

CARLO FRANCHI

Versus

DIXON A MOHAMMED

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 21 MAY 2004 & 10 MARCH 2005

N Ndlovu for applicant
L Nkomo for respondent

Opposed Application

NDOU J: In HC 2468/02, the respondent issued summons against the applicant (and another defendant) claiming the sum of \$1 500 000,00 being damages for unlawful arrest and detention, *injuria* and defamation. The applicant filed a request for further particulars. The respondent supplied certain further particulars requested but refused to supply others for the reason that they were evidence and not necessary for purposes of pleading. After being served with the further particulars the applicant did file his plea and the respondent had to issue and serve a notice of intention to bar on 22 August 2003. After being served with the said notice of intention to bar the applicant elected to file a notice of exception to the (plaintiff's) declaration in the main cause. The exception was filed on 1 September 2003, and served on the respondent's legal practitioners the next day. After filing the exception the applicant failed or neglected to set it down for argument in terms of Order 21 Rule 138C of the High Court Rules. Neither did the applicant plead over to the merits after failing to set down his exception for argument. The respondent proceeded to file another notice of intention to bar on 16 October 2003 and served it on applicant's legal practitioners. The applicant's legal practitioners responded to this notice of intention

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to bar by filing with this court an application to compel the supply of further particulars which the respondent refused to supply. The respondent is opposing the application on the basis that it is procedurally improper. This is the issue in this application. Put in another way, this court has to determine whether the particulars requested by the applicant are reasonably necessary to enable the applicant to plead in the main action. Allied to this is whether or not the application is properly before the court. Relying on Order 21 Rule 141(b) the applicant seeks “a better statement” of the respondent’s claim in order to plead or even plead over. The respondent argues that the applicant can only make a court application to compel the supply of further particulars requested but not supplied strictly in terms of Order 21 Rule 142(b). Rule 142 (b) provides that where particulars are refused the applicant must make a court application for an order within twelve (12) days of the refusal. In *casu*, the applicant chose to file an exception after being served with the response to his request for further particulars. This chosen avenue meant that the applicant cannot make an about-turn and start to apply to compel the supply of further particulars. For this reason alone the respondent urged that the court dismisses the application. The respondent however, further submitted that once the applicant elected to file an exception to the respondent’s declaration in the main case, the applicant is resultantly bound by order 21 Rule 138 and that the latter rule is peremptory and the applicant ought to have pleaded over to the merits instead of adopting the route of this application.

I propose to set out the particulars requested by applicant and refused by the respondent which form subject matter of this application:

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- “1. Where was plaintiff at the time it is alleged 1st defendant (applicant) informed the police of the alleged offence?
2. Plaintiff is requested to provide details of the alleged words uttered by 1st defendant.
3. 1st defendant requests a copy of the Warned and Cautioned Statement signed by the plaintiff at the police station.
4. Plaintiff requests a copy of the statement given by 1st and 2nd defendants to the police.
5. 1st defendant requests the full names of the police officer, rank and station who apologised.
6. What words exactly were uttered by the officer(s) in apology.”

Rule 138 provides:

“When a special plea, exception or application to strike out has been filed –

- (a) the parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with sub-rule (2) of rule 223;
- (b) failing such consent either party may within a further period of four days set the matter down for hearing in accordance with sub-rule (2) of rule 223;
- (c) failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before the trial.”

In my view, save for particulars requested in 2 above, the rest of the particulars do not necessarily affect the applicant’s ability to plead. When asking for further particulars, the applicant is required to show that without such requested particulars he will be embarrassed in attempting to plead and that he must make plain to the court the precise embarrassments which he alleges he will suffer – *Barendse v Rattray* 197 TPD 622; *Birrell v Fryer* 1926 EDL 284; *The Citizen (Pvt) Ltd v Art Printing Works* 1957 (3) SA 383 (SR); *Time Security (Pvt) Ltd v Castle Hotel Ltd* 1972 (3) SA 112 (RA); *Allen v Kinsey* 1966 RLR 335 (G); *Davidson v Standard Finance Ltd* 1985(1) ZLR 173 (HC) and *ALESP Enterprises (Pvt) Ltd v Natural Stone*

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Export Co (Pvt) Ltd HB-59-04. The applicant seems to be carrying out inquisitional forays upon the respondent. That is not what the procedure in order 21 Rule 141(b) was designed to achieve. There is, however, some merit on particulars requested under 2, above. Particulars requested under 2 only relate to the defamation claim and not the other claims. That being the case, exception cannot be taken to the summons (as amplified by the declaration) on the ground that it does not support one of the several claims arising out of one course of action. This is so because this does not serve the main objective or purpose of an exception, which is to avoid the leading of unnecessary evidence. An exception to part of a pleading should not be allowed unless it would obviate the leading of unnecessary evidence – *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956(1) SA 700(A) and *Barclays National Bank Ltd v Thompson* 1989(1) SA 547(A). The problem here is that this exception has not been set down so I cannot determine it on its merits. As alluded to above, as the exception was still pending (i.e. after the respondent filed opposition thereto) the applicant ignored the provisions of Rule 138(b) *supra* and instead filed another request for a better statement in terms of Rule 141(b). By electing to except, the applicant put himself within the provisions of Rule 138(b) *supra*. Alternatively, in terms of Rule 142(b) the applicant ought to have made a court application to compel the supply of further particulars refused within twelve days of the refusal. This, the applicant did not do. It is trite that this court has a discretion to condone a departure from the rules, where the time periods for applying for particulars has not been observed – *Eagle Tanning (Pvt) Ltd v Belmont Leather (Pvt) Ltd* HH-190-90. Rule 141 indicates that at any stage of the proceedings the court may order either party to furnish further and better particulars. Rule 4C permits this court to condone a departure from any

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provision of the rules, notwithstanding an extension of any specified period, where the court is satisfied that the departure is required in the interests of justice. *Forestry Commission v Moyo* 1997(1) ZLR 254 (S) at 259A-B; *Wilmot v Zimbabwe Owner Driver Organisation (Pvt) Ltd* 1966(2) ZLR 415(S) and *Bishi v Secretary for Education* 1989(2) ZLR 240H. This court exercises judicial discretion in such matters. But, the applicant has to make a substantive application for the court to allow a departure from the rules in terms of rule 4C(a). The applicant did not make application. Absent of the application, there is nothing that triggers the discretion to extend time – *Mpofu and Anor v Parks and Wild Life Management Authority and Ors* HB-36-04. If I do not extend the time limits, then the application falls foul of the requirements of rules 138(b) and 141(b). The application was therefore, not procedurally proper.

Accordingly, the application is dismissed with costs on legal practitioner and client scale.

Lazarus & Sarif, applicant's legal practitioners
Webb, Law & Barry, respondent's legal practitioners