

VICTOR RUKAINGA
versus
NYASHA MUWOMBA
and
SIMBARASHE SITHOLE
and
MANDLA
and
BULAWAYO 24 NEWS

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 17, 20 May 2019 & 31 July 2019

CIVIL TRIAL

V Masaiti, for the plaintiff
Ms P Masunungure, for the 1st defendant

MUNANGATI-MANONGWA J: The termination of a landlord-tenant relationship between the parties was followed by certain occurrences which culminated in this defamation suit. The plaintiff issued summons against all defendants claiming different sums in damages for defamation arising out of an article published by an online publication Bulawayo 24 News .The plaintiff claims US\$30 000.00 from first defendant and the sum of US\$5000.00 as against the second to fourth defendants upon their failure to place a prominent apology to plaintiff on their website. The first defendant defended the action whilst the second to fourth defendants are in default for want of entering appearance to defend.

The online publication Bulawayo 24 News carried an article with a heading which reads “Mysterious juju found in famous club.” The article was accompanied by the picture of a Club and

the purported juju. The article states that the juju was found at Club Ten which belongs to a successful businessman Nyasha Muwomba (first defendant) who confirmed the juju, but distanced himself from the whole “juju scare” by pin pointing his next door colleague Victor Rukainga (plaintiff) for casting a spell on him. The publication went on to quote the first defendant disowning the juju and pointing to plaintiff. The publication quoted the plaintiff denying the allegations of being the owner of the juju and terming them a fabrication.

The plaintiff in his summons alleges that he was defamed by the article. He further alleges that the online publication is widely read by many Zimbabweans who have easy access to smart phones and the internet. That in addition the publication operates a website accessible locally and internationally where all their content is posted and circulated.

The first defendant denies knowledge of the article, nor providing information to the rest of the defendants. He denies ever defaming plaintiff and points to bad blood that exists between him and the plaintiff as former landlord and tenant. The following are issues for determination by this court:

1. Whether or not first defendant published the alleged story about plaintiff to second, third and fourth defendants.
2. Whether or not the said article was wrongful and defamatory.
3. Whether or not third and fourth defendants perpetuated the defamation by publishing the alleged story.
4. If the defendants are liable, the *quantum* of damages thereof.

The plaintiff Victor Rukainga gave evidence that he is 65 year old, married and has 3 adult children the youngest who is 37 years old. He has been in the retail business for 37 years. He stated that he operates businesses in Bindura, Shamva, Mazowe and he is also a farmer. He gave evidence that he knew the first defendant as he was once his tenant. The first defendant breached the lease agreement and ultimately left after the place was closed by Bindura Municipality as first defendant was operating without a liquor licence. The plaintiff stated that he had approached the Municipality to take action against the first defendant as he was operating illegally. First defendant began leasing premises next to his building and is still there. Their relationship had turned sour hence first defendant left.

Plaintiff stated that people including his patrons stated calling him telling him that first defendant was accusing plaintiff of practicing witchcraft against the first defendant. Some of the callers would remain anonymous. He was surprised as he had nothing to do with first defendant. He was then alerted to an article which appeared online under the publication of Bulawayo 24 News which contained the “juju” allegations. The said article was produced in court and stands as exh 1. The article states that “juju” was found at first defendant’s night club, Club Ten in Chiwaridzo. First defendant was quoted as follows:

“The juju you are talking about indeed was removed in my bar, but it is not mine, this is a spell cast by my rival in business. Rukainga. I went to apostolic prophets seeking divine intervention and they told me that it was him. Fortunately the prophets do the ‘back to sender style’, so I am protected.”

The plaintiff maintained that the said article was wrongful and defamatory in that it identified him as a person who uses juju in his business to attack a competitor and had amassed wealth through unorthodox means.

He stated his name was tarnished, defamed in the community and in the province as well. Due to the article he lost considerable business contacts. As the article is still online the damage still continues. He had built a business empire in 37 years and accumulated considerable contacts and this was lost as a result of the damaging and defamatory article. In his African culture dealing with juju is inappropriate and is associated with witchcraft. Plaintiff stated that upon the death of an icon and national hero Dr Oliver Mutukudzi, he was the family’s spokesperson and had to receive the country’s president, various dignitaries local and foreign. People were thus asking if he is the same Rukainga.

It was put to plaintiff in cross examination that there was bad blood between him and first defendant as he had reported the first defendant for assault and first defendant got acquitted. Also the parties had issues dating back to the time of their tenancy relationship so plaintiff had a score to settle with first defendant. Plaintiff maintained his claim insisting after the landlord tenant relationship’s demise he had moved on. As an acclaimed businessman he had no basis to fight with first defendant who is a child to him given his age. He simply seeks justice to be done.

On why he believed the article to be prompted by the first defendant he indicated that, the pictures of the first defendant’s night club and of the juju were taken inside the first defendant’s bar and such an occurrence could not have happened without his knowledge. Further the first

defendant had done nothing to distance himself from the article. The defendant had also approached his relatives speaking of the juju hence he believed the story was instigated by him. The witness struck the court as a credible witness who was unwavering in his case insisting what he lost in his good name and standing cannot even be assuaged by payment of US\$30 000.00.

The plaintiff called one Susan Dzumbunu as his witness. The witness indicated that she works at Bindura Country Club where the defendant often goes for lunch. She knows the plaintiff as a businessman who is also a board member of Bindura University as well as a member of the association of entrepreneurs. The plaintiff is also a member of civilians that work with the police in the province. Further her sister Ratidzai Maganyo works for the plaintiff.

She said she knew the first defendant as he operates a bar in the same vicinity as plaintiff. It was her evidence that sometime in November 2017 the defendant approached her at her work place and indicated that he wanted to share information with her. He told her that her sister was dabbling in magic and he had seen the sister and Mr Rukainga going to a “n’anga” (witchdoctor/traditional healer) in Chiweshe and hence she had to be careful as the family could end up losing children. The defendant proceeded to show her a picture in his phone wherein there was a palm holding a piece of cloth red, white and black in colour and the purported juju.

The first defendant told her that the piece of cloth had charms and the hand holding it belonged to her sister. Further that her sister was used by a goblin of Mr Rukainga which was at the shop. The defendant indicated that he had tried to contact her uncle to no avail. She had proceeded to confront her sister who denied dealing in black magic. She indicated that later her husband brought her attention to the story/picture which was circulating on a whatsapp group in which first defendant is a member. The husband said that it was alleged that the palm holding the juju was her sister’s. Under cross examination this witness maintained her story and indicated that she had no reason to lie against the first defendant. Her evidence was to the point. The plaintiff closed his case.

The first defendant gave evidence that he is a businessman who runs two bars in Bindura and a hardware in Bindura and Shamva. He stated that he was once the plaintiff’s tenant and the landlord-tenant relationship ended on a sour note. There was bad blood between the parties as the plaintiff once caused the arrest of defendant on assault charges although the defendant was acquitted. He produced a copy of the court record book which confirmed the acquittal. After

vacating the plaintiff's premises he had set up shop next to the plaintiff's night club and continues to operate therefrom. He confirmed that he knows one Susan Dzumbunu the plaintiff's witness who is sister to plaintiff's employee. He maintained that he only knows Susan as a waitress at Bindura Country Club where he occasionally goes for drinks and lunch. He denied showing Susan any pictures on his phone of a hand holding the alleged juju and also denied being a member of a whatsapp group to which Susan's husband belong. He thus denied being aware of the picture circulating on that whatsapp group. According to him it is due to the bad blood that the plaintiff is claiming \$30 000.00 as against him specifically and not the other defendants yet raising the same allegations of defamation. He stated that the whole stay was a fabrication.

It was the defendant's evidence that he was never interviewed by any journalist nor contacted for comment by any of the rest of the defendants in connection with the article. The purported quote in the article did not emanate from him and he was shocked by it. Thus, in as much as the plaintiff claims not to have been interviewed, he equally had not been interviewed. He had no reason to make such allegations against the plaintiff as his business was doing very well. In his words, his club is popular, it closes late.

The defendant maintained under cross examination that despite the article coming out in January 2018 he was not aware of it until April 2018 when he received summons. Under cross examination the defendant failed to provide satisfactory reasons why the plaintiff's witness Susan would lie against him.

Analysis

In an action for damages for defamation it is important to consider whether the article is wrongful and defamatory see *Masuku v Goko & Anor* 2006 (2) ZLR 341. The article complained of refers to the plaintiff casting a spell on the defendant. It refers to juju being seen at defendant's night club with the defendant distancing himself from the juju. It refers to the first defendant seeking divine intervention and protection from prophets. That the juju is associated with a "spell" and that protection is required point to the evil associated with juju. A simple dictionary meaning of "juju" is "fetish," "charm associated with magical powers."

In *casu* the plaintiff and the defendant are both agreed that the allegations of delving in juju are disturbing and the article is wrongful and defamatory. The words complained of are clearly

defamatory. Equally the picture itself of the juju as read with the article as a whole projects the evil associated with the juju.

A reader would easily reasonably understand the plaintiff to be involved in witchcraft given the meaning of the words. There is clearly an imputation by the article that the plaintiff uses unorthodox means to compete with other business people, delves in black magic and uses charms. This is defamatory in all respects.

See *Moyce & Others v Mujuru* 1998 (2) ZLR 353 (S) at 356 which notes the test applicable in determining defamation.

The words are defamatory hence it was never an issue between the parties that the article is defamatory.

The court accepts the plaintiff's explanation that the reader would understand the article to mean he used witchcraft to sabotage defendant's business. The ordinary meaning depicts use and practice of dark magic. This would be the meaning reasonably understood by any reader especially within the context of the article depicting business rivalry.

The pertinent question pertains to the origins of the story, who provided the story to the online publication? The plaintiff indicated in evidence that he got calls from patrons and anonymous persons telling him that the first defendant was accusing him of practising witchcraft. Thereafter the article appeared in the online publication. The plaintiff was alerted to the article. Of note is that, apart from the calls from patrons *viz* the allegations the article itself extensively and directly quotes the first defendant. It quotes him exonerating himself from the juju but attributing it to the plaintiff. It depicts him as a victim who needed protection. It further refers to him as a successful business man whose club "...despite the juju scare people still flock at Club Ten and it has proved to be the biggest bar in town in terms of attendance." The success of his business as gleaned from the article resonates with the first defendant's evidence in court. The first defendant indicated that, "my clubs are popular, my night clubs close late and I have no reason to hate anyone." He rode on the popularity of his club as stated in the article. No doubt the article portrays the first respondent as a victor. No reason is given why the online publication would seek to carry his story where he is purported to be under attack and emerges unscathed. If anything the article was in his interest and the words attributed to him must have come from him. It could not have

been coincidence that the person accused of mischief is the plaintiff whom the first defendant had a fall out with.

On being asked why he would be quoted, the first defendant stated under cross examination that he was shocked and did not understand the article. However, despite it being brought to his attention, he never raised issue with the publication. He did not complain, simply content to say I brought it to my legal practitioner's attention.

It is common cause that the picture of the first defendant's bar and the juju itself appeared in the article. Such pictures could not have been taken without his consent or at least his knowledge. This was a "scare" as the publication put it, it was no ordinary occurrence and the court does not believe that this could have happened without the first defendant's knowledge. Equally the court does not believe that despite the publication coming out in January 2018 the first defendant only got to know of it in April 2018 when he received summons. This is against a backdrop of his unceremonious removal from plaintiff's shop. The first defendant even stated in evidence that the relationship had deteriorated to an extent that parties did not greet each other. He had signed a 2 year lease which ended within 8 months, the plaintiff had sought to increase rentals, the plaintiff had caused his arrest and the plaintiff had also instigated council to go for him for operating without a liquor licence. This cocktail provided sufficient motive for the first defendant to go for the plaintiff. The allegation by him that the article was a fabrication and that journalists can write whatever content cannot be true given the aforementioned events which point to acrimony let alone the verbal statements attributed to him.

Equally, the evidence of one Susan Dzumbunu nails the first defendant. She clearly stated how the first defendant had approached her, shown her a picture of the juju alleging her sister, plaintiff's employee was involved in juju together with plaintiff. She did not take issue with him but with her sister, whom she confronted. She had no reason to lie against the first defendant who agreed was a regular client at Bindura Country Club where the witness works. On being asked why this witness would give an elaborate account of their discourse the first defendant could not give a satisfactory answer. He could only say "I believe there is some sort of relationship as the witness would come and mingle with workers." Susan's evidence was simply a recount of her encounter with first defendant. She further stated how her husband brought the picture of the juju to her attention and indicated that the palm holding the juju belonged to her sister. She was honest to

state that the husband did not state who made the allegations and she did not check the whatsapp group. She maintained that she had no reason to implicate the first defendant and the court believes her.

The first defendant's attempt to ride on the denial by plaintiff that no-one interviewed him does not succeed. The plaintiff stated under cross examination that he received calls from some anonymous callers and he would deny the allegations. He indicated that one caller asked "Mr Rukainga can you tell us the story that is circulating that you sent juju to Mr Muwomba's bar?" He responded that he knew nothing about the story and why should he as he was the first person to establish a bar. This answer resonates with the quotations in the article which read:

"Contacted for comment Rukainga denied the allegations saying that Bhanyaz was once my tenant when he was given marching orders he started fabricating stories for him."

He is further quoted as saying "I do not know what he is talking about, this man was once my tenant but our relationship turned sour when I told him that I wanted to use my bar so he feared competition."

This plaintiff's evidence points to the fact that he may have spoken to the journalist or the defendants albeit not knowing. The first defendant's outright denial shows him as a witness not to be trusted. He was not honest with the court. He knew of the story as he had provided it to the rest of the defendants. The story is not a fabrication but a report of what transpired. He does not dispute the picture of his bar and he cannot explain why words resonating with his evidence as regards the success of his business would be attributed to him by strangers. The first defendant sought to say that he was equally harmed by the article as the article indicated that he went to apostolic churches where a process of sending back the spell to the originator commonly known as "back to sender" was carried out. This, it was submitted would put him in bad light hence both parties were defamed. This cannot be so, as the article depicts him as a victim who has managed to evade forces of darkness with his club remaining popular as people continue to flock to it.

The court rejects the first defendant's argument that the online publication is a result of abuse of internet technology where a story can be formulated, pictures edited to suit a story as a marketing strategy. The evidence of the plaintiff was clear that the allegations started filtering through members of the public before the online publication. Further the approach by the first defendant to the plaintiff's witness points to the first defendant as the origin of the article. It was and could not be a fabrication more so given the acrimony between the parties. Only one party could benefit by the discrediting of another.

The court thus finds that the first defendant is responsible for the published words which is the basis of the defamatory article. He is thus liable to pay damages to plaintiff.

A finding of liability consequently leads to the issue of quantum. What damages should the first defendant pay to plaintiff?

The case of *Shamuyarira v Zimbabwe Newspaper (1980) Ltd & Anor* 1994 (1) ZLR 445 (H) at 503 ROBINSON J laid down various factors to be considered in assessing the quantum of damages and these include: the content and nature of the defamatory publication, the probable consequences of the defamation; the extent of the publication, the plaintiff's standing in society, the conduct of the defendant from the time the defamatory matter was published to time of judgment, the recklessness of the publication; comparable awards of damages in other defamation suits and the declining value of money. The list not being exhaustive.

The court must however be wary of the fact that damages are not meant to be punitive but seek to a greater extent to compensate the plaintiff for the loss suffered in good name and *contumelia*. This is not easy to quantify

The plaintiff is 65 years old and of an impeccable character. The plaintiff's evidence of being a successful businessman respected not only in Bindura but in the province was not challenged. The first defendant did not point or give evidence on any aspect that would impinge upon the defendant's character. Plaintiff is involved and sits on Bindura University's board which evidence although coming from a witness was not controverted by first defendant. He is also part of the police community forum. The court would not put much on the fact that he was a spokesperson for the Mtukudzi family during the late Oliver Mtukudzi's funeral. This is because it was a once off occasion coming after the article's publication and no evidence was led as to how the article could have impacted upon the plaintiff's image. In fact, the fact that the family had the confidence to choose him to assume that important family role tells a different story.

As aforesaid, the content and the nature of the defamatory publication puts the plaintiff in bad light in the eyes of others. As submitted on his behalf, the African culture is highly superstitious and allegations of witchcraft attract isolation, ridicule, hatred and contempt. The plaintiff gave evidence that he has lost considerable contacts built over 37 years. It cannot be disputed that given such serious allegations some people may decide to disassociate with plaintiff as he claims losing out on contacts. These would be some of the consequences arising from the

defamatory matter. The consequences could be aggravated by the fact that the publication remains online as at the trial date.

Where a wrong has been committed, it assuages a victim's feelings where the offensive, unfounded words are retracted and an apology rendered, the moral blameworthiness gets drastically reduced by such an act. The first defendant did not proffer an apology from the time of receiving a letter of demand and has up till trial stage vehemently dissociated himself from the article. That has the effect of increasing the amount of damages, that lack of contrition works against the defendant.

The plaintiff has sued 3 (three) defendants but sought different amounts of damages from first defendant and the rest of the 3 defendants.

A certain degree of recklessness characterised the offending article. The first defendant is quoted as naming the first plaintiff and even indicating that he is a business rival. Further buttressing the allegation by stating that prophets confirmed it was the plaintiff. Such boldness created some credibility over the article which places the first defendant's liability a notch above the rest.

The decline in the value of money is a factor which cannot be ignored. It is however noted that the claim by the plaintiff is in United States dollars hence the erosion of value is minimal given that it is steady currency.

In *Manyange v Mpofu & Others* 2011 ZLR (2) 87 the plaintiff had claimed damages in the sum of US\$30 000 arising from several newspaper articles published by the Chronicle newspaper. The court found the articles which contained allegations of corruption were defamatory. The first defendant being the Minister of Mines cited in his personal capacity was ordered to pay US\$2 000.00 interest and costs.

Having regard to the authorities cited above, the plaintiff is entitled to payment of damages in the sum of US\$7000.00. The court notes that the summons did not claim damages against the 2nd, 3rd and 4th defendants jointly and severally the one paying the other to be absolved. This means that each of the defendants ought to pay their proportionate share of the damages.

It is the court's finding that the first defendant knowing the allegations to be not true instigated the publication of the defamatory article. It cannot be ignored that the article being an online

publication which is still appearing online damaged the applicant's good name and standing. In their regard damages in the sum of US\$4 000.00 is appropriate in the case.

The second, third and fourth defendants have not defended the matter and plaintiff sought default judgment against them. As a corollary the plaintiff has made submissions pertaining to damages. The plaintiff sought the following relief: retraction of the story from the defendants' website, damages in the sum of US\$5 000.00 in the event of failure to place a prominent apology on their website and associated publications, and costs of suit on an attorney client scale.

It is common cause that no retraction was effected, no apology has been rendered and the publication remains on the internet. The defendants did not respond to demand and to the summons.

The second and third defendants are journalists who although their profession bestows upon them the duty to inform the public and publish matters of interest, they are duty bound to verify facts. The fourth defendant is an online publication which is not exempt from the duty of responsible reporting.

G Feltoe in his book "*A Guide to the Zimbabwean Law of Delict*, 2013 state:

"at the same time the law cannot ignore the fact that newspapers and other broadcasting media are extremely powerful agencies which are able to reach enormous numbers of members of the public and that, if they publish defamatory material, the end result can be devastating harm to reputation. It should also be borne in mind that harm to reputation is extremely insidious and once reputation has been damaged it is very difficult to repair the damage."

It has been demonstrated that the article was damaging to plaintiff's reputation and its continued presence online exacerbates plaintiff's cause. As no appearance to defend was entered there is no defence tendered to court. The court having concluded that the article was defamatory in nature liability duly follows. The plaintiff gave unrefuted evidence that no one phoned and identified himself as a journalist, thus no formal interview was done.

Recklessness on the part of the defendants arises out of the fact that no proper comment was sought from the plaintiff. The allegations were false and the words read in the context within which the article was published together with the picture of the juju clearly impacted upon the reputation of the plaintiff. To them leave the article online further militates against the defendants.

That the plaintiff had just sought a retraction with damages only sought upon failure to retract shows that the plaintiff endeavored to clear his name and not to enrich himself. No doubt the internet is widely used in Zimbabwe and online publications have a wide readership. That the

plaintiff was quizzed by a number of colleagues and relatives through phone calls shows that the publication had been accessed by a sizeable number. As a prominent business person and member of a reputable University the article smudged dirt on his clean reputable. Accordingly, damages are awarded in the sum of US\$3000.00 as against second, third, and fourth defendants jointly and severally the one paying the other to be absolved.

It is thus ordered:

1. The 1st defendant shall pay to the plaintiff the sum of US\$4000.00 together with interest at the prescribed rate, calculated from the date of judgment to date of payment in full.
2. The 2nd and 3rd and 4th defendants shall each pay to the plaintiff the sum of US\$1000.00 together with interest thereon at the prescribed rate calculated from the date of judgment to date of payment in full.
3. The 1st, 2nd, 3rd and 4th defendants shall jointly and severally the one paying the others to be absolved, bear the costs of suit.

Musunga & Associates, plaintiff's legal practitioners
Matsanura & Associates, 1st defendant's legal practitioners