IAN FARAI MASAMBA
and
IGNATIUS MASAMBA
versus
DIRECTOR – ZIMSEC

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 16 November 2015 and 16 December 2015

Opposed Matter: SPECIAL PLEA & EXCEPTION

K Kachambwa, for the plaintiff
I Masamba, for the 1st respondent

MUNANGATI-MANONGWA J. The first and second plaintiffs in this matter are son and father respectively and are self-actors. The plaintiffs issued summons against the defendant claiming damages for what they termed "professional negligence for mental suffering" in the sum of US$1200 000-00. In the very summons, the first plaintiff went on to claim against the defendant payment of $1400 000-00 for what he termed "Defamation-Libel"**.** The defendant entered appearance to defend and raised two defences being special pleas and an exception to the summons and declaration.

At the hearing, the first plaintiff was not in attendance. The second plaintiff, the father, sought a postponement of the hearing on the basis that the son might have been interfered with by certain perceived political foes, and, he wanted to go and report to the Police. The defendant opposed the application for postponement. Service of the notice of set-down having been effected on the plaintiffs and second plaintiff having confirmed that he had informed his son of the hearing date a day before and also texted a message to him, the court refused to postpone the matter.

As the first plaintiff was in default, the defendant applied for dismissal of the plaintiff's claim, which application was granted. The court proceeded to deal with the second plaintiff's claim.

The facts of the matter may be summarised as follows:

The first plaintiff wrote 'O' Level and 'A' Level examinations in 2006 and 2008 respectively. He was not satisfied with the results he got. The first plaintiff once again sat for another 'A' level examination in 2009 and got poor results. The first and second plaintiffs approached the court for relief. Below is the claim instituted as stated in the summons:

> "Professional negligence for mental suffering US$1 200 000-00 payable half and half to the first and second plaintiffs and defamation-libel payable to the first plaintiff US$200 000-00 all in all being US$1 400 000-00."

The first plaintiff stated his causes of action as follows:

> " i) breach of contract because the first plaintiff paid exam fees for a fit and proper result and the
> ii) omission or failure to issue fit and proper (or competent) results and the
> iii) unfair and provocative discriminating results in the November 2006 and November 2008 diets which resulted in damage of mental suffering directly as a result of the defendant's carelessness."

The second plaintiff's cause of action is couched as follows.

> "The second plaintiff is suing for the careless and deliberate act by the defendant of having to watch ghastly and inexplicable subtle torture of his son as well as being his home-based tutor being denied his exam results in the specified years in what looked unprincipled political corruption which basically resulted in financial sabotaging circumstances and a forced wastage of money. The second plaintiff was also greatly physically inconvenienced."

It is to these claims that the defendant raised the special plea and exception on the basis that:

1. The claims arising in 2006, 2008 and 2009 had prescribed.
2. There was a misjoinder as the defendant, the Director of ZIMSEC should not have been joined in the proceedings as he had no direct and substantial interest in the dispute. It is the Zimbabwe Schools Examination Council, a body corporate and a separate legal entity which should have been sued and not its Director.

As the first plaintiff's claim had been dismissed with costs earlier, the court was left with the second plaintiff's claim to deal with.

<u>Prescription</u>

Mr *Kachambwa*, counsel for the defendant submitted that: as the plaintiffs alleged that their claims are based on contract and delict, the claims are therefore "debts". He expounded on the scenario as follows:

- For November 2006 examinations, results were received in 2007
- For the November 2008 A level examination, results were received in 2009
- For the November 2009 A level examination, results were received in 2010

That being the factual position, all the claims arising out of complaints pertaining to those results had prescribed as they were subject to the 3 year time limit within which a debt expires. The second plaintiff only conceded that the claim arising out of the November 2006 examination, the results of which came out in 2007 had indeed prescribed. He however argued that the rest of the claims were within the running time limits.

To determine this issue, one has to look to the relevant Act. The Prescription Act [*Chapter 8.11*] not only defines what a debt is, but also clearly states when a debt prescribes. There was never an issue before the court that what was being claimed falls under a debt since the definition covers claims arising from delict, so there is no need to dwell on the definition thereof.

Section 15 (d) stipulates that an ordinary debt (as opposed to specific debts listed in subsection (a) to (c)) prescribes after 3 years.

It is therefore important to consider the period when the clock starts ticking for one to ascertain the duration for which the claim would still be alive.

Section 16(1) of the Act states that prescription shall commence to run as soon as a debt <u>is due</u>. The act further clarifies when a debt can be said to be due.

Section 16 (3) states as follows:

> "A debt shall not be deemed to be due until the creditor becomes aware of identity of the debtor and of the facts from which the debt arises
> Provided that a creditor shall be deemed to have become aware of such identity and of such facts, if he could have acquired knowledge thereof by exercising reasonable care"

The defendant’s counsel submitted that, the second plaintiff’s cause of action arising out of the results of the examinations at issue would start running from the year the result was received. In that regard, the prescription periods for the two remaining claims would be as follows: claim arising in 2009 would be 2012 and the claim arising in 2010 would be sometime in 2013.

I agree with the defendant’s analysis. The claims should have been instituted within 3 years. The second plaintiff knew or was aware of the identity of the debtor and of the facts giving rise to the cause of action such that he had no excuse for failing to institute his claim timeously. This is buttressed by the fact that, the second plaintiff detailed in his declaration the follow ups he made with the relevant authorities during the years 2007, 2008 and 2009. Furthermore, the second plaintiff indicated that he had commenced proceedings in 2012 but had to withdraw the summons as they were fatally defective. This case was instituted on 29 June 2015, 3 years later after the initial proceedings which were withdrawn.

Clearly the second plaintiff’s claim has prescribed. As the prescription period is stipulated by statute, the court has no power to extend the period or condone the delay. The court thus has no choice but to uphold the special plea of prescription raised by the defendant.

MISJOINDER

The defendant had further raised the defence of his joinder, alleging that the defendant being the Director of ZIMSEC should not have been cited in these proceedings, the body itself being duly empowered by statute to sue or being sued in its own right. Counsel for the defendant argued further that, the defendant had no direct and substantial interest in the dispute. Even if an order was to be granted, the defendant would not be required to do something to give effect to the order.

Rule 87 (1) of the High Court rules 1971 makes it clear that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party, the court being enjoined in its discretion to determine the issues or questions in dispute in so far as they affect rights and interests of persons who are parties to the matter.

Sub rule 2 empowers the court at any stage of the proceedings on such terms as it thinks just and either of its own motion or an application

a) Order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party.

In essence misjoinder or non-joinder of a party is not fatal to the cause of action *per se*. It remains intact, as against the necessary parties. The issue of whether the defendant was improperly or unnecessarily cited as a party to those proceedings can only be determined by a further consideration. This is whether that party has a direct and substantial interest in the dispute. In *Burdock Investments (Pvt) Ltd* v *Time bank Zimbabwe Ltd & Others* HH 194/03 particularly at p(s) 5-6 in describing that interest Makarau J (as she then was) remarked that the interest must be such that judgment cannot be carried into effect without adversely affecting the position of the party misjoined or without requiring the party misjoined to do something to give effect to the judgment. The required interest, she explained, must be based on a direct legal relationship between the parties such that the parties must owe each other obligations to the extent that one can compel the other to perform or discharge duties.

The court agrees with defendant's submissions that defendant has no direct or substantial interest in the dispute. As the claim arises out of the issue of *examination* results, the correct body to deal with the matter or to answer the cause would be Zimbabwe School Examinations Council a body corporate capable of suing and being sued in its corporate name. This body is the one mandated by statute to conduct examinations, confer or approve conferment of certificates. The defendant does not have to do something or anything to give effect to the order if it were to be granted. There being no direct legal relationship between second plaintiff and defendant to the extent that one can compel the other to perform or discharge duties, the court finds that it was not necessary to join defendant to these proceedings, in that regard the claim against him is again dismissed.

EXCEPTION

The defendant had also excepted to the plaintiff's summons and the declaration on the grounds that it does not disclose a cause of action either in contract law or in delict. Further it did not comply with rr 11 (c); 99 (c) and 109 of this court's rules. The defendant averred that the declaration is argumentative and sets out historical and evidentiary facts not necessary in a pleading.

As the decision to dismiss the second plaintiff's claim has already been made, the court will briefly deal with this issue.

Rule 11 of the High Court Rules stipulates that every summons shall contain

> "a true and concise statement of the nature, extent and grounds of cause of action and of the relief, or remedies sought in the action."

Rule 99 (c) states that

> "A pleading shall
>
> (c) Contain a statement in 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 to be proved."

A look at the summons itself clearly shows that there is no concise statement of the nature extent and grounds of cause of action and of the relief sought. I fully identify with the defendant's observations.

The declaration which is meant to amplify matters raised in the summons is not only confusing, full of evidence, fraught with allegations against named individuals not party to the proceedings but also contains what seems to be legal research of sorts.

In one instance the second plaintiff seeks to base his claim under delict, (apparent on the face of the summons) and in another instance, in his declaration, he seeks to rely on contract. In both instances the material averments necessary to sustain the claim under the stated branch of law are glaringly absent. In my view, the second plaintiff himself is not clear as to the basis of his claim. The defendant is left at a loss as to what case he has to answer to. Even the relief sought is problematic and not competent at law. One fails to comprehend the claim and relief moreso phrased as "professional negligence for mental suffering US$1200 000-00." This is further compounded by the declaration which brings out all sorts of causes of action all not supported by the material facts. The summons and declaration disclose no cause of action, the claim is bad in law and incurably bad.

In as much as individuals have constitutional rights to bring whatever claims they have to the courts for adjudication, it is necessary to ensure that processes comply with the rules of court and that they are fully and legally informed regarding the decisions to take legal action. This claim borders on abuse of legal process as the second plaintiff on his behalf and that of the first

plaintiff unprocedurally filed numerous voluminous documents at will including amendments to other amendments, and wrote several letters to the registrar which documents had to be read by defendant and the court. Some of the documents did not even make legal sense, a typical example being a notice of withdrawal filed on 10 December 2015, well after this matter had been argued and judgment was being prepared, which notice reads as follows:

> **"**Take notice that 2nd Plaintiff is giving notice to withdraw this matter because the 1st Plaintiff was in default of plea.
> With no order as to costs as 2nd Plaintiff believes the defendant had been barred."

The second plaintiff filed this document on 10 December 2015, well aware that this matter was already awaiting judgment, further, the first plaintiff's claim had been dismissed in court in his presence.

If a litigant is not sure of how to prosecute their rights, recourse should be made to legal representation which is rendered free of charge by certain entities. This is a typical case where the plaintiffs should bear costs on any attorney – client scale as their conduct deserves to be censured.

The following order is granted:

1. The special pleas raised by the defendant be and are hereby upheld.
2. The first and second plaintiffs' claims against defendant be and are hereby dismissed.
3. The first and second plaintiffs to pay defendant's costs on an attorney – client scale jointly and severally, the one paying the other to be absolved.

Dube, Manikai & Hwacha, defendant's legal practitioners
Ian Masamba & Ignatius Masamba, 1st and 2nd plaintiff's legal practitioners