

BAMBAZONKE MOTORS P/L

Versus

PINKY NCUBE t/a AIRPORT ROAD FILLING STATION

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 25 OCTOBER 2004 AND 15 DECEMBER 2005

H Shenje for the plaintiff

R Nyathi for the defendant

Judgment

NDOU J: The plaintiff issued summons against the defendant for payment of \$12 861 784,00. The cause of action was not pleaded in the summons i.e. no attempt was made on the face of the summons to set out the particulars of the action. In terms of order 3 rule 11(c) of the High Court Of Zimbabwe Rules, 1971, every summons shall contain-

“(c) a true and concise statement of the nature, extent and grounds of the cause of action and the relief or remedies sought in the action.”

- *Coley Hall (Pvt) Ltd v Sinclair Builders* 1972(2) RLR 101; *Singh v Vorkel* 1947(3) SA 400 at 404; *Kennedy v Mazongororo Syringes (Pvt) Ltd* 1996(2) ZLR 565 and *Mavheya v Mutangiri & Ors* 1997(2) ZLR 462.

The defendant excepted to the summons. Initially the plaintiff refused to comply despite due notice. However, when the exception came up for argument the plaintiff, with the benefit of

hindsight, conceded that the summons fell foul of the provisions of rule 11(c). Mr *Shenje*, for the plaintiff, withdrew the summons but did not tender costs.

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I am, therefore required to determine the issue of costs. It is clear from the above that the plaintiff employed defective procedures and pursued the litigation without due diligence. The withdrawal was done on the eleventh hour so to speak.. Where a plaintiff withdraws a summons, very sound reasons must exist why the other party should not be entitled to his costs. The plaintiff is the litigant who has been found wanting here. There are not exceptional circumstances warranting the departure from the general rule that the successful party is entitled to costs – *Ritter v Godfrey* [1920]2 KB 47 (CA) at 60-61; *Mafukidze v Mafukidze* HH-279-84; *Davidson v Standard Finance Ltd* 1985(1) ZLR 173 (HC) at 175G-176C; *Gwinyayi v Nyaguwa* 1982(1) ZLR 136 (SC) and *Waste Products Utilisation (Pty) Ltd v Wilke's & Anor* 2003(2) SA 590 (W). The plaintiff was granted ample time to take remedial steps but chose not to do so timeously. The award of costs is wholly within my discretion – *Fripp v Gibbon & Co* 1913 AD 354; *Re J (an infant)* 1981 (2) SA 330 (Z); *Levhen Products (Pty) Ltd v Alexander Films (SA)(Pty) Ltd* 1957 (4) SA 225 (SR) at 227v – c and *Kerwin v Jones* 1958(1) SA 400 (SR). *In casu*, I see no reason why the defendant should not be indemnified for the expense to which she has been unjustly compelled to except to the summons. In the exercise of my

discretion I accordingly order that the plaintiff bears the wasted costs on the legal practitioner and client scale.

Shenje & Company, plaintiff's legal practitioners

Marondedze, Nyathi and Partners, defendant's legal practitioners