REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL DIVISION

CIVIL CAUSE NUMBER 760 OF 2020

BETWEEN

DINGANI SOKO ..... CLAIMANT

AND

NORMAN CHISALE..... DEFENDFANT

CORAM : HONOURABLE JUSTICE WILLIAM Y. MSISKA

: Mr. K.B. Soko, of Counsel, for the Claimant

: Mr. C. Gondwe, of Counsel, for the Defendant

: Mr. F. Dzikanyanga, Court Clerk

RULING

This is a Ruling of the Court following the hearing of an application to strike out the defence for not disclosing any reasonable defence and for being irregular as it has contravened the provisions of Order 7 Rules 6 and 7 CPR 2017. The Claimant commenced proceedings against the Defendant claiming damages for false imprisonment and assault. He also claimed aggravated and punitive damages.

According to the statement of case (claim), on 22nd November, 2018, the Claimant was driving around the roundabout which connects Mzimba Street and Paul Kagame Highway. While so driving, the Defendant with his motor vehicle entered into the roundabout in violation of the Claimant's right of way.

The Claimant politely expressed his disapproval of the unbecoming, reckless and unlawful conduct of the Defendant and thereafter went to his office at Area 47. The Defendant followed the Claimant to his office where he assaulted him by drawing a gun and threatening to discharge it. This episode caused the Claimant to fear for an immediate attack upon himself.

The Claimant was subsequently unlawfully detained by police from Lingadzi Police Station for a period of over three hours at the directions of the Defendant. The Claimant was then released at the direction of the Defendant. The actions of the Defendant were actuated by spite towards the Claimant who was humiliated in the presence of his workmates and colleagues. The Claimant further alleges that the Defendant was motivated in his actions by the fact that he was at that time security aide to a sitting head of state by which fact he thought he could conduct himself as being above the law.

The Defendant filed a statement of case (defence) in which he denied all the facts as alleged in the statement of case (claim) and stated that all the claims are also denied. The Defendant concluded his statement of case (defence) by stating that except for the facts in the statement of case (claim) which he had admitted to, he denies each and every allegation of fact contained in the statement of case(claim) as if each one were specifically denied one after the other. Hence, the application to strike out the statement of case (defence).

The application to strike out the defence was made in accordance with Order 10 Rule 4 (b) which allows applications for interlocutory orders not to be supported by a sworn statement on two grounds. The two grounds are that there are no questions of fact that need to be decided in making the order being sought; or the facts relied on in the application are already known to the Court. Nevertheless, the Claimant filed skeleton arguments in support of the application.

The application is opposed through a sworn statement made by Counsel Gondwe. It is stated that at the time the Summons was being issued the Defendant was in custody at Maula Prison on several charges ranging from fraud to murder and the Summons were served on his Legal Practitioners. It was difficult for Counsel to elicit full and better particulars from the Defendant about the allegations.
The Defendant was only released on bail around month end of September, 2020. Since his release on bail, the Defendant was busy defending himself in two criminal cases on the charge of attempted murder which was taking place in Blantyre and and the other one on the charge of impersonation of a person named in a certificate which was taking place in Lilongwe.

Further, he averred that the Defendant has had to defend himself on a matter involving fortfeiture of his property and also attending to the ongoing investigations by the Anti-Corruption Bureau, the Financial Intelligence Authority and the Fiscal and Fraud Section of the Malawi Police. As a result of these commitments, and other personal and family issues he has been unable to furnish his Legal Practitioner with further and better particulars of the defence up until the time for hearing the application to strike out the defence that he had managed to fashion out a defence which was intended to filed with the court.

It was also averred that the Defendant has a meritorious defence which has all the prospects of success and that it is the intention of the Defendant to vehemently defend the proceeding in order to be exonerated of any wrong doing. It was stated that a draft copy of the defence was exhibited to the sworn statement. The view of the Defendant is that the proceeding should be determined on merit and not on mere technicalities

Lastly, it was stated that unless the Defendant is allowed to file an amended defence, he shall suffer injustice.

In his oral address, Counsel Soko started by saying that the statement of case (Claim) is detailed and makes specific factual allegations while the statement of case (defence) only contains general denials and no attempt has been made by the Defendant to deal with the factual claims raised and offer his side of the story as to what really happened. In order for the defence to be saved from being struck out, the test to be used to that the defence must reveal prospects of success and it must also carry with it some degree of conviction. The defence in the present proceeding does not comply with Order 7 Rules 6 and 7 CPR, 2017. In circumstances where a statement of case (whether claim or defence) does not comply with provisions of Order 7 CPR it should be struck out.

In response, Counsel Gondwe just repeated all what is contained in his sworn statement in opposition and urged the court to direct that the Defendant be heard through the amended defence.

In reply, Counsel Soko made a number of observations. The first one was that the sworn statement in opposition does not have the purported copy of the draft of the amended defence exhibited. Secondly, it was his observation that invariably,

Counsel works on the basis of instructions received from client and it is therefore perplexing as how the defence which is the subject of the application was prepared. It is therefore safe to state that Counsel sat down with his client and came up with the defence the subject of the present application.

It was his further observation that Counsel for the Defendant conceded that his client has been on bail for close to a year within which period he could have approached the court for an amendment to the defence. However, this has not been done. The last observation was that in spite of being served with the application to strike out defence, the Defendant never sought leave from the court to amend the defence. The requirements under Order 7 rule 23 CPR 2017 is to the effect that upon closure of statement of case, an amendment to statement of case can only be had with the permission of the court. It is unreasonable and inappropriate to make an application to amend the defence as an answer to the application to strike out the defence. The court was urged to ignore it as it has not been properly moved to do so.

The law governing the formulation or preparation of a statement of case is to be found in Order 7, CPR, 2017. According to rule 1, a statement of case shall—

a. *Set out the material facts between the parties, as each party sees them, but not the evidence to prove them;*
b. *Show the areas where the parties agree;*
c. *Show the areas where the parties disagree that need to be decided by the Court;*
d. *Be as brief as the nature of the proceedings permit;*
e. *Identify any statute or principle of law on which the party relies, but not contain the legal arguments about the statute or principle;*

f. *Where the party is relying on customary law, state the customary law;*

g. *State specifically any fact that if not stated specifically, it would take another party by surprise; and*

h. *Where the statement of case was prepared by a legal practitioner, state the name and address of the legal practitioner.*

It should be acknowledged that the above reproduced provision applies to the drafting of all types of statement of case, that is to say, claim, defence, reply and counterclaim. Regardless of the general provision governing the preparation of all types of statement of case, rules 6 and 7 specifically address what a defence should contain. Rule 6 requires a defendant to deal with each fact in a claim and prohibits the defendant from denying a claim generally. Where the defendant does not agree with any fact stated in the claim, then rule 7 requires the defendant to file and serve a defence that denies the facts and states what the defendant alleges happened.

This Court has given careful consideration to the submissions by both Counsel in light of the law on how to formulate a statement of case. The Court wishes to state that the rules requiring that a statement of case must contain a concise statement of material facts in support of the any claim or defence is a pivotal centerpiece to the operation of a fair and just system of adjudication. The power of the court to strike out a defence for failure to comply with this rule is therefore a critical gatekeeping function which must be carried out seriously and diligently.

In the current scheme of things, it is important to note and understand that the CPR 2017 has revolutionalised practice and procedure in civil matters. For that reason, under Rule 6, a simple traverse or general or bare denial is not allowed contrary to

what was the case under the Rules of the Supreme Court. Rule 7 effectively requires that a defendant respond by way of confession and avoidance. As such, a simple or bare denial of the facts alleged by the Claimant will no longer suffice as adequate statement of case. The clear intent of rule 7 is to require a party to address the point or points of substance in his statement of case.

Turning to the present application, I fully agree with Counsel Soko that the statement of case (defence) does not comply with the requirements of the CPR in most respects. In the case of ***Airtel Limited v Komiha and Others Miscellaneous Civil Appeal Number 59 of 2013***, the Supreme Court of Appeal made the following observations about the importance of rules of procedure—

"It has been argued that rules of procedure are there to facilitate the smooth and just disposal of the case. Whilst this is correct, it is a requirement that they have to be complied with. Any departure without good cause would create chaos in the administration of justice. Similarly, the fact there is no apparent injury or prejudice on the other party is no excuse for breaking the rules of procedure"

The Defendant has not stated the facts known to him as an alternative to the facts contained in the claim contrary to the requirements of the rules of procedure. Secondly, the reasons for delaying to apply for leave to amend the defence are in my considered view an afterthought. The Defendant has failed to amend the defence for close to year since his release on bail in September, 2020. The reasons for the delay cannot be justified and this Court rejects them.

The defence the subject of this application is indeed bare denials and can only be properly described as a "holding defence" which is intended to delay the proceedings. As was observed by the Court in the case of ***Chikondi Mkwapatira v***

Wexxing Jiang and Prime Insurance HC/PR Personal Injury Cause 684 of ...(unreported)

> *"The filing of the so called "holding defences" is more than a time wasting practice which has hitherto belaboured the Courts and seriously hindered the efficient delivery of justice. Such a practice can no longer be tolerated under CPR; it has to eliminated."*

The reason for having a defence that is bare or general denial eliminated is because it runs counter to the provision of rule 6 which does not allow or permit general or bare denials. The defence as it stands is a bare or general denial which has the effect to leave the Claimant and the Court in quandary as to what the dispute between the parties is all about. This Court is of the firm view that the defence could utmost be described as being evasive and should not stand.

It should be noted as well that the Defendant did not even exhibit to the sworn statement a copy of the draft amended defence. Even if it were exhibited, this Court would not have regard to it as it is clear indication that it was a mere reaction to the application to strike out the defence. This only shows to confirm that the defence as filed was aimed at delaying justice. The failure to exhibit a copy of the amended defence is in the view of this Court a serious irregularity.

The other irregularity that again goes to indicate lack of seriousness on the part of the Defendant is the failure to file skeleton arguments as required by Order 20 CPR, 2017. Rules of procedure are put in place for a purpose and they should be observed. No any reason for failure to file skeleton arguments were advanced during the time of hearing of the application.

For all what I have set out above, the application by the Claimant to strike out the defence for being general denial is allowed. Consequently, the defence is struck out and judgment is entered in favour of the Claimant. It so ordered.

Pronounced in Chambers this 24th day of February, 2022 at Lilongwe in the Republic of Malawi.

William Yakuwawa Msiska

JUDGE