ZIMBABWE RURAL DISTRICT COUNCIL WORKERS TRADE UNION
versus
MHONDORO NGEZI RURAL DISTRICT COUNCIL
and
WASHINGTON RUZIWA N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 29 September 2020 & 6 September 2021

Opposed Matter – Special Plea & Exception

Mr T. Nyamucherera, for the plaintiff
Mr T.J. Mafongoya, for the first defendant

MUSITHU J:

BACKGROUND

The first defendant filed a combined special plea and exception to the plaintiff's summons and declaration. It implored the court to uphold the special plea and the exception, and consequently to dismiss the plaintiff's claim with costs on the attorney and client scale. The plaintiff opposed both the special plea and the exception. The plaintiff is a trade union established in terms of the Labour Act[1]. It represents the interests of employees of the first defendant, a local authority established in terms of the Rural District Councils Act.[2] The second defendant is a designated agent in the Employment Council for Rural District Councils.

The relief sought by the first defendant herein is founded on the following factual background. On 3 June 2020, the plaintiff issued summons against the first and second defendants. The summons was issued, filed and served concurrently with the declaration. The claim was set out in the summons as follows:

> "The Plaintiff's claim is for:-
> 1. The setting aside of the purported draft ruling by the 2nd Defendant dated 14 October 2019 which was issued out without a Certificate of Settlement as provided for by the Labour Act.
> 2. An order that the 1st Defendant pays the Plaintiff an amount to the tune of US$29 776.07 (Twenty Nine Thousand, Seven Hundred and Seventy Six Dollars and Seven Cents United States Dollars) at the applicable bank rate upon payment and RTGS$10 010.44. This is in terms of an agreement entered into by the parties on the 18th of June 2019 which the 1st Defendant has partially complied with.
> 3. Costs of suit on an attorney and client scale."

[1] [*Chapter 28:01*]
[2] [*Chapter 29:13*]

The plaintiff's claim was further amplified in its declaration. The plaintiff averred that it was locked in a dispute with the first defendant over the non-payment of certain union dues. A conciliation hearing was held before the second defendant, and the parties allegedly agreed to settle the dispute. The settlement terms agreed upon on 30 May 2019 were that: the first defendant would pay a sum of US$33 742.46 and RTGS $10 010.44; the payment was to be made within 8 months of the said agreement. The plaintiff contended that the full payment ought to have been made by 30 January 2020. Only US$3 966.39 was paid as at the time the summons was issued. The remaining balance of US$29 776.07 and RTGS$ 10 010.44 remained unpaid despite demand.

The plaintiff further claimed that notwithstanding the aforementioned agreement, the second defendant allegedly prepared a draft ruling in the plaintiff's favour on 14 October 2019. The ruling was not based on a certificate of no settlement as required by the law. Rather, it was based on the parties' aforementioned agreement. The plaintiff averred that the ruling was irregular as it did not comply with the Labour Act. It was for that reason that it sought an order declaring the ruling null and void.

The Special Plea in Bar: Lack of Jurisdiction

The document does not appear like a plea at all. It looks more like an affidavit. It bears all the hallmarks of an affidavit. It is long, rumbling and rather convoluted. It has a long list of annexures that span from annexure 'A' to 'F2'. Be that as it may, the nub of the first defendant's complaint is that this court lacked jurisdiction to deal with the matter as it was based on a draft ruling issued by the second defendant on 14 October 2019. That ruling was issued in terms of the Labour Act. It was still to be confirmed by the Labour Court in terms of the same Act. The High Court had no business enmeshing itself in a process that was within the bounds of another court created by law to deal with such matters. Whatever issues plaintiff had with the draft ruling had to be dealt with by the Labour Court.

Two applications were allegedly made to the Labour Court by the second defendant for confirmation of his draft ruling. The first was made under LC/H/LRA/367/19. It was allegedly withdrawn after the first defendant filed its opposition. The second was made under LC/H/LRA/389/19. It was still to be disposed of. The first defendant opposed the confirmation proceedings on the basis that the plaintiff was not owed anything. The first defendant claimed that it was the plaintiff that requested the issuance of the draft ruling from the second defendant.

The draft ruling was made following the issuing of a certificate of no settlement by the second defendant.

The first defendant further averred that the alleged agreement alluded to by the plaintiff was of no account. The mutual proposals by the parties that culminated in the alleged agreement were shared during the conciliation proceedings. That agreement could only bind the parties if it was reduced to a certificate of settlement. A certificate of no settlement was issued instead. That certificate of no settlement triggered the draft ruling which must be determined by the Labour Court.

Res Judicata

It was contended that a competent tribunal had already determined the merits of the dispute that the plaintiff had placed before this court. The dispute was concerned with the same parties and based on the same facts. What was left was for the Labour Court to exercise its confirmation jurisdiction. The plaintiff was attempting to run away from the legal issues raised by the first defendant in opposition to the confirmation proceedings. It was engaged in a forum shopping adventure. The court was urged to dismiss the claim with costs on the attorney and client scale.

The Exception

The exception was anchored on two bases. The first was that the summons and declaration did not disclose a cognisable cause of action under the law. The second was that the summons and declaration were so vague and embarrassing to an extent that the defendant was left uncertain of the exact claim it was required to respond to. The first defendant pointed to the following. The plaintiff's claim was based on an alleged agreement with the first defendant. The material terms of that agreement were not set out. There was no allegation that following the conciliation process by the second defendant: the dispute between the plaintiff and first defendant was settled by an agreement in terms of which the first defendant admitted liability to the plaintiff, and made an undertaking to pay US$29 776.07 at the prevailing interbank rate; the first defendant was lawfully indebted to the plaintiff and the origins of such indebtedness.

As regards the allegation of non-payment of certain union dues, the first defendant averred that: the summons and declaration did not plead the basis upon which first defendant was required to levy such union dues; the plaintiff did not plead how those union dues were fixed; the plaintiff's claim did not disclose the period within which the alleged union dues

arose. For that reason, the first defendant submitted that it was embarrassed and unable to ascertain the case it was expected to meet.

Further, the first defendant averred that the sum of RTGS$10 010.44 was allegedly thumb sucked. The basis of claiming that amount was unclear. The claim for US$29 776.07 was also impugned on yet another basis. There was no allegation that the amount did not fall foul of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019, (hereinafter referred to as "S.I. 33/19" or the instrument). The first respondent further contended that the plaintiff ought to have also pleaded that the alleged claim did not violate the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019 (S.I. 212 of 2019). In view of the foregoing, the first defendant averred that it was embarrassed and unable to ascertain the claim it was required to respond to. The summons and declaration were incurably bad, meriting the dismissal of the claim with costs on the attorney and client scale.

Plaintiff's Reply to the Special Plea and the Exception

The plaintiff raised a point in *limine* in response to the special plea. It averred that the special plea relating to jurisdiction was improperly before the court. The special plea could only be raised after a plea on the merits was filed with the court. There had to be a dispute appearing *ex-facie* the pleadings first before the plea of jurisdiction could be raised. According to the plaintiff, that anomaly explained the voluminous documents attached to the special plea as annexures. Those annexures were not properly before the court. They were not accompanied by any deposition under oath. The plaintiff did not have an opportunity to interrogate those documents through cross examination. The plaintiff implored the court to expunge the annexures from the record.

As regards the merits of the special plea, the plaintiff responded as follows. The High Court was endowed with jurisdiction to deal with the matter. Any agreements could be enforced by the High Court. The basis of the plaintiff's claim was an agreement entered into between the plaintiff and the first defendant. The first defendant partially complied with that agreement. The plaintiff was justified to approach the court to enforce full compliance with the terms of the agreement. The first defendant had to be ordered to make payment in terms of the agreement that it signed, and partly complied with. The cause of action was the agreement and not the second defendant's ruling alluded to by the first defendant. In any case, the ruling was a nullity

as it did not comply with the law. The plaintiff averred that in terms of section 93(2) (5) of the Labour Act, a ruling was only made if the parties failed to agree and a certificate of no settlement was issued.

The plaintiff further averred that the second defendant had since withdrawn the application for confirmation. There was nothing pending at the Labour Court. The plaintiff further submitted that the High Court was the only court reposed with powers to grant a *declaratur*. The ruling did not determine the rights of the parties, and neither could it oust the jurisdiction of the High Court to grant a *declaratur.* At any rate that ruling was a nullity. It could not supersede an agreement entered into between the parties. The plaintiff further averred that a certificate of settlement was not a *sine quo non* to the validity of the agreement between the parties. The agreement itself was a complete record of what transpired between the parties. In any case, it was not in dispute that there was an agreement between the parties.

As regards the special plea of *res judicata*, the plaintiff averred that the requirements for such plea were not satisfied. These were: that the matter should be between the same parties; the subject matter must be the same; and the cause of action should be the same. A consideration of the parties disposed of the matter. The second defendant could not have been a party to his own proceedings. There could not be a competent ruling under the circumstances. Further, the issues were dissimilar. The ruling was being challenged. The ruling itself did not determine the rights of the parties since the second defendant did not have adjudicating powers. The draft ruling did not create any rights before it was confirmed. There was therefore no competent ruling to speak of. On those bases, the court was urged to dismiss the special plea with punitive costs.

Coming to the exception, the plaintiff averred that the defects that allegedly afflicted the summons and declaration could have been cured by a request for further particulars or a letter of complaint, thus obviating the need to file an exception. The plaintiff further contended that the averments made in connection with the agreement between the parties was adequate. The rest of the allegations that the first defendant wanted incorporated into the plaintiff's claim were matters of evidence that would be raised at the appropriate time.

The plaintiff further stated that at law what it was required to allege was the existence of an agreement which the first defendant failed to fulfil. The figures referred to in the summons and declaration were based on the same agreement. Any dispute pertaining to those figures were curable through evidence. On the basis of the foregoing, the plaintiff averred that there

was no way the defendants would be embarrassed in the conduct of their defence. The exception was meritless.

Analysis of submissions on the preliminary point regarding the propriety of the Special Plea

The plaintiff submitted that the special plea was irregular, primarily for two reasons, which are: that the special plea ought to have been raised after the filing of a plea on the merits, and that the attachment of evidence to the special plea was highly improper and such evidence ought to be expunged from the record of proceedings.

The first part of the complaint is easily disposed by a consideration of the Rules of Court. Order 21 Rule 137 provides for alternatives to pleading on the merits. The relevant part states as follows:

> ***"137. Alternatives to pleading to merits: forms***
> (1) A party may—
> (*a*) take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case;
> (*b*) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defence as the case may be;
> (*c*) ……;"

Rule 137 accords a litigant the choice of pleading to the merits of a claim or simply providing some other answer to the plaintiff's claim. Rule 138 sets the procedure for the setting down for hearing of the special plea, exception or application to strike out once it has been filed. It states as follows:

> ***"138. Procedure on filing special plea, exception or application to strike out***
> When a special plea, exception or application to strike out has been filed—
> (*a*) the parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with subrule (2) of rule 223;
> (*b*) failing consent either party may within a further period of four days set the matter down for hearing in accordance with subrule (2) of rule 223;
> (*c*) <u>failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so</u> and the special plea, exception or application shall not be set down for hearing before the trial."

What is clear from the construction of rule 138 is that where a special plea has been taken, it must be set down for hearing by consent within ten days, failing which either party may set it down for hearing within a further period of four days. Where the matter is not set down as envisaged, the party that has taken the special plea is expected to plead over to the merits. There is no requirement that a party must have pleaded over to the merits at the outset.

Rule 139 states that where a special plea has been filed, it shall not be necessary for the defendant to plead over to the merits. It is necessary to recite it hereunder.

"***139. Special pleas, etc. to be stated or made at one time: pleading to merits***
(1) A party shall state all his special pleas and exceptions and make all his applications to strike out at one time:
Provided that where an exception or special plea is taken or where application to strike out is made it shall not be necessary to plead to the merits of the case.
(2) A party who pleads over may be allowed the costs of such plea to the merits even where the case is disposed of without going into such merits."

Rule 139 reaffirms the spirit of the law as espoused in rules 137 and 138. A party is only obliged to plead over to the merits where, after taking a special plea, they have not set it down for hearing within the period stipulated in the Rules.

The case of *Cargill Zimbabwe v Culveham Trading (Pvt) Ltd*[3] that the plaintiff's counsel referred the court to is distinguishable from the present case. The issue in that case was whether a dispute existed *ex facie* the pleadings for the court to stay proceedings and refer the matter to arbitration. The plaintiff argued that there was no dispute between the parties while the defendant claimed that there was one. The court found that there was no evidence of a dispute between the parties. The existence of a dispute was the *sine quo non* for declining jurisdiction and referring the matter to arbitration. In my view, the dictum in that case was specific to a special plea to stay proceedings and referring a matter to arbitration.[4] It does not propose a one size fits all approach. In the present case, the issue is about the status of a draft ruling allegedly issued by the second defendant, and whether that ruling should be disposed of by the Labour Court before the plaintiff can approach this court. It certainly can be dealt with differently. In the premises, the court finds no merit in the objection.

The second leg of the first defendant's objection was that the attachment of evidence to the special plea was irregular and such evidence ought to be expunged from the record of proceedings. In their book *The Civil Practice of the Supreme Court of South Africa*[5], authors Herbstein & Van Winsen explained the position regarding the special plea to jurisdiction as follows:

> "The usual method of raising a defence of absence of jurisdiction is by way of a special plea because the lack of jurisdiction is often not apparent from the allegations contained in the

[3] HH 42/06
[4] See on page 2 of the judgment, where MAKARAU J said:

> "From the above, it appears to me that before raising a special plea staying proceedings in this court and referring the matter to arbitration, the defendant must file a plea as to the merits of the matter for the dispute between the parties to arise *ex facie* the pleadings. It further appears to me that any practice short of this will result in the special plea being dismissed as having been prematurely filed."

[5] (5th Ed.), at p612

> pleadings objected to and must, therefore, be proved with fresh matter introduced by way of evidence, which cannot be done in the case of an exception. Where, however, it is apparent *ex facie* the pleading itself that the court concerned has no jurisdiction, the matter may be decided on exception." [6]

In *Doelcam (Pvt) Ltd v Pichanick & Ors*[7], GILLESPIE J reasoned as follows:

> "Since a special plea involves the averment of a new fact, it is susceptible of replication and of a hearing at which evidence on this new fact alone may be led….."[8] (Underlining for emphasis)

From the above authority, it is clear that a special plea of absence of jurisdiction must be proved through the introduction of fresh evidence, which is not apparent *ex facie* the pleadings. Where however, the absence of jurisdiction is apparent *ex facie* the pleading itself, then there would be no need to lead evidence. In fact the defence of absence of jurisdiction can competently be raised by way of an exception in such an instance.[9]

In the present matter, the absence of jurisdiction does not appear *ex facie* the summons and the declaration. This explains the voluminous evidence that the first defendant attached to the special plea. It is the manner in which that evidence was introduced that the plaintiff found objectionable. In the case of ***Brooker v Mudhanda and Another***[10]**,** GOWORA JA (as she then was) made the following remarks:

> "It can therefore be accepted as settled that evidence is necessary when disposing of a matter in which a special plea of prescription is raised. The rationale behind this is that where a party raises a special plea as a defence, new facts arise and because of the introduction of fresh facts which did not appear in the declaration, there is need for a court to hear the evidence of the parties where facts are disputed before making a ruling on the plea." (Underlining for emphasis).

Even though this pertinent observation was made in the context of a special plea of prescription, in my view the principle applies with comparable force to a special plea of absence of jurisdiction and *res judicata*. The two parties hold divergent views as regards: firstly, whether the second defendant issued a certificate of no settlement in the labour dispute between the plaintiff and the first defendant; secondly, the status of the draft ruling allegedly issued by the second defendant; and thirdly whether the second defendant ought to have issued a certificate of settlement to record the alleged agreement between the plaintiff and the first defendant. The court can only determine these issues after hearing *viva voce* evidence from the

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[6] See also PATEL JA in ***National Employment Council for the Construction Industry v Zimbabwe Nantong International (Pvt) Ltd*** **SC 59/16 at pages 5-6**
[7] 1999 (1) ZLR 390 (HC) at p 396
[8] See also Beck's Theory and Practice of Pleading in Civil Actions 6th ed at p 152
[9] See *Viljoen* v *Federated Trust Ltd* 1971 (1) SA 750 (O) at 760B-E
[10] SC 59/18 at p16

parties. That evidence is crucial to the resolution of the two special pleas. In the *Brooker v Mudhanda and Another* case, the court further remarked as follows:

> "The failure by the court *a quo* to call evidence was akin to a court which determines a matter through the application procedure in the face of material disputes of fact. The learned judge in the court failed to appreciate that prescription is a defence and therefore a matter of substance. The court *a quo* and the parties before it, ignored the nature of the pleading that was central to the dispute. Essentially what had to be disposed of was a plea. Its nature did not change by virtue of having the adjective special placed before it. It remained a plea which is a defence and which the court could only determine after hearing evidence unless the facts surrounding the plea were common cause or admitted. The facts were in dispute. It was therefore a matter for a trial cause. It is referred to as a special plea mainly due to its ability to destroy the action or postpone the proceedings."[11] (Underlining for emphasis).

I associate myself with the views enumerated by the court in the above case authority. The court must avoid falling into the trap of deciding the matter through an application procedure in the face of irreconcilable material disputes of fact. What makes it even more unpropitious is that the evidence was not tendered through an affidavit, thus denying the plaintiff an opportunity to confute such evidence in the conventional way.

CONCLUSION

The court therefore finds the plaintiff's objection to the special plea meritorious. The court cannot safely determine the special plea without hearing evidence in light of the parties conflicting positions on the very issues that are germane to the determination of the special pleas. It also follows that the determination of the exception has to be stayed pending the resolution of the question of jurisdiction. The determination of the question of costs must also be stayed. The issue of costs will be considered when the matter is ultimately determined on the merits.

DISPOSITION

In the result, it is ordered as follows:

1. The plaintiff's preliminary objection (pertaining to the attachment of evidence to the first defendant's special plea) is hereby upheld.
2. The Registrar is directed to set the matter down on the next available date for hearing of oral evidence on the special pleas.
3. Costs shall be in the cause.

Lawman Chimuriwo Law Chambers, legal practitioners for the plaintiff
Mafongoya and Matapura, legal practitioners for the first defendant

[11] Supra at page 18