JAMES J MUROZVI
versus
CHAWATAMA SIGN
and
DELTA BEVERAGES
and
RM INSURANCE (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 21 May, 2015 and 27 May 2015

Exception

R Mahuni, for the plaintiff
T Chagonda, for the 3rd defendant

MAHTONSI J: On the night of 8 October 2013 at an unnamed road in an unnamed part of Zimbabwe, a tractor belonging to the plaintiff, whose description and registration particulars are not given, was parked by the side of the road when it was hit by an unnamed motor vehicle belonging to the second defendant but driven by its employee, the first defendant, as a result of which it sustained damage requiring repairs at a total cost of $6 481- 00.

I mention this just to highlight how uninformative the plaintiff's pleadings are. It is unbelievable how a pleading could so disarmingly lack particularity as to leave the reader nowhere near knowing what the claim is all about. One is left uninformed and no wiser as to where and how the accident occurred, what it involved and who caused it. We can only surmise that somewhere at a place policed by Mvurwi Police Station (because the first defendant allegedly paid an admission of guilt fine at that police station), an accident involving a tractor occurred.

When formulating pleadings legal practitioners should always bear in mind the purpose of pleading because the essence of any claim is found in the pleadings. The function of pleadings is to inform the other party, in concise terms, the precise nature of the claim they have to meet and also to identify the area of law under which the claim is made. Different

branches of law require different matters to be specifically pleaded for a claim to be sustainable under that action: *Chifamba* v *Mutasa and Others* HH 16/08; *Nhau* v *Kafe and Another* HH 73/15.

The plaintiff has instituted summons action against the first, second and third defendants for payment of a total sum of US$ 196 656-00 being $7 920-00 for hiring equipment and $188 736-00 "being loss suffered by plaintiff as a result of not undertaking his farming activities to full capacity." On the face of the summons he attempts to give a summary of the claim in the following:

> "Plaintiff's claim against (sic) judgment against 1st, 2nd and 3rd defendants jointly and severally, the one paying the other to be absolved for:
>
> (a) Payment of the sum of US$ 196 656-00 –the one paying the other being absolved broken down as follows:
>
> (i) US$ 7 920-00 being the loss suffered by plaintiff as a result of not farming to full capacity.
> (ii) Interest on (i) and (ii) above calculated at the prescribed rate from the date of issue of summons to the date of payment in full.
> (iii) Collection commission an costs of suit on a legal practitioner and client scale."

Something is badly wrong with the above passage in the summons. It does not make sense. While I appreciate that arithmetic has never been the strongest point for lawyers, the breakdown does not add up, they may now be adding another weakness, grammatical frailties.

In his declaration the plaintiff averred without making any reference to a motor vehicle driven by the first defendant, that the first defendant negligently caused the accident by driving without due care and attention and without taking proper care. As a result his tractor was damaged requiring repairs at a cost of $6 481-00. While his tractor which is used for farming activities was off the road, he was forced to hire equipment from the neighbours at a cost of $7 920-00. He also lost income of $188 736-00 which he would have derived from farming.

The basis of the claim against the third defendant is only pleaded in para 16 of the declaration which reads:

> "16. The third defendant is the first and second defendant's insurer. 3rd defendant has since paid for the repair of the tractor in the sum of US$ 6 481-00. As insurer the 3rd defendant is jointly and severally liable to compensate the plaintiff for the loss."

That is all that is said about the third defendant and nothing else.

The third defendant has excepted to the summons and declaration in the following:

> "TAKE NOTICE that the 3rd defendant excepts to the plaintiff's summons and Declaration as bad in law and more particularly in that:
>
> 1. Ad Summons
>
> The summons does not disclose a cause of action and does not comply with the requirements of the High Court Rules as it does not contain a concise statement setting out the cause of action.
>
> 2. Ad Declaration
>
> The claim by the plaintiff does not arise out of damage to its property it being clearly conceded that its tractor has since been repaired as at the date of the issuance of the summons. The plaintiff's claim is for consequential damages for which the third defendant being an insurer for the purposes of section 23 of the Road Traffic Act is not liable for."

Mr *Chagonda*, for the excipient submitted that the face of the summons does not comply with r 11 (c) of this court's rules which requires that it must 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."

Although now with the benefit of several months of reflection and consideration, the action was instituted on 25 November 2014, Mr *Mahuni* did not see anything wrong with the face of the summons. As far as he was concerned the import of r 11 (c) is that the summons must establish a case for the defendant to answer. When his attention was drawn to the fact that even the breakdown of the claim does not add up, Mr *Mahuni* submitted, without seeking any amendment, that the summons is capable of amendment. Whether by that he meant that the plaintiff will move to amend the summons at a future date or that an exception cannot be made to a summons capable of amendment, he did not clarify.

I have stated that the summary of the claim is defective and does not make sense. It cannot pass in its present state. In fact the entire pleading betrays inattention and negligence on the part of the drafter which is of unacceptable levels. It fits squarely the description given by Gillespie J in *Mavheya* v *Mutangiri and Others* 1997 (2) ZLR 362 (H) 465 E that:

> "The face of the summons therefore discloses profoundly muddled thinking on the part of whomsoever was responsible for drawing the summons. In fact, that defect is, however mitigated by the filing of a declaration. One thus turns to this declaration in order to examine the cause of action."

In my view there is merit in the exception raised against the face of the summons. Ordinarily where such an exception is upheld, the plaintiff would be afforded an opportunity to amend the summons within a fixed period of time and not an outright dismissal of the

claim: *Adler* v *Elliot* 1988 (2) ZLR 283 (S) 292B; *Auridiam Zimbabwe (Pvt) Ltd* v *Modus Publications (Pvt) Ltd* 1993 (2) ZLR 359 (H) 373 C-D.

It is the second leg of the exception which poses serious difficulties for the plaintiff. I have said that the third defendant has been sued as an insurer of a motor vehicle. The requirement for insuring a motor vehicle for use on any road in this country is provided for in the Road Traffic Act [*Chapter 13:11*]. Section 22 of that Act provides:

> "(1) Subject to this Part, no persons shall use a motor vehicle or trailer in a road unless there is in force in relation to the use of the motor vehicle or trailer by the user –
>
> (a) a policy of insurance; or
> (b) a security ;
> in respect of third-party risks which complies with the requirements of this part."

This is the requirement for a statutory policy of insurance in respect of the use of motor vehicles.

Section 23 provides:

> "(1) A statutory policy shall be issued by a person who is approved by the Minister as an insurer for the purpose of this part.
>
> (2) Subject to this section, a statutory policy shall insure such persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by them in respect of –
>
> (a) the death of, or bodily injury to, any property.
> (b) the destruction of, or damage to, any property caused or arising out of the use of the motor vehicle or trailer concerned on a road.
>
> (3) A statutory policy shall not be required to cover –
>
> (a) any contractual liability; or
> (b) ---------
> (c) ---------
> (d) ---------
>
> (4) Notwithstanding any other law, a person who issues a statutory policy shall be liable to indemnify the persons or classes of persons specified in the statutory policy in respect of liability which the statutory policy purports to cover in the case of those persons or classes of persons."

Mr *Chagonda* for the excipient submitted that compulsory motor insurance against third party risk is limited by statute to death or bodily injury to any person and the destruction of or damage to any property caused or arising out of the use of the insured motor vehicle. It does not extend to consequential damages for failure to farm as a result of damage to property. I agree.

The plaintiff has pleaded that the excipient discharged its obligations arising from the insurance of whatever vehicle collided with his tractor by paying the sum of $6 481-00 required to repair the tractor. He has not pleaded any other cause of action against the excipient averring only that "the third defendant is the first and second defendant's insurer." He does not even begin to suggest there is any other cover in terms of which consequential damages are claimable against the excipient.

I do not agree with Mr *Mahuni* that the excipient's pleading amounts to a confession and avoidance of the plaintiff's cause of action and therefore cannot ground a valid exception. Writing about confession and avoidance as a method of pleading to a claim, Herbstein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, ed 3, Juta and Co Ltd at p320 said:

> "The defendant may admit the facts alleged in the declaration but seek to avoid the legal consequences by setting up other facts which, if established, would have the effect of such an avoidance. Thus defendant, while he admits that he is bound in contract to the plaintiff as alleged, may wish to plead that he has been released from his obligations under the contract by reason of merger, *pactum de non pretendo*, fraud, misrepresentation, or one or other of the grounds which, if established, would release him from the usual consequences of the contract. All matters of confession and avoidance must be specifically pleaded."

In my view, it is the plaintiff who has pleaded in such a manner as to admit facts and then release the excipient from the legal consequences of those facts. He has stated that as insurer, the excipient has discharged the obligation of repairing the damaged tractor. No further liability has been pleaded.

There is therefore merit to the exception. While the defect in the face of the summons can easily be rectified by an appropriate amendment, I do not think the plaintiff can do anything to save the absence of a cause of action against the insurer where he cannot allege the existence of insurance cover over consequential damages. Mr *Mahuni* did not suggest that it exists but could not find it in him to concede that the plaintiff has blundered by suing the insurer in this matter. It means the end of the road for the plaintiff in respect of the excipient.

In the result, it is ordered that:

1. The exception of the third defendant is hereby upheld.
2. The plaintiff shall bear the third defendant's costs.

Mahuni & Mutatu, plaintiff's legal practitioners
Atherstone & Cook, 3rd defendant's legal practitioners