

AFARAS MTAUSI GWARADZIMBA  
versus  
ALPHA MEDIA HOLDINGS (PRIVATE)LIMITED  
and  
TREVOR NCUBE  
and  
RAPHAEL M KHUMALO  
and  
VINCENT KAHIYA

HIGH COURT OF ZIMBABWE  
MATANDA-MOYOJ  
HARARE, 18 November 2015

### **Exception**

*E Matinenga*, for the plaintiff  
*T Mpofu*, for the defendant

MATANDA-MOYOJ: The plaintiff instituted a claim against the defendants for \$250 000-00 being defamation damages arising out of an article printed in the *Zimbabwe Independent* of 19 April 2013.

The words complained of are the following;

“Gwaradzimba under new fire. Lawyer calls for investigation into professional misconduct.”

“AMG Global Chartered Accountant boss Afaras Mtausi Gwaradzimba has come under intense fire for his role in the liquidation of Sasit Stockbrokers, amid allegations he could have inflated the asset base of the securities trading firm to get a handsome payout for his services as liquidator, to the prejudice of creditor’s, business digest has established ---”

In *casu* plaintiff under para 7 of the founding affidavit alleges as a “sting” that

“the article meant, and was understood to mean that; the plaintiff has the propensity of committing unprofessional conduct in dealing with liquidation matter, and, that the defendants had established and ascertained that the plaintiff was actually guilty of unprofessional misconduct alleged by the creditors in the liquidation of Sagit Stock-brokers”

My obligation is to determine whether the words published carries such a meaning.

The plaintiff alleged that as a result of the above wrongful, unlawful, false, malicious,

baseless and defamatory words, he suffered injury to his good name, fame, esteem and reputation in the sum of \$250 000-00. The defendants excepted to the summons on the following grounds;

- 1) That the words set out above do not in their primary or secondary meaning defame plaintiff.
- 2) That neither of the defamatory meanings ascribed to the words by the plaintiff are within the ordinary meaning of the words set out above.
- 3) That no reasonable person of ordinary intelligence would understand the words to convey a defamatory meaning of plaintiff.

The plaintiff objected to the exception on the basis that it is a plea disguised as an exception. The plaintiff averred that such an exception is ill founded and of no basis at law. The plaintiff insisted the words published are defamatory and prayed for the dismissal of the exception.

Rule 137 of the High Court rules provide for exceptions and special pleas.

“Rule 137 (1) A party may-

- (a) take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case.
- (b) except to the pleading or to a single paragraph thereof if they embody separate causes of action or defence as the case may be;
- (c) -----“

Where the defence is on a technicality then the defendant is allowed to file an exception to the summons. Firstly plaintiff objects to the exception on the basis that it is a plea. A plea is an answer to the claim on the merits of the matter. In other words a plea represents defendant’s version of events. Whereas an exception should be taken on a technicality. I understand an exception to be that the summons discloses no cause of action. Herein the defendant is saying the words complained of by the plaintiff do not disclose defamation. The words complained do not give rise to an issue of defamation. Once that is the complain then the exception is well taken. The rationale of an exception is that the defendant should not be expected to file his defence if he is somehow prejudiced. The defendant herein are simply saying they should not be allowed to respond to a summons which *ex facie* does not disclose defamation. The claim ought to be dismissed at this stage. R F V Heuston on “*Salmand of Torts*” 11 Ed at p 422 has this to say on defamation;

“A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers which tends to say, to lower him in the estimation of right thinking members of

society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem.”

The elements of defamation are the following;

- 1) there must be publication;
- 2) the matter published must have a defamatory meaning; and
- 3) the defamatory matter must refer to the plaintiff.

In *National Media Limited and Ors v Bongoshi* 1999 (1) BCLR 1 (SCA) the courts said that where the media is concerned defamation can be more narrowly defined as the unlawful negligent publication of defamatory matter concerning another which causes reputational impairment. From the onset the summons must allege all the elements of defamation. Once some element or elements are missing then the summons is exceptable.

In order to come to a conclusion on whether the summons discloses defamation the court has to look at the words complained of and the plaintiff's declaration. I have already quoted the words which plaintiff is complaining as being defamatory in their ordinary meaning. An analysis of whether a statement is defamatory is conducted in two stages: the first stage is to establish the ordinary meaning of the words complained of, and secondly to establish whether such meaning is defamatory.

The plaintiff pleads that the entire publication above is defamatory. He pleaded that the words were understood by members of the public to mean;

- a) that the plaintiff has the propensity of committing unprofessional conduct in dealing with liquidation matters
- b) that the defendant had established and ascertained that the plaintiff was guilty of unprofessional misconduct alleged by creditors in the liquidation of Sagit Stock-brokers.

The defendants objected to the meanings imputed on the words published by the plaintiff. In ascertaining whether the words are defamatory, the test to be applied is an objective one. See *LeRoux & Ors v Dey* 2011 BCLR 577 (CC). The test is what meaning would a reasonable reader of ordinary intelligence attribute to the statement. The attributes of a reasonable reader were enunciated in *Channing v South African Financial Gazette* 1996 (3) SA 47(OW) as follows;

“From these and other authorities it emerges that the ordinary reader is a “reasonable; right-thinking person, of average education and normal intelligence, he is not a man of

‘morbid and suspicious mind’ nor is he ‘super critical’ or abnormally sensitive; and he must be assumed to have read the articles as articles in newspapers are usually read”

See also *Cele v Avusa medical Ltd* (2013) ZAGPJHC 15.

The above cases provide the test to be in exception, that is, whether a reasonable person of ordinary intelligence might reasonably understand the words to convey a meaning which is defamatory of plaintiff. Such reasonable person is taken to understand the words in their natural and ordinary meaning. In so doing, the words are also taken in their implied meaning. See *Same v Associated Newspapers* (1963) 2 ALL ER 151. However, for innuendo, such innuendo should have been specifically pleaded. The test at exception stage is different from the test at trial stage. All that the court is required to do at exception stage is to decide whether a reasonable person of ordinary intelligence having, read the defendant’s words might reasonably understand those words as defamatory. See *Basner v Trigger* 1945 AD 22 and Burchell: *The law of Defamation in South Africa*. Looking at the words complained of it is difficult to find that a reasonable right-thinking person of normal intelligence might find the words to mean that plaintiff has the propensity of committing unprofessional conduct. The words clearly refer to an investigation into professional misconduct. A reasonable, right-thinking person of ordinary intelligence understands investigation to simply mean a stage of enquiring into the actual facts of the case. The report uses such words as “allegations”. Such words do not have the effects of lowering the plaintiff in the estimation of right-thinking members of society. Such words as used do-not carry a defamatory meaning in the sense alleged by the plaintiff.

I am of the view that the plaintiff’s claim does not satisfy the requirements for defamation and does not disclose a cause of action because the words complained of are not reasonably capable of conveying the meaning attributed to it by the plaintiff. See *Kembo Mohadi v the Standard and Others* HH 16/13, *Taylor v Chavhunduka & Ors* 1995 (2) ZLR 22 (H) and *Chinamasa v Jongwe Printing and Publishng Co. (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H), *Makova v Modus Publications (Pvt) Ltd* 1996 (2) ZLR 326 (H).

This takes me to the remedy available. Advocate *Matinenga* strongly argued that even if I upheld the exception, the correct remedy is not dismissal of the claim but to grant the plaintiff leave to amend his pleadings. That proposition is correct. However it is correct where the pleadings are capable of amending. The words as published should be capable of conveying some other defamatory meaning. I consider such interpretation superfluous. Where it is shown that all possible evidence that may be led on the words in question could not

disclose any cause of action then the proper remedy would be dismissal of the claim.

Accordingly it is ordered as follows;

- 1) The defendant's exception is upheld
- 2) The plaintiff's claim is dismissed and
- 3) The plaintiff is ordered to pay costs of suit.

*Chihambakwe, Mutizwa & Partners*, plaintiff's legal practitioners  
*Gill Godlonton & Gerrans* 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> & 4<sup>th</sup> defendants' legal practitioners