NOAH ALEX MUKANGANYAMA
versus
D MHAKA
and
C M E D (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 7 & 8 June 2007 and 20 August 2008

Civil Trial

A Muchadehama, for the plaintiff
C Muringi, for the defendants

GOWORA J: On 21 April 2006 the plaintiff issued summons out of this claim for payment to him for damages in the sum of $10 billion. The claim as framed in the summons and declaration is in the following terms:

a) payment of ten billion dollars owed by the defendants to the plaintiff being defamation damages suffered by the plaintiff as a result of a defamatory letter published by the defendants of and concerning the plaintiff in or about August 2004. The amount is due and payable but despite demand the defendant refuses, neglects or fails to pay.

Alternatively

b) payment of the sum of ten billion dollars being damages for injuria as a result of the letter written to Plaintiff by the defendants in or about August 2004. The amount is due and payable but despite demand, the defendant refuses neglects or fails to pay.
c) Interest on the amount from 18 August 2004, being the date of publication to the date of payment.

In his declaration the plaintiff averred that on 18 August 2004, the first defendant, who is the Managing Director for the second defendant had written a letter to the plaintiff. The plaintiff alleged that the letter had stated that the plaintiff had failed the vetting process, had

failed to disclose that he had been fired by one of his former employers, which non-disclosure had reflected badly on the plaintiff's integrity and was also prejudicial to the interests of the second defendant as it had employed the plaintiff when he was unsuitable for the position. The plaintiff averred in the declaration that the article was defamatory of him in several respects. In the alternative the plaintiff averred that he had been degraded and humiliated by the letter. He averred further that he had suffered damages in the sum of ten billion dollars.

In their plea, the defendants admit that the first defendant wrote the letter complained about. They deny that the letter was widely distributed within C.M.E.D with the intention of defaming the plaintiff. They further deny that the words complained were 'made' wrongfully or with intention to injure the plaintiff's reputation. They aver that the statements were true and were made by the first defendant as Acting Managing Director in a letter written to terminate plaintiff's contract with the second defendant and that as a result the first defendant had an obligation to furnish the plaintiff with reasons for the termination. The defendants further averred that the publication was made to the plaintiff only and was done in the interest of the company. It is denied that the letter humiliated and degraded the plaintiff.

It is necessary at the outset to set out the background to this dispute as well as the areas that are common cause. The plaintiff was interviewed by the board of the second defendant for the post of Human Resources Executive, which had been widely advertised in the media. The plaintiff was interviewed on the basis of a referral from an employment agency with which he had registered. After the interview the plaintiff was offered the post, the letter of appointment being penned by the first defendant. His employment was to be with effect from 1 December 2003, or such other time as he would have served his notice period with his then employer. The plaintiff due to his commitments at the time only commenced employment sometime in February 2004. Certain differences then emerged between the parties which culminated in the plaintiff being released from his contract of employment.

The matter was referred to trial on the following issues:

a) Whether or not the letter authored by the first defendant to the plaintiff on 18 August 2004 was defamatory of the plaintiff.
b) The nature and extent of the said letter's publication
c) Whether the plaintiff suffered damages and if so the quantum of damages

The basis of the alleged defamation according to the plaintiff is that the letter stated of the plaintiff that he had failed the vetting process, he had failed to disclose that he had been discharged by one of his former employers, that the non disclosure reflected badly on Plaintiff's integrity and that the non-disclosure was prejudicial to CMED as it ended up hiring plaintiff when he was unsuitable. In his declaration the plaintiff contends that the letter is wrongful and defamatory of him because the words complained of were intended and were understood by the readers of the letter to mean that the plaintiff was dishonest in that he had lied about his past employment record, he was not worthy to be a human resources executive, he had secured employment fraudulently, he was not a fit and proper person, he had prejudiced CMED, he could not be relied upon, he was dishonourable and he was a bad person.

In response to the averment of defamation the defendants have pleaded as follows:

"6) The defendants deny that the words complained of were made wrongfully or with the intention of to injure Plaintiff's reputation because:-

a) The statements were in essence true or substantially true

b) The statements were made by first defendant in his capacity as Acting Managing Director in a letter written to terminate plaintiff's contract of employment with the second defendant and first defendant was obliged to furnish plaintiff with reasons for taking such a course of action

c) The publication of the statement was made to plaintiff only and it was done in the company's interest. First defendant had a legal and moral duty to communicate that information to plaintiff. He was not actuated by malice to do so".

A statement can be termed as defamatory if it tends to diminish the esteem in which a person is held by other people. A statement which exposes another to contempt, ridicule or which is calculated to diminish the willingness of others to associate with the person who is the subject of the statement is also defamatory. A statement can be defamatory in its primary sense, or in its secondary sense in which case there is need on the part of the plaintiff to plead an innuendo. In this case the plaintiff has to all intents pleaded that portions of the letter are defamatory in the secondary sense. In his declaration the plaintiff did not pick out the offending paragraphs in the letter which he considered as having defamed him. However it is easy enough to single the offending paragraphs from the declaration itself. I will therefore deal with each of the paragraphs in turn. The first one is worded as follows:

(iv) You also failed the vetting process.

It is common cause in this trial that when one is employed in a senior position within government or a parastatal, it is necessary to be subjected to a process of vetting. There is no dispute that certain persons had visited the plaintiff's parents and that subsequently a letter was written to the second defendant to the effect that the plaintiff had failed the vetting process. Having pleaded an innuendo in respect of this part of the letter it was incumbent upon the plaintiff to plead how he considered that that statement would be understood. He needed to lay before the court the basis upon which he considered that the statement had diminished the esteem with which he was held by others. He has left it to the court to try and find the sting in the sentence. He has not done so and as the statement is not defamatory in its primary sense for me to put a sting or twist to the same which the plaintiff has omitted would be mere speculation. I therefore do not find that portion of the letter offensive in the least. It is not defamatory.

I turn next to the last paragraph of the letter which is concerned with the alleged failure by the plaintiff to disclose that he had been discharged by one of the government departments and that this non-disclosure had prejudiced the second defendant as a wrong decision was made in hiring him. The paragraph is worded as follows:

> "(c) It has come to our attention that on joining CMED (Private) Limited you failed to disclose that you had been discharged by one of your employers who is the same shareholders of this company. The non disclosure of such critical information reflects badly on your integrity and has prejudiced CMED (Private) Limited as we ended up making a wrong decision on your suitability for the Human Resources Executive post".

The plaintiff contends that the letter imputed that he had lied about his past employment record and that he had secured his employment fraudulently and that he was not a fit and proper person to be employed within the second defendant. An ordinary person reading the letter would certainly conclude that the plaintiff had not fully disclosed his past employment record, the question is would the ordinary reader assume that the plaintiff had lied about the record in question. The ordinary reader of the letter would indeed conclude that the plaintiff was a liar and that he was not a person of integrity and conclude that he should not have been employed by the second defendant. I do not believe that the ordinary reader would go further

and conclude that the plaintiff was a bad person who could not be relied upon. The ordinary reader would however believe that the second defendant would not have employed the plaintiff had he disclosed that he had been discharged from employment with government and that as a result the second defendant was prejudiced by the actions of the plaintiff. The ordinary reader would at the end of the day believe that the plaintiff was dishonest. I can only conclude therefore that the statement was defamatory.

I turn now to examine the defence proffered by the two defendants. The requirements for the defence is that although the statement alleged to be true must be true, there is no requirement that such statement be true in every detail. It suffices if only the material allegations or sting of the charge is true. In Zimbabwe truth alone is not a full defence. In addition to truth it must be established that the publication of the defamatory statement was for the public benefit. Before discussing this additional requirement I should dispose of the requirement that the statement must be true.

The defendants have produced a letter as part of their documents for trial a letter written by a Director General in the Office of the President to the effect that the plaintiff had failed 'the vetting process.' The plaintiff said that the so called process consisted of two people, a gentleman and one lady, who had visited his elderly parents and enquired of them as to his politics. It is not in this judgment, the function of this court to place the process itself under scrutiny. Whether or not the process was conducted in a professional and credible manner is not for this court to comment thereon. What is beyond question is that the Office of the President had in fact subjected the plaintiff to some scrutiny, and that the second defendant was informed that the process had not yielded good results where the plaintiff was concerned. The defendants, one can only assume would have to take the communication at face value and accept that indeed the plaintiff had failed the process. That part of the complaint by the plaintiff is therefore disposed of, albeit I had found that that statement was not defamatory as it did not tend to lower the esteem of the plaintiff in the eyes of right minded people.

I turn then to the portion dealing with the failure by the plaintiff to disclose that he had been discharged by the President's Office. The plaintiff admitted in his evidence that he was employed by the President's Office but said that he had not been discharged but had retired from that office. He said that he was in fact in receipt of a pension from government as a result of his having worked in government. The plaintiff attached to the documents produced to court

an extremely detailed curriculum vitae. It details his employment record, but the stint in the President's Office is missing from the same. It was omitted. When cross-examined on the omission he said that his employment in that office was interchangeable with employment in the Foreign Office. It is pertinent to note that indeed he did include employment with the foreign office but did not say that it was interchangeable with any other position.

The evidence of the first defendant was to the effect that the letter had been written in response to a letter of complaint written to the Secretary for Transport by the plaintiff. The first defendant indicated that the issues highlighted in his letter were issues that he had been raised by the Secretary in phone call and were to address the allegations which had been raised by the plaintiff to the Secretary. The Secretary had requested that CMED furnish him with the reasons for the dismissal of the plaintiff from employment. According to the first defendant the previous correspondence had not specified why the plaintiff had been let go from his position and it was necessary for clarification as the plaintiff had approached the department of Labour for relief on his alleged unlawful dismissal. The time frame as to when the plaintiff approached the department of Labour in relation to his dismissal was not established and on the evidence before me I am unable to say whether or not the letter was written in response to the complaint of unlawful dismissal. What is clear, however, is that the matter was referred to that department which then rendered a disposition, which is not relevant for present purposes.

The plaintiff confirms that the matter was referred for determination but has not placed a time frame on the letter and the complaint to Labour. I have no option but to give the benefit of the doubt to the defendants.

It is trite that one of the requirements for defamation is that the injurious statement be published at least to one person. The letter which is the subject matter of this dispute was written to the plaintiff by the first defendant as Acting Managing Director of the second defendant. A perusal of the letter shows that it appears on the face of it not to have been copied to any other person. The plaintiff stated in his evidence that he did not see it being circulated but that those people who had got the letter telephoned him. He mentioned board members of the second defendant, the Director for Transport at the parent ministry and the Secretary for Transport. The last two showed him a copy of the letter. He said he had received calls from Masvingo Gweru, Mutare, Chinhoyi and Bulawayo, an indication of the kind of harm inflicted on him by the letter. Although the Secretary and the director had allegedly showed him the

letter written by the first defendant, the plaintiff chose not call them to confirm that they had been sent a copy of the same by the first defendant. The witness he called, one Kenneth Maphosa was unable to state how he got a copy of the letter. He said it had been placed in his in-tray by a messenger. He was therefore not in a position to state that it was sent to him by the first defendant. The witness did not appear to have a clear recollection of the contents of the letter in question. According to the witness the letter that he saw talked about the plaintiff having failed his probation after it was extended and that that some one called Tinarwo was taking over from the plaintiff.

What is telling from the evidence of this witness is that he did not get the sense from the letter that the plaintiff had lied about his employment record and that as a result he got the impression that the plaintiff was dishonest. I am not convinced that the witness saw the letter in question. During cross-examination it came out that the witness was actually on suspension from his employment with the second defendant. The dispute between himself and the second defendant has not yet been concluded and no-one can accuse the witness of being impartial in this matter. He clearly has a score to settle with the second defendant. His demeanour as a witness was not impressive and I am unable to accept his evidence as reflecting the truth.

The plaintiff himself did not impress as a witness. A perusal of his curriculum vitae does show that he omitted any reference to his employment in the President's Office. He said in his evidence that his was a board appointment and yet conceded that his letter of appointment had been written by the first defendant. He also agreed that he reported not to the board but to the first defendant. He also said that he had never been placed on probation and yet after his probation period was extended he wrote a letter to the first defendant in which he said about his probation:

> "Please be advised that the purported extension of the probationary period is invalid. I have executed the duties to the best of my ability and you have failed to honour the contract dated 28 November 2003. Paragraph (2) of the contract reads as follows: Duties:
>
> > 'A detailed job description will be made available to you on commencement of duty'.
>
> This has not been done. Failure to do so should you be aware constitutes an Unfair Labour Practice.(sic) I am therefore confirmed as Human Resources Executive with effect from 19 April 2004".

It appears that wiser counsel prevailed however because on 10 May 2004 the plaintiff again addressed a letter to the second defendant. This latter letter was a withdrawal of his letter of 26 April 2004. He said that he had written the earlier letter due 'a feeling of unfair treatment arising out of a failure to be supplied with a job description as stated in the letter of 28 November 2003.'

In court, when giving evidence he denied categorically that he had been aware that he was on probation for a period of three months and that his supposed failure of the process had been a creation of the second defendant. The rhetoric question that immediately springs to mind is why, if he had not been on probation, he saw it fit to have declared himself as confirmed with effect from 19 April 2004. Again one is bound to conclude that he found it necessary to state the confirmation because that would signify the end of the period of probation and the permanence of his employment position.

I turn next to his evidence on the effect of the letter on his peers and those whom he said regarded him highly. He spoke eloquently of the eminent persons and ones not so eminent, some of whom were in the employ of the second defendant and others who were not who had been aware of the contents of the letter under discussion. Yet when it came to have witnesses come and confirm the publication of the offending letter he appeared hamstrung in calling them. He was not able to give a response as to the reason why he had not called these people who had seen the letter and had been shocked by its contents. Certainly the witness that he called is not amongst the people who phoned him in solidarity after perusing the awful letter. It does appear to me as if these phone calls that he described to the court were nothing but a figment of his imagination. I find that on the evidence the plaintiff has not proved publication of the letter.

Judging by the submissions from his counsel, I am inclined to believe that there might be an acceptance that no publication took place. I am fortified in this belief in that I have been asked to find that an *injuria* took place if there was no publication of the letter. When one peruses the summons and declaration filed on behalf of the plaintiff however, it becomes clear that the alternative claim for i*njuria* was not well thought out. The *actio iniuriarum* is a separate wrong to that of defamation with its own requirements. In order to be able to pray for an order in the alternative based on the same, the plaintiff ought have specifically pleaded the same and thus laid a basis for the same. Unlike the law of defamation where our law differs

slightly from that of South Africa, under the *actio iniuriarum* the requirements under both systems are similar. Thus the plaintiff would have needed to show that the first defendant had the requisite *animus iniuriandi*. This was not pleaded nor was any evidence adduced to show that the first defendant had such *animus iniuriandi.* The plaintiff has not established the claim for *iniuria* and consequently the claim in the alternative must need fail too.

In the premises the plaintiff has failed to establish the main claim for defamation and the alternative claim for *iniuria.* The entire claim is therefore dismissed with plaintiff meeting the costs of the two defendants.

Mbidzo Muchadehama & Makoni, plaintiff's legal practitioners
Hute & Partners, defendant's legal practitioners