STEWARD BANK LIMITED
versus
MAYOR MANGEYA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 16 & 18 March 2016, 17 August 2016

Civil trial

Adv. L. Uriri, with him, *J. Koto,* for the plaintiff
A. Mugandiwa, for the defendant

MAFUSIRE J: The trial in this matter aborted. The defendant took a point *in limine*. I dismissed it and said I would provide written reasons at the end of the trial. Defence counsel said he had instructions to appeal. He submitted that no leave to appeal was required. But he wanted written reasons to facilitate the intended appeal because, as he said, by practice, the Supreme Court countenances no appeal which is not accompanied by the judgment appealed against. Inevitably, the proceedings were adjourned indefinitely.

The plaintiff, a bank, was successor-in-title to T N Bank Limited ["***T N Bank***"]. It issued summons against the defendant claiming US$2 450 000 allegedly being the extent to which the defendant, in terms of an overdraft facility, had stood surety and guaranteed the repayment of certain monies loaned and advanced by T N Bank to a company called Orchard Lane [Private] Limited ["***Orchard Lane***"]. Orchard Lane had been placed under provisional liquidation.

The defendant raised multiple defences. He said there had been no genuine and valid overdraft agreement between T N Bank and Orchard Lane, but merely a sham arrangement to dupe the Reserve Bank. He also said in reality, no monies had ever been advanced at all; that the alleged overdraft facility had not been authorised by Orchard Lane's board of directors; that Orchard Lane's liquidation had been orchestrated by the plaintiff; and that the defendant's signature to the surety agreement had been procured by misrepresentation.

It appears that at some stage the plaintiff applied for summary judgment. However, the parties consented to that application being withdrawn and to the plaintiff amending its

claim in the summons and declaration. In the application for summary judgment, the defendant had been represented by counsel from the *de facto* Bar, duly instructed by his legal practitioners of record.

Soon thereafter, the plaintiff filed an amended summons and an amended declaration. The substance of the claim was the same. But there was considerably more detail.

Three months after the application for summary judgment and the court order by consent, the defendant's legal practitioners, by letter addressed to the plaintiff's legal practitioners, and copied to the registrar of this court, among other things, queried the propriety of the consent order that had authorised the amendment of the plaintiff's summons and declaration. It was said in the letter counsel [from the *de facto* Bar] had been instructed merely to oppose the application for summary judgment and not to consent to any amendment of the summons. The point was made strongly that the plaintiff's summons and declaration had been defective and therefore incapable of amendment in any way. There having been no prior application for the amendment, the defendant's legal practitioners would take up the matter and seek clarification. The defendant's rights were reserved.

Three months after the plaintiff's amended summons, the defendant filed a very detailed request for further particulars. The request sought raw evidence. The plaintiff supplied the information, but under protest. A month later, the defendant filed an exception to the plaintiff's claim on the basis that it did not comply with the mandatory provisions of Order 3 r 13[5] of the Rules of this Court, allegedly in that the declaration stated neither the total amount of the capital lent by the plaintiff to Orchard Lane, nor the total interest claimed on that amount as well as on the bank charges. The exception was not set down for hearing. A few weeks later, the defendant pleaded over to the merits. They were substantially the same defences as before. Thereafter, a pre-trial conference was held before a judge in chambers. The agreed issues were:

- whether or not the defendant was indebted to the plaintiff, and if so, in what amount;
- whether or not a valid and binding loan agreement had been concluded between the plaintiff and Orchard Lane;
- whether or not the summons and declaration complied with r 13[5].

At the trial before me, the parties had apparently agreed to deal with the last issue first. The plaintiff denied that it was a genuine point *in limine* or that the exception was well taken. For that reason, and more, plaintiff's counsel sought costs *de bonis propriis* against the defendant's counsel. He was accused of having raised and persisted with what was patently a frivolous and unmeritorious point which had only helped to "***trifle***" the court's process and waste time.

As said before, I dismissed the defendant's objection *in limine*. Below are my reasons.

Order 3 r 13 provides for a summons for a debt or liquidated demand. The plaintiff's claim was for a debt or liquidated demand. Sub-rule [5] relates specifically to a bank overdraft. The plaintiff's claim related specifically to a bank overdraft. The rule reads:

"13 Summons for debt or liquidated demand: endorsement

[1] In an action where the claim, apart from costs, is for a debt or a liquidated demand only, the summons may, at the option of the plaintiff, be endorsed with the particulars of the claim.

[2] Such particulars shall take the place of a declaration and shall state truly and concisely the nature, extent and the grounds of the cause of action.

[3] …….

[***Subrule substituted by S.I. 277 of 1981***]

[4] Subject to subrule [5], where the amount claimed includes capital and interest on the capital, the particulars endorsed on the summons in terms of subrule [1] shall state clearly—

[*a*] the capital amount claimed; and

[*b*] the total amount of interest claimed on the capital as at the date of the summons or as at an earlier date specified in the particulars; and

[*c*] whether or not interest is claimed on the total amount of capital and interest referred to in paragraph [*a*] and [*b*] and, if not, the amount in respect of which any interest is claimed and the date from which interest is to run.

[***Subrule inserted by S.I. 192 of 1997***]

[5] Where the claim relates to a bank overdraft, the particulars endorsed on the summons in terms of subrule [1] shall state clearly—

[*a*] the total amount claimed; and

[*b*] the total capital amount lent by the bank to its client; and

[*c*] the total amount of interest claimed on the capital amount referred to in subparagraph [*b*] as at the date of the summons or as at an earlier date specified in the particulars; and

[*d*] any amount claimed in respect of bank charges, cheque books and similar matters; and

[*e*] any interest claimed on any amount referred to in subparagraph [*d*] as at the date of the summons or as at an earlier date specified in the particulars; and

[*f*] any payments made by the client or respondent, and whether such payments have been appropriated to capital or interest.

[***Subrule inserted by S.I. 192 of 1997***]"

Defence counsel's predominant argument at the hearing was that the plaintiff's declaration, when read together with the further particulars, was contradictory. He referred to the plaintiff's further particulars which stated the total amount advanced to Orchard Lane. For further details of such disbursements, the further particulars incorporated by reference the statement of account which was attached. Defence counsel then compared the further particulars with the plaintiff's declaration, which had also listed certain payment made by the plaintiff to two other banks, in discharge of Orchard Lane's indebtedness to them. To defence counsel, the amounts of the disbursements in favour of those two other banks, as reflected on the attached statement of account, which the further particulars incorporated by reference, did not tally with the original amounts as stated in the declaration proper. Therefore, defence counsel argued, the plaintiff's pleadings provided contradictory information which, allegedly, left the defendant at a loss as to the correct amount being claimed. Thus, it was concluded, the plaintiff's pleadings did not comply with r 13[5][b].

Defence counsel followed the same pattern and made the same argument with regards the rest of the declaration. He dissected virtually every paragraph in the plaintiff's declaration, virtually every paragraph in the plaintiff's further particulars and the documents attached thereto, and virtually every facet of sub-rule [5] in an effort to show lack of compliance by reason of the alleged contradictions.

In my view, and with all due respect, defence counsel's conduct was plainly ridiculous. He was knit picking. He was being frivolous. In *Kusano* v *Inscor Africa Limited*[1] I

[1] HH 223-16

decried the conduct of some lawyers who act like hired guns, taking up dead causes and pushing them through the courts. Litigation is not a game of wits. It is a serious legal process designed to solve serious legal disputes.

The substance of r 13, particularly sub-rule [5], is to ensure that in a claim relating to a bank overdraft, the defendant is sufficiently informed of the various components of the claim in relation to the capital amount; the interest charged; the account charges and the repayments made. In a normal bank overdraft situation, the parties operate a running account. The customer withdraws any amount, at any time, to the extent of the limit allowed. Interest on the drawn account is generally calculated and capitalised monthly on the daily debit balances. Unless he is scrupulously meticulous in keeping track of his drawings, and the calculation of the interest and the other charges, the customer normally relies on the bank records. With the advent of computers, it should be too easy for the bank to produce, at any given time, a print out of the account.

Sub-rule [5] of r 13 was a 1997 amendment. It was inserted to deal with the mischief or lacuna in the old Rule. This mischief or lacuna had been identified in *Commercial Bank of Zimbabwe Ltd v MM Builders and Suppliers [Pvt] Ltd & Ors*[2]. Before this case, pleadings in relation to claims for loans or overdrafts invariably lumped everything together. There was no proper distinction between the capital drawdowns; the interest charged on them; the bank charges raised on the operation of the account; the further interest levied on the interest, and so on. As a result, it was often difficult, for example, to determine whether or not interest had been charged in violation of the prohibition against interest *in duplum*.

The *in duplum* rule says interest ceases to accumulate upon any amount of the capital owing once it equals the amount of that capital, whether the debt arises out of a financial loan or out of any contract whereby a capital sum is payable, together with interest thereon: see *Deggelen* v *Triggs*[3]; *Commercial Bank of Zimbabwe Limited* v *MM Builders and Suppliers (Private) Limited & Ors*, *supra*, and *Conforce (Private) Limited* v *City of Harare*[4]. The *in duplum* rule is conceived in public policy to protect borrowers from avaricious moneylenders.

In dealing with the mischief or lacuna in the old Rule, SMITH J, in the *MM Builders and Suppliers'* case, said[5]:

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[2] 1996 [2] ZLR 420 [H]
[3] 1911 SR 154
[4] 2000 (1) ZLR 445 (H)
[5] At p 471C – D

> "In the case of a claim relating to a bank overdraft, the papers should show the total amount of the debt claimed and, separately, the total capital amount loaned by the bank to the client, the total amount of interest due thereon as at a specified date and, if appropriate, the total amount due in respect of bank charges, cheque books, etc. and the interest, if any, due thereon as at a specified date. If the client has made any payment in respect of the overdraft account, the papers should specify the total amount paid and also indicate how the payments have been appropriated."

Thus, the amendment to the Rule merely adopted the direction given in the above case. However, it was not a licence to plead evidence. It did not take away the character of a pleading. A pleading, whether in a bank overdraft claim, or some other cause, remains a pleading. It should be a clear and concise statement of the material facts upon which the claim or defence relies, with sufficient particularity to enable the opposite party to reply to it: see HERBSTEIN & VAN WINSEN *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th ed. at p 565. A summons or declaration should contain the cause of action. A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed in his action. The facts must enable the court to reach a conclusion: see *Dube* v *Banana*[6].

Of the amendment, GILLEPSIE J, in *Trust Merchant Bank Ltd* v *Lewis Muridzo Enterprises [Pvt] Ltd & Anor*[7], a case in which the attachment to a pleading of documentary evidence such as bank statements, invoices, receipts, and the like, was discouraged, said[8]:

> "This amendment requires certain particulars to be endorsed clearly on the summons. Obviously, if an endorsed summons is not used, the particulars must be contained in a declaration. It is no compliance with this rule to attach to the summons or declaration lengthy and bulky statements of account containing masses of 'raw' information that still require critical appraisal, collation and analysis. It is in effect an affront to the court to present information in this way. It is the duty of the legal practitioner to reduce this unprocessed information to a simple schedule or calculation. If it is too much work for him, then he ought not to accept instructions."

In casu, defence counsel's attitude was difficult to appreciate. His request for further particulars, spanning over five pages, sought raw evidence and bulky documents. A typical question in the defendant's request for further particulars ran something like this:

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[6] 1998 [2] ZLR [H], @ p 95G - H
[7] 1998 [2] ZLR 387 [H]
[8] At p 390C – D

"1.1 A copy of the loan agreement between Orchard Lane … and the Plaintiff is requested;

1.2 A copy of the application for the loan by Orchid Lane … is requested;

1.3 Copies of all supporting documents that were submitted by Orchard Lane … together with the application for a loan are requested;

1.4 A copy of written communication, if any, to Orchard Lane … by the Plaintiff advising of the approval of the loan is requested;

1.5 …….

1.6 Details of all instructions by Orchard Lane … to the Plaintiff requesting the payment of each and every amount that was advanced are requested;

1.7 A copy of a statement of account in respect of all the monies that were allegedly loaned and advanced by the Plaintiff to the Defendant is requested. …".

The rest of the request, comprising thirty three [33] questions and sub-questions, was in similar vein. Every conceivable piece of evidence upon which the claim relied was demanded. Yet although the plaintiff's declaration might have lacked precision or finesse, it had been sufficiently detailed and informative. Among other things, it informed adequately who the parties were; what the claim was all about; how it had arisen; what the capital outlay had been; what drawdowns the defendant, through Orchard Lane, had made; what amount of interest had accrued; what bank charges had been raised; what total repayments the defendant, or Orchard Lane, had made, and what the residual balance was. No genuine confusion could possibly have arisen.

As plaintiff's counsel pointed out, the defendant's modified exception was no longer that the claim fell short of the requirements of sub-rule [5]. It was that there were contradictions between the declaration and the further particulars. But having raised his exception in a document filed ahead of the plea, plaintiff's counsel argued, the defendant had to stick to the grounds set out therein. It was that document that outlined the exception. As such, the enquiry had to be confined to an examination of the plaintiff's amended declaration, against the requirements of r 13[5], and not for the court to concern itself with the so-called contradictions between the declaration and the further particulars.

The plaintiff's objection to the defendant's conduct was justified. But defence counsel completely missed the point. He went to town about the trite legal position that says that the

particulars furnished by a party, in relation to a pleading, form part of the pleadings. Of course, it is trite that if an exception, on the basis that the pleading is vague and embarrassing, is taken after further particulars have been requested and supplied, the exception is to the pleading as a whole, i.e. the original claim, as amplified by the further particulars: see HERBSTEIN & VAN WINSEN, at p 644.

However, that where further particulars have been requested and supplied, a litigant can except to the pleading as amplified by the further particulars, was not the plaintiff's point. The plaintiff's point, as I understood it, and in my own words, was that the defendant's exception, as originally laid out, was not about any contradictions in any pleading. It was about the plaintiff's declaration allegedly falling short of the requirements of r 3[5]. The argument about so-called contradictions was only made up much later, and, undoubtedly, as an afterthought.

I was satisfied that the plaintiff's declaration adequately complied with r 3[5]. Any other imprecisions would be matters for evidence, or for further and better particulars, or for further particulars for trial, or for cross-examination at the trial. I was satisfied that the exception was frivolous and lacked merit. It was on that basis that I dismissed it when the parties argued the point *in limine*.

The plaintiff prayed for costs *de bonis propriis* against the defendant's counsel. This is a position which is not without my sympathy. It seemed plain to me, and obviously to the plaintiff as well, that the defendant's game plan, aided and abetted by counsel, was to thwart the trial from getting off the ground. He succeeded. All manner of spanners were thrown in the works. An exception that was patently frivolous and vexatious was taken. Despite the plaintiff's protest, it was persisted with, albeit in a modified form. When I dismissed it, the defendant said he wanted my reasons solely in order to appeal.

It is one's right to appeal where such right is available. But defence counsel said categorically leave to appeal was not required. Yet my decision was classically an interlocutory order with no definitive effect: see *Cronshaw and Another* v *Fidelity Guards Holdings (Pty) Ltd*[9]; *Mwatsika* v *ICL Zimbabwe*[10] and *Golden Reef Mining [Private] Limited*

[9] 1996 (3) SA 686 (AD)
[10] 1998 (1) ZLR 1 (H)

& Anor v *Mnjiya Consulting Engineers [Private] Limited*[11]. Such type of an order is ordinarily not appealable without leave.

Anyway, whether the defendant does, or does not require leave to appeal, is not the concern of this judgment. No such application was made. However, when the defendant's pre-trial conduct as a whole is taken into account, one sympathises with the plaintiff's frustration and, therefore, the prayer for a special order of costs.

This was a straightforward debt collection claim. According to the plaintiff, it arose out of an overdraft facility and a suretyship agreement. Multiple defences were raised. Both the claim and those defences are still to be tested at trial. So I need not say anything more, lest I be blamed for having pre-judged the case. What seems strange though is that the defendant did at first plead substantively to the original summons and original declaration. It appears it was in his opposition to the application for summary judgment that the defendant had put the validity of the plaintiff's claim into question. I did not have these details. So again I cannot say more. But from the record, the parties had gone on to agree to a consent order, among other things, authorising the plaintiff to amend its summons. However, the resultant court order triggered a sharp reaction from the defendant's legal practitioners. The court, the defendant's own counsel from the *de facto* Bar whom he had briefed for the summary judgment application, and the plaintiff, were all taken to task.

Despite the substance of the amended summons and declaration having been substantially the same as the original claim, and despite the defendant having previously pleaded to the claim, he went on to request detailed further particulars which, as said before, solicited raw evidence. The ill-conceived exception was persisted with tenaciously.

The award of costs is a matter wholly in the discretion of the court: see *Graham* v *Odendaal*[12]and *Kruger Brothers & Wassermen* v *Ruskin*[13]. The court's discretion is exercised judiciously and not whimsically or capriciously.

In my view, it is wrong, both in law and in equity, that a litigant, having been put through to great lengths to enforce its right, or rights in the face of unreasonable resistance, should be left without adequate recompense of the expenses incurred. The law says where

[11] HH 631-15
[12] 1972 [2] SA 611 [AD]
[13] 1918 AD 63, at p 65 - 67

costs of suit are incurred unnecessarily, the court can order the party responsible to pay them. DEVILIERS JP put it this way in *Fripp* v *Gibbon and Company*[14]:

> "To me it seems more in accordance with the principles of equity and justice that costs incurred in the course of litigation which judged by the event or events, proved to have been unnecessarily or ineffectually incurred should, as a rule, be borne by the party responsible for such costs."

However, in spite of all that conduct by the defence counsel, which I consider regrettable, I felt I had to treat the issue of costs *de bonis propriis* with restraint. I still subscribe to, and wish to abide by my view in the recent case of *Exor Holdings [Private] Limited t/a Exor Petroleum* v *Mubvumbi*[15]. Dealing with a request for a special order of costs, I said:

> "In litigation, there is always some level of tolerance required so as not to unduly stifle citizens from enjoying and exercising their freedom of expression and access to the courts. *In casu*, I may not have been impressed by the respondent's defences. However, I would not go so far as to penalise him on costs beyond the ordinary scale, especially given that there was also no precision or anything impressive in the manner the applicant's case was cast."

In the circumstances, my dismissal of the defendant's exception was with costs on the ordinary scale.

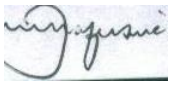
There is one last point. The trial in this matter never got off the ground. I did not get ceased of the merits. Therefore, it is not partly-heard. The parties shall be free to proceed in any way they see fit.

DISPOSITION

The defendant's exception to the plaintiff's claim in the amended summons and amended declaration, on the basis that it does not comply with r 13[5] of the Rules of this Court, is hereby dismissed with costs.

17 August 2016

[14] 1913 AD 354, at p 363
[15] HH 447-16



Koto & Company, plaintiff's legal practitioners
Wintertons, defendant's legal practitioners