

ECOBANK ZIMBABWE LTD
versus
PEARSON CHITANDO
and
TENDAI LOICE CHITANDO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 22 November & 7 December 2016

Opposed application

D Tivadar, for the applicant
T Magwaliba, for the respondent

TSANGA J: The applicant (as defendant) filed an exception and application to strike out with respect to respondent's claim (the plaintiff). The exception is premised on the grounds that the summons is fatally defective and not in compliance with the rules of the court in that it does not set out a true and concise nature and extent of the grounds of cause of action. The application to strike out relates to evidentiary material attached to the plaintiff's summons and declaration. The evidentiary material consists of a facility letter and two unlimited guarantees. These are said to be evidentiary material which are meant to verify and prove the plaintiff's case. It is the defendant's position that the plaintiff may not at this stage attach many evidentiary material to its declaration but must state the allegations that form the basis of its claim in the declaration. The material is said to be prejudicial in that instead of pleading to the allegations, the defendants must now deal with the evidence in their plea. Costs are sought on a higher scale.

Rule 119 sets out the *dies induciae* or time of reckoning for filing an exception and special plea. It is peremptory in nature. Rule 119 of the High Court rules provides as follows:

"119. Time for filing plea, exception or special plea

The defendant shall file his plea, exception or special plea within ten days of the service of the plaintiff's declaration:

Provided that where the plaintiff has served his declaration with the summons as provided for in rule 113 there shall be added to the period of ten days above referred to the time allowed a defendant to enter appearance as calculated in terms of rule 17.”

The summons were issued on 27 April 2016 together with the particulars of claim. The defendant’s exception and application to strike out was filed on 27 June 2016, approximately one month after the expiry of the 20 days *dies induciae* since the summons and declaration had been served at the same time. The exception should have been taken by the 27th of May 2016, if one takes into account national holidays during that period.

Guided by the Supreme Court decision of *Sammy’s Group (Pvt) Ltd v Meyburgh NO & Ors* SC 45-15, I drew attention at the hearing to the fact that the exception was in accordance with the reasoning in that case, filed out of time and could therefore not be entertained by this court. As was observed therein in discussing the import of r 119:

“It is true, as the learned Judge remarked, that there is no sanction for the late filing of an exception or special plea. However, the provision in the Rules is mandatory and the documents filed in contravention thereof cannot, in the absence of condonation of the non-compliance with the Rules, have any legal validity. The sanction must, in my view be, that the pleading is invalid by virtue of its non-compliance with the Rules. First respondent’s exception was filed 15 days out of time. Second respondent’s special plea and exception were filed 6 and a half months out of time. Both applications were in violation of the Rules without explanation, without condonation, sought or granted. There was, therefore, no legal basis on which they were entertained by the court *a quo*”.

After the receipt of the summons the defendants had asked for further particulars which had been furnished on 3 June 2016. It was thereafter that the exception had been filed. A summons that does not disclose a cause of action is defective from the outset. Further particulars will not save it. For vivid imagery, such summons is somewhat akin to the famed children’s story of the emperor’s new clothes. If the emperor has gone out with no clothes, it serves no purpose to be coy about telling the truth or pretending that he has some on. The time frames are clearly there for a purpose. A party who receives summons and finds fault with them in the sense that they do not set out a true and concise nature and extent of the grounds of cause of action, and who deems an exception justifiable, must have the courage of their conviction to raise such exception within the time frame stipulated by the rules.

Rule 140 (1) sets out the procedure to be followed before a party takes out the exception.

140. Complaint by letter before applying to strike out or filing exception

(1) Before—

- (a) making a court application to strike out any portion of a pleading on any grounds; or
- (b) filing any exception to a pleading;

the party complaining of any pleading may state by letter to the other party the nature of his complaint and call upon the other party to amend his pleading so as to remove the cause of complaint.

While such a letter is not a requisite as per the case of *Ritenote Printers (Pvt) Ltd & Anor v A Adam (Pvt) Ltd & Ors* 2014 (1) ZLR 160 (H) even where it is written, the exception must nonetheless be taken within the time frame set out in r119. A party who requests further particulars as an alternative to pleading signifies at some level, a comprehension of the claim that has been levelled against him even though they may not have all the necessary particulars to respond to the claim. This is different from an exception.

Being one month out of time, the exception and application to strike out is therefore improperly before the court. No explanation has been proffered for late filing nor has condonation been sought. Counsel for both parties signify a disagreement with the interpretation of the import of r 119 of the High Court Rules in the Supreme Court case of *Sammy's Group (Pvt) Ltd supra*. That decision on the observance of time frames for filing the exception is binding on this court. There is accordingly no need to go into the merits.

There will be no order as to costs since both parties had proceeded to file papers to the exception regardless of the rule.

The application to strike out and the exception are dismissed with no order as to costs for not being in accordance with r 119 of the High Court Rules, 1971.

Gill Godlonton and Gerrans, Applicants Legal Practitioners
Danziger & Partners, Respondent's Legal Practitioners