

BRIGADIER GENERAL E A RUGEJE  
versus  
BARBRA MAKUYANA

HIGH COURT OF ZIMBABWE  
BHUNU J  
HARARE, 1<sup>st</sup> February 2006 and 1<sup>st</sup> March 2006 and  
6 June 2006 and 20 September 2006

### **Civil Trial**

Mr *Mamvura*, for the plaintiff  
Mrs *Mtetwa*, for the defendant

BHUNU J: The plaintiff issued summons against the defendant claiming \$100 000 000.00 old currency. \$100 000.00 revalued being defamation damages, interest at the prescribed rate from the date of demand being the rate from the date of demand being the 26<sup>th</sup> November 2004 to the date of payment.

The plaintiff is a high ranking member of the Zimbabwe National Army. At the material time he was a Brigadier General in the army. He has since been elevated to the rank of Major General. He is a close friend of the defendant's husband.

The defendant and her husband are civilians members of society.

The defendant and her husband are engaged in acrimonious divorce proceedings which appear to have sucked in the plaintiff by virtue of his close friendship to the defendant's husband.

The defendant has counter-claimed for payment in the sum of \$50 000 000.00 old currency now \$50 000.00. Her complaint is that she was unlawfully and maliciously harassed and defamed by Colonel Chineka at the plaintiff's instance. She accused the plaintiff of poking his nose into her private affairs.

The plaintiff's claim arises from a letter dated 6<sup>th</sup> July 2004 addressed to the commander of the Zimbabwe National Army by the defendant's then lawyers *Kantor and Immerman*. The letter was copied to the defendant, Matipano and Musiniwa the legal practitioners for her

husband in the divorce case and the Director of legal services, Zimbabwe National Army. It reads:

“Re Complaint Against Brigadier Rugeje

We act for Mrs Barbra Makuyana in a matrimonial action she has instituted against her husband following some Major Matrimonial differences between them. Mr Makuyana is a close friend with Brigadier Rugeje who was one of the persons who accompanied Mr Makuyana when he went to pay lobola for the girlfriend who has caused the breakdown of the marriage.

Our client was unlawfully summoned to KG 6 where she was, at the instance of Brigadier Rugeje, interrogated on issues pertaining to her marriage and personal life with allegations being made that she was having an association with one of the soldiers at KG6. Our client was humiliated by this unlawful intervention by the army on an issue that is before the courts and in respect of which the army has no jurisdiction. There can be no question that Brigadier Rugeje’s actions constitute one of the worst abuses of office and we would be grateful if this can be investigated without delay failing which we have instructions to approach the high Court for appropriate relief. Should we have to take the matter to court, we shall be obliged to cite the army as a party to the proceedings as army personnel and premises are being used for these unlawful interventions.

We are by copy of this letter, advising your legal services department of our intentions.” (my emphasis)

Colonel Ncube the Director of Legal Services responded to the above letter in the following vein on the 18<sup>th</sup> August 2004.

:Complainant against Brigadier Rugeje A

I have been directed to respond to your letter dated 6<sup>th</sup> July 2004 which is addressed to the Commander of the Zimbabwe National Army and copied to myself.

The Army does not involve itself in the affairs of people especially civilians.

Your client and her husband are not known to the army and are of no interest of it. We deny that your client was ever summoned by the army.

The army cannot commend on the relationship between Mr and Mrs Makuyana as that is purely private matter between those parties.

We are surprised that you are contemplating citing the army in any legal proceedings connected with this matter.”

The plaintiff gave evidence on his own behalf and called one witness.

His testimony was to the effect that he is a close friend and cousin brother of the defendant’s husband. The defendant admits that the plaintiff is a close friend of her husband but denies that they are related. It is not necessary to resolve that factual dispute, suffice it to say the two are close friends.

Sometime in June 2004 the defendant’s husband Christopher Makuyana approached him complaining that his wife, the defendant was having an affair with a soldier one Sergeant Tede of Five Brigade based in Kwekwe.

It is standard military procedure and tradition that when a commander discovers that his soldier may be misbehaving in the manner alleged he is obliged to take effective steps to warn the soldier against such unbecoming behaviour.

In keeping with the above military procedure and tradition he relayed the complainant to Colonel Chineka, sergeant Tede’s direct commander.

Colonel Chineka in turn summoned sergeant Tede to his office for the purposes of counselling and warning him against such antisocial behaviour.

Colonel Chineka testified that when he interviewed sergeant Tede the sergeant claimed that the defendant was his wife. He then advised him that the defendant was someone else’s wife and he had to dissist from continuing with the affair as this was dangerous play.

He then excused sergeant Tede. Shortly thereafter he received a telephone call from the defendant who asked to come and see him to clarify her involvement with sergeant Tede. He granted her request after seeking the necessary clearances.

When the defendant called at his office he immediately recognised her and recalled having previously met her at Five Brigade where she was introduced to him as a representative of Time Bank. She then told him that she was on the verge of divorcing her husband and that Tede should not be held responsible for the breakdown of the marriage.

He then pointed out to the defendant that as long as her marriage to Makuyana has not been lawfully terminated the affair exposed sergeant Tede to danger.

Colonel Chineka flatly denied having summoned the defendant to his office. He denied having harassed or instilled fear in the defendant in anyway. He further denied that he interrogated the defendant. He maintained that it was the defendant who approached him to exonerate Sergeant Tede. The meeting was at her request and instance. Likewise the plaintiff denied having ordered colonel Chineka to torture and harass the defendant as alleged or at all. They both maintained that they had no interest in the defendant. Their interest lay solely with their soldier's welfare and image of the army.

The defendant gave evidence on her own behalf. She called no witnesses although she had previously indicated that she would call Sergeant Tede. She gave no reason for her failure to call him. It was her testimony that Colonel Chineka at the instigation of the plaintiff summoned her to his office. He telephoned and left a message with her secretary for her to report at his office at KG6. It will be recalled that Colonel Chineka denied having summoned the plaintiff to his office. In the face of such denial the defendant did not see it fit to call her secretary whom she alleges received the message. She did not give any reason as to why she did not call her secretary. Her evidence in this respect therefore remains uncorroborated hearsay evidence. No weight can be placed on that kind of evidence.

Infact the defendant gave herself away when she was caught off guard during cross-examination. She was asked:

“Q. I put it to you that the allegations of the 6<sup>th</sup> July 2004 had no basis at all they were purely meant to be-little and embarrass the plaintiff

A. No it’s what happened. It’s me who was demeaned. He got into my private life. I just went there to stop him. Who was I supposed to tell?

Q. You went to KG 6 purely to protect Sergeant Tede.

A. Protecting him from what? Was his job at stake? I went there because I had been called to go there.”

From her response it is clear that her motive and purpose for going to KG6 was to protect her reputation. She then adds almost as an after thought that she went there because she had been summoned there. In the circumstances of this case it is illogical and improbable to suggest that the plaintiff could have caused the defendant to be summoned to KG6 to protect her reputation if he was bent on defaming and harassing her.

Thus the probabilities favour plaintiff and Colonel Chineka’s version that the defendant initiated the meeting to protect her reputation and Sergeant Tede’s career. This explains her reluctance to call her secretary whom she says received the telephone message summoning her to KG6.

Her failure to call her secretary leaves the court with the impression that she knows that the secretary was unlikely to support her story.

She however confirmed that when she reported at colonel Chineka’s office he immediately recognised her. As a result he did not harass or torture her in any way.

He chose to do her a favour instead by putting the plaintiff on the speakerphone so that she could hear for herself what he had to say about her.

On the speakerphone she heard the plaintiff instructing Colonel Chineka to torture and instil fear in her until she went back crawling to her husband.

Colonel Chineka did not however obey the instruction to harass her. He instead noted that what the plaintiff was doing was wrong. He then referred her to the Army Legal Services Directorate resulting in the complaint letter of the 6<sup>th</sup> July 2004.

Both the plaintiff and Colonel Chineka denied that the plaintiff spoke on the speakerphone as alleged by the defendant. The colonel also denied having referred the defendant to the Army Legal services Directorate.

Both the plaintiff and Colonel Chineka were honest and credible witnesses who corroborated each other in every material respect. I believe their evidence.

The defendant was a dishonesty and unreliable witness. Her defence and counter-claim began to disintegrate when she denied that Colonel Chineka harassed her in the manner alleged in her complaint letter or at all. Having realised the folly of her denial she kept on vacillating between saying the Colonel harassed her and that he did not. The inconsistencies can best be illustrated by the following excerpts from my long hand notes which dovetail into a disastrous performance both in her evidence-in-chief and under cross-examination.

“Defendant: Colonel Chineka did not interrogate me. What he said is ‘I am going to do you a favour and put Rugeje on the speaker phone so that you can hear for yourself what he has to say.’ When I heard what Rugeje said I was very angry. I didn’t know why he was doing all this to me. I was not married to him.

Q. So it is therefore incorrect to say Colonel Chineka interrogated you on issues pertaining to your marriage.

A. No he didn’t interrogate me. He asked.

Q. The letter dated 6<sup>th</sup> July 2004 claims that at the instance of the plaintiff you were interrogated about your private life.

A. No, I think those are just different words, but Colonel Chineka never got to do what he was told.

Q. Paragraph 4.1 of your plea states that you were indeed summoned to KG 6 and interrogated on personal issues.

- A. I don't know the use of words. Colonel Chineka never got to interrogate me.
- Q. The letter claims that there were allegations being made of you having an affair with a soldier at KG6.
- A. He said it but in a nice way.
- Q. Did he accuse you of having an affair with Sergeant Lenny Tede?
- A. Yes.
- Q. Earlier on you said he did not accuse you.
- A. He asked me, I did not like the word accuse.
- Q. So did he accuse you?
- A. Yes he did.
- Q. How did he accuse you?
- A. He asked me and said, they think you are having an affair with a certain Sergeant in the army. They think that's why you are divorcing Makuyana. That's how he accused me.
- Q. In the alleged speaker conversation did plaintiff accuse you of having an affair with Sergeant Tede?
- A. Yes
- Q. Are you sure?
- A. Yes
- Q. In your evidence in-chief you said Rugeje did not say that I was having an affair with a Sergeant in the army
- A. Yes because of the word accusation which you were using but he talked.
- Q. Why did you in your evidence in chief say Brigadier Rugeje did not say I was having an affair with a Sergeant?
- A. I forgot. You can forget things. He accused me.

Q. You had forgotten that he accused you on the speakerphone.

A. Yes. This is a very sensitive issue to me

Q. Just answer my question.

A. Yes I forgot.

Q. You were asked, so there were no allegations of improper conduct and you answered, yes. So had you forgotten?

A. Yes.

Q. What makes you remember today that there were allegations of improper conduct

A. It's me not concentrating on the word accusations. I just remembered."

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Q. Paragraph 5 of your claim in reconvention you refer to accusations and interrogation.

A. Yes.

Q. Who accused you?

A. Colonel Chineka

Q. What did he accuse you of?

A. Of having an affair.

Q. And who interrogated you?

A. Colonel Chineka.

Q. Earlier you said he did not get to interrogate you.

A. No he did interrogate me. He put Brigadier Rugeje on the speaker phone but he was going to interrogate me."

It is self evident that the defendant's evidence was riddled with inconsistencies and self contradictions from start to finish such that it cannot reasonable be taken to be the truth. Hers was a deplorable



pathetic performance in open court under oath such that she clearly perjured herself.

The defendant struck this court as being a person given to drawing factual conclusions purely based on mere unsubstantiated conjecture and wild speculation. For instance when it was reported that a green car had dropped a talisman or evil charm at her gate. She immediately concluded that it was the plaintiff simply because the plaintiff had a green Peugeot 405. She was asked:

“Q. You said his action constitutes one of the worst abuses of office?

A. Yes because his friend my husband never said anything. He was being used to kill me because I have a heart problem.

Q. You say he was using army personnel and premises for unlawful intervention.

A. Yes because the car which was seen dropping things at my gate and the car which was following me was a green car.

Q. So if you see a green car its an army car?

A. At that time Brigadier Rugeje was driving a green car. A Peugeot 405.”

On the basis of the facts before me I come to the conclusion that the complainant’s letter of the 6<sup>th</sup> July 2004 written by the defendant’s lawyers at her instance and request was persee defamatory of and concerning the plaintiff. The allegations were malicious and baseless calculated to interfere with the plaintiff’s reputation and career. The letter undoubtedly portrayed the plaintiff as the worst abuser of public office who uses army personnel and premises for unlawful purposes. In her testimony she stuck to that portrayal of the plaintiff.

No other meaning could possibly have been imputed to the words because the letter expressly said so. The defendant’s desperate attempt to pass off the letter as an innocent genuine complaint does not wash because it was couched in judgmental condemnatory language. For from being a genuine complaint the letter was a deliberate attempt

to get even with the plaintiff for what she perceived to be an unwarranted meddling in her private life.

The publishing of the letter to Matipano and Musiiwa can hardly be viewed as a complaint but a message to her husband that she was now effectively dealing with and demasculating his friend and strongman on whom he purportedly relied upon for support in the divorce case.

Having said that I find as a fact proved that the defendant is liable to the plaintiff for defamatory damages. I now turn to consider the quantum of damages.

In assessing the quantum of damages the court derives guidance from the case of *Nyatanga vs Editor, The Herald and Another* 2001, ZLR 63. That case is authority for the proposition that our courts take a serious view of unwarranted defamation of senior government officials and will award punitive damages where appropriate. The headnote reads in part.

“Held, that allegations which impugn the integrity of a person holding the post of Master and Sheriff of the High Court are defamatory in the highest degree and call for punitive damages. They are much more serious than allegations defaming a politician or businessman. To attack falsely, the honesty and integrity of a person holding high office in the judicial system undermines the confidence that the public should have in the judicial system of the country.”

I am in respectful agreement with the above sentiments. Undoubtedly the plaintiff was a high ranking official holding the office of Brigadier General at the material time. As such he was an embodiment of the army. Tarnishing his good name and reputation amounts to an attack on the army and ultimately government itself. The above remarks in the Nyatanga case (*supra*) therefore apply to the plaintiff with equal force.

That being the case I believe the plaintiff when he says that the army commander was not amused when he got wind of the defamatory letter and a copy was kept in his personal file.

I however take note of the fact that the plaintiff has since been promoted to the position of Major General. Although he alleges that his promotion was delayed on account of the allegations levelled against him he did not adduce any concrete evidence to that effect. On the contrary the army appears to have dismissed the allegations off hand as baseless and unfounded. Despite that finding the inescapable truth is that the unfounded allegations posed a serious potential danger to the plaintiffs career path and promotion prospects. In the absence of a retraction it matters little that this catastrophe was averted.

In the case of *Zvobgo v Kingstons Ltd* 1986(2) ZLR 310(H) cited with approval in the *Nyatanga* case (*supra*) the court laid down factors to take into account in assessing the quantum of damages in cases of this nature. These include the character and status of the plaintiff, the nature of the words used, the extent of the publication the conduct of the defendants and previous awards of damages taking into account the depreciation of the dollar.

I have already alluded to the fact that the plaintiff is a high ranking member of a vital organ of the State charged with the responsibility of maintaining peace and stability in the country. The defamatory words were to the effect that the plaintiff was in the habit of abusing his authority, army personnel and equipment. The allegations struck at the very core of the plaintiff's reputation and career.

The plaintiff on the basis of the evidence before me is a man of high moral values and unquestionable military and social integrity. The words complained of must have seriously wounded his standing in the army and the lawyers to whom they were published. Had common sense not prevailed, the words could have had a catastrophic effect on his reputation and career.

Having regard to the current rampant inflation the amount claimed is now in my view no more than a nominal amount inadequate to sufficiently assuage the plaintiff's injured reputation and self esteem In

the result the plaintiff's claim in the amount demanded can only succeed.

It is accordingly ordered:

1. That the defendant be and is hereby ordered to pay the plaintiff the sum of \$100 000.00 revalued together with interest at the prescribed rate with effect from the 26<sup>th</sup> November 2004.
2. That the defendant's counterclaim be and is hereby dismissed.
3. That the defendant be and is hereby ordered to pay costs of suit.

*Scanlen & Holderness*, the plaintiff's legal practitioners

*Mtewa and Nyambirai*, the defendant's legal practitioners