

IGNATIUS MASAMBA  
versus  
SECRETARY-JUDICIAL SERVICE COMMISSION

HIGH COURT OF ZIMBABWE  
MUNANGATI-MANONGWA J  
HARARE, 16 November 2015 & 23 December 2015

**Opposed matter-exception**

Plaintiff in person  
Mrs *F Chikwanha*, for the defendant

MUNANGATI-MANONGWA J: This is an exception by the defendant to the plaintiff's summons and declaration as amplified by further particulars on the grounds that the plaintiff's claim does not disclose a cause of action. The defendant further avers that the claim is bad in law. The background to this case is that, the plaintiff had sued for damages in the magistrates' court in an action he had stated as "trespass on person-battery". As no appearance to defend was entered, he sought default judgement. The magistrate threw out his application and in doing so, stated that the plaintiff had sued for "trespass on land". The plaintiff appealed against the decision and the appeal is pending in this court.

Arising out of those circumstances, the plaintiff has in this matter instituted an action for damages against the defendant being Secretary – Judicial Service Commission. The plaintiff relies on vicarious liability, and is suing the defendant in a representative capacity as the employer of the magistrate who dismissed his case. The action is defended.

The plaintiff's claim is couched as follows:

"the failure or omission to read accurately all the plaintiff's documents filed of record at court by the plaintiff in this matter, that has a cause of action of "Trespass to the person-battery" which the magistrate read as "Trespass to land"..... inexplicably".

The plaintiff further states that he is suing the defendant in contract and delict in her representative capacity. The defendant requested for further particulars, upon being furnished with same, the defendant raised an exception to the plaintiff's summons.

The exception is premised on the following grounds

- (i) The summons do not reveal a cause of action for its claim against the defendant thus does not comply with the peremptory provisions of Order 3 r 11 (c) of this court's rules which specifically provides that a summons shall contain  
"a true concise statement of the nature, extent and grounds of the cause of action and of relief or remedies sought in the action"
- (ii) The summons are vague and embarrassing in that it is not clear whether the plaintiff's claim is in contract or in delict. The plaintiff has not averred any of the elements required to succeed in a claim either in delict or contract.
- (iii) There is no action known as "professional negligence for mental suffering" which further points to the fact that the claim is vague and embarrassing.

The defendant sought dismissal of the plaintiff's claim with costs at a higher scale.

After service of the exception on the plaintiff, he filed a document headed "Notice of Amendment" in which he sought to amend the claim indicating that at the hearing he was to apply to amend the summons. No such application was made on the day of the hearing. Suffice to say, the notice of amendment would not have changed the state of papers as nothing materially changed apart from creating further confusion.

Before the hearing, plaintiff raised issue that the defendant had not filed her heads of argument on time since they were filed after plaintiff had filed a response to the exception and filed a notice to amend summons, hence, defendant was barred. The defendant's counsel disputed that assertion insisting there was no bar in operation against the defendant. The court found no merit in plaintiff's assertion. Clearly, the defendant filed heads of argument on 2 November 2015 and served same on plaintiff, plaintiff filed his on the 12<sup>th</sup> November 2015 hence there is no issue of delay in that aspect and no bar operated against defendant. The court proceeded to hear the matter on merits.

Mrs *Chikwanha* for the defendant argued that the plaintiff's summons did not satisfy the mandatory requirements set out in r 11(c), that omission rendered them a nullity. She referred the court to the case of *Bank of Credit & Commerce Zimbabwe Ltd v Jani Investments (Private) Limited* 1983 (2) ZLR 317 (H) at 318 F where faced with similarly defective summons the court remarked:

“It will be immediately realised, of course, 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 summons can only succeed instantly and completely.”

She further argued that the summons was vague and embarrassing as it did not disclose whether the claim was based in delict or contract law.

In response the plaintiff maintained that a reading of the summons and declaration which documents were complimentary, made issues clear. Further he had filed a notice of amendment. The heads of argument filed by the plaintiff were not helpful as they contained a lot of historical evidence and did not further his case.

I agree with submissions made by the defence counsel regarding the non-compliance and the inadequacy of the summons and declaration. A reading of the summons, declaration and further particulars clearly reveals that these documents contain long winding explanations duly tainted with allegations of bribery, corruption and political interference against different court officials.

There is no true and concise statement of the nature, extent and grounds of the cause of action.

Facts and evidence are all mixed up and one gets to pains as to determine the facts upon which at law one can rely on to sustain a claim. In Odgers *Principles of Pleading and Practice in Civil Actions in the High Court of Justice* 2<sup>nd</sup> Ed at 113 it is stated as follows

“the object of pleadings is to ascertain definitely what is the question at issue between the parties and this object can only be attained when each party states his case with precision.”

It is this precision that in my view r 11 (c) of this court’s rules advocates for. The reason behind r 11 (c) is to ensure that a summons be a document that clearly and concisely sets out the facts that the plaintiff relies on which establish a cause at law for which specific relief can be sought. Compliance with the requirement would create or bring out a case to which the defendant is able to answer. It must be clear to the defendant, what it is he is alleged to have done giving rise to the plaintiff at law to claim the relief sought.

Rule 99 (c) although not referred to by the defendant, comes to play. It states that

“A pleading shall

(c) Contain a statement in summary form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved”

There has to be a summary of allegations of fact which in law give rise to a claim or justify the relief sought. *In casu*, facts in the summons and declaration are so mixed up so as

to cloud the case to which the defendant has to answer. In essence they are vague and embarrassing so as to go to the root of the claim.

The court further agrees with the defendant's submissions that it is not clear under which branch of law the plaintiff is suing. Be it in delict or contract, the plaintiff has failed to satisfy the elements that sustain a claim under either of the branches. In purporting to claim delictual damages the plaintiff's declaration reads as follows:

“(i) There was damage of mental suffering directly arising out of the magistrate's ruling to the plaintiff which is actionable under negligence law.  
The plaintiff bases this averment on what he considers to be failure by the defendant to recruit a competent magistrate.”

The issue is, there is no cause of action like ‘damage of mental suffering’. Even if one can sue for mental distress, the facts alleged do not support liability. The plaintiff appealed against the judgment granted in the magistrates' court, further one cannot sue a magistrate for damages when he/she is acting in their professional capacity for misinterpreting the law or the facts, hence the appeal and review processes. Of note is the fact that the defendant in this matter is the Secretary – Judicial Service Commission, apart from not being the employer of Ms Dzikiti the alleged magistrate (the employer being the Judicial Service Commission) the sitting magistrate herself was not cited. Most important, as the defendant is not an employer in the circumstances no vicarious liability can attach to her.

The contractual claim is stated as follows:

“The plaintiff is suing in contract because the plaintiff paid court fees being in consideration for a competent (a fit and proper ruling).”

The question is, in paying for court fees did the plaintiff enter into a contract with the sitting magistrate? This is not so, as court fees are meant for processing of papers and never for the judgment.

In *Ebrahim v Controller of Customs and Excise* 1984 (1) ZLR 41 (HC) McNally J (as he then was) considered at length the meaning of cause of action' as defined by scholars and in certain judgments. As a result the accorded meaning in that case was stated as:

“the entire set of facts which give rise to an enforceable claim, this includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim”.

My understanding is, that the plaintiff has to specifically plead material facts that entitle him to relief under the specific branch of the law. This, the plaintiff has failed to do. From the pleadings, no material facts have been averred to sustain a claim for damages under delict or the law of contract.

Notably the plaintiff had not made the claims in the alternative, he sought to rely on both causes of action for the same relief. As demonstrated, none of the claims could hold.

In Herbstein and Van Winsen, *Civil Practice of the High Courts of South Africa* 5<sup>th</sup> ed Vol 1 at p 630 the learned authors clearly deal with the purpose of an exception.

“The aim of the exception procedure is thus to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost-effective manner. Thus pleadings whose contents are so vague and it is impossible to determine the nature of the claim or the defence and pleadings which are bad in law in that their contents do not support any legally recognised cause of action or defence are struck out”.

Certainly the plaintiff’s claim does not disclose a legally recognised cause of action, the facts pleaded do not inform the defence in concise terms the claim the defendant has to answer to. The summons and declaration are fatally defective, the pleadings are incurably bad. The claim can therefore not stand. In the premises the exception has to be upheld, this being the expeditious and cost effective way of disposing the case without putting defendant to unnecessary expense.

Where an exception is upheld, the court is at liberty to grant the affected party an opportunity to amend its pleadings. This, in the case of a plaintiff, could be in the form of leave to amend the particulars of claim if so advised, within a specified period of time as the court may determine. As alluded to earlier, the plaintiff had filed a notice of amendment. A reading of the proposed amendment shows that the contents are argumentative, and consist of historical and evidentiary facts not necessary in a pleading. In essence, the summons and declaration and the proposed amendments consists of pleadings which are incurably bad, nothing can be salvaged. This, coupled by the fact that the party sued is the wrong party, defendant not being the employer, and there being no direct legal relationship between the parties, granting plaintiff leave to amend his pleadings is a futile exercise. In such an instance, the court has no option but to order dismissal of plaintiff’s claim.

Finally, whilst it is a constitutional right to be able to approach the courts to obtain relief, self-actors must know that the practice of law is a very specialised area which requires deep knowledge and skill. Simply reading law books at random does not equip one with the requisite knowledge. Legal assistance should be sought if one is to comply with the rules and file appropriate papers. The plaintiff in this matter fell into a pit by his mere belief that he could handle his claim without legal assistance. As a result, the defendant has had to be put to expense in defending fatally defective proceedings where the plaintiff filed numerous documents without restrain some being withdrawn. This is a case which warrants that an

order for costs on a legal practitioner scale be granted to discourage such conduct which is unnecessary and costly.

Accordingly the following order is made:

It is ordered that:

1. The defendant's exception is upheld.
2. The plaintiff's claim is dismissed with costs on a legal practitioner and client scale.

*Kantor & Immerman*, defendant's legal practitioners