SITHULE TSHUMA
And
KAREN KHUMALO
And
NHAMO NYATHI
And
THEMBEKA C. MOYO
And
SINIKIWE DUBE
And
ANGELINE NDLOVU

Versus

DUMISANI MOYO
And
EDNAH NAKUBIYANA MOYO
And
THE REGISTRAR OF DEEDS, N.O.

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 18 OCTOBER & 4 NOVEMBER 2021

Opposed Application

Advocate L. Nkomo, for the plaintiffs
N. Mazibuko, for the 1st and 2nd defendants
No appearance for the 3rd defendant

KABASA J: On 25th September 2020 the plaintiffs issued summons against the defendants in which they claimed:

> "1. A declaratur that the plaintiffs are joint purchasers, together with the 1st defendant, of the immovable property known as Lot 1 of subdivision L of Upper Rangemore, situate in the District of Bulawayo, measuring 4, 8627 hectares and held under Deed of Transfer number 2015/2018 in the name of the 1st defendant, having contributed towards the US$80 000,00 purchase price of the property as follows:
>
> 1.1 1st plaintiff US$30 000,00 cash being 37,50% of the purchase price;

1.2 2nd plaintiff US$30 000,00 cash being 37,50% of the purchase price;
1.3 3rd plaintiff US$5 000,00 cash being 6,25% of the purchase price;
1.4 4th plaintiff US$5 000 cash being 6,25% of the purchase price;
1.5 5th plaintiff US$2 500 cash being 3,125% of the purchase price;
1.6 6th plaintiff US$2 500 cash being 3,125% of the purchase price.

2. An order directing the 1st defendant, within 14 days of the date of service upon him of this order, to execute all documents and instruments, and do all deeds requisite to the conveyance or registration of the names of the plaintiffs, or that of their nominee Qoki Zindlovukazi Investments (Pvt) Ltd, as joint owner/s of the immovable property known as Lot 1 of subdivision L of Upper Rangemore, in the district of Bulawayo, measuring 4, 8627 hectares and held under Deed of Transfer number 2015/2018.
3. An order authorising and directing the Sheriff of Zimbabwe or his lawful Deputy to execute all documents and instruments or take all requisite actions in place and stead of the 1st defendant, should the 1st defendant fail to comply with paragraph 2 above.
4. Alternatively, an order that within 30 days of this order the immovable property known as Lot 1 of subdivision L of Upper Rangemore, situate in the district of Bulawayo, measuring 4,8627 hectares and held under Deed of Trasfer number 2015/2018 in the name of the 1st defendant, be sold at best advantage by a firm of real estate agents and the net proceeds realised be distributed to the plaintiffs and the 1st defendant according to their respective pro rata contributions towards the purchase price of the property as detailed in sub-paragraphs 1.1 to 1.8 above.
5. Cost of suit as against the 1st defendant on the attorney and client scale."

This claim was expounded in the declaration as follows: The six plaintiffs and 2nd defendant, who is 1st defendant's wife came together as women based in the United Kingdom and other foreign countries and agreed to acquire property and also invest back home. In pursuance of this agenda, the 2nd defendant pitched a possible investment opportunity that entailed paying off the purchase price of an immovable property which 1st defendant was purchasing from the estate of the late Cloete. The 1st defendant had only managed to pay US$5 000 of the total US$80 000 which was the purchase price. He stood to lose the US$5 000 and the

immovable property if he failed to pay the US$75 000 that was outstanding. The six plaintiffs bought into the idea and pulled resources together, US$75 000 in all in the proportions as detailed in the summons. The US$75 000 in cash was then given to the 1st defendant who, although also based in the United Kingdom was in Zimbabwe at the relevant time. The full purchase price was then paid and the plaintiffs also paid the conveyancing and stamp duty fees. The immovable property was then to be transferred into the 1st defendant's name who was to in turn pass transfer to 1st and 2nd plaintiff and 2nd defendant or their nominee Synergy Estates (Pvt) Ltd which was one of the corporate entities used by the plaintiffs in their investment drive. The plaintiffs, on coming together for this purpose, called their "collective" of UK based women, Qoki Zindlovukazi.

The 2nd defendant was to be included in the transfer as her husband's US$5 000 was to be allotted to her as her contribution.

Qoki Zindlovukazi Investments (Pvt) Ltd and Synergy Estates (Pvt) Ltd were later registered as corporate entities and the plaintiffs were to use these corporate entities as the investment vehicles through which the immovable property would be held.

The 1st defendant subsequently reneged on the agreement and has not transferred the immovable property as agreed, offering instead to pay the plaintiffs the US$75 000 they contributed for the purchase of the property but such US$75 000 to be paid as RTGS75 000 in light of the provisions of the "functional currency regulations and laws in Zimbabwe". If this were to be allowed, the 1st defendant would have been unjustly enriched, so the plaintiffs aver.

The defendants sought and were supplied with further particulars before they excepted to the summons. The basis of such exception being that:

"1. To the extent that the plaintiffs admit that when they allegedly pulled their resources together to contribute towards the purchase price, the 1st defendant had already concluded an agreement of sale with the Estate of the Late Cloete, the relief sought of a declaration as framed is bad in law as the plaintiffs could not possibly be joint purchasers in the circumstances.
2. To the extent that the plaintiffs admit that payment towards the purchase price was made on behalf of Qoki Zindlovukazi Investments (Pvt) Ltd for the benefit thereof, the summons and declaration do not disclose a cause of action in favour of the plaintiffs.

3. To the extent that the summons and declaration show that no individual agreements were entered into between the 1st and 2nd defendants and the plaintiffs but allegedly with Qoki Zindlovukazi Investments (Pvt) Ltd, alternatively, for the benefit of Qoki Zindlovukazi Investments (Pvt) Ltd, the summons and declaration do not only not disclose a cause of action but the relief sought is bad in law as no order can be made in favour of parties with no legitimate contract personally with the 1st defendant.
4. To the extent that the plaintiffs aver that whatever agreement was entered into with the 1st defendant was in favour of or for the benefit of either Synergy Estates (Pvt) Ltd or Qoki Zindlovukazi Investment (Pvt) Ltd, and to the extent that the said entities have separate legal standing from the plaintiffs, it is submitted that the plaintiffs have no *locus standi* to institute the proceedings against the 1st and 2nd defendants as one or both institutions are capable of carrying the cudgels for themselves.
5. To the extent that the plaintiffs do not impugn the transfer of the disputed property from the Estate of the Late Cloete to the 1st defendant, the relief sought by the plaintiffs is bad in law as same cannot be granted without first impugning and setting aside 1st defendant's title to the disputed property.
6. The plaintiffs' claims are vague and embarrassing to the following extent:-
    (a) In paragraph 7.4 of their declaration, the plaintiffs' allege that after taking up transfer of ownership of the immovable property in issue, the 1st defendant was to simultaneously or subsequently pass transfer of the same to the 1st and 2nd plaintiffs and 2nd defendant. If that is the case then why are 3rd to 6th plaintiffs cited as such?
    (b) In the same paragraph 7.4 of the plaintiffs' declaration as read with 8.3 and 8.5 of the plaintiffs' declaration, the suggestion is that the agreement was in favour of Synergy Estates (Pvt) Ltd or Qoki Zindlovukazi Investments (Pvt) Ltd. The defendants are embarrassed as to who are the true plaintiffs in this matter. The 3 scenarios espoused by the plaintiffs in their papers are mutually inconsistent and therefore embarrass the defendants in their defence.

Wherefore the 1st and 2nd defendants pray that the exception be upheld and the plaintiffs' summons and declaration be struck off".

At the hearing of the application *Mr Mazibuko* for the defendants submitted that the summons is excipiable because the plaintiffs talk of being co-purchasers

and also that defendants have been unjustly enriched, if there is unjust enrichment they can therefore not be declared co-purchasers.

The plaintiffs ought not to have proceeded in their personal capacities.

Advocate Nkomo for the plaintiffs in response contended that the court must consider the exception based on the 2 pronged approach enunciated by MATHONSI J (as he then was) in *Matewa* v *ZETDC* 2013 (2) ZLR 263 (H).

I propose to look at what it is the court is called upon to do in dealing with an exception and juxtapose that to the excipients' argument in support of the exception in order to determine whether such exception has been properly taken.

MATHONSI J cited with approval DAVIS J's judgment in *Kahn* v *Stuart* 1942 CPD 386 at 391 where the learned judge set out the approach to be taken.

> "… the court should not look at a pleading with a magnifying glass of too high power. If it does so, it (is) almost 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 the 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 point of law or such real embarrassment, then the exception should be dismissed."

Is it a point of law which can dispose of the matter in whole or in part that the plaintiffs pooled resources together when there already was an agreement of sale between the 1st defendant and the Cloete estate and so a declaratur is bad in law as the plaintiffs could not be joint purchasers in the circumstances?

A declaratur is in essence a definitive pronouncement as to the rights of parties. In *Dongo* v *Naik and 5 Others* HH-73-18 MWAYERA J (as she then was) put it thus:

> "It is apparent there is a condition precedent to bringing an application for a declaratory order. The applicant must be an interested person having a substantial and direct interest in the matter and such interest must relate to an existing, future or contingent legal right."

The plaintiffs stated in detail how they pooled resources together to come up with the US$75 000 that was required to pay the US$80 000 for the disputed immovable property.

Their legal rights stem from the fact that but for the US$75 000 contribution the immovable property would not have been bought. The agreement of sale could only be "consummated" by the payment of the purchase price. The plaintiffs stated in their declaration that the 1st defendant stood to lose the US$5 000 he had paid and the immovable property if the US$75 000 was not paid.

I find nothing legally untenable in the claim for a declaratur in the circumstances. The plaintiffs seek to have their rights over the immovable property defined in light of the contributions made towards its purchase. The complexion of the claim does not change by their reference to the fact that the 1st defendant will be unjustly enriched. I am persuaded by counsel for the plaintiffs' submission that the relief sought flows from the general enrichment claim. (*Industrial Equity Ltd v Walker* 1996(1) ZLR 85)

I find nothing excipiable in the relief sought and hold that the first ground of exception is not well taken.

I move on to the second ground of exception. Does the summons and declaration not disclose a cause of action? If it does not that would be a point of law which can dispose of the matter in whole.

What is a cause of action? In *Pebbles* v *Dairiboard Zimbabwe (Pvt) Ltd* 1991 (1) ZLR 4 (H) it was described as follows:

> "simply a factual situation the existence of which entitled one person to obtain from the court a remedy against another person."

The plaintiffs averred that at the time of the agreement to pool resources together, they were acting as a collective of United Kingdom and foreign countries-based ladies under the umbrella of Qoki Zindlovukazi. This was in July 2018 before Qoki Zindlovukazi was incorporated into a legal entity. There is no averment that Qoki Zindlovukazi was a legal entity when the plaintiffs came up with that collective in 2016. Nowhere in the pleadings do the plaintiffs speak of Qoki Zindlovukazi being a legal entity which entered into an agreement with the 1st defendant.

The factual situation giving rise to the relief sought by the plaintiffs' arose after these women, as individuals, pooled resources as detailed in the summons

in order to raise US$75 000. Whether evidence will show that this is what happened is an issue to be determined at trial.

The verbal agreement is no less a contract because it was verbal and it is that agreement that birthed the cause of action.

At paragraph 11 of the declaration the plaintiffs averred:-

> "In breach of the oral agreement between the plaintiffs and himself, the 1st defendant has, despite several demands, declined to pass transfer of ownership of the immovable property, from his name to that of the plaintiff's' nominees jointly with the 2nd defendant".

This averment speaks to the agreement having been between the plaintiffs and the 1st defendant. Without evidence to controvert the averment it remains so and can only be controverted at trial.

The second ground of exception was therefore not properly taken. The third ground of exception is subsumed in the second ground. The defendants appear to read into the plaintiffs' summons and declaration more than what is actually stated therein.

In paragraph 2 of the summons, the plaintiffs seek the registration of their names as joint owners of the immovable property or that such be registered into their nominee, Qoki Zindlovukazi. It cannot be read into this that the plaintiffs are saying the agreement was between "Qoki" and 1st defendant. There is equally nothing legally untenable to seek transfer into a nominee's name.

There is no law that says when a purchaser purchases a property transfer should be in that purchaser's name and no other. The averment by the plaintiffs is not that it is these entities which concluded the agreement with the 1st defendant.

The third ground equally has no merit.

The fourth ground of exception raises the same issue as it seeks to suggest that the plaintiffs have no *locus standi* to bring the action. *Locus standi* is simply the right or capacity to bring an action or to appear in a court. Having stated that the plaintiffs' cause of action arose as a result of the verbal agreement concluded wherein they were to pay US$75 000 towards the purchase price of the property, their right or capacity to bring this action stems from such.

The plaintiffs' heads of argument make reference to the judgment of the Supreme Court in *TBIC Investments and Anor* v *Mangenje & Others* SC-13-18 where BHUNU JA quoted with approval from the learned author Innocent Maja in the book *The Law of Contract in Zimbabwe* at p27 thereof:

> "The doctrine of privity of contract provides that contractual remedies are enforceable only by or against parties to a contract and not third parties, since contracts only create personal rights."

The contract was, as per the pleadings, between the plaintiffs and the first defendant and so it is the plaintiffs who can sue not some other third party. If the defendants have evidence to the contrary then such will be adduced at trial.

The defendants look to the pleadings to see what claim they are to meet and who the plaintiff is. *In casu* the plaintiffs averred that they are the plaintiffs and the basis for such.

As MATHONSI J (as he then was) stated in the *Matewa* case *(supra):*

> "The essence of any claim is located in the pleadings whose function is to inform the parties of the points of issue between them to enable them to know in advance what case they have to meet, to assist the court define the limits of the action and to place the issues on record."

In paragraph 6.1 of the plaintiffs' further particulars the plaintiffs averred that:

> "The contractual obligation of paying the purchase price for the property was performed through the joint contributions of the plaintiffs and the 1st defendant in the ratios detailed in the plaintiffs' declaration. As a matter of fact, the plaintiffs and the 1st defendant by joint contributions purchased the property …"

There is no mention of any other entity or individual in the conclusion and fulfilment of the contractual terms on the part of the plaintiffs. They therefore have *locus standi*.

The fourth ground of exception was therefore not properly taken.

The fifth ground takes issue with the fact that the plaintiffs did not impugn the transfer of the property to the 1st defendant.

Are the plaintiffs supposed to impugn the transfer first before they can seek to be registered as joint owners? Is there a legal impediment to seeking registration as co-owners with one who already has title to the property? The

answer is to be found in the case cited in the plaintiffs' heads of argument, *CBZ Bank Ltd* v *David Moyo & Another* SC-17-18 where UCHENA JA had this to say:

> "… In any event, the registration of transfer in the Deeds Registry or registration of cession at the offices of a local authority or Deeds Registry does not always reflect the true state of affairs. A title deed or registered cession is therefore prima facie proof of ownership or cessionary rights which can be successfully challenged."

To the extent that the learned JA stated that the registration of transfer in the Deeds office does not always reflect the true state of affairs, *in casu* the plaintiffs seek to show that they ought to be registered as co-owners and if they are able to prove that, there is no legal impediment to their being so joined without necessarily first impugning the 1st defendant's title. Their pleadings show that they accept that there is US$5 000 which was paid by the 1st defendant and the transfer of title to him was as per the parties' agreement with the proviso that once he took title he would then register the plaintiffs as co-owners.

That said, I find no merit in the fifth ground of exception.

The sixth ground attacks the pleadings as being vague and embarrassing. This is premised on the fact that transfer was to be passed to 1st and 2nd plaintiffs and 2nd defendant yet the 3rd – 6th plaintiffs were cited as parties to the action.

Is it suggested that the defendants are unable to know what case they are to meet because of this? The plaintiffs set out in the declaration at paragraph 7.4 that transfer was to be passed to 1st and 2nd plaintiffs and 2nd defendant "… and the plaintiffs having agreed among themselves as to how the respective pro rata contributions of the 3rd to 7th plaintiffs (should be 6th) would be treated in relation to the immovable property at issue."

This was what the parties agreed on amongst themselves. Such agreement did not detract from the contribution the 3rd – 6th plaintiffs are said to have made and their citation stems from the agreement itself which saw all 6 plaintiffs pulling resources together as stated in the pleadings.

I therefore find nothing vague and embarrassing with the pleadings unless it is being suggested that the pleadings must have shown what was to happen to the 3rd – 6th plaintiff's contributions? Such would not have been expected and the pleadings would have turned into evidence rather than stating the case which the defendants had to meet.

The other issue relates to the mention of Synergy Estates (Pvt) Ltd and "Qoki" in paragraphs 7.4, 8.3, and 8.5 of the plaintiffs' declaration. The two entities are mentioned as the nominees into which the transfer was to be made, transfer was to be into 1st, 2nd plaintiff and 2nd defendant or their nominees. As stated earlier the mention of nominees did not create doubt as to the plaintiffs' claim.

The detail included in the 7 page declaration has clarity as to the basis of the claim and who the plaintiffs are.

It is one thing for a defendant to be embarrassed by a pleading because such pleading is vague and quite another to be embarrassed not because of the vagueness of the pleadings but because the defendant is being fastidious.

The learned authors, Herbstein and Van Winsen in their book *The Civil Practice of The High Courts and The Supreme Courts of Appeal of South Africa,* 5th Edition, at p636 explain what it entails for a pleading to be vague and embarrassing:

'An exception that a pleading is vague and embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged. A pleading will not cease to be prejudicial merely because it is possible to draft an unexcipiable response to it. Prejudice to a litigant faced with an embarrassing pleading must ultimately lie in an inability properly to prepare to meet the opponent's case"

With that said, is there real embarrassment *in casu*? Are the pleadings such that the defendants do not know what case they are to meet? I think not. I would say the plaintiffs' averments, as observed by MATHONSI J in the *Matewa* case (supra) "contained a lot of prolixity and lengthy, tedious and the pleading is unnecessarily wordy". The case the defendants have to meet is however clear. There is therefore no embarrassment.

Before I conclude, *Advocate Nkomo* made the point that the defendants did not write to the plaintiffs seeking the cause of their complaint to be addressed.

Rule 42 (3) of SI 202/21 provides that:

> "Before filing any exception to a pleading or making a court application to strike out any portion of a pleading on any grounds, the party complaining of any pleading shall, within the time allowed for filing a subsequent pleading, by written letter to his or her opponent state the nature of his or

her complaint and call upon the other party to remove the cause of the complaint within twelve days of the complaint."

I must point out however that this exception was filed before the coming into force of the High Court Rules, *SI*202/21 which now make it peremptory for the party complaining of any pleading to write to the other party first seeking that such other party attend to the complaint. The High Court Rules,1971 were permissive as the word 'may' was used not 'shall'.

This was an option available to the defendants but *Mr Mazibuko* explained that the need to observe time limits dictated against such a course of action. Whilst this sounds lame the issue is whether a party is precluded from taking an exception where they have not written to the other party to remove the cause of the complaint.

In *CMED (Pvt)Ltd* v *First Oil Company & Ors* 2013 (2) ZLR 737 (H) the 3rd defendant wrote to the plaintiffs' legal practitioners and so complied with the provisions of the then r140 (3) of the High Court Rules, 1971. The learned judge therein observed that where an excipient has not sought for further particulars but wrote a letter of complaint, the failure to ask for further particulars did not preclude them from filing an exception but that course of action may have relevance on the question of costs.

In casu, the defendants asked for further particulars which were provided and thereafter excepted to the pleadings. They did not write to the plaintiffs to attend to the cause of their complaint. I am inclined to agree with *Mr Mazibuko* that this course of action has relevance on the issue of costs but did not preclude the defendant from excepting.

That said, it is my considered view that the defendants' exception was not well taken.

In the result, I make the following order:

The exception be and is hereby dismissed, with costs.

Ncube & Partners, plaintiff's legal practitioners
Calderwood, Bryce-Hendrie & Partners, 1st & 2nd defendant's legal practitioners