CHIDO MATEWA
versus
ZIMBABWE ELECTRICITY TRANSMISSION AND
DISTRIBUTION COMPANY (ZETDC)

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 10 September 2013& 25 September 2013

C. Mcgown, for the plaintiff
Ms *R.P. Shuva,* for the defendant

Exception

MATHONSI J: The defendant, who is the excipient in this matter, is an incorporation, charged with the transmission and distribution of electricity in this country it being a subsidiary of ZESA Holdings Limited. The plaintiff is a commercial farmer performing her trade at subdivision 1 of Dagbreek farm in Nyazura, where she is engaged in the growing of tobacco and sugar beans.

The plaintiff sued out a summons out of this court against the defendant for payment of US$ 500 000-00 for loss of 30 hectares of tobacco crop and 20 hectares of sugar beans crop as well as US $200 000-00 being damages for consequential loss together with interest thereon and costs of suit.

In her declaration, the plaintiff averred that about October 2009 the defendant wrongfully and unlawfully confiscated electrical equipment at her farm in the form of meter boxes, cables, MCBs and other electrical gadgets. She averred further that in January 2010 and following an investigation into the circumstances of the removal of the electrical equipment, the defendant undertook to reinstate electricity at the plaintiff's farm upon a realisation that the plaintiff required it to irrigate her 30 hectares of tobacco and 20 hectares of sugar beans. The plaintiff averred that the defendant advised her to continue with her activities as an instant installation of power was being undertaken. However the defendant disregarded its obligation to install electricity which was wrongful as a result of which her tobacco and sugar beans crops wilted due to moisture stress resulting in loss. In para 9 of the declaration the plaintiff specifically averred that:

> "9. Defendant's conduct was wrongful and unlawful and resulted in serious loss to the plaintiff."

She therefore craved for compensation a foresaid.

The defendant excepted to the plaintiff's summons a follows:

> "The defendant enters an exception to the plaintiff's summons based on the following grounds:
> 1. The summons and declaration served on it does (sic) not state a true and concise statement of the nature, extent and grounds of the cause of action more specifically in that it omits an essential element of the cause of action. The summons does not specify whether the claim arises from a contractual obligation or delictual or any other basis on the part of (the) defendant.
> 2. (The) defendant therefore prays for a dismissal of the plaintiff's claim on the basis that the summons does not disclose a cause of action."

Ms *Shuva* for the defendant submitted that the plaintiff's summons does not disclose a cause of action as it does not specify whether the claim arises from a contractual obligation or a delictual one. The averment that the defendant's actions were wrongful and unlawful was not enough to found a cause of action. In her view in order to succeed in a suit for patrimonial loss under the acquilian action "the party must plead and prove" that the defendant committed a wrongful act which resulted in actual loss.

Therein lies the defendant's problem. The determination of whether a claim is excipiable or not cannot be permissed on proof of an averment. Proof relates to evidence which is the province of trial and not an exception.

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. See Beck's *Theory and Principles of Civil Actions*, 5th ed at p32. To that extent pleadings are required to be drawn in summary form, must be brief and concise and must state only relevant facts and not evidence.

The seminal judgement of DAVIS J in *Kahn* v *Stuart* 1942 CPD 386 at 391 sets out clearly how the court should approach the pleadings;

> "--- 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 excepient can satisfy the court that there is such point of law or such real embarrassment, then the exception should de dismissed."

It is crucial to note that a pleading is excipiable on the ground that it does not disclose a cause of action if no possible evidence led on the pleading can disclose such cause of action. As stated by Beadle AJ (as he then was) in *McKelvey* v *Cowan N.O* 1980 (4) SA 525 (Z)

> "It is a first principle in dealing with matters of exception that if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action. That is the manner in which I approach this case."

The plaintiff makes the statement in her declaration that the defendant removed electrical equipment from her farm wrongfully and unlawfully. She also states that at some stage, after some engagement, the defendant undertook to restore electrical power on realising that she needed it for cropping purposes. It further advised her to continue with her farming activities on the promise that electricity would be restored without delay. Notwithstanding all this, the defendant wrongfully failed to provide power resulting in loss of crops.

There is no doubt that the plaintiff's averments contain a lot of prolixity, are lengthy, tedious and the pleading is unnecessarily wordy. Indeed the declaration could have been couched in more elegant terms than it is. That however does not detract from the fact that the pleading bellies all the necessary averments. If evidence can be led to prove the wrongfulness and unlawfulness of the defendants' conduct and to prove the existence of an undertaking made by the defendant to restore electricity at the plaintiff's farm and the attendant knowledge that such was needed for irrigating crops, then a cause of action would be established. For that reason, the pleading cannot be said to be excipiable: *Mc Kelvey* v *Cowan* (*supra*)

I am not persuaded that the exception taken by the defendant has the object of settling the case or part of it in a cheap and easy manner or that it has the object of protecting the defendant against an embarrassment so serious as to merit the costs of an exception: *Keeley* v

Heller 1903 TS 101. If anything the exception appears designed to confound the plaintiff. It is without merit.

Having come to that conclusion, Ifind it unnecessary to deal with the objection taken by Mr *Mcgown* for the plaintiff that the exception was not taken in accordance with r 140(1) (b) of the High Court of Zimbabwe Rules 1971, in that no letter of complaint was written to the plaintiff to address the source of complaint about the pleading: See also Herbestein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, 3rd ed, p338.

The pleading is simply not excipiable on the basis relied upon the defendant. There would have been nothing to amend or rectify as envisaged by r 140(1)(b).

While it is not the intention of the law to discourage parties from taking exceptions if such exceptions may result in the reduction of costs and the shortening of proceedings: *Mc Kelvey* v *Cowan N.O (supra); Mnangagwa* v *Alpha Media Holdings (Pvt) Ltd* and *Anor* HH225/13, I am of the view that this exception is thoroughly without merit and should not have been taken at all.

It is remarkable that this court is now increasingly being called upon to adjudicate over so many of these exceptions which are devoid of merit and appear intended to delay proceedings. Invariably excipients are approaching the court frequently praying for a dismissal of claims, as has been requested by the defendant *in casu*, when the proper remedy would be for the plaintiff to be directed to amend the impugned pleading. Where an exeption of this nature is upheld, the plaintiff would be allowed to amend the pleading; *Levitan* v *Newhaven Holiday Enterprises* CC 1991 (2) SA 297; *Marney* v *Watson and Anor* 1978 (4) SA 140, *Herbstein* & *Van Winsen op cit* p341. I therefore take the view that the defendant must face the consequences of its ill – conceived exception which has unnecessarily put the plaintiff out of pocket.

Accordingly the exception is hereby dismissed with costs.

Venturas & Samukange, plaintiff's legal practitioner
Messrs Muza &Nyapadi, defendant's legal practitioners