

NHLANHLA MASUKU  
versus  
CHRIS GOKO  
and  
ASSOCIATED NEWSPAPERS OF ZIMBABWE (PVT) LTD

PATEL J  
HARARE, 17 & 19 January and 30 November 2006

### **Civil Trial**

*Mr. Mhlanga*, for the plaintiff  
*Adv. Morris*, for the defendants

PATEL J: The plaintiff in this case claims payment in the sum of \$80 million in respect of damages for defamation arising from the publication of an article written by the 1<sup>st</sup> defendant in the 27<sup>th</sup> August 2003 edition of the *Daily News*. The defendants admit the publication of this article but deny that its contents were defamatory of the plaintiff.

### **The Issues**

The issues for determination in this case are as follows:

- (a) Whether or not the publication in question was defamatory of the plaintiff.
- (b) Whether the publication was privileged and/or justified.
- (c) The amount of damages, if any, to which the plaintiff is entitled.

### **The Evidence**

#### ***Nhlanhla Masuku (plaintiff)***

The plaintiff testified that he is a medical engineer by profession and that he is a member of two professional associations based in the United Kingdom. From 1982 to 1989 he was employed by the Ministry of Health as Chief Medical Engineer. He held the post of President of the Zimbabwe National Chamber of Commerce from

1998 to 2000. In 1999 he became the national spokesman for the National Economic Consultative Forum (NECC) and its Anti-Corruption Task-force. He presently holds directorships in two private commercial companies. Additionally, he was Vice-Chairman of the Industrial Development Corporation Board from 1998 to 2005 and became Chairman of the Zimbabwe International Trade Fair in 2005 for a term of three years.

Lastly, he is the founder Chairman of the Gold Mining and Minerals Development Trust (the Trust), having been appointed to that position in 2001. As Chairman of the Trust, he interacts with all stakeholders in the mining sector, including the Zimbabwe Miners Federation (the Federation). The activities of the Trust, relating to sound mining practices, accountability in mineral trading and the curbing of illegal gold dealings, are all matters of public interest. The Trust's mandate also extends to the activities of the Federation which is a relatively new association formed in 2003.

On the 22<sup>nd</sup> of August 2003, the Federation held a meeting of its members. The minutes of that meeting were produced by consent (as Exhibit 1). The plaintiff stated that paragraphs (4) and (5) of these minutes were defamatory of himself. He consequently sued the Federation and its principal office-bearers who conceded and settled the case in 2005 by agreeing to pay \$5 million as damages.

The minutes were also carried in an article published on the 27<sup>th</sup> of August 2003 in an article written by the 1<sup>st</sup> defendant. The latter had been advised by the plaintiff to investigate the matter further before publishing any excerpts from the minutes. The article was produced in evidence without objection (as Exhibit 2).

According to the plaintiff, the defamatory features of the article are contained in the headline, the caption below his photograph and in paragraphs 1 and 6 of the text. The defendants did not give full coverage to the plaintiff's comments and did not invite or incorporate any comments from the Federation itself. The

article is selective in terms of its emphasis and coverage of the Federation's minutes. In essence, the article suggests that he was involved in underhand dealings and corruption. The article was particularly injurious to his reputation because of his involvement in the crusade against corruption.

Soon after the article was published, he received several telephone calls from family members, friends and others who held him in high esteem. He was also questioned at social and business gatherings by various people who regarded the article as being slanderous. His response was to tell these people to ignore the article and to inform them that he had taken corrective measures.

In September 2003, he called a routine press conference as part of his duties as Chairman of the Trust. Although he did respond to questions raised relating to the article, the conference was simply one of such regular meetings and did not specifically relate to the article. It was not called to correct the contents of the article. He, together with his co-trustees, had decided to take the legal route rather than the press route immediately after the article was published. The requisite litigation papers were prepared before the conference was held.

As regards the quantum of the plaintiff's claim for damages, the original amount claimed in November 2003 was \$5 million. He now claims the sum of \$80 million, applying a multiplication ratio of 18 from November 2003 to December 2005. This ratio accords with the rise in the cost of living index tabulated by the Central Statistical Office as well as the devaluation in the exchange rate of the local currency.

Chris Goko (1<sup>st</sup> defendant)

The 1<sup>st</sup> defendant qualified as a journalist in 1999. He worked for the *Sunday Mail* from 2001 to 2002 and then for the Zimbabwe Broadcasting Corporation until March 2003. He joined the *Daily*

News at that stage and became its Deputy Business Editor in July 2003.

He testified that he obtained the minutes of the Federation's meeting from the then Minister of Mines, Chindori-Chininga, who was present at that meeting. The latter also provided him with various other relevant documents. He then telephoned the plaintiff who told him not to publish anything for the time being.

On the day before the article in question was published, he contacted two individuals who were present at the Federation's meeting, Pride Masamba and Zamayi Sithole. The latter was the person who took the minutes of that meeting. He did not discuss specific details of the minutes with these individuals. Nevertheless, he concluded that the minutes were an authentic record of the proceedings of the meeting. In his opinion, the minutes were a matter of public interest inasmuch as the Trust and the Federation were involved in gold mining activities funded by the Reserve Bank of Zimbabwe.

After he had compiled the article, it was sent to the newspaper's Business Editor who in turn passed it on to the Editor for final approval. The article was then submitted to the Chief Sub-Editor who allocated it to a sub-editor to frame its headline, photograph and caption.

Under cross-examination, the 1<sup>st</sup> defendant accepted that the minutes produced before the Court were not signed by anyone as being a true record of the Federation's proceedings. He also conceded that the article did not contain any comments from any Federation official and that paragraph 5 of the article, relating to efforts to obtain such comments, did not reflect the correct position.

He further testified that he wrote the article having regard to the factors of timeliness and relevance and the overriding need to publish matter that is newsworthy. In this respect, he did not heed the plaintiff's advice to await further developments on the subject. Nor did he deem it relevant to publish the other matters contained

in the minutes which pertained to the Federation but which did not relate to the plaintiff.

According to the 1<sup>st</sup> defendant, the *Daily News* had a wide readership at that time and many people would have read the article in question. He did not think that any retraction or correction was necessary because the story that he wrote was authentic.

When questioned by the Court, the 1<sup>st</sup> defendant admitted that when he spoke to Masamba and Sithole he did not ascertain what the specific allegations against the plaintiff were and merely relied on previously known allegations. However, he was unable to produce any documents before the Court to substantiate those earlier allegations. Again, although the minutes and the article make specific reference to other press reports imputing corruption on the part of the plaintiff, the 1<sup>st</sup> defendant failed to produce any relevant press reports to that effect.

*Samuel Sipepa Nkomo*

This witness is employed by the 2<sup>nd</sup> defendant as its Chief Executive Officer. He testified that the *Daily News* enjoyed its highest circulation immediately before it was closed down on the 12<sup>th</sup> of September 2003. At that time, approximately 90,000 to 95,000 copies of the newspaper were being printed and sold. Comparatively, *The Herald* was printing and circulating *circa* 50,000 copies.

He stated that he was familiar with procedures regulating meetings and that the minutes of a given meeting are usually only signed and dated after being corrected and confirmed by the chairman of the meeting. As a matter of editorial policy, he would rely on unsigned minutes even though they might be uncorrected and unconfirmed. However, he accepted that such unsigned minutes might contain material errors. In any event, whenever the minutes of a meeting were relied upon for the publication of an

article, they would be attached to the draft article for scrutiny up the editorial line.

### Defamation

According to Feltoe : *A Guide to the Zimbabwean Law of Delict* (2<sup>nd</sup> ed.) at p.33:

“Defamation causes harm to reputation, that is, the estimation in which a person is held by others (his good name and standing). A defamatory statement is one which is published and injures the person to whom it refers by lowering him in the estimation of reasonable, ordinary persons generally; it diminishes his esteem or standing in the eyes of ordinary members of the general public. It may also cause the target of the statement to be shunned or avoided or may expose him to hatred, ridicule or contempt. Finally, a person can be defamed by casting aspersions on his character, trade, business, profession or office.”

The approach to be applied in determining whether or not a person has been defamed is a three-pronged one, as enunciated by BARTLETT J in *Chinamasa v Jongwe Printing and Publishing Company (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) at 149, and in *Madhimba v Zimbabwe Newspapers (1980) Ltd* 1995 (1) ZLR 391 (H) at 400. This approach was affirmed by the Supreme Court in *Moyse & Ors v Mujuru* 1998 (2) ZLR 353 (S) at 356, as follows:

“The three stages of the test are that a court must:

(a) first, consider whether the words as specified are capable of bearing the meaning attributed to them, that is, whether the defamatory meaning alleged is within the ordinary meaning of the words;

(b) secondly, assess whether that is the meaning according to which the words would probably be reasonably understood; and

(c) thirdly, decide whether the meaning identified is defamatory.”

The article published *in casu* has the headline “*Miners’ Federation probes Masuku*” and a photograph of the plaintiff with the caption “*NHLANHLA MASUKU .... under probe over misconduct allegations*”. The relevant passages in the text of the article read as follows: “*The Zimbabwe Miners’ Federation (ZMF) has assembled a*

*five- man team to probe allegations of misconduct against Gold Mining and Minerals Development Trust (GMMDT) chairman Nhlanhla Masuku, the Business Daily has established. .... According to the minutes of last Friday's meeting, the organisation has mandated 'following continued Press reports over alleged corruption', five of its senior members 'to probe Masuku and, if found fit, to demand his urgent resignation'. The five-man team is supposed to 'compile areas of misconduct to include use of Masuku's consultancy firm USK Consultancy'. The organisation also said it was concerned by the delay in funding several gold mining projects."*

The plain meaning of the article, taken in its entirety, is that the plaintiff is being probed or investigated for improper or unethical behaviour and that he has committed acts of misconduct involving corruption rendering him unfit to hold public office which he should be required to relinquish urgently. Although the article refers to alleged misconduct, its overall tenor suggests that the applicant is already under probe and that the case against him has overtaken mere allegations of corruption.

Applying the established test cited above, I am satisfied that the words complained of, as understood by the ordinary reader, are defamatory of the plaintiff inasmuch as they cast aspersions on his character, lower him in the estimation of ordinary reasonable persons and, having regard to the diverse public offices that he holds, expose him to public ridicule and contempt.

#### Privilege and/or Justification

The defence of privilege entails having to establish that the defendant had a duty or interest in publishing the impugned statement and that the person or persons to whom it was published had a similar duty or interest to receive it. It is trite that newspapers have a right to keep their readers informed about matters of public interest involving public figures. The more prominent the personage

the more the public has an interest in his affairs and moral probity. However, even if the elements of privilege are established, the defence is vitiated if it is shown that in making the statement the defendant was actuated by malice or that he abused or exceeded the bounds of privilege. See in these respects *Musakwa v Ruzario* 1997 (2) ZLR 533 (H) at 535-537; *Mugwadi v Nhari & Anor* 2001 (1) ZLR 36 (H) at 41-46.

The burden of proving the requisites of privilege lies on the defendant, while the onus in establishing malice or abuse of privilege shifts to the plaintiff to prove *animus injuriandi*. He can do this by showing that the defendant acted *mala fide*, not only by proving actual malice, but by showing that the defendant was actuated by any indirect or improper motive or that he stated what he did not know to be true, reckless as to whether it was true or false. The evidence of *animus injuriandi* must be affirmative and cogent. See *Mugwadi's case, supra*, at 42& 46.

*In casu*, it is indisputable that the conduct of the plaintiff, as Chairman of the Trust, was a matter of public interest and that the defendants' newspaper had a duty to report on his activities as a public figure. However, the contents of the offending article were published recklessly and, in my view, exceeded the bounds of privilege for the following reasons. Firstly, the article is unbalanced and selective in that it only reproduced two out of the ten resolutions contained in the Federation's minutes and did not include any comment from the Federation itself. Secondly, the defendants acted contrary to the clear advice proffered by the plaintiff to withhold publication of the article until they had investigated the matter further. Thirdly, the article's reference to prior press reports of alleged corruption on the part of the plaintiff was, on the evidence before the Court, unsubstantiated and patently unfounded. In publishing the article precipitately and inaccurately, as appears from the 1<sup>st</sup> defendant's own testimony,

the defendants were motivated by the drive to sensationalise their report in order to render it newsworthy.

Ultimately, the defendants were reckless in relying on the Federation's minutes for several compelling reasons. As was eventually admitted by the 1<sup>st</sup> defendant, the minutes were received from the then Minister of Mines and not from the Federation itself. More significantly, the minutes were unsigned and unconfirmed but, nonetheless, the defendants did not attempt to verify the authenticity of the minutes despite the possibility that they might have been false or incorrect.

The defence of justification requires the defendant to establish not only that the offending statement was true but also that the publication of such true defamatory material was for the public benefit. See Feltoe, *op. cit.*, at p.37, where the learned author elaborates as follows:

“The statement does not have to be completely accurate in every single particular detail. It is sufficient that it was substantially true in its major particulars that form the basis of the complaint of defamation.

The publication of that statement in that manner at that time must be of some benefit to the public. Thus, for instance, this requirement would be satisfied if the statement is about the integrity or competence of a public official.”

As I have already stated, the defendants in this case published the offending article without verifying the authenticity or correctness of the minutes that they utilised to devise their report. Nothing was placed in evidence to establish that the document relied upon was indeed a copy of the minutes of the Federation's meeting in question. More importantly, there was nothing before the Court to show, as imputed in the article, that the plaintiff was in fact being probed by the Federation and that he had conducted himself, either allegedly or actually, in an unethical and corrupt manner such as to warrant his immediate resignation from public office. For these reasons, it cannot be said that the contents of the article were even partially true let alone completely or substantially true.

As for public benefit, it is unquestionably clear that the public have an interest in being informed about the conduct and moral probity of any public figure. However, it is doubtful that statements which are distorted and disproportionate and which therefore serve to beguile rather than enlighten the public, as was the case *in casu*, can be said to be for the public benefit.

It follows from all of the foregoing that the defences of privilege and justification, on the facts before me, cannot be availed to the defendants and must accordingly fail in this case.

### Damages

In assessing the quantum of damages in a defamation case, it is necessary to consider a variety of factors. As expounded in the cases – for instance, in *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (HC) at 289, *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445 (H) at 503, *Levy v Modus Publications (Pvt) Ltd* 2000 (1) ZLR 68 (H) at 70-71 & 73, and *Mnangagwa v Nyarota & Anor* HH 153-2004 – these include:

- (a) the content and nature of the defamatory publication;
- (b) the plaintiff's standing in society;
- (c) the extent of the publication;
- (d) the probable consequences of the defamation;
- (e) the conduct of the defendant;
- (f) the recklessness of the publication;
- (g) comparable awards of damages in other defamation suits;
- and
- (h) the declining value of money.

In applying the above factors it must be borne in mind that damages for defamation are intended *qua solatium* to compensate the plaintiff for sentimental loss and should not as a rule be punitive. See *Shamuyarira's case, supra*, at 502-503; *Levy's case, supra*, at 73; *Thomas v Murimba* 2000 (1) ZLR 209 (H) at 217.

As for comparable awards in other defamation cases in the recent past, the following awards are instructive:

- *Chinengundu v Modus Publications (Pvt) Ltd* HH 135-1992 – \$23000 in 1992
- *Chinamasa's case, supra* – \$30,000 in 1994
- *Zvobgo v Modus Publications (Pvt) Ltd* 1995 (2) ZLR 96 (H) – \$20,000 in 1995
- *Mnangagwa's case, supra* – \$5,000,000 in June 2004

As appears from the plaintiff's uncontroverted testimony, he is a man who has over the years held several very senior positions both in private enterprise and in the public sphere. Until the publication of the offending article by the defendants, the plaintiff had striven to sustain his reputation and was generally held in high esteem. The nature and content of the article were highly defamatory of the plaintiff, particularly in his capacity as Chairman of the Trust and as national spokesman for the NECC and its Anti-Corruption Task-force. Moreover, as testified by the 2<sup>nd</sup> defendant himself, the article was carried in a newspaper which at that time enjoyed wide circulation and would therefore have been extensively disseminated.

As for the defendants' conduct vis-à-vis the article, it is aggravated by a number of pertinent factors. At the outset, they did not heed the plaintiff's sage advice to investigate the matter further before publishing the article. They compounded this by not verifying the authenticity and correctness of the minutes that they relied upon to produce the article. After having published the article, they declined to publish any retraction or apology despite the plaintiff's specific demand to that effect. Last but not least, following the institution of the plaintiff's action herein, they persisted with their denial of liability.

Having regard to the cost of living index and the devaluation in the official exchange rate of the local currency, the award in

*Mnangagwa's case, supra*, would as at the time of the trial of this case have equated to *circa* \$80 million. This accords with the amended amount claimed by the plaintiff.

Taking all of the above factors into account as well as the rapidly declining value of money, I am satisfied that an award of \$80 million as damages due to the plaintiff is amply justified *in casu*.

### Order

In the result, it is ordered that:-

Judgement be and is hereby granted in favour of the plaintiff as against the defendants jointly and severally, the one paying the other to be absolved, for:-

- (i) payment of the sum of \$80,000.00 (revalued);
- (ii) interest thereon *a tempore morae* from the date of judgement to the date of payment in full; and
- (iii) costs of suit.

*Chihambakwe, Mutizwa & Partners*, plaintiff's legal practitioners  
*Gill, Godlonton & Gerrans*, defendants' legal practitioners