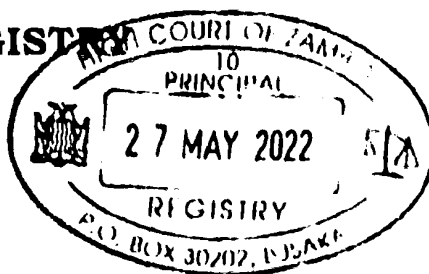


2021/HP/1476

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

HONOURABLE DR. CHITALU CHILUFYA PLAINTIFF

AND

THE ANTI-CORRUPTION COMMISSION 1ST DEFENDANT

ROSEMARY KHUZWAYO **2ND DEFENDANT**

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON 27TH DAY OF MAY, 2022.**

For the Plaintiff: *Mr. T. S. Ngulube & Mr. E. Lilanda –
Messrs. Tutwa S. Ngulube & Co.*

For the 1st Defendant: No Appearance.

For the 2nd Defendant: No Appearance.

RULING

CASES REFERRED TO:

1. *Savenda Management Services v Stanbic Bank Zambia Limited (SCZ) Appeal No. 37 of 2017;*
2. *Patrick Kangwa v Mubokai Zambia Limited – 2020/HPC/0654;*
3. *John Chisata v The Attorney General (SCZ) Judgment No.3 of 1992; and*
4. *Stanley Mwambazi v Forrester Farms Limited (1977) Z.R. 108.*

LEGISLATION AND OTHER WRITTEN WORKS REFERRED TO:

1. *The Rules of the Supreme Court of England (White Book) 1999 Edition; and*
2. *Halsbury's laws of England Volume 28 (Fourth Edition, 1997-reissue)*

1 INTRODUCTION

1.1 This Ruling is in respect of the preliminary issues raised by the 1st Defendant.

2 BACKGROUND

2.1 On 29th November, 2021, the Plaintiff, Dr. Chitalu Chilufya, launched this action by way of Writ of Summons and accompanying documents, seeking *inter alia*, damages for malicious prosecution to be assessed; damages for libel and defamation against the 1st Defendant to be assessed; damages for intimidation to be assessed; an order for damages amounting to Fifty Million Dollars (US \$50,000,000.00) being damages to his reputation following malicious publications attributed to the Defendants; and exemplary and aggravated damages to be assessed.

2.2 Upon being served with the originating process, the 1st Defendant entered appearance and filed herein its defence and accompanying documents on 10th January, 2022. On 11th January, 2022, the 1st Defendant filed herein its Notice of Motion to raise a preliminary issue.

2.3 The record was first allocated to my brother Justice M. L. Zulu and upon his transfer to Kasama, the record was re-

allocated to this Court on 15th February, 2022, but only received on 1st March, 2022. I then scheduled the matter for a status conference on 7th April, 2022, at 11:00 hours. On the return date, only the Plaintiff's Advocates were in attendance. The Defendants were absent and no reason was advanced for their absence despite having been served with the Notice of Hearing. I thus proceeded to hear the matter. Being satisfied that the preliminary issues raised by the 1st Defendant could be considered and determined on the documents on record and in agreement with the Plaintiff's Advocates, the Court has proceeded to deliver the Ruling based on the documents on record.

3 ISSUES RAISED BY THE 1ST DEFENDANT

3.1 The 1st Defendant has raised preliminary issues pursuant to **Order 14A** of **The Rules of the Supreme Court**¹, seeking determination of the following: -

1. *Whether or not the Statement of Claim and the Writ of Summons discloses Defamatory words contrary to the provisions of **Order 18, Rule 7 (13)** of **The Rules of the Supreme Court**¹;*
2. *Whether the Plaintiff's defamatory action against the 1st Defendant should be dismissed;*
3. *Whether the relief of damages amounting US \$50,000,000.00 specifically pleaded as damages for pain, anxiety and mental anguish but endorsed as damages to the Plaintiff's reputation on the Writ of Summons and Statement of Claim should be*

struck out for being embarrassing and incapable of being liquidated as they arise from alleged tortious wrongs; and

4. Whether the relief of exemplary and aggravated damages endorsed on the Writ of Summons and Statement of Claim should be struck out for not having been specifically pleaded in the Statement of Claim.

4 AFFIDAVIT EVIDENCE

4.1 The 1st Defendant's Notice of Intention to Raise Preliminary Issues was accompanied by an Affidavit in Support deposed to by Boniface Chiwala, the Acting Director, Legal and Prosecutions, in the employ of the 1st Defendant, who averred *inter alia*, that the Plaintiff is alleging that the 1st Defendant defamed the Plaintiff by "*rushing to the media to announce the arrest and charges brought against the Plaintiff*" but has not disclosed the actual defamatory words which were used by the 1st Defendant as required by law.

4.2 It was further deposed that the Plaintiff seeks the relief of damages amounting to US \$50,000,000.00 specifically pleaded as damages for pain, anxiety and mental anguish but endorsed as damages to the Plaintiff's reputation on the Writ of Summons and Statement of Claim because they are incapable of being liquidated as they arise from tortious wrongs.

- 4.3 Finally, it was deposed that the Plaintiff seeks the reliefs of exemplary and aggravated damages as endorsed on the Writ of Summons and Statement of Claim but they have not been specifically pleaded in the Statement of Claim as required by the law.
- 4.4 By the Plaintiff's Affidavit in Opposition to the Notice of Motion to Raise a Preliminary Issues filed on 26th January, 2022 and deposed to by the Plaintiff, it was averred *inter alia*, that it is not in all cases that the actual defamatory words complained of should be set out in exact words in the Statement of Claim and that a litigant has an option to set out the actual defamatory words complained of or attach a schedule to the Pleadings at the commencement stage.
- 4.5 It was further deposed that the objective behind a schedule can be achieved by filing the first list of documents at commencement stage to enable the other party to have notice of the document complained to have defamatory material and that in this particular case, the charge sheet itself is the defamatory material as the counts levelled against the Plaintiff were defamatory in nature owing to the Plaintiff's capacity then and currently.
- 4.6 The Plaintiff deposed that the allegations and/or counts that he was charged with, maliciously and without justifiable cause were injurious to his reputation and

greatly impaired his reputation in the minds of the right thinking members of society. He further deposed that he had been advised by his Advocates and verily believed that the 1st Defendant's application is not attainable at law and that the 1st Defendant has not demonstrated any prejudice that it has suffered owing to the alleged irregularities.

4.7 The Plaintiff furthermore deposed that he had been advised and verily believed to be true that a perusal of the Plaintiff's List of Documents filed with the originating process shows that the Plaintiff has an arguable case on the merits which ought to be determined in full and finality as opposed to technicalities and piece meal and that the issue of propriety of damages ought to be determined at the end of the action.

4.8 Finally, the Plaintiff deposed that this is not a proper case in which an originating process can be set aside.

4.9 By the 1st Defendant's Affidavit in Reply, filed herein on 1st February, 2022 and deposed to by said Boniface Chiwala, it was averred *inter alia* that the 1st Defendant maintains that the Plaintiff has not pleaded the exact alleged defamatory words in the pleadings or by any schedule in accordance with the provisions of the law. It was further averred that a schedule containing a defamatory matter must be part of the pleadings and part of the list of documents.

4.10 It was furthermore averred that by a letter dated 16th November, 2021, the Plaintiff's advocates were requested to provide further and better particulars of the alleged defamatory words attributed to the 1st Defendant, but elected to respond with unintelligible pleadings devoid of the particulars requested for. A copy of the said letter was exhibited as **"BC1"**. The deponent averred that the 1st Defendant had demonstrated the prejudice and embarrassment it would suffer in defending the process with unintelligible pleadings which do not conform to the rules on pleadings.

4.11 It was additionally averred that the Plaintiff's Statement of Claim and List of Documents has not complied with the rules on pleading an action for defamation and that therefore, this was an appropriate issue to be determined at a preliminary stage. Finally, it was averred that the damages for tortious wrongs are incapable of being liquidated and as such the issue of damages had to be dealt with at preliminary stage.

5 SUBMISSIONS

5.1 By the 1st Defendant's Skeleton Arguments in Support of the Notice of Motion to Raise a Preliminary Issues, the 1st Defendant's Counsel submitted, *inter alia*, that the Plaintiff by his Statement of Claim has not disclosed the actual defamatory words which were used by the 1st

Defendant in accordance with the provisions of **Order 18, Rule 7 (13)** and **Order 18, Rule 6 (3)** of **The Rules of the Supreme Court**¹.

5.2 Counsel submitted that the provisions of **Order 18** of **The Rules of the Supreme Court**¹ are very clear in that the words complained of must appear in the body of the pleadings. Counsel further stated that a thorough perusal of the pleadings does not disclose the actual words that the 1st Defendant used to defame the Plaintiff and that leave has not been obtained to plead the libel by schedule. Based on the foregoing, Counsel submitted that the defamation action be expunged from the pleadings as it constitutes an embarrassing pleading.

5.3 It was further submitted that the relief of damages amounting to US \$50,000,000.00 specifically pleaded as special damages for pain anxiety and mental anguish but endorsed as damages to the Plaintiff's reputation on the Writ of Summons and Statement of Claim be struck out for being embarrassing and incapable of being liquidated as they arise from tortious wrongs. Counsel cited the case of **Savenda Management Services v Stanbic Bank Zambia Limited**¹ in support of the forgoing submission.

5.4 Finally, it was submitted that the relief of exemplary and aggravated damages endorsed on the Writ of Summons and Statement of Claim must be struck out for not having

been specifically pleaded in the Statement of Claim. **Order 18, Rule 12 (12) of The Rules of the Supreme Court** was cited in support of the foregoing submission.

- 5.5 By the Plaintiff's Skeleton Arguments in Opposition to the Notice of Motion to Raise a Preliminary Issues filed on 26th January, 2022, the Plaintiff's Counsel submitted that the 1st Defendant's Notice of Motion to raise a Preliminary Issue is incompetently presented before this Court. Counsel cited **Order 18, Rule 19 of The Rules of the Supreme Court**¹ and an excerpt of the Ruling by Lady Justice W. Sithole Mwenda in the case of **Patrick Kangwa v Mubokai Zambia Limited**² where she stated as follows:

"Clearly from the above, it is preferred that an applicant who will raise an objection to a pleading, which said objection calls for serious discussions on a point of law, is better doing so under Order 14A or Order 33 of the White book. In casu, the Defendant has delved into arguments on the Partnership Act of 1890, and I am of the view that the same is an overkill, given the Order pursuant to which the Application herein has been made."

- 5.6 Based on the forgoing authority, it was submitted that the 1st Defendant has delved into the law of damages, aggravated, exemplary, libel by schedule *inter alia*, which issues require serious consideration under **Order 33**.

Rule 3 of **The Rules of the Supreme Court**¹ and not **Order 18** of **The Rules of the Supreme Court**¹ as guided by the authorities cited above.

- 5.7 Counsel further submitted that the 1st Defendant has not demonstrated what prejudice will be occasioned to it and that the failure to do so shows that no prejudice whatsoever will be occasioned to the 1st Defendant. Furthermore, Counsel submitted that there wasn't any risk that the fair trial of the matter will be undermined by reason of the alleged defect if any. In support of the foregoing submission, Counsel cited **Practice Note 18/19/1** of **The Rules of the Supreme Court**¹ which provides as follows: -

“...Not every writ or pleadings which offends against the rules will be subjected to sanctions. An applicant must show that he is in some way prejudiced by the breach.”

- 5.8 Counsel cited **Order 18, Rule 19 (1)** of **The Rules of the Supreme Court**¹ under the heading “effect of the Rule” as follows: -

“The rule also empowers the Court to amend any pleadings or endorsement or any matter therein.”

- 5.9 Based on the foregoing authority the Plaintiff's Counsel submitted that should this Court be of the view that the Plaintiff's originating process has offending features, this will be a proper case in which it can order the same be

amended to allow triable issues to come to trial. The cases of ***John Chisata v The Attorney General***³ and ***Stanley Mwambazi v Forrester Farms Limited***⁴ were cited in support of the foregoing.

5.10 Finally, it was submitted that this action was mainly based on malicious prosecution and that the Plaintiff has provided all necessary information and particulars to have the case heard on the merits.

5.11 By the 1st Defendant's List of Authorities and Skeleton Arguments in Reply filed on 1st February, 2022, the 1st Defendant's Counsel submitted *inter alia*, that its Notice of Motion or Skeleton Arguments did not rely on **Order 18, Rule 19** of ***The Rules of the Supreme Court***¹ but **Order 14A** of ***The Rules of the Supreme Court***¹ and that therefore, the Notice of Motion to raise a Preliminary Issue had been made under the correct law.

5.12 In response to the Plaintiff's contention that the 1st Defendant had not demonstrated the prejudice it would suffer or whether or not this action is *ex debito justitiae*, Counsel for the 1st Defendant submitted that the 1st Defendant had clearly demonstrated the prejudice it would suffer by stating that the Plaintiff's pleadings are embarrassing. Counsel stated that the 1st Defendant had highlighted the relevant portions of the Plaintiff's

pleadings that are bound to prejudice, embarrass or delay the fair trial of the action.

5.13 Counsel further stated that the filing of a defence by the 1st Defendant does not in any way cure the glaring defects in the Plaintiff's unintelligible pleadings. Counsel invited the Court to note that the filing of a defence on the part of the Defendant is a prerequisite to any application under **Order 14A of The Rules of the Supreme Court**¹.

5.14 Counsel submitted that the Plaintiff's Affidavit purports that the indictment itself is the defamatory matter when it is settled law that documents or information used in judicial process even if malicious are absolutely privileged and beyond the reach of defamation. **Paragraph 97 of Halsbury's laws of England**² on absolute privilege was cited in support of the foregoing submission.

5.15 Finally, it was submitted that given the Plaintiff's unintelligible pleadings, the Court may make an order to strike out the portions of the pleadings that are embarrassing to the Defendants.

6 CONSIDERATION AND DECISION OF THE COURT

6.1 I have considered the issues raised by the 1st Defendant and the Affidavit evidence. I have also considered the submissions advanced by Learned Counsel for the Plaintiff and 1st Defendant and the lists of authorities cited, for

which I am grateful to both Counsel. On my analysis of the preliminary issues raised before me, I find that the legal points for determination are as follows: -

1. *Whether or not the Statement of Claim and the Writ of Summons discloses Defamatory words contrary to the provisions of **Order 18, Rule 7 (13) of The Rules of the Supreme Court**¹;*
2. *Whether the Plaintiff's defamatory action against the 1st Defendant should be dismissed;*
3. *Whether the relief of damages amounting US \$50,000,000.00 specifically pleaded as damages for pain, anxiety and mental anguish but endorsed as damages to the Plaintiff's reputation on the Writ of Summons and Statement of Claim should be struck out for being embarrassing and incapable of being liquidated as they arise from alleged tortious wrongs; and*
4. *Whether the relief of exemplary and aggravated damages endorsed on the Writ of Summons and Statement of Claim should be struck out for not having been specifically pleaded in the Statement of Claim.*

6.2 I shall now proceed to address the legal issues in the order they have been identified above starting with whether or not the Statement of Claim and the Writ of Summons discloses Defamatory words.

6.3 The 1st Defendant contends that the Plaintiff has not disclosed the actual words which were used by the 1st Defendant in defaming him contrary to the provisions of **Order 18, Rule 7 (12)** and **Order 18, Rule 6 (2)** of **The**

Rules of the Supreme Court¹, which respectively provide as follows: -

“Defamation— In defamation actions, the words complained of must appear in the body of the pleading, save in the exceptional situation mentioned in 18/6/2 above” (Court’s emphasis)

“Schedules— A schedule is information in documentary form which is annexed to a pleading. It does not itself fall within the definition of a pleading, and may be attached to a pleading only if the leave of the Master has been obtained, which leave should be sought ex parte. A schedule may usefully be employed to deal with such matters as, e.g. arrears of rent, dilapidations, or calculations relating to interest in claims for a liquidated sum. In those libel cases in which the offending material is so long that it cannot reasonably be pleaded in the statement of claim, leave should be sought to plead the libel by schedule. Even then, the precise words should be clearly identified and distinguished from any surrounding material.”

6.4 From the foregoing, it is clear that in defamation actions, the words complained of must appear in the body of the Plaintiff’s pleadings. Alternatively, the Plaintiff with leave of Court, can plead libel by schedule in situations where the offending material is too long to be pleaded in the Statement of Claim.

6.5 On my analysis of the Plaintiff's pleadings, I find that they do not disclose the actual words that the 1st Defendant allegedly used to defame the Plaintiff nor has leave to plead libel by schedule been sought by the Plaintiff. However, I note from the Plaintiff's Statement of Claim that the allegations of defamation against the Defendants are generally descriptive in nature and in the interest of justice I am inclined to order that the Plaintiff herein amends his pleadings so that they are in conformity with the formal rules of Court. My decision is fortified by the case of **Stanley Mwambazi v Forrester Farms Limited**¹ where it was held as follows: -

"It is the practice in dealing with bonafide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties... it is not in the interest of justice to deny him the right to have his case heard."

6.6 Based on my decision above, it follows that the second legal issue of whether the Plaintiff's defamatory action should be dismissed, is rendered *otiose* pending the Plaintiff's amendment of the pleadings as directed above.

6.7 I now turn to address the third point for determination of whether the relief of damages amounting US \$50,000,000.00 specifically pleaded as damages for pain, anxiety and mental anguish but endorsed as damages to

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the Plaintiff's reputation on the Writ of Summons and Statement of Claim should be struck out.

6.8 On my perusal of the Writ of Summons and Statement of Claim, it is clear that the Plaintiff endorsed the sum of US \$50,000,000.000 as damages to his reputation on the Writ of Summons but specifically pleaded the said sum as damages for pain, anxiety and mental anguish in his Statement of Claim. The foregoing inconsistency, in my view is an embarrassing pleading and would be difficult for the Defendants to defend at trial. My finding is fortified by **Order 18, Rule 7 (3) of The Rules of the Supreme Court¹** which provides as follows: -

“Pleadings play an essential part in civil actions, and their primary purpose is to define the issues and thereby to inform the parties in advance of the case which they have to meet, enabling them to take steps to deal with it.”

6.9 Based on the foregoing and my finding above, I order that the highlighted inconsistent portions of the Plaintiff's pleadings be struck out for being an embarrassing pleading.

6.10 I note further and as rightly pointed out by Counsel for the 1st Defendant that the relief of damages in the sum of US \$50,000,000.00 endorsed by the Plaintiff in his pleadings arises from the alleged tortious claims and are therefore

incapable of being liquidated. This position is fortified by the provisions of **Order 6, Rule 2 (5) of The Rules of the Supreme Court**¹, which provides as follows: -

“A liquidated demand is in the nature of a debt i.e. a specific sum of money due and payable under or by virtue of a contract... its amount must either be already ascertained as a mere matter of arithmetic.”

6.11 Additionally, the Supreme Court in the case of **Savenda Management Services v Stanbic Bank Zambia Limited**¹, cited by the 1st Defendant, stated as follows: -

“...It is evident that the Appellant ought not to have claimed liquidated damages because the basis of his claim arose from an alleged tortious claim... The Appellant as a result ought not to have quantified his claim in monetary terms because it was not a liquidated demand.”

6.12 Based on my findings above and the foregoing authorities, I order that the portion of the Plaintiff's claims seeking damages in the sum of US \$50,000,000.00 be struck out from the pleadings for being incapable of being liquidated, as they arise from tortious claims.

6.13 I now to turn to consider the fourth point for determination of whether the relief of exemplary and aggravated damages endorsed on the Writ of Summons and Statement of Claim should be struck out for not having been specifically pleaded in the Statement of Claim.

6.14 On my analysis of the Plaintiff's pleadings, it is clear that the reliefs of exemplary and aggravated damages have not been specifically pleaded by the Plaintiff. **Order 18, Rule 12 (12)** of **The Rules of the Supreme Court**¹ provides as follows, regarding the manner in which exemplary and aggravated damages should be pleaded: -

"A claim for exemplary damages must be specifically pleaded, together with the facts on which the party pleading relies..."

The facts relied on to support a claim for aggravated damages should be pleaded."

6.15 The foregoing provisions of **The Rules of the Supreme Court**¹ are couched in mandatory terms, thereby leaving no room for the Court to exercise its discretion to order an amendment of the pleadings. Accordingly, I Order that the portion of the Plaintiff's claims seeking damages for exemplary and aggravated damages be struck off from pleadings for not being specifically pleaded.

7 CONCLUSION

7.1 I find that the Plaintiff's Pleadings do not disclose the actual words that the 1st Defendant allegedly used to defame the Plaintiff nor has leave to plead libel by schedule been sought from Court by the Plaintiff. The allegations of defamation against the Defendants are generally descriptive in nature and in the interest of justice I am

inclined to order that the Plaintiff herein amends his pleadings so that they are in conformity with the formal rules of Court within seven (07) days from date hereof. UNLESS, the Plaintiff amends the pleadings as directed herein, this matter shall stand dismissed for want of prosecution.

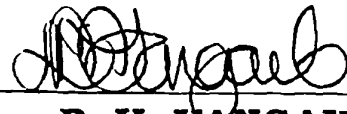
- 7.2 Having directed the Plaintiff to amend his pleadings, the second issue raised by the 1st Defendant of whether the Plaintiff's defamatory action should be dismissed, is rendered *otiose* pending the Plaintiff's amendment of the pleadings as directed above.
- 7.3 The inconsistency in the claim for damages endorsed on the Writ of Summons and Statement of Claim, regarding the claim for damages in the sum of US \$50,000,000.00 amount to embarrassing pleadings. Accordingly, I order that the highlighted inconsistent portions of the Plaintiff's pleadings be struck out.
- 7.4 Further, I order that the portion of the Plaintiff's claims seeking damages in the sum of US \$50,000,000.00 be struck out from the pleadings for being incapable of being liquidated as they arise from tortious claims.
- 7.5 Finally, I Order that the portion of the Plaintiff's claims seeking damages for exemplary and aggravated damages

be struck off from pleadings for not being specifically pleaded.

7.6 Having succeeded with the preliminary issues raised, costs are for the 1st Defendant against the Plaintiff, to be taxed in default of agreement.

7.7 Leave to Appeal is granted.

**SIGNED, SEALED AND DELIVERED AT LUSAKA, ON 27TH DAY
OF MAY, 2022.**

A handwritten signature in black ink, appearing to read 'P. K. Yangailo', is written over a horizontal line.

**P. K. YANGAILO
HIGH COURT JUDGE**