

SHOOTER NGWENYA
versus
POPULATION SERVICE INTERNATIONAL
and
MINISTER OF HEALTH AND CHILD WELFARE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 18 FEBRUARY 2019 AND 21 MARCH 2019

Exception

T Mabika for the plaintiff
Advocate *P Dube* for 1st defendant
P Taruberekera for 2nd defendant

MOYO J: Plaintiff in this matter issued summons against the two defendants claiming

- “1. Payment of the sum of \$400 000-00 due by 1st and 2nd defendants to the plaintiff being damages arising from the defendant’s wrongful and unlawful conduct which resulted in plaintiff’s minor child who does not have legal capacity being circumcised without the consent of the plaintiffs’ the biological parents.
2. Interest at the prescribed rate of 5% per annum reckoned from the date of summons to date of full payment.”

Plaintiffs then filed an amendment wherein the other plaintiff was dropped and the current plaintiff as being the plaintiff in his capacity as the guardian of Christiano Mbalikayise Mukwevho.

Plaintiff’s counsel submitted that the exception is not properly before me and consequently should be struck off the roll and not heard as it was not set down in accordance with rule 138.

First defendant’s counsel argued that the exception is properly before me in that it was filed on 26 September 2018, and from 26 September 2018, after the service of the exception on plaintiff, plaintiff had ten working days to respond, which plaintiff did on 2 October 2018.

From 26 September 2018, the parties could have consented on the set down within ten days.

That is to say by 10 October 2018, parties should have consented on set down. If they hadn't, either party could set the matter down within a further 4 days.

A further 4 days mathematically expired on 16 October 2018. A blank request for a set down date was filed with this court by the first defendant on 15 October 2018.

That was well with the ambit of the time provided for in the rules. Setting down a matter as envisaged in rule 138 or any other rule, should in practice mean requesting for a date of set down from the registrar, as in practice a party does not allocate themselves a date. All a party can do in pushing for a set down of a matter, is to apply for set down dates. The registrar then takes up the application and the matter is set down on the next available slot on a first come first served basis. This means that once an application for a set down is made, the matter then joins the queue for the set down of such matters. At that juncture, the matter is off a litigant's hands, they cannot force an early set down. A litigant's duty with regard to rule 138, or any other rule relating to set down, is to make a formal request with the registrar, through the filing of a blank notice of set down, that is adequate in the circumstances.

I accordingly hold that the exception is properly before me and proceed to deal with the merits.

The summons and declaration in this matter are a typical example of bad legal drafting. Not much thought and care was put in coming up or framing the plaintiff's case as against the first defendant.

The summons and the declaration clearly have the following handicaps.

1. The date and place of occurrence of the incident being the subject matter of the suit is not pleaded.
2. The persons who allegedly circumcised plaintiff's child are unknown, not named.
3. The claim of \$400 000-00 being a claim for damages does not have heads, under which heads of damages is how much claimed? That is not pleaded.
4. The sum of \$400 000-00 claimed is not stated what it is for and how it is arrived at.

5. The nexus between the circumcision and the \$400 000-00 is not pleaded. How does the circumcision of one's child result in patrimonial loss? The cause of action is very difficult to glean *ex-facie* the summons as amplified by the declaration.

It is not clear as to who has suffered these, damages and how? If it is the parent, how does the circumcision of his son result in a loss to him? If it is the child, what has the child lost as a result of the circumcision that, which is quantifiable as damages? It is a difficult claim to comprehend and place in our law of delict. The summons clearly fails to disclose a cause of action in the circumstances.

6. The particulars of the legal status of the first defendant are not properly pleaded. What is first defendant? What is its legal capacity derived from? Can it sue and be sued? It is also not pleaded as to how the persons who conducted the alleged circumcision are linked to the defendants. There are two defendants, both of whom are sued on the basis of vicariously liability. It is not properly pleaded as to who these defendants employ, and in what capacity these people acted, resulting in the defendants becoming vicariously liable.

7. The particulars of negligence by both defendants or their employees are not pleaded.

In the circumstances, clearly, the summons and declaration were badly drawn so much so that the defendants would be harmstrung, pleading to them because no cause of action has been established whatsoever.

It is for these reasons that the exception is upheld with costs.

Mugiya and Macharaga Law Chambers, plaintiff's legal practitioners

Kantor and Immerman, 1st defendant's legal practitioners

Civil Division-Attorney General's Office, 2nd defendant's legal practitioners