

DOHNE CONSTRUCTION (PVT) LTD  
versus  
UNKI MINES (PVT) LTD

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 29 October 2015 & 17 February 2016

**OPPOSED MATTER**

*J B Wood*, for the plaintiff  
*D Tivadar*, for the defendant

MATANDA-MOYO J: The plaintiff issued summons against the defendant for an order compelling the defendant to;

1. a) Comply with paras 6.1 to 6.5 of the Adjudicators decisions and that the amount calculated as being due to the plaintiff as reassessed value of work done to date is certified.  
b) pay to it the amount so calculated in accordance with Clause 6.6 of the Adjudicators decision together with interest calculated in accordance with Clause 51.3 of the contract.
2. The plaintiff also sought an order declaring the purported termination of the contract by the defendant to be of no force and effect and payment of the sum of \$412 201-11 together with VAT and interest in terms of the contract
3. the plaintiff also sought a declaration that it is entitled to complete the contract in accordance with paras 6.8.2 to 6.8.4 of the Adjudicators decision.
4. that the defendant pays costs of suit on an attorney-client scale.

The adjudicator's decision was attached to the summons.

The defendant wrote to the plaintiff on 12 June 2015 in terms of Order 21 r 140 of this court's rules advising them that they would be taking an exception to the summons unless the defects in the summons are rectified. The plaintiff denied that the summons and declaration are

exceptible. The defendant then filed an exception to the plaintiff's claim on the following grounds;

- 1) That the claim is vague and embarrassing and lacks averments necessary to sustain an action.
- 2) Despite the defendant's request for further particulars and the subsequent further particulars provided by the plaintiff, the summons and declaration remained vague and embarrassing.
- 3) The plaintiff pleads the existence of an "implied term of contract" and alternatively the existence of a "tacit term of the contract" without pleading the legal and factual basis of the alleged implied or tacit term.
- 4) The defendant excepted to the plaintiff turning an adjudicator's award into a court order. The plaintiff failed to plead how it wishes the Adjudicator's decision to be enforced. The plaintiff has also failed to plead what actual steps the defendant should take to regularize the contractual position. The order sought is embarrassing for vagueness and incapable of performance.
- 5) The defendant also excepted to the plaintiff's summons as having failed to comply with r 11 of the High Court Rules, in that the summons fail to set out a true and concise statement of the nature, extent and grounds of the cause of action. The plaintiff has not stated the nature, extent and grounds of its cause of action.

The defendant prayed for the dismissal of the plaintiff's claim with costs.

The brief facts are that the plaintiff and the defendant entered into a contract where the plaintiff was obliged to carry out certain construction work. A dispute arose between the parties and such dispute was submitted to an adjudicator for resolution. The adjudicator handed down his decision on 11 December 2011. The defendant has not complied with the adjudicator's decision and the plaintiff has approached this court for enforcement. The plaintiff seeks an order that:

- a) The defendant complies with certain paras of the adjudicator's decision.
- b) The adjudicator's decision obliging the defendant to pay an unspecified amount to the plaintiff be certified.
- c) That the defendant pays the unspecified amount together with interest

- d) A declaration that the contract entered into by the parties is still valid; and
- e) A declaration that the plaintiff is entitled to recover \$412 201-11 together with VAT and interest.

An excipient must not only prove that the summons is defective but must also show that he will suffer prejudice if the court does not uphold his exception. Makarau JP (as she then was) had this to say on the purpose of pleading in *Chitanda v Mutasa and Others* HH 16/08;

“The purpose of pleadings is not only to inform the other party in concise terms of the precise nature of the claim they have to meet but pleadings also serve to identify the branch of law under which the claim has been brought. Different branches of the law require different matters to be specifically pleaded for a claim to be sustainable under that action ... This may appear trite but a number of matters coming before the courts seem to indicate that legal practitioners have abandoned the need to plead a cause of action by making the necessary averments to sustain an action ... Legal practitioners are urged to read on the law before putting pen to paper to draft pleadings in any matter so that what they plead is what the law requires their clients to prove to sustain the remedy they seek ... Litigation in the High Court is serious business and the standard of pleadings in the court must reflect such.”

The defendant herein complains that the plaintiff’s claims as formulated in the summons and declaration lack clarity and precision. The claim is vague and lacks the necessary averments necessary to sustain an action. As stated in *Jowell v Bramwell – Jones and Others* 1998 (1) SA 836 W at 905 E-H.

“I must first ask whether the exception gives to the heart of the claim and if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet ...”

See also *Trone v South Africa Reserve Bank* 1992 (3) SA 208 T at 221 A-E where the court found that the exception test for vagueness and embarrassing involved a twofold consideration; firstly whether such pleadings are not clear and concise to the extent that is vague; and secondly whether the vagueness causes embarrassment to the prejudice of the excipient. See *First Rand Bank Ltd v Joste* 2015 ZAGPJHC 11 and *Venter v Wolfberg Arch Investments 2 (Pvt) Ltd* 2008 (4) SA 639 (C).

The pleadings must disclose a cause of action. The meaning of “cause of action was defined in *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 at 23 as:

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but necessary to be proved.”

I now proceed to assess the particulars of claim in the present matter, taking into consideration the above requirements.

The plaintiff's cause of action is based on an adjudicator's decision. The problem with trying to enforce the decision as it is, is that the decision lacks specific amounts and precision as to exactly what the defendant is expected to do. The amounts payable have not been specified. The plaintiff was enjoined to calculate such amounts and specifically inform the defendant and the courts on the amounts claimed. The pleadings as they are are vague and embarrassing in that they failed to disclose the specific amounts claimed. The claim becomes meaningless. The same reasoning applies to the undisclosed percentage of interest claimed.

I agree with the submissions by the applicant's counsel that the court is enjoined to make orders capable of enforcement. I was referred to the case of *Swaziland national Ex-Miners Workers Association v The Ministry of Education and Others* (2168/09) (2010) SZHC 258 where the court said:

“In the case of *Mansell v Mansell* 195 (3) SA 716 at 720-1, it was held that the court will not make orders which cannot legally and practically be enforced since they do not have any practical efficacy.

I associate myself fully with that judgment in deciding the present application, I have to be convinced that the orders made can legally and practically be enforceable. An order which does not pass this test can only lead to ordinary chaos and confusion; such state of affairs cannot be allowed to happen.”

The plaintiff ought to be given an opportunity to amend its pleadings.

In the result I order as follows;

- 1) The exception is upheld.
- 2) The plaintiff is given ten days to amend its pleadings.
- 3) The plaintiff to pay costs of suit.

*Venturas & Samkange*, plaintiff's legal practitioners  
*Gill, Godlonton & Gerrans*, defendant's legal practitioners