

MAXWELL MATSVIMBO SIBANDA
versus
ZIMBABWE NEWSPAPERS (1980) LIMITED
and
THE EDITOR IN CHIEF OF THE HERALD (CAEZAR ZVAYI)
and
SHEILLAH MAPANI (REPORTER AT HERALD)

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 15 & 31 October 2018

Civil trial

Plaintiff in person
AM Murambiwa, for the defendants'

MUZENDA J: Mr Maxwelll Matsvimbo Sibanda issued summons against the three defendants claiming US\$700 000 defamation damages and costs of suit.

The plaintiff bases his claim on the following synopsis amplified in his declaration. On Wednesday 6 December 2017 and 11 January 2018 articles entitled “Tenant loses \$2 million property to landlord” and “Fake court order backfires” written by the third defendant were published in the Herald newspaper. The article titled “tenant loses \$2million property to landlord” stated that plaintiff sold his tenant’s property worth over \$2million using a fake court order as compensation for \$4, 000-00 rentals arrears. The article added that the plaintiff refused to accept payment of the rentals in plastic money and took the law into his own hands and ended up stealing and selling tenant’s machinery.

The article titled “fake court order backfires” stated that the plaintiff was fined \$400 for selling his tenant’s property worth over \$2 million using a fake court order as compensation for \$4000 rentals arrears. That article added that the plaintiff pleaded guilty to charges of theft and was ordered to compensate his tenant for all the property he sold and had no right to sell his tenant’s machines without a court order and found him guilty of theft as defined in s 113 (1) (a) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] and contravening s 24 of Statutory Instrument 676 of 1983

“Disturbing or preventing a tenant from occupying the leased premises without a court order.”

The plaintiff avers in his declaration that the said words appearing in the two Herald articles are wrongful and defamatory of him in that they were intended and were understood by readers of the newspaper to mean that the plaintiff is cruel, a criminal and dishonest. According to the plaintiff both publications were incorrect and were meant to tarnish the plaintiff's image and reputation, they harmed his reputation, deminished his standing in the eyes of ordinary members of the general public. They also damaged his aspirations on his business and profession.

The defendants' deny that the articles published were wrongful and defamatory of the plaintiff. The publication of the articles were a report on court proceedings and the reporting was fair, accurate and balanced. They add that the publications were in the public interest and deny that the publications were meant to defile plaintiff's good image and reputation. The defendants refute that the plaintiff suffered damages in the amount claimed or at all.

The parties agreed that the following constitute issues for trial:

1. Whether or not the two articles admittedly published by the 1st defendant are defamatory of the plaintiff as alleged, and if so, in what way;
2. Whether or not the publications are a correct, fair and balanced reportage of court proceedings regarding the plaintiff.
3. Whether or not the publications were made in the public interest.
4. Whether or not the defendants are liable for any defamation damages to the plaintiff, and if so, the amount of such damages.

THE PUBLICATIONS

A: “WEDNESDAY 6 DECEMBER 2017.

TENANT LOSES \$2M PROPERTY TO LANDLORD.

A Harare business man allegedly sold his tenant's property worth over \$2million using a fake court order as compensation for \$4000 rental arrears.

This was after he had refused to accept payment in plastic money.

Maxwell Sibanda (59) of Borrowdale Brook last Friday appeared before Mbare magistrate Ms Rutendo Rakafa.

He was facing charges of theft and disturbing or preventing tenant from occupying the leased premises without a court order charges.

Testifying as the court's second witness, Artwell Kapita narrated how Sibanda took the law into his own hands and ended up stealing and selling their machinery.

‘Sibanda only wanted his rental payments in cash so due to the cash crisis in our country we would struggle to meet his due dates, resulting in him closing us out of the factory.

He went on to obtain a fake order which he used to auction our machinery and other factory properties worth \$2 225 273 which does not tally with the \$4000 we owed him.

Sibanda even looted some of our machinery before the auction because most of the big machines were not there at the auction and also the list given to the Messenger of Court did not include some of the big machines which were in the factory.” he told the court.

Sibanda allegedly took over the premises in question located at Gazaland Shopping centre from Jairos Jiri disabled beneficiaries converting it into his own business.

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The court heard that Magonde failed to pay monthly rentals from October 2015 to July last year. It is the State case that on October 11 last year, Sibanda locked the premises being used by Pacefootwear without court order and thereby disturbing the company production.

It is further alleged that on June 7 this year, he went on to auction the company’s machinery without its knowledge

.....”

B. “THURSDAY 11 JANUARY 2018

FAKE COURT ORDER BACKFIRES

A Harare businessman was last week fined \$400 for selling his tenant’s property worth over \$2 million using a fake court order as compensation for \$4000 rental arrears.

Maxwell Sibanda (59) of Borrowdale Brook pleaded guilty to charges of theft and preventing a tenant from occupying leased premises without a court order.

He appeared before Mbare magistrate, Ms Rutendo Rakafa.

In passing sentence, Ms Rakafa indicated that Sibanda should compensate his tenant for all the property he sold.

She said he had destroyed his tenant’s business operations by selling his machines. Ms Rakafa noted that Sibanda had no right to sell his tenants machines without a court order and, therefore, found him guilty of both charges.

In mitigation, Sibanda pleaded with the court to be lenient with him because he was a businessman assisting the country by creating employment.

Magonde failed to pay monthly rentals from October 2015 to July last year. On 11 October last year Sibanda locked the premises without a court order and, thereby disturbing production.

On 7 June last year, he even went on to auction the company’s machinery without the owner’s knowledge. The total value of goods stolen and auctioned was \$2 225 273 and nothing was recovered.”

MBARE CRIMINAL COURT'S RECORD OF PROCEEDINGS

The following are salient findings by the court upon perusal of the record of proceedings in the criminal court.

1. the accused before the criminal court was Industrial and Farming Development (Pvt) Ltd, a duly registered company represented by the plaintiff, Maxwell Matsvimbo Sibanda.
2. the company pleaded not guilty to both counts preferred by the State.
3. the plaintiff did not plead guilty to any of the charges.
4. the verdict of guilty was only returned against the company for the offence of contravening s 24 of Statutory Instrument 676 of 1983 after a full-fledged trial and a verdict of not guilty was returned for the charge of theft.
5. summons for the recovery of \$8500 arrear rentals were issued by the accused company against the tenant company and its director and was properly served by the Messenger of Court on the addresses provide in the lease agreement.
6. an application for default judgment was filed by the accused company and a default judgment and all papers given to the Messenger of court.
7. the Messenger of Court served the notice of attachment of property on the tenant and locked the premises.
8. the tenant attempted to apply for rescission of judgment and the application was dismissed;
9. the Messenger of Court sold the tenant's property through a public auction and accounted to the plaintiff's company. The name of the auctioneer was LM Auctioneers.
10. all the witnesses who testified in the prosecution of the accused company confirmed that the tenant owed the accused company arrear rentals of \$8 500.
11. all relevant court documents were produced in the criminal court during trial and were taken as exhibits. They bore the civil court's date stamp. They were authentic court orders and were produced by the consent of the State's representative.

On the date of trial the defendants agreed that they published the two articles and on the joint pretrial conference this admission was confirmed. It was also agreed that in terms of r 437 of the High Court Rules, 1971 of Order 49 the burden of proof and the right on duty to begin lay on the defendants. Hence the defendants presented their case first.

The defendants' first witness was Ms Daphne Tomana, she is employed as the Corporate Legal Services Manager by the first defendant. She stated that by virtue of her

position as a Company Secretary she was authorised to represent the first defendant in all legal proceedings. The two articles published on 6 December 2017 and 11 January 2018 were authorised by the first defendant and both articles were a report on court proceedings which were in the public interest. She denied that the articles published were wrongful and defamatory. She was challenged by the plaintiff to produce a company resolution authorising her to represent first defendant. She told the court that she did not have it but can go back to her office and produce it. She testified that she was shown the two articles well after their publication and she saw nothing amiss about the two articles. She admitted that the name of the accused in the criminal matter was not of the plaintiff but that plaintiff was but only representing his company. Industrial and Farming Development (Pvt) Ltd. There was no need to phone the plaintiff about the two articles and there was no need for an apology and the two articles were fair, accurate and balanced.

The second witness for the defendants was Mr Caezar Zvayi. He is the Editor-in-Chief of the first defendant. The daily procedure at his work place is that reporters go for briefing in the morning before they attend court proceedings and after court attendance they go back for debriefing. During court hearings they are obliged to take notes of the proceedings and cover various stages of the story. The reporter goes to the Assistant Editor first before presenting the story to the Editor-in-Chief. In this case the witness checked the two articles before publication and he was satisfied that the two were not neither malicious nor defamatory of the plaintiff. According to him the articles accurately captured what exactly happened. However he admitted that there were a number of issues which were not accurately reported. Those issues related to the name of the accused, the pleas of guilty, the sentiments by the court and question of court orders. But he insisted that the articles were not defaming the plaintiff.

The last witness for the defendant was Mr Ronald Mahonde, one who represented the complaint company in the criminal case at Mbare. He was in court and his employer company had problems with the plaintiff. He confirmed that the plaintiff did not have authentic court orders which he used to auction the complainant's \$2 million plus worth of property. Asked what he meant by fake court orders, he was at pains to explain. He is the one who went to the first defendant to ask that the story by published in the newspaper and was asked to bring documents to the first defendant. He continued the same story he had told the trial court in the criminal case and had a bone to chew with the plaintiff. He however confirmed that the accused person in the criminal matter was a company represented by the plaintiff. The plaintiff company

was fined \$400 and acquitted of the theft charges. The witness did not assist the defendants and his evidence did not advance the defence case. Defendant closed its case.

The plaintiff took the witness box and indicated that he sticks to his summons amplified by the declaration. He added that he is church member of the United Methodist Church in Zimbabwe and sits in a number of Committees. He is one of the three directors of Industrial and Farming Development (Pvt) Ltd. When the articles appeared in the newspapers his company lost a number of tenants and the fellow directors blamed him for that. He only represented his company and is not a thief or a criminal. He paid the fine of \$400 on behalf of the company. He has never stolen in his almost 60 years of age. He was heavily emotionally affected by the articles published by the defendants and his reputation was soiled his future prospects as a businessman was tainted he, was, now being regarded as an inconsiderate person in the corporate world public and church circles. According to him a lot of people within the church read about the article and others went on to telephone him to enquire about the background of the matter. To him the articles virtually closed all future opportunities for him. He used his monthly previous income as a basis to claim \$700 000 for the remaining period up to his presumed retirement age that is 10 year period. He cannot start afresh on life to go back to where he was before the publication. He however failed to explain why he would use monthly income as a basis for his claim for damages. He could not justify whether he lost employment as a result of the publication. The issue of damages was a completely new minefield for him, and he could not give the reasons for such a claim. This is understandable since he was but a self-actor.

After testifying he was excused and indicated that he wished to call his wife. He was asked to explain her evidence to the court and he indicated that she was going to repeat what he had told the court. The plaintiff's witness' evidence was dispensed with the plaintiff then closed his case. Though unrepresented by counsel, he gave his evidence very well and the court accepted same. The defendants' witnesses were not impressive at all they chose not to answer some of the obvious answers and were protective of the defendants especially the conduct of the third defendant the reporter. I will reject their evidence as untrue and believe that of the plaintiff as credible. Some of the aspects of plaintiff's evidence were apparent of mere comparison of the articles juxtaposed with the record of proceedings from the criminal court. The third defendant embarked on a lackadaisical approach of taking a witness's evidence in court for value without going through the record of proceedings itself. The article of 6 December 2017 written by the third defendant Sheillah Mapani contains inaccuracies. The

article states that the plaintiff allegedly sold a tenant's property worth over \$2 million using a fake court order and that the plaintiff had refused to accept plastic money. The plaintiff was not a party to the proceedings. He was representing Industrial and Farming Development (Private) Limited and the record of proceedings is very clear on that note. The way the third defendant presented the facts in the Herald appear as if what she was reporting what had been found by the criminal court as a fact yet the record shows that it was Artwell Kapota who was alleging that information in his evidenced in chief. The third defendant did not accordingly capture the correct picture of what was happening in court. She did not report that the plaintiff's company was involved. She did not report that the complainant in the criminal case actually owed the plaintiff's company \$8 500 which was for arrear rentals, she chose \$4000. She did not report that the plaintiff's court documents were all authentic and that it was the messenger of court who attached the tenant's property. She did not mention that LM Auctioneers were tasked by the messenger of court to sell the defendant's property at a public auction.

The third defendant erroneously reported that it was the plaintiff who auctioned the tenant's machinery without the tenants' knowledge.

The Thursday 11 January 2018 article had equally inaccuracies. The plaintiff in his personal capacity was not fined \$400 and the fine was not for selling a tenant's property. The plaintiff did not plead guilty to charges of theft and preventing a tenant from occupying leased premises without a court order. There is no remark by Ms R Rakafa on the record of proceedings to the effect of the plaintiff compensating his tenant for all the property he sold, nor the fact that the plaintiff had no right to sell his tenant's property or machines without a court order thereby finding him guilty of both charges. The third defendant incorrectly reported in the 11 January 2018 Herald issue what she had reported in the 6th December 2017 issue that the plaintiff locked the premises without a court order thereby disturbing the tenant's production. Further that on 7 June 2017 the plaintiff went on to auction the company's machinery without the owner's knowledge, the third defendant added that the total value of goods stolen and auctioned was \$2 225 273-00 and nothing was recovered.

A comparison of the information contained in the record of proceedings and the two articles reflect a parallel line of the veracity of what transpired. In short the third the two articles in the Herald are at tangent with what is in the record of proceedings in as far as the plaintiff is concerned.

The defendant's plea is that of qualified privilege, that is applicable to reports of proceedings of courts, that is one of public policy. In the words of RUMPF JA in *Benson v Robenson & Co (Pty) Ltd and Anor* 1967 (!) SA 420 (A) at 427 E-F.

“... the public proceedings of an authority or body entrusted with public duties may be reported in full, if it is in the interests of the public to be informed of such proceedings and the publication of such proceedings will be protected for the same reasons and subject to the same conditions (as to accuracy and fairness) as reports of judicial and parliamentary proceedings.”

The defence of qualified privilege applies to fair and substantially accurate reports of judicial proceedings.

INNES CJ in *Siffman v Weakley* 1909 TS 1095 clearly spelt out the following:

“As the court has pointed out on previous occasions, the publication of reports of proceedings in courts of justice (including the publication of the relative judgment) is privileged. Because it is for the public benefit that such publications should be made, so that those who are not in a position to attend the court may be reading them; see the manner in which justice is administered.” (at 1099-1100).

However such report must be fair and substantially accurate. The two publications on 6 December 2017 and 11 January 2018 were substantially inaccurate and unfair of the plaintiff. The court has already highlighted such instances of inaccuracies and there is no purpose of repeating. The defence of qualified privilege therefore fails.

In the matter of *Magwadi v Dube & Ors* HH 314-14 CHIGUMBA J held that:

“The three stage approach in determining whether the words complained of are defamatory is as follows:

- (a) consider whether the words as specified are capable of bearing the meaning attributed to them, that is whether the defamatory meaning alleged is within the ordinary meaning of the words;
- (b) assess whether that is the meaning according to which the words would probably be reasonably understood and
- (c) decide whether the meaning identified is defamatory.”

The ordinary meaning of the words complained of was that plaintiff was inconsiderate, cruel a thief, dishonest and criminal who does not follow the legally stipulated recourse of getting relief and illegally dispose of a tenant's property worth over 2 million to recover a paltry \$4 000 arrear rentals. There could be no doubt that a statement which imparts a person as thief, who does not respect the law and is incompassionate to others is defamatory within the ordinary meaning of those words. Looking at the record of proceedings in the criminal court there is no justification why third defendant would cite the plaintiff in his personal capacity yet, he was

representing a body corporate. How would an ordinary reader of these two articles in the Herald understand these words?

In the *Magwadi v Dube & Ors (supra)* the court approached the matter as follows:

“In determining how an ordinary reader of a newspaper in question would understand the words it is necessary to strike a balance between subtle analysis and hasty misconception between cool reserve and excitability. One is entitled to assume of the ordinary reasonable reader that he gets a general impression and one can expect him to look again before coming to a conclusion and acting upon it. The ordinary reasonable reader is not super-intelligent, highly educated or sophisticated. At first glance such a reader would immediately become aware that the article was a “from grace to grass” story about Plaintiff.....”

With regard to defence of justification, the question of plaintiff’s probity was a matter of public interest. However where there is evidence that such a defendant was motivated by malice, the defence cannot shield him from a plaintiff who has discharged the onus of proving *animus inuriandi*. The contents of the article exceeded the bounds of privilege because it was based on fabrications. Not only was the article untrue it was not for public benefit, it was calculated to bring plaintiff into disrepute”

As already pointed out hereinabove the three defendants admitted that the two articles complained of by the plaintiff were published by the first defendant, that is on item 2 of the joint pretrial conference minute before CHITAPI J. In the matter of *Tekere v Zimbabwe Newspapers (1980) Limited & Anor* 1986 (1) ZLR 275 (H2) SANDURA JP quoting Joubert in the *Law of South Africa* Vol 7 para 236, emphasized that:

“The publication of a defamatory statement about a person constitutes an invasion of his right to reputation and is *prima facie* unlawful. When in defamation proceedings a defamatory statement is proved or admitted, two inferences arise, viz that the publication was wrongful and that the defendant acted *animo injurandi*. The onus is then upon the defendant to establish either some justification or excuse for the defamatory language used on the absence of intent to defame”

In the circumstances, I am satisfied that where the words complained of are defamatory in their natural and ordinary meaning the plaintiff need prove nothing more than that publication. There is a presumption that the publication of the defamatory statements by the defendants was wrongful and that the defendants acted *animo injurandi*. It is for the defendant to rebut that presumption of establishing either of the two defences which they have raised (see *Tekere v Zimbabwe Newspaper (1980) Ltd & Ano* (Supra) at 279 F). The defendants have failed to prove their defence and I conclude that the two articles are defamatory of the plaintiff.

On the question of damages SANDURA JP in the *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor, (Supra)* quoting GOLDIN J (as he then was) in *Mavromatis v Douglas* 1971 (1) RLR 119 at 123 A, stated:

“I turn to the question of damages, the law presumes that the plaintiff has suffered loss by reason of the *contumelia* or insult, and, under the action *injuriam* he is entitled to damages for the injury to his reputation. The plaintiff has not proved and need not prove that he sustained actual loss or damage”.

On p 280 D-E the learned Judge President went on to add

“In cases of libel or slander actionable per se, the plaintiff need not have actual damages for the law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation”

As already indicated the plaintiff is claiming \$700 000 for both articles. As pointed out by SANDURA JP in the *Tekere v Zimbabwe newspapers* case (supra), the assessment of damages in a case like this is not an easy stroll in the park. It is not an easy exercise to recompense the plaintiff for the defamation perpetrated against him. However there are certain points which are relevant in the assessment of damages for defamation set out by WILLIAMSON AJ in *Bethelesi v Poorter & Ors* 1975 (4) SA 608:

That are

- (a) the content of the defamatory article
- (b) the nature of the publication
- (c) the plaintiff’s standing
- (d) the extent of the publication
- (e) the conduct of the defendants and,
- (f) the recklessness of the publication

With regard to the content of the defamatory statements it is quite clear that some very serious allegations were made against the plaintiff. That he was a thief and a convict. I also bear in mind that these statements were published in a daily reputable newspaper which commands a pole position in the market on the aspect of readership. Given the current media trends like facebook, WhatsApp, Twitter and Instagram, surely the publication has a wide outreach. The articles could have been read globally. I shall also bear in mind the plaintiff’s social standing. However it is not clear from the plaintiff’s evidence how the articles affected his “profession”. He did not satisfactorily cover this aspect. The conduct of the third defendant is not satisfactory. She did not have time to go through the record of proceedings to accurately pick the correct information before publishing the articles. Even after being brought to the

correct position that plaintiff was but representing his company defendants did not apologise to the plaintiff. The conduct of the defendants was reckless and almost touches on media ethics. It is recommended that reporters of court proceedings must have some basic knowledge of legal terminology in order to responsibly, accurately and professionally cover these matters.

In the matter of *Amwu and Bloomfield v Gwekwerere & Ors* GS 202 -81
(unreported) at p 29 the cyclostyled judgment BECK J (as he then was) had this to say:

‘The allegations by the defendants were widely disseminated and are grievously defamatory of the second plaintiff in the field of endeavour which has been his life’s work and in which he has enjoyed an unsullied reputation for honesty. The defamation is particularly scurrilous in that the second plaintiff dishonesty was said to have been not only great and habitual but at the expense of the very people whose interest it was his duty to protect. It was not made impetuously but was deliberately persisted in and repeated the next day and it calls for a punitive and exemplary award’

The defamatory statements in the second article of 11 January 2018 are more serious because they are not correct. The first statement of 6 December 2017 lies on a border line for one will be pardoned to read the article as if the journalist was citing evidence of a witness who was in court by putting notes at the beginning of some of the statements and at the end but the second publication appear as if it was a report on the outcome of the court case. The quantum of damages demanded by the plaintiff are too high and such an award would set a very bad precedent. However, in assessing the quantum of damages to be awarded to the plaintiff I shall bear in mind the gravity of the defamatory allegations in each article. As already alluded to above the defamatory allegations in annexure B are far more serious than those in annexure A, the article of 6 December 2017 and this must be reflected in the amounts of damages to be awarded. It seems to me that in respect of the 6 December 2017 article the plaintiff is entitled to damages in the sum of \$10 000 and in respect of the second article of 11 January 2018 he is entitled to damages in the sum of \$20 000.

In the circumstances I order as follows:

1. That in respect of Annexure A judgment in the sum of \$10 000 be and is hereby granted against the defendants jointly and severally the one paying the other to be absolved.
2. That in respect of Annexure B judgment in the sum of \$20 000 be and is hereby granted against the defendants jointly and severally the one paying the other to be absolved.
3. That the defendants pay costs of suit jointly and severally the one paying the other to be absolved.

Gula-Ndebele & Partners, defendants' legal practitioners