HB 344-16
HC 557-15
XREF HC 1213-14

GUTA RA MWARI
versus
GUTA RA MWARI, TSHABALALA

HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 10 JULY 2015 AND 1 DECEMBER 2016

Opposed Application

Adv P Dube for applicant
Adv H Moyo for respondent

KAMOCHA J: This is an application to strike out instituted by the defendants on 18 December 2014 in terms of rule 141 (a) (ii) and (iii) wanting to strike out plaintiff's summons and declaration on the following grounds:

> "(1) Plaintiff's declaration does not allege that defendant has legal personality;
> (2) Plaintiff accepts in its supply of particulars that the "Tshabalala" put after defendant's name is not part of its name but rather some undefined appellation;
> (3) Resultantly, the two parties which are before the court have one name;
> (4) There being no two parties before the court, there can be no basis upon which a cause of action could accrue and plaintiff's pleadings are consequently vague, evasive, embarrassing, inconsistent, contradictory and prejudicial.
>
> Wherefore defendant prays that those pleadings be struck out with costs."

Nearly three months before the present application on 9 September 2014 defendant had filed a special plea in respect of the same matter in the following terms:

> "SPECIAL PLEA
> Defendant hereby pleads special *(sic)* to plaintiff's claim as follows:
>
> (1) There is no legal entity known as Guta Ra Mwari, Tshabalala, plaintiff has sued a non-existent institution and on that basis, the claim should be dismissed with costs.
> (2) Alternatively, the plaintiff cannot sue itself. The plaintiff ought to have proceeded against specific individuals whom it deemed to be unlawfully using the name GUTA RA MWARI .
>
> Wherefore, Defendant prays that the plaintiff's claim be dismissed with costs. In the event that the special plea is not upheld, the defendant pleads over to the merits as follows ----."

The Plaintiff's response to the application to strike out was firstly a point *in limine* in the following terms:

"*POINT IN LIMINE*

(1) The application falls foul of rule 140 of the High Court Rules in that it was not preceeded by a letter of complainant.
(2) The application falls foul of rule 139 of the High Court Rules in that it was not filed together with the special plea on 9th September, 2014.
(3) The application falls foul of rule 137 of the High Court Rules as it does not seek to strike out specific paragraphs of the pleadings.
(4) The application is misplaced. The failure to put the allegation of legal *persona* is not fatal to the process as amendment will cure the complaint.
(5) The word "Tshabalala" is not there in the pleadings but is art of the heading. What is important is that the pleadings do not include the complaint raised by the defendant. However, an amendment of the mis-described defendant's name will cure the complainant.
(6) The parties are different. The plaintiff was established in 1961 and had its constitution registered in 1974. The defendant on the other hand was established in 2014 and has its constitution registered in January, 2014.
(7) There is nothing vague, evasive, embarrassing, inconsistent, contradictory and prejudicial for defendant who has already pleaded to the plaintiff's claim.

Wherefore plaintiff prays for dismissal of defendant's application to strike out with costs."

This application is founded on the provisions of rule 141 (a) (ii) (iii). It however admits of no doubt that the procedure of bringing such an application to court as laid down in the rules of court was not followed. No letter of complaint as required by rule 140 preceeded the filing of the application to strike out. The rule recites thus:

"140 Before:

(a) Making any court application to strike out any portion of pleading on any grounds: or
(b) Filing any court exception to any pleadings; the party complaining of any pleading may state in a letter to the other party the nature of his complaint and call upon the other party to amend his pleadings so as to remove the cause of complaint,"

It is also not disputed that the application was not filed together with the special plea filed on 19 September 2014 as required by rule 139 (1) which reads as follows:

"(1) A party shall state all his special pleas and exceptions and make all applications to strike out at one time.

> Provided that where an exception or special plea or where an application to strike out is made it shall not be necessary to plead over to the merits of the case." Emphasis added.

It was imperative that this application should have been filed at the same time with the special plea as there was no room to exercise a discretion in the matter.

Further, a look at rule 137 (1) (c) and rule 141 reveal that the defendant should apply to strike out specific paragraphs. Rule 137 (1)(c) recites thus:

"137. Alternative to pleading to merits:

(1) A party may—
(a) -----.
(b) -----.
(c) Apply to strike out any paragraphs of the pleading which should be properly struck out."

What should be properly struck out at any stage of the proceedings is laid down in rule 141 as follows:

> "141 At any stage of the proceedings the court may—
>
> (a) Order to be struck out or amend—
> (i) Any argumentative or irrelevant or superfluous matter in any pleadings;
> (ii) Any evasive or vague and embarrassing or inconsistent and contradictory matter stated in any pleading;
> (iii) Any matter stated in any pleading which may tend to prejudice, embarrass or delay the fair trial of any action;
> (b) Order either party to furnish further particular."

In my view this application is not supported by the above rules of court and is therefore strange and irregular.

In the light of the foregoing, I would uphold the point *in limine* and dismiss the application to strike out with costs.

Phulu and Ncube, plaintiff's legal practitioners
Messrs Calderwood, Bryce Hendrie & Partners, defendant's legal practitioners