

MUTARE TOYOTA (PVT) LTD  
versus  
XSIGMA CORPORATION (PVT) LTD  
and  
PRESTON GOREDEMA  
and  
CHARLES NHAMO NYAMBUYA

HIGH COURT OF ZIMBABWE  
**MUSHURE J**  
HARARE, 17 September & 16 October 2024

*Opposed matter – exception*

*K. Maeresera* for the excipient/third defendant  
*K. Rangarirai* for the plaintiff

MUSHURE J:

**Background**

[1] This matter involves an allegation of a breach of contract for the supply of motor vehicles to the plaintiff by the first defendant. On 6 May 2024, the plaintiff issued summons for the claim of the delivery of motor vehicles against the defendants jointly and severally, the one paying the other to be absolved. The plaintiff’s claims were as follows:

- “I. Delivery of 4 Toyota Land Cruiser LC200VX Auto motor vehicles within 30 (thirty) days of the grant of this order, which the plaintiff purchased from the first defendant in or around January 2017 but were not delivered, failing which the defendants shall be ordered to pay damages in the sum of US\$632 000.00 (Six hundred and thirty-two thousand United States Dollars) or the local currency equivalent at the prevailing interbank rate at the time of payment.
- II. Payment of interest thereon at the prescribed rate.
- III. Costs of suit.”

[2] In the plaintiff’s declaration, it was averred that on 13 February 2017, the plaintiff placed an order for the supply and delivery of eight (8) brand-new Toyota Land Cruiser motor vehicles from the first defendant. At the time, the third defendant, acting as the plaintiff’s Chief Executive Officer, personally facilitated and oversaw the transaction, instructing that payments be made to the first defendant.

[3] It was further alleged that in February 2017, the plaintiff paid a total sum of one million one hundred and six thousand United States dollars (US\$1 106 000) to the first defendant in four instalments, representing the full payment for the vehicles. The first defendant acknowledged receipt of the full purchase price and undertook to deliver the motor vehicles within three weeks. However, only three Toyota Prado vehicles and one Toyota Land Cruiser were delivered, leaving four Toyota Land Cruiser LC200VX undelivered.

[4] The plaintiff further alleges that despite demand, the defendants have failed, neglected and/or refused to deliver the four outstanding vehicles. This continued non-compliance, according to the plaintiff, constitutes a clear breach of the contractual obligations agreed upon.

### **The third defendant's exception**

[5] The third defendant raised an exception against the summons and declaration, contending that they are vague and embarrassing, as no cause of action has been pleaded against him. He argues that the plaintiff has failed to establish any legal basis for holding him liable. On this basis, the third defendant seeks that his exception be upheld and that the plaintiff's claim against him be dismissed, with costs to be awarded on a legal practitioner and client scale.

[6] Before filing the exception, the third defendant, in terms of rule 42(3) of the High Court Rules, 2021, wrote a letter to the plaintiff. In this letter, he expressed his concerns specifically that the summons failed to disclose any cause of action against him. Despite this notice, the plaintiff did not amend or rectify the alleged deficiencies in the summons and declaration.

[7] However, in response to the complaint, the plaintiff averred that:

“The third respondent was the Chief Executive Officer (CEO) of Mutare Toyota (Pvt) Ltd at the material time. Further, he handled the contentious transaction personally, including directing where the amount being claimed by the Plaintiff should be deposited, hence it is our considered view that it is fair, just and reasonable to have him present when this matter is being adjudicated so that he can tell the Court his side of the story.

We are surprised and shocked that the third respondent avers that the summons do not (*sic*) disclose any cause of action against the third respondent when it is clear that the third respondent was the main player in this transaction and he was the CEO of the Plaintiff at the time. He is an interested party....”

### **The plaintiff's opposition to the exception**

[8] The plaintiff opposed the exception raised by the third respondent. It contended that the exception had been raised as a matter of form rather than substance, exposing the third defendant's failure to appreciate the legal relationship between a director and the fiduciary

duties owed to a company, both under common law and as codified. The plaintiff accused the third defendant of improperly introducing aspects of an alleged contractual relationship between himself and the plaintiff, which lacked relevance to the claim.

[9] The plaintiff further argued that its claim against the third defendant is not one that is based on contract, but rather on the third defendant's role as the plaintiff's Chief Executive Officer. It asserted that the third defendant, in this capacity, breached his fiduciary duties by failing to properly execute his responsibilities, thereby establishing a valid cause of action against him.

[10] The plaintiff contended that all it had to do was to show that the third defendant was the third defendant's Chief Executive Officer at the relevant time and once that is established, the common law and statutory obligations of a director kick in. The plaintiff submitted that it was not disputed that the third defendant was aware of the transaction and that the defendants failed to deliver the vehicles.

[11] It submitted that if a director of a company fails in his dealings on its behalf, the plaintiff submitted, personal liability for any loss the company may have suffered will visit him. The plaintiff further claimed that once it was accepted that the third defendant was the Chief Executive Officer at the relevant time, liability attached to him by operation of the law. In fact, the plaintiff insisted that the fact that the summons stated that the third defendant was the Chief Executive Officer at the relevant time, was sufficient to disclose a cause of action.

### **Oral submissions by the parties**

[12] At the hearing of this matter, Mr Maeserera, for the third defendant, urged the court to consider that the plaintiff had, in its heads of argument, introduced a completely different cause of action compared to what was pleaded in its summons. He also urged the court to consider that the summons was based on contract, and the issue of liability of a director under the Companies & Other Business Entities Act [*Chapter 24:31*] ("the Companies & Other Business Entities Act") only arose in the heads of argument. He emphasised that if this was indeed the original cause of action, the plaintiff should have articulated it clearly in its summons and declaration.

[13] Relying on the decision in *Al Shams Global BVI Ltd v Sambadza* 2016 (1) ZLR 593 (H), he submitted that heads of argument cannot introduce new evidence that has not been previously pleaded. He asserted that the arguments presented by the plaintiff in its heads of argument merely served to bolster the assertion that the third defendant's exception was

properly taken. Finally, he contended that the third defendant would suffer prejudice if required to plead to the summons and declaration in their current form, given the discrepancies and lack of clarity in the plaintiff's claims

[14] In response, Mr *Rangarirai*, for the plaintiff, maintained that there was no departure from the summons. He asserted that the heads of arguments were simply expanding on the summons, elucidating the rationale for citing the third defendant. He referred the court to s 60 and s 197(3) of the Companies & Other Business Entities Act, highlighting the specific provisions regarding the liability of a director of a company. He argued that it had not been controverted that the third defendant was the plaintiff's Chief Executive Officer and that the plaintiff had incurred a loss as a result of the non-delivery of the vehicles. He contended that lengthy summons were unnecessary to explain the role of the third defendant, as his position inherently carried fiduciary responsibilities. In conclusion, Mr *Rangarirai* expressed surprise at the fact that the exception had made its way into court asserting that it lacked merit and should be dismissed.

**Issue(s) for determination**

[15] In my view, the sole issue that falls for determination is whether or not the summons and declaration establish a cause of action against the third defendant.

**Whether or not the summons and declaration disclose a cause of action against the third defendant**

[16] The requirement as set out in rule 12(5)(d) of the High Court Rules is that before issue, every summons shall set forth, 'a true and concise statement of the nature, extent and grounds of the cause of action and of the relief of remedies sought in the action.'

[17] Authorities are abounding in this jurisdiction on what exactly constitutes a cause of action. In *Dube v Banana* 1998 (2) ZLR 92 (H), the court cited with approval the decision in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 wherein WATERMEYER J said:

“The proper legal meaning of the expression ‘cause of action’ is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action....” (at p 95D-E)

[18] The definition was underscored in *Silonda (Substituted By Executor Vusumuzi Thomas Silonda) v Nkomo* SC 6-22 as follows:

“The law on what constitutes a cause of action is settled. A cause of action is simply a factual conspectus, the existence of which entitles one person to obtain from the court a

remedy against another person. In other words, it is an entire set of facts upon which the relief sought stands. See *Peebles v Dairiboard (Private) Limited* 1999 (1) ZLR 41 (H) at 54E-F and *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637.” (at p 16 of the cyclostyled judgment)

[19] The consideration of what an ‘entire set of facts’ ought to include has also been well traversed in this jurisdiction. The issue is fundamentally linked to the purpose of pleadings. In *National Social Security v Metbank Ltd* 2019 (3) ZLR 28 (H), MATHONSI J (as he then was) at p 32F noted that:

“The purpose of a pleading is to inform the opposing party in advance of the basis of the other party’s claim. This is to enable the other party to prepare for the case which it has to meet at the trial.”

[20] To enable the opposing party to prepare adequately for the case they must meet at trial, a pleading must be sufficiently detailed to inform them of the basis of the plaintiff’s claim. The claim must be pleaded in a manner that is lucid, logical and intelligible, ensuring that all essential facts are presented without ambiguity. This clarity facilitates the defendant’s understanding of the allegations. See *Mphoko & Anor v Nanavac Investments and Ors* HB 209/22.

[21] Not only that:

“pleadings also serve to identify the branch of the law under which the claim has been brought. Different branches of the law require different matters to be specifically pleaded in the claim to be sustainable under that action”. See *Chifamba v Mutasa* HH 16-08, cited in *Tel-One (Pvt) Ltd v Capitol Insurance Brokers (Pvt) Ltd* 2016 (1) ZLR 169 (H) at 177 C-D.

[22] It therefore follows that pleadings must enable a party to identify the specific branch of the law under which the claim is being brought. For example, a claim under contract would require that the plaintiff specifically pleads material averments such as the existence of the contract, the relevant terms of the contract, and the applicability of those terms to the particular right forming the basis of the claim *ex contractu*. See *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holding (Pvt) Ltd* 2018 (1) ZLR 449 (S) at 457H-458A. This level of detail is essential for both the opposing party and the court to understand the legal framework governing the dispute and to ensure that the issues are framed correctly for resolution.

[23] This does not mean that the summons and declaration must be unnecessarily verbose. In *Tel-One (Pvt) Ltd v Capitol Insurance Brokers (Pvt) Ltd supra* the court made the important observation at p177 H-178A that:

“I echo the sentiments of MWAYERA J in *Hwange Colliery Gasification Company v Hwange Colliery Company Limited* HH-477-15 at p 2 as aptly stating the legal position, when she said:

“It is settled by definition that pleadings should be concise and to the point. The pleadings must inform the parties of the points and issues between to enable each to know in advance what case they are faced with. By nature, long winding and argumentative pleadings are not only failing to comply with the rules of the court but defeat the whole purpose of pleadings. Pleadings must be clear and to the point. They need only identify the branch of the law under which the claim or defence to it is made and should not contain evidence.”

[24] Thus, as long as the claim is pleaded with sufficient logic and lucidity to enable the opposite party to discern what case it has to meet, the requirement would be satisfied. I hasten to point out that however, even if the summons have to be concise and to the point, there is a corresponding need to ensure that the facts so pleaded have sufficient particularity to enable the opposite party to reply to it. See *Steward Bank Ltd v Mangeya* 2016 (2) ZLR 250 (H) at 254H.

[25] It seems to me that there is a basic minimum standard that should be met in pleadings. A defendant is not entitled to an abridged version of the plaintiff’s evidence, however, he is entitled to receive sufficient information that enables him to respond to the plaintiff’s claims. See the case of *Mphoko & Anor v Nanavac Investments and 2 Ors supra*. This balance ensures that while the plaintiff presents their case, the defendant is not left in the dark regarding the allegations being made against him, thereby upholding the principles of fairness and justice in the litigation process.

[26] A plaintiff cannot expect a defendant to properly plead without providing a sufficient factual basis for the claim. *Dube v Banana supra* is authority for that a cause of action constitutes ‘every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court’. The same decision is authority for that while a cause of action ‘does not comprise every piece of evidence which is necessary to prove such fact’ it must comprise every fact which is necessary to be proved. This authority underscores the importance of clarity and comprehensiveness in pleadings to ensure that both parties can engage meaningfully in the litigation process.

[27] In the present case, the plaintiff needed to present a combination of facts that are material for it to succeed in its action. The plaintiff argues that once it is proved that the third defendant was the Chief Executive Officer of the plaintiff, that is sufficient to establish liability. I find

this argument peculiar, for the simple reason that being a Chief Executive Officer cannot, by any stretch of the imagination, constitute a cause of action. Furthermore, merely handling transactions for a company in that capacity does not, in itself, give rise to a cause of action. The plaintiff must demonstrate specific actions or omissions by the third defendant that directly relate to the claim, rather than relying solely on his title or role within the company.

[28] To demonstrate what the third defendant is being expected to plead to, paragraph 6 of the plaintiff's declaration is worded thus:

“6. Mr Charles Nhamo Nyambuya, who was Mutare Toyota (Pvt) Ltd's Chief Executive Officer (CEO), handled this particular transaction personally and gave instructions for payments to be made to Xsigma Corporation (Pvt) Ltd.”

[29] This statement encapsulates the entirety of the plaintiff's allegations against the third defendant, followed by an account of how the payment was made to the first defendant, the delivery of four of the eight vehicles, and the assertion that the defendants have failed, neglected and/or refused to deliver the remaining four vehicles despite demand. Upon examining the summons and declaration collectively, it is evident that the basis of the plaintiff's claim against the third defendant has not been clearly articulated. As such, it is challenging to ascertain the specific allegations that the third defendant is expected to address.

[30] Moreover, the summons and declaration fail to delineate the factual context necessary to justify the plaintiff's claim for a remedy against the third defendant. The plaintiff's assertion is essentially that the third defendant served as its Chief Executive Officer during the relevant transaction and that he authorised the payment to the first defendant. However, this assertion, devoid of additional factual details or legal grounding, does not sufficiently establish a valid cause of action against the third defendant.

[31] Given that the plaintiff is a juristic person, and must act through a natural person, I find that the statement made in the declaration does not disclose a cause of action.

[32] In my view, the plaintiff ought to have elaborated further to establish a clear connection between the third defendant and the demands it is making. It is essential that the plaintiff pleads a comprehensive set of facts that would entitle it to seek either delivery of the remaining vehicles or damages from the third defendant. Without this detailed pleading, the third defendant is left without sufficient information to respond meaningfully to the claims against him.

[33] Section 60 and s 197(3) of the Companies & Other Business Entities Act referred to by Mr *Rangarirai* in his arguments provide that: -

**“60 Direct actions by members**

(1) A member of a private business corporation or a company may bring an action in court in such person’s own name against any manager, officer or director referred to in section 54 or 55 to enforce, or recover damages caused to him or her caused by violation of a duty incumbent upon any such manager, officer or director under this Act or any other law including laws against fraud or misappropriation.”

**“197 Liability of directors and prescribed officers**

(3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having—

- (a) acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so; or
- (b) acquiesced in the carrying on of the company’s business despite knowing that it was being conducted in a manner described in section 68 (“Fraudulent, reckless or grossly negligent conduct of business”) (3); or
- (c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose; or
- (d) signed, consented to, or authorised, the publication of—
  - (i) any financial statements that were false or misleading in a material respect; or
  - (ii) a prospectus or a statement in lieu of prospectus that contains—
    - A. an “untrue statement” as defined and described in section 2 (“Interpretation”) (1); or
    - B. a statement to the effect that a person had consented to be a director of the company, when no such consent had been given, despite knowing that the statement was false, misleading or untrue, as the case may be....”

[34] From my reading of the above provisions, it is apparent that a claim predicated on the liability of a director of a company must not merely show that the defendant held the position of a director. Instead, it is essential to include material averments demonstrating how the director can be held liable for the company’s losses, costs or damages. This includes detailing instances where the director may have failed to fulfil their duties in good faith or in the best interests of the company or where they lacked the requisite care, skill and attention that a diligent person would exercise in the same circumstances. Additionally, the claim must elucidate any instances where the directors acquiesced in the company’s operations in a manner that was fraudulent, reckless or grossly negligent or where they participated in any act or



omission for a fraudulent purpose. Without such averments, the claim remains incomplete and fails to establish a clear basis for the director's liability.

[35] In *casu*, if the plaintiff intended to establish liability against the third defendant as a director, it was imperative for the plaintiff to articulate how the third defendant breached his duties as the Chief Executive Officer. However, the summons and declaration fail to disclose any fault attributable to the third defendant. The plaintiff ought to have explicitly articulated the particular grounds for the third defendant's reprehensible conduct to support its claim against him. Without such clarity, the plaintiff's case lacks the necessary factual foundation to proceed.

[36] The citation of the third defendant seems to have been made out of routine. This notion is supported by the plaintiff's response to the third defendant's complaint in terms of rule 42(3) of the High Court Rules, which indicates a lack of a substantive basis for his citation. The plaintiff stated that the third defendant personally handled the contentious transaction and it was therefore 'fair, just and reasonable' to have him present when the matter was being adjudicated so that he could 'tell the court his side of the story'. The plaintiff went further to state that the third defendant was the main player in the transaction, he was the Chief Executive Officer and he was an interested party. However, this rationale does not sufficiently establish a valid cause of action against him.

[37] A deduction of these statements leads to the logical conclusion that the third defendant's role appears to be akin to that of a witness rather than a defendant. Consequently, one is left uncertain regarding the actual cause of action being asserted against the third defendant in the summons and declaration. It was only in the heads of argument for the exception that the plaintiff indicated that it was imputing liability on the third defendant as its Chief Executive Officer. I find merit in the third defendant's objection to the introduction of new evidence through the heads of argument. It cannot be successfully argued that the plaintiff's heads of argument were expanding on the summons when they introduced a new dimension to the cause of action. Moreover, it is difficult to comprehend how the plaintiff could seek to augment an already insufficient summons through heads of argument in an exception.

[38] In conclusion, I am persuaded by the remarks made by MUNANGATI-MANONGWA J in the case of *Masamba v Secretary of the Judicial Service Commission* HH-978-15 at p 5 of the cyclostyled judgment that:

“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.”

[39] The summons and declaration in the present matter are fatally defective in as far as they relate to the claim against the third defendant. The claim cannot stand.

### **Disposition**

[40] Having regard to the plaintiff’s summons and declaration, I find that the third defendant would be unable to adequately plead in response. While I appreciate that the court should not scrutinise a pleading excessively, the pleadings in this case are excipiable due to the insufficiency of the facts upon which they are based. It is challenging, if not impossible, for anyone to comprehend the case against the third defendant. It is equally impossible to decipher what the cause of action against the third defendant is. The dearth of information renders the particulars vague and embarrassing. Consequently, the plaintiff’s claim against the third defendant stands to be dismissed as prayed for.

[41] The third defendant has prayed for costs on a higher scale. It is trite that courts will not lightly accede to a prayer for an award for costs on a legal practitioner and client scale. It is only in exceptional circumstances. This case does not present such exceptional circumstances.

### **Order**

[42] In the result, it is ordered that:

1. The third defendant’s exception be and is hereby upheld.
2. The plaintiff’s claim against the third defendant be and is hereby dismissed.

3. The plaintiff shall pay the third defendant's costs on an ordinary scale.

**MUSHURE J:** .....

*Rangarirai & Co Legal Practitioners*, plaintiff's legal practitioners

*Chizengeya Maeserera & Partners*, third defendant's legal practitioners