MICHAEL HEPKER
versus
WONCON INVESTMENTS (PRIVATE) LIMITED
and
SMITH CHUCKS OKONKWO
and
VIRGINIA DADIRAI

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 12 March 2013 and 13 January 2016

Opposed Application

E. T. Matinenga, for the applicant
T. Mpofu, for the respondent

MUSAKWA J: This is an application to strike out the declaration filed by the plaintiff on the ground that it is superfluous.

The plaintiff issued an endorsed summons which was accompanied by a declaration. Appearance to defend was then filed on behalf of the defendants. Subsequently the defendants requested for further particulars to which the plaintiff responded. The defendants again sought further and better particulars to which the plaintiff responded. The defendants then wrote to the plaintiff pointing out that the filing of a declaration was superfluous since the plaintiff had opted to file an endorsed summons. The defendants intimated an intention to apply for the striking out of parts of the summons that are inconsistent with the particulars furnished.

The plaintiff remained unmoved and replied that there was nothing that could prevent the defendant from pleading. It was further pointed out that the amendment to the summons that the plaintiff issued was not necessary in light of the further particulars that were furnished. When the plaintiff filed a notice to plead and intention to bar the defendants then filed an application to strike out.

The application to strike out is in the form of a statement which contends that the plaintiff's declaration should be struck out as it is superfluous. It is further contended that the

plaintiff filed an endorsed summons in accordance with Order 13 r 13 (1). The particulars of claim set out the plaintiff's cause of action. In terms of r 13 (2) the particulars of claim supersede the declaration. The declaration is a repeat of the particulars of claim. The defendant complained to the plaintiff by way of letter dated 13 August 2014 in terms of r 140 (1) (a).

Having reserved judgment it subsequently occurred to me that the parties should address some procedural point that was overlooked. They were duly directed to file supplementary heads of arguments addressing the issue of the propriety of the form of the application in light of the rules of court.

As observed earlier, the defendants filed a one page statement titled 'Defendants' Application To Strike Out'. The next process filed were the plaintiff's heads of argument.

Order 21 r 137 (1) (c) provides that a party may apply to strike out any paragraphs of a pleading that should properly be struck out. Rule 140 further provides that-

> "(1) Before—
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> (*a*) making a court application to strike out any portion of a pleading on any grounds; or
>
> (*b*) filing any exception to a pleading;
>
> the party complaining of any pleading may state by letter to the other party the nature of his complaint and call upon the other party to amend his pleading so as to remove the cause of complaint."

Rule 137 (2) provides that application to strike out shall be in Form 12. This is the form for an exception.

However, Order 32 is the one that governs the manner in which all applications are made. In this respect r 226 (1) provides that-

> "Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made—
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> (a) as a court application, that is to say, in writing to the court on notice to all interested parties ; or
>
> (*b*) as a chamber application, that is to say, in writing to a judge.
>
> (2) An application shall not be made as a chamber application unless—
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> (*a*) the matter is urgent and cannot wait to be resolved through a court application; or
>
> (*b*) these rules or any other enactment so provide; or
>
> (*c*) the relief sought is procedural or for a provisional order where no interim relief is sought only; or
>
> (*d*) the relief sought is for a default judgment or a final order where—

(i) the defendant or respondent, as the case may be, has previously had due notice that the order will be sought, and is in default; or

(ii) there is no other interested party to the application; or

(iii) every interested party is a party to the application; or

(*e*) there are special circumstances which are set out in the application justifying the application."

As submitted by the plaintiff's counsel, the current application does not comply with either r 226 or r 227. It must be noted that r 227 prescribes the requirements for a written application. Counsel for the plaintiff submitted that r 137 (2) must conform with r 226. He further contended that an application to strike out must lead some evidence. Such evidence would be in the form of an affidavit. Reference was made to *Jackson* v *Rothmans of Pall Mall (Zimbabwe) (Pvt) Ltd* 1993 (2) ZLR 156 (SC). In addition to leading evidence, counsel for the plaintiff further submitted that a party making an application to strike out must allege prejudice. Reference was made to Herbstein and Van Winsen in *The Civil Practice of the Superior Courts in South Africa*, 5th edition. It was thus contended that in such a situation one cannot meet the requirements of alleging prejudice by confining themselves to Form 12. This reinforces the need to depose to an affidavit in which the essential averments are canvassed.

On the other hand, counsel for the defendants contended that even though r 140 gives the impression that an application to strike out should be made by way of court application, the specific rules relating to the procedure in question do not provide for a court application. Citing r 238, counsel for the defendants submitted that there appears to be a distinction between an application, an exception and an application to strike out. Counsel further submitted that the contention that an application to strike out is a special application is borne out by r 223. Counsel for the defendants further buttressed his submission by referring to an excerpt from *Viljoen* v *Federated Trust Ltd* 1971 (1) SA 750 (O) in which Steyn AJ had this to say at 754-756:

" In the 3rd edition of Beck on Pleadings in Civil Actions, the position is correctly set out at p. 95 as follows:

"Exceptions and motions to strike out are alike in this: that neither does nor can introduce any fresh matter…."

In an application to strike out offending averments, the pleadings will, therefore, have to be interpreted as they stand without taking into consideration any matter outside the pleadings concerned. Ordinarily speaking no answering affidavit can or will be filed in opposition to a

> motion to strike out and it will, therefore, be unnecessary and senseless for an applicant in such a matter to call on the respondent file any answering affidavits whatsoever. Any answering affidavits which may be filed would be irrelevant and therefore inadmissible for the purpose of the application……"

The above excerpt does not support the defendant's contention. This, together with r 226 persuades me to hold that an application to strike out must be in the form of a court application. I am further fortified by the remarks of De Villiers J in K*leynhans* v *van der Westhuizen NO* quoted by Korsah J.A. in *Jackson* v *Rothmans of Pall Mall (Zimbabwe) (Pvt) Ltd* supra at 161:

> "It is trite law that an applicant should set out in his petition or notice of motion and supporting affidavits a cause of action and, since in application proceedings the affidavits constitute not only the pleadings but also the evidence, such facts as will entitle him to the relief sought. ... Normally E the court will not allow an applicant to insert facts in a replying affidavit which should have been in the petition or notice of motion (cf *Manerberger* v *Manerberger* 1948 (3) SA 731 (C); *de Villiers* v *de Villiers* 1943 TPD 60; *John Rodericks Motors Ltd* v *Viljoen* 1958 (3) SA 575 (O); *Berg* v *Gossyn* (1) 1965 (3) SA 702 (O); *van Aswegen* v *Pienaar* 1967 (1) SA 571 (O)), but may do so in the exercise of its discretion in special circumstances (cf *Bayat & Ors* v *Hansa & Anor* 1955 (3) SA 547 (N); *Schreuder* v *Viljoen* 1965 (2) SA 88 (O)). Once such a discretion has been exercised in favour of an applicant a Court of Appeal will only interfere if it comes to the conclusion that the court a quo has not exercised its discretion judicially."

In any event, an application to strike out will not be granted unless the applicant shows that it will be prejudiced in the conduct of its claim or defence. See Herbstein and Van Winsen in *The Civil Practice of the Supreme Court of South Africa*, 5th ed at pp 500-501. It is apparent that the plaintiff needlessly filed a declaration accompanying an endorsed summons. However, the defendants have not led evidence showing in what way it they have been prejudiced in the conduct of their defence. That the defendants will needlessly incur costs in pleading to the additional document is neither here nor there. The plaintiff will, in the event of succeeding in his claim be restricted to costs of preparation of the endorsed summons only. See *Miller* v *Roussot* 1975 (1) ZLR 324 and *Border Grain Co (Pvt) Ltd* v *Stock* 1961 R & N 569.

In the result, the application is dismissed with costs.

Gama & Partners, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondents' legal practitioners