

CHINA AFRICA COTTON ZIMBABWE (PRIVATE) LIMITED
versus
QUTON SEED COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 28 February & 11 April 2018

Opposed Matter- Exception

Mr S Muzondiwa, for the plaintiff
Mr T Chagonda, for defendant

CHAREWA J: Plaintiff issued summons against the defendant, on 21 November 2017, claiming an order for eviction, holding over damages in the amount of \$7 873,97 per month from 1 October 2017 to date of eviction and legal practitioner and client costs. On 30 November 2017, the defendant notified the plaintiff that its summons and declaration were defective as they did not give a concise statement of the nature of the claim, and thereby disclosed no cause of action. As a consequence, the plaintiff filed a notice to amend on 11 December 2017 to cure the defect. On 12 December 2017, the defendant excepted to the summons and declaration.

Procedural Irregularities

The offending parts of the summons read as follows:

“Plaintiff’s claim is for:-

- a) An Order evicting the defendant and all those claiming occupation through it from the leased premises 222A Sally Mugabe Way Glendale Township, Glendale.
- b) Holding over damages at the rate of \$7 873.97 per month calculated from 1st of October to the date of eviction.
- c) Costs of suit on a Legal Practitioner-Client scale, as will more fully appear from Plaintiff’s Declaration attached hereto.”

For its part, the declaration reads in the relevant paragraphs as follows:

- “3. On the 27th day of December 2011, Plaintiff and Defendant executed a lease agreement in terms of which Plaintiff leased out to Defendant certain premises known as No. 222A Sally Mugabe Way, Glendale Township.
4. The duration of the lease was five years commencing on the 1st of January 2012 to the 31st of December 2016.

5. Upon expiration of the lease period.(sic) Defendant continued to perform its obligations in terms of the expired lease. Defendant had become a statutory tenant.
 6. On the 29th of June 2017, Plaintiff through its Legal Practitioners of record, gave a three (3) months written notice to Defendant terminating the statutory tenancy on the 30th of September 2017 and indicating that it wishes to use the premises for its own operations upon the expiration of the notice period. Plaintiff attaches hereto a copy of said notice marked "A". Defendant has known of Plaintiff's long term plans to expand its business and use the leased premises.
 7. During the three (3) months notice (sic) period rentals were being paid at the rate of \$7 873.97.
 8. The notice period having expired, Defendant has failed/refused to vacate the premises for no lawful grounds.
 9. Plaintiff as (sic) suffered and continues to suffer prejudice as its operations have been put in abeyance due to Defendant's holding over of the premises.
- WHEREFORE** Plaintiff's claim as against the Defendant is for:-
- a) An Order evicting the Defendant and all those claiming occupation through it from the leased premises.
 - b) Holding over damages at the rate of \$7 873.97 per month calculated from 1st October 2017 to the date of eviction.
 - c) Costs of suit on a Legal Practitioner-client scale."

The intended amendments to the summons and declaration are as follows:

Summons

- (a) By deletion and substitution of paragraph (a) of Plaintiff's claim to read "An order evicting the Defendant and all those claiming occupation through it from the leased premises 222A Sally Mugabe Way, Glendale Township, Glendale; Plaintiff and Defendant's lease agreement having expired and Defendant's statutory tenancy having been duly terminated on the 30th of September 2017."
- (b) By the deletion and substitution of paragraph (b) of the Plaintiff's claim to read "Holding over damages at the rate of \$7 873.97 per month, being the rate at which rentals were being paid as at the date of termination of the tenancy, calculated from the 1st of October 2017 to the date of eviction."

Declaration

- (a) By deletion and substitution of paragraph (a) of Plaintiff's prayer to read "An order evicting the Defendant and all those claiming occupation through it from the leased premises 222A Sally Mugabe Way, Glendale Township, Glendale; Plaintiff and Defendant's lease agreement having expired and Defendant's statutory tenancy having been duly terminated on the 30th of September 2017."
- (b) By the deletion and substitution of paragraph (b) of the Plaintiff's prayer to read "Holding over damages at the rate of \$7 873.97 per month, being the rate at which rentals were being paid as at the date of termination of the tenancy, calculated from the 1st of October 2017 to the date of eviction."
- (c) An on the alternative, plaintiff claimed for "payment of the sum of \$13 700 as damages to the plaintiff for the loss of said figure through negligence of defendant, which failed to act reasonably in its duty of care to Plaintiff who is a client of defendant. In that the bank ought to have known that it was transferring stolen money."

Parties' Submissions

In its main heads of argument, the defendant submits that the summons is incurably bad as plaintiff has not stated clearly and concisely the facts that supports its right to judgment by the court as it merely contains a prayer. It is defendant's further averment, in its supplementary heads that the plaintiff does not deny that its summons is bad at law as it discloses no cause of action. This admission is manifested by the intended amendment.

In that regard, defendant submits that since the admission is made that the summons discloses no cause of action, it is therefore a nullity and hence cannot be amended as one cannot amend something which does not exist. Consequently, the intended amendment is also a non-event as there is no cause of action for the defendant to defend, since a nullity cannot be amended or cured.

Further, the defendant submits that the exception it took goes to the root of the matter and has the effect of destroying the plaintiff's claim. In that case there is nothing before the court that could be subject to amendment. Consequently, the proper course that plaintiff should have taken was to withdraw its claim.

Finally, defendant argues that the intended amendment sought by plaintiff is a complete overhaul or substitution of what initially appeared on the summons. Such amendment cannot be allowed as it is contrary to the law.

The defendant's heads of argument do not address what effect, if any, the declaration and intended amendments thereto have.

On its part, the plaintiff concedes that its summons was indeed deficient but contends that such submissions were sufficiently amplified by the declaration such that the defendant was adequately aware of the details of the claim, the basis thereof and the relief sought. In that regard, plaintiff submits that the summons is not incurably bad and can thus be cured by appropriate amendment and that the intended amendment does in fact cure the complaint.

Further, plaintiff submits that since defendant has not alleged any prejudice should the amendment be ordered, since the amendment is already on the record, it should be allowed.

It is trite that summons must disclose a cause of action otherwise it is so bad in law that it cannot be condoned and is thus expiable¹. It is further trite that summons which does not disclose a cause of action is a nullity and cannot be amended.² The only cure for such summons is to withdraw it and start afresh.

In addition, the courts have also consistently held that the object of any pleading is to state in clear and concise terms the facts upon which a party relies in order for each party to come to trial well prepared to meet the case it must answer and to enable the court to adjudicate thereon. In that regard, the courts invariably address the questions which I may generally express as follows:

1. Is a litigant sufficiently aware of the details of the claim?
2. Is the legal basis of such claim adequately articulated?
3. Is the relief clear?

In the result, where the summons does not contain sufficient facts on the details of the claim, or where the relief sought is not sufficiently clear, the courts generally allow amendments, as this does not go to the root of the matter. Where however, the legal basis of the claim is completely absent, an exception is generally upheld as without a *causa*, a claim is dead in the water³. Exceptionally, where a reading of the summons together with the declaration discloses the *causa* sufficiently, particularly where the summons specifically states that the claim is more fully amplified in the declaration, the courts have taken the robust approach to allow amendment of the cause of action.

Analysis

There is no doubt that the summons in this case discloses no cause of action as it merely contains a prayer, i.e. the relief sought. No particulars of the claim are given nor is the cause of action stated at all. Nor is there an invitation, on the face of it, to read the summons in conjunction with the declaration. The summons is thus invalid as it does not contain a true and concise nature of the details of the claim and the legal basis thereof.

In any event, while clause 6 of the declaration amplifies, quite inelegantly, the legal basis for seeking eviction, no case is made at all for a claim for holding over damages, apart from giving the general information, in clause 7, of the monthly rental that was payable.

¹ *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S)

² See also *Business Equipment Corp v Baines Imaging Group* 2002 (2) ZLR 354 (S).

³ See *Muchakata v Netherburn Mine* 1996 (1) ZLR 153(S). See also *Taruona v Zvarevadza & Ors* HH-87-12 and *Tobacco Processors (Pvt) Ltd v Bak Storage (Pvt) Ltd & Ors* HH-49-12

Therefore, the declaration does not cure the deficiencies in the summons as submitted. And in any case, the plaintiff also seeks to amend the declaration as well to disclose a cause of action for holding over damages.

Further, this case is sufficiently distinguishable from the case of *Sanctuary Insurance*⁴ which plaintiff seeks to rely on. Therein, the prayer in the summons contained elements of the *causa* and further, the summons specifically invited the defendant and the court to amplify those details by reading it in conjunction with the declaration, which document was sufficiently detailed as to the cause of action. Nor is the case of *Nuvert Trading*⁵ apposite. Therein, the summons was not a nullity as it was curable by the declaration.

I therefore agree with the defendant that the summons is fatally defective and is therefore a nullity. In my view, this is a case where the exception must be upheld, as clearly the summons is incurably defective and is not subject to amendment.

And once I have found that the summons is a nullity, whether or not defendant has not alleged any prejudice should the amendment be allowed is irrelevant.

Disposition

CONSEQUENTLY, IT IS ORDERED THAT

1. The exception is upheld with costs.

Sawyer and Mkushi, plaintiff's legal practitioners
Atherstone & Cook, defendant's legal practitioners

⁴ *Sanctuary Insurance Company (Pvt) Ltd v BG Insurance (Pvt) Ltd t/a BGI Financial Services* HH821-16

⁵ *Nuvert Trading (Pvt) Ltd t/a Tripple Tee Footwear v Hwange Colliery Company* HH 791/15