UPENYU MASHANGWA
and
BLESSING MASHANGWA
versus
EMMANUEL MAKANDIWA
and
RUTH MAKANDIWA
and
UNITED FAMILY INTERNATIONAL CHURCH

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 6 November, 2017 and 12 January, 2018

Opposed Matter

T. Mpofu, for the plaintiffs
L. Uriri, for the defendants

MANGOTA J: The plaintiffs are husband and wife. They are members of the third defendant.

The first and second defendants are also husband and wife respectively. They are leaders of the third defendant. The third defendant operates under the name United Family International church.

The first and second defendants, as leaders of the third defendant, are allegedly endowed with the spiritual gift of being able to foretell a person's past, present and future circumstances. They are, in the parlance of the third defendant's teachings, referred to as *prophets*.

The plaintiffs filed six claims against all the three defendants. These entered appearance to defend. They, in terms of r 140 of the High Court Rules, 1971 addressed a letter to the plaintiffs. The letter is dated 9 August, 2017.

The letter complained about the manner in which the plaintiffs pleaded their claims. Its contents alleged that:

'(i) the claim was either vague and embarrassing, or

(ii) the claim did not disclose a cause of action; or

(iii) the claim did not clarify if the plaintiffs were suing in contract or in delict; or

(iv) the plaintiffs did not know how to plead defamation under the *actio injuriarum*; or

(v) the plaintiffs failed to appreciate that mental anguish was not a head for damages claimable for defamation; or

(vi) the plaintiffs did not state, in regard to the sixth claim, if they were pleading defamation or injuria.

The letter placed the plaintiffs on notice to remedy the alleged defects which the defendants complained of failing which the latter would except to the claims.

The plaintiffs received the letter on 10 August, 2017. They did nothing about the complaint. The defendants filed the exception on 30 August, 2017. This is, therefore, the subject of these proceedings.

The record does not show the date on which the defendants served the plaintiffs with the exception. Nor does it show the date that they served their heads of argument upon the plaintiffs. What is evident, however, is that both parties filed their Heads. The defendants' Heads were filed on 20 September, 2017. The plaintiffs filed theirs on 4 October, 2017. The filing of Heads by the parties set the stage for the exception to be heard and determined.

The defendants summarised their case in paras (3) and (4) of their Heads. They submitted that the plaintiffs' summons and declaration were excipiable in two respects. These were that:

(a) they did not disclose any cause of action against any of the three defendants – and

(b) they are vague and embarrassing to the extent that the vagueness and embarrassment go to the root of the cause of action.

Critical to the resolution of this matter is whether or not one or more or all of the claims do not, as the defendants alleged, disclose a cause of action. Where they do not, the defendants' position remains unassailable. Where they do, the defendants' complaint remains unwarranted.

The phrase '*cause of action*' was aptly defined in *Peebles* v *Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 which the defendants cited in their Heads. The case authority says of the phrase:

> "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

The question which begs the answer is does that factual situation exist in each of the plaintiffs' six claims. The plaintiffs said it does. They also submitted, and in my view correctly so, that all their claims were grounded in delict and not in contract.

An analysis of each of the six claims is relevant. It is from the intended analysis that the existence or otherwise of the cause of action is established.

The plaintiff's case was/is that their claims (1) to (4) rested on the delict of fraud. Professor G Feltoe defines fraud in his "*A Guide to The Zimbabwean Law of Delict*", 3rd Ed, p 8. The learned author states that the delict of fraud falls under deceptive practices. He says fraud is committed when the defendant, with intent to defraud, makes a statement to the plaintiff knowing or suspecting that the statement is false and intending that the plaintiff will act upon it to his prejudice. He stresses that, if the plaintiff suffers loss as a result of such fraudulent deception, he is entitled to claim damages. With fraud, therefore, the false statement is made to the plaintiff who acts upon it.

The definition which Professor Feltoe gave for the delictual action of fraud is, with minor variations, substantially the same as fraud as defined in the law of contract. Innocent Maja defines fraud from the perspective of the law of contract. The learned author states in his book: "*The Law of Contract in Zimbabwe*" p 96, that:

> "For an innocent party to claim delictual damages successfully, she/he must establish that:
>
> (a) there was a wrongful or unlawful conduct (by either commission or omission) by the wrongdoer:
> (b) the conduct led to the harm of a person, property or finances-and
> (c) the wrongdoer caused patrimonial loss either intentionally or negligently."

The plaintiff's statement as regards each of the four claims is that they are claiming delictual damages from the defendants. They submitted that the damages are based on the misrepresentations which the defendants made to them and other members of the third defendant. The misrepresentations, they argued, induced them to act as they did to their actual prejudice. The defendants, they said, by word or conduct created false impressions in their minds and the impressions induced them to act in the way which they did much to their serious loss. They argue that the defendants made the false statements with the specific intention to defraud them.

The argument of the defendants is that the statements were not made to the plaintiffs alone. They were made to all members of the third defendant and during church service.

The plaintiffs' declaration shows that whilst the statements were made to all members of the third defendant, the plaintiffs acted upon them. These, it is evident, enjoyed a special privileged position in the third defendant. A reading of each claim shows the following:

Claim I:

The first and second defendants knew, before the date the statement was made, that the plaintiffs had an existing ZB Bank loan to the tune of $500 000. The plaintiffs had informed them of that matter privately. The statement which was to the effect that anyone with a bank debt or loan would be cancelled as it was the season of miraculous cancellation of debts did induce the plaintiffs more than any other congregant to believe the defendants. They did and, in the process, they lost their Marlborough house as a result of the same.

Claim 2:

The defendants' statement which was to the effect that one Tichaona Mawere was a great lawyer who would never lose a case was taken seriously by the plaintiffs. Out of their trust in the defendants, they handed their case to Mr Mawere for his attention. When he produced no results, they consulted the defendants on the same. These assured them that everything was above board.

Claim 3:

The first and second defendants would call the plaintiffs on to the stage,

presumably during church service, and announce to the congregants that the plaintiffs were a successful example of their Ministry. Such statements encouraged the plaintiffs to pour more and more contributions in the form of money into the third defendant's pocket.

Claim 4

Defendants paraded the plaintiffs on stage, presumably during church service, and showed them as the chosen people whom God showered with blessings to a point where they were regarded as successful business people.

It is evident, from the foregoing, that the plaintiffs and the defendants enjoyed very good social, and possibly spiritual, ties. That fact alone explains why the plaintiffs took the word of the defendants more seriously than any other member of the third defendant did.

That the defendants made the statements, in words or deed, in all the four claims requires little, if any, debate. The statements, the plaintiffs argue, were false. They were made

with the intention that they act upon them. They so acted upon them to their actual prejudice in regard to each claim. They stated, and correctly so, that, if they had known the true facts, they would not have acted in the manner which they did.

The plaintiff's case in regard to the four claims is water-tight. There is nothing which is vague and/or embarrassing in each of those claims. Their cause of action for each is clear, cogent and to the point. The claims fall neatly into the delict of fraud. They are neither frivolous nor vexatious.

The defendants urged the court not to concern itself with the claims of the plaintiffs. They submitted that the claims arose from proceedings which took place within the third defendant. They said the proceedings related to matters of faith in which the court had no business. They, in the mentioned regard, referred the court to the *dictum* of DOUGLAS J who made some remarks on a matter which was similar to the present one. The learned judge stated in *United States* v *Ballard*, 322 US 78 (1944) that religious doctrines and beliefs could not be subjected to the rigours of legal proof. The defendants took their arguments to the jurisdiction of this court. They referred me to what DEVITTE J stated in *Independent African Church* v *Maheya* HH 79/90 wherein he remarked as follows:

> ""… in the case of a congregational schism, where the resolution of a church property dispute involves matters of church doctrine and practices, the courts should not become immersed in a consideration of the merits of doctrinal matters. They ought, instead, to use a term applied by the American courts to apply 'neutral principles of law.'"

The plaintiffs argued to the contrary. They stated that the court can, indeed, inquire into matters ecclesiastical. They, in the mentioned regard, placed reliance on *Church of the Province of Central Africa* v *Diocesan Trustees of the Diocese of Harare*, SC 481/12 which they said rejected the position which this court took in the *Maheya* case. They insisted that the current case does not require the court to inquire into matters ecclesiastical. They said it requires the court to inquire into the defendants' lies. They placed further reliance on *Robert Martin Gumbura* v *The State* SC 78/14 wherein Patel JA, dismissing Gumbura's appeal for bail pending appeal, stated as follows:

> "In the circumstances presented by this case, the quasi-mystical force of religious dogma might overwhelm its conscripts and devotees to a point where it operates to vitiate and negate any meaningful consent to sexual abuse and exploitation by their spiritual masters
>
> Taking a broad conspectus of the facts and probabilities *in casu*, it appears to me that the complainants having been enmeshed within the overpowering cocoon woven by the appellant, unwillingly succumbed to his sexual advances and predations. Thereafter constrained by fear and misconception, they remained taciturn for several years and only reported their respective ordeals after appreciating the full nature of their sexual bondage." (emphasis added).

The background to the above citation is that Gumbura, like the first two defendants, was a leader of his church. He was tried and convicted of rape by a magistrate. He appealed to this court against conviction and sentence. He unsuccessfully applied to the magistrate for bail pending appeal. He appealed to this court and also failed. He appealed to the Supreme Court against the decision of this court which refused to grant him bail pending appeal. He submitted, as a ground of appeal, that the complainants took an inordinate delay to complain against what he was alleged to have done to them. He said the complainant's delay in report the rape showed that his prospects of success on appeal were very strong.

The learned judge of appeal rejected his argument. He remained of the view that Mr Gumbura had to prosecute his appeal while he is in prison. He, therefore, dismissed the appeal.

Two important matters come out of the above cited case. The first is that every person is fallible. No one is, therefore, immune to making mistakes. That is so notwithstanding the person's standing-social, spiritual or otherwise – in society. The second is that, where one commits a crime or a wrong (i.e delict) the person cannot escape the long arm of the law. He will either be prosecuted or sued, depending on what he is alleged to have done. That, depends on the definition which society places on his conduct. That will, once again, occur irrespective of his status-social, spiritual or otherwise – in society.

Applying the above-observed matters to the current case, therefore, the defendants cannot be allowed to hide behind the proposition that their situation relates to ecclesiastical matters which the court has no jurisdiction to determine. A *fortiori* when the *Maheya* case upon which they placed reliance was over-ruled by the Supreme Court. Where they are alleged, as *in casu*, to have acted fraudulently to the prejudice of some of their congregants the latter have every right to sue them. The plea which they advance will not, therefore, assist them.

The last two claims of the plaintiffs (i.e. 5 and 6) were not elegantly drafted. The plaintiffs' position in regard to the fifth claim is that the defendants issued malicious statements which affected the business of the plaintiffs. They describe the statement as being defamatory of them.

The defendants stated that the claim does not plead the particulars of the alleged defamatory publication with sufficient particularity. They submitted that it does not identify the "sting thereof." They averred that they did not plead that the alleged material, whatever it is and howsoever allegedly published, is *per se* defamatory.

The statement which is the subject of the defendants' complaint reads:

> "25. The defendants caused damages through defamation of character by publishing false articles against the plaintiffs and their business activities , articles claiming that plaintiffs' perfumes cause cancer" (emphasis added)

The plaintiffs should have couched their claim in a clearer manner than they did. The claim, in my view, falls under injurious falsehood more than it does fall under the delict of defamation of character. The allegedly false statement about the plaintiffs was made to third parties who acted upon it with the result that the plaintiffs suffered financial loss. The delict is committed when the defendant intentionally publishes to a third party a statement concerning the plaintiff or his business which the defendant knows or suspects is false intending that the third party will act upon it and that the plaintiff will be caused financial loss (See *Feltoe's A Guide To The Zimbabwean Law of Delict,* p 61).

The last claim (i.e. 6) falls under the delict of *injuria*. This is committed when a person, without justification, intentionally affronts another's dignity or invades the other's privacy. The plaintiffs alleged that the defendants exposed the plaintiffs' private lives on the defendants' Facebook online page, *The Truth About Prophet Makandiwa*. They submitted that they had given the information about them to the defendants in private.

It is evident, from the foregoing that, whilst the headings which related to the two claims were erroneously stated, the substance of each claim discloses a clearly defined cause of action. A request for further particulars by the defendants would have assisted the plaintiffs to realise that the heading of each claim was stated in error. They would, therefore, have effected the necessary amendments to the same and, in the process, allowed the defendants to know what the plaintiffs' case in regard to each of those claims was.

The defendants have not pleaded to the plaintiffs' claims. The plaintiffs stated that, where necessary, they would move the court to permit them to amend those of their claims which remained unclear to the defendants. The law allows them to effect the amendments in respect of claims (5) and (6). See *Addler* v *Elliot,* 1988 (2) ZLR 283 (SC) at 292 B and *Green* v *Lutz,* 1996 RLR 633 at 641 A. The amendments, I am satisfied, will not prejudice the defendants in any away.

All the three defendants were properly sued. The first two's suit lies in the statements which they made. The suit of the third defendant hinges on the fact that it connected the plaintiffs to the defendants. The bond which the plaintiffs' created with the first two defendants emanates from the fact that the plaintiffs became members of the third defendant

in which the first and second defendants were/are leaders. The least two claims also follow from the parties' initial relationship

In the premise, it is ordered that:

1. The defendants' exception in regard to all the six claims be and is hereby dismissed with costs.
2. Leave be and is hereby granted to the plaintiffs to amend their declaration and prayer in regard to claims (5) and (6) within ten (10) days of their receipt of this judgment.
3. Thereafter, the matter shall proceed in terms of the High Court Rules, 1971.

Venturas & Samukange, plaintiffs' legal practitioners
Manase and Manase, defendants' legal practitioners