

WATTLE COMPANY LIMITED
versus
SAMUEL MUKUBVU
and
TANAKA VENTURES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 9 December 2019

Exception and special plea

Ms P. Murove with N.M. Chinamo, for the plaintiff
T. Magwaliba, for the defendants

ZHOU J: This matter was set down for trial. However, this judgment is in respect of the exception and special plea taken by the defendants to the plaintiff's claim as set out in the summons and declaration in this matter. The exception and special plea had to be dealt with first because they were set down for argument before trial date. The plaintiff opposed both the exception and special plea of prescription. However, in respect of the special plea concessions were made in the plaintiff's heads of argument that some of the claims have indeed prescribed. These claims, which the plaintiff has explicitly abandoned are in respect of the alleged value of the Toyota Land Cruiser motor vehicle (US\$12 000), US\$15 399.38 for groceries, and US\$15 112.30 supposedly for creditors (which was probably meant to be a reference to debtors). Plaintiff persists with the claim for a sum of \$6 394.19 which it says represents the value of cutlery, crockery, kitchen appliances and equipment.

The defendant's exception to the plaintiff's summons and declaration is on two grounds namely (a) that the summons and declaration disclose no cause of action, and, (b) that the claim as set out in the summons and declaration is vague and embarrassing. During the hearing Mr *Magwaliba* for the defendants advised that no reliance was being placed on the non-compliance with the requirements of Order 3 r 11 (c) which requires the summons to contain a true and concise statement of the nature, extent and grounds of the cause of action and the relief or remedies sought in the action. The non-compliance with this rule is clear from the summons.

The summons claims payment of the sum of US\$125 205.87, interest on that sum of money at the prescribed rate from 30 June 2014 to the date of payment and costs of suit. In the declaration the plaintiff alleges that on 30 June 2011 the plaintiff entered into an agreement with the first defendant in terms of which the first defendant rented trading stores, a canteen and clubs from the plaintiff. It is also alleged that the first defendant “took over” (whatever this means) cutlery, crockery, kitchen appliance and equipment, grocery stocks and debtors in the trading stores and clubs the values whereof are given as follows: grocery stocks US\$6 394.19; grocery stocks US\$15 399.39; debtors US\$15 112.30. It is further alleged that the first defendant agreed to purchase the plaintiff’s motor vehicle, a Toyota Land Cruiser for US\$12 000 which was payable on demand. The declaration states that first defendant agreed to pay rent for the clubs, canteen and stores at a rate to be determined by Hagan & Hill Estate Agents in July 2014, which rent was determined to be US\$2 119.44. It is then alleged that the defendants are indebted to the plaintiff in the sum of US\$125 205.87 which is the amount claimed.

The cause of action upon which the claim for US\$125 205.87 arises does not appear anywhere in the declaration. The declaration does not say the basis upon which it is alleged that the defendants are indebted to the plaintiff in that sum of money. Equally, there is an allegation that the defendants were required or agreed to pay for the debtors, groceries, cutlery, crockery and kitchen appliance and equipment.

Additionally, the averments in the declaration are vague and embarrassing. The relationship between the sum of \$125 205.87 and the sums of \$15 112.30, US\$15 399.38, and US\$6 394.19 is not alleged and does not appear in the declaration. There is no allegation that the defendant breached the alleged agreement, hence it is unclear as to how the claim arises or what it is for. On this ground, too, the plaintiff’s claim is exceptionable.

In respect of the special plea, the plaintiff has abandoned its claims for US\$12 000 in respect of the Toyota Land Cruiser, US\$15 399.38 being for groceries, and US\$15 112.30 for creditors (*sic*) taken over by the defendant. The plaintiff, however, persists with the claim for \$6 394.19. Determination of whether this particular claim has prescribed depends on when the cause of action arose. The challenge is that the cause of action upon which this claim is founded does not appear *ex facie* the summons and declaration. The question of when a cause of action arose can only be determined if the cause of action itself is disclosed. On this basis, the court is unable to uphold the special plea of prescription.

Where an exception is upheld the court does not dismiss the party’s claim unless it is clear that the party has no intention to amend its pleadings. In this case no such intention has

been expressed by or attributed to the plaintiff. On this basis, it is appropriate that the plaintiff be granted leave to amend its summons and declaration.

On the question of costs, the defendant has asked for attorney-client costs. These are a punitive order of costs and are awarded in special circumstances. In the present case the summons and declaration were carelessly prepared without attention being given to the basis of the claims. The plaintiff's attention was drawn to these deficiencies in August 2018. No attempt was made to amend the pleadings concerned. What has exercised the court's mind is whether the plaintiff's legal practitioners should recover the costs of preparing the summons and declaration. This is a matter which I leave to them to seriously introspect about given the serious deficiencies in these pleadings which are glaring. Mr *Magwaliba* for the defendants did not ask for the order of costs to be made against the plaintiff's legal practitioners. However, the plaintiff cannot escape the attorney client costs because the defendants have been put to unnecessary expenses by having to litigate over such inelegantly drafted pleadings.

In the result, IT IS ORDERED THAT

1. The defendant's exception be and is hereby upheld.
2. Plaintiff is granted leave to amend its summons and declaration, if is so advised, within 10 days of today's date.
3. Thereafter the matter shall proceed in terms of the rules.
4. Plaintiff shall pay the defendant's costs on the attorney-client scale.

Scanlen & Holderness, plaintiff's legal practitioners
Mushoriwa Pasi Corporate Attorneys, defendant's legal practitioners