MARSHALL T. GUMA
versus
CHRISTOPHER FRANSCISCO
and
DRUMMONS CHICKENS (PVT) LTD

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 22 June &15 September 2021

Opposed Application-Exception

C Mateza, for applicant
L Shambamuto, for 1st respondent
L Matapura, for second respondent

TAGU J: Plaintiff filed summons against Defendants jointly and severally for an order for the payment of ZWD equivalent of US$4 917 being the outstanding balance on damages arising from an accident negligently caused by the first defendant whilst in the course and scope of his employment with the second Defendant along Samora Machel Avenue, Harare, on 6th of June 2020 and costs of suit on a higher scale.

In his declaration the plaintiff alleged that on the 6th June 2020 at Harare, along Samora Machel Avenue, the first defendant whilst in the course and scope of his employment with the second Defendant negligently drove a Hino Truck Registration Number AEL 8356 registered in the second Defendant's name into plaintiff's recently purchased AUDI A4, Engine number CDH062023 vehicle which was parked in a parking bay. He said the accident was caused by the exclusive negligent driving of the first defendant who was driving the motor vehicle negligently. The particulars of negligent were that he failed to keep a proper lookout, failed to apply the brakes of his vehicle, failed to avoid the accident by taking reasonable care, and driving a vehicle which was not in a roadworthy condition. As a result of the accident plaintiff's vehicle suffered extensive damages the repairing of which cost the total sum of US$7 314.24. Alliance Insurance Company (Pvt) Ltd the second defendant's insurer for the Hino Truck Registration Number AEL 8356 acknowledged Plaintiff's claim and settled the extent of its cover in the sum of $200 000 leaving

the outstanding balance of the cost of repairing the plaintiff's vehicle, which the defendants are jointly liable to settle to the tune of ZWD equivalent of US$4 917. The one paying the other to be absolved.

Having been served with the summons both defendants entered an appearance to defend. First defendant further excepted to the plaintiff's summons and declaration in that it does not disclose a valid cause of action and lacks essential elements to sustain a claim of negligence and damages and how he arrived at the sum of USD$4 917.00. He further submitted that the citation of the second defendant is in issue as there is no entity by the name Drummonds Chickens. The second defendant also filed an exception, special plea in bar and special plea in abatement. In short the second defendant alleged that the plaintiff's summons and declaration does not disclose a cause of action against first and second defendants and is vague and embarrassing to such an extent the defendants cannot tell with precision the claim they are supposed to answer. Second defendant further alleged that the plaintiff purported to sue the second defendant on the basis of vicarious liability but does not plead the essential requirements which gives rise to a claim of vicarious liability against the second defendant. Further, it alleged that the second defendant is a non – existent entity as there is no entity called Drummonds Chickens.

In reply to the defendants' exceptions and special plea in abatement the plaintiff denied that second defendant is none existent. He said second defendant has been sued in this matter under its trade name as plaintiff failed to ascertain its registration name despite frantic efforts to do so. It averred that its trite to sue a company in its trade name and the question that is before the court by virtue of the special plea is whether there is a company trading as DRUMMON CHICKENS, and that that question can only be answered through evidence which could not be attached on the summons nor heads of argument but led through trial. He contended that the registration documents of the vehicle in issue identifies the second defendant as owner in its trade name as per Annexure "A". Secondly, first defendant identified the second defendant as his employer and owner of the vehicle in issue in that name. Thirdly, the vehicle was branded and inscribed second Defendant's name. Lastly, the second defendant made various public advertisements under the name and style DRUMMON CHICKENS. On the special plea in abatement the plaintiff averred that he withdrew case HC 4227/20 and tendered costs. Hence second defendant is lowing hot and cold as it insists on costs in HC 4227/20, and engaged legal representation to fight plaintiff's claim

yet it says it's a none-existent entity. In short the plaintiff pleaded that the second defendant has sought to hide its registered name from all its papers filed of record instead of simply pleading same to show bona fides in raising this special plea. He prayed that the exception and the special pleas be dismissed with costs.

In his heads of argument the first defendant as the first excipient submitted that he is embarrassed to plead to the Plaintiff's claim which is in United States Dollars as no basis has been pleaded in the summons upon which such claim is made. He referred the court to the case of *Chifamba v Mutasa and others HH 16/08* where MAKARAU JP (as she then was) held that:

> "The purpose of pleading is not only to inform the other party in concise terms of the precise nature of the claim they have to meet but pleadings also serve to identify the branch of the law under which the claim has been brought. Different branches of the law require different matters to be specifically pleaded for a claim to be sustainable under that action. Thus, for example in a divorce action, the allegation of irretrievable breakdown is imperative while in a delictual claim for bodily injury, fault has to be averred against the defendant. This may appear trite but a number of matters coming before the courts seem to indicate that legal practitioners have abandoned the need to plead a cause of action by making the necessary averments to sustain such an action."

As to the amount of US$4 917.00 being claimed by the plaintiff the first defendant submitted that the Plaintiff failed to plead the deference between the pre accident value and the salvage value of the wreck. For this contention the first defendant referred the court to the case of *Maduwa* v *Zheke & Anor* HH 372-16 where CHAREHWA J had this to say-

> "Case law has established that the measure for diminution in value is the difference between the market values of the vehicles immediately before and after the wrong was committed. Alternatively, it is possible to take as a measure, the cost of restoring the vehicle to its original condition as long as such cost does not exceed the diminution in value of the vehicle. A plaintiff must prove both values in order to establish a prima facie claim to the quantum of his damages. However, the cost of repair will not serve as a measure of the damages due to the plaintiff where they exceed the pre-accident market value, or they exceed the diminution in value or they do not actually restore a vehicle's pre-accident market value."

L. Shambamuto for the first defendant in oral submissions said their issue is about the claim which is in United States Dollars. It was said this claim is illegal. Reference was made to **S.I. 127/21** which she said does not apply in retrospect. At the time the summons was instituted the law was clear that the currency to be used was in Zimbabwean Dollars and not United States Dollars. She further maintained that the plaintiff failed to plead the pre and post values of the

vehicle. She said if one is claiming damages one must show that figures are not plugged from the air. She therefore prayed that the exception be upheld with costs.

The second defendant in its heads of arguments maintained that the plaintiff's summons and declaration do not disclose a cause of action against the 1st and second defendants and is vague and embarrassing, to such an extent that the defendant cannot tell, with the required precision, the claim they are supposed to answer. Reference was also made to *James J. Murovi* v *Chawatama and Ors* HH 481-15 *as well as Chifamba* v *Mutasa supra* and several other case authorities. Further, a point was made that the plaintiff's claim founded on vicarious liability, once it is accepted that no person exists known as DRUMMONDS CHICKEN, the whole claim falls. Lastly, it was submitted that the provisions of r 8C of the High Court Rules, 1971 cannot rescue the Plaintiff.

Mr *L.Matapura* submitted orally that the citation of second defendant is in issue. He said Drummons Chickens is not a registered entity. He referred to the case of *Salomon v Salomon & Co. Ltd* [1897] AC 22**.** He said the plaintiff wants to rely on r 8C of the High Court Rules, 1971 that allows the person to be sued in his trading name and style. According to him r 8C cannot be invoked. He therefore insisted that there is no second defendant in this matter premised on vicarious liability hence Summons are fatally defective. He too prayed for the dismissal of the plaintiff's claim with costs.

In his heads of argument the plaintiff in refuting the defendants' exception to the effect that plaintiff's summons and declaration do not disclose a cause of action against second defendant to the extent that the essential elements of vicarious liability are not pleaded submitted that the legal elements of a claim based on vicarious liability were enunciated in the Supreme Court case of *Biti v Minister of State Security* 1999 (1) ZLR 165 (SC) at 169A where it was stated that –

> "The standard test for vicarious liability is, of course, whether the delict in question was committed by an employee while acting in the course and scope of his employment. The enquiry is frequently said to be whether at the time the employee was about the affairs or doing the work of his employer."

He cited *Amlers Precedents of Pleadings*, 8th Ed. at p 376 that outlines the essential elements of a claim based on vicarious liability. The writer notes as follows:

"the onus rest on the Plaintiff to allege and prove in addition to the usual allegations to establish delictual liability

a. That the person who committed the delict was an employee of the Defendant,
b. That the employee performed the delictual act in the course and scope of his/her employment……"

The plaintiff submitted that an analysis of the above authorities demonstrated that both elements of vicarious liability appear ex-facie the summons and declaration. As to the exception that the plaintiff's summons and declaration do not disclose a cause of action against defendants to the extent that the essentials of negligence are not pleaded the second defendant seemed to have abandoned this ground in its heads of argument. However, be that as it may, the Plaintiff cited again Amler's Precedents of pleadings supra where the essential elements of a claim based on negligence were stated. The learned author noted as follows-

"It is not sufficient to allege negligence without detailing the particular grounds of negligence"

The plaintiff said a reading of the plaintiff's declaration at para. 5 of the plaintiff's declaration fulfils both elements of negligence. Lastly, the plaintiff submitted that the exception that plaintiff's summons and declaration fails to plead how the figure claimed as damages, was arrived at is a matter of evidence which need not be pleaded. The exception against the claim for a ZWD equivalent amount of US$4 917 was abandoned in the heads of argument. Be that as it may the Plaintiff submitted that it is not unlawful for a litigant in an effort to hedge against inflation, to couch his or her claim in the manner done by the plaintiff.

In his oral submissions Mr *L. Mateza* submitted that r 8C is very clear as it provides that a person ought to be sued in both his name and trade name. He said the mischief in r 8C must be followed. He said the plaintiff made frantic efforts to ascertain names of the second defendant but failed, hence r 8C applies. He then produced evidence to show that an entity by the name Drummonds Chickens exists.

In dealing with the various grounds of exceptions raised by the excipients, I have noted as did the plaintiff that several other grounds of exceptions seem to have been abandoned since they were not dealt with in the heads of argument. However, the court will deal with five major grounds of exceptions which are the following-

i. That the plaintiff's summons and declaration does not disclose a cause of action against 1st and second Defendants which is legally recognizable at law, is vague and embarrassing to such an extent the defendants cannot tell with precision the claim they are supposed to answer;
ii. That second defendant does not exist;
iii. That requirements of vicarious liability have not been pleaded;
iv. That elements of negligence have not been pleaded; and
v. That the claim for a ZWD Equivalent amount of US$4 917 is a thump suck figure.

DOES PLAINTIFF'S SUMMONS AND DECLARATION NOT DISCLOSE CAUSE OF ACTION?

A cause of action in relation to a claim was defined in various cases. In Read v Brown (1885) 2 QBD 13 the Court defined it in the following words:

> "Every fact which would be necessary for the Plaintiff to prove, if traversed in order to support his right to the judgment of the Court."

The same was defined in the case of *Dube* v *Banana* 1998 (2) ZLR 92 (H) at 95 by SMITH J in the following manner-

> "A cause of action means the combinations of facts that are material for the Plaintiff to prove in order to succeed in his action."
>
> It was also defined as-
>
> "The entire set of facts which gives rise to an enforceable claim and include every fact which is material to be proved to entitle a Plaintiff to succeed in his claim." See *Abrahamise & Sons* v *SA Railway Harbours* 1933 CPA 630; *Peebles* v *Dairiboard Zimbabwe (Private) Limited* 1999 (1) ZLR 41 at 45.

In *casu* the plaintiff's claim against the defendants jointly and severally is for an order for the payment of ZWD equivalent of US$4 917.00 being the outstanding balance on damages arising from an accident negligently caused by the first defendant whilst in the course and scope of his employment with the second defendant along Samora Machel, Harare on the 6th of June 2020. Paragraph 4 of the plaintiff says that on the 6th of June 2020 at Harare along Samora Machel Avenue, the first defendant whilst in the course and scope of his employment with the second defendant negligently drove a Hino Truck Registration Number AEL 8356 registered in the second

Defendant's name into the plaintiff's recently purchased AUDI A4, Engine number CDH062023 vehicle which was parked in a parking bay.

A reading of the above averments or set of facts if proved by way of evidence surely will entitle the plaintiff to succeed in his claim. I do not see anything that is vague and embarrassing in the claim. The questions or facts that will have to be proved by the plaintiff is that on the day in question his newly purchased vehicle was rammed into by the first defendant whist it was parked in a parking bay. He further have to prove that the first defendant was negligent, that at the time of the accident the first defendant was in the course and scope of his employment with the second defendant. Lastly he has to prove the ZWD equivalent values of US$4 917. The plaintiff is not claiming for damages in United States Dollars but ZWD. There is nothing illegal about this. The defendants are therefore being asked to refute the above allegations. The plaintiff's summons and declaration therefore disclose a cause of action against the first and second defendants. I found no merit in this ground of exception.

IS SECOND DEFENDANT A NON-EXISTANT ENTITY?

It is trite that proceedings brought by or against a non-existent entity is *void ab initio* and a nullity. See *Gariya Safaris (Private) Ltd* v *van Wyk* 1996 (2) ZLR 246.

In the case of *Mercy Masuku* v *Delta Beverages* HB-172/12**,** this Honorable Court, faced with a similar situation had occasion to comment as follows where "DELTA BEVERAGES" was cited as such instead of "DELTA BEVERAGES (PRIVATE) LIMITED",

> "Where, the entity is non-existent indeed the issue of nullity sits to the bottom of the sea like lead and cannot be brought up to the surface. However, the issue adopts a completely different complexion where there is in existence an entity who is by some error or omission is not cited. It would seem that authorities held that there should be a distinction. In *van Vuuren Braun & Summers* 1910 TPD 950 WESSELS J at 955 states:
>
> "Now in order to bring a defendant legally into court a summons is required. In order that summons may be valid, it must comply with the requirements of r 6. It must purport to be a summons, a mere request or letter to the effect that the defendant is kindly requested to appear in court on a certain day is an invalid citation. Next the summons must specify the defendant. It is true that it will not be described as accurately as he should be. If a man is baptized "George Smith" it is no defect to call him "John Smith" because the individual is pointed out with sufficient accuracy. But if there were no mention of the defendant at all the summons would be a wholly worthless document and could not be amended by inverting the defendant's name in Court."

The judge went further to say-

> *"*In *casu* the entity against whom applicant has sued is said to be non-existent. The argument is grounded on the fact that the citation omitted the full description of the respondent. The crucial question that irresistibly begs an answer is, to what extent does the omission affect the identification of the respondent? Respondent is a well –known blue chip company whose fleet of cars are all over our national and domestic roads and its commercial advertisements need no introduction…. To me, applicant may have technically erred in her description, but, has described respondent with sufficient clarity to an extent of eliminating any mistake either legal or factual of respondent's identity. Applicant sufficiently described respondent."

In the present case it is not in dispute that on or about the 6th June 2020 an accident occurred along Samora Machel Avenue, Harare at about 1607hrs involving one *Christopher Francisco* (first defendant herein) who was driving a Hino registration number AEL 8356 whose owner was identified by the Police on TAB 2128/20 as **DRUMMONS CHIKENS**, residing at **DRUMMONS CHICKENS, 363 Norton,** and insured by Old Mutual and another vehicle. A copy of the registration book for the Hino describes the owner as **DRUMONDS FARM F.C**. On the 26 June 2020 second defendant's Legal Practitioners, *Mafongoya & Matapura* sent an email addressed to the Plaintiff's Legal Practitioners *Messrs Chimwa Murombe* in which they said the following:

> "The above matter refers kingly note our legal interest as we act for **Drummonds Chicken** herein. We can advise that we received a letter of demand on behalf of our client dated 24 June 2020. We are getting instructions from our client and shall revert to you soonest with a substantive response." Then on the 17th of May 2021 another email was generated by *ZENAS LEGAL PRACTICE* and sent to Plaintiff's legal practitioners and it reads in part as follows-
>
> **"Subject RE:** *Marshal Guma* v *Christopher Francisco, Drummon Chickens & Old Mutual Limited*
>
> ---
>
> 1. The insurer for **the second Defendant** is not Old Mutual but **Alliance Insurance**.
> 2. Our client Alliance insurance is willing to settle the policy limit of **ZWL$200 000**.
> 3. You shall proceed to withdraw the summons under case No. HC 3648/20 and issue fresh ones to correctly reflect our client as the third Defendant.
>
> ……" (emphasis added)

What is clear from the above correspondents clearly shows that an entity by the name Drummons Chicken indeed exists. If in fact there is no such entity as second defendant, which I doubt, then it is curious that a non- existing entity could engage legal representation to fight plaintiff's claim. What is apparent is a case of a defendant who, in all mala fides, has sought to hide its registered name from all its papers filed of record instead of simply pleading same to show

its bona fides in raising this special plea. As things stand we do not know who second defendant is, neither did the first defendant disclose who his employer was. Going by the papers filed of record the plaintiff sued an existent entity. This ground of exception is dismissed for lack of merit.

HAVE ESSENTIAL ELEMENTS OF VICARIOUS LIABILITY NOT PLEADED?

To resolve this issue the court will be guided by the authorities above. The legal elements of a claim based on vicarious liability are those enunciated in the cases of *Biti* v *Minister of State Security, ZUPCO* v *Van Wyk Z & Amlers Precedents of Pleadings supra*. The test is whether the delict in question was committed by an employee while acting in the course and scope of his employment, that is whether the employee was engaged in the affairs or business of the employer when the delict was in issue occurred. The present Summons clearly says that the accident was caused by the first defendant whilst in the course and scope of his employment with the second defendant. Even the Declaration in para. 4 says the first defendant was in the course and scope of his employment with the second defendant when he negligently drove a Hino Truck registration number AEL 8356 registered in the names of the second defendant into plaintiff's AUDI A4 that was parked in a parking bay. The basis of the vicarious liability of the second defendant was explicitly pleaded. The exception therefore lacks merit.

WERE ELEMENTS OF NEGLIGENCE PLEADED?

Paragraph 5 of the Plaintiff's Declaration clears the position. It reads as follows:

"The aforementioned accident was caused by the exclusive negligent driving of the first defendant who was driving the motor vehicle negligently in one, or more of all the following aspects,

5.1 He failed to keep look-out.

5.2 He failed to apply the brakes of his vehicle timeously, or sufficiently. Alternatively, he drove his vehicle whilst the breaking system was in a defective condition.

5.3 He failed to avoid the accident by taking reasonable or proper care when he both could, and should have done so.

5.4 He failed to exercise proper or adequate control over his vehicle.

5.5 He drove the vehicle which was materially not in a roadworthy condition."

The particulars of negligence were therefore pleaded. In particular if points 5.2 and 5.5 are proved then the second defendant was negligent in that it allowed the first defendant to drive a vehicle that had defective breaks and or not roadworthy. This point has no merit.

CLAIM FOR A ZWD EQUIVALENT OF US$4 917.00?

A reading of the summons and the declaration shows that the plaintiff is not claiming damages in United States Dollars but in Zimbabwean Dollars. As to how the plaintiff equates the balance of ZWD to US$4 917 is a matter of evidence which the plaintiff has to prove during trial. It is not a basis for this court to dismiss the plaintiff's claim at this stage. If the defendants have issuers with the figures the best course was to apply for further and better particulars. I will therefore dismiss this ground of exception.

WHEREFORE, IT IS ORDERED THAT

1. All the exceptions, special pleas in bar and special pleas in abatement are dismissed.
2. The first and second defendants are to pay costs, the one paying the other to be absolved.

Chimwamurombe legal practice, plaintiff's legal practitioners.
Shambamuto legal practitioners, first defendant's legal practitioners
Mafongoya &Matapura, second defendant's legal practitioners