

ROLAND JACK VAN DEN BERG  
versus  
WARHURST ATTORNEYS

HIGH COURT OF ZIMBABWE  
**DUBE-BANDA J**  
HARARE; 6 October 2024 & 11 February 2025

### **Exception**

*B. Mwatara* for the plaintiff (respondent)  
*Ms. J. Wood* for the defendant (excipient)

DUBE-BANDA J:

[1] The plaintiff issued summons against the defendant out of this court on 24 April 2024.

The claim as endorsed on the face of the summons is for the following relief:

- i. “Payment in the sum of US\$60 000.00 payable in local currency at the prevailing exchange rate, being damages suffered by the plaintiff arising from breach of professional duty of care as a conveyancer which duty was owed to the plaintiff who was purchasing an immovable property. The defendant failed to exercise reasonable care, skill and diligence when drafting an agreement of sale of the immovable property in which plaintiff as purchaser was entitled to transfer of title, thereby causing the plaintiff to suffer damages. The defendant is liable for such negligence and breach of professional duty.
- ii. Interest on the above amount at the prescribed rate from the date of service of summons to the date of full payment.
- iii. Costs of suit on a legal practitioner and client scale.”

[2] The claim as set out in the declaration is summarized as follows. The plaintiff alleges that the defendant is a law firm registered in accordance with the laws of Zimbabwe. That it breached its professional duty of care as a conveyancer which duty it owed to the plaintiff as a purchaser of an immovable property. It is further contended that defendant failed to exercise reasonable duty of care, skill and diligence when drafting an agreement of sale of an immovable property in which plaintiff as the purchaser was entitled to transfer of title, thereby causing the plaintiff to suffer prejudice. It is particularly averred that:

- i. “On the 13<sup>th</sup> February 2023, the plaintiff, with the intention of purchasing an immovable property namely Flat No. 4 St. Hilliers Flats, Avondale Harare, entered into a written

agreement with the Estate of the Late Gavin Montgomery Langham, which at all material times was duly represented by Edward Mark Warhurst, a principal for the defendant, who was acting in his capacity as the executor. The agreement of sale was drawn up by the defendant in its capacity as a conveyancer.

- ii. The plaintiff took occupation of the immovable property immediately after paying the full purchase price on 13 February 2023 while waiting for the defendant to effect transfers in his favour as per the terms of the agreement.
- iii. It was after a period of almost a year that plaintiff was advised that transfer of title could not be effected. It was revealed that the property which the plaintiff bought had no title deed. This is despite the fact that defendant had inserted a clause 5 to the said agreement of sale, in terms of which the plaintiff was guaranteed and therefore legitimately expected transfers of the immovable property to be passed in his favour. The defendant also caused the plaintiff to pay conveyancing fees and stamp duty in anticipation of this process.
- iv. The defendant was negligent in that:
  - a. It negligently misrepresented to and led the plaintiff into believing that the property he was buying has a title deed whilst in actual fact it is only held under a share certificate.
  - b. It entered the wrong property description in the agreement of sale which relates to a completely different property, namely, a Flat at Montague Place, situated along Montague Avenue, Harare, and not Flat No. 4 St. Hilliers Flats, Avondale, Harare, which the plaintiff was purchasing.
  - c. Prior to concluding the transaction, the defendant failed to conduct the basic due diligence expected of a conveyancer in a property sale transaction, including but not limited to deeds search. Defendant therefore breached its professional duty of care.
  - d. It failed to exercise due care, skill and diligence expected of a diligent and reasonable conveyancer, which would have revealed that Flat No. 4 St. Hilliers Flats, Avondale does not have title deeds and that its ownership is held through a share certificate.
- v. The plaintiff would never have continued with the transaction had the defendant properly exercised due care and skill of a diligent and reasonable conveyancer and revealed the facts which the plaintiff only became aware after the fact.
- vi. The plaintiff is now forced to take possession of the property without title deeds because the balance of convenience does not favour cancellation of the transaction and refund of the Plaintiff's purchase price.
- vii. As a direct result of the defendant's negligence and breach of professional duty of care, skill and diligence, the plaintiff has suffered damages in the sum of US\$60,000.00 for ownership of a property without title deeds and losing all benefits attached to title deeds of the property.
- viii. Despite demand the defendant has refused, neglected and/or failed to pay the said amount. The defendant only refunded payments made by plaintiff in respect of stamp duty, portion of the conveyancing fees and applicable interest."

[3] The defendant entered appearance to defend on 6 May 2024 and on 30 July 2024 filed a notice of exception to the claim. The grounds of exception are set out extensively in the notice of exception, they are these:

- i. "Plaintiff, on one hand alleges that he was entitled to take title of an immovable property known as No. 4 St Hilliers Flats, Avondale, in terms of an agreement of sale drafted by defendant on behalf of the seller but that defendant was guilty of a negligent misrepresentation in that the flat has no title deed.

- ii. On the other hand, plaintiff alleges that the property described in the agreement was not No. 4 St Hilliers Flats, Avondale, but a flat in Montague Place, in Montague Avenue.
- iii. As defendant is said to be the conveyancer and, as such, the agent of the seller, the claim cannot arise out of the law of contract but out of the law of delict and, being for pecuniary loss, can only lie under the *Lex Aquilia*.
- iv. In order to sustain an action under the *Lex Aquilia*, plaintiff has to allege and prove, *inter alia*, that the misrepresentation has caused him patrimonial loss.
- v. By choosing to accept the offer of a share certificate entitling him to remain in Flat No. 4 St Hilliers Flats, plaintiff alleges that he has lost the benefits attaching to a property with title deeds but any loss of such benefits is attributable to his decision to accept such offer, not defendant's alleged misrepresentation.
- vi. Moreover, such benefits allegedly would not have resulted in patrimonial loss but in patrimonial gain. The duty allegedly owed to plaintiff by defendant was to guard against loss not to provide gain.
- vii. In any event, the alleged loss of benefits is based on conjecture not facts.
- viii. As illustrated in paragraph 10 of plaintiff's further particulars, the purpose of his choosing to remain in the flat concerned was, *inter alia*, to avoid patrimonial loss.
- ix. In the premises, plaintiff has not established a cause of action under the *Lex Aquilia*.
- x. Alternatively, to paragraphs 1 to 7 above, plaintiff's claim is vague and embarrassing in that:
  - a. his claim is contradictory as to the property which formed the subject of the agreement of sale and he has failed to clarify it as requested;
  - b. his claim is not clear as to the basis of the damages he is alleged to have suffered;
  - c. he has refused to supply the particulars of the damages allegedly suffered in such manner as to enable defendant reasonably to assess the quantum thereof."

[4] The plaintiff has opposed the application and filed a reply to the exception in terms of which he denies the allegations made by the defendant. He also contended there is a cause of action and that he successfully pleaded defendant's negligence and his patrimonial loss.

#### **SUBMISSIONS BY THE PARTIES**

[5] In summary, the defendant argued that as the conveyancer would be the agent of the seller, no claim would lie against it in contract. If the plaintiff has a claim at all it must lie in delict under the *Lex Aquilia* since it is alleged that he suffered pecuniary loss. It was further argued that for a claim for damages in delict arising out of negligent misrepresentation to succeed, it is necessary for the plaintiff to prove a diminution in his patrimony.

[6] It was argued further that what the plaintiff is suing for is a benefit he would have gained had the property he bought had a title deed. As neither the title deed nor any claim to a title deed was an asset in his estate from which he would derive a benefit, he would never have been enriched by such benefit and has not suffered a loss thereof.

Accordingly, his patrimony has not been diminished by his failure to receive a title deed.

[7] It was submitted that the measure of damages in delict is such amount as will put the plaintiff in the position he would have been in if the delict had not been committed. Therefore, where a misrepresentation has been made, he should be put in the position he would have been in had the misrepresentation not been made, i.e., the actual diminution of his patrimony must be made good. It was argued that he is not entitled to be placed in the same position as if the representation had been made good. It was argued further that what the plaintiff is claiming is what the authorities say he cannot claim, namely that he should be put in the position he would be in had the representation been true. It was argued that had the misrepresentation not been made, the position that the plaintiff would have been in is that he would have had USD100 000 but he would not have had the flat of which he is currently in occupation. To that position would mean surrendering the flat and reclaiming the purchase price but he does not want to do that. It was argued that it was not the alleged misrepresentation that has caused the plaintiff loss but his own decision to remain in the flat. By accepting a share certificate, he has decided to forego the alleged benefits he would have received from being in possession of a title deed.

[8] It was argued that the plaintiff's claim is not based on the defendant's alleged duty to ensure that he did not suffer any loss but on a duty to ensure he made a gain he had bargained for. That is said to be a claim in contract, not delict. As a conveyancer the defendant is said not to have such a duty. Further, it was argued that the plaintiff's claim is one based on purely conjecture, as he has not alleged a definite decision to acquire a loan for which he would need a title deed as security and has not indicated how a loan which he would have to repay with interest would benefit him. It was argued that the plaintiff's allegations do not indicate how he has suffered any loss, let alone how his patrimony has been diminished, and therefore do not contain averments necessary to sustain his claim.

[9] In the alternative, it was argued that the plaintiff's claim is vague and embarrassing in that the nature of the misrepresentation he alleges is not clear, contrary to r 36(7); he has refused to annex a true copy of the agreement or part thereof to his declaration as required by r 36 (5); the basis of his claim for damages he is alleged to have suffered is not clear; and that he has failed to comply with 36(9) in that he has not set out his claim

for damages in such a manner that enables the defendant to reasonably assess the quantum.

[10] It was argued that the exception be upheld and the plaintiff's claim be dismissed with costs.

[11] In summary, the plaintiff argued that he has pleaded negligence with clarity and the loss he suffered. He argued that he suffered patrimonial loss in that he ended up owning a property without title deed. The value which comes with the title deed was diminished, the patrimonial interest was decreased. It was argued that the title deed comes with value which the share certificate does not have. He was deprived of such value because of the defendant's negligence. It was argued that *Aquilian* action even covers loss of expectation. It was submitted that in the event the court upholds the exception, the appropriate relief is not to dismiss the action, but to give the plaintiff an opportunity to amend his pleadings.

### **THE LAW AND THE FACTS**

[12] In terms of r 42 (1) (b) of the High Court Rules, 2021 a party may except to the pleadings or to paragraph thereof if they embody separate causes of action or defence, as the case may be. In *Pretorius and another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC) para [15] the court said:

“In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.”

See *Chimakure & Anor v Mutambara & Anor* SC 91/20; *Phinda & Anor v East View High School* 2015 (1) ZLR 991 (H); *Gweru Tourism Promotions (Pvt) Ltd v Sadler & Anor* 2011 (2) ZLR 265 (H).

[13] Distilled to the minimum, the jurisprudence is that an exception is competent if the defect appears clearly *ex facie* the pleadings. The *onus* lies with the excipient to show that such pleadings are excipiable. When an exception is raised against the pleadings that do not disclose a cause of action, the averments pleaded by the plaintiff must be accepted as true. Exception proceedings are not ordinarily the forum to decide

a complex mix of factual and legal issues. See *Pretorius and another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC) para [42].

- [14] In *casu*, there are two issues for determination, namely: (a) whether or not the plaintiff has established a cause of action under the *Lex Aquilia*; (b) whether or not the plaintiff's claim is vague and embarrassing.

### **HAS THE PLAINTIFF ESTABLISHED A CAUSE OF ACTION UNDER THE LEX AQUILIA**

- [15] The defendant's complaint is that the plaintiff has not established a cause of action under the *lex Aquilia*. In *Amler's Precedents of Pleadings* it is stated that the *lex Aquilian* enables a plaintiff to recover patrimonial loss (including purely economic loss) suffered through a wrongful and negligent act of the defendant. The plaintiff must allege the act or omission on which the cause of action is based. The plaintiff must also allege facts from which wrongfulness can be inferred. Wrongfulness can also manifest itself in different ways e.g., by the breach of a duty of care. Therefore, there are essentials of liability that the plaintiff must plead in a claim under *lex Aquilia*, these are: (i) he must plead a wrongful act; (2) and he must plead fault on the part of the defendant; and (3) he must plead patrimonial loss occasioned to him. Where the basis of the claim is negligence, the plaintiff must allege that the defendant was negligent. In addition, the plaintiff has to allege the quantum of damages suffered as a result of the defendant's wrongful act. See Harms LTG *Amler's Precedents of Pleadings* (8<sup>th</sup> ed. LexisNexis) 236-239.

- [16] In *Delta Beverages v Rutsito* 2013 (2) ZLR 298 (S) the court said:

“In an Aquilian action in which a claims damages whether for patrimonial or non-patrimonial loss, it is, I believe, incumbent upon such plaintiff to plead negligence on the part of the defendant and set out the particulars of such negligence. Where such particulars are not set out, the defendant is embarrassed in his defence as he cannot know the basis on which liability is claimed. It is not enough to allege and fail to give particulars of such negligence.”

- [17] In *casu*, the plaintiff alleged that the defendant was negligent in that he misrepresented that the property had a title deed whilst it was held under a share certificate; that it breached the duty of care owed to him in that it failed to conduct a due diligence expected of a conveyancer, including but not limited to deeds search; and that it failed to exercise due care, skill and diligence expected of a diligent and reasonable conveyancer, which would have shown that Flat No. 4 St. Hilliers Flats,

Avondale does not have title deeds and that its ownership is held through a share certificate. The plaintiff alleged further that he suffered damages in the sum of US\$60,000.00 arising from owning of a property without title deeds and losing all benefits attached to title deeds of the property. My view is that the defendant has been given a clear idea of the material facts which anchor the cause of action. See *Jowel v Bramwell-Jones* 1998 (1) SA 836 (W). The plaintiff has pleaded all the requirements necessary in a claim based on *lex Aquilia*.

[18] A closer scrutiny of the defendant's arguments is that they may or may not eventually be found to have merit at the trial. Exception proceedings are inappropriate to decide the complex factual and legal issues raised by these objections, those are issues for trial. Whether the plaintiff is entitled to or will succeed in its claim as set out in the declaration as amplified by further particulars is not something this court, seized with the exception, should concern itself with. The issue is rather whether the pleadings as they stand, are such that the defendants ought to be in a position to plead thereto. In my view the pleadings disclose a cause of action under the *lex Aquilia* and the exception anchored on this ground ought to fail.

#### **WHETHER THE CLAIM IS VAGUE AND EMBARRASSING**

[19] The alternative objection is that the claim is vague and embarrassing. In *Trope v South Africa Reserve Bank* 1992 (3) SA 208 (T) at 210- 211 the court said an exception to pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. In *casu*, the complaint is that the plaintiff has not complied with r 36(5); r 36 (7); and 36(9) of the High Court Rules, 2021. Rule 36(5) says a party who in a pleading is relying on a contract shall state whether the contract is written or oral and when, and where the contract is written, a true copy or of the part relied on in the pleading shall be annexed to the pleading. The plaintiff has, against this provision declined to annex a copy agreement referred to in the claim. Rule 36(7) provides that in all cases in which the party pleading relies *inter alia* on any misrepresentation, and in all other cases in which particulars may be necessary, particulars shall be stated in the pleading. Rule 36(9) says plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum of such damages.

[20] On 21 May 2024 the defendant sought further particulars, *inter alia* seeking a copy of the agreement and requesting the plaintiff to specify how the damages suffered have been calculated. The request to produce a copy of the agreement was refused, and on how the damages were calculated, the plaintiff averred that they are based on the position he had been placed by virtue of the defendant's negligence and breach of duty of care. On 17 June 2024 the plaintiff filed a request for further and better particulars, in this instance it sought *inter alia*, a copy of the agreement of sale and precise facts relied on in calculating the damages claimed. In addition, the plaintiff was requested to provide precise details of how the figure of US\$60 000.00 was arrived at. Again, the request to produce a copy of the agreement was declined, and regarding the request on damages it was averred that not all damages require precise mathematical calculation, and he shall adduce evidence to prove his damages.

[21] It is clear that the defendant is aggrieved by the refusal to produce a copy of the agreement of sale, and considers the answers regarding the calculation of damages as unhelpful. It then sought to except on the basis that the claim is vague and embarrassing. My view is a party aggrieved by the other party's failure to provide further particulars sought, or not satisfied with the particulars provided, should proceed to the next stage and seek to compel the other party to provide the requested particulars. This is a case where the defendant, if still aggrieved by the refusal to provide the particulars should seek to compel the production of such particulars. In addition, I take the view that an alleged failure to comply with r 36(7); r 36 (5); and 36(9) in the circumstances of this case, cannot anchor an exception. I say so because the pleading do not lack particularity to the extent that it is vague.

[22] In the premises the defendant has not discharged the *onus* on it to show that the plaintiff's declaration as amplified by further particulars is excipiable or that that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.

[23] In addition, exception proceedings are not ordinarily the forum to decide a complex mix of factual and legal issues as germane to this case. It will be better to get the full story thrashed out at a trial. For the above reasons and conclusions, I find that the defendant has not made up a case for me to uphold the exception, based on the grounds raised. The exception therefore must fail.

[24] There remains to be considered the question of costs. No good grounds exist for a departure from the general rule that costs follow the cause. The plaintiff is entitled to his costs.

I consequently make the following order:

The defendant's exception is dismissed with costs.

**DUBE BANDA J:** .....

*Jambo Legal Practice*, plaintiff's legal practitioners

*Warhurst Attorneys*, defendant's legal practitioners