AUGUR INVESTMENTS OU
and
TATIANA ALESHINA
and
KENNETH R SHARPE
versus
TENDAI BITI
and
MOVEMENT FOR DEMOCRATIC CHANGE ALLIANCE
and
THE NEWSHAWKS

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 9 July & 20 August 2021

Civil Action –Exception & Special Plea

E T Moyo, for the plaintiffs
T L Mapuranga, for the defendants

MANZUNZU J: The 1st defendant has raised an exception to the plaintiffs' summons and declaration and a special plea in bar against the 1st plaintiff the details of which will be dealt with later in this judgment.

BACKGROUND:

The 1st and 2nd plaintiffs issued summons on 16 December 2020 against the 1st and 2nd defendants seeking, among other reliefs, damages for defamation in the sum of USD1 000 000 jointly and severally the one paying the other to be absolved. The 1st and 2nd plaintiffs then amended their summons and declaration before the same were served on the 1st and 2nd defendants.

The amended summons and declaration were filed on 19 March 2021. Of significance to the amended processes is the introduction of the 3rd plaintiff and the 3rd defendant.

The three defendants were served with the amended summons on 22 March 2021. The 1st defendant entered an appearance to defend on 22 March 2021 followed by the 2nd and 3rd defendants on 6 April 2021. The defendants requested for further particulars to the summons

on 9 April 2021. On 27 April 2021 the plaintiffs filed their reply to the request for further particulars. The plaintiffs then filed a notice of withdrawal of action against the 3rd defendant on 5 May 2021.

On 24 May 2021 the 1st defendant simultaneously filed a special plea in bar and an exception which I will now deal with in turn.

SPECIAL PLEA:

The 1st defendant raised a special plea in relation to payment of security for costs and whether a corporation can be defamed.

a) Security for costs.

It is common cause that the 1st plaintiff is a *peregrinus,* in fact it pleaded so. The 1st defendant simply put the special plea thus;

> "As *peregrinus*, the 1st plaintiff has failed to pay security of costs with the High Court of Zimbabwe. To the extent that the Plaintiff has failed to pay such costs, it has no right to the jurisdiction of this honourable court and its claim therefore should be dismissed with costs."

In replication the 1st plaintiff said there was no prior demand for security for costs which could either be agreed between the parties or assessed by the Registrar. It further said failure to pay security for costs cannot be used to defeat the plaintiff's claim.

The question of security for costs is one borne out of practice. As such the 1st defendant ought to have demanded such costs from the 1st plaintiff. In the event of the parties failing to agree then 1st defendant would file a chamber application to compel for the payment of such costs. The court would then exercise its discretion to grant or refuse the request. It need not come as a special plea.

In *The Sheriff of Zimbabwe & Anor* v *Anderson Manja & 98 Others* HH 325/19 the court cited with approval a passage in Herbstein & van Winsen's *Civi Practice of the High Court of South Africa* (5 ed by van Winsen Cilliers & Loots & Dendy) at page 391that;

> "The question of security for costs is one of practice and not of substantive law. The courts have a discretion to grant or refuse an order for security and in coming to a decision will consider the relevant facts of each case. Hardship to the *peregrinus* and financial ability to provide security are taken into account but are not necessarily decisive. The court should have due regard to the particular circumstances of the case and consideration of equity and fairness to both the *incola* and the non-domiciled foreigner."

I ride on the words of MATHONSI J (as he then was) in *Redstone Mining Corporation (Pvt) Ltd & 3 Ors* v *Diaoil Group Zimbabwe (Pvt) Ltd & 4 Ors* HH 438/15 when he stated;

> "What appears to be lost to litigants is that the requirement of security for costs to be given by a *peregrinus* is not only there for the asking, neither is it there as a weapon of defence by an

> *incola* bent on preventing an approach to the court by a *peregrinus*. The object of the rule relating to provision of security is to ensure that an *incola* will not suffer loss if he is awarded costs of the proceedings. It protects the interests of the *incola*. See Herbstein and van Winsen, *The Civil Practice of the Superior Courts of South Africa,* ed 3 at p 251, *Zendera* v *McDade & Anor*, (*supra*).
>
> In that regard a party requiring security for costs should make an application to the court for an order to be made. Such party is not the court and therefore cannot prevent the *peregrinus* from accessing the court until it has been paid ridiculous sums of money as security. It is the court which, in its discretion, should prescribe the amount to be paid, usually to the registrar.
>
> In *casu,* there has been no application made by the respondents, no figure has been proposed and indeed security for costs is being used to ward off an application by respondents who appear determined not to get to the merits of the matter."

This position of the law has been reiterated time and again by this court. In *Grandwell Holdings (Pvt) Ltd* v *Minister of Mines & Mining Development & 4 Ors* HH 193/16 where the issue of security for costs was raised as a preliminary point the court had this to say;

> "I summarily dismissed the point *in limine*. Plainly, it was raised in bad faith. The idea was manifestly to thwart the application before it could even begin. There had been no prior demand for such costs… But substantively, an order for security for costs is one entirely in the discretion of the court. It is a rule of practice, not one of substantive law: see *Saker & Co Ltd* v *Grainger*[1]. Admittedly, the discretion has to be exercised judiciously, not capriciously. Many considerations are taken into account, not least the particular circumstances of the case, the equities and fairness of the request, and even the character of the *peregrinus* itself: see *Magida* v *Minister of Police*[2] and *SA Iron & Steel Corporation Ltd* v *Abdulnabi*[3].
>
> Only when there is reason to believe that a company, whether local **or foreign**, may be unable to pay the costs of the defendant or respondent **may** the court order security for costs."

In *casu* the special plea based on payment of security for costs must fail. This is not to say the 1st defendant is barred from filing a proper application in that regard herein, if so advised, for the court to judiciously exercise its discretion.

b) Whether a corporation can be defamed:

The second leg of the special plea was that at law 1st plaintiff does not have fama. The 1st plaintiff said the issue of fama was one which cannot be raised as a special plea and in any event, it was alleged, the 1st plaintiff can be defamed a position it said is recognizable at law. The 1st plaintiff prayed that the special plea be dismissed with costs.

The 1st defendant's position in the written heads is that a corporation cannot sue for defamation under the *actio injuriarum* because it has neither feelings nor dignity. That in the

[1] 1937 AD 223, at pp 226 – 227
[2] 1987 [1] SA 1 [A] at p 12B – D
[3] 1989 [2] SA 224 [T], at p 233C – I

circumstances the 1st plaintiff could only sue under the *lex aquilia* for patrimonial loss. The 1st defendant relied on the South African authorities but he also cited other South African authorities to the contrary. In this jurisdiction the 1st defendant referred to the case of *Boka Enterprises (Pvt) Ltd* v *Manatse & Another* 1990 (3) SA 626 (Z) where the court took the position that a trading corporation can sue for defamation. Having acknowledged that the 1st defendant took the view that the Boka case was wrongly decided and urged the court to take the position of some South African authorities which say a corporation cannot sue for defamation under the *action injuriarum*.

In *PTC* v *Modus Publications (Pvt) Ltd* 1997 (2) ZLR 492 (S) the Supreme Court even made the position in this jurisdiction clearer when the court said;

> "There are three questions which arise here. The first is "can an artificial person sue for defamation?" The second is "can the State sue for defamation?" Then arises the third and vital question "Is the PTC covered by the phrase 'the State?' "The answer to the first question is "yes", and to the second question is "no" ".

Mr *Mapuranga* for the 1st defendant said he was constrained to argue otherwise against the position of the law as taken by the Zimbabwean authorities.

The point raised by the 1st defendant has no merit and must be dismissed.

EXCEPTION:

The basis of 1st defendant's exception to the plaintiffs' summons and declaration is premised on two grounds. The first has been referred to as a defective joinder. I believe he meant misjoinder of the defendants. The second is that there is no connection between 2nd and 3rd plaintiffs with the words complained of.

It is important at this stage to recite the relevant parts of the amended declaration which is excepted to;

> "2. Plaintiff's' claim against the first defendant
>
> 2.1 On or about 4 December 2020, first defendant published certain comments of and concerning the plaintiffs on his twitter account which were false, malicious and defamatory.
>
> 2.2 The said twitter account has a substantial following in and out of Zimbabwe and is widely read by the general public.
>
> 2.3 The Article stated the following of and concerning plaintiff:
> "I have been at CID Law and Order since 11 a.m. being charged with the most spurious the most desperate of all charges. It is said that I called someone an idiot and that is said to be an assault. No amount of harassment will prevent us from fighting and exposing corruption. The Harare Airport Road project was a total stink where thousands of hectares of land where illegally and fraudulently transferred to Augur Investments and its shelf companies. That land must be returned to the City & its citizens. They want to detain me overnight, so be it."

2.4 On or about 13 December 2020, first defendant further published a second statement which was similarly false, malicious and defamatory on the same twitter account wherein he stated the following:
"the airport scandal is the most uncouth, most crude land heist in post-colonial Zim. They took thousands of hectares of land but failed to construct the road. They did not have council approval. The High Court set aside the agreement. Now they have captured the State. we will not rest until Harare gets back its land. We will fight this most pernicious of looting that has involved debasement of institutions. We will fight the crooks till they get back to Siberia..."

2.5 The publications are defamatory per se of all the plaintiffs to whom they specifically refer in that they specifically refer to plaintiffs as crooks and alleges that they were involved in fraudulent transactions where they have stolen land from the city of Harare.

2.6 Alternatively they impute and/or were intended to impute, and were understood by the persons to whom they were published, to impute that the plaintiffs are part and parcel of a corrupt and diabolical cartel abusing vantage position to engage in iniquities, unsavoury, diabolical, illicit and opaque lucrative deals with people alleged to be of questionable integrity.

2.7 Plaintiffs have at no point in time ever committed the acts first defendant attributed to them. The comments are wrongful, false, injurious and defamatory. Plaintiffs' conduct regarding the subject matter concerned has always been legal, regular and in good faith with the parties concerned.

2.8 As a result of the defamation, plaintiffs have been damaged in their good names and reputation and have suffered damages in the total sum of USD1 000 000. Made up as follows:

2.8.1	Augur Investments	$500 000
2.8.1	Tatiana Aleshina	$100 000
2.8.1	Kenneth Sharpe	$400 000
	Total	$1 000 000

3. Plaintiffs' claim against the second defendant

3.1 On or about 4 December 2020 second defendant published certain comments of and concerning the plaintiffs on its twitter account which were false, malicious, and defamatory.

3.2 the said twitter account has a substantial following in and out of Zimbabwe and is widely read by the general public.

3.3 The Article republished the defamatory remarks of and concerning the plaintiffs said by the first defendant in para 1 above and further stated the following of and concerning second plaintiff in particular: -
"Vice President Tendai is detained at CID Law and Order on a spurious charge of assault. His crime is unearthing a #corruption scandal concerning the Harare Airport land deal involving complainant Russian #TatianaAleshina..."

3.4 The Article *inter alia* specifically alleges that second plaintiff was involved in corrupt dealings involving 'Airport Land'.

3.5 Neither second plaintiff nor any of the other plaintiffs ever committed the acts second defendant attributed to them. The comments are wrongful, false, injurious and defamatory.

3.6 The publication is defamatory *per se* of plaintiffs ever committed the acts second plaintiff in particular to whom it specifically refers. Alternatively, it imputes and/or was intended to impute, and was understood by the persons whom it was published, to impute that the plaintiffs are part and parcel of a corrupt and diabolical cartel abusing vantage position to engage in iniquitous, unsavoury, diabolical, illicit and opaque lucrative deals with people alleged to be of questionable integrity.

3.7 As a result of the defamation, plaintiffs good name and reputation has suffered damages in the amount of US$1 000 000.

3.7.1	Augur Investments	$500 000
3.7.2	Tatiana Aleshina	$100 000
3.7.3	Kenneth Sharpe	$400 000
	Total	$1 000 000

4. Plaintiffs'' claim against third defendant

4.1 On or about 16 October 2020, third defendant printed and published a certain article with comments of and concerning the plaintiffs in its newspaper aforementioned which were false, malicious and defamatory.

4.2 The said newspaper is fast gaining a substantial following in and out of Zimbabwe and is widely read by the general public.

4.3 The article headlined 'Mnangagwa, minister in messy deals' identifies and/or refers to then plaintiffs whom it describes as being involved in what it describes as a 'messy secret agreement' that is 'unlawful' giving then 'unusual immunity from litigation on vast tracks of land he (third defendant) acquired through the Airport Road Construction project.' It further alleges that 'most of the land mentioned was however irregularly obtained through the airport deal, according to a Harare council 2010 report.'

4.4 On or about 13 February 2021 the third defendant further published another article referring to that of 16 October 2020 in which it repeated the allegations in 4.3 above and further stated that in the said earlier article it had 'exposed how Augur Investments controversially acquired vast tracks of land around Harare as part payment for the construction of Airport Road, which the company failed to complete.' It described the agreement as 'dodgy'.

4.5 The plaintiffs have at no stage been involved either personally or through other persons in acts third defendant attributed to them in the publications in 4.3 and 4.4. above. The comments are wrongful, false, injurious and defamatory. Plaintiffs' conduct regarding the subject matter concerned has always been legal, regular and in good faith with the parties concerned.

4.6 The publication imputes and/or was intended to impute, and was understood by the persons to whom they were published, to impute that the plaintiffs are

part and parcel of a corrupt and diabolical cartel abusing vantage position of proximity to the president and/or ministers to engage in uncouth, iniquitous, unsavoury, diabolical, illicit and opaque lucrative deals with people of alleged questionable integrity.

4.7 As a result of the defamation, plaintiffs' good name and reputation has suffered damages in the amount of US$1 000 000

4.7.1	Augur Investments	$500 000
4.7.2	Tatiana Aleshina	$100 000
4.7.3	Kenneth Sharpe	$400 000
	Total	$1 000 000

3. Relief Sought

WHEREFORE plaintiffs' claims as against the defendant jointly and severally the one paying the other to be absolved for:

(a) Payments to the plaintiffs of damages in the sum of one million United Stater dollars (US$1 000 000).

(b) An order directing the 1st and 2nd defendants to remove the tweets posted by them on 4 and 13 December 2020 and any subsequent tweets on the subject matter relating to the plaintiffs immediately upon service of the court order.

(c) An order that the 2nd and 3rd defendants print a retraction and apology to the plaintiffs in a prominent place the 2nd defendant in three widely circulated newspapers in Zimbabwe and the 3rd defendant in its newspaper.

(d) Cost of suit."

a) Mis-joinder of defendants:

The 1st defendant has argued that the plaintiffs have joined three defendants in three separate causes of action. Such a joinder of defendants has been described as improper and bad at law because each defendant will raise his/its own defence while the parties are not related to each other. It was further argued that summons alleging distinct and separate causes of action in delict against separate and distinct defendants is bad on the ground of mis-joinder. The case of *Ackerman* v *Paskwaali Montague Divisional Council* 1913 CBD 296 was relied upon.

As a matter of fact, the 3rd defendant is no longer a party to these proceedings the action against it having been withdrawn by the plaintiffs on 5 May 2021. The exception will therefore be determined in light of the claims against the 1st and 2nd defendants.

In opposing this position, the plaintiffs have relied on rule 85 of the High Court Rules 1971 which provides that; "Subject to rule 86 two or more persons may be joined together in one action as plaintiffs or defendants whether in convention or in reconvention where—

(*a*) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and

(*b*) all rights to relief claimed in the action, whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions."

On the basis of these provisions the plaintiffs argued that despite the separate actions against the 1st and 2nd defendants the same questions of law or fact will arise and that the relief sought arise out of the same transaction. I can do more than agree with this observation by the plaintiffs. The reasons are simple. The action against the 1st defendant is based on two articles as shown in the declaration recited supra. The action against the 2nd defendant is partly based on the repetition of the articles by the 1st defendant and secondly an article with specific reference to the involvement of 2nd plaintiff in the alleged corruption. There is interconnectivity to these actions to the extent that they will ride on the same question of law or fact based on the same transaction.

Even if there was a misjoinder such cannot defeat the cause. See rule 87 (1) which provides that;

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

I find no merit in the exception based on misjoinder.

b) Nexus between 2nd and 3rd Plaintiffs with the words complained of.

The 1st defendant said of the two articles complained of there is no mention of the 2nd and 3rd plaintiffs. It is correct that the two articles do not mention by name any of the two plaintiffs. The parties are in agreement as to the essentials which constitute defamation. These are;

a) The statement or words must be defamatory
b) There has been publication of the defamatory words
c) The words were intended and must refer in particular to the plaintiff
d) The defendant must not have a lawful defence.

See *Chinamasa* v *Jongwe Printing & Publishers Company (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H); *Madhimba* v *Zimbabwe Newspapers 1980 Limited* 1995 (1) ZLR 391 (H).

These essentials are alleged in a complete cause of action for defamation. The individual in respect of whom words complained of refer to him/her has the *locus standi* to bring an action for defamation. In *casu*, do the articles complained of refer to the 2nd and 3rd plaintiffs? The courts apply an objective test which was aptly put in *Young* v *Kemsley* 1940 AD 258 at 281 as; "the test is whether the ordinary, reasonable man hearing the speech would have understood the words complained of to apply to the Plaintiff."

The words complained of are in my view per se defamatory. The question then is, on what basis are the two tweets said to refer to the 2nd and 3rd plaintiffs. The plaintiffs' argument is that the first article refers to the 2nd plaintiff by implication as the one who pressed charges against the 1st defendant and as such any reasonable person reading that article would understand the words complained of to refer to her. It was further argued the 2nd and 3rd plaintiffs are identified in the second tweet as persons who come from Siberia.

The plaintiffs relied on the case of *Moyo* v *Chiponda* 2004 (2) ZLR 67 (H). This is a case where the defendant excepted to the summons and declaration on the grounds, inter alia, that the words complained of did not identify the plaintiff. However, there were other subsequent publications which identified the plaintiff. The question that arose was whether a subsequent publication that explicitly identified the plaintiff by name could be relied upon as a ground upon which an exception could be dismissed in an action involving a previous publication in which the reference to the plaintiff was so general that at the time of the publication the ordinary reader could not have immediately identified the plaintiff as being the subject of such publication. In dismissing the exception, the court held that;

> "I would therefore reject that the summons is expiciable merely on the ground that identification of the plaintiff occurred after the publication complained of and in subsequent publications. It would be absurd to hold otherwise, particularly in this case where the first subsequent publication came barely three weeks after the initial publication. The evidence of such subsequent publication is admissible and can be summoned to support the plaintiff's case."

In *casu*, several other subsequent articles are alleged to have identified the two plaintiffs but no such articles were disclosed in respect to 3rd plaintiff neither in the declaration nor in the reply to the request for further particulars other than the date when such were published. I find no nexus between the 3rd plaintiff and the words complained of. The tweets do not sufficiently identify the 3rd plaintiff. However, the same cannot be said of the 2nd plaintiff whose identification is not only by implication of being a complainant in the Police case but a subsequent article which is subject of the action against the 2nd defendant identifies the 2nd plaintiff by name.

The 1st defendant asked for dismissal of the plaintiffs' action in the event the special plea and exception succeeds. Such a relief will be drastic to the plaintiffs. In *Sammy's Group (Pvt) Ltd* v *Meyburgh NO & Ors* SC 45/15 the court cited with approval the following passage (which I cite herein in part) from Erasmus *Superior Court Practice* thus: -

> "Where the exception is successful, the proper course is for the court to uphold it. When an exception is upheld, it is the pleading to which exception is taken which is destroyed. The remainder of the edifice does not crumble .... The upholding of an exception to a declaration or a combined summons does not, therefore, carry with it the dismissal of the action. The unsuccessful party may then apply for leave to amend his pleading. It is in fact the invariable practice of the courts in cases where an exception has been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time... Where the court does not grant leave to amend when making an order setting aside the pleading, the plaintiff is entitled to make such application when judgment setting aside the pleading has been delivered."

COSTS

The 1st defendant asked for dismissal of the plaintiffs' action with costs. The plaintiffs have asked for dismissal of the special plea and exception with costs on a punitive scale. However, the 1st defendant has partially succeeded in his exception against the 3rd plaintiff. The special plea and exception were reasonably arguable. Punitive costs against 1st defendant are not called for.

DISPOSITION

1. The special plea in bar be and is hereby dismissed.
2. The exception in relation to mis-joinder of defendants be and is hereby dismissed.
3. The exception against the 2nd plaintiff be and is hereby dismissed.
4. The exception against the 3rd plaintiff is upheld. The pleadings by the 3rd plaintiff against the 1st defendant are set aside.
5. The 1st defendant shall pay 75% of the plaintiffs' costs on the ordinary scale.

Scanlan & Holderness, plaintiffs' legal practitioners
Tendai Biti Law, for 1st & 2nd defendants' legal practitioners