VAKAKORA CAPITAL (PRIVATE) LIMITED

versus

ASSOCIATED NEWSPAPERS OF ZIMBABWE

(PRIVATE) LIMITED t/a DAILY NEWS

and

ALPHA MEDIA HOLDINGS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

MTSHIYA J

HARARE, 11 September 2012, 24 October, 2012

Advocate *Morris*, for the applicant (plaintiff)

*T. Hussein,* for the respondent (2nd defendant)

MTSHIYA J: On 14 October 2011 the plaintiff issued summons against the first and second defendants. The second defendant (excipient) excepted to the summons. In the main, the plaintiff’s claim, as contained or spelt out in the declaration, is as follows:-

“4. In or about April 2011, the plaintiff managed to secure a loan from a company, namely Crown Finance Corporation, of Namibia from the sum of US$250 million to finance projects in Zimbabwe.

5. However, on 6 May 2011, the said Crown Finance Corporation’s legal practitioners wrote a letter to the plaintiffs, indicating that the loan had been withdrawn and that the signing ceremony for this loan, which had been set for Sandton, Johannesburg, had been cancelled.

6. The said legal practitioners of Crown Finance Corporation indicated that the decision to withdraw the loan facility was influenced by reports o violence in Zimbabwe, which resulted in Crown Finance Corporation fears that the country risk of Zimbabwe would escalate to untenable levels and therefore render the recovery of the said loan impossible.

7. It was also indicated by Crown Finance Corporation that in arriving at their decision to cancel, they were specifically influenced by a front-page headline story published by the second defendant on 5 May 20111 entitled “Violence Erupts Countrywide”, and another article published by the fist defendant on 6 May 2011 entitled “SADC Troike Directive Violated – Priorities Issue of Violence During Talks”.

8. The said articles published by the First and second defendants were false, and/or were published negligently without taking reasonable care in establishing the correctness of the articles.

9. In terms of the law, the first and second defendants have a duty to report factually, and defendants violated this duty.

10. As a result of the wrongful misrepresentations of the situation in Zimbabwe by the defendants, the plaintiff suffered the loss of the withdrawal of its loan of US$250 million, which loan would have resulted in the plaintiff earning at leas5t US$50 million.

WHEREFORE, PLAINTIFF CLAIMS:-

1. Damages in the sum of US$50 million from the defendants to be paid by them in equal shares.
2. Interest a *tempore morae* at the prescribed rate.
3. Costs of suit”.

Prior to filing the exception the excipient had not, as envisaged under r

140 of the High Court Rules 1971, sent a letter of complaint to the plaintiff. The said rule provides as follows:-

“(1) Before –

1. Making a court application to strike out any portion of a pleading on any grounds, or
2. Filing any exception to a pleading;

The party complaining of any pleading may state by letter to the other party the nature of his complaint and call upon the other party to amend his pleading so as to remove the cause of complaint.

(2) …...

(3) ……”.

(My own underlining)

On 21 November 2011, the plaintiff’s legal practitioners had, in light of the above

rule, written to the excipient in the following terms:-

“We refer to the notice of exception which appears to have been drafted by Mr *E.W.W. Morris* but signed by your Ms *Cook*.

The notice of Exception was filed without following r 140 of the High Court Rules. This Rule was clearly designed to avoid the filing of vexations exceptions where a quicker response could be achieved by despatching a letter of complaint.

We also take exception to the filing of an Exception were (*sic*) you gratuitously attack the integrity of the writer and his Law firm and invite the Court to take punitive action.

The filing of such a serious attack on us raises suspicion of sinister motives and the inability to professionally resolve issues. You are clearly aware that as we are not party to the proceedings we do not have the opportunity to respond to it. We also view this as a crude intimidatory tactic which we hitherto thought was beneath you.

The Exception is in any event bad in law. We therefore call upon you within 4 days of this letter to withdraw your Exception and proceed in terms of the Rules.

If we do not hear from you we will file a response to the Exception.

We believe that your attack on us is an attempt to intimidate a Legal Practitioner contrary to the provisions of the Legal Practitioners Act as read with the UN Basic Principles of the Rule of Lawyers. In our response we will point out that your action constitutes grave misconduct and we will seek costs *de bonis* against Mr E.W. Morris and Ms LA Cook and we will seek their referral to the Law Society disciplinary tribunal”.

The exception was not withdrawn and on 28 November 2011, the

excipient’s Legal Practitioners wrote to the plaintiff’s Legal Practitioners in the following terms:-

“We acknowledge receipt of your letter dated 21st November 2011.

We have to say that we are astonished by the contents thereof. With regard to r 140 it is not mandatory to deliver a letter of complaint in respect of every exception. Letters of complaint are normally given in circumstances where the source of the complaint can be removed by an amendment being made to the declaration. In this case, it is believed that the claim is so thoroughly defective that it would be inappropriate to give a letter of complaint, because the cause of complaint cannot be removed by means of a simple amendment.

As to the substance of the exception it does not arise from sinister motives nor is it intended to intimidate you. Indeed, we do not believe that we can do so or that you would be intimidated. In fact, your reaction very clearly shows that you are not intimidated.

With regard to the suggestion that you are entitled to file a response to the exception, we suggest that you have regard to the rules of the High Court. There is no provision for a response to an exception.

We have instructed Counsel to draft heads of argument so that the matter can be set down for argument. You will then have your opportunity to answer the exception by means of legal argument”.

Indeed on 5 December 2011 the excipient’s Legal Practitioners filed heads

of argument. This was followed by the plaintiff’s heads of argument which were filed on 7 December 2011.

In the heads of argument, Advocate *Morris* for the excipient, citing a number of authorities, stated, in part:-

“17. Accordingly, the first huge barrier that the respondent has to

surmount before it can move on to the other aspects of its claim, therefore, is that it is not *prime facie* wrongful and unlawful to cause a man economic loss, even if such loss was reasonably foreseeable as a result of a certain cause of action; Zimbabwe law has followed South African law in this regard …”.

*Zimbabwe Banking Corporation* v *Pyramid Motor Corporation*

1985(1) ZLR 358 (SC)

18 …….

19 …….

20. ……..

21. To sum up this far, the respondent has failed to plead such acts that would show that the publication complained of would be wrongful.

22. Respondent also faces the difficulty that, were the publication wrongful, it would result in Excipient’s unlimited liability for an indeterminate amount to an uncountable number of persons.

23. Of fundamental importance here is the issue of press freedom and the role of publishers of a newspaper to keep society aware of what is going on around it in the country”.

The rest of the submissions in support of the exception were, in my view, premature

because we have not yet reached the trial stage where such submissions would be based on evidence. I do not believe a special way of pleading is called for just because the claim is based on economic loss.

Mr *Hussein*, for the respondent submitted that the excipient had jumped the gun by failing to observe r 140 of the High Court Rules 1971, quoted at p 2 herein. He said the excipient should have expressed whatever complaint(s) it had with the declaration through the use of that rule. He correctly, in my view, submitted that, in order for the exception to be upheld, the excipient should show that:

1. The pleading does not disclose a cause of action, and
2. The pleading is vague and embarrassing.

The excipient, Mr *Hussein* submitted, had failed in all its grounds, to prove

the above. He urged the court not to go beyond ground 7 because the matters raised thereafter were not emanating from the contents of the respondents declaration. I agree.

Although urging the court to dismiss the exception on the basis of failure to prove that the declaration does not disclose a cause of action or that it is vague and embarrassing, Mr *Hussein* went further to specifically deal with each ground of exception. I deem it necessary to reproduce what he said regarding each ground of exception. He submitted:-

“GROUND 1

18. Ground 1 of the Exception relates to a purported formal defect and cannot found an Exception. The excipient, again in his haste, does not suggest which sub-rules or what part of the sub-rule the plaintiff has not complied with. However, in para A on p 2, it appears the complaint refers to the plaintiff’s physical address. These are issues dealt with by Rules 11(a) and (b) this Honourable Court in the landmark case of *Pumpkin Construction* (*Private*) *Limited* v *Chikaka,* made it abundantly clear that failing to comply with r 11 was not an excipiable ground. The Court stated:-

‘with regard to the second leg of the exception, we do not consider that the alleged lack of compliance with para(s) (a) and (b) r 11 is of such significance as to warrant nullification of the summons’

GROUND 2

19. It will be seen that in view of the claim which the second defendant did not apply its mind to, would immediately destroy grounds 2 and 4 of the Exception. As regards ground 2, which claims that the plaintiff needs to show wrongfulness, it is submitted that this ground was inserted dishonestly as the plaintiff clearly states in para 10 of the Declaration that:-

‘As a result of the wrongful misrepresentations’

As such, wrongfulness was, in fact, pleaded, and the second defendant will be invited to explain why it claimed in the Exception that it was not. However, in any event, a breach of statutory duty is *prima facie* wrongful and as such, “wrongfulness” need not be pleaded.

GROUNDS 3 AND 5

20. Also destroyed by the above claim, are grounds 3 and 5, which make the suggestion that a pleader should plead public in a Declaration. As Herbstein succinctly put it,

‘It is, however neither necessary nor even appropriate for the plaintiff to set out in the pleadings the relevant policy considerations and *boni mores* on which he relies’

GROUND 4

21. This ground claims that the pleading does not “show” that the second defendant was at fault, and that it reasonably foresaw that its false article would cause damage. In terms of the claim being pursued, it is not necessary to plead fault. In any event, the defendant has clearly stated that the article was false.

GOUND 6

22. Ground 6 has been dealt with earlier.

GOUND 7

23. Ground 7 is clearly answered in the Declaration on the basis that in cancelling the contract, the financer specifically made reference in one letter to articles published by the first and second defendants. Clearly, there is every reason to join them as the same transaction and therefore, evidence will be used. Further, a common question of fact and law arise between the two”.

I do not believe that I am, at this stage, expected to deal with the law applicable to the

relief sought by the plaintiff in the main matter. Both parties have attempted to do that. That, I believe is the duty of the trial court. I believe that at this stage all I need to determine, in the face of the exception, is whether or not the declaration discloses a cause of action and also whether or not such cause of action has been placed before the excipient in a vague or embarrassing manner.

I am in full agreement with Mr *Hussein* that the first ground cannot, in terms of practice and case law, be held to be fatal to the plaintiff’s summons. The declaration, issued simultaneously with the summons, adequately gives full particulars of the plaintiff. These as submitted, were the issues fully covered in *Pumpkin Construction* (*Private*) *Limited* v *Chikaka*, 1997(2) ZLR 430 (H).

As to the plaintiff’s ability to pay the excipient’s costs, I refuse to accept that this is an issue for an exception as envisaged in the rules.

With regard to the rest of the grounds, I again find myself in agreement with the plaintiff. I do not see how it can ever be argued that there is no cause of action *in casu.* This is so because a reading of para(s) 4-10 of the plaintiff’s declaration, which I have reproduced at pp 1-2 of this judgment, gives answers to the issues being raised in the exception. What I seem to hear from the excipient is that because the plaintiff’s action relates to economic loss, then there should be a special way of pleading. As already indicated, I do not agree. Adequate facts have been placed before the excipient to enable it to plead.

I believe a declaration should confine itself to facts that establish a cause of action and the relief prayed for thereof. This is what the plaintiff has done.

I am, therefore indebted to Mr *Hussein* because, he has, in his submissions, adequately dealt with each ground of exception as seen herein at pp 5-6. Indeed in *Khan* v *Stewart* 1942 CPD 386 we find the following:

“It used, apparently, once to be thought that the object of an exception was to embarrass your opponent. That is not the true object of an exception at all. The true object of an exception is either, if possible, to settle the case, or at least part of it, in a cheap and easy fashion, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception. In my opinion, the court should not look at a pleading with a magnifying glass of too high power. If it does so, it will be almost bound to find flaws in most pleadings – except formal replications, but certainly including the present exception itself. It is so very easy especially for busy counsel, to make mistakes here or there to say too much or too little, or to express something imperfectly. In my view, it is the duty of the court, when an exception is taken to a pleading first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is any embarrassment which is real and such as cannot be met by the asking particulars, as the result of the faults in pleading to which exception is taken. And, unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed. Otherwise we shall be in danger, as BENJAMIN J points out to bringing about in our own courts a return to the old days of the demurrers of England”.

In addition to our own High Court Rules, our courts are, in the main, guided by some

of the principles contained in the above statement when dealing with exceptions.

For my part, this is a clear case where a request for further particulars or a complaint in terms of r 140 would have been appropriate. I know that the rule is not mandatory, but there was, in my view, no basis for the exception *in casu*. The excipient would have used this rule or merely asked for further particulars. As matters stand, I find nothing that disables the excipient from pleading.

With respect to ground 7, all I can say is that if the excipient is indeed serious, the rule of this court allow for separation of trials. That ground cannot, in my view, be used for the purposes of sustaining an exception. The excipient is not saying it has been wrongly cited.

In view of the foregoing I find it difficult to uphold the exception.

The plaintiff prayed for costs on a legal practitioners and client scale. This, it was argued, is because the exception should never have been filed. The excipient could have simply requested for further particulars or followed r 140. Through its legal practitioners letter of 28 November 2011 the excipient arrogantly refused to do so. I therefore agree, and having satisfied myself that there was never any basis for the exception, I cannot deny the plaintiff the costs it has prayed for.

I therefore order as follows:-

1. The exception be and is hereby dismissed; and
2. The excipient shall pay costs on a legal practitioner and client scale.

*Atherstone & Cook*, defendant (Excipient’s) legal practitioners

*Hussein Ranchod & Co. Legal Practitioners*, plaintiff’s legal practitioners