ROY NYABVURE
versus
ZIMBABWE NEWSPAPERS (1980) LTD
and
THE EDITOR IN CHIEF ZIMBABWE NEWSPAPERS (1980) LTD
and
RUTENDO MAPFUMO

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 27 and 28 June 2018 & 11 July 2018

Civil Trial

B Mutiro, for the plaintiff
O.T Gasva, for the defendant

MUZOFA J: At the close of the plaintiff's case the defendant applied for absolution from the instance.

The plaintiff issued summons out of this court for defamatory damages in the sum of $650 000. It was alleged that the defendant in its publication in the *Herald* newspaper of 1 March 2013 published and distributed a features article with a photograph of the plaintiff which was defamatory. Plaintiff alleged that the article taken in totality with the photograph depicted him as a person who engages in domestic violence by abusing his wife or partner in the marriage, as terrible as hell. And that the photograph was published without his consent.

The defendant conceded that an article with plaintiff's photograph was published on 1 March 2013. However it denied that the article was defamatory in that the article did not attack the

person, integrity or reputation of the plaintiff. The article constituted a fair comment on a topical issue in the society and of public interest.

The test to be applied in an application for absolution from the instance is settled in our jurisdiction see *Walker* v *Industrial Equity Ltd* 1995 (1) ZLR 87 SC, *United Air Carriers (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 341 (S). The test was clearly set out in the case of *Gordon Lloyd Page & Associates and Rireira & Another* 2001 (1) SA 88 (SCA) at 92 E-93 A that,

> "The test for absolution to be applied by a trial court at the end of plaintiff's case was formulated in Claude neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409 G-H in these terms
>
> > '… when absolution from the instance at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established but whether there is evidence upon which a court applying its mind reasonably to such evidence could or might (not should or ought) find for the plaintiff…'
>
> This implies that the plaintiff has to make out a *prima facie* case in the sense that there is evidence relating to all elements of the claim… to survive absolution because without such evidence no court could find for the plaintiff…"

The test therefore is, whether the plaintiff has made out a *prima facie* case against the defendant on the basis of which the court could or might find for the plaintiff.

In a defamation claim the plaintiff has to make out a *prima facie* case on the following,

1. that the defendant made a false and defamatory statement concerning the plaintiff;
2. that there was an unprivileged publication to a third party and
3. proof of the damages suffered.

The plaintiff's evidence was that on 1 March 2013 the first respondent published in the *Herald* newspaper a features article captioned 'When marriage becomes hell' which had his photograph with his ex- wife. He said the totality of the article and the photograph portrayed him as a wife abuser. He said he was a building inspector and by virtue of his office at the City of Harare he interacted with many people. At the time he was a student at Midlands State University and a lecturer at the Real Estate Institute**.** The article was published in a widely read news paper the *Herald*. When the article was published two people called him on his mobile phone on the day about the issue. He said as a result of the publication of the article his esteem, character, integrity and dignity was lowered in the minds of his professional colleagues, workmates, clients, fellow students and members of the public. It also caused him a lot of mental stress that he had to be

counseled by colleagues. He also said the article was part of the reasons he divorced his ex- wife in the photograph.

Under cross examination the plaintiff was referred to the article. He conceded that the written article did not mention his name, it was a feature article on domestic violence, giving statistics on perpetrators and the survivors. It also spoke to the service providers available in the country that assist in domestic violence matters. He was questioned at length on the photograph that accompanied the article. He conceded that the photograph depicted his estranged wife pulling his shirt and he was walking away. He also conceded that the photograph showed that he was being abused by his estranged wife and not that he was abusing his ex- wife.

Plaintiff was asked if para 9 of his declaration was accurate in its description of the photograph, he said, it was not correct. Paragraph 9 of the declaration forms the basis of the claim and is couched as follows;

> "The publication of the photograph and the distribution of the article is defamatory of the plaintiff in that it depicts and was understood to mean that the plaintiff engages in domestic violence by abusing his wife or partner in a marriage as terrible as hell, by those who read the article or saw the picture."

The court even sought clarification from the plaintiff on the issue and he confirmed that the photograph showed that he was the victim of an abuse.

Under re-examination, plaintiff indicated that paragraph 9 was still correct. He did not offer an explanation why under cross examination he changed his statement on one of the key elements of his case. His case was ultimately closed with such glaring, unexplained contradictions.

Generally courts are slow to allow absolution from the instance before hearing both sides see *Manyange v Mpofu and Others HH 162/11* where the court had this to say about an application for absolution, that

> "And in practice, the courts are loath to decide upon questions of fact without hearing all the evidence from both sides, and have usually inclined towards allowing the case to proceed. See *Theron* v *Behr* 1918 CPD 443 at 451; *Erasmus* v *Boss* 1939 CPD 204 at 207; *Supreme Service Station (1969) Pvt Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5-6. Moreover, at this stage of the trial, it is not pertinent to evaluate the weight of the evidence adduced or the preponderance of probabilities, save where such findings are manifest from the evidence already heard. See *Quintessence Co-ordinators (Pty) Ltd* v *Government of the Republic of Transkei* 1993 (3) SA 184 (Tk) at 18."

Although *Mr Mutiro* for the plaintiff vehemently emphasized in his submissions that defamation was proved, I do not think so. The plaintiff, the only witness in the case contradicted himself on the interpretation of the article and the photograph. He seemed not so sure anymore whether the photograph portrayed him as the abuser or the victim. The fact that his claim is based on the alleged portrayal as an abuser and not simply that his marriage was rocked with domestic violence the photograph should, in the mind of a reasonable citizen portray the plaintiff as the abuser. The plaintiff said it in court that the photograph portrayed him as the victim. That evidence destroyed his case. The question is whether where he is portrayed as a victim, could a court find for the plaintiff. If he was the victim then nobody would conclude on the face of the article that he was a wife abuser. The written article did not identify him by name. It did not explain what was happening in the photograph; it did not attribute any abuse to the plaintiff. It remained to any reader to reconcile that domestic violence can manifest in different forms. The one form that was clearly portrayed in the published photograph was a woman abusing a man. The caption under the photograph read,

> "Domestic violence can occur in many different forms – it can be between men and women, when they emotionally, verbally, mentally, sexually, financially abuse their partners."

There was no allegation that plaintiff was abusing his estranged wife. The totality of the plaintiff's evidence in chief and under cross examination showed that part of his domestic issues were already in the public sphere. The defendant's H-Metro had published certain pictures and alleged arrests and court proceedings between the plaintiff and his estranged wife. Apparently the plaintiff confirmed that the photograph used on 1 March 2013 article was taken in 2011. When this happened the plaintiff did not take any legal action against H-Metro. He was not sure whether it was the defendant who photographed him, but he insisted that the photograph was used without his consent.

The photograph spoke for itself that the plaintiff was the victim of abuse, there is no falsity in that, and therefore no defamation. There was no proof of malice on the part of the defendant.

In respect of the damages, the plaintiff claimed $650 000 in the summons. In his oral evidence the plaintiff said at the time of issuing summons he was emotionally charged and had

placed a figure, he changed the amount to $100 000 in court indicating that the figure was reasonable.

The plaintiff failed to prove *prima facie* that his dignity had been impaired to the tune of $100 000.

In the *Manyange* case (*supra*) this court expressed its sentiments on the quantum of damages as such:

> "In assessing the quantum of damages in a defamation case it is necessary to consider a variety of factors. These include the following; the content and nature of the defamatory publication, the plaintiff's standing in society, the extent of the publication, the probable consequences of the defamation, the conduct of the defendant, the recklessness of the publication, comparable award of damages on other defamation suits and the declining value of money."

In his evidence, the plaintiff said he was a public figure and the article demeaned him. There was no evidence of what in reality were the consequences of the article. He said he did not lose any business or customers. He just said his associates and fellow students viewed him differently thereafter.

There is nothing before the court that warrant defendant being called upon to rebut. The application should therefore succeed.

Where a defendant is absolved from the instance, the court regards the defendant as being the successful party. The normal rule is that the plaintiff must pay the defendant's costs *General Wholesale Suppliers (Pvt) Ltd* v *Ams Distributors* 1975 (1) SA 600 RA.

Accordingly, the application for absolution from the instance succeeds with costs.

Rubaya & Chatambudza, for the plaintiff's legal practitioners
Chiirimuta & Associates, defendant's legal practitioners