JONATHAN NATHANIEL MOYO

Versus

JOHN LANDA NKOMO

And

DUMISO DABENGWA

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 3 FEBRUARY 2011

J Sibanda for plaintiff
F Chirimuuta for the defendants

Judgment

BERE J: On 18 July 2005 the plaintiff issued summons out of this court against the defendants for the payment of Z$2 000 000 000,00 (two billion dollars) being damages for defamation. The claim was strenuously denied by the two defendants leading to the subsequent protracted trial.

The detailed background

At the time this suit was initiated the plaintiff was the Minister of Information and Publicity in the Office of the President and Cabinet.

The first defendant was a cabinet Minister and the National Chairman of a political party called ZANU (PF).

The second defendant was a committee member of the Politburo of the same political party ZANU (PF).

The circumstances which led to this suit and as taken from the plaintiff's declaration were given as follows:

"4. On the 12th of January 2005 both defendants said of and concerning the plaintiff words to the following effect:

4.1 that the plaintiff had instigated, funded and led the hatching of a coup plot against President Robert Mugabe and others in the top leadership of

ZANU (PF) party with the view of removing the national leadership of the government.

4.2 that the coup plot by the plaintiff crafted a "Tsholotsho Declaration" that detailed the coup plot.

4.3 that plaintiff had paid unspecified sums of money sourced from foreign persons or countries hostile to Zimbabwe to unnamed people including some members of ZANU (PF)'s Tsholotsho District Coordinating Committee (DCC).

4.4 that the plaintiff was to be barred from contesting in the ZANU (PF) primary election because of his role in the coup plot.

5. The above meeting and statements made by both defendants were widely published in the press circulating in the country.

6. The statements by the defendants of and concerning the plaintiff were false, wrongful, unlawful and highly defamatory of the plaintiff …"

For the alleged utterances by the defendants the plaintiff sought to be paid a sum of Z$2 000 000 000,00 (two billion dollars) in defamation damages.

In response to the claim against them both defendants denied any form of liability and offered a joint plea.

In their joint plea to the plaintiff's claim both defendants accepted having attended the meeting in Tsholotsho on the 12th of January 2005 but denied that that meeting was a public meeting. Defendant denied having addressed the meeting in issue. The defendants denied everything that was alleged against them by the plaintiff.

They however concluded their plea by stating as follows:

"5.2 In any event, even if the words complained of were defamatory, which is not admitted, defendants aver that the statements were true or substantially true and the publication thereof for the public benefit.

5.3 In the circumstances, any publication of these statements in the press, which is not admitted was not wrongful."

They proceeded to seek for the dismissal of the plaintiff's case with costs.

I will later in this judgment comment in greater detail on the ambivalence nature of the joint plea filed by the defendants.

At the pre-trial conference conducted by the parties before my brother judge Ndou J on 7 September 2005 it was agreed that the following issues be determined at trial.

1. Whether the meeting of 12 January 2005 was a public or private meeting?
2. Whether the defendants uttered the words complained of.
3. Whether, if the words complained of uttered by the defendants, they were true or substantially true or for the public benefit?
4. Whether if the words complained of were uttered by the defendants, plaintiff suffered any damages and the extent thereof?

It will be noted that as the trial unfolded there were basically two fundamental developments which took place. Firstly because of the unprecedented hyper inflation which characterized the economy of this nation, there were numerous applications filed to amend the amount of the claim. I advised the parties that given the extremely unusual circumstances that we were operating under it would be prudent for the plaintiff to defer the application for amendment to the end of trial. This was subsequently done. The plaintiff sought to amend its claim from the original suit of Z$2 billion to Z$100 000 000 000,00 (one hundred billion dollars). The application was strenuously opposed by the 1st defendant. I reserved my ruling in this matter.

The second development was the determination of the 2nd defendant's costs of suit as a result of the withdrawal of the suit against him by the plaintiff. It is these two issues that I wish to deal with before I deal with the main judgment.

The Application for amendment of the amount of claim

As stated, the application for amendment of the amount of claim was prompted by the unprecedented hyper inflation which gripped this country from the time the trial commenced up until the hearing was completed. Inflation was astronomically rising. The times were unusual and literally presented what I would refer to as an economic circus. Despite the opposition to the application by the defendant I felt judiciously bound to grant the application. In fact I would have been surprised if the application for amendment had not been made because by the time the application was made the original amount of claim was literally non-existent. It had been completely wiped out by inflation.

The second defendant's costs

For some reason, after the 2nd defendant had just opened his case and when he was in the middle of giving his evidence in chief, the plaintiff decided to withdraw his claim against him but declined to offer the 2nd defendant his costs up to this stage of the proceedings. The 2nd defendant insisted on getting his costs.

The plaintiff through his counsel insisted that the 2nd defendant was not automatically entitled to his costs but that such costs were at the discretion of the court. I agree. Costs are generally at the discretion of the court but that discretion must be judiciously exercised. Discretion is not just grounded in air but must be properly anchored.

To guide the parties in this case, perhaps reference should be made to Order 7 Rule 52(1) which reads as follows:

> "Where the defendant has entered appearance the plaintiff shall not be entitled, save with the defendant's consent in writing to withdraw the action until he has paid the defendant's taxed costs or has undertaken to pay such costs. Such undertaking shall be incorporated in the notice of withdrawal."

The established norm is that a party who decides to withdraw action against the other party must tender costs. The plaintiff in this case did not advance his reasons for withdrawal. Both the court and the 2nd defendant were deprived of such reasons.

In order to depart from the norm there must be special reasons. No such reasons were advanced. I think it would be a sad day in litigation proceedings if a plaintiff were to be allowed to initiate proceedings and withdraw such proceedings without tendering costs. Such practice if unchecked would promote spurious and adventurous litigation.

In this case, it is doubtful that even if the plaintiff had allowed his case to run its full circle he would have been able to establish his case as against the second defendant. I am more than satisfied that the plaintiff properly appreciated the futility of pursuing his claim against the second defendant Dumiso Dabengwa. In such circumstances the plaintiff cannot avoid the payment of costs. I accordingly order that the plaintiff pays the 2nd defendant's costs up to the stage he formally withdrew his action against him.

Analysis of the issues and evidence

There has been a lot put into this trial. So many witnesses have testified and several exhibits totaling 49 have been produced. Not everything is relevant in determining the issues as agreed upon by the parties.

However, I remain cognizant of the following; that the meeting at Tsholotsho on 12 January 2005 and the function at Dinyane Secondary School on 18 November 2004 are central

to this trial. This is so because it was in Tsholotsho on 12 January 2005 that the 1st defendant was alleged to have uttered the offending and defamatory words. Secondly, it was the function at Dinyane Secondary School and the subsequent gathering at Rainbow Hotel, Bulawayo on 18 November 2004 which appeared to have ruffled senior members of ZANU (PF) who included the 1st defendant.

I also did not loose sight of the fact that because this trial involved two fairly senior politicians the gathering of evidence was never going to be easy especially given the fact that all those people who gave evidence bore some form of allegiance to the two litigants given their political association.

In my effort to determine the issues I remained alive to the fact that the plaintiff did not himself attend the Tsholotsho meeting of 12 January 2005 where the alleged defamation took place. Equally true is the fact that the defendant did not attend the Dinyane function. Both litigants did not have first hand knowledge about what took place at these places respectively. They had to rely to a large extent on reports they received from supposedly "reliable sources".

Having made these observations I now wish to proceed and deal with the issues as set out by the parties in the joint pre-trial conference minute.

Was the meeting of 12 January 2005 a public one?

This issue arose because of the two diametrically opposed positions taken by the plaintiff and the defendant. The plaintiff's position was that this was a public meeting whereas the defendant maintained it was an exclusively ZANU(PF) DCC meeting, and therefore a private one.

I am relieved that both parties recognize and are agreed that exhibit 47 (the minutes of the DCC meeting held in Tsholotsho) should not be religiously accepted because of its notable limitations. Both parties are agreed that the minutes on their own are inadequate and that they scream for qualified acceptance. The minutes do not tell the whole story of what took place at Tsholotsho. This is basically because the original minutes were not availed to the court and more importantly the fact that even the tendered minutes were not confirmed to be a true record of what happened on 12 January 2005. Equally notable is the fact that the minutes as presented did not tally in many respects with evidence given by the witnesses both from the plaintiff and defendant side.

Having gone through the minutes and having had the benefit of hearing *viva voce* evidence with regards to the meeting of 12 January 2005 which culminated in the compilation of those minutes, I am satisfied that not all those people who attended that meeting were members of ZANU(PF). The witnesses who testified and in particular, Believe Gaule was able to

single out individuals like Nicholas Ncube, S T Nleya, James and other members of the security agents who were not members of ZANU(PF). This evidence was not challenged to the satisfaction of the court.

In addition, it was also made clear that there was no security put in place to ensure people who had nothing to do with ZANU(PF) had no access to the meeting. Really such a meeting could not qualify to be an exclusively ZANU (PF) meeting. It was a public meeting despite those from defendant's stable desiring it to be regarded as an exclusive ZANU (PF) meeting.

If the argument is that the plaintiff could not have been defamed in an exclusively ZANU(PF) meeting, that argument does not appeal to me because such a gathering would certainly not enjoy the same privilege as afforded to parliament.

Whichever way one looks at it I am satisfied that the meeting of 12 January 2005 was a public one.

Did defendant utter the words complained of on 12 January 2005?

The plaintiff's evidence in this regard centered on 4 witnesses namely Rose Masuku, Virginia Ndlovu, Joram Ndlovu and Believe Gaule.

At the time they testified Rose Masuku and Virginia Ndlovu were still active members of the defendant's political party ZANU (PF).

Virginia Ndlovu who was the second witness to testify for the plaintiff with regards to the alleged defendant's utterances noted that it was the defendant who was picking up people from the floor starting with Gaule. The people were being asked by the defendant to explain in detail what happened at Dinyane on 18 November 2004. The critical part of her evidence was that after people had spoken the defendant said:

> "… it would appear you did not know what you were doing, you were exploited. … I see my fellow men you were being exploited you did not see what was happening because what you were involved in is that you wanted to stage a coup against the President … The trouble with you is that you get led by the nose. This young man, a "mafikizolo" has led you into a bad thing because it was a smart coup. We brought this young man in, you do not know where we got him … this smart coup continued to the Rainbow but you as simple villagers did not know there had been something like that at Rainbow."

When subjected to a lengthy cross-examination she generally stuck to her story. The thrust of her evidence did not change.

Rose Masuku another active member of ZANU (PF) at the time told the court that after Gaule had spoken the defendant commented that Gaule had not said anything and went on to say:

> "You do not know, you do not know, a coup was to be done and completed here in Tsholotsho. The coup was in its phase I. Jonathan and company were going to carry out this coup. It was going to be said Nkomo out, Msika out and it was going to remove all members of ZAPU. From there it was going to go on to phase two. The phase 2 was to force and remove the President."

The witness said the defendant's utterances were complimented by the comments of Dabengwa who said among other things the plaintiff did not go to war and that he had brought him from South Africa.

The witness said political slogans demeaning the plaintiff were then made by the defendant. The slogans were along the following "viva ZANU, forward with ZANU (PF). Down with Jonathan the sell out."

The evidence of Joram Ndlovu, to a large extent corroborated that of the two witnesses.

This witness said the whole day, the story was about the plaintiff and the speeches were punctuated by slogans calculated to demean the plaintiff. The witness who by his own admission is closely related to the plaintiff could not take it in. The result of all this was his unceremonious resignation from ZANU (PF). Having examined this witness' testimony with extreme caution given his close relationship with the plaintiff I was satisfied he gave a true narration of what took place.

Of all the witnesses who testified, Believe Gaule appeared to be more sophisticated in terms of his status. He also appeared to be more enlightened. He opened his testimony by humbling himself before the court and emphasizing that he held both the defendant and Dabengwa in high esteem because of their illustrious history in both pre and post independent Zimbabwe and that he felt awkward that he had to give evidence against these two illustrious politicians, the politicians he adored and respected from his childhood.

He adored Dabengwa to the extent that he named one of his sons who was then in grade six the name Dabengwa.

He said he was related to the defendant and that his mother would not approve him testifying against him.

He expressed regret that it was extremely unfortunate he had to give evidence against the defendant and Dabengwa given the two's respectable positions in the party, that he loved

so much. He emphasized his decision to testify was motivated by his desire to have the world know the truth.

He took the court through both the function at Dinyane Secondary School and the meeting at Tsholotsho of 12 January 2005, giving the court the background of both meetings. The witness captured the words uttered by the defendant as follows; "I have now realized that you do not know. … This thing which was happening here did not start here. It started at other places including Ntalale and it was meant to conclude at Dinyane. This thing was about Nkomo out, Chinamasa in, Msika out, Mnangagwa in, then Lesabe in. The plot would be in two phases. Phase two was going to force the President to retire and someone would take over. All this was a smart coup. For all this plan they used Professor Jonathan Moyo. That young man was used by these people. This was a way of destroying ZAPU."

The witness was subjected to a lengthy cross-examination. The cross-examination was thorough and searching. I did not detect any traces of variation or inconsistencies in his testimony.

It occurs to me that the general tenure of the witness' testimony is that the defendant did utter the words as captured above.

However, these words did not quite fit into the elaborate version given by the plaintiff himself when he in his testimony tried to summarise what he was told by Gaule.

The emphasis in all the witnesses' testimony was that the plaintiff was linked to the smart coup to change the leadership of this country.

Let me hasten to say at times one feels there is a serious misconception about what is perceived to be inconsistencies in the testimony of witnesses. Witnesses who testify on anything are not expected to recount events as if they were recording machines. People will observe or hear certain things but may put emphasis on different aspects of what they hear and see. There is absolutely no way witnesses can see, hear and then repeat the same thing in similar fashion. What is required is to try and see if there is a common denominator/common thread running in the witnesses' testimony.

In my assessment of the witnesses' evidence, I detected no serious and material variations in their testimonies.

In response to the alleged utterances of 12 January 2005 the defendant completely denied what all the plaintiff's witnesses said about him. He denied ever chairing the meeting despite the minutes – exhibit 47 and the evidence by the witnesses suggesting that in essence he literally chaired the meeting particularly if one considers the fact that the minutes despite

their inadequacies suggest he gave the opening remarks and that it was him who would choose the people when they spoke.

It is not normal in a meeting that the choice of speakers at any given time is given to anyone other than that remaining as the prerogative of the chairperson.

It appeared the thrust of the defendant's approach was to deny virtually everything that put him closer to the alleged utterances. It was also clear that he did not respect the plaintiff even for the work he did for his party before he left that party. The defendant had the audacity to accuse the plaintiff of being hostile to the private media during his reign as Information Minister and forgot he was bound by Cabinet collective responsibility. The doctrine presupposes that the defendant must either fall or stand with the plaintiff for whatever the plaintiff did whilst he was in office. The evidence of Dabengwa provided another dimension to the whole episode. For the first time the court was told that when the meeting of 12 January 2005 was held there were members of the press who however were advised to stay away from the venue of the meeting. These people must then have been milling around the venue of the meeting. The press reports which followed the meeting of 12 January 2005 must clearly be looked at within this context.

The difficulty with Dabengwa's testimony was that on critical issues relating to the defendant he pleaded loss of memory or offered unwarranted explanations which were obviously calculated to protect the defendant.

When questions were put to him by plaintiff's counsel concerning the offending words contained in the declaration he proffered answers not only for himself but also for the defendant despite not having been asked to comment on defendant's behalf.

When questioned on the origins of the "smart coup" phrase he seemed to suggest this had emanated from the politburo meeting of 30 November 2004 yet a close examination of the extract of minutes of that meeting show clearly there was no specific reference to "smart coup". See exhibit 13 which captures the meeting of 30 November 2004.

Questioned further he then shifted and suggested that one of the DCC members had initiated the term "smart coup". Compare this with the evidence of Gaule who was emphatic this was initially said by the defendant.

Perhaps one needs to understand why this witness's sympathy would lie with the defendant. The two have come a long way together. According to Dabengwa the two first met in Zambia in the early 70s and worked together in both pre and post independent Zimbabwe. There is no doubt the two have an illustrious political history. They both regard the plaintiff as not having participated in the liberation war and as a "mafikizolo" in politics in general and in

ZANU (PF) in particular. It is only natural and understandable that Dabengwa would sympathise more with the defendant as opposed to the plaintiff.

Josephine Moyo's testimony demonstrated her determination to support the defendant at all cost. The court was completely taken aback when the witness attempted to deny that the plaintiff had not been unanimously elected by Tsholotsho DCC to represent Tsholotsho in the then impending elections of 2005. Her denial was made despite there being overwhelming evidence pointing to the contrary and suggesting that herself as a member of Tsholotsho DCC had actively participated in choosing the plaintiff. It was only when minutes to do with the election of the plaintiff were produced that she subsequently made some concessions.

There was yet another significant aspect of her testimony which heightened the court's caution in dealing with her evidence on the events of 2 January 2005. She attended the Lupane Provincial Election Directorate armed with her curriculum vitae despite her full knowledge that the plaintiff had been chosen by her own DCC to represent Tsholotsho as the Member of Parliament. She struck me as one of those women who went to Tsholotsho having been clandestinely advised to be ready with her curriculum vitae because of the political circus that had gripped her party at the time. This was despite her being fully aware that the selection of aspiring Members of Parliament could not have been initiated at the provincial but at the district level. She kept all these secret happenings in the party to herself instead of grabbing the first opportunity to at least notify the then DCC chairperson of these developments. She participated in the *ad hoc* committee's deliberations to ostensibly declare Tsholotsho a preserve of aspiring women candidates despite what appears to the court that a decision had already been made before the meeting of 2 January 2005 to remove the plaintiff from participating in elections on the ZANU(PF) ticket.

This witness' testimony of what transpired on 18 November 2004 and 12 January 2005 had to be looked at with extreme caution. I agree with the plaintiff's characterization of this witness' evidence of the events of 18 November 2004 that it only showed her paranoiac inclination. In short the witness did not acquit herself well in these proceedings. Her own interpretation of the events at Dinyane Secondary School was frightening to say the least.

Headman Moyo was one of the immediate beneficiaries of the suspension of the provincial ZANU (PF) leaders for he was thrust into the hot seat of acting Provincial Chairman after the suspension of Mudenda. He owed a lot to the defendant and in my view it could have been naïve for anyone to expect him to shuttle the tree. In his own testimony, he indicated and portrayed himself as the kind of politician who would religiously accept or just accept directions from above with unquestionable obedience and loyalty. He had much more to loose in testifying against the defendant. It was naturally expected of him not to offend the defendant in his testimony.

The witness showed his shortcomings as a leader when he watched helplessly his fellow senior politicians flouting the ZANU (PF) disciplinary proceedings by unprocedurally ejecting people like Gaule from the Lupane meeting of 2 January 2005. He gave the impression he was a powerless leader who could do anything to protect his newly found comfort as provincial party chairperson.

Patrick Ngwenya portrayed himself as a cunning fellow. He went on a rampage to suspend fellow party members from DCC Tsholotsho for attending the Dinyane function and forgot to suspend himself since he had also attended the meeting and at one stage acted as the master of ceremony before handing over the function to Mudenda. The witness' testimony as presented will show that he was the kind of person who would do anything to please people like the defendant in the hope that in the process he would carve his own political career.

This explains why he offered himself to have been the person who coined the term "smart coup" despite overwhelming evidence presented to this court showing that the defendant was the first person to have used the term at the gathering of 12 January 2005 in Tsholotsho. His hatred for the plaintiff was shown by his constant sloganeering against the plaintiff. His closeness to the defendant was also demonstrated by the fact that according to the witnesses who testified he was granted more opportunity to talk at Tsholotsho on 12 January 2005 than any other participant. The witness' apparently biased testimony against the plaintiff did not edify or bolster the defendant's case.

John Vumile Dube who replaced Gaule as DCC Chairperson has known the defendant and worked with him closely ever since he joined the liberation struggle in Zambia. He worked as the defendant's subordinate for quite a long time in Zambia and in the court's view his evidence about the events at Dinyane Secondary School and at Tsholotsho on 12 January 2005 must be looked at within this context. In my view that evidence was deliberately tailor made to suit what the defendant desired it to portray.

It was quite interesting to hear the witness testifying that Gaule had suggested to him that there was need to replace the ZANU(PF) old leaders like Msika and the defendant with young men. When he was asked to indicate which young politicians would be voted for to replace these old politicians he curiously mentioned *inter alia* the late Lesabe who herself could not have qualified to be referred to as young politician. Such were the inconsistencies which characterized this witness's testimony. The witness, having succeeded Gaule under very controversial and unclear circumstances was not expected to give evidence which would place Gaule in good light. This is human nature.

K M Tshuma, the author of the minutes of 12 January 2005 could not produce the original record of those minutes, neither did anyone at the meeting see him writing those

minutes. It was a well informed position that both the plaintiff's counsel and the defendant's counsel accepted that the minutes exhibit 47 could not be religiously accepted as reflecting the totality of what took place on that day. The court had to look at those minutes with caution and in conjunction with the *viva voce* evidence led in this court.

In fact I would hazard to say the court really sympathized with the rest of the witnesses who testified in support of the defendant given the defendant's strategic position in the ZANU(PF) party. He was part of the presidium in his capacity as the national Chairman of his party. It would have been unthinkable for all those he called to testify for them to testify against him. They would have had much more to loose than to gain from such kind of adventurism. I think it is fair to say that all these witnesses were testifying under some kind of pressure given this scenario.

Despite the defendant's denial that when he mentioned on 12 January 2005 that the party had taken a decision not to allow certain individuals not to contest elections on the ZANU (PF) ticket, such individuals included the plaintiff, I am more inclined to say that in fact the plaintiff was one of such targets. This conclusion was arrived at in the light of the hostile attitude which the defendant exhibited against the plaintiff throughout these proceedings and in particular the language of hate he persistently used against the plaintiff in Tsholotsho on 12 January 2005. The defendant showed he had a very low opinion of the plaintiff. He was not even prepared to give the plaintiff the benefit of doubt by accepting that he went to Tanzania during the liberation struggle despite it being common knowledge that there may not have been waterproof or reliable records showing those who actually went to or actually participated during the liberation movement of this country.

The events of Lupane on 2 January 2005 as explained by Gaule and accepted by this court clearly demonstrated that by addressing the women's league first together with a few selected individuals, the defendant was determined to ensure nothing would go wrong in ensuring that the plaintiff was locked out of the ZANU (PF) political system.

The defendant did not acquit himself well in his defence when he tried to argue that one of the lady witnesses who testified against him was a direct beneficiary of tablets supplied to her by plaintiff to combat her HIV medical condition. He also suggested that Gaule had testified against him because of finances given to him by the plaintiff. These allegations were made at a time the two witnesses had given their evidence in chief and vacated the witness stand after extensive cross-examination by the defendant's counsel. The witnesses were obviously deprived of the opportunity to defend themselves because they had no opportunity to do so. This was most unfortunate and it portrayed the defendant in bad light.

It was never going to be an easy walk for the witnesses who testified on behalf of the plaintiff to give evidence against the defendant. This was particularly so given the fact that two of the witnesses were still members of ZANU (PF). I am satisfied that in giving evidence against their very senior party leader, they were not motivated by malice but by the desire to let the world know all about what they know about the specific events they testified on. I was extremely impressed by the courage and principled position taken by the witnesses. The story they told unfolded naturally and despite them having been subjected to torching and elaborate cross examination I was unable to find any meaningful cracks in their evidence. I accept their evidence in its entirety.

Were the words uttered by the defendant substantially true and for the public benefit

This issue raises the defence of justification which was part of the defendant's plea.

One cannot effectively deal with this defence without having to consider the ambivalence nature of the plea filed by the defendant. By filing this plea and put in simple terms the defendant was advising the court "My Lord, I did not utter these words. However, in the event that you find that when I say I did not utter these words I actually uttered then, I would then argue they were true or substantially true and for the public benefit."

Mc NALLY J A in the case of *Ndewere* vs *Zimbabwe Newspapers (1980) Ltd and Anor* 2001 (2) ZLR 508 aptly summed up the legal position that guides the issue of fair comments. He remarked as follows:

> "The tests for fair comment were set out by BARTLETT J in *Madhimba* vs *Zimbabwe Newspapers (1980) Ltd* 1995 (1) ZLR 391 (H) and appeared in *Moyse supra* 359D-362C, subject to a rewording of the fifth test proposed by the learned judge. I do not think it is necessary to go beyond the third test, namely –
>
> "The factual allegations on which the comment is based must be true …"

The bulk of the defendant's cross examination of the witnesses was calculated to demonstrate that the events at Dinyane Secondary School represented a "scene of crime". It was meant to demonstrate that the alleged Speech and Prize giving day function was no more than a cover up by the plaintiff to strategise his plot of changing the leadership of ZANU (PF) or government by irregular means, by way of a smart coup.

One needs to look closely at the events at Dinyane Secondary School. There should be no room for fanciful imagination.

The witnesses provided by both the plaintiff and the defendant took the court through the events at Dinyane Secondary School. Gaule, who the court has already found to have been

both a credible and truthful witness advised the circumstances pertaining to how the function was organized right up to the holding of the actual ceremony on 18 November 2004. Josephine Moyo and J V Dube who were the most visible witness for the defence on the events at Dinyane did give us detailed accounts of what they saw at Dinyane Secondary School. The plaintiff also took the court through what happened at Dinyane and Rainbow Hotel.

Perhaps it is necessary for me to reaffirm the position that the onus to sustain this alternative plea lay squarely on the shoulders of the defendant.

The allegations that the Dinyane function was a cover up to plan a coup, smart or otherwise are of very serious magnitude and such allegations cannot be subject to speculation and conjecture. Such allegations screamed for the tabling of real evidence including but not limited to the people who sat down with the plaintiff to plan such a coup or people who heard the plaintiff planning such a coup including the funding of that adventurous exercise.

It seems to me there was nothing tendered by the defendant by way of evidence to substantiate the alternative defence. Even in his own testimony in court the defendant was completely silent on this defence except to continuously repeat his very strong conviction that the plaintiff was the architect of the coup plot. It was not shown to the court despite the defendant's assurance in his plea and cross-examination of the plaintiff and his witnesses that he would in addition to his denial lead evidence to show that the statements complained of were true and substantially true and published for the public benefit.

It is one thing to state one's plea and another to back up that plea with tangible evidence. The record of proceedings will show that the plaintiff's witnesses who testified on the Dinyane function were thoroughly questioned about the function at Dinyane and on suggestions of a coup plot by the plaintiff. But none of the defence witnesses testified in support of such serious allegations. A part to litigation does not lay the foundation of his plea during cross examination and leave it hanging in the air by failing to back that up with real evidence. This record of proceedings will show that this is precisely what happened in the defendant's case.

What happened at Dinyane Secondary School on 18 November 2004 occurred during broad day light and everyone who cared to follow the events did so. All the witnesses who testified about the events at Dinyane, the plaintiff inclusive did explain what happened. I did not see anything consistent with organization of a coup. There was not even time for the participants to sit down and craft the much talked about Tsholotsho declaration. The evidence tendered even from those witnesses like Josephine Moyo and J V Dube who painted the picture that they were most critical of the events at the school did not support the crafting or even discussion towards the crafting of the Tsholotsho Declaration. I would probably understand it if

it was called the "Harare Declaration" because in Tsholotsho the schedule was so tight that the events for the day spilled into early evening and ended without giving the guest time to discuss anything at Dinyane.

The plaintiff stated that after Dinyane people went to Rainbow for dinner and the meeting there was a chance meeting. He explained that the party members sought clarification from the party's legal advisor P. Chinamasa as regards the amendment of the ZANU (PF) constitution to pave way for the accommodation of a woman vice-president. It was his uncontroverted evidence, and well given for that matter that after the explanation given by ZANU (PF) legal advisor those who had gathered appeared to have fully understood although there were others who voiced dissent by threatening to scuttle the decision of the ZANU (PF)'s politburo.

According to the plaintiff, the discussion at the Rainbow centered mainly on whether or not the politburo had the power to amend the ZANU (PF) constitution. Others argued that this was the prerogative of the Central Committee. His testimony was that with the confusion having been explained by the party's legal advisor the matter ended there although some people in that informal and unsanctioned gathering started discussing names they thought would serve them best in the Presidium.

In the court's view this cannot be equated to a coup plot. Is it not the position that in any democratic organization it is in fact these informal discussions in pubs, churches, hotels, at funerals or any other social function for that matter that form the pillars of democratic decisions? I want to imagine that even the result of a national election is largely a result of informal discussions. Such informal gatherings require no sanctioning because like the plaintiff stated they do not require such authorisation.

From a distance the testimony of Josephine Moyo about the events at Dinyane Secondary School appear to lend some credence to the concerns raised by the defendant. But a closer look at her evidence would show that other than trying to feed the court with her own opinion about the events at Dinyane her real evidence came nowhere nearer to justify the defendant's concerns.

According to this witness' testimony, she was unsettled by among other things the fact that there was an imbongi from Bulawayo who was clad in a leopard skin who kept the crowd on their feet by continuously praising the guest speaker who was expected to grace the occasion, E. D. Mnangagwa. It was her testimony that she was surprised to hear some songs AAAAand praises which she thought were a preserve for the late Joshua Nkomo and the sitting President of the Republic. She became suspicious.

She was also concerned about the leopard skin donated to Mnangagwa and she felt that was consistent with the king-making of Mnangagwa. Strange reasoning, is it not so?

It should be remembered that according to the plaintiff the Dinyane function was not without precedent. A similar function had been held at Ntalale with resounding success and E D Mnangagwa had attended together with other senior ZANU(PF) party members. It was reported that Mnangagwa had made generous donations there and this was one of the reasons why a decision was made to also invite him as a guest of honour with the hope that Dinyane would also benefit from his benevolent hand. In my view, the praise songs must be seen as a desperate attempt by the Dinyane function organizers to encourage the guest speaker to make helpful donations to improve the school in question.

I observe that revolutionaries, heroes and puppets will come and go but revolutionary or praise songs for true heroes and those songs calculated to demean puppets will remain and forever will remain part of a nation's rich heritage. Praise songs are never meant to be for the exclusive benefit of a particular person – living or departed. These are songs which are passed from one generation to the other. The averment by Josephine that these are songs for the exclusive benefit of a particular leader must not be taken seriously by all fair minded persons.

Really, in my view the praise songs by the imbongi coupled with the donation given to Mnangagwa must not be soiled by the opinion of Josephine Moyo but must simply be seen as an effort by Dinyane Secondary School to get the financial assistance which it desperately needed to develop the school. I would take advantage of having presided over this case and urge those who made pledges to Dinyane to honour those pledges for the good of the school whose image suffered severely from the unnecessary fighting by these two litigants. I imagine Dinyane was the greatest sufferer when these two "elephants" were engaged in this unproductive fight. It is not too late to rekindle the bright side of Dinyane Secondary School.

I find it to be extremely inconceivable that the plaintiff could have been so naïve to mastermind a plan about the so called smart coup in the full glare of such senior and high ranking members of ZANU (PF). Add to this the possible presence of members of the security agents of this country. Could the plaintiff have tried to implement such a plan in such a reckless manner as suggested by his political foes? Lest we forget the Dinyane function was not only about the suspended six provincial party leaders and the 5 governors. Dinyane attracted several other senior politicians in ZANU (PF) as well as Ministers, some of whom are serving in this inclusive government. I am unable to come to this conclusion.

Whichever way one looks at the evidence placed before this court, I am satisfied the defendant has failed to establish his alternative plea. If anything that plea is corroborative of the fact that he indeed uttered the words attributed to him by the witnesses.

At this stage I must go back to the pleadings and see whether in fact the plaintiff has been able on a balance of probabilities to prove the allegations stated in his declaration. I note that the words complained of by the plaintiff were allegedly uttered on the 12 January 2005. Not everything he stated in his declaration was proved on a balance of probabilities.

I accept that the general tenure of the allegations as captured in paragraphs 1-4.1; 4.4; 5; 6; and 7 have been substantially established.

Perhaps I need to briefly comment on the publication of the defamatory statements.

From the evidence tabled before me, I am not quite satisfied that the defendant must be taken to have been the source of the publications before the meeting of 12 January 2005. There is evidence that by the time people gathered for the meeting at Tsholotsho on 12 January 2005 the plaintiff had received quite some battering in the various newspapers. In this regard I can do no more than refer to the evidence of Dabengwa when he remarked:

> "I accept that at the time of the meeting of 12 January 2005 plaintiff had received quite some battering from the press. There were several newspaper articles whose source the evidence tendered could not link to the defendant. Going by the media statements that has been made the Professor's reputation had been seriously injured even the cartoons in the press. I remember the one he was firing a salvo with a gun trying to shoot himself".

I agree with the observation and the quantum that I will award will reflect this.

Did the plaintiff suffer damages as a result of the utterances by defendant?

In the much celebrated case of *Shamuyarira* v *Zimbabwe Newspapers (1980) Ltd and Anor* 1994 (1) ZLR 445 (H) R*OBINSON* J (as he then was) laid down some guidelines which should assist the court in the assessment of damages;

The learned Judge listed the following guidelines. The content of the article which includes the defamatory matter, the nature and extent of the publication, the plaintiff's standings including his status; the nature of the defamation, the probable consequences of the defamation; the conduct of the defendant from the time the defamation matter was published up to time of judgment; recklessness of the publication; comparable awards of damages in other defamation suit and the declining value of money."

The list is not exhaustive. The plaintiff projected himself as an accomplished scholar, writer, academic, public figure. He is a professor and has lectured and worked at universities in the United States of America, Zimbabwe, South Africa, Tanzania and Uganda. He has worked

for an international organization. There is no doubt in my mind the plaintiff is a man of recognizable status.

There were various publications which followed the utterances by the defendants as found out by the court.

The plaintiff gave a graphic detail of the effect the defamation had on him including his unceremonious eviction from government and the attended loss of benefits which he would have been ordinarily entitled to had he not left government in a huff.

Although the defamation was done in Tsholotsho, his home, the plaintiff showed his resilience by standing as an independent and winning the seat, an achievement he repeated in 2008. It seems like the plaintiff's constituency did not quite bother about the adverse utterances made against the plaintiff. The bulk of the newspaper articles that published the defamatory material were local ones and there was nothing tabled to show that internationally his image had been battered.

I also would want to make the following observation. Political life is a hazardous exercise. It is no easy walk. It can be dirty at times and those who opt for it must appreciate that by doing so they are voluntarily assuming certain risks. In an effort to compete for the same political space there is bound to be a lot of fighting in politics. Political foes are always competing for recognition and it is not unusual that in the vicious competition for political space day in and day out politicians are busy defaming each other. That is part of the hazards of the journey in politics.

It should not be the desire of courts to settle petty political disputes. Politicians must learn to resolve their differences within the sometimes not so friendly political environment. Really politicians are in a special category when it comes to defamation suits. Sometimes these disputes are better resolved at constituency level as opposed to someone running to court at every opportunity to prop up one's damaged reputation. Political defamation must be treated differently from the other ordinary forms of defamation.

The defendant's counsel aptly summed it up when he stated in his closing address:

> "The nature of the allegation is political and it is an accepted phenomenon that "politics is a dirty game." In such a game, insults, twisted facts, below the belt punches and false accusations are traded for political advantage. This is more so where there is rivalry for power, control and influence."

It would appear to me that the conflict between the plaintiff and defendant was really nothing but an indulgence in acerbic political wits by the defendant to tilt the balance of power

and popularity at that time against the plaintiff whose growing political stature in Tsholotsho appeared to have caused so much discomfort to him. The defamation of the plaintiff must be seen within this context.

Quantum for damages

Whilst it is accepted that the Zimbabwe dollar remains legal tender in this country the reality of our situation is that its value has been rendered otiose.

This brings me to another point which is of great concern to the court. Almost every Zimbabwean is currently burdened by notes in Zimbabwe dollars. The banks have yet to mop up this currency.

I believe the retrieval of this money in real and useful currency is long overdue. The nation cannot just wish away the quiet and unceremonious disappearance of the Zimbabwe dollar. There is need for legislative intervention in this regard. Parliament must come up with an acceptable rate which people can then use to recover their investment still locked up in our banks and homes.

The Zimbabwe dollar has literally been flushed out of the system with the advent of the multi-currency regime. It would be a mockery to award the plaintiff damages in that currency. I am not prepared to make a *brutum fulmen* order.

A brief survey done on similar cases does not seem to provide much of assistance by way of precedent because of the nation's current appetite for the use of foreign currency.

One of the greatest challenges courts face in cases of this nature is the quantification of damages. There is no mathematical formula which one can turn to. In the case of *Dapi and Anor* v *Mutare and Anor* 2002 (2) ZLR 14 SMITH J emphasized that in the assessment of damages "inflation is a factor that must be taken into account …"

NICHALOS JA in *Southern Insurance Associates* v *Barley N O* 1984 (1) SA 98 (A) at 113-114 commented that the assessment of damages is open to two possible approaches.

> "One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guess work, a blind plunge into the unknown."

In this country the situation has become even more compounded by dollarization which has not favoured us with meaningful precedent.

In this case I have had to sample basically four cases which were done at a time when our currency was a bit stable to try and derive some form of assistance in the assessment of the possible correct quantum for damages.

Date of award	Name of case	Applicable rate at the time	Amount in Zimbabwe Dollars	Conversion to US Dollar at time of award of damages
Dec 1986	*Zvobgo* v *Kingstons Ltd* 1986 (2) ZLR 310 (H)	US$1.6 to Z$14 000	Z$14 000	US$8 750
Jan 1994	*Chinamasa* v *Jongwe P & P Co* (*Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H)	US$8 to Z$30 000	Z$30 000	US$3 750
Jan 2000	*Levy* v *Modus Publications (Pvt) Ltd* 2000 (1) ZLR 68 (HC)	US$38 to Z$20 000	Z$20 000	US$526
March 1994	*Shamuyarira* v *Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445 (H)	US$8 to Z$15 000	Z$15 000	US$1 875

Having considered everything in this case I consider that an award of $5 000 would be fair in this matter. It is accordingly ordered:

That judgment be and is hereby awarded to the plaintiff in the sum of $5 000,00 with interest from the date of judgment to the date of payment together with costs of suit.

Messrs Job Sibanda and Associates, plaintiff's legal practitioners
Messrs Chirimuuta and Associates, defendant's legal practitioners

JONATHAN NATHANIEL MOYO

Versus

JOHN LANDA NKOMO

And

DUMISO DABENGWA

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 3 FEBRUARY 2011

J Sibanda for plaintiff
F Chirimuuta for the defendants

Judgment

CORRIGENDUM

Pursuant to the release of this judgment some typographical errors have been noted on page 20 of the judgment. The correct table should be as follows:

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