

MADOCK CHIVASA
versus
AARON NYAMAYARO
and
LAWRENCE MOYO
and
ZIMBABWE NEWSPAPERS (1980) LTD

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 28 January and 14 February 2013

Civil Trial

KE Kadzere, for the plaintiff
OT Gasva, for the defendants

KUDYA J: This is a claim for defamatory damages. The plaintiff seeks US\$35 000-00 for *injuria* and *contumelia* arising from an article written in the H-Metro of 13 October 2011 by the first defendant, edited by the second defendant and published by the third defendant. The three defendants contested the action.

The plaintiff testified and called the evidence of Hilary Zhou and Kebby Zhou. In addition, he produced the articles in issue as exh 1 and his letter of demand, exh 2. The defendants called the evidence of the first defendant and that of one of his informants Elizabeth Mutetwa.

The article appears in full on p 6 of the paper together with four colour photographs of Hillary, Kebby, a crying Rumbidzai and a battered, bruised and bleeding Elizabeth. More captioned pictures cover the whole of p 7. Three of the pictures on p 7 cover Rumbidzai in various poses. The first is of a standing Rumbidzai with a torn top clad in her brassiere and a leotard pair of trousers, the second is of a crouching Rumbidzai covering her face with her left hand next to a destroyed door that is lying on the floor and the third shows her seated on a bed with a ghastly wound on her left shoulder. The fourth picture is that of the plaintiff standing in a car park with the caption “MADDOCK MURDER CHIVASA allegedly teamed up with the Chivasa siblings to bash two hookers”. The last covers a full frontal view of

Elizabeth bleeding from the nose and mouth with blood flowing down her face, chin, chest and white blouse crying out in pain.

The article on p 6 is headlined: Bashed for refusing free sex: and reads in part:

“There was drama at Fintra Court in the capital on Tuesday night when two suspected pimps beat up two self confessed commercial sex workers for denying them FREE SEX services. The two siblings identified as Hillary and Kebby Zhou, in the company of their friend Maddock “Murder” Chivasa (who fled the scene), allegedly assaulted two sex workers Rumbidzai Zambuko (23) and her flat mate Elizabeth Mutetwa (30). H-Metro established that the trio had an understanding with the women such that they would sometimes be given sex services on a “play now pay later basis”, but on the day in question Rumbidzai was busy with a cash on delivery client. She turned down Hillary who wanted free sex as per their tradition opting to go for the cash paying client. Hillary could NOT afford to wait for his turn nor fathom the idea of having left overs so he bashed Rumbidzai leaving her badly injured. H-Metro learnt that Hillary and his mates Maddock and Kebby were “account holders” and could have regular free sex from the Fintra Court self-confessed tarts whom they often even pimp. All the prostitutes here have serviced Murder (Maddock) and he comes every day leaving his wife at his flat located at the Corner of Selous and 8th here in the Avenues.”

The accompanying pictures on p 6 are of Hillary and Kebby Zhou, a seated but crying half-dressed Rumbidzai and a battered, bruised and bleeding Elizabeth with a caption that it was after allegedly being bashed by Maddock “Murder” Chivasa, Hillary and Kebby Zhou. This is despite the fact that in the body of the story Elizabeth accused Kebby as the only person who head-butted her.

On p 4 of the same paper is the editorial. It is entitled: PROSTITUTES: GIVE THEM PROTECTION. In his letter of demand exh 2, the plaintiff took issue with a portion of the editorial which reads:

“The picture of the commercial sex worker butchered on our front page in the lead story should leave people begging for answers within them. Is this really what we are as a society? Do we let the hounds of anarchy haunt and hound all we do not like or think to be lesser moral people than us? Like the pigs and humans through the window in Animal Farm, one day people may never know the difference between us the moral and they who err at the street corner every night if we do not stand up against such a travesty.”

He may as well have complained over the portion towards the end of the editorial that reads:

“In any commercial line of work, the woman in our story today was beaten when she refused to let a hooligan ‘loot her stock’ it may elicit giggles.”

The plaintiff took the view that his dignity and reputation were maligned by the article and accompanying photograph and caption that were understood by all readers of average

intelligence to mean that he was of loose morals, consorts with prostitutes and engages in risky sexual behaviour, a serial cheat who engages in adultery with prostitutes and is a violent character. He further found the article factually incorrect, materially false, scurrilous and malicious especially as his side of the story was not sought before publication thus convicting him in the court of public opinion. As a public figure in the form of a spokesperson of the National Constitutional Assembly, NCA, he sought retraction and apology of the same prominence and an additional payment of US\$35 000-00 in his letter of demand.

The plaintiff Maxwell Tatirai Chivasa testified. He is currently a student at the University of Zimbabwe. He worked for the Zimbabwe Development Country Trust as an Advocacy and Projects Officer for six years. Thereafter in 2004 he became a volunteer spokesperson for the NCA, a position he still holds. He is also a consultant for various local civil society organisations.

He was shown the news article exh 1 by his younger brother in the morning of 13 October 2011. On 10 October 2011 at 4pm he visited his friend Hillary Zhou at his flat at Fintra Court. He surfed the internet on his friend's laptop together with Darlington. Rumbidzai Zambuko barged into the flat without knocking. Hillary took issue with her and took her out of his flat. Rumbidzai kicked and felled the door open and shattered two bottles of Savannah Dry liquor that she held in her hands. Darlington and the plaintiff restrained Hillary from assaulting her. Hillary took their advice and went and reported the incident at Fife Avenue police post. The plaintiff left for Lion King to shoot pool when Hillary went to make a police report. Later that evening Hillary and his young brother Kebby found him at Lion King. Kebby made a report to him. Kebby was later arrested, tried and convicted for assaulting Rumbidzai's flat mate Elizabeth Mutetwa. He performed community service at David Livingstone Primary School for assaulting her. The plaintiff stated that he did not assault either Rumbidzai or Elizabeth. He never saw Elizabeth on that day. He disputed having a credit account with prostitutes who reside at the flat in question. He was happily married and faithful to his wife.

It was the plaintiff's view that the author of the article was unprofessional in failing to hear his side of the story. He was embarrassed and hurt by the story. That day he drove to Bulawayo for a meeting of Civil Society Organisations. Almost every one had the article and asked him about it. He had problems with his wife emanating from the article that led him to temporarily relocate from his matrimonial home for two months. It dented his political ambitions to represent Bikita West in the forthcoming general elections. His opponents in

Bikita photocopied the article and distributed it. He was phoned by his agents in that constituency and other representatives of civil society organisations in Masvingo over the article. He believed that US\$35 000-00 would fairly compensate him for the damage to his dignity and reputation.

In cross examination he said Rumbidzai was once married to one of his friends Gerald. The two set their matrimonial home at the flat where the plaintiff presently resides. He agreed that in the article neither Rumbidzai nor Elizabeth stated that he assaulted either of them but correctly pointed out the caption on p 6 of the bleeding Elizabeth that alleged that he also assaulted her while the caption to his picture on p 7 alleged that he teamed up with his two friends to “bash the two hookers”. The article revolved on the one sided story of Rumbidzai. He further intimated that his organisation, the NCA, is represented through out the country. He stated that his nickname was Meda and not Murder. He got it as a short cut for Madock when he was in Form Two at Silveira Secondary School in Masvingo.

The whole story from Rumbidzai as shown by quotations does not implicate the plaintiff in any wrongdoing that day. Rumbidzai complained about Hillary’s conduct. The author of the article, the first defendant took literary licence to interleave his own investigations and opinions between Rumbidzai’s quoted version and implicated the plaintiff in the assault of the two women. It was the author’s view that the plaintiff was a pimp and a “part-time gigolo”.

Hillary Zhou confirmed the plaintiff’s version to the hilt both in his evidence in chief and under cross-examination. A visibly drunk Rumbidzai barged into the flat and broke the two beer bottles she had. When he escorted her out, she kicked his flat door, broke it and re-entered. He took her outside and left the flat with his companions. He went on his own to report at the Fife Avenue police post. He exonerated the plaintiff from any wrongdoing. Rumbidzai did not make a report against the witness. He was never charged with assaulting any of the two women.

Kebby Zhou, the person who assaulted Elizabeth testified too. When he got home around 6 pm he found his brother absent. The door was broken and lay on the floor. He received a report from a drunken Rumbidzai that H-Metro was on its way to report on the happenings at the flat. As he was closing the steel screen gate to the door, Elizabeth came to stop him. He then assaulted her. In the street outside the flat he met three H-Metro journalists. One of them took his photograph. He shielded himself and ran away. He did not change his version under cross examination. Kebby confirmed the plaintiff’s version that he was not

present when the door was broken. That he was the only one in the vicinity of the flat when H-Metro personnel arrived at the scene was also confirmed by the first defendant.

The first defendant, a photojournalist for the third defendant attached to H-Metro received calls from Elizabeth, Rumbidzai and Fungisai to attend the fracas at Fintra Court. He arrived at the flat as Kebby Zhou was leaving. Kebby declined to comment but ran away and jumped over a pre-cast wall but only after he had captured his photograph. He found Rumbidzai in Hillary's flat. He recorded her story but did not produce the recording or transcript of the recording in evidence. Her version was that she had asked to use Hillary's toilet. She found the plaintiff seated with "her girlfriend". The plaintiff ordered Hillary to have sexual relations with her for which the plaintiff would pay notwithstanding that her fee paying client stood outside Hillary's door. She declined. All hell broke loose. Hillary beat her up. The disturbance led other local residents to call H-Metro. In fear of H-Metro the plaintiff hurriedly left with Hillary. He interviewed Elizabeth who fingered Kebby in the assault upon her.

He went to Fife Avenue police post where he interviewed Hillary and audio-recorded the interview. Again he did not produce the recording in transcript or in its original form. Rumbidzai provided him with the plaintiff's cell but it was not reachable. He did not confirm with the plaintiff in cross examination the cell number that he was given. His version in court of what Rumbidzai told him about her affair with the plaintiff was not recorded in the article. He then wrote his story without hearing the plaintiff's version. In his testimony he identified the plaintiff with the accused persons. He took the plaintiff's picture from his Facebook profile so that readers would be able to identify one of the perpetrators of violence.

It was demonstrated during cross examination that he acted unprofessionally and recklessly in writing a one sided and unbalanced story and submitting it for publication. He did not seek the plaintiff's comments. A reading of the story shows that the plaintiff was not a major player in the disturbances and assaults yet his name took prominence in the story. He did not run Rumbidzai's version of her alleged association with the plaintiff with Hillary.

The defendants also called Elizabeth Mutetwa. She was not present when Rumbidzai barged into the plaintiff's flat. She only went to the flat to investigate Rumbidzai's screams. She saw Hillary assaulting Rumbidzai. She saw the plaintiff leave the room without restraining Hillary. She was assaulted by Kebby as she was picking Rumbidzai's cell from the floor to contact H-Metro. Her version was that Rumbidzai told her that he wanted to solicit the plaintiff for prostitution to raise money to pay their landlord who had locked the

two women out of their flat. Her version as told to her by Rumbidzai is different to the one Rumbidzai gave to the first defendant that she had a fee paying client and wanted to use Hillary's toilet.

It became apparent under cross examination that she was coached on what to say by the first defendant. Like the first defendant she associated the plaintiff's nickname with violence only because she called him "Murder" instead of "Meda". She did not see him acting violently against anyone. She came to demonize the plaintiff as a man of loose morals and justify the article published by the defendants. Some key aspects of her version were not canvassed with the plaintiff when he was cross examined. Two things became clear to me after the defendants' case. These were that Rumbidzai and Elizabeth had no compaction about lying against the plaintiff. The second was that the conflicting stories emanating from Rumbidzai showed beyond a shadow of doubt that she was drunk. Elizabeth falsely painted her as sober that evening.

I am satisfied that the plaintiff and his witnesses told the truth while the defendants deliberately gave false testimony concerning the plaintiff's conduct on 10 October 2011.

The two issues referred to trial were:

1. Whether or not the newspaper article published by the defendants was defamatory of the plaintiff and
2. If so whether the plaintiff is entitled to any damages for defamation.

I turn to determine these issues.

Whether or not the newspaper article published by the defendants was defamatory of the plaintiff

In his oral address Mr *Gasva*, for the defendants, conceded that the published words were *per se* defamatory. He, however, contended that they were substantially true and of public interest. I agree that the collage of pictures on pp 6 and 7 correctly capture what the first defendant saw. I also agree that the first defendant reproduced some of the statements he attributed to Rumbidzai and Hillary. I also agree that the editorial comment on p 4 was fair to the extent that it did not seek to link the violence in the collage of pictures with the plaintiff. However, the article must be read as a whole and in context of what it states about the plaintiff.

I pointed out in *Butau v Madzianike & Ors* HH 378/12 at p 8 that:

“A false story cannot be substantially true. In my view, no justification or public interest was served in writing and publishing a false story. The defences of justification and public interest are grounded in the truth.”

In the present matter Rumbidzai’s failure to testify and the failure to produce her interview transcript was fatal to the defendants’ defence. The article refers to the plaintiff as a pimp and gigolo. The Collins Dictionary defines a pimp, amongst other things, as “one who lives off the proceeds of prostitution and as a whoremaster”. Elizabeth, even in her damning testimony against the plaintiff did not paint him as a pimp but as a male prostitute. However, I have found her an untruthful witness. The story written by the first defendant and published by the second and third defendants was half-baked and half true. There was clearly absence of investigative journalism. Investigative journalism involves verifying information given with other corroborative sources independent of the main parties involved. A story that is based on accusation and denial and counter-accusation lacks depth and truthfulness. A journalist who produces such a story and a publisher who publishes it runs the risk of falling into the vortex of defamation. The defendants ought to have held their horses before publishing the story. There was no need to hurriedly publish such a half baked story. They misspelt the nickname of the plaintiff and gave it an untrue and pejorative meaning. The story was false in so far as it painted the plaintiff as a man who consorted with prostitutes, had a credit facility with prostitutes, was a serial cheater and adulterer and was a violent man.

I am satisfied that the defences raised by the defendants of substantial truth, justification and public interest must fail.

The measure of damages

In the *Butau* case, *supra*, at p 9 I highlighted the factors a court takes into account in calculating defamation damages. The content and nature of the publication painted the plaintiff in grave light as a pimp, a gigolo, a male prostitute and a serial cheater who was violent. He is a student who, however, is a volunteer national spokesperson of the NCA. He has political ambitions in Bikita West. He is a public figure and is well known in that Constituency. The publication went far and wide. It was read in Bulawayo where he had a meeting with other civil society members. It was widely published in the constituency he seeks to contest in. Even though he did not call further evidence to support this spread, his testimony to that effect was not disputed in cross examination. It is an accepted fact that the H-Metro does have wide circulation outside its base in Harare.

The defamatory article dented his political future. It upset his marriage for two months. He moved out of the matrimonial home and stayed in a hotel. He was embarrassed and had to defend himself to his family, friends, workmates and acquaintances. The defendants acted maliciously and recklessly. The story should have been about Hillary and Rumbidzai, Kebby and Elizabeth. The defendants did not retract the story against the plaintiff nor did they apologise to him. In evidence the first defendant and Elizabeth added insult to injury by persisting in maligning the plaintiff as a male prostitute. Their overall conduct was reprehensible.

Taking into account all these factors and the decided cases referred to by counsel of *Butau v Madzianike, supra* and the cases cited therein, I estimate the plaintiff's defamatory damages in the sum of US\$4 000-00.

Accordingly, it is ordered that:

1. The defendants shall jointly and severally, one paying the others to be absolved, pay the plaintiff:
 - (a) The sum of US\$4 000-00 together with interest at the prescribed rate from the date of the service summons to the date of payment in full.
 - (b) Costs of suit.

Kadzere, Hungwe and Mandevere, plaintiff's legal practitioners
Chirimuuta & Associates, defendants' legal practitioners