

BEVERLEY MAPURANGA
And
CHARLES TAWONA
Versus
CARSON AND CARSON REAL ESTATE (PVT) LTD
And
NGONI MAWUNGA
And
RICHARD KUNDAI CHIRIPAMBERI

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 23 February 2023

Opposed Application

G. Chifamba for first and second plaintiff
T. Chigudugudze for first and second defendant
J. Tusso for third defendant

THE EXCEPTION

[1] First plaintiff (“Beverley”) is a Zimbabwean based in the United Kingdom. She instructed second plaintiff (“Charles) to represent her in a deal to purchase a residential stand in Ashdown Park, Harare. First defendant (“Carson”) is the firm of real estate agents who facilitated the transaction, represented by second defendant (“Ngoni”) their alleged employee or consultant. Beverley and Charles allege that the third defendant (“Richard”) who sold them the stand, later turned dishonest by selling the same stand to another person. Beverley and Charles accuse Carson and Ngoni of negligence in failing to prevent the loss caused by Richard’s alleged fraudulent acts.

[2] Beverley and Charles approached this court seeking an order for compensation of their loss following the unsuccessful transaction. Carson, together with Ngoni their alleged employee, raised an exception to Beverley and Charles’s claim. Carson claimed that they ought not have been cited in the legal proceedings. They also argued, together with Ngoni,

that the claim by Beverley and Charles was invalid at law and was calculated to embarrass them in their defence.

[3] Richard, the seller of the stand is not involved in this exception.

THE PRELIMINARY POINT

[4] Before the exception could be heard by this court, Beverley and Charles raised a preliminary objection to it. Mr. *Chifamba*, who represented them, argued that Carson and Ngoni had not observed the requirements of rule 12 (2) of the High Court (Commercial Division) Rules SI 203/20 (“the Commercial Court Rules”). This rule, required Carson and Ngoni to submit a paginated and indexed bundle in the format prescribed by form number CC2 of the Commercial Court Rules.

THE RESPONSE TO THE PRELIMINARY POINT

[5] Mr. *Chigudugudze*, who represented Carson and Ngoni, responded by attacking the preliminary objection raised by his counterpart. His argument was that an exception was at law, a complaint raised by one party against the other`s claim for the defects appearing on the document setting out that claim; -in this case, the summons and declaration. For that reason, there was no need for Carson and Ngoni to file any evidence to support their objection. The requirement in rule 12 (2), that a party raising an objection such as Carson and Ngoni had done, was according to Mr. *Chigudugudze* not applicable. He also pointed out that Beverley and Charles had themselves failed to file an answer to the exception raised by Carson and Ngoni in the method, and within the 10 days required by the [rule 42 (9) of the High Court] Rules.

[6] In response, Mr. *Chifamba*, -for Beverley and Charles, admitted that indeed his clients had failed to file a response to the exception in 10 days as prescribed by rule 42 (9). He however blamed this default on Carson and Ngoni, who had omitted to attach the bundle of documents required by rule 12 (2) to their objection. Absence of this bundle made it difficult for Beverley and Charles to construct a response to the exception so argued Mr. *Chifamba*.

DISPOSITION OF THE PRELIMINARY POINT

[7] I have three quick points to make in disposing of this preliminary point. Firstly, it is quite clear that this matter has taken a diversion from the original claim. It has in fact taken a

further detour from that diversion and is now a battle of which party failed to observe the requirements of the rules of court. I must emphasise the importance of parties focussing on the key dispute between them. In order for that to happen, litigants have to observe the requirements set by the rules.

[8] This court has explained in previous decisions that rules are not an end to themselves, in the famous statement “*rules are made for the court and not the court for the rules*”¹. Rules serve a simple and logical purpose. They make legal proceedings orderly and predictable by giving guidance to litigants on specific issues governing litigation. Adherence to rules of court is therefore a mark of courtesy to the court and fellow litigants. It also represents compliance with the law. Compliance and courtesy are necessary ingredients of convenience.

[9] Convenience in turn, means reduction or even elimination of those well-known ills that make litigation painful, expensive, acrimonious and lengthy. For these reasons, courts persistently urge litigants and lawyers to observe the rules of court. Parties who find themselves in breach of the rules, have a responsibility to take urgent, corrective action through honest and contrite applications for condonation.

[10] Secondly, coming back to the present matter, it is clear that rule 12 (2) requires a party raising an exception to a plaintiff’s claim to file a paginated and indexed bundle. Rule 12 (2) says; -

12. (2) The plea, exception, special plea or other answer shall be supported by a paginated and indexed bundle of all relevant and material documentary evidence and a summary of the evidence that the defendant relies on which shall be in Form No. CC 2.

[11] Not only did Carson and Ngoni fail to adhere to this simple rule, they did not see it fit to correct that failure nor at least explain their failure or inability to do so. The explanation given on their behalf- that the rule did not apply to their situation- was not backed by convincing legal argument. Their counsel instead, went further and attacked Beverley and Charles for having failed as well to observe the requirements of the rules. That complaint by Mr. *Chigudugudze* was not only admitted but was again not met by a prayer for condonation

¹ *Stuttarford v Madzudzu* HH 33-2003.

from Beverley and Charles. This mutual disrespect of the rules by both sides will (a) see the preliminary objection upheld and (b) each side being ordered to meet its own costs of suit.

[12] Before disposing of this matter, I will comment on the following issues which also weighed on my mind in reaching the conclusion in paragraph [10] above, as well as the final order below. There is the third general matter of preliminary or interlocutory objections and applications filed during the course of proceedings. The rules of court as well as fundamental provisions of law allow litigants to quickly raise objections to avoid matters straying into the irrelevant. Interlocutory applications are handy corrective tools available to litigants. For that reason, they are an essential facility in the conduct of legal proceedings and can yield huge benefits to the entire litigation process.

[13] But like all tools, they must be held in responsible arms, and flexed by skilled hands. Put to misuse, these tools will destroy the benefits originally intended. Litigants and their legal practitioners must therefore reflect with greater sincerity, their use of interlocutory applications. This court has raised concerns in previous decisions about the abuse of this procedural facility².

[14] I can do no more than set out, in closing, to its full extent, Schedule 3 which anchors the commercial court rules with values and principles which should guide the resolution of commercial disputes. These values and principles encourage parties to approach the resolution of commercial disputes in particular with the correct mindset. Elimination of yester-year`s curse of (purposeless) legalese is key among them.

SECOND SCHEDULE

Values

(R 2) [effectively rule 3]

The adjudication of disputes and operation of the Commercial Division of the High Court of Zimbabwe (hereafter referred to as “the Commercial Court”) shall be guided by the set of values listed below which however, are not part of the Rules of Court.

² See the famous dictum by MATHONSI J (as he then was) in *Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Ors* 2015 (1) ZLR 651 at 659 C-E.

(1) The establishment of the Commercial Court in Zimbabwe is designed to improve the ease of doing business in line with the criteria set by the World Bank and contribute towards the national effort in attracting local and foreign direct investment.

(2) The core function of the Commercial Court is the expeditious resolution of commercial disputes according to international best practices to enhance efficient justice delivery.

(3) The core attributes of the Commercial Court are:

- (a) reduction and simplification of processes;
- (b) curtailment and minimisation of costs and time;
- (c) full integration of electronic case management systems;
- (d) complete digitalisation of records;
- (e) across the board training;
- (f) enhanced professionalism and increased efficiency;
- (g) new rules of procedure;
- (h) adaptability.

[15] It is therefore ordered as follows; -

1. The preliminary objection raised by plaintiffs to the first and second defendants` exception be and is hereby upheld.
2. The first and second defendants` exception be and is hereby dismissed for want of compliance with the rules of court.
3. Each party to carry its own costs.

Mugomezwa & Mazhindu-plaintiffs` legal practitioners
Madanhe & Chigudugudze- first and second defendants` legal practitioners
Tavenhave & Machingauta-third defendant`s legal practitioners