TOBACCO SALES PRODUCERS (PRIVATE) LIMITED
versus
ETERNITY STAR INVESTMENTS

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 18 and 19 October 2006 and 15 November 2006

Civil Trial

Mr *Manjengwa*, for the plaintiff
Mr *Fitches*, for the defendant

KUDYA J: On 8 February 2006, the plaintiff issued summons out of this court. It claimed the following relief:

(a) An order confirming the cancellation of the agreement of sale.
(b) An order for the ejectment of the defendant, and all those occupying through it, from stand 168 Willowvale Township of Willowvale also known as 168 Erith Road, Willowvale Industrial Avenue, Harare.
(c) Payment of arrear rentals in the sum of $273 784 000.00 together with interest at the prescribed rate from the date of summons to the final payment.
(d) Payment of holding over damages in the sum of $38 000 000.00 per month from 1st February 2006 until the date of ejectment.
(e) Interests on holding over damages at the prescribed rate from the 1st day of every month to the date of ejectment
(f) Cost of suit as between legal practitioner and client.

The summons was served on 15 February 2006. On 16 February 2006, the defendant entered an appearance to defend. On 24 February 2006 the defendant sought further particulars which were supplied on 7 March 2006. It then filed its plea and counter-claim on 10 March 2006. Only the plaintiff filed discovery, but both parties filed their respective pre-trial conference issues and summaries of evidence. The pre-trial conference was held on 12 May 2006 and thereafter the matter was referred to trial on the basis of 6 issues that are recorded in the joint pre trial conference minute.

On 22 August 2006, after the matter had been referred to trial, the defendant filed an exception, and a special plea in abatement. The plea, exception and the plea in abatement were all based in the main on *res judicata.*

At the commencement of trial on 18 October 2006, Mr *Manjengwa* for the plaintiff submitted that the filing of an exception on 22 August 2006 after the matter had been referred to trial on 12 May 2006, was irregular. In any event, so he submitted, it was improper for the defendant to file an exception after it had pleaded over the summons and declaration. He therefore urged the court to expunge the exception from the record. Mr *Fitches* did not seriously challenge this submission. He however, submitted that the exception should be allowed to stand as our rules in Order 21 are clear in that an exception may be filed at any time.

Rule `137 is entitled "Alternatives to pleading to merits: forms". Sub-rule 1(b) of rule 137 reads:

> "(1) A party may—
>
> (b) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defence as the case may be."

Rule 138 deals with the period within which *inter alia* an exception may be set down for hearing either by consent of the parties or through an application. It further makes it clear that in the absence of consent or an application it shall not be set down for hearing before the trial date. Rule 140 requires the excipient to advise the other party by letter of the nature of his complaint to enable that other party to amend his pleadings in order to remove the cause of complaint.

In *The Civil Practice of the Superior Courts in South Africa* (2nd ed)(Herbstein and van Winsen) at page 314-315 states that:

> "The true object of an exception is either, if possible, to settle the case, or at least a part of it, in cheap and easy fashion or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception."

It is my view, that an exception can only be properly filed before the excipient pleads to the merits of the matter. In terms of the heading of rule 137 it is an alternative to pleading to the merits. Once the excipient pleads before filing the exception, he is in fact telling the other party that its declaration discloses a cause of action and that it is neither vague nor embarrassing. Otherwise if it did not disclose a cause of action or was vague and embarrassing, then the defendant would of necessity raise an objection either through an exception or the other recognised ways laid out in the rules of court. After the defendant has pleaded, it becomes difficult to ask the plaintiff to remove the vague and embarrassing averments. It also becomes difficult to except to the cause of action.

I would therefore agree with Mr *Manjengwa* that the exception filed by the defendant was irregular and should be expunged from the record. I will not refer to it in my judgment.

The defendant also filed a special plea in abatement. This was obviously done in terms of Rule 137 (1)(a) which reads:

> "(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."

Herbstein andVan Winsen *supra*, at page 307A highlight that a plea in abatement is a "special defence which has as its object either to delay the proceedings, a dilatory plea, or to abate or quash the action altogether, a declinatory plea. Thus if the defendant is sued on a contract, he may either with or without pleading over on the merits, seek to delay the action by specially pleading that the same cause is pending in another court, a plea of *lis pendens*, or he may seek to quash the action by specially pleading that the same cause of action has already been tried and decided upon by some other court of competent jurisdiction, a plea of *res judicata*. Neither of these special pleas concern the merits of the action. They merely seek to interpose some defence not apparent on the face of the pleadings up to the time they are raised."

It seems to me, therefore, that while an exception is apparent from the declaration, a plea in abatement is not. Further that while an exception should be raised before pleading, a plea in abatement may be raised at any time, even after pleading.

I therefore hold that the special plea in abatement was properly raised.

The defendants, however, chose not to argue the special plea at the commencement of the trial. In the result the plaintiff opened its case and led the evidence of 1 witness. The defendant also opened its own case and called the evidence of two witnesses. It was in his oral submissions that Mr *Fitches* sought to persuade me to uphold the special plea in abatement.

In *Owen Smith v Owen Smith* 1981 ZLR515(S) at 517, LEWIS JP stated:

> "Moreover, it is of the essence of the defence of *res judicata* that it must be pleaded. See for example *Vooght v Winch* (1819) 106 ER 507; [1814-23] ALLER Rep. 270."

In *casu*, the defendant raised the defence of *res judicata* in its plea. It also raised it in its exception (which I have already removed from the record) and in the special plea in abatement. In the final analysis the defence of *res judicata* is captured in the first three issues which were referred to trial. No prejudice would arise to either party were the court

to determine the matter on the basis of the special plea in abatement or on the basis of the full pleadings of the parties.

The issues that were referred to trial were as follows:

1. Whether or not the judgment of JUSTICE KUDYA in case No. HC 1427/05 superceded the parties' obligations in terms of the agreement or confirmed them.
2. Whether the plaintiff could still demand performance of the defendant's obligations in terms of the contract.
3. Whether the defendant was in breach of the agreement and plaintiff was entitled to cancel the same.
4. Whether or not plaintiff is entitled to payment of arrear rentals and if so, in what amounts.
5. Whether or not plaintiff is entitled to holding over damages and if so in what amount.
6. Whether or not defendant is entitled transfer as per the counter-claim.

CASE NO HC 3705/05

The first issue referred to trial gave the case number of the case that I determined on 24 November 2005 as HC 1427/05, when in fact it was HC 3705/05 reference case HC 1427/05.

In that case, the present defendant applied for an order *inter alia* authorising the conveyancer to proceed with transfer of Stand No. 168 Erith Road Willowvale Township Harare. I heard the opposed application on 24 November 2005 and delivered a 10 paged judgment that day. The respondent in that case was the plaintiff *in casu*. In its opposition, the plaintiff was tendering transfer subject to the payment of rentals and interest. The full facts of the matter are dealt with in that judgment and will therefore not be set out herein.

I made the following order:

"The respondent should authorise the conveyancer to proceed with the transfer of Stand No. 168 Erith Road Willowvale Township Harare to the applicant within 14 days of payment of interest calculated at the Barclays Bank rate from 28 July 2004 to the date of judgment, 24 November 2005. The respondent will pay the applicant's costs at the ordinary scale."

In essence I subjected transfer to the payment of interest. The basis of the order I made is found at page 9 to 10 of my judgment. I stated thus:

> "The respondent was within his rights to withhold transfer pending fulfilment of payment of that interest as set out in clause 5.3 of the agreement of sale.
>
> In its opposing affidavit the respondent tendered transfer against payment of interest. Even though it requested for the dismissal of the application with costs, it was in essence inviting applicant top pay interest on the terms set out in the agreement for it to fulfil its own part of that agreement.
>
> I will therefore not order dismissal of the applicant's case, rather I will order transfer but make it subject to the payment of interest at the Barclays Bank rate from 28 July 2004, to the date of judgment."

I thus determined that the capital amount owing had been paid late but in full and that since the present plaintiff was tendering transfer that this transfer be done on payment of interest by the present defendant from the date that that payment was due which was 28 July 2004 to the date of judgment 24 November 2005.

THE ACTIONS OF THE PARTIES PRIOR TO THE JUDGMENT OF 24 NOVEMBER 2005

In terms of clause 5.2 of the Agreement of Sale, the present defendant was to supply the conveyancers with three things. These were the outstanding balance of the purchase price of any bank charges or commission, the amount of all costs of transfer and any other costs or charges that may be due by him and all information and documents necessary for transfer to be effected. These three requirements were to be supplied to the conveyancers at their request. The conveyancers did make the request and the defendant responded.

The present plaintiff had two choices available to him in terms of the agreement of sale in the event that the defendant breached the agreement by failing to pay the outstanding amounts on time. It could cancel the agreement or it could *in lieu* of cancellation seek the payment of interest. In the papers filed of record in case HC 3705/2005, The plaintiff chose the payment of interest and abandoned cancellation. It is in this context that the statement I made on page 6 of the judgment should be understood. I wrote:

> "If it is found that this was done on 14 July 2005 (should actually be 14 July 2004) or on a prior date then the respondent is entitled to withhold transfer until payment is made, if it chooses not to cancel the agreement as a possible breach was committed."

It thus seems clear to me that I simply meant that the plaintiff in *casu* could choose either to withhold transfer until the outstanding balance and fees were paid or it could

choose to cancel the agreement of sale for that breach. The plaintiff could not possibly lawfully do both. It could not demand and accept payment of the balance, fees and charges levied by the conveyancer and cancel the agreement of sale.

THEEFFECT OF THE ORDER OF 24 NOVEMBER 2005

In my view by ordering transfer but making it subject to the payment of interest, I determined that the plaintiff had elected to be bound by the agreement and that it had abandoned its right to cancel.

THE POST 24 NOVEMBER JUDGMENT REVEALS

None of the parties appealed against the judgment. The plaintiff demanded payment of arrear rentals and interest on the outstanding capital itself and the outstanding rentals. It did not advise the defendant how it had arrived, at least for the interest request, at its figures. An exchange of correspondence ensued. The defendant supplied the plaintiff with figures it believed plaintiff was entitled to. The plaintiff rejected these figures and purported to give 14 days notice to the defendant to pay the figure it had supplied failing which the agreement of sale was to be deemed cancelled.

The 14 -day ultimatum expired. The plaintiff purported to have cancelled the agreement of sale. After the expiration of the 14 days, the defendant offered to pay a higher amount than the one it had initially averred was interest calculated in terms of the November 2005 judgment. The plaintiff was unmoved by this offer. It proceeded to issue summons out of this court seeking the order I have set out at the beginning of this judgment.

THE LAW

In their oral submissions both Mr *Manjengwa and* Mr *Fitches* were agreed that the first issue for determination was whether the defence of *res judicata* was available to the defendant.

In *Banda and others v Zisco* 1999(1) ZLR 340 (S) at341G-342E, SANDURA JA outlined the essential ingredients of *res judicata* thus:

> "The requisites of the plea of *res judicata* have been set out in a number of previous cases. In *Pretorious v Barkly East Divisional Council* 1914 AD at 409, SEARLE J set them out as follows:
>
> > 'As to the first point, the requisites for a plea of *res judicata* have several times been laid down in this court. The three requisites of a plea of *res judicata*, said the CHIEF JUSTICE in *Hiddingh v Denyssen and others (*1885)3 Menz 424, quoting Voet (44.2.3) are that the action in respect of which judgment has been given must have been between the same parties or

> their privies, concerning the same subject matter and founded upon the same complaint as the action in which the defence is raised……
>
> In order to determine the cause of the complaint, the pleadings and not the evidence in the case must be looked at."

Subsequently, in *Mitford's Executors v Ebden's Executors and Others* 1917 AD 682 and at 686 MAASDORP said the following:

> "The question now arises whether that decision was given under the circumstances which preclude the plaintiff from bringing his present action. Are the first defendants entitled to set up that decision as *res judicata* in the present action? To determine that question it will be necessary to enquire whether that judgment was given in an action (1) with respect to the same subject matter, (2) based on the same ground, and (3) between the same parties"

More recently GUBBAY JA (as he then was) commented on the plea of *res judicata* in *Wolfenden v Jackson* 1985(2) ZLR 313 (S) at 316B-C as follows:

> "The *exceptio rei judicata* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to, even if erroneous. See *Le Roux en'n Ander v Le Roux* 1967(1)SA 446(A) at 461H. It is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or in the case of a judgment *in rem*, any other person) are not permitted to dispute its correctness"

Finally, in *Beck's Theory and Principles of Pleading in Civil Actions 5 ed* by *Isaacs*, the learned author specifies in what respects a previous judgment may be *res judicata.* At p 171, he states as follows:

> "The previous judgment is only *res judicata* as regards matters between the parties which the judgment actually affects and when the plea is raised, it therefore becomes essential to determine whether the present claim is actually affected by the previous judgment."

In *Madondo v Fyfe and Others* 1988(1) ZLR138 (H) REYNOLDS J also dealt with the special plea of *res judicata.* At 140E he stated:

> "It is trite that, in order for the special plea of *res judicata* to succeed, it must be established that the judgment given in the prior action concerned the same subject matter; was founded on the same grounds and was either a judgment *in rem*, or was between the same parties or their privies."

See also GILLESPIE J IN *Towers v Chitapa* 1996(2) ZLR 261(H) at 270F-272C.

In applying these principles to the present case it is clear that the parties in HC3705/2005 were the plaintiff and the defendant. The subject matter was, amongst

others, the transfer of the immovable property in question arising out of the agreement of sale. One of the issues which was determined was whether or not transfer could be granted.

The effect of the order was therefore that the plaintiff elected to abide by the agreement and thus chose not to cancel it, for if it had chosen to cancel transfer would not have been ordered. See *Guardian Security Services (Private) Limited v Zimbabwe Broadcasting Corporation* SC95/2001 at p8 where SANDURA J quoted WATERMEYER AJ in *Segal v Mazzur* 1920CPD634 at644-5 . The order was made by a competent court. It was clear that the interest was for the outstanding capital as represented by the post-dated cheques and the rate of interest was given, as was the period that governed the levied interest. It was left to the parties to agree on the actual emprical interest, which was capable of arithmetic calculation. Thus even if the judgment was wrong, as long as it stood, it was binding on both parties.

It is noteworthy that the effect of the alleged cancellation of the agreement of sale by the plaintiff was to render the judgment of 24 November 2005 nugatory. If it desired to cancel, then the plaintiff was in my view obliged to first of all have that judgment set aside. It seems to me grossly irregular that the plaintiff could undermine an order of court by the medium of cancelling the agreement while that judgment was extant. Mr *Manjengwa* was unable to make any meaningful submissions on whether the plaintiff could by cancelling the agreement nullify a valid court order. It is clear to me that the plaintiff could not lawfully do so.

I am satisfied that the special plea in abatement of *res judicata* succeeds. It is accordingly upheld.

In the result, it is not necessary for me to deal with the main claim on the merits. It is accordingly dismissed.

It became clear to me that the reason why the defendant counter claimed and why it deferred and relegated argument on the special plea to the stage that it did after evidence had been led for both the main and counter claim was for the court to make a finding on the exact figure due to the plaintiff as interest pending transfer. The expert witness called by the defendant provided the correct formula for calculating the interest that was due, pending transfer. He however arrived at the wrong figure. After making their oral submissions the parties retired and approached me in chambers where they indicated that the empirical figure calculated in terms of the judgment of 24 November 2005 was $193 473.00 revalued. It seems to me that after the defendant has paid this amount, transfer should take place in terms of the order of 24 November 2005 which remains clear and unambiguous. The

counter claim must also fail on the basis of *res judicata,* a basis I raise *mero motu.* See *Towers v Chitapa supra* at 270C .

The defendant's position on *res judicata* has been vindicated. It however asked for costs on the higher scale on the basis that the plaintiff unnecessarily dragged it to court. That may be so, but it seems to me that the defendant could have avoided the costs incurred after it filed its plea if it had rather than counter claim raised the special plea, and this would have curtailed the costs associated with the filing of further pleadings and trial. It however emerged during Mr *Fitches* oral address that the defendant decided to go along with the plaintiff in the hope that this court would determine its counter claim and put to rest the actual figure of interest that it should pay. By electing to use this tactic, the defendant incurred unnecessary costs which it would have avoided. Had the defendant conducted its case properly, I would have granted its costs on the higher scale. I however deny it its costs on the basis that it aggravated the expense of trial by its failure to curtail the proceedings by timeously setting down the special plea for hearing.

It is my view that it will be just and equitable if each party were to bear its own costs.

IT IS ORDERED THAT:

1. The defendant's special plea in abatement of *res judicata* be and is hereby upheld.
2. The plaintiff's claim be and is hereby dismissed.
3. The defendant's counter claim be and is hereby dismissed.
4. Each party shall bear its own costs.

*Wintertons, p*laintiff's legal practitioners

*Nhemwa and Associates,d*efendant's legal practitioners