ORION CONSTRUCTION (PVT) LTD
versus
MOTA ENGIL AFRICA

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 3 October & 30 October 2017

**Opposed Application- Exception**

*Mr S Mpofu*, for the plaintiff
*Mr ZT Zvobgo,* for defendant

CHAREWA J: On 12 May 2017, the plaintiff issued summons against the defendant claiming payment of $5 198 076.92 representing its 51% share of profits for three years from 2014-2016 in terms of an indigenisation agreement together with prescribed interest from 31 June 2014 and collection commission.

**Background**

By letter dated 24 May 2017, the defendant's legal practitioners advised the plaintiff's legal practitioners that:

1. No such entity called Motor Engil Africa existed, or if it did then it was not the same as their client.
2. Further, the summons disclosed no cause of action as, assuming that plaintiff was indeed a shareholder in defendant,
    a. Merely being a shareholder does not entitle one to a claim for profits in the absence of the directors' declaration of a dividend.
    b. The summons did not allege any factual basis for any indigenisation agreement between the parties particularly since indigenisation does not per se ground a cause of action.
3. The summons was vague and embarrassing in that

a. The allegation that defendant had received payment of $53 000 000 was not particularised such that it was not clear who made the payment, how and in what form.
b. Details of production costs were not particularised as to how they were computed and what those costs entailed; and

4. Finally, that demand had not been made.

Upon receipt of the letter, plaintiff's legal practitioners, on 9 June 2017, filed a notice to amend its summons to cite defendant as Mota-Engil Africa. They also filed an amended declaration which attempted to address the issues raised by the defendant in so far as the vague and embarrassing parts were concerned.

On 30 June 2017, defendant filed its exception alleging that the summons

A. disclosed no cause of action as

1. the defendant as cited did not exist, the proper entity being Mota-Engil, Engenharia E Construcao S.A. Public Limited as appears on its registration certificate.
2. A shareholder has no valid claim to a share of profits unless dividends are declared, and none were declared in this case.
3. Defendant was not put *in mora.*

B. The summons was vague and embarrassing as

1. details of when the alleged indigenisation agreement was entered into, by whom and when it was allegedly confirmed and by which stakeholders are not disclosed
2. it is unclear who paid $53 000 000, how and in what form; and finally
3. it is not sufficiently pleaded how production costs of $21 or the selling price of $26 is arrived at or what the alleged production costs constitute of.

Consequently, as plaintiff was given due notice of these shortcomings and did not address them causing defendant to incur the costs of excepting to the summons, the defendant claims for costs on the scale of legal practitioner and client.

**Submissions**

At the hearing the plaintiff raised two points *in limine*: that the issue of wrong citation of the parties is a special plea and ought not to have been raised as an exception, and secondly, that the exception is improperly before the court, it being supplemented by extraneous documentary evidence.

In response to the points *in limine*, the defendant argued that an exception goes to the root of a claim, and if there is no party before the court to answer to the claim, that goes to the root of the case. As for attachment of documents to an exception, the defendant submitted that this is proper as long as the attachments are necessary to ground the cause of complaint and are brief and to the point of the exceptions raised.

On the merits, the plaintiff submitted that it sued the defendant in its operating/trading name. It conceded that the issue of a shareholder's entitlement to profit being subject to a declaration of a dividend is properly raised, but argued that paragraphs 5-7 of its declaration adequately addresses this since plaintiff's claim is based on the net profit made. As for the issue of *mora* plaintiff submitted that the issuance of summons is tantamount to a demand and thus complies with the requirement to put a litigant *in mora.* Finally, on whether the summons should be excipiable on the grounds of being vague and embarrassing, the plaintiff submitted that the primary allegations have been sufficiently made in the summons and declaration. And since no basic facts are missing, an exception cannot be taken.

On its part, the defendant submitted that the plaintiff's claim exhibited no cause of action as firstly, where a party has been wrongly cited the matter should not be allowed to proceed as it is unreasonable to proceed with a non-existent litigant. This is because the judgment would be a *brutum fulmen* as it is not executable. Further since the defendant has not been put *in mora* no cause of action arises. Thirdly, and in any event, even had defendant been put *in mora* there is no cause of action arising from a 51% shareholding, as the percentage of shareholding does not equate to 51% of profits particularly where directors of a company have not declared a dividend allowing shareholders to receive a share of the profit.

Finally, the defendant argued that the summons were vague and embarrassing in that they contained insufficient information or detail to enable the defendant to plead. More particularly, in so far as the alleged indigenisation agreement is concerned, defendant is left in the dark as to who negotiated and signed it, when this was done, who the stakeholders who "confirmed" it were and what its terms and conditions were.

With regard to the alleged receipt of $53 000 000 by defendant, it is not specified when defendant received this amount, in what form, from whom and how. And finally it is not sufficiently pleaded how production costs of $21 or the selling price of $26 is arrived at or what the alleged production costs constitute of.

**Analysis**

*Points <u>in limine</u>*

1. <u>Should the issue of wrong citation have been raised as a special plea?</u>

Rule 137(1)(a) permits a party to take a special plea

> "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"

It seems to me that the fact of mis-citation of a party has the effect of raising the special defence that there is no plaintiff or defendant. And if there is no plaintiff or defendant, this is certainly a matter of substance which does not go to the merits but will dispose of the case. One cannot sue no one. Ordinarily therefore I would agree with plaintiff that objection to citation of a party must be raised as a special plea.

An exception on the other hand, is provided for under r 137(1)(b) and should normally be raised where the summons and declaration *ex facie* do not disclose a cause of action or is vague and embarrassing.

Given that r 137(1) specifically provides for different procedures for objecting to summons, exceptions and special pleas being but two of them, it follows that a litigant is expected to strictly follow and adopt the right procedure. Thus, one cannot utilise exceptions where a special plea is required and vice versa. This general practice of maintaining the distinction between special pleas and exceptions has been retained in our jurisdiction for decades. The reason for the distinction is that in special pleas, there is need, generally, to adduce further evidence.

However, a departure from this general principle has also been sanctioned in our jurisdiction as case law amply demonstrates. In *Edwards* v *Woodnutt N.O.* 1968 (4) SA 184 (R) BEADLE CJ allowed a matter to proceed to be heard on the merits even though an objection had been raised that the matter should have proceeded more properly by way of plea in bar or abatement than by exception. The reason for that was expressed as follows:

> "In the instant case the defendant does not rely on a single fact which does not appear in the declaration, nor does he challenge any of the facts pleaded. This being so, though it would have been better had the defendant's first and second exception been taken by way of a plea in bar, if no possible prejudice is caused the plaintiff by this form of procedure, I can see no reason why the real issues should not now be determined by this Court. Had the plaintiff wished to lead evidence I would have ruled that the plaintiff [*sic*] was out of order for adopting the wrong procedure, but as the plaintiff has not been able to suggest any evidence which he might have led which could have any bearing at all on these issues I have allowed the matter to proceed so

that (as I have said) the real issues raised in these proceedings can be determined without waste of costs."[1]

This stance was approved of and confirmed in a more recent case by PATEL JA when he stated:

> "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 exceptions 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 applies in each and every case irrespective of the particular circumstances of a given case. In the absence of clear guidance from the provisions of r 137 *per se*, but having regard to the case authorities on the subject, I am inclined to adopt a negative answer to that question.
> As a general rule, exceptions taken by a defendant must be limited to objections or defences that arise *ex facie* the declaration itself. These would include averments that the declaration or part thereof does not disclose a valid cause of action or is vague and embarrassing. On the other hand, where the point taken constitutes a special defence, such as absence of jurisdiction, *res judicata* or prescription (*cf.* the pleas referred to above, as discussed by Herbstein & van Winsen, *loc. cit*), the procedure to be followed is by way of special plea. These are instances where the defence relied upon is not evident *ex facie* the declaration and involves the averment of some new fact or facts to be proved with fresh matter. The procedure by way of special plea enables the plaintiff to rebut the defence raised by replication and the adduction of further evidence where necessary. In exceptional cases, however, where the special defence in question is apparent *ex facie* the declaration itself, the court may allow the matter to be decided on exception. This is subject to the qualification that the plaintiff has nothing to adduce in rebuttal and will not be prejudiced by a decision being taken on exception."[2](my emphasis)

By the same token, plaintiff not having indicated that it required to call evidence with regard to the proper citation of the defendant, and the defendant having raised the objection to the citation *ex facie* the summons and declaration I am not prepared to refuse to decide the matter on exception.

2. Is the exception improperly before the court it being supplemented by extraneous evidence?

It is trite that an exception should not, as a general rule, have extraneous documents attached. This is why the rules differentiate between exceptions and special pleas. This general rule follows on from the practice that evidence should not be attached to pleadings in actions.

However, it has been an age old practice that a party who relies on a written document for his claim (or defence, as in this case), ought to do one of three things:

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[1] *Edwards* v *Woodnutt N.O (supra)* at 186C-I
[2] See *National Employment Council For The Construction Industry v Zimbabwe Nantong International (Pvt) Ltd* SC59-15 @ p11-12

a. Annex the document

b. Set forth the material portions; or

c. Refer to the material portions.[3]

Where a party chooses to annex the document, then it must not be lengthy or bulky or contain masses of information that requires critical appraisal, collation and analysis. As stated by GILLESPIE J[4]

> "the decision whether or not to attach a document…..will depend generally upon the bulk of the document or documents in question and more importantly upon the desirability or otherwise of having the whole document available on the pleadings. Thus where it is essential to attach a document in order to set out the cause of action, then that should be done if it can be done without surplusage."

*In casu*, the defendant objects to the summons on the basis of wrong citation and attaches the certificate of incorporation to show the proper identity of the defendant. This is a one page public document which, if plaintiff's legal had been diligent, could have obtained in order to properly identify the party to bring before the court.

Further, defendant objects to the summons on the grounds that it was never put *in mora* and attaches the last communication from plaintiff to defendant requesting for a meeting to "deliberate on Hwange Colliery contract" which contains a specific disclaimer that it was not a letter of demand.

It is my view that these documents form the basis of the defendant's defence that it the wrong or non-existent party has been brought to court and that in any event, even had the correct party been brought to court, it was not *in mora*. I therefore find that these documents were necessary attachments, which are not bulky, did not contain masses of information requiring critical appraisal, collation and analysis and were necessary to show the basis of defendant's exception.

Consequently, I dismiss the points *in limine* as being of no import in the circumstances of this case.

*On the merits*

1. <u>Does the summons and declaration disclose a cause of action?</u>

   a. Is Mota-Engil Africa a legal person?

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[3] See *Bantry Head Investments (Pty) Ltd & Anor v Murray & Stewart (Cape Town) (Pty) Ltd* 1974 (2) SA 386 © @ 392H.

[4] *Trust Merchant Bank Ltd v Lewis Murodzo Enterprises (Pvt) Ltd & Anor* 1998 (2) ZLR 387 (H).

The original summons cited the defendant as Mota Engel Africa. Upon being advised that no such legal person existed, plaintiff amended its summons to cite defendant as Mota-Engel Africa. The certificate of incorporation provided by the defendant shows that the correct legal person is Mota-Engil, Engenharia E Construcao S.A. Public Limited.

Clearly, plaintiff sued a non-existent entity. Nowhere in its declaration is it alleged that the proper defendant trades as Mota-Engil Africa. In any case, it does not do so, rather Mota-Engil, Engenharia E Construcao S.A. Public Limited trades as Mota-Engil Zimbabwe. No possible evidence can be led to justify the citation of a wrong party in circumstances where the *persona* of a corporation is a matter of public record.

The plaintiff urged the court to resort to r8C, but this is of no assistance to it as the rule only allows a party to be sued in its trading name or the name under which it carries on business. The cases cited by the plaintiff are thus inapplicable.

Mota-Engil Africa does not exist. Nor is there in existence a company trading under that name. A judgment against Mota-Engil Africa is not capable of enforcement. The summons is thus a nullity on that basis.[5]

b. Is there a valid claim for a shareholder's share of profits?

Plaintiff's claim is based on 51% of profits predicated on 51% shareholding in defendant. The plaintiff concedes that a shareholder's claim to profits is consequent upon a declaration of dividends. *Ergo*, any declaration of profits in a company must be in terms of the Companies' Act. Therefore there must be a declaration of dividends to entitle a shareholder to lay claim to its share of the profits.

The summons and declaration do not aver that any dividend was declared. Rather plaintiff avers that its entitlement is properly based on the net profit made by the defendant. However, holding a certain percentage of the shares in a company does not automatically translate to an entitlement to that percentage of the net profit. Further it is trite that the fact that a company has made a certain net profit does not entitle a shareholder to a share of the profits as due to operational exigencies the profits may be ploughed back into the company or may be allocated to other investments according to the directors' discretion. Rather, the directors must declare a dividend, having taken account of any allocation of net profit towards reserves for recapitalisation, expansion,

[5] Stewart Scott Kennnedy v Mazongoror Syringes (Pvt) Ltd 1996 (2) ZLR 565 @572D

investment and any other anticipated operational requirements. It is only thereafter that a shareholder may claim its pro-rata share of profit on the residual profit.[6]

It seems to me that plaintiff's cause exhibits a woeful lack of knowledge of corporate law and management basics. I am in complete agreement with Mafusire J that a shareholder must await the declaration of a dividend.[7] Otherwise the only relief a plaintiff must seek is to compel such a declaration.

In the premises, this shortcoming, which cannot be cured by any amendment, is fatal to the plaintiff's claim.

c. Was defendant put *in mora?*

To the extent that failure to put a party *in mora* is a matter of substance which does not go to the merits but may dispose of the case I would exceptionally be willing to deal with it on exception, in the circumstances of this case. After all, it is trite that a debtor does not fall into *mora* merely by failing to perform. He must be put *in mora*, and where the notice to perform does not accord the defendant a reasonable opportunity to do so, it is ineffective and may be disregarded. It is also trite that a party may be put in mora by the issuance of summons.[8]

However, it seems to me that this issue does not take this matter further one way or another. Whether or not a letter of demand was not sent putting plaintiff *in mora* or summons was issued, which also has the effect of putting defendant *in mora* is beside the point in view of my finding on a. and b. above.

2. <u>Is the summons and declaration vague and embarrassing?</u>

It is trite that summons and declaration must state clearly and concisely the nature and extent and grounds of the cause of action. By this is meant every fact which is necessary to be proved to succeed. The purpose is to enable a defendant to be put in a position to decide whether to persist with its defence, or admit or deny a particular allegation. It is unacceptable to force a party to plead in the dark.[9]

*In casu*, the plaintiff has based its claim on an alleged agreement with the defendant, but has not provided sufficient detail of the pertinent particulars of the agreement. For

[6] See Part 1 of the First Schedule to the Companies Act Cap 24:03
[7] See Farpin Investments (Pvt) Ltd v Netone Cellular & Anor HH 28/16
[8] See *Asharia v Patel & Ors* 1991 (2) ZLR 276 (SC) @ 279-280.
[9] See *Time Security (Pvt) Ltd v Castle Hotel* 1972 (1) RLR 155 @ 114F-115A

instance, it is not known when such agreement was entered into, who represented the parties, when was the agreement confirmed by stakeholders, and who were these stakeholders.

Further, plaintiff alleges that defendant received payments totalling $53 000 000 but does not state who made these payments, how and in what form. Finally, plaintiff has not articulated the defendant's alleged production costs of $21 per ton and how they are calculated, or how the alleged selling price of $26 per ton was arrived at.

These issues were drawn to the plaintiff's attention by letter dated 24 May 2017, yet the attempt to amend the plaintiff's declaration still left these issues unaddressed.

Clearly, the summons and declaration even in the amended form disclose no cause of action and are vague and embarrassing. The extent of the defects make it well-nigh impossible to cure them by any order of amendment to the summons and declaration. I am therefore in agreement with the defendant that the obduracy of the plaintiff's legal practitioners in failing or refusing to rectify the defects to enable defendant to properly plead to the summons and declaration should lead to the dismissal of the plaintiff's claim on account of defective summons.

**Who should pay costs and on what scale?**

I agree with the defendant that it made a *bona fide* effort to bring the issues subject of this exception to the plaintiff's attention. Despite this, the plaintiff took a lackadaisical and stubborn approach thus forcing the defendant to file an exception.

In these circumstances, there is sufficient basis to justify defendant's claim for costs on a legal practitioner and client scale.[10]

**Disposition**

IT IS ORDERED THAT

1. The exception is upheld
2. The plaintiff's claim is dismissed.
3. The plaintiff be and is hereby ordered to pay the defendant's costs on the scale of legal practitioner and client.

*Munangati & Associates*, plaintiff's legal practitioners
*Dube Manikai & Hwacha,* defendant's legal practitioners

[10] See CMED (Pvt) Ltd v First Oil Company & Ors HH495/13 @p.5