CLAUDIUS MAPEDZAMOMBE

versus

EMILY MHINI

and

COMMERCIAL BANK OF ZIMBABWE

(FORMERLY BEVERLY BUILDING SOCIETY)

and

COMMERCIAL BANK OF ZIMBABWE

and

REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE

ZHOU J

HARARE, 4 & 6 September, 2012

Plaintiff in person

*Mr Manjengwa*, for the second and third defendants

ZHOU J: The second and third defendants are, in fact, the same person cited twice in the proceedings instituted by the plaintiff by way of summons. The summons was served together with what purports to be the plaintiff’s declaration, to which was attached an “affidavit to prove damages”. In response, the second and third defendants objected to the claim on three distinct grounds. The first objection is by way of exception to the summons and declaration on the basis that they do not disclose a cause of action and, alternatively, that they are vague and embarrassing. The defendants have also raised the special plea of prescription. Thirdly, the defendants have applied to strike out the affidavit which is attached to the declaration as well as any para(s) in the declaration which refer to the affidavit.

It is convenient to consider the application to strike out first. Order 15 Rule 99 states that a pleading shall, inter alia, “contain a statement in a 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.” The affidavit contains evidence which must not be contained in pleadings. It must be struck out. The also be struck out.

The most issue to be considered is whether the summons and declaration are excipiable on the ground that they do not disclose a cause of action or, in the alternative, that they are vague and embarrassing. In *City of Cape Town* v *National Meat Suppliers* *Ltd* 1938 CPD 59 the court stated that the onus is always on the excipient to satisfy it that sound and adequate grounds exist for an exception to be upheld. The grounds of the exception must be properly set out in the exception. If the grounds are not properly set out the exception would be bad in law. See Quinlan v Machregor 1960 (4) SA 383 (O); *Standard Ganners and Packers Ltd* v *Bezuidenhont* 1955 (1) SA 601 (T).

In order to determine the validity of an exception founded upon the ground that the summons and declaration disclose no cause of action, the summons and declaration to which the exception is taken must alone be looked to. No other document is considered. See *Oceana Consolidated Company Ltd* v *The Government* 1907 TS 786.

The summons in this case merely sets out the amount being claimed and refers to “details as outlined in the attached affidavit.” No cause of action is disclosed. The affidavit, as already stated, is improperly before the court.

The plaintiff’s declaration does not remedy the situation. It is unintelligible. It merely narrates certain events, some of which are not even related, in a manner that merely creates confusion. A reading of the plaintiff’s declaration does not reveal the cause action.

I cannot consider the special plea of prescription, given that the summons and declaration do not disclose a cause of action. It is not possible on the pleadings filed to determine when a cause of action arose when such cause is not disclose in the first instance.

In the result, it is ordered as follows:

1. The affidavit attached to the plaintiff’s summons and declaration is struck out.
2. The second and third defendants’ exception to the plaintiff’s declaration is hereby upheld.
3. The plaintiff if given five days within which to file an amended summons and declaration.
4. Should the plaintiff fail to file the amended summons and declaration within the period given, the defendants are hereby granted leave to file a chamber application on notice to the plaintiff, for the dismissed of the plaintiff’s claim.
5. The plaintiff shall pay the costs.