

KETHIWE VAN DER SANDEN
versus
BRIGHT MUGOROGODI

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 14 November 2019 & 27 November 2019

Opposed Matter

Ms Takaindisa, for the applicant
B Hatinahama, for the respondent

DUBE-BANDA J: This is an application to compel the furnishing of further particulars in terms of Order 21 Rule 141(b) of the High Court Rules, 1971 (Rules). For ease of reference and where the context allows, the parties will be referred to as plaintiff (Bright Mugorogodi) and defendant (Kethiwe Van Der Sanden). In case number HC 5746 / 19 plaintiff caused to be issued out of this court a summons seeking an order directing defendant and all those persons claiming occupation through her to vacate an immovable property being subdivision 6 of Lot 1 a Greendale also known as No. 3 Rhodesville Avenue, Greendale Harare, (property) within seven days of the order and other ancillary relief. Defendant entered a notice to defend and filed a request for further particulars.

A perusal of the request for further particulars and reply by plaintiff, it is apparent that some of the requested particulars were supplied while others were refused on the basis that the particulars requested constituted evidential material or that they are not necessary to enable the defendant to plead. Defendant was aggrieved by the replies given and in some instances the refusal to provide the particulars sought and filed this application to compel the plaintiff to furnish the particulars sought.

The application is opposed.

The law

In terms of the rules of court and the jurisprudence developed in this jurisdiction and in South Africa, particulars of a claim may be supplied on the principle that a litigant is entitled to know the cause action or defence he has to meet; and to know whether he should admit or deny a particular allegation. He is entitled to be placed in the position of being able to decide

whether to persist in his claim or defence. See *Tahan v Griffiths* 1950 (3) SA 899 ()). The purpose of the request for further particulars is to put oneself in a position to take the next step in the proceedings without being at a disadvantage. There is no general rule which can be applied to determine whether the particulars are necessary and the facts of each case will often be determinative. An attempt at a general set of guidelines is provided in *South African Railways & Harbours v Deal Enterprises (Pty) Ltd* 1975 (3) Sa 944 (W). The crucial test is that the party requesting the particulars must be embarrassed without them. He must therefore be in ignorance as to the exact case that he has to meet, or that he is forced into a general denial and unable to plead a particular version in defence.

A litigant is permitted to request only those particulars that are reasonably necessary to enable him or her to draft a plea. At the pleading stage he is not entitled to those particulars which could enable him to prepare for trial. A party seeking particulars must show the following, that without the particulars sought, he will be embarrassed in attempting to plead; he must show that the other party has failed to deliver particulars which are reasonably necessary to enable him to plead. A litigant is not entitled to particulars which he desires in order to find out evidence upon which his opponent intends to rely. See *Pete S Civil Procedure Manual* (University of Natal 1999) 137.

The particulars to which a litigant is entitled, however, are particulars of averments forming part of the opposing case; or put another way, particulars of matters in respect of which the *onus* is on the opponent. A litigant is not entitled to request particulars of matters where the *onus* in respect of which is upon himself or herself. Where particulars are sought, the incidence of *onus* is important and particulars will not be ordered on matters which form no part of the plaintiff's cause of action or which relate to matters extraneous to the *facto probanda* put forward by the plaintiff. See *Trinity Engineering (Pvt) Ltd v Commercial Bank of Zimbabwe Ltd* 2000 (2) ZLR 385, *Sakunda Energy (Private) Limited and Sakunda Logistics (Private) Limited and Kudakwashe Regimond Tagwirei v Justice Mayor Wadyajena* HH 226 /18.

Rule 99 (c) of the Rules provides that a plea shall contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. The distinction between fact and evidence was set out in *Jones v Hamilton & Haw* (1886) 5 EDC 22 at 228 as follows: "stating that a thing was done is stating a fact; giving details of how it was done would be giving evidence of it." As a result a court cannot under the defendant's guise of a request for further particulars order plaintiff to furnish defendant with evidential material. Again the court

cannot order plaintiff to furnish particulars which are not necessary to enable defendant to plead.

The facts and the law

In its declaration, plaintiff pleads that it is the registered owner of the immovable property, and defendant request a copy of the title deeds in the name of the plaintiff. This request is refused by the plaintiff on the basis that a copy of the title deed is a public document and constitutes evidence. The summons and declaration show that this eviction is sought by means of a *rei vindicatio*, in which case plaintiff must plead ownership of the property and the defendant's possession of the property. See Harms LTC Amler's *Precedents of Pleadings (LexisNexis Eighth Edition)* 187. In *casu* plaintiff has pleaded ownership of the property and the occupation by the defendant. These averments are sufficient to enable defendant to plead. The request amounts to seeking production of documentary evidence upon which the plaintiff will rely during the trial. It is at the discovery stage that plaintiff will have to discover the title deed if it is available.

Defendant requests plaintiff to admit that he bought matrimonial property. In this instance defendant is seeking an admission, and such cannot be sought at pleadings stage and for the purpose of drafting a plea. An admission can, depending on the facts of the case, be sought in terms of Order 27 of the Rules or at a pre-trial conference. See Order 26 r 182 (2) (a) of the Rules. Defendant is not entitled to seek an admission at the pleadings stage under the guise of a request for further particulars.

Defendant requests a copy of the agreement of sale between the plaintiff and one Roberts Antoine Willy Van Sanden. The copy agreement constitutes documentary evidence and is not necessary to enable defendant to draft a plea. Documentary evidence in the possession of the opponent cannot be requested for the purposes of drafting a plea. It is at discovery stage that defendant may request the plaintiff to make discovery on oath of all documents relating to matter. See Order 24 of the Rules.

Defendant request plaintiff to admit that at the time he bought the property, defendant had instituted divorce proceedings against the seller. Defendant is seeking an admission, allegedly to enable her to draw and file a plea. I repeat, an admission cannot be sought for the purposes of drafting a plea. It can only be sought in terms of Order 27 of the Rules and / or at a pre-trial conference, not to enable defendant to plead.

A request is made requiring plaintiff to state the date defendant was advised that the property had been sold and a copy of the letter is requested. The cause of action is not that the

property was sold to the plaintiff, it is that the plaintiff is the owner of the property. Defendant can plead without seeking particulars in respect of the sale. The copy of the letter constitutes documentary evidence and not necessary for drafting a plea.

Defendant requests to know the date when the property was legally and procedurally transferred into the plaintiff. Further defendant requests to know the amount plaintiff paid for the property. The particulars sought constitutes evidence and not necessary to enable defendant to plead. In any event the cause of action is anchored on that plaintiff is the owner of the property. A further request demanding to know the person who received the purchase price. This is evidence and absolutely not necessary for the purpose of filing a plea. Defendant now knows that the property has been transferred to the plaintiff, this is sufficient for the purposes of filing a plea.

These requests are made; the capacity in which plaintiff gave defendant a written notice in 2008 to vacate the premises when he was not yet the legal owner of the property; and whether plaintiff viewed the property prior to purchasing it; and if he viewed it, when and how. My view is that the particulars sought are not necessary to enable defendant to plead. These are matters of evidence. Further the defendant requests a copy of the written notice to vacate the property, this is a matter of evidence, not necessary to enable defendant to draw and file a plea.

Defendant complains in its heads of argument that if plaintiff is not compelled to furnish the particulars requested, it shall plead in the dark. I disagree. These averments in the plaintiff's summons and declaration are sufficient to enable defendant to plead.

In *casu* defendant seeks evidence, which is not permissible at this stage, e.g. alleging that the property has been transferred to the plaintiff is a fact, but a copy of the deed of transfer constitutes evidence. Stating that defendant was advised that the property has been sold to the plaintiff is a fact, however a copy of a letter sent to defendant constitutes evidence. When the property was transferred to plaintiff, the purchase price and to whom it was paid to, constitute evidence. Whether plaintiff viewed the property before purchasing it, when and how constitute evidence. A copy of the written notice to vacate constitutes evidence. Defendant in its request for particulars is seeking evidence.

The particulars requested do not affect the defendant's ability to plead. When asking for further particulars, the defendant is required to show that without such requested particulars he will be embarrassed in attempting to plead and that he must make plain to the court the precise embarrassments which he alleges he will suffer – *Barendse v Rattray* 197 TPD 622; *Birrell v Fryer* 1926 EDL 284; *The Citizen (Pvt) Ltd v Art Printing Works* 1957 (3) SA 383

(SR); *Time Security (Pvt) Ltd v Castle Hotel Ltd* 1972 (3) SA 112 (RA); *Allen v Kinsey* 1966 RLR 335 (G); *Davidson v Standard Finance Ltd* 1985(1) ZLR 173 (HC) and *ALESP Enterprises (Pvt) Ltd v Natural Stone Export Co (Pvt) Ltd* HB-59-04. The defendant seems to be carrying out inquisitional forays upon the plaintiff. That is not what the procedure in order 21 Rule 141(b) was designed to achieve. See *Carlo Franchi v Dixon Mohammed* HB 17 / 05.

I am of the view that this application has no merit.

Costs

Litigants should be attempting to resolve litigation as quickly as possible with as few steps as possible, and the request for particulars should be employed only if it is strictly necessary. An unnecessary request for further particulars, in an appropriate case should be met with an order of costs. In *casu*, in my view the defendant seeks the particulars for the purpose of establishing the plaintiff's evidence, which is not the purpose of a request for further particulars at the stage of pleading. The general rule on costs is that costs follow the cause, I do not intend to depart from such a rule and defendant must pay the costs of this application.

Disposition

In the result it is ordered as follows:

The application is dismissed with costs of suit.

Mupanga Bhatasara Attorneys, applicant's Legal Practitioners
Hatinahama and Associates, respondent's Legal Practitioners