

REPORTABLE (56)

**NATIONAL EMPLOYMENT COUNCIL
FOR THE CONSTRUCTION INDUSTRY
v
ZIMBABWE NANTONG INTERNATIONAL (PVT) LTD**

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, GWAUNZA JA & PATEL JA
HARARE, JUNE 5 & OCTOBER 20, 2015**

T. Mpofo, for the appellant

R. Nyapadi, for the respondent

PATEL JA: This is an appeal against the whole of a judgment of the High Court handed down on 14 November 2014.

The appellant had issued summons against the respondent claiming the sum of US\$165,755 for general fund and pensions contributions due from 16 February 2009 to 31 March 2013. The appellant also claimed interest on the principal amount, at the rate of 7.5% per annum, and costs of suit. The respondent duly filed its notice of appearance to defend.

Following the further exchange of pleadings between the parties, but before filing its plea, the respondent filed an exception to the appellant's claim. The principal objection raised was that the High Court lacked jurisdiction to entertain the

claim as it was a labour matter. The respondent also averred that part of the claim had prescribed by effluxion of time and that the rate of interest claimed exceeded the prescribed rate of interest.

High Court Decision and Grounds of Appeal

The court *a quo* found that the appellant's claim was premised on the provisions of the Collective Bargaining Agreement (the CBA) for the Construction Industry (Statutory Instrument 244 of 1999) which had been negotiated and registered under s 79 of the Labour Act [*Chapter 28:01*]. Consequently, the alleged failure to comply with the CBA was a labour matter to be dealt with by the Labour Court at first instance in terms of s 89 (1) (a) of the Act, the jurisdiction of the High Court having been specifically ousted by s 89 (6) of the Act. The court further held that it was an abuse of court process for the appellant to approach the High Court after the jurisdictional issue was raised by the respondent. The appellant's claim was accordingly dismissed with costs on a legal practitioner and client scale.

The grounds of appeal herein encompass the entirety of the judgment of the court *a quo* pertaining to its jurisdictional competence, including the merits of that judgment under the new constitutional dispensation. The appellant also raises the procedural point that the court erred in entertaining a challenge to its jurisdiction by way of an exception as opposed to a special plea. At the hearing of this appeal, argument was confined to this procedural point on the basis that a decision on that point would dispose of the appeal.

The Submissions

Adv. *Mpofu*, for the appellant, submits that an objection to jurisdiction must be by way of special plea. This emerges from r 137 (1) (a) and (b) of the High Court Rules, which provides a clear distinction between special pleas and exceptions. In South Africa the position may be different, but in this country there is specific authority, which states that a challenge to jurisdiction must be taken by way of special plea and that it is necessary to restrict exceptions to objections dealing with the merits of the matter.

Mr. *Nyapadi*, for the respondent, submits that the distinction between an exception and a special plea is one of form and not of substance. By virtue of rule 106 of the High Court Rules, no technical objection may be raised to any pleading on the ground of any alleged want of form. Although an objection to jurisdiction is usually raised by special plea, the failure to do so is not necessarily fatal. In South Africa, there is clear authority to the effect that a special plea and an exception are interchangeable.

Adv. *Mpofu* counters that r 99, which deals with the form and content of pleadings, and rule 106, relating to technical objections, both form part of Order 15 regulating pleadings generally. Rule 106 itself refers only to r 99 and not to r 137, which is contained in Order 21 dealing specifically with special pleas and exceptions.

The Case Authorities

In South Africa, the traditional approach has been to differentiate between an exception and a special plea on the basis the latter raises some special defence not

apparent *ex facie* the declaration. In the words of INNES CJ in *Brown v Vlok* 1925 AD 56 at 58:

“... a plea in bar is one which, apart from the merits, raises some special defence, not apparent *ex facie* the declaration – for in that case it would be taken by way of exception – which either destroys or postpones the operation of the cause of action.”

The same approach is adopted and elaborated by Herbstein & van Winsen: *The Civil Practice of the Supreme Court of South Africa* (4th ed.), at pp. 471-472, as follows:

“The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the declaration. The defence he raises on exception must appear from the declaration itself; he must accept as true the allegations contained in it and he may not introduce any fresh matter. Special pleas, on the other hand, do not appear *ex facie* the declaration. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the declaration, and those facts have to be established by evidence in the usual way. Thus, as a general rule, the exception procedure is appropriate when the defect appears *ex facie* the pleading, whereas a special plea is appropriate when it is necessary to place facts before the court to show that there is a defect. The defence of prescription appears to be an exception to this rule, for it has been held that that defence should be raised by way of special plea even when it appears *ex facie* the plaintiff’s particulars of claim that the claim has prescribed, apparently because the plaintiff may wish to replicate a defence to the claim of prescription, for example an interruption.”

The learned authors proceed, at pp. 473-479, to enumerate and explain those special defences that are typified by special pleas, *viz.* dilatory pleas, pleas in abatement, *lis alibi pendens*, arbitration as a condition precedent, prescription, non-joinder or misjoinder, *res judicata* and absence of jurisdiction. As regards jurisdiction in particular, they take the view, at p. 479, that:

“The usual method of raising a defence of absence of jurisdiction is by way of a special plea because the lack of jurisdiction is often not apparent from the

allegations contained in the pleadings objected to and must, therefore, be proved with fresh matter introduced by way of evidence, which cannot be done in the case of an exception. Where, however, it is apparent *ex facie* the pleading itself that the court concerned has no jurisdiction, the matter may be decided on exception.”

The case cited as authority for the last proposition is *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 760B-E, where STEYN AJ held that:

“If, however, it is apparent *ex facie* the pleading itself that the court concerned has no such jurisdiction, a defence based upon the absence of jurisdiction can be established without the introduction of any fresh matter.

.....
.....

In my opinion, it is clear, therefore, that the above-quoted phrase in sub-rule (1) of Rule 23 [*i.e.* “sustain an action”] has a meaning which is wide enough to cover a case where the absence of the necessary jurisdiction is apparent *ex facie* the pleading concerned, and that a defence based upon the absence of such jurisdiction can validly be raised by way of exception.”

In advancing the respondent’s position, Mr. *Nyapadi* cites the broad principle that the courts are inclined to look at the true nature and substance of the matter in question as opposed to its form. He relies in particular on the decision of the South Gauteng High Court in *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) which appears to have been inspired by the need to give precedence to substance over form. After citing Voet’s *Ad Pandectaes* (46), where the eminent jurist subsumes all special defences under the broad rubric of exceptions generally, Claasen J opines, at paras. 18 and 21, that:

“It, therefore, seems to me of little moment whether a particular defence is raised by way of exception or by way of special plea, provided that it is properly and timeously raised in an intelligible form.

.....
.....

It would seem to me that the nature of a defence raised by special plea or exception is more important than the procedure adopted. It is the nature of such

defence which would determine whether or not evidence is required and whether or not the defence should have been raised *in initio litis* or whether it can be raised on appeal. How the defence is raised is of lesser importance than the grounds for the defence and the point in time that it is raised. In my view this conclusion is fortified by the fact that practicalities determine the method by which a defence is raised.”

In Zimbabwe, the tendency has been to retain the distinction between exceptions and special pleas, in keeping with the traditional approach expounded by Herbstein & van Winsen (*op. cit.*). Thus, in *Reuben v Meyers* 1957 (4) SA 57 (SR) at 58C-D, MURRAY CJ observed that:

“According to the modern practice a defence of prescription is raised by a special plea; in the Courts of Holland this was done by an exception, a term which as pointed out by INNES, C.J., in *Western Assurance Co. v. D Caldwell's Trustee*, 1918 AD 262 at p. 270, is used not in the narrow sense applied to it in South Africa (and Southern Rhodesia), but as covering a number of what would here be called special pleas.”

In *Edwards v Woodnutt N.O.* 1968 (4) SA 184 (R), the distinction was rationalised as being founded on the need to adduce further evidence in the case of special pleas. As is explained by BEADLE CJ, at 186C-I:

“It will be seen that the two major objections of the defendant to the declaration relate to the *locus standi* of the plaintiff to pursue his action and do not suggest that if the plaintiff had the requisite *locus standi* the declaration did not disclose a cause of action. Objections to the *locus standi* of a litigant to sue are more properly taken by way of plea in bar or abatement than by exception. The practice of this Court is to employ the procedure of excepting for those objections which go to the root of the declaration and allege that the declaration does not disclose a cause of action at all, and not for those cases where only the *locus standi* of a particular plaintiff to sue is concerned. The basic difference, however, between an exception and a plea in abatement is that in the case of a plea in abatement evidence may be led, whereas in the case of an exception the facts stated in the pleadings must be accepted.”

On the particular facts of that case, although the defendant had followed the wrong procedure in challenging the plaintiff's *locus standi* by way of exception, the matter was allowed to proceed to a determination on its merits. The reason for do doing was that:

“In the instant case the defendant does not rely on a single fact which does not appear in the declaration, nor does he challenge any of the facts pleaded. This being so, though it would have been better had the defendant's first and second exception been taken by way of a plea in bar, if no possible prejudice is caused the plaintiff by this form of procedure, I can see no reason why the real issues should not now be determined by this Court. Had the plaintiff wished to lead evidence I would have ruled that the plaintiff [*sic*] was out of order for adopting the wrong procedure, but as the plaintiff has not been able to suggest any evidence which he might have led which could have any bearing at all on these issues I have allowed the matter to proceed so that (as I have said) the real issues raised in these proceedings can be determined without waste of costs.”

In the more recent case of *Doelcam (Pvt) Ltd v Pichanick & Others* 1999

(1) ZLR 390(H), at 396 B-F, Gillespie J outlined the various forms of special plea available and the rationale underlying that procedure:

“The purpose of a special plea is to permit a defendant to achieve prompt resolution of a factual issue which founds a legal argument that disposes of the plaintiff's claim. Special pleas are three in kind. The plea in bar, by which a party may interpose a purely formal objection to the jurisdiction of the court. The plea is available as a plea to the jurisdiction or as a plea for the recusal of a judge and in no other case. Other special pleas are available to disclose some ground either for quashing or abating a declaration or for delaying proceedings. Both are usually termed pleas in abatement, although that expression is properly used to describe the declinatory, rather than merely dilatory, plea. The plea in abatement, strictly so called, avers some good ground, not disclosed in the declaration, which otherwise is admitted, for denying the plaintiff relief. The dilatory plea advances some fact, not disclosed in the declaration, which is otherwise admitted, and which entitles the defendant to a stay of proceedings. Since a special plea involves the averment of a new fact, it is susceptible of replication and of a hearing at which evidence on this new fact alone may be led.
.....”

The learned judge proceeded to reject the preliminary point taken by one of the defendants because it had been improperly mounted through a special plea rather than by way of exception:

“In this case, we can therefore see that the point taken by the messenger of the court did not constitute a plea in bar. In fact it was not properly a special plea at all. It advanced the legal argument that a messenger of court acts as agent for a judgment creditor. An exception was the appropriate method of raising the point.”

The High Court Rules

Order 15 of the High Court Rules governs pleadings generally, while r 99 regulates the form and content of pleadings as follows:

“A pleading shall—

- (a) be legibly written on A4 size paper on one side only; and
- (b) state the title of the action, the case number, if any, and the description of the pleading; and
- (c) contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved; and
- (d) be divided into paragraphs numbered consecutively, each paragraph containing wherever possible a separate allegation; and
- (e) have each page, including every document annexed to it, numbered consecutively; and
- (f) be signed by the party concerned or by his legal practitioner; and
- (g) give the party’s address for service.”

Rule 106, which also forms part of Order 15, is concerned with technical objections to form and states that:

“No technical objection shall be raised to any pleading on the ground of any alleged want of form.”

Order 21 deals with special pleas, exceptions, applications to strike out and applications for particulars. Rule 137 prescribes alternatives to pleading to the merits and the forms to be utilised for any such alternative. It provides that:

- “(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;
 - (b) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defence as the case may be;
 - (c) apply to strike out any paragraphs of the pleading which should properly be struck out;
 - (d) apply for a further and better statement of the nature of the claim or defence or for further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars.
- (2) A plea in bar or abatement, exception, application to strike out or application for particulars shall be in the form of such part of Form No. 12 as may be appropriate *mutatis mutandis*, and a copy thereof filed with the registrar. In the case of an application for particulars, a copy of the reply received to it shall also be filed.”

The form referred to in subrule (2) of r 137, *i.e.* Form No. 12, is divided into three separate forms, each dealing respectively with (a) the plaintiff’s or defendant’s exception, (b) the defendant’s plea in bar or abatement and (c) the plaintiff’s or defendant’s application to strike out. No specific form is prescribed for a request for particulars before the close of pleadings, as opposed to a notice calling for further particulars in order to enable the requesting party to prepare for trial, *i.e.* Form No. 13, as prescribed by r 143.

Rule 137 in its present form has, apart from a minor inconsequential amendment effected by section 3 of Statutory Instrument 120 of 1995, remained unaltered since the enactment of the original High Court (General Division) Rules 1971 (R.G.N. No. 1047 of 1971). These Rules repealed and replaced the Rules of the High Court of Rhodesia, contained in the Schedule to the High Court Practice and Procedure Act (Chapter 9 of the 1939 Revised Edition of Statutes).

Order 15 of the 1939 Rules regulated the taking of exceptions and special pleas and the procedure to be followed in their set-down for hearing. Rule 1 of Order 15 dealt with pleas in bar or in abatement, while rule 2 of that Order related to exceptions. Rule 1 was virtually identical to its current equivalent in rule 137 (1) (a). Rule 2 was somewhat differently formulated as compared with the present rule 137 (1) (b), but in substance captured the same restriction against excepting to single paragraphs of a pleading. In short, nothing of significance is to be derived or gleaned from the legislative history of r 137.

Exception versus Special Plea

My reading of r 106, which precludes technical objections on the ground of any alleged want of form, is that it is confined to the application of r 99. I take this view not only because both rules are contained in the same Order 15 but also because they both relate in particular to the form of pleadings. Rule 106 does not extend to the application of r 137 for two reasons. Firstly, the latter rule is set out in an entirely separate Order 21 dealing specifically with special pleas and exceptions. Secondly, and more importantly, although subrule (2) of r 137 is concerned with the form of special

pleas and exceptions, the more crucial aspect of r 137 is subrule (1) which is designed to regulate the procedure to be followed in raising exceptions or special pleas.

As for the formulation of r 137 (1) itself, there can be no doubt that it explicitly differentiates between special pleas on the one hand and exceptions on the other. Moreover, r 137 (2) clearly stipulates that different forms are to be utilised when one or the other procedure is followed. This tends to support the argument that r 137 (1) is to be strictly applied and that any deviation therefrom is to be visited with an adverse ruling. The critical question is whether this position invariably applies in each and every case irrespective of the particular circumstances of a given case. In the absence of clear guidance from the provisions of r 137 *per se*, but having regard to the case authorities on the subject, I am inclined to adopt a negative answer to that question.

As a general rule, exceptions taken by a defendant must be limited to objections or defences that arise *ex facie* the declaration itself. These would include averments that the declaration or part thereof does not disclose a valid cause of action or is vague and embarrassing. On the other hand, where the point taken constitutes a special defence, such as absence of jurisdiction, *res judicata* or prescription (*cf.* the pleas referred to above, as discussed by Herbstein & van Winsen, *loc. cit*), the procedure to be followed is by way of special plea. These are instances where the defence relied upon is not evident *ex facie* the declaration and involves the averment of some new fact or facts to be proved with fresh matter. The procedure by way of special plea enables the plaintiff to rebut the defence raised by replication and the adduction of further evidence where necessary. In

exceptional cases, however, where the special defence in question is apparent *ex facie* the declaration itself, the court may allow the matter to be decided on exception. This is subject to the qualification that the plaintiff has nothing to adduce in rebuttal and will not be prejudiced by a decision being taken on exception.

Disposition

Turning to the instant case, the relevant sequence of pleadings filed by the parties is as follows. The appellant issued summons on 2 October 2013 claiming general fund and pensions contributions in the sum of US\$165,755 together with interest thereon at the rate of 7.5% per annum. After filing its notice of appearance to defend, the respondent requested further particulars on 5 November 2013. The issues raised related to part of the claim having prescribed, the rate of interest claimed and the jurisdiction of the High Court to adjudicate the matter. On 15 November 2013 the appellant furnished its further particulars, specifically addressing the three issues raised by the respondent. There followed a request for further and better particulars, dated 29 November 2013, in which the respondent again raised the same three issues. The appellant responded with its further and better particulars on 6 December 2013 and served its notice to plead on 13 December 2013. The pleadings then culminated in the respondent's exception, filed on 18 December 2013, wherein it primarily challenged the court's jurisdiction and incidentally raised the points relating to prescription and the rate of interest claimed.

The court *a quo*, as I have already indicated, eventually dismissed the claim on the basis that it was an exclusively labour matter and that, therefore, it had no

jurisdiction to entertain it. The court did not determine the other two issues raised in the exception.

The appellant's claim before the High Court was premised on the provisions of a collective bargaining agreement concluded in terms of the Labour Act. In my view, this did not necessarily render the claim as being one within the exclusive remit and jurisdiction of the Labour Court. That is a question that has yet to be decided by this Court. In any event, the jurisdiction of the High Court to adjudicate the claim was impliedly asserted and presumed in the declaration. Thereafter, the question of the court's jurisdiction was fully ventilated in the respondent's requests for particulars and the appellant's responses thereto. In effect, the appellant had substantially replicated to the respondent's special defence of lack of jurisdiction. In these circumstances, it seems to me that there was nothing further that either party might have adduced, whether by way of further pleadings or through fresh evidence, to enable the court to determine the propriety or otherwise of its jurisdiction over the matter. Moreover, I do not perceive that the appellant was prejudiced in any fashion by the matter having been allowed to proceed on exception rather than by way of special plea. Consequently, it cannot be said that the court *a quo* erred in entertaining a challenge to its jurisdiction raised through an exception.

It follows that the appellant's first ground of appeal cannot succeed and must be dismissed. It also follows that the appeal cannot be disposed of on this ground alone, as was envisaged by counsel for the appellant at the hearing of the matter. It will

therefore be necessary to set the matter down afresh for hearing of argument on the remaining four grounds of appeal. There will be no order as to costs at this stage.

It is accordingly ordered as follows:

1. The appellant's first ground of appeal (relating to the determination of the challenge to the jurisdiction of the court *a quo* by way of exception) be and is hereby dismissed with no order as to costs.
2. The Registrar is directed to set the matter down on the next available date for hearing of argument on the remaining four grounds of appeal.

MALABA DCJ: I agree.

GWAUNZA JA: I agree.

Mabulala & Dembure, appellant's legal practitioners

Muza & Nyapadi, respondent's legal practitioners