AFRICAN BANKING CORPORATION OF ZIMBABWE LIMITED
versus
MUNHENGA ENTERPRISES PRIVATE LIMITED
and
ECOBANK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 17 March 2014, 24 March 2014

Opposed Application-Exception

O. Mutero for the plaintiff
C. Kwirira, for the 1st defendant
T.I. Gumbo, for the 2nd defendant (excipient)

CHIGUMBA J: The plaintiff issued summons against the defendants, on 23 July 2013, for an order compelling the first and second defendants to deliver to it certain property in a functional state, payment of US$1000-00 per month jointly and severally with effect from 1 February 2013 to the date of delivery of the property, and costs of suit on a legal practitioner client scale. In its declaration, plaintiff averred that the first defendant is the owner of a property known as stand 360 Mopani Drive in Chiredzi, and that on or about March 2011, the plaintiff and the first defendant entered into a lease agreement in terms of which the plaintiff leased these premises from the first defendant for a five year period, at a monthly rental of US$2 520-00. In terms of clause 11 of the parties' agreement of sale, the plaintiff could, at its own cost and expense effect, additions and alterations to the leased property with the first defendant's consent provided that the plaintiff had the right to remove the non-permanent improvements effected by it when the lease terminated.

The plaintiff averred that it installed the following non permanent improvements on the leased premises at its own cost:

(a) Furniture and Fittings
    (i) All the teller counters on the property

(ii) Writing and brochure counters

(iii)Television and advertisement panels

All valued at US$13 674-00

(b) Partitions and Frames

(i) Half demountable wall partitions

(ii) Glazed partition walls

(iii) Bulkheads

All valued at US$7 389-00

(c) All the air conditioning units on the property valued at US$26 810-00

The total value of the improvements is US$47 873-00. The plaintiff terminated the lease agreement and vacated the premises around May 2012. At the time of the termination of the lease agreement, the plaintiff averred that it was entitled to remove and collect all the property listed above and to restore the premises to their former state, but was barred from doing so by the first defendant. The first defendant subsequently leased the premises to the second defendant, which is currently in possession of the disputed property and is enjoying the use thereof. The plaintiff claims payment of US$1000-00 per month from the first and second defendants jointly and severally the one paying the other to be absolved for the use of its property as listed above, with effect from 1 February 2013 to the date of delivery of the property to it.

Clause 11 of the lease agreement reads, in part:

> "the lessee shall not make any additions and alterations whatsoever to the premises without the prior written consent of the lessor…all additions and alterations of a permanent nature made by the lessee for the benefit of the business of the lessee shall become part of the premises and shall remain the property of the lessor at the termination of the lease on condition that the lease runs to full term and when termination before full term is caused by default or initiation on the part of the lessee".

The second defendant entered appearance to defend the summons on 30 July 2013, and, on 30 August 2013, filed an exception to the plaintiff's declaration on the grounds that it does not disclose a cause of action against it, more particularly that no unjust enrichment is established against it, and that no privity of contract exists between it and plaintiff. In its heads of argument, the second defendant, the excipient submits that Zimbabwean law recognizes the general action of unjust enrichment and relies on the case of *Industrial Equity* v *Walker* 1996 (1) ZLR 269 (H), as authority for that proposition. It denied that it was unjustly enriched in any way

as the premises in issue belong to the first defendant, which is accruing value from renting the premises to it. The second defendant submitted that the requirements of unjust enrichment have not been satisfied and prayed for dismissal of the plaintiff's claim against it. In its heads of argument, the plaintiff averred that the second defendant has been cited as a party to the proceedings because it is currently in possession of the property that the plaintiff seeks to recover, and is benefitting from the use of the property. The plaintiff denied that its declaration is vague, and submitted that the exception is not well taken, is frivolous and vexatious, and is an abuse of court process. The plaintiff relied on the case of *Leversteirn* v *Leversteirn* 1955 (3) SA 615 LSR. At the hearing of the matter, the first defendant, though represented, advised that it would abide by the court's decision and did not wish to argue the matter.

Order 21 of the rules of this court provides as follows:

"**ORDER 21**
SPECIAL PLEAS, EXCEPTIONS, APPLICATIONS TO STRIKE OUT AND APPLICATIONS FOR PARTICULARS
137. Alternatives to pleading to merits: forms
(1) A party may—
(*a*) …
(*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*) …
(*d*)…
(2)…"

The second defendant excepted to the plaintiff's declaration in its entirety. The question that the court must answer is not whether the plaintiff's declaration established the requirements of unjust enrichment as suggested by the second defendant. The question for consideration is whether the exception is properly taken, whether the plaintiff's declaration in its entirety fails to disclose a cause of action as against the second defendant. It is trite that the object of a summons or a declaration is to inform the defendant of the cause of action and the facts upon which the claim is based. See Herbstein & Van Winsen – *Civil Practice of the Superior courts of South Africa*, 4th ed pp395, *Haskel* v *Lebedina Schechter* 1930 WLD 296, *Erasmus* v *Slomonitz* 1938 TPD 238, *Pietpot Gieters Rust White Lime Co* v *sand & Co* 1916,TPD 687, *Bulawayo Pattern Makers (Pvt) Ltd* v *Motor & Agri Equipment (Pvt) Ltd* HB-32-98.

In order to uphold an exception such as the one raised by the second defendant, the court must consider whether the plaintiff''s claims as formulated in the summons and the declaration

are set out clearly, concisely, both in fact and in law. If the claims are not clear or concise in fact and or in law, the exception must be upheld. In other words, if the averments contained in the plaintiffs summons and declaration disclose:

(a) Sufficient particularity

(b) Are not contradictory and mutually destructive;

(c) A cause of action

(d) Are appropriate in law, then the exception ought to be dismissed and the matter proceeds to trial. See *Benson* v *Robinson* 1917 WLD 126, *Kali* v *Incorporate General Insurance (Pvt) Ltd* 1976 (2) SA 178.

According to Herbstein & Van Winsen *Civil practice of the Superior Courts in South Africa,* 2nd ed, at pp 314-315:

> "The true object of an exception is either, if possible to settle the case or at least a part of it, in cheap and easy fashion or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception".

The second defendant is being sued in the alternative, jointly and severally with the first defendant, to answer a claim for delivery of property that is currently in its possession pursuant to a lease agreement between it and the first defendant. In my view, the summons and declaration contain sufficient particularity to enable the second defendant to plead. There is nothing vague or embarrassing about the plaintiff's claim. It is not contradictory, and is appropriate at law. The plaintiff's claim, as against the second defendant, is that it is benefitting from the use of the property unjustly. The second defendant may plead lack of privity of contract, or lack of evidence of unjust enrichment. What it may not do, is to fail to answer the plaintiff's claim, unless the claim is too vague and embarrassing for it to know of the cause of action against it. In my view, the cause of action is as clear as crystal, sufficiently so to enable the second defendant to plead.

It follows that the exception was not properly taken, and it is dismissed for the reasons set out above. The second defendant is to bear the costs of this application.

Atherstone & Cook, excipient's legal practitioners
Sawyer & Mkushi, the plaintiff's legal practitioners
Kwirira & Magwaliba, the 1st defendant's legal practitioners