

DISTRIBUTABLE (102)

Civil Appeal – *Ex tempore*

(1) ALPHA MEDIA HOLDINGS (PRIVATE) LIMITED t/a THE
SOUTHERN EYE (2) KHOLWANI NYATHI (3) THANDIWE
MOYO
v
ROGER MUHLWA

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, UCHENA JA & CHITAKUNYE AJA
BULAWAYO: 22 & 23 JULY 2020

S. Siziba, for the Appellants

J. Tshuma, for the Respondent

UCHENA JA: This is an appeal against the judgment of the High Court handed down on 9 May 2019 which awarded defamation damages to the respondent in the sum of US\$16 000,00.

On 21 January 2015 the third appellant, an employee of the first appellant wrote a story published in the Southern Eye in which she stated *inter alia*:

“We had the likes of Lazarus Sibanda who admitted taking money from the club, Luke Mkandla who ran the club down into insolvency, Roger Muhlwa who was suspended when he misappropriated funds.” (emphasis added)

Roger Muhlwa is the respondent in this case. He was appalled by the defamatory story and sued the appellants in the court *a quo*. The court upheld his claim for defamation and awarded him damages in the sum of USD16 000,00. This award was against the first and third appellants, the court *a quo* having exonerated the second respondent of any wrongdoing.

The appellants did not dispute that they published the story through their paper (the Southern Eye). Nor do they dispute that the statement in question was defamatory of the respondent. The third appellant who wrote the article in question told the court *a quo* that she wrote it in error. Further, that when she realised the error she consulted the Acting Editor resulting in their retracting the story in their publication of 23 January 2015. It is not in dispute that they placed the retraction at the end of another article, where it reads as follows:

“Meanwhile in Wednesday’s edition we erroneously stated that Roger Muhlwa was suspended for misappropriation of funds. It has since been confirmed that he was a chairman of the executive where treasurer Lazarus Sibanda misappropriated \$1 700 and that he and Peter Dube suspended the treasurer. We unreservedly apologise to Muhlwa for the error.”

In their plea the appellants stated as follows;

“The defendants, while admitting the publication herein and as alleged, aver that the contents of the publication were patently erroneous and based on incorrect information and that as soon as the error was discovered, a full retraction and apology was proffered to the plaintiff through the same publication. They deny however that such publication was either malicious or calculated to defame plaintiff in his character, dignity and integrity. Further the defendants aver that in playing the role that they did in the publication, they were carrying out their constitutional duty to inform members of the public who had a right to such information and at no time did they entertain any intention to injure the good name and reputation of the plaintiff or were malicious in so acting.”

In its judgment the court *a quo* commenting on the appellant's defence stated;

“I must state from the outset that it appears to me that the defendants' plea as shown above is somewhat self-contradicting. In my view the defendants cannot claim that the publication was erroneously made and based on incorrect information yet at the same time to have been carrying out their constitutional duty to inform members of the public who have a right to such information. In my view once it is admitted that the publication was in error and based on incorrect information, then it cannot honestly and reasonably be argued that members of the public have a right to such erroneous and incorrect information.”

We agree that members of the public have a right to receive information. However such information should not be erroneous or incorrect. In as much as the Constitution provides for freedom of expression and freedom of the media, the exercise of such freedom does not entitle the media to infringe other people's constitutional and other rights. We are of the view that it is an abuse of journalistic privilege to publish incorrect and unverified information. It is in fact unprofessional conduct to publish a story without first verifying it. One is expected to verify the story with the person mentioned and the institution alleged to have been affected. It is common cause that the third appellant did not verify the story before publication of the article, as she, in the retraction published on 23 January 2015, clearly states that it had “since been confirmed” that it was not the respondent, but the treasurer, who had misappropriated the funds in question. The appellants were therefore reckless in publishing the defamatory story before verification. Such recklessness in our view points to an intention to defame. This position is confirmed in the case of *Suid-Afrikaanse Uitsaaikorporasie v O'Malley 1977 (3) SA 394 (AD) at 406 G-H* where it was stated as follows;

“The use of defamatory language about a person is *prima facie* evidence of *animus injuriande*. The *onus* is then upon the defendant to establish some lawful justification or excuse for the defamatory language used. But it is not enough for him to show that he did not intend to do wrong for it is a principle of our law which applies as well to libel and slander as to other wrongs that if a man acts recklessly not heeding whether he will or will not injure another he cannot be heard to say he did not intend to hurt another.”

The appellants put emphasis on their having voluntarily retracted the defamatory statement on 23 January 2015. This must however be considered together with the respondent's evidence that on 22 January 2015 he went to the appellants' offices and asked to speak to the editor. As the editor was not at the premises he asked to speak to the reporter. He was also told that she was not present. He left a message for the editor or the reporter to the effect that he had come to complain about the article they wrote about him on 21 January 2015.

This in our view destroys the alleged voluntary retraction, which must have been triggered by the respondent's visit and complaint.

Commenting on the third appellant's evidence the court *a quo* stated as follows;

“Surely if she had made an error this is the kind of error she could not have missed in proof reading. It plainly appears she published the story without verifying the facts with the plaintiff or someone at Highlanders who would have been expected to know the correct facts. Her evidence that she erroneously listed him under those who had misappropriated funds cannot be believed. It is an attempt to escape liability.”

We find no fault in the court *a quo*'s assessment of the third appellant's evidence. In any case, in his submissions before us, counsel for the appellant abandoned the defence of mistake/error and instead concentrated on lack of malicious intent, which we have already dealt with above.

We are also satisfied that the court *a quo* properly exercised its discretion in assessing the *quantum* of damages. Having analysed the law and the authorities cited on behalf of

the parties, we hold the view that no case has been made for interference by this court, with the court *a quo*'s discretion in assessing the damages awarded.

The appeal has no merit and ought to be dismissed. Costs will follow the cause.

It is accordingly ordered as follows;

The appeal be and is hereby dismissed with costs.

GWAUNZA DCJ

I agree

CHITAKUNYE AJA

I agree

Masiye-Moyo & Associates (Inc Hwalima Moyo & Associates), appellants' legal practitioners

Webb, Low & Barry (Inc Ben Baron & Partners), respondent's legal practitioners