REPORTABLE: **(51)**

TAFADZWA MUSHUNJE
v
ASSOCIATED NEWSPAPERS OF ZIMBABWE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAKONI JA & CHITAKUNYE JA
HARARE, 11 JUNE 2021 & 9 JUNE 2022

T. Zhuwarara, for the appellant

T. Mpofu, for the respondent

MAKONI JA: This is an appeal against the whole judgment of the High Court dated 2 June 2019 dismissing the appellant`s claim for defamatory damages suffered by the appellant as a result of an article published by the respondent's newspaper.

FACTUAL BACKGROUND

On 22 February 2016, an online article about the appellant was published on a website that goes by the style *Musvo Zimbabwe*. It detailed an abuse that was being allegedly perpetrated by the appellant on her boyfriend`s son including the allegation that the appellant "would fill a syringe with her HIV infected blood before injecting it into the child's body". This led to the mother of the minor child filing a police report against the appellant after linking the contents of the article with the suspicious marks she had observed on her child.

The appellant was, on 25 February 2016, charged with contravening s 79(1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (The Code), regarding the deliberate transmission of the Human Immunodeficiency Virus (HIV). She was also charged

with contravening s 89 of the Code for assaulting the minor child. She appeared in court on initial remand on 25 February 2016.

On 26 February 2016, the respondent in its newspaper, *The Daily News*, reporting on the criminal proceedings, published an article concerning the appellant under the title "*Woman up for wilfully infecting stepson with HIV".* The article reported that the appellant allegedly injected her blood with the HIV into the minor child and that consequently, the child tested HIV positive. The article further stated that the appellant was also being charged with the assault of the same child. The article made reference to the *Musvo* publication which had also published that the appellant would force the minor child to drink her urine.

The charges against the appellant were subsequently withdrawn on 2 March 2016 after medical reports indicated that both the appellant and the minor child were not HIV positive. The respondent published a follow-up article detailing the withdrawal of the charges against the appellant.

This led to the appellant issuing summons against the respondent in the court *a quo* claiming payment of the sum US$ 1 000 000.00 (One Million United States Dollars) for damages. The amount was reduced to US$ 80 000.00 (Eighty Thousand United States Dollars) through an amendment at the commencement of the trial.

PROCEEDINGS IN THE COURT *A QUO*

The appellant, in her declaration, pleaded that the contents of the article published on 26 February 2016 by the respondent were false, malicious, and injurious to her reputation as a professional model. She refuted the allegations contained in the article as untruthful and contended that the respondent refused to retract the same and pay the consequent damages upon demand.

In its plea, the respondent pleaded, in the main, that the appellant`s declaration did not point out what part of the article was defamatory. It further stated that "not only is this bad pleading but constitutes no claim at all against the defendant." In the alternative the respondent pleaded that it based its story on the appellant's appearance in court. All that was published appears in the court papers. In the further alternative the respondent pleaded that the article was published by three other publications. It published a follow-up story when the matter was withdrawn before plea. Furthermore, the respondent argued that the amount the appellant was claiming, that is US$1 000 000, was "ridiculously high and constituted *petit patio*". It further asserted that the claim was meant to harass the respondent and prayed for costs on a punitive scale.

At the hearing, the appellant in her evidence in chief, testified that she was a professional model and TV presenter. She confirmed that she was arrested and appeared in court in connection with the above mentioned charges. The charges were later withdrawn before plea. The article published by the respondent contained inaccuracies such as the fact that the minor child was HIV positive. She complained that her side of the story was not published by the respondent as it did not interview her. She received telephone calls from people who read the article. She also received hateful messages from anonymous people. She

lost business contracts as a result of the publication. Additionally, she stated that the fact that the child was HIV positive was not contained in the state papers and that the material fact of her being granted bail was omitted in the article.

During cross-examination the appellant stated that out of the US$ 80 000.00 she was claiming, the sum of USD$40 000 00 was in respect of loss of business. She also stated that the US$80 000 00 was being claimed on behalf of her twin sister also, with whom she was involved in some business ventures.

The respondent led evidence through Ms. Tarisai Machakaire, a journalist working as the respondent`s court reporter. She submitted that she gathered the information in the article from the Magistrates Court. She was in attendance when the charges were being read to the appellant. Furthermore, she perused the court record. She further stressed that she had an obligation to inform the general public regarding pertinent issues such as child abuse and transmission of HIV. She confirmed that she did not interview the appellant to get her version of events as the follow-up article exonerated her of the allegations.

In addition, Ms. *Tarisai Machakaire* testified that she was unable to include the contents of the appellant`s warned and cautioned statement in the article as it would amount to interference with court proceedings. She, however, conceded that the headline was inaccurate and laid the blame on the editor.

DETERMINATION OF THE COURT *A QUO*

The court *a quo* noted that the appellant`s summons and declaration did not state the portions of the article which were alleged to be defamatory or impairing the dignity of the

appellant. It went further to point out that the appellant`s declaration was inelegantly drafted such that it did not set out which amounts were for damages to her dignity and which portion was in respect of damages to her reputation. It went further to highlight that the appellant`s declaration was excipiable because it was vague and embarrassing such that the respondent ought to have proceeded by way of exception for the deficiencies to be resolved. The court proceeded to deal with the merits on the basis that the respondent had pleaded to the claim as presented by the appellant even though the respondent noted the deficiencies in its plea.

On the merits, the court *a quo* made a finding that, based on the common cause facts that it found, the requirements for defamation had been satisfied. It reasoned that the article was published in a newspaper accessible to the members of the public and that there was injury to the appellant`s reputation as a result.

The next issue to be considered, by the court *a quo*, was whether the defences raised by the respondent were sustainable in the circumstances of the case. The court reasoned that the defence of qualified privilege is what the respondent was relying upon. To that end, it opined that there is no requirement that the material published be true. It further stated that the respondent had a moral and social duty to expose potential abuse of children and inform the public about the prosecution of such cases in courts of law.

The court further reasoned that the defence of qualified privilege could only be vitiated by malice or improper motive and that in the case of publishing court proceedings, the defence will succeed if the report is fair, accurate, and balanced. After analysing the evidence, the court found that the defence of qualified privilege succeeded in the circumstances of this case. It therefore proceeded to dismiss the appellant`s claim.

This prompted the appellant to note the present appeal on the following ground:

GROUNDS OF APPEAL

"1. The learned judge of the court *a quo* made an error at law in assessing and finding that the defence of qualified privilege was available to the respondent when the elements of the defence; of a publication being fair, accurate, and balanced were not proven (*sic*). In this respect, the learned judge of the court *a quo* erred in that:

a. He found that the respondent`s publication of the appellant`s story was accurate, yet the respondent distorted the material fact of the HIV status of the minor child, reporting that the child was now HIV positive.
b. He found that the publication was balanced yet it did not include the position of the appellant`s defence at the time of the publication.
c. He failed to observe that distortion of facts would result in an article being unfair".

SUBMISSIONS ON APPEAL

At the hearing of the appeal, Mr *Mpofu*, for the respondent, raised a point in *limine* that the appellant's declaration was fatally defective in two respects. Firstly the specific defamatory words were not set out in the declaration. Secondly the amounts of damages sought by the appellant were not particularly set out. He contended that the defective pleading could not be cured by evidence placed before the court *a quo.* There was therefore no cause for which the jurisdiction of the court *a quo* could be invoked. He moved that the appeal be dismissed with costs as costs follow the cause.

Per contra, Mr. *Zhuwarara* for the appellant, whilst conceding that the declaration was excipiable, however argued that the respondent did not raise an exception to that effect in the court *a quo.* He submitted that the adjudication of the matter on the merits by the court *a quo* effectively cured the defective declaration. In addition, he contended that once evidence is now on record such evidence can cure a defective declaration.

He further submitted that the court *a quo* found that the requirements for defamation were established therefore the matter ought to be determined presently on its merits.

ISSUE FOR DETERMINATION

1. Whether or not the appellant`s declaration before the court *a quo* sufficiently disclosed the appellant's cause of action.

2. Whether or not the court *a quo* was correct at law to allow the defence of qualified privileged.

Whether or not the appellant's declaration before the court *a quo* sufficiently disclosed the appellant's cause of action

THE LAW

Pleadings in general

The law relating to pleadings was succinctly captured in the case of *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holdings (Pvt) Ltd* 2018 (1)ZLR 449 (S) at 455 G – H and 456 A in the following terms:

> "In general the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. Various decisions of the courts in this country and elsewhere have stressed this important principle.
>
> 25.1 In *Durbach v Fairway Hotel, Ltd* 1949 SR 115; 1949 (3) SA 1081 (SR) the court remarked:-
>
> > "The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed."

25.2 Harwood BA in his text *Odgers' Principles of Pleading & Practice in Civil Actions in the High Court of Justice* (16th ed, Stevens & Sons Ltd, London, 1957) states at page 72:-

> "The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus arrive at certain clear issues on which both parties desire a judicial decision."

Further down at 456 para 25.6 E-H the court stated:

> "In *Jowell v Bramwell-Jones & Ors* 1998 (1) SA 836 at 898 the court cited with approval the following remarks by the authors Jacob and Goldrein in their text *Pleadings: Principles and Practice* at p 8-9:
>
> > "As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings … For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties…….The court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither *party can complain if the agenda is strictly adhered to.*"" (my emphasis)."

In *Chifamba v Norbet Mutasa and Ors* HH 16/08, the learned MAKARAU JP (as she then was) remarked as follows:

> "The purpose of pleadings 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…
>
> In my view, the exchange of pleadings between the parties is what may pass as conversation at a social gathering between disagreeing parties but bears not the slightest resemblance to pleadings in a court of law.
>
> Legal practitioners are urged to read on the law before putting pen to paper to draft pleadings in any matter so that what they plead is what the law requires their clients to prove to sustain the remedy they seek.
>
> The duty of a legal practitioner to precisely and concisely draw up pleading is closely related to the duty to establish and assess the evidence necessary to sustain each important averment made in the pleadings."

The authors Cilliers AC, Loots C and Nel HC in their text book *Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa* (5th edn, Juta and Co. Ltd, Cape Town 2009) quote the following passage from Halsbury's *Laws of England*, 4th ed (Reissue), Vol 36 para 1 in which the function of pleadings is said to be,

> "… to give a fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings the appropriate method of trial can be determined. They also form a record which will be available if issues are sought to be litigated again. The matters in issue are determined by the state of pleadings at the close if they are not subsequently amended." (at p 558)

In *Jirira v Zimcor Trustees Ltd & Anor* 2010 (1) ZLR 375 (H), MAKARAU JP (as she then was) ruled that the matter before the court was a difficult one for the court to use its discretion in favour of the applicant because his cause of action was vague thus there was no purpose to refer the matter to trial and consequently, the application was dismissed.

What comes out from the above remarks made by eminent jurists both within and outside this jurisdiction is that, what is important is that, the pleadings should make clear the general nature of the case. They are meant to mark out the parameters of the case sought to be advanced and define the issues between the litigants. In that regard, it is a basic principle that a pleading should be so framed as to enable the other party to fairly and reasonably know the case he or she is called upon to meet. These requirements, in respect of pleadings, are the very essence of the adversarial system. The prime function of a judge is to hear evidence in terms of the pleadings, to hear arguments and to give his decision accordingly. Further, it is for the court to adjudicate upon the disputes and those disputes alone as raised in the pleadings.

Pleadings in a defamation claim

According to *Harms, Amler`s Precedents of Pleadings*, Fourth Edition at p 107, the plaintiff must set out the words alleged to have been used by the defendant and may not content himself with giving their effect and meaning. He highlights that it is not necessary to plead the actual words used but the plaintiff may allege that the words set out "or more or less those words" which were used by the defendant.

In the English case of *Wissa v Associated Newspapers Ltd* [2014] EWHC 1518 (QB), it was held that the exact words must be quoted *verbatim* when drafting defamation particulars of claim.

The case concerned a Uniform Resource Locator (URL) which is a specific address on the internet used by a person to access the particular site they wish to view. The claimant, instead of putting the exact wording complained of in his defamation proceedings

only made reference, in his particulars of claim, to the URL which he said held all the words which were the subject of the defamation proceedings. The defendant made an application for the claim to be struck out, as, by referring to the words in the URL, the claimant had not adequately described in full detail the exact words which they complained were libellous.

The court held that the URL did not wholly identify the words complained of as there was more than one account of the story appearing on that day and it was unclear exactly what the offending words were, from what had been published. The Judge further held that in a libel claim the publication must be identified and the claimant must specify in the particulars of claim, the defamatory meaning which it is alleged that the words or matters complained of conveyed as to their natural and ordinary meaning.

The court referring to the case of *Best v Charter Medical of England Limited* (2001) and CPR 16.4 and PD 53 ruled that it was vital that the exact wording complained of is quoted in the defamation proceedings, verbatim.

It further held that a defendant must be able to defend the claim against them. They have to know exactly what words were allegedly used by them for the claimant to bring the action in the first instance and thereafter be able to prepare their defence. As the claimant had not established which story he was referring to and which formed the basis of his libel action, the court found that the words could not be sufficiently identified to be the subject of the proceedings. The claim was struck out.

The Supreme Court of Jamaica in the case of *Khemlani Mart Limited & Anor v Radio Jamaica Limited* 2007HCV 03326 addressed the above issue in the following terms:

"THE PUBLICATIONS

18. The claimants have challenged the defendants in respect of both publications. In respect of the *Newsline* 7 publication (which I will also refer to as the radio broadcast) the claimants aver as follows in paragraph 3 of their particulars of claim:

> *"3. …The defendant published and or caused to be published allegations that Khemlani Mart, which is operated by the claimants, illegally obtained and used electricity valued at $13 million."*

> It can be seen, without much scrutiny, that paragraph 3 of the particulars of claim has not reproduced, *verbatim*, the terms of the alleged broadcast. The words are not particularized for one to see the actual words or the context in which they were used in order to independently determine the meaning to be attributed to them. The defendant has not admitted that pleading. It is not for the defendant to supply the alleged defamatory statement but the claimants who are alleging defamation. I am not particularly satisfied with the claimants' omission in this regard.

19. R.69.2 (a) provides that in addition to the matters set out in Part 8, the particulars of claim in a defamation claim must give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified. R. 8 then states the consequences of not setting out case. It provides that the claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim but which could have been set out there unless the court gives permission".(my underlining)

The court went further and cited with approval the sentiments in *Carter- Ruck on Libel and Slander,* 5th edition, p. 39 in the following terms:

> *"Carter- Ruck on Libel and Slander,* 5th edition, p. 39 also points out that the claimant must set out in his particulars of claim, with reasonable clarity and precision, the words of which he complains and that where the subject matter of a libel action is a long article or programme, the claimant must specify the particular passages which are claimed to be defamatory of him (*Collins v Jones* [1955] 2 All ER 145 and *DD SA Pharmaceuticals Ltd. v Times Newspaper Ltd* [1972] 3 All ER 417 cited)." (my underlining)

In the South African case of *Deedat v Muslim Digest* 1980 (2) SA 922 (D) at 928, the Court highlighted that depending on the length and nature of the document, the failure to specify the defamatory passages may render the pleading vague and embarrassing. The following was said:

> "A plaintiff is entitled to rely on the whole of an article if he claims that the whole of it is defamatory of him. He may however in an appropriate case be under a duty to furnish the defendant with particulars of those portions or words upon which he specifically relies...Where the defamatory meaning is not quite explicit a court would probably be more inclined to order the words of passages relied on to be pointed out but might be less so inclined when the plaintiff sets out the meaning or meanings which he attributes to the article." (my underlining)

In *Chimakure & Anor v Mutambara & Anor* SC 91/20, GOWORA JA (as she then was) cited with approval the case of *Munyai v Chikasha* 1992 (2) ZLR 31 (S) where it was stated at p 32B-F that:

> "It was submitted that it was therefore incumbent upon the appellant to prove that those words were uttered and it was not sufficient merely to show that words substantially similar were uttered. It was submitted that the appellant`s declaration did not allow him to depart from the *ipsissima verba* rule. The case of *International Tobacco Co v Wollheim* 1953 (2) SA 603 was cited in support of this proposition. If anything, this case is authority for the opposite position, that is to say, what is required is to show that substantially the same words were used. It is therefore no longer necessary to plead *ipsissima verba.* All that is necessary is to plead the substance and effect of the words.
>
> Although it would have been advisable for the appellant`s legal practitioners to have included the words "or words to that effect", the failure to do so did not render the appellant`s case fatally defective. Indeed, as was said in the case of *International Tobacco Co v Wollheim* supra at 640G:
>
> > 'The pleading of *ipsissima verba* leads to artificiality and disingenuousness in pleading because a witness can rarely recollect the *ipsissima verba* but only the substance or effect of the words spoken and the versions of two or more witnesses as to the *ipsissima verba* may differ in detail but not on the substance or effect thereof.'

The issue in the *Munyai* case *supra* was whether the exact words or *ipsissima verba* should be pleaded. In other words it was saying that the defamatory words should be pleaded but not *ipsissima verba*.

The setting out of the exact words or " words to that effect" assists a defendant in opposing a claim for damages arising from publication of allegedly defamatory material. A defendant may wish to deny that a particular statement referred to the plaintiff; he may wish to place in issue whether a particular passage was *prima facie* defamatory; he may wish to plead that certain defamatory allegations were true and that publication was for the public benefit, or contend that they constituted fair comment on matters of public importance. The defendant may wish to raise differing defences to the different respects in which the plaintiff contends it has been defamed in an article. Until the defendant knows precisely what charges it has to meet, as it were, it is hardly in a position to meaningfully defend itself.

The particular respect or respects in which the plaintiff has been defamed also affects the assessment of the quantum of damages which it may ultimately be awarded. Where there is uncertainty in the pleadings about this, that process of assessment is also rendered more difficult both for the defendant and the court. (*See Kritzinger v Perskorporasie van Suid Afrika (Edms) Bpk en `en Andere* 1981 (2) SA 373 (O)). A pleading was held to be vague and embarrassing for failure to indicate how the quantum of damages had been calculated in *Honikman v Alexandria Palace Hotels (Pty) Ltd* 1962 (2) SA 404 (CPD) at 406;

It follows that the defendant is entitled to know what case he has to meet. The precise words complained of or words to the effect should be pleaded. It is not sufficient for a

claimant to say "*there is an article which has been written about me and the contents of that article are defamatory, and I want damages for the defamation."*

The overall conclusion to this whole discourse is that the claimant has to quote the words or more or less those words in his defamation particulars of claim that form the basis of his action as they are written, making reference to which story and at what time they appeared, so as to accurately pinpoint the offending words in order to bring his claim.

APPLICATION OF THE LAW TO THE FACTS

Mr *Mpofu's* point *in limine* is that the appellant`s declaration was defective as it did not set out the specific defamatory words complained of and that the damages were not particularly set out. It is his contention that no cause of action is disclosed in the pleadings. He further submitted that the case that the appellant is presenting before this court is not the one she pleaded *a quo.*

It is imperative, at the outset, to highlight the parts of the appellant`s declaration which are relevant for the determination of this issue; Paragraph 1 and 2 identify the parties with the plaintiff identified as 'a female adult aged 24 years who is an internationally and locally acclaimed model.' Thereafter, the following appears:

"3. On the 26th of February 2016 the defendant`s The Daily News newspaper published an article regarding the Plaintiff which was false, malicious and **injurious to her reputation as a professional model.**

4. The **contents** of the Defendant`s aforesaid newspaper articles were wrongful and defamatory of the plaintiff in that;

4.1 It contained falsehoods claiming that the Plaintiff is HIV positive; and

4.2 She inflicted a certain minor fathered by Collin with the HIV virus through a syringe.

4.3 She further assaulted the minor child by forcing him to drink her urine.

5 As a result of the defamation, Plaintiff has been damaged in her **self-esteem, personal dignity and professional integrity and reputation as a model** and has suffered damages in the sum of US$ 1 000 000.00."

6 Despite demand, and having knowledge that the above allegations were false, the defendant has failed to tender an apology or to retract its false publication and to pay the above-mentioned damages.

WHEREFORE Plaintiff prays for judgment against Defendant (for the) payment of the sum of US$1 000 000.00, being damages suffered by plaintiff **to her reputation** and **dignity** arising out of a defamatory article published by the defendant's newspaper being, The Daily News together with interest thereon at the prescribed rate of 5% per annum from the 26th of February to the date of payment and together with the cost of suit."

In the first place the appellant does not state whether it is the whole article or parts thereof that are defamatory. Although the declaration alleges the meanings that she attributes to the article that was published by the respondent, it does not specify the actual defamatory words published by the defendant that she is complaining of or 'words to that effect'. Instead in para 4 she talks of the **'contents'** of the article.

Further the damages claimed are not particularised. A reading of the declaration shows that even the appellant herself is not sure of her claim. Paragraph 3 talks about injury to her reputation as a professional model. Paragraph 5 refers to damage to 'her self-esteem, personal dignity, and professional integrity and reputation as a model'. In her prayer she prays for 'damages suffered to her reputation and dignity'. She does not tell us how much she is claiming in respect of the various heads she makes reference to.

The respondent, in its request for further particulars, and in its plea required the plaintiff to specify the statements which she alleged were defamatory. Para 3.1 of the defendant`s plea reads:

> "*The article is not attached; Plaintiff does not say what is in the defamatory article. Not only is this bad pleading but constitutes no claim at all against the Defendant."*

This is again repeated in respondent's alternative plea in para 4.1.1 where is stated:

> "There is therefore no basis for alleging any defamation. As in paragraph 3, this is not only constitutes bad pleading but constitutes no claim against the Defendant. On this basis too, the Plaintiff's' claims' must be dismissed with costs on a higher scale of legal practitioner and client scale."

I cite also at some length the appellant`s response to the above request in para 2.1 of the replication which reads as follows:

> *"Attaching the article amounts to pleading of evidence. Paragraph 4 of the declaration clearly demonstrates how the article was defamatory. There is only one article about the Plaintiff on the paper published by the defendant on the 6th of February 2016; which is the reason why Defendant was able to plead on its alternative..."*

The impression created in the above paragraph is that pleadings are filed for the benefit of the parties and not the court. The respondent, if it is magnanimous, might pore through its archives and find the article. The question that then arises is how the court is expected to deal with the matter at pre-trial conference, for example, before the article is produced in evidence. In any event, as was stated in *Khemlani Mart Limited & Anor supra,* it is not for the defendant to supply the alleged defamatory statement but the claimants who are alleging defamation.

Mr *Zhuwarara,* for the appellant argued that the defects in the declaration were cured by the leading of evidence at trial and where that happens the claim cannot be dismissed. He relied on one of the leading cases on pleadings of *Shill v Milner 1937 AD 101* which is authority for the proposition that omissions in pleadings could be widened or cured by evidence. It held that an appeal tribunal is entitled to go beyond the pleadings where the deficiency in the issues have been traversed in evidence. Mr *Zhuwarara* submitted that this Court cannot ignore how the court *a quo* dealt with the dispute and found that the requirements of defamation had been established.

The court *a quo* was alive to the issue of the defective declaration. It had this to say:

> "The claim, as formulated in both the summons and declaration is stated as one for damages to the plaintiff's dignity and reputation. These are two separate causes which would require that the amounts be distinctly stated. Both the summons and declaration do not state what portion of the amount is for damage to dignity and what portion is in respect of damage to reputation. The plaintiff's declaration is so inelegantly drafted that it does not even identify the portions of the article complained of which are alleged to be defamatory or impairing the dignity of the plaintiff; neither does it state the manner in which it is alleged the plaintiff was defamed or her dignity was impaired. There is a series of cases from this jurisdiction in which it has been repeatedly stated that in a claim such as the one in *casu* the plaintiff must identify the portions of an article complained of which form the basis of his or her claim. It is not enough for the plaintiff to simply make a general reference to the article as a whole. Such a declaration would be excipiable for being vague and embarrassing. Further, unless the plaintiff is relying on plain defamation where the words complained of are per se defamatory, it is for the plaintiff's declaration to identify the defamatory meaning or the "sting of the charge" which is being relied upon or where the plaintiff relies upon as *innuendo*, the facts upon which the secondary meaning attributable to the words complained of. This was not in this case. Be that as it may, the defendant in this case proceeded to plead to the claim as presented by the plaintiff even though the plea noted the deficiencies in the pleading and pointed these out as follows in para 3.1 (and also in para 4.1.1) of the plea:" (The declaration) does not say what it is in the article which is defamatory. Not only is this bad pleading but constitutes no claim at all against the defendant." The plaintiff was taken to task during cross-examination about the manner in which her declaration had been drafted, a matter that ought to have been raised by way of exception."

Despite making the above pertinent remarks the judge *a quo* decided to proceed with the matter on the basis that the respondent had not excepted to the pleading. The court

could have dealt with the issue of the defective pleading first as it was raised as the defendant's main defence in its plea rather than sanitize the defective pleading. It is the duty of litigants or their legal practitioners to formulate proper pleadings. It bears repeating what Makarau JP (as she then was) said in *Chifamba supra;*

> "Legal practitioners are urged to read on the law before putting pen to paper to draft pleadings in any matter so that what they plead is what the law requires their clients to prove to sustain the remedy they seek."

Regarding the quantum of damages Mr *Mpofu,* in his reply, observed that Mr *Zhuwarara* had not made any submissions regarding how the appellant was defamed and the quantum of damages being claimed under each head. He submitted that that objection remained unanswered. Consequently there was no claim for defamation damages. This defect cannot be remedied by evidence.

Mr *Mpofu* is correct in his observation. Mr *Zhuwarara* did not make submissions on the second part of the respondent's objection. One can understand his invidious position. The dangers of proceeding on the basis of such a nebulous pleading became apparent in the appellant's evidence. The following excepts say it all:

At p101

Q Which para says you are HIV Positive?

A It is insinuated.

Q Where does the article say you were HIV Positive?
A By merely saying the child is now HIV Positive.
Q You are deducting. There is nowhere it states that you were HIV Positive.
A I disagree.
Q Are you aware that in your claim you are supposed to state what is defamatory.
A I am not aware.
Q This is not in your summons and declaration?
A I thought by summarizing.
Q The declaration para 4.2 says she infected the child in a syringe.
A Yes.
Q Show me in the article where para 4 appears.
A **(No answer)**

Q Where in the daily news does article say she forced the son to drink her urine?
A **(No answer**)
Q We are in court on the basis of those 3 facts alleged.
A Yes
Q Not on the basis of the whole article.
A I do not agree.
Q When you file your papers in Court you tell the Court your basis for approaching the Court.
A I do respect what you are saying.

Further down on p102 the following except:

Q In your declaration you did not even attach the article.
A You already had the article.
Q Neither did you say in your declaration that what the Daily News said shows that you are cruel, of loose morals *etcetera.*
A That is why we are here in court.
Q Defendant states that the story was wholly based on your court appearance.
A I do not agree with that.
Q The whole article is a repetition of the court proceedings.
A I do not agree, your publication was not as in the state papers.
Q Is that the only sentence-the fact that the child was infected- that you ascribe to Daily News.
A You were saying that. Yes, it is the only sentence.
Q Is that the only sentence?
A It is the only sentence that changes the accuracy of the article.
Q So you have no problem with the whole article.

A I have a problem with the headline.

At p103 the following exchange took place

Q How is that statement defamatory.
A I am not sure.

And finally at p110 to p112:

Q What is your basis for claiming $80 000.00
A Based on what I felt, my financial injury, reputational injury, professional injury, what I went through psychologically and physically. Financially my twin – sister who works with me was also affected; my social standing discrimination, humiliation and embarrassment.
Q Your summons has no claim for financial loss.
A When I say professional loss.
Q From the $80 000 how much are claiming for the financial loss.
A $40 000.
Q Reputation.
A There is no monetary value. I cannot put a figure.

Q Professional injury.
A I cannot say.
Q Where in your summons are you claiming for professional injury?
A Read para 5).
Q How much?
A I did not rate it.
Q How much of the $40 000 is the loss to your sister?
A I did not rate it.
Q Answer the question.
A I stated the figure.
Q Social standing.
A No figure.
Q Stigmatisation.
A I did not put them in a particular order.
Q Discrimination.
A Same answer.
Q Humiliation, embarrassment.
A No answer.
Q Why do the 10 heads not in your claim?
A I am testifying to prove.
Q So the claim includes what your twin-sister felt.
A Yes.
Q So you are also claiming on behalf of your twin – sister.
A Yes.
Q So if the court grants you $80 000 how much will you give your twin-sister.
A It will be up to us.

The appellant was all over the place as she was not guided by her declaration which had not been properly formulated. This defeats the argument advanced by Mr *Zhuwarara* that the defective pleading was cured by evidence.

The court *a quo* was alive to the defective nature of the pleadings before it but nevertheless decided to hear the matter. The defects in the appellant`s declaration were, in my view, fatal and rendered the proceedings a nullity. As was correctly submitted by Mr *Mpofu* there was no cause of action for which the jurisdiction of the court could be invoked. The court *a quo* should not have delved into the merits of the matter.

In the result, I find that the point *in limine* raised by the respondent has merit and hereby uphold it. In view of this finding it will not be necessary to determine the merits of the matter.

The parties were requested to file supplementary Heads of Argument to address the question of how the court would dispose of the appeal if it upheld the point in *limine*. These were duly filed and the court is grateful for the assistance.

Mr *Mpofu* submitted that should the court uphold the point in *limine* it ought to dismiss the appeal for the following reasons;

a. Upholding a point in *limine* means the appellant would have failed to sustain the appeal and the court ought to afford relief which is consistent with the failure of an appeal.

b. As the judgment of the High Court was a dismissal of the claim, although on a different basis, the success of the point in *limine* means that the claim remains dismissed. It is competent for this court to dismiss a claim on a different basis than relied upon *a quo*. He relied on the authority of C*hidyausiku* v *Nyakabambo* 1987 (2) ZLR 119 (S) at 124(C).

c. The defect addressed by the point in *limine* is that the claim is insufficient in that it does not comply with the substantive requirements of the claim. There would be no cause of action pleaded and this makes a dismissal of the claim competent.

d. Although a full trial was conducted the evidence led establishes nothing as it was led contrary to the law.

He further submitted that s 22 (1) of the Supreme Court Act (*Chapter 7; 13*) (The Act) allows this Court, on appeal, to confirm the judgment of the High Court. The point in *limine,* in effect, seeks confirmation of the court a quo's judgment which was a dismissal.

Mr *Mpofu* further contended that upholding the point in *limine* must yield an order in favour of the respondent. It is trite that a dismissal of a matter is a judgment in favour of a respondent.

He concluded by praying for dismissal of the appeal with costs.

Per contra the gravamen of Mr *Zhuwarara*'s argument was that if the present objection had been raised *a quo* it would not defeat the appellant's claim. It would have been raised in an exception and an exception forces an amendment and does not in itself defeat a claim.

I agree entirely with the position put forward by Mr *Zhuwarara.* If an exception had been properly taken, it is trite that a claim should not be dismissed on an exception where it is possible that the party affected may be able to allege further facts that would disclose a cause of action. See *Adler* v *Elliot* 1988 (2) ZLR 238 (SC) at 292. Such party is given an opportunity to amend its claim. The principles advanced by Mr *Mpofu,* in argument, would have been correct if the appeal had been determined on the merits. In *casu* the court resolved

the appeal on the basis of a procedural issue. It did not delve into the merits of the matter. It cannot dismiss the claim.

In circumstances such as these, the Supreme Court or a Judge of the Supreme Court has the authority to invoke review powers in terms of s 25 (2) of the Act. In my view, this is a proper case for the invocation of this provision. See *Zimasco v Marikano 2014 (1) ZLR 1*.

As for costs, there is no reason to depart from the norm that costs should follow the cause.

Accordingly, I make the following order;

1. The matter is struck off the roll with costs.
2. In the exercise of this Court's review powers under s 25(2) of the Supreme Court Act [*Chapter 7:13],* the proceedings of the High Court in HC 2579/16 are hereby set aside and substituted with the following:

"The plaintiff's claim is hereby struck off the roll with costs."

GUVAVA JA : I AGREE

CHITAKUNYE JA : 1 AGREE

Chimwamurombe Legal Practice, appellant's legal practitioners

Mbidzo, Muchadehama, Makoni, respondent's legal practitioners