WINDMILL (PVT) LTD
versus
MARK HUGO DEREK SELBY
and
ADAM SELBY
and
IAN RONALD COOMER
and
MIKE WEEDEN

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 18 September & 25 September 2013

Exception

E.T. Moyo, for the plaintiff
D. Ochieng, for the defendants

MATHONSI J: The plaintiff issued summons against the 4 defendants as principal officer and agent (in respect of the first defendant) and as directors of a company known as Kettex Holdings (Pvt) Ltd, in which it sought payment of US$1 579 418 being the value of products delivered to Kettex Holdings (Pvt) Ltd for sale.

In its declaration, the plaintiff made the following relevant averments:

"6. In terms of a consignment stockists agreement between the plaintiff and Kettex Holdings, which was entered into at the special instance and request of the defendants and which was signed by the first defendant on behalf of Kettex Holdings on 8 September 2010, Kettex Holdings would stock at its premises on consignment various farming in puts or products belonging to the plaintiff for sale to its own customers in return for a commission from the plaintiff at agreed rates.

7. Kettex Holdings was *inter alia* obliged to account to the plaintiff for all the products collected from the plaintiff and to make good any differences.

8. Between September 2010 and 29 March 2012 Kettex Holdings through one or other of the defendants, collected from the plaintiff various quantities of fertilisers and chemicals which it sold and/or disbursed to its own customers but it has failed and/or neglected and/or refused to remit the proceeds thereof or to account to the plaintiff.

9. The value of the plaintiff's products collected by the defendant but which it has failed and/or neglected to remit or account to the plaintiff as aforesaid is in the sum of one million five hundred and seventy nine thousand four hundred and eighteen United States dollars (US$1 579 418).

10. The defendants have carried on the business of Kettex Holdings recklessly and/or with gross negligence and/or with intent to defraud the plaintiff as contemplated by s 318 of the Companies Act, [*Cap 24:03*], as a result of which the plaintiff has suffered damages in the sum of US$1 579 418 aforesaid.

11. Despite written demand the defendants have failed and/or neglected and/or refused to pay the sum of US$1 519 418 aforesaid or any portion of it". (The underlining is mine)

In the prayer, the plaintiff merely seeks payment of the sum claimed by the defendants jointly and severally. It has not sought a declaration that the directors of Kettex Holdings (Pvt) Ltd are personally responsible for its debts.

The defendants excepted to the claim on the basis that it is "vague and embarrassing, bad in law and disclosing no cause of action" for various reasons including that to the extent that the plaintiff claims damages, s 318 of the Companies Act [*Cap 24:03*] does not provide for liability of directors for payment of any damages. For that reason the claim is bad at law. The defendants also took issue with the claim on the basis that it embarrasses them leaving the cause of action obscure especially as para(s) 9 and 10 of the declaration connote that the debt is owed by one of the defendants.

More importantly the defendant attacked para 10 as failing to disclose whether negligence, recklessness and fraud are alleged cumulatively or alternatively and failing to disclose any particulars of negligence, recklessness or fraud.

Mr *Ochieng* for the defendants submitted that the pleading embarrasses the defendant in that para 9 refers to one defendant and not all of them and a reading of it suggests that the plaintiff alleges that it is one of the defendants who collected the products. Paragraph 10, swings round and makes reference to "the defendants" all of which creates confusion in the mind of the defendant who is left unsure as to what case to expect to meet.

Further, Mr *Ochieng* took the view that para 10 lacks specificity as to which of the factors set out in s 318 of the Companies Act is alleged to have been committed by the defendants as it is not clear whether they are pleaded cumulatively or in the alternative. He would therefore want para(s) 9 and 10 of the declaration to be struck off.

Mr *Moyo* for the defendant submitted that an exception is not meant to embarrass the pleader but should complain of a defect inherent in the pleading. He maintained that the plaintiff's claim has been pleaded with sufficient clarity to inform the defendant as to what case to expect at the trial. In defending the plaintiff's declaration, Mr *Moyo* relied on the authority of *Kahn* v *Stuat* 1942 CPD 386 at p 391 where DAVIS J made the following pronouncement:

> "The courts should not look at a pleading with a magnifying glass of too high power. If it does so it will almost be bound to find flaws in most pleadings ….. It is so easy, especially for busy counsel, to make mistakes here or there, to say too much or too little, or to express something imperfectly. In my view, it is the duty of the court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is any embarrassment, which is real and such as cannot be met by the asking of particulars …. And unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed".

I agree that all the defendants are properly brought into the fray in the declaration by virtue of their positions in the company called Kettex Holdings. Once their positions in that company are pleaded then the pleading loses its direction completely when it gets to para 9 to an extent that the defendants are right to complain. To the extent that para 9 alleges that a single defendant, and not even Kettex Holdings, collected the products, it is not clear what is being alleged.

Paragraph 10 does not make the situation any easier for the defendants. It is couched in such vague and general terms that one is left wondering what it is that the defendants are alleged to have done. Section 318(1) of the Companies Act provides:

> "If at any time it appears that any business of a company was being carried on –
>
> (a) recklessly; or
> (b) with gross negligence; or
> (c) with intent to defraud any person or for any fraudulent purpose;
>
> The court may on the application of the Master, or liquidator or judicial manager or any creditor of or contributory to the company, if it thinks it proper to do so, declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct".

I do not agree with Mr *Ochieng* that reference to damages in para 10 destroys the plaintiff's cause of action by virtue of the fact that s 318 does not concern itself with damages

but only debts of the company. That section incorporates damages by virtue of its reference to "other liabilities of the company". I agree however that para 10 has been pleaded in a manner which embarrasses the defendant. It is necessary for the plaintiff to make up its mind as to which of he factors set out in s 318 it relies upon and to also give particularity to such averment. The omnibus manner in which the pleading is couched results in vagueness and embarrassment, what Mr *Ochieng* has called the "scattergun approach".

The defendant is indeed entitled to know which of the grounds is relied upon and the basis upon which the averment is being made. I agree that a pleader must state the particulars of any alleged recklessness or gross negligence and the factual basis on which it is alleged. The same applies to the alleged fraud if the plaintiff desires to rely on it for seeking a declaration that the defendants are personally liable for the debts of the company. There is a need for the plaintiff to amend para(s) 9 and 10 of the declaration as well as the prayer to seek a declaration of the personal responsibility of the directors.

Mr *Moyo* submitted that it is inappropriate for the defendants to seek a dismissal of the plaintiff's action on the basis of the defects in the pleading. I agree. If an exception is upheld the court will usually give the plaintiff an opportunity to file an amended pleading within a fixed time; *Auridiam Zimbabwe (Pvt) Ltd* v *Modus Publications (Pvt) Ltd* 1993(2) ZLR 359(H) 373 C-D; *Adler* v *Elliot* 1988(2) ZLR 283 (S) 292B; *Trope & Ors* v *SA Reserve Bank* 1993(3) SA 264 (A) 269 G-I.

Happily Mr *Ochieng* conceded that point and moved for an amendment of the defendants' prayer.

Accordingly I make the following order, that:

1. The defendants' exception is hereby upheld with costs.
2. Paragraphs 9 and 10 of the plaintiff's declaration are struck out.
3. The plaintiff is granted leave to file an amended declaration which will also contain a prayer incorporating a declaration that the directors of Kettex Holdings (Pvt) Ltd are personally responsible for the debts of that company, within 21 days of this judgment.

Scanlen & Holderness, plaintiff's legal practitioners
Coghlan, Welsh & Guest, defendant's legal practitioners