

MOUNT MERU PETROLEUM ZIMBABWE(PRIVATE) LIMITED
versus
MUDHAWIN ENTERPRISES (PVT) LIMITED

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 5, 7 and 13 July 2022

K Mangwiro, for the plaintiff
S T Farai, for the defendant

Exception and Special Plea

CHIRAWU-MUGOMBA J:[1] The plaintiff issued summons against the defendant on the 29th of December 2020. The claim is for damages for fuel stock in the amount of US\$24414, special/consequential damages for lost profits in the sum of US\$75828, special damages calculated at the rate of US\$15165.60 for every month of non-payment calculated from the 1st of January 2021 and costs of suit.

[2]. The plaintiff's claim as amplified in the declaration is as follows. It entered into a lease agreement with a company called Premier Petroleum (Pvt) Ltd on the 4th of January 2018 for the purpose of operating a fuel station. On the 8th of July 2020, based on a writ of ejectment obtained by the defendant against Premier Petroleum (Pvt) Ltd from the Magistrates Court in case number 1329/20, the plaintiff was ejected from the leased premises. The Messenger of Court did not remove some items belonging to the plaintiff. However, the defendant refused to allow the plaintiff to remove three items that included 4025 litres of petrol and 21251 litres of diesel that was in the tanks. The plaintiff abandoned claim to the two other items. The defendant proceeded to dispose of the fuel without the plaintiff's consent. The plaintiff has thus suffered loss as stated in para 1 above.

[3]. On the 15th of April 2021, the defendant's legal practitioners addressed a letter to the plaintiff's legal practitioners a complaint in terms of R140 of the High Court Rules, 1971 requiring them to withdraw the summons on two main grounds, (1) that the summons does not disclose a 'cognizable' cause of action at law and (2) the relief sought in the said matter is illegal.

[4]. On the 16th of April 2021, the defendant (the excipient) filled the following exception and special plea. It is pertinent to also note the defendant filed a plea and the plaintiff a replication.

EXCEPTION

- a. Declaration does not disclose a recognizable cause of action at law.
- b. The summons is vague and embarrassing as it fails to articulate whether the claim arises from: -
 - (i) delict, or;
 - (ii) breach of contract or
 - (iii) both in delict and breach of contract
- c. There is fatal non-joinder of Premier Petroleum (Pvt) Ltd, the former lessor of the plaintiff as well as the Messenger of Court who effected the ejection.

SPECIAL PLEA

- a. The plaintiff has no *locus standi* to bring the current suit as there was no contractual or any relationship between it and the defendant.
- b. The relief claimed is in violation of statute as there is no alternative request for reprieve in local currency.

[5]. The provision on exceptions and special pleas is now found in R42 of the High Court Rules of 2021 as follows-

Exceptions, special pleas, applications to strike out and applications for particulars

42. (1) As an alternative to pleading to the merits, a party may within the period allowed for filing any subsequent pleading: -

- a) take a plea in bar or abatement where the matter is one of substance which does not involve going into the merits of the case and which if allowed, will dispose of the matter.
- b) Except to the pleading or to single paragraphs thereof if they embody separate causes of action or defence as the case maybe where the pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case maybe.

There is a further requirement in r 42(3) that before filing any exception, the party complaining of the pleading shall write a letter to their opponent and state the nature of the complaint and give the other side twelve days to attend to the cause of the complaint.

[6]. At the hearing, Mr *Mangwiro* contented that the defendant had not amplified all the grounds of exception in a letter as required by the law. I note that the exception in *casu*, was

filed under the High Court Rules of 1971. In terms of O21R140(1)(b) of those rules, the party filing an exception may state by letter the nature of the complaint and call upon the other party to amend. In the 2021 rules, it is now mandatory through the use of the word, 'shall'. I will therefore deal with all the grounds of exception as filed of record. I also do not perceive of any prejudice suffered by the plaintiff.

[7]. The difference between a special plea and an exception is articulated by Herbestein & Van Winsen in *The Civil Practice of the Supreme Courts of South Africa*, 5th ed Volume 1 pp 599-600 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 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”

The same approach has been adopted in our jurisdiction. See *National Employment Council for the Construction Industry v Zimbabwe Nantong International (pvt) Ltd*, SC-59-15.

[8]. The 1st ground of exception is that the summons and declaration do not disclose a recognizable cause of action at law. What constitutes cause of action is set in our jurisdiction. It is as stated in *Abrahams & Sons v SA Railways and Harbours* 1933 CPD 626 @637 by WATERMEYER J as follows: -

“The proper meaning of the expression ‘cause of action’ is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.”

In *casu*, the cause of action is very clear. The plaintiff is not challenging their eviction. The claim is based on the fact that they left 4025 litres of petrol and 21251 litres of diesel upon eviction from the premises. The defendant then fully aware that the plaintiff was the owner proceeded to sell or dispose of the fuel without their consent. At that time, the fuel was being sold at a certain price. They therefore claim based on that price. Based on that

same fuel, the plaintiff has incurred a loss of profits, thus the claim for special/consequential damages. Again, based on the same fuel and a turnover rate, the plaintiff claims consequential damages. The plaintiff has clearly pleaded a recognisable cause of action.

[9]. The defendant avers that the summons is vague and embarrassing as it fails to articulate whether the claim arises from delict or contract or both. In *ASA Metals (Pty) (Ltd) v Vardocap*, High Court of South Africa, Polokwane, Case Number 5031/18, KGANYAGO J stated as follows: -

“An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity. See *Trope and Others v South African Reserve Bank* 1993(3) SA 264 (A) at 2691. The court cannot uphold an exception on the ground that it is vague and embarrassing and set aside the summons unless the exception goes to the root of the action. (See *SA Motor Industry Association v SA Bank of Athens*)1980 (3) SA 91 (A)In order to succeed, an excipient has a duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed, failing which the exception ought not to be upheld.”

In terms of r 12(5) (d) of the High Court Rules, 2021 summons must give a concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action. This is found in O3(11) (c) of the 1971 rules. My reading of the summons and declaration is that they are far from vague and embarrassing. They lay out the claim precisely. The defendant seems to be inventing the aspect of a contract between the parties. The plaintiff has not claimed that there was one.

[10]. The defendant further excepts to the plaintiff’s claim on the basis that there was fatal non-joinder of Premier Petroleum (Pvt) Ltd, the former lessor of the plaintiff as well as the Messenger of Court who effected the ejection. In my view, there is no need for the joinder of the two. The plaintiff is not disputing the eviction. Its contention is that it left some fuel at the premises. It is not seeking any relief against Premier Petroleum (Pvt) Ltd and the Messenger of Court. The defendant seems to be confusing an issue of evidence of what transpired with that of joinder. In O13R 87 (1) of the High Court Rules of 1971, it is clear that no cause of action shall be defeated by joinder or non-joinder. This provision is now found in R32(11) of the 2021 rules.

[11]. The grounds of exception taken by the defendant clearly have no merit.

[12]. The first ground of the special plea is that the plaintiff has no *locus standi*, there not having been a contract between it and the defendant. *Locus standi* arises when a person has a direct and substantial interest in a matter and the outcome thereof. See *Stevenson v Minister*

of Local Government and National Housing and Ors, SC 38-02. It is clear that the plaintiff has an interest in the fuel that it claims to have left at the premises. This has nothing to do with eviction or a contract with the defendant. Plaintiff never pleaded that it had a contract with the defendant. Plaintiff is also not challenging its ejection.

[13]. The defendant also raises the ground that the plaintiff's claim is illegal having been expressed in United States dollars. It is trite that a litigant can make a claim in United States dollars. Whether the court will award it or not is a matter of interpretation of the law together with the evidence. I do not read the case authorities to imply that a party can be non-suited for making a claim in United States dollars.

[14]. Clearly both the exception and special plea taken have no merit. I see no reason to depart from the norm that costs should be awarded against the unsuccessful party. Accordingly, the defendant shall pay the costs.

DISPOSITION

1. The exception be and is hereby dismissed.
2. The special plea be and is hereby dismissed.
3. The defendant shall pay the costs.

M B Narotam and Associates, plaintiff's legal practitioners
Farai and Associates, defendant's legal practitioners