RODGER MUHLWA
versus
ALPHA MEDIA HOLDINGS (PVT) LTD
t/a THE SOUTHERN EYE
and
KHOLWANI NYATHI
And
THANDIWE MOYO

HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 13, 14 AND 15 NOVEMBER 2018 AND 9 MAY 2019

Civil Trial

J Tshuma for the plaintiff
T Masiye-Moyo for the defendants

MABHIKWA J: Plaintiff issued summons for defamation against the three defendants. He complained that on the back page of the Southern Eye issue of 21 January 2015, the 1st defendant published a story under the headline.

"Outcry over Maphepha disqualification clumsy."

Plaintiff complained further that the story dealt with the administrative difficulties faced by Highlanders as a club and an anonymous source therein was purportedly quoted stating that plaintiff was suspended for misappropriating funds from the Highlanders football club during his tenure as club chairman.

Plaintiff also complained that the said publication by the defendants in the Southern Eye newspaper was false, malicious, and calculated to defame him in his character, dignity and integrity. He averred that the said publication was calculated to maliciously portray him as a person lacking integrity and a thief. In so doing, he averred, the defendants intended to injure

and impair his dignity, reputation and public image in the eyes of all who read the published story.

Plaintiff complained that as a result of the said publication he suffered impairment in his dignity, reputation, esteem and good standing in the eyes of people who read the story in the Southern Eye, a paper with a wide circulation and readership both nationally and internationally.

Plaintiff thus sought the following relief.

a) Payment of the sum of US$100 000-00 being fair and reasonable estimation of plaintiff's damages.

b) Interest a *tempore morae* on the sum of US$100 000-00 or any sum awarded by the court at the prescribed rate, and calculated from 21 January 2015 (date of demand) to date of full payment.

c) An order that within 7 days of granting of the court order, the defendants cause to be published in their Newspaper and their website, a clear and unambiguous retraction of the mandatory publication, published by the defendants on the Southern Eye newspaper on 21 January 2015 and apology to plaintiff.

In their plea, 1st and 2nd defendants raised a point *in limine* which however they did not pursue on at the start of the trial.

On the merits, 1st defendant averred that it does not trade as the Southern Eye, which is now defunct and that 2nd defendant was no longer the Editor of the said paper.

The defendants however admitted that the said Southern Eye newspaper did publish the story as alleged.

The defendants however averred that the publication was patently erroneous and based on incorrect information and that as soon as the error was discovered, a full retraction and apology was proffered through the same publication. They deny that the publication was either malicious or calculated to defame plaintiff. Further, defendants averred that in the publication, they were simply carrying out their constitutional duty to "inform members of the public who had a right to such information. They averred that they never entertained any intention be in; where the plaintiff's good name and reputation.

The defendants further averred that in their view, the publication of an apology immediately upon the discovery of the error adequately compensated and repaired any damage that may have been suffered by plaintiff in his good name and reputation.

Finally, the defendants averred that the quantum of damages claimed by plaintiff was grossly exaggerated and this is an abuse of the process of this court.

I must state from the onset that it appears to me that the defendants' plea as shown above is somewhat self-contradictory. In my view defendants cannot claim that the publication was erroneously made and based on incorrect information yet at the same time claim to have been carrying out their constitutional duty to inform members of the public "who have a right to such information". In my view, once it is admitted that the publication was in error and based on incorrect information, then it cannot honestly and reasonably be argued that members of the public have a right to such erroneous and incorrect information.

It was plaintiff's evidence that on 21 January 2015, the defendants published or caused to be published in the Southern Eye newspaper, a story under the heading.

"Outcry over Maphepha disqualification clumsy."

It was his evidence that although initially he had not seen the article himself, he received a call from his niece in England and from his son in South Africa. Both were enquiring whether he had seen the newspaper article and whether the contents therein were true. Thereafter, he received calls from several others including Peter Dube, a former colleague in the Highlanders Football clubs' executive committee. They all indicated to him that the newspaper article alleged that he had embezzled club funds. He said he was shocked and shattered. He eventually got a copy of the paper. The following morning he went straight to the defendant's offices but found both the reporter of the offending article and the editor not available. He introduced himself to some ladies that were sitting on top of a desk. He told the ladies that he had come to complain about the said story written about him. He then asked them to tell both the editor and the reporter that he wanted an immediate apology and retraction of the story. It was his testimony that as far as he is concerned, there was no apology and no retraction, neither did the editor or the reporter contact him up to date.

He took legal action as a result. He testified also that there was no grain of truth in the said story about him having embezzled funds from Highlanders Football club. He said his executive in fact found Highlanders in dire straits but when he left, they had managed to turn around its fortunes, not only financially but also in terms of success on the field of play. He said the story was totally incorrect, yet it insinuated that during his tenure as Highlanders Chairman he embezzled club funds and was suspended. He complained that the story carried a further uncomfortable but false sting that he had apologized to the club and was just suspended.

Plaintiff was disgusted that both the reporter and the editor published the story without verifying with either him or Highlanders Football club. After the story, inspite of having left his contact numbers at their offices, both did not care to contact him.

Plaintiff's testimony was that as Chairman of Highlanders, he had worked hard to build a name for himself. He had even earned names such as "chairman" and "the Mayor". He said all that good name was damaged by the publication, which portrayed him as "a thief". He was portrayed in the story as a person who cannot be trusted with public office and funds. He said the article cast him in such bad light that at times when people refer to him as "the chairman" he no longer knows whether they would be admiring him or that they would be referring to him as "the thieving chairman." He believes also that no one would want to be associated with a thief even one's own family members. The article insinuated that he was guilty of maladministration and misappropriation of public funds.

Mr Muhlwa (plaintiff) stated that the effect of the article was that it left his image shattered to the extent that when opportunities arose in football administration, his name would come up in bad light. At one time he had wished to replace Ndumiso Gumede who was to retire but he eventually decided not to take part in the race as there were whispers that some in Highlanders circles who would be voting were in fact still referring to the article insinuating that he could not be trusted and so they could not vote for him. He believes also that whilst the likes of Peter Ndlovu and the said Gumede have been bestowed with civic honour by the City of Bulawayo, he thought that he probably was not honoured because the city fathers may have felt that doing so in the light of the publication portraying him as a thief would raise eyebrows.

In cross-examination plaintiff remained adamant that the article had de-esteemed him. When put to him that soon after the error was noted, an apology and a retraction was immediately published, he said firstly, he did not see the retraction, secondly, it came too late when the damage was done, and thirdly that it was not given the same prominence as the offending story. It was (retraction) mentioned in passing in an article titled "Maphepha fights on." He would have preferred an eye catching retraction story headed "Matter of Fact", "Apology" "Putting the Record straight" and so on, at the front or back pages of the newspaper. It was also put to him that in the offending article, only 8 words out of 960 were about him whilst in the retraction story, 52 out of 908 words were dedicated to him. His reply was that he had not noticed that Mathematical calculation of words but that to him it made no difference as the intention of the article remained the same, that is to maliciously scandalize and damage his name.

In short, plaintiff was taken through some intense cross-examination by *Mr Moyo-Masiye* but remained adamant that he had his name and reputation soiled by the defendants as a result of the publication.

Miss Thandiwe Moyo was the reporter of the offending article. She testified that when Mr Ernest "Maphepha" Sibanda wanted to be chairman of Highlanders football club, there was a lot of talk about the topic. She then contacted various people to get their views. One source told her that the late Lazarus Sibanda was suspended by chairman Rodger Muhlwa and secretary Peter Dube for misappropriation of funds. She then mistakenly cited Rodger Muhlwa in the article under people who had misappropriated funds.

The court takes note however of the fact that Ms Moyo's evidence in this regard was misleading. It was not correct in the court's view to give the impression that Rodger Muhlwa's name was erroneously included under a list of people who had misappropriated funds. In a stand alone sentence the article actually stated that he misappropriated funds. The article states:

> "If you go back to the time when Ndumiso Gumede ran the club. You will find that there were irregularities. We had the likes of Lazarus Sibanda who admitted taking money from the club, Luke Mkandla who ran the club down to insolvency, Rodger Muhlwa who was suspended when he misappropriated funds."

Although she may have done so for professional ethics and other reasons, Ms Moyo steadfastly insisted that her source had not misled her but that she herself made an error.

Ms Moyo said as soon as she noticed the error on the Wednesday (day of the publication) she sought audience with her editor who was unfortunately not available. When she eventually got the chance to talk to him it was Thursday. She discussed with the editor and she was given the green light to publish an apology and retraction and how to do it.

Ms Moyo told the court that the editor at the time was one Njabulo Ncube who was acting editor whilst second defendant was on leave. A retraction was therefore published on the Southern Eye issue of Friday 21 February 2015.

Much of the cross-examination of this witness centered on whether she conducted herself in a contrite and apologetic manner after hearing that the plaintiff had been to their offices complaining. She insisted that she did what she thought was best in the circumstances whilst applicant insisted that she and others in their field of work are just downright rude and never care about the images or characters of people that they damage through their articles. Whilst Mrs Moyo 3rd defendant said she had apologized to plaintiff over the phone and indicated that a retraction had already been published but was referred by plaintiff to his lawyers, plaintiff said 3rd defendant had not contacted him or apologized up to the date of trial.

It is true as submitted by counsel for the defendants that the defendants' defence is mainly premised on mistake. It is the defendants' plea also that the defamatory words published were patently erroneous and based on incorrect information and that the publication of an apology and retraction immediately upon the discovery of the error has adequately compensated plaintiff and repaired any damage that may have been suffered by him in his good name and reputation.

However, I have already stated elsewhere in this judgment that the statement complained of is a stand alone statement that is unlikely to have been made in the erroneous manner alleged by the 3rd defendant.

It is not like she had a list of people who had misappropriated funds and erroneously included plaintiff's name on the list as she seems to imply in her evidence. The statement was just blunt, clear and unambiguous.

> "We had the likes of Lazarus Sibanda who admitted taking money from the club, Luke Mnkandla who ran the club down to insolvency, Rodger Muhlwa who was suspended when he misappropriated funds."

Surely, if she had made an error, this is the kind of error she could not have missed in proof reading. It appears plainly that she published the story without verifying the facts with the plaintiff or anyone at Highlanders who would have been expected to know the correct facts. Her evidenced that she erroneously listed him under those who had misappropriated funds cannot be believed. It is an attempt to escape liability.

The words, as shown above are clearly defamatory. Even the defendants themselves have not denied that fact. Surely, media practitioners cannot be allowed to publish stories that are highly defamatory of an individual only to explain in evidence that that they had done so in error. The damage would have long been done to the individual's reputation and very difficult to undo.

In *casu,* there is no question of innuedo or interpretation of the published words. They are defamatory in their ordinary grammatical English meaning, and this fact has been admitted. The fact that only 8 out of 960 words in the article were in reference to the plaintiff does not make them less defamatory neither can it be said that because a retraction had 52 words out of 908 dedicated to the apology then that fully compensates for all the damage done to one's image.

The Media practitioner's code of ethics, particularly section 4 presents a very strict code of conduct clearly designed to guard against wrongfully damaging other people's images.

It is also this court's finding that the defendants, particularly 1st and 3rd defendants fell short of the set standards. When coupled with the foregoing findings, the court finds that the publication complained of was indeed defamatory of plaintiff. Plaintiff is entitled to defamation damages therefore as against 1st and 3rd defendants.

The court finds in respect of the 2nd defendant that he has sufficiently proved his plea. The court thus agrees that from the evidence before it, the cause of action is in the publication. The editor of the publication at the time was one Njabulo Ncube, also employed in that capacity by 1st defendant. It was sufficient for the 2nd defendant to establish that at all material times during the publication, he was not at work but on leave and only resumed work in March 2015

when those at his workplace obviously advised him that a month earlier, a publication was made which was followed by an apology and retraction. For all we know, they may not have even advised him after all. He had neither reason nor obligation to dig matters and all publications that took place when he was on leave. No liability attaches to 2nd defendant.

It is true that the court often finds itself with a timorous balancing act in the assessment of damages. This equation is made the more difficult with the usually outrageous quantum of damages claimed by parties in recent years, more often with no justification. Indeed it is an important principle of law that an award of damages in such a delict is not meant to be punitive but at least to provide some solace to the plaintiff. Quite often, the way journalists and media practitioners in general damage people's images and cause despondency and anxiety to a person and his or her family is so disheartening that some people get tempted to believe that they actually enjoy the agony and pain they cause and they should be punished heavily. However, the reality and the law is that the damages should not be meant to punish a journalists or more so journalists and their media houses in general especially where they have shown some measure of remorse and made attempts to mitigate the damages.

In *Tekere* v *Zim Newspapers and Another* 1986 (1) ZLR (H) the court in computing the quantum of damages adopted the South African approach in *Buthelezi* v *Poorler and Others* - 1975 (4) SA 608 were it set out the following factors as worth of consideration.

a) The content of the defamatory article
b) The nature of the publication
c) The plaintiff's standing
d) The extent of the publication
e) The conduct of the defendants and the recklessness of the publication
f) Attempts to retract and apologise
g) Comparable awards and the dwelling value of money.

See also *Samangura* v *Econet Wireless (Pvt) Ltd and Others* 2012 (2) ZLR 304 (H); See also *Mugwadi* v *Dube and others* 2014 (1) ZLR 753 (H) were almost the same factors were listed verbatim.

In the current case, there is no doubt that the article was that blunt and defamatory on the face of it with no need for inference, a fact also admitted by the defendants.

The publication was done in the print media in a newspaper admittedly circulating locally and abroad. The court has dully noted that at the time, the Southern Eye may not have been at its peak as it folded about two months after the publication. Nonetheless, considerable damage had been done. In these days of information technology, such damage to one's reputation cannot be easily erased as shown by the fact that by October 2018, the offending portion of the publication had been removed from the defendant's media website, and perhaps others as well, but it remained unremoved on the Highlanders Website and possibly other websites. In any event, 2nd defendant admitted in cross-examination that even at the time of trial, one could google and make a character cheek of the plaintiff's and still find that allegation. He indicated also that he was aware that efforts were made to remove the offending article from websites but there were challenges with the online team, compounded by the fact that the Southern Eye at the time was going through difficult times and was folding up.

From the evidence before the court, it was not controverted that plaintiff is a man of quite some standing and esteem in his own right. He almost emotionally decried that that esteem and social standing was "brutally" damaged by the article. Whilst there is no agreement between the parties as to whether the defendants apologized and retracted the story, there is also no agreement as to whether the retraction if it was made, was given the same prominence as the offending publication. 3rd defendant said that she verbally apologized on the phone at a time when she had already followed the offending story by a retraction. Plaintiff denies that an apology was ever made by the reporter (3rd defendant or the editor of the Southern Eye). He said he only saw it when it was shown to him as part of the pleadings and in his view no one would have cared to read it unless the person was the type that would read a newspaper as if he was reading for an examination. On the other hand, 2nd respondent mostly testified on examples of retractions. He also tried to justify the placing of the retraction in this case and why it was placed in that manner.

The court finds that inspite of the arguments and inspite of the fact that damage had been caused to plaintiff's reputation and difficult to completely repair, some attempts were made to mitigate the said damages.

Accordingly, it is ordered as follows:

1) The 1st and 3rd defendants, jointly and severally, the one paying the other to be absolved, pay the plaintiff the sum of US$16, 000 defamation damages.
2) Interest on the said sum of US$16,000 a *tempore morae,* calculated from the date of this judgment to date of full payment.
3) Costs of suit on the client to client scale.

Webb, Low and Barry, plaintiff's legal practitioners
Gill, Godlonton & Gerrans, defendant's legal practitioners