WINSLEY EVANS MILITALA N.O.
(In his capacity as the Judicial Manager of Matufu Investments
(Private) Limited t/a Precision Grinders)
versus
SECURITY PARTNERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 22 October 2020 & 10 September 2021

Exception

Mr *K. Mutyasira,* for the plaintiff
Mr *S. Musapatika,* for the defendant

MUSITHU J: The defendant filed an exception to the plaintiff's claim as set out in the summons. It did so on the basis that the summons: did not disclose a cause of action; was vague and embarrassing as it failed to show the nature of the agreement that founded the claim; did not conform to the mandatory Commercial Court Rules. Further, the defendant also claimed that on two occasions, the plaintiff filed defective summons in the Magistrates Court which he withdrew and tendered wasted costs. The costs were not paid. The defendant implored the court to uphold the exception and dismiss the plaintiff's claim with costs on the legal practitioner and client scale. The exception was opposed.

FACTUAL BACKGROUND

The exception was founded on the following factual basis. On 9 July 2020, the plaintiff issued summons against the defendant claiming the following relief:

"**TO: The Defendant named above:-**
WHEREFORE Plaintiff claims:-

a) An order confirming the termination of the agreement between the parties.
b) An order ejecting defendant from the premises at 55 Craster Road Southerton Harare.
c) Payment of holding over damages from 30 December 2019 to the date of eviction in the sum of $450.00 per month.
d) Payment of arrear rentals up to 30 September 2019 in the sum of $7 876.72 together with interest at the prescribed rate.
e) Costs of suit on the attorney/client scale."

The summons was filed simultaneously with the declaration. The claim as amplified by the declaration can be summarised as follows. On 1 January 2015, the plaintiff and the

defendant entered into a lease agreement in terms of which the plaintiff leased some office space to the defendant at 55 Craster Road, Southerton, Harare (the premises). The defendant took occupation of the premises on 1 January 2015, and remains in occupation. The lease was to endure for a period of three years terminating on 31 December 2018, at which point the defendant was required to vacate the premises.

The defendant remained in occupation and became a statutory tenant from 1 January 2019. It failed to pay rentals, and as at 31 May 2019, it had accumulated arrears of $6 076.72. On 17 June 2019, the defendant was given notice to vacate the premises as well as to pay the accumulated rent arrears. It was expected to vacate the premises by 30 September 2019. Despite demand, the defendant failed to do so. The plaintiff claimed that it continued to suffer holding over damages in the sum of $450.00 per month, calculated from September 2019 to the date the defendant surrendered possession of the premises. Because of the defendant's obstinacy, the plaintiff implored the court to grant the claim with costs on the attorney and client scale.

THE DEFENDANT'S EXCEPTION

Following the service of summons and declaration, the defendant's legal practitioners wrote a letter to the plaintiff's legal practitioners. The letter of 29 July 2020 reads as follows:

> "We refer to the above matter and our Mr *Musapatika*'s telephone conversation with your Mr *Mutyasira* on the 20th July 2020 in which an undertaking was made to withdraw HC.3531/20 for reasons stated in our letter dated 15th July 2020.
>
> Contrary to the undertaking, we did not receive the notice of withdrawal and we now assume that the intention was to get our client barred for failure to file an appearance to defend which we have since filed. We remind you that the duty of honesty and honour to undertaking remains an integral part of the legal profession. Over and above the reasons given in our earlier correspondences, please note that the summons is defective. It does not disclose a cause of action at all. In light of that we insists that the only way forward for your client is to withdraw on or before the 31st July 2020, failing which we will file an exception and move for costs on the legal practitioner and client scale. This is the third defective summons in this matter.
>
> ……."

It is not clear whether the letter evoked some response from the plaintiff's legal practitioners. On 3 August 2020, the defendant filed its exception to the summons. The exception attacked the summons on four bases. The first is that the summons did not disclose a cause of action. It only contained a prayer. It did not inform the defendant the basis of the relief sought. The defendant contended that such summons was fatally defective. The second ground was that the summons was vague and embarrassing. It did not show the nature of the

agreement whose termination the plaintiff wanted confirmed. The third was that the summons did not conform to the mandatory High Court (Commercial Division) Rules, 2020, Statutory Instrument 123 of 2020, (the Commercial Court rules). It was therefore fatally defective.

The last ground appears to be ill-conceived. It is not an attack on the summons or declaration as it were. It is more of a complaint directed at the conduct of the plaintiff. The position of the law is clear in this regard. An excipient is confined to the four corners of the pleading that is being impugned. The defect complained of must appear *ex-facie* the pleading that forms the basis of the complaint.[1] That ground of objection does not warrant consideration as it is misplaced.

THE SUBMISSIONS

The plaintiff does not deny that the summons is defective. In paragraph 6 of his heads of argument, the plaintiff admitted that the summons did not contain a true and concise statement of the cause of action as required by Order 3 Rule 11(c).[2] The plaintiff however averred that the omissions in the summons were amply rectified by the declaration which was filed and served simultaneously with the summons. The plaintiff further made reference to Order 17 Rule 113 and Rule 115 to support this contention. The sole issue before the court therefore is whether the defects afflicting the summons were cured by the declaration.

Mr *Musapatika* submitted that the law required a summons to disclose a cause of action. A summons that failed to disclose a cause of action was a nullity. It could not be cured by a declaration, because a declaration did not stand on nothing. It could not supplement nothing. Mr *Musapatika* referred to the case of *Bank of Credit & Commerce Zimbabwe Ltd* v *Jani Investments (Private) Limited*[3], where SQUIRES J said of the summons before him:

> "It will be immediately realized, of course, even by someone who runs very quickly as he reads, that the summons is wholly invalid since it discloses no cause of action whatever. Any exception to such a summons can only have succeeded instantly and completely."

Mr *Musapatika* further submitted that Order 3 Rule 11(c) which required a summons to contain *"a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action",* was mandatory in its construction and purport. The summons was incurable. Counsel further submitted that the case of *Mutyasira* v

[1] PATEL JA in *National Employment Council for the Construction Industry v Zimbabwe Nantong International (Pvt) Ltd* SC 59/16 at page 4
[2] See paragraph 6 of the plaintiff's heads of argument.
[3] 1983 (2) ZLR 317 at p318F

Estate of the Late Muchineripi Rishoni Gonyora[4] cited in the plaintiff's heads of argument was distinguishable from the present case. In that case, the court had made a factual finding that the plaintiff's claim was liquidated for purposes of Order 3 Rule 13. In *casu*, the plaintiff's claim was not one for a debt or liquidated demand.

Mr *Mutyasira* for the plaintiff submitted that the rules of court should not be read disjunctively. Order 3 Rule 11(c) had to be read together with Order 17 Rule 109,113 and 115 of the court Rules for as long as the summons was accompanied by a declaration. He further submitted that the omission in the summons was sufficiently cured by the declaration in line with rule 109 as read together with rule 115. Mr *Mutyasira* further submitted that the *dictum* in *Mutyasira* v *Estate of the Late Muchineripi Rishoni Gonyora* all but put paid to the defendant's argument that the summons was defective. He made reference to the following statement where the court said of Order 3 rule 11(c):

> "An isolated literal interpretation of the rule favours Mr *Kanengoni'*s submissions. If the summons had been issued alone without being accompanied by the plaintiff's declaration which, gave 'a true and concise statement of the nature, extend and grounds of the cause of action', I would have found for the first defendant on this issue. However in the circumstances of this case Rule 11 (c) must be interpreted together with the provisions of the rules which deal with the filing of a declaration together with the summons and the effect of a declaration on a summons it accompanies and particularises."[5]

In his heads of argument, the plaintiff submitted that the sentiments expressed by the court in the foregoing authority were unassailable and apposite to the present case. The circumstances were the same. As regards the failure to comply with the Commercial Court rules, the plaintiff urged the court to exercise its discretion in terms of rule 4(c) and condone the non-compliance as no prejudice had been occasioned to the defendant. The court was exhorted to dismiss the exception with costs.

In reply, Mr *Musapatika* submitted that the plaintiff was clearly abusing the *Mutyasira v Estate of the Late Muchineripi Rishoni Gonyora* judgment. The plaintiff was advocating that a party could avoid complying with rule 11(c) for as long as its summons was accompanied by a declaration. That would clearly defeat the purpose of rule 11(c). On the issue of costs, Mr *Musapatika* submitted that any sluggishness by represented litigants was something the courts have always frowned upon. The plaintiff was clearly abusing the courts and he deserved to be penalised through an appropriate order of costs on the higher scale of attorney and client.

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[4] HH 343/12
[5] At page 3 of the judgment.

ANALYSIS

I will deal at the outset with the issue pertaining to the nonconformity of the plaintiff's summons with the Commercial Court rules. The Commercial Court rules came into operation on 1 June 2020. They apply to "commercial disputes" as defined in section 3 of those rules. They are intended to regulate the proceedings of the Commercial Division of the High Court. The rules were never operationalized since the Commercial Division had not been officially commissioned at the time the rules were promulgated. It was for this reason that the operation of the rules was officially suspended through section 2 (1) of the High Court (Commercial Division) (Amendment) Rules, 2020 (No.1), to avoid unnecessary confusion as regards their status.[6] For that reason, the court shall not belabour this point any further. The plaintiff was not obliged to comply with these rules.

As noted already, the plaintiff does not deny that his summons was defective. On the strength of the *Mutyasira* v *Estate of the Late Muchineripi Rishoni Gonyora,* he argued that the alleged defects and omissions in the summons were cured by the declaration as the two were issued, filed and served simultaneously. I do not read the *Mutyasira* v *Estate of the Late Muchineripi Rishoni Gonyora to* be proposing a *carte blanche* solution to defects that afflict summons. If the plaintiff's approach were to be accepted, it would mean that litigants have a free hand to disregard rules of court with impunity even where the defects afflicting their pleadings are not illusory, but real. It would not matter that such defects were brought to the attention of a plaintiff for regularisation. The plaintiff would still avoid culpability by pointing to the existence of the declaration. Such an approach would render rule 11(c) nugatory. It would become meaningless. In my view, each case must be considered on its own merits.

A reading of the *Mutyasira* v *Estate of the Late Muchineripi Rishoni Gonyora* judgment shows that the case had its peculiarities which made it distinguishable from the present case. Firstly, that case was already at trial stage with the issue being raised as a point in *limine* in the first defendant's plea. The court found that in its plea on the merits, the first defendant had all but admitted that it understood the plaintiff's claim by pleading to it. There was no prejudice to the first defendant. Secondly, the court established that the plaintiff's claim was for a liquidated debt. In such a case, the summons could, at the option of the plaintiff, be endorsed

[6] Section 2(1) reads as follows:

> "These rules shall come into operation on a date to be fixed by the Minister of Justice, Legal and Parliamentary Affairs in consultation with the Chief Justice by statutory instrument"

with the particulars of claim, which would take the place of a declaration.[7] The court accepted the submission that if the endorsed particulars of claim could take the place of a declaration, then an accompanying declaration could by the same token take the place of the endorsement. What appeared in the declaration would be considered to be an endorsement and thus part of the summons.[8] This conclusion was also supported by rule 115.

Thirdly, the court remarked that it would still condone the plaintiff's non-compliance with rule 11(c) by invoking rule 4C (a), having noted that *"the interests of justice cannot be served by allowing a defendant who is admitting the plaintiff's claim to delay the day of reckoning by relying on an omission which has been supplied to him by the accompanying declaration"*.[9] The court thus made a factual finding that the first defendant was not disputing the plaintiff's claim. Fourthly, having reached the conclusion that the defective summons was cured by the accompanying declaration, the court still allowed an amendment to the summons. It concluded its analysis as follows:

> "It is for these reasons that I dismissed the first defendant's point in *limine* and ordered that the case should proceed to trial on the merits and for the clarity of pleadings allowed the plaintiff to amend his summons by supplying the omitted details". (Underlining for emphasis).

The approach of the court where defects of the nature complained of by the defendant manifest themselves in the summons has been expressed in several case authorities. In *Sanctuary Insurance Company (Pvt) Ltd* v *BG Insurance (Pvt) Ltd T/A BGI Financial Services*[10] CHAREWA J expressed the position as follows:

> "I will go further to state that whatever deficiencies are in the summons are amply supplemented by the declaration. The plaintiff's cause of action and the facts upon which it is based are therefore quite apparent from the summons as read with the declaration. Hence, the defendant cannot claim that he is unaware of the details of the claim, the basis thereof and the relief sought unless the court endorses a rigid and mechanical approach which defeats the cause of justice."

The court nevertheless upheld the exception and gave the plaintiff an opportunity to amend the summons within a certain period of time, failing which the defendant could approach

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[7] See Order 3 rule 13 (1) and (2) which states as follows:

> "***13. Summons for debt or liquidated demand: endorsement***
> (1) In an action where the claim, apart from costs, is for a debt or a liquidated demand only, the summons may, at the option of the plaintiff, be endorsed with the particulars of the claim.
> (2) Such particulars shall take the place of a declaration and shall state truly and concisely the nature, extent and the grounds of the cause of action."

[8] See page 4 of the judgment.

[9] See page 5 of the judgment.

[10] HH 821/16 at page 4 of the judgment.

the court for the dismissal of the claim. In the case of *Sanyangombe* v *Chalimba & 3 Ors*[11] MATHONSI J (as he then was) held that:

> "I must mention that a failure to include a statement of the nature, extent and grounds of the cause of action and of the relief sought on the face of the summons is an omission that is easily curable by an amendment of that summons."[12]

The principle that permeates across these cases is that the court will not gloss over defects that are clearly manifest in the summons. It will accord the plaintiff an opportunity to remedy the defects for the clarity of pleadings. This is the same approach that this court will follow even though the plaintiff's counsel was adamant that the summons was not defective. Such stance was inspired by a clear misapprehension of the reasoning behind the approach in the *Mutyasira* v *Estate of the Late Muchineripi Rishoni Gonyora* judgment.

COSTS

The general rule is that the successful party is entitled to costs on a scale which must be determined depending on the nature of the case and the manner in which litigation was conducted. The defendant prayed for costs on the legal practitioner and client scale. Such costs are punitive and are awardable in exceptional circumstances. In *Nel* v *Waterberg Landbouwers Ko-operative Vereeniging,*[13] the court said of such costs:

> "The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be put out of pocket in respect of the expense caused to him by the litigation…."[14]

In the present case, the plaintiff admitted that the summons did not contain a true and concise statement of the nature, extent and the grounds of the plaintiff's cause of action as required by rule 11(c). The plaintiff's legal practitioners were apprised of the defects through a letter from the defendant's legal practitioners. No action was taken to regularise the anomaly.

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[11] HH 79/14 at page 2 of the judgment

[12] See also *Nuvert Trading (Private) Limited t/a Tripple Tee Footwear* v *Hwange Colliery Company* [12] HH 791/15 at page 5 and *Chifamba* v *Mutasa & Ors* HH16/08

[13] 1946 AD 597 at 607, Per TINDALL JA.

[14] See also *In re Alluvial Creek Ltd* 1929 CPD 532, where GARDNER JP said at page 535:

> "An order is asked for that he pays the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious although the intent may not have been that they should be vexatious".

Instead, the plaintiff's legal practitioners determinedly stood their ground insisting the defects were all but cured by the declaration. In doing so they relied on a judgment which dealt with a set of circumstances that were significantly different and therefore distinguishable from the present case. Even in that case, the court allowed an amendment to the summons at the trial stage for the sake of clarity. The plaintiff's condescending attitude clearly deserves some censure. These proceedings would have been obviated had the plaintiff's legal practitioners addressed the complaint raised in the defendant's letter of 29 July 2020. The defendant has been unnecessarily put out of pocket, all because of the plaintiff's intransigence. An order of costs on the attorney and client scale is clearly justified under the circumstances.

DISPOSITION

Resultantly, it is ordered as follows:

1. The defendant's exception be and is hereby upheld.
2. The plaintiff shall amend his summons within ten days of the service of this order, failing which the defendant shall be entitled to approach the court for the dismissal of the plaintiff's claim.
3. The plaintiff shall pay the defendant's costs of suit on a legal practitioner and client scale.

Mubangwa and Partners, legal practitioners for the plaintiff
Danzinger and Partners, legal practitioners for the defendant