INVESTMENTS (PVT) LTD
t/a PORTUGAL RESTAURANT

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 30 January 2017 & 22 February 2017

Opposed Matter

P Nyeperai, for the plaintiffs
T. Biti, for the defendant

FOROMA J: In this matter the first, second and third plaintiffs instituted an action against the defendant claiming an order for:

- ‘(i). The ejectment of the defendant from an immovable property called Stand 2903 Salisbury Township of Salisbury Township Lands also known as No 186 Samora Machel Avenue East Harare.
- (ii) Payment of \$60 464,41 owing in respect of rates and
- (iii) Interest on the sum of \$60 464,41 at the rate of 5% per annum with effect from the date of summons to date of payment
- (iv) Costs of suit. Plaintiffs also claimed in the alternative for an order declaring invalid an agreement between Marija Crnkovic and the defendant and in the event the said agreement is found to be valid plaintiffs claim an order confirming cancellation of the said agreement on account of breach of same by the defendant and consequent upon cancellation of the agreement that the defendant be ordered to pay US\$60 464,41 owing in respect of rates and interest on the said US\$60 464,41 at 5% p.a from the date of summons and to date of payment.

The defendant entered an appearance to defend and filed a request for further

particulars which the plaintiffs responded to timeously i.e on 21 August 2015.

On 2 September 2015 the plaintiff's filed and served on the defendant's legal practitioners a Notice to Plead and intention to Bar in response to which the defendant filed an Exception to what the defendant referred to as the plaintiff's Multiple Claims on 9 September 2015.

Instead of filing a bar against the defendant in default of a plea at the expiry of 5 days in the notice to plead in terms of the authority of *Russel Noah (Pvt) Ltd v Midsec North (Pvt) Ltd* 1999 (2) ZLR 8 the plaintiff's legal practitioners acquiesced in the defendant's delaying the matter further by filing an exception on 9 September 2015. After filing the defendant exception the defendant's legal practitioners filed on behalf of the defendant heads of argument on 23 September 2015 and on the same date applied for a set down of the exception in an attempt to comply with Order 21 r 138 (a) of the High Court Rules 1971. Rule 138 (a) requires the parties to set down the exception by consent within 10 days of the filing of the exception. What defendant did was not a compliance with r 138 (a) of the High Court Rules 1971 as he fell short of compliance in two respects as I will show below.

The defendant could only set down the matter within 10 days of the filing of the exception with the consent of the plaintiff in accordance with its r 2 of r 223. In the absence of such consent the defendant could only set down the matter within further days in accordance with subrule 2 of r 223. There was no consent of the plaintiff to the attempt to set down the exception.

What the defendant filed was a blank notice of set down. It is headed Notice of set down of the defendant's Exception on The Opposed. It then goes on to say "Be Pleased To Take Notice that the above matter has been set down for hearing at the High Court Harare before Honourable Justice on theday of2015 at am or so soon thereafter as the matter may be heard." This notice is not a notice of set down. A notice of set down indicates in the notice the date on which the matter has been set down. A blank notice is inadequate and not a compliance with r 138 aforesaid. It is no more than an application for a set down date. As a result of the defendant filing a blank notice of set down the defendant's exception was not dealt with as expeditiously as is contemplated by r 138. The exception thus fell to be dealt with as an ordinary court application in terms of order 236 (2) It was heard more than 17 months after its filing which in terms of the rules of court is unacceptable.

At the hearing of the defendant's exception on 30 January 2017 I brought to the defendant's counsels attention that the matter was not properly before me for the reasons above. Mr *Biti* most vociferously sought to defend the procedure he had adopted as outlined above justifying same on the basis that a strict compliance with r 138 had long been abandoned as a result of the increase in the volume of litigation brought in the High Court. He further argued that what parties are expected to do in order to comply with r 138 (a) is to file heads of argument and file same with a blank notice of set down within the 10 days of filing the exception and await allocation of a date of set down by the judge to whom the matter will have been allocated. I was not satisfied with this argument and would have struck off the exception but for an application that I exercise my discretion in terms of r 4 C in order to condone non-compliance with the rules. It is not correct that the provisions of r 138 of the High Court Rules have been abrogated by disuse.

In the case of *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630 the court aptly explained the purpose of an exception in the following terms

“the form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings; it also serves as a means of taking objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing”. (the underlining is mine for emphasis).

The relaxation urged upon the rules of set down of exceptions totally renders nugatory a very useful rule which not only curtails proceedings but saves parties unnecessary costs while at the same time reducing the clogging of the cause list Proper application of the set down procedure in respect of special pleas exceptions as provided for in the rules of court should assist in reducing the congestion of the courts with trial matters the bulk of which should otherwise never proceed to trial stage.

A set down by consent must be filed within 10 days of the filing of the exception special plea or application to strike out while a set down at the instance of one or other of the parties with the agreement of the registrar should be made not later than four days after expiry of the 10days during which a set down should be by consent. It is important to note that a set down by consent does not require the registrar to allocate the set down date. However from a practical point of view it is unavoidable to involve the registrar in the set down as in terms of Practice Note No. 1 of 1989 the registrar can only enter a matter in the appropriate register (whether opposed or unopposed) once the registrar is satisfied that in terms of the rules of court the papers are in order.

It is worth noting that the set down of the exception special plea can be on any business day provided the registrar agrees. Obviously the registrar will not be in the way if there is no congestion of the roll on a particular day that parties or a party as the case may be may indicate provided:

- (i) the papers are in order and
- (ii) the minimum notice of six days is afforded to the other side in terms of sub rule 2 (a) of r 223 of the High Court rules.

It is therefore clear that in the absence of a set down of a hearing by consent within the 10 days of filing of a special plea, exception or application set down can only be done with the agreement of the Registrar when one of the parties proceeds to set down the matter within the additional 4 days.

Where a special plea is not set down by consent or with the agreement of the registrar it shall not be set down before trial of the matter.

In this matter the defendant filed its exception on 9 September 2015 and a notice of set down by consent of the parties ought to have been done before the expiry of 10 days i.e by 23 September 2012. The excipient filed a blank notice of set down filed on 23 September 2015. This is a not a compliance with r 138 (a) in three respects

- (a) it is not a notice of set down but an application for a set down date.
- (b) for a set down to qualify for purposes of r 138 (a) a notice of set down has to have the date of set down endorsed on the notice of set down.
- (c) A party cannot set down the exception within the 10 days of filing of the exception except with the consent of the other party.

It was for these reasons that I considered that the matter was not properly before me. Barring consent to set down within 10 days of filing of the exception the excipient ought to have set down the matter with the agreement of the registrar within another four days of the expiry of the ten days within which matter could have been set down by consent in terms of r 223 (2). None of these two ways of setting down the exception was utilized *in casu*.

The primary reason for this elaborate procedure of setting down of special pleas and exceptions is to assist the parties dispose expeditiously cases which do not merit trial.

In the circumstances legal practitioners and the litigating public should take note that the provisions of r 138 regarding set down of exceptions special pleas and applications should religiously be observed r 138 (a) is still alive and has infact not been abrogated by disuse.

As indicated herein above, the defendant was granted leave to present its application after the court exercised its discretion in terms of r 4 C. Mr *Biti* proceeded to present the defendant's exception by adopting his heads of argument.

The defendant claimed that by making averments that the plaintiffs are the registered owners, of the property in question the plaintiff evinced a claim based on *rei vindicatio*. The plaintiffs then proceeded to aver that the defendant's occupation is contrary to the wishes of the first and second plaintiffs and also that the first and second plaintiffs intended to dispose of the property and required the defendant's vacation prior to such disposal.

He further argued that no cause of action can be found on the grounds that occupation is contrary to the wishes of plaintiff or that the plaintiff's require the defendant's vacation prior to such disposal.

The defendant further argued that the averment that the plaintiffs require vacation prior to disposal brings the plaintiff's in direct conflict with the protection afforded to occupants in terms of Commercial Premises Rent Regulations – it is not clear how and Mr *Biti* did not demonstrate how.

A party suing on a *rei vindicatio* needs to prove two requirements in order to succeed namely:

- (i) Ownership of the property – *Gondini Chrome (Pty) Ltd v MCC Contractors (Pty) Ltd* 1993 (1) SA 77 A at 92 and *Unimark Distirbutors (Pty) Ltd v ERF 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986.
- (ii) Possession of the property by defendant at the time of instituting of action – *Chetty v Naidoo* 1971 (3) SA 13.

Once possession is established the unlawfulness is presumed. In their declaration the first and second plaintiffs averred that they are the owners of the Commercial property in question and the defendant has acknowledged this averment. Once possession is proven then the onus to justify it shifts on to the possessor. In *casu* the defendant having acknowledged the averment of ownership by the plaintiffs and it being the possessor it should be able to plead the justification of its possession.

The additional averments which the defendant complains of are superfluous material which the defendant need not deal with in its plea. Clearly therefore the plaintiffs have adequately set out the allegations which it must prove for their *rei vindicatio* claim to succeed. This exception is therefore without merit.

The plaintiff also claimed rates in the sum of \$60 464-41 in respect of unpaid rates. In regard to this claim the defendant complains that the claim is excepiable on the basis that details of when the rates occurred and a breakdown of the rates including dates when the rates became due should have been pleaded. The plaintiffs declined to furnish the information that the defendant complains is missing when they responded to the defendant's requested for further particulars claiming that what the defendant was seeking was evidence which it did not require for purposes of pleading. The defendant did not persist with its request further by seeking an order to compel delivery of the particulars which suggests that it was satisfied with the answer given. If the defendant disagreed with the reasons advanced for declining the delivery of the particulars its remedy would have been to seek to compel delivery of the particulars – see r 142 b (a) and not excepting to the claim.

The defendant's third exception is based on the complaint that the plaintiffs' claim that the defendant occupies the premises on the basis of an alleged lease agreement entered into between it and Marija Crnkovic and that the said Marija Crnkovic had since passed on and the agreement is consequently invalid. The defendant considers that this alternative claim is bad in law. That a claim is bad in law does not make it excepiable as that does not cause the defendant any embarrassment. Surely the defendant can plead that the lease is valid and thus its occupation is not unlawful or wrongful if those are the facts.

The defendant also complains that the details of the lease agreement have not been pleaded as it believes that it is the duty of the plaintiff to disclose fully the facts that are essential for the defendant to plead. In this regard the defendant submits that the plaintiffs ought to have alleged the following:

- (a) the date when the lease agreement was signed
- (b) the full terms and conditions of the lease agreement
- (c) the terms and conditions if any which the defendants breached
- (d) the date and manner of the cancellation of the agreement and yet none of all of this has been provided.

The defendant seems to have misunderstood the basis of the plaintiff's claim which is allegedly based on the lease agreement. The plaintiffs do not aver that there was infact a lease agreement between the defendant and Marija Crnkovic. A revisit of the further particulars makes it easier to illustrate the significance of the reference to the alleged lease agreement.

The plaintiffs are on firm ground in criticizing the defendant as having proceeded on the basis of the plaintiff's claim being founded in delict as opposed to ownership of property.

If the defendant had understood the averment correctly as amplified by the further particulars it would be obvious that it is not the plaintiff's case that there was indeed a lease agreement between the defendant and one Marija Crnkovic. Therefore the exception as pleaded is based on a misunderstanding of the plaintiff's pleading and for this reason the exception is not sustainable. There is no way the plaintiffs can plead facts concerning a lease agreement whose existence the plaintiffs challenge.

In the circumstances the exception(s) taken are without merit and are accordingly dismissed with costs.

Costa & Madzonga, plaintiffs' legal practitioners
Tendai Biti Law, defendant's legal practitioners