

ALVA MANDIZVIDZA SENDERAYI
versus
BLESSED MHLANGA
and
VINCENT KAHIYA
and
ALFA MEDIA HOLDINGS LIMITED

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 10 June 2015

Civil Trial

R Goba, for the plaintiff
T Mpofu, for the defendants

NDEWERE J: On 7 February 2011 the *Newsday*, a publication of the third defendant, Alpha Media Holdings Limited published the following article on p 6:

“Golden handshake for former director”

Blessed Mhlanga

Former director of Health Services Dr Alva Senderayi is set to receive over \$30 000-00 from Kwekwe City Council as part of his exit package after he was allegedly illegally dismissed from work by the local authority 10 years ago.

Almost the entire council says it views this as a fraudulent deal by Town Clerk Emmanuel Musara to pay Senderayi for allegedly playing emissary on his behalf when he offered suspended treasurer Gilbert Zingwe a sweet retirement package last July.

Senderayi allegedly met Zingwe in July last year, weeks after the treasurer had been placed on forced leave, and presented the town clerk’s offer and conveying the consequences of turning down the offer.

The meeting is said to have taken place at the treasurer’s house where Senderayi allegedly told Zingwe that he was acting on behalf of Musara, who wanted the treasurer to retire from office on medical grounds in exchange for immunity in his ongoing case.

‘I have been sent by Musara... he wants this thing to end peacefully but he is under a lot of pressure from councillors ... he says he will drop all charges if you retire on medical grounds ... if you don’t, he said he will bring in a whole lot of new charges which include ballistics (street lights) which were not delivered to Council,’

Senderayi is alleged to have said in a recorded conversation which Zingwe’s lawyers say they intend to use at his hearing soon.

Zingwe rejected the deal and was subsequently suspended from Council on December, 20, last year and is now facing nine charges which include fraud, theft and insubordination.

Among the charges, Zingwe is being accused of paying a company called Fieldcare Supplies \$6 000-00 for products Musara claims were not delivered to Council.”

Blessed Mhlanga, a reporter with Newsday was the writer of the story. The plaintiff issued summons against Blessed Mhlanga, the writer of the story and Vincent Kahiya who is the Group Editor in Chief and Alpha Media Holdings, who are the publishers of the Newsday paper, for US\$150 000-00 defamation damages because of the above article.

In his declaration the plaintiff said the words were defamatory in that they were intended and were understood by the readers of the newspaper to mean that the plaintiff was unprofessional and corrupt in that:

- He was dismissed from his position of Director for Health services by the City of Kwekwe some 10 years ago.
- He was set to receive a hefty exit package of US\$30 000-00 as a favour from the Kwekwe Town Clerk for his efforts in trying to prevail upon the City’s suspended Town Treasurer to accept an out of court settlement proposed by the Town Clerk; and
- He did not deserve the exit package that he was claiming from the City of Kwekwe.

The defendants filed their plea on 26 May, 2011. It was admitted that the first defendant wrote the article and the third defendant published it. The defendants however pleaded that they lacked *animus injuriandi* when the article was published because (a) the matter concerned the public interest, (b) came from a source who it was reasonable for first and third defendants to rely on, and was published in the genuine belief of the truth emanating from the source. First and third defendants also said they published the article without malice to plaintiff.

Second defendant pleaded that he was the Group Editor in Chief and not the Editor. He said he neither saw the article before it was published nor had any hand in its publication and he knew nothing about its publication.

Plaintiff argued that second defendant, as the overall in charge is still involved and third defendant is vicariously liable for the actions and omissions of both first defendant and second defendant.

While it would have been smarter to cite the Editor, I find merit in plaintiff's argument that second defendant, as the overall in charge as Group Editor in Chief, is also involved since he is responsible for setting the policy which first defendant is expected to follow in the discharge of his duties and which policy first defendant said he followed.

The issues for determination are whether the article set out at the beginning of this judgment is defamatory of the plaintiff and if it is, what are the damages thereof.

The agreed background facts were that plaintiff was dismissed from employment by Kwekwe City Council some ten years back. He challenged the dismissal and the matter is currently pending appeal before the Supreme Court of Zimbabwe. There were attempts to settle the dismissal dispute out of court and the Kwekwe Town Clerk was involved in the settlement discussions on behalf of the City of Kwekwe. Before the settlement was finalised, the City Treasurer, one Zingwe, was suspended. The plaintiff, acting on information received from the Town Clerk about Zingwe's misconduct, approached Zingwe and advised him to resign and leave employment with some terminal benefits rather than risk losing out if disciplinary charges were pursued against him by the Town Clerk. Unbeknown to plaintiff, his discussion with Zingwe was recorded and the recording later got into the hands of the City Council, defendants and other media.

Zingwe did not resign and charges were later brought against him and he was dismissed. First defendant's evidence is not disputed that on 27 January 2011, there was a full council meeting which First defendant attended as a journalist. He followed all the proceedings in the gallery alongside other journalists and he heard the full deliberations of Kwekwe Council. He was present when the Town Clerk sought to put the issue of the plaintiff's settlement package on council's agenda. He heard the councillors objecting and saying it was unprocedural to put plaintiff's item on the agenda. During the debate that ensued he heard some councillors accusing the Town Clerk of bringing up the issue of the Senderayi package as a reward to Senderayi for the role he played in trying to convince the suspended Treasurer to resign rather than be disciplined. The First defendant, during his evidence, was even able to remember names of Councillors who moved the motion and seconded respectively, in having the agenda item struck out for being brought in unprocedurally.

On 7 February 2011, the defendants then published the article at the beginning of this judgment on p 6 of the Newsday.

Given the above background, is the article defamatory of the plaintiff? In my view the article is not defamatory. As correctly pointed out by G Feltoe, *A Guide to the Zimbabwean Law of Delict*, 3rd edition, on p 56,

“Put in the context of newspaper reporting it is vitally important that there should be a free press that keeps the public informed, especially about public affairs.”

Senderayi had been working for a public institution, funded by ratepayers. He got dismissed and there were now plans by the Town Clerk of Kwekwe to pay him an exit package; after having dismissed him. This was a matter in the public interest. The defendants had a duty to inform the public about this pending payment from public coffers.

Plaintiff, in his declaration, says the article is defamatory because it says he was dismissed from his position of Director for Health Services by the City of Kwekwe. The article cannot be defamatory in that respect because it is true that the plaintiff was dismissed by the City of Kwekwe and at the time the article was written, the dismissal was about ten years back. The fact that he was challenging the dismissal did not mean he was not dismissed. Even if he succeeds in getting his job back in court that will be called a reinstatement, confirming that he had been dismissed when the article was written.

In any event, the defendants, out of an abundance of caution, used the word “allegedly” and wrote “allegedly dismissed,” in case it later turned out that he had not been dismissed. A statement which starts with “allegedly” cannot be said to be defamatory because a reasonable reader will know that the allegations may not be true. So the article was true in its respect and its publication was in the public interest since Kwekwe Council is a public institution.

As regards the package, it is true that at the time the article was written he was set to receive an exit package because according to the evidence adduced in court the objection to the item by councillors was just procedural and not on whether he should get the package or not. If the Town Clerk was recommending such a package and there was an objection on the procedure of placing the item on the agenda only, the conclusion by the defendants in the article that plaintiff was set to receive a golden handshake cannot be faulted.

The “fraudulent deal” remarks in the second paragraph of the article refer to the Town Clerk and not the plaintiff. This statement by councillors was about the integrity of the Kwekwe Town Clerk, a public official, in the exercise of his duties. So its publication was in the public interest. Further, the first defendant was reporting about the proceedings of a Council Meeting and in terms of the law, the defendants were protected by the defence of qualified privilege which covers media reports of proceedings of public bodies like City

Council of Kwekwe even if the words used from the proceedings were to be defamatory. There was no other way to reflect what the councillors said about the Town Clerk's conduct. So the statement is not defamatory of the plaintiff.

The case of *Thomas v Murimba* 2000 (1) ZLR 2009, at 213, G clearly sets out the law on qualified privilege. In that case, the court said,

“It is trite that three categories of occasions are accorded the defence of qualified privilege. These are (1) statements published in the discharge of a duty, the exercise of a right or the furtherance of a legitimate interest, (ii) statements published in the course of judicial or quasi-judicial proceedings; and (iii) reports of proceedings of courts, parliament and public bodies.”

The defendants' article covered the proceedings of a public body. In fact, the defendants were extra cautious in writing the second paragraph by saying “almost the entire council” when we now know from the evidence that the decision was unanimous when they rejected the Town Clerk's agenda item for being brought unprocedurally. The defendants were also cautious when they wrote “for allegedly playing emissary ...” The use of the word allegedly showed that the defendants were saying the statement that the plaintiff was an emissary for the Town Clerk was a mere allegation which may or may not be true.

Thirdly, the plaintiff said the article is defamatory because it was intended and was understood by readers of the newspaper to mean that the plaintiff did not deserve the exit package that he was claiming from the City Council of Kwekwe. It is not clear how the plaintiff came to this conclusion when the first paragraph of the article shows that the reason for the exit package was his alleged illegal dismissal from work. The article does not go so far as to say he did not deserve the package. As pointed out by G Feltoe in “*A Guide to the Zimbabwean Law of Delict*” ed 3, p 58;

“The test in such instances is that of the response of ordinary, reasonable people. In respect of written material the test obviously does not take account of how a reader with a morbidly suspicious mind or how an abnormally sensitive or super critical reader would respond to the contents.”

In my view, concluding that the article meant the plaintiff was unprofessional and corrupt is being overly sensitive because the article did not say that. Yet even if it had done so, the defence of qualified privilege would still be available to the defendants since the article was reporting on the proceedings of the meeting of 27 January, 2011.

As far as the recording by Zingwe, plaintiff admitted during his evidence that he later became aware of the recording and that Zingwe had confirmed that his son had recorded their discussion. The fact that the phraseology of what may be on the audio recording differs from part of what was quoted in the article does not detract from the main issue which is not in dispute which is that plaintiff, acting on information received from the Town Clerk

approached Zingwe and advised him to resign rather than face disciplinary action. As stated, in *A Guide to the Zimbabwean Law of Delict* by G Feltoe, 3rd ed on p 62,

“The statement does not have to be completely accurate in every single particular detail. It is sufficient that it was substantially true in its major particulars...”

So all the three aspects of what plaintiff considered defamatory in his declaration have objectively been analysed to reveal that they are not defamatory. Consequently, if there is no defamatory part in the article complained about, there is no basis to claim defamation damages.

The defendants have also raised the defence of lack of “*animus injuriandi*” in their plea. According to that defence, once publication is on a privileged occasion, the ordinary presumption of intending to injure is rebutted. The onus is then on the plaintiff to prove that the defence of privilege does not apply because the statement was motivated by malice or the bounds of privilege have been exceeded, *Musakwa v Ruzario* 1997 (2) ZLR 533.

Once that defence is raised, the plaintiff needs to prove that publication was in bad faith and exceeded the limits of privilege. The plaintiff was unable to prove any bad faith or malice. His allegations of previous dealings with first defendant as suggestions of malice were never pleaded nor laid out in the plaintiff’s replication hence they were successfully objected to by the defendants during the hearing. The court does not therefore have any evidence of malice before it which would rebut the evidence of qualified privilege.

So to conclude, the article complained of was not defamatory of the plaintiff.

Having ruled that the plaintiff was not defamed, it is not necessary for the court to look into the aspect of quantum of damages. Suffice it to say that no damage to the plaintiff was revealed to the court. He still sits on various boards and is a director of various companies. He still runs his private practice in Kwekwe. He intimated that his medical practice has reduced in business but he did not profer any proof to link the reduced business to the defendants’ article. Neither was the plaintiff struck off the roll of medical practitioners. No proof or justification of the damages claimed was presented to the court.

Wherefore the plaintiff’s claim against all the defendants is dismissed, with costs.

Danziger & Partners, plaintiff’s legal practitioners

Gill Godlonton & Gerrans, 1st, 2nd and 3rd defendant’s legal practitioners