DUMISANI SIBANDA
versus
NEVILLE BLUMEARS

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 20 JUNE 2018 AND 5 JULY 2018

Special Plea and Exception

Plaintiff in person
T K Hove and *T Ndebele* for the defendant

MOYO J: In this matter the plaintiff issued summons claiming:

1) $27 449-30, the total value of cash and material supplied to the defendant as working capital support in terms of the agreement between the plaintiff and the defendant.

2) $62 200,00 being the hire charges for the plaintiff's air compressor up to 20 November 2017 and $50-00 for every day the compressor remains in defendant's possession.

3) Immediate return of plaintiff's compressor valued at $8000-00.

4) Interest at the prescribed rate calculated from 1 January 2012 to date of full final payment.

The defendant filed a special plea and an exception to the claim in that firstly, the cause of action as pleaded in the summons has since prescribed. Secondly, that there is no basis or foundation for the claim for $62 200-00 pleaded in the summons.

At the hearing of this matter, I upheld the special plea and the exception with costs at an attorney and client scale and I stated that my detailed reasons would follow. Here are the reasons:

Upon receipt of the summons the defendant requested for further particulars which were duly supplied. The defendant later filed a special plea in terms of order 21 Rule 137 (1) as read with rule 139 (1) of the High Court Rules. The defendant firstly pleaded prescription and also that the summons is fatally defective in that the claim for $62 200-00 has no foundational basis constituting a cause of action.

From the summons, the cause of action is pleaded in paragraph 4 and 5 of the declaration wherein it is stated:

> "4. Sometime during February 2011, the plaintiff and the defendant entered into an agreement whereby it was agreed that the plaintiff would invest working capital in the defendant's mining claims known as Right stead, Bushy Park and Red Rose.
> 5. In terms of the agreement, the plaintiff invested $27449-30 as working capital for the mining venture, and supplied various equipment including a compressor valued at $8000-00."

We are not given the full terms and conditions of the agreement in the summons. We are not told what the plaintiff was to benefit for such an investment in terms of the agreement. We are not told the precise obligations of either party in terms of the agreement. We are just told at paragraph 6 that:

> "The agreement stipulates that the working capital should be repaid to the plaintiff. Further, the equipment supplied to the mine remains the property of the plaintiff as it has not been paid for."

It is not pleaded as to when and how the working capital was to be repaid to plaintiff. We are then told that the equipment supplied by the plaintiff remains his property as it has not been paid for.

We are then told that the operation of the agreement has been frustrated by the unilateral actions of the defendant including the removal of equipment and workers from the mines.

It is then said that the defendant has ignored plaintiff's demands for him to pay his dues and return his equipment.

On the plea of prescription

In terms of section 3 of the Prescription Act a debt prescribes in three years from the time the cause of action arose. The plaintiff has pleaded in his summons that the agreement being the subject matter of these proceedings was entered into in February 2011. Per the summons we are not told when the agreement was breached therefore plaintiff's cause of action arose in February 2011. In fact he claims interest from January 2011 meaning that is when his monies become due. In his further particulars he supplies a copy of the contract. The contract clause 1 thereof gives its effective date as 1 February 2011. Clause 2 thereof stipulates that the investor shall invest working capital which shall be recoverable from mining proceeds as shall be agreed between the parties. Plaintiff then attaches an annexure which tabulates a series of payments made between January 2011 and 17 May 2012. It is on 17 May 2012 that plaintiff last injected money into the mining venture. From the summons it would appear that defendant did not honour the agreement from the outset, this is as per plaintiff's declaration paragraph 6 thereof where it is stated:

> "The agreement stipulates that the working capital should be repaid to plaintiff. Further the equipment supplied to the mine remains the property of the plaintiff as it has not been paid for."

Clearly from plaintiff's own summons and declaration as read with the agreement, the cause of action arose between February 2011 and 17 May 2012. I say so, for despite the vagueness of the agreement itself plaintiff pleads in the declaration that the working capital should have been repaid to him. Even the agreement itself stipulates that the working capital shall be recoverable from mining proceeds. Meaning that the moment the mine was up and running plaintiff's dues became payable. Plaintiff should then have acted at that juncture when the mining operation had commenced and within a reasonable period after he did not receive his dues. The defendant was in *mora*, the moment the mine started production without an effort to pay plaintiff's dues. It is therefore correct that the cause of action lapsed sometime in 2015, 3 years from 2012. The plaintiff issued summons in November 2017, presumably 5 years out of time in terms of the Prescription Act.

In his heads of argument on the issue of Prescription the plaintiff comes up with various theories that are not recognizable grounds at law for challenging prescription. As a self-actor, no matter how sympathetic this court can be, the law does not change, it remains the same, operating with equal effect against both the ones who understand legal issues and the ones that are ignorant. It is clear from the heads of argument filed by the plaintiff that he does not appreciate the legal concept of prescription, he does not appreciate what to say in rebuttal of a prescription defence. He does not appreciate how the issue of prescription itself finds its way into pleadings. He just makes bold assertions and quotes case law that does not address the issue at hand.

The claim is clearly prescribed both in terms of the summons and the agreement attached to the further particulars. It is for these reasons that I upheld the special plea on prescription and dismissed the plaintiff's claim.

<u>On the exception in relation to the claim for $62200-00.</u>

Defendant also excepted to the summons in that it contains a claim for damages in the sum of $62200-00, which damages have not been properly pleaded in that the face of the summons provides for the claim of $62200-00 being the hire charges for plaintiff's compressor up to 20 November 2017. It is not stated in the declaration, the basis for that claim nor the justification. It is not pleaded from what instance that claim arises. Plaintiff attempted to file a notice of amendment which notice did not formulate any basis for a hire claim. The notice itself is improperly before the court as it was filed on 22 March 2018 after defendant had long excepted to the summons.

The plaintiff's summons is poorly drawn and renders the plaintiff's claim bad at law in the following respects.

a) Firstly the agreement forming the substance of the cause of action is not properly pleaded. That is, the terms and conditions of the agreement are not pleaded. The agreement attached to the further particulars also does not give precise terms and conditions of the contract between the parties and yet it stipulates in clause 13 and 14 that

> "This agreement constitutes he whole agreement and understanding between the parties and supercedes all prior discussions between parties."

It further stipulates that

> "No amendment or variation to this agreement shall be valid and binding unless reduced to writing and signed by both parties."

The agreement itself is also badly drawn. It does not state precisely the rights and obligations of either party. It also does not state what should happen in the event of a breach. It lacks legal sense. It is more of a gentleman's agreement than a legal document. The summons did not do any better either. The terms and conditions of the contract are not precisely pleaded in the summons. The legal obligations and rights of the parties are not properly pleaded in the summons.

The summons is bad at law in that it does not show concisely what the defendant was to do in terms of the agreement, that he then failed to do. Conversely, the summons does not state what the defendant was not supposed to do per the agreement which he then did. The claim for the damages of $62200-00 just appears on the face of the summons. It is not pleaded as to what constitutes the foundation for that claim. An attempt to amend did not take the anomaly any further.

A pleading must allege the facts that are required in order to disclose a cause of action or defence. Refer to the case of *Scutrachem Bpk* v *Wenhold* 1995 (4) SA 312 (A).

As I have already alluded to herein, in an action based on a contract as in this case, the material averments that must be made are the existence of the contract, the relevant terms of the contract and the applicability of those terms to the particular right forming the basis *ex contractu* of the claim. Refer on this aspect to the case of *Prins* v *Univesiteitvan Pretoria* 1980 (2) SA 171 (T) at 174 G-H. In a damages claim as is the one by plaintiff, the formulation of damages claimed must be clear and concise. In this case plaintiff does not plead any hire agreement, but he nonetheless seeks damages for the hire of the compressor.

From plaintiff's summons and declaration no cause of action is pleaded for the hire of plaintiff's compressor by the defendant. Plaintiff just plucks a hire claim from the air and does not formulate any basis for it whatsoever in his pleadings. Neither does the annexed agreement between the parties lay any ground for a hire claim.

The plaintiff's summons is thus bad at law. The sum of $62200-00 claimed indeed renders the summons excipiable in that on that claim no cause of action is pleaded.

On the issue of costs, the defendant claimed costs at a higher scale and I granted such costs for the reason that the pleadings filed by the plaintiff are so bad at law, that once an objection was raised, plaintiff should have withdrawn the matter and sought to bring a proper summons and a properly pleaded claim before the court.

The plaintiff as a self-actor clearly does not appreciate the principles of legal drafting but in as much as that is so, where a self-acting litigant approaches higher courts where litigation is more complex, and does not seek legal representation, they are preparing themselves for whatever outcome the court may give, both the good and the bad. There are no separate rules for self-actors, in this court unfortunately and before a self-acting litigant mounts litigation in this court, they should make sure that they fully understand the law formulating the basis for their case so that they properly plead it. It is also a dangerous gamble on the part of a self-acting litigant who does not fully appreciate the law and the rules of this court, to simply close their eyes and plunge headlong into a legal suit that they do not fully appreciate. In fact such a litigant should be wary of forging ahead in ignorance where those in the know (the other party's lawyers) start raising red flags about the appropriateness of his/her papers. Forging ahead in light of technical objections that one does not fully appreciate or understand, would give an impression that the litigant does not want to give due consideration to the issues raised and in fact does not want to educate themselves or seek wise counsel despite their lack of knowledge. Such conduct must be discouraged. Those who are not in the know should seek legal counsel especially where objections have been raised at their pleadings which objections they would not fully comprehend. Even those litigants who cannot afford legal practitioners can find solace in the legal aid organisations who assist indigent litigants to enable them to access justice while being fully informed. For a litigant to forge ahead in ignorance unnecessarily increases costs on a matter that has no merit whatsoever and in fact that means that such litigant is in fact carefree and is not mindful of the costs attendant in litigation proceedings. Self-acting in my view, is no excuse for mounting badly drawn pleadings in my view. The existence of a grave defect relating to proceedings is indeed a recognized ground for awarding punitive costs.

Refer to the case of *Tarry & Co Ltd* v *Matatele Municipality* 1965 (3) SA B1E. It is for these reasons that I awarded costs at a punitive scale as asked for.

For the reasons detailed herein I upheld the special plea and the exception with costs at a higher scale.

T K Hove and Partners, defendant's legal practitioners