

TENDAI MASHAMHANDA
versus
BARIADIE INVESTMENTS (PRIVATE) LIMITED
and
LAXTON TENDAI BITI
and
MACDUFF MADENGA N.O
and
ELLIOT ROGERS
and
THE REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
TAGU J
HARARE; 26 October 2022, 16 & 31 January & 22 February 2023

Opposed Application-Special Plea

Advocate J J Chirambwe, for the plaintiff
Advocate T Mpofu with Advocate T L Mapuranga, for the 1st defendant

TAGU J:

INTRODUCTION

When this matter resumed on 16 January 2023, the matter could not be heard. The reason being that counsel for the Plaintiff made an oral application for the recusal of this court. He emphasized then that the reason for the recusal had absolutely nothing to do with this Lordship's integrity or bias on the Lordship's part but premised upon first Defendant's conduct in causing another Lordship to recuse himself, and the Plaintiff had developed a discomfort to have this matter presided over by this Court. The counsels for the first Defendant challenged the application on the basis that they had been ambushed, that they had not been notified in advance hence were in a difficult position to respond to the application.

After hearing the brief submissions, the court ruled that the Plaintiff should make a formal application, serve it on other parties and that the other parties should respond in terms of the Rules. Thereafter, the court to make a ruling. The matter was postponed to 31 January 2023.

On resumption of hearing on 31 January 2023, the Plaintiff had not filed a formal application for recusal. Consequently, the other parties had not filed their responses. Advocate. *J J Chirambwe* indicated that he had made consultations, involving his instructing counsel on the merit of the application. It was resolved that the application should not be made and would not be made. He was prepared to proceed with the hearing. Advocate *T Mpofu* then asked for wasted costs on a higher scale. His reasons for costs on a higher scale at this stage being that a patently frivolous request was made for the court's recusal with the effect of scandalizing the court. The allegations were made against his lordship without merit, hence the first hearing was aborted. It was a naked allegation that scandalizes the court. When asked to put the application in writing he developed cold feet. The counsel for the first Defendant was unnecessarily put out of pocket and the process of the court was abused. The counsel for the Plaintiff did not say anything in respect of costs on a higher for wasted time. I will at this stage award wasted costs on a higher scale.

BACKGROUND FACTS

The Plaintiff issued summons on 14 June 2022 against the defendants claiming an order that in terms of section 8 of the Deeds Registries Act [*Chapter 20.05*] that the fifth Defendant cancel and annuls:

- (1) Deed of transfer Number 2541/2022 dated 5 May 2022 in favour of Bariadie Investments (Private) Limited in respect of the Remainder of Subdivision C of Lots 190, 191, 193, 194 and 195 Highlands Estate of Welmoed measuring 4 377 square metres on the basis that such title was obtained fraudulently, and pursuant to legally invalid documents emanating from second, third and fourth Defendants.
- (2) Costs of suit against the first to fourth Defendants jointly and severally, the one paying the others to be absolved.

The facts as stated in the Plaintiff's Declaration are that in or around February 2019, the Plaintiff purchased a certain piece of land situate in the district of Salisbury called the Remainder of subdivision C of Lot 6 of Lots 190, 191, 193, 194 and 195 Highlands Estate of Welmoed

measuring 4 377 square metres (the property” from one Puwayi Chiutsi which property was subsequently transferred to him. According to the Applicant it became apparent after title to the property had been registered in the Plaintiff’s name that the first Defendant was laying claim to the property on the alleged basis that it had bought the property at an auction. The property had allegedly been judicially attached by third Defendant in order to satisfy a debt owed to the fourth Defendant by Puwayi Chiutsi. However, Plaintiff became aware in 2021 that the property was never auctioned and the purported auctioneer together with the second and third Defendants have since been charged with fraud by the police under CR 1139/09/21. The documents which were used to effect registration of title to the property in the name of the first Defendant, being an application/affidavit by the second Defendant dated 7 April 2021 and a purported power of attorney by the third Defendant dated 18 January 2019 were legally invalid.

The first Defendant filed its plea and a special plea on 13 July 2022. The special plea is that of lack of *locus standi* on the part of the Plaintiff as well as non-joinder and misdirection of the third Defendant.

On the issue of *locus standi* the contention by the first Defendant is that the Plaintiff once had his name on a Deed of Transfer for the stand in dispute called the Remainder of Subdivision C of Lots 190, 191, 193, 194 and 195 of Highlands Estate of Welmoed measuring 4 377 square metres (the property). Plaintiff’s Deed of Transfer was then cancelled by order of the Supreme Court in the judgment of *Bariadie Investments (Private) Limited v Puwayi Chiutsi, Tendai Mashamanda, The Registrar of Deeds, The Sheriff of the High Court and Elliot Rogers SC 24/22*. The Supreme Court then directed that title to the property be registered in the name of the first Defendant. The Registrar of the Deeds then cancelled the Plaintiff’s Deed of Transfer. Title in the property has since been registered in the name of the first Defendant. Therefore, the Plaintiff, by virtue of the judgment of the Supreme Court, has ceased to hold any legal interest in the issue of ownership of the property or in issues related to registration of title in the property. It said any claim by the Plaintiff which does not seek to set aside the judgment of the Supreme Court aforesaid is a claim in which the Plaintiff lacks legal interest in. Even if the relief which the Plaintiff seeks is granted to him, he has no legal benefit from such relief as this only resuscitates Puwayi Chiutsi’s title deed to the property, but it does not resuscitate the Plaintiff’s deed. The first Defendant therefore submitted that the Plaintiff has no direct and substantial interest in either the subject

matter of the *lis* he has brought before the Court or in the relief he has sought from it, hence the Plaintiff's claim be dismissed with costs.

As to the special plea of non-joinder and miscitation, the first Defendant pleads in bar/abatement that the Plaintiff's claim is a nullity because the Plaintiff cited the Third Defendant as MACDUFF MADEGA N.O. The Plaintiff went on to describe the third Defendant in the Plaintiff's Declaration as being cited "in his official capacity as the Sheriff of Zimbabwe who is responsible for carrying out executions of court judgments in Zimbabwe..." First Defendant averred that this form of citation is in violation of s 4 of the State Liabilities Act [*Chapter 8:14*]. This means that the Sheriff of Zimbabwe is not before the Court at all and yet it is his actions in giving transfer of the property to the First Defendant which are being challenged. MACDUFF MADEGA is therefore improperly before the Court. The entire action is therefore invalid because the first Defendant is disabled from effectively defending its title in the property with the party which gave it transfer and whose actions are impugned not being before the Court and an improper party being cited. For these reasons the first Defendant prayed that the Plaintiff's claim be dismissed with costs.

As a preliminary point the Plaintiff raised the issue that the points taken by the first Defendant are based on facts or averments which appear *ex facie* the pleadings. It said where the averments by a party are based on what appears in, or is alleged *ex facie* the particulars of claim /declaration (in this case that the Plaintiff does not have *locus standi* or that there is a miscitation and/non-joinder) the first Defendant may take exception rather than to file a special plea. Special pleas have to be established by the introduction of fresh facts from outside the circumstances of the pleading and those facts have to be established by evidence in the usual way (in the same manner that evidence is adduced in trial proceedings). For these reasons, the Plaintiff submitted that the matter should be struck of the roll with costs because the first Defendant adopted inappropriate procedure and its special pleas are consequently not properly before the court.

In making the submissions as it did, the Plaintiff referred the court to Herbstein & Van Winsen "CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA, FIFTH EDITION at p 599 to 600 where it was said-

"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 pleading itself the excipient must accept as correct the factual allegations

contained in it and may not introduce any fresh matter. 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.” See *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O), *Sibeko v Minister of Police* 1985 (1) SA 151 (W).”

The issue as to the procedure to adopt in a case of this nature was deliberated on at length in the case cited by the first Defendant, the case of *National Employment Council for the Construction Industry v Zimbabwe Nantong International (Pvt) Ltd* SC 59/2015. In that case reliance was had to the case of *Brown v Vlok* 1925 AD 56 at p 58 where INNES CJ had this to say-

“...a plea in bar is one which, apart from the merits, raises some special defence, not apparent *ex facie* the declaration – for in that case it would be taken by way of exception – which either destroys or postpones the operation of the cause of action.”

The court further adopted the approach elaborated by Hebrbstein & van Winsen *supra* at pp 471-472 and 473-479 as follows-

“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 declaration. The defence he raises on exception must appear from the declaration itself; he must accept as true 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 declaration. 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 circumstances of the declaration, 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. The defence of prescription appears to be an exception to this rule, for it has been held that that defence should be raised by way of special plea, even when it appears *ex facie* the plaintiff’s particulars of claim that the claim has prescribed, apparently because the plaintiff may wish to replicate a defence to the claim of prescription, for example an interruption.”

At p 473-479, the leaned authors enumerated and explained those special defence that are typified by special pleas, viz, dilatory pleas, pleas in abatement, *lis alibi pendens*, arbitration as a condition precedent, prescription, no-joinder or misjoinder, *res judicata* and absence of jurisdiction. In *Edwards v Woodnutt N, O.* 1968 (4) SA 184 (R), the distinction was rationalized as being founded on the need to adduce further evidence in the case of special pleas. As was explained by BEADLE CJ, at 186C-J,

“It will be seen that the two major objectives of the defendant to the declaration relate to the *locus standi* of the plaintiff to pursue his action and do not suggest that if the plaintiff had the requisite *locus standi* the declaration did not disclose a cause of action. Objections to the locus standi of a

litigant to sue are more properly taken by way of plea in bar or abatement than by exception. The practice of the Court is to employ the procedure of exception for those objections which go to the root of the declaration and allege that the declaration does not disclose a cause of action at all, and not for those cases where only the *locus standi* of a particular plaintiff to sue is concerned. The basic difference, however, between an exception and a plea in abatement is that in the case of a plea in abatement evidence may be led, whereas in the case of an exception the facts stated in the pleadings must be accepted.” (my emphasis)

What is clear from the above authorities is that *locus standi* can be raised as a special plea and not as an exception. In the case of *National Employment Council for the Construction Industry v Zimbabwe Nantong International (Pvt) Ltd*, *supra*, the Supreme Court said at p 6 of the cyclostyled judgment that-

“On the particular facts of that case, although the defendant had followed the wrong procedure in challenging the plaintiff’s *locus standi* by way of exception, the matter was allowed to proceed to a determination on its merits....”

So to challenge *locus standi* of a plaintiff and or non-joinder or mis-citation the proper procedure is to raise a special plea and not exception. An exception is generally a “pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action or the specific defence relied upon.

The taking of an exception is a procedure which is interposed before the delivery of a plea on the merits by a defendant or before the delivery of a replication or the joinder of issue by a plaintiff. It is designed to dispose of pleadings which are so vague and embarrassing that an intelligible cause of action or defence cannot be ascertained or to determine such issues between the parties as can be adjudicated upon without the leading of evidence.” – **Herbstein & van Winsen**, *supra*, p 630.

In casu, the first Defendant is not saying the pleadings are vague and embarrassing, but is merely seeking to interpose some defence not apparent on the face of the pleadings up to the time when they are raised. First Defendant did so after pleading. Therefore, the preliminary point that the first Defendant adopted a wrong procedure is without merit and is dismissed.

The first Defendant’s special plea is that the Plaintiff in his pleadings merely disclosed that he was once the holder of title in a property called the Remainder of Subdivision C of Lots 190, 191, 193, 194 and 195 of Highlands Estate of Welmoed measuring 4 377 square metres. The

Plaintiff did not disclose that the registration of title in the property in his name was cancelled by the Supreme Court of Zimbabwe in the judgment of *Bariadie Investments (Private) Limited v Puwayi Chiutsi and others (supra)*. That judgment is extant. It also directed that title in the property be registered in the first Defendant's name. It is not in dispute that title over the property is now registered in the first Defendant's names. Therefore the Plaintiff did not disclose, nor indeed does he have, any standing to still be challenging the transfer into first Defendant's name.

On the other hand the Plaintiff indicated that he is still in occupation of the property in question. He argued that he is approaching the court seeking the cancellation and annulment of the title deed in the first Defendant's name on the basis that it was obtained fraudulently and pursuant to legally invalid documents. He denied the suggestion that he has ceased to hold any legal interest in the issue of ownership of the property or in issues related to registration of title in the property. He said in terms of s 8 of the Deeds Registries Act [*Chapter 20.05*] a registrar only cancels a registered deed of transfer on the strength of an order of Court. So he argued that anyone can approach the registrar for the cancellation or annulment of a deed of transfer.

In order for a party to have standing to bring a claim, such a party must have a real and substantial interest in the subject matter of the litigation and in the relief sought. This has also been described as a direct and substantial interest. In the case of *Stevenson v The Minister of Local Government and National Housing and Ors SC 38/02* it was held that-

“Whilst it is well established that a party who initiates legal proceedings, whether by application or summons, should indicate in the commencing papers that he has the locus standi to bring such proceedings, what he has to show in order to satisfy that requirement is that he has an interest or special reason which entitles him to bring such proceedings.”

Thus, in **Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa 4 ed** at p 401, the learned authors have this to say on the issue of *locus standi* to institute legal proceedings by means of summons:

“It must appear from the summons that the plaintiff has an interest or special reason entitling him to sue, i.e. that he has *locus standi* in the matter.”

Similarly, on the issue of *locus standi* to file an application, the learned authors say the following at p 364;

“As in the case of a summons, it must appear from the application that the applicant has an interest or special reason entitling him to bring the application- that he has *locus standi* in the matter.”

The facts of this case are clear. The Plaintiff once had title to the property in his name transferred from Puwayi Chiutsi. The title was subsequently cancelled and registered in the name of the first Defendant by the Order of the Supreme Court. So he is now a former holder of title. Dealing with the position of former owners whose title no longer exists, the Supreme Court in J.C. *Connoly & Sons v Ndhlukula and Anor* SC 22/13 held that-

“That being the position the former owner and title holder has no *locus standi* to approach the court for an interdict because he or she cannot establish a clear right-Cedar Park Farm (Pvt) Ltd v Minister of State for National Security and Ors 2010 (2) ZLR 158 (H), 164 B-C”

The above is the position of the Plaintiff *in casu*. The judgment divested him of any interests in the property. He lacks standing. Yes, s 8 of the Deeds Registry Act, allows any person to apply for cancellation or annulment of a deed of transfer, but that person must have a recognizable interest in the suit. Plaintiff does not.

The second special plea relates to non-joinder and miscitation. The Plaintiff conceded that there was non-joinder of the Sheriff for Zimbabwe and miscitation of MACDUFF MADENGA. However, the Plaintiff argued that in terms of the Rules of the High Court 2021, the fact that there is a non-joinder or miscitation is not fatal to the application.

I have noted that what the Plaintiff filed is not a mere application. It is a summons and declaration. The first Defendant's position therefore, is rendered precarious by the miscitation and nonjoinder. The Sheriff gave first Defendant title. The second Defendant acted as an agent of the Sheriff in giving the first Defendant title. The Sheriff not being before the Court the first Defendant suffers obvious prejudice in its defence. The miscitation and nonjoinder is therefore a separate and valid ground for impugning the action. The Plaintiff's summons and declaration are fatally defective. The action may therefore be dismissed with costs on this basis alone.

IT IS ORDERED THAT

1. Plaintiff's action filed under case number HC 3955/22 be and is hereby dismissed.
2. Plaintiff to pay first Defendant's wasted costs on a higher scale.
3. Plaintiff to pay costs of this suit on the ordinary scale.

Sankange Hungwe Attorneys, plaintiff's legal practitioners
Gill Godlonton and Gerrans, 1st defendant's legal practitioners
Tendai Biti Law, 2nd and 4th respondents' legal practitioners