

**IN THE HIGH COURT FOR ZAMBIA
2012/HPC/242**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

S.F. ENTERPRISES LIMITED

PLAINTIFF

AND

**ARMCOR SECURITY LIMITED
DEFENDANT**

**BEFORE HON. JUSTICE NIGEL K. MUTUNA THIS 18TH DAY OF
MARCH, 2013**

For the Plaintiff : Mr. Chikuba of Messrs AED Advocats

For the Defendant : Mrs. D. Findlay of Messrs D. Findlay and
Associates

RULING

Cases referred to:

- (1) Philipps vs Phiipps (1878)4 QBD 127**
- (2) Gun vs Tucker (1891)5 TLR 280**

- (3) **Godden vs Corsten (1879) 5 CPD 17**
- (4) **Barber vs Mackrell (1879) 12 ch D 534**
- (5) **Kariba North Bank Company limited vs Zambia states Insurance Corporation Limited (1980) ZR page 94**
- (6) **Bank of Zambia vs Jonas Tembo and other (2002) ZR page 103**

Other authorities referred to:

- (1) **Supreme Court Practice, 1999, volume 1**
- (2) **High Court Act, Cap 27**
- (3) **Halsbury's Laws' of England by Lord Hailsham of St. Marybone 4th edition, volume 36, page 46, paragraph 56**
- (4) **Odgers on Civil Court Actions by Simon Goulding, Sweet and Maxwell, London, 1996**

This is the defendant's application for an order to direct the talking of an account and providing further and better particulars. It is made by way of summons and supporting affidavit filed pursuant to order 15 rule 1 of the **High Court Act**, Order 43 rule 2 and order 18 rule 12 of the **Supreme Court Practice, 1999 (White book)**. The endorsement on the summons as it relates to the application for further and better particulars reveals that the defendant seeks the following particulars:

- (1) The date when the sum of USD 300, 000.00 was advanced to the defendant and whether or not the same was advanced in one lump sum.
- (2) If the sum advanced was advanced in various amounts the dates and exact amounts that each advance was made.

- (3) If the sum advanced was disbursed in various amount's particulars of how the sum of USD 300, 000.00 was calculated and arrived at.
- (4) Whether the sum advanced was advanced in United States Dollars.
- (5) Particulars as to whom the sum advanced was advanced to and on which particular date or dates.

The background to this matter as it is relevant to this application is as follows. The plaintiff took out this action by issuance of a writ of summons and statement of claim on 17th may, 2012. On the same day, the plaintiff also took out summons for entry of judgment on admission. The defendant's first response was by way of a conditional memorandum of appearance filed on 9th July, 2012. This conditional appearance does not state the condition pursuant to which it was being entered nor did the defendant file an application within to which it was not being entered nor did the defendant file an application within 14 days of filling of the conditional appearance. Subsequently, on 12th July, 2012, the defendant filed a defence.

The application for entry of judgment on admission was heard later and granted. What followed were an application to pay judgment debt by installments, application for leave to issue third party proceedings and to stay execution. The defendant then made this application.

The evidence in support and opposition is contained in the two affidavits in support and opposition respectively sworn by one Gray John Wadey and Faruk Ghumra.

The evidence of Gary john Wadey reveals the following facts. That he verily believes, with specific reference to the affidavit in reply to affidavit in opposition to affidavit in support of application for entry of judgment on admission that, the amount claimed was

advanced to the defendant over a period of time from November, 2009 to October, 2010. The amount was paid in various advanced and there were several of many transactions relating to the advance. This he deposed is evident from paragraphs 6, 8, 17, 18, 19, 21, 32 and 33 and it contradicts the contents of the statement of claim which suggest that the amount of USD 300, 000.00 was advanced as a one off payment. Further, it is apparent that there were disbursements in Zambian kwacha and payments made in United States Dollars which contradicts the contents of the statement of claim which allege that the defendant received the sum claimed in claimed in United States Dollars. This the deponent deposed necessitates the providing of particulars as to exact amounts disbursed.

The deponent deposed further that there is evidence which shows that the initial amount advanced was USD 800, 000.00 which was reduced and negotiated. Therefore, the defendant did not receive the sum in one lump sum payment. He went onto state that as a consequence of the foregoing various discrepancies, the defendant's advocates did write to the plaintiff's advocates seeking further and better particulars as per copy letter dated 30th January, 2013 marked "GW 1". The Plaintiff's advocates responded by way of letter dated 5th February, 2013 and marked "GW 2" which did not provide the further and better particulars. As a consequence of this, the defendant is entitled to make an application for further and better particulars.

The evidence went onto reveal that it is necessary for the particulars and account and or inquiry to be rendered because it is relevant in respect of the issues that relate to the intended third party proceedings. Further that, it is imperative that a reconciliation and account be rendered notwithstanding that judgment has been entered so as to ascertain whether the amount claimed by the plaintiff is indeed the true figure owed by the defendant especially that the Chief Executive officer of the

defendant who was involved in the transaction is no longer with the defendant. That such account will not prejudice the plaintiff but will instead determine with finality whether indeed the amount of USD 300, 00.00 is owing.

The evidence in the affidavit in opposition reveals that the deponent has been informed and verily believes that the defendant's application for further and better particulars has no merit. Further that the defendant ought to have requested for further and better particulars immediately after being served with the writ of summons and statement of claim. That the record of the court shows that the defendant filed its defence on 12th July, 2012 and subsequently the court entered judgment on admission against the defendant on 18th October, 2012. The said judgment was entered on the basis of a letter under the hand of one Gary Wadey acknowledging the fact the defendant is indebted to the plaintiff in the sum of USD 300, 000.00. Following the judgment, the defendant applied to settle judgment debt by installments. Therefore, this is not a proper case to order taking of an account because by this own motion the defendant applied to liquidate the judgment debt by installments. Further, by paragraph 6 of the affidavit in support of summons to pay debt by installments, the deponent has indicated that the defendant has accepted the decision of this court to enter judgment on admissions in the sum claimed of USD 300, 000.00.

The application came up for hearing on 5th March, 2013. Counsel for the parties made verbal submissions and also relied on the skeleton arguments.

In her verbal submissions counsel for the defendant, Mrs. D. Findlay argued that the defendant has been promoted to make this application because there are discrepancies in the statement of claim and the affidavit in reply to the affidavit in opposition to the application for judgment on admission. The discrepancies, it was argued, leave a lot of questions between the parties

unanswered in particular the amount advanced which is approximated at USD 800, 000.00.

In the skeleton arguments counsel argued that order 15 rule 1 of the **High Court Act** grants the court discretion to order further and better particulars. Further that, order 18 rule 12 of the **white book** sets out the particulars that must be contained in the pleadings and that if any pleadings are wanting, the court may order further and better particulars. She went on to set out the particulars requested for as endorsed in the summons.

As regard the request for an order to direct the taking of an account, counsel argued that this court has power under 43 rule 2 subrule 2 of the **white book** to order the taking of an account. This, it was argued, can be ordered at any stage of the proceedings. She argued that the circumstances that have necessitated the taking of account are that in the statement of claim the plaintiff has alleged that the sum of USD 300, 000.00 was advanced in one lump sum whilst in the affidavit in support of application for judgment on admission the plaintiff has alleged that the funds were advanced in piecemeal fashion and not in United States Dollars. There is therefore need for an account to be taken to determine whether there were any payments made by the defendant towards settling the amount owed and what the situations between the parties is before any further steps can be taken in the action.

It was also argued that the defendant has complied with the necessity for requesting for further and better particulars by initially sending a letter to the plaintiff requesting for the same as per the exhibit produced. This she stated is in accordance with **Halsbury's Laws of England 4th edition, volume 36.**

In her concluding arguments, counsel referred to the cases of **Philipps vs Philipps (1)** which she argued held that in a matter where the claim is for a lump sum, particulars must be given

showing how the sum is made up; **Gunn vs Tucker (2)** where it was held by the court that if the claim is for money paid the particulars must show when and to whom each item was paid; **Godden vs Corten (3)** where it was held that where the issue is for credit, the Plaintiff must not endorse is for lump sum but must set out the items making up the sum; and **Barber vs Mackrell (4)** where it was held that the court has jurisdiction to, order the account asked for whether the question of fraudulent withdrawal of money and claims for interest thereon might not have been raised.

Counsel prayed that the order be granted so that all the issues in controversy between the parties may be identified, isolated and effectively dealt with.

In the verbal arguments counsel for the plaintiff, Mr. Chikuba argued that the request for further and better particulars should have been made after the writ of summons was served upon the defendant.

As regard the issue of rendering of an account, it was argued that the judgment in this matter emanates from an admission. The defendant is therefore presumed to know or ought to have known how the debt arose. It was argued further that paragraph 6 of the affidavit in support of application to judgment debt by installments indicates that the defendant did not object to entry of judgment on admission and the issue of what the amount due is was not issue.

In the written submissions counsel for the plaintiff begun by citing Order 15 rule 1 of the **High Court Act** and Order 18 rule 12 of the **Supreme Court Practice**. He also explained the functions of pleadings citing from **Atkin's Court Forms and the case of Kariba North bank Company Limited vs Zambia State insurance Corporation Limited (5)**. It was argued that the said authorities do not envisage a situation where a party

requests for further and better particulars after the judgment. Counsel argued **that the Kariba North Bank Company Limited vs Zambia State Insurance Corporation (5)** case makes it clear that the purpose of particularly is to enable an opponent prepare for trial and to avoid surprises.

As regards the application for the rendering of an account, it was argued that this is not an appropriate case for the ordering of an account because the defendant accepted the court's decision to enter judgment on admission. It was argued further that the application amounts to re - opening litigation which is against public interest as was held in the case of **Bank of Zambia vs Jonas Tembo (6)**.

I have considered the affidavit evidence and the arguments by counsel. In determining this application I will first consider the request for further and better particulars and then consider the request for an order of account.

The defendant has relied upon Order 15 of the **High Court Act** and Order 18 rule 12 of the **white book** in making the application for further and better particulars. The former states as follows:

“The court or a judge may, on the application of the defendant order further and better particulars”.

Whilst the latter states as follows:

“Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing,

- (a) Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies;**
- (b) Where a party pleading alleges any condition of the mind or any fraudulent intention or other condition**

of mind except knowledge, particulars of the facts on which the party relies; and

- (c) Where a claim for damages is made against a party pleading, particulars of any facts on which the party relies in mitigation of, or otherwise in relation to, the amount of damages.**

(1A) Subject to paragraph (1B), a plaintiff in an action for personal injuries shall serve with his statement of claim.

- (a) A medical report, and
(b) A statement of the special damages claimed.**

(1B) Where the documents to which paragraph (1A) applies are not served with statement of claim, the court may-

- (a) Specify the period of time within which they are to be provided,
Or
(b) Make such other order as it thinks fit (including an order dispensing with the requirements of paragraphs (1A) or staying the proceedings).**

(2) Where it is necessary to give particulars of debt, expenses or damages and those particulars exceed three folios, they must be set out in a separate document referred to in the pleading and the pleading must state whether the documents has already been served and, if so, when, or is to be served with the pleading.

(3) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

(4)

(5)

(6) An order under his rule shall not be made before service of the defence unless, in the opinion of the court, the order is necessary or desirable to enable the defendant to plead or for some other special reason.

(7).....”

These orders clearly demonstrate that a plaintiff must set out in detail all the particulars relating to his claim. Further that where a plaintiff does not do so and on application by the defendant, the court may order that the plaintiff furnish further and better particulars.

The reason why the law requires a party to particularize his claim and the ordering of further and better particulars is to enable the defendant to respond to the claim properly and to inform him of what the other side is claiming.

Order 18 rule 12 subrule 2 of the white book sets out the rationale for giving particulars and their functions as follows:

“ The requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises particulars is accordingly:

- (1) To inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved.....**
- (2) To prevent the other side from being taken by surprise at the trial.....**
- (3) To enable the other side to know with what evidence they ought to be prepared and to prepare for trial.....**

- (4) **To limit the generality of the pleadings.....**
- (5) **To limit and define the issues to be tried, and as to which discovery is required.....**
- (6) **To tie the hands of the party so that he cannot without leave go into any matters not included.....”**

Odgers on Civil Court Actions by **Simon Goulding** has summarized the need for further and better particulars at page 213 as follows:

“The object of particulars is to enable a party asking for them to know what case he has to meet at the trial, and so as to save unnecessary expense, and to avoid allowing parties to be taken by surprise. If an opponent has worked his pleading so vaguely that you cannot be sure of what his line of attack or defence will be at the trial, it is worth while to apply for particulars”

The foregoing authorities all indicate that the need for further and better particulars is to prepare a party for trial. That is to say, he must know what his opponent’s line of attack will be at the trial so that he is not caught by surprise. It also affords a party an opportunity to respond to the pleading adequately in preparation for trial. The request for further and better particulars must therefore always be made in anticipation of trial. The foregoing have been indicated as the functions of particulars in the holding in the case cited by counsel for the plaintiff of **Kariba North Bank Company Limited vs Zambia State Insurance Corporation Limited (5)**

In this matter the further and better particulars are sought and using the words of counsel for the defendant “so that all issues in controversy between the parties maybe identified, isolated and effectively dealt with” (C.F. page 4 of the defendant’s skeleton arguments). There is no trial that is anticipated in this matter

because as the facts of this case show, judgment has already been entered on admission against the defendant. Further, the particulars are not sought to enable the defendant to settle its defence in readiness for the trial because it has already settled a defence. By implication, having settled the defence, the statement of claim served by the plaintiff contained sufficient particulars to enable the defendant respond. I therefore, find that the application is misconceived for being brought for the wrong reasons because the authorities I have highlighted in the preceding paragraph do not provide for the furnishing of particular for the reason advanced by the defendant. In my considered view, the request has also been brought at the wrong stage of the proceedings. As I have stated in the earlier part of this ruling, particulars are sought for purposes of the opponent responding to pleadings served upon him such as the defence after receipt of the writ and statement of claim. This is clearly demonstrated by the facts in the case of **Kariba North Bank Company Limited vs Zambia State Insurance Corporation Limited (5)** which are as follows. The plaintiff claimed K50,000.00 the amount payable by the defendant under an insurance policy in consequence of the plaintiff's death, alleged to have been accidental.

On receipt of the defence, the plaintiff wrote to the defendant seeking further and better particulars on the exception clause in the policy relating to the war like situation. The defendant attempted to explain but it was not to the satisfaction of the plaintiff.

The foregoing facts clearly demonstrate that a request must be made at the pleading stage for purpose of responding to pleadings in anticipation of trial not after judgment as was the case in this matter.

Further, as counsel for the plaintiff has quite rightly argued the defendant has accepted owing the sum of USD 300,000.00 as is

evident from paragraph 6 of the affidavit in support of summons to pay debt by installments. The said paragraph states as follows:

“That the defendant accepts the decision of this Honourable Court but is presently unable to satisfy the judgment debt in one lump sum payment to the plaintiff.”

The decision of the court referred to in the foregoing paragraph is the finding that the defendant admitted being indebted to the plaintiff in the sum of USD 300, 000.00 pursuant to which the judgment was entered. Therefore, if the defendant accepted the said decision, it is logical to conclude that it understands the basis upon which the plaintiff arrived at its claim of USD 300, 000.00 especially that at the time of admitting the debt and accepting the court’s decision it did not question how the amount was arrived at. This being the case there can be no need for further and better particulars of claim.

In arising at the decision I have made in the preceding paragraph I have considered the four cases relied upon by counsel for the defendant of **Philipps (1), Gun vs Tusker (2), Godden vs Corsten (3) and Barber vs Mackrell (4)**. The holding in the case of Philipps vs Philipps (1) at page 127 is that in an action for the recovery of land which the plaintiff has never been in possession, the statement of claim must allege the nature of the deeds and documents upon which the plaintiff relies in deducing his title from the person under whom he claims. Further that a general statement, that by assurances, wills, documents and crown grants in the possession of the defendants without further describing them, the plaintiff is entitled to the land, is embarrassing and liable to be struck out. The foregoing holding demonstrates the need for the plaintiff to particularize his claim and the risk he runs if he does not do so. It is clearly in line with Order 18 rule 12 of the **white book** which I have referred to in earlier part of this ruling in as far as the Order stipulates the need to state the particulars of the claim and the court’s discretion to

order the furnishing of further and better particulars. However, in my considered view, the case does not assist the defendant's because because the facts of the case indicate that it is distinguished from this case. The facts in the **Philipps (1)** case demonstrate that the defendant took out a summons to strike out writ as tending to embarrass the fair trial of the action. The said summons were taken out by the defendants soon after service of the statement of claim upon them and in anticipation of preparation for the trial. This is unlike the motion taken out by the defendant in this case which was after judgment was entered against the defendant and whose request is not in anticipation of trial. The **Philipps (1)** case is therefore distinguished from this case and does not aid the defendants cause.

On the other hand the holding in the **Gun vs Tucker (2)** case (cited in **Halsbury's Laws of England** at page 31) is that if the claim is based on more than one ground (eg. Services rendered and money disbursed), the particulars must show how much is claimed in each ground and how each claim arose. Whilst I endorse the foregoing holding, I do not consider it relevant to this case because the plaintiff's claim for USD 300, 000.00 in this case was based on one ground. It is contended by the plaintiff in the statement of claim that it entered into an oral agreement with the defendant on 29th November, 2009 by which it advanced to the defendant the sum of USD 300, 000.00. The contention does not allege several agreements or transactions warranting several grounds. To this extent the **Guns vs Tucker (2)** cases is distinguished from this case.

The third case is the case of *Godden vs Corsten (3)* whose facts were that the plaintiff indorsed a claim upon an account for building some cottages on the writ of summons. The endorsement indicated an account which revealed that credit was given for two items as follows:

“The object of the new system is to give information on the pleadings, if an endorsement on writ, statement of claim, and c, may be so designated and that everything stated by one litigant against the other should afford all the information to which he is fairly entitled for the purpose of stating his case..... here the credit being general and the items various, as bricks, work, and co., and the total put at a lump sum, it is evident that the defendant not only, may not know, but apparently does not know which of the items these credits are given for, still less does he now what particular sum the plaintiff has allocated to separate items, and if the defendant wants to plead payment or set off, it is essential to the conduct of his case that he should know what items the plaintiff has given him credit for, as otherwise he would claim things for which the plaintiff, having withheld information, would at the trial declare that he had already given credit, and thereby seriously embarrass the defendant.”

The foregoing holding sets out two important principles of pleadings. These are that; a litigant should specify all the particulars and information of his claim to afford the other an opportunity to properly state his case; and the need for a litigant to particularize the claim and furnish all necessary information is to afford the opponent a fair trial.

These principles are in line with order 18 referred to in the early part of this ruling and restate the need for particulars for purpose of pleading properly in anticipation of trial. To this extent the Godden (3) case is distinguished from this case because as I have already stated the particulars in this case are required for the wrong purpose and not in anticipation or preparation for trial. It, like the other cases, does not aid the defendant's cause.

I now turn to consider the issue of rendering of an account. It is the defendant's contention that there is need for such an account

to be taken in order to ascertain whether certain moneys were paid by the defendant to the plaintiff. Reliance was made on Order 43 rule 2 of the white book. This order states as follows:

“The court may, on an application made by summons at any stage of the proceedings in a cause or matter, direct any necessary accounts or inquiries to be taken or made.”

Prima facie, this provision empowers this court to order an account or inquiry to be taken in any matter where it deems fit. However, the order cannot be read in isolation from the earlier order 43 rule 1 of the **white book** which sets out instances where an application for an account or inquiry can be made. It states as follows:

“(1) Where a writ is indorsed with a claim for an account or a claim necessarily involves taking an account, the plaintiff may, at any time after the defendant has acknowledged service of the writ or after the time limited for acknowledging service, apply for an order under this rule.

(1A) A defendant to an action begun by writ who has served a counterclaim, which includes a claim for an account or a claim which necessarily involves taking an account, on

- (a) The plaintiff, or**
- (b) Any other party, or**
- (c) Any person who becomes a party by virtue of such service may apply for an order under this rule.**

(2) An application under this rule must be made by summons and, if the court so directs, must be supported by affidavit or other evidence

(3) on the hearing of the application, the court may, unless satisfied that there is some preliminary question to be tried, order that an account be taken and may also order that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order.”

It is clear from the foregoing order that a plaintiff is entitled to make an application for the rendering of an account or enquiry if the writ is indorsed with a claim for an account or one which necessarily involves the taking of an account. Similarly the defendant will be entitled to apply for an order for the taking of an account if it has made a counterclaim for the taking of an account. In this case, the writ of summons is not endorsed with a claim for the taking of an account but for payment of sum of USD 300, 000.00 plus interest and damages. Further, the claim will not and did not necessitate the taking of an account. The plaintiff would not therefore be entitled to make to make a counterclaim with its defence. It is not therefore entitled to make an application under Order 43 rule 2. The defendant has also not made a counterclaim for the taking of an account and neither did it file a counterclaim with its defence. It is not therefore entitled to make this application. Having so found, this application is, in my considered view, also misconceived.

In arriving at the foregoing finding I have considered the case of **Barber vs Mackrell (4)** whose facts are as follows. In an action to administer the estate of a deceased solicitor, an administration decree directing the usual accounts and inquires, was made in April, 1867. In December, 1871, an order was made that in addition to the accounts and inquiries directed by the decree, the ordinary accounts and inquires should be taken and made of and relating to the partners who consented to be bound. Before this order was made the partners had claimed to be creditors on the estate for a large amount, and had filed affidavits alleging that

the testator had fraudulently misappropriated moneys belonging to the partnership. In February, 1879, the then surviving partner applied by summons that an additional account might be taken of the amount in which the testator's estate was indebted to the applicant for partnership moneys fraudulently retained or improperly applied by the testator, and the interest which ought to be allowed on taking the account.

The holding of the court was that the court had jurisdiction to add the account asked for, and that under the circumstances it ought to be added.

From the foregoing facts and holding, it is evident that the issue for determination in the case whether or not the court had jurisdiction to order an additional account, having ordered one earlier. The case did not deal with circumstances under which the court would grant an order for the rendering of an account as is the case in this matter. To this extent the **Barber vs Mackrell (4)** cases is distinguished from this case and does not aid the defendant's cause.

By way of conclusion, I find no merit in both applications and accordingly dismiss them with costs. The same are to be agreed, in default taxed.

DELIVERED IN CHAMBERS THIS 18TH DAY OF MARCH, 2013

**NIGEL K. MUTUNA
HIGH COURT JUDGE**

