

JOSEPH SIFARA
Versus
DEVIANT JEMWA
And
THE MINISTER OF LANDS, WATER, AGRICULTURE &
FISHERIES & RURAL DEVELOPMENT N.O

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
CHINHOYI, 27 February & 14 March 2024

Opposed Application

W. Bherebhende, for the Applicant
H. Chitima, for the 1st Respondent
No appearance for the 2nd Respondent

BACHI-MZAWAZI J: On the 6th of November 2023 applicant excepted to 1st respondent's summons which had been filed on the 12th of October 2023 and issued out on the 13th of October 2023. The exception was premised on the grounds that, the summons were fatally defective, as they did not comply with rule 12 (5) (d) of the High Court Rules 2021. In that respect, they did not contain a true and concise statement of the nature and grounds of the cause of action. As a precursor, to the exception, the applicant had written a letter dated the 1st of November 2023, the same day they filed their appearance to defend drawing the 1st respondent's attention to the alleged defect. This letter was written in terms of rule 42 (3) of the High Court Rules.

The above-mentioned, letter of 6th of November 2023, reads:

"We write to inform you that your summons is fatally defective for non-compliance with Rule 12 (5) (d) of the High Court Rules S.I. 202/2021, in that they do not disclose the cause of action, thus not properly before the court...."

In response, the 1st respondent pointed out that the exception was bad at law for several reasons. The first was that, the applicant flouted Rule 42 (3) by filing an exception proceeding before the exhaustion of twelve days stipulated in the cited rule. It is their submission that, the letter which was addressed to them raising the issue of the defect did not particularize what manner the summons were fatally defective so as to enable them to rectify

the flow. Further, they should have been given ample time within the 12 days window period to rectify their mistake by removing the defect. Rule 42 (3) reads:

“Before filing any exception to a pleading or making a court application to strike out any portion of a pleading on any grounds, the party complaining of any pleading shall, within the time allowed for filing a subsequent pleading, by written letter to his or her opponents state the nature of his or her complaint and call upon the other party to remove the cause of the complaint within twelve days of the complaint.”

It is the 1st respondent’s further argument that the applicant by failing to adhere to this Rule, is equally at fault by breaching those provisions. Especially, after pointing it out to them in their letter dated the 3rd of November 2023. The 1st respondent further argues that rule 42 (6) of the High Court Rules requires an exception to state the grounds upon which it is founded clearly and concisely, which the applicant failed to do.

They cited Rule 42 (6) which reads:

“Wherever an exception or plea in bar or abatement is taken to any pleading, the grounds upon which it is founded shall be clearly and concisely stated and a party shall state all his or her exceptions, special pleas and make all his or her applications to strike out at one time.”

In any event, they also submit, even if on the face of the summons there may not be mention of the claim in precise terms, this is cured by the detailed declaration capturing both the claim and the relief sought. From the respondents’ point of view, the combined importation of the summons and declaration illustrates that the 1st respondent as the plaintiff in the main action, does have some rights in the disputed from which the applicant does not have. As such, by virtue of those rights the 1st respondent is entitled to his claim for affirmation of those rights and the eviction of the applicant. In addition, the 1st respondent states that there is no prejudice that has been alluded to by the applicants necessitating the upholding of the exception.

Finally, they attack the relief sought in the exception as not recognisable at law. They advert that striking off is a drastic measure as opposed to a relief giving the 1st respondent an opportunity to amend the summons as is the norm.

Is it of significance to note that, the parties waived their right to make oral representations through letters after the virtual hearing collapsed on connectivity challenges.

On further analysis, from the set of facts presented, in the parties founding papers and heads of argument, the issues that take centre stage are:

1. Was the 1st respondent's summons fatally defective?
2. Was the applicant's exception equally defective?
3. Can the exception be upheld?

The first issue to consider is, was the 1st respondent's summons fatally defective? To begin with, what needs interrogation is whether or not the summons was defective in order to determine or condemn it as totally irredeemable. It is trite that summons set forth the cause of action upon which the defendant is answerable. It specifies the wrong, harm or injury that has been perpetrated by the wrong doer. It also spells out the manner in which these injuries were done as well as the remedy sought.

What constitute a cause of action was enunciated in several cases amongst them *Mudhanda v The Registrar of Deeds & Anor SC 5/18*. Gowora JA (as she then) was in that case of *Mudhanda* above cited the case of *Abrahams & Sons v SA Railways and Harbours 1933 CPD 626*, at 637 where WATERMEYER J described a cause of action as;

"The proper meaning of the expression „cause of action“ is the entire set of facts which give 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 included all that a plaintiff must set out in his declaration in order to set out in his declaration in order to disclose a cause of action."

In my view, I can paraphrase that a cause of action requires three factors to be outlined. That is the, injury or harm, the manner, the injury or wrong was perpetrated, or why the defendant should be liable? That in itself encompasses the facts and allegations of how the misfeasance took place and why it is necessary for the misfeasant to be accountable. Lastly, the remedy, or redress to correct the wrong. See *Stanbic Bank of Zimbabwe Ltd 2007 (1) ZLR 399, Radebe and Ors v Oosthuizen & Ors (2015/36616) [2023 J SAFLIII*.

In *Mawire v Rio Zim Limited (Private) (SC 13 of 2021, Civil Appeal CS795 of 2017) [2021] ZWSC 13 09 March 2021* the Appellate court made reference to the case of *Peebles v Dairiboard (Pvt) Ltd 1999 (1) ZLR 41 (H) at 54 E-f* wherein MALABA J (as he then was) defined a cause of action as;

“A cause of action is defined by Lord Esther MR in *Read v Brown* (1888) 22 QB 131, as every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court.”

Following, the definitions above, the applicant submits that the plaintiff’s summons, 1st respondent herein, only contains the relief being sought and is bereft of a true and concise statement of the nature, extent and ground of the cause of action as mandated by Rule 12 (5) (d) of the High Court Rules 2021.

Rule 12 (5) (d) is couched as follows:

“(5) Before issue, every summons shall set forth:

a).....

b).....

c).....

d) A true and concise statement of the nature and grounds of the cause of action and of the relief or remedies sought in the action”

Further, on examination, the 1st respondents summons reads as follows:

“The plaintiff named above has instituted proceedings against you claiming;

- a. An order declaring the plaintiff to be the lawful and right holder of rights, title and interest to land known as subdivision 32 of Aryshire A Lot 1 situate in Zvimba District of Mashonaland West Province measuring approximately 67 to 75 hectares in extent (hereinafter called the disputed farm).
- b. An order declaring the 1st defendant to be in unlawful and illegal occupation of the disputed farm.
- c. Eviction of the 1st defendant and all those claiming occupation through him from the disputed farm
- d. Costs if suit against the 1st defendant on the higher scale.”

It does not need a rocket scientist to discern that the summons filed by the 1st respondent as the plaintiff in case HC 221/23, only has the relief sought on its face and not the claim.

The applicants are correct in their observations. It is evident that two set of rules governs the summons as well as the attendant declaration. Rule 13 is devoted to all what is required of a declaration. This is for a purpose. It means the summons though it should be accompanied by a declaration or particulars of claim in the lower court, should bear a precise statement on the cause action as well as the relief sought.

Nonetheless, does this vitiate the summons and nullify or make them fatally defective as urged by the applicants? Fatally defective means the pleading in question is beyond redemption. Nothing can be resuscitated or salvaged from it. I do not think this is the case

here. Why? It is because at the end of the day the summons moves hand in glove with its declaration although separately provided for in the rules. As such, in the circumstances of this case the declaration clearly spells out the cause of action. A perusal of the declaration shows that the cause of action was clearly explained. A combination of the two does not leave the recipient lost as to what the cause of action is.

I agree with the 1st respondents that though there is indeed no compliance with Rule 12 (5) (d) to the book, the breach is not fatal to the proceeding. Rules of the court are for standardisation. They are procedural law and must be adhered to. However. They cannot enslave the court. There is room for flexibility for the sake of justice, expediency and finality to litigation.

DUBE J commented in *Munyorovi v Sakonda HH467/2021* that the rules are made for the court and not the court for the rules as emphasised in the cases of *Chukura & Anor v AI Sham's Global BVI Ltd SC 17/17* and *Watson v Gilson Enterprises (Pvt) Ltd 98 (1) ZLR 381 (SC)*.

DUBE J proceeded to note that “It is the reason that rule 4C was included in the rules. In *Nortery Assurance Co. Ltd v Somndla 1960 (1) SA 58 CA*, it was noted;

“Once it is seen that the court has discretion, it seems to follow inescapably that it was not intended that a breach of the rules relating to actions should necessarily be visited with a nullity.” This suffices to buttress the point that the noncompliance with rule (5) (d) is not fatal to the proceeding.

In *Mnangagwa v Alpha Media Holdings & Anor 2013 (2) ZLR 116 (H)*, it was stated as follows;

“It is a first principle in dealing with exception that, if evidence can be led which can disclose the action in the pleading, (then) that particular pleading is not explicable on the basis that no possible evidence led on the pleadings can disclose a cause of action. That is the manner in which I approach this court”.

In *Mpoko & Anor v Nanavac Investments & Ord HB 209/2022*, Makonese J noted that;

“.....An exception based on the lack of cause of action in the plaintiff claims must establish that there are no facts pleaded that can be sustained even if evidence is led!”

In *Warehousing and Sales CC v Bowsink Investments CC 2000 (3) SA 833 at 834*, the following was 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.”

In a nutshell, as extrapolated above since it is common cause that a summons is not supposed to stand as a standalone but hand in hand with the declaration, the applicant has failed the test in the *Warehousing* case above.

Further, this court sees no prejudice if the 1st respondent is allowed to amend the summons. In *Chimakure & Anor v Mutambara & Anor SC91/20* it was highlighted that, “the ultimate test as to whether or not an exception should be upheld is whether the excipient is prejudiced”.

In *Trebo & Khays (Pvt) Ltd & Ors v Deposit Protection Corporation HH354/18* at page 5 it was observed that;

“If the exception is allowed the court will usually give the respondents an opportunity to file an amended pleading within a stated time”.

These two authorities are clear examples as to the general approach by the courts. If prejudice has not been pleaded and established by the excipient, then the summons stand and exception will not be an option. If indeed there is need to rectify the mistake “amendment” is the recourse advocated for and spelt out in Rule 42 of the High Court Rules and the above cited case authorities. The best course of action is to allow for the amendment of the summons rather than striking them off. See *Trebo v Khays* above.

Having examined the above, the court agrees with the 1st respondent, that Rule 42 amply covers the subject at hand. It addresses the need for the court to call for amendment to the summons if need be, coupled with the issue of prejudice. I need not elaborate on all the elements of that rule which is self-explanatory.

In view of the above observations, the court is mindful of the glaring shortcomings of the applicant’s exception *viz a viz* Rule 42 of the High Court Rules. They in turn did not comply with the 12-day period which enables the 1st respondent to rectify and amend their summons before filing their exception. They also prematurely set the exception before the

expiration of the 12-day period. They too were in breach of this court's rules. This will in a way still have incapacitated their exception. Both parties did not strictly adhere to the rules. They are in *pari delicto*, so to say. Two wrongs do not make a right though. However, this is water under the bridge as a finding has already been made on the merits that the exception fails.

There is no justification in imposing punitive costs. Each party has the right to contest their positions in court. However, shoddy drafting is not encouraged. Respondent will thus be visited with costs on the ordinary scale.

Disposition

The apparent defect on the face of the summons has been cured by the declaration which succinctly outlines the cause of action. Ordinarily, the face of summons should disclose the precise and concise cause of action which is then elaborated and or developed, in the declaration. However, there is no prejudice on the applicant as both documents which stand in combination do disclose a cause of action at no prejudice on the applicant.

Resultantly, it is ordered that:

1. The application is dismissed.
2. The 1st respondent pays cost of suit at the ordinary scale.

Bherebhende Law Chambers for the Applicant.

Mutandiro, Chitsanga, P Chitima Attorneys for the 1st Respondent.