

KEMBO MOHADI
versus
THE STANDARD
and
STANDARD PRESS (PVT) LTD
and
DAVISON MARUZIVA
and
EDDIE CROSS

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 13 September 2012 and 17 January 2013

E.W.W. Morris for the excipient
R. Dembure for the respondent

ZHOU J: This is an exception to the plaintiff's claim for damages for defamation on the ground that the words complained of carry no reference to the plaintiff and that the declaration makes no proper allegations of facts which would enable the ordinary reader to identify the plaintiff as the person defamed. The background to the dispute between the parties is as follows:

The plaintiff is a Cabinet Minister in the current Government of Zimbabwe. He is co-Minister of Home Affairs. The second defendant is a publisher of a newspaper known as **The Standard**. The third defendant is employed by the second defendant as editor. The first defendant is the name of a newspaper. In its issue of **The Standard** of October 11-17, 2009 the second defendant published a letter authored by the fourth defendant under the title "**Criminal vandalism**". The full text of the letter is as follows:

"DRIVING to Harare last week I saw an astonishing sight just outside Gweru. From Gweru to Harare, a distance of more than 250 kilometres, the electrical system built after independence at a cost of over US\$100 million dollars, has been stripped and lies derelict and destroyed.

Tens of millions of dollars damage carried out on the side of the main road and in front of the entire country and its police force. Recently the co-Minister of Home Affairs responsible for the Police had his 30-tonne truck impounded with 30 tonnes of stolen copper wire on board.

We have heard nothing since then but I understand a close relative has been running a gang stripping wire from power lines for several years. The police at Beitbridge are well aware of this and have done nothing.

This criminal vandalism on a massive scale, just when we need our railways for exports and bulk movements of food, coal and other commodities, someone cripples the only major investment we have carried out in our rail system since independence.

Eddie Cross

Bulawayo.”

Based on the publication of the above letter, the plaintiff issued summons against the defendants claiming a sum of thirty-five million United States dollars (US\$35 000 000) for defamation. The material paragraphs of the plaintiff’s declaration read as follows:

“6.

In its October 11-17 issue, the Standard newspaper published a letter written by the fourth defendant headed “Criminal Vandalisation” (sic) which letter contains lies, and misleading statements of and concerning the plaintiff. A copy of the newspaper article is attached and marked “A”.

7.

The article is not only false but is defamatory of and concerning the Plaintiff in that it states falsely that:

- 7.1 the plaintiff is responsible for vandalising the electrical system from Gweru to Harare.
- 7.2 that the plaintiff owns a 30 tonne truck that was impounded by the police with 30 tonnes of stolen copper wire on board.
- 7.3 that the plaintiff or his close relatives is (sic) responsible for theft of copper wire countrywide.
- 7.4 that the plaintiff has a criminal gang that has been stripping wire from power lines for several years and police at Beitbridge where the plaintiff is the Member of Parliament is aware of but has done nothing.

7.5 that the plaintiff who is a co-Minister responsible for the police and the sole minister of police before the formation of the current inclusive government has somehow corruptly managed to influence the police not to investigate or prosecute the thieves.

8.

Though the plaintiff is not mentioned by name the article in the newspaper is couched in such a way that it leaves an ordinary reader with no doubt that the plaintiff is the subject of the article. The publication is in fact based on a similarly false and defamatory publication by an obscure online publication <http://www.thezimbabwetimes.com>, of the 14th June 2009 a copy of which is attached and marked "B".

In response to the summons and declaration, the defendants filed a special plea and an exception. The special plea was based on the citation of the first defendant, The Standard, which is the name given to the publication in which the article complained of was published. The plaintiff withdrew its claim against The Standard, thereby rendering it unnecessary for the Court to determine the special plea. The exception taken is that the words complained of contain no reference to the plaintiff and, further, that the declaration makes no proper allegations of what facts would enable the ordinary reader to identify the plaintiff as the person referred to.

It is trite that in order to succeed in a claim for defamation damages a person must establish that the material complained of referred to or concerned him or her. See *Ndewere v Zimbabwe Newspapers (1980) Ltd & Anor* 2001 (2) ZLR 508(S) at 511D; *Goodall v Hoogendoorn Ltd* 1926 AD 11. The test for determining whether in any publication the reference is to the plaintiff is an objective one. In the case of *Young v Kemsley & Ors* 1940 AD 258 at 281 the court expressed the position in the following terms:

"The test is whether the ordinary, reasonable man hearing the speech would have understood the words complained of to apply to (the plaintiff)."

See also *Potgieter v Ellis & Anor* 1948 (3) SA 1183(D) at 1187; *SA Associated Newspapers Ltd & Anor v Estate Pelsler* 1975 (4) SA 797(A) at 812.

There are two stages in the inquiry into the question whether the material complained of refers to or concerns the plaintiff. The first stage is whether the statements complained of are reasonably capable of referring to the plaintiff, either in their ordinary meaning or by reason of some special circumstances. This is a question of law which can be determined on exception. Evidence is not admissible in that enquiry. The case of *SA Associated Newspapers*

Ltd & Anor v Estate Pelsler (supra) at 811 states that the inquiry on the exception will be directed at “whether the words are reasonably capable of conveying to the reasonable readerthat the alleged defamatory matter refers to the plaintiff”. See *Taylor & Anor v Chavunduka & Ors* 1995 (2) ZLR 22(H) at 27C-28E. The second leg of the inquiry is whether a reasonable person would regard the words complained of as referring to the plaintiff. The determination of this matter is not concerned with that second stage but only with the first one. See Jonathan Burchell, *The Law of Defamation in South Africa*, p. 129.

In the instant case the article does not refer to the plaintiff by name. Where the plaintiff is not identified or referred to by name or description such as his office or occupation, he must state the facts upon which he relies as showing that the statements complained of referred to or concerned him. Jonathan Burchell, *The Law of Defamation in South Africa*, p. 131. *In casu* the article contains a general complaint regarding vandalism of railway cables and the author’s perceived inaction of the police in the face of such vandalism. The only reference to a co-Minister of Home Affairs is in the context of an instance given of a motor vehicle belonging to him which was impounded by the police while carrying thirty tonnes of copper wire and to the alleged fact that the said co-Minister’s close relative is believed to be leading a group which steals railway cables. The fourth respondent who is the author of the article further states that the police at Beitbridge are aware of the acts of vandalism but have not acted to avert them or to bring the perpetrator to account. While it is possible to identify the plaintiff as the co-Minister of Home Affairs being referred to in the article by reference to his gender by a reader who knows that the other co-Minister is female, it is clear that the defamatory aspects of the article which the plaintiff seeks to rely upon do not refer to or concern the co-Minister of Home Affairs. They concern a relative of the Minister as well as the police who are being accused of inaction.

The plaintiff’s declaration reveals that he relies on what is referred to as a “quasi-innuendo” or innuendo pointing to the sting to the defamation or “sting pointing imputation”. See *Auridiam Zimbabwe (Pvt) Ltd v Modus Publications (Pvt) Ltd* 1993 (2) ZLR 359(H) at 366B-E. In para 7 of the declaration the plaintiff points to certain defamatory meanings which he attributes to the words in the article. In the case of *Auridiam Zimbabwe (Pvt) Ltd v Modus Publications (Pvt) Ltd (supra)* at 366E-F, the following is pointed out:

“What is of importance in regard to the pleading of a ‘quasi-innuendo’ is that the plaintiff is bound by the specific meanings selected by him as being those defamatory of him, those therefore being the limited charges which the defendant has to meet.”

See also *Demmers v Wyllie & Ors* 1978 (4) SA 619(D) at 622F.

In other words, the Court must examine the meanings identified and relied upon by the plaintiff in order to determine whether the defamatory aspects of the article referred to in the plaintiff's declaration are reasonably capable of conveying to a reasonable reader that the alleged defamatory matter refers to the plaintiff. The assertion by the plaintiff that the article states that he is responsible for vandalising the electrical system from Gweru to Harare is not supported by the contents of the article. The allegation that the police impounded a motor vehicle owned by the plaintiff carrying thirty tonnes of copper wire does not in any way mean that the plaintiff was involved in the stealing of the copper wire. In fact, the article specifically states that a close relative of the plaintiff has been leading a gang of persons responsible for stealing copper wire from the railway company. There is no suggestion that the plaintiff is responsible for the conduct of his relative. The article does not state or suggest in any way that the plaintiff runs a criminal gang that has been stealing copper wire. That allegation relates to a relative of the plaintiff. Also, nowhere in the article is there a suggestion that the plaintiff has influenced the police not to arrest the persons who steal the copper cables.

In para 8 of his declaration the plaintiff alleges that the article complained of is based upon another article, a copy of which is attached, which was published online on <http://www.thezimbabwetimes.com> on 14 June 2009. That assertion is not supported by a reading of the letter written by the fourth defendant and published by the second defendant. I agree with Mr *Morris* that the fourth defendant would not have lost the opportunity to blame the plaintiff for the matters complained of in the letter if he wanted and had a basis to do so. But he blames the police.

I am persuaded that the facts relied upon by the plaintiff do not show that the words in the article complained of refer to him. The plaintiff's declaration is therefore exceptionable. Mr *Morris* urged that in the event that the exception is upheld the Court must strike down the declaration and dismiss the plaintiff's claim on the ground that the case turns upon an interpretation of the article complained of. The plaintiff did not ask for leave to amend his declaration in the event of the exception being upheld. The correct procedure where an exception is upheld is not to dismiss the plaintiff's claim as prayed by the defendants, but to grant the plaintiff leave to amend his pleadings if he is so advised. See *RM Insurance Co (Pvt) Ltd v GCM (Pvt) Ltd* 1993 (2) ZLR 407(S) at 413D; *Auridiam Zimbabwe (Pvt) Ltd v*

Modus Publications (Pvt) Ltd (supra) at 373D; Taylor & Anor v Chavunduka & Ors (supra)
at 30D.

The Court was invited by Mr *Morris* to award costs on an attorney-client scale on the ground that the amount claimed should excite the anger of the Court as a *plus petitio*. It is not uncommon now for large sums of money which bear no relation to the awards being made in this jurisdiction or other jurisdictions to be claimed as damages for defamation. There is need for the legal profession to be reminded that lawyers owe it to their clients to render proper legal advice on quantum of damages claimed, and should avoid creating false expectations in the minds of their clients regarding the amounts which they can claim. Although the amount claimed in the instant case falls in the category of the claims referred to above, I do not consider it to be appropriate to take it into account for the purposes of considering the costs given the basis upon which the exception has been upheld.

Accordingly, it is ordered as follows:

1. The defendants' exception is upheld with costs, and the plaintiff's declaration is set aside.
2. The plaintiff is given leave, if so advised, to file an amended declaration within ten days of the date of this judgment.

Mabulala & Motsi, plaintiff's legal practitioners
Atherstone & Cook, defendants' legal practitioners