

TENDAI MASHAMHANDA  
versus  
BARIADIE INVESTMENTS (PRIVATE) LIMITED  
and  
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
**MAMBARA J**  
HARARE 9 and 10 September 2024

### **Special Plea and Exception**

*LT Mapuranga*, for the excipient  
*L Madhuku*, for the plaintiff

MAMBARA J: This is a matter with a chequered history. The protagonists have been at each other's throat for quite some time now and are not prepared to take any prisoners. It's a fight to the death so it seems. They have been in and out of this court and have been to the Supreme Court too. This time they are back in this court for probably one more fight and hopefully the last fight.

The present matter involves a special plea and an exception raised by the first Defendant, *Bariadie Investments (Private) Limited*, against the Plaintiff, Tendai Mashamhanda, in relation to a claim for compensation for improvements made on a property owned by the Defendant. The Defendant asserts that the Plaintiff's claim is legally incompetent because it arises from improvements made in violation of a court order, thus contravening the doctrine of "dirty hands." The Plaintiff, however, contends that the Defendant's special plea and exception are improper and that the matter should proceed to trial.

The Plaintiff's claim stems from his acquisition of a piece of land known as the Remainder of Subdivision C of Lot 6 of Lots 190, 191, 193, 194, and 195 Highlands Estate of Welmoed, where he undertook significant improvements. The Defendant argues that the improvements were unlawful, made without regulatory approval, and in defiance of court orders.

The Court must determine the following issues:

1. Whether the Plaintiff's failure to file a replication under Rule 42(9) of the High Court Rules 2021 is fatal to the case.
2. Whether the Defendant's special plea and exception meet the requisite legal threshold under Rule 42 of the same rules.
3. Whether improvements made in contravention of court orders or without regulatory approval can form the basis of a legal claim.
4. Whether the Defendant complied with Rule 42(3) regarding the issuing of a letter of complaint before filing the special plea and exception.

The High Court Rules, 2021 introduce new procedural requirements, particularly for the raising of special pleas and exceptions. The relevant provisions include:

- Rule 40(1), which states that a replication may be filed by a Plaintiff only if it is necessary. The rule prohibits filing a replication where it would only serve as a bare denial of the Defendant's allegations. This rule aligns with judicial efficiency by limiting unnecessary pleadings.
- Rule 42(9), which obliges a Plaintiff to file a replication within ten days of being served with a special plea or exception, but only if such a replication is essential. If no new factual allegations are raised, the Plaintiff need not respond with a formal replication.
- Rule 42(3), which mandates the issuance of a letter of complaint before the filing of a special plea or exception. The letter must inform the Plaintiff of any perceived deficiencies in the pleadings, affording the Plaintiff the opportunity to address these issues before the Defendant takes further legal steps.

The Defendant, represented by Mr *Tafadzwa Mapuranga*, raised both a special plea and an exception. These defences are pivotal procedural mechanisms that may dispose of a case without the need for a trial. The definitions and appropriate application of these defences are essential to understanding the merits of the Defendant's position.

A special plea may relate to issues such as jurisdiction, prescription, or lack of legal standing (*locus standi*). As described in *Future Chirango Muvirimi v Ramsway Investments*, HH 343-18, a special plea seeks to quash a claim without addressing the merits because of a procedural or legal flaw. As further stated in *Herbstein and Van Winsen: The Civil Practice of The High Courts and Supreme Court of South Africa* (5<sup>th</sup> Edition), a special plea does not deal

with the substance of the case but rather raises issues that are preliminary and not related to the merits.

In *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N), it was established that where a special plea goes to the merits of the case it cannot be treated as a special plea. The purpose of a special plea is not to dispute the factual allegations of the Plaintiff but to assert that the legal framework precludes the claim. In *Future Chirango Muvirimi* (*supra*), Justice MANGOTA remarked:

“The special plea should succeed where the legal framework within which the Plaintiff operates does not allow the claim to proceed. For instance, a claim barred by prescription or filed out of time should be dismissed, irrespective of its merits.”

In the current case, the Defendant’s special plea is based on the illegality of the Plaintiff’s actions. The Defendant argues that the Plaintiff made improvements to the property in defiance of a court order under HC 7751/19, which prohibited any further construction on the land. The Defendant contends that the Plaintiff, fully aware of the legal challenge to his title, proceeded with construction, thereby violating the court’s injunction. The Defendant relies on *Mashamhanda v Bariadie Investments* SC 65/24, where the Supreme Court held:

“An unlawful acquisition of title followed by improvements in defiance of a court order cannot be sanctioned by the courts. Courts cannot use their discretion to grant orders in favour of a party who has demonstrated a clear lack of respect for the law and for court orders.”

The Plaintiff’s improvements were not only made in contravention of the court’s order but also without obtaining the necessary regulatory approvals. The Defendant argues that improvements made under such circumstances cannot form the basis of a legitimate legal claim.

An exception is a procedural defence raised when a pleading, such as a declaration or summons, is deemed vague and embarrassing or fails to disclose a cause of action. It challenges the legal sufficiency of the Plaintiff’s pleadings without addressing the substantive merits of the case. As Justice MUSAKWA stated in *Aldercraft Investments (Private) Ltd v Dave Caposopolous* HH 431-18:

“An exception attacks the validity of the Plaintiff’s pleadings by arguing that even if the facts alleged are true, the pleading is so vague or incomplete that no legal claim is established.”

In other words, an exception does not contest the facts but asserts that the Plaintiff has failed to provide the necessary legal grounds to support their claim.

The Defendant's exception is premised on the assertion that the Plaintiff, as a *mala fide* occupier, has no right to claim compensation for improvements made to the property. In *Mashamhanda v Bariadie Investments* SC 17/24, the Supreme Court held:

"A *mala fide* possessor or occupier has no right of retention or compensation for improvements made to the disputed property. The Plaintiff, having occupied the land unlawfully and in defiance of court orders, cannot claim compensation for improvements made under such circumstances."

The Defendant argues that the Plaintiff was aware of the defects in his title and the legal challenges surrounding the property but proceeded to make improvements nonetheless. As a result, the Plaintiff's claim for compensation is not supported by law.

After noticing that there was no letter of complaint filed of record the court invited Mr *Mapuranga* to address it regarding the failure to write such a letter since rule 42(3) of the High Court Rules 2021 provides for such a letter before an exception is raised. Mr *Mapuranga* was very candid and admitted that such a letter was not done. He went further to submit that the absence of such a letter was not fatal and could be compensated by the Defendant being deprived of its costs.

The Plaintiff, represented by Professor *Lovemore Madhuku*, opposes the Defendant's special plea and exception on several grounds:

Professor *Madhuku* argues that the Plaintiff's failure to file a replication does not render the claim procedurally defective. He cites Rule 40(1), which provides that a replication is only required when necessary to address specific factual or legal issues raised in the Defendant's plea. In this case, the Plaintiff contends that the Defendant's arguments could be addressed through heads of argument, and no formal replication was needed.

This position is supported by *Helensville Construction v Kadoma City Council* HH 434-18, where Justice CHAREWA ruled:

"While it is incumbent upon a Plaintiff to file a replication where necessary, the court retains the discretion to determine whether a replication is essential for the proper adjudication of the issues. In cases where heads of argument sufficiently traverse the grounds of opposition, a replication may not be required."

The Plaintiff further contends that the Defendant failed to comply with rule 42(3), which requires a Defendant to issue a letter of complaint before filing an exception. The rule is intended to give the Plaintiff an opportunity to correct any deficiencies in their pleadings before further legal steps are taken.

In *Mashamhanda v Bariadie Investments* SC 65/24, the Supreme Court emphasized the importance of adhering to procedural rules, stating:

“Non-compliance with procedural rules, especially where the rules are mandatory, may result in the dismissal of a party’s case or application. These rules ensure the proper administration of justice and the fair treatment of all parties.”

The Plaintiff argues that the Defendant’s failure to issue a letter of complaint is a fatal procedural defect, and the special plea and exception should be dismissed on these grounds alone.

The Plaintiff contends that even if some of the improvements were made in contravention of a court order, the Defendant benefited from the improvements and should be held liable for compensation under the principle of unjust enrichment. The Plaintiff argues that the issue of whether the improvements were made before or after the court order, and whether they benefitted the Defendant, raises triable issues that should be resolved at trial.

The Court finds that the Plaintiff’s failure to file a replication does not render the claim procedurally defective. Rule 40(1) of the High Court Rules, 2021 clearly states that a replication is only necessary when required to address specific issues. In this case, the Plaintiff adequately traversed the issues raised by the Defendant through heads of argument. As stated in *Helensville Construction (supra)*, the court has the discretion to determine whether a replication is necessary.

The Defendant’s failure to issue a letter of complaint before filing the exception is a significant procedural oversight. Rule 42(3) is designed to promote judicial efficiency by allowing the Plaintiff an opportunity to correct any deficiencies in their pleadings before the Defendant takes further legal steps. The Court agrees with the Plaintiff that this omission is a fatal defect. As stated in *Mashamhanda v Bariadie Investments* SC 65/24, procedural rules must be adhered to strictly to ensure fairness in legal proceedings.

While the Defendant has raised valid concerns regarding the legality of the Plaintiff’s improvements, these issues touch on the merits of the case and cannot be resolved through a special plea. The Defendant’s arguments would be better addressed during the trial, where the facts can be fully ventilated. The special plea, which is based on the Plaintiff’s alleged violation of court orders, does not dispose of the matter at this stage.

The Defendant’s exception, based on the Plaintiff’s status as a *mala fide* occupier, also raises substantive issues that must be determined at trial. The question of whether the Plaintiff

is entitled to compensation under the doctrine of unjust enrichment requires a factual inquiry, which cannot be adequately addressed through an exception.

### **Disposition**

For the reasons stated above, the Court finds that the Defendant's special plea and exception are procedurally and substantively flawed. The failure to issue a letter of complaint under Rule 42(3) is a critical defect that cannot be overlooked. Additionally, the issues raised by the Defendant require factual determination and should be addressed at trial. **As a result, it is ordered as follows:**

1. The Defendant's special plea is dismissed.
2. The Defendant's exception is dismissed.
3. The matter shall proceed to trial on the merits.
4. The Defendant shall bear the costs of this application.

*Rangarirai and Company*, legal practitioners for the plaintiff  
*Gill, Godlonton and Gerrans*, legal practitioners for first defendant

MAMBARA J.....