

SYLVIA MATAMBIRA
versus
ZIMBABWE BROADCASTING CORPORATION PENSION FUND
and
BOARD OF TRUSTEES
ZIMBABWE BROADCASTING CORPORATION PENSION FUND
and
ZIMBABWE BROADCASTING CORPORATION
and
OLD MUTUAL LIFE ASSURANCE COMPANY ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 28 July and 21 September 2022

Opposed Application – Exception

J Mambara, for the 1st and 2nd respondents
P J Chivanga, for the 3rd respondent
R Moyo, for the 4th respondent

TAGU J: The plaintiff issued summons against the four defendants claiming payment by the defendant of the sum of US\$70 505.05 being the capital sum to be used to purchase pension benefits from a registered pension fund to be nominated by the plaintiff, interest on the aforesaid sum at the prescribed rate calculated from the date of the summons to the date of full payment as well as costs of suit.

The facts are that between October 1978 and December 2003, the plaintiff was a participating member of the first defendant. The plaintiff was retrenched in December 2003, when the fourth defendant, as the administrators and underwriters of this Fund, advised plaintiff that she would be due for pension benefits. A cash commutation of ZWL\$1 515 498.00 was paid out to the plaintiff as part of the benefits. The plaintiff was then advised that a balance pension of ZWL\$131 712.10 per annum or ZWL\$10 976 per annum would be payable monthly in arrears for a guaranteed period of 5 years, and for life thereafter. The fourth defendant however disbursed some funds to the third defendant, in the sum of ZWL\$1 955 328.48, unbeknown to plaintiff. Third

defendant paid funds that were less than those disbursed by fourth defendant to the plaintiff. The fourth defendant did not disclose how it arrived at the pension capital values, and the funds disbursed to third defendant. All the defendants ignored all demands to explain and/or honour pension benefits due from first defendant. Hence the issuing of summons against the four defendants.

Having been served with the summons, the first, second and third defendants though they entered appearance to the defendant, have as of now not given their defences. The fourth defendant entered appearance to fend, and proceeded to file the present application for an exception on the basis that there is no cause of action against the fourth defendant. That no claim is being made against the fourth defendant. It argued that it was merely a messenger of the first defendant, and that the relief being sought is against the first defendant.

At the hearing of the matter Mr *PJ Chivanga* applied that the third respondent be excused in these proceedings as it had not raised any exception. By consent of the parties third respondent was excused.

Before the filing of the exception the counsel for the fourth respondent wrote a letter of complaint in terms of r 42(1) (b) as read with r 42 (3) of the High Court Rules, 2021 to the counsel for the plaintiff highlighting that the summons did not identify against which “defendant” it is directed. It indicated that the summons was excipiable as against the fourth defendant.

In response to this letter of complaint, by letter dated 20th June 2022, the counsel for the plaintiff made the following remarks:

“As may be gleaned from the summons, the 4th Defendant is the administrator and underwriter of the 1st Defendant. It advised the plaintiff of her pension. It disbursed some funds to the 3rd Defendant. It has failed to explain why it disbursed only ZWL\$1 955 328.48 to the 3rd Defendant.

While it is accepted that no monetary relief is claimed from it, the participation of the 4th Defendant in this suit is to enable the matter to be expeditiously and effectively resolved. If the 4th Defendant is excluded, there shall be a gap that shall be difficult to fill.”

In its heads of argument the fourth defendant maintained that no cause of action has been shown against it. Relying on a number of cases such as *Santos and Others v Standard General Insurance Co. Ltd and Anor* 1971 (3) SA 434 (O) at p 437 where it was said:

“It is trite law that an exception that a particular claim discloses no cause of action, cannot succeed unless it goes to the root thereof, that is to say unless the upholding of the exception would have the

effect of destroying it altogether.” See *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 at p 706.

In casu the excipient (4th Defendant) submitted that it has made a case not only for the upholding of the exception and dismissal of the plaintiff’s action but that this be done with an order for costs to be borne by the plaintiff on a legal practitioner and client scale.

In maintaining its position that the fourth defendant is a necessary party in these proceedings, the plaintiff submitted that the dynamics of the matter calls for the participation of the fourth defendant in these proceedings in order to shed light and explain how the Plaintiff’s pension was managed and why a life pension was then terminated.

The purpose of a plea in bar is well explained in Rule 42(1) (a) of the High Court Rules, 2021, which is to the effect that:

“.....a party may....take a plea in barwhere 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 case.”

I tend to agree with the plaintiff. The fourth defendant does not dispute that it was the administrator and underwriter of the plaintiff’s pension albeit engaged by the first, second and third defendants. The fourth defendant does not dispute that it directly advised the plaintiff that she was due for cash commutation of ZW\$1 515 498.00, that the plaintiff had a balance of pension of ZW\$131 712.10 or ZW\$10 976.01 per annum guaranteed for 5 years. Further, that the plaintiff was going to receive pension for the rest of her lifetime. This was not to be as the pension payments were terminated during the plaintiff’s lifetime. Who could be better placed to explain to the court the above dynamics other than the fourth defendant, the expert to whom first, second and third defendants assigned the task of administering and underwriting the plaintiff’s pension?

What the fourth defendant is trying to do is to refuse to come to court to explain how it administered the pension resulting in no life pension being paid to the plaintiff. There is indeed a cause of action against the fourth defendant jointly with the first, second and third defendants.

In *City of Harare v D and P Investments (Pvt) Ltd and Anor* 1992 (2) ZLR 254 at D-E, the court had this to say on the purpose of an exception:

“An exception is an answer to the plaintiff’s claim or to the defence claimed. Its main purpose is to obtain a speedy decision upon a point of law apparent on the face of the pleading attacked and to settle the dispute in the most economical manner by having a faulty pleading set aside.”

In this matter all that the fourth defendant is called to do is to explain. There is indeed a cause of action against it. A cause of action is a combination of facts that are material for the plaintiff to prove in order to succeed in his action. See *Dube v Banana* 1998 (2) ZLR 92(H) at 95 and *Muhahlera v Clerk of Parliament and Others* HH-107/07. In *Muhahlera* matter *supra*, the court defined a cause of action as:

“.....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.”

On a proper application of what constitutes a cause of action, the fact that the fourth defendant administered the plaintiff's pension up to maturity and pay out stage is enough to demand the participation of the fourth defendant in this matter. The plaintiff is not demanding any relief but an explanation from the fourth defendant which explanation cannot be tendered by the first, second or third defendant who hired the fourth defendant as an expert to administer the pension fund. Even if there is a misjoinder or non-joinder of a party to these proceedings, the court can still decide the matter as far as the issues affect them. See r 32 (11) of the High Court Rules, 2021 which provides that:

“No cause or matter shall be defeated by reason of misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

This is not a proper case where an exception can be taken and be granted. The exception has no merit and I will dismiss it.

IT IS ORDERED THAT:

1. The exception by the fourth defendant be and is hereby dismissed.
2. The costs are in the cause.

J Mambara & Partners, plaintiff's legal practitioners
Gill, Godlonton & Gerrans, fourth defendant's legal practitioners