ZIMBABWE NATIONAL WATER AUTHORITY
versus
FORESTER ESTATES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 14 July 2016 and 5 July 2017

Opposed Matter

Ms *F. Mahere*, for the plaintiff
S. M. Hashiti, for the defendant

MAKONI J: On 16 December 2015, the plaintiff issued summons against *Forester* (with one v) *Estates Private Limited* claiming payment of the sum of US71 548-00 in respect of water sold, supplied and delivered to the defendant by it in terms of an agreement entered into between the parties.

On 9 February 2016, the defendant filed an exception and plea. The defendant excepted to the summons on the basis that the plaintiff had cited a non-existent defendant. It also raised a special plea for the stay of the present proceedings in terms of the provisions of s 7 of the Arbitration (International Investment Disputes) Act [*Chapter 7:03*] (The Act). The basis is that there is a pending dispute between the Von Pezold family, who are shareholders of the defendant and the Zimbabwe Government in the matter of *Berhard Von Pezold & Ors* v *Republic of Zimbabwe ICSID Care* No ARB/10/15. The dispute between the parties relate to compensation for expropriated land and water rights and permits involving entities including the defendant. An award was made in favour of the Von Pezold family on 28 July 2013. On 21 October 2013 the Republic of Zimbabwe then filed an application for Annulment, which is still pending.

The present claim by the plaintiff involves payment for the use of water. It is the defendant's contention that its water rights and permits were expropriated by the Republic of Zimbabwe and that dispute is still pending. The plaintiff's claim should be stayed in terms of s 7 of the Act.

The defendant further raised a special plea of set off on the basis that it is actually owed significant amounts by the respondent of Zimbabwe and its departments.

In the ICSZD award dated 28 July 2015, the Republic of was ordered to compensate the defendant's shareholders being the Von Perold Family, the sum of $27, 446, 539 and in the alternative $51 629,628 in respect of experienced land and water rights as well as premises relating to the defendant. Those sums should be set-off against the plaintiff's claims in the summons and declaration in the plaintiff being a government department.

The defendant is also owed various significant sums of money by other government departments such as the Judicial Service Commission (JSC) which owes the defendant the sum of $99 209.30 in unpaid rentals as at January 2016.

In response the defendant pleaded that it cited the correct party as sufficiently described in the pleadings and that an amendment to the spelling would be sufficient and would not cause prejudice to the defendant. Regarding the special plea for stay of proceedings, the plaintiff pleaded the defendant is a body corporate which can sue and be sued. The arbitral proceedings are between Berhard Von Pezold & Ors versus the Republic of Zimbabwe. The plaintiff and the defendant are not parties to those proceedings and the outcome there of does not bind the plaintiff nor the defendant.

Regarding set off, the plaintiff pleaded that it is a body corporate distinct from the Republic of Zimbabwe. The defendant must proceed against those alleged debtors in their own capacities.

I will deal with the heads in senatim.

Exception: Citation of a non-existent defendant.

The plaintiff cited the defendant as FORESTER ESTATES (PRIVATE) Limited. The defendant contends that there is no entity answering to that name and that the correct defendant is FORRESTER ESTATE (PRIVATE) Limited. The defendant as cited by the plaintiff has one R and Estates is in the plural.

The position of the law in settled where any pleading before the court, let alone a constitute pleading such as a summons, must bear the name, title and ascription of a legal *persona* answering to that name. If it does not then that pleading is a nullity incapable of salvage or amendment. The point was made in *JDM Agro Consult & Marketing (Pvt) Ltd* v *Editor, The Herald and Anor* 2007 (2) 71 (H) at p … where it was stated.

> "The entity sued by the plaintiff as the second defendant is The Herald Newspaper. It is not a registered company and does not exist in any other form. Consequently the plaintiff issued summons against a non-exist being. The amendments to the second defendant's name

therefore was of no force and effect as the summons itself was a nullity. In *Gariya Safaris (Pvt) Ltd* v *Van Wyk*, this court stated:

> 'A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names in the summons as being those of the defendant, the summons is null and void *ab intio*.'

……..The citation of the first defendant in that form is therefore irregular."

The question is, in the circumstances of this case, can it be said that a non-existent entity was cited.

In casu, what is clear is that the plaintiff omitted the second letter R in the name FORRESTER and it would be clearly a typographical or misspelling error that in my view is inconsequential. Such an error can be easily remedied by amending the offending pleading as is provided for in Rule 132 of the High Court Rules 1971. Such an amendment will not cause any prejudice to the defendant and I did not hear the defendant suggesting that there will be any. It has been sufficiently described in para 2 of the Declaration and the process was served at its address of service. It has pleaded to the offending pleading meaningfully suggesting that it is the correct entity though its name was wrongly spelt.

The facts in JDM Agro Consult And Making Pvt Ltd *supra* are distinguishable from the present matter in that the plaintiff had sued a defendant which did not exist in any form either natural or legal. In that case it was a case of miscitation. In *casu* it is a case of misspelling.

In view of the above I will dismiss the exception and grant leave to the plaintiff to amend the pleadings by correcting the wrongly spelt name.

Stay of Proceedings In Terms of s 7 of the Act

Mr *Hashiti* submitted that the present proceedings be stayed in terms of s 7 of the Act. There is a dispute between the Republic of Zimbabwe and the defendant's shareholders which relates to land rights and all other rights arising from the land rights which include the water rights. This would mean the right to use water that is in issue in the present proceedings. The special plea seeks stay of proceedings pending resolution of who holds those rights and who ought to bear the liabilities associated with those rights. It was his view that as long as the water rights stand expropriated, it is the government which ought to bear the liabilities pertaining to that.

Ms *Mahere* submitted that the claim pending before this court is not a matter within the jurisdiction of the ICSID. No arbitration agreement has been placed before the court that would have rendered it competent to place the dispute before the Arbitration Centre.

She further submitted that the defendant has to establish the same requirements as in *lis pendinis* plea i.e that the dispute is pending between the same parties, the subject matter is the same and the cause of action is the same.

She further submitted that the award of the ICSID referred to by the defendant had not been registered by this court.

A special plea is defined in *Beck's Theory and Principles of Pleading In Civil Action* by Isaacs 5th ed p 254 as:

> "The common characteristic of the special pleas which are now under consideration is that they do not raise any defence upon the merits of the case at all; they seek only to evade the action either by declining the jurisdiction, by postponing the trial or by abating the declaration; they therefore allege merely some defect or irregularity."

The position of the law regarding a special plea/defence in bar, as raised by the defendant was clearly spelt out by GOWORA J (as she then was) in *Innscor Africa Limited* v *Dolphin Trading (Pvt) Ltd* HH 271/10 when she stated:

> "A special plea in bar interposes a purely formal objection to the proceedings in the particular court in which the action has been instituted, either that the court presiding over the matter lacks jurisdiction to do so or because the constitution of the court itself is such that it ought not to exercise jurisdiction. Isaacs in his book *Beck's Theory of Pleadings and Practice* is of the view that there are only two possible cases for the application of a special plea in bar, firstly a plea to the jurisdiction proper, and secondly, a plea that the judger should recuse himself from hearing the matter on grounds of partiality, malice or corruption."

Section 7 of the Act provides:

> "7. Stay of court proceedings where matter within jurisdiction of centre
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> If any proceedings are instituted in any court in regard to any matter which, under the Convention, is required to be submitted to the Centre for conciliation or arbitration, any party to the proceedings any apply to the court to stay the proceedings, and the court, unless satisfied that the matter is not required to be submitted to the Centre under the Convention, shall make an order staying the proceedings."

The question that arises is whether the proceedings in this matter, can be said to be proceedings that are required to be submitted to the Centre for conciliation or arbitration.

I would want to agree with Ms *Mahere* that not enough facts have been placed before the court to make the determination in favour of the defendant. The arbitration agreement which sets out what matters can be competently placed before the Centre has not been placed

before the court. In any case a dispute for payment for water between two national, cannot be within the jurisdiction of the Centre.

In any event the parties that are before the ICSID are not the same parties in the dispute before this court. Before the ICSID is *Bernhard Von Pezold & Ors* v *Republic of Zimbabwe*. In *casu* the parties are *Zimbabwe National Water Authority* v *Forrester Estate (Private) Limited.* The dispute before the ICSID relates to compensation for expropriation of land and water rights and permits. The dispute before me relates to payment for water sold and supplied to the defendant by the plaintiff in terms of an agreement made and entered into between the parties. The claim is supported by an Acknowledgement of Debt signed by the defendant on 6 October 2015. This was after the award of the ICSID was made on 28 July 2015.

The applicant has therefore not laid a basis for proceedings in this matter to be stayed in terms of s 7 of the Act.

In view of the above findings I will dismiss the special plea in bar.

Set Off

In R H Christe in the Law of Contract in South Africa 3rd ed p 582, the learned author defines set-off on the following terms:

> "Set-off or compensation or compensation is a method by which contractual and other debts may be extinguished. It comes into effect when two parties are reciprocally indebted to each other".

In *casu* the defendant seeks the set-off of the amount owed by the defendant to the plaintiff against amounts owed to the defendant by the JSC.

The question is whether the parties in this matter are reciprocally indebted to each other.

Ms *Mahere* contended that set-off is a defence on the merits and was improperly raised as a special plea. This is so at it would require evidence to be led to lay facts which establish the set-off.

In *Doelcam (Pvt) Ltd* v *Pichanick & Ors* 1999 (1) ZLR 390 (H) at 396 B – D. GILLESPIE J had this say on special pleas.

> "I am unable to forbear to comment on this. There are many errors in procedure to point out. The purpose of a special plea is to permit a defendant to achieve prompt resolution of a factual issue which founds a legal argument that disposes of the plaintiff's claim. Special pleas are three in kind. The plea in bar, by which a party may interpose a purely formal objection to the jurisdiction of the court. The plea is available as a plea to the jurisdiction or as a plea for the recusal of a judge and in no other case. Other special pleas are available to disclose some ground either for quashing or abating a declaration or for delaying proceedings.

> Both are usually termed pleas in abatement, although that expression is properly used to describe the declinatory, rather than merely dilatory, plea. The plea in abatement, strictly so called, avers some good ground, not disclosed in the declaration, which otherwise is admitted, for denying the plaintiff relief. The dilatory plea advances some fact, not disclosed in the declaration, which is otherwise admitted, and which entitles the defendant to a stay of proceedings.
>
> Since a special plea involves the averment of a new fact, it is susceptible of replication and of a hearing at which evidence on this new fact alone may be led. It is, however, the duty of any party not pleading to the merits to cause the limited issue to be set down within the time limits stated by rules of court. Failing that, the party must plead over to the merits and the main issue must proceed".

The question that arises is whether set-off can be raised under any heads of a special plea i.e a dilatory plea, a plea in abatement or a plea in bar.

Before examining the facts in casu, I might need to point out that this issue raises the question of how special pleas should be pleaded. From the above quotation from Doelcom's case supra, there are three special pleas in bar. My view is that when pleading a special plea in bar, a party should be clear which of the three pleas he or she is relating to. To just plead "special plea" would be too general and might lead to the questions being raised as in this matter. A party or a legal practitioner must have exercised his or her mind, looking at the facts before him or her, which of the three pleas he or she is relating to before make a decision whether to file the special plea or not. In filing the plea the party must clearly state which type of special plea it is.

In *casu*, the special plea of set-off does not fall into the definition of either of the three special pleas in bar. Set off is not a dilatory plea which merely discloses some ground for not proceeding with the action at the moment and prays for stay of proceedings until that ground is removed. It is not a plea in abatement which shows some good ground for abating or quashing the declaration either because it is improperly framed or because the remedy is barred. See Isaac's *supra* p 156 and 157. It is either a pela in bar which inter pores a purely formal objection to the proceedings such as the issue of jurisdiction. Ms *Mahere* is correct therefore that it can only be raised as defence on the merits. This is because of factors that must be taken into account in considering set off such as that the defendant must be in position to say "the plaintiff owes me a debt". In other words the debt must be liquidated or admitted by the other side. This would entail leading evidence. Mr *Hashiti*, in making submissions regarding what the defendant could be owed by the JSC, had to suffer a lot of objections from Ms *Mahere* as his submissions amounted to leading evidence from the bar.

As a result it is my finding that set off cannot be properly raised as a special plea.

Assuming I am wrong on this point, I will proceed to consider the other issues.

The defendant has not established that the parties before me are reciprocally indebted to each other.

However the defendant has sought to rely on s 56 (1) and 68 of the Constitution of Zimbabwe. Section 56 (1) provides that all persons equal before the law and have the right to equal protection and benefit of the law.

In paragraphs 21 and 22 of the defendant's Head of Argument, it states:

> "21. It is beyond doubt that the plaintiff is a State entity. It is beyond doubt that the defendant is owed monumental sums by the Judicial Service Commission in arrear rentals for leasing the defendant's premises which it used to house the Labour Court.
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> 22. It is neigh neither desirable nor possible for the defendant to evict the Judicial Service Commission or Labour Court on account of public policy considerations. Notwithstanding, the defendant is saddled and levied with a suit, a possible execution on its assets in furtherance of State rights or interest yet his rights remain held in abeyance."

After examining a whole host authorities defining "the protection of the law", "equal protection of laws", and "due process", Mr *Hashiti* then made reference to a case which sets out the position of the law regarding set off by one government department of a debt owed by another government department. He cited *Zimbabwe Revenue Authority* v *Reserve Bank of Zimbabwe and Anor* HH 127/11 where the following was stated:

> "Although not specifically pleaded as such, it seems that the respondent is raising the defence of set-off. From my reading of the papers it seems that the respondent there is an implication from the respondent that in view of the fact that the two entities are under the control of the Minister of Finance, then monies can be transferred between them without the need to follow statutory requirements. The further implication on the papers is that a set-off between the two is permissible. This issue has already been decided by our courts, as to whether set-off is possible where two or more government departments are involved. In *Cot* v *First Merchant Bank Ltd* 1997 (1) ZLR 350 (S) at 353 C-F GUBBAY CJ stated:
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> 'At common law set-off or compensation is a method by which mutual debts being liquidated and due, may be extinguished. It takes place, ipso jure. If the debts are equal, both are extinguished; if unequal, the smaller is discharged and the larger is proportionally reduced. There are, however, two important exceptions to the operation of the rule. A debt owed by one department of the State cannot be set off against a debt owed to another department. A set-off cannot be raised against taxes due to the fiscus or where goods are sold for the benefit of the State, See *Schierhout* v *Union Government* 1926 AD 286 at 291; *Pentecost & Co* v *Cape Meat Supply Co* 1933 CPD 472 at 497; Voet Commentarius ad Pandectus 16.2.16 (Gane's translation Vol 3 at 166); van Leeuwen Censura Forensis 1.4.36.11 and 13 (Barber and Macfayden's translation): Wessels The Law of Contract in South Africa 2 ed vol II at paras 2567 and 2568: Willies' Principles of South African Law 8 ed at 483. Both these exceptions are grounded in public policy and utility. The first is designed to avoid confusion in State accounts and the second to ensure the uninterrupted flow of tax revenue to the Treasury in the interests of good governance. In each instance, it is for the State to decide whether or not set-off should apply even though the debts co-exist'"

He then contended that that position is unconstitutional in that the defendant is denied the remedy of set- off in this matter that is afforded to other parties. It has a right yet has no remedy.

Whether the defendant has a right of set-off is a question that cannot be answered in these proceedings where set off is pleaded as a special plea. My view is that that issue will come up for consideration in the main matter when if it were to be pleaded as a defence.

In view of the above I will dismiss the special plea of set off.

In the result, I will make the following order.

1. The exception and special pleas are dismissed.
2. The defendant to pay the plaintiff's costs.

Chirenje Legal Practitioners, applicant's legal practitioners
Wintertons, defendant's legal practitioners