ZFC LIMITED
versus
KETTEX HOLDINGS (PRIVATELIMITED)
and
IAN RONALD COOMER
and
MIKE WEEDEN
and
ADAM SELBY

HIGH COURT OF ZIMBABWE
MATANDA-MOYOJ
HARARE, 2 & 18 March 2015

OPPOSED MATTER

Ms R Bwanali, for the plaintiff
O. Chieng, for the defendants

MATANDA-MOYO J: This matter was initially set down for 31 October 2013. The parties sought a postponement indefinitely on the pretext that they were negotiating a settlement. On 2 March 2015 this matter was re-enrolled on the opposed roll. Nothing showed that the parties had moved from their initial position. Legal practitioners should be candid with court. If an indulgence is given by the court to give room for negotiation, especially when such indulgence came as a result of a request by the parties it is desirable that at least there be proof on the day of appearance that such request was genuine. Otherwise what would stop ill prepared practitioners from simply hiding behind the need to negotiate to get unwarranted postponements resulting in a creation of backlog. I am a bit worried that in the present matter I find no basis for the previous postponement.

The plaintiff issued summons against the defendants jointly and severally, for the payment of $268 654-30 plus interest at the prescribed rate plus costs of suit. The defendants requested further particulars as to the sort of agreement that existed between the parties. The

plaintiff's answer was to annex the agreement between the parties. The plaintiff respondent in the positive to the request for further particulars that:

"It was the stock supplied to the first defendant on consignment basis"

After receiving the further particulars the defendant filed an exception to the summons and a motion to strike out. The defendant alleged that the declaration did not allege any basis on which the defendant was obliged to remit any funds to the plaintiff. The defendant however, acknowledged that a reading of further particulars supplied by the plaintiff show that the duty to remit money to the plaintiff by the defendant arose out of a stockiest agreement. The defendant submitted that this averment is contradicted by the contents of pa 13.1 of the declaration which is to the effect that the plaintiff relies on an alleged credit sale of unspecified goods on unstated terms. The plaintiff contended that the claim by the plaintiff is not clearly articulated and has contradicted itself as regards the only inference that may be drawn in its favour. The defendant further alleged that the contents of para 10 of plaintiff's declaration are ambiguous, redundant and confusing and thus embarrass the defendants.

The defendants prayed for the dismissal of the plaintiff's claim with costs or alternatively that para(s) 10 and 13.1 of the declaration be struck out with costs.

The defendants also submitted that the plaintiff's declaration is not clear and concise on the cause of action. On one hand it looks like the claim arose from a stockiest agreement between the parties. On the other hand a reading of para(s) 13 of the plaintiff's declaration suggest that the cause of action arose from a credit sale. Such pleadings, defendants submitted, embarrasses them and ought either to be amended or stuck out.

The plaintiff denied that its pleadings were vague and embarrassing. The plaintiff submitted that the defendants requested further particulars which further particulars were provided and had the effect of curing any embarrassment on the previous pleadings. The plaintiff prayed for the dismissal of defendants exception.

The relevant part of the declaration for purposes of this judgement to which the exception is directed is para(s) 7,8,9,10 and 13.1 of the Declaration that reads as follows;

> "7. Between April 2011 and October 2011, Defendant sold fertilizer and chemicals in the sum of US$53 550-30 and did not remit the proceeds thereof to Plaintiff.

8. In the premises, 1st defendant is liable to pay plaintiff the sum of $53 550-30.
9. 1st defendant has also failed to account to plaintiff for fertilizers worth US$211 756-00 and crop chemicals worth US$3 348-00 and despite repeated demand, and in the result, 1st Defendant is liable to re-imburse the Plaintiff the value of the unaccounted fertilizer and crop chemicals in the total sum of US $215 104-00.

13. The 2nd, 3rd and 4th Defendants carried on the business of the 1st Defendant recklessly and/ or with gross negligence and with such knowledge, incurred liabilities on behalf of 1st Defendant which the 1st Defendant has failed to settle in that;

13.1. They purchased on credit for resale massive stocks from the plaintiff and various other creditors to third parties and failed to remit payments to the plaintiff and other creditors upon being paid by the third parties".

The basis of the exception is that the plaintiff's declaration is vague and embarrassing and further that it is contradictory. The defendants submitted that there is a conflict in the plaintiff's declaration on whether transaction was a stockiest agreement or a credit sale and, such conflict is unreconciliable. The further particulars as provided by the plaintiff failed to resolve or cure such conflict.

Rule 11(a) of this court's rules provides;

"11. Contents of summons. Before issue every summon shall contain:
(c) a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action"

Rules 109 and 110 deals with what must be provided for in a declaration. These rules simply mean that the pleadings should not be vague and embarrassing. MaCreath J in the case of *Trope and Others* v *South African Reserve Bank* (641/91) 1993 ZASCA 54 discussed the meaning of vague and embarrassing in the context of exception. He said at p211

> "The ultimate test, however must in my view still be whether the pleading complies with the general rule enunciated in r 18(4) and the principle laid down in our existing case law.
> An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleadings lacks particularity to the extent that it is vague. The second is whether the vagueness caused embarrassment of such a nature that the excipient is prejudiced (Quinlan v MacGregor 1960(4) SA 383D at 393E-H). As to whether there is prejudice, the ability of the excipient to produce an exception proof plea is not the only, nor indeed the most important, test – see the remarks of Conradie J in *Leviton* v *Newhaven Holiday Enterprises* CC 1991 (2) SA 297 (c) at 298 G – H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not to be taken by surprise may well be deferred.
>
> Thus it may be possible to plead to particulars of claim which can be read in any one of a

> number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing – See *Parow Land (Pty) Ltd* v *Schneider* 1952(1)SA. 15 (SWA) at 152 F – G and the authorities there cited.
>
> It follows that averments in the pleadings which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing, one can but be left guessing as to the actual meaning (if any) conveyed by the pleading"

Applying the above principle in the present case, I am satisfied that there is a serious contradiction in plaintiff's declaration. I am also not sure whether the plaintiff relies on a stockiest agreement or is suing in contract. In order to meet the requirements of clarity the plaintiff could have sued in the alternative. But it has not done so. It is trite that pleadings which are contradictory and not pleaded in the alternative are vague and embarrassing. See *Hopday* v *Adams* 1949(2) SA 645(C) *Credit Corporation of South Africa Ltd* v *Brow* 1970(1) SA 18(C).

I agree with the plaintiff's submissions that further particulars do form part of the pleadings. Such further particulars in order to cure the initial defect must clear the vagueness and ambiguity formerly created by the declaration. I do not believe the further particulars in this instance have satisfied the test. A reading of the declaration together with the further particulars provided still left the contradictions. The plaintiff's cause of action still arose from a stockiest agreement and also from a credit sale.

However, the plaintiff submitted that ever if the pleadings remained vague and embarrassing after supplying further particulars the remedy was for defendants to seek further and better particulars and not to seek exception. The defendants referred me to the case of *Rheeder* v *Spence* 1978(1) SA 1041(R) where the court held that:

> "the unspecified details of the contract are questions of fact capable of determination by evidence".

In *Edwards* v *Woodnutt*, No. 1968 (4) SA 184(R) the court said,

> "The practice of this court is to employ the procedure of excepting for those objections which go to the root of the declaration and allege that the declaration does not describe a cause of action at all"

I therefore agree with both parties that the exception can only force an amendment. The

upholding of the exception is not such as would lead to the dismissal of the matter. The case referred to by the plaintiff in its heads is instructive on the matter. See *Adler* v *Elliot* 1988 (2) ZLR 283 (SC) where the court said;

> "A claim should not be dismissed on an exception where it is possible that the party affected may be able to allege further facts that would disclose a cause of action. See *Green* v *Lutz* 1966 RLR 633 (GD) at 641A. He should be given leave to amend within a specified period, it so advised. Such an opportunity was not afforded to the plaintiff".

In the result the exception is well taken and I order as follows;

1). That the plaintiff be and is hereby given an opportunity to amend its pleadings within 10 days of receipt of this order.

2). Costs be in the cause.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Coghlan, Welsh & Guest, defendant's legal practitioners