

REPORTABLE (49)

SAMMYS GROUP (PRIVATE) LIMITED
v
**(1) JOHN BOURCHIER MEYBURGH N.O. (2) NUGLO INVESTMENTS
(PRIVATE) LIMITED (3) C.W. ELECTRICAL (PRIVATE) LIMITED (4)
REGISTRAR OF COMPANIES N.O.**

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, HLATSHWAYO JA & MAVANGIRA AJA
BULAWAYO, JULY 28, 2014 & JULY 23, 2015**

M. Ncube, for the appellant

N. Mazibuko, for the first, second & third respondents

ZIYAMBI JA:

[1] On May 16, 2013, the High Court gave judgment upholding an exception taken by the respondents and dismissing the appellant's claim with costs. This is an appeal against that judgment.

THE BACKGROUND

[2] On 17 December 2010 the appellant (plaintiff in the court *a quo*) issued summons against the respondents (defendants in the court *a quo*) in the High Court Bulawayo under case No. HC 2734/10. It sought:

- (a) A declaratory order that the Plaintiff has a right of refusal upon the disposal of the immovable property known as Stand 1396 Bulawayo and registered in the name

of the second respondent regardless of whether the disposal is by way of sale of shares in the second respondent;

(b) A declaratory order that the agreement of sale of shares of second respondent entered into by the first respondent and the third respondent on 15 and 21 April 2010, is in breach of the Plaintiffs right of first refusal and therefore invalid;

(c) An order directing second respondent to enforce the right of first refusal by selling the property to the plaintiff.

[3] The appellant alleged, *inter alia*, that there was a lease agreement between second respondent and the appellant in terms of which second respondent let to the appellant the premises known as Kings Auction Centre (“the property”); that sometime in or about 30 June 2006 the second respondent, then represented by one of its directors and shareholder one Graham Leonard Elston (now late), concluded a verbal agreement with the appellant, represented by one of its directors, Irene King, in terms of which second respondent granted to the appellant as a sitting tenant a right of first refusal in respect of the property should it be put up for sale; that as a consideration for the right of first refusal the parties agreed that the appellant would, at its own cost, undertake all necessary repairs and maintenance of the property and pay installments towards the eventual purchase of the property; that following the conclusion of the right of first refusal agreement the parties negotiated and agreed upon a purchase price of \$5 billion for the property but before the sale could be finalized, the late Mr Elston and his wife Elana, both directors and holders together of all the issued share capital of second respondent, died and the appellant remained in occupation of the property; that on or about 15 and 21 April 2010, the first respondent, in his capacity as executor of the estate of the Elstons, concluded a written

agreement for the sale of shares of second respondent to third respondent; that the sale of shares agreement had the effect of disposing of the property to third respondent in breach of the right of first refusal granted by second respondent to appellant and was therefore invalid and of no force and effect; that the property was the sole asset of second respondent and the sale of shares agreement had the effect of disposing of the shares of the second respondent without compliance with s 183 of the Companies Act [*Chapter 24:03*] and for this additional reason was invalid and of no force and effect.

[4] Thereafter, the following is the sequence of events:

On 1 February 2011, second and third respondents entered appearance to defend.

[5] On 21 February, 2011, Messrs Coghlan Welsh and Guest, who signed themselves as “Defendant’s Legal Practitioners”, entered appearance to defend the action on behalf of a defendant only described as “the Defendant”. On the same date a request for further particulars was filed in the name of the “first Defendant” by the same legal practitioners

FIRST RESPONDENT’S EXCEPTION

[6] Before the requested particulars were filed, the first respondent, on 29 March 2011, filed an exception to the declaration on the grounds that it disclosed no valid grounds for the relief sought in that:

- No averment was made that the first respondent had in fact sold stand 1396 Bulawayo Township;
- First respondent had not sold the stand which remains registered in the name of second respondent;

- The appellant acknowledged the above facts in paras 13-14 of its declaration; (in these paragraphs it is alleged that the sale of shares in the second respondent to the third respondent had the effect of disposing of the property to the third respondent);
- It was not alleged that the stand belonged to the Elstons and formed part of their estates;
and
- That the declaration was vague and embarrassing and the appellant had failed to rectify its defects.

First respondent therefore prayed that the exception be allowed and that the appellant's claim be dismissed with costs.

[7] Rule 119 of the High Court Rules ("the Rules") governs the filing of exceptions. It provides:

"119. Time for filing plea, exception or special plea

The defendant shall file his plea, exception or special plea **within ten days of the service of the plaintiff's declaration** provided that where the plaintiff has served his declaration with the summons as provided for in r 113 there shall be added to the period of ten days above referred to the time allowed a defendant to enter appearance as calculated in terms of r 17."

[8] According to the Notice of appearance to Defend, the summons was served on the first respondent on 14 February 2011. The declaration appears, going by the date thereon, to have been served with the summons in which event the exception ought, in terms of the above rule, to have been filed 20 days later, at the latest by 14 March 2011. The exception was out of time by 15 days.

[9] Nothing further took place until 31 August 2011, some 5 months after the exception was filed. On that date, the first respondent filed its plea to the merits. By then, the provisions

of r 138 of the Rules had come into effect and the exception could not, in terms of that Rule, be set down for hearing before the trial. Rule 138 provides:

“138. Procedure on filing special plea, exception or application to strike out

When a special plea, exception or application to strike out has been filed—

- (a) the parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with sub rule (2) of rule 223;
- (b) failing consent either party may within a further period of four days set the matter down for hearing in accordance with sub rule (2) of rule 223;
- (c) failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before the trial.”

[10] On 27 September 2011 the first respondent joined issue with the appellant on the pleadings.

THE SECOND RESPONDENT’S EXCEPTION AND SPECIAL PLEA

[11] On 13 September 2011, the second respondent apparently woke up to the fact that an exception had been filed by first respondent on 29 March 2011. It filed ‘SECOND DEFENDANT’S EXCEPTION’ in which it “aligned itself” to the first respondent’s exception filed of record on 29 March 2011 and alleged that the appellant’s summons and declaration were vague, bad in law, contradictory and disclosing no cause of action. By then, the exception was hopelessly out of time by reason of its non-compliance with r 119.

[12] In addition, on the same date, the second respondent filed a ‘SPECIAL PLEA’ in which it alleged that the matter was *lis alibi pendens* in that the same suit was pending before the High Court in a court application under case number HC 2104/10 referred to trial by NDOU J on 20 June 2011 some 6 months after the issue of summons in this matter. And then, to further complicate matters, second respondent, on the same day, filed its plea to the merits as well as a claim in reconvention in which it sought the eviction of the appellant from the property.

As already noted above, by virtue of the provisions of r 138, once the plea had been filed, the matter could not be heard before the trial.

[13] Third respondent’s plea was filed on the same day.

[14] The matter proceeded to finality with the plea to the claim in reconvention being filed and discovery being made by the parties. Thereafter, it appears that at a pre-trial conference held in the matter under HC 2104/10 (the court application), the two matters were consolidated and referred to trial. According to the appellant, it was agreed in principle ‘to consolidate the issues in both matters and to formalize the fact that only one issue was to be decided at the trial’.

[15] Following the pre-trial conference referred to above the parties prepared for trial. On 20 February 2013, second and third respondents filed a document stating that to ‘avoid unnecessary duplication’, they would rely on the synopsis of evidence and Discovery affidavit filed by the appellant in case No. HC 2104/2010.

- [16] On the same date, first respondent filed a document entitled 'FIRST DEFENDANT'S ISSUES FOR TRIAL'. In this document the first respondent set out 6 issues for determination arising from the merits of the claims.
- [17] A similar document was filed by the second and third respondents also setting out the issues for determination at the trial. As a point *in limine*, they raised the issue that the summons and declaration were vague and embarrassing, bad in law contradictory and disclosed no cause of action.
- [18] Thereafter, on 13 March 2013 the first respondent filed its discovery affidavit in case number HC 2734/10 (the very case in which the exceptions were taken). The appellant's synopsis of evidence and issues for trial were adopted by the respondents and the trial was set down by consent of the parties for hearing on 21 and 22 March 2013.
- [19] On the first day of the trial the respondents moved their exceptions and special plea. The court *a quo* heard the exceptions and special plea as a point *in limine*. Thereafter, rejecting a plea by the appellant for the grant of leave to amend its pleadings, it proceeded, without hearing evidence, to dismiss the appellant's claim with costs on the basis that the pleadings were incurably bad.

GROUND OF APPEAL

[20] The main issues raised in the grounds of appeal are:

- Whether the court *a quo* properly entertained the exception and special plea as a point *in limine* at the hearing;

- Whether the court misdirected itself in determining the exceptions on facts and evidence not found within the pleadings excepted to;
- Whether or not the court erred in dismissing the appellant's claim without affording it an opportunity to amend the offending pleadings.

These issues are considered in turn.

Whether the court *a quo* properly entertained the exceptions and special plea as a point *in limine* at the hearing.

[21] The first consideration is that the exception filed by first respondent and the exception and Special Plea filed by the second respondent were filed outside the time frame stipulated in the Rules. The learned Judge dealt with the breach of r 119 in the following terms:

“The Plaintiff sought to argue that second Defendant filed the exception to the Plaintiff's summons and declaration outside the time limits stipulated in the rules in that the papers were filed five and a half months after the Plaintiff's further particulars were served on the second defendant.... It is beyond argument that the rules do not provide for an automatic bar against a defendant who files an exception outside the prescribed time limits.”

He went on to say:

“I am satisfied that the first and second defendants exception and special plea are properly before the court and that there is no prejudice to be suffered by the Plaintiff because the basis of the exception and special plea have always been known to them.”

[22] It is true, as the learned Judge remarked, that there is no sanction for the late filing of an exception or special plea. However, the provision in the Rules is mandatory and the documents filed in contravention thereof cannot, in the absence of condonation of the non-compliance with the Rules, have any legal validity. The sanction must, in my view be, that the pleading is invalid by virtue of its non-compliance with the Rules. First

respondent's exception was filed 15 days out of time. Second respondent's special plea and exception were filed 6 and a half months out of time. Both applications were in violation of the Rules without explanation, without condonation, sought or granted. There was, therefore, no legal basis on which they were entertained by the court *a quo*.

[23] The second consideration under this head is whether the court *a quo* acted properly when it heard the exception and special plea as a point *in limine* at the trial. It was submitted on behalf of the appellant that the two matters, having been consolidated, were set down for trial in order that the merits of the dispute might be determined. Indeed, so it was submitted, the two parties were agreed that the central issue to be decided was whether the appellant had been granted a right of first refusal in respect of the property. The agreement to set the matter down for hearing for determination of the central issue meant that the exceptions and special plea fell away. Had it been the respondents' intention to pursue the exceptions and special plea they ought to have proceeded in terms of r 138. The appellant having been led to believe that the exceptions and special plea had fallen away was now confronted with them at the trial to its prejudice. It was submitted that the court *a quo* erred in allowing the exceptions and special plea to be argued at the trial without hearing evidence.

[24] Further, and this brings me to the third consideration under this head, it was submitted that the court *a quo* erred in holding that there was no prejudice to the appellant in entertaining the exceptions and special plea at that stage. Had the proper procedure, as outlined in r 138 been followed, the appellant would have had the opportunity to challenge the exceptions and special plea and, among other things, raise any or all of the

defences available to it, including the defence that the exceptions and special plea were not properly before the court. It was further submitted that the special plea and exceptions were abandoned when the matter was, by consent, referred to trial for the determination of the sole issue agreed upon by the parties.

[25] It appears to me that the matter having proceeded to trial, the court *a quo* ought to have conducted a hearing to determine the merits thereof. Thereafter, an order of absolution from the instance or dismissal of the claim on the merits could properly follow if the court, after hearing all the evidence, was so minded. Having regard to the purpose of the exception which is to remove contradictions and bring clarity to the declaration and summons in order to enable the respondents to plead thereto, it would seem to me to follow that the fact that the respondents had pleaded over on the merits and proceeded to set the matter down for hearing by consent and on defined issues, was an indication that they no longer considered a ruling on the exceptions to be necessary. In the premises, there is substance in the appellant's submission that the procedure adopted by the court *a quo* in dealing with the exceptions as a point *in limine* was prejudicial to the appellant. I therefore agree with counsel for the appellant that the court *a quo* erred when it failed to conduct a full trial and determine the matter on the evidence adduced.

[26] The determination of this issue in favour of the appellant is in my view, dispositive of this appeal. I proceed, however, to consider the remaining issues.

Whether the court misdirected itself in determining the exceptions on facts and evidence not found within the pleadings excepted to

[26] In arriving at its decision on the exceptions court said¹:

“I am satisfied that the Plaintiff’s claims are vague and embarrassing and do not disclose a cause of action for these reasons:

- 1) There is *no evidence* that the Plaintiff and second defendant entered into a lease agreement in respect of stand 1396 Bulawayo Township.
- 2) There is *no evidence* to support the assertion that at the time Auction Centre (Pvt) Ltd entered into a lease agreement with the Plaintiff, Mr Elston was mandated to represent second defendant.
- 3) There is no legal basis for the assertion that the sale of shares in second Defendant amounted to the sale of the immovable property in dispute
- 4) ...
- 5) ...
- 6) The defects in the plaintiff’s claim as particularized in the declaration cannot be cured by amendment.” (The italics are mine).

[27] The italicized words clearly show that the court relied on *evidence* outside the four corners of the impugned pleading in arriving at its determination on the matter. In that connection it was submitted by the appellant in its heads of argument that:

- “46. In summarizing its judgment the court *a quo* held that there was no evidence of a lease agreement in respect of the immovable property and further that there was no evidence to show that Mr Elston was mandated to represent the second defendant.
47. With due respect, the court *a quo* should have confined itself to the four corners of the pleading excepted to as it was obliged to do in terms of the law and Rule 137 (1) of the High Court Rules.
48. The court was dealing with allegations made in the summons and declaration and the court was required to make a decision as to whether such allegations were vague and embarrassing and disclosed no cause of action.
49. No evidence had been led at that stage and in any event one cannot plead evidence. In arriving at its judgment, the court *a quo* wrongly considered the submissions made on the merits by the parties in case number HC 2104/10 which submissions touched on the merits and as a result mixed up issues to be decided.

¹ Record 332; p9 of the cyclostyled judgment

50. With all due respect, the mixing up of the issues to be decided resulted in the court *a quo* making a final decision on the merits without any evidence being led by the Appellant in violation of the *audi alteram partem* rule.”

[28] That the court *a quo* relied on the evidence contained in HC 2104/10 is also apparent from the following passage which appears at p 6 of the cyclostyled judgment²:-

“*In both papers under case No. HC 2734/10 and HC 2104/10, the plaintiff alleges that it entered into a lease agreement with the 2nd defendant which subsequently granted it the right of first refusal. Herein lies the problem.*

The lease agreement referred to was in fact between the plaintiff and Auction Centre (Pvt) Ltd. At no stage did the plaintiff deal with the late Graham Leonard Elston in his capacity as representing the 2nd defendant. Indeed, from the papers, it is clear that plaintiff was not even aware of the existence of the 2nd defendant until after the death of Mr Elston. *It follows therefore, that if at all Mr Elston gave a right of first refusal, he did so either in his personal capacity or as an officer of Auction Centre (Pvt) Ltd, in which case such right was of no force and effect as neither Mr Elston nor Auction Centre had the mandate to grant a right over the property which they did not own. The fact that Mr Elston may have thought that he owned the property in his personal capacity or through Auction Centre (Pvt) Ltd does not assist the plaintiff as the court must look at the facts and the circumstances surrounding the transaction. See Felisano Khumalo v Lizzie Mandeya and Bulawayo City Council 2008 (2) ZLR 203 (S) where MALABA JA held that even when the parties purported to be selling each other immovable property when in fact they were selling each other rights in the property the court had to look beyond that as agreeing with the parties could accord no legal effect at all to a nullity.”(My italics)*

[29] The court *a quo* had before it, and took into consideration, the affidavits of evidence contained in the court application (H.C.2104/10). For the purposes of an exception no facts (except agreed facts) may be adduced by either party and an exception may thus only be taken when the defect objected against appears *ex facie* the pleading itself³. Nor can the court rely on any facts or evidence not contained within the pleading excepted to. In this instance, the need felt by the court *a quo* to rely on evidence outside the pleading

² Also at Record p329

³ Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa 5th ed Vol 1 at p 631..

points to the fact that a proper decision on the exception was bound with the merits of the dispute and a trial of the issues was therefore imperative.

[30] In adopting the procedure that it did – namely, relying on evidence outside the pleadings and basing its conclusion on the lack of evidence on the issues to be determined without hearing the appellant, the court *a quo* effectively deprived the appellant of the opportunity to lead evidence on the matters which were taken into account in arriving at its decision in the matter. Since the parties were ready for trial, the proper course was to conduct a trial in order to determine the merits of the matter and the court erred in failing to do so. This issue is also determined in favour of the appellant.

Whether or not the court erred in dismissing the appellant’s claim without affording it an opportunity to amend the offending pleadings

[31] The order of the court *a quo* reads as follows:

“(1) The first and second defendants exception and special plea be and are hereby upheld.

(2) The Plaintiff’s claims are dismissed with costs.”

Dealing firstly with para (1) of the order, it was submitted by the appellant that the court erred in upholding first and second respondents’ exception and special plea when first respondent did not file a special plea. It was submitted that in view of the fact that only second respondent filed a special plea, the court *a quo* ought to have separately stated the orders granted to each respondent since their pleadings were filed separately. I agree. A party ought not to be granted relief on an application that it did not make particularly where the grant of such relief is to the detriment or prejudice of the opposing party.

[32] Additionally, and more substantially, it was submitted that the issue of *lis alibi pendens* was not an issue at the date of the trial and the special plea ought not to have been upheld.

[33] That submission is also valid. The so called *lis pendens* (Case No. HC 2104/10) relates to a court application by the second respondent for the eviction of Irene King trading as Kings Auction Centre, and is the very matter which was consolidated with the appellant's claim (at pre-trial conference stage apparently, on 4 September 2012) in the present matter for trial. A notice of set down by consent, issued by the High Court on 20 February 2013 and signed by the legal representatives of all the parties states:

“TAKE NOTICE THAT the above mentioned matters, namely H.C. 2104/2010 and H.C. 2734/2010 which were consolidated at the Pre-Trial Conference stage, be and are hereby set down for trial on Thursday and Friday the 21 and 22 March 2013 respectively at 10a.m. on both dates.”

[34] There was in fact no *lis pendens* since the two matters were consolidated for purposes of trial. The special plea could not, for this reason, succeed. In any event, nowhere in the judgment does the court deal with the merits of the special plea and the impression is gained that no thought was given to the matter which renders wrong the upholding of the special plea when it was not considered.

[35] As to para (2) of the Order, the general practice where a court upholds an exception is not to dismiss the plaintiff's action but to order that the offending pleading be set aside and the plaintiff be given leave to file an amended pleading, if so advised, within a certain period of time. The following passage from Erasmus SUPERIOR COURT PRACTICE⁴ is instructive:-

⁴At page BI- 159

“where the exception is successful, the proper course is for the court to uphold it. When an exception is upheld, it is the pleading to which exception is taken which is destroyed. The remainder of the edifice does not crumble The upholding of an exception to a declaration or a combined summons does not, therefore, carry with it the dismissal of the action. The unsuccessful party may then apply for leave to amend his pleading. It is in fact the invariable practice of the courts in cases where an exception has been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time. It has been held that it is doubtful whether this practice brooks of any departure; in the rare case in which a departure may be permissible, the court should give reasons for the departure. This practice *a fortiori* applies where an exception is granted on the ground that the pleading is vague and embarrassing, a ground which strikes at the formulation of the cause of action and not its legal validity.

Leave to amend is often granted irrespective as to whether or not at the hearing of the argument on the exception the plaintiff applied for such leave. Where the court does not grant leave to amend when making an order setting aside the pleading, the plaintiff is entitled to make such application when judgment setting aside the pleading has been delivered.”

[36] In *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593A at 602C-D the court said the following:

“As far as I am aware, in cases where an exception has been successfully been taken to a plaintiff’s initial pleading, whether it be a declaration or the further particulars of a combined summons, on the ground that it discloses no cause of action, the invariable practice of our Courts has been to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time.”

[37] The reason given by the court *a quo* for its denial of leave to the appellant to amend its pleadings was that it found that the appellant’s claims were “so incurably bad that it would in [its] view be undesirable to grant Plaintiff leave to amend its declaration within a stipulated period.”

[38] An order dismissing the Plaintiff's claim is a drastic remedy and the courts have inclined towards the grant, where an exception is upheld, of leave to the Plaintiff to amend the offending pleadings. To quote the words of Corbett CJ in the *Group Five Building* case⁵:-

“An order dismissing an action puts an end to the proceedings and means that if the plaintiff wishes to pursue his claim on a different pleading he must start *de novo*. This may have drastic consequences for the plaintiff particularly where it results in the prescription of the claim. In my opinion, it would be contrary to the general policy of the law to attach such drastic consequences to a finding that the plaintiff's claim discloses no cause of action. Here the analogy of a defective summons springs to mind. And the cases of *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA273 (A) and *Prudential Assurance Co Ltd v Crombie* 1957 (4) SA 699 (C) illustrate the reluctance of the Courts to deny the plaintiff the opportunity to amend his summons, even if fatally defective by reason of its failure to state a cause of action.”

See also *Auridiam Zimbabwe (Pvt) Ltd v Modus Publications (Pvt) Ltd* 1993 (2) ZLR 359 (H) at 373; *Adler v Elliot* 1988 (2) ZLR 283.

IN CONCLUSION

[39] The above having been said, had the exceptions been properly taken, I would have had no difficulty in upholding the finding by the court *a quo* that the appellant's declaration as amplified by its further particulars is excipiable. A more ineptly drawn declaration and further particulars is difficult to imagine. The further particulars read like an essay of sorts. The draftsman clearly lacked learning or training in the area of drafting of pleadings.

[40] However, in that event, the proper course to be taken would be to grant leave to the Plaintiff to amend the offending pleadings, if so minded.

⁵ *Supra* at PP 602J-603B

DISPOSITION

[41] In the premises, the proper course would be to remit the matter to the court *a quo* for trial.

[42] It is therefore ordered as follows.

1. The appeal is allowed with costs.
2. The judgment of the court a quo is set aside.
3. The matter is referred back to the High Court for trial on the issues agreed by the parties.

HLATSHWAYO JA: I agree

MAVANGIRA AJA: I agree

Cheda & Partners, appellant's legal practitioners

Calderwood, Bryce Hendrie & Partners, first, second & third respondents' legal practitioners