HH367-24
HCH 9390-18

FADZAYI MAHERE
versus
PETINA GAPPAH

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 3 June 2024

Date of written judgment: 29 August 2024

Civil trial

N. Moyo, for the plaintiff
The defendant in person

MAFUSIRE J

[1] On 11 October 2018 the plaintiff issued a summons for damages for defamation against the defendant. Until the "last minute", the defendant contested both liability and quantum quite vigorously. But in the end, she admitted liability. She published some retraction and an apology. The plaintiff did not accept them. So, the issues remaining for trial reduced to the weight to be given to the purported retraction and apology, the level of damages as may be due to the plaintiff, if any, and of course, the question of costs.

[2] The journey to the day of judgment has been long, arduous and acrimonious. The theatre of contest has been a 'hard hat area'. At the various milestones the court has assumed the roles of conciliator, mediator, counsellor and judge over interlocutory disputes, spats, tiffs and rows being urged upon it with so much zest and passion. It has rather been distressing to be umpire over an internecine contest between arguably two brilliant legal minds.

[3] Both the plaintiff and the defendant are lawyers. However, they occupy space in very different spheres of endeavour. Both attained their undergraduate law degrees at the University of Zimbabwe but at different times. They went on to attain higher academic qualifications and to make names for themselves in their chosen careers: the

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plaintiff as an advocate and academic, the defendant as an author. It was during the pursuit of academic excellence by the plaintiff at the prestigious Cambridge University in Britain that their paths would meet but subsequently cross. That was probably the dawn of the defamation claim.

[4] At the time of the plaintiff's enrolment at the University of Zimbabwe for her first degree in law her father was the Permanent Secretary in the Ministry of Education in the Government of Zimbabwe. The reason for this rather innocuous detail emerges very soon.

[5] At the time of her summons, the plaintiff was practising law as an advocate in Zimbabwe. She had been a part-time law lecturer at the University of Zimbabwe. She is a human rights advocate and an active participant in mainstream politics. Among other achievements, she rose to become a Member of the Parliament of Zimbabwe on the ticket of the main opposition political party. During the pendency of this case she became the national spokesperson for that party. Abroad, she had worked, initially as an intern and subsequently as a legal assistant at the United Nations' International Court of Justice in The Hague, Netherlands.

[6] On the other hand, apart from her academic achievements, peaking at a Doctorate [PhD] in International Trade Law, the defendant is an internationally acclaimed author with several titles under her belt. She worked for an international organisation abroad as a legal advisor. At the time of the summons she had been engaged in some advisory capacity in the office of the President and Cabinet in Zimbabwe.

[7] The plaintiff's summons for damages against the defendant claimed US$1 million. At trial the amount was reduced to US$50 000-00. The cause of action hinged on some exchanges between the parties on social media from about 28 September 2018. At all relevant times both parties operated accounts with what was then known as Twitter, now called X. They had numerous followers running into several thousands, some of whom got involved in the spats.

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[8] For context, it is necessary to reproduce those relevant tweets on the defendant's twitter handle *@VascoDaGappah*. Some of them were the defendant's exchanges with, among others, followers on Twitter:

Defendant: "I dreamt that Zim's most active Twitterers had stopped tweeting to write wonderful books: on politics, constitutional law, the media, business, political science and gripping memoirs. I woke up to find them tweeting. It is easier to trawl for cheap likes than to write solidly."

Plaintiff: "It's easier to tweet about the folly of twitter than to leave people to live their lives as they choose. It's almost like attacking lawyers who've never set foot in a courtroom or featured in the law reports for choosing that course. Let people be.''

Defendant: "As someone who claims to have been an international criminal lawyer in The Hague when you were actually just an intern, you are certainly aware that there are different ways to be a lawyer. I hope you leave Twitter long enough to write even just one article. Good day to you."

Defendant: "She went there first. I can go even further and talk publicly about how she repaid me after I helped get her into Cambridge. But I won't go there. Because I don't stoop that low."

Defendant: "I have on my computer this person's Cambridge application essay which I completely rewrote for her. Your advice is better given to her."

Defendant: "Everything I have I got through merit. It was not because my Perm Sec father knew people who knew people who got me into the UZ with not enough points, giving me a favourable advantage not enjoyed by others not favoured with a father who was a Perm Sec."

Defendant: "It was a Master's degree based on an LLBS from the UZ. By that point, the unorthodox entry to the UZ was inconsequential."

Defendant: "No point beyond the fact that she is very good at pissing in the faces of the people she comes running to for help. Thanks for your thoughts."

Defendant: "We broke up many years after Fadzayi tried and failed to get into his pants.. … …"

Defendant: "No. How is that an issue? Twitter is not life … my post was not even about her!"

Defendant: "Oh I think she is great. Just not as great as she thought she was. She needed a lot of help. I was very happy to give her. Until she tried to do a number on me. But I have no regrets at all."

Plaintiff: "1. Hi @VascoDaGappah. You've blocked me from seeing your tweet replies due to your lies – expected. I had full academic colours & sufficient points to

study at the UZ. That's what got me in & why I received the Book Prize every yr & won All African IHL moot representing Zim

2. Whatever your gripe with my dad, leave him out of this. Just argue with me and based on fact. As a lawyer, baseless slander ought to be beneath you. You know the implications.

3. You have never worked at the ICC so I don't expect you to know how it works or my employment record. Having interned there in Prosecutor v Bemba, I was hired to work on the Kenya situation. I am an international criminal lawyer whether you are at ease with that fact or not.

4. I was accepted into Cambridge based on my academic and employment record. You did not rewrite my essay as you claim. In any event, my credentials spoke for themselves hence I did well there and was granted a Fellowship to work at Chambers in London.

5. Stop picking on people you don't know, creating stories that aren't true and slandering my name & that of my family to feed your ego. It's unbecoming & petty of someone of your stature. You've done it many times before & I've ignored it. Enough now. Let people be."

Defendant: "I haven't blocked you at all, I don't need to. Don't lie. You and I know exactly how you got into UZ, how you got into Cambridge with my help and how you tried to get into my then partner's pants. I have all the emails. Please don't go there. I don't want to. Thanks."

Defendant: "I did not block her. She is lying. But feel free to believe what you wish. Not my circus not my monkeys. She knows I have the proof for every assertion I make. Thanks."

Defendant: "I have tried really hard to get over the past. Really hard. I even reached out to her two years ago only to find she had accused a dead man who could not defend himself of some horrible things. His wife, now late, was a dear friend. I found this hard to forgive."

Defendant: "But the bottom line is that Twitter is not the place for any of this. I apologize to Fadzayi for my intemperate response but mostly to all of you that you had to witness this. I am genuinely sorry. I can assure you it will not happen again."

Defendant: "I am really sorry to all who witnessed my altercation with @advocatemahere last night. It has been a long time coming but it really should not have blown up on Twitter. A number of you said I really should have been the bigger person. You are absolutely right. I should have."

[9] In her declaration the plaintiff averred that the defendant published a series of tweets on Twitter about the plaintiff to the effect that the plaintiff did not qualify to be admitted into the University of Zimbabwe on her own credentials for the law degree but that she had been accepted only because of the influence exerted by her father

who was a Permanent Secretary in the Government of Zimbabwe; that the defendant wrote the essay that enabled the plaintiff to be admitted into Cambridge University for her Masters' Degree, and that the plaintiff tried to get into the pants of the defendant's ex-partner.

[10] The declaration went further to allege that the defendant's tweets were re-tweeted by her followers who had, as the defendant had intended, understood them to mean that the plaintiff had corruptly been admitted into a university programme for which she did not qualify by using her father's influence; that the plaintiff had been incapable of writing the required essay for Cambridge University but had corruptly got the defendant to write it out for her; that the plaintiff was a liar who had falsified her curriculum vitae to claim that she had been an employee of the International Criminal Court when she had only been an intern, and that the plaintiff was a woman of low morals who had tried but failed to seduce the defendant's ex-partner.

[11] In her plea, the defendant, then represented by a firm of lawyers, averred that the plaintiff had extracted a tweet from the defendant's feed which was not at all about her and had responded in a crude and disproportionate manner; that to this unnecessary provocation and lies the defendant had responded by stating the truth about the plaintiff's employment in the Hague, namely that she had merely been an intern; the truth that the plaintiff's qualifications had been below the threshold as required by the University of Zimbabwe; the truth that the defendant had assisted the plaintiff to re-draft her essay for Cambridge University and had rendered her other assistance that had enabled her to obtain a place there; and the truth that the plaintiff had attempted to start a sexual relationship with the father of the defendant's son.

[12] The defendant's plea further alleged that the defendant's statements had been fair comment in response to the aspersions by the plaintiff against the defendant and therefore not defamatory of the plaintiff, and that the plaintiff had deliberately highlighted the defendant's statements to more than 150 000 of her own followers on Twitter, thereby giving the statements greater prominence than they might otherwise

have had. The defendant prayed for the dismissal of the plaintiff's claim with costs at the higher scale.

[13] The matter was prosecuted to the pre-trial conference stage and eventually to trial before me. The trial aborted on several occasions owing to some interlocutory applications by the defendant that were consistently filed late. The first of these was to compel the plaintiff to effect further discovery of certain documents and for the setting aside of the plaintiff's declaration on the grounds that it did not disclose a cause of action. I dismissed the application with costs under judgment number HH 334-22 in May 2022. The main matter was set down for the commencement of the trial.

[14] The second of the defendant's interlocutory applications was for leave to appeal the judgment aforesaid. I dismissed the application with costs under judgment number HH 633-22 in September 2022. The main matter was again set down for the commencement of the trial.

[15] Having failed to get the leave to appeal, the defendant sought the leave of a judge of the Supreme Court. The Supreme Court dismissed the application with costs under judgment number SC 55-23 in June 2023. Yet again the main matter was set down for the commencement of the trial.

[16] The defendant was not finished. She applied for my recusal. Under judgment number HH 112-24 in March 2024 I dismissed the application with costs on the higher scale.

[17] In between these applications the defendant had, among other things, written letters of complaint to the Law Society of Zimbabwe alleging, among other things, dishonourable and unprofessional conduct by the plaintiff. She had also written to the Judicial Service Commission complaining about alleged bias by myself in the conduct of the interlocutory applications.

[18] However, just before the trial began in earnest, the defendant published a statement on her X account which she alleged was a retraction of her defamatory statements and an apology to the defendant. She admitted liability for the defamatory statements.

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Arguing that the retraction and apology were compensation enough for any damages as might be due to the plaintiff, she however offered to pay an undisclosed amount to a charitable organization of the plaintiff's choice. During the course of the trial the defendant also withdrew her letters of complaint aforesaid.

[19] The plaintiff did not accept the defendant's retraction and apology. She maintained that they were too little too late. The plaintiff also rejected the defendant's apology on the basis that there was no contrition, that it was not genuine and that, in any event, the retraction was not of the original defamatory words published but was of something newly crafted by the defendant. She scoffed at the defendant's offer to make a payment to a charitable organization of the plaintiff's choice.

[20] During the course of the trial the plaintiff reduced her claim from US$1 million to US$50 000-00. She explained that the reason why the original claim had been pegged at that huge amount had been to hedge against inflation given that at the time of the summon, the Zimbabwean currency had been pegged at a ratio of one to one to the United States dollar, that the economy was in a state of hyper-inflation and that any payments by the defendant would be in the local currency.

[21] At the eleventh hour there were attempts by the parties to settle the matter out of court. Regrettably they collapsed. The trial proceeded on the three issues aforesaid, namely the weight to be given to the defendant's retraction and apology, the quantum of damages, if any, and the question of costs. These aspects will now be determined *seriatim*. But first, it is necessary to set out some of the relevant legal principles on the law of defamation as a guide to the determination process:

- Damages for defamation are compensation for the injury to the plaintiff's reputation. That compensation is to vindicate the plaintiff to the public for the wrong done to him or her. The compensation is also a *solatium* [a payment for injured feelings or emotional pain and suffering] rather than a monetary recompense for harm measurable in money and damaged reputation: *Uren v John Fairfax & Sons [Pty] Ltd* (1966) 117 CLR 118, 150 and *August v Maimane* 2023 ZAWCHC 254, para 64.

- It is always a difficult process translating into money what a plaintiff has lost as a result of the defamation. It is largely a question of impression: *Mujuru v Moyse* 1996 (2) ZLR 642 [H], at p 653.

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- The circumstances relevant to the assessment of damages include:

  [a] the content of the article which includes the defamatory matter,

  [b] the nature and extent of the publication, including the aspect of republication of the defamatory matter,

  [c] the plaintiff's standing, i.e. his or her reputation, character and status,

  [d] the nature of the defamation,

  [e] the probable consequences of the defamation,

  [f] the conduct of the defendant from the time the defamatory matter was published up to the time of judgment, including [i] the defendant's reliance and persistence in a plea of justification, [ii] the question of malice on the defendant's part, and [iii] the question of retraction or apology for the publication of the defamatory matter;

  [g] the recklessness of the publication, and

  [h] comparable awards of damages and the declining value of money, but this aspect not to be considered with such mathematical precision as to lead to an unreasonable result:

  see *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445 [H]; *Chinamasa v Jongwe Printing & Publishing Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 [H] and *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 [S] :

- No regard is to be had to the subjective value of money to the injured person, for the award of damages for pain and suffering cannot depend upon, or vary, according to whether he or she be a millionaire or a pauper: *Minister of Defence v Jackson's* case above;

- The courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties: *Mineworkers Investment Co (Pty) Ltd v Modibani* 2002 (6) SA 512 [W] and *Jacobson v Finch* [2023] ZAWCHC 115;

- A public apology [by the defendant] is usually far less expensive than an award of damages and it can set the record straight, restore the reputation of the victim, give the victim the necessary satisfaction, avoid severe financial harm to the culprit, and encourage rather than inhibit freedom of expression: *Mineworkers Investment Co v Modibani* and *Jacobson v Finch* cases above.

- An apology should contain an unreserved withdrawal of all imputations made and an expression of regret otherwise without them it is not a full and free apology: *Ward-Jackson v Cape Times Ltd* 1910 WLD 257, 263;

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- A timeous, spontaneous and contrite apology containing an unconditional retraction mitigates the amount of damages for defamation: see VISSER & POTGIETER, *Law of Damages*, 3rd ed., Juta 2012, at p 528. See also *Modibani* and *Finch's* cases above.

- The courts in Zimbabwe and South Africa have not been generous in their awards for *solatium* since an action for damages is not a road to riches: *Shamuyarira* and *Chinamasa* cases above;

- In exercising its discretion as to costs, the court is entitled to consider the principle of *plus petitio* [an overclaim or claiming too much in pleadings without any hope of proving the amount], the degree of cupidity [greed for money or possessions] revealed by the claimant being a relevant factor: *Rowles v Isipingo Beach Revision Court & Anor* 1966 (3) SA 751 [D], 753A-G; *Kathrada v Arbitration Tribunal & Anor* 1974 (2) SA 535, 540E and *Mohadi v Standard Press [Pvt] Ltd* 2013 (1) ZLR 31 [H].

[22] Speaking generally, legal principles are sometimes quite easy to lay out but altogether difficult to apply to the nuts and bolts of any given case. For example, by how many dollars and cents shall a plaintiff's claim reduce or increase after the court has made findings on his or her reputation, his or her character, his or her status? Or to what extent does a successful claimant be mulcted in costs because of his or her apparent cupidity?

[23] It must be accepted that some principles may be more relevant in some cases than they may be in others. Determining a claim for defamation damages is not a weighting exercise whereby a principle is accorded this or that number of points. All the principles are considered conjunctively. It is one's considered view that at the end of the day, it is an exercise of a value judgment by the court after a thorough blending, mixing and synthesis of the relevant legal principles. It is largely a question of impression: see *Mujuru's* case above, at p 653.

[24] I now turn to consider the three issues for trial aforesaid. Only the parties themselves gave evidence. And as a general comment, save for certain aspects that emerged in the defendant's cross-examination of the plaintiff, *viva voce* evidence lent little weight or impetus to what had already been ventilated in the pleadings or the various statements filed of record, most facts being common cause anyway. Relevant aspects of the parties' evidence will be related to as and when it becomes appropriate.

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i/ *Defendant's retraction and apology*

[25] The defendant maintains that within a matter of six hours after the offensive tweets she apologised to the plaintiff. The relevant tweet in this regard must be the one above in which she stated:

> "I am really sorry to all who witnessed my altercation with @advocatemahere last night. It has been a long time coming but it really should not have blown up on Twitter. A number of you said I really should have been the bigger person. You are absolutely right. I should have."

[26] Then four days before the trial, the defendant published on her X account the following statement:

"APOLOGY AND RETRACTION

FADZAYI MAHERE V PETINA GAPPAH HCH 9390\18

In September 2018, following a public spat on Twitter, now X, I posted a number of statements about Advocate Fadzayi Mahere, namely that:

- she got into the University of Zimbabwe through the help of her father in 2004;
- she was an intern in the Hague in 2009;
- she attempted to 'get into [the] pants' of the father of my son after he asked me to help her with her application to Cambridge University; and
- I helped her get into Cambridge by editing her application essay in October 2009;

Advocate Mahere considered my statements to be untruthful, defamatory and injurious to her. Consequently, she launched legal action against me for causing 'irreparable harm' to her political career, her career as a civil society activist and to her career as an advocate.

In order to bring a conclusive end to the legal action, I hereby fully and unequivocally retract all the statements that I made about her, both on Twitter and in subsequent legal pleadings, and tender a full, public and unreserved apology to Advocate Mahere for any pain, hurt or distress that were caused by my statements.

I wish Advocate Mahere continued success in her political career, her career as a civil society activist and her career as an advocate.

As a demonstration of my good faith, sincerity and regret, I undertake to make a donation in Advocate Mahere's name to the charity of her choice. It is my sincere hope that that this full retraction and apology brings finality and closure to this matter."

[27] The plaintiff dismisses the defendant's retractions and apologies. With regards to the first one, she states that the statement was hardly a retraction or apology and that at any rate, it was not made to her but to the defendant's own followers on social media.

[28] With regards to the second and more extensive retraction and apology, the plaintiff argues that the defendant cleverly crafted new statements that were rather different from the original defamatory matter. The plaintiff has dissected the various lines in the defendant's retraction and apology and contrasted them with the original defamatory matter. For example, where in the retraction and apology the defendant wrote that the plaintiff got into the University of Zimbabwe through the help of her father in 2004, the plaintiff argues that the original defamatory matter was to the effect that the plaintiff had been admitted into the university only because her father had been a Permanent Secretary in Government who had used his influence to get her admitted because she did not qualify. The plaintiff does the same analysis with all the other statements.

[29] The plaintiff further argues that the purported retraction and apology were not genuine, that they lacked contrition and that they were published only for the purposes of averting the trial and not with the genuine intention to appease.

[30] On the other hand, the defendant argues that out of an abundance of economy she published an easily readable and understandable retraction, combining all the statements she had originally posted on social media and in her pleadings and that she adequately addressed the gist or sting of the original defamatory matter. She stresses that the day after posting the retraction and apology she copied the statement to the plaintiff through her lawyers in compliance with their demands and that therefore, it cannot be said that she apologised in the hope of avoiding the trial.

[31] I need not be detained by the first of the defendant's alleged retraction and apology above. It was hardly an apology. An apology should contain an unreserved withdrawal of ***all*** imputations made by the defendant. It should be an expression of regret. Absent these, it is not a full and free apology: see *Ward-Jackson v Cape Times Ltd* above. This one fails the test. At any rate, as the plaintiff argues, the purported

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apology was not to the plaintiff. It was to some third party followers on Twitter. Therefore, I do not take it into account in my determination.

[32] The second and more extensive retraction and apology by the defendant stands on a different footing. Undoubtedly, there is so much content that gets published on social media. There is so much to read. Statements on electronic media have almost an unlimited reach. The defendant's spats had gone viral. Thus, the publication had been extensive. However, the defendant argues that social media is ephemeral. She has a point.

[33] I would think that as with defamatory matter in newspaper articles, there exists various categories of readers on social media. This aspect was graphically illustrated in the *Mujuru* case above, albeit in the context of assessing the character and reputation of the plaintiff, an ex-army General and decorated hero of the Zimbabwe war of liberation. The court, *per* CHIDYAUSIKU J, as he then was, said, at p 654:

> "The General means different things to different people. On the one hand, you have the 'Rhodesian never die' brigade. To these, the general has no reputation to talk of and therefore cannot be defamed. … … … To them, the General is merely coming to court to look for money. … … … Then you have the ordinary man, the one to be found on the Chawasarira Commuter Omnibus to Chitungwiza. To the ordinary man, the General is a hero."

[34] To some type of readers, statements on social media are like chewing gum. They skim though them, get amused and after a chuckle or two they move on to the next tweet. As in the case of newspaper articles, I consider that this type of readership is inclined to loose thinking and to reading in implications more freely than a lawyer would: see *Chinamasa v Jongwe Printers* above. This readership does not read an item with cautious and analytical care beyond casual entertainment. In my view, this readership would not have discerned the subtle or scholarly differences between the defendant's original defamatory publications and her retraction and apology, six years later.

[35] I imagine that having read the brief but loaded spats at the time, the undiscerning readership, after some chuckles, would have dismissed them as a tussle over a

boyfriend by two educated girls. Indeed, one follower by the twitter handle Pride@Khamaradha latched onto that aspect and tweeted:

> "'… you tried to get into my then partner's pants …' I think *ndipo pane mwongo webopoto iri*" [The Shona words loosely translating to … **there lies the heart of this intense wrangle**.]

[36] The defendant's tweet in reply seems to have given credence to that conclusion:

> "It was hurtful and mind boggling at the time. I have since got over it but the uncomfortable memory remains."

[37] I consider that to the undiscerning reader of social media, the defendant's retraction and apology did touch on the gist or sting of the original defamatory matter. They would have been adequate. However, to those other followers of social media in the same social class as the plaintiff and the defendant, namely the more educated and therefore more discerning ones, for example the lawyers, the defendant's retraction and apology were probably meaningless. The gist or sting of the defamatory statements would have remained.

[38] The more discerning readership would have seriously questioned the plaintiff's eligibility to enter law school for her first degree without the help of her influential father. They would also have concluded that but for the defendant's writing the entry essay for her, the plaintiff would probably never have qualified to study at Cambridge University. They probably would have considered the whole arrangement as fraudulent or corrupt. Indeed, one of the readers made reference to criminality when he tweeted:

> "May I know how you helped a non deserving candidate? Are you not incriminating yourself here?"

[39] Despite the plaintiff's outstanding performance and success in subsequent years, questions would still linger on in the minds of the scholarly reader, particularly if he or she continued to be bombarded with the defendant's persistent reference to the plaintiff's alleged under qualification, for example:

> "It was a Master's degree based on an LLBS from the UZ. By that point, the unorthodox entry to the UZ was inconsequential."

[40] In my assessment, given the analysis above, the impact of the defendant's retraction and apology, whilst commendable, was minimal. At any rate, it is just one of the many aspects that are thrown in the mix for synthesis. It is not decisive by itself. No one single principle is.

[b] *The quantum of damages due to the plaintiff, if any*

[41] The plaintiff reduced her claim to $50 000-00. The defendant maintains that nothing is due to her, the retraction and apology being adequate recompense. In the alternative, the defendant offers to donate an undisclosed amount to a charity of the plaintiff's choice, her reason for this approach being that the plaintiff is known for her support of charity work.

[42] What sets this case apart from any others in the past, the South African cases of *Finch* and *Modibani* aforesaid included, is the defendant's conduct after the summons. In her plea, the defendant pleaded truth, justification and fair comment, defences which, if raised, must succeed at all costs otherwise they boomerang in the face of a defendant. In *Shamuyarira v Jongwe Printing & Publishing* aforesaid, it was accepted that the defence of justification seriously aggravates the damages if it fails.

[43] At one stage, from her synopses of the witnesses' statements, the defendant indicated she had lined up no less than eight witnesses to come and testify to the truth of her defamatory matter. In her subsequent pleadings and interlocutory applications aforesaid, the defendant scaled up the defamation, taking every opportunity to gouge out the plaintiff's character, reputation and fame, something I commented upon in those previous judgments. Her conduct was so evidently violent, patently unrestrained and demonstrably malicious. It sank to the lowest depths in her application for recusal the founding affidavit of which was replete with references to the plaintiff as a woman of loose morals and a serial mistress. The details are in judgment number HH 112-24 above.

[44] The defendant's bitterness and malice were still evident even during her cross-examination of the plaintiff. Initially her approach had been, among other things, to show that her own defamatory statements paled into insignificance compared to the vile things that had been said of the plaintiff by other people. The defendant had also been bent on involving the plaintiff's father in the matter, such as by showing that the absence of any suit by him against her was proof that she had done no wrong.

[45] Seeing that the defendant was unassisted and that she might unwittingly be jeopardizing the good foundation she had laid down with her retraction and apology, I called the parties into Chambers. We eventually all agreed on what issues to focus on in evidence and cross-examination. Afterwards the trial went on smoothly.

[46] Reference to awards in previous cases is a futile exercise. They were made in completely different economic epochs and under different monetary regimes. Furthermore, the defendant's malicious conduct during the pendency of this case as has been commented upon above is without precedent. Thus, previous awards are merely being noted. In *Chinamasa,* a case decided in 1994, the award was $30 000. In *Shamuyarira*, also in 1994, the award was $15 000. In *Zimbabwe Banking Corporation Ltd v Mashamhanda* 1995 (2) ZLR 417 [S] the Supreme Court refused to tamper with an award of $45 000 granted by the trial court. In *Mujuru*, the award was $40 000.

[47] Certain considerations by the court in the *Chinamasa* case are relevant to this case. In that case the plaintiff was a respected lawyer of long standing. He had previously practised as an attorney before ascending to the position of Attorney-General of Zimbabwe. It was during his tenure as Attorney-General that certain defamatory matter was published in a newspaper which happened to be an official mouthpiece of the political party to which he belonged. The court considered that the slur by the defendants was as serious as anyone could make against a professional lawyer, almost as serious as the worst that could be said about a serving Attorney-General and that the defamation had struck at his professional reputation: see also the South African case of *South African Associated Newspapers Ltd & Anor v Yutar* 1969 (2) SA 442

which concerned the defamation of a serving Deputy Attorney-General and in which similar sentiments had been expressed.

[48] In the present matter, the plaintiff points out that as a professional woman, an advocate and officer of the court, a respected Member of Parliament and a human rights defender, her reputation and character are her currency. She has testified on, among other things, the harrowing experience and abuse that she has endured from, among others, her fellow parliamentarians from the ruling party. She testified that each time she stood up in Parliament to debate a point some of the members would derisively shout her down, calling her all sorts of names such as prostitute and husband snatcher. She blames the defendant for having sown the seed for that abuse.

[49] In defence, the defendant argues that contrary to her allegations that she suffered an irreparable harm by reason of the defamation, the plaintiff has actually been more successful in her various pursuits in that, among other things, she has continued to be briefed as an advocate; she was re-elected to Parliament with an even greater number of votes than before; she has been featured in certain high-profile programmes and articles debating issues on social justice.

[50] The defendant's arguments are relevant considerations. However, the contrasting position to them is that the fact that the words complained of did not achieve their objective does not make them any less defamatory: see *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 [H], 290D; the *Yutar* and *Mujuru* cases above. In the *Chinamasa* case above, it was held that the fact that a plaintiff might not have been adversely affected in his career as a result of the defamatory publication about him did not make the publication any less defamatory.

[51] I consider that one of the reasons for the approach in cases such as *Tekere*, *Chinamasa*, and *Yutar* above, and several others, is that damages for defamation are compensation not only for the injury to the plaintiff's reputation, but also act as *solatium*: *Uren v John Fairfax, supra*. Thus, it would matter little to the victim's injured feelings that the defamatory statements might have had little or no effect on other people. In the English case of *McCarey v Associated Newspapers Ltd & Ors*

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[1964] 3 All ER 947 [CA] DIPLOCK LJ said, at 959 [quoted with approval by ADAM J in *Robertson v Ericksen* 1993 (2) ZLR 415 [H]), at 417A]:

> "In an action for damages, the wrongful act is the damage to the plaintiff's reputation. The injuries he sustains may be classified under the two heads: (i) the consequences of the attitude adopted to him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement; and (ii) the grief or annoyance caused by the defamatory statement to the plaintiff himself. It is damage under this second head which may be aggravated by the manner in which, or the motives with which, the statement was made **or persisted in…**" [*emphasis added*]

[52] The plaintiff seeks US$50 000. That is too much. The defendant offers nothing except an impugned retraction and apology, alternatively an undisclosed amount to a charity of the plaintiff's choice. That is too mean. Taking all the above factors into account, particularly the defendant's reckless and violent conduct after the defamatory statements and the resultant hurt inflicted by her in her subsequent pleadings and the interlocutory applications, the fact that the reach of any electronic media is probably unlimited, the defendant's retraction and apology, the apparent minimal harm to the plaintiff's career, and so on, and exercising a value judgment, I consider that an amount of US$18 000 should be adequate compensation for the plaintiff.

[c] *Costs*

[53] The plaintiff claims costs of suit on the higher scale of attorney and client. Part of the justification for this is that the defendant has abused the court process at every turn in ratcheting up the defamation in all her subsequent pleadings and interlocutory applications. It is argued that the defendant persisted with her defamatory conduct despite the plaintiff at all times proving the falsity of the defendant's allegations, such as that she did not qualify to study law at the University of Zimbabwe.

[54] On the other hand, the defendant argues that the plaintiff should be denied her costs on the basis of the principle of *plus petitio* because she was extravagant in claiming a humongous amount of money which she had no hope of ever recovering, an aspect which allegedly forced her to defend the action. Pointing out that the plaintiff only reduced her claim at the last minute in court, the defendant asserts that by right she could herself have claimed costs but chose not to.

[55] In regards to her amending her claim at the last minute, the plaintiff argues that she should not be penalised for this because when she issued her summons in October 2020 the Zimbabwean currency was at par with the United States dollar at a ratio of 1:1 and that her intention in claiming such a huge amount had been to hedge against the inevitable fall in value of the local currency given that if she succeeded, all payments by the defendant would probably be in the local currency. She disputes the defendant's assertion that it was the staggering amount that forced her to defend the action and points out than none of that appeared in her plea.

[56] The general rules about costs, which require no citation of cases, are that they follow the result unless special circumstances warrant a departure; that the award is in the discretion of the court, and that in exercising such discretion the court should not be whimsical or capricious about it but should exercise the discretion judiciously.

[57] I determine that the plaintiff is entitled to her costs but not on the higher scale. My reason for this is that whilst the defamatory statements by the defendant were vile and persistent, the stiff award of damages above has been in recognition of that factor, among others. Furthermore, the defendant lost all the interlocutory applications with costs being awarded against her there and then. None were held over for determination later as is sometimes done. In the recusal application, the costs were awarded on the higher scale. There is no reason to mulct the defendant any further. Lastly, the plaintiff's summons was not issued in October 2020, but in October 2018 when the monetary regime in place was different from the one-to-one ratio referred to by her. So it cannot have been the reason for the initially inflated claim.

[58] However, whilst the *plus petitio* principle is relevant, it has had little sway in this matter because I have considered that there are really no special circumstance to warrant a departure from the general rule about costs. In the result, the following order is hereby made,

i/ The defendant shall pay the plaintiff the sum of US$18 000 [eighteen thousand United States dollars], or the equivalent thereof in local currency at the rate of exchange prevailing at the time of payment.

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ii/ The defendant shall pay interest on the above amount at the prescribed rate, namely 5% per annum from the date of judgment to the date of payment.

iii/ The defendant shall pay the plaintiff's costs of suit.

29 August 2024

Coghlan, Welsh & Guest, plaintiff's legal practitioners

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