

EDGARS STORES LIMITED
versus
JABULANI MLOTSHWA

HIGH COURT OF ZIMBABWE
MAMBARA J
HARARE 26 & 27 February 2025

Exception

F. Mahere, for the plaintiff
M.E.P. Moyo, for the excipient

MAMBARA J:

INTRODUCTION

This matter comes before the Court on an exception raised by the defendant against specific claims pleaded in the plaintiff's declaration. The defendant contends that certain claims - specifically claims 2, 3, 4, and 5 - fail to disclose a proper cause of action because they do not sufficiently allege the requisite elements of negligence or a special duty of care necessary for a delictual claim. The plaintiff, by contrast, asserts that the defendant's unauthorized engagement with third-party suppliers, conducted without proper due diligence and in breach of the plaintiff's internal procedures, caused quantifiable financial loss. This judgment addresses both the procedural and substantive issues, balancing strict adherence to court rules with the overarching interest in a substantive resolution of the dispute.

BACKGROUND AND FACTUAL MATRIX

The plaintiff initiated these proceedings alleging that, between 2016 and 2022, the defendant - then employed by the plaintiff - engaged third-party suppliers without the plaintiff's knowledge or authority. It is pleaded that the defendant disbursed sums amounting to ZAR 388,280.25, ZAR 433,912.33, ZAR 2,795,187.93, USD 1,385,810, ZAR 34,340.63, and USD 80,433 in furtherance of these transactions. The plaintiff contends that the defendant's failure to follow the established procurement and stock management procedures resulted in non-delivery or substandard delivery of merchandise, thereby inflicting significant patrimonial loss.

Following the discovery of these irregularities, the defendant resigned on 13 January 2023 purportedly to pre-empt disciplinary proceedings. The plaintiff has since sought redress for the losses incurred. In response, the defendant has raised an exception arguing that the plaintiff's pleadings are vague, embarrassing, and deficient in establishing a cause of action based on delict.

PROCEDURAL ISSUES: RULE 42(9) AND SET DOWN DELAYS

At the commencement of the hearing, the plaintiff argued that the defendant should be barred from raising the exception on the grounds of non-compliance with Rule 42(9) of the High Court Rules, 2021. That rule requires a legal practitioner to file replication and heads of argument within ten days of receiving an exception or special plea, after which the registrar must set down the matter within one month.

Counsel for the plaintiff submitted that the defendant failed to file a "blank notice of set down" within the prescribed period. Citing cases such as *Shabtai and Anor v Syven and Others* HH 95/23 and *Blackie Investments (Pty) Ltd v Delta Beverages (Pvt) Ltd and Others* HH 88/23, the plaintiff argued that strict compliance was necessary. The exception was filed on 27 August 2024, and subsequent correspondence from the registrar on 15 November, 16 December, and 19 December 2024 went unanswered until the defendant filed the necessary notice on 27 January 2025 - approximately four months late.

The defendant, however, argued that this preliminary point should not bar the hearing of the exception. It was submitted that the Court's inherent discretion should be exercised in the interests of justice, especially considering ZHOU J's earlier case management order directing the matter to be set down within 30 days. The defendant further contended that dismissing the exception on technical grounds would undermine judicial finality and unnecessarily delay the resolution of the substantive issues.

The Court reiterates that the purpose of an exception is not to engage in abstract debates over technical deficiencies but to ensure that the pleadings disclose sufficient material facts to support a claim. In this matter, while certain aspects of the plaintiff's pleadings require clarification, the overall cause of action is sustained by the factual allegations.

ANALYSIS OF THE PROCEDURAL ISSUE

The Court acknowledges that while procedural rules are essential to ensure an orderly administration of justice, they must be interpreted in a manner that does not frustrate the substantive resolution of disputes. Rule 42(9) imposes an obligation on the registrar to set

down matters; however, it is silent on automatic sanctions for non-compliance. Moreover, the purpose of an exception is to narrow the issues for trial, not to serve as a trap for technical non-compliance when such delay has not caused demonstrable prejudice.

In this case, the Court finds that any alleged prejudice due to the delay in filing the notice has not been sufficiently established to warrant dismissal. Furthermore, dismissing the exception now would conflict with ZHOU J's order, which remains binding. Accordingly, the plaintiff's preliminary point on Rule 42(9) is dismissed.

SUBSTANTIVE ANALYSIS

The defendant contends that the plaintiff's declaration fails to set out a proper cause of action by not specifically pleading the requisite elements of negligence or a special duty of care. In response, the plaintiff has pleaded, and will prove at trial, that the defendant engaged in unauthorized transactions that directly resulted in quantifiable financial loss. To clarify the legal standard applicable to pleading a cause of action, the Court relies on several seminal judgments.

In *McKelvey v Cowan N.O. 1980 (4) SA 525 (Z)*, the Court held:

"If evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable."

This succinct principle underscores that an exception will only succeed if it is impossible for any evidence to establish the alleged cause of action.

Similarly, in *Border Timbers Ltd v Zimbabwe Revenue Authority* HH 13-2009, it was stated:

"A plaintiff must specifically plead the necessary elements of a cause of action, including wrongful conduct, patrimonial loss, and fault."

This excerpt reinforces the requirement that the pleadings must furnish sufficient detail regarding the wrongful act and the consequent loss to enable the defendant to respond.

Further, the Supreme Court in *Chigovera v Minister of Energy and Power Development & Anor* SC 115/21 clarified:

"In our law, a cause of action consists of all the facts upon which the relief sought is based."

This statement emphasizes that the full set of material facts—rather than legal conclusions - must be pleaded to disclose the claim.

Taking these authorities into account, the Court observes that the plaintiff's declaration, while perhaps not exhaustively detailed in every respect, discloses sufficient

factual matter to form a viable cause of action. Specifically, the plaintiff has alleged that the defendant, acting outside his authority, failed to conduct due diligence before engaging third-party suppliers, thereby causing significant financial loss. The evidentiary record, which will be further elucidated at trial, is expected to demonstrate:

1. The defendant's unauthorized engagement with third-party suppliers.
2. A failure to follow the plaintiff's established procurement and stock management procedures.
3. A direct causal link between the defendant's conduct and the financial loss suffered by the plaintiff.

While the defendant argues that certain claims (notably claims 3 and 4) are vague because they do not specify the precise nature of the duty allegedly breached, the above excerpts make it clear that - if evidence can later demonstrate the requisite elements - the pleadings are not excipiable. Nonetheless, to remove any residual ambiguity, the Court grants the plaintiff leave to amend its declaration with respect to claims 3 and 4 to clarify the specific duty and the precise loss alleged.

In contrast, the pleadings relating to claims 2 and 5 are sufficiently specific, and the defendant's exception to those claims is rejected. The plaintiff has set forth clear allegations of negligent conduct and the resultant patrimonial loss, thereby meeting the standards as set out in the cited authorities.

Thus, even if certain technical refinements may be beneficial, the overall cause of action is sustained by the facts pleaded. The seminal judgments cited above unequivocally support the conclusion that the pleadings need only set out the material facts from which a cause of action can be inferred, rather than every possible legal element in exhaustive detail.

CASE MANAGEMENT AND JUDICIAL FINALITY

An important aspect of these proceedings is the interplay between the procedural management of the case and the underlying substantive issues. The defendant maintained that the delay in setting down the matter under Rule 42(9) should render the exception inoperable. However, the Court reiterates that while procedural compliance is essential, it cannot be applied in a manner that frustrates the substantive resolution of the dispute.

The direction given by ZHOU J on 15 January 2025 was intended to prevent further delay in resolving the exception, and it remains binding. As held in *General Leasing (Pvt) Ltd v Allied Timbers Zimbabwe (Pvt) Ltd* HH 76/15, orders made by a judge must be given effect unless they are formally rescinded or varied on substantial grounds. The defendant's

submission that non-compliance with Rule 42(9) should result in dismissal is untenable, especially since the plaintiff has not demonstrated significant prejudice.

In balancing the interests of justice, the Court is also mindful that dismissing the exception at this stage would delay the resolution of the substantive dispute. Procedural devices, such as exceptions, are meant to narrow issues for trial. To the extent that dismissing the exception would force a prolonged dispute over technical matters, such an outcome is contrary to the overriding need for judicial efficiency and finality.

FINDINGS AND DISPOSITIONS

After careful consideration of the submissions and the relevant legal authorities, the Court makes the following findings:

1. The defendant's late filing of the blank notice of set down, though contrary to the prescribed timeline, does not warrant dismissal of the exception. The Court exercises its discretion to condone the delay in the interests of justice and to avoid further procedural delay. Accordingly, the preliminary point on Rule 42(9) is dismissed.
2. Substantive Exception Analysis
 - 2.1 The Court finds that the plaintiff's declaration adequately pleads the wrongful conduct and resultant loss. The exception to claim 2 is dismissed.
 - 2.2 Claims 3 and 4: The pleadings with respect to these claims are ambiguous regarding the specific duty allegedly breached. The Court, therefore, grants leave to the plaintiff to amend its declaration within 10 days to clarify the precise nature of the alleged breach and the corresponding loss.
 - 2.3 Claim 5: The pleadings for claim 5 are sufficiently clear and specific; hence, the exception to claim 5 is dismissed.
3. The Court holds that the plaintiff's overall cause of action—arising from the defendant's unauthorized and negligent conduct—is sustained by the pleadings. Although certain claims may benefit from refinement, the factual allegations, when read as a whole, disclose a viable claim for recovery of financial losses.
4. The Court emphasizes that while procedural rules must be followed, they should not be applied in a manner that frustrates the ultimate resolution of substantive issues. The decision to permit the matter to proceed rather than dismiss it on

technical grounds is consistent with the principles of judicial economy and finality in litigation.

In the result, it is ordered that;

1. The defendant's preliminary point regarding non-compliance with Rule 42(9) is dismissed.
2. The exception raised by the defendant with respect to claim 2 and claim 5 of the plaintiff's declaration is dismissed.
3. The exception with respect to claims 3 and 4 is upheld; however, the plaintiff is granted leave to amend its declaration within 10 days from the date of this judgment to clarify the specific duty breached and the precise loss incurred.
4. The matter, including any amended pleadings, shall proceed to trial on the substantive issues as originally set out, in accordance with the directions given by ZHOU J.
5. Costs of these proceedings shall be awarded as costs in the cause.

MAMBARA J:

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Mathonsi Ncube Law Chambers, defendant's legal practitioners