KENIAS MUTYASIRA

versus

ESTATE MUCHINERIPI RISHONI GONYORA

(represented by BARBRA GONYORA in her capacity

as the Executrix Dative)

and

THE MASTER OF THE HIGH COURT. NO

HIGH COURT OF ZIMBABWE

UCHENA J

HARARE 18, 19, 20, 26 June and 13 September 2012.

**Civil Trial**

Miss *F Mahere* for the Plaintiff

*T. L Kanengoni* for the 1st Defendant.

No Appearance for the 2nd Defendant

UCHENA J: The plaintiff was at some stage of the administration of the first defendant’s estate appointed to act as its curator, and later for a shorter period as its executor dative. He for the services he rendered to the first defendant claims fees in the sum of US$160 788.98, plus interest at the prescribed rate from the date of summons to the date of payment in full. The fees he claims were taxed by the Master’s office. They are therefore a liquidated claim.

In its plea the first defendant raised a point in *limine* that the plaintiff’s summons was defective in that it does not contain a true and concise statement of the nature, extend and grounds of the cause of action, as required by Order 3 rule 11 (c ) of the High Court Rules 1971.

In its plea on the merits the first defendant did not dispute being indebted to the plaintiff in the sum claimed but however pleaded that its indebtedness to the plaintiff was extinguished by set-off as the plaintiff sold its stand No 462 Prospect Waterfalls for the sum of Z$3500 000.00, whose current value is US$250 000.00. The first defendant also raised the sale of its shares, the proceeds of which together with those of the sale of the Prospect property it claims were used to pay the plaintiff’s fees.

The parties filed a Joint Pre Trial Conference Minute in which they agreed that the following issues be referred to trial;

1. Whether the plaintiff’s summons is defective in terms of Order 3 Rule 11 ( c ) or at all?
2. Whether the court can exercise its powers in terms of Rule 4 ( a) to condone the non-compliance?
3. Whether the debt owed to the plaintiff by the first defendant has been extinguished by set off ?

In view of issues 1 and 2 the trial started by hearing submissions from Counsel for the parties on the preliminary issue.

**Point in Limine**

Mr Kanengoni for the first defendant submitted that the plaintiff’s summons was fatally defective as it did not comply with Order 3 rule 11 ( c) of the High Court Rules. It is true that the plaintiff’s summons does not contain “a true and concise statement of the nature, extend and grounds of the cause of action”.

Miss Mahere for the plaintiff in response argued that the plaintiff’s summons was not fatally defective because the plaintiff’s summons was issued together with the plaintiff’s declaration which supplied the omission. She further submitted that the 1st defendant did not, suffer any prejudice, therefore the court could condone the omission in the summons or grant an amendment which she applied for.

Order 3 Rule 11 (c ) of the High Court Rules provides as follows;

“Before issue every summons shall contain;-

1. the full name of the defendant and his residence or place of business and, if he is sued in a representative capacity, the capacity in which he is so sued. Where the defendant’s full name is unknown to the plaintiff, that fact should be stated and his name and initials, or his name and such of his initials as are known, should be given;
2. the full name, and address for service of the plaintiff and, if he sues in a representative capacity, the capacity in which he sues;
3. 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;

(*d*) the date of issue.”

The clear meaning of the rule is that before a summons is issued it should contain the details specified in paragraphs (a) to (d) of rule 11 ( c). In this case the details specified in rule 11 (c ) were not contained in the plaintiff’s summons.

An isolated literal interpretation of the rule favours Mr Kanengoni’s submissions. If the summons had been issued alone without being accompanied by the plaintiff’s declaration which, gave “a true and concise statement of the nature, extend and grounds of the cause of action”, I would have found for the first defendant on this issue. However in the circumstances of this case Rule 11 ( c) must be interpreted together with provisions of the rules which deal with the filing of a declaration together with the summons and the effect of a declaration on a summons it accompanies and particularizes.

It is common cause that the plaintiff issued his summons together with his declaration. He was in terms of Order 17 rule 113 entitled to opt to file and serve it with the summons. In terms of Order 17 rule 109 a declaration is a statement of the plaintiff’s claim which must contain details similar to those specified in rule 11 (a) to ( c). It provides as follows;

“The statement of the plaintiff’s claim shall be called his declaration, and it shall state truly and concisely the name and description of the party suing and his place of residence or place of business, and if he sues in a representative capacity, the capacity in which he sues, the name of the defendant and his place of residence or place of business, and if he is sued in a representative capacity, the capacity in which he is sued and the nature, extent and grounds of the cause of action, complaint or demand.”

The fact that the declaration was issued and served together with the summons means that the first defendant was not prejudiced by the plaintiff’s failure to comply with the provisions of rule 11 (c ). It was informed of the cause of action by the declaration. Miss Mahere’s submission that the omission was supplied by filing and serving the declaration together with the summons is supported by the provisions of rules 13 (1- 2) and 115 which she referred the court to. These rules respectively provides that a summons for a debt or liquidated demand can at the option of the plaintiff be endorsed with the particulars of the claim, which shall take the place of a declaration and that a declaration shall be deemed to amend a summons.

Rule 13 (1), and 2 provides as follows;-

“(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.”

Miss Mahere for the plaintiff submitted that the plaintiff’s claim is for a liquidated debt. He thus could have endorsed the summons with the particulars of his claim in terms of rule 13 (1). Such particulars could have taken the place of the declaration as provided by rule 13 (2) and would have stated “truly and concisely the nature, extent and the grounds of the cause of action.” That would have provided the details required by rule 11 ( c). With such an endorsement on the face of the summons the point in l*imine* would not have risen. She submitted that if the endorsed particulars can take the place of the declaration an accompanying declaration can by the same token take the place of the endorsement. It must be noted that rule 13 (1) gives the plaintiff an option to endorse or to proceed by way of a declaration. This means what appears in the declaration can be considered to be an endorsement and thus a part of the summons. I am persuaded by Miss Mahere’s submissions.

 Rule 115 provides as follows;

“In his declaration a plaintiff may alter, modify or extend his claim or claims as

 stated in the summons and the summons shall thereupon be deemed to be

 amended in accordance with the claim or claims made in the declaration:

 Provided that where the defendant shows that he is prejudiced by such

 amendment the court may make such order as to costs or otherwise as the justice

 of the case demands.”

In this case the plaintiff’s claim was amended by the declaration which supplied the omission which was not included in the summons. In its plea on the merits the first defendant indicated that it understood the plaintiff’s claim, to the extend, that it accepted it and sought to set it off, against what it claimed the plaintiff owed it. The first defendant can therefore not claim to have been prejudice by the omission.

In view of the above I find that the plaintiff’s summons is not fatally defective because of its being filed and issued together with the declaration which supplied the missing details.

Even if it could be argued that the declaration does not supply the omission I would have in terms of rule 4 C condoned the plaintiff’s none compliance with rule 11 (c ). This is because the first defendant has signified an understanding of the plaintiff’s claim by pleading to it and accepting it. Rule 4C (a) authorise’s the court or a judge to direct, authorise or condone a departure from any provision of these rules. Rule 4C (a) provides as follows;

“The court or a judge may, in relation to any particular case before it or him, as the case may be;-

1. direct, authorize or condone a departure from any provision of these rules,

including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;”

Rule 4C (a) gives the court or a judge a very wide discretion to condone, direct or authorise a departure from “any provision of these rules”. The use of the words “from any provision of these rules” confirms the existence of the court’s wide discretion. Any provision of these rules means any provision of the High Court rules 1971 without exception This means Mr Kanengoni’s submission that the provisions of rule 11 (c ) are mandatory cannot prevent this court from exercising its discretion in terms of rule 4C (a). The court or judge must however always be guided by his being “satisfied that the departure is required in the interest of justice”. It cannot be doubted that the interests of justice cannot be served by allowing a defendant who is admitting the plaintiff’s claim to delay the day of reckoning by relying on an omission which has been supplied to him by the accompanying declaration.

It is for these reasons that I dismissed the first defendant’s point in *limine* and ordered that the case should proceed to trial on the meritsand for the clarity of pleadings allowed the plaintiff to amend his summons by supplying the omitted details.

**The Merits**

On the merits it was agreed that the onus was on the first defendant. Miss Mahere therefore merely gave the outline of the plaintiff’s case in which she indicated that for the defence of set-off to succeed;-

1. the debts must be of the same nature.
2. both debts must be liquidated
3. both debts must be fully due
4. both debts must be payable by and to the same person in the same capacities.

She submitted that the defendant’s case as pleaded does not, satisfy these requirements, and is therefore not likely to succeed.

Mr Kanengoni for the first defendant then called Barbra Gonyora the executrix dative of the first defendant who in her evidence conceded that the plaintiff is owed the amount claimed. She however said he in a statement he presented to the first defendant on 11 June 2007 which was produced as exhibit 2 indicated certain sums of money as having been appropriated towards his fees. She also claimed that he had wrongfully sold a house in Prospect Waterfalls which was owned by a company in which the deceased was a 30% shareholder. She conceded that the amounts in Exhibit 2 are stated in Zimbabwean dollars, whose conversion to US dollars she said she has to consult others to establish. She thus does not know how much she wants to set-off against the plaintiff’s claim. She is not sure of whether or not the plaintiff actually paid himself from the trust account. She admitted the plaintiff was owed more than was in the trust account. She admitted that the figures in exhibit 2 are confusing as some amounts are not labeled revalued leading to valuation and commission figures, being deducted for the sale of the house being more than the selling price. She conceded that during the period in question the Zimbabwean dollar was revalued several times and that the effect thereof has to be established to determine whether or not the amounts in exhibit 2 where not affected by the revaluations. She to her discredit admitted that inflation affected funds which where being held by banks in Zimbabwean dollars but sought to give the impression that funds in the estates trust account could not have been affected. She conceded that funds which where being held in Zimbabwean dollar accounts where affected by dollarisation and account holders are not able to access them. Mrs Gonyora admitted that the plaintiff claimed fees of Z$2.9 Billion while the trust account had a balance of Z$1.8 billion. She disputes some of the figures in exhibit 2. She admitted that her legal practitioners in their letter to plaintiff exhibit 5 indicated that the plaintiff’s fees was to be dealt with at the winding down of the estate, meaning that what he indicated as due to him was merely an indication to the first defendant of what it owed him. The break down is dated 11/ 6/07 while the first defendant’s legal practitioner’s letter exhibit 5 is dated 15/6/07. She could not state the value in US$ of the money which was being held in the trust account. She also could not state in US$ the value of the amounts realised from the sale of the Prospect property and the shares. She admitted that the prices of houses fluctuated from time to time. She conceded that the true value in US$ of the money realised from the sale of the house and shares can only be established after a protracted inquiry.

The first defendant closed its case after Mrs Gonyora’s evidence. Miss Mahere for the plaintiff did not lead any evidence in rebuttal.

Miss Mahere for the plaintiff in her closing address, submitted that the debt the first defendant seeks to set off against the plaintiff’s admitted claim is not of the same nature with the plaintiff’s, and thus the defence of set-off is not available to the first defendant. She further submitted that the first defendant’s claim against the plaintiff is not liquidated as the first defendant is still to establish how much it is claiming from the plaintiff. She further submitted that the first defendant failed to establish that the plaintiff paid himself from the trust account, as she admitted that money held in bank accounts was eroded by inflation. She submitted that the value of the house in US$ at the time it was sold was not established, and that the claim in the first defendant’s plea that the house’s current value is US$250 000-00 was not established and is irrelevant. The plaintiff’s fees bill was only taxed by the Master on 3 March 2010 meaning that the amounts the plaintiff intended to use to pay himself from the trust account were eroded by inflation as he could not have paid himself before taxation.. She submitted that the first defendant can only establish her claim against the plaintiff if any, after a protracted trial therefore set off is not available to it. In conclusion she submitted that the first defendant’s defence of set- off must be dismissed.

Mr Kanengoni for the first defendant submitted that a sum of Z $1 890 336-00 is stated in exhibit 2, as having been appropriated to the plaintiff’s fees. He therefore submitted that part of what was due to the plaintiff was paid from the trust account. He submitted that the amount not appropriated under exhibit 2 is due to the plaintiff. He for obvious reasons could not say how much was appropriated in US dollars and how much remains due to the plaintiff. Mr Kanengoni agrees with Miss Mahere on the legal principles to be applied for set-off to succeed. The concession was correctly made. The principles of the law of set off were clearly stated by Innes CJ in the case of Schierhout v Union Government 1926 A D 286 @ 289 to 290, where he said;

“The doctrine of set-of with us is not decided from statute and regulated by rule of court, as in England. It is a recognised principle of our common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectively as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of *compansatio* by bringing the facts to the notice of the Court.------ but compensation once established the claim would be regarded as extinguished from the moment the mutual debts were in existence together.”

This means the court merely recognises that the debts were once in existence and that they extinguished each other and therefore that both parties are no longer indebted to each other. The only issue to be determined is therefore the applicability of the facts of this case to the law.

Set-off is the extinction of debts owed reciprocally to each other by the plaintiff and the defendant. It can only be applied where both debts are liquidated and certain. A liquidated debt can not be set off against a debt which is still to be established and can not be readily established. It was admitted that the first defendant is still to determine how much it is claiming from the plaintiff. It is thus not possible to set off an unknown claim against the plaintiff’s known and admitted claim. It is a clear principle of the law on set -off that, that which is certain cannot be set- off against that which is uncertain.

In her evidence Mrs Gonyora who testified for the 1st defendant made a disclosure which defeats the first defendants defence of set –off. She told the court that the Prospect property was owned by a company in which the deceased was a 30% shareholder. This means part of the money which was in the trust account mentioned in exhibit two does not belong to the first defendant. It also means the balance of Z $1.8 which the first defendant claims the plaintiff used to pay himself for his fees does not wholly belong to the first defendant. This means the debt which the first defendant wants to set-off against what it admits it owes to the plaintiff, is a debt which if it exists, as it has not been proved that it does, is owed to it and the company. A company is a separate legal persona, which can sue its debtors on its own..

As already said the debts must be reciprocal between the parties. They must exist between the same parties in the same capacities. See the case of *Strachen & Ano v* The *Master & Ano* 1963 (2) SA 620 (N) @ page 622 E - G. In this case one of the creditors the company whose debt the 1st defendant seeks to set-off against plaintiff’s is not even before the court and the 1st defendant has not proved that it has authority to claim it on its behalf. This is therefore more than a case of a litigant seeking to set-off a debt incurred in different capacities, but an attempt to set off a third party’s debt without authority from it to do so. One cannot set-off a debt that is not owed to him.

 In this case the debt the first defendant seeks to set-off against the plaintiff’s .is not wholly reciprocal between it and the plaintiff and what is owed to it and that owed to company has not been established. This further complicates the determination of what the first defendant is owed by the plaintiff if any. Its defence of set- off must therefore fail.

In the result the plaintiff’s claim succeeds. It is therefore ordered as follows;

1. The first defendant is ordered to pay to the plaintiff the sum of US$160 788.98,plus
2. Interest at the prescribed rate from the date of Summons to the date of payment in full, and
3. Costs of suit.

*Messers Charamba & Partners* The Plaintiff’s Legal Practitioners.

*Messers Chikumbirike and Associates* 1st Respondent’s Legal Practitioners.