

SIQOKOQELA MPHOKO

And

PHELEKEZELA MPHOKO

Versus

NANAVAC INVESTMENTS (PRIVATE) LIMITED

And

CHOPPIES ENTERPRISES LIMITED

And

CHOPPIES DISTRIBUTION CENTRE (PROPRIETARY) LIMITED

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 19 AND 28 JULY 2022

Exception

Advocate L. Uriri with Z. C. Ncube, for the plaintiffs

M Moyo, for the defendants

MAKONESE J: A plaintiff is required to plead his /her claim in terms that are lucid, logical and intelligible. A plaintiff must only plead the *facta probanda* and not the *facta probantia*. A plaintiff does not need to plead evidence or the law. The defendant is not

entitled to an abridged version of the plaintiff's evidence. The defendant is only entitled to such information as would enable them to respond to plaintiff's claims. An exception based on the lack of a cause of action in the plaintiff's claims must establish that there are no facts pleaded that can be sustained even if evidence is led. The onus is on an excipient to show that the pleadings are vague and embarrassing. An exception that a pleading is vague and embarrassing will not be upheld unless the excipient will be seriously prejudiced in his/ her defence.

The exception

The defendants except to the plaintiff's summons and declaration on the grounds that the cause of action is vague and embarrassing and that the summons and declaration does not disclose a cause of action. The exception is opposed by the plaintiffs. It is necessary to give a brief factual background to the matter.

Background Facts

The plaintiffs are Zimbabwean citizens based in this country. The 2nd defendant is a former Vice President of the Republic of Zimbabwe. The 1st defendant is a duly incorporated company in terms of the laws of Zimbabwe. 2nd and 3rd defendants are public companies incorporated in terms of the laws of the Republic of Botswana. At all material times the 2nd defendant had a chain of retail shops known as Choppies in all major cities of the country. The 1st and 2nd plaintiffs were the majority shareholders in 1st defendant, holding an aggregate of 51% shares in the company. 1st plaintiff held 25.5% of the shareholding in 1st defendant, whilst 2nd plaintiff also held a 25.5% shareholding. 2nd defendant held the remaining 49% shares in 1st defendant. In 2018 disputes arose between the 1st plaintiff and 2nd defendant. The dispute spilled into the courts with 2nd and 3rd defendants instituting legal proceedings in

this court under case number HC 6297/18. Around 9th January 2019 the plaintiffs and the defendants agreed that plaintiffs would divest themselves of their shareholding in 1st defendant. The parties entered into certain agreements resulting in a deed of settlement being recorded. That deed of settlement is now the subject of these proceedings.

Plaintiffs seek an order declaring the deed of settlement null and void and further that the plaintiffs are entitled to payment of the true value of their 51% shareholding which they held in 1st defendant. Faced with this claim, the defendants gave written notice to the plaintiffs on 18 August 2020 complaining that the summons and declaration was vague and embarrassing and did not disclose a cause of action. In 19 paragraph, defendants called upon the plaintiffs to remove the cause of complaint within 12 days of service of their letter of complaint. Plaintiffs contend that there is no merit in the complaint by the defendants, which they argue is a ploy to delay the finalisation of the matter.

I must determine whether the exception has been properly taken regard being had to the case pleaded by the plaintiffs in the summons and declaration. From the onset, I need to point out that an exception must relate to the pleaded facts. It is trite law that the plaintiff is required to plead facts which if proven would entitle him to a remedy. In our law evidence and the law are not pleaded.

Whether the cause of action is vague and embarrassing

The first exception raised by the defendants is that the cause of action is vague and embarrassing. This will be addressed first. It is apparent from the submissions filed by the defendants that there are aware of the following as arising from the plaintiffs' declaration.

1. That the plaintiffs claim the true value of their 51% shareholding in the 1st defendant as the sum of US\$22 585 714.00.

2. That the plaintiffs consider that the sum of US\$2 900 000, which was paid is not the true value of the 51% shareholding.
3. That the deed of settlement to the extent to which it purports to set out the value of the 51% shareholding of the plaintiffs in the 1st defendant is null and void.
4. That plaintiffs are entitled to an order declaring that they are entitled to payment of the true value of the 51% shareholding which they held before they were divested of their shareholding in 1st defendant.

The contention by the defendants is that plaintiffs' claim is contradictory and inconsistent in that it seeks a declaration of invalidity without a tender of the amount they allege they received under duress. Defendants contend that plaintiffs ought to have sought a set-off against the true value of the shares. The contradiction which is alleged does not arise from the amended declaration. It would appear to me that the alleged contradiction appears from defendants' own perception of what the plaintiffs must have pleaded. This is not the purpose of an exception. It is evident that the declaration is understandable and contains nothing which contradicts the averments in the declaration. The assertion by the defendants that plaintiffs ought to have tendered the sum of US\$2 900 000.00 or to have pleaded set-off in respect of a portion of the value of the 51% is a matter the defendants may raise in their plea. The position taken by the defendants amounts to a defence to the claims. Even then, it may be a partial defence to be raised and dealt with at trial. This does not invalidate the pleaded cause of action. I must emphasise that the purpose of an exception is to set aside a pleading among other reasons, where it is vague and embarrassing or inconsistent. In *Mnangagwa v Alpha-Media Holdings (Pvt) & Anor* 2013 (2) ZLR 116 (H), MATHONSI J

(as he then was) cited with approval, the remarks of BEADLE AJ in *McKelvey v Cowan* NO 1980 ZLR 235 (G); 1980 (4) SA 525 (Z) at 526D where he stated as follows:

“It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action. That is the manner in which I approach this case.”

In my view, an exception which requires the plaintiffs to plead something more than their cause of action is without merit. There is no legal requirement in our law that compels a plaintiff to plead more than the cause of action. The judgment of *Mtemwa Holdings (Pvt) Ltd & Ors v Mutunja & Ors* HH 532-16 cited by the defendants is in relation to an application for review. The review related to an arbitral award which was premised on a dispute over mining claims. This has nothing to do with the question of an exception. This is apparent from the fact that in the said matter, what was at stake was rescission and restitution following the termination of a contract. The matter therefore related to *restitutio in integrum*.

It was argued by the defendants that the plaintiffs’ declaration is contradictory in that a declaration of invalidity of the deed of settlement leads to *restitutio in integrum* or set-off of what has already been received against the true value of the shares. I am in no doubt that any finding on the status of the contract arrived by a court at trial would be decided on the basis of the evidence led. It is pertinent to observe here that in terms of section 8 of the General Laws Amendment Act (Chap 8:07) it is provided that no contract shall be void or voidable by reason merely of *laesio enormis* sustained by either of the parties to the contract. The doctrine of *laesio enormis* gives a contracting party the ability to rescind an agreement if the price of exchange is less than a certain sum (for instance one half, or two thirds) of its actual

value. This principle was developed as a way to ensure that people received a just (*pretium*) or price in exchange, as opposed to the view that the parties to an exchange were entitled to try to outwit each other.

I conclude, therefore that on the first ground of exception, the plaintiffs have pleaded a complete cause of action. The material facts upon which the cause of action for duress is based have been pleaded. What constitutes a cause of action has been set out in the seminal decision of *Abrahamse & Sons v SA Railways & Harbours* 1933 CPD 636 as follows:

“The proper meaning of the expression “cause of action” is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It included that all a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not “arise” or “accrue” until the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.”

In the present case, the plaintiffs have in my view, pleaded facts upon which if they are able to prove with evidence, they may establish duress or undue influence. The exception on the grounds that the cause of action in relation to duress is vague and embarrassing has no merit. These are matters to be resolved by evidence.

Whether the summons and declaration do not disclose a cause of action for the payment of US\$22 585 714.00 and interest on that amount

The second ground of exception is that the summons and declaration do not disclose a cause of action for the payment of the sum of US\$22 585 714.00.

It is important to underline that legal practitioners must plead information that is relevant and necessary. This principle was laid out in the case of *Jouel v Bramwell-Jones* 1998 (1) SA 836 (W) where HEHER J stated as follows:

- “1. *The object of pleading is that a succinct statement of the grounds upon which a claim is made or resisted shall be set forth shortly and concisely and the pleading is thus merely required to plead a summary of the material facts.*
2. *It is therefore incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which he seeks to rely and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it.*
3. *Where a statement is vague, it is either meaningless, or capable of more than one meaning. It is embarrassing in that it is also something which is insufficient in law to support in all or in part the action or defence.*
4. *The test whether a pleading is vague and embarrassing has also been stated to be whether an intelligible cause of action (or defence) can be ascertained.*
5. *An exception that a pleading is vague and embarrassing may only be taken when the vagueness and the embarrassment strikes at the root of the cause of action.*
6. *An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action/or defence not its legal validity. Minor blemishes are irrelevant and pleadings must be read as whole no paragraphs may be read in isolation.*

7. *A distinction must be drawn between facta probanda or primary factual allegations which every plaintiff must make and the facta probantia, which are secondary allegations upon which the plaintiffs will rely in support of primary factual allegations. Generally speaking, the latter are matters of particulars for trial and even then are limited. For rest they are matters of evidence. Only facts need to be pleaded, conclusions of law need not be pleaded.*
8. *An exception that a pleading is vague and embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged.”*

These remarks apply with equal force to the first ground of exception as they do to the second ground. In paragraph 23 of the defendants’ heads of argument the defendants complain that the plaintiffs did not identify “the branch of law under which the claim for payment of US\$22 000 000 is based or set out the cause of action.”

As I have indicated above, the pleader must not plead the law. A pleader must set out facts. Only facts must be pleaded and not legal conclusions. See *Buchner & Anor v Johannesburg Consolidated Invest Co. Ltd* 1995 (1) SA 215 (T) where the learned Judge stated that:

“A summons, which propounds the plaintiffs’ own conclusions and opinions instead of material facts, is defective. Such summons does not set out a cause of action. It would be wrong if a court were to endorse the plaintiffs’ opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based.”

Disposition

For an exception to succeed, the plaintiffs' claim must be beyond salvage. It must be such that no evidence can be led on such a claim to sustain it. If evidence can be led on the claim, the exception must be dismissed. A plaintiff does not need to plead evidence. A defendant is not entitled to an abridged version of the plaintiffs' evidence. An exception that the pleading is vague and embarrassing may only be taken when the vagueness strikes to the root of the cause of action as pleaded.

I am satisfied that the excipients have failed to discharge the onus to show that the pleadings are vague and embarrassing and that they would be prejudiced in any way. The cause of action is sufficiently set out in the summons and declaration.

In the result, and accordingly, the following order is made:

The application be and is hereby dismissed with costs.

Ncube and Partners, plaintiffs' legal practitioners

Messrs Dube-Banda, Nzarayapenga, defendants' legal practitioners