FLORENCE MADAKE
versus
PAMELA MAKONZA
and
DARLINGTON NYABINDE

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 20 October and 21 December 2022

**Exception**

Mr *T Tabana*, for the excipients / defendants.
Mr *J J Chirambwe*, for the plaintiff.

DEME J: The plaintiff instituted an action against the defendants seeking an order for defamation damages in the sum of US$65 000. According to the plaintiff, the second defendant defamed her on 27 December 2021 through Whatsapp and on 6 June 2022 where the second defendant allegedly uttered defamatory words in the presence of church leaders.

After giving notice to except to the plaintiff's Summons and Declaration on 27 July 2022, on 11 August 2022, the defendants filed an exception to the Summons and Declaration. The basis for the exception was that the Summons and Declaration do not disclose a valid cause of action and that the plaintiff's pleadings are vague and embarrassing.

The plaintiff raised numerous points *in limine* to the exception. Firstly, the plaintiff's counsel argued that the exception ought to have been filed within ten days from the date of being served with the Summons and Declaration. The plaintiff's counsel, Adv. Chirambwe referred the court to R 37(3) of the High Court Rules, 2021 (hereinafter called "the High Court Rules") which provides as follows:

> "(3) Where the defendant has delivered notice of appearance to defend, he or she may, subject to r 39, within ten days after filing such appearance, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out or special plea."

On the contrary, the excipients' counsel submitted that the excipients are entitled to a total period of twenty days in accordance with R 12(3) as read with R 12(4) of the High Court Rules, 2021. More precisely, R 12(3)-(4) provides as follows:

> "(3) The summons shall call upon the defendant, if he or she disputes the claim and wishes to defend it, to give notice of his or her intention to defend with the registrar within the time specified therein.
>
> (4) thereafter, if the summons is a combined summons and declaration, the defendant shall, within a further 10 days after giving such notice to defend, deliver a plea (with or without a claim in re-convention), an exception or an application to strike out."

I do agree with the submissions for the counsel of the excipients. The Rules should not be read in isolation but they should be read together. It is apparent that R 37(3) of the High Court Rules is subject to R 12(3)-(4) of the High Court Rules. According to the return of service filed, the defendants were served with copies of summons and declaration on 19 July 2022. The defendants filed their notice of appearance to defend on 21 July 2022. The time or the first ten day period contemplated in R 12(3) expired on 2 August 2022 while the second period of ten days contemplated in R 12(4) expired on 18 August 2022. The exception was filed on 11 August 2022 and served upon the plaintiff on 12 August 2022. The filing and service of the exception were done well before the expiration of the *dies induciae*. This point *in limine* is therefore meritless. It consequently stands dismissed.

The plaintiff's counsel also argued that the excipients used the wrong Form. The counsel referred the court to the provisions of R 42(2) of the High Court Rules which is as follows:

> "(2) A plea in bar or abatement, exception, application to strike out or application for particulars shall be in the form of such part of Form No. 11 as may be appropriate with the necessary changes and a copy thereof filed with the registrar and In the case of an application for particulars, a copy of the reply received to it shall also be filed."

The counsel for the excipients responded by highlighting that the Rules allow the use of Form 11 with modifications. The appropriate part of Form 11 is as follows:

"The plaintiff /defendant hereby excepts to the defendant's plea/plaintiff's declaration as (herein insert the full grounds of exception)

WHEREFORE the plaintiff / defendant prays for judgment in his favour, with costs of suit."

The exception filed begins with the following words:

> "TAKE NOTICE THAT the first and second defendants except to plaintiff's summons and declaration;"

The excipients have made some modifications to the appropriate portion of the Form. These modifications do no harm to the plaintiff. The counsel for the plaintiff did not advance any prejudice suffered as a result of the modifications. In my view, the modifications did not vary the content and scope of the Form.

Further, R 36(17) of the High Court Rules discourages the raising of technical objections for a party's failure to comply with the particular form. More precisely, Rule 36(17) of the High Court Rules provides as follows:

> "No technical objection shall be raised to any pleading on the ground of any alleged want of form."

Consequently, I therefore see no value in this point *in limine*. Thus, this point *in limine* must be dismissed.

The plaintiff also raised a further point *in limine* to the effect that the letter addressed to the plaintiff's legal practitioner calling upon the plaintiff to attend to the irregularity did not give the plaintiff the required period of twelve days contemplated by R 42(3) of the High Court Rules. In particular, R 42(3) of the High Court Rules provides as follows:

> "(3) Before filing any exception to a pleading or making a court application to strike out any portion of a pleading on any grounds, the party complaining of any pleading shall, within the time allowed for filing a subsequent pleading, by written letter to his or her opponent state the nature of his or her complaint and call upon the other party to remove the cause of the complaint within twelve days of the complaint."

Although the letter dated 27 July 2022 did not specifically provide for twelve days within which the plaintiff was called upon to respond, the exception was not filed before the expiry of twelve days. Thus, the plaintiff was given sufficient time to rectify the alleged irregularities. I am of the view that the plaintiff suffered no prejudice as she was afforded enough time. The purpose of R 42(3) of the High Court Rules is to ensure that the plaintiff does have ample time to correct the alleged defects. Resultantly, this point *in limine* has no merit and must therefore be dismissed.

The plaintiff criticised the exception on the basis that prayer for the exception which calls for the dismissal of the plaintiff's action is incompetent as this is contrary to R 42(10) of the High Court Rules which provides as follows:

> "(10) At any stage of the proceedings the court may—
> a) order to be struck out or amended—
> (i) any argumentative or irrelevant or superfluous matter stated in any pleading;
> (ii) any evasive or vague and embarrassing or inconsistent and contradictory matter stated in any pleading;
> (iii) any matter stated in any pleading which may tend to prejudice, embarrass or delay the fair trial of the action;
> (b) order either party to furnish a further and better statement of the nature of his or her claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars."

The excipients' counsel correctly argued that the prayer only represents the wish list subject to amendment by the court. This court has power to amend the relief by a party appearing before it. The point *in limine*, therefore lacks merits. Accordingly, I dismiss this point *in limine*.

It was submitted on behalf of the plaintiff that the exception is bad at law as the excipients attached the letter to the exception. While this may make the exception undesirable, I do not agree that this should make the exception fatally defective. In the interest of justice, the court does have powers to condone minor infractions in light of the fact that no prejudice is alleged to have been suffered as a result. The court's power to condone is enshrined in Rule 7 of the High Court Rules. This was previously provided for in Rule 4C of the repealed High Court Rules. Reference is made to the case of *Telecel Zimbabwe. (Pvt) Ltd* v *Postal and Telecommunications Regulatory Authority of Zimbabwe and Others*[1], where the court made the following remarks:

> "I take the view that the rules of court are there to assist the court in the discharge of its day to day function of dispensing justice to litigants. They certainly are not designated to impede the attainment of justice. Where there has been a substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in Form 29B when they are set out in abundance in the body of the application, is to worry more about form at the expense of the substance. Accordingly, by virtue of the power reposed to me by r 4C of the High Court Rules, I condone the omission."

[1] HH446/15.

I fully associate myself with the views of the court in the case of Telecel Zimbabwe (Pvt) Ltd (*supra).* Resultantly, the point *in limine* concerned is dismissed.

The plaintiff's counsel further argued that the exception does not disclose valid grounds of exception. He further submitted that the exception is not clear and concise in compliance with the provisions of R 42(6) of the High Court Rules. According to the plaintiff's counsel, the exception itself seems to attack the Whatsapp messages on the basis that the same cannot constitute a valid cause of action.

The counsel for the excipients submitted, through oral submissions, that the plaintiff's pleadings lack precision and clarity in meaning in so far as they fail to identify the actual words allegedly uttered by the excipients. On the other hand, the counsel for the plaintiff argued that this was not necessary. He further contended that it was sufficient to allege that innuendo occurred as a result of the defamatory words uttered.

In their exception, the excipients, in para 1, stated:

> "There is no valid cause of action in the summons. The allegations in the summons express a rambling displeasure over some Whatsapp posts which do not constitute a known cause of action at law. The summons is not clear and concise."

Further, para 4 of the plaintiff's Declaration states as follows:

> "On 27 December 2021, the second defendant posted on the church group defamatory material to the public through the whatsapp group platform which words denoted to an average person that the plaintiff had unsuccessfully tried to derail him and the first defendant from successfully attending their own wedding. The words connoted that the plaintiff was a disruptive person who sought to ruin the wedding procession of the defendants."

A closer analysis of para 1 of the exception reveals that this paragraph has got three sentences all of which must be construed and read together to get the meaning of the exception. The last sentence of para 1 quoted above suggests that the summons is not clear and concise. If this third sentence was missing from para 1 of the exception, one would have been persuaded to have the opinion and understanding of the plaintiff's counsel that the exception is challenging the source of the defamatory words. Thus, the third sentence in para 1 of the exception is further developing the argument that the summons does not disclose a valid cause of action. If, indeed, the excipients were challenging the source of defamation, that argument could have been a misplaced argument. Cause of action has been defined in a

number of cases. In the case of *Abrahams & Sons* v *SA Railways and Harbours*[2], the court defined the cause of action in the following way:

> "The proper meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action."

In my view, it is necessary that the actual words allegedly uttered be specified. It should be easy for the plaintiff to pick the actual words uttered from the Whatsapp communication. The messages kept in such form are more durable. The specification of the words allegedly uttered becomes more compelling in light of the fact that the plaintiff, in the summons and declaration, seeks an order that the defendants should retract the defamatory words. It is difficult to retract statements which have not been unambiguously stated. Para 2-3 of the summons as read with paragraph (b) of the prayer in the Declaration are as follows:

> "An order that defendants shall cause withdrawal of all defamatory publications made to the Plaintiff on the Whatsapp group platform published on the 27th of December 2021 and on 2 June 2022."

It is apparent that the summons as amplified by the declaration lacks clarity. They do not disclose the actual words allegedly uttered. By failing to disclose such words, they fail to disclose the cause of action. Resultantly, the summons and declaration lack averments necessary to sustain the action as averred by the excipients in paragraph 4 of the exception. One cannot be expected to retract unspecified words. If the excipients were to plead to the present summons and declaration, they will be prejudiced and embarrassed as they do not know what statements they are going to withdraw. The specification of the words allegedly articulated will enable the excipients to properly plead to the summons and declaration. If the words allegedly expressed are not clearly stated, this will delay the fair trial of the action. I am of the view that the exception complies with the provisions of R 42(6) of the High Court Rules as the exception is clear and concise. Consequently, the point *in limine* is without merit and is accordingly dismissed.

Having dealt with all points *in limine*, it is pertinent at this moment to warn legal practitioners who unnecessarily detain the court by raising meritless points *in limine* not capable of resolving the matter before the court. I fully subscribe to the views of MATHONSI

[2] 1933 CPD 626.

J, as he then was, which he expressed in the case of Telecel Zimbabwe (Pvt) Ltd (*supra)* where he propounded the following comments:

> "Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence *viz-a-viz* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propiis."*

Having disposed of the points *in limine*, the court will now shift its attention to the merits of the exception. In addressing the points *in limine*, I extensively addressed the merits of the exception. It may therefore be unnecessary to regurgitate some of the issues. As highlighted above, the defendants will plead in darkness if the words allegedly published via whatsapp are not specified. It is in the interest of justice that the defendants be sufficiently informed of the words allegedly emitted via whatsapp.

Additionally, the court made an observation that the role of the first defendant is not clearly specified in the summons and declaration. In para 4 and 7 of the declaration, only the second defendant is alleged to have pronounced the defamatory words. The provisions of para 4 of the plaintiff's declaration has been highlighted before. Paragraph 7 of the declaration is as follows:

> "On 6 June 2022**,** a senior church member called a meeting and invited both the plaintiff and the defendants to attend the meeting. Both parties attended the meeting. A few minutes into the meeting, the second defendant became emotionally charged and uttered these words to the effect that the plaintiff was an old crook who conned people for a living. The statements were uttered in the presence of the plaintiff's son and cast aspersions on the plaintiff's dignity and character."

Despite this lack of plainness of the first defendant's role, the plaintiff is seeking an order that all the defendants must retract the defamatory words. It is difficult for the first defendant to plead under such circumstances when there is no clear allegation levelled against her. This makes the summons and declaration vague and embarrassing. The counsel for the plaintiff admitted that this was an error of drafting which may be cured through an amendment of pleadings.

On the basis of the reasons highlighted above I find no reason in dismissing the exception which was properly taken. The summons and declaration do not disclose sufficient facts that may entitle the plaintiff's claim to fully succeed. Further, if the summons and declaration are not amended, they remain vague and embarrassing. This lack of clarity, vagueness and embarrassment will cause prejudice to the defendants. These defects can only be cured by the amendment of the pleadings. Such amendment will ensure that real issues between the parties are properly ventilated at the trial. In the circumstances, the exception is upheld.

With respect to costs, the excipients had prayed for punitive costs against the plaintiff. I am of the view that costs on an ordinary scale are reasonably sufficient and are in the interest of justice as the excipients could have simply requested for further particulars which would have saved the costs. Further, such costs are justified as the plaintiff was warned in advance by copy of the letter dated 27 July 2022 and ignored the call to ensure that the summons and declaration are amended to cure the defects complained of. Punitive costs can only be granted in exceptional circumstances as they may scare away potential litigants thereby impacting negatively against the enjoyment of access to justice.

Consequently, it is ordered as follows:

(a) The exception be and is hereby upheld.

(b) The plaintiff be and is hereby directed to amend the summons and declaration within seven days from the date of this judgment.

(c) The plaintiff shall bear the costs of the exception on an ordinary scale.

*Tabana and Marwa*, excipients' legal practitioners.
*Chatsama and Partners*, plaintiff's legal practitioners.