

## Defamation: protecting reputation or suppressing media freedom?

By G. Feltoe

Harm to reputation is extremely insidious and once reputation has been damaged, it is very difficult to repair the damage. Newspapers and broadcasting media are extremely powerful agencies which are able to reach a very wide audience people. Many newspapers are on line and their copy is accessible to the entire world. If they publish defamatory material, the end result can be devastating harm to reputation. It is important therefore that the law affords proper protection against harm to reputation and provides suitable remedies for defamation.

On the other hand, the mass media plays an important role in keeping the public informed about what is happening in the country and exposing wrongdoing in both the public and private sectors.

Thus the right to freedom of expression and of the media are guaranteed in section 61(2) of the Constitution but excluded from these freedoms is malicious injury to a person's reputation. [section 61(5)(c)]

This article explores the problem of achieving a reasonable balance between protection of reputation and freedom of the media. It will show how there is a danger that if defamation laws are not carefully fashioned and applied they can end up stifling freedom of the media.

### Criminal defamation

The crime of criminal defamation was abolished in Zimbabwe after the Constitutional Court found it to be unconstitutional<sup>1</sup> in the case of *Madanhire & Anor v The Attorney General* 2014 (1) ZLR 719 (CC). Essentially the court found that the criminalization of speech that carried with it a threat of imprisonment for offenders had a stifling effect on free speech and it was a disproportionate instrument for protecting reputation, especially because there was an alternate civil remedy available. This offence was not one which is reasonably justifiable in a democratic society.

It should be noted that there are still other criminal laws that have a highly constraining effect upon the freedom of the media. One of these is the criminal offence of publishing or communicating false statements prejudicial to the State.<sup>2</sup>

In the case of *Chimakire & Ors v The Attorney-General of Zimbabwe* CCZ-6-2014 declared section 31(a)(iii) of the Criminal Law Code to be unconstitutional and null and void. This provision deals with publishing a false statement which is wholly or materially false with the intention of undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe. The challenge to the constitutionality of this provision was made under the constitution that was in effect prior to the new 2013 constitution. The

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<sup>1</sup> This decision was based on section 20(1) of the pre-2013 Constitution but there is no doubt that the same conclusion would be reached under section 61 of the 2013 Constitution.

<sup>2</sup> This offence is found in section 31 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

Constitutional Court decided that this provision violated section 20(1) of the pre-2013 constitution. The effect of this ruling is that no prosecutions can now be brought under section 31(a)(iii) as currently worded. The court decided that the restrictions that this provision imposed on freedom of expression were not reasonably justifiable in a democratic society. It decided that section 31(a)(iii) went beyond what was necessary and proportionate to the achievement of its legitimate objective. Several factors prompted this conclusion, including the overbroad scope of the provision, its “chilling effect” on legitimate speech and the draconian punishment of up to twenty years imprisonment. Clearly the same ruling would have been made had the constitutional challenge been made under section 61 of the 2013 Constitution. Although the Constitutional Court only struck down section 31(a)(iii), at least some of the reasons given for the declaration of unconstitutionality of this provision would also be application to many if not all of the other provisions in section 31 and persons prosecuted under any of the other provision of section 31 would be able to challenge the constitutionality of the provisions under which they are being charged.

### **Civil defamation**

It is submitted that civil defamation can also potentially have a chilling effect on freedom of expression and freedom of the media. These days the media often plays a watchdog role by exposing wrongdoing, such as corruption and abuse of power, by persons both in the private and public sectors. If these persons are powerful and influential they are likely to bring actions against the media for appreciable amounts of damages. A successful claim for substantial damages against a small media house may be enough to put it out of business. But even large media institutions may be deterred from publishing a story about an influential person who is threatening to sue them for large amounts of damages if the story is published. Again even a large media institution is likely to think twice about carrying a story revealing wrongdoing on the part of a high-ranking person if in the past that person or another such influential person has successfully sued for appreciable damages.

This is, of course, not to say that powerful and influential persons are not entitled to protection against reputational harm.<sup>3</sup> But our courts have decried the fact that often completely extravagant and disproportionate claims are brought.<sup>4</sup> These huge claims are often brought by important political figures or senior businesspersons and the threat of such large-scale damages claims must inevitably have some suppressive effect on the media.

### **Justifying the story**

The response to the exposure of the media to defamation claims might be that such claims can be defended under defences like justification. Thus if a media institution publishes a story exposing wrongdoing on the part of an influential person it would not be held liable if it publishes true facts in the public interest.<sup>5</sup> Clearly before publishing any story purporting to expose

<sup>3</sup> See *Makova v Masvingo Mirror (Pvt) Ltd & Ors* 2012 (1) ZLR 503 (H).

<sup>4</sup> See *Mnangagwa v Alpha Media Hldgs (Pvt) Ltd & Anor* 2013 (2) ZLR 116 (H) and *Mohadi v The Standard & Ors* 2013 (1) ZLR 3! (H)

<sup>5</sup> It is obviously in the public interest or for the public benefit to expose the wrongdoing.

wrongdoing, a responsible media will take all reasonable steps to check its facts to ensure that does not publish a false story that will cause great harm to the reputation of the person concerned.

But it is not that easy. Firstly, it is often difficult to gather provable true facts that can be used to defend the action because influential persons may be able to deflect investigations or discourage subordinates from disclosing information or testifying against their superiors. The media institution may have been given information by a confidential source whose information has proved reliable in the past. But when the institution is sued for defamation by a powerful and influential figure, the source may refuse to testify because he or she is fearful of the consequences that might ensue from testifying against the powerful person.

### **Accessing information to check the facts**

To overcome these problems when gathering and corroborating facts, far greater use should now be made by the media on the constitutional provisions on the right of access to information. Thus section 62(1) of the Constitution provides that the media has the right to have access to information held by the State or institutions or agencies of government at every level where access to the information is required in the interests of public accountability. Section 62(2) also provides for access to information by the media held by any person, including the State, where the information is required for the exercise or protection of a right which could include the right to media freedom. However, section 62(4) provides that legislation must be enacted to give effect to this right and, unfortunately the pre-existing legislation, the Access to Information and Protection of Privacy Act [*Chapter 10:27*] is replete with grounds upon which access is excluded. The completely antiquated Official Secrets Act provisions could also be used to deny access to government information. On the other hand, section 64(4) of the Constitution could be used to invalidate some of these restrictive provisions. This provides that legislation giving effect to the right of access to information “may restrict access to information in the interests of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

### **Reasonable mistakes**

In South Africa the courts have used the constitutional provisions on freedom of expression and of the media to develop the common law on defamation relating to the mass media. This approach towards the liability of the media seeks to achieve a better balance between the protection of reputation on the one hand and the right and duty of the press to inform the public about matters of public interest.

The South African courts have decided the media plays an important role in investigating and exposing malpractices in both the public and private sectors and therefore some latitude must be allowed to the media in the interests of keeping members of society informed about what Government is doing or has done. They have decided that errors of fact should be tolerated,

provided that statements were published justifiably and reasonably in the public interest, that is with the reasonable belief that the statements made are true. This approach has been used particularly in respect of cases where the press has published articles about the fitness of public officials to hold public office or that they were engaging in corruption. In *Thembi-Mahanyele v Mail and Guardian & Anor* 2004 (6) SA 329 (SCA) the newspaper had published an article that suggested that a Cabinet member was corrupt. The Court said freedom of expression in political discourse is necessary to hold members of the Government accountable to the public. See also *Zillie v Johnson & Anor* 1984 (2) SA 186 (W).

The South African approach has not so far been followed in Zimbabwe as there has been no definitive decision of the effect of the constitutional provisions. The courts continue to require for defence of justification that the facts must be true. It is no defence that a story was published in the public interest reasonably believing facts to be true and after taking all reasonable steps were taken to verify the facts. It is only a defence if the facts are true and publication was in the public interests. It is strongly arguable that the freedom of expression provision in the 2013 Constitution will require that this position be changed. Section 61(5) provides that freedom of expression and freedom of the media excludes malicious injury to a person's reputation or dignity. Impliedly, therefore, it is only when the defendant acted maliciously that the right to freedom of expression does not apply. Put in the context of media reporting a defamatory statement is published with maliciously if the media institution knows that the information it is publishing is false and it proceeds to publish it with the malicious motive of harming the reputation of the plaintiff. This section is subject to the general limitation provisions of section 86(1) of the Constitution that requires that the fundamental rights and freedoms must be exercised reasonably and with due regard to the rights and freedoms of other persons.

This approach does not mean that the media would now have a licence to publish untrue statements about politicians or business people. They too have the right to protect their reputations. Deliberate character assassination would certainly still be actionable if this new approach is followed.

The different approaches to a situation where the media was seeking to expose abuse on the part of a prominent businessperson is graphically illustration in the case of *Levy v Modus Publications (Pvt) Ltd* 1998 (1) ZLR 229 (S) The plaintiff, a well-known businessman, sued a newspaper for defamation. The newspaper had published two editorials criticising the manner in which P had implemented his project to develop a shopping complex. On appeal, the majority of the court decided that paper had defamed the businessman. The editorials had implied that P was a crook, that he had corruptly used his wealth and his political connections to suborn officials who ought to have prevented the continuation of the project, and that he had bent the rules and violated the law in pushing through the project. The majority also decided that the defence of justification had not been established as the statements had not been shown to be true.

In a strong dissenting judgment the minority of the court decided that in democracy the public should guard against the tendency of prominent, wealthy and well-connected people in society

to get away with breaking and bending the law and rules, and trampling on the rights of other citizens. In this case, the paper had a right to raise these issues pertaining to the conduct of this public figure. The statements were generally true and the comments based on them were fair. The minority therefore decided that the paper was therefore not liable to pay damages for defamation.

### **Requiring actual malice for defamation of public figures**

Relying on case law from the United States of America the judge in *Mushunje v Zimbabwe Newspapers* HH-47-17 wrongly rules that in our law a public figure can only successfully sue the media for defamation if he or she establishes that the defamatory statement was made "with actual malice or reckless disregard for the falsity or otherwise of the statement." This extremely high burden of proof on the plaintiff has meant that defamation claims by public figures in America rarely prevail. The American approach has not been followed in Zimbabwe. Indeed it is submitted it should not be adopted as it affords inadequate protection to public figures against reputational harm. It may be appropriate to make allowances for reasonable mistakes by the media, but even unreasonable mistakes would not lead to liability under the American approach unless the plaintiff can prove that the story was published with a malicious motivation.

### **Conclusion**

In his State of the Union address to Parliament President Emmerson Mnangagwa said that his goal is to build a new Zimbabwe based on transparency, accountability and hard work. Government is now taking active steps to root out corruption and other abuses. The mass media can and should play an active role in this regard by holding both public officials and private business people accountable. Responsible investigative reporting must be encouraged and laws that inhibit and constrain media institutions from performing this role must be revised. The law should facilitate reasonable probing of abuse of power and impropriety, whilst at the same time giving adequate protection against reputational harm.