

SIQALISILE SIBANDA
versus
VINCENT TOBAIWA MUSVOTA

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 16 November 2016 & 14 June 2017

Opposed Matter

T L Marange, the plaintiff
R Nyapadi, for the defendant

CHATUKUTA J: It is common cause that sometime in March 2005, the defendant purchased Stand No. 239 Glenview Township of Lots 1-548 of Subdivision D of Subdivision A (the property) from one Douglas Nyaude through Graham and Douglas Real Estate. In a case of a double sale, Douglas Nyaude sold the same property to the plaintiff sometime in September 2009. The plaintiff commenced constructing a structure on the property. On 14 November 2014, the defendant filed an application under case number HC 13223/12 seeking a declarator that he was the owner of the property and an order compelling Douglas Nyaude to transfer the property into his name. An order was granted in his favour on 30 July 2014.

At the time the defendant filed the application under case number 13223/12, the structure being constructed by the plaintiff was at window level. On 7 April 2016, the plaintiff issued out summons against the defendant claiming a sum of US\$50 000 expended on erecting the structure. The claim is based on unjust enrichment. On 3 April 2016, the defendant entered an appearance to defend the action. On 15 April 2016, a request for further particulars was filed. The plaintiff furnished the further particulars which were furnished on 20 May 2016. Ten days later on 30 May 2016, the defendant filed a special plea and an exception to the claim.

The defendant contended that the plaintiff had voluntarily incurred the loss that he suffered in putting up the structure. He averred that according to the application under case number HC 13223/12, the plaintiff became aware of his entitlement to the property sometime

in March 2009. The defendant had just dug a foundation. A meeting was convened and attended by the plaintiff, Douglas Nyaude and the defendant at which Nyaude confirmed that the defendant had lawfully purchased the property. Despite this confirmation, the plaintiff continued to build a structure on the property necessitating the filing of the application under case number HC 13223/12.

The plaintiff failed to oppose the application and was accordingly barred. At the hearing of the application, the plaintiff was represented by Mr *Tafireyi Chitsima* of Chiganga and Partners. Mr *Chitsima* conceded during the hearing that the plaintiff was barred. He submitted that the plaintiff was not going to seek the upliftment of the bar and further would abide by the decision of the court.

The defendant contended that the failure to oppose the application and to apply for the upliftment of the bar and the acceptance to be bound by the order of the court was an admission that he did not have any cause to believe that he had a right over the property. Consequently he did not have a cause of action against the defendant for unjust enrichment.

The defendant excepted to the claim on the ground that the plaintiff did not set out in its pleadings the basis upon which it held the defendant responsible for his genuine but mistaken belief that he was the owner of the property in question. It was contended that the plaintiff was well aware that his belief was not mistaken in light of what transpired under case number HC 13223/12. The failure to set out the grounds meant that he had failed to establish a cause of action.

The plaintiff defended the claim. Regarding the special plea, it was contended that the defence of *volenti non fit injuria* cannot be raised as a special plea. Regarding the exception, it was contended that all the essential requirements for unjust enrichment were set out in the declaration in a clear and unambiguous manner. The pleadings were not vague or embarrassing. It was further contended that both the special plea and the exception had been filed out of time contrary to r 119 of the High Court Rules. The summons and declaration were both served on the defendant on 11 April 2016. Both the exception and the special plea ought to have been filed at the latest by 13 May 2016. The exception and the special plea were filed on 30 May 2016, 13 days out of time. The plaintiff relied in support of his proposition on the case of *Sammys Brooke (Pvt) Limited v John Butcher Meyburgh N.O. & Ors* SC 45/2015.

The time within which an exception or a special plea can be filed is set out in r 119. The rule provides:

“119 Time for filing plea, exception or special plea

The defendant shall file his plea, exception or special plea within ten days of the service of the plaintiff’s declaration provided that where the plaintiff has served his declaration with the summons as provided for in r 113 there shall be added to the period of ten days above referred to the time allowed a defendant to enter appearance as calculated in terms of r 17.”

The defendant conceded that the special plea and exception were indeed filed out of time. He appeared to have abandoned the exception. He however persisted with the special plea arguing that a special plea, being a point of law, can be raised at any time. The defendant filed supplementary heads of argument in which he referred, in support of his proposition, to *Muskwa v Nyajina & Ors* SC 17-14, *Gold Driven Investments (Private) Limited v Telone (Pvt) Limited & Anor* SC 9/13 (2013 (1) ZLR 172), *Tobacco Sales Producers (Private) Limited v Eternity Star Investments* HC 749/2006 (2006 (2) ZLR 293) and *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S).

The plaintiff submitted that the cases referred to by the applicant were of no assistance to the defendant as the cases were all decided before and had been overtaken by *Sammys Brooke Pvt Limited v John Butcher Meyburgh N.O.* (*supra*).

Whilst the law in this regard as cited by the defendant may be true in relation to points of law generally, it cannot be so in relation to exceptions and special pleas. The defendant referred to the case of *Gold Driven Investments (Private) Limited v Telone (Pvt) Limited & Anor* (*supra*). Had the defendant’s counsel taken time to read that case he would have noted that there are exceptions to that general rule. In *Gold Driven Investments (Private) Limited & Anor* 2013 (1) ZLR 172 MALABA DCJ, (as he then was), remarked at 180 C- E that:

“The theme that runs through the principles is that a question of law can be raised at any stage of the proceedings provided it does not occasion prejudice to the other party. These principles are subject to the absence of clear provisions governing procedures in particular proceedings. The principles do not, on their own, provide a separate legal basis on which a court can ignore explicit provisions of law designed to deal with the raising of questions of law. In this case art 23 (2) is comprehensive and clearly takes care of the appropriate procedure by which a point of law may be raised in arbitral proceedings. There is no exception to the procedure which would allow the arbitrator to decide the question of raising of points of law outside art 23 on the ground that one of the parties considers the matter to go to the root of the dispute.

The relevant procedures regarding the time within which an exception or a special plea should be raised is found in r 119. An exception or a special plea shall be filed within ten

days of the service of the plaintiff's declaration. However, where the plaintiff has served both the summons and the declaration, a defendant is entitled to an additional ten days within which to file the exception or special plea. As stated in *Sammys Brooke Pvt Limited v John Butcher Meyburgh N.O.* (*supra*), (which is almost on all fours with the present case) the requirements in r 119 are mandatory. In that case, ZIYAMBI JA stated as para 22 that:

“It is true, as the learned Judge remarked, that there is no sanction for the late filing of an exception or special plea. However, the provision in the Rule is mandatory and the documents filed in contravention thereof cannot, in the absence of condonation of the non-compliance with the Rules, have any legal validity. The sanction must, in my view be, that the pleading is invalid by virtue of its non-compliance with the Rules. First respondent's exception was filed months out of time. Both applications were in violation of the Rules without explanation, without condonation, sought or granted. There was, therefore no legal basis on which they were entertained by the court *a quo*.”

As rightly submitted by the plaintiff and conceded by the defendant, both the special plea and the exception in the present matter were filed out of the time prescribed by the rules “without explanation, condonation sought or granted.” The special plea and the exception accordingly do not have any legal validity and I find no basis to entertain both.

Turning to the question of costs, the plaintiff prayed for costs on an attorney and client scale. He contended that the defendant should have been aware that the special plea and the exception were improperly before the court. I am inclined to agree with the plaintiff. Despite the defendant being the excipient, it is the plaintiff who first filed heads of argument on 17 June 2016. He raised the issue in the heads of argument and cited the case of *Sammys Brooke Pvt Limited v John Butcher Meyburgh N.O.* The defendant filed his heads of argument on 4 July 2016. The defendant did not address the issue in his heads, neither did he consider the case cited by the plaintiff. Despite being given an opportunity to file supplementary heads of argument and provide the requisite authorities, he still did not mention the case or attempt to distinguish it from the present case. Had the legal practitioner been diligent in addressing the issue from the onset, he would not have persisted with his submissions. I am in agreement with the plaintiff's counsel that the plaintiff had to incur unnecessarily expenses to defend the exception and the special plea. The conduct of the defendant's legal practitioner is clearly dilatory and the defendant having chosen his counsel, should meet the costs incurred by the plaintiff.

It is accordingly ordered that:

1. The exception and the special plea be and are hereby dismissed.
2. The defendant be and is hereby ordered to pay costs on an attorney to client scale.

Chinyama & Partners, plaintiff's legal practitioners
Muza & Nyapadi, defendant's legal practitioners