

TAFADZWA MUSHUNJE
versus
ZIMBABWE NEWSPAPERS (1980) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 19, 20 October 2016 & 25 January 2017

Trial

Mr F Chimwamurombe, for the plaintiff
Mr O T Gasva, for the defendant

CHAREWA J: The plaintiff issued summons against the defendant claiming \$2 000 000, interest and costs for defamation damages arising out of the publication of three articles by defendant's stable of newspapers which she alleged damaged her reputation and dignity. She subsequently amended her summons to reduce the quantum of damages claimed to \$100 000.

Facts

It is common cause that on 22 February 2016, a social media site called *Musvo Zimbabwe* published a damaging article alleging that plaintiff was HIV positive and injected her HIV tainted blood into the son of her boyfriend. Further the same site alleged that plaintiff made the child drink her urine and that she physically abused the child.

As a result of this publication the mother of the child filed a complaint against plaintiff with the police. *Musvo Zimbabwe* followed up with another article on 24 February 2016 alleging that plaintiff had been arrested.

It is also common cause that newspapers under the defendant's stable published a series of articles on the story, starting with the articles complained of on 26 February 2016. *The Herald* went on to publish the same article on its online publication.¹ The online article spawned similar articles on other international online publications, among them *Nehanda Radio*, *Zimville* and *AllAfrica.com*, all carrying the by-line of *The Herald* reporter Fungai Lupande.²

¹ See Exhibit 1 page 11

² See Exhibit 1 page 12-14

A follow up article on 1 March 2016 alleged that plaintiff had been ordered by the Court to undergo HIV tests.

Finally, on 2 March 2016, defendant published the last article in the series, containing the outcome of the state case and summarising the injustice that plaintiff had been subjected to from the false allegations labelled against her³.

Medical tests on both the child and the plaintiff showed that neither was HIV positive, nor did the child exhibit any signs of abuse. The plaintiff was thus acquitted of all charges on 29 February 2016.

Issues

The issues for the Court's determination are as follows:

1. Whether the articles published by the defendant were defamatory of the plaintiff, and if so
2. Whether the defence of qualified privilege is open to the defendant; and
3. If not, whether plaintiff suffered damages and in what quantum?

Parties' submissions

Plaintiff

The plaintiff gave evidence on her own behalf and supplemented such evidence with the articles complained of, as well as documentation establishing her reputation as a model and showing how her means of living as such was affected by the publications. These were entered into the record as Exhibits 1-2.

She also submitted that the articles by defendant were unfair, unbalanced and inaccurate as they were based on the articles on the *Musvo Zimbabwe* social media site which is renowned for cyber bullying and vilification of persons by publishing false and fabricated stories.⁴ Therefore the defendant's action did not fall within the ambit of the defence of qualified privilege, particularly since the headlines and the tenor of the articles did not categorically state that these were mere allegations being made by the state. Further, the articles did not merely repeat what was in the state outline and charge sheet, and in particular, Exhibit 2 was published long after the medical results were already in the record. Besides, the articles were published without obtaining the plaintiff's side of the story, in circumstances where the plaintiff's statement was already in the record.

³ See Exhibit 6

⁴ Exhibit 3-4 are examples of some the false publications on Musvo Zimbabwe

Defendant

The defendant called its two reporters who wrote the articles impugned to give evidence on its behalf. They denied basing their articles on *Musvo Zimbabwe* but stated that they were actually in court on the 25th of February 2016 when the plaintiff was remanded. They do not deny that they had read the social media article on 22 February 2016, but assert that they did not publish their story based thereon. They stated that they obtained the information for their articles from the public proceedings in Harare Remand Court in the normal course of their duty as court reporters on 25 February 2016. In that regard, they therefore claimed that they were covered by the defence of qualified privilege as they merely reported public proceedings.

They denied any malicious intent, or that the reports were unfair, unbalanced or inaccurate. They stated that headlines complained of are mere captions which indicate the nature of the story to follow so as to catch the readers' attention to entice them to buy the paper and read the article, and are therefore not malicious, misleading or defamatory. They also testified that the purpose of taking a picture is to identify the subject and for packaging the story.

The witnesses further stated that it is defendant's policy not to interfere with judicial processes and thereby incur the wrath of the law. Therefore they do not liaise or interview state or defence counsels on remand matters until the matter is finalised. For that reason, they merely report what transpires in court and what appears in the court record that they can access. They do not carry out any investigative journalism as they are court reporters not investigative journalists.

Their job is to keep readers informed on developments in the case, and in that respect, they covered this particular story from the first remand hearing until the plaintiff was acquitted on 1 March 2016. For that reason, the last articles on the matter were on 2 March 2016 when they covered the plaintiff's HIV test results and acquittal.⁵

Thereafter, the defendant then sought an interview with the plaintiff to tell her side of the story, particularly since her statement or warned and cautioned statement had not been read in court prior to her acquittal, nor had she been asked to state her defence as the matter appeared only in remand court. The results of this interview were also published.

⁵ See Exhibit 5 -6.

Therefore the defendant's coverage of the story was fair, accurate and balanced as it was a series of articles which followed developments from the first remand date until the dismissal of the matter, and concluded its coverage with the plaintiff's own story.

Regarding the plaintiff's complaint that defendant's articles appeared to be stating facts, rather than allegations, the witnesses testified that in court reporting, it becomes repetitive and monotonous to keep saying that "it is alleged that". It is thus good reportage, they aver, that as long as it is a continuation of an introduction or of a story, to use variations such as "it is said that".

Finally, the witnesses asserted that the plaintiff's reputation was not damaged nor was she defamed by their reports of public proceedings in the public interest on a matter which was already in the public domain. Rather any damage to her reputation or defamation was by *Musvo Zimbabwe*, which is why she first and foremost sued that social media site.

The Law

It is trite that defamation is publication of a statement that injures someone's reputation.⁶ The accepted definition of the delict of defamation in Zimbabwe is as follows:

"Defamation causes harm to reputation, that is, the estimation in which a person is held by others (his good name and standing). A defamatory statement is one which is published and injures the person to whom it refers by lowering him in the estimation of reasonable, ordinary persons generally; it diminishes his esteem or standing in the eyes of ordinary members of the general public. It may also cause the target of the statement to be shunned or avoided or may expose him to hatred, ridicule or contempt. Finally, a person can be defamed by casting aspersions on his character, trade, business, profession or office."⁷

Therefore generally, to constitute defamation, the statement must be false and must be made to a third person other than the defamed. My reading of legal developments indicates that for one to succeed in a claim for defamation they must be able to satisfy four elements:

1. that the statement made about them is false;
2. that the statement was published to third persons who did not have an interest or duty to receive that information
3. this being a delictual claim, there must be some fault on the part of the publisher. For ordinary persons, at least negligence must be shown. However, for public figures

⁶ *Wex Legal Dictionary and Encyclopaedia*, Legal Information Institute, Cornell University Law School.

⁷ Feltoe: *A Guide to the Zimbabwean Law of Delict* (2nd ed.) at p.32

(public servants and public personalities), the bar is raised somewhat. There must be shown actual malice or reckless disregard of the falsity or otherwise of the statement.

4. Finally, the plaintiff must be able to prove the damage to her/his reputation.

Likewise, jurisprudence, within and without Zimbabwe, seems to have coalesced around the idea that for a defendant to escape liability, she/he must show that the statement is:

- a. true (truth is an absolute defence to a claim for defamation);
- b. that there was a duty or interest to publish it and only to persons with a duty or interest to receive the information;
- c. and for public figures, such as in this case, that there was no malice or reckless disregard of the falsity of the statements complained of;⁸
- d. and finally that plaintiff's reputation was not damaged.

Therefore, a defendant would be entitled to raise the defences of either absolute or qualified privilege, the latter of which defendant *in casu* resorted to. That the publication was fair, balanced and accurate would of course be a *sine qua non* of such a defence.

Analysis of the case

Did the plaintiff suffer damages and if so, in what amount?

I will address the issue of whether or not the plaintiff suffered damage to her reputation first because, during the trial, the defendant did not raise any serious challenge to her averments in that regard. It was shown through documentation that the plaintiff lost contracts due to the publication of the allegations against her. Neither did the defendant refute her averments that she has had difficulty being appointed brand ambassador or obtaining opportunities to do runway modelling or performing in pageants.

And apart from questioning why the plaintiff is claiming \$100 000 from the defendant when she has a similar claim but for \$80 000 against the *Daily News*, the defendant did not seriously challenge her quantification of her damages.

The other issue the defendant raised was plaintiff's basis for claiming \$100 000 at all considering the average quantum granted by Zimbabwean courts and whether her claim therefore is justified in our jurisdiction.

⁸ See *St Amant v Thompson*, 390 U.S. 727(1968)

Clearly, the plaintiff's reputation suffered a grave battering which made it difficult to work as a professional model. It was not seriously disputed that the plaintiff is a model who had attained a certain level of fame both nationally and internationally, or that as a result of the publications, she lost some modelling contracts and therefore her means of living was adversely affected.

I believe therefore that once I find that the publications by the defendant were defamatory of plaintiff, and defendant has no defence thereto, I am at liberty to assess the damages that ought reasonably to be awarded to the plaintiff.

Were the articles published by the defendant defamatory of the plaintiff?

The approach to determine whether or not someone has been defamed is three pronged:

“The three stages of the test are that a court must:

(a) first, consider whether the words as specified are capable of bearing the meaning attributed to them, that is, whether the defamatory meaning alleged is within the ordinary meaning of the words;

(b) secondly, assess whether that is the meaning according to which the words would probably be reasonably understood; and

(c) thirdly, decide whether the meaning identified is defamatory.”⁹

The articles complained of published in *The Herald* and *H-Metro* on 26 February 2016 had the following headlines and sub headlines:

- 1) **“Model injects lover’s son with HIV infected blood”.**
- 2) **“CRUEL LOVER BOY (2) INJECTED WITH HIV. FORCED TO DRINK MODEL’S URINE”**
- 3) **MODEL INJECTS HIV BLOOD IN CHILD.....Forces boyfriend’s son to drink urine”**

The plaintiff alleges that taken at face value, in both their ordinary meaning and in how they would reasonably be understood, these headlines scream out defamatory allegations: of a cruel and evil person deliberately injecting a helpless child with HIV tainted blood, as well as committing despicable abuse of the child.

I must state that I agree with the plaintiff that the words are capable of bearing the meaning she ascribes to them, would be reasonably understood to have that meaning and that

⁹ *Moyse & Ors v Mujuru* 1998 (2) ZLR 353 (S) at 356

such meaning is defamatory. It is therefore my opinion that the words in the headlines pass the three stage test for defamatory statements and are defamatory of plaintiff.

However, I am not convinced that the body of the articles were unfair, unbalanced and inaccurate and are thus defamatory of the plaintiff as alleged as I will explain in my analysis below.

Is the defence of qualified privilege open to the defendant?

Qualified privilege applies to a statement or publication made

1. In good faith;
2. Without malice;
3. On a subject matter in which the author has an interest, or has a legal, moral or social duty to publicise; and
4. To persons with a corresponding interest or duty to receive such information.

The objective of granting this privilege to publish what may otherwise be defamatory material is to permit free communication without the risk of facing an action for defamation. This is particularly so for court proceedings which are matters of public interest and for which newspapers have an obligation to inform the public.¹⁰

The defendant argues that most of the words complained of are just headlines intended to catch the attention of the reader so that they can read the article. The article itself, contrary to plaintiff's testimony, is a summarised narration of the allegations made in court papers.

I tend to agree with the defendant that a reasonable reader does not go by the headline, but accepts it as an invitation to buy the paper and read the story. If defamation was to be predicated merely on newspaper headlines, then there would be an onerous plethora of litigation. In my view a headline is akin to the heading on any legal document, which does not create any substantive rights for the parties concerned but merely indicates what the legal document is all about. In the same way that one cannot sue for breach of a heading on a legal document, one ought not to be able to claim infringement or damage to reputation merely from a newspaper headline which is not supported by the substance of the article.

¹⁰ *Alva Mandizvidza Senderayi v Blessed Mhlanga & 2 Ors* HH 514/15

In fact, the article in *The Herald*, published under its “Crime & Court” section wherein reports are made of matters before the courts purported to report what had transpired in court on 25 February 2016, as it starts and continues as follows:

“Harare model Tafadzwa Mushunje appeared in court yesterday facing allegations..... The court heard that.....”¹¹.

H-Metro carried a similar article starting and continuing as follows:

“Model Tafadzwa Mushunje is standing accused of...

The sordid incident has been circulating on social networks and it has since spilt into court...(my emphasis)¹²

The 24 year old model appeared at the Harare magistrates’ court.....

Tafadzwa...appeared before magistrate Elijah Makomo who remanded her out of custody.... on US50 bail.

State counsel, Peter Kachirika, had it that on....

The court also heard...”¹³

From the foregoing, I am doubly convinced that the headline ought not to be taken in isolation, as every reasonable reader knows that to obtain the true gist of a story one must read it, and not rely on a headline. More so when one is a “famous” person where the headline is an effective bait to catch the eye of more readers.

Neither do I agree with the position of plaintiff of cherry picking particular phrases outside the context of the narrative and alleging that they are factual assertions by defendant rather than a continuation of allegations made in court, either by the prosecutor or in the court record.

Further, it is neither here nor there that the articles by defendant came out long after some of the court proceedings and outcomes. For example, the plaintiff made much of the fact that the article on 1 March 2016 that she had been sent for HIV tests was published long after the tests had already come back negative. The court takes judicial notice that articles may not be published the day they are submitted, in the same way that some articles end up

¹¹ See Exhibit 1 page 1.

¹² This bears out the defendant’s witnesses testimony that they did not base their articles on social media, but on what spilled into the courts.

¹³ See Exhibit 1 page 3

on the back page or front page. It all has to do with editorial policy and competing articles and the importance ascribed to each as it comes before the editor's desk and the priority he allocates to each as they queue up for publication. In any event, the defendant did do a follow up article that both the plaintiff and child had tested HIV negative.

In addition, while G Feltoe¹⁴ is undoubtedly correct as quoted by plaintiff at p 14 of her closing submissions, the difficulty that the plaintiff has is that at the time of the reports, what was only available in the record was the state outline and charge sheet as this was a matter at initial remand stage. There was no defence case on record for the defendant to have quoted save her mere denial of the charges. It is trite that at a remand hearing, a person in the gallery will only hear the charges and the accused's application for bail if any, or a mere announcement of the next remand date.

Further, it seems to me that the plaintiff failed to grasp the difference between investigative journalism and court reporting, insisting as she did that defendant's court reporters ought to have carried out investigative journalism to establish the truth or falsity of the allegations plaintiff was being charged with. Clearly, for the court reporters to have written about the falsity or otherwise of the charges plaintiff was facing would have offended the rules of justice as that would have amounted to pre-judging a matter before the courts and tantamount to interfering with judicial processes.

Nor was the plaintiff able to prove malice, acknowledging as she did, the assertion by the defence witnesses, that until they came across her case, they did not know her at all.

Crucially, while acknowledging that the story started circulating on social media on 22 February 2016, the reports in the defendant's papers do not suggest that they are derived from social media, but from proceedings before the courts. The defendant only started publication on 26 February 2016 after picking up on the story from court proceedings. I therefore find credible, the defendant's witnesses' assertions that they did not pick up and propagate a story from social media, but from public court proceedings.

Nor did I hear the plaintiff to state that the defendant had knowledge of the falsity of statements made by *Musvo Zimbabwe* and, regardless, formulated the intention to use or recklessly used that statement to defame her.

I am of the firm view that persons who find themselves in the public eye must expect a certain amount of publicity and intrusion into their private and personal lives, including

¹⁴ Supra at p.77

inaccurate statements as long as the publicity is not malicious or reckless in its disregard of truth. This is more so when they are public or famous figures where the happenings in their lives are, after all, news for the average citizenry.

They should therefore not be thin skinned, belligerent or litigious, but ought to have the courage to take such social blows, which go with the territory, on the chin. They must understand that once they are in the public arena they become targets of pot-shots for real or imagined indiscretions, errors or failures.

Therefore, unless the publications about them are malicious, or reckless in their disregard of truth, or clearly intended to tarnish their reputations, such persons should not rush to court to seek damages.

In casu, I do not find that defendant was reckless in its disregard of truth, was malicious or intentionally sought to defame plaintiff. Rather, it is my view that defendant was quite fair and balanced in its reportage, which was largely accurate, in following up on a story unfolding before the courts right up to its conclusion. In addition, the publication, involving as it did allegations of abuse of children, put it squarely within the public interest for which defendant had a duty to report, as plaintiff herself admits in her closing remarks.¹⁵

In my view, if anyone is liable for defaming the plaintiff, it is not defendant, but *Musvo Zimbabwe*.

Consequently, the defence of qualified privilege succeeds. The plaintiff's claim for damages for defamation is dismissed with costs.

Mberi Chimwamurombe, plaintiff's legal practitioners
Chirimuuta & Associates, defendant's legal practitioners

¹⁵ See the quote from *Masuku v Goko & Anor* 2006 (2) ZLR 341 @ page 13 of plaintiff's closing remarks