

OTTO CHIMWANENGARA
versus
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE (N.O)
and
DEBRA CHAMBARA

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 17 July 2018 & 20 August 2018

Opposed Application – exception

A Nyamupfukudza, for the respondent (plaintiff)
G Sithole, for the 1st defendant
G Nyengedza, for the excipient (2nd defendant)

MUZOFA J: This is an exception by the second defendant to summons issued out of this court by the plaintiff on 2 May 2018 against the defendants.

In the summons the plaintiff alleged that sometime in 2014 on the instructions of the second defendant, an auction was conducted by auctioneers Hammer and Tongues in respect of an immovable property stand 783 Bannockburn Township . Plaintiff's bid won and he paid US\$36 500.00. The sale was confirmed and he deposited the transfer fees with the conveyancers. In due course, however he was advised by the conveyancers that the sale had been rescinded and the property sold by private treaty to the second defendant without his knowledge. Plaintiff applied to place a caveat on the property which was served on the first defendant. Despite knowledge of what was taking place in respect of the property, the first defendant advised the conveyancers to transfer the property to the second defendant. The first defendant continued to hold on to the purchase price paid by the plaintiff. According to the plaintiff the first defendant should have advised the plaintiff of the developments since he was an interested party. To that extent plaintiff sought an order for

1. Transfer of stand 783 Bannockburn Township of stand 1 Bannockburn into his name.

2. The sale by private treaty of the same property to the second defendant to be declared null and void.
3. The transfer of the property to second defendant be declared null and void
4. The costs be in the cause.

The first defendant requested for further particulars that were not furnished. The exception by the second defendant was pleaded as follows;

- “1. The summons does not disclose a “true and concise statement of the nature, extent and grounds of the cause of action...” against the second defendant as required by law.
2. There is no causal link between the second defendant and the plaintiff.
3. The summons wrongly cited the second defendant, in respect of whom there is no nexus which itself is an elementary error of drafting pleadings.
4. Furthermore in any event, the summons purports to challenge transfer yet it does not allege fraud or any such misadventure”.

It was apparent that at all times the plaintiff (the respondent herein) was legally represented, however no heads of argument were filed in terms of r 238 (2a) of the High Court Rules in respect of the exception. On the date of hearing of this matter the respondent’s legal practitioner requested for a postponement to file the heads of argument on the basis that the respondent had at one point indicated that at the hearing of the exception he did not require representation. However he later changed his mind and indicated his desire for representation. This is the reason why the heads of argument were not filed. Both the excipient and the first defendant opposed the application. I dismissed the application for the simple reason that there was no renunciation of agency filed of record as proof that the respondent was no longer represented at any stage in the matter. In the absence of such *prima facie* evidence the respondent was represented and heads of argument were supposed to be filed. What is clear is that the respondent’s legal representative failed to file heads of argument in terms of the rules. The respondent was therefore barred.

In terms of r 238 (2b) of the rules the court can proceed and consider the merits of the case even where respondent is barred.

In terms of r 137 (10 (b) of the High Court Rules, 1971 a party can except to pleadings. An exception is meant to curtail unnecessary litigation where no cause of action is disclosed on the pleadings. I was referred by the excipient to the case of *City of Harare v D and P Investments (Pvt) Ltd and Another* 1992 (2) ZLR 254 at D – E where the court had this to say on the purpose of an exception;

“An exception is an answer to the plaintiff’s claim or to the defence claimed. Its main purpose is to obtain a speedy decision upon a point of law apparent on the face of the pleading attacked and to settle the dispute in the most economical manner by having the faulty pleading set aside.”

In this case the summons and the declaration only indicate that the property was transferred to the excipient. That averment standing on its own only does not found liability. There is no allegation that she fraudulently caused the transfer of the said property nor is there an allegation that despite the knowledge that the property had been sold to the plaintiff the excipient nevertheless proceeded to purchase the property and take transfer. Negligence is the failure to exercise that degree of care expected in any given circumstances R G McKerron *The Law of Delict*, 7 ed pp 25-26. It involves a duty of care and a breach of that duty. To found a cause of action there must have been a duty of care owed to the plaintiff that the excipient ought to reasonably have guarded against. There is nothing to show that the excipient had such a duty of care. From the pleadings there is no causal link between the plaintiff and the excipient, no relationship at all is established. Nothing was pleaded to found a cause of action against the excipient, on the face of the pleadings there is no case that she has to answer to.

What constitutes a cause of action has been aptly set out in a number of cases and the court was referred to the cases of *Dube v Banana* 1998 (2) ZLR 92 H at 95 and *Muhahlera v Clerk of Parliament and Others* HH 107/07. A cause of action is a combination of facts that are material for the plaintiff to prove in order to succeed in his action. In the *Muhahlera* case *supra* the court defined a cause of action as

“...the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim.”

On a proper application of what constitutes a cause of action in relation to this case clearly nothing has been set out by the plaintiff. If the plaintiff intended to rely on fraud or negligence this remained in the air, for no particulars were set out to ground the claim.

The exception is well taken. Accordingly the following order is made.

1. The exception be and is hereby upheld.
2. The plaintiff’s claim against the second defendant be and is hereby dismissed with costs.

Nyamupfukudza and Partners, plaintiff's legal practitioners
Kantor & Immerman, 1st defendant's legal practitioners
Scanlen & Holderness, 2nd defendant's legal practitioners