ALLAN WEBB AND 42 OTHERS
versus
LOCAL AUTHORITIES PENSION FUND
and
BULAWAYO CITY COUNCIL

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 22 June 2017 & 5 July 2017

Special plea

L Madhuku, for the plaintiffs
N Mutasa, for the defendant

DUBE J: The second defendant has filed a special plea to the plaintiffs' claims.

The plaintiffs' claims are based on the following synopsis. The first defendant is the Local Authorities Pension Fund, a registered Pension Fund. The second defendant is the plaintiffs' former employer. The plaintiffs brought an action for payment of $1 570 783.20 being total benefits due and payable to them by the first defendant in terms of pension contracts entered into in respect of their retirement from service of the second defendant. Each plaintiff entered into an employment contract in terms of which he became a member of the first defendant whilst the second defendant, (hereinafter referred to as the defendant), was a participating employer. Each of the plaintiffs made contributions to the first defendant through the participation of the defendant. It was a term of the pension contract that the first defendant would pay to each plaintiff pension benefits on retirement. The plaintiffs state that the first defendant has failed to pay to each plaintiff pension benefits due in breach of the pension contracts. The plaintiffs aver in their declaration that the second defendant has been joined out of necessity and in the interests of justice and that the determination of the issues between the parties requires the participation of the defendant. It is this statement that the defendant takes issue with.

The defendant's special plea is based on the following points. The plaintiffs' prayer for costs is bad at law because there is no substantive relief that is being sought against it.

The prayer is without foundation and finds no support in the declaration in that whilst para 17 of the declaration affirms that the defendant has been joined out of necessity and in the interests of justice, there is no cause of action against it and it cannot plead in circumstances where there is no cause of action against it.

At the hearing of the special plea, Mr *Madhuku* took a preliminary point. He asked the court to consider whether the procedure of a special plea adopted by the defendant was the proper procedure or that of an exception. Mr *Mutasa* appearing on behalf of the defendant conceded that the objections to do with absence of a cause of action are ordinarily dealt with by way of exception. He submitted that while the objection relating to the absence of a cause of action ought to have been taken by way of an exception, the adoption of a wrong procedure cannot on its own be a basis for dismissal of the defendant's objection. He contended that the nature of the prejudice in a case such as this does not go beyond the inability to lead evidence. He submitted that because the defendant proceeded by way of special plea, the plaintiff is in a better position than he would have been if the exception procedure had been adopted because the plaintiffs can still lead evidence which they would not have been able to do had defendant proceeded by way of an exception. He urged the court to deal with this case on its own circumstances. The defendant argued that where the adoption of a special plea procedure instead of an exception is unlikely to cause prejudice to the plaintiff such a course is not fatal to the case. The defendant referred the court to the case of *National Employment Council for the Construction Industry* v *Zimbabwe Non Tong International (Pvt) Ltd* SC 59/15 for that proposition.

Before I determine the points of law raised by the parties, it is apposite that I give a brief overview of the procedures questioned. Herbstein and Van Winsen in *The Civil Practice of the High Courts of South Africa* 5th Ed at p 630 defines an exception as follows,

> "An exception is a pleading in which a party states his objection of the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action or the specific defence relied upon."

The authors define a special plea on p 598 as follows,

> " a special plea is one that does not raise a defence on the merits of the case but, as its name implies, sets up some special defence which has as its object either to delay the proceedings (dilatory plea) of to object to the jurisdiction of the court (a declinatory plea) or to quash the action altogether (a peremptory plea).''See *Brown* v *Vlok* 1925 AD 56.

PATEL JA in the *NEC* case relied on a crisp definition of the procedures given in the earlier edition of Herbstein and van Winsen, *The Civil Practice of the Supreme Court of South Africa* , 4th ed and quoted from pp471-72 as follows,

> "The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the declaration. The defence he raises on exception must appear from the declaration itself; he must accept as true the allegations contained in it and he may not introduce any fresh matter. Special pleas, on the other hand, do not appear *ex facie* the declaration. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the declaration, and those facts have to be established by evidence in the usual way. Thus, as a general rule, the exception procedure is appropriate when the defect appears *ex facie* the pleading, whereas a special plea is appropriate when it is necessary to place facts before the court to show that there is a defect. The defence of prescription appears to be an exception to this rule, for it has been held that that defence should be raised by way of special plea even when it appears *ex facie* the plaintiff's particulars of claim that the claim has prescribed, apparently because the plaintiff may wish to replicate a defence to the claim of prescription, for example an interruption."

In our jurisdiction, the filing of an exception and a special plea is made possible by Order 21 r137 (1) which reads as follows;

> "137(1)
>
> 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;
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> (b) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defence as the case may be;
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> (c) apply to strike out any paragraphs of the pleading which should properly be struck out;
>
> (d) apply for a further and better statement of the nature of the claim or defence or for further and batter particulars of any matter stated in any pleading, notice or written proceeding requiring particulars.
>
> (2) a plea in bar or abatement, exception, application to strike out or application for particulars shall be in the form of such part of Form No. 12 as may be appropriate *mutatis mutandis*, and a copy thereof filed with the registrar. In the case of an application for particulars, a copy of the reply received to it shall also be filed."

These authorities reveal that before a defendant files his plea, he is permitted to file an exception or special plea in terms of r 137(1). Procedures for filing of exceptions and pleas allow a party to raise technical defences that are capable of disposing of the matter without the need to go to trial on the merits of the matter. An exception to a pleading may be taken

when the pleadings are vague to the extent that it is unfeasible to determine the nature of the claim or defence brought and where facts do not disclose a legally recognisable cause of action or defence. Objections raised as exceptions must relate to the cause of action. The rationale behind the exception procedure is that a party armed with a technical defence should not be required to answer a claim which has no basis at law and should be able to avoid the leading of unnecessary evidence at trial where he stands to be prejudiced by such a claim. An exception is an objection to another party's declaration. The exception is required to arise from the contents of the declaration, and must appear *ex facie* the four corners of the declaration or pleading. A litigant raising an exception may not go outside the declaration. The purpose of an exception is to have the claim delayed, withdrawn or dismissed. In some instances rectification or amendment of the declaration may be achieved or ordered by court.

A party wishing to raise an objection that is not apparent *ex facie* the declaration is required to file a special plea. Special pleas are usually not apparent on the face of the declaration. The facts giving rise to a special plea derive from outside the declaration. They advance new matter. A special plea has nothing to do with the merits of the matter. Facts have to be placed before the court to demonstrate the existence of a defect in the claim. A special plea sets out a basis for which a trial cannot proceed and raises technical defences that once raised may have the effect of defeating the other party's claim and operates as a complete defence. It raises new facts, is susceptible to be replied to and hence evidence may be led in order to prove the special plea. Examples of special pleas are *lis pendens, locus standi,* settlement, arbitration, prescription, non-joinder, misjoinder, *res judicata* and absence of jurisdiction.

The major differences between a special plea and an exception are that the exception has to be apparent *ex facie* the record and no facts may be adduced. The pleaded facts are accepted as they are. In the case of a special plea, there is need to adduce further evidence. This is necessitated by the fact that the special plea is not always apparent *ex facie* the declaration. Both types of objections have the effect of disposing of the matter without the need to delve into the merits of the matter.

The facts in the *NEC case (supra*) concerned an appeal matter where an exception had been filed instead of a special plea. The objections raised in the High Court were that the court lacked jurisdiction as the claim concerned a labour matter, prescription and that the rate of interest claimed exceeded the prescribed interest rate. The High Court entertained the exception and dismissed the appellant's claim. The appellant took the point on appeal that

the court had erred in entertaining a challenge to its jurisdiction by way of an exception as opposed to a special plea. The appeal court upheld the High Court decision and held as follows,

> "…..the jurisdiction of the High Court to adjudicate the claim was impliedly asserted and presumed in the declaration. Thereafter, the question of the court's jurisdiction was fully ventilated in the respondent's requests for particulars and the appellant's responses thereto. In effect, the appellant had substantially replicated to the respondent's special defence of lack of jurisdiction. In these circumstances, it seems to me that there was nothing further that either party might have adduced, whether by way of further pleadings or through fresh evidence, to enable the court to determine the propriety or otherwise of its jurisdiction over the matter. Moreover, I do not perceive that the appellant was prejudiced in any fashion by the matter having been allowed to proceed on exception rather than by way of special plea. Consequently, it cannot be said that the court *a quo* erred in entertaining a challenge to its jurisdiction rose through an exception.''

The court appeal upheld the decision of the lower court and allowed the special plea to proceed on the basis that the jurisdiction of the court was impliedly asserted in the declaration and that the basis of the special plea had been fully ventilated in the respondent's requests for further particulars and the appellant had been afforded adequate opportunity to respond to the objection. The court was of the view that there was no further evidence needed to be adduced and hence the appellant was not prejudiced by the procedure adopted. The contention that what matters is the substance and not the form of an objection brought under r 137(1) was rejected by the superior court.

The appeal court took the opportunity to examine the law applicable in South Africa and remarked that the tendency in Zimbabwe as opposed to the position in South Africa is to retain the distinction between exceptions and special pleas. Commenting on r 137 (1) the court stated as follows;

> "As for the formulation of r 137 (1) itself, there can be no doubt that it explicitly differentiates between special pleas on the one hand and exception on the other. Moreover, r 137(2) clearly stipulates that different forms are to be utilised when one or the other procedure is followed. This tends to support the argument that r 137 (1) is to be strictly applied and that any deviation therefrom is to be visited with an adverse ruling. The critical question is whether this position invariably applied in each and every case irrespective of the particular circumstances of a given case. In the absence of clear guidance from the provisions of r137 per se, but having regard to the authorities on the subject, I am inclined to adopt a negative answer to that question''

The appeal court relied on the case of *Viljoen* v *Federated Trust Ltd* 1971 (1) SA 750 (0) for the proposition that where the absence of jurisdiction is apparent *ex facie* the pleading concerned and the defence can be established without the introduction of fresh matter, it is permissible for the objection to jurisdiction to be raised by way of exception. The court also

cited with approval the case of *Edwards* v *Woodnutt N.O* 1968 (4) SA (R) where the court allowed an objection over *locus standi* to proceed as an exception on the basis that all facts giving rise to the objection appeared in the declaration and found that no prejudice was caused by the form of the procedure adopted.

Both the *Viljoen and Edwards cases* involved defendants who brought exceptions when they ought to have filed special pleas. The reason why the courts allowed the objections to proceed as exceptions is because the objections were apparent on the face of the declarations and hence it was competent to bring the objections either as exceptions for the reason that the objections were apparent *ex facie* the declaration or as special pleas because of the nature of the objections. In addition, the courts were alive to the need to ensure that the other party does not suffer any prejudice if the objections proceeded in the form in which they were brought.

What I understood the court in the *NEC case* to be stating is as follows. The general rule is that an objection brought as a special plea or exception must meet the criteria set in r 137 (1). There are exceptions to the rule. The procedure laid out in r 137(1) is not cast in stone and may be relaxed in deserving and very limited circumstances. In the case of a special plea which has been filed as an exception instead of a special plea in circumstances where the facts giving rise to the special plea are apparent *ex facie* the declaration, the objection can be raised as either a special plea or an exception. Such an objection must meet the requirements of either an exception or a special plea. The main criteria therefore, are whether the objection can be raised either a special plea or an exception. It is permissible for the objection to proceed in the form in which it is, provided that the defence can be established without the need to adduce any further facts and that evidence has been sufficiently canvassed with respect to the plea, leaving the plaintiff with no evidence to lead in rebuttal. It must be shown that there is no prejudice likely to be suffered by the other party arising from the adoption of a wrong procedure. The consideration regarding prejudice will only be taken into account after it has been shown that the defendant relies on facts appearing in the declaration and that the objection can be raised as both a special plea and an exception. It is not correct that the *NEC case* is authority for the proposition that it no longer matters whether you file an exception or special plea nor that the criteria employed in relaxing the rule is simply that of prejudice.

Where a litigant files a special plea instead of an exception, he must meet the first criteria set in the *NEC* case that is whether the objection can be raised as either a special plea

or an exception. If this course is not competent, that is the end of the enquiry. A court need not consider the rest of the requirements. The set test seems to me to be unique to special pleas brought as exceptions. We do not have guidance regarding a scenario where an exception is brought as a special plea.

Turning to the present matter, the plaintiffs bring a claim against both defendants. They seek costs against both defendants. Paragraph 17 of the declaration is couched on the following terms,

> "17. The 2nd defendant has been joined out of necessity and in the interests of justice, given that the determination of the issues between the plaintiffs and the 1st defendant require the participation of the 2nd defendant.''

The challenge raised relates to the cause of action which is apparent *ex facie* the declaration. The defendant ought to have brought an exception instead of a special plea. The concession by the defendant that it ought to have brought an exception instead of a special was properly made. The parties are not agreed regarding the import and applicability of the *NEC* case to the facts of this case. Whether the court should proceed to determine the objection to the claim in the form in which it is the question.

Applying the test set in the *NEC* case, it is clear that these facts fall outside the parameters set in that case. A challenge to a cause of action challenges the merits of the case. The objection to a declaration, because of its nature of challenging a cause of action and the merits of the matter, cannot be raised as a special plea. Further, the objection cannot be raised as both an exception and a special plea. For an exception to be raised as a special plea, it must be shown that it is capable of being raised as a special plea. That to me seems to be the primary reason why PATEL J in the *NEC* case allowed the exception to proceed as it was. No basis has been set for raising the exception as a special plea. No cogent reason has been advanced for any deviation from the rules. The need to consider the other requirements laid out in the *NEC* case falls away. There is no need to consider the question of prejudice.

We must be mindful of the fact that the legislature provided for two distinct procedures of special pleas and exceptions. It must have been intended that the two distinct procedures be adopted for the two classes of objections concerned. I agree with the view expressed in the *NEC* case that it was intended that r137 (1) be strictly applied and complied with and that any deviation therefrom is to be visited with an adverse ruling. Rule 137(1) must not be departed from without good cause. If courts were to allow litigants to place any label on objections they raise in terms of r 137 (1), without justification, this sort of approach would encourage

chaos. A person raising a special plea or an exception has to be within the rule. The rule does not give legal practitioners a choice over which label to place on an objection brought in terms of r 137(1). Litigants should not be allowed try to make r137 (1) redundant. A party who brings a special plea when he is required to file an exception out of sloppiness only has himself to blame if it is thrown out. The defendant slept on the job. The law does not the help the sluggard.

I am not satisfied that this exception can be raised as both an exception and a special plea. The special plea filed by the defendant is improperly before the court. It will not be necessary for the court to proceed with the exception on the merits.

Accordingly I order as follows

1. The plaintiffs' point *in limine* is upheld.
2. The special plea is dismissed
3. The second defendant is to pay the costs of this application.

Lovemore Madhuku Lawyers, plaintiff's legal practitioners
Sawyer & Mkushi, 1st defendant's legal practitioners
Coghlan and Welsh, 2nd defendant's legal practitioners