HH 158-03
HC 1150/99

PETER KAWONDE
versus
DUN AND BRADSTREET (PVT) LIMITED

HIGH COURT OF ZIMBABWE
KARWI J,
HARARE, 19 February and 15th October, 2003

Civil Matter

P Kawonde for plaintiff
S Wernberg for respondent

KARWI J: Plaintiff in this matter is a legal practitioner and has been so since 1992. He is a sole partner of a legal firm. He instituted legal action against the defendant claiming damages in the sum of $2000 000 arising out of alleged defamation of his character, his case being that defendant, during the period March to December, 1999, published material that was defamatory of the plaintiff.

The plaintiff's claim is based on the following facts -

On the 31st December, 1997 Summons were issued against him in case number HC 32072/97 at the instance of Delta Corporation t/a Angwa Furnishers (Pvt) Ltd. on the 20th January, 1998, plaintiff paid the amount claimed by Angwa Furnishers to Messrs Coghlan, Welsh and Guest, the legal practitioners for Angwa Furnishers.

On 13th February, 1998 - Angwa Furnishers (Pvt) Ltd obtained default judgment against defendant despite the fact that plaintiff had already paid his debt in full and did not owe anything to Angwa Furnishers (Pvt) Ltd at that stage. On the 23rd February, 1998 defendant made an Application for Rescission of the default judgment. On 24th March, 1998, plaintiff's application for rescission was granted unopposed.

On 31st March, 1998, defendant published in its publication called Duns Monthly Consumer Gazette that plaintiff had a judgment against him in favour of Delta Operations t/a Angwa Furnishers for goods sold and delivered in the sum of $3 019,96.

Sometime before 3rd August, 1998 plaintiff attempted to buy goods on credit unsuccessfully and was referred to defendant. On 3rd August, 1998 plaintiff wrote to the defendant enclosing a copy of the rescission of judgment and seeking that defendant "expunge his name from its list of bad debtors". The latter was hand delivered by the plaintiff at the defendant's place of business.

On 16th September 1998, plaintiff wrote to the defendant demanding that defendant "expunges" the plaintiff's name from the defendant's black list within forty-eight hours failure of which plaintiff would apply for an interdict restraining defendant from continuing to defame the plaintiff. It also warned that plaintiff would seek defamation damages if the demand was not complied with.

On 22 September, the defendant wrote to the plaintiff through its lawyers Messrs Surgey, Pittman and Kerswell stressing that if plaintiff wanted the rescission of judgment to be published, the plaintiff would have to pay an administrative charge of $200,00. This prompted an application by plaintiff, which was filed on 2nd October, 1998 and served on the defendant's legal practitioners on that day. The application was opposed. Despite the opposition, the application was successful. Plaintiff was granted an interdict

restraining the defendant from continuing further publication of applicant's name to the world on its list of bad debtors and uncreditworthy persons. The defendant was also ordered to completely expunge applicant's name from the list of bad debtors and uncreditworthy persons. The rule *nisi*was confirmed in November, 1998.

On 31st December, 1998, plaintiff attempted to purchase goods on credit from some shops, TV Sales and Hire and Truworths. He was denied credit and referred to the defendant. On 31st January, 1999 defendant published the fact of the rescission of judgment against the plaintiff in its Dun Monthly Gazette.

Plaintiff gave evidence in court testifying to the above position. These facts were found to be undisputed by the defendant. This was clear from Mr Chris Mlala Chipembere's evidence who represented the defendant. Mr Chipembere who was employed by the defendant for 38 years, most of which time he was its publications Manger also stated that the Gazette in question was published on 31st March, 1998 and that once information is published in the Gazette, such information would remain in their computers for 5 years. Defendant's subscribers would either phone in to request for information or check in the Gazette. On phoning, staff at the defendant would check for the information requested by the subscriber from the computer. Mr Chipembere added that any retraction or withdrawal of information published would be done in one or two way i.e. where defendant was convinced that judgment should not have been entered a retraction would be automatic once the error is discovered. And if judgment had been correctly obtained, the debtor would pay an administration fee of $200,00 if he later obtains a rescission of that judgment. Mr Chipembere also emphasised that his company does not rely on information from defaulters, but from plaintiffs. It was apparent from Mr Chipembere's evidence that defendant was made aware that judgment had been erroneously entered against the plaintiff in August 1998, but did not publish a reversal until 31st January, 1999 apparently because the plaintiff was either not paid the administration fee of $200,00 or that the matter was then in the hands of defendant's lawyers or both. He said that a retraction was published in January, 1999, following defendant's lawyers' advice to do so.

There are clearly three issues to be decided in this matter -

(a) whether or not, in the circumstances of the case, publication by the defendant that judgment had been entered against the plaintiff was defamatory;

(b) whether or not failure to publish a withdrawal immediately after plaintiff had demanded same was tantamount to publication of defamatory material;

(c) whether or not plaintiff was defamed and if so what would be the appropriate quantum of damages in the circumstances of this case?

The first issue to be decided is whether the publication by defendant was defamatory. From the chronology of events in this case, it would appear clear that the publication complained of occurred on 31st March, 1998. At the time of publication a judgment had been entered against the plaintiff in default. It is defendant's case that, if judgment had been rescinded, which we now know to be a fact, defendant had no knowledge of that fact and had no means of obtaining that information before publication of its March edition. Defendant has argued further that at the time of the publication of the March edition of its Gazette, defendant had no knowledge of the fact that plaintiff had effected payment of the debt owed to Angwa Furnishers. Defendant further submitted that defendant had no knowledge that the default judgment obtained by Angwa Furnishers had been erroneously obtained through the negligence of Angwa Furnishers. I agree

with the defendant on this. Moreover, it would be apparent that plaintiff himself only became aware of the publication on 3rd August, 1998 when he tried unsuccessfully to purchase goods on credit. That is when he made defendant aware of the rescission of judgment on that very day.

The Court was told by Mr Chipembere, the Publications Manager of the defendant that once information is punched into the computer, that information remains in the computer for five years. Any subscriber of the defendant can access that information during that period of five years. The Court was given to understand that the defendant had and has a duty to communicate to its subscribers the fact that judgment has been entered against a debtor. Defendant's subscribers are usually entities which are in the business of giving credit facilities to consumers and as such it is in their interest to know who pays and who does not pay debts in order to avoid advancing credit facilities to same. In terms of the way defendant operates, any information published, whether on the computer or in the Gazette, would remain valid for five years from the time of its publication, unless that information is withdrawn.

It seems to me that when defendant first published the information complained of by the plaintiff on 31st March, 1998, that publication was privileged by virtue of the fact that the judgment in question had not been rescinded and also that defendant had no knowledge at that stage and had no way of ascertaining that payment of the capital and costs associated with the claim had been effected prior to the granting of such judgment.

The situation, however, changed completely as from the 3rd August, 1998. It was on that day that defendant, on discovering that he could not be granted credit facilities from certain shops because of the publication, made the correct position to be known by the defendant. He sought that defendant should "expunge his name from its list of bad debtors". Defendant failed to do what was requested until 31st January, 1999, some six months down the line. It must be remembered that the effect of any publication of any information by the defendant in its computer or Gazette is to subsist for five years from the date of that publication. It is therefore clear to me that publication continues to subsist for 5 years despite the fact that the art of publication was once.

It is because of this fact that I am of the view that defendant, once notified that its publication was not justified on 3rd August, 1998, defendant had no obligation from then on to "expunge defendant's name from its list of bad debtors". Any continued publication of the information complained of on defendant's computers and Gazette became wrongful, unlawful and defamatory as from 3rd August, 1998. In defining an action for defamation, in *Zvobgo* v *Kingstons Ltd* 1986(2) ZLR 310 REYNOLDS J stated at p 317 that -

> "…the essence of the action in my view, lies in determining whether the imputations made tend to lower the plaintiff in the estimation of others, or to injure his standing and reputation".

Indeed, a publication by the defendant that there was a default judgment against the plaintiff from 3rd August up to 31st January 1999 became defamatory because (a) that was not true - the judgment had been rescinded and (b) defendant was made fully aware of that fact, yet he did nothing for six months. That publication lowered the plaintiff in the estimation of others and injured his standing and reputation. I therefore find the publication to have been defamatory.

The next issue to be decided is what would be the appropriate quantum of damages in the circumstances of this case? Defendant has urged that the quantum of damages being claimed *in casu*, is in light of other awards that have been made by the Court, outrageous and unjustifiably high and unprecedented. IN support of his argument, he has quoted the following cases - *Zvobgo* v *Modus Publications (Pvt) Ltd* 1995(2) ZLR p 96 in which a senior politician and then Government Minister, was awarded damages in the sum of $20 000 after having been portrayed as heartless for allegedly trying to stop charitable organizations from assisting Patrick Kombayi, who had been shot in the run up to the 1995 General Elections and had subsequently been hospitalized in the United Kingdom. *The Chairman* v *Jongwe Printing and Publications (Pvt) Ltd and Anor* 1994(1) ZLR 133(H) damages to the tune of $30 000 were awarded to a

respected lawyer who held the position of Attorney-General. In the publication concerned it had been alleged that the plaintiff was being investigated by the police in connection with fraud perpetrated by him whilst he was in practice. And in *Mujuru*v *Moyse*, 1996(20 ZLR 642 (H) the author of a publication which accused plaintiff of engaging in dishonest and corrupt dealings was found to have been "pondering to the readers insatiable appetite for scandal" in making allegations against a person of extremely high reputation. The court granted damages in the sum of
$40 000,00.

In assessing damages in this matter, I have taken into account the fact that although initially, the defendant's publication was privileged, he did not take measures to stop the continued publication or continued appearance of the offensive publication after he was advised and requested to stop. He continued to do so for six more months. I have also taken into account the fact that the plaintiff is a registered legal practitioner and has been since 1992 who has worked as a prosecutor and magistrate. He is a sole partner of a legal firm. He employs a staff of ten people. There was no apology made to him at all. He had to take legal action to protect his reputation. I also took into account the fact that this matter was contested to the end. I also took into account hat there was a withdrawal by the defendant, albeit six months down the line. I also accept argument by the defendant that plaintiff may have failed to take measures to mitigate damages to his reputation by paying the $200,00 administration demanded by the defendant.

After considering all the circumstances of this case and the reality that the Zimbabwe dollar has seriously lost value since the cases referred to above, it is considered appropriate to award damages against the defendant in favour of the plaintiff in the sum of $150 000 *tempore morae*and costs of suit.

Kawonde & Company, legal practitioners for the plaintiff
Wintertons, legal practitioners for defendant