GRANITESIDE ELECTRICAL HARDWARE (PVT) LTD
versus
JOCKSTAR INVESTMENT (PVT) LTD
and
IBI PROPERTY AND INFRASTRUCTURE (PVT) LTD

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 19 May 2022 & 6 July 2022

Exception

Adv.*S.M. Hashiti*, with Mr.C *Mutandwa* for the plaintiff.
Adv.*G. Madzoka,* for 2nd defendant (excipient.)
No appearance for first defendant.

CHILIMBE J

BACKGROUND

[1] Second defendant has taken an exception to plaintiff`s claim. Second defendant`s complaint is that (a) the claim is bad at law, (b) it offends the standard set for pleadings by the rules and (c) in all that, discloses no cause of action against it. Plaintiff issued summons against the defendants on 25 October 2021 claiming in the main, specific performance. It demanded the delivery of a swathe of land comprising of several stands situate in an area of Harare known commonly as Mount Pleasant Heights.

[2] In the alternative, plaintiff claimed damages in the sum of US$540,000 plus several ancillary sums of money. The monetary claims constituted damages allegedly sustained by plaintiff as a result of the defendants` wrongful conduct. Plaintiff alleged that it was induced to enter into the transaction for the stands in question through misrepresentation. The first defendant pleaded to the claim. Second defendant raised an exception. The exception was resisted.

[3] Set out in full, the plaintiff`s claim went thus; -

> WHEREFORE the Plaintiff prays for an order against the Defendants in the following terms;

i. The 1st Defendant`s purported cancellation of the agreements of sale of stand number 2826,2827,2828,2836,2837 and 2838 be and is hereby declared null and void ab initio.
ii. The Defendants shall provide the Plaintiff with bank account details for the purpose payment of the sum of ZWL$22 666.66 being the balance of the development fees within 72 hours of this order.
iii. In the event that the Defendant fails to provide the bank account details as above, the Plaintiff be and is hereby authorised to pay the amount to the Registrar of the High Court.
iv. Upon payment of the development fees, the Defendant shall issue the Plaintiff with stand payment clearance certificates in respect of stand number 2827,2828,2836 and 2837.
v. The Defendant pay the Plaintiff`s cost of suit on an attorney client scale.

[4] The plaintiff also pleaded as follows in the alternative; -

ALTERNATIVE CLAIM
Only in the event that the above claim is dismissed, the Plaintiff`s alternative claim is for an order that;

a. The Defendants to pay to the Plaintiff the market value as at the date of judgment of the six stands being Stands Number 2826,2827,2828,2836,2837 and 2838 of Zazalisari Lot 4 currently being the sum of USD540 000.00 (Five Hundred and Forty Thousand United States Dollars).
b. The Defendants pay to the Plaintiff the sum of USD11 332 (Eleven Thousand Three Hundred and Thirty-Two United States Dollars) being a refund of the development fees paid to the 1st Defendant by the Plaintiff.
c. The Defendants pay to the Plaintiff the sum of USD6034.50 (Six Thousand and Thirty-Four United States Dollars), being the conveyancing fees paid by the Plaintiff to the Defendants` nominated conveyancers.
d. The Defendants pay interests at the prescribed rate on the above amounts calculated from the date of issue of summons to the date of full payment.

THE EXCEPTION

[5] The second defendant`s submitted as follows; -plaintiff`s claim was based on six agreements of sale. These agreements were concluded between plaintiff and first defendant sometime in 2008.In terms of those agreements, plaintiff purchased from first defendant, six stands being 2826,2827,2828,2836,2837, and 2838 of Zazalisari Lot 4. Zazalisari Lot 4 is also known as Mount Pleasant Heights Phase 2. I will refer to these stands as the "Zazalisari Stands".

[6] The contracts of sale of the Zazalisari Stands were exclusive to plaintiff and first defendant. Second defendant was not party to those agreements. That aspect underpins the exception. The agreements of sale invested plaintiff with certain rights, as they did burden the first defendant certain obligations. A principal term of the contracts was that plaintiff would receive title to the stands once he met the capital and ancillary payments. Plaintiff claims that he duly performed as obliged but transfer of the stands was not effected. Frustrated by fruitless attempts to resolve the matter, plaintiff instituted proceedings.

[7] Plaintiff sued for specific performance, with an alternative claim for damages. Notwithstanding the said privity of contract between plaintiff and first defendant, plaintiff cited and sought relief against second defendant. The declaration attached to plaintiff`s summons carried no averments linking second defendant to the dispute. The legal basis of the claim against second defendant was thus not borne out in the declaration. On the alternative claim, the excipient stated that the damages claimed were based on misrepresentation and unjust enrichment. That notwithstanding, no specific allegation of wrongful conduct on the part of second defendant were raised.

[8] It was also argued on behalf of second defendant that the declaration embarrassed it in its defence. It offended the requirements of the High Court Rules SI 202/21, including r 36 (1) (d) and r 36 (7). On that basis, the excipient prayed that the exception be upheld, and plaintiff`s claim dismissed. In the alternative, it was submitted, without conceding as much, that the court could uphold the exception, but grant plaintiff a reprieve to cure the defects noted in its pleading.

[9] It is necessary to note that the exception was directed at the declaration in its entirety and not at specific sections thereof.

THE PLAINTIFF`S RESPONSE

[10] The plaintiff argued for the dismissal of the exception. It was submitted on its behalf that the declaration contained no defect. It set out the plaintfiff`s claim as it did the case against both defendants. To demonstrate this fact, counsel traversed the length and breadth of the declaration in his address to the court.

THE ISSUES BEFORE THE COURT

[11] The task before me is simple. Firstly, I need to establish whether the exception is sustainable. This evaluation will be determined by (a) the standards prescribed in the rules of court and, (b) the guidance from precedent and (c) the nature of the claim or dispute before me. If the exception is unsustainable, it will be dismissed and the matter will end thus. Secondly, if the exception succeeds, I will then determine the fate of plaintiff`s claim; - outright dismissal or a reprieve for plaintiff to cure the defects in the pleading impugned.

DEFINITION AND PURPOSE OF AN EXCEPTION

[12] MUZOFA J summarised the above in *Otto Chimwanengara versus The Sheriff of The High Court of Zimbabwe (N.O) And Debra Chambara in HH 487-18* as follows at page 2; -

> "In terms of r 137 (10 (b) of the High Court Rules, 1971 a party can except to pleadings. An exception is meant to curtail unnecessary litigation where no cause of action is disclosed on the pleadings. I was referred by the excipient to the case of *City of Harare* v *D and P Investments (Pvt) Ltd and Another* 1992 (2) ZLR 254 at D – E where the court had this to say on the purpose of an exception
>
> "An exception is an answer to the plaintiff's claim or to the defence claimed. Its main purpose is to obtain a speedy decision upon a point of law apparent on the face of the pleading attacked and to settle the dispute in the most economical manner by having the faulty pleading set aside."

[13] This means that an exception must be purposed on digging down to the bedrock of cause of action. It must draw out and expose the exact nature of the dispute between the parties. By doing so, the declaration would have assisted the court to identify the underlying controversy between the parties. A court well-seized with the parties' dispute is best placed to resolve that dispute and deliver justice between the parties and beyond.

[14] Van Winsen in The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa discusses, in Chapter 22, Subtopic 1 B, how the courts will deal with situations "*Where, if a pleading lacks averments which are necessary to sustain an action or defence, as the case may be*." The authors state as follows at p 639; -

> "As stated, for the purpose of deciding an exception a court must assume the correctness of the factual averments made in the relevant pleading, unless they are palpably untrue or so improbable that they cannot be accepted.
> The excipient has a duty to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed."

[15] The test was also set out in the following terms in *Constantine Chimakure & Another v Ambassador Agrippa Mutambara & Another SC 91-20* at [29] where it was held that;-

> "Whenever a pleading is vague or lacking in precision it is susceptible to an exception only if the alleged vagueness renders the whole pleading unintelligible. A defendant is, as a consequence, under a burden to establish that the pleading has embarrassed him or her in pleading thereto."

[16] In *Pete's Warehousing and Sales CC v Bowsink Investments CC* 2000 (3) SA 833 at 834H, the following is stated:

> "The test to be applied in determining an exception is as follows: The excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular any document on which it is based, could bear no cause of action or defence, failing this, the exception had to be dismissed."

Given the above guidance, one may pause and revisit the issue of cause of action.

THE CAUSE OF ACTION

[17] What constitutes 'a cause of action' was described in *Abrahams & Sons v SA Railways and Harbours* 1933 CPD 626. At 637 WATERMEYER J stated:

> "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 act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action."

[18] This definition coincides with rule 13 (2). MANZUNZU J put it as follows at p 2 in *Chimimba* v *First Capital Bank Limited HH 262-22*;

> "A cause of action in any summons is the set of facts which if proved will enable the plaintiff to obtain judgment, see *Syfin Holdings Ltd v Pickering 1982 (1) ZLR 10 (SC), Controller of Customs and Excise v Guiffre 1971 (1) RLR 91 (G) @94.*
> In *Chifamba v Mutasa & Ors HH 16/08* the court said the following on the purpose of pleadings: "The purpose of pleadings is not only to inform the other party in concise terms of the precise nature of the claim they have to meet but pleadings also serve to identify the branch of the law under which the claim has been brought. Different branches of the law require different matters to be specifically pleaded for a claim to be sustainable under that action."

In *Masendeke* v *Chalimba & Others HH 354/14* the court had this to say:

> "In order to determine if the plaintiff has adequately pleaded his cause of action, the court will examine the claim brought, the branch of the law concerned and determine if every fact which is material to be proved has been pleaded."

APPLICATION OF THE ABOVE CONSIDERATIONS

[19] The plaintiff bases its claim of (a) misrepresentation (b) unjust enrichment and (c), the liability of a principal over the acts of his agent. One may traverse therefore the areas of law in respect of which the causa is based.

[20] The facts as alleged in the declaration hardly point toward second defendant in as far as the above three aspects founding the claim. The bulk of the averments are directed toward the first defendant.

[21] Viewed against the test in the above dicta, how does the plaintiff`s claim stand? The plaintiff`s claim is in contract. The exception has raised a breach of the principles of privity of contract. In *TIBIC Investments (Private) Limited and Another Mangenje SC 13-18 (reported in 2018 (1) ZLR 137* (S)) the Supreme Court observed as follows (at pages 11-12 of SC 13-18); -

> "That conclusion of law renders both appellants strangers to the contract between the acquiring authority and the respondent. This brings us to the doctrine of privity of contract. That doctrine restricts the enforcement of contractual rights and remedies to the contracting parties, to the

exclusion of third parties. The learned author Innocent Maja in his book *The Law of Contract in Zimbabwe* at p 27 para 1.5.3 graphically explains the doctrine as follows:
"The doctrine of privity of contract provides that contractual remedies are enforceable only by or against parties to a contract, and not third parties, since contracts only create personal rights. According to Lilienthal, privity of contract is the general proposition that an agreement between A and B cannot be sued upon by C even though C would be benefited by its performance. Lilienthal further posts that privity of contract is premised upon the principle that rights founded on contract belong to the person who has stipulated them and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one who is not a party to it."

The court *a quo* having correctly found that the sale of the land in dispute to the first appellant was a nullity and that the acquiring authority remains the lawful owner of the land in dispute, it follows that both appellants were not privy to that contract. That being the case, the doctrine of privity of contract excluded them from suing for cancellation of the contract between the first and second respondents in the form of the first respondent's offer letter. The second respondent being the only other contracting party to the Offer Letter swept the carpet from underneath the appellants' feet when he elected not to contest the court a quo's judgment choosing to remain neutral and abide by the court's decision. That in effect means that the only other party privy to the contract has capitulated and is no longer challenging the validity of the first respondent's Offer Letter."

[22] In the matter before me, the declaration is silent on the nexus of second defendant to the contracting parties in the Zazalisari Stands. The indirect references to second defendant in the declaration are insufficient to inform or support a conclusion that second defendant was privy to the contract.

[23] This conclusion sustains despite the attempt to introduce an agency relationship. It was stated in the declaration that; -

"15.8 The 1st Defendant is claiming that it was acting upon the instance of the 2nd Defendant in entering into the contracts hence the latter is also liable for the former`s conduct."

[24] This was but a fleeting reference to the agency relationship. No details apart from the averment made in paragraph 15.8 of the declaration were set out. Agency is a specific area of the law which is guided by certain principles. HUNGWE J (as he then was) revisited these principles in *Robert Madzamba v Catherine Mercy Chidemo And 2 Others* HH 71- 13, as follows [page 2]; -

"It is trite that the authority of an agent may be express or implied. If express it may be created by formal writing, informal writing or verbally. Authorisation may also be given ex post facto

> by ratification. The liability of the principal to a third party upon transactions concluded by an agent, or the transfer of his interest by an agent may be based on the fact that;
> a) The agent was expressly authorised,
> b) The agent was apparently authorised; or,
> c) The agent had a power arising from the agency relationship and not dependent upon express authority or apparent authority.
> (See generally *Tucker's and Development Corporation (Pvt) Ltd v Perperllief 1978 (2) SA 11(T).* In order to succeed therefore plaintiff had to show that second defendant had the authority to bind first defendant."

[25] The bare averment relating to the existence of an agency relationship between first and second defendant in paragraph 15.8 of the declaration would not suffice for purposes of informing second defendant of the case against it.

[26] Plaintiff makes, in the declaration, persistent allegations against first defendant. Paragraphs 15.1 to 15.3, as well as paragraphs 16.1 to 16.6 all carry the allegations of unjust enrichment and misrepresentation pointing to first defendant. Second defendant remains unscathed by these averments. In particular, paragraphs 15.1,16.1 and 16.2 are set out below;

> "15.1 At the time the Plaintiff entered into six agreements of sale referred to above and up to the time the 1st Defendant filed its plea, it was not aware that the agreements of sale were illegal, the 1st Defendant misrepresented through its Director ANTHONY TAENGWA PAREHWA…".
> 16.1 The 1st Defendant misrepresented to the Plaintiff that a subdivision permit was granted in respect of the six stands it sold to the Plaintiff and that it,1st Defendant, was the owner of the stands and that it could pass title of the stands to the Plaintiff upon Plaintiff paying the purchase price, development fees and transfer fees.
> 16.2 In making these representations, the 1st Defendant knew that they were false. It knew that there was no subdivision permit and it had no title to the land. The misrepresentations were therefore fraudulent or at the very least negligent."

[27] In addition, the requirements prescribed by rule 36 (7), set out below, were not met by plaintiff.

> 36 (7) In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary, particulars (with dates and items, if necessary) shall be stated in the pleading:-

The required averments supporting a claim based on misrepresentation are absent from the declaration. The below excerpt from Van Huysteen, Lubbe, Reinecke and Du Plessis` book Contract-General Principles ,6th edition, can aid in the further understating of the requirement prescribed in r 36 (7). The learned authors summarised the elements of misrepresentation in the following fashion, at p 119; -

> "The **elements** of the delict of misrepresentation *in contrahendo* are an *act* (conduct), which undisplays the quality of *wrongfulness*, is accompanied by *fault* or blameworthiness on the part

> of the wrongdoer, and *causes* an *undesirable result* (either at the very conclusion of the contract or some detrimental result (damage)) flowing from the contract."

[28] Again, the particulars of unjust enrichment, in so far as they related to second respondent, were neither articulated nor set out in the declaration.

CAN EXTRINSIC EVIDENCE BE USED TO INTERPRET THE PROPRIETY OR OTHERWISE OF AN IMPUGNED DECLARATION?

[29] It took the perspicacity of Advocate *Hashiti* to draw out plaintiff`s claim against second defendant from the declaration as noted in [ 10] above. That the declaration needed further amplification of its contents outrightly betrays its inadequacy. Advocate *Hashiti* attempted to refer to other aids in a bid to accentuate plaintiff`s claim against second defendant. Counsel, urged the court to have regard to a matter, HC 7488/20. In paragraph 11 of the heads of argument dated 2nd December 2022 filed on behalf, counsel submitted that:

> - *"The court is urged to consider the record in HC 7488/20 wherein the involvement of the second defendant is set out".*
> The authorities forbid such an approach.

[30] Advocate *Madzoka* cited *Webb and Others* v *Local Authorities Pension Fund and Another 2017 (2) ZLR 169*. In that decision, the court matter examined the distinction between an exception and special plea. In essence, the court found that an exception must be confined to the pleading objected to. Effectively, the court in *Webb and Others* v *Local Authorities Pension Fund and Another* (*supra*) did no more than follow the reasoning adopted in *Sammy's Group (Private) Limited v John Bourchier Meyburgh & 3 Others, SC 25/2015*.

[31] In that case, the court had to make a finding on the following issue; - "**Whether the court misdirected itself in determining the exceptions on facts and evidence not found within the pleadings excepted to.".** The court`s finding was in the positive. Below is part of the reason behind the finding at page 12; -

> "For the purposes of an exception no facts (except agreed facts) may be adduced by either party and an exception may thus only be taken when the defect objected against appears *ex facie* the pleading itself. Nor can the court rely on any facts or evidence not contained within the pleading excepted to."

[32] Again on the same point it was held in *Viljoen v Federated Trust Limited 1971 (1) SA 750* at 754 that; -

> "Thus in deciding whether a particular averment in a pleading should be struck out the Court must have regard only to the pleadings filed and cannot consider any fresh matter introduced either by way of evidence on affidavit or in any other manner. In the 3rd edition of Beck on Pleadings in Civil Actions, the position is correctly set out at p. 95 as follows:
> *"Exceptions and motions to strike out are alike in this, that neither does nor can introduce any fresh matter..."*
> In an application to strike out offending averments, the pleadings will, therefore, have to be interpreted as they stand without taking into consideration any matter outside the pleadings concerned."

SHOULD CLAIM BE DISMISSED OR SALVAGED?

[33] I am satisfied that the excipient has made out its case and must succeed. The next question is whether the exception should be allowed as prayed or with a reprieve to plaintiff to cure the defects in its papers. Second defendant prayed for dismissal of plaintiff`s claim. Plaintiff argued otherwise. It was submitted on behalf of plaintiff that even if the exception is upheld, the prayer for dismissal of plaintiff`s action ought not be granted. The authorities are clear on that point. The authorities say that where an exception is upheld, the plaintiff ought to be granted an opportunity to remedy its pleading. Van Winsen express this position as follows at page 646 of the 5th edition of Volume 1; -

> "If the exception is allowed, the court will usually give the respondent an opportunity to file an amended pleading within a stated time."

[34] I was referred to *Adler* v *Elliot 1988 (2) ZLR 283 (SC)* which has been variously followed in this jurisdiction. In *ZFC Limited versus Kettex Holdings (Private) Limited, and 3 Others*, HH 253-15 MATANDA-MOYO J followed *Adler v Elliot (supra*) and held thus; -

> "I therefore agree with both parties that the exception can only force an amendment. The upholding of the exception is not such as would lead to the dismissal of the matter. The case referred to by the plaintiff in its heads is instructive on the matter. See Adler v Elliot 1988 (2) ZLR 283 (SC) where the court said;
> *"A claim should not be dismissed on an exception where it is possible that the party affected may be able to allege further facts that would disclose a cause of action. See Green v Lutz 1966 RLR 633 (GD) at 641A. He should be given leave to amend within a specified period, it so advised. Such an opportunity was not afforded to the plaintiff*".

[35] The leading case of *Sammy`s Group* (*supra*) put matters beyond issue. It held that dismissal of a plaintiff`s claim following the success of an exception would be a drastic step. It may assist to set out ZIYAMBI JA`s dictum at [ 35] to [ 36] of the court`s judgment.

> "As to para (2) of the Order, the general practice where a court upholds an exception is not to dismiss the plaintiff's action but to order that the offending pleading be set aside and the plaintiff be given leave to file an amended pleading, if so advised, within a certain period of time. The following passage from Erasmus SUPERIOR COURT PRACTICE4 is instructive: -
> At page BI- 159

> "where the exception is successful, the proper course is for the court to uphold it. When an exception is upheld, it is the pleading to which exception is taken which is destroyed. The remainder of the edifice does not crumble …. The upholding of an exception to a declaration or a combined summons does not, therefore, carry with it the dismissal of the action. The unsuccessful party may then apply for leave to amend his pleading. It is in fact the invariable practice of the courts in cases where an exception has been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time. It has been held that it is doubtful whether this practice brooks of any departure; in the rare case in which a departure may be permissible, the court should give reasons for the departure. This practice a *fortiori* applies where an exception is granted on the ground that the pleading is vague and embarrassing, a ground which strikes at the formulation of the cause of action and not its legal validity. Leave to amend is often granted irrespective as to whether or not at the hearing of the argument on the exception the plaintiff applied for such leave. Where the court does not grant leave to amend when making an order setting aside the pleading, the plaintiff is entitled to make such application when judgment setting aside the pleading has been delivered."

[36] Van Winsen (ibid), go further, closely quoting the court`s remarks in Group of Five Building Ltd v Government of the RSA (Minister of Public Works and LAND Affairs 1993 (2) SA 593 (SCA); -

> "……on appeal, the Appellate Division held that when an exception has been taken successfully to the plaintiff`s initial pleading. Whether it be a declaration or a combined summons, on the ground that it discloses no cause of action the invariable practice of the courts has been to order that the pleading be set aside and that the plaintiff be given leave, if he is so advised, to file an amended pleading within a certain period of time."

[37] In casu, the excipient has argued that the plaintiff`s declaration discloses no cause of action. In *Trope and Others v South African Reserve Bank 1993 (3) SA 264 (A)*, the court made a distinction between a declaration that discloses no cause of action and another that is vague and embarrassing. The court stated as follows at raising such a compliant from at 270 F-H; -

> "Where an exception is granted on the ground that a plaintiff's particulars of claim fail to disclose a cause of action, the order is fatal to the claim as pleaded and therefore final in its effect. (*Liquidators, Myburgh, Krone & Co Ltd v Standard Bank of South Africa Ltd and Another 1924 AD 226 at 229, 230*.) Leave to amend will be of no avail to a plaintiff in such a case unless he is able to amend his particulars of claim in such a way as to disclose a cause of action. On the other hand, where an exception is properly taken on the ground that the particulars of claim are vague and embarrassing, by its very nature the order would not be final in its effect. All that a plaintiff would be required to do in such a case would be to set out his cause of action more clearly in order to remove the source of embarrassment."

[38] In *Wattle Company Limited* v *Samuel Mukubvu and Tanaka Ventures (Private) Limited HH 840-19*, shared the following guidance on how a court should proceed after upholding an exception. At pages 2-3, the court held thus; -

> "Where an exception is upheld, the court does not dismiss the party's claim unless it is clear that the party has no intention to amend its pleadings. In this case no such intention has been expressed by or attributed to the plaintiff. On this basis, it is appropriate that the plaintiff be granted leave to amend its summons and declaration".

[39] It was argued on behalf of second defendant that the plaintiff in casu had indicated no intention to amend its pleadings. On that basis, plaintiff forfeited the right to the court`s clemency and respite. I am unable to agree with counsel. Firstly, apart from resisting the exception, there was nothing on the plaintiff`s papers or submissions to suggest it was hostile to amending its claim. Secondly, such a position would have been automatically inconsistent with plaintiff`s repeated prayer entreating the court to not dismiss its claim even if the exception succeeded. Thirdly, as noted at [8] above, second defendant did not appear unrelenting in its position.

[40] I presume that the above position is consistent with the approach taken by courts when dealing with failure to adhere to the rules. First one can refer to the decisions on "rules for the court not court for the rules" line of cases. These cases include the oft quoted dictum of MAKARAU J as she then was, in *Stuttarfords Holdings v Alice Madzudzu HH 33-03* at page 4 to 5; -

> "It is my further view, that in considering the above factors and any other that may present themselves to it, a court should be guided by the spirit behind the crafting of the rules of court. It is trite that rules are made for the court and no the court for the rules. The ultimate aim of the rules of court is to achieve justice between the parties. Rules of the court should therefore be applied to ensure as far as is possible, that the real dispute between the parties is aired, that the parties are treated on an equal footing, that the proceedings are completed expeditiously and inexpensively and that real justice is done between the parties."

[41] Granted the court in condonation applications are seized with different circumstances. Granted too, that exceptions and special pleas relate to different set of rules and principles. But that distinction notwithstanding, can the principles behind a court`s treatment of all forms of infractions against the rules not be applied to breach by a plaintiff, of rules regarding drawing up of proper declarations?

Secondly, the guidance issued by the courts in [] is consistent with the position taken in DAVIS J in *Kahn v Stuart 1942 CPD 386* at 391 where the court stated; -

> "--- the court should not look at a pleading with a magnifying glass of too high power. If it does so, it (is) almost bound to find flaws in most pleadings ------. It is so easy, especially for busy counsel to make mistakes here or there, to say too much or too little, or to express something imperfectly. In my view, it is the duty of the court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in the whole or in part. If there is not, then it must see if there is any embarrassment, which is real and such as cannot be met by the asking of particulars -----. And unless the excipient can satisfy the court

> that there is such point of law or such real embarrassment, then the exception should be dismissed."

[42] I see no basis to depart from the established course and sound guidance of the authorities on this point. On that basis, I will extend an opportunity to plaintiff to attend to the noted deficiencies in its declaration.

COSTS

[43] The first defendant made a prayer for costs on an attorney-client scale. ZHOU J, faced with a similar prayer, took the following approach in *Wattle Company Limited versus Samuel Mukubvu and Tanaka Ventures (Private) Limited (supra)*- [page 3]; -

> "On the question of costs, the defendant has asked for attorney-client costs. These are a punitive order of costs and are awarded in special circumstances. In the present case the summons and declaration were carelessly prepared without attention being given to the basis of the claims. The plaintiff's attention was drawn to these deficiencies in August 2018. No attempt was made to amend the pleadings concerned. What has exercised the court's mind is whether the plaintiff's legal practitioners should recover the costs of preparing the summons and declaration. This is a matter which I leave to them to seriously introspect about given the serious deficiencies in these pleadings which are glaring. Mr *Magwaliba* for the defendants did not ask for the order of costs to be made against the plaintiff's legal practitioners. However, the plaintiff cannot escape the attorney client costs because the defendants have been put to unnecessary expenses by having to litigate over such inelegantly drafted pleadings."

[44] The strict view taken by the court in *Wattle Company Limited* is insightful. It supports in the main, the value, role and relevance of adjectival law in the administration of justice. In addition to the dictum cited in the preceding paragraphs on pleading, SCHREINER JA in *Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273* (A) at 278 F-G cautioned thus; -

> "No doubt the parties and their legal advisors should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice."

[45] In that regard, the remarks of ZHOU J are an apt reminder of the need for parties and their lawyers to observe the standards set in the rules without fail. In the matter before me, I note the following; -the defects in the declaration were drawn to plaintiff`s attention by letter dated 29 October 2021.The plaintiff disagreed, by letter dated 16 November 2021, with the position communicated by second defendant. In that response, plaintiff expressed the view that the parties ought to focus on resolving the underlying dispute rather than be delayed by "technicalities". Plaintiff also commented on the fact that second defendant had been joined

to the proceedings. In addition, plaintiffs noted, in the same letter that the original declaration had been amended.

[46] I recognise the spirited efforts by plaintiff to seek an enforcement of what it perceived as its rights against the two defendants. It took steps to join second defendant to the proceedings. It proceeded to amend the declaration to accommodate the joinder. These processes suggest an intent to proceed against second defendant, in addition to the original claim against first defendant. Joinder of second defendant on its own creates a presumption; - that the requirements for joinder set out in the rules of court had been met. In the main rule 32 provides for the joinder of a party to existing proceedings where the party concerned has discernible interest or connection to that matter.

[47] Based on the above, it is my view that that plaintiff`s (wrong) position conveyed in the letter of 16 November was informed more by mistake or carelessness. I do not believe that they were being stubborn and warlike. I further take into account the nature of the defects in plaintiff`s declaration. That declaration was blighted by a paucity of fact. Indeed, that defect resulted in the success of the exception. But I do not believe that the defect is of such nature and severity as to render an ordinary order of costs inconsistent with an appropriate reprimand.

[48] Finally, one must also consider, in the present matter, the underlying dispute, and the plaintiff`s intent to have such dispute resolved. That point being noted, plaintiff's decision to nevertheless insist on its flawed declaration remains a recurrent rebuke. The plaintiff did sail, as they say, perilously close to the wind. It is only in view of the mitigants noted above that plaintiff escapes a punitive order of costs. Otherwise, the concerns expressed by ZHOU J in *Wattle Company* apply in this and every other matter where a party files sub-standard pleadings. The plaintiff and its attorneys ought to feel appropriately chastised. It is an absolute imperative that pleadings be drafted with the requisite degree of clarity and sufficiency. The purpose and principles guiding the filing of pleadings in general, and declarations in particular, are invaluable to the process underlying resolution of disputes by the courts. In that regard, I believe that an award of costs on the ordinary scale will however, assuage the inconvenience endured by second defendant, as it will also admonish plaintiff for its breach of the rules.

DISPOSITION

In the result, it is ordered that;

1. The defendant's exception be and is hereby upheld.
2. Plaintiff is granted leave to amend its summons and declaration, should it be so advised, within 10 days of today's date, should it be so advised.
3. Thereafter the matter shall proceed in terms of the rules.
4. Plaintiff shall pay the defendant's costs on the ordinary scale.

Machinga Mutandwa- plaintiff`s legal practitioners
Jiti Law Chambers-second defendant`s legal practitioners