

PETTIE NYONI
(In his official capacity as the *curator ad litem*
For DEAN BUKHOSI NYONI)

Versus

ANDREW ANDREW ENAKROME

And

RADAR HOLDINGS LIMITED t/a
MACDONALD BRICK PRIVATE LIMITED

And

OLD MUTUAL INSURANCE COMPANY LIMITED

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 8 MARCH 2024

Civil Trial-Exception to Summons

Ms S. Tshabalala, for the plaintiff
V. Chagonda, for the 2nd defendant
Ndlovu, for the 3rd defendant (excipient)

KABASA J: This is an exception taken by the 3rd defendant against the summons issued by the plaintiff. I have decided to identify the parties as plaintiff and defendant for purposes of clarity. The 3rd defendant herein is the excipient.

The background to the exception is this. The plaintiff issued out summons against the 3 defendants in which the cause of action is stated as follows:-

“Payment in the sum of US\$485 191.68 or RTGS equivalent at the day of payment and ZWL 83 903.20 being damages suffered by Dean Bukhosi Nyoni arising from a motor vehicle accident which occurred on the 12th of October 2019 when the 1st defendant, an employee of the 2nd defendant drove a motor vehicle negligently thereby causing Dean Bukhosi Nyoni injuries and losses in respect of which plaintiff sues the defendants jointly and severally, the one paying the other to be absolved.”

The 2nd and 3rd defendants entered appearance to defend. Subsequent to the filing of this pleading, the 3rd defendant wrote to the plaintiff's legal practitioners. I propose to reproduce the letter hereunder for ease of reference:-

“We refer to this matter in which we act for the 3rd defendant.

The plaintiff's summons are expiable in that no averment is made that establishes a cause of action against the 3rd defendant.

A summons, on its own should in any event and in accordance with r 12(5)(d) set out in a true and concise statement the nature, extent and grounds of the cause of action as against the 3rd defendant.

That is not the case in this matter.

It seems to us that your only remedy in the circumstances is to withdraw the summons altogether as this kind of defect may not be capable of rectification.

In any event, we demand, therefore, that you withdraw the summons with an appropriate tender for costs or take any competent action to remove the cause of complaint within twelve (12) days of your receipt of this letter.”

The plaintiff's response was to the effect that the 3rd defendant was cited as the insurer of the motor vehicle which was being driven by the 1st defendant and such averment was made in the declaration, which in the 7th paragraph clearly substantiated the claim against 3rd defendant.

Rule 12(5) (d) of the High Court Rules, SI 202/2021 states that:-

“(5) Before issue, every summons shall set forth –

- (a)
- (b)
- (c)
- (d) 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.”

Before taking the exception the defendant afforded the plaintiff an opportunity to attend to the complaint and this was as per the dictates of r 42(3) of the rules of court.

The 2nd defendant associated itself with the 3rd defendant's exception.

On the date of hearing of the matter the 2nd defendant appeared merely to note the decision of the court. Counsel for the plaintiff and 3rd defendant argued the matter. After hearing arguments I upheld the exception and struck out the plaintiff's summons. This decision was handed down in an ex tempore judgment. The parties have not asked for written reasons but I decided to furnish them nonetheless. These are my reasons:-

Mr Ndlovu, counsel for the 3rd defendant's contention was that r 12(12) (d) of SI 202/21 is peremptory. The plaintiff's failure to state why 3rd defendant was being brought to court offend the express provisions of r 12(d). The summons is where the cause of action is located. The declaration merely adds flesh to the summons. The failure to comply with the mandatory rules rendered the summons defective and it must resultantly be struck out.

In response *Ms Tshabalala* for the plaintiff submitted that a summons can be amended. The defect can therefore be cured by an amendment and secondly the declaration addressed the cause of the complaint in that the cause of action is given therein.

I found counsel for 3rd defendant's argument meritorious and conversely was not persuaded by counsel for the plaintiff's argument.

Rule 12 specifically deals with summons commencing action and states what such pleading should contain. It is to the summons that a party looks as the cause of action is located therein.

Rule 13 deals with declarations. What should be contained therein is also stated. As regards the cause of action, the declaration must show the nature, extent and grounds of the cause of action. It is in essence an elaboration of what is already captured in the summons. Put differently a party does not look to the declaration when they are desirous to know why they have been dragged to court. They look to the summons and to the declaration for the detail as to the nature, extent and grounds of the cause of action.

In *Masamba v Secretary – Judicial Service Commission* HH 978-15 MUNANGATI-MANONGWA J, in dealing with an exception to summons for failure to disclose the cause of action, had this to say:-

“The reason behind r 11(c) (now r 12(5) (d) is to ensure that a summons be a document that clearly and concisely sets out the facts that 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.”

In casu apart from merely citing the 3rd defendant and that the defendants are jointly and severally liable, the 3rd defendant is left none the wiser as to why it is liable for the damages claimed. The summons is completely silent on this.

In *Tobacco Processors (Private) Limited v Bak Storage (Private) Limited & Anor* HH 49-2012 PATEL J (as he then was) had this to say:-

“It is trite that the procedure for excepting is to be employed for “those objections which go to the root of the declaration and allege that the declaration does not disclose a cause of action at all.”

In casu the summons is silent as to the cause of action and an attempt to draw the plaintiff’s attention to this defect was met with resistance. Where a summons does not disclose a cause of action as demanded by r 12(5) (d), such a failure, in my view, goes to the root of the pleading.

Counsel for the 3rd defendant also referred to a number of authorities on what a cause of action is and the effect of a failure to disclose such cause of action in pleadings. (*Peebles v Dairibord Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H), *Abrahames & Sons v SA Railways & Harbours* 1933 CPD 626, *Santos & Ors v Standard General Insurance Co Ltd & Anor* 1971 (3) SA 434 (O).

As regards the effect of such non-compliance the court was referred to the case of *Nyathi v The Trustees for the Time Being of the Apostolic Faith Mission of Africa & Ors* SC 63-22 where KUDYA JA, although dealing with a matter that involved a failure to comply with the rules of court in respect of chamber applications and opposition thereto, said failure to comply with the peremptory rules of court renders the matter a nullity.

Counsel for the plaintiff on the other hand argued that r 12(5)(d) was complied with as the declaration provided the link between the 1st, 2nd defendant and the 3rd defendant. Counsel also cited the case of *Abrahamse & Sons v SA Railways & Harbours (supra)* on what a cause of action means. A declaration aids the plaintiff in disclosing the full cause of action but such ought to have been concisely stated in the summons.

Counsel argued that the declaration sets out in greater detail the plaintiff's claim. I hold the view that setting out in greater detail comes in after the cause of action is set out in the summons. How does one set out in greater detail from nothing? The detail is sitting on what if the pleading that is sort to be fleshed out does not refer to that which is sought to be amplified?

In *Mnangagwa v Alpha-Media Holdings (Pvt) Ltd & Anor* 2013 (2) ZLR 116 (H) the court held that a pleading should be excipiable only on the basis that no possible evidence led on the pleadings can disclose a cause of action.

Where a summons fails to disclose the cause of action and yet it is the very pleading which informs the defendant why he/she has been brought to court, are we to say the defendant cannot except to such because evidence which will be led will cure that defect? I think not, more so when the defendant has brought such to the plaintiff's attention and the plaintiff stubbornly refuses to take remedial action.

Where a party is afforded an opportunity to address a cause of complaint and chooses not to, I am of the view that the court should not come to such a party's aid. Granted a pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action. (*Local Authorities Pension Fund v Nyakwawa & Ors* 2015(1) ZLR 103(H)). It is also trite that where an exception is allowed the proper approach is not to dismiss the matter as such exception does not call for judgment against the plaintiff who is at liberty to issue summons afresh. The plaintiff could have taken remedial action on receipt of the defendant's complaint but chose not to, unnecessarily prolonging a matter as the 3rd defendant decided to take this exception. It is for these reasons that I allowed the exception.

As regards costs, I am not persuaded to award punitive costs. The plaintiff's conduct is not such that it calls for censure, more so given the decision to strike out the summons.

It is for the foregoing reasons that I acceded to the excipient's prayer and upheld it as I did with costs.

Ncube-Tshabala Attorneys, plaintiff's legal practitioners
Caldrewood, Bryce Hendrie and Partners, 2nd defendant's legal practitioners
Gill, Godlonton and Gerrans, 3rd applicant's legal practitioners