

NHAMO ANTHONY MHIRIPIRI
versus
PATIENCE MUSHUKU
and
MIDLANDS STATE UNIVERSITY

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 26 November 2024 and 29 April 2025

Summons commencing action

A Chimhofu, for the plaintiff
M Jaravaza, for the second defendant

TAKUVA J: The plaintiff in this matter instituted summons seeking the following relief;

1. An order that the Defendants pay the Plaintiff the sum of USD 200 000.00 (Two Hundred Thousand United States Dollars), jointly and severally the one paying the other to be absolved, being defamation damages suffered by Plaintiff on account of defamatory and false report by the first Defendant to the second Defendant wherein first Defendant maliciously lied that Plaintiff had sexually assaulted her for over 18 years and the allegations were republished and or allowed to get to the unintended public and media by the first and second Defendants which resulted in Plaintiff suffering diminution from his reputation and dignity.
2. An order that the first and second Defendants retract the said report and tender to the Plaintiff a public apology through publication in the Newsday and Herald newspapers.
3. An order that the first and second Defendants pay, jointly and severally the one paying the other to be absolved, costs of suit on the legal Practitioner client scale.

Background Facts

The plaintiff in this matter is a male adult employed by the second defendant as a Professor for over 20 years. The first defendant is a former student of the second defendant who is also now currently employed by the second defendant as a Lecturer. Both Plaintiff and second defendant work under the same department; Media Communication, Film and Theatre

Art Studies with first defendant being a subordinate to the Plaintiff. On 14 September 2023 the plaintiff avers that the first defendant reported him to the second defendant claiming to have been sexually assaulted by the plaintiff while she was still a student at the school. This letter was also copied to the plaintiff. However, plaintiff claims that second defendant only took action a month or so after the receipt of the letter. It was at this point that plaintiff became aware that he was posted on various social media platforms accused of sexually molesting the first defendant. The plaintiff claims that some of the posts actually painted him as a serial rapist and the news circulated.

Following these events, the plaintiff proceeded to write a letter to the second defendant complaining about the publication of the issue that was meant to only be between the parties in this matter. The allegation eventually led to the plaintiff's demotion from current position and he claims that he has been severely impacted by the allegation which he claims to be false.

In response to the summons, the second defendant filed 6 grounds of exception namely;

1. The Summons and Declaration do not disclose a valid cause of action as required by r 12 (5) (d) and 36 (1) (d) of the High Court Rules SI 202 of 2021.
2. No cause of action as particulars of alleged negligence were not pleaded.
3. Since there is no cause of action, second Defendant is disabled and incapacitated from pleading to the defective Summons and Declaration.
4. The Plaintiff's Declaration does not state truly and concisely the nature, extent and grounds of cause of action, but is a rumbling synopsis of evidence as contemplated by r 49 (6) and (7) of the High Court Rules.
5. The allegation that both first and second Defendant acted in common purpose, has been made without pleading any facts upon which this allegation is anchored.
6. Facts and evidence mixed up in contravention of r 39 (1) (d) of the high court rules.

The Law and its application to the facts

Plaintiff challenges the second defendant's exception stating that it was filed out of time. Its argument is based on r 37(3) of the High Court Rules [2021] which reads,

“(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.”

The defendant filed its appearance to defend on the 06 September 2024. The Plaintiff avers that the 10 day period lapsed on 20 September 2024 yet the defendants only proceeded to file its exception on 08 October 2024.

R37(3) should not be read in isolation. DEME J set out this clearly in the case of Florence Madake v Pamela Makonza and Darlington Nyabinde when he made the following remark:

“.....It is apparent that R 37(3) of the High Court Rules is subject to R 12(3)-(4) of the High Court Rules.”

Rule 12(3)-(4) set out the following;

“(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.”

After filing its notice of appearance to defend on 06 September it therefore follows that the defendant ought to have filed its exception by 20 September and the Plaintiff rightfully states. The plaintiff however, to leave out its actions on 08 October. On this day it shows on record that the plaintiff filed its notice to plead and intention to bar wherein it directed the defendants to file its plea within 5 days. The second defendant proceeded to file its exception on the very same day and this explains why the exception is before this court. If it was indeed filed out of time without the leave of the plaintiff the Registrar of the High Court would have rejected the exception and it would not have formed part of the record. The plaintiff's claim therefore hold no merit and is dismissed.

Further, the plaintiff also argues that the second Defendant did not comply with rule 42(3) of the High Court Rules [2021] which reads;

“(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.”

In its letter addressed to the plaintiff, the second defendant raised 2 grounds of exception as opposed to 6 that they actually proceed to file on 08 October 2024. This rule was put in place to allow the plaintiff to rectify whatever it is the defendant's find defective in order to smoothen the flow the proceedings before the court. It therefore served no purpose for a defendant to raise only a fraction of the claims that it intends to raise then surprise the plaintiff

with more grounds after the fact. The 6 grounds of exception that were raised by the defendant, out to have formed part of its letter sent to the plaintiff's lawyers rather than submitting the piecemeal. This expedites the running of proceedings. The second defendant, intending to add or amend its grounds, needed the leave of the court to do. The discrepancy from 2 to 6 grounds clearly highlights the extent to which the second defendant barely stated anything in its letter and allowing action will sure prejudice the plaintiff. It is for this reason that the court find the exception incompetent before this court.

Nonetheless, the court encountered some hurdles when considering this matter. Rule 12(5)(d) of the Zimbabwe High Court Rules [2021] requires every summons to include;

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

This position was emphasised in the case of *Mawire v Rio Zim Limited (Private) SC 13/21* wherein it was noted that,

"A cause of action is defined by Lord Esther MR in *Read v Brown* (1888) 22 QB 131, as every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court."

In this case the plaintiff has not clearly established his cause of action and the court at this point is still in the dark in regards to what exactly was said publicised. It becomes impossible therefore for this court to order the defendants to retract a statement unknown to it. Plaintiff ought to make it transparent to both the court and the defendants in order to attain the relief they are seeking. This however, does not render the summons fatally defective. Plaintiff is allowed to amend its summons and include the exact statement which it seeks the defendant to retract since currently there is only what seems to be only a summary or paraphrase of what the original statement was. In the case of *Sifara v Jemwa and Anor ZWHCC 28/24* wherein BHACHI-MUZAWAZI J stated that;

"Rules of the court are for standardisation. They are procedural law and must be adhered to. However, they cannot enslave the court. There is room for flexibility for the sake of justice, expediency and finality to litigation."

Further, the plaintiff in this matter also fails to disclose how exactly the second defendant worked hand in hand to have the statement publicised. The evidence as to who exactly approached the media and caused the publication is not apparent to this court. It will therefore be unjust to order both defendants collectively under the same order when the court

is not clear as to what part each party played in these events. The court will be misdirecting itself if it proceeds to grant the relief without considering the actual facts that occurred and to what extent each of the defendants are separately liable if the defamation is proven to have merit.

Conclusion

Accordingly, it is very clear that the Plaintiff falls short in his efforts to establish his cause of action and the extent to which both defendants are liable and how. As noted, before, there is need for the plaintiff to amend its summons and declaration. This will assist the court in reaching a fair judgement.

Disposition

Plaintiff be and is hereby ordered to amend its summons and declaration within 7 days of this judgment.

TAKUVA J:.....

Rusinahama-Rabvukwa Attorneys, plaintiff legal practitioners.
Dzimba, Jaravaza & Associates, defendant's legal practitioners.