FADZAYI MAHERE
versus
PETINA GAPPAH

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 29 March 2022

Date of written judgment: 26 May 2022

Civil trial – interlocutory applications

Ms *N. Moyo*, for the plaintiff
Ms *N. Munzara,* for the defendant

MAFUSIRE J

[1] The plaintiff is suing the defendant for damages for defamation. The trial was scheduled to begin on 29 March 2022. It did not. The defendant's counsel of choice was said to be indisposed and therefore unavailable. Amid objections by the plaintiff, I postponed the matter to the second judicial term of 2022. In the meantime, two interlocutory issues were argued. The first was the defendant's application to compel further discovery of certain documents by the plaintiff. The application had been filed separately under a different case number and via the chamber book. The second was a coterie of what the defendant termed points *in limine* against the plaintiff's declaration. I reserved judgment on both. This now is the judgment.

[2] In the application to compel further discovery, the defendant wants the plaintiff to discover certain documents which she claims are relevant to the trial and are in the control or custody of the plaintiff. The application is said to be presented in terms of Order 24 r 165 of the old High Court Rules, 1971. The defendant alleges that the documents are critical in informing the nature of her defence. That defence is that of truth or fair comment. She describes the plaintiff as a congenital liar who, among other things, has dishonestly and deliberately introduced into evidence some illegible document so as to make it harder for the defendant to expose her lies. The further documents that the defendant wants discovered include certain

exchanges by the parties on social media, including Facebook Messenger, and certain documents pertaining to the plaintiff's employment status abroad.

[3] Both the plaintiff and the defendant are lawyers but in different spheres. Both attained their undergraduate degrees at the University of Zimbabwe but at different times. The plaintiff currently practises law as an advocate in Zimbabwe. The defendant currently works for an international organisation abroad. At the time of the summons, she was an employee in the office of the President and Cabinet in Zimbabwe. In justifying the demand for further discovery, the defendant explains that in regards to the plaintiff's academic transcript, for example, the copy produced is deliberately unclear to conceal the fact that, among other things, the plaintiff did not receive the University Book Prize in every year of her study. With regards to the plaintiff's one time engagement at The Hague, the defendant accuses the plaintiff of deliberately producing a document that only relates to her three months stint as a legal assistant at The Hague, but concealing her employment status during the preceding period. The defendant further accuses the plaintiff of deliberately and dishonestly concealing information on her own untrue and unpleasant defamatory statements about a former Vice-Chancellor of the University of Zimbabwe, deceased, whose widow the defendant alleges was friends with. The plaintiff attained her post-graduate qualification with the University of Cambridge. The defendant alleges that some of the documents concealed by the plaintiff would expose the fact that she attended this prestigious institution on the back of a lie.

[4] In reply, the plaintiff strongly objects to the order for further discovery as sought by the defendant. Her grounds are multiple. She points out that the application is unprocedural. Order 24 r 165 does not govern the right to further discovery. It governs the right to discovery upon breach of a notice to make discovery and the right to an inspection of the discovery documents upon prior notice. The plaintiff further alleges that she has discovered all the documents that she intends to use at the trial. She does not have the documents that the defendant wants her compelled to discover. She does not even know some of them. She denies she has told untruths at any time or deliberately falsified certain information in any way. She points out that some of the documents demanded of her relate to certain communication between the parties on social media which the defendant can herself produce from her end. The plaintiff accuses the defendant and her legal practitioners of abusing the court process by turning the purported

application to compel further discovery as a platform to launch further defamatory attacks upon her person. She asks that the application be dismissed with costs not only on the higher scale, but also *de bonis propriis* against the defendant's legal practitioners for misguiding the defendant in deposing to such a defamatory affidavit.

[5] I rule that the defendant's application to compel further discovery is ill-conceived for a number of reasons. To start with, r 165 of the old Rules did not govern what the defendant has done. The relevant portion of that rule read as follows:

> "**165. Failure to make discovery or permit inspection**
>
> (1) If a party fails to make discovery under this Order or, having been served with a notice under rule 164**,** fails to give notice of a time for inspection or fails to permit inspection as required by that rule, the party desiring discovery or inspection may make a chamber application for an order compelling such discovery or inspection, and the judge may grant or refuse the order as he thinks is appropriate."

[6] The reference to "... *discovery under this Order* ..." was a reference to the obligation of a party to make discovery on oath upon being called upon to do so by the other party in terms of r 160. In terms of r 160, a party could call upon the other party, after the pleadings had been closed, to make discovery of all the documents relating to the matter in question which were, or had at any time been in the possession or control of such other party. This is not the situation pertaining to this matter. The record shows that the plaintiff effected discovery "... *in terms of the Rules* ..."[1] The situation is way past the discovery stage. It is now at the trial stage. Among other things, after discovery, the parties went on to attend a pre-trial conference before a judge, and agreed on the issues for trial. The matter was duly set down for trial in terms of the rules.

[7] By saying that the matter is way past the discovery stage, I am not suggesting that the defendant, or either party for that matter, is barred from requiring further discovery. That aspect is not before me. I do not have to decide it. What I am deciding is the procedural impropriety by the defendant in relying on an inapposite rule for the order that she seeks. A party did not compel further discovery in terms of r 165.

[8] There was, of course, in the old Rules, a rule governing further discovery, r 162. It said:

[1] Para 4 of the Pre-Trial Conference Round-Table Minute, p 35 – 36 of the record

> "**162. Further discovery**
>
> If a party believes that there are, in addition to documents as disclosed as aforesaid, documents, including copies thereof, which may be relevant to any matter in question in the possession of any other party thereto, the former may give notice to the latter requiring him to make the same available for inspection in accordance with rule 164 or to state on oath within six days that such documents are not in his possession, in which event he shall, if known to him, state their whereabouts."

[9] Even assuming that it is r 162 that defendant intended to rely on, and that the reference to r 165 was just a harmless mistake, which is not what the defendant has argued, still the defendant's application cannot succeed. Admittedly, r 162 did not say *when*, in relation to the closure of pleadings, a party might call for further discovery. But it explained *why* he or she might do so. It was when he or she believed that there were documents in the possession of the other party, in addition to those already disclosed, that were relevant to any matter in question. In the present matter, the defendant says the further documents she wants discovered are critical in informing the nature of her defence, which is that of truth or fair comment. In reply, the plaintiff says in part the alleged documents have no relevance to her case.

[10] I do not have to decide this particular point, namely, whether the further documents required by the defendant are relevant to inform the nature of the defendant's defence, or are irrelevant to the plaintiff's cause. The defendant has botched the procedure. She has not brought herself within the ambit of r 162, or for that matter, any other on the point. If she desired further discovery in terms of r 162, she ought to have issued the plaintiff with <u>a notice</u> requiring her to make these further documents <u>available for inspection</u>. The defendant does not suggest or argue that she issued the plaintiff with this notice. Instead, she just confronted the plaintiff with a chamber book application. Not only that, but she requires the plaintiff, not to make these documents <u>available for inspection</u>, as the rule said, in accordance with the procedure laid out in r 164. Her draft order seeks that the plaintiff <u>produces</u> the documents within <u>ten days</u> of the granting of the order.

[11] It is not explained what informs the demand by the defendant for the plaintiff to <u>produce</u> the documents, instead of making them available for inspection. It is not explained how the plaintiff would go about <u>producing</u> the documents. It is not explained what informs the <u>ten-day</u> time frame. Rule 164 which governed the inspection of documents, set out the procedure. The notice to produce documents for inspect had to be in accordance with Form No. 19. A time

frame of five days was given to the other party. And this was not to produce the documents, but merely to inform or indicate when and where the documents might be inspected. The response by the other party had to be in accordance with Form No. 20. The response had to give a three-day time frame within which the inspection might be carried out.

[12] In terms of r 164(4) a party that failed to produce any document for inspection was precluded from using such document at the trial unless the court allowed them. It was r 165 that governed the procedure for compelling discovery or inspection of documents. The aggrieved party was entitled to make a chamber application to compel discovery or inspection. But this was only after the procedure set out above would have been followed. The procedure adopted by the defendant in the present proceedings being alien to the rules, her application cannot succeed.

[13] The defendant's application cannot succeed also on the more substantive ground that, assuming the documents are relevant to any matter in question within the contemplation of r 162, and that the plaintiff is deliberately refusing to make them available when she has them in her possession or knows their whereabouts, the plaintiff says she does not know about these documents. Further assuming that the defendant adopted the correct procedure, the plaintiff also points out that there is nothing precluding the defendant herself from producing these documents, given that in the main, they are alleged to be communication between the parties or communication on social media which is available to the defendant or any person. Regarding the unclear academic transcript, the plaintiff says she provided a copy from the only copy in her possession which is also unclear. If the defendant is unable to read the copy given her, she is free to call for inspection of the one in the plaintiff's possession in accordance with the Rules.

[14] The court cannot be involved in a merry-go-round where the one party demands production of documents but the other says she cannot because she does not have them or does not know about them. If the plaintiff says she does not have the documents, or that she knows nothing about them, and the defendant does not show that the plaintiff is lying, any compelling order would be a *brutum fulmen*. Courts do not issue orders which are a *brutum fulmen*. Therefore, the defendant's application under HC 3178-21 is hereby dismissed. The issue of costs is dealt with later.

[15] The second issue upon which argument was presented on 29 March 2022 and judgment reserved was the propriety of the plaintiff's declaration. By letter dated 9 March 2022 which was copied to the court, the defendant's attorneys wrote to the plaintiff's attorneys advising that on the day of trial, the defendant would take a point of law to the effect that the plaintiff's declaration disclosed no cause of action and that there was, in fact, no defamation claim for trial. It was said the letter would serve as the requisite notice in terms of r 42(3) of the new High Court Rules, 2021.

[16] Rule 42(3) falls under "*Exceptions, special pleas, applications to strike out and applications for particulars*". These processes are alternatives to pleadings on the merits. Rule 42(1)(b) provides that as an alternative to pleading to the merits, a party may within the period allowed for filing any subsequent pleading, except to the pleading or to single paragraphs thereof, *inter alia*, where the pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence.

[17] After the defendant's letter of 9 March aforesaid, the plaintiff, through her attorneys, replied on the next day, 10 March 2022, pointing out that r 42 provides for alternatives to pleadings on the merits within the period allowed for filing any subsequent pleadings, and that it did not appear that r 42(3) provided for what the defendant wished to do. In spite of this reply, the defendant went on to file, exactly on the day of trial, and just before the hearing, a forty-three paged document titled "*Defendant's Points in limine and Submissions*". Distilled, the point taken in that document was predominantly that the plaintiff's declaration is bad in law and does not disclose a cause of action for a number of reasons, not least that whilst it is not necessary to plead the *ipsissima verba* amounting to the alleged defamation, nonetheless, the plaintiff ought to have set out the words, or substantially those words, making out the delict of defamation. It is argued that the plaintiff has merely pleaded <u>the effect</u> of those words. The defendant's further objections are said to be in addition, or alternative to, the main objection. They are:

- that not having pleaded the actual words making out the defamation, the plaintiff must be relying on the sting or inuendo of those words, but that she has not pleaded the sting or the innuendo either;
- that whilst *animus injuriandi* is automatically presumed under Zimbabwean law, unlike South African law, and therefore needs not be pleaded in a claim for defamation, *in*

casu, the plaintiff has disavowed the presumption and has therefore exonerated the defendant in the process, more particularly in that the plaintiff accepts, tacitly, that the defendant was unaware of the defamatory statements or that the effect of the words she used in the communication in question amounted to defamation;

- that the plaintiff's claim does not disclose a cognisable cause of action and is therefore vague and embarrassing in that many of the tweets in question did not relate to the plaintiff and that the average reader of average intelligence would not connect the plaintiff to them;

- that the plaintiff's claim is an abuse of the court process in that, at USD1 million, it is so grossly excessive as to lead to the conclusion that it has been mounted just for the sake of litigation and for an audience outside of the legal process than for achieving an outcome.

[18] The defendant's document goes into some considerable detail in attempting to show that her objections are points of law which can be raised at any point of the proceedings, allegedly in accordance with case law in general[2], and r 42(10) in particular. Rule 42(10) reads in part:

> "(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;" (*emphasis by defendant*)

[19] Since the defendant's lengthy document was filed on the day of hearing, the plaintiff had no opportunity to file a written response. However, her counsel declined to have the matter postponed for that reason and opted to make oral submissions in response. In the main, counsel's submissions were that the defendant's alleged objections were time-barred in that despite labelling them points *in limine* or points of law which could be raised at any stage of the proceedings, they were nothing more than ordinary exceptions to a pleading which ought to have been taken within the same time the plaintiff's declaration ought to have been filed. At

[2] E.g., *Muskwe v Nyajina & Ors* SC 17-12 and *El Elion Investments (Pvt) Ltd v Auction City (Pvt) Ltd* 2016 (1) ZLR 289 (S)

any rate, not only had the defendant since pleaded to the merits of the claim, but in her plea, she expressly admits the defamation and only seeks to justify it under the guise of truth or fair comment. As such, the defendant's conduct is an abuse of the court process which is coming against a background where, at every turn, she files more and more defamatory and virulent statements. Thus, not only should this late and bad exception be dismissed, but also the defendant should be mulcted in costs.

[20] The defendant's objections cannot succeed. They are wrong in many respects. I deal with just one or two. Despite calling them points *in limine*, or points of law which allegedly can be raised at any time, the objections are no more than ordinary exceptions to a pleading as set out in r 42 which should be raised within a stated time frame. Rule 42(1) provides that such exceptions, among other processes, may be taken within the period allowed for filing any subsequent pleading. What this period is, is not expressly stated. But it is easily worked out. After the plaintiff's summons and declaration were served on her, the defendant entered an appearance to defend. Rule 37(3) provides that where the defendant has delivered a notice of appearance to defend, he or she is required to deliver his or her plea, with or without a claim in reconvention, or an exception with or without an application to strike out, or a special plea, within ten days after filing such appearance.

[21] Thus, in accordance with r 37(3), a defendant's plea, or exception, or special plea, have to be filed within ten days of the appearance to defend. In the present matter, given that the defendant's appearance to defend was filed on 15 October 2018, on 29 March 2022 when she delivered her exception under the guise of points *in limine* or points of law, she was almost 3 ½ years out of time. No explanation has been given for this inordinate delay. No condonation has been sought to admit the exception out of time. On the contrary, the exception is sought to be justified on the basis that it is a point of law which can be taken at any time. This is manifestly misconceived. Of course, an exception deals with points of law. But this is not an ordinary point of law. This is an alternative to a pleading on the merits. There are rules expressly governing the procedure. The defendant has not followed them.

[22] The defendant's reliance on R 42(10) is misguided. The direction given by this provision as to when a striking out may be done is to the court and not as to when a party may file an exception. The exception has to be taken within the time allowed for the filing of any

subsequent pleading. Rule 37(3) allows a defendant to deliver a plea, with or without a claim in reconvention, or an exception with or without an application to strike out, within the ten-day period aforesaid. At any rate, r 42(3) directs in mandatory terms that before filing an exception to a pleading, or making a court application to strike out any portion of a pleading on any grounds, the complaining party "***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.

[23] The defendant's letter of 10 March 2022 aforesaid claimed that it served as a notice in terms of r 42(3). The material portion of it read:

> "Reference is made to the above matter, and the Notice of Set Down for trial to held (*sic*) on 29 March.
>
> By this letter, were hereby (*sic*) advise that on the day of the trial, the Defendant will take a point of law to the effect that the Declaration does not disclose a cause of action and that there is in fact no defamation claim for trial. This letter therefore serves as a notice to yourselves of the same in terms of Rule 42(3) of the High Court Rules SI 202 of 2021."

[24] But the defendant's letter could not possibly be the type of letter contemplated by r 42(3) for the obvious reason that not only was it way out of time, but also that its contents lacked the directives prescribed by the rule as to the nature of the complaint, and the demand to remove the cause of the complaint within the specified time-frame. The old Rules had kindred provisions under Order 21. The plaintiff's summons and declaration were filed under the old dispensation. So was the plea and all the other subsequent pleadings. The pleadings were closed under the old Rules. A pre-trial conference was convened under those Rules and the matter was referred to trial on 25 June 2021, thus way before the new Rules which came into operation only in July 2021. It has not been explained why the defendant should seek to rely on the new Rules instead of the old. But be that as it may, she still could not rely on the old Rules for the reason, among others, that the requirement for an exception to be preceded by a letter such as the one prescribed by r 42(3) is common in both dispensations. It is not necessary to go into any further detail concerning the old Rules because they are not the basis of the procedure the defendant has adopted.

[25] Apart from the procedural impropriety, the defendant's objections cannot succeed on substantive grounds as well. The main objection is that the plaintiff's declaration is bad in law and does not disclose a cause of action in that the plaintiff does not plead the words allegedly used or words of a similar meaning, but that she was content to plead the effect of the allegedly defamatory words. It is argued that to plead the effect of the words is the function of the court. It is its duty to determine whether the words complained of have the effect attributed it. The defendant cites a surfeit of authorities in support of her argument on this point.

[26] The defendant's objection fails on the basis that not only has she pleaded to the claim, but also that she has all but admitted the effect complained of. What she seeks to do is to justify her conduct on the basis that her statements were true or fair comment. A brief example suffices. In paragraph 3 of her declaration the plaintiff avers in part:

> "3 In a series of tweets on Twitter on the night of Saturday 29 September 2018, Defendant published a series of tweets about Plaintiff to the effect that:
>
> 3.1 Plaintiff did not qualify to be admitted into the University of Zimbabwe for her Law Degree;
>
> 3.2 Plaintiff was admitted into the University of Zimbabwe only because her father was a permanent secretary in the Government and he used his influence to get her admitted because she was not qualified to be admitted on her own credentials;
>
> 3.3 Defendant wrote the essay that enabled Plaintiff to get into Cambridge University for her Masters Degree;
>
> 3.4 Plaintiff falsified her CV by claiming to have been employed by the International Criminal Court when she had only been an intern;
>
> 3.5 Plaintiff 'tried to get into Defendant's then partner's pants.'"

[27] In her plea, the defendant averred as follows:

> "AD PARA 3
>
> 4. This is denied *in toto*.
>
> 4.1 In actual fact, the Plaintiff extracted a tweet from the Defendant's Twitter feed, which was not at all about her and inferred that it was, and responded in a crude and disproportionate manner, suggesting that the Defendant had 'never been in a Zimbabwean courtroom', she was not qualified to call herself a lawyer.
>
> 4.2 In response to this unnecessary provocation, the Defendant responded to the Plaintiff by stating the truth that as the Plaintiff had served as an intern at the Hague, she was surely aware of different ways to be a lawyer.

4.3 When the Plaintiff denied the uncontestable and easily demonstrated fact that she had been an intern in the Hague, the Defendant was further provoked by this obvious lie, as well as by another lie told by the Plaintiff which was that the Defendant had blocked her on Twitter. In this state of provocation, the defendant responded by telling the Plaintiff not to lie. The Defendant also added that the Plaintiff's qualifications were below the threshold that was required by the University of Zimbabwe in the year that she enrolled.

4.4 Further, the Defendant responded by stating the truth that she had assisted the Plaintiff to redraft her Cambridge essay and had also given her other assistance which helped her to attain a place at Cambridge.

4.5 Lastly, Defendant responded to the Plaintiff by stating the truth that the Plaintiff had attempted to start a sexual relationship with the father of the Defendant's son. The colloquialism used was 'getting into my then partner's pants.'"

[28] To the plaintiff's averments in paragraph 5 of the declaration that the allegations [by the defendant] were false and highly defamatory, the defendant respondent that her statements constituted truth and or fair comment and that as such, they were not defamatory. A pre-trial conference was held before a judge of this court. The matter was referred to trial on the issues as settled before that judge. They were these:

- whether or not the defendant's tweets defamed the Plaintiff;
- if so, whether or not the defendant has a valid defence to the defamation claims;
- if the defendant does not have a valid defence, whether or not the plaintiff should be compensated in damages and in what quantum

[29] On that pre-trial conference minute, the onus of proof is on the defendant. After that the parties went on to file detailed synopses of the evidence they wish to lead at the trial. The defendant is calling nine witnesses. From their synopses, there is one issue intended to be proved: the truth of the defendant's statements. Therefore, given this background, it is quite incredible that so late in the day, the defendant should spring on the court, on the day of trial, a forty-three paged document alleging that the defendant's claim is excipiable allegedly in that it does not disclose a cause of action or that it is vague and embarrassing. An exception is a formal objection to a pleading. It is taken where, among other things, a party cannot plead to a pleading because of an irregularity. In this case, the defendant has understood the plaintiff's claim as presented. In essence, her lengthy document seems to be a hybrid, constituting a notice of exception, heads of argument and closing submissions, particularly as it seeks, in some portions, to comment on the evidence to be led at the trial. This is manifestly irregular.

Regarding quantum, a pleading cannot be struck off just because a party thinks that the amount claimed is excessive. Quantum is always settled by the court.

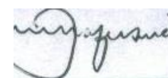
[30] In all the circumstances therefore, the defendant's objection is irregular. It is hereby dismissed. As regards costs, it would normally be prudent to reserve them for determination at the trial. However, given the gross irregularity of the courses taken by the defendant at this stage, it is not fair that the costs be held over for determination another day. The conduct of the defendant in mounting the application to compel further discovery and in filing a lengthy but baseless objection cannot be justified. Therefore, the following orders are made:

i/ the application under HC 3178/21 to compel further discovery is hereby dismissed with costs.

ii/ the defendant's points *in limine* and submissions on 29 March 2022 are hereby dismissed with costs.

iii/ the trial of this matter shall proceed on a date, time and place to be advised.

26 May 2022



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