TASISIYO TEMION MUGADZIWA
and
DINGANI SHOKO

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 3 and 8 February and 15 March 2006

Civil Trial

Mr *A*. *Muchandiona*, for the plaintiff
Ms *Chigwida,* for the defendant

KUDYA J: The plaintiff Mugadziwa issued summons out of this court on 19 May 2004 seeking from the defendant $20 million defamatory damages arising from a misconduct letter written by the defendant, Shoko, which was published to officials in the Ministry of Education, Sport and Culture at Kwekwe, the Provincial Education Director for the Midlands Province in Gweru, the Secretary for Education, Sport and Culture and the Secretary for the Public Service Commission in Harare, interest at the prescribed rate from 1st April 2004 to date of payment and costs of suit. The summons was served on the defendant on 25 June 2004, who filed an appearance to defend on 7 July 2004 and his plea on 9 July 2004.

The plaintiff gave evidence and produced six documentary exhibits. His evidence was to the following effect:

He started teaching on 1 January 1962. From January to April 2004, he was based at Ntabeni Primary School where he was a senior teacher. The defendant was the headmaster of this school.

On 1 April 2004, the defendant wrote a misconduct charge letter to the plaintiff which was copied to the Secretary for the Public Service Commission, the Secretary for Education, Sport and Culture, the Midlands Provincial Education Director and himself. The charge was served on the plaintiff on 5 April 2004. It was produced as Exhibit '1'. He stated that he was being charged with misconduct arising from an allegation of embezzlement of $6 526-00 belonging

to the School Development Committee (SDC) which had taken place in 1986.

He produced Exhibit '2', an order made by the Provincial Magistrate Kwekwe on 23 April 2002 in the matter between the plaintiff and the Ntabeni School Committee case No. 496/2000. It reads:

> "Judgment is hereby granted in favour of the Plaintiff as prayed in the summons plus costs. The reasons thereof are reserved. Such reasons will be ready by 30 April 2002."

The Plaintiff's legal practitioners received that judgment on the day it was delivered, the 23rd April 2002.

On 5 December 2002, a Warrant of Execution Against Property Exhibit '3' was issued by the Provincial Magistrate Kwekwe for payment of $6 526-00 being the judgment debt, and $6 526-00 interest up to the *in duplum* level, and costs, all totalling $64 202-00. This warrant was served on the school by the Messenger of Court, Kwekwe on 7 February 2004. It was to give effect to the order in Exhibit '2'.

Exhibit '1', the misconduct charge was issued in terms of section 44(2)(a) as read with paragraphs 8 and 13 of the 1st Schedule of the Public Service Regulations SI 1/2000. It gave 7 grounds upon which the charge was based. It reads in the relevant part –

"The grounds on which this charge is based are that it is alleged that:

i) You embezzled $6 526-00 school funds in 1986.
ii) You settled this out of court with Mashambazhou District Council and the District Administrator's Office by agreeing that $100 be disallowed from your salary every month.
iii) In 1998 you turned around and engaged a lawyer and sued Ntabeni School Development Committee claiming that you paid the money under duress.
iv) The case dragged on until 2000 when you claimed that you had won the case.

v) You demanded payment from the SDC in 2002 but you got no response.
vi) On 7 February 2004 you attached school property through the Messenger of Court.
vii) Documentary evidence of the alleged misconduct is attached for your scrutiny."

The plaintiff stated that he took umbrage to (iv) above especially to the words "you claimed that you had won the case". The view he took was that the defendant knew of Case No. Kwekwe 496/2000 in which the plaintiff was successful. The defendant had personally attended the hearings in Kwekwe on 4 or 5 occasions. He had also seen Exhibit '3' which had a Kwekwe Magistrate Court stamp which showed that it was authentic. The use of the above quoted words were in his view, defamatory.

The last page of Exhibit '1' consists of a section which gives details of the alleged misconduct and one for comments. The section on comments has the following:

"Comments

I, Shoko D, as Headmaster of Ntabeni School, persuaded Mr Mugadziwa to withdraw his case to no avail. He viewed me as an enemy who was sympathising with the community. On several occasions I approached the District Officers who indicated that they could not help me since this was a court case. I watched helplessly until now when the school property was attached. I sought assistance until last week when the EO Standards (Kwekwe) advised me to charge the teacher.

As a Senior Officer who is incorrigible, stubborn and resistant to professional advice I hereby recommend that the member be:-

1. Discharged or
2. Suspended until retirement since his behaviour tarnishes the image of the profession and hinders development." (underlining mine for emphasis)

The plaintiff stated that he was very concerned about the words as they really damaged his status. He further stated that these comments that he was "incorrigible, stubborn, and resistant to

professional advice" and that "his behaviour tarnishes the image of the profession and hinders development" ran contrary to the excellent assessment reviews he had been given in Exhibit '4', by the Deputy Headmaster of St. Theresa Primary School where he was teaching, on 20 July 1995. It also ran contrary to Exhibit '5' the performance Appraisal Report for the period 1 October 2000 to 30 September 2001 compiled by the defendant in which he gave him a rating of 4 out of 5.

He also produced Exhibit '6' his response to the misconduct charge, in which he denied the allegations which formed the basis of the charge and threatened to institute an action for defamation against the defendant.

The words he complains of in his view, paints him in bad light to those who do not know him and it crippled his character. They disparage his honour. They portray him as one who can hardly work with others, can hardly liaise with his superiors so much so that he remains an island, unto himself, very much isolated. He was transferred from Ntabeni School, less than a 1km away from his home, to St. Andrews School which is 45km away. The misconduct was finalised on 7 July 2005 and he was acquitted.

He was cross-examined. He revealed that he had been the Headmaster of Ntabeni School from 1973 until 1986. In 1986 he was transferred to St. Theresa Primary School and demoted to assistant teacher after an internal audit by the Ministry of Education, Sport and Culture revealed a misappropriation of $6 256-00 in the School Development Committee account. The Ntabeni community was aware of the incident and its resultant effect on his career.

He admitted that he paid for the shortfall through a cheque drawn on the Bank of Credit, and Commerce Zimbabwe's cheque number 6503. This was done on his behalf by one Chikore. He denied that he entered into an agreement with the School Development Committee for the deduction from his salary in the

sum of $100 per month to last until he had repaid the embezzled funds.

He admitted that he was pained by the transfer to a school 45km from his home arising from the misconduct letter at a time of economic hardships that are bedeviling our economy but denied that he nursed a grievance against the defendant for taking over his former position. He was more pained by the allegation that he pretended to have won the Kwekwe court case and the words which referred to him as incorrigible, stubborn and hinders development.

He admitted that the Kwekwe judgment Exhibit '2' was not served on the School Development Committee of which the defendant was an ex-officio member, but stated that the school was represented by a firm of legal practitioners Messrs Mkushi, Foroma and Maupa legal practitioners. He explained that he executed the judgment after 2 years because of lack of funds on his part. He admitted that members of Ntabeni community consisting of war veterans, the Zimbabwe Republic Police, the District Administrator, the local Member of Parliament, the local ZANU(PF) leadership and the chief approached him in a bid to dissuade him from executing his judgment after the attachment had been made to the school property. He had referred them to the Messenger of Court.

He maintained that he had no difficulties with the charge sheet as it was professional but he had difficulty with the comments which were and still are damaging as they will forever remain for posterity on the files of Government. He accepted that it was not a public document and that it was restricted in its circulation to those officials whose duty it was to receive and act upon it.

He also accepted that the proforma of the misconduct charge permits the head of office, like the defendant, to inscribe his comments, but averred that the comments he complains of had no relevance to the charge of embezzlement and sought from the defendant the link thereto.

The defendant also testified. He has been a headmaster at Ntabeni Primary School since September 1990. In 2000 the plaintiff was transferred back to Ntabeni School. His professional school work was good but his relationship with the community was sour. He attended the Kwekwe case No. 496/1990 five times. At one time the plaintiff tried to have him removed from the gallery but without success.

The charge of embezzlement of funds was triggered by the attachment of school property by the plaintiff. The witness and the SDC, though they were represented by a legal practitioner, were never served with the court order Exhibit '2'. He saw Exhibit '3'. An emissary of the SDC approached their legal practitioners who expressed ignorance of the judgment. The result was that the SDC resolved not to pay the judgment debt.

He drew the misconduct charge faithfully following the requirements of section 44(2)(a) of the relevant Public Service Regulations of 2000. He only sent it to the plaintiff and the relevant government officials in his Ministry and the Public Service Commission whose duty it was to receive it. He admitted that he wrote the charge, inclusive of the comments which the plaintiff found offensive.

He explained that incorrigible according to the Concise Oxford Dictionary means "a person or a habit incurably bad or not readily improved". To his mind this was an honest and true assessment and description of the plaintiff. He used the term because on that day a meeting had been held between the plaintiff and the local traditional chief, the Chief Executive Officer, who is the responsible authority, the District Administrator and the local Member of Parliament pleading with the plaintiff to withdraw attachment as it was felt he was disadvantaging the community and its children. He had refused to pay heed to these pleas, hence the use of the word incorrigible.

Fellow teachers and members of the community did not have access to the misconduct charge.

He too was cross-examined. He became headmaster of Ntabeni in September 1990 and went to Kwekwe Magistrate Court on five occasions in 1991 to attend the hearing of the suit brought by the plaintiff. He sought help from the District Education Office then on how to deal with the embezzlement of funds but was advised that as the matter was before the Kwekwe Magistrate Court it was *sub judice.*

He failed to acquit himself well when it was put to him that the only reason he decided to charge the plaintiff was because he had attached the school property. Indeed he ended up blaming Mr Masvibo, the Education Officer (Standards) based in Kwekwe for instructing him to charge the plaintiff. This was contrary to his version under details of the misconduct in which he averred that he was advised to charge the plaintiff of misconduct. He admitted that the words in the misconduct charge Exhibit '1' were his alone.

He recommended discharge or suspension in line with the 4th Schedule (section 44(3)(a)) of the Public Service regulations in question.

He averred that if the same words that he used to described the plaintiff were used on him he would not be offended. He used them to describe the plaintiff's behaviour.

He explained that he used the word stubborn to convey the message that the plaintiff did not readily accept advise. He was resistant to professional advice as the defendant had talked to the plaintiff to drop the case against the SDC so that he would enjoy improved relations with the community. The words tarnishes the image of the profession were meant to portray that, as a teacher who had the interests of children at heart, he was aware that the goal of the Zimbabwe Government was to give every child access to quality education, his actions undermined this goal. The community

wondered at the type of teacher he was who sued his own community. Lastly on hindering development it reflected the expense the SDC would incur in replacing that property in order to enhance school development.

At the pre-trial conference, held on 24 May 2005 the following issues were identified –

a) whether the statements complained of by the plaintiff are wrongful and defamatory of the plaintiff;

b) whether the defendant acted out of malice and abused a charge sheet to publish statements which are defamatory of the plaintiff;

c) whether the plaintiff suffered damages in the sum of $20 million as a result of the defendant's statement.

d) whether the defendant cannot be held personally liable for the statements which he made in a charge sheet;

e) whether the statements made by the defendant were privileged;

f) whether the statements made by the defendant constitute true and fair comments.

The first point for decision is whether the statements complained of were defamatory in the sense of whether the imputations made would lower the reputation of the plaintiff in the eyes of ordinary right-thinking persons of normal intelligence. In *Zvobgo v Kingston Ltd* 1986 (2) ZLR 310 (H) 314F REYNOLDS J stated as follows:-

> "The first such issue is whether the words used were defamatory. In considering this issue, it is customary to divide the enquiry into two separate stages. The plaintiff here relies on the meaning of the words in their primary sense and in this event, it must first be determined what the words actually mean in this sense. Having arrived at a conclusion in this aspect it must then be determined whether that meaning is defamatory."

The headnote in *Marais v Richard en 'ander* 1981 (1) SA 1157 AD reads:-

> "Concerning the question when the allegation in question amounts to comment, the primary question here is also, as it is in determining whether words amount to a defamatory allegation, how would the ordinary reader (with the ordinary quality of reasonableness) understood it."

I am thus called upon to determine the ordinary meaning of the words used.

The first set of words the plaintiff takes issue with is "claimed that you had won the case". Mr *Muchandiona*, for the plaintiff, submitted that the defendant insinuated that the plaintiff was a dishonest person who was lying that he had a court judgment in his favour.

To determine the ordinary meaning of these words, one must read them in their proper context. In doing so the words would be constructed thus "The grounds on which this charge is based is that it is alleged that (iv) the case dragged on until 2000 when you claimed that you had won the case". In my view the author was expressing doubt on whether the plaintiff had a judgment in his favour. The words to the ordinary reader betrayed the uncertainty that the author had on the outcome of the suit. In my view an ordinary reader in the shoes of the officials to whom it was sent would not view them as maligning the standing of the plaintiff. In any event the plaintiff's case is circumscribed by his pleadings. In the declaration the above quoted words were not mentioned as part of the words which he found defamatory. I therefore do not find them defamatory of him.

The next set of words are those under comments. These are "incorrigible, stubborn and resistant to professional advice … his behaviour tarnishes the image of the profession and hinders development".

The defendant assisted, in court, in giving the ordinary meaning of these words. Incorrigible denotes an individual who is incurably bad. It means someone who is beyond redemption; stubborn imports a headstrong and unreasonable individual, resistant to professional advice, denotes an individual who is impervious to reason, and behaviour tarnishes image of the profession denotes one who is unsuitable to hold office while hindering development relates to one who is uncooperative. These words are strong words which are disparaging of the individual on whom they are used. The ordinary reader, even one in the shoes of the recipients of these words would view the plaintiff as a good for nothing individual who did not deserve to be a teacher.

In my view the words written by the defendant were defamatory of the plaintiff. The first issue raised at the pre-trial conference is therefore answered in the plaintiff's favour.

Since *Monckton v British South Africa Co.* 1920 AD 324, our law has always recognized that once words that are found to be defamatory are published, it is presumed that the intention was to injure. This was confirmed by SANDURA JP in *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H) at 278H-279A:

> "It is a well established principle in our law that once it is proved, or admitted, that a defamatory statement was published, the presumption arises that such publication was wrongful and the defendant acted *animo injuriandi*."

In *Wonesayi v Smith and Anor* 1971 (2) RLR 62 (GD) GOLDIN J grappled with the meaning of *animus injuriandi* at page 72. I quote him in *extenso.*

> "When relief, as here, is claimed by the *actio injuriarum,* the plaintiff must allege and prove defendant's *animus injuriandi.* While controversy had existed concerning this requirement, there is now no doubt that *animus injuriandi* is an essential element of liability under the *actio injuriarum.*
> ……

> The meaning and concept of *animus injuriandi* has also been the subject of conflicting views and in particular concerning the nature of the mental element involved. The words have been at times interpreted and applied as if they involved the type of evidence and the mental attitude for proof of *mens rea* in criminal law. Schreiner JA points out in *Basner v Trigger* 1946 AD 83 at p 95 that language has been used which suggest that *animus injuriandi* is actually wider than malice as used in English law. In my respectful view these words must be given their ordinary and literal meaning and any other approach contributes to the confusion which has often arisen in this branch of the law. As has been mentioned in many decided cases, the literal translation of *animus injuriandi* is 'the intention to injure'. Malice, improper motive, neglect of duty etc. may help to prove the existence of *animus,* but it can exist and be proved without evidence of such a mental state and in the absence of negligence.
>
> Thus whether or not the intent is wrongful or unlawful is irrelevant to the question whether the intention to injure has been proved or disproved. *Animus injuriandi* therefore, does not connote a form of *dolus directus* or *indirectus* or wrongful intent, but merely means the intent to injure. If the intent is present, however, then proof that it was lawful will constitute a defence and liability will be avoided."

In the present matter the intention to injure is subsumed in the fact of publication of words that have been found to be, on the face of it, defamatory. The first defence raised by the defendant that the words used are not defamatory therefore falls away.

The second tier defence raised by the defendant was that the words he used fall under the head of qualified privilege.

In *Wonesayi's case supra* at 73E-F, GOLDIN J stated:

> "It is necessary to bear in mind that the *action injuriarum* requires firstly proof that injury was caused, secondly *animus injuriandi,* namely the intention to cause injury and thirdly that the commission of injury was unlawful. It will be presumed, unless the defendant proves that the intended injury was lawfully inflicted and thereby escapes liability."

The plaintiff *in casu* having shown that the defendant intended to cause injury, the duty to rebut that presumption by showing either that he did not intended to injure or that even though he

intended to injure, his actions were lawful falls on the defendant. By raising the defence of qualified privilege, the defendant implicitly accepts he intended to injure the plaintiff. He therefore submits that that injury he wished to bring about on the character and reputation of the plaintiff was lawful. He in this vein submitted that he had a duty to make these comments in the space provided for them in the charge sheet, and the addressees to whom he published them had an equal duty imposed by law, that is by the Public Service Commission Regulations SI 1/2000 to receive them.

The defendant thus discharged the onus on him to show that he had a duty or interest in publishing the defamatory statements and that the persons to whom he published them had a similar duty or interest to receive them. In the premises, he was acting within the authority prescribed to him. He was acting within the scope of his duties. That however would not preclude the plaintiff from suing him personally for the statements he made in the charge sheet which he deemed defamatory. Thus the fourth issue is answered in favour of the plaintiff. The plaintiff has the right to elect whom he wished to sue. The fifth issue on qualified privilege is answered in the defendant's favour, as he has established the two essential elements which shift the onus back to the plaintiff.

In *Mugwadi v Nhari* 2001 (1) ZLR 36 (H) at 41D, CHINHENGO J observed that:

> "Having admitted that the statements made were defamatory and having raised the defence of qualified privilege, Nhari had to show that he had a duty or interest in publishing the defamatory statement and the person or persons to whom he published it had a similar duty or interest to receive it. Once the defendant fulfilled this requirement, the onus shifts to the plaintiff to prove *animus injuriandi* on the part of Nhari."

CHINHENGO J found support for this proposition in INNES CJ in *Monckton's* case *supra* at 331-2. In that case, which incidentally arose from Rhodesia, INNES CJ laid out the law as follows:-

1. Once defendant establishes that he published the communication on a privileged occasion, the ordinary presumption that he intended to injure is rebutted.

2. The plaintiff must on a balance of probabilities affirmatively establish the intention.

3. The plaintiff can prove such intention by showing -
   i) that the defendant published the communication not in good faith but in bad faith;
   ii) once he proves that it was done in bad faith, it follows that the defendant exceeded the limits of his privilege;
   iii) bad faith further indicates that he was driven/propelled by that intention to injure which is an essential element in actions for verbal or literal injury;
   iv) in the great majority of cases the defendant who exceeds his privileged limits is driven by what in English law is called express malice;
   v) the intention to injure may be established not only by proving actual ill-will towards the plaintiff but by showing that the defendant was driven by an indirect or improper motive;
   vi) that intention can also be shown by a statement made by the defendant when he did not know it to be true in circumstances were he was reckless as to whether it was true or false.

In the present case, the plaintiff contended that the defendant was driven by bad faith in writing the words he complains are defamatory. In *Mugwadi's* case *supra* at page 43B-E CHINHENGO J found that the evidence led by Mugwadi "did not go far enough" to show that Nhari was actuated by malice or some other indirect purpose which would justify a finding that Nhari had exceeded the

limits of privilege. He failed to show that there was a motive or other indirect purpose, Nhari thus escaped censure on the basis that no evidence was led at the trial to establish bad faith.

In a bid to show bad faith, the plaintiff submitted that the offensive words are sandwiched between the recommendation to "discharged or suspended until retirement". He submitted that the bad faith arose from the fact that the plaintiff had merely sought to allow the legal process he had stated in 1990, arising from the alleged out of court settlement on the 1986 fraud to which he claimed duress, be allowed to take its full and logical conclusion. Indeed the defendant subjectively confirmed that the failure by the plaintiff to abandon attachment, which was the tail end of that legal process which the plaintiff had instituted, drove him to write those words. It is my view that the plaintiff led sufficient evidence in the form of the 23 April 2002 judgment, Exhibit '2' which the defendant did not see, and the Warrant of Execution Against Property which the defendant saw before he wrote the offensive words, as proof that the words complained of were written in bad faith. The indirect purpose was to have the plaintiff removed from the teaching profession.

Section 44(2)(a) does not have provision for the head of office to recommend the type of penalty which the Disciplinary Authority can impose. That duty may lie with the Disciplinary Committee but remains the sole prerogative of the Disciplinary Authority. It therefore does not assist the defendant to justify his actions on the basis of truth and public benefit.

After all the defendant was aware of the nature of the plaintiff's suit in the Kwekwe Magistrates Court. He had seen Exhibit '3' with the official date stamp which showed that the plaintiff had won his suit against Ntabeni School Development Committee for the refund of the $6 582-00. Faced with these documents, no reasonable man in the defendant's shoes would justify the writing of

defamatory words on the basis of truth. The words were false. He also falls into the class of those who choose to be diligent in ignorance, as the School Development Committee's legal practitioners would have correctly advised him of the proper legal position.

The twin defence of public benefit would not assist him. He was not dealing with the public but with private officials. But even if it were applicable to these officials, the jurisdiction of public benefit would not assist him as it is not in the interest of the public that the due process be compromised by extra-legal pressures in the nature of those alluded to by the defendant as coming from the local pillars of authority in the Ntabeni community. I would thus answer the sixth issue against the defendant. I am thus satisfied that bad faith on the defendant's part is in the instant matter synonymous with the kind of malice expressed by INNES CJ in the *Monckton'*s case. I would answer the second issue in the plaintiff's favour.

The last issue for determination is the quantum of damages due to the plaintiff.

The assessment of damages is always a matter of discretion of the court. It is however not an easy task. The factors relevant in this matter are:-

a) the content of the article which includes the defamatory matter;

b) the nature and extent of the publication;

c) the plaintiff's standing, that is to say his reputation, character and status;

d) the probable consequences of the defamation;

e) the conduct of the defendant from the time the defamatory matter was published up to the time of judgment including;

   i) their reliance or and persistence in a plea of justification;

   ii) the question of any motive on his part;

iii) the question of any retraction or apology for the publication of the defamatory matter.

f) the recklessness of the publication;

g) comparable awards of damages in other defamatory suits and the declining value of money. (See *Mnangagwa v Nyarota & Anor* HH 153/2004 at pages 8-9 of the cyclostyled judgment of MAKONI J)

In applying these principles to the present case it is clear that the words complained of painted the plaintiff in extremely bad light. Notwithstanding the excellent assessments done by the plaintiff and the Deputy Headmaster of St Theresa the plaintiff was portrayed as a thick-headed and uncooperative person, simply because he had dared to salvage his name from the 1986 allegation of embezzlement using the legal process. The content aggravates the damages.

On the nature and extent of the publication it is clear that it was restricted to those officials whose duty it was to officially discipline the plaintiff. It was not for public consumption. The restricted circulation would mitigate the damages.

The plaintiff was and still is a senior teacher. He had been demoted and transferred to another school in 1986. The District, Provincial, Head and Public Service Commission offices were likely to have been involved in this move. They thus had prior knowledge of his earlier fall from grace. That in my view mitigates the damages.

The resultant consequence of the defamation was his transfer from Ntabeni Primary School to St Andrews which was 45km from his home. That aggravates the damages. The conduct of the defendant from the time of defamation until the time of judgment demonstrates an absence of an apology even after the plaintiff was acquitted by the Disciplinary Authority of the misconduct. The defendant did not retract his words. He continued to justify them on spurious grounds thus adding insult to the injury.

Lastly, comparable awards in other defamation suits are not very helpful regard being had to the apocalyptical fall in the value of our currency.

In *Mnangagwa* case, *supra,* a far more serious defamation than the present one, damages of $5 million were awarded. That was on 16 June 2004. Inflation rose month on month to December 2004 by 38% and year on year from December 2004 to December 2005 by 585%. It therefore increased by approximately 625% since the Mnangagwa award.

I accept that Mnangagwa would in January 2006 be entitled to about $50 million dollars.

Taking into account all the factors outlined above I estimate that an award of damages in the sum of $10 million is appropriate.

In the premises judgment is entered for the plaintiff against the defendant in the sum of $10 million together with interest at the prescribed rate from 25 June 2004 to the date of payment in full and costs of suit.

Danziger & Partners, plaintiff's legal practitioners.

Civil Division, Attorney General's Office, defendant's legal practitioners.