

APPELLATION ENTERPRISES (PVT) LTD

Versus

MRS R. GUMBO N.O.

IN THE HIGH COURT OF ZIMBABWE
CHEDA AJ
BULAWAYO 17 FEBRUARY & 15 MARCH 2012

C. Dube for applicant
L. Chikwakwa for respondent

Judgment

CHEDA AJ: This is an exception to the plaintiff's claim as elaborated in the summons.

The claim on the plaintiff's summons is couched in the following terms:

- (a) Payment of the sum of USD75 700,00 being prejudice suffered by the plaintiff as a result of defendant's failure to deliver the machinery;
- (b) Interest *a tempo morae* on the said sum;
- (c) Costs of suit.

The plaintiff's declaration reads in part as follows:

- (3) On or about the month of October 2011 the defendant conducted an auction wherein she put certain machinery belonging to All Metal Founders (Pvt) Ltd for sale.
- (4) The plaintiff duly accepted the offer and offered to purchase the machinery for \$20 000,00.
- (5) The plaintiff's offer was accepted and plaintiff duly paid the defendant the said amount.
- (6) Despite being paid the said amount the defendant has unlawfully refused to deliver the said machinery.
- (7) Plaintiff is in business and had a standing order for the machinery for the sum of USD75 900,00.
- (8) As a result of the failure by the defendant to deliver the machinery the plaintiff suffered prejudice amount of USD75 900,00.

On receiving the summons the defendant entered appearance to defend on the 21st December 2011. On 3rd January 2012 the defendant filed its letter of complaint as required by rule 140 (1). The defendant filed its exception on the same date, the 3rd January 2012. The defendant filed the Excipient's Heads of Argument on the same date, the 3rd of January 2012.

The defendant filed a request for set down on the same date, 3rd of January 2012. The plaintiff, in a panicky response, filed a notice of opposition to the exception. The defendant however, proceeded with the setting down of the matter for hearing on the 14th day of February 2012 despite the fact that in the plaintiff's heads of argument the procedural errors made by the defendant had been pointed out.

Rules 138 – 140 lay down a very clear procedure to be followed on filing a special plea, exception or application to strike out. None of the procedural requirements were followed by the defendant.

Rule 140 provides in part as follows:

(1) Before

- (a) Making a court application to strike out any portion of a pleading on any grounds; or
- (b) Filing any exception to a pleading, the party complaining of any pleading may state by letter to the other party the nature of his complain and call upon the other party to amend his pleading so as to remove the cause of complain.

Rule 138 provides as follows:

Where a special plea, exception or application to strike out has been filed –

- (a) The parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with sub-rule (2) of rule 223;
- (b) Failing consent either party may within a further period of four days set the matter down for hearing in accordance with sub-rule (2) of rule 223;
- (c) Failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before trial.

The defendant did not do any of these. At the hearing of the matter the plaintiff argued that it had not been afforded the chance to remove the cause of the complaint in the pleadings as the defendant had filed the letter of complaint at the same time with heads of argument,

and defendant also raised the issue of exception before the 5 days stipulated in his letter and also applied for the matter to be set down.

In reply defendant admits that the above rules were not complied with but suggested this is not mandatory as the word may is used.

There is a purpose for the rules providing as above. The purpose is to give the plaintiff the opportunity to rectify the claim. In this case it is not clear what the plaintiff would have done as it complained of not being afforded the opportunity to deal with the complaint.

In the circumstances the submissions made on the merits are pre-mature and I will not deal with them.

Rule 141 gives the court powers to deal with this situation as follows.

141. Powers of court in relation to pleadings

At any stage of the proceedings the court may:-

- (a) Order to be struck out or amended
 - (i) Any argumentative or irrelevant or superfluous matter stated in any pleading;
 - (ii) Any evasive or vague and embarrassing or inconsistent and contradictory matter stated in any pleadings;
 - (iii) Any matter stated in the pleading which may tend to prejudice, embarrass or delay the fair trial of the action;
- (c) Order either party to furnish a further and better statement of the nature of his claim or defence, or further and better particulars of any matter stated in any pleadings, notice or written proceeding requiring particular.

In this case, while there are some contradictory matters, such as which party offered and no proper basis for the claim or prejudice I do not consider it necessary to strike out any matter, but prefer to let the plaintiff have the opportunity to rectify its pleadings if it wishes to do so in response to the letter of complaint.

I find that both parties erred as far as the procedure is concerned. The plaintiff in turn could have still exercised its right to respond to the defendant's complaint once it pointed out to the defendant the procedural error.

Accordingly, I order that the plaintiff respond to the defendant's complaint by forwarding a further and better statement of the nature of its claim.

In my view none of the parties in this case should be awarded any costs. Accordingly there will be no order as to costs.

Dube-Banda, Nzarayapenga & Partners excipient's legal practitioners
Sansole & Senda, plaintiff's legal practitioners