SHARAI CHIMIMBA
versus
FIRST CAPITAL BANK LIMITED

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 31 March & 20 April 2022

COURT APPLICATION

E Mubaiwa, for the applicant
T Chagudumba, for the respondent

MANZUNZU J:

INTRODUCTION

This judgment decides an exception raised by the defendant that the plaintiff's summons and declaration discloses no cause of action.

SUMMONS AND DECLARATION

The plaintiff issued summons against the defendant for payment of US$1 000 000 being general damages under *actio injuriarum* for impairment of plaintiff's personality, injury and reputation during plaintiff's wrongful arrests and detention pursuant to the defendant's wrongful and unlawful conversion of US$19 130.88.

In her declaration, the plaintiff alleged that she is a director of Participatory Approaches Consultancy Services (Private) Limited (the company). The company was in the business of processing visas and arranging air travel for prospecting employees in the Middle East and Canada. In 2015 the company opened a corporate foreign currency account with the defendant through which all moneys paid by prospecting employees would be deposited. The money was paid in United States dollars as it was required in that currency for the processing of visas and air travel tickets.

It is then alleged, in 2018 the defendant unilaterally converted the company's foreign account which had a balance of US$19 130.88 into a Nostro FCA domestic account with an opening balance of US$1 050. Consequent to this the company could not meet its financial obligations to pay for its clients'visas and air tickets. The company then engaged the defendant

to rectify the anomaly but damage was already done as some individuals could not get visas nor travel tickets. Some of the frustrated individuals then reported the plaintiff to the Police for fraud.

The plaintiff was then arrested by the Police and went through a humiliating ordeal. The social media also published her as a fraudster. She claims her character and personality remains damaged. Paragraph 23 of the declaration read in part:

> "Defendant's unlawful conduct had a direct bearing on the plaintiff's personality rights, dignity and reputation, as it was consequent to the unlawful withholding of funds…" In paragraph 25 she states: "As a result of defendant's unlawful, wrongful and intentional (dolus eventualis) conduct, plaintiff suffered general damages under *actio injuriarum* in the sum of US$1 000 000.00".

The defendant was served with the summons on 29 November 2021 and entered appearance to defend on 6 December 2021.

DEFENDANT'S EXCEPTION

The defendant filed an exception on 5 January 2022 to which the plaintiff has raised a point *in limine* that the same was filed out of time, although the same was not pursued with at the hearing. It must have been abandoned.

The essence of the defendant's exception is that the summons and declaration do not comply with provisions of rules 12 (5) (d) and 13 (1) (e) of the High Court Rules 2021. It is said the plaintiff sued the wrong defendant *vis a vis* the nature of the claim. The relief sought was also said to be incompetent.

Rule 12 (5) (d) provides that:

" (5) Before issue, every summons shall set forth—
(d) a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action".

Rule 13 (1) (e) provides that:

"(1) In every case in which the claim is not for a debt or liquidated demand the summons shall have annexed to it a statement of the material facts relied upon by the plaintiff in support of his or her claim, to be called a declaration which shall state truly and concisely—
(e) the nature, extent and grounds of the cause of action."

The nature of the exception by the defendant brings into play two things:

a) whether the summons and declaration disclose a cause of action
b) in the event there is a cause of action, is it against the defendant

CAUSE OF ACTION

A cause of action in any summons is the set of facts which if proved will enable the plaintiff to obtain judgment, *see Syfin Holdings Ltd* v *Pickering* 1982 (1) ZLR 10 (SC), *Controller of Customs and Execise* v *Guiffre* 1971 (1) RLR 91 (G) @94.

In *Chifamba* v *Mutasa & Ors* HH 16/08 the court said the following on the purpose of pleadings:

> "The purpose of pleadings is not only to inform the other party in concise terms of the precise nature of the claim they have to meet but pleadings also serve to identify the branch of the law under which the claim has been brought. Different branches of the law require different matters to be specifically pleaded for a claim to be sustainable under that action."

In *Masendeke* v *Chalimba & Others* HH 354/14 the court had this to say:

> "In order to determine if the plaintiff has adequately pleaded his cause of action, the court will examine the claim brought, the branch of the law concerned and determine if every fact which is material to be proved has been pleaded."

In casu, plaintiff identifies the branch of the law under which her claim has been brought. The action is under the *actio injuriarum.* One then looks at the averments in the declaration to see whether the same meet the requirements of *actio injuriarum.*

There are three essential requirements for injuria, namely; an intention on the part of the offender to produce the effect of his/her act (*animus injuriandi*), an overt act which the person doing it is not legally competent to do (wrongful act) and which at the same time is an aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person's dignity or reputation of the other. *See Delange* v *Costa* 1989 (2) SA 857 (A).

It is against these three requisites that the plaintiff's action must be measured. Mr *Chagudumba* for the defendant argued that plaintiff has no valid cause of action against the defendant due to a misjoinder. He was also quick to point that plaintiff's written heads were in support of a claim for unlawful arrest which was a departure from the claim in the summons. I did not hear him strongly argue that there are no necessary averments in the declaration to meet the pre requisites of *actio injuriarum*. What comes out clear though in his argument was that the claim is not directed at the person who caused the infringement. It is in that spirit that he says there is no cause of action against the defendant as the actions complained of are not

actions of the defendant. In short there is no causal link between the actions complained of and the defendant.

In the written heads the plaintiff's argument is that the defendant must carry all the consequences arising from its unlawful action of withholding funds which caused the various individuals to cause the arrest of the plaintiff. The plaintiff shifted her argument from a claim of *actio injuriarum* to one for wrongful arrest. The argument is misplaced. In fact Mr *Mubaiwa* who appeared for the plaintiff did not pursue this line of argument. His main argument was that there was no misjoinder because the relief is sought against the defendant.

Be that as it may, the conduct of the defendant must have caused, both legally and factually the harm for which compensation is sought. In this respect para 14 of the declaration states:

> "Due to these criminal proceedings brought by disgruntled individuals who had anticipated placement, the plaintiff faced humiliation ordeal as she was caused to during the process of arrest and detention, remove her shoes, sit on the floor and was subjected to name calling by the police who were already treating her as a fraudster."

The plaintiff's position is that it is the defendant's unlawful conduct of withholding the plaintiff's employer's funds which led to her arrest and the humiliating ordeal at the hands of the Police. One may pause to ask as at what stage, in the chain of events, should one be absolved from liability arising from one's unlawful conduct. In *Rowland Electro Engineering Private Limited t/a Sita Sound Forex* v *Zimbabwe Banking Corporation Limited* HH 3/07 the court cited a passage in Law of Damages by the learned authors *P J Visser and J M Potgieter* at page 238 to 239 of book thus:

> "No legal system holds a defendant liable without limitation for all the harmful consequences suffered by the plaintiff. There is general agreement that some means must be found for limiting the defendant's liability. The question of legal causation arises whenever one must determine for which of the damaging consequences actually caused by the wrongdoer's wrongful, culpable act, or breach of contract, or any other legal fact creating a duty to pay damages, he should be held liable; In other words which harmful consequences should be imputed(attributed) to him…
> A delictual and contractual duty to pay damages can arise only if the wrongdoer's conduct, in addition to other requirements, factually caused the harm suffered by the plaintiff. Consequently conduct can be described as a damage causing event only with reference to the damage actually flowing from such an event. Without factual causation, no duty to pay damages can arise. Factual causation on its own however, is not sufficient as it is undesirable to hold a person liable for all the damage which he has caused. In International Shipping Co (Pty) Ltd v Bentley[1] the court stated as follows:

[1] 1990 (1) SA 680 at 700

> 'Demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily re[2]sult in legal liability. The second enquiry then arises, *viz* whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called legal causation.'

Stated differently, legal causation is determined by evaluating the nature and quality of factual causation on the basis of relevant criteria". (emphasis is mine).

The issue of legal causation was also considered in the case of *Ruvinga* v *ZEDTC* HH 389/12 where the court said:

> "For the Defendant to be held liable to pay the damages claimed it must be shown that its conduct not only factually caused the loss in the sense of the loss having ensued as a consequence of the conduct complained of, but also that the loss suffered is sufficiently connected to the conduct of the Defendant to justify making it liable for such loss. The latter stage is what is referred to as legal causation."

The test for legal causation is one of reasonable foreseeability. The Ruvinga case (*supra*) recognized this test in the following words:

> "In our jurisdiction the test for determining legal causation is that of reasonable foreseeability. See *United Bottlers (Pvt) Ltd* v *Shambawamedza* 2002 (1) ZLR 341(S). A wrongdoer is held liable only for the reasonably foreseeable consequences of his or her conduct. The moment of causing damage is the relevant one in determining reasonable foreseeability".
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> *Visser & Potgieter*, in Law of Damages 2nd Ed. p. 274, state the following:
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> > "The reasonable foreseeability test….limits liability to those factual consequences which a reasonable person in the position of the defendant would reasonably have foreseen. It is not necessary that all the consequences of the defendant's conduct should have been foreseen: only the general nature or the kind of harm which actually occurred must have been reasonably foreseeable. The exact extent or precise manner of occurrence need not have been reasonably foreseeable. However, the risk of harm must have been a real risk, which a reasonable person would not have brushed aside as being far-fetched…. Van Rensburg ……suggests the following test: 'Was the consequence, as well as the causal progression between the act and the consequence, at the time of the act foreseeable with such a degree of probability that the consequence can, in the light of the circumstances, reasonably be imputed to the alleged wrongdoer?"

See also *Smit* v *Abrahams* 1992 (3) SA 158(C) at 165; *The Wagon Mount (No. 2) (Overseas Tankships) (UK) Ltd* v *Miller Steamship Co (Pty) Ltd* 1966 (2) ALL ER 709(PC)."

Mr *Mubaiwa* took the view that issues of causation were evidential. In the premise it was argued an exception cannot be taken if the issue is capable of being resolved through evidence or further particulars. Be that as it may, evidence cannot start trading in a new area which has not been pleaded. The fact that evidence will be led does not absolve the plaintiff's obligation to set out facts in the declaration which if proved will enable the plaintiff to obtain judgment. *In casu* there is no legal causal link. I agree with the issue of misjoinder raised by the defendant.

Having found no merit in the exception in respect to the cause of action, I find no need to deal with the issue of whether or not the relief sought is competent.

COSTS

The defendant asked for costs on a higher scale in the event the exception succeeds. While I accept that the plaintiff's claim is outrageous as it bears no relation to awards made in comparable cases, the court cannot have an armchair approach towards the kind of frustration born out of the conduct by the defendant in withholding money held by it in trust. I find no basis to penalize the plaintiff on costs.

DISPOSITION

1. The exception by the defendant is upheld.
2. The plaintiff's claim against the defendant is dismissed with costs.

Jarvis Palframan, plaintiff's legal practitioners
Atherstone and Cook, defendant's legal practitioners