Reporting a court case arising from false social media report
Case note on *Mushunje v Zimbabwe Newspapers* HH-47-17
By G. Feltoe

The false social media report

The facts of the *Mushunje* case show how false and highly defamatory information published on a social media website can spread like wildfire and do enormous damage to the reputation of a person. In this case the damage was to a well-known professional model who was falsely accused of serious child abuse.

The events leading to an action for defamation by the plaintiff against the Zimbabwe Newspapers were as follows: a social media site published a highly damaging article about the plaintiff. It falsely alleged that the plaintiff was HIV positive and had injected her HIV tainted blood into the son of her boyfriend. She was also alleged to have made the child drink her urine and to have physically abused the child. Based on these publications, the mother of the child filed a complaint against plaintiff with the police. The social media site then published another article alleging that plaintiff had been arrested. Charges of child abuse were then brought against the plaintiff but she was acquitted on all charges after medical tests on both the child and the plaintiff showed that neither was HIV positive, nor did the child exhibit any signs of abuse.

The Zimpapers story

Zimpapers published a series of articles about this matter which were also posted on its website and this resulted in a number of international online sites re-publishing the same story. The newspaper articles dealt with the court case and the acquittal, and ended up pointing out the injustice to which the plaintiff had been subjected as a result of the false allegations levelled against her.

In addition to an action for defamation against the website which had originated the false story, the plaintiff sued Zimbabwe Newspapers for defamation based upon its reporting of this matter in its two newspapers, *The Herald* and *H-Metro*.

Plaintiff alleged that newspaper articles were unfair, unbalanced and inaccurate and failed to make it clear in its reports that there were merely allegations against the plaintiff instead of presenting them as facts. The plaintiff said the defendant's reporters had not approached the plaintiff to obtain her side of the story. The plaintiff also argued that the newspapers continued to report the allegations long after the results of the medical facts were already in the record.

The reporters of the defendant admitted that they had read the story on the social website but maintained that they had based their reports solely on the public court proceedings. The

court accepted this. The reporters said they did not seek to interview the plaintiff during the court proceedings because this would have amounted to interference with court proceedings which were underway but, after the plaintiff was acquitted, they interviewed her and published what the plaintiff said in the interview.

Whether the stories were defamatory

The court accepted that the articles were defamatory although, confusingly, later the judge said that she was "not convinced that the articles were unfair, unbalanced and inaccurate and are thus defamatory of the plaintiff as alleged." (Emphasis added by case noter.)

Defamation of public figures

The court erroneously stated that in an action for defamation by a public figure such as a celebrity or a politician, the plaintiff must establish that the defamatory statement was made "with actual malice or reckless disregard for the falsity or otherwise of the statement." The judge derives this requirement from the American case of *St Amant v Thompson*, 390 U.S. 727(1968). This approach, which was originally enunciated in the case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is squarely based on the emphatic freedom of the press guarantee in the First Amendment to the American Constitution. 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 and it is not correct that in our law a public figure can only succeed in an action for defamation if it is shown that there was malice or reckless disregard for the falsity or otherwise of the statement by the press in publishing the statement.

Indeed in South Africa, under South African common law, the press was strictly liable for defamation. However, in a series of constitutional decisions the South African courts have decided that there was a need to balance the right to untarnished reputation against the right to freedom of expression and the duty of the press to inform the public about matters of public interest. This has led the South African courts to modify the strict liability approach by providing that a newspaper is entitled to a defence where it publishes a story in the public interest believing it to be true after taking all reasonable steps to check the facts even if the story turns out to be false. In effect a newspaper will not be liable if it was not negligent. The courts have said that some latitude must be allowed to the press in order to allow robust and frank comment in the interests of keeping members of society informed about what Government is doing or has done and revealing abuses of power in the public and private sectors. Errors of fact should thus be tolerated, provided that statements are published justifiably and reasonably: that is with the reasonable belief that the statements made are true. This did not mean that there should be a licence to publish untrue statements about politicians. They too have the right to protect their reputations and publication of false statements in mass circulation newspapers can do enormous damage. See *National Media Ltd & Ors v Bogoshi* 1998 (4) SA 1196 (SCA); *Khumalo & Ors v Homilisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC); and *Thembi-Mahanyele v Mail and Guardian & Anor* 2004

(6) SA 329 (SCA). There is considerable merit in this approach and it is strongly arguable that, under section 61 of the Constitution of Zimbabwe which guarantees the freedom of the media, the press should be entitled to similar protection to that that obtains in South Africa where a print or electronic media outlet publishes a story in the public interest reasonably believing its facts to be true. Section 61(5)(c) makes it clear that freedom of the media excludes maliciously injuring a person's reputation. There is no clear ruling in Zimbabwe as to whether we will follow the constitutional rulings in South Africa that the press is entitled to raise the defence that it published facts in the public interest reasonably believing the facts to be true but which facts turned out to be false.[1]

In Zimbabwe the position regarding the approach towards the *animus injuriandi* requirement remains somewhat unclear. Originally in *Smith NO and Lardner-Burke NO v Wonesayi* 1971 (2) RLR 62 (G) the court decided that subjective intention to defame is not required. However, later cases seem to have adopted the approach that some form of intention is required. In *Garwe v Zimind Publishers (Pvt) Ltd* 2007 (2) ZLR 207 (H) at 235 D-E the judge quotes Burchell to the effect that subjective intention to defame is required on the part of an individual as opposed to the mass media, but then proceeds to find that the newspaper, its editor and reporter had had the intention to defame.[2]

In the present case the judge also said that "persons who find themselves in the public eye must expect a certain amount of publicity and intrusion into their private and personal lives, including inaccurate statements as long as the publicity is not malicious or reckless in its disregard of truth." This, she said, "is more so when they are public or famous figures where the happenings in their lives are, after all, news for the average citizenry. They should therefore not be thin skinned, belligerent or litigious, but ought to have the courage to take such social blows, which go with the territory, on the chin. They must understand that once they are in the public arena they become targets of pot-shots for real or imagined indiscretions, errors or failures. Therefore, unless the publications about them are malicious, or reckless in their disregard of truth, or clearly intended to tarnish their reputations, such persons should not rush to court to seek damages." (Emphasis added by case noter).

Whilst public figures are in the public eye, in *Makova v Masvingo Mirror (Pvt) Ltd & Ors* 2012 (1) ZLR 503 (H) it was pointed out that the fact that the plaintiff is a politician and a public figure, whose life is necessarily in the public domain and open to criticism, does not divest him of protection against harm to his dignity and reputation. In particular, the defendant is not entitled to protection against defamation if it makes false allegations. See *Levy v Modus Publications (Pvt) Ltd* 1998 (1) ZLR 229 (S). It has not been accepted in Zimbabwe that a defendant is only liable for defamation of a public figure if it is proved that the statement was made maliciously. It

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[1] In the *Garwe v Zimind Publishers (Pvt) Ltd* 2007 (2) ZLR 207 (H) at 231 the defendants contended that they genuinely believed in the truth of the statement they published. The court found that published facts were false and rejected the defence of justification.

[2] Intention, the court said, can take the form of *dolus directus* or other forms of *dolus* like *dolus indirectus* or *dolus eventualis*. See p 235D.

is only when the defendant relies on the defence of qualified privilege that the issue of malice may arise as this defence can be defeated if the defendant acted maliciously.

Headlines

The articles complained of and published in *The Herald* and *H-Metro* had headlines which portrayed as bald facts, rather than as allegations, that the model had injected her lover's son with her HIV infected blood and had forced the boy to drink her urine. For example, one of these headlines read: "MODEL INJECTS HIV BLOOD IN CHILD…..**Forces boyfriend's son to drink urine."**

The stories following these headlines did, however, refer to allegations against the plaintiff made in court proceedings. The judge found that taken alone these headlines were clearly defamatory However, the judge went on to state that reasonable readers do not go by the headline alone but will read the content of the story to obtain the true gist of the story. This, she said, is "more so when one is a 'famous' person where the headline is an effective bait to catch the eye of more readers."

The judge agreed with the defendant that the headlines complained of are mere captions which indicate the nature of the story to follow so as to catch the readers' attention to entice them to buy the paper and read the article. She said if that actions for defamation were to be based merely on newspaper headlines, then "there would be an onerous plethora of litigation." She went on as follows: "In my view a headline is akin to the heading on any legal document, which does not create any substantive rights for the parties concerned but merely indicates what the legal document is all about. In the same way that one cannot sue for breach of a heading on a legal document, one ought not to be able to claim infringement or damage to reputation merely from a newspaper headline which is not supported by the substance of the article."

It is submitted that the heading in a legal document is entirely different from a headline in a newspaper. A legal document is likely to be read carefully by the persons that it will bind or affect. On the other hand, the courts have accepted that the ordinary reader of a newspaper is not supercritical and does not read every item with meticulous care. Rather than engaging in a process of careful intellectual analysis, because of the mass of material the reader is likely only to form an overall impression of the material. See *Mugwadi v Dube & Ors* 2014 (1) ZLR 753 (H). Because this reality is recognised by the courts, it is important that the headline does not create a misleading impression. A headline should accurately sum up the contents of story that follows. It is advisable that where a newspaper is covering criminal allegations that have yet to be proven that its headline reflects the fact that these are allegations and not proven facts. There is a danger of misleading readers when sensational headlines are used to catch their attention.

The defence of qualified privilege[3]

The defendant raised the defence of qualified privilege, contending that it had a duty to inform the public about these court proceedings and their outcome, and the public had a reciprocal interest to receive this information. It maintained that its coverage of the court proceedings from the initial remand to the dismissal of the charges was fair, accurate and balanced coverage.

The court set out the requirements for this defence in a rather confusing and somewhat inaccurate fashion.

The judge correctly states that for qualified privilege the person making the statement must have a duty or interest to communicate the information and the recipient of the statement must have a reciprocal duty or interest to receive the information.

The judge says that the defendant must show that the statement is true, adding that truth is an absolute defence to a claim for defamation. There seems to be some confusion here between the defences of justification and qualified privilege. The judge says that truth alone is an absolute defence. Truth is an essential requirement for justification but for justification the statement must not only be true but it must it must also be in the public interest to publish the true facts. A defendant is not allowed to dredge up and publish long forgotten true facts where it is not now in the public interest or for the public benefit to publish these facts.[4]

Typically the defence of qualified privilege will fail if the published statement is not true. Thus in the *Garwe* case the defence failed because the statement about the judge was false. However, it is not invariably the case that the statement must be true. The law recognises certain situations where a person has a right to make a statement even though the statement turns out to be untrue. Thus in *Musakwa v Ruzario* 1997 (2) ZLR 533 (H) the court held that where the defence of qualified privilege is raised it is not necessary to establish that the defamatory statement is true. The degree of truth in the defamatory statement is only relevant to the issue of whether the bounds of privilege have been exceeded or the statement was motivated by malice.

Another requirement for the defence of qualified privilege, the judge says, is for public figures there must be no malice or reckless disregard of the truth of statements complained of. In fact our law does not draw any distinction between public figures and other persons: malice will defeat qualified privilege in both cases.

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[3] The requirements of the defence of qualified privilege is set out clearly in the *Garwe* case at 230 and in *Chinamasa v Jongwe P& P Co (Pvt) Ltd* 1994 (1) ZLR 133 (H) 163-165 and *Musakwa v Ruzario* 1997 (2) ZLR 533 (H).

[4] See J Burchell *The Law of Defamation in South Africa* pp 212-214.

A further requirement, the judge says, is that the plaintiff's reputation is not damaged. The correct position is that the defence of qualified privilege allows the defendant to publish what amounts to a defamatory statement where it has a duty to do so and the recipient has an interest in receiving the information. With press reporting of court cases, the press is entitled to report the start of a criminal case but it is then expected to report later developments in the case, especially if the accused person has been acquitted.

Finally the court says that a defendant may raise either absolute or qualified privilege, pointing out that the defence raised in the present case was qualified privilege. What the judge omits to mention is that absolute privilege only applies to statements made by members of parliament during parliamentary proceedings.

The court found that the reporting by the defendant was a "quite" fair and balanced and "largely" accurate account of what had occurred when the matter was going through the courts and that the defendant did not act maliciously or with reckless disregard for the truth. As the report dealt with allegations of child abuse, this was clearly a matter of public interest upon which defendant had a duty to report to the public.

Conclusion

The court made rather heavy weather in dealing with what should have been a relatively straightforward matter of whether the newspaper reports were defamatory and, if they were, whether they fell within the protection of the defence of qualified privilege. Once the court found that the newspapers had not based their reports on the malicious and false report on the social website, the sole issue was whether its reports of the court proceedings fell within the ambit of the defence of qualified privilege. The newspapers were entitled to report the criminal court proceedings against the plaintiff provided they did so fairly and accurately and in a balanced fashion, and provided that they did not report in a manner that showed that they were actuated by malice in relation to the plaintiff. In the present case, although the somewhat sensational headlines used did not make it clear that these were mere allegations, the content of the stories made it clear that criminal allegations had been made. The fact that the plaintiff was a public figure was only relevant to establishing the public interest that the public would have on receiving information about this matter. But even if the plaintiff was not a public figure the public would have still had a right to know that she was being prosecuted on serious allegations of child abuse.

The outcome in this case, of course, would have been different if the defendant had simply reproduced the totally false and highly damaging story contained in the social media. By carrying this false story in its newspaper, it would have been guilty of spreading further this scurrilous story and the defence of qualified privilege would not have applied.