PETINA GAPPAH
versus
FADZAYI MAHERE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 7 July 2022

Date of written judgment: 20 September 2022

Interlocutory application – leave to appeal

T. Chinyoka, with him, *F. J. Majome*, for the applicant
N. Moyo, for the respondent

MAFUSIRE J

[1] This is an application for leave to appeal to the Supreme Court. The applicant is the defendant in an action for defamation damages instituted by the respondent under the case reference no HC 9390-18. The trial is yet to begin. It has been so delayed. At one time it had been scheduled to commence on 29 March 2022. It did not. One of the reasons why it did not was that the applicant raised two intermediary issues that required to be dealt with. The one was her application for an order to compel the respondent to effect further discovery of certain documents. The other was a technical objection against the respondent's declaration in the main action on the basis that it was fatally defective and therefore, a nullity upon which no trial could possibly be conducted.

[2] Under judgment no HH 334-22 delivered on 26 May 2022, I disposed of the interlocutory issues aforesaid in favour of the respondent. I then directed that the trial should commence on a date, time and place to be advised. The Registrar, in consultation with the parties who had made prior, but unsolicited written representations on their preferred dates for the commencement of the trial, which dates were informed by their availability and that of their counsel, proceeded to set the matter down for hearing on 7 July 2022 to accommodate both of them. However, on this date, the trial did not take off again. The applicant was not in

attendance. Her counsel appeared, but was not ready to proceed, allegedly he having been briefed to appear just the previous day.

[3] There were a number of other logistical problems that militated against the commencement of the trial, not least the fact that the applicant's erstwhile legal practitioners had purported to renounce agency belatedly, resulting in the applicant's counsel of choice returning the Brief; the fact that the renunciation of agency had cited an incorrect case number; the fact that the applicant's new legal practitioners had assumed agency only in the morning of the trial, and the fact that the applicant, through her counsel, insisted that she had received the notice of set down for trial very late in the day and was, at any rate, travelling abroad, allegedly having been made to believe that the trial would not be proceeding.

[4] The other reason why the trial would not proceed on 7 July 2022 was that apparently on 16 June 2022 the applicant had filed this application. She had done so as a 'self-actor'. On the morning of 7 July 2022, the respondent had filed a notice of opposition. But the application had not been processed, either expeditiously or at all. Among other things, it was not brought to my attention. Rule 60(7) of the High Court Rules, 2021, directs the Registrar, in the normal course of events, but without undue delay, to submit a chamber application to a judge who must consider the papers without undue delay. This was not done. Upon investigation, it transpired that after the applicant had filed her application on 16 June 2022 as aforesaid, the Registrar had raised a query. By letter dated 27 June 2022 addressed to the applicant on the address appearing on her application, the Registrar had advised that the application had not been referred to a judge in Chambers because there had been no certificate / affidavit of service. The letter had further advised the applicant to attend to the query. She had not. Counsel explained from the Bar that she had not seen the letter because she had left the country. It is common cause that the applicant, at the material time, worked for an international organisation abroad.

[5] Amid spirited objection by the applicant, the matter was removed from the roll as the only pragmatic course open. It was postponed indefinitely. By consent the parties would file whatever further documents would be necessary, including the heads of arguments, within the agreed time-frames. Thereafter, I would deliver judgment on the papers. The applicant tendered the wasted costs.

[6] In this application, leave to appeal is sought in respect of the second of those issues dealt with in judgment no HH 334-22 aforesaid, namely that despite having pleaded to it, the respondent's declaration in the main action is, in my own paraphrase, so fatally defective as to make it an incompetent ground to base a defamation trial on. The respondent opposes the application every step of the way. One of the issues that necessarily have to be considered and disposed of at the outset is that of the condonation being sought by the applicant for having failed to seek the leave to appeal orally immediately after the judgment had been delivered. Rule 94 sub-rule (1), as read with sub-rule (8), directs that an application for leave to appeal may be made orally immediately after the judgment has been delivered and that the applicant's grounds shall be stated and recorded as part of the record. In terms of sub-rule (2), where such an application has not been made orally immediately after the judgment has been passed as aforesaid, an application may be filed in writing within twelve days of the date of the judgment. In such an application, the reasons why the application was not made orally as directed, the proposed grounds of appeal, and the grounds upon which it is contended that leave to appeal should be granted must all be stated.

[7] *In casu*, the applicant did not seek the leave to appeal orally immediately after the judgment was delivered in court on 26 May 2022. Having filed this application on 16 June 2022, it means that, on the face of it, she also missed the twelve-day time frame prescribed by sub-rule (2). Where an application has not been made within the prescribed twelve-day period, sub-rule (5), again as read with sub-rule (8), allows an application for condonation to be filed and served on the respondent forthwith, together with the application for leave to appeal, whereupon the respondent may, within three days of the date of service, file submissions on both applications. In terms of sub-rule (4), upon receipt of the application and the respondent's submissions, if any, the Registrar is required to place the matter before the presiding judge in chambers who shall grant or refuse the application, or invite oral argument on any particular point.

[8] On why or how she missed the twelve-day deadline, the applicant alleges that when the judgment was handed down in court on 26 May 2022, only the operative part was read out. She wanted to read the whole judgment so as to decide whether or not to appeal, after consulting her counsel. She further alleges that the judgment was not readily available after it

had been handed down. As a matter of fact, I delivered the judgment in one of the court rooms at the newly established commercial division of the High Court [the Commercial Court] which is housed in a different building and different location from the general division. I had moved to the Commercial Court as head of the contingent of judges deployed to that division which is an electronic court. But the custody of all the records from the general division is at the registry of the general division. The Commercial Court has its own digital registry. The applicant says her lawyers' efforts to uplift the full judgment soon after it had been handed down were unsuccessful as the record could not be immediately located between the two registries. It was only on 31 May 2022 that the lawyers had finally managed to uplift a copy of the judgment. As such, she argues, all the *dies induciae* for filing the application for leave to appeal should be reckoned from 31 May 2022, not 26 May 2022. Therefore, she concludes, she was still within the prescribed time-frames when she finally filed her application on 16 June 2022.

[9] In opposing this particular aspect of the application, the respondent alleges that the applicant has advanced no competent basis for the failure to seek leave to appeal orally immediately after the judgment was handed down. She further alleges that there is no proper application for condonation before the court because the applicant's allegations relating to the alleged efforts by her erstwhile legal practitioners to uplift the whole judgment after it had been handed down were all hearsay statements which are inadmissible. The applicant, in answer, denies that her narration of the events in question is hearsay as the facts were all within her personal knowledge. At any rate, she says, the legal practitioners were acting on her instructions. However, in spite of that stance, the applicant went further to cause her erstwhile legal practitioner of record to file an affidavit confirming what she had deposed to in her founding affidavit.

[10] Objectively, I need not be detained by this technical point. It is common cause that in delivering the judgment in court on 26 May 2022, I only read out the operative part in accordance with the rule of practice. I then indicated that the rest of the judgment would be immediately available for uplifting, albeit not from the electronic platform of the Commercial Court as the applicant incorrectly alleges. There is no meaningful disputation by the respondent of the allegations by the applicant regarding the difficulties that she or her legal

practitioners might have experienced in trying to uplift the rest of the judgment from the court registries. In fact, such glitches are being experienced from time to time during this transitional period after the establishment of the Commercial Court on 1 May 2022, which is poised to become fully paperless on its second anniversary. Therefore, I have no reason to disbelieve the applicant in this regard. I do not consider it necessary to go into the whole debate whether the applicant's averments are, or are not, hearsay. Her erstwhile counsel of record has since confirmed them. That should be the end of the matter. Therefore, condonation for the applicant's failure to make the oral application for leave to appeal immediately after the judgment in question was delivered is hereby granted. Furthermore, given the delays experienced by the applicant in trying to uplift the rest of the judgment soon after it had been handed down means that she was not out of the twelve-day time frame prescribed by r 94(2) when she eventually filed her application on 16 June 2022. However, this conclusion does not quite dispose of the matter. There is another issue.

[11] Sub-rule (3) of r 94 of the High Court Rules provides that a copy of the application has to be served on the respondent immediately after it has been filed. The rule does not define 'immediately'. Furthermore, it does not say what should happen in the event that the application is not served immediately. Dismissing a construction on 'immediately' that would mean "... *on the same day of filing* ..." as being too prescriptive and injudicious, this court, in *RioZim v Maranatha Ferrochrome (Pvt) Ltd* HH 623-20, said that 'immediately' is one of those abstract notions, like "reasonable", that defy precise definition. They are malleable concepts that are pliable. They derive colour or meaning from the context in which they are used in any given circumstances.

[12] Rule 94 has no provision relating to the filing of proof of service of the application for leave to appeal. Evidently, the applicant did not file the necessary proof of service of her chamber application. This prompted the Registrar to write to her as indicated before. That failure meant that the record would not be brought to me either expeditiously, or at all. When it was brought to my attention just before the commencement of the trial on 7 July 2022 that the applicant was alleging that she had filed an application for leave to appeal, I caused an investigation to be conducted on the whereabouts of the record. It was eventually located on

the eve of the trial at the registry of the general division. But the trial had to be aborted for the second time running.

[13] It is said the applicant did not see the Registrar's letter. That is neither here nor there. The Rules require that once such an application has been filed, it ought to be served immediately. If proof of service has to be filed, then it ought to be filed regardless of whether the Registrar writes or not. The only difficulty that I perceive hereon is whether the Rules require that proof of service be filed, and if so, within what time frame. Part VIII of the Rules deals with applications in general, encompassing chamber applications. Rule 58(15) provides that where, for any reason, proof of service is not filed in, among other things, the time specified, the application shall be deemed to be abandoned for that reason and the Registrar shall accordingly notify the parties. In terms of r 58(14), the time specified is five days of the service of the application. However, this is in respect of an application made in terms of Part VIII under which this rule falls. An application for leave to appeal is made in terms of Part XVI. But Part VIII begins by r 57(1). It provides that all applications made for whatever purpose in terms of the Rules or any other law, other than applications made orally during the course of a hearing, shall be made, *inter alia*, as a court application or a chamber application. Rule 58 aforesaid is general provisions for all applications (*underlining for emphasis*).

[14] The point is, in spite of the fact that r 94 which governs applications for leave to appeal does not refer to the filing of proof of service, it may be that on a proper consideration of the Rules as a whole, particularly r 58(14) and (15), proof of service is indeed required even despite that r 58(14) under Part III of the Rules refers to proof of service in respect of an application made in terms of that Part. These matters were not argued before me. I have flagged them purposefully because they seem quite pertinent. However, I have ultimately considered that I should not concern myself with them. Evidently, the applicant served her application. But nobody has told me when she might have done that. The respondent went on to file her notice of opposition on 1 July 2022. But she has given no indication as to when she might have received the application. It seems that the notice of opposition was filed some eleven days after the application was filed.

[15] Given that the respondent has made no issue of the fact that the applicant filed no proof of service of her application for leave to appeal, and given that the issue whether or not

such proof is in fact required, and if so, what the effect of a failure to comply might be, have not been raised, let alone argued, the applicant cannot be held non-suited for this reason. In fact, I notice that in her heads of argument, the respondent does not concern herself, or persist with this technical objection. In all the circumstances therefore, I proceed to consider the actual application for leave to appeal.

[16] In judgment no HH 334-22 that the applicant wants to appeal against, this court dismissed her objection to the plaintiff's declaration for a number of reasons. In paraphrase, it held that despite the length and density of the document that the applicant had filed so belatedly – 43 pages long – which contained the putative points of law allegedly as being capable of being raised at any time, and despite the applicant's strategy of spraying and dispersing those so-called points of law across multiple and long paragraphs, the whole objection was no more than an ordinary exception, and an ordinary application to strike out a pleading for which the time to file had long since expired. In terms of the Rules, an exception or application to strike out have to be filed within ten days of an appearance to defend. Hers were a whopping 3 ½ years out of time. No condonation was sought. Furthermore, the applicant had completely botched the procedure for giving to an opponent advance notice before an exception is taken. The details are in that judgment.

[17] Apart from the procedural impropriety of the so-called points on law, the court dismissed the applicant's purported exception and application to strike out also on the substantive ground that, again distilled, it was not competent for her to now pretend that she could not plead to the plaintiff's declaration, 3 ½ years later, and, for that matter, whilst already in court for the trial, on the purported basis that it was bad in law or that it did not disclose a cause of action, when not only had she competently pleaded to that declaration, but had also unequivocally admitted the essentials of the claim in that declaration. The judgment went on to demonstrate in some detail the manner, nature and extent of that admission. It also referred to the onus of proof as agreed upon between the parties at the pre-trial conference. Again the details are in that judgment. Finally, the court considered her whole conduct as being grossly irregular and wasteful for which she deserved to be mulcted in costs there and then rather than later. The court consciously ruled against reserving the wasted costs for another day or making them in the cause.

[18] In the present application, the applicant says she wants to appeal the judgment aforesaid allegedly because it contains errors of law. She raises five grounds of appeal. Distilled, they are:

- that the applicant having raised five separate points *in limine* in her objection to the respondent's declaration, in the judgment, the court only dealt with two, yet all five of them should have been considered separately and shown why they were an exception that would be time barred;
- that the fact that the applicant had pleaded to the declaration which was defective and therefore a nullity was neither here nor there because a nullity remained a nullity which could not hold or be repaired and clothed with validity;
- that the court erred in finding that the applicant had admitted the defamatory effect of the words complained of because in her plea she had denied them *in toto*;
- that the court wrongly placed the onus on the applicant to prove that she had not defamed the respondent, and had further erred in that it said this was the sole issue for determination at the trial when, to the contrary, it is the respondent who bears the onus to prove that she was defamed by the applicant's statements and that this would be the first issue for determination;
- that the finding that the applicant had admitted the defamatory effect of the words in question, despite her denial *in toto*, meant that the court had already prejudged the dispute between the parties before the evidence has been led, raising questions about the propriety of the trial being conducted by the current judge, given the human inclination to hold fast to positions already taken;
- that the court's finding on costs was predicated on an incorrect premise because the respondent could not possibly have been prejudiced by the length and timing of the filing of the objection because not only had the respondent spurned the opportunity offered her by the court to respond to the applicant's objection, but also there were extraneous circumstances known to all parties that had caused the delay.

[19] In two affidavits and comprehensive heads of argument, the applicant goes on to elaborate on the proposed grounds of appeal, citing case authorities extensively, ostensibly to show how, among other things, every single one of those grounds of appeal has good prospects of success; how the judgment of this court above goes against the weight of authority, including cases from the Supreme Court, about the right of a party to raise points of law at any stage of the proceedings; how this very same court, in previous cases decided by other judges, has held that an exception, even despite it being itself a point of law, can be raised at any stage of the proceedings; how the situation confronting the court in the present situation is a novel one, which should therefore be referred at this stage to the superior court

for an authoritative determination and guidance before time is wasted in conducting a trial that might well be overturned on appeal, and so on.

[20] The law says leave to appeal can be granted if the following factors are proved:

- that there are reasonable prospects of success;
- that the balance of convenience favours the grant of such leave;
- that the matter is of substantial importance to one or both parties;
- that there is a point of law, or divergence of authorities on it that will be settled by the appeal court;
- for a judgment sounding in money, that the amount in dispute is not trifling.

See *Pichanick NO v Paterson* 1993 (2) ZLR 163 (H) and *Chikafu v Dodhill* (Pvt) Ltd & Ors 2009 (1) ZLR 293 (S).

[21] No single factor is exclusively determinant or decisive by itself. They have to be considered conjunctively and cumulatively. One or some or more factors may be more predominant in some cases than they may be in others. For example, in some cases, the absence of prospects of success may completely overshadow all the other factors, yet in other cases their existence may compensate for any inadequacies in the other factors. The court has a wide discretion. It exercises it judiciously. It should endeavour to be fair to all the parties involved: see *Read v Gardiner & Anor* SC70/19.

[22] It is the duty of the court to examine closely the proposed grounds of appeal and, among other things, dispel the notion that the appeal is not a stratagem to harass an opponent by delaying the proceedings and stave off the day of reckoning. By its very nature, an appeal against an interlocutory judgment calls for greater scrutiny because it is potentially wasteful. It is an impeachment of merely an intermediary point that may arise during the course of the proceedings. The right of appeal to the Supreme Court in ***any*** civil case against ***any*** judgment of this court is guaranteed by s 43 of the High Court Act [*Chapter 7:06*][1]. But that same right becomes altogether proscribed by the same provision in certain circumstances, for example, the refusal of summary judgment where an unconditional leave to defend is granted[2]. It is

[1] Sub-section (1)
[2] Sub-section (2)(b)

severely restricted or delimited in interlocutory orders or judgments, except in the special instances listed[3]. The restriction or delimitation is that the leave of the judge who passed the judgment sought to be appealed is required, which, if refused, the leave of a judge of the Supreme Court may be sought.

[23] On the scale of convenience, the court tries to balance the advantages of an immediate appeal on the interlocutory matter against the immediate prosecution of the action: see *Pichanick*, *supra*, and *RioZim Ltd*, *supra*. Sometimes it is much faster and comparatively much cheaper for the trial to complete and for the loser, if he or she or it be so inclined, to take the matter on appeal, at the end of the trial, than to allow appeals piece meal. There is always the chance of an interlocutory appeal falling flat on its face and the matter coming back to the court for the resumption of the trial. To allow an appeal, metaphorically, 'at every drop of a hat', does not bode well for the administration of justice. Obviously every case depends on its own merits.

[24] Turning now to the instant applicant, I consider it to be no more than a stratagem to harass the respondent and an attempt to thwart the trial by every means possible. The grounds of appeal conflate many issues. They lack attention to detail. They gloss over, or incompetently try to explain away far-reaching admissions made by the applicant, not only in formal pleadings drafted by her own counsel, but also in sworn statements by herself. Some statements in the application are completely false. An aspect of it is a thinly veiled demand for recusal, albeit couched in polite legalese. I proceed to demonstrate all these.

[a] *Court did not deal with all the five separate points*

[25] There were no five separate points. Essentially there were just two crisp issues raised. That they might have been incompetently broken down into multifarious facets, and strategically strewn over a staggering forty-three pages would not detract the court from identifying the true genus of the objection that was before it. As summarised in the impugned judgment, the applicant's main objection was that the plaintiff's declaration was bad in law in that it did not disclose a cause of action more particularly in that the defamatory words had

[3] Sub-section (2)(d)

not been pleaded but that it was only their effect that had been pleaded. That kind of objection is classically an exception. The other so-called point was classically an application to strike out. That was why the applicant had, among other things, purported to give the mandatory notice of an exception or application to strike out in terms of r 42(3) of the High Court Rules. Unfortunately for herself, she had completely botched the procedure. Poignantly, even in this application, the applicant does not even begin to explain what else was left out for consideration. A pleading or document is identified by its contents, not the title or heading, or what the litigant alleges or wishes it to be.

[b] *A nullity remains a nullity despite pleading to it*

[26] Under this ground the applicant conflates inapposite legal views and inapposite case authorities. Her predominant argument is that she might have pleaded to the plaintiff's declaration but that this should not have blinded the court to the fact that the declaration was a nullity which could not be given validity merely by her having pleaded to it. Inevitably, she wheels into her argument the over-quoted but seminal statement by DENNING MR in *MacFoy v United Africa Company Ltd* [1961] 3 All ER 1169(PC) that you cannot put something on nothing and expect it to stay there. She further makes reference to several other case authorities, chiefly the judgment of this court in *Sindikumbuwalo Pacifique v Commissioner General* HH 137-18 for the argument that where a wrong defendant has been cited in a summons, it matters not that the putative defendant does not raise an exception but that he or she can raise an objection on a point of law even at the start of a trial because the process of filing pleadings in such circumstances would not imbue the summons with any form of legality. Undoubtedly, there is a glut of cases on this point, for example, *Ngani v Mbanje & Anor*; *Mbanje & Another v Ngani* 1987 (2) ZLR 111(SC), 114C and *Muchakata v Netherburn Mine* 1996 (1) 153 (S), 157A.

[27] The applicant pays little attention to detail. For example, in *Muchakata* above, the Supreme Court prefaced the above legal position by this important qualification, "**Provided it** [i.e. the point of law] **is not one which is required by a definitive law to be specially pleaded** …". The appellate court then went on to say, "…a point of law, which goes to the

root of the matter, may be raised at any time, even for the first time on appeal, …" But the court ended with this equally important qualification, "… **if its consideration involves no unfairness to the party against whom it is directed** …" (*my emphasis*). The point is, whilst an exception or an application to strike out are predominantly points of law, a definitive law, r 42(3) of the High Court Rules, requires that this genre be specially pleaded, not only that, but within a specific time frame. As shown above, the applicant identified her objection as an exception and application to strike out, but failed to comply with the definitive law. She does not explain why she did not except or apply to strike out on time. She did not apply for condonation. She merely and stubbornly insists on the right of a litigant to raise a point of law at any time of the proceedings. She is ill-advised.

[28] *Sindikumbuwalo Pacifique* above, and all the other cases cited, are on a completely different footing altogether. They are distinguishable. An exception or an application to strike out are manifestly different from an objection based on the fact that a non-existent or wrong party has been brought to court. For example, no judgment can, or should be granted against a non-existent or wrong party. Even in the absence of an objection, the court can, on its own, refuse to enter judgment if it becomes aware of the fact that a wrong or non-existent party has been dragged before it. Except in exceptional circumstances, litigation is always a suit by one party versus another or others. If there is no another or others, there can be no litigation. Pleadings stand on a different footing. The court cannot, for example, raise prescription on its own accord even though it can allow it to be raised at any stage of the proceedings[4]. With exceptions and applications to strike out, only those that are raised on time; that go to the root of the matter; that involve no unfairness to the other party against whom they are directed; and the alleged defect of which cannot be cured by the evidence to be led; and so on, can be upheld: see *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) and *Local Authorities Pension Fund v Nyakuwa & Ors* 2015 (1) ZLR 103 (H). The applicant's objection came nowhere near any of these requirements. Among other things, and most tellingly, the applicant, apart from herself, intends to lead evidence of eight other witnesses just to prove the truth of her statements which are the subject of the defamation. Thus, even if the respondent's declaration be defective, which is not accepted, the evidence will easily cure it.

[4] Section 20 of the Prescription Act [*Chapter 8:11*]

[29] However, the respondent's declaration in the main action is not defective in the manner alleged. The gravamen of the applicant's objection then and now is that in the main action, it is not enough for a plaintiff merely to plead the effect of the words complained of without actually pleading those words, or the *ipsissima verba*, or failing that, pleading words of a substantially similar meaning, and that as such, the declaration is hopelessly defective beyond any repair. She quotes extensively *dicta* in several authorities, including *International Tobacco Co. of SA Ltd v Wollheim & Ors* 1953 (2) SA 603 (AD).

[30] But with all due deference, it is not a rule of thumb that only the *ipsissima verba*, or that only words bearing a substantially similar meaning, need always be pleaded or that a plaintiff cannot plead the effect of the words only. She can. In *Munyai v Chikasha* 1992 (2) ZLR 31 (S), after clarifying certain confusion by some counsel on the *ratio decidendi* in *International Tobacco Co* above, the Supreme Court concluded that, "**All that is necessary is to plead the substance and effect of the words**."[5] (*emphasis added*). In *Chimakure and Anor v Mutambara & Anor* SC 91-20, after reaffirming the position in *Munyai*, the appellate court concluded, "**A plaintiff no longer needs to set out the exact words complained of**"[6]. Above all, as has already been adverted to, an exception on the basis that a pleading is vague and embarrassing will not be expunged unless it is shown that the defendant will be seriously prejudiced and that no evidence will possibly cure the alleged defect. No such prejudice beyond what can easily be dismissed as contrived and fanciful has been shown by the applicant herein. This conclusion, but for the sake of completeness, all but puts paid to the application for leave to appeal.

[c] *Defamation denied in toto*

[31] In *Commercial Bank of Zimbabwe Ltd v MM Builders and Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H), following startling submissions by counsel, this court was driven to remark, at p 442E:

[5] At p 32F
[6] P 11, Para 27

> "There may exist those silver-tongued orators who prove that black is white, but I am unable to hold that the argument advanced on this point is valid."

[32] What the applicant admitted is self-evident from the pleadings, from her sworn statements in the application to compel further discovery and from the various synopses of evidence of her witnesses filed on her behalf. The judgment is quite clear on the nature and extent of that admission. In the present application, the applicant wants to latch onto the opening sentence in her plea that reads, "*This is denied in toto*" as if there is some magic in them. She ignores or tries to down-play the substantive plea which, among other things, says her twitter statements were intended to expose the respondent's lie. The words, "*This is denied in toto*" are classically a bare denial. The law says a bare denial is no plea: see Amler's *Precedents of Pleadings*, 7th ed., LexisNexis, at p 324 and r 37 of the High Court Rules, 2021.

[33] The applicant goes to some length to complain that the judgment thrusts the onus on her to prove that she did not defame the respondent. This is manifestly misleading. The judgment makes no such finding. It deals with the question of onus in the context of what the parties agreed between themselves at the pre-trial conference. The judgment merely regurgitated what is in black and white. The joint pre-trial conference minute filed with the court on 12 May 2021 and upon which the matter was referred to trial, after setting out the issues in Section 2 as stated in the impugned judgment, goes on, in Section 3, to list "**Onus**" as a heading. Below it, under paragraph 2.1, and contrary to the document the applicant attaches as annexure "AN1" to her answering affidavit herein, are the words, in long hand, those in print apparently having been crossed out, "**On the Defendant**" (*emphasis added*). This is a document signed jointly by counsel of both parties. It is the one that forms part of the bundle of documents consolidated for the trial, not the applicant's document aforesaid. But nonetheless, if there be a dispute on the authenticity of this document or any other issue, including whose duty it is to begin, then that exactly is the object of a trial, not an appeal. It is self-evident and an elementary position of the law that a defendant that pleads "truth" or "justification" to a claim for defamation damages, bears the onus of proof: Amler's, *supra*, a p 168.

[34] The applicant alleges that the judgment contains an error of fact to the effect that her witnesses' list was published after the pre-trial conference and that to the contrary, that list

had been published well before the pre-trial conference. It is unclear what or where the applicant is reading from. The claim that the list was published well before the pre-trial conference is down-right false. From the records placed before the court, the pre-trial conference was held on 25 June 2020. But it was not until 6 July 2020 that the applicant went on to file her supplementary summary of evidence on which the synopses of eight of her witnesses were listed. They are all to prove the truth of the defendant's statements. Then on 18 March 2022, almost two years after the pre-trial conference, the applicant filed a further supplementary summary of the evidence to be led from one of her other witness from the University of Zimbabwe. Patently, the judgment contains no error in this regard. Leave to appeal cannot possibly be predicated on falsehoods or incorrect facts. But again, if there be any confusion, that is the function of the trial to clear it up, not an appeal.

[35] The applicant further alleges that the point raised in her objection was a novel one and that therefore it is necessary that it be referred at this stage to the Supreme Court for guidance before time and costs are wasted over a trial that may well be set aside. But as the court observed in the case of *Commercial Bank of Zimbabwe Ltd* above, silver-tongued oratory or glib do not turn black into white. There is nothing novel about what the application is raising. It is what she insists on doing that is novel. The situation is unlike the one in *Chikafu* above, where leave to appeal was granted because there had been a divergence of authority on some point, both in this jurisdiction and elsewhere, and it had become necessary to have it resolved to provide certainty in the law. As amply demonstrated, the whole application is based on a thorough misconception on both the facts and the law.

[d] *Court has prejudged the case*

[36] In the light of the clarification given on the several points above, and in all objectivity, the applicant should, to put it mildly, simply concede the impropriety of her application and abandon it. Otherwise, the accusation that the court might have already pre-judged the case before the evidence has been led will stick out prominently as an insidious attempt to secure an outcome in her favour and to serve merely as a foreword to proceedings for recusal and for which ample hint has already been given. But a philosophy that suggests

or insinuates that justice is only justice if a case is decided in a particular way is wicked and self-serving: see *Chimhini v Chairperson, ZEC & Ors* 2018 (2) ZLR 876 (EC), 882, Para 25.

[e] *Costs*

[37] Again the argument that the order of costs in the impugned judgment was predicated on an incorrect premise should now also fall away in the light of the clarifications above. At any rate, the award of costs is a matter wholly in the discretion of the court: see *Graham* v *Odendaal* 1972 (2) SA 611 (AD) and *Kruger Brothers & Wassermen* v *Ruskin* 1918 AD 63, at p 65 - 67. Generally, the order of costs follows the event unless there are special circumstances warranting a departure. It is not right that a party, having been put through to some effort to enforce or defend a right, especially in the face of unreasonable intransigence, should be left without adequate recompense of the expenses incurred. The law says where costs of suit are incurred unnecessarily, the court can order the party responsible to pay them. It was put this way in *Fripp* v *Gibbon and Company* 1913 AD 354, at p 363:

> "To me it seems more in accordance with the principles of equity and justice that costs incurred in the course of litigation which judged by the event or events, proved to have been unnecessarily or ineffectually incurred should, as a rule, be borne by the party responsible for such costs."

[38] In the circumstances, the application for leave to appeal is hereby dismissed with costs. The trial of this matter shall proceed on a date, time and place to be advised in due course.

20 September 2022

Jessie Majome & Co., applicant's legal practitioners
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