

MEADOWS (PVT) LTD  
and  
SHARADKUMAR PATEL  
versus  
COSMO TRUST  
and  
BARBRA VITORIA

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 26 July, 2017 & 18 October 2017

**Civil**

*F Chimwamurombe Mateza*, for the plaintiffs  
*Advocate B Hungwe*, for the defendant

MATANDA-MOYO J: This is an application for absolution from the instance. The plaintiffs instituted proceedings for defamatory damages arising out of statements made pursuant to court proceedings. The defendants made corruption claims against the plaintiffs in support of an appeal before the Administrative Court under T6/16. The defendants alleged that the plaintiffs had paid a bribe to the Harare City Council officials to facilitate the granting of a development permit for construction of 121 cluster houses at Meadows of Monavale which area is a wetland.

The defendants admitted to making such defamatory statements but raised the defence of privilege. The defendants denied that in making such statements they were driven by malice. They believed in their cause of protecting an ecologically sensitive area and a significant source of water for the Harare City as a whole. Having raised objections and also having knowledge that other persons had objected to plaintiffs projects, the defendants failed to understand how the permit was secured. The Harare City Council also breached its own rules with regards to the time limit in dealing with the matter. The application was dealt with after it was deemed to have lapsed. The second defendant also met with an official of the Harare City Council. The facts of the matter led

defendants to genuinely believe that corruption had taken place in the granting of the permit. The defendants had no personal benefit in the matter but were motivated by their desire to prevent harm to a fragile eco system. The defendants wanted to preserve the area for reproduction of birds.

The matter came up for pretrial conference and the issues referred for trial were;

1. Whether the defendants defamed the plaintiffs through their averments in support of their appeal in case number T6/16 and
2. Whether the defence of privilege is available to the defendants against the plaintiff's defamation action.

On the day of hearing plaintiffs led evidence from Mr Sharadkumar Patel, the second applicant who is a director of first applicant. This witness explained how he applied for a permit for the construction of the cluster houses, the follow ups he made with City Council and how he eventually got the permit after 6 months. During the follow ups he learnt that a lot of objections had been raised to the construction of the cluster houses. This witness admitted that they got a permit without the Environmental Management Authority report. He however said EMA advised him to get a permit before its report. He admitted the area was a wetland.

However he denied he got the permit corruptly. On the issue of quantum Mr Patel testified that the damages of \$120 000.00 were justified as he could not proceed with the project after all investors pulled out. Every person is skeptical about the company and everyone is shunning dealing with plaintiffs as a result of the corruption allegations. This is after the plaintiffs had incurred expenses in engineering drawings, plans and brochures. He estimated that the plaintiffs were going to realise a value of about two million dollars from the project but could not do so because of the defendants' conduct. Under cross-examination Mr Patel said the \$120 000 represented damages for defamation and damages for loss of earnings. The plaintiffs closed their case thereafter.

It is the defendants case that they should not be put on their defence as the plaintiffs have failed to make out a *prima facie* case against them. The defendants averred that the plaintiffs had not led evidence to prove malice on the part of the defendants. The plaintiffs also did not make any attempt to quantify damages claimed. The defendants averred that there is no evidence placed before the court quantifying the damages claimed.

The plaintiffs oppose the granting of absolution from the instance on the basis that they had established a *prima facie* case against the defendants. The defendants in their papers admitted to making the defamatory statement and only raised the defence privilege. The plaintiffs submitted that the onus of proving such a defence lies with the plaintiffs and in order to discharge such onus the defendants ought to be put on their defence.

The law relating to absolution from the instance is now well settled. The requirement for the granting of an application for absolution from the instance are akin to those for discharge at the close of the State case. The test for absolution was clearly set out in the case of *Gordon Lloyd Page and Associates and Rireira and Another* 2001 (1) SA 88 (SCA) at 92 E-93A:

“The test for absolution to be applied by a trial court at the end of plaintiffs 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 plaintiffs case, the test to be applied is not whether the evidence led by 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 to) find for the plaintiff.

.....

This implies that a 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 plaintiffs herein only led evidence showing that such defamatory statements were made by the defendants during court proceedings. The plaintiff knew that the only defence raised to defamation was privilege. In so doing the plaintiffs ought to have led evidence showing that the statements so made by the defendants were made with malice.

Qualified privilege is a defence to an otherwise defamatory statement when the statement

1. was made in good faith,
2. is on a subject matter in which the person making it has an interest or on reference to which he or she has a duty,
3. is made to a person having a corresponding interest or duty and
4. is made without malice.

The purpose of such a defence especially in court proceedings is to ensure that there

is free presentation of a party's side of the story without the risk of an action for defamation. See *Taylor v Serious Fraud Office* (1998) 4 ALL ER 801. However the person making such a statement must believe in the truthfulness of such statements and such privilege must not be abused. The statements made should not be motivated by malice. The statements must be relevant to the matter under consideration. As rightly pointed out by the plaintiff's counsel *A Guide to the Zimbabwean Law of Delict* at p 41, states that the defence of qualified privilege attaches to statements made during the course of judicial proceedings by a party, witness, legal practitioner a judicial officer but such statements must be relevant to the issues to be considered.

Once such a defence has been raised the plaintiff ought to have put before the court evidence showing that the statement was made with malice. No such evidence was led from the plaintiff's witness. Nothing has been put before the court that warrant defendant being called upon to rebut. See *Pearson Mungofa v Rosinita Musengi* HH 38/14.

On the issue of damages the plaintiffs failed to provide *prima facie* proof that their dignity had been impaired to the tune of \$120 000-00 dollars. The witness testified that within that figure are damages for loss of business. No specific figure has been attributed to defamation damages. This court has no basis to place the defendant on his defence as the defendant has no figure to rebut. The plaintiff referred me to the sentiments expressed by this court in *Manyange v Mpofo and Ors* HC 2308/09 where it said:

“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 in other defamation suits and the declining value of money.”

The plaintiff's has not made any effort to substantiate their damages.

The elements for a claim defamation are as follows:

- (1) there must be proof that the defendant made a false and defamatory statement concerning the plaintiff.
- (2) there must be an unprivileged publication to a third party and
- (3) there must be proof of damages suffered.

Herein the plaintiff only showed that the defendants made the defamatory statements

and failed to lead evidence on the other two elements. Without such evidence the defendants' application for absolution should succeed.

On costs I am persuaded that no justification has been shown for costs on a higher scale.

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

*Mberi Chimwamurombe Legal Practice*, plaintiffs' legal practitioners  
*Messrs, Coghlan, Welsh & Guest*, defendants' legal practitioners