ALFRED CHAAVURE
versus
OLD MUTUAL ZIMBABWE LIMITED
and
REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 7 July 2017 and 11 August 2017

Opposed Matter

Adv *H.M. Moyo*, for the plaintiff
B.L. Mataruka, for the first defendant

CHIWESHE JP: The plaintiff issued summons against the defendants claiming specific performance in terms of an agreement between the parties, for payment of value of shares in the sum of $23 310.14. The plaintiff also claimed costs of suit.

The facts as contained in the plaintiff's declaration are as follows. On 30 April 2012 the first defendant entered into an agreement of sale of certain shares with plaintiff. This agreement was contained in Annexure A to the summons and declaration. The material terms according to that annexure were that the first defendant would pay the value of the shares when the shares vested. The shares vested on 30 June 2016 on which date the plaintiff became entitled to have the shares transferred to him or paid the value of the shares being the sum of $23 310.14. In breach of Annexure A, first defendant has neglected or failed to tender transfer to plaintiff nor has it paid cash for the value of the shares.

It turned out that contrary to the above averments, the plaintiff had not attached Annexure A (the agreement) to the declaration. The first defendant nonetheless entered appearance to defend and thereafter wrote to the plaintiff's legal practitioners alerting them to the fact that no

agreement had been attached and could they be furnished with the same. The first defendant followed this request with a formal request for further particulars seeking the production of Annexure A. The plaintiff respondent by furnishing further particulars in the form of Annexure "A". However the document presented as Annexure "A" was an advertising brochure, and not an agreement.

The first defendant has excepted to the plaintiff's declaration on the grounds that it does not disclose a cause of action or alternatively that it is vague and embarrassing in that the Annexure, being a brochure, does not constitute an agreement between the parties. More particularly that the brochure does not constitute an agreement to sell certain shares, nor an entitlement on the part of plaintiff to receive shares in first defendant nor does it reflect any entitlement on the part of the plaintiff to be paid the sum of $23 310.14 or any other sum. For these reasons the first defendant prayed that the plaintiff's claim be struck out and that judgment be awarded in favour of first defendant with costs.

The exception procedure is provided for under Rule 140. It Reads:

"**140. Complaint by letter before applying to strike out or filing exception**

(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 complaint and call upon the other party to amend his pleading so as to remove the cause of complaint.

(2) The costs of any such necessary letter and of any matters incidental to it, including any necessary conferences with another legal practitioner, shall be allowable on taxation.

(3) In dealing with the costs of any motion to strike out or of any exception, the provisions of this rule shall be taken into consideration by the court."

The requirements for an exception to be upheld are spelt out in numerous cases in this country and in kindred jurisdictions. The general approach is well articulated in the South African case of *Kahn v Stuat* 1942 CPD 386 where at p 391 the court pronounced as follows:

> "The courts should not look at a pleading with a magnifying glass of too high a 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 exception should be dismissed."

In Southern Developments (Pty) Ltd v Transnet 2003 (5) SA 665 it was held that:

"(i) the excipient must establish that the pleading is excipiable on every reasonable interpretation.
(ii) the pleader is entitled to a charitable interpretation
(iii) minor blemishes can be cured by further participation
(iv) the pleading must be read as a whole."

I agree with the plaintiff that the exception in this case has no merit. Firstly, it is evident that the summons and declaration set out sufficient averments to establish a cause of action. The claim is based on an agreement for the sale of shares in the first defendant. The salient features of the agreement are described thus:

"5.1 That the first defendant would pay the plaintiff the value of the shares when the shares vested.

5.2 The shares vested on 30 June 2016 whereupon the plaintiff became entitled to have the 28 427 Old Mutual Zimbabwe shares transferred to him or paid the value of the shares being $23 310.14.

5.3 That the initial offer and acceptance agreement remains in force and that it is binding.

6. In breach of Annexure A first defendant has failed or reneged on the agreement and has failed to tender transfer to the plaintiff, nor paid cash for the value of the share."

Clearly the cause of action is the agreement signed between the plaintiff and the first defendant in terms of which shares were sold and the parties' rights and obligations spelt out. It is averred that the first defendant has breached the terms of that agreement – specific performance is the relief sought. Nothing could be clearer than the plaintiff's averments which without doubt establish a cause of action.

The plaintiff's initial complaint was well taken, that the summons and declaration refer to annexure A (the agreement) which had not been attached to the summons as averred. A document was then furnished as annexure A. It would have been evident to any litigant that annexure A could not possibly be the agreement the subject of litigation – a mere brochure – and

that it had been furnished in error. The first defendant ought to have given notice by letter calling upon the plaintiff to rectify the error by furnishing the correct document. Instead it rushed to file the present exception which was not called for. But that assumes that the first defendant was entitled to the production of the agreement at that stage. The correct position is that the agreement is evidence which needs not be pleaded – it is sufficient to make reference to the agreement in the averments in the summons and declaration. The plaintiff is not obliged to produce it at that stage and the first defendant does not need evidence in order to plead. That is trite.

It is incumbent upon would-be excipients to comply with Rule 140 (1) (b) which, although cast in permissive terms, would save the parties both costs and time. In terms of that Rule the parties are enabled to clarify the issues and effect the necessary amendments to clumsy pleadings, rather than seek the court's directions for specifically the same reason. The court will invariably order that which the parties could have done without recourse to it, namely that the pleading be amended accordingly. *Auridium Pvt Ltd v Modus Publications* 1993 (2) ZLR 359 (H) is a case in point. Similarly in *Sammy's Group (Pvt) Ltd v Meyburgh NO and Ors* SC 45-15 it was held that;

> "It is invariably the practice of the courts in cases where an exception has been taken to an initial pleading that it discloses no cause of action to order that the pleading be set aside and the plaintiff be given leave if so advised to file an amended pleading within a certain period of time."

I have already indicated that the plaintiff's averments in the summons are clearly spelt out – the claim is for payment of a specific sum of money arising out of an agreement of sale of shares. Further that the document referred to as Annexure A is not the agreement of sale but that it was tendered in error. In any event the agreement constitutes evidence which need not be pleaded in an initial pleading and which the defendant does not require in order to plead. For the same reasons the summons and declaration cannot be challenged on the basis that it is vague and embarrassing.

I come to the inevitable conclusion that the exception cannot succeed. The brochure referred in the summons and declaration as Annexures A is superfluous and in any event submitted in error. It must be expunged.

Accordingly it is ordered as follows:

1. The exception be and is hereby dismissed in its entirety.

2. The first defendant shall pay the costs of suit.

Messrs Rubaya & Chatambudza, plaintiff's legal practitioners
Gill, Godlonton & Gerrans, 1st defendant's legal practitioners