JDM AGRO – CONSULT & MARKETING (PVT) LTD
versus
THE EDITOR OF THE HERALD NEWSPAPER
and
THE HERALD NEWSPAPER

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 25 and 27 June and 8 August 2007

Civil Trial

G Mtisi, for the plaintiff
H Zhou, for the defendants

GOWORA J: The plaintiff issued summons against the defendants described herein for defamation damages in the sum of $ 500 000 000-00. In the declaration which is attached to the summons the defendants are described in the following terms:

> "2 (a) The first defendant is the Editor of the Herald Newspaper.
>
> (b)The second defendant is the Owner, Publisher of the Herald Newspaper, the Distributor of the Herald Newspaper and the Printer of the Herald Newspaper all of Herald House, Corner Second Street/George Silundika Avenue, Harare".

The allegations in the declaration are to the effect that on 12 July 2005 in Zimbabwe and to the world at large an article was published in the Herald of that date. The article was entitled "Bogus Firm Swindles farmers of $4,4 billion". A copy of the article is annexed to the summons. The plaintiff further alleges that the Herald is widely distributed both within and outside this country. The plaintiff further alleges that the article is highly defamatory of the plaintiff and as a result it suffered damages due to the injury done to its reputation as a business concern. It therefore claimed the sum of $ 500 000 000-00 against both the defendants jointly and severally.

The summons and declaration were served on the parties named as the defendants therein. Appearance to defend was entered on behalf of both and a joint plea was filed on behalf of the said defendants. Thereafter the parties applied for a pre-trial conference to be held at which issues for trial between the litigants would be defined. It is at this juncture that it seems to have occurred to the plaintiff and or its legal practitioners that the description of the defendants was incorrect. An application to amend the summons and declaration was therefore filed. At a pre-trial conference held on 11 September 2006 the plaintiff moved for the said amendment which was granted by consent. The amendment was to the following effect:

> "2 b) The second defendant is The Zimbabwe Newspapers 1980 (Pvt) Ltd, which is the owner, publisher of The Herald Newspaper, distributor of The Herald Newspaper and printer of the Herald Newspaper all of the Herald House Corner Second Street/ G. Silundika Avenue Harare".

There was no attempt to try and describe the first defendant in any other manner other than what appeared on the face of the summons and in the declaration. With the pleadings in that state the matter was then referred to trial.

On Monday 25 June 2007 when the matter was due for trial before me a notice of point in *limine* was filed on behalf of the defendants. In order to give the plaintiff a chance to respond thereto the matter was then stood down to 27 June 2007 for oral argument on the point in *limine*. In the meantime both counsel had filed written submissions by the time the matter was called and I am indebted to counsel for the submissions thus filed.

The point taken by the defendants is that the summons filed of record is invalid in that there are no defendants before the court. The Editor of the Herald cited as the first defendant does not exist. The editor of a newspaper is a position within the structures of a newspaper and is neither a natural nor a legal person. There is no entity called the Herald Newspaper and the attempt to amend the summons at the pre-trial

conference did not cure the invalidity. The defendants therefore prayed that the matter should be struck off the roll with the plaintiff being made to pay the costs.

In response to the point in *limine*, the plaintiff raised two issues, the first being that the defendants were not entitled at the trial stage to raise a point in *limine*. The contention by the plaintiff was that pleadings had closed and the defendants were not entitled thereafter to raise such a point and that to do so was acting in bad faith. The second contention by the plaintiff was that the citation of the defendants was due to a misnomer which can easily be cured by an appropriate application to amend the summons and declaration. It was contended that the emphasis by the court should be to ensure that matters and disputes between parties be finalized rather than delayed due to technicalities that do not deal with the real issues between the parties.

It is correct as submitted by counsel for the plaintiff that the point in *limine* taken by the defendants is in fact a special plea, in that its determination may ultimately resolve the issue as to whether or not the citation of the defendants is fatal to the claim at this stage of the proceedings. The contention by the plaintiff is that in terms of order 18 r 119 the time for filing a plea or other answer to the plaintiff's is within the period stated therein and after pleadings have closed and *litis contestaio* joined the defendant cannot just file a special plea. Apart from the rule quoted above the plaintiff has not referred me to any authority that would preclude this court from considering the application made by the defendant in connection with the point in *limine*. The nearest authority I was able to find is that of Reuben V Meyers[1]. The defendant in that case had, on the day of trial, made an application to amend his plea by raising a special plea of prescription. The plaintiff opposed the application on the grounds that once the parties had joined *litis contestatio* such a plea was no longer available and that the defendant would be taken as having abandoned all such rights as a plea of prescription would have given him.

[1] 1957 R & N 616

The court granted the application to amend the plea and found that parties are permitted by the rules to amend their pleadings at any stage of the proceedings but before judgment in such a manner and on such terms as may be just.

A party can in this court amend his pleadings at any time, provided that there is no prejudice to the other party which prejudice is not capable of being cured by an award of costs. As much as I have searched I have not come across any authority that says that such an application cannot be made even after pleadings have closed. The application raised does not in mind fall under exceptions or special plea as it does not attack a defect in the pleadings. It deals with an irregularity in the summons itself which cannot be amended. I am unable to agree therefore with the contention by the plaintiff that, having pleaded to the summons, the defendants are barred from raising the issue of the incorrect citation of the parties that have been brought before the court. I turn now to consider the application on its merits.

I am not in this instance considering a special plea raising prescription as in the authority I have just referred to. What is now before me is a point in *limine* dealing with the question of the citation of the parties. It is a legal issue in that the defendants aver that the summons is bad at law in that no defendant has been brought before the court. They allege that the proceedings are a nullity as a result and no application launched by the plaintiff to amend the summons or substitute the defendants can cure the defect as the summons is a nullity.

It is pertinent to state from the outset that the application to amend the summons by altering the name of the second defendant which was granted at the pre-trial conference was without effect. The party named as the second defendant did not exist at the time that the summons was issued and served. The correct appellation for the publisher and owner of the newspaper is Zimbabwe Newspapers (1980) Limited. This is a registered company duly incorporated under the laws of this country. Its coming into being is due to the process by which it is incorporated as such.

It is then, after its incorporation, that it becomes a juristic person, capable of suing and being sued in its own right. Without that process it is non existent. The entity sued by the plaintiff as the second defendant is The Herald Newspaper. It is not a registered company and does not exist in any other form. Consequently the plaintiff issued summons against a non existent being. The amendment to the second defendant's name therefore was of no force and effect as the summons itself was a nullity. In *Gariya Safaris (Pvt) Ltd* v *Van Wyk*[2], this court stated:

> "*A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names in the summons as being those of the defendant, the summons is null and void ab initio*".

There might have been an attempt to correct the defect relating to the citation of the second defendant. There was no such attempt when it relates to the first defendant. The editor of a newspaper is the person responsible for the editorial content of such newspaper. It is a position that is occupied for the appropriate period by such individual employed in that capacity. It is therefore an occupation wherein the occupant can change from time to time. It is not a natural or legal person and there is no person identified by that name. The citation of the first defendant in that form is therefore irregular. It matters not, in my view, that the two defendants entered appearance to defend and proceeded to file a plea. The process of filing pleadings under those names would not have imbued the summons with any form of legality. There was no summons for them to plead to given that there were no persons answering to the names on the summons. They cannot be identified as such. This is not a mis-description which can be amended by alteration of the names on the summons, nor is it a substitution. You cannot amend or substitute something which does not exist.

In the premises it is my finding that the proceedings before me are a nullity. In terms of the disposition of the matter, I am urged by the defendants' counsel to strike the matter off the roll, on the premise that as

[2] 1996 (2) ZLR 246 (H)

the summons is a nullity there is in fact no matter before me. I have not been referred to any authority to support this contention. In *Stewart Scott Kennedy* v *Mazongororo Syringes (Pvt) Ltd*[3], the Supreme Court dismissed an appeal against a decision in the High Court where an application for substitution was refused with the claim by the plaintiff being dismissed as a consequence of the refusal for substitution. The plaintiff as cited had not existed as a legal or natural person at the time proceedings were instituted. I can see no harm in following the same course.

With regard to the issue of costs both parties had claimed costs against each other. The plaintiff was clearly dilatory in not confirming the exact identities of the defendants it intended to proceed against. The defendants on the other hand, lulled the plaintiff into a false sense of security. They, more than the plaintiff, knew their proper names. It did not have to take them to the eve of trial to inform the plaintiff that the wrong parties had been cited. They were not, in my view, vigilant in defending this claim. Even though they were successful in challenging the citation, it is my view that they should be disallowed part of their costs. It would be proper therefore for the plaintiff to be ordered to meet half their costs for this suit.

In the premise I make the following order.

The plaintiff's claim is dismissed. The defendants are hereby awarded half their costs.

Sawyer & Mkushi, legal practitioners for the plaintiff
Gula-Ndebele & Partners, legal practitioners for the defendants

[3] 1996 (2) ZLR 655 (S)