BLOOMING LILLY INVESTMENTS (PRIVATE) LIMITED
and
REYTALON LIMITED
versus
ONTAGE RESOURCES (PRIVATE) LIMITED
and
TAPIWA ZEBRON GURUPIRA
and
TAWANDA ELIAS GURUPIRA
and
THE REGISTRAR OF COMPANIES (N.O)

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 28 October, 2020 and 30 December 2020 and 4 January 2021

Opposed Matter

Ms *C Damiso,* for the plaintiffs
T Mpofu with *T. Mapuraga,* for the 1st 2nd & 3rd defendants

MANGOTA J: An exception and a special plea fall under the genus "Alternatives to pleading to the merits; forms". Whilst the stated matter is the case, the two are not the same. They are markedly different from each other.

Herbestein & Van Winsen articulate the difference which exists between a special plea and an exception. They do so in *The Civil Practice of the Supreme Courts of South Africa,* 5th ed Volume 1 pp 599-600. They state that:

> "The essential difference between a special plea and an exception is that in the case of the latter, the excipient is confined to the four corners of the pleading. The defence raised on exception must appear from the declaration itself; the excipient must accept as correct the allegations contained in it and he may not introduce any fresh matter. Special pleas, on the other hand, do not appear *ex facie* the pleading. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the pleading, and those facts have to be established by evidence in the usual way …..
>
> Thus, as a general rule, the exception procedure is appropriate when the defect appears *ex facie* the pleading whereas a special plea is appropriate when it is necessary to place facts before the court to show that there is a defect …." (emphasis added).

The distinction between the two concepts-special plea and exception –places this matter

into context: The plaintiff sued the defendant which it alleged to have illegally obtained certain benefits or advantages from it in violation of provisions of the Companies Act [*Chapter 24:03*]. It moved for an order which declares as null and void the benefits or advantages which the defendant allegedly obtained from it.

The defendant entered appearance to defend and raised four special pleas. These centred on *locus standi*, lack of authority to sue, prescription and absence of cause of action. They constitute the subject matter of these proceedings.

The defendant filed Heads and so did the plaintiff which did not file any replication to the special pleas of the defendant.

On the day of hearing of the special pleas, Mr *Mpofu* who appeared for the defendant travelled a very easy road. He moved for the dismissal of the plaintiff's claim on the basis that its non-replication of the special pleas which had been raised constituted an admission by it that the special pleas were well-taken. He placed reliance on such case authorities as *Fawcett Security Operations* v *Director of Customs & Excise,* 1995 (2) ZLR 12.(SC), *DD Transport* v *Abbot* 1988 (2) ZLR 92 both of which state the simple rule of law which is to the effect that what is not denied in affidavits must be taken to be admitted.

Ms *Damiso* who appeared for the plaintiff had a very bumpy road to travel during submissions. She, as a learned and capable legal practitioner who she is, had no choice but to concede that the plaintiff's case died the moment it failed to file a replication to the special pleas of the defendant. Her concession was well made.

The plaintiff, in my view, suffered from a genuine but mistaken confusion of the above mentioned concepts namely, special plea and exception. If it applied its mind to the characteristics of a special plea which, as is known, is established by introduction of fresh facts which are outside the circumference of the pleadings, it would have known, as it should, that it had to rebut such fresh facts by way of a replication. Its mistaken view of treating a special plea as an exception accounts for the pitifal which it created for itself.

Authorities are agreed on the point that a replication is a *sine qua non* aspect of a special plea. GOWORA JA, for instance, discusses the point at hand in *Jennifer Nan Brooker & Anor* v *Mudhanda & Anor* SC 5/18 wherein she dealt with the special plea of prescription and said:

> "After being served with the special plea of prescription, the respondent should have replicated. The purpose of a replication is to inform the court and the defendant of the plaintiff's rebuttal to the special plea. The failure by the respondent to file a replication to the special plea means that there are no disputes for determination on the special plea. In the absence of such replication, there would be no issue for determination by the court a *quo*."

Most of the matters which the plaintiff included in its Heads are, it is apparent, not points of law. They are averments which should have been in its replication. SANDURA JA dealt with a matter which was akin to what the plaintiff did in *casu*. He advisedly discouraged the stated practice of including the litigant's averments in his heads. He did so in *Nedbank Investment (Pvt) Ltd & Anor* v *Global Electrical Manufacturers (Pvt) Ltd and Anor*, SC 43/09 wherein he remarked that:

> "If Global wished to rely upon the alleged interruption of the running of prescription, it should have filed its replication to the special plea. In the absence of a replication, the issues between the parties were to be found in the pleadings as they stood. Those issues did not include the issue of whether the running of prescription had been interrupted" (emphasis added)

It is only in its replication that the plaintiff's case becomes known to the court and the defendant. Where it has not replicated, as is the case in this matter, the issues which the defendant will have raised in its special plea remain unchallenged. The trite law which was enunciated in *Fawcett Security* as well as in *DD Transport* (supra) remains applicable under the stated set of circumstances. The long and short of that matter is that there will be no triable issues to talk of.

The plaintiff's replication to the defendant's special plea cannot be found in the plaintiff's heads as the plaintiff attempted to do in *casu*. Heads of argument are points of law which a legal practitioner prepares and files for, and on behalf of, the litigant whom he represents. They are not averments of the litigant. They are simply the law which is applied to a given set of facts by the legal practitioner. There is, therefore, a marked difference which exists between a litigant's averments which are contained in his pleadings and the heads which the litigant's legal practitioner draws from the litigant's pleadings.

A legal practitioner, it is a fact, cannot act as both a litigant and the legal practitioner whom the litigant engages to represent him. Legal practitioners must, therefore, disabuse themselves of the unwholesome tendency of wanting to play the role of the litigant whom they represent together with their own role which they play when they represent the litigant. Each person must play the role which the rules of court as well as the law of practice and procedure ascribes to him. The difference of the two roles should not be allowed to be blurred. It is real and it must, at all times, be regarded as such.

The defendant, it is my view, proved its case on a balance of probabilities. The special pleas which it raised are upheld. The plaintiff's claim is dismissed with costs.

Rubaya-Chinuwo Law Chambers, plaintiffs' legal practitioners
Mangwiro Tandi Law, 1st, 2nd, 3rd defendants' legal practitioners