

CATHERINE KUMBULA
versus
PEARL PROPERTIES

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 24 March 2015 and 13 January 2016

Opposed Application

T. Nyamasoka, for applicant
O.D. Mawadze, for respondent

MUSAKWA J: Following the issuance of summons by the plaintiff, the defendant duly filed appearance to defend and subsequently filed an exception in terms of Order 3 r 11 (c) of the High Court Rules.

The plaintiff issued summons in which she claims special and general damages. Having referred to a declaration as amplifying the summons, the plaintiff simultaneously filed a declaration that outlines the particulars of claim. Four days before the defendant filed an exception, the plaintiff filed a notice of amendment of the summons and declaration.

The defendant's exception is that the summons is bad at law as it discloses no cause of action as it does not comply with Order 3 r 11 (c). This is because the summons is said not to give a general statement of the claim.

In response to the exception the defendant filed an opposing affidavit in which it is contended that the summons contains a clear and concise statement of the nature, extent and grounds of the plaintiff's cause of action. Thus it is contended that the provisions of Order 3 r 11 (c) have been fully met.

In his submissions, Mr *Nyamasoka* for the defendant contended that the summons is defective as it simply contains a prayer. The basis of the claim is not stated. Without the defect being remedied the defendant will not be able to plead. It is immaterial that there is a declaration. Rule 11(c) provides what a summons must contain. In support thereof he cited *CMED (Pvt) Ltd v First Oil Co & NCZIM & Ors* HH-495-13 and *Mavheya v Mutangiri & Ors* 1997 (2) ZLR 462 (H).

Mr *Nyamasoka* further submitted that once the summons is defective it cannot be cured by the declaration. Therefore the defendant is seeking that the exception be upheld so that the defect complained of is cured. The lack of particularity in the summons makes it fail to disclose the cause of action. Reference was made to *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 and *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A).

On the other hand Mr *Mawadze* submitted that counsel for the defendant admitted to two forms of summons. Thus an endorsed summons is commonly used for claims for debts or liquidated demands. On the other hand the combined summons comprises the summons and declaration which has particulars of claim. In such a case the summons does not stand alone. Therefore, neither the summons nor the declaration will be read in isolation of the other. That is why there are different time limits for filing pleas to a stand-alone summons and a summons followed by a declaration.

The summons that is complained of is framed as follows-

“To the defendant named above:-

The Plaintiff's claim as against the Defendant is for:-

- (a) Payment of the amount of US\$10 000-00 (Ten Thousand United States Dollars) for hospital and medical expenses.
- (b) Payment of US\$40 000-00 (Forty Thousand United States Dollars) being estimated future medical expenses that the plaintiff is likely to incur.
- (c) Payment of US\$50 000-00 (Fifty Thousand United States Dollars) for loss of earnings.
- (d) Payment of US\$150 000-00 (Fifty Thousand United States Dollars) being general damages for loss of earning capacity, pain and suffering, loss of amenities of life and, permanent disability.
- (e) Costs of suit on a legal practitioner and client scale.

As amplified by plaintiff's declaration attached hereto.”

The declaration then describes the particulars of the plaintiff and the defendant as well as laying out the particulars of the claim.

Order 3 r 11 provides that:

“Before issue every summons shall contain—

- (a) the full name of the defendant and his residence or place of business and, if he is sued in a representative capacity, the capacity in which he is so sued. Where the defendant's full

name is unknown to the plaintiff, that fact should be stated and his name and initials, or his name and such of his initials as are known, should be given;

- (b) the full name, and address for service of the plaintiff and, if he sues in a representative capacity, the capacity in which he sues;
- (c) 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;
- (d) the date of issue.”

It is apparent that the plaintiff’s summons does not comply with para(s) (a) to (c) of r 11.

On the other hand, Order 17 r 109 provides that-

“The statement of the plaintiff’s claim shall be called his declaration, and it shall state truly and concisely the name and description of the party suing and his place of residence or place of business, and if he sues in a representative capacity, the capacity in which he sues, the name of the defendant and his place of residence or place of business, and if he is sued in a representative capacity, the capacity in which he is sued and the nature, extent and grounds of the cause of action, complaint or demand.”

It can be noted from the above provisions that the content of a summons which is not for a debt or liquidated demand only is the same as the declaration. It is only an endorsed summons that will incorporate the contents of a declaration. See Order 3 r 13. It matters not that the plaintiff subsequently sought to amend the summons even before the defendant filed the exception. As it stands, the amendment to the summons has not been granted. I can only note in passing that the amendment sought only relates to the declaration although it is titled ‘Notice of Amendment of Summons and Declaration.’ As correctly observed by Mr *Nyamasoka*, the intended amendment does not rectify the defects in the summons.

The defendant sought a dismissal of the plaintiff’s claim. Mr *Nyamasoka* submitted that the court should uphold the exception and consequently, this will lead to dismissal of the claim. Mr *Nyamasoka* had in his earlier submission prayed for the exception to be upheld so that the defective summons is cured. The ultimate prayer he made was in response to Mr *Mawadze*’s submission that the relief being sought by the defendant was vague. There is really no need to debate on whether the claim should be dismissed or amended. The pleading that the plaintiff calls a summons is incurably defective and what the court only has to do is to uphold the exception.

It the result it is ordered that-

The exception be and is hereby upheld with costs.

Atherstone & Cook, applicant's legal practitioners

Manase & Manase, respondent's legal practitioners