REPORTABLE (85)

(1) CONSTANTINE CHIMAKURE (2) ALPHA MEDIA HOLDINGS (PRIVATE) LIMITED
v
(1) AMBASSADOR AGRIPPA MUTAMBARA (2) ESTER MUTAMBARA

SUPREME COURT OF ZIMBABWE
GOWORA JA, MAKONI JA & BERE JA
HARARE: APRIL 1, 2019 & JULY 2, 2020

T. Mpofu, for the appellants

F. Mahere, for the respondents

GOWORA JA:

BACKGROUND FACTS

[1] The respondents are husband and wife. They are before this Court pursuant to a suit for defamation instituted by them in the High Court against the appellants herein. In the declaration, the first respondent is described as an Ambassador. It is a description which appears common cause. The first appellant is the editor of the Newsday Newspaper, with the second appellant being the publisher, printer and distributer of the publication.

[2] On 19 May 2014, the respondents, as plaintiffs instituted proceedings by way of summons claiming damages for defamation arising out of an article published by the second appellant on 6 July 2012.

[3] On 23 November 2016, the High Court dismissed with costs an exception filed by the appellants in answer to the claim for defamation damages instituted by the respondents herein. The court also ordered the respondents to furnish the appellants with the particulars of the exact words being relied on in the defamation suit within a specified period from the date of judgment. This appeal is against that judgment.

[4] In their declaration in the suit described above, the respondents alleged that one Francis Mhere had, on 5 July 2012, written a letter to the first respondent imploring him to rein in his spouse, the second respondent. The letter alleged that the second respondent was meddling in, and involving herself in child custody issues between Mhere and his wife.

[5] The respondents alleged that, without establishing the veracity or truthfulness of allegations in the letter, the appellants had gone ahead and published an article on 6 July 2012 in the Newsday publication of that day. The respondents alleged that the article was defamatory of and concerning them. It is alleged that despite the falsity of the article, the appellants published the statements in the letter which were made with the intention of making a public spectacle of the first respondent in the office of Ambassador with the intention of injuring his reputation.

[6] It was further alleged that the statements were understood by the ordinary reasonable man within the readership of the Newsday newspaper to mean that the second respondent was out of control, meddled in other people's affairs, was selfish and cruel, vindictive in nature and was not a law abiding citizen and lacked moral fibre.

[7] Based on the above allegations, the respondents claimed damages for the article published by the appellants in the sums of USD 120 000.00 and USD 80 000.00 respectively.

[8] The appellants did not plead. They jointly filed an exception and application to strike out in the form set out hereunder:

"A No cause of action disclosed.

1.1 First Defendant is cited as Constantine Chimakure cited herein in his capacity as the Editor of Newsday Newspaper.

1.2 First Defendant as cited does not exist and no cause of action is consequently disclosed against first defendant. Alternatively, the proceedings are as against first defendant a nullity. (sic)

1.3 First plaintiff does not allege that the publication on which he sues and its unnamed words were published of and concerning him. No cause of action is consequently set out in favour of first plaintiff. (sic)

1.4 Second plaintiff does not allege that the publication of 6 July 2012 was made of and concerning her. No cause of action is consequently set out in favour of second plaintiff.

B Vague and embarrassing

1.5 Plaintiff alleges in para 9 of the declaration that "Defendant went ahead and published a damning article on 6 July 2012 on page 2 of that publication to the Plaintiff's mortification and detriment". In paragraph 11 they allege, "The article contained falsehoods of a venomous type".

1.6 The words complained of which are alleged to appear in the said article are not set out and their effect cannot be ascertained.

1.7 The claim is consequently vague and embarrassing.

C Application to strike out

1.8 Plaintiffs tell a story in a declaration made up of 21 paragraphs. The declaration is argumentative, superfluous irrelevant is crafted in breach of the rules of court and must be struck out.(sic)

Wherefore defendants pray in the main that the exception be upheld and the claim be dismissed with costs. Alternatively, defendants pray that the declaration be struck with costs."

PROCEEDINGS BEFORE THE COURT A QUO

[9] Before the court *a quo*, the parties made the following contentions. As regards the appellants, it was contended firstly that the summons and declaration did not disclose a cause of action primarily because the first appellant, as defendant, did not exist. It was argued that the improper citation rendered the proceedings a nullity.

[10] It was also contended that the summons was vague and embarrassing because the exact words published were not set out in the declaration. It was argued further that the declaration told a story which was superfluous, irrelevant and argumentative contrary to the rules of court. To that end, it was only right that the declaration be struck out as being vague and embarrassing.

[11] Premised on the above arguments, the appellants prayed that the exception be upheld with the claim being dismissed with costs. In the alternative, the appellants prayed that the declaration be struck out with costs.

[12] The respondents countered by arguing that the first appellant, a natural person had been properly cited. The description of the first appellant as Editor of the newspaper did not render the citation defective in any manner. As to the objection that the summons and

declaration did not allege that the publication was made of and concerning the respondents, it was contended that the declaration alleged that the publication made reference to a letter wherein certain specific allegations were made of both respondents. It was argued that the exception to the summons and declaration should, as a consequence, be dismissed with costs.

[13] Turning to the allegation that the summons was vague and embarrassing, it was argued that the claim was not vague or embarrassing. In this regard it was argued that the prayer for the striking out of the declaration should be dismissed with costs.

[14] It was further contended that the prayer for the dismissal of the claim in the event of the exception being upheld was misplaced. The proper course, it was argued, would be to afford the respondents an opportunity to amend the declaration.

[15] The court *a quo* reasoned as follows:

> "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 a pleading. See *Masukusa* v *National Foods Ltd & Anor*[1], *Taruona* v *Zvarevadza & Ors* HH 87-12, *Mwayisa* v *Jumbo & Ors* HH 3-10, *Morris* v *Morris & Anor* HH71-11.
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> Rule 99 (c) of the rules of this court provides that:
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> "A pleading shall-

[1] 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".

…
(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 vestige 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."

[16] The court *a quo* dismissed the exception with costs being made to be in the cause. The respondents were ordered to furnish the appellants within a period of ten days, with the particular words on which the claim for defamation was premised.

THE APPEAL

[17] With the leave of this court, the appellants have noted an appeal on the following grounds:

"1. The court *a quo* erred in holding that the appellants' exception did not go to the root of the respondents' claim. At law, where a party fails to plead and set out actual allegedly defamatory statements upon which its claim for defamation is based, then such pleading is patently defective and cannot be amended.
2. The court *a quo* further erred in holding that the appellants' exception was without merit and worthy of dismissal. Such holding was at law anomalous on account of the finding by the same court that the respondents' pleadings were deficient and called for better particulars.

3. The court *a quo* erred in granting to the respondent's relief that was not sought or pleaded. There was no cause for the amendment of the respondents' pleadings and the court went beyond the purview of its jurisdictional mandate in ordering an amendment and particularizing the details of such amendment.
4. Additionally, the court again erred in disregarding the mis-citation of the first appellant. At law a summons that cites a non-existent person or capacity is a nullity.
5. The court *a quo* grossly misdirected itself and erred in holding that the respondents' declaration was capable of being pleaded to. Once a declaration is vague and embarrassing the defendant ought not to be required or compelled to plead to it."

[18] Three issues for determination emerge from the grounds set out above. First and foremost is whether or not the citation of the first appellant is defective rendering the summons and declaration a nullity as contended by the appellants. The last two issues are whether or not the summons and declaration do not establish a cause of action rendering them subject to an exception and also vague and embarrassing and liable to be struck out.

ARGUMENTS ON APPEAL

[19] Mr *Mpofu* abandoned the fourth ground. He was wise to do so. To argue that the first appellant as cited is irregular would be an exercise to test human logic. The first appellant, cited by name, was further identified by the occupation in which he is sued. Such description cannot by any stretch of the imagination turn him into a non-existent person.

[20] On the substance, the argument for the appellants went as follows. The court *a quo* misdirected itself and erred in affording relief which had not been sought and which amounted in the order of things to an acceptance that the exception was well taken. It was suggested that the court *a quo* purported to be exercising a discretion which it was

not imbued with. For this proposition Mr *Mpofu* sought reliance on *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S).

[21] As regards the alleged absence of a cause of action, it was argued that the law was clear that a party must set out in its declaration the words that it alleges to be defamatory. To that extent it was suggested that reference to the actual words used is indispensable to the existence of a proper cause of action, and that without it, the pleading is vague and embarrassing.

[22] Miss *Mahere* submitted that the relief afforded by the court was correct and that the court was empowered to exercise its discretion in the manner it did. She submitted that even where an exception is upheld, a plaintiff is afforded the opportunity to amend its declaration.

ANALYSIS OF THE DISPUTE ON APPEAL

[23] For the sake of convenience, I will begin with the nature of the relief ordered by the court *a quo.* The court dismissed the exception. It found that the pleadings were not excipiable. Once the court found that the exception was not well taken it could not exercise the discretion of affording the respondents an opportunity to file further particulars. Such indulgence could only follow upon a finding that the exception was well taken. To that extent it is my view that the court was guilty of a misdirection.

[24] I turn now to the substance of the appeal. What a plaintiff to a claim for defamation is required to allege in the summons was settled in *Taylor & Another v Chavunduka & Ors* 1995 (2) ZLR 22, by CHATIKOBO J, at p27C-F wherein the learned judge stated:

> "It is true that before a person can be held liable for defamation the words complained of must have been published of and concerning the plaintiff. In everyday parlance, the article must refer to the plaintiff. Before the defendants can be held liable the "……. plaintiff must therefore identify himself as the person defamed, that is, he must allege and prove that the statement complained of referred to him as an ascertained or ascertainable person. The test is whether the ordinary reasonable man hearing or reading the statement would be likely to understand the statement to apply to the plaintiff": per R G McKerron The Law of Delict 7 ed p 178-9. See also *SA Associated Newspapers Ltd & Anor v Est Pelser* 1975 (4) SA 797(A) at 810C. The complaint at this stage of the inquiry is on the need to allege in the declaration that the article refers to him. In this regard it has been averred in par 6 that the article in Parade was published of and concerned the plaintiffs. But as I stated earlier, the article does not identify the plaintiffs either by name or by description. McKerron supra at p 179 states that "Where the statement contains no reference on the face of it to the plaintiff as an ascertained or ascertainable person, the plaintiff must set out in his pleadings the special facts and circumstances which he relies upon as supporting the allegation that the statement referred to him. Having thus alleged facts connecting himself with the defamation, the plaintiff will be entitled to call witnesses to prove that they understood the words complained of to refer to him."

And later at p 28F-G

> "All that has been pleaded in para 6 is that the words were published of and concerning the plaintiff.
> ……..
> That is not so with the ordinary man and woman of normal intelligence reading the article in Parade unless he was, at the time, aware of the contents of the report."

[25] Going by the test set out in the above authority it cannot be denied that the respondents alleged in the declaration that on 6 July 2012 the Newsday newspaper published a statement of and concerning them. Paragraphs 6, 11, 12, 13, and 14 are pertinent. It is my considered view that the exception on this aspect was not well taken. The declaration

was not framed in elegant terms. What it does however is identify who the plaintiffs are, the circumstances under which the article came about and the allegation that a defamatory statement was published of and concerning them.

[26] Next it falls for me to consider whether or not the appellants were embarrassed by the failure on the part of the respondents to set out the exact words which are alleged to have appeared in the article and which defamed them. For the proposition that the exact words complained of should have been set out in the declaration Mr *Mpofu* sought reliance on *International Tobacco of SA Ltd v Wollheim & Others* 1953 (2) SA 603. This authority received attention in this jurisdiction in *Munyai v Chikasha* 1992 (2) ZLR 31 (S). At p 32B-F, this court stated:

> "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.
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> 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 604G:
>
> > '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'."

[27] I am mindful of the fact that in the above mentioned authority the words complained of were not published in a newspaper article. In my view however, the substance of pleading is the same. A plaintiff no longer needs to set out the exact words complained of.

[28] Erasmus, Superior Courts Practice, states:

> "An exception that a pleading is vague and embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged. The effect of this is that the exception can be taken only if the vagueness relates to the cause of action. Such embarrassment may occur where the admission of one or two sets of contradictory allegations in the plaintiff's particulars of claim or declaration, destroys the plaintiff's cause of action. In other words, averments in a pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing.
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> The test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows:
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> (a) In each case the court is obliged to first of all consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning. To put it simpler: the reader must be unable to distill from the statement a clear single meaning.
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> (b) If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him or her by the vagueness complained of.
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> (c) In each case *an ad* hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects. A point may be of the utmost importance to the case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a matter of detail.
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> (d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced."[2]

[2] B1-154-154A

[29] Whenever a pleading is vague or lacking in precision it is susceptible to an exception only if the alleged vagueness renders the whole pleading unintelligible. A defendant is, as a consequence, under a burden to establish that the pleading has embarrassed him or her in pleading thereto. In *Pete's Warehousing and Sales CC v Bowsink Investments CC* 2000 (3) SA 833 at 834H, the following is stated:

> "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."

[30] It is not sufficient to merely allude to lack of clarity or particularity as was alleged by the appellants in this case, a defendant must show how he was embarrassed. The appellants have not met the *onus* on them to establish that the declaration is excipiable. In this instance, the respondents pleaded an innuendo and the appellants have not shown that they have been embarrassed.

[31] It only remains for me to deal with the arguments made by the parties on the application to strike out the declaration. The appellants submitted that the declaration was crafted in breach of the rules of court and on that premise ought to be struck out in its entirety. It is argued by the respondents that the application was not in the proper form and as a result was not before the court *a quo*. It seems to me that counsel on both sides of the appeal have overlooked one fundamental issue, that there is in fact no appeal against the refusal by the court *a quo* to strike out the declaration. None of the grounds speak to issue of the alleged irrelevant, superfluous or argumentative nature of the declaration.

The court *a quo* has not been impugned for its decision not to strike out the declaration. In the absence of a ground of appeal on that aspect this Court cannot embroil itself in a matter not in contention.

[32] I turn to the nature of relief sought by the appellants. The appellants have sought that the appeal succeeds and that the exception be upheld with the claim being dismissed. As rightly submitted by Miss *Mahere* the prayer for dismissal in circumstances such as these is, as a matter of law, incompetent. In *Adler v Elliot* 1988(2) ZLR 283(S), at 292B-C, this court said:

> "Finally, although of no significance in view of the conclusion I have reached, Mr *Gillespie* justly criticized the order made by the learned judge. A claim should not be dismissed on an exception where it is possible that the party affected may be able to allege facts that would disclose a cause of action. See *Green v Lutz* 1966 RLR 633(GD) at 641A. He should be given leave to amend, within a specified period, if so advised. Such an opportunity was not afforded to the plaintiff."

(See also *Auridiam Zimbabwe (Pvt) Ltd v Modus Publications (Pvt) Ltd* 1993(2) ZLR 359 (H), at 373D-E; *R M Insurance Co (Pvt) Ltd v G C M (Pvt) Ltd* 1993 (2) ZLR 407 (S) at 408; *Taylor & Anor v Chavunduka & Ors* 1995 (2) ZLR 22(H).)

DISPOSITION

[33] The court *a quo* ordered the respondents to furnish further particulars to the appellants. This was despite the finding that the exception had not been successful. In my view the court, having found that the appellants had not been embarrassed, should have confined itself to dismissal of the exception. That said, it is my considered view that no prejudice

will ensue if the order for the provision of the letter is left untouched. The respondents have not appealed that order and I see no reason to interfere with it.

[34] In my view the appeal lacks merit and is accordingly dismissed with costs.

MAKONI JA : I agree

BERE JA : I agree

Gill, Godlonton & Gerrans legal practitioners for the appellants

Sawyer & Mkushi legal practitioners for the respondents