

SANCTUARY INSURANCE COMPANY (PVT) LTD  
versus  
BG INSURANCE (PVT) LTD t/a BGI FINANCIAL SERVICES

HIGH COURT OF ZIMBABWE  
CHAREWA J  
HARARE, 23 November 2016 & 21 December 2016

### **Exception**

Mrs *M Mutetwa-Muzembe*, for the plaintiff  
*T Chagudumba*, for the defendant

CHAREWA J: This is an application to compel delivery of an insurance account and schedule to enable the plaintiff to determine the amount that may be due to it from the defendant in terms of a verbal agreement between the parties. After requesting and receiving further particulars, the defendant excepted to the summons as being “bad at law and disclosing no cause of action” for failure to “comply with the provisions of Order 3 r 119 (c); more particularly in that it does not give a concise statement of the nature of the claim”.

### **Facts**

The plaintiff issued summons praying for

“an order that

1. Defendant be directed to deliver ....
  - a. A full account....
  - b. A schedule....reflecting:
    - i. The names of the insured persons...
    - ii. The type of cover that the insured were issued with
    - iii. The amount of premium collected by defendant
    - iv. The amount of premium remitted to plaintiff after deducting commission by defendant
    - v. The period of insurance for each policy
    - vi. The names of the insurers to which the policies were transferred
2. The plaintiff be granted leave to reset the matter down (presumably after receiving the information under clause 1) for
  - a. Debatement of the account
  - b. Determination of the amount due to plaintiff
  - c. Judgment in the sum so determined, and
  - d. costs
3. In the event of failure by defendant to supply the information requested under clause 1, plaintiff be granted leave to file a declaration setting forth the amount it considers due to it
4. Costs of suit on the higher scale.”

The prayer set forth in the summons concludes by stating

“As morefully (sic) appear on the Plaintiff’s Declaration . As will more fully appear on the Plaintiff’s declaration annexed hereto.”

The declaration then explains how and when the parties entered into an agreement, the terms of the agreement, the documents exchanged and how defendant breached the agreement. Further the declaration avers how the defendant failed to render an account when demand was made, wherefore the plaintiffs seeks for an order as prayed for in the summons.

### **Exception**

The defendant’s exception is basically that the plaintiff, in the summons, did not give a concise statement of his claim as required by the rules, but merely made a prayer, and thus discloses no cause of action. The defendant did not except to the declaration.

### **Defendant’s submissions**

The defendant submits that the plaintiffs’ summons is not valid as it does not contain a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought. Further, the summons does not concisely set out the facts plaintiff intends to rely on and prove but merely contains the relief sought. Therefore, defendant does not know what case he has to meet.

### **Plaintiff’s submissions**

For its part, while conceding that its summons merely contains a prayer encapsulating the remedy sought, the plaintiff submits that that prayer sufficiently states the nature, extent and grounds of its claim by claiming delivery of a full account for 10 cover notebooks which plaintiff supplied to defendant. Further and in any event, plaintiff submits that the summons must not be read separately from the declaration. In particular, plaintiff asserts that since the summons clearly states on the face of it that the particulars of claim are contained in the annexed declaration, then the two documents must be read as one.

### **Issues**

The only issue before the court therefore is whether the summons is excipiable for failing to comply with Order 3 r 11, and if so, whether the declaration saves it.

### **The law**

Order 3 r 11 provides that for summons to be valid, it must contain:

“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”.

Therefore, it is trite that a cause of action is a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person. Case law has settled that cause of action pertains to those facts that a plaintiff must prove to support his/its right to judgment by the court.<sup>1</sup>

Further, the interpretation of r 11(c) has long been settled in various case law.

MAKARAU JP (as she then was) in *Chifamba v Mutasa and Ors* HH 16/08 stated it thus:

“the purpose of pleadings is not only to inform the other party in concise terms of the precise nature of the claim they have to meet but pleadings also serve to identify the branch of 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”.

Pleadings must thus be brief and to the point, with just the minimum information to alert a party as to the case he/she faces. However, the mere fact of inadequate information or a defect does not automatically entitle one to dismissal of the claim. A party may be given the opportunity to rectify the summons.

MATHONSI J articulated this position better than I could when he stated:<sup>2</sup>

“Clearly the summons which says, “A statement of the plaintiff’s claim is set out in the declaration, a copy of which is annexed to this summons”, does not meet the requirements of r 11(c)..... However, the respondent mentions that defect in augmenting its argument that the summons is a nullity. I do not agree.

..... In any event, even were such an exception be made, if upheld, the plaintiff would be afforded an opportunity to amend the summons within a fixed period of time. It would not amount to an outright dismissal of the claim: *Alder v Elliot* 1998 (2) ZLR 283 (S) 292B; *Auridiam Zimbabwe (Pvt) Ltd v Modus Publications (Pvt) Ltd* 1993 (2) ZLR 359 (H) 373 C – D; *Murozvi Chawatama Signs & Ors* HH 481/15.”

### **Analysis of the case**

There can be no doubt that the summons is defective, merely stating as it does the relief sought, without any indication at all of the precise nature, extent or legal basis for the claim, however briefly.

But it is also true that the relief sought contains within it the elements of the *causa*. It is quite apparent, as stated by the appellant, that defendant is required to deliver a full account, supported by vouchers, of the ten cover note books that were supplied to it. Thus a

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<sup>1</sup> See *Peebles v Dairibord Zimbabwe (Private) Limited* 1999 (1) ZLR 41(H).

supply and delivery agreement is alleged, the subject of delivery is articulated, and what the defendant is required to do is apparent.

I will go further to state that whatever deficiencies are in the summons are amply supplemented by the declaration. The plaintiff's cause of action and the facts upon which it is based are therefore quite apparent from the summons as read with the declaration. Hence, the defendant cannot claim that he is unaware of the details of the claim, the basis thereof and the relief sought unless the court endorses a rigid and mechanical approach which defeats the cause of justice.

I am thus in agreement with the plaintiff that this is a case where the defendant will not be seriously prejudiced if it is required to plead to the summons and declaration in their current form. In fact, the defendant does not allege that any serious prejudice arises from the shortcomings in the summons.

As a result, I am inclined to find that this is an appropriate case for the condonation of any defects in plaintiff's summons and will not order dismissal of the plaintiff's claim.

**Disposition**

Consequently, it is ordered as follows:

1. The exception to the summons is upheld.
2. The plaintiff shall amend its summons within ten days of the service of this order, failing which the defendant shall be entitled to pray for dismissal of plaintiff's claim.
3. The plaintiff shall pay costs of the exception.

*Mungeni & Muzvondiwa*, plaintiff's legal practitioners  
*Atherstone & Cook*, defendant's legal practitioners