

WALTER HANKEY  
and  
MUTUAL FINANCE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
KARWI J  
HARARE, 21 October 2011

### **Opposed Court Application**

Mrs *Wood*, for applicant  
Mr *Jori*, for respondent

KARWI J; Applicant is seeking an order for the upliftment of a bar operating against him as a result of his failure to file a plea.

The facts of this matter are that respondent instituted proceedings against the applicant for being in wrongful and unlawful occupation in case No. H/C 964/07. Having perused the cause of action set out in the respondent's summons, the applicant filed a notice of exception on 27 March 2007. Respondent says that the applicant's summons were not endorsed in terms of r 13 of the Rules of this court. Accordingly, a declaration had to be filed by the respondent. On 20 April 2007 the applicant requested further particulars to the respondent's claim. The respondent was not prepared to file these and the respondent proceeded to file a notice of a bar. In order to avoid becoming involved in side issues and following telephone conversation between parties, it was agreed that in the event of the applicant filing a plea to the respondent's claim the bar would be lifted. Applicant then filed his plea on 26 April 2007 denying that he was in wrongful and unlawful occupation. Respondent was unhappy with the plea and refused to remove the bar. Applicant is of the view that his plea is as cryptic as the respondent's cause of action in the summons which he says does not truly and concisely state the nature of action.

Respondent had a lease agreement with the applicant, which agreement had terminated on 31 December 2006. Respondent was seeking the eviction of the applicant from the premises, on the basis that he was an undesirable tenant. Respondent alleged the

applicant was in breach of the lease agreement and that he was persistently in arrears with his rentals and had put up an illegal structure at the leased premises.

The issues to be determined in this matter are whether or not the summons state the cause of action and secondly whether the applicant's plea truly and concisely set out the applicant's defence, if any. As stated above the applicant's position is that summons were not endorsed with particulars of claim and that in the circumstances a declaration was required. On the other hand the respondent contends that summons were indeed endorsed with particulars of claim which state clearly the nature, extent and grounds of the cause of action as required by Order 3 r 13 (2).

The requirement for a document to bear an endorsement was dealt with in *Estate Sauna v The Master, High Court (SR) and Anor*, 1956 (1) SALR 158 AD AT 162 where it was held that:-

“There can be no doubt that the word ‘endorse’ is capable of more than one meaning. One of those meanings is the writing on the back of a document. This definition is not of universal application. An endorsement may equally be on the face of the document. See *Shrouds Judicial Dictionary* 3<sup>rd</sup> Edition, Volume 2 p 952. It seems that the endorsement need not appear on the back of the summons nor be separate from the rest of the summons or document. In terms of Order 3 r 15, there is a requirement that the summons shall have endorsed thereon an address for service. In practice this endorsement is contained in the body of the summons itself, and the particulars of claim can also therefore appear in the body of the summons itself. What is important and essential, in my considered view is that whenever the cause of action is stated in the summons, it has to be clear enough to notify defendant of the cause of action which would enable defendant to plead without the need to even request for further particulars or to leave him in any doubt as to the cause of action. As long as the cause or action is clearly stated in the body of the summons, a plaintiff would enjoy the option of leaving out a declaration. *In casu*, the body of the summons claims; an order evicting defendant and all persons holding through it from the premises on the ground that the plaintiff is the owner of the property, and the defendant is in wrongful and unlawful occupation thereof, plus costs of suit”

It is my view therefore that those particulars as disclosed on the summons cryptic though they may be, truly and concisely state the nature, extend and the grounds of the cause of action. There would be little, if any point, in issuing a declaration in exactly the same terms. Since the respondent's claim is based on a vindicatory action, whose essential averments are ownership and possession by

applicant, it is not necessary to state in the summons that applicant is in unlawful possession because the onus is on the possessor of the property, owned by another, to establish his right to possession. It is unnecessary to allege unlawfulness as it does not change the incidence of onus.

The next issue to consider is whether or not the respondent's plea set out his defence. It seems to me that neither his plea nor his founding affidavit set out his defence. Some attempt was made to establish a defence in his answering affidavit, but this should have been one in his founding affidavit. Even if one were to ignore or overlook this defect the answering affidavit still does not set out a defence. It should be stressed that the onus is on the applicant to establish his entitlement to occupy somebody's property. A plea of a bare denial, as is the case here, does not discharge the onus which rests on the applicant. On the face of the lease agreement between the parties, which lease terminated in December 2006 for the applicant to claim the right to stay after the termination, he would have to establish one of the following:

- (a) that he is a statutory tenant,
- (b) that there has been a tacit relocation of the lease and
- (c) that he has negotiated a renewal of the lease with the landlord.

Applicant has failed to establish any of the above. He cannot be a statutory tenant because he is in breach of the lease agreement. In terms of clause 5 of the lease agreement, the rent is to be increased each quarter by 25% or the rate of inflation whichever is the greater. The rate of inflation shall be determined by the lessor's accountant. It appears that applicant has neither paid the 25% increase nor any rate of inflation and is therefore in breach of the lease agreement. The protection afforded to him as a statutory tenant does not prevail in this situation. Even if there was tacit relocation of the lease he is still in breach of the lease agreement. Clause 31 of the agreement provides that if he fails to pay rent on due date the lessor has a right to cancel the lease forthwith. It is also a fact that the applicant has been unable to negotiate a renewal of the lease agreement.

In the premises, I find that the application has no merit whatsoever. It is therefore dismissed with costs.

*Wintertons*, applicant's legal practitioners  
*Venturas & Partners*, defendant's legal practitioners