

DISTRIBUTABLE (69)

Judgment No. S.C. 100/2001
Civil Appeal No. 357/2000

FAWCETT SECURITY OPERATIONS (PRIVATE) LIMITED v

(1) COMMERCIAL BANK OF ZIMBABWE LIMITED

(2) ZIMBABWE EXPRESS AIRLINES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
McNALLY JA, CHEDA JA & ZIYAMBI JA
HARARE, NOVEMBER 8 & DECEMBER 21, 2001

D M Campbell, for the appellant

A P de Bourbon SC, for the first respondent

No appearance for the second respondent

ZIYAMBI JA: This is an appeal against a judgment of the High Court dismissing an exception taken by the appellant in this matter to a Declaration filed by the first respondent.

The first respondent (the Bank) issued summons against the appellant (Fawcetts) and the second respondent (ZEX) jointly and severally, the one paying the other to be absolved, claiming damages for the loss of a cash box containing cash in various foreign currencies as well as travellers cheques.

The events leading to the issue of summons are as follows. The Bank and Fawcetts entered into an agreement described on the face of it as a “SECURITY

CARRIAGE SERVICE AGREEMENT” (the agreement). In terms of the agreement, Fawcetts was to collect a locked and sealed cash box from the Bank’s premises at Victoria Falls and convey it to Victoria Falls Airport where it was to be consigned to Harare. Fawcetts would then collect the box at Harare International Airport and deliver it to the Bank’s premises in Harare. Fawcetts duly collected the cash box from the Bank’s premises in Victoria Falls and handed it to ZEX for onward transmission to Harare. The ZEX aircraft arrived at Harare Airport at 4.30 pm but Fawcetts’ employees did not arrive to collect it until 8.30 pm at which time the cash box was found to be missing.

The Declaration alleged, in the relevant paragraphs, as follows:

“CLAIM AGAINST FIRST DEFENDANT

4. On 1 April 1999, the plaintiff and the first defendant entered into an agreement in terms of annexure A hereto.
5. The material terms of annexure A were that:
 - 5.1 ‘on an as and when required basis, at a time mutually agreed upon, Fawcett Security will collect a locked, sealed steel container, from Commercial Bank’s premises, Laxmi Building, Victoria Falls and convey same to Victoria Falls Airport where it will be consigned to Harare. Upon notification of a consignment being sent, Fawcett Security, Harare will collect the locked, sealed, cash container from Harare Airport and deliver it to Commercial Bank’s premises, Harare.
9. In terms of annexure A:
 - 9.1 The first defendant undertook to convey the cash box from Victoria Falls to Harare;
 - 9.2 The first defendant took possession of Plaintiff’s cash box but has failed to deliver the same at Harare.
10. Its failure to do so is breach (sic) of the agreement stated in annexure A;

10.1 The first defendant is therefore liable to plaintiff for damages for breach of the contract;

11. ALTERNATIVELY

11.1 The first defendant is a public carrier and is subject to absolute liability;

11.2 The first defendant is therefore liable for failing to deliver the goods;

11.3 The first defendant is therefore liable for damages being the foreign currency lost.”

There was a second alternative claim based on negligence, which claim was not excepted to and which therefore is not relevant for the purposes of this appeal. The claim against ZEX was based on similar grounds, namely, breach of a contract of carriage between the Bank and ZEX, and negligence. The prayer to the declaration claimed damages against the Bank and ZEX jointly and severally, “the one paying the other to be absolved”.

The exception taken by Fawcetts was on the grounds that there are no allegations set forth in the Declaration to support either the claim based on breach of contract or the alternative claim based on liability as a public carrier and that the claim for joint and several liability is vague and embarrassing.

It was contended on behalf of the appellant that the contract of carriage was in three parts and that Fawcetts was only to be the carrier in the first and third legs of the journey, that is, Fawcetts was to collect the cash box and deliver it to Victoria Falls Airport and to collect it from Harare Airport and deliver it to the Bank’s premises in Harare; that the appellant had performed the first leg of the contract by delivering the box to Victoria Falls Airport; that the third leg, which was to collect the

box from Harare Airport, could not be undertaken until ZEX handed over the box; and that there was no averment that Fawcetts ever undertook the third leg but, on the contrary, it was alleged in the Declaration, as against ZEX, that ZEX had taken possession “of the plaintiff’s sealed box at Victoria Falls Airport but failed to deliver the same to the first defendant (Fawcetts) at Harare International Airport”. In the premises, since Fawcetts did not collect the box from Harare Airport, the third stage had not commenced and accordingly, the Agreement was not in operation.

With regard to the first alternative claim based on Fawcetts’ absolute liability as a public carrier, the appellant submitted that a new contract of carriage was concluded between the Bank and ZEX and that the airwaybill is evidence of such a contract in that it states the “shipper” to be “CBZ”. Further support for this view, it was submitted, is found in para 13 of the Declaration where the Bank alleges a contract between itself and ZEX for the carriage of the box to Harare. In the premises, Fawcetts could not be charged with failing to deliver until they were re-vested with the box at Harare Airport, which re-vesting did not happen.

In essence, it was Mr *de Bourbon*’s submission that the attachment of the agreement to the Declaration, though not an elegant pleading nevertheless was sufficient to enable Fawcetts to plead; that Fawcetts had contracted to provide a security carriage service and that the obligation in terms of clause 1 of the “Standard Conditions” of the agreement was a continuing obligation to the last destination, being the Bank’s premises in Harare. Mr *Campbell*’s answer to that was that clause 1 was not pleaded as a term on which the Bank intended to place reliance and that it is unacceptable in pleading to draw a party’s attention to one clause and then seek to rely on a clause which has not been pleaded.

A reading of clause 1 of the “Standard Conditions” of the agreement would appear to support Mr *de Bourbon*’s submission that it was contemplated that Fawcetts’ obligation would be a continuing one up to the time that the box was delivered to the Bank’s premises in Harare. In terms of that clause, Fawcetts’ responsibility for the safekeeping of the box was to commence “from the time that the (box was) handed over at the collecting point” and was to continue until the cash box was “delivered at the last destination point in accordance with clause 2 of the Agreement”. But, as Mr *Campbell* submitted, it was open to the Bank to plead clause 1 and it failed to do so.

It seems to me that there is substance in the appellant’s stance that, on the terms of the contract as specifically pleaded, it cannot be said that Fawcetts undertook to convey the cash box from Victoria Falls Airport to Harare and took possession of the box for that purpose. In the first place, the Bank, in its further particulars to the Declaration, referred to the Airwaybill, Annexure “B” to the Declaration, which, it was said, “contains all relevant details”. The airwaybill points to an agreement between the Bank and ZEX for the conveyance of the box to Harare. In the second place, the Declaration directed Fawcetts’ attention to the sole issue of whether or not Fawcetts had performed its obligations in terms of clause 2 of the agreement. Clause 1 of the standard conditions on which Mr *de Bourbon* sought to rely was not pleaded. The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another. See *Kali v Incorporated General Insurances Limited* 1976 (2) SA 179 at 182.

I am, therefore, in agreement with counsel for the appellant that the Declaration lacks essential averments necessary to found both the main and first alternative claims against Fawcetts.

With regard to the third ground of exception, it was submitted on behalf of the appellant that the allegations in the Declaration did not support a claim for joint and several liability against the respondents. On behalf of the Bank it was submitted that in terms of Rule 85 of the Rules of the High Court this claim may be brought in a single action since there is a common question of law or fact arising between the parties. Counsel for the appellant did not press the issue of joinder in terms of Rule 85 of the Rules of the High Court but submitted that the inclusion of Fawcetts as a debtor jointly and severally with ZEX is not supported by the only allegation in the Declaration which contains a reference to Fawcetts, namely, para 13.3 of the Declaration where it is alleged that:

“The second defendant (ZEX) took possession of the plaintiff’s sealed box at Victoria Falls Airport but failed to deliver the same to the first defendant (Fawcetts) at Harare International Airport. Its failure to do so is a breach of the agreement contained in annexure ‘B’.”

As has already been indicated above, Annexure B, the airwaybill, speaks of a contract of carriage between the Bank and ZEX. If ZEX is found liable for the loss of the box because of a breach of its obligations in terms of Annexure B, then Fawcetts would be absolved from liability. The claims made against Fawcetts and the Bank are, therefore, as the pleadings stand, mutually destructive and the allegation that Fawcetts and ZEX are jointly and severally liable is unfounded. As was observed by HATHORN J, in *Newmarch v Puzey & Diss Motors Limited* 1958 (1) SA 393 at 397:

“In principle it seems to me a defendant is entitled to know what relief is claimed on what cause of action. He may well be embarrassed if he does not know this”.

For the above reasons the appeal is allowed with costs. The order of the court *a quo* is altered to read as follows:

- “1. The exceptions are upheld.
2. The plaintiff is given leave to amend its declaration within 10 days of the date of this order.
3. The costs of the exception shall be borne by the plaintiff.”

McNALLY JA: I agree.

CHEDA JA: I agree.

Calderwood, Bryce Hendrie & Partners, appellant's legal practitioners

Granger & Harvey, first respondent's legal practitioners