AMBASSADOR AGRIPPA MUTAMBARA
and
ESTHER MUTAMBARA
versus
CONSTANTINE CHIMAKURE
and
ALPHA MEDIA HOLDINGS PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 12 May and 9 November 2016

Opposed Application

T. Zhuwarara, for the applicant
F. Mahere, for the respondent

CHIGUMBA J: The plaintiffs brought an action against the defendants in terms of the *actio injuriurum* for defamation damages. That claim has been met with an exception and in the alternative, an application to strike out. The applicants (defendants/excipients) take the position that the plaintiff's summons and declaration does not disclose a cause of action against them, and that it is vague and embarrassing and ought to be struck out, or found to be patently bad and dismissed if the exception is upheld.

The background to these alternative applications is as follows: The plaintiffs are a husband and his wife. The first defendant is cited in his official capacity as the editor of the *Newsday Newspaper*, while second defendant is cited as the owner, publisher, printer and distributor of the *Newsday Newspaper*. Plaintiffs issued summons as against the defendants on 19 May 2014, claiming payment of USD$200 000-00 plus interest thereon at the prescribed rate calculated from 18 March 2014 to the date of payment in full, as well as costs of suit. The plaintiffs aver in the declaration to the summons that: on or about 5 July 2012 Francis Mhere

wrote a letter to the first plaintiff in which he complained about the second plaintiff's conduct of meddling in a custody dispute between him and his ex-wife, Usual Mutema. The letter urged the first plaintiff to reign in his wife, the second plaintiff. The contents of the letter were not true, more particularly the allegation that the second plaintiff had bussed in several people to give political weight to the custody dispute and bragged about her political influence and threatened to use it against Francis Mhere.

The letter contained an allegation that the second plaintiff was forcing the minor child to live in unpleasant conditions. The statements were untrue, therefore wrongful and defamatory to the plaintiffs' reputations. In July 2012 Francis Mhere took the letter to the defendants' newspaper where it was published. The plaintiffs were exposed to ridicule as a result of the publication of the letter by the defendants. The letter was published without verification, to the plaintiffs' detriment and mortification. The first plaintiff's office of an ambassador was exposed to ridicule. On 10 July 2014, the defendants filed an exception and application to strike out, premised on the averments that: The plaintiffs' summons did not disclose a cause of action because the first defendant as cited did not exist, rendering the proceedings against him a nullity, no cause of action is set out in respect of the first plaintiff: the second plaintiff does not aver that the publication of 6 July 2012 was made of and concerning her.

It was averred, secondly, that the summons is vague and embarrassing because the exact words which were published were not set out in the plaintiffs' declaration. Lastly the application to strike out is brought on the premise that the declaration tells a story which is superfluous, irrelevant, and argumentative, which is a contravention of the rules of this court. The defendants pray that the exception be upheld and the plaintiffs claim be dismissed with costs, or alternatively, that the plaintiffs declaration be struck out, with costs. The defendants' heads of argument start off with the submission that, for a cause of action to be valid, it must be brought against an existent party. See *Gariya Safaris (Pvt) Ltd* v *van Wyk*[1], where the court said that:

> "To try an action in which there is only one party is an exercise in futility. There were no two parties to give rise to the existence of a cause of action between them. There was nothing to be

[1] 1996 (2) ZLR 246 (HC) It was held that;- "A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names in the summons as being those of the defendant, the summons is null and void ab initio".

substituted by the respondent as a new judgment debtor". See also *JDM Agro Consult & Marketing (Pvt) Ltd* v *Editor of the Herald Newspaper & Anor*[2]

It was submitted that the first defendant is not a party and that therefore no cause of action can exist against it, which renders the proceedings invalid and excipiable. It was submitted on behalf of the plaintiff that: As a general principle, every natural person who has full legal capacity *(legitima persona standi in judicio)* may sue and be sued. See *Malan* v *van Rooyen* 1929 OP 25, *SA Coolong Services (Pty) Ltd* v *Church Council of the Full Gospel Tabernacle* 1955 (3) SA 541 (D) @ 543 C. It was submitted that legal capacity is presumed in respect of parties who are natural persons where there is nothing to indicate lack of legal capacity.

It was contended on behalf of the plaintiffs that the manner in which a natural person ought to be cited is provided for in r 11 (a) of the rules of this court, which requires that a summons contains the full name of the defendant. The purpose of this rule is to 'ensure that the parties are described in such detail as is necessary, first to identify them and secondly, to show that each is capable of suing and of being sued…". See *Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa* 4th ed @ p 398. The position taken on behalf of the plaintiffs is that the first defendant is correctly cited by his first name and then further described as the editor of the Newsday newspaper. This court accepts that the line of cases relied upon by the defendants in support of the exception relates to matters where the editor of the newspaper is cited as such and not referred to by his given name first. *JDM Agro Consult* v *The Editor Herald* (*supra.*) The court accepts as correct, the plaintiff's contention that even the case of *Gariya Safaris (supra)* is distinguishable from the circumstances of this case for the reason that the company in that case did not exist. It had no capacity to sue or to be sued. Accordingly, this ground of the exception be and is hereby dismissed as being ill conceived and short on merit.

[2] 2007 (2) ZLR 71; the defendant in that case had been cited as 'the editor of the Herald' and the court said that;- "The editor of a newspaper is the person responsible for the editorial content of such newspaper. It is a position that is occupied for the appropriate period by such individual employed in that capacity. It is therefore an occupation wherein the occupant can change from time to time. It is not a natural or a legal person and there is no person identified by that name. The citation of the defendant in that form is therefore irregular…there was no summons for them to plead to given that there were no persons answering to the names on the summons. They cannot be identified as such. This is not a mis-description which can be amended by the alteration of names on the summons, nor is it a substitution. You cannot amend or substitute something which does not exist.

The second objection raised on behalf of the defendants is that it is essential in a claim for damages that the plaintiff alleges that certain identified defamatory words were published concerning him. See *SA Associated Nespapers Ltd* v *Estate Pelser*[3], *Amlers Precedents of Pleadings* 7th ed, pp 162-163, *A Neuman CC* v *Beauty Without Cruelty International* [4].The test is objective. Did the plaintiff s allege that certain identified defamatory words were published of and concerning them? It is common cause that the published words are not set out on the face of the summons or in the declaration. It is common cause that the letter which contains some of the published words was written of and concerning the second plaintiff. A 'cause of action' is defined in the case of *Peebles* v *Dairiboard Zimbabwe (Pvt) Ltd* [5] where the court stated that:
"Simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". See also *Patel* v *Controller of Customs & Excercise*[6], *Denton* v *Director of Customs & Exercise*[7], *Hodgson* v *Granger & Anor*[8], *Dube* v *Banana.*[9]A cause of action in my view, arises when all the relevant facts and information required to prove a case and establish all its elements are present in space and time, including factors such as;-

(a) Knowledge of the action or omission which creates liability.
(b) The identity of the offending party.
(c) Actual prejudice or injury.

It was submitted on behalf of the defendants that if no cause of action exists then an exception must be taken. See *Edwards* v *Woodnutt NO*[10]where it was held that:

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[3] 1975 (4) SA 683 (A)

[4] 1986 (4) All SA 524 ©

[5] 1999 (1) ZLR 41 (H)

[6] 1982 (2) ZLR 82 (H)

[7] HH216-89

[8] HH133-91

[9] 1998 (2) ZLR 92 (H)

[10] 1968 (4) SA 184 (R)

> "The practice of this court is to employ the procedure of excepting for those objections which go to the root of the declaration and allege that the declaration does not disclose a cause of action at all".

In the case of *Santos & Ors* v *Standard General Insurance Co Ltd & Anor*[11] it was observed that;-

> "It is trite law that an exception that a particular claim discloses no cause of action, cannot succeed unless it goes to the root thereof, that is to say unless the upholding of the exception would have the effect of destroying it altogether". *Dharumpal Transport Pty) Ltd* 1956 (1) SA 700 (AD @ p 706.

The Plaintiff's response to this submission was that it was contended on behalf of the plaintiffs that the summons did refer to the contents of a letter in which it was stated that:-

(a) The second plaintiff was meddling in a custody issue (para 5 declaration)
(b) The second plaintiff bussed in several people during the custody hearing to give political weight to the fight for the minor child (para 6 declaration)
(c) The second plaintiff dragged the author of the letter to court and said she would use her political influence to make sure that the case was protracted (par 6 declaration)
(d) The second plaintiff was forcing the minor child to live in unpleasant conditions (par 7 declaration)

In par 7 plaintiffs pleaded that all these allegations were untrue, and in para 9, that the plaintiffs published the letter without establishing the veracity of the allegations. It was contended that the "…test to be applied in determining an exception is as follows; The excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular, any document on which it is based, could bear no cause of action or defence, failing this, the exception had to be dismissed". See *Pete's Warehousing & Sales CC* v *Bowsink Investments CC*[12]. The court accepts that the plaintiff's summons and declaration is not excipiable on this basis. It cannot be said that there is no cause of action at all because the contents of the letter form the basis of the plaintiffs' claim.

[11] 1971 (3) SA 434 (O) @ 472

[12] 2000 (3) SA 833 @ 834 H-I

The court also finds unsupportable, the contention raised on behalf of the defendants that the summons and declaration does not contain a cause of action against the first plaintiff. The first plaintiff complained that the contents of the letter suggest that he needed to restrain his wife and that he was allowing her to run amock. It is indeed correct that paras 4, 11, 14 and 15 of the plaintiffs' declaration establish a cause of action in relation to the first plaintiff.

Another ground on which the exception was taken is that the claim is vague and embarrassing for the reason that the plaintiffs merely aver that the article was published on 6 May 2012, and there is no corresponding averment that the article injured the plaintiffs and was false. There is no specific setting out of the alleged offending words which were published, which is contrary to the requirements of the pleadings in a defamation claim. The defendants relied on the case of *International Tobbacco Co of SA Ltd* v *Wollheim*[13] in support of this proposition, where the court stated that:

> "It appears to be clear that the plaintiff in his declaration must set out the words alleged to have been used and may not content himself with giving their effect. It is for the court to decide what is their effect". *Foodworld Stores Distribution Centre (Pty) Ltd* v *Allie* [14].

It was submitted further, that, it is trite that failure to make reference to the actual words published renders the declaration vague and embarrassing. In the case of *Deedat* v *Muslim Digest*[15] the court had this to say:

> "The gravamen of this complaint is that the defendants are embarrassed in not knowing what imputations the plaintiff claims to be defamatory and that the words or statements relied upon should be pointed out".

The defendants do not know which words are defamatory according to the plaintiff and this is 'embarrassing' to them. See *National Union of Distributive Workers* v *Cleghorn & Harris Ltd* 1946 AD 984, *Sutton* v *Brown* 1926 AD 155 @ 163, *Demmers* v *Wylie & Ors* 1980 (1) SA 835 @ 842D. In the alternative the objection taken is that the declaration is argumentative, superfluous, irrelevant, and is crafted in breach of the rules. The declaration tells a story, it is not

[13] 1953 (2) SA 603 (A) @ 613 H

[14] 2002 (3) All Sa 200 ©

[15] 1980 (2) SA 922 (D) @ 928

a pleading. See *Masukusa* v *National Foods Ltd & Anor* [16], *Taruona* v *Zvarevadza & Ors* HH 87-12, *Mwayisa* v *Jumbo & Ors* HH 3-10, *Morris* v *Morris & Anor* HH71-11.

Rule 99 (c) of the rules of this court provides that:

> "A pleading shall-
> …
> (c) contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are proved". It is trite that a pleading which is irrelevant must be struck out. See *Stephens* v *De Wet* 1920 AD 279 @ 282, *Golding* v *Torch Printing & Publishing Co (Pty) Ltd & Ors* 1948 (3) SA 1067 (C) @ 1090."

It is my considered view that the defendants' remedy lies in an application for further particulars if they are of the view that the exact words relied upon by the plaintiff's ought to form part of the summons and declaration. This would cure the defendants' embarrassment, if any. An exception which goes to the root of the mater and is calculated to divest the plaintiffs of any viestige of a cause of action is ill conceived in these circumstances, and inappropriate. We find merit in the submission made on behalf of the plaintiffs that the case law which is relied upon by the defendants is distinguishable from the circumstances of this case and inapplicable. That case implies that the court must exercise its discretion in the circumstances of the case before it, and in this case, it is my view that the defendants are not embarrassed by the plaintiff's claim to the extent that the plaintiff's case should be dismissed by the upholding of the exception. Rather than delay the resolution of this matter further, the court directs that the plaintiffs set out the exact words that they allege to be defamatory as they appear in the letter which they refer to in the declaration.

In the result, it be and is hereby ordered that;-

1. The exception is dismissed.
2. Costs shall remain in the cause.
3. The plaintiffs shall within a period of ten working days from the date of this order furnish the defendants with the particulars of the exact words which they rely on as being defamatory.

[16] 1983 (1) ZLR 232 (H) @ 236F-237A where it was held that;-"Procedure by way of notice of motion, though often convenient, is far less disciplined than procedure by action. A good novelist can write a series of exciting affidavits and at the end claim large sums of money. It takes a lawyer to draw a declaration".

Gill, Godlonton & Gerrans, applicants/excipients' legal practitioners
Sawyer & Mkushi , respondents/ plaintiffs'' legal practitioners