EMMERSON MNANGAGWA
versus
ALPHA MEDIA HOLDINGS (PRIVATE) LIMITED
and
DUMISANI MULEYA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 17 July 2013 & 25 July 2013

E.W.W. Morris, for the excipients (defendant)
L. Uriri, for the respondent (plaintiff)

Exception

MATHONSI J: The defendants (who are the excipients in this matter) have excepted to the plaintiff's (who is respondent) declaration and I have, to decide whether that exception has merit or not.

The plaintiff is a government Minister, being the Minister of Defence, and a senior member of a political party known as the Zimbabwe African National Union Patriotic Front (Zanu PF) which is one of the ruling parties in the current government of national unity. The defendants are the owner of a publication which is said to enjoy wide circulation in Zimbabwe, namely the Zimbabwe Independent, and its editor.

In the Zimbabwe Independent edition of 11 May 2012, an article was published in the front page under the title "Mnangagwa Ready to Rule". The article reads in pertinent part thus:

> "Defence Minister Emmerson Mnangagwa (pictured) has for the first time openly declared his interest in taking over from President Robert Mugabe as the leader of Zanu PF and the country, in remarks showing the succession battle in the party is intensifying.
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> Mnangagwa told the Zimbabwe Independent last Friday at Heroes Acre during the burial of Zanu PF politburo member Edson Ncube he was ready to govern if given an opportunity. This virtually confirmed he is positioning himself to succeed Mugabe, remarks which could anger senior Zanu PF officials and fuel factionalism and internal power struggles ahead of the next elections.
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> 'I am ready to rule if selected to do so', Mnangagwa said. 'Zanu PF, is about observing the will of the people and I will respect the people's wishes if they choose me'.

….

In remarks which show succession is now hotly – contested, Zanu Pf secretary for administration Didymus Mutasa this week poured, cold water on Mnangangwa's ambitions, saying he would not waste his time commenting on individuals' dreams. 'I do not, want to be drawn into baseless arguments by commenting on individuals' wishes; said Mutasa. 'I will comment on that issue when the time comes, that is when the people- here I mean Zanu PF – have chosen him as the leader of the party'.

Mutasa, who is number five in the hierarchy, recently said Mnangagwa, who is not in the top 10, was far down the pecking order to succeed Mugabe compared to Mujuru and others.

……

Mnangagwa has been battling the Mujuru faction for years in a sustained turf war to succeed Mugabe. The Zanu PF fight for power has escalated as evidence mounts that Mugabe is struggling with old age complications and ill health. Factionalism and infighting recently flared up in Zanu PF forcing Mugabe last Friday to slam faction leaders and greed, saying they were destroying his party.

Mnangangwa has been fighting to take over from Mugabe for a long time. He first tried to position himself as heir apparent by vying for the vice-presidency in the run up to the 2004 congress but was ruthlessly crushed by Mugabe and the Mujuru faction. His camp was also trounced during the 2009 congress, but is now gaining ground. ….

Zanu PF spokesperson Rugare Gumbo also appeared to dismiss Mnangagwa's ambitions saying his party had laid - down procedures to be followed on succession. 'In Zanu PF, we have a hierarchy and this is adhered to whenever there is need for promotion' said Gumbo. 'Whilst people may harbour presidential ambitions, it is unfortunate (for Mnangagwa) that we follow this hierarchy'.

…..

The Zanu PF Youth league said factional leaders causing chaos in the party should be confronted and dealt with head on. 'These are pretenders (factional leaders) and we don't work with pretenders but the person elected at the congress. We deal with reality – that is the person in power' national deputy youth secretary for external affairs Tongai Kasukuwere said. 'If people are named for fanning divisions, they must be disciplined. We don't want to work with people who cause confusion'".

The plaintiff took issue with the article and instituted summons action against the defendants seeking defamation damages of US$1 million. In para(s) 2.6 to 2.9 of his declaration he made the following averments;

"2.6 The article specifically alleges that (the) plaintiff, is a leader of a 'faction' fighting and involved in a power struggle with other government officials to succeed the President of Zimbabwe.

2.7. The article is false in that the plaintiff never made the remarks attributed to him in the article nor did he speak to the Zimbabwe Independent or anybody else as alleged.

2.8. The article is defamatory *per se* of (the) plaintiff to whom it refers, in both his personal as well as his professional capacities.

2.9. As a result of the defamation, (the) plaintiff has been damaged in his good name and reputation and suffered damages in the amount of USD 1 000 000-00".

"Allow me a minute", as Alan Paton would say, while I make the point that I share the indignation of Mr *Morris* who appeared on behalf of the defendants about the outrageous amount of damages being claimed. Quite often in recent years litigants of this country have taken to coming up with these outlandish claims for damages, even for the slightest of infractions, which are completely divorced from the economic realities of this country and are detached from existing precedence and legal realities of our jurisdiction. It is the kind of habit which legal practitioners must take responsibility for encouraging, as ultimately it is them who advise litigants and draft the processes filed in court.

Legal practitioners engaged by litigants to represent them in this court and to draft court processes on their behalf should take care in drafting such court papers and claims and should apply their minds to the task reposed upon them. After all they are paid to provide such service and it is the height of irresponsibility to come up with outrageous claims which not only fail to ventilate the relief the litigant seeks but also to conform with existing precedence on the subject. Legal practitioners should be taken seriously by the courts for it is serious business that we transact in these courts and not local drama, nor is it the television series "Carson's Law" or "LA Law".

But then, I digress. The quantum of damages is not the subject of the present inquiry and drifting away from the field of discourse will not resolve the present dispute between the parties. The quantum of damages will obviously feature prominently in the event of the matter going to trial. My immediate concern is to determine the propriety of the exception that has been taken.

The defendants have excepted as follows:-

> "The defendants hereby note an exception to (the) plaintiff's declaration as disclosing no cause of action in that the words complained of are not defamatory *per se* and can under no circumstances be damaging to (the) plaintiff's good name and reputation.
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> Wherefore (the) defendants pray that (the) plaintiff's claim be struck down with costs on the scale of legal practitioner and client".

Where exception is taken on a defamation suit, the law is as was set out by the learned author J.M Burchell, The Law of Defamation in South Africa, Juta & Co, Ltd at pp 102-3 where he said;

> "Where exception is taken to the plaintiff's declaration, the test of what constitutes defamatory matter is different from that at the trial stage.
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> TINDALL JA said in *Basner* v *Trigger* 1945 AD 229 & 32 (this case involved an innuendo, but the test on exception is the same). 'In other words all the court is called on to decide at this stage is whether a reasonable person of ordinary intelligence, having heard the defendants' words and having knowledge of the circumstances … might reasonably under – stand these words as meaning that the plaintiff had been guilty of illegal or criminal conduct…' The test on exception is, therefore, whether a reasonable person of normal intelligence and with knowledge of the circumstances could or might regard the statement as defamatory, whereas at the trial stage the test is whether a reasonable person would regard it as defamatory".

The above passage in Burehell was adopted in our jurisdiction by SANDURA JP (as he then was) in *Zvobgo* v *Mutjuwadi & Ors* 1985 (3) SA 1055 (ZH) 1058F-G where the learned judge pronounced:

> "I must now deal with the fourth defendant's exception to the plaintiff's declaration. The fourth defendant excepts to the plaintiff's declaration on the ground that it is bad in law because it discloses no cause of action in that the words relied upon are not reasonably capable of conveying a defamatory meaning. I ought to make it quite clear right from the outset that I do not have to determine at this stage whether or not the article in question is in fact defamatory. What I must decide is whether the words complained of are reasonably capable of conveying to the average reader the defamatory meaning assigned to them by the plaintiff. This is made quite clearly by Burchell in his new book, The Law of Defamation in South Africa at 102-3".

In *Auridiam Zimbabwe (Pvt) Ltd* v *Modus Publications (Pvt) Ltd* 1993(2) ZLR 359(H) at 368C-D, ROBINSON J added the following:-

> "The test is undoubtedly an objective one. See *Botha en'n Ander* v *Marais* 1974(1) SA 44(A) at 48E and Demmers on appeal *supra* at 842A-B. In Visse's cases supra at 447, MURRAY J went on to say:-
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> > 'The test to be applied by the court in determining whether these words are reasonably capable of the alleged defamatory meaning is the effect on the mind of the ordinary reader, an average reasonable person of ordinary

> intelligence – *Basner* v *Trigger* 1945 AD at p 32 – who reads the article with ordinary care, but not as 'an astute lawyer or a super critical reader would read the passage' – per WESSELS JA in *Johnson* v *Rand Daily Mails* 1928 AD at p 204".

The learned judge went on at 371 C-G to say:-

> "Accordingly, putting aside, as I am told I must do, my training and my logical, critical and analytical habits of mind as a lawyer and stepping into the shoes of the ordinary reader of the Financial Gazette, the question which I must answer is – what immediate impact would the contents of the article in question have on the mind of such a reader and what would be the overall impression gained by him? Or put another way, in the contest of the article as a whole; are the words used reasonably capable of conveying to the reasonable reader the defamatory meanings ascribed to them by the plaintiff in para 5 of his declaration?"

BEADLE AJ (as he then was) made the point in *McKelvey* v *Cowan NO* 1980(4) SA 525(Z) that:

> "It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action. That is the manner in which I approach this case".

Mr *Morris* for the defendant submitted that the article complained of does not in fact specifically allege that the plaintiff is a faction leader although the implication is there. In this view, in most organisations including political ones, there is vying for leadership and nothing turns on that. He submitted that there is nothing in the article to suggest that the plaintiff is fanning division or creating dissent but that he is just one of a number of people interested in standing for the office of president once the incumbent steps down.

Mr *Morris* further submitted that the fact that the article attributes to the plaintiff the words that he will abide by the decision of the people and respect their wishes shows considerably greater nobility of mind than some of those quoted who believe that a presidential candidate must be selected following a party hierarchy of succession.

Mr *Uriri* for the plaintiff pointed to passages in the article which, in his view would be understood by the ordinary reader to mean that the respondent is of a diminished reputation and character. According to Mr *Uriri*, the crux of the matter lies in para 2.8 of the declaration which avers that the article complained of is defamatory *per se*. For that reason, the article must be examined in its entirety to determine whether it would convey the message complained of. I agree.

I am mindful of the fact that I am not being called upon at this point in time to determine whether the article is defamatory. That is the province of the trial court. What I have to determine at this stage is whether the article is reasonably capable of conveying to the average reader the defamatory meaning assigned to it by the plaintiff.

In doing so, I must, as, as suggested by ROBINSON J in Auridiam Zimbabwe (Pvt) Ltd (*supra*) put aside my training and my logical critical and analytical habits of mind as a lawyer and step into the shoes of the ordinary reader of the Zimbabwe Independent in order to answer that question.

The article states that the respondent is "positioning himself to succeed Mugabe, remarks which could anger senior Zanu PF officials and fuel factionalism and internal power struggles". It also states that Zanu PF has laid down succession procedures which it follows whenever there is a need for promotion. The ambitions of the plaintiff, who is not even in the top 10 of that hierarchy, to succeed the president are therefore misplaced and at variance with the procedures of that party.

It is the kind of ambition which could fuel factionalism and internal struggles which have already flared up resulting in President Mugabe slamming faction leaders for greed and destroying his party. Indeed, even the youth wing of Zanu PF has taken a stand against faction leaders for fanning divisions insisting that they should be disciplined.

To the extent that the declaration makes the averment that the entire article is defamatory *per se* and that one has to therefore look at it in its entirety, one cannot avoid the conclusion that in the context of the article as a whole, the words used are reasonably capable of conveying to the reasonable reader of the Zimbabwe Independent the defamatory meaning ascribed to them by the plaintiff.

Generally, factionalism is presented as a sticking problem for Zanu PF and faction leaders as not only undisciplined but also as destroying the party. I do not agree with Mr *Morris* that the article does not allege that the plaintiff is a faction leader. In fact that argument is made half-heartedly because counsel conceded at the same time that the implication is there.

It is also important to point out that the plaintiff avers in his declaration that he never gave an interview to the Zimbabwe Independent and that everything attributed to him in the article is false. That is an issue to be canvassed by evidence and if evidence can be led to that effect, clearly a cause of action exists. The declaration is therefore not excipiable: *McKelvey* v *Cowan N.O. (supra)*.

I am therefore unable to uphold the exception. I however take the view expressed by BEADLE AJ (as he then was) in McKelvey (*supra*) that the law does not discourage parties from taking exceptions when exceptions may result in the reduction of costs and shortening of proceedings. This is a case in which the defendants were entitled to except, albeit unsuccessfully. For that reason, the costs should be in the cause.

In the result, it is ordered that:-

1. The exception is hereby dismissed.
2. The costs shall be in the cause.

Dube, Manikai & Hwacha, plaintiff's legal practitioners
Atherstone & Cook, defendants' legal practitioners