

LISIAS SIBANDA
versus
RAYMOND TAZARURWA

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 12 October 2022 & 19 January 2023

Civil Trial

G Nyengedza, for plaintiff
Advocate *T Zhuwarara*, for defendant

MHURI J: On 5 August 2020 Plaintiff issued summons against Defendant claiming.

1. Payment of the sum of US\$50 000-00 (fifty thousand United States dollars) being money paid to the Defendant to design, author and deliver to specification, a customized on line store program which defendant failed to deliver.
2. Interest at the prescribed rate on all sums due and owing with effect from the date of demand.
3. Collection commission in terms of the Law Society tariff alternatively costs of suit on an attorney and client scale.

Plaintiff's declaration is as follows:-

Under Section B: Purpose of the Declaration

- This declaration is in support of plaintiff's claim for an order for the payment of the sum of US\$50 000-00 being money paid to Defendant for delivery of an authored, customized bespoke online store program.
- The defendant failed to deliver the agreed product to specifications.
The delivered program does not meet the requirements as agreed to by the parties.

Section C Basis of Claim

C1 Sometime between February and March 2020 he and Defendant entered into a verbal contract in terms of which Defendant would design, author and deliver to Plaintiff a bespoke online store program.

Consideration was in the amount of US\$175 000-00

C2 Plaintiff's Performance

He performed his side of the contract by making a deposit of US\$50 000-00 being part payment towards the contract fee.

C3 Defendant's Breach of Contract.

In breach of contract defendant delivered an "off the shelf" program which he later discovered cost US\$600- to purchase on the net. The program was a deaf and dump as it could not respond to commands expected of bespoke programs.

The Defendant delivered a product which was materially different, inadequate and so manifestly unfit for the purpose to which its use was intended.

Defendant breached the contract by failing to perform in terms of the contract.

As a result of the breach plaintiff cancelled the agreement and request a refund of the US\$50 000-00.

Wherefore his claim is payment of

1. The sum of US\$50 000-00 being damages for breach of contract
 - Interest at the prescribed rate on all sums due and owing with effect from date of demand.
 - Collection commission in terms of the Law Society tariff/alternatively costs of suit on an attorney and client scale.

The issues referred to trial at a joint Pretrial Conference before the Judge were:-

1. What were the material terms of the agreement between the parties?
2. Whether the Defendant delivered the user defined online store required by the Plaintiff
3. Whether the Plaintiff is entitled to a refund of the US\$50 000-00.

At the commencement of the trial, Advocate Zhuwarara sought clarification from Plaintiff on what the claim is so that they know what to expect and reply to. He submitted that the summons are silent on whether the claim arises out of a breach of contract, delict or what as his prayer says its damages for breach of contract.

In response Plaintiffs' Counsel's clarification was that he had taken the view that the facts are common cause. Parties went as far as crystalizing the 3 issues at a joint pretrial conference before a Judge and at p 5 para C3 the heading, Breach of Contract, the Plaintiff's claim is that parties entered into a contract for a user defined bespoke website and pursuant to that, Plaintiff paid a deposit of US\$50 000-00 and in breach of contract the Defendant delivered a product which was at cross-purposes with what parties had contracted. In analogy, the contract was for beans and Defendant delivered peas which resulted in pecuniary loss.

Following this clarification, Defendant then raised the point *in limine* that the summons are defective in that *ex facie*, the summons do not reveal the claim recognized at law. It does not tell

the cause of action. In his declaration he says it is a claim for damages for breach of contract and yet this is not what is on the summons. In his address he says it's a refund, this is not contractual damages but restitution. It was further submitted that as the summons do not specify a cognizable claim at law they do not conform to R 12(5)(d) of this Court's Rules and this breach of the Rules is prejudicial to Defendant. He moved the court to, in terms of Practice Direction 3/2013, strike the matter off the Roll

As the point had been raised without notice to Plaintiff, I granted Plaintiff's Counsel request to post-pone the matter so that he researches on the point and be able to respond.

Upon resumption of the hearing, Plaintiff's Counsel indicated that Plaintiff was opposing the point raised by Defendant.

His submissions were that the point of law was improperly taken. The point was actually an exception which is clothed as a point of law. Defendant ought to have, in terms of R 42(3) made an exception to the pleading within the time frame provided in the Rule. The opportunity to raise an exception has since passed and no longer available to him.

As regards the summons it was submitted that the summons speak to restitution by way of damages, hence there is no defect. Further it was submitted that the summons and the declaration read together are sufficient and it is to these that Defendant pleaded over to the merits.

Plaintiff moved that the point of law raised be dismissed and the matter proceeds on the merits.

It is trite, a position plaintiff has no quarrel with, that a point of law can be raised at any time. The position was succinctly stated in the case of

Austerlands (Private) Limited

v

Trade & Investment Bank Limited

and

The Sheriff of Zimbabwe

and

Bernard Construction (Private) Limited SC 92/05

thus,

"The general rule, as I understand it, is that a question of law may be advanced for the first time on appeal if its consideration then involves no unfairness to the party at whom it is directed"
per CHIDYAUSIKU CJ.

See also

Muchakata v Netherburn Mine 1996 (1) ZLR 153(S) at 157A per KORSAH JA

“Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed.”

Rule 12 subrule 5 of this Court’s Rules SI 202/2021 which Defendant relied on provides as follows;-

“Before issue, every summons shall set forth-

(d) 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;

(e).....”

Defendant’s issue is with the summons. He submitted that in terms of the above Rule a summons can be issued if it does state the nature, extent and ground of cause of action, but if it does not then the summons violates the Statute and it ought not to have been issued. The requirement is one that is borne of Statute and goes to the validity of the claims.

Defendant submitted further that for not being in compliance with Statute, the summons are defective and in terms of Practice Direction 3/2013 ought to be struck off.

Paragraph 5 of the Practice Direction cited by defendant reads,

“where a matter has been struck off for failure by a party to abide by the Rules of the Court, the party will have 30 days within which to rectify the defect, failing which the matter will be deemed to have been abandoned.

Provided that a judge may on application and for good cause shown reinstate the matter, on such terms as he deems fit.”

As alluded to earlier, Defendant sought clarification of Plaintiff’s address about his claim, and it is from this clarification that Defendant then raised the point of law. Having listened to Defendant’s submissions on this point, I was convinced and persuaded by Plaintiff’s submissions that the point is actually an exception clothed as a point of law. The point was improperly taken.

In *Muchakata v Netherburn* case (*supra*) KORSAH JA clearly made the point when he stated;

“provided it is not one which is required by a definitive law to be specially pleaded”
An exception in terms of the Rules is pleaded. (Emphasis my own).

In terms of Rule 42 subrule (1)(b) Defendant ought to have excepted to the summons raising the issues that he is now raising at this juncture to wit, that the summons is not in

compliance with Rule 12, it does not disclose cause of action and is therefore defective as a result of which there are no valid proceedings before this Court. This, the Defendant did not do at the time he ought to have in terms of Rule 42. He cannot be allowed to do so now.

Defendant pleaded to the summons, went through all the motions, at a Pretrial Conference before the Judge three issues were agreed upon by the Parties and were referred to trial. If during the trial Plaintiff raises new issues which do not arise from his claim Defendant has the right to raise an objection. I am in agreement with Plaintiff's submission that the summons is not defective and with the declaration they speak to each other. There is no prejudice that Defendant will suffer.

In the result, I find that the point taken by Defendant cannot be upheld and I dismiss it.

Parties are directed to liaise with the Registrar for the matter to be reset.

Hogwe, Nyengedza Attorneys, plaintiff's legal practitioners
Coghlan Welsh & Guest, defendant's legal practitioners