JEAN BUTAU

versus

NYORE MADZIANIKE

and

LAWRENCE MOYO

and

ZIMBABWE NEWSPAPERS (1980) LTD

HIGH COURT OF ZIMBABWE

KUDYA J

HARARE 18, 19, 20 and 21 September and 3 October 2012

**Civil Trial**

*W Muchandibaya,* for the plaintiff

*OT Gasva,* for the defendants

 KUDYA J: The plaintiff issued summons on 24 May 2011 against the three defendants seeking defamation damages in the sum of US$50 000-00, interest and costs. The first defendant, a senior reporter, wrote the article in issue in the H-Metro tabloid of 3 March 2011. The second defendant was his editor while the third printed and published the article.

In her declaration, the plaintiff averred that the defendants intended to defame her from their failure to verify the allegations pouted by her husband and anonymous sources with her former superior, the hotel in Kariba and the Registrar of Births and Deaths. She further averred that the story harmed her reputation and good name, lowered her esteem with her children, family members, friends, relatives, workmates, and the generality of the subscribers and readers of the H-Metro. In para 18 of her declaration she asserted that she was “characterized as an adulterous elderly woman who had been cheating on her husband for years.”

The defendants disputed impairing the plaintiff’s good name averring that the contents of the article were substantially true. They also contested the measure of damages sought by the plaintiff.

The plaintiff testified and produced four documentary exhibits. In addition she called the further evidence of three witnesses. The first defendant testified for all three defendants. In addition, the plaintiff’s husband testified as a witness for the defendants.

 It was common cause that the article written by the first defendant in the paper edited by the second defendant was published by the third defendant in the H-Metro of 3 March 2011. The newspaper in question was produced as exhibit 3. On the front page in bold capital letters screams the headline “ELDERLRY ACCUSED OF CHEATING.” The full blown picture of a pensive elderly woman and that of a smiling elderly man complements the headline. The actual story covers the whole of page three of the tabloid. The story is entitled “Elderly woman (57) cheating with boss?” The pictures of the husband and wife, who are identified, are captured. A caption below the husband’s name reads: “[his name], who suspects his wife of infidelity, believes, that his last born [first name of the minor child] is not his son”. Underneath the picture of the woman are the words: “JEAN BUTHAU denies ever having an affair and says she and her husband have already “forgotten about the matter”.

The article covers 144 lines of which 83 cover exclusively the husband’s version, 44 the plaintiff’s rebuttal, 9 the superior and 8 refer to both the plaintiff and her husband. It begins with these words:

“IF BELIES belief!

An elderly senior management level employee at Star Africa Limited is being accused of cheating on her husband with her former boss.

Charles Buthau, who is in his early sixties, is accusing his wife Jean Buthau (57) of cheating on him with her former boss she worked with at the sugar refinery company.”

Towards the end of the article is written:

“I suspect that my last born (name supplied) might be his child because I heard that they went with her at the Registrar’s offices for another birth certificate.”

The article reproduced the story related to the first defendant by the plaintiff’s husband of 36 years, a marketing director with a named company. The husband stated that his wife had been cheating on him with her former boss for more than a decade. He told the first defendant that the affair blossomed when the former boss was promoted to work from the company’s Borrowdale station and the plaintiff was promoted to a senior position. The two used the cover of company workshops to cheat on him. At first the husband received reports of the affair from some undisclosed informants. Some of the informants apparently had access to her boss’ personal diary where his sexual escapades with the plaintiff were recorded. The boss had even chosen the appropriate gender name of his expected love child with the plaintiff. In those days, the plaintiff who was denying him conjugal rights fell pregnant and suffered a miscarriage. Later, the plaintiff gave birth to their minor child. His informants had advised him that the love birds went to the registrar of births and deaths to register him under the boss’ name.

His moment of truth came in Kariba. The company held a week long workshop at a four star hotel at which spouses were invited at the company’s expense. On arrival, his wife was visibly overjoyed by the car the boss drove to the workshop. On the first two successive days, the plaintiff woke up at 4 am purportedly to prepare the conference venue. Instead she would sneak into her boss’s room. When the boss’ girl friend showed up at the workshop, the plaintiff expressed her disappointment by putting her arms around the shoulders of her boss and his girlfriend and pinching her boss’ shoulder.

The first defendant sought the plaintiff’s version. He described her as “the soft spoken woman” who expressed shock and disbelief when he approached her for her side of the story. She denied ever cheating on her husband with anyone including her superior. Her husband had in he past asked her about the allegations. She was keen to know who was resuscitating the story. She disputed the information derived from informants, the two birth certificates story and the Kariba allegations. She was aware that her former superior was a married man with two children. She had visited his Borrowdale home once at his invitation to trap her messenger who was having an affair with her superior’s sister in law. On that visit they found the messenger at the house with the sister in law.

She referred the first defendant to a tobacco company on the outskirts of Harare to interview the former superior. The first defendant failed to interview the superior who had apparently relocated to South Africa. The decision in the fifth paragraph of the article against naming the superior was abandoned in the middle of the article.

It was common cause that the first defendant was prevented from writing further articles on the plaintiff by an interdict that was granted by consent in the magistrates’ court on 16 March 2011. It was further agreed that the defendants did not retract the story or apologise to the plaintiff.

While four issues were referred to trial on 9 March 2012, I believe that the real issues for determination are:

1. Whether or not the defendants’ article was defamatory of the plaintiff.
2. Whether or not the story was substantially true.
3. The amount of damages, if any, due to the plaintiff .

I proceed to determine each issue in turn.

1. *Whether or not the defendants’ article was defamatory of the plaintiff*

The plaintiff stated that the version given by her husband to the tabloid was false and was understood by members of the public to mean that she was an adulterous elderly woman who fell pregnant as a result of the association; aborted one pregnancy and gave birth to the other; and falsely registered the child in her husband’s name. She was deeply hurt, troubled and shocked by the article. She had cautioned the first defendant to publish the truth and not falsehoods. In days that followed the publication she was shunned by workmates, friends, relatives and church mates. Conspiratorial looks were often cast in her direction and conversations stopped when she approached colleagues and acquaintances. Under cross examination she maintained the defendants acted unprofessionally in publishing false information of a love affair with her general manager and on her minor child’s birth certificate and his paternity.

I generally found her to be a truthful witness who related what transpired between her and the first defendant. Where her version differs with that of the fist defendant, I believed her. This is because in their summary of evidence, the defendants’ averred that she rebuffed first defendant’s enquiries, yet the article and first defendant’s testimony show that she answered his questions and was keen to know the source of his information and identity of his informers. In addition, her elder brother Collen Phiri, her friends Rudo Buhera and Mazvita Winnet Makuto confirmed her story that she was not involved in an adulterous relationship with her general manager. They understood the article to mean that the plaintiff was a cheat, an adulterer and an immoral woman.

Collen Phiri, the elder brother to the plaintiff and the oldest surviving male member in her paternal family was shown the article on 3 March by the plaintiff. His eye caught the prominent headline. He read the story. He was taken aback. He was at a complete loss and wished the ground would swallow him. Members of his family phoned him in disgust and disappointment. He repeatedly uttered the statement that the article was deeply embarrassing. Those who knew him asked whether the plaintiff was his real sister. All these people were concerned, disappointed and embarrassed that his sister would go to hotels and cheat on her husband.

 He was cross examined. He indicated that he would do anything morally acceptable to support his sister in this her difficulty time. His view was that the amount she was claiming was too little to assuage the injury done to her reputation by the article. I formed the impression that he understood the article as labelling her sister as an adulterous elderly woman and that this was the impression that was drawn from all concerned, disappointed and embarrassed family members. That he knew that his brother in law had issued divorce proceedings did not lessen the pain and hurt caused by the article. I found him a credible witness who truthfully stated his impressions of the article and that of others whom he came into contact with. I did not detect any bias on his part. I believed him.

Rudo Buhera worked for the 17 years between 1990 and 2007 with the plaintiff. She is now based in Botswana. Other former workmates phoned her in Botswana and together with her husband questioned the nature of her friendship with the plaintiff and suggested that they were birds of the same feathers. When she came to Zimbabwe at the end of March 2011, she read the article. She maintained that it falsely portrayed the character of the plaintiff as an adulterous elderly woman. She was adamant that the plaintiff was not involved in a love affair with her superior at work. She often saw the plaintiff and her husband together including a time he actually noticed and directed the plaintiff to her at a busy hospital in Gaborone, Botswana. She was not aware and her friend did not tell her of the divorce summons issued in 2002.

The article had the same effect on Mazvita Winnet Makuto, a friend of the plaintiff since 1987, as it had on Rudo Buhera. She received many calls from friends and relatives who saw the article on the day of publication and thereafter. A sister in law who attended the same church as the plaintiff was the first to telephone her. She purchased the tabloid and read the article. She was deeply embarrassed and cried. The underlying message she deciphered from the article was that her friend was an adulteress. It dawned on her that all those who phoned her were in essence accusing her of being like the plaintiff. She too was not aware that the plaintiff’s husband issued divorce summons in 2002.

I did not detect any bias in the evidence of Rudo Buhera and Mazvita Makuto. They are ordinary working women who outlined their understanding of the article in issue. They also chronicled how other ordinary citizens understood the article as depicting the plaintiff as an adulteress. Their opinions and impressions were left intact after cross examination.

The defendants through the evidence of the first defendant and the plaintiff’s husband stated that the contents of the article were true and correct. The first defendant received numerous anonymous calls from women complaining about the adulterous association between the plaintiff and her superior at work. On 23 February 2011 at 10 am he approached the plaintiff at her work place with a photographer who took her picture. She willingly answered his questions on “her adulterous relationship” with her former superior. Later he asked her about the incidents at a hotel in Kariba. She denied the affair and refuted the hotel allegations. He also interviewed her about her last child. She was interested in his sources of information. He interviewed her husband the following day and he gave him the information reproduced in the article. He believed the husband’s version. He failed to locate the former superior at the company where the plaintiff directed him. On 2 March he presented the article to his news editor who approved it for publication.

Under cross examination he made the following admissions. Firstly, that the pictures on the front page and the story on page 3 were given prominence in order to highlight to H-Metro readers that in our society elderly married people cheat on their spouses. Secondly, that the version given by the plaintiff’s husband that she was an adulteress who was impregnated by another man twice was true and not defamatory. Thirdly, that he gave greater coverage to the husband’s version. Fourthly, that he did not verify with the registrar general the existence of two birth certificates for the minor child because; again in his words “the main thrust was about the adulterous relationship between the plaintiff and her superior”. Fifthly, that he did not find out when the Kariba incident and pregnancies occurred.

The first defendant did not have reason to believe the husband and disbelieve the wife. Had he been professional in seeking out the truth he would have sought corroboration of the husband’s allegations. He would have realised that the Kariba hotel version of the husband did not make sense. The husband did not disclose whether he trailed his wife after she left the hotel room; whether he consulted the hotel management about the preparation of the conference room; whether he sought assistance from other hotel guests to witness the shenanigans of his wife. The allegations by the husband were bald and unsubstantiated. The first defendant was duty bound to seek corroboration of the husband’s story from his sources of information. The plaintiff’s youngest child was born in March 1997 and his birth was registered in June of that year. The diary allegations and pregnancy stories predated the birth of the minor child. A journalist worth his salt would have been more circumspect in believing a husband who would wait 5 years before issuing a divorce summons in 2002 based on these allegations of adultery and thereafter sit on the unopposed divorce action for 9 years before withdrawing it. Had the first defendant been properly applying his mind, he would have realised that the plaintiff’s husband was an untruthful and malicious man whose agenda was to scandalise his own wife to cover up for his own shenanigans that were revealed when he was cross examined. These factors together with the revelation that the plaintiff did not know that her former superior had left the tobacco company must have persuaded him that she was being truthful.

The first defendant admitted that the underlying reason in publishing the story was to demonstrate to his readers that elderly managerial married woman commit adultery with their married male counterparts at work and the emphasis of the article was on the adulterous relationship between the plaintiff and her superior. In my view, his intention was therefore to lead the readers to the conclusion that the plaintiff committed adultery.

The plaintiff’s husband was the second witness called by the defendants. He married the plaintiff in 1976 and has four children by her. His marriage has been unhappy since 1997. He confirmed giving the version attributed to him in the article. He said in Kariba his wife would wake up at 3 am purportedly to prepare for the conference. He stated it as a fact even though he did not have proof that she was joining her superior in his room. What belies belief is that he simply kept quiet and did not act on this knowledge because he was not a violent man. He was aware the superior impregnated her in 1997 and she had an incomplete abortion but he kept a low profile. He issued divorce summons in 2002 based on the allegations of adultery with her superior at work. He said he remained in the marriage and did not prosecute the divorce for the sake of his children but now that they are adults after withdrawing the divorce in 2012 he issued new summons for divorce in which he seeks custody of the minor child. He was adamant that his version was true. He said between 1997 and 2002 he was following leads of the whispers he received. Apparently those leads failed to produce concrete proof of his wife’s infidelity. He does not sleep at home at the times he puts up at his mother’s house in Highfield. He disputed that he was the one committing adultery with another woman with whom he had two children and in whose company he spends each time he absconds from the marital home.

I was satisfied that he was an untruthful witness. His version in court and in the article in issue was not confirmed by any independent and concrete evidence. The probabilities discredit it. It runs against the grain of human experience that he would acquiesce in the shenanigans of his wife in Kariba. He has no child bearing any of the names allegedly found by his informers in the diary of his wife’s former superior. He made bald and unsubstantiated allegations. He proved to be afflicted by mood swings as espoused by his wife. I did not believe him.

A broad definition of defamation is set out by PATEL J in *Masuku* v *Goko & Anor* 2006 (2) ZLR 341 (H) at 347C-D. It is a published statement that injures the good name and standing of a person in the estimation of reasonable and ordinary people. The three stage approach in determining whether the words complained of are defamatory is well established in this country. It is set out *in Moyse & Ors* v *Mujuru* 1998 (2) ZLR 353 (S) at 356G-H thus:

(a) first, consider whether the words as specified are capable of bearing the meaning attributed to them, that is, whether the defamatory meaning alleged is within the ordinary meaning of the words;

(b) secondly, assess whether that is the meaning according to which the words would probably be reasonably understood; and

 (c) thirdly, decide whether the meaning identified is defamatory.

The headline, the pictures and the words complained of in the declaration read conjunctively with the whole article insinuate that the plaintiff is an elderly adulterous woman who had a child by her senior at work during the subsistence of her marriage. In my view, the words are capable of bearing the meaning attributed to them by the plaintiff. The evidence led by the plaintiff and her witnesses established that ordinary and reasonable members of the public understood them to mean that she was an adulteress who cheated her husband with her boss and bore him a child. The article lowered her good name and standing in the eyes of ordinary readers. It cast aspersions on her character and exposed her to public ridicule and contempt. Like McNALLY JA in *Ndewere* v *Zimbabwe Newspapers 1980* (*Ltd*) *& Anor* 2001 (2) ZLR 508 (S) at 511E, I am satisfied that they are *prima facie* defamatory.

1. *Whether or not the story was substantially true*

The defendants raised the defence that the article was substantially true. What was true about the article was that it recited the version of the plaintiff’s husband and her rebuttal. The story given by the husband was false. The first defendant did not conduct any meaningful investigations to confirm the husband’s story. In his testimony the first defendant constantly averred that the version of the husband was true. The first defendant proceeded to write and the second defendant to publish a half baked and untrue story. A false story cannot be substantially true. In my view, no justification or public interest was served in writing and publishing a false story. The defences of justification and public interest are grounded in truth. See *Manyange* v *Mpofu & Ors* HH 162/11 at p 11-12 of the cyclostyled judgment. The defence raised by the defendants fails.

1. *The amount of damages, if any, due to the plaintiff*

The last issue for determination is the amount of damages due to the plaintiff. The factors that influence a court in arriving at a just and fair estimate of damages are set out in such cases as *Manyange v Mpofu & Ors,* *supra*, at p 14 and *Garwe v Zimind Publishers* (*Pvt*) *Ltd & Ors* 2007 (1) ZLR209 (H) at 236-242. They include:

1. the content and nature of the defamatory publication;
2. the plaintiff’s standing in society;
3. the extent of the publication;
4. the probable consequences of the defamation;
5. the conduct of the defendant;
6. the recklessness of the publication;
7. comparable awards in other defamation suits and
8. the declining value of money.

The plaintiff claimed the sum of US$50 000-00 as the appropriate measure of damages for the injury to her name and reputation. Mr *Gasva,* for the defendants, submitted that the amount sought was too high. The defamatory publication was through a newspaper that circulates in Harare. The extent of its publication was not disclosed. The headline and pictures of the plaintiff was eye catching and the article was sensational. It cast aspersions on the morality of the plaintiff. The plaintiff did not disclose her social standing. All she disclosed was that she works for a publicly listed company; attends church and is a family woman with mostly grown up children. She appears to be just an ordinary member of society with no particular prominence. She did not establish the extent of the circulation of the newspaper other than that it is a Harare tabloid that has an electronic version on the internet. The paper appears to be localised in Harare and is not widely read through out the country. Indeed some of her witnesses like her brother and her friend Mazvita were not avid readers of the tabloid. Her Botswana based friend read the paper when she came to Zimbabwe, courtesy of a friend who kept a copy for her.

The major consequence of the article was that it exposed her to ridicule and contempt from her relatives, workmates and acquaintances. Some of her workmates shunned her. She was humiliated by the article. Her marriage which was on the mend was severely affected as her moody husband first withdrew an earlier divorce summons and issued a new one after the article was published. The defendants were reckless in publishing the article without verifying the husband’s story with other players. The article suggests that the illicit love affair was fresh and on going. The defendants were drawn to the stale and old story by its sensational value. The ingredients that attracted the first defendant were the age of the plaintiff, the managerial positions held by the plaintiff, her purported lover and her husband and the alleged birth of a child from the illicit love affair, a child who had two birth certificates in different names. The defendants did not render an apology to the plaintiff. I find there overall conduct reckless and reprehensible.

In regards to comparable awards, I was referred by both counsel *to Moyo* v *Nkomo & Anor* HB 38/11 and *Manyange* v *Mpofu & Anor, supra.* In *Moyo’s* case, BERE J awarded the sum of US$5 000-00 as fair compensation on the facts before him. In *Manyange’s* case PATEL J apportioned the damages between Mpofu and the publishers by awarding against them US$2 000-00 and US$4 000-00 respectively. I consider that the plaintiffs in these two cases held higher social standing than the present plaintiff. I also find that the newspapers that published the articles in those two cases had a wider circulation than the H-Metro. The measure of damages that I estimate to be fair and just to the plaintiff will therefore be less than those found in the two cases referred to above.

In view of the foregoing considerations, I estimate fair compensation to the plaintiff in the sum of US$ 3 000-00.

Accordingly, it is ordered that:

1. The defendants shall jointly and severally, one paying the other to be absolved, pay the plaintiff:
2. The sum of US$3 000-00 together with interest at the prescribed rate from the date of service of summons to the date of payment in full.
3. Costs of suit.

*Muchandibaya & Associates*,the plaintiff’s legal practitioners

*Chirimuuta & Associates*,the defendants’ legal practitioners