

ZIMBABWE COVER LEGAL AID TRUST
versus
CLAUDIUS TAUNZWASURE CHIROCHANGU

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 May & 6 September 2017

Exception

T Mpfu, for plaintiff
L Uriri, for defendant

TAGU J: Zimbabwe Cover Legal Aid Trust, a body corporate duly registered as such in terms of the laws of Zimbabwe issued summons against the defendant (excipient) one Claudious Taunzwasure Chirochangu claiming a payment of the sum of US\$ 41 580.00, payment of interest on the capital sum at the rate of 20% per month calculated from the 24th November 2014 to date of full payment. In the alternative, and in the event of the defendant failing to pay the capital sum and interest within time to be fixed by this Honourable Court, an order declaring the sale of the property being a piece of land situate in the district of Umtali called stand 1939 Umtali Township of Stand 1933A Umtali Township measuring 3703 square metres secured under the aforementioned mortgage Bond to recover the capital amount and interest accrued. Lastly, the plaintiff claimed cost of suit on the legal practitioner and client scale as agreed by the parties in the mortgage bond aforesaid.

In its declaration the plaintiff said that on or about November 2014 the plaintiff and the defendant, now the excipient entered into an agreement in terms of which the plaintiff extended to the defendant (excipient) a revolving facility in the sum of US\$ 41 580.00. The aforesaid credit facility extended to the defendant was secured by a mortgage Bond number 3091/2014, executed at Harare on the 24th November 2014 by the defendant in favour of the plaintiff. The interest was to accrue on the facility at the rate of 20% per month calculated from the mortgage bond, which was the calculated from the 24th November 2014 to date of full payment.

The plaintiff claimed that the defendant failed to pay back his instalments as agreed.

The defendant was served with the summons and declaration on the 12th June 2015. He entered appearance to defend on the 15th June 2015. This prompted the plaintiff to apply for a summary judgement on the basis that the defendant did not have a valid defence to the claim in the face of an acknowledgment of debt that the defendant had signed. The application for summary judgment was dismissed in case HH- 62/16 after the defendant raised the defence that he had borrowed the sum of \$10 000.00 from one Mr Mupindu, a lawyer in Harare and not from the plaintiff. He further admitted surrendering his title Deeds to the stand in question as security for the loan, but claimed that he did not read the documents at the time of signing the acknowledgement of debt.

After the dismissal of the application for summary judgement, the excipient was served with a notice to plead to the summons and declaration and an intention to bar on the 9th of March 2016.

Instead of pleading to the summons and declaration the excipient excepted to the plaintiff's summons and declaration on the basis that the summons and declaration are vague and embarrassing in that the plaintiff is identified and described in paragraph 1 of the declaration as a "trust". However, its identification suggested that it is a "body corporate" hence it is not clear whether the plaintiff is a trust, body corporate or a company. Secondly he said that the summons does not disclose a cause of action and must be dismissed.

See *Crundal Brothers v Lazarus* 1990 (2) ZLR 290 (S), *Gold Mining and Minerals Development Trust v Zimbabwe Miners Federation* HH-24-06, *Greenberg v Greenberg's Estate* 1955 (3) SA 361 (AD) and *Savanhu v Postmaster-General* 1992 (2) ZLR 455 (H).

The plaintiff opposed the exception on the basis that it was ill taken, is meritless and mala fide considering that the excipient clearly borrowed the money, is admitting that he owes but is now employing all manner of technical objections to avoid paying what is due. This conduct was frowned upon in *ABC t/a BANCABC v PWC Motors (Pvt) Ltd & Others* HH- 123-13 as well as in the case of *Industrial Equity Ltd v Walker* 1996 (1) ZLR 269 (H).

The plaintiff further submitted that a Trust can sue in its own name in terms of Order 2A Rule 8 as read with the interpretative r 7 of the Rules of the High Court Rules 1971. It said if the excipient was genuine about his objection to the manner in which the plaintiff is described in this lis, the excipient would have simply proceeded in terms of r 8A. In this case it said the defendant should have filed a request for further and better particulars on the issue rather than to except to it. See *Mugabe v Ndlovu* HH-151-93 as well as the writing of M. Welsh in "*The Civil Practice Handbook*", Legal Resources Foundation 1996.

Finally, the plaintiff asked the court to dismiss the exception on the basis that it was filed outside the 14 day tariff set by the Rules and the relevant Practice Directives on the set down of matters. In this case the present exception was filed on the 26th March 2016, the Sheriff's fees were only paid on the 27th April 2016 and this was outside the 14 day tariff set in the rules.

In *Ritemore Printers (Pvt) Ltd & Others* HH-83-14 it was stated that once the defendant had filed its exception, it had ten days within which to engage the plaintiff and agree to set the exception down for hearing by using the application procedure provided by r 223. If the parties failed to set the exception down for hearing by consent, then the defendant had a further four days to itself to set the exception down for hearing. If neither course is followed, after a further four days, the defendant must plead over to the merits. After pleading over to the merits, the special plea, exception or application may not be set down for hearing before the trial.

See *Mazibuko & Anor v Ndebele & Ors* 2008 (2) ZLR 26 (H) at 29B and *General Leasing (Pvt) Ltd v Allied Timbers Zimbabwe (Pvt) Ltd* HH-76-15.

In casu the excipient does not deny that he borrowed some money and failed to pay back. He does not deny that he offered his stand as a security for the money owed. He does not deny that he failed to pay back. In my view the summons discloses a cause action, though he said he borrowed from an individual and not the plaintiff.

The plaintiff in this case is cited as Zimbabwe Cover Legal Aid Trust. If indeed it is a Trust, then it can sue or be sued in that name in terms of Order 2A r 8 as interpreted in r 7 of the Rules of the High Court. The plaintiff is therefore clearly described in both the summons and the declaration.

Be that as it may even if I am wrong, this exception was not set down for hearing within the time limits allowed in terms of r 223, rendering the applicant to be improperly before this court.

In the result it is ordered that

1. The exception is dismissed.
2. The applicant is ordered to plead over to the summons and declaration within 5 days of the service of this order.

Mupindu legal practitioners, plaintiff's legal practitioners
Uriri Attorneys-At law, defendant's legal practitioner