

CHIVERERE CONTRACTORS (PVT) LTD
versus
CLOTHING INDUSTRY PENSION FUND
and
SARA TAFIREI

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 19 July 2016 and 9 February 2017

Civil Appeal

C. P Paul, for the appellant
C Malaba, for the respondents

NDEWERE J: The appellant, Chiverere Contractors issued summons in the magistrates court against the respondents in November 2014 claiming undisturbed possession of office 602, Pockets Building at corner Jason Moyo Avenue and Angwa Street and the eviction of the second respondent from the said office 602.

The respondents filed a special plea and stated that the appellant had no *locus standi* to sue the respondents and to seek the eviction of the second respondent from the first respondent's premises. The respondents also filed an exception and stated that the appellant had no cause of action against the first respondent since there was no legal relationship between the appellant and the first respondent in view of the cancellation of the lease agreement which used to be between them. The respondents also averred that the appellant had no legal relationship with the second respondent, as admitted in para 5 and 6 of the plaintiff's particulars of claim.

All the parties filed Heads of Argument and agreed that the matter be determined on the papers.

On 15 October, 2015, the magistrate upheld both the special plea and the exception and dismissed the plaintiff's claim. Appellant's grounds of appeal were as follows:

1. The Magistrates Court Rules make no provision for the filing of a special plea.

2. The learned magistrate should have held that the special plea and exception were in fact simply exceptions based on an averment that the plaintiff had no cause of action to seek the eviction of the second respondent.
3. The learned magistrate erred in finding that the summons did not set out a cause of action since there was an averment in the summons that the plaintiff leases the premises from the first respondent. Since this averment is made in the summons, for the purposes of the exception, that averment must be accepted and the learned magistrate erred in finding that the summons disclosed no cause of action and that the lease agreement had been cancelled.

The relief the appellant wants is for the decision of the court *a quo* to be set aside and substituted with one dismissing the Special plea and exception, with costs.

The appellant's first ground of appeal is that the Magistrates Court Rules make no provision for the filing of a special plea.

Order 16 r 9 of the Magistrates Court (Civil) Rules, 1980 (SI 290/1980) provides as follows:

"Any defence, including an exception, which can be adjudicated upon without the necessity of going into the main case may be set down by either party for a separate hearing upon seven days' notice at any time after such defence has been raised."

Rule 9 therefore provides for the filing of a plea in bar although the terminology of "Special Plea" was not specified. The first and second respondents' plea in the court *a quo* when they were the first and second defendant is on p 15 of the record. It said the plaintiff had no *locus standi* to sue the respondents and that since there was no lessor and lessee relationship there was no basis for the appellant (as plaintiff in that court) to seek the second respondent's eviction.

The respondents' defence in the court *a quo* given on p 15 of the record is definitely a defence "which can be adjudicated upon without the necessity of going into the main case" as provided for in r 9 of the Magistrates Court (Civil) Rules. The fact that the rules do not use the term "special plea" does not invalidate the defence once it falls within the four corners of the defence described in r 9. The first ground of appeal therefore has no merit.

The second ground of appeal by the appellant does not take its appeal anywhere. In fact, that ground of appeal appears to be a concession that the defence raised by the respondents was valid. The ground of appeal states as follows:

- "2. The learned magistrate should have held that the special plea and exception were in fact simply exceptions based on an averment that the plaintiff had no cause of action to seek eviction of second respondent."

And then what, if the magistrate had so held? Indeed, the magistrate's decision confirmed that the appellant had no cause of action against either respondent: hence my conclusion that the second ground of appeal is more of a concession by the appellant, than a ground of appeal.

The third ground of appeal was that the magistrate erred in finding that the summons did not set out a cause of action since there was an averment in the summons that the plaintiff leased premises from the first respondent.

The facts of the matter were very simple and straight forward. They appear in the appellant's own particulars of claim. The first respondent let out offices 601 to 605 to the appellant. In August 2013, the appellant allowed the second respondent to occupy office 602 on compassionate grounds following her eviction from other premises. The words; "On compassionate grounds" clearly reveal that there was no formal lease arrangement. The second respondent did not pay any rent to the appellant, confirming the "compassionate arrangement." So the second respondent was never a tenant of the appellant.

The first respondent then advised that it cancelled its lease with the appellant for non-payment of rentals and operating costs and instituted eviction proceedings, in 2013. This factual position was never disputed by the appellant and must therefore be taken as the correct position. After cancelling the lease with the appellant, the first respondent discovered that the second respondent was occupying office No. 602. The first respondent then entered into a lease agreement with the second respondent in relation to the office she was occupying, Room 602

The averment of a lease was made in the summons which were issued on 24 November, 2014 when it was common cause that the lease being referred to had been cancelled the previous year, in 2013. I say common cause because the appellant never disputed the cancellation of the lease. Indeed it could not do so successfully in view of the pending litigation which arose after the cancellation of the lease. The magistrate cannot therefore be faulted for finding that the summons did not set out a cause of action when it was common cause at the time of issuance of summons that there was no longer a lease agreement.

There was no legal basis for the appellant to evict the second respondent from office 602 in 2015 when it was neither the owner nor possessor of office 602, having voluntarily given

occupation of that room to the second respondent on "compassionate grounds" in 2013. There was no legal basis for the appellant to claim undisturbed possession from the first respondent in 2015, when the first respondent had cancelled the lease agreement in 2013. There was therefore no legal basis for the appellant's claim in the court *a quo* to succeed.

In our view, the learned magistrate did not misdirect herself in any way. She correctly upheld the special plea and exception.

The appeal is therefore dismissed, with costs.

CHITAKUNYE J agrees _____

Wintertons, appellant's legal practitioners
Kantor & Immerman, respondents' legal practitioners