

INNOCENT GONESE
versus
ANDREW ZHAKATA
and
SHADRECK BETA

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 6 May 2003 and 31 March 2003

Trial Cause

Advocate E. Mushore, for the plaintiff
Mr A. Makoni, for the defendant

HUNGWE J: Plaintiff is a registered legal practitioner and a senior partner in the law firm Gonese and Partners. He is also the Honourable Member of Parliament for the Movement for Democratic Change (“MDC”) for the Mutare Central Constituency and is the opposition party’s Chief Whip in the Parliament of Zimbabwe.

The first defendant was the Editor of the weekly newspaper “The Observer” whilst the second defendant is its owner and publisher.

Plaintiff issued summons claiming damages for defamation in the sum of \$100 000.00 *temporae morae* at the prescribed rate from 20 September 2000 and costs of suit.

This claim is based on an article published in the 14-20 July 2000 issue of “The Observer” scripted by the first defendant.

Plaintiff, in his declaration, alleges that the said article stated of the plaintiff that:

- (a) He had used his party supporters and dumped them after winning the parliamentary election,
- (b) He had sowed seeds of division amongst party supporters by practising discrimination and favouritism in Dangamvura and Sakubva,
- (c) He had failed to satisfactorily account for monies paid to his party by sympathisers and supporters.
- (d) That he had mobilised youths for a coup on the Provincial Executive Committee of his party so as to replace them with his own people.
- (e) That he had squandered party funds from donors and sympathisers on women and beer.

In their plea the defendants' deny that the article in question makes the averements made by the plaintiff. They aver that these are innuendos by the plaintiff which could not have been drawn from the article by a reasonable reader. It is denied by the defendants that the article makes the accusation that plaintiff suggests. The defendants pleaded that in the event that the publication of the article is found to have been defamatory, the publication was justified and in the public interest.

At issue therefore is whether the article is defamatory of the plaintiff and if so, whether the article though defamatory, was justified and in the public interest. If it is held that it was not justified, then what is the quantum of damages?

Plaintiff gave evidence for himself. He told the court that on a Thursday he was driving to Harare. He received a call on his mobile number. It came from first defendant whom he knew to be a journalist. First defendant wanted his comments on certain allegations which his newspaper had received. As he was driving on a highway he advised first defendant that he was driving and it would be unsafe to engage in a long conversation. Further he told first defendant that the reception on his handset was poor and could go off at any time. He was on his way to Harare for a meeting and would be back the following day Friday when he could give his side of the story and any comment he may have. According to the plaintiff the conversation was very brief. It ended on the understanding that the first defendant would seek plaintiff's side when he came back from Harare and as such he would hold on to the story till he had heard his side of the story. Plaintiff had not been told of the nature of the allegations and could not have made any comment. He needed the details of the allegations before he could comment.

He told the court that on the following Saturday as he drove into town, his attention was drawn to a billboard headlined:

“WE ARE NOT POLITICAL CONDOMS - Say MDC supporters.”

He bought a copy of the defendant's newspaper. What he found at page 2 of that edition of the newspaper shocked him.

He told the court that not only were the contents of the article downright lies but defamatory of himself. It damaged his personal reputation as a legal practitioner, politician and a family man. It lowered his esteem in the eyes of the ordinary reader.

He denied that he had received “huge amounts of money” from sympathisers saying that he got \$30 000.00 from his party, the MDC, for use in his election campaign in Mutare. Being a small rural geographical constituency, he did not require to undertake extensive

journeys by motor vehicle which is a requirement in rural constituencies. He only got paid that much well after he had expended his own money for campaign purposes.

He had paid his election agents after the poll in a full transparent manner. He produced exhibit 2 and 3. Those two sheets reflect the list of his polling agents. Exhibit 2 is form AG/01/11 issued in terms of the Electoral Act [*Chapter 2:01*]. It certifies the people mentioned therein as plaintiff's polling agents for the 2000 parliamentary elections. It is endorsed that it was used to pay out \$300.00 per agent. Exhibit 3 is titled "Allowances" and reflects the same agents, their addresses and that they signed for \$700.00 received by each one of them. Therefore they were paid \$1 000.00 each.

Plaintiff said that to allege that he intended to stage a coup in the provincial executive committee is defamatory as their party's procedure has always been to elect its executive officers.

He said that at that time there was a crisis of expectation amongst the majority of MDC membership, resulting in people making unreasonable demands on him. He had explained to them how the money from Harare was to be used such that he could not use it as they wanted.

He denied that people had demanded \$5 000.00 at a meeting at Devonshire Boys Club but that views were expressed and eventually it was agreed that a victory party could be held.

He described how distressed he was by the allegation that he squandered public money on beer and women. His wife had been quizzed by her workmates about this newspaper article. He had to explain to his friends and associates that this article had no foundation at all.

The only money he received from donors was that he paid out in Exhibit 2 and 3. The rest of his funding was from his own finances. His wife cooked food for his agents. It had been an expensive campaign.

He denied that the letter on which the article was allegedly based was shown to him. In fact the defendants have neither discovered it nor have they produced it in court.

Plaintiff said that he believed that the second defendant intended to damage his reputation as they are political rivals whose rivalry predated the 2000 election campaign. Second defendant at one time was the Provincial chairman of ZANU(PF). He had contested the same election in the same constituency with the plaintiff and lost to plaintiff.

The defendants' case was built around second defendant's case. First defendant was not called to the witness stand. Second defendant gave evidence and called one witness.

His evidence was aimed at showing that he was not liable as he did not control the day to day editorship of the newspaper. His editor and manager, first defendant ran the show. He ran it so independently of second defendant that the only time he was aware of this article is when he received summons. He denied receiving any letter of demand. He told the court that after summons were served to him he had referred to the article in Exhibit, 1 his newspaper, and perused it. He had also gone out of his way to establish the veracity of the allegations contained in the article. He said he had established that the article contained more factual allegations than lies. For instance he had established that in the fact there were complaints about how the plaintiff handled the party funds after the elections. He stated that he had many witnesses, so many that they could not fit into his motor vehicle which he drove to court. He brought only one witness!!! He however says he had lost contact with the first plaintiff at the time the matter was called for trial.

In order to determine whether words are defamatory, or refer to the plaintiff it is first necessary to decide what they mean. The plaintiff contends that in their natural and ordinary grammatical meaning the words used are defamatory. On the other hand the defendants contend that the article is an innuendo or alternatively there is justification for the publication of this article as the matter published is true and in the public interest.

It is the primary (or *per se* ordinary) grammatical meaning of the words used that a court looks to in order to decide whether the article complained of is defamatory. If the words used are alleged to convey a meaning that is *per se* defamatory the court has to determine the ordinary meaning of the words. The ordinary meaning of the words is not necessarily the dictionary meaning of the words. It is the meaning which an ordinary or reasonable reader or hearer would attribute to the words.

As was stated by *Muller J in Deemers v Wyllie and others* 1980 (1)S.A.835A at 840H:

“[The reasonable person or reasonable man] is a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot be reasonably be attributed to it.”

That has been accepted in our jurisdiction as setting of the principles of construction to be used by our courts.

In the present case the article was in plain language. It ascribes certain acts to the plaintiff. It states as a matter of fact what members of the plaintiff's political party say about him. The title of the article says "We are not condoms – says MDC supporters." It then gives the allegations being made against plaintiff in a letter claimed to have been left at its offices. The defendants do not seek his comment before publishing. The nearest they go is to say that he was on his way to Harare when contacted for comment and "could not discuss anything until Saturday as he was on the road."

The defendants did not put the allegation to him on the telephone. They claim they did but when evidence was led in court, there was no one to dispute the plaintiff's claim that this was not done.

In fact the last paragraph of the article does not suggest that all these allegations were put to him.

To say that plaintiff, a Member of Parliament, lied about how he applied public donations is clearly defamatory. To say he squandered some of the money on beer and women is decidedly defamatory to the extreme. The plain thrust of the article was to demonise and ridicule, deride and defame the plaintiff. To seek to ascribe any other meaning to the abjectly provocative article is idle. There is no special meaning to be reasonably ascribed to such a plainly worded defamatory article. I am satisfied that the article is defamatory of the plaintiff. It is a pointed attack on his personal reputation both as a legal practitioner and a Member of Parliament. There can be no doubt that serious damage was inflicted upon the personal integrity of the plaintiff. He is entitled to damages for defamation.

As for question of damages, it is important to point out that plaintiff is a person of high social standing in society. He is a legal practitioner, a Member of Parliament of Zimbabwe, a trustee of the Legal Resources Foundation, the opposition party chief whip in Parliament and above all a family man. Society expects good leadership qualities in an MP and lawyer. An MP commands and deserved respect as he is a representative of the people in parliament. He is a man of integrity and honesty. To impugn his integrity without good cause is to invite punitive or exemplary damages. I have also taken into account that the newspaper in which this matter was published did not enjoy national circulation.

Given the present value of the Zimbabwean dollar I am not inclined to reduce the claim. Had this judgment been timeously given, plaintiff would have enjoyed the full value of the judgment. To reduce his claim is to further erode his success and add salt to injury.

In the premises, I give judgment for plaintiff together with interest calculated from the date of service of summons as well as costs of suit.

Atherstone & Cook, plaintiff's legal practitioners

Makoni Legal Practice, defendant's legal practitioners