

SUNDAY CHIDZAMBGA
versus
ZIMBABWE NEWSPAPERS 1980 LIMITED
and
WILLIAM CHIKOTO
and
HOPE CHIZUZU

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE

Civil Trial

Miss B Mupawaenda, for the plaintiff
Miss L Mhundirwa, for the defendants

GOWORA J: The plaintiff is a technical director in Dynamos Football Club. He has issued summons against the two defendants for damages for defamation, which claim arises out of an article written by the third defendant in the Sunday Mail of 30 July to 5 August 2006. The first defendant is the publisher of the newspaper, whilst the second defendant is its editor. The article, which should have been an annexure to the summons but was only availed later, is in the following terms:

CHIDZAMBGA TO BLAME FOR DYNAMOS PROBLEMS

Sunday Chidzambga, director of coaching at Dynamos, has been accused of interfering with team selection and tactics.

The team has been struggling for positive results amid reports that the former Warriors coach still coaches Dynamos via remote control, with the coach David Mandigora and his assistant David George complying.

A Dynamos board member, who spoke on condition of anonymity, was blunt about the problems at Zimbabwe's most popular club.

“It is very unfair for people to lambaste Yogi David Mandigora for poor results. Why should he be accountable for results of a team he does not pick?

“People need to know that the problems at Dynamos have always centred on Sunday (Chidzambga) and that people are blinded by past successes to an extent they have left him to do as he pleases with the team.

“He appointed the coaches and set up the structures and, therefore, he should be accountable for the results because they are the fruit of his planning.

“The same people who are saying Mandigora is hopeless and has failed should have the guts to lay the blame where it belongs-that is at Sunday’s door” said the board member.

Results have proved elusive for Dynamos despite going to the market in search of players who can deliver. Supporters are losing patience and calling for the return of the ever popular Moses Chunga.

Questions are being asked why Mandigora, who is head coach, continues to take instructions on team composition from Chidzambga.

Calls are now being made for a coach who can stand up to the “domineering” Chidzambga.

The board member told the Sunday Mail that the club had had enough.

“Action needs to be taken sooner because we have run out of our patience while the team is losing. It is our general agreement that Mandigora can operate better in a freer situation and as an assistant.

“He has some strengths but he tends to be too soft for the job at Dynamos, something that Sunday has taken advantage of,” said the visibly unhappy board member.

Only last week, Mwana Africa deleted the title of technical director from their vocabulary and elected to rename Willard Mahinkila-Khumalo as the head coach with Arthur Tutani as assistant.

In his declaration the plaintiff has averred as follows in regard to the article:

6. The article is full of falsehoods, fabrications and speculative conjecture, as the plaintiff has not been doing any other function save to be Director of Coaching. It is clear that the third respondent (sic) obviously and deliberately did not see it prudent to either interview the plaintiff or the coach David Mandigora, to get a clearer picture and come up with a true and balanced story.
7. The article insinuated that the plaintiff was at the helm of the dismal performance of the Dynamos Football Club as he was continuously interfering with the coach and was still indirectly practically coaching the team. The headline of the on its own is defamatory.

8. The innuendo from the article portrayed the plaintiff as power hungry, undemocratic and unprofessional being who rules with an iron fist and takes advantage of his post and position as Director of Coaching. The article refers to Plaintiff as “domineering Chidzambga” and the cause of the team’s losing debacle.
9. The article was defamatory and had been calculated at tarnishing and in fact tarnished the image of the Plaintiff a great sports personality, former Zimbabwe National Football Team Head Coach, a former footballer, an administrator and Businessman.
11. The effect of the article is that people have lost confidence in the Plaintiff and his ability as a leader. The Plaintiff’s personal and professional esteem has been diminished and as a result has suffered damages.

Although the plaintiff filed an application to amend paragraph 8 of the declaration, I have no knowledge of such amendment having been moved. The only amendment moved on the morning of the trial was the one that sought to increase the claim for damages from \$50 million to \$1 billion which amendment was not opposed by the defendants.

In a plea filed on behalf of all three defendants, the claim is denied. The following is averred in the plea:

2. Ad paragraph 6

This is denied. The article contained true and correct facts at the time it was published. There was no fabrication by the third defendant neither was this article false.

The plea to paragraphs 7-9 of the declaration was as follows;

3. Ad paragraph 7-9

This is denied. This article was not defamatory in any way. The defendants were expressing their opinion in the public interest and were not spiteful and malicious towards the Plaintiff. The defendants raise the defence of fair comment on this matter as it is considered the information published to be of public interest. The third defendant wrote about the plaintiff

as a holder of a public office and in so doing keeping the public informed about public affairs like football.

They deny further that the plaintiff suffered any damages from the publication of the article in the newspaper in question. They accept however that the newspaper enjoys wide circulation within the country but that no injury was done to the plaintiff's reputation. They contend that it is their duty to publish news that is meant for public benefit about officials like the plaintiff who hold public office.

In addition to himself the plaintiff, in proving his claim, called one other witness, David Mandigora the head coach for Dynamos. The defendants only called one witness, the third defendant who was the writer of the offending article.

The first issue for determination, in accordance with the issues upon which the matter was referred to trial was whether or not the statement per se was defamatory. The plaintiff testified that he was 55 years of age and that he ran a sports shop at Eastgate complex. He said he had started playing soccer in 1977 for Dynamos. In 1983 he had broken his leg and the next year Dynamos had sent him to Brazil for a coaching course. Upon his return that same year he commenced coaching the Dynamos team. During his stint as a coach, the team had won many League and Cup titles and in 1998 they managed to reach the finals for the Africa Cup. He left them in 1999 and coached Caps Football Club for two years. He was then recruited by Reinhert Fabisch as assistant coach for the national team of Zimbabwe. He left same time as Fabisch. In 2003 he was appointed National coach for the team and under him the team qualified for Africa Cup of Nations for the first time since independence in 1980. He stepped down as national coach in 2005. He was called back to Dynamos thereafter as part of a process to assimilate within the management of the team those people who had been instrumental in having the team set up and its achievements. He was co-opted as a board member to the Board of Trustees in and recognition and acceptance of the achievements that the team had attained through his efforts, both as a player and as a coach. On the board he is a representative of the coaches of junior teams up to the senior team. He also assists any of the coaches who need or ask for assistance from him. He also assists the executive in searching for coaches for the teams.

He said that the article had caused him a lot of injury. He stated that what is contained in the article is false and further that the writer never sought his views or those of the coach,

David Mandigora. He was of the view that if what was said in the article was true or reflected the views of a director of Dynamos then such director would have been mentioned by name. He added that after the publication of the article he would receive a lot of phone calls alleging that he had caused the downfall of the club. He was threatened in those phone calls, and some of the calls were from abroad. The callers would indicate that they had seen the article on the internet. He stopped attending football matches after he had been threatened with assault. He belongs to Trinity Methodist Church and on one occasion the pastor to the church, offered to pray for him as a result of what he had seen in the newspaper and what he had heard being said about the plaintiff.

The plaintiff said that from his perspective the article had been seen the entire length and breadth of the country and in addition it was posted world wide on the internet. He stated that Dynamos has a lot of supporters and the article has affected the business that he runs as it is to do with the selling of sportswear. He said that on a professional level, he has many achievements and the article has lowered his esteem in the minds of many people. He said that he would want to coach outside our borders but if people saw such an article they would assume that he cannot work with other people. He said the article portrays him as someone whose character is bad, one who oppresses coaches and then causes blame to be placed on the coaches. He denied that there was a coach who coached by remote control as stated in the article. He also denied that he would attend training sessions if not invited by the coach himself. He complained further that when he was national coach the third defendant had written a number of articles on him which articles were critical of the plaintiff. He had accepted the criticism and hence did not sue, but that in the instant case he had decided to sue the defendants because of the falsehoods in the article.

He denied that he had been responsible for the poor results as he was not a player. He said there were several reasons why a team would lose matches, ranging from the quality of the players, the executive or administration running the affairs of the team or the attitude of the players towards their remuneration package and conditions of service. The quality and competence of the coach is also a factor in the performance of the team. He denied that at the relevant time the team was really losing matches and said it would be fair to say that it would lose some and win some.

He denied that he had ever used a cellphone when coaching and reiterated that he had last coached the team in 1999. He said that two years before the team had almost been relegated from the league. He was part of Dynamos at the time. The head coach was Moses Chunga. He denied suggestions that the defendants believed that the article contained the truth and said that if that was the case the defendants would have asked himself or Mandigora about what was really happening at the club. He said that coaches did not report to him but rather to the executive through him. He then informs the executive. Coaches only approach him with requests for assistance or complaints. One of his duties is to recruit players and if he spots a promising player he informs the coaches who then make their own decision as to who to approach.

He confirmed that as a director for coaching he expects good results from the team. He acknowledged that supporters are concerned when a team is not performing well and said that as the director of coaching he would be even more concerned than the supporters themselves. Although he recommends coaches he denied that he should be held accountable if they fail to perform. He said the selection of the players was up to the coaches but he can comment if his opinion is sought.

Asked on whether his life had changed since the article, he said that he no longer attended soccer matches as he was now afraid of insults. He was also afraid that his house would be bombed by Dynamos fans as had happened to some people in the past. He used to get offers from abroad, but these have since stopped. He said the board does not know about the day to day business of the team which is something in the purview of the executive and denied that the board would discuss in meeting the performance of the team, although the board members would have their own views of the performance. He was known personally to the third defendant whom he felt had a grudge against him as all the articles he wrote about the plaintiff were to criticize him until the plaintiff told him that he would not talk to reporters from the Sunday Mail. His perception was that the writer of the article, the third defendant was actuated by malice in the last article he wrote concerning the plaintiff. He felt that the article had been written merely to diminish his standing in the eyes of society. When the article was written he was not a member of the board of trustees for Dynamos. He said further that he wanted \$ 1 billion because the story had been read by many people within Zimbabwe and abroad and his reputation had been lowered world wide. The plaintiff said that in view of the

injury done to him by the third defendant if it were possible, he would have sought for some other relief other than damages, his view being that it would be more appropriate for the third defendant to be sent to jail.

The evidence of David Mandigora was to the effect that he had known the plaintiff from the time when they had both played for Dynamos, as well as the national team. He also worked with the plaintiff at the club where the former was the technical director and the witness was the head coach. He said he regarded the plaintiff as an older brother and would want to emulate his achievements. They had a good working relationship and he approaches him often for advice. He confirmed that his duties were to select the team with the assistance of his two assistants and in the conduct of his duties he reports to the executive. He was appointed to his post by the executive.

He confirmed that he was aware of the article which was the subject matter of the claim by the plaintiff and said that he was pained by the manner in which the article had been written. He himself has qualifications as a coach and it would appear from a reading of the article that his co-workers had no respect for him and the players. He said that the article did not give the correct reflection of who the plaintiff really is. He denied that the plaintiff selected players and he never attends training sessions. According to his recollection when the article was written there had been an exodus of players from the team and he, the plaintiff, the executive and others who had played for the team, assisted each other in getting new players for the club. He said that the executive, of which plaintiff is a part is the organ responsible for the appointment of coaches for the club.

Asked to comment on the atmosphere that he worked in the witness said he worked in a conducive atmosphere and said they approach the plaintiff instead of the converse. He said the article was not true and the writer had not sought his views as to how he performed his duties. If the writer had consulted him he would have explained to the same on the manner in which the witness carried out his duties. He confirmed that prior to the publication of the article no-one from the first defendant had contacted him, neither did the second or third defendants. He refused to attribute the losses of the team to the plaintiff and said that a team, including the executive, comprised of more than one person and no one person can be held accountable for the losses. He also denied suggestions that the plaintiff was domineering. He also confirmed the evidence of the plaintiff to the effect that the plaintiff would only attend

training sessions upon an invitation being extended to him. He attributed the losses that the team had suffered to the exodus of players which occurred sometime in 2005. He added that they had recruited players and at the particular time these events were happening he was not being paid. He said the article wronged both himself and the plaintiff and what it contained was not the truth.

The third defendant was the only witness called on behalf of the defence. He said that he was the Deputy Sports Editor for the Sunday Mail. He holds an Honours degree and several diplomas including journalism and Mass Communication. He admitted that he had not interviewed the plaintiff or Mandigora prior to writing the article. He said that he had assigned his juniors to contact the plaintiff but they were not successful. From the tenor of his evidence I got the impression that seeking the view of the plaintiff was not importance, as he felt that the plaintiff having 'banned' the Sunday Mail from speaking to him, there was no point in making much effort to obtain a comment from him. There was no effort made either to contact Mandigora who clearly is pivotal to the article. The defendant was content to rely on a source who wished to remain anonymous.

I find that the evidence of the plaintiff and his witness has a ring of truth to it. The two witnesses gave consistent evidence and neither was shaken under cross-examination. I am particularly impressed by their ready admission that Dynamos had been struggling as a team even under their helm and that neither attempted to paint a rosy picture on the team's performance. I also find that there has been to an extent corroboration of their in the version rendered by the defendants to court. They told the court that the defendants had made no effort to contact either of them to have the story verified, and the third defendant conceded that the story had been written without comment from either of them even though they were pivotal to the story. I cannot accept the contention by the defendants that efforts had been made to speak to the plaintiff or Mandigora prior to publication of the article. The witness for the defendant conceded that he had assigned juniors to do so. Those juniors were not called to verify that indeed they had been assigned such a task and what efforts they made. In the absence of such evidence I will accept that the plaintiff's version is the correct one. I accept in full the evidence given on behalf of the plaintiff.

Having made a finding on the evidence adduced before me and the credibility of the witnesses called on behalf of the parties I now need to consider whether the article is

defamatory of the plaintiff as averred in the pleadings. The approach in determining whether or not a statement is defamatory was laid out in this jurisdiction by BARTLETT J in *Chinamasa v Jongwe Printing & Publishing Co (Pvt) Ltd & Anor*¹, which authority has been cited by counsel for the plaintiff. It is argued on behalf of the plaintiff that the article is per se defamatory of the plaintiff which submission I take to mean that the article is defamatory in its primary sense or meaning. The defendants have not addressed the question as to what approach to adopt in determining whether or not the article is defamatory. The plaintiff's counsel having quoted the authority did not proceed to deal with the offending paragraphs in the article which it is sought to be found defamatory by this court. It is therefore left to the court to examine the article in the light of the criterion set in the authorities decided within this jurisdiction. As the plaintiff's legal practitioner did not break down each of the paragraphs, it would not be appropriate in my view for me as a court to consider each of the paragraphs in the article which the plaintiff has complained about. I believe it would be better if I had regard to the entire article whilst mentioning specific paragraphs which appear to offend.

In the first paragraph the plaintiff is accused of interfering with team selection and tactics. The plaintiff is employed as a director of coaching which in the circumstances obtaining at Dynamos is a supervisory or consultant role. Under him is a head coach and two assistants. The paragraph I have just referred to states that the plaintiff has been accused by some person or persons with departing from the terms of reference of his job and interfering with the performance of his job by the head coach and the assistants. He is not content to let the coach select the team and imposes his own choices. He also decides on what tactics should be used by the team when playing matches.

The next paragraph goes on to state that the team has been struggling for positive results and that the plaintiff coaches through remote control with passive acceptance by the head coach and his assistants. The clear implication is that the plaintiff apart from interfering with team selection and tactics, from the sidelines will tell the head coach how to coach the team. It is not stated how the remote control is done but from the statement, the plaintiff is the one that controls how the team is coached and gives instructions to Mandigora and his team. The quotations from the board member in fact re-enforce the statement that the plaintiff is the one selecting the team players and that the poor results dogging the team are to be laid at the

¹ 1994 (1) ZLR 133 (H)

plaintiff's door. There is an implication that because of his past achievements people have let him get his way to the detriment of the team. Because he supposedly appointed the coaches and set up the systems, the plaintiff is allegedly to blame for the poor performance. It is then the comment of the author of the article that despite having sourced good players the poor results have persisted and that as a result there are calls for the return of Chunga who once coached the team and who was still popular choice at the team in what capacity, it is not specified. Again the attitude of Mandigora in accepting instructions from the plaintiff is questioned and it is stated that the plaintiff is domineering. The impression is created that Mandigora is soft and cannot stand up to the plaintiff who tends to take advantage of that softness. A stronger coach would be able to stand up to the plaintiff and his domineering attitude and it was indicated that there were calls for such kind of coach. It is acknowledged in favour of Mandigora that he has strengths which would be of assistance were he operating in a freer situation and as an assistant coach.

Taking the test laid down in *Chinamasa v Jongwe P & P Co (Pvt) Ltd* (supra) I have no hesitation in accepting the contention by the plaintiff's legal practitioner that the article would create in the mind of anyone who read it, the impression that the plaintiff was an unprofessional being who tramples upon other people and that he coaches teams through the back door. I accept further as contended that the article creates the impression that the plaintiff is the cause of the instability at the club and was to blame for the deficiencies dogging the club at the time. I therefore accept that the defamatory meaning alleged is within the ordinary meaning of the words.

Having found that the words in the article are capable of the meaning alleged in the pleadings, I must turn now to consider whether the article would be reasonably understood by the ordinary reader according to the meaning pleaded in the declaration.

I have not been told how extensive the readership of the Sunday Mail is but judging by the fact that the plaintiff said in evidence that the article had been posted on the internet because he had received threats from readers beyond our borders who claimed to have read the article on the internet, I can only conclude that the paper enjoys a large readership. It was also suggested by the plaintiff that it was a family paper a suggestion which was but seriously disputed by the defendants. If it is a family paper as has been stated its readers are your ordinary persons without much sophistication. How is that ordinary person going to

understand the article written on the plaintiff and published in the Sunday Mail? In the case of *Chinamasa v Jongwe P & P* (supra) BARTLETT J reviewed a number of authorities in which the courts had considered the question of how an ordinary reader would understand an article in a newspaper. At p 155E-F the learned judge commented thus:

“Having made these comments about the ordinary reasonable reader, I find it difficult to analyse each of the paragraphs alleged in the declaration and decide what impression the ordinary would gain. This is because the ordinary reader would not break down and analyse the article in the manner it has been broken down in the declaration. In this regard, I agree with the comments of HOLMES JA in *Dorfman v Afrikaanse Pers Publikasies (Edms) Bkp en andere* 1966 (1) PH J9 (A) at 45, where the learned JUDGE of APPEAL stated:

“A court deciding whether a newspaper report is defamatory must ask itself what impression the ordinary reader would be likely to gain from it. In such an inquiry the court must eschew any intellectual analysis of the contents of the report and of its implications, and must also be careful not to attribute to the ordinary reader a tendency towards such analysis or an ability to recall more than an outline or overall impression of what he or she has just read. Furthermore, in view of the mass of material in a newspaper it is in general unlikely that the ordinary reader would peruse and ponder a single report in isolation”.

In undertaking the task before I am aware that I am not an ordinary reader and that the tendency for me to break down the paragraphs and analyse them is part and parcel of the function of judicial officer. It would have been of assistance if the plaintiff had called a witness who would have given the court an insight of what the ordinary reader would have made of the article. In my view, the ordinary reasonable upon reading the article would believe that there was chaos at Dynamos caused primarily by the plaintiff. The ordinary reader would gain the impression that all the losses that the team was suffering were to be blamed on plaintiff who not just picked the players but also determined tactics for the matches. The ordinary reader would gain the impression that the plaintiff was coaching the team by remote control and was sidelining Mandigora and his team and that because the plaintiff was domineering Mandigora was compliant. The reader would believe that plaintiff's departure from the club was imminent and that Chunga might be called upon to return to the club with Mandigpra being demoted to assistant coach. The overall impression would that of a domineering character who was acting unprofessionally with the board being generally dissatisfied with his conduct. I am satisfied that the ordinary reader would not read

domineering as a strength on the part of the plaintiff but as that of a person who dominates others and wants his way at all times. In her written submissions, counsel for the plaintiff argued that the article carried an additional sting but did not specify what that additional sting is. I am unable to determine therefore whether there is such an additional sting as the declaration does not specify or plead an additional sting.

As to whether the article is defamatory of the plaintiff my view is that it is. A defamatory statement is one which has the effect of lowering the estimation of a person's standing in the eyes of right thinking people. It is calculated to bring the plaintiff into contempt, undue ridicule or calculated to diminish the willingness of people to associate with the plaintiff. In my view the article meets the criteria I have just set out and consequently I find that it is defamatory of the plaintiff.

This leads me to examine the defences raised by the defendants and the evidence adduced to substantiate the defences themselves.

In answer to paragraph 6 of the declaration the defendants have raised the defence of truth. The averment in the declaration is to the effect that the article was full of falsehoods and speculative conjecture, as the plaintiff had not been doing any other functions apart from being the director of coaching. The paragraph goes further to aver that the defendants had not seen it prudent to either interview the plaintiff and or Mandigora to get a clearer picture and come up with a true and balanced story.

The defence of truth raised is not a full defence within our law. In addition to the article being true, the defendant has to show that the publication of the information was in the public benefit. Although it is not a requirement that the statement be true in every single particular, it must be substantially true in its major particulars. The defendants did not, before publishing the article, seek comment from the two people whose names appear therein. According to the third defendant, his source was a director within the board of Dynamos. He refused to name the director on the basis that it was in the interest of maintaining good relationships. Given the evidence that the plaintiff and his witness adduced before the court, that all the plaintiff did was to direct coaching, it would have been appropriate in the circumstances if the defendants had called the source of the story to substantiate the material aspects thereof. This, the defendants failed to do and what was therefore before the court was the hearsay evidence of the third defendant. He had no independent knowledge of the

operations of Dynamos as a football club. He gave evidence in general of what the duties of a technical director entailed, but it is my view that such general analysis cannot be taken as evidence of the manner in which the affairs of the team are regulated at Dynamos. Once the defendants have failed to substantiate the truthfulness of the statement it is not necessary in my view that I consider whether or not it was in the public benefit for the statement to be published. It is clear that the defence of truth is not available to the defendants in these circumstances.

Next, the defendants pleaded fair comment. . In *Moyse & Ors v Mujuru*², the requirements for this defence were set out to be following:-

- the allegation in question must amount to comment (opinion);
- it must be fair;
- the factual allegations on which the comment is based must be true;
- the comment must be on a matter of public interest;
- the defence must be based on facts expressly stated or clearly indicated, in a document or speech, which contains the defamatory words.

The article states that the plaintiff has been accused of interfering with the team selection and tactics. It goes on to mention that the team has been struggling and that there were reports that the plaintiff was coaching the team via remote control. The head coach and his assistants were allegedly complying with the actions of the plaintiff. The article mentions that results had proved elusive for the team and further that supporters were losing patience and calling for Chunga's return. Questions were being asked as to why Mandigora continued to take instructions from the plaintiff and also that calls were being made for a coach who could stand up to domineering Chidzambga.

According to the defendants, the description of the plaintiff as 'domineering' was in fact a strength, in that the plaintiff is portrayed as a strong character. I am not so sure that the word can be understood in its primary sense to reflect a character of good traits in a person. As the plaintiff describes it, the article makes him appear to be a person who is oppressive of the coaches under him and who goes behind the coaches and coaches their teams and tries to control the teams.

The next question is whether the comment is fair. The truth is that the team was struggling as conceded by the plaintiff and his witness. It was not, however, losing matches to

² 1998 (2) ZLR 353 at 359D-E

the extent that the defendants sought to portray but it was not one of the best performing teams at the time of the article. Results had proved elusive for Dynamos as testified by the plaintiff and his witness and it was also their evidence that they had gone into the market to search for talent to bolster the performance of the team. Whether or not the plaintiff was coaching by remote control was a question of fact which the defendants had to establish. Either he was or he was not. The plaintiff and his witness said he was not and therefore that aspect of the comment would not be considered to be fair. As to whether or not supporter were calling for Chunga to return to the team is not an issue that was supported by evidence before me. In addition, I was not availed of any evidence as to whether or not questions were being asked as to why Mandigora was taking instructions from the plaintiff. In Mandigora's view the portrayal of the plaintiff as being oppressive and underhand is not correct. He said the plaintiff is a different person to that described in the article. I would say therefore that the comment is not fair.

The defendants needed to establish that the factual allegations on which the comment was based were true. They needed to show that the plaintiff coached by remote control, that he is amongst the panelists who appoint coaches, that he is domineering, that he selects players and interfered with tactics. They have proved that he is the director of coaching. In his evidence, the third defendant said that he had witnessed the plaintiff at a match in 2005 pull out his mobile phone instructing some he described as them, to change a player who according to the plaintiff was playing off position and within a few minutes that player had been substituted. He also said on several occasions he had seen the plaintiff involved in training at Railton club where the team used to play. Two weeks before then the plaintiff had conducted training sessions whilst the head coach and his assistants stood by. Although both the plaintiff and the witness Mandigora gave their evidence which contradicted this assertion in the article, neither one was challenged on that evidence. It was a vital fact to the defence case, and in cross-examination the third defendant went on to give dates as to when the incident with the mobile phone took place. His legal practitioners ought to have put it to the plaintiff and his witness that they were lying to the court. Instead, the evidence went in unchallenged. In so far as the training the third defendant gave out in cross-examination that he had witnessed the plaintiff conducting training with the teams and on the third day of this happening he wanted to take a photograph but was chased away. Again it was never put to the witnesses that such an

incident had occurred. The evidence of the plaintiff was that he would attend training sessions if invited. He did not say he never attended training sessions. The third defendant gave a view as his view that in football when the team has poor results the highest authority is to blame for such failure. He also gave a lengthy description of what the duties of a director of coaching meant. He said he had got the definition from a manual on football. In my view the allegations in the absence of evidence from the source as to the cause of the losing streak of the team for Dynamos have not been shown to be true.

There is no dispute that a comment on the affairs of football team, and in this case the affairs of Dynamos would be in the public interest. As regards the fifth criteria, their lordships considered that there had been unwarranted for the judge in *Madhimba Zimbabwe Newspapers (1980) Ltd*³ to have added a fifth criterion, in the form in which it was expressed, to the four originally set out by JANSEN JA in *Marais v Richards en 'n Ander*⁴. In their wisdom they decided to frame it differently as follows;

“The comment must be based upon facts expressly stated or referred to in the document or speech concerned, or generally known to the relevant audience”.

Neither of the legal practitioners in their written submissions addressed this issue, and as a result I am loath as a court to make pronouncements on an issue that has not argued before me by the parties. All that the defendant’s legal practitioner said in relation to the article was that it was written as a continuation of a public debate concerning Dynamos. This was the evidence that was given by the defendants’ witness but the article in question does not give the impression that it was a continuation to an article or articles written earlier. If it was meant to be a continuation in the sense stated it missed its mark. It appears to be the only article to have been written on the subject matter at the time.

The statement by the anonymous board member when examined in the context of the comments by the writer of the article does not mention any domination of the coaches or the teams by the plaintiff. The source seeks to have the blame of the poor results on the plaintiff and not to be blinded by his past achievements. It also states that the plaintiff had chosen the coaches, set up the structures and so he should be accountable for the team’s failures. The board member accused Mandigora of being soft, which failing the plaintiff had allegedly taken

³ 1995 (1) ZLR 391 (H)

⁴ 1981 (1) SA 1157 (A)

advantage of. The defence has failed the final requirement that it be based on facts or allegations in the document.

I turn now to consider the issue of quantum. That the plaintiff has suffered an injury to his good name and reputation has been demonstrated in his evidence and that of Mandigora. Miss Mupawaenda has submitted that in the assessment of the level of damages the court should consider the following factors-:

- the character and status of the plaintiff
- the nature of the words used
- the extent of the publication
- the conduct of the defendants
- the previous awards of damages in similar cases taking into account the depreciation of the local currency (See Nyatanga Editor, *The Herald & Anor*)⁵

In Zimbabwe football is very dear to the hearts of then nation. Whenever the national team plays a match there is a frenzy of excitement and newspapers are full of comments on the performance of the team the administration in general and the players individually. It is a sport that evokes emotions from all and sundry. The team of which the plaintiff is the technical director is one of the oldest teams in the country. It is certainly amongst the most popular teams and its fortunes are discussed widely in the media. The plaintiff is also very well known and as he stated he has attained a reputation as a competent and professional football coach. He was privileged to have been part of the coaching department to have coached the national team. He has taken the team to heights which have not been by anyone else after him. One can say he is one of the more famous and well liked coaches within the country. The defendants do not dispute this and in fact in the excerpts allegedly quoted from the anonymous board member mention is made of the plaintiff's past successes. It cannot be disputed that as far as football goes he ranks amongst the most successful, not just as a player but a coach as well. To then publish in the newspaper an article where he is credited with the dubious honour of being the architect of the misfortunes that are befalling Dynamos cannot be other than a death knell

⁵ 2001 (1) ZLR 63 (H)

to his past reputation and acknowledged achievements. To brand him unprofessional in the execution of his duties as a director of coaching has the effect of destroying all the respect that he had built up over the years. His management and coaching skills have called into question by the entire article. The personality that is depicted in the article is of someone who is unable to work with subordinates and rides roughshod over them. The damage to his reputation is extensive especially considering that the subject for discussion in the article relates to the manner in which the plaintiff earns a living. As he stated he used to get invitations for engagements from outside the country but these have since dried up. I consider extent of the defamation to have been serious in this case. I have been referred to previous cases of defamation and the awards made therein. The most recent of those is *Nyatanga v The Editor, The Herald & Anor* (supra) in which the court awarded the plaintiff an amount of \$50 000.00. In that matter the integrity of the plaintiff had been impugned by the allegation that he had facilitated sales of properties and had the properties transferred in dubious circumstances. It was also alleged that he was being investigated for alleged fraud and perjury. The court found that to impugn the honesty and integrity of a person holding high office in the judicial system undermines the confidence that the public should have in the judicial system and that it was more serious than defaming a businessman or politician. The plaintiff herein cannot claim to hold the kind of office that is described in the case of *Nyatanga* (supra) but nevertheless, as a professional certain standards of behaviour and professionalism under demanded of him in the performance of his duties. Those standards have been said to be missing in the plaintiff in terms of the article published of him. It has undermined the goodwill and good standing that he has built up over the years and has in fact put the sport of football and coaches into disrepute. The defamation is serious. To cap it all the defendants right up to the trial refused to publish a retraction and they went to the extent of defending the claim even when it was clear that the article had not been based on fact. Their conduct is extremely reprehensible. The honourable thing would have been to admit having been at fault in publishing the article and contested the question of the quantum of damages.

In the assessment of damages, regard should be had to previous awards and the depreciation of the local currency is a factor in the assessment. It is safe to say that since *Nyatanga's* case was decided the value of the dollar has been on a downward spiral or a freefall. Inflation has hit record highs. If one had recourse to the inflationary trend in the

economy we would see courts awarding higher and higher sums by way of damages. Compensation in defamation is primarily for sentimental loss, which, by its very nature, is not easily translated into monetary terms. See Burchell –The Law of Defamation in South Africa p 29. ‘Compensation by damages operates in two ways –as a vindication of the plaintiff to the public and as a consolation to him for a wrong done’ per WINDEYER J in *Uren v John Fairfax & Sons (Pty) Ltd*⁶. It has been accepted by our courts that an action for defamation has been seen as a method whereby a plaintiff vindicates his reputation, and not as a road to riches and consequently the courts have not been generous in awarding damages for injury to one’s feelings. It should then not be a mathematical assessment in which the forces of inflation and depreciation come into play. Whilst the fall in the value of the currency is acknowledged nevertheless the assessment should not be such as to equate the damage to plaintiff’s reputation to the loss occasioned to the purchasing power of the currency. When the award was made to Nyatanga the amount he got was a considerable sum. I cannot vouchsafe how much that amount is worth in today’s situation nor am I going to try. All I have to consider is what amount can reasonably be accepted as sufficient to assuage the plaintiff’s hurt feelings. The plaintiff had initially claimed \$ 50 million in August 2006. Granted, there has been a marked depreciation in the value of our dollar but such as would justify an award of \$1 billion. I believe that an amount which is three times that initially claimed would be a reasonable amount. It is not so paltry as to be an insult to the plaintiff but is also not so great as to amount to a money making enterprise on the part of the plaintiff. The sum of \$150 million would in my view be a reasonable amount of damages. There will therefore be an order to that effect against the three defendants jointly and severally.

In the premises the claim succeeds and I make the following order:

1. The plaintiff is awarded damages for defamation in the sum of \$ 150 million against all the three defendants jointly and severally the one paying the other to be absolved.
2. The defendants shall pay the plaintiff’s costs of suit jointly and severally the one paying the other to be absolved.

⁶ (1966) 117 CLR 115 at 150

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