

FARAI RWODZI
and
CHRISTOPHER SAMBAZA
versus
DEPOSIT PROTECTION CORPORATION
In its Capacity as the Liquidator of INTERFIN BANK Limited (under Liquidation)
and
TIMOTH NATHAN CHIGANZE
and
JEREMIAH JUSTIN TSODZAI
and
RAYMOND NJANIKE
and
EMMANUEL CHENJERAI TAGARIRA
and
DAVID MBIZA
and
JAMES SHUMBANHETE
and
PELAGIA KAFESU
and
DR TEDDY GODFREY ZENGENI
and
MAXWELL REVAI
and
TENDAI PHINEAS CHIMURIWO
and
NOMSA HAZEL NCUBE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 July and 03 October 2018

Opposed Application

D Sanhanga with E Jera, for applicant
ABC Chinake, for 2nd applicant
F Girach, for 1st respondent
2nd – 11th respondents- in default

TAGU J: The two applicants lodged this application to compel the first respondent to supply the applicants with further and better particulars to enable the applicants to plead to some of the first respondent's particulars of claim. The second to the twelfth respondents were cited in these proceedings for purposes of just informing them of the steps that have been taken since they are the applicants' co-defendants in the matter under Case Number HC 10679/16.

The facts are that the applicants and the second and twelfth respondents were jointly and severally sued by the first respondent for the payment of the sum of US\$136 097 897.09. After receiving the summons and on the 18th of November 2016 the applicants felt that the particulars pleaded in the declaration were totally inadequate to enable them to plead. The applicants then requested for further particulars from the first respondent to enable them to plead. The first respondent then took time to supply the applicants with the requested particulars only to supply them on the 20th of June 2017 when the request had been made on the 18th November 2016. The applicants then felt that the further particulars supplied were inadequate for them to plead. The applicants then made a request for further and better particulars. The first respondent then refused to supply further and better particulars thus necessitating the applicants to file the current application to compel the first respondent to supply further and better particulars.

The first respondent raised a point *in limine*. The point *in limine* is that the request for further and better particulars was bad in law and not properly before the court because the request was made out of time and not within twelve days after the first respondent refused to supply further and better particulars and that the applicants essentially repeated the same issues and or requested particulars they could or should have requested with the first request. In fact the first respondent submitted that the applicants are seeking further and better particulars to the plaintiff's further particulars. It argued that one cannot request particulars on particulars furnished as rules do not provide for that. In its view this is a mere repetition since they seek further particulars to the further particulars and not to the declaration. Reference was made to p 35 para 5 and p 46 para 5 of the record which shows that the particulars requested is a mere repetition of the previously requested particulars.

Order 21 r 137 (1) d) of the High Court Rules 1971 provides for requests for further particulars. The rule reads as follows-

“(1) A party may –

.....

(d) apply for a further and better statement of the nature of the claim or defence or for further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars.”

In my view a party is expected to request for further particulars, and if the particulars are not satisfactory a party may request for further and better particulars provided that the party is not requesting for new particulars on issues not initially requested. If a party is repeating the same request on the same issues it’s a sign that the particulars supplied are not adequate. The point that the request is repetitive is not properly taken. This position is clear when one reads r 141 (b) which says

“At any stage of the proceedings the court may –

(b) 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 pleading, notice or written proceeding requiring particulars.” See (1) *Heating Elements Engineering (Pvt) Ltd* (2) *Makwabarara Investments (Pvt) Ltd* (3) *Tony Tongesayi Makwabarara v The Eastern and Southern African Trade and Development Bank (PTA BANK)* SC13/2002 and *Trinity Engineering (Pvt) Ltd v Commercial Bank of Zimbabwe Ltd* 2000 (2) ZLR 385 (H) which showed that more than one request may be made.

Rule 142 (b) states the time within which such particulars may be requested. It reads as follows-

“(b) where the particulars are refused and the applicant fails to make a court application for an order within twelve days of the refusal, from the date of expiry of such period of twelve days,”

In casu the request was made within ten days of refusal. The preliminary points are therefore dismissed.

AD MERITS

This is an application to compel the first respondent to supply further and better particulars in a matter in which plus \$136 million is claimed. The application is resisted by the first respondent. No relief is being sought from the second to twelfth defendants.

It is settled law that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. Where pleadings are long, winding and argumentative the other party is obliged to request for further and better particulars. Pleadings must therefore be lucid and logical and in an intelligible form, and the cause of action or defence must appear clearly from the factual allegations made. In *UDC Ltd v Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (HC) this court accepted the following-

“The object of a pleading is to state in clear and concise terms the facts upon which a party relies to enable each side to come to trial prepared to meet the case of the other and to enable the court to isolate the issue it is to adjudicate upon.”

In *Fungai Nhau v Memory Kipe and Anor* HH-73-15, MATHONSI J made this point very clear when he said –

“By definition pleadings must be concise and to the point. They must identify the branch of the law under which the claim or defence to it is made and should not contain evidence. Pleadings which are long, winding and argumentative should not find their way to these courts. It is a serious dereliction of duty for legal practitioners to continue presenting such offensive pleadings when they have the aid of literature guiding the drafting of pleadings. I associate myself fully with the sentiments of MAKARAU JP (as she then was) in *Chifamba v Mutasa & Ors* HH-16/08 (unreported) that-

‘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.’”

With these remarks I must endeavor to examine seriatim whether or not the applicants’ complaints are genuine or not, whether the first respondent’s Declaration is riddled with ambiguity or not so much so that the applicants are left in a position where they are simply unable to plead a defence.

FIRST COMPLAINT

In para 17 of the first respondent's declaration the first respondent alleges that "the 2nd applicant and the 2nd to 12th respondents were at all material times the directors of the bank and in that capacity owed the bank a fiduciary duty to ensure that the bank was operated according to sound corporate principles and that good corporate governance and accepted banking practice was adhered to at all material times. Thereafter throughout its declaration the first respondent adopts the phrase "at all material times" with reference either to the knowledge of the defendants or events that may have occurred or in respect of which the plaintiff relies on, for example in paras 19.5 and 22 of the particulars of claim. The plaintiff's use of the phrase "at all material times" encompasses an extensive period of at least 13 years.

The first respondent therefore made allegations in delict that could have taken place at any time during the thirteen years of the Bank's operation. The use of the phrase "at all material times" is therefore an ambiguous reference to the period being referred to as "during the period leading up to the bank being placed under curatorship by the Reserve Bank of Zimbabwe". No period has in fact been stated precisely in which the bank was allegedly not operating according to sound corporate principles, good corporate governance and accepted banking practices. The employment of such a phrase renders the particulars ambiguous as it remains unclear when during the extensive period the alleged events took place. The first respondent has to state the period precisely to enable the applicants to plead.

SECOND COMPLAINT

In paragraph 19.1 of the first respondent's Declaration the first respondent alleged that the 1st, 2nd Applicant and the 2nd to the 12th respondents failed to ensure that any meaningful capital was injected into the bank resulting in a negative capital of US\$5 876 089.00 as at 31 March 2010. Nothing in the particulars supplied show the exact period that the bank allegedly operated with a negative capital. The first respondent must show precisely how it arrived at the figure of US\$5 876 089.00 as at 31 March 2010 in order for the applicants to be able to plead to the serious averment. Only the first respondent has the critical information relating to the accumulation of the alleged negative capital. In the absence of greater particularity as to when the applicants supposedly embarked on the alleged misconduct the first respondent's particulars of claim remain ambiguous.

THIRD COMPLAINT

In para 19.2 of the first respondent's Declaration the first respondent has failed to specify precisely in what respects the board failed to properly supervise and/or monitor the lending activities of the bank, when and in what amount loans were allegedly granted; with which related parties or customers without adequate security; and the specific dates. This declaration is, with greatest respect, riddled with ambiguity and specifics are required.

FORTH COMPLAINT

In para 19.3 of its declaration the first defendant simply alleged that the defendants negligently or intentionally allowed the bank to pay interest on a loan obtained from a third party for the benefit of the defendants, utilizing depositors' funds to the prejudice of the bank. The applicants asked the first respondent for the particulars relating to that loan whose interest was allegedly allowed to be paid by the bank using depositors' funds. Such particulars were not provided. It must be noted that the bank in question was a big institution giving various loans and making various investments. In my view the first respondent must therefore-

- (a) State the exact proportion of the funds that was available to the bank for lending purposes, and the amount allegedly granted to the related parties;
- (b) Specify the related third parties who were allegedly granted the loans rather than just generalizing. Without such particulars it is impossible to plead to the serious allegations without the further particulars requested.

FIFTH, SIXTH, SEVENTH EIGHTH AND NINETH COMPLAINTS

In para 20 of its declaration the first respondent made allegations of fraud against the first applicant without specifying the exact alleged wrongful, unlawful, fraudulent, gross negligent or recklessness actions that the first applicant allegedly committed. The particulars are generalized.

In para 23 of the declaration the first respondent made bold allegations that the first applicant wrongfully and unlawfully or intentionally utilized his influence as a controlling shareholder and caused the board of directors to act in the manner specified therein. Once again the first applicant

was left in the dark with regards to the exact details of the alleged wrongful, unlawful or fraudulent actions that he is alleged to have committed. These acts must be specified to enable the first applicant to plead.

At para 23.1, 23.2 and 23.4 the first respondent alleged that the bank through its employees granted loans to companies or entities in which the first applicant had a direct or indirect interest. Again the specificity of such an allegation remain unknown to the first applicant. The alleged company or entities have not been mentioned to date. The amounts of the loans allegedly granted are not specified either. The nature of the first applicant's interest in those entities are not mentioned at all. Such vital particulars are necessary to enable first applicant to plead.

Finally, in para 23.5 of the declaration allegations are made that the first respondent misrepresented the financial status of the Bank to both the shareholders and the Reserve Bank. However, the specific way in which it was done and when it was done is not stated to enable the first applicant to plead.

All the requested particulars were not fully provided by the first respondent when requested to do so. It is therefore unfair to expect the applicants to plead a defence to such serious allegations without the further and fundamental details requested. The first respondent needs to particularize the allegations made. The further particulars that the applicants have requested are quite essential to enable them to plead. The first respondent therefore has to be compelled to supply such further and better particulars as requested.

IT IS ORDERED THAT

1. The 1st Respondent shall supply the further particulars requested by the 1st and 2nd Applicants within ten (10) days of the service of this order.
2. 1st Respondent shall pay the costs of suit.

Moyo & Jera, applicants' legal practitioners
Wintertons, 1st respondent's legal practitioners

