PADDINGTON GARWE
versus
ZIMIND PUBLISHERS (PRIVATE) LIMITED
and
VINCENT KAHIYA
and
AUGUSTINE MUKARO

HIGH COURT OF ZIMBABWE
GWAUNZA JA
HARARE, 31 July, 2 August 2006 and 10 October 2007

Mr S Chihambakwe, for plaintiff
Adv S F Joubert and *Adv E Morris*, for the defendant

GWAUNZA JA: I was assigned from the Supreme Court to the High Court specifically to hear this matter.

The trial was conducted over a period of two days, at the end of which it was agreed between the parties that the parties would prepare their written submissions and submit them by certain specified dates. The deadlines were not all met, a circumstance that contributed to the delay in the preparation and handing down of this judgment.

At the time the cause of action *in casu* arose, the Plaintiff was the Judge President of the High Court of Zimbabwe. He was elevated to the Supreme Court Bench a year or so after the publication of the article in question. The first, second and third defendants are, respectively, the publishers, editor and correspondent of a weekly news publication titled "The Zimbabwe Independent", hereinafter referred to as 'the Independent.'

The essential facts of the matter are not in dispute and are as follows:

On the 26th of February, 2004 a criminal trial presided over by the Plaintiff, sitting with two assessors, came to an end. The trial had lasted some eighteen weeks and attracted considerable interest nationally and internationally. On trial, for high treason, was Morgan Tsvangirai, the President

of an opposition political party called the Movement for Democratic Change (the "MDC"). At the end of that trial the plaintiff, as the presiding judge, had indicated that he expected judgment in the matter to be handed down on 29 July, 2004. When this date came, he was, however, for reasons that are now in dispute, not able to hand down the judgment and postponed the event to a future date. Because of the interest the trial had generated, the postponement of the judgment gave rise to a lot of speculation, particularly concerning the possible reasons behind it.

Reporting on the postponement, the Independent of 30 July 2004, carried an article containing the following passage,

"TSVANGIRAI TREASON JUDGMENT BLOCKED:

> **Assessors in the Movement for Democratic Change leader Morgan Tsvangirai's treason case have blocked Judge President Paddington Garwe from passing his judgment before they could review transcripts of the trial, the Zimbabwe Independent has gathered"**

The Plaintiff regarded these words as being both misleading and highly defamatory of him, and took two courses of action. Firstly and on the same date the article appeared in the Independent, he asked the Registrar of the High Court to prepare and transmit to the second respondent, a detailed response explaining the procedures followed in criminal trials in the High Court, including the role of assessors. The Registrar in his response took issue with, among other concerns, the suggestion in the article complained of, that the Plaintiff had already prepared a judgment in the Tsvangirai trial. He referred to the article in question as 'misleading and mischievous'. Secondly and on the 3rd of August 2004, the Plaintiff wrote a letter of protest to the defendants and asked for a retraction of the statement in question. In their response dated 5 August 2004, the defendants disputed the Plaintiff's claim that the words were defamatory, and indicated that no retraction would be

forthcoming. The second defendant, however, caused the Registrar's letter to be published in the Independent's edition of the following week, on the same page as the column headed "Editor's Memo". At the end of the editor's memo of that day, titled "Windshield Smash" the second respondent appended two paragraphs in which he "placed on record" that, contrary to the Registrar's contention, the defendants had not suggested in their article that the plaintiff had already prepared a judgment. Nor, the second respondent added, was it their intention to do so.

The plaintiff subsequently issued summons against the three defendants, jointly and severally, the one paying the other to be absolved, for damages for defamation arising out of the article in question. He initially claimed $250 000-00 (old currency) as damages but revised this amount upwards, firstly to $1 00 000 000 (old currency) and on the day the trial commenced, to $75 000 000 000 (old currency).

The reason for these revisions in the *quantum* of damages claimed, was given in the main as the then prevailing high rate of inflation. While submitting that to his knowledge there was no law that recognised inflation as a ground for raising a monetary claim upwards, defendants' counsel, Advocate *Joubert*, said the defendants would however not object to the amendment, although they would make submissions on this issue later.

The plaintiff claims that the words complained of were false, malicious and defamatory of him. Further, it is claimed by the plaintiff that such words meant, and were understood by the general readership locally and internationally, to mean that;

(a) he had reached a verdict in the Tsvangirai trial/case without discussing the evidence with the assessors;

(b) had the assessors not stopped him, he would have delivered a single man's judgment thereby acting wrongfully, unlawfully and illegal and
(c) that he was thus a corrupt and unjust person.

The plaintiff goes on to say that as a result of the aforesaid defamatory words, he had suffered damages in his good name, fame and reputation and had sustained damages in the amounts indicated. In this connection, I will take judicial notice of the fact that in August 2006, the Government of Zimbabwe effected changes to its currency by removing three zeros therefrom, but without reducing the value of such currency in any way. As a result of this currency change, the plaintiff's initial claim of $250 000 000 would currently translate to $250 000, while the second and third amendments to his claim would, in today's terms, translate to $1 000 000 and $75 000 000 respectively. I shall, for obvious reasons determine the matter of the damages claimed, on the basis of the new currency.

1. EVIDENCE

The plaintiff gave evidence on his own behalf and called two witnesses, Mr Muguyo ("Muguyo") who at the relevant time was a Judge's clerk attached to the plaintiff, and Mr Dangarembizi ("Dangarembizi") who sat as an assessor with the plaintiff during the trial referred to in the article. The defendants' instructing legal practitioner, *Mr Chagonda* ("Chagonda") gave evidence for the first defendant. The second defendant gave evidence on his own behalf and that of the first defendant, while the third defendant gave evidence on his behalf.

In his evidence, the plaintiff chronicled his professional advancement within the magistracy (where he was once Chief Magistrate) and judiciary, among other legal spheres. He was also the chairman of the National Council of Community Service, and had been involved in criminal

jurisprudence as a Board member of Penal Reform International since 1999. He was also a founder member of the International Correctional Services and a Board member of several international Judicial Bodies.

The plaintiff then explained the process that ensues after the end of a criminal trial in the High Court. He said that it was normal, after closing submissions by the parties' legal counsel, for a Judge to reserve his/her judgment indefinitely or indicate when judgment might be handed down. He explained that the Judge would normally meet with the two assessors who sat with him and discuss mostly the evidence relating to factual matters, while leaving issues of law to be determined by the judge. After this the judge would prepare a judgment and indicate when it would be handed down. Before this date, however, something might happen to cause the judge to postpone the handing down of the judgment. During the trial, both the judge and the assessors record the evidence in longhand even though transcription of the record of proceedings normally took place after close of argument, if one of the litigants wished to appeal. In the case at hand, the trial had been a long one. At its end he had about twenty three note books containing handwritten notes. Judgment was reserved and everybody involved in the trial was exhausted. He had not looked at the matter – that is, considered his notes and the record – until after the second term of the High Court started on 2 May 2004.

He said he must have met with the assessors then, and suggested they all went back to their notes to refresh their memories. Hoping that by the end of that term, they would be ready with the judgment, he had given a provisional date of July 29 2004, for the handing down of the judgment.

The Plaintiff explained that at the request of counsel from both sides, special arrangements had been made by the Registrar for the transcription of the record to be done

simultaneously with the trial. Around June 2004, the assessors were still studying their notes and he was able to meet with them several times around mid July, to discuss the evidence. After a while, there was some confusion as to what had happened at the various meetings held with the assessors, so the plaintiff suggested that the assessors too, be given transcripts of the proceedings. Since only three copies had by that time been made - one each for the prosecutor, defence counsel and the plaintiff – there was need to postpone handing down of the judgment to give time to the assessors to review the transcripts. The judgment had, in fact, not yet been prepared, such process having only started from the end of August to September 2004.

The plaintiff submitted that the issue of availing the transcripts to the assessors was his own initiative, and that the transcripts were bulky and lengthy. He emphatically denied that the assessors had "blocked" him from passing judgment in the matter saying such an assertion was blatantly untrue. He denied, too, that the assessors had at any time demanded the transcripts or forced him to postpone handing down of the judgment saying the judgment had at that time not even been prepared. He challenged the defence put up by the defendants that the words complained of were fair comment, saying they had no factual basis and were false. The plaintiff said he was hurt after seeing the article in question, and added that the decision to institute these proceedings had not been easy. He had, despite making the request, received no apology from the defendants, who had also refused to withdraw the statement.

Asked by his legal counsel, Mr *Chihambakwe*, to justify the $75 000 000 000 (old currency) that he was claiming as damages, the plaintiff noted that he was not "a small man" in legal circles, and was well known internationally, and in particular by Governments in Malawi, Kenya and other African

jurisdictions through his involvement in the community service programme. He added that his position on the boards of various international institutions had necessitated extensive travel around the world, and his work was well known and commended. He had also been a judicial officer for many years, and currently occupied a very senior position in the judiciary. Against this background, it was his view that for anybody to suggest he had acted in the manner alleged in the article, was highly defamatory of him. The newspaper in question had a wide circulation within and without Zimbabwe, and he knew that the article had been read far and wide, to the detriment of his reputation.

The plaintiff was subjected to a lengthy cross examination. He conceded that many things had been said and written about him, some of them unkind and untrue. When his attention was drawn to what defence counsel, Advocate *Joubert*, referred to as a "highly defamatory" article about him, that is, the plaintiff, published in the United Kingdom's Daily Telegraph newspaper, the plaintiff responded that he was not aware of this article, nor could he have accessed it on the internet, since he had no access to such facility. He was also not aware of the other articles appearing in international newspapers, that defence counsel referred to as having said things about the plaintiff that were "much worse" than the statement complained of. The plaintiff conceded that the Daily Telegraph had a more extensive circulation than the Zimbabwe Independent since the United Kingdom had wider readership than Zimbabwe. He admitted that the Tsvangirai case had attracted a lot of interest and speculation especially after rumours had started circulating in Harare about the possible verdict of the court in the case. He said that both legal counsel had received adequate notice of the postponement of the handing down of judgment. He conceded that he had consulted with the

Registrar of the High Court over the response to the article in question, that the latter submitted to the media, although he could not remember whether he had actually examined the draft before it was submitted for publication.

The plaintiff denied knowledge of the unsuccessful attempt that the second respondent was said to have made, to contact him over and before publication of the article in question. He conceded that everybody might not have been aware that the judgment date of 29 January 2004 was provisional, and also that journalists, in trying to find out why, might have been told that judgment had been postponed to allow time for the assessors to study the transcript. However, he questioned where, if that was the case, the issue of "blocking" the judgment had come from, even assuming that journalists may have wanted to capture readers' interest in the judgment through exaggeration. The plaintiff submitted that while he had initially not been aware of the rumour doing the rounds, to the effect that he was ready with a judgment to convict Tsvangirai before the publication of the article in question, he had become aware of it later.

It was also put to the plaintiff that his impression was wrong, that other newspapers within and without Zimbabwe had drawn from the Zimbabwe Independent article and subsequently printed other articles on the same subject matter. His attention was drawn to exhibit 4 which was an excerpt from an article in a South African newspaper, the *Cape Town Argus*. It was published on 28 July 2006, a day before the Zimbabwe Independent article. The plaintiff asserted he was not aware of that article or its contents. He dismissed as untrue the statement in that article, that judgment in the case had been **"postponed indefinitely this week because the presiding Judge had reached a verdict without consulting his two assessors."** It also said that the reporter had been "authoritatively" told that the plaintiff had **"convicted Tsvangirai over the**

alleged plot to kill Mugabe but that the assessors refused to rubber stamp this decision".

As to whether or not the article complained of had alleged that he had not consulted the assessors, the plaintiff said it was implied in the article, if one read all of it. He denied that the word "blocked", which he himself understood to mean "stopped" could be read or interpreted to mean "delayed", since it was followed by the word "before" and not "because". In response to the question whether he had seen the 'retraction' published by the defendant in their next edition of the Zimbabwe Independent, the plaintiff said he had not seen it, since, as it later emerged, the 'retraction' had been "hidden away" at the bottom of another article dealing with matters unrelated to the trial of Tsvangirai. The plaintiff was asked why he had not looked for a copy of the Daily Telegraph newspaper, which the defendants' legal practitioners referred to in their letter to his (plaintiff's) legal practitioner dated 5 August 2004 (exh 7). It was stated in that letter that the Daily Telegraph article had actually alleged that the plaintiff had reached a verdict, which he wished to deliver without consulting the assessors. The plaintiff responded that he had not looked for the article because he had no access to the internet. He added that while he was aware of other articles highly defamatory of him, he had not gone out of his way to look for them either. Asked why he did not sue all those other publication as well, the plaintiff responded that he would not have afforded the foreign currency to sue those international publications. He had not thought of asking the Registrar to write to the publications, as he had done with the Zimbabwe Independent, even though he doubted that the letter would have elicited any response.

The plaintiff was asked to comment on a variety of other articles appearing in some international publications, which

made allegations against him that the defendants said were far much worse in their defamatory content, than the statement complained of (exh 8,9,14). While he may have heard about those articles, the Plaintiff maintained that the current case was the worst since it suggested that he had abdicated his responsibilities as a judge and corruptly sought to hand down a judgment without the knowledge of the assessors.

In re-examination, the plaintiff said apart from the article in the Daily Telegraph, he had, until the previous day, not been aware of the other international articles that were highly defamatory of him. He denied causing the arrest of the Zimbabwe Independent journalists following publication of the article, even though he was the complainant.

Generally, the plaintiff gave his evidence well and with confidence, although he hesitated and was somewhat evasive over the question relating to the arrest of the second and third respondents after publication of the article complained of.

The plaintiff called his then clerk, Mr Muguyo, as his first witness. The latter confirmed that he had, at the instruction of the plaintiff, contacted both the state and defence counsel and asked them for their copies of the transcript so they could be availed to the assessors. Although he could not remember the exact number of times he had communicated with the defendants' legal practitioner, Mr *Chagonda*, he was certain he must have conveyed to him news of the postponement of the judgment several weeks before hand. Under cross examination he denied ever receiving any telephone calls from the second defendant, even though he knew him by sight. He said he could not recall whether he was on duty on the 28 and 29 July 2004.

Although he exhibited some confusion over the dates on which certain actions were taken by him, no negative comment can be made about Muguyo's credibility as a witness.

The plaintiff's next witness was Mr Joseph Dangarembizi, one of the assessors who had sat with the plaintiff during the Tsvangirai trial. It should be noted that Mr Dangarembizi was said by the defendants' counsel, to have initially agreed to be the defendants' witness but had, apparently, decided to switch over to the Plaintiff's side. Be that as it may, Dangarembizi explained in his evidence in chief that he had been an assessor since 1994. After the Tsvangirai trial he, the other assessor and the plaintiff had gone into the latter's chambers to discuss the matter and had been told they would be given transcripts. He added that the Judge had not yet made a decision on the matter, which decision was made long after the assessors had received the transcripts. He added that after he heard about the publication of the article in question, he had looked for the newspaper and read it for himself. Dangarembizi denied that he and the other assessor had blocked the judgment, nor demanded to see the transcripts.

Under cross examination Dangarembizi said he and the other assessor had met with the plaintiff to discuss the case, the very next day after the conclusion of the trial. He however, could not remember when the trial ended, whether or not both counsel filed heads of argument at the end of the trial, or whether the plaintiff had mentioned the need to wait for the transcripts of the record. He said he did not know that transcripts were being prepared as the trial proceeded. He admitted knowing the third defendant, as a reporter, but did not recall him phoning or visiting him at his house to discuss the case. He did not recall being informed that 29 July 2004 was the date on which judgment was to be passed. He had sought this information from the

registrar and had then confirmed it with the judge's clerk. As for the postponement of the handing down of the judgment, it was the witness' evidence that he had been informed of this fact by the plaintiff's clerk. He denied that he had told the third defendant that he and the other assessor were waiting for the transcripts, and emphasised that the postponement of the judgment had nothing to do with the transcripts.

Mr Dangarembizi's demeanour as a witness was not impressive. He gave the impression of tailoring his evidence in order to distance himself from the article that attributed to him a role in holding up the passing of the judgment. His evidence on the issue of the transcripts was inconsistent with the weight of other evidence on the matter. His memory of events was also selective as he resorted to memory loss on questions that he did not wish to answer. Finally, Dangarembizi's denial of having had any visit from, or communication with, the third respondent over the delayed judgment, lacked credence. His evidence, in my view must be treated with caution.

Dangarembizi's evidence marked the end of the plaintiff's case.

The defence case started with evidence from Mr *Chagonda* (Chagonda) who was Tsvangirai's legal practitioner in the main trial. He confirmed that transcripts of the record were being prepared as the trial progressed. While the transcript came in batches, it was possible at the end, after receiving the full record, to make several copies for the advocates, the accused and himself, as well as a spare copy. He had received a call from the plaintiff's clerk, around 4 July 2004, to the effect that judgment would be delivered on 29 July 2004. He immediately shared the information with the local and foreign counsel who had represented Tsvangirai in the trial. The latter started making arrangements to travel

to Zimbabwe and avail himself on the date indicated. Around 20 July 2004, he received another call from the plaintiff's clerk, informing him that judgment had been postponed because the assessors had requested copies of the transcript. He then offered to assist by giving the assessors a copy of the transcript. The second defendant telephoned him a few days later seeking confirmation of the postponement of the judgment, as well as the reasons for such postponement. He gave the second defendant the reasons as given to him by the clerk.

Under cross examination, the witness said he himself had used the words postponed *sine die,* not block, because he had not understood the plaintiff's clerk to say the assessors had blocked the judgment. While he knew the second defendant, the witness said he did not know the third defendant.

Chagonda gave his evidence confidently and was not shaken under cross-examination.

The third defendant, Augustine Mukaro, was the second witness for the defence. He was a reporter for the Independent and was responsible for writing the article in question. He prefaced his evidence with the statement that the postponement of the judgment was high profile news and that it was, at that time, attracting a lot of interest, excitement and speculation. Many articles had also been written on the subject in the international press, and transmitted through the electronic media. The issue was discussed at a diary meeting at the Independent's offices and it emerged that despite speculation and numerous rumours doing the rounds nationally and internationally, no concrete reason had emerged as to why the judgment had been postponed. As the Independent treated all the rumours as speculation, he was given the mandate to investigate the matter. Having decided to talk to various people, he on 27 July 2004, telephoned one of the two assessors who had sat with the

plaintiff in the Tsvangirai trial, Mr Dangarembizi, because he had known him for a long time. By agreement, the two then met at Mr Dangarembizi's home in Mandara, which address he had visited before. Mr Dangarembizi told him that the assessors had requested from the plaintiff copies of the transcript because their notes were not clear. Mr Dangarembizi had also, in answer to the question whether there was a judgment ready, informed him that there was no judgment as yet, since the Judge would not hand it down without consulting with the assessors. After this interview, Mukaro had proceeded to interview other people in the legal profession, who included Lovemore Madhuku, a law lecturer who is also the chairman of the National Constitutional Assembly, an NGO whose main mandate is to advocate for a new Constitution for Zimbabwe. Madhuku explained to him the role of assessors in a trial. Mutero also contacted someone from the Lawyers for Human Rights Organisation, the defence lawyer, *Chagonda,* and a retired judge. He had then written the article on 29 July 2004 and discussed it with the editor several times. He had also "cross checked" the information he had gathered because he was concerned about writing the truth. Mukaro admitted using the word "block" which had given rise to this dispute, and submitted he had actually intended to say the judgment had been delayed or deferred. He added that it was not his intention to infer that the judgment had been written.

Under cross examination, Mukaro said he took care to use words carefully in his articles, and that he had never received any criticism over the way he wrote his articles. He said his superiors had not effected much change to the article although the heading had been put in by the sub editors who had however showed it to him first. Asked whether he agreed with the use of the word "blocked", Mukaro hesitated somewhat before answering in the affirmative. He

was also asked what he had meant by the words "passing his judgment". His response was that the words must be read in context, but he did not mean to say the plaintiff had a written judgment that he was ready to pass. He went on to say that the word "blocked" was one of the alternative meanings attributed to words like "delay", "impede" and so on in the Thesaurus Dictionary.

Mukaro gave his evidence clearly, although, as indicated, he was somewhat shaken during cross examination over the use of the word "blocked", and its meaning, given the information he said he had gathered concerning the judgment in question.

The next witness for the defence was Vincent T Kahiya ("Kahiya"), who gave a run down of his educational, journalistic and public relations qualifications and explained that he was the custodian of editorial policy at the Independent. His job included ensuring that articles published in the newspaper conformed to both policy and laws governing their operations. He also wrote commentary and other articles for the newspaper and represented it in any litigation by or against the newspaper. Prior to publication, it was also his job to read the newspaper back to front. This was because the media environment was a "minefield" and the need to check and cross check articles was paramount, in order to check for accuracy and prevent litigation against the paper for defamation. He also ensured that anyone mentioned in the newspaper was given a chance to respond.

Kahiya confirmed that the Tsvangirayi trial had generated a lot of interest nationally and internationally, and added that close to the given date of judgement a number of meetings were held within civil society circles in order to speculate on the possible outcome of the trial and its impact on opposition politics. While this had "spawned" many

rumours, even more had been generated by news of the postponement of the judgment. He repeated what Mukaro said about wild stories being flighted in the international media, and in this respect summarised the "tone" prevailing at that time as being that –

(1) there was a verdict
(2) there was a judgment
(3) the assessors had rebelled; and
(4) the Government was in panic and did not know what to do.

Kahiya made reference to the diary meeting mentioned by Mukaro and said the latter's specific mandate was to find out –

(1) whether there was a judgment already prepared.
(2) what the role of the assessors was in the trial process; and
(3) why the original date of judgment had been moved back.

Even though Mukaro had been given the mandate to investigate the story, he himself had called a number of people, and met with a retired judge, to discuss the matter. The retired Judge had told him that the plaintiff was unlikely to have attempted to hand down the judgment without consulting the assessors. The retired judge had gone on to explain the role of the assessors which was essentially, to help the judge on factual matters, although they would be "in the know" as to the verdict by the time it is given. The retired Judge had advised him to contact the two assessors over the issue of the transcripts. By Wednesday Mukaro had talked to Mr Dangarembizi and they then met to compare notes. He had then telephoned Mr Chagonda to ask about the postponement and was told the same story about the assessors and the transcripts. Since it was his wish to contact the plaintiff before publication of the article, Kahiya had attempted to do so but was told that the plaintiff was not in the office. He had sat down with the reporter (Mukaro) and

then finally had the story ready. However, it was no longer a page one story. He also explained the procedure followed in the publication of an article, saying the article goes to the news editor, who reads and asks any questions before sending it to the editor. Since he himself was acquainted with the matter, he had not sent it to the news editor.

Even on the day of publication of the article, stories on the matter continued to appear on the internet. The witness denied that when he saw the article, he understood it to mean that a judgment had already been written, or that the assessors had stopped the plaintiff from handing it down. He explained that he had, after being advised of it over the phone, gone to the registrar's office to collect the letter from him which sought to put the record straight. He had also telephoned the registrar to seek clarification on a number of issues mentioned in the letter. The letter was then published in its original form on the page in the newspaper that is reserved for contributions from people who would have been aggrieved by any of their articles. He denied that he intended the article in question to be misleading or mischievous, since they had made the effort to verify its veracity before publication. He also denied that the story implied that a judgment had been written. He emphasised that he believed the article in question correctly reported on the matter, and that there was no intention on the part of the newspaper to defame the plaintiff.

Kahiya explained that the editor's page was reserved for the editor, and it was on this page that he wrote articles expressing his own views and opinions. As indicated earlier, the page also had space for readers' letters. Kahiya said he stood by the short statement printed at the bottom of the editor's memorandum of the following week, in which it was recorded that the newspaper had not suggested in the article concerned, that the plaintiff had

already prepared a judgment. Under cross examination Kahiya was asked why, in the article complained of, reference had been made to a judgment, when their investigations had revealed that no judgment had in fact been written. His response was that 'judgment' was meant to refer to the process of preparing and handing down a judgment, not the actual judgment. He went on to say that the assessors' concern was the need to consult the transcripts and cross check them against their notes. His understanding, having heard from a number of sources, was that the assessors had raised their objections with the registrar, or perhaps the plaintiff. Kahiya said he was not acquainted with Mr Nyatanga, the Registrar, and did not see the need to contact him over the matter, since it was the judge and not Mr Nyatanga, who prepared the judgment. Kahiya was taken to task over consulting other people outside of the plaintiff and the Registrar, and also over leaving it until 11.00 am on the day before publication, to look for the plaintiff. His response was that it was their choice to interview those other people and that they could not have sought to contact the plaintiff earlier since they were still gathering information. He added that when investigating an issue, it was their practice to consult people who have some link to the systems and processes involved, to explain these without necessarily referring to the specific case being investigated. They had considered it important to talk to a retired judge because he had in the past sat with assessors and was certain to have an intimate knowledge and understanding of the process involved. Kahiya failed to give a direct answer when he was asked about his understanding of the word 'blocked' and repeated that reference to "judgment" meant the process of coming up with a judgment, which process had been "deferred". Kahiya was asked why the "retraction" contained at the bottom of his editor's memorandum of the

following week's publication had not been given prominence. He explained that a retraction is normally placed on the same page that the article complained of would have been published. However in this case, the article had been given due prominence since many readers read the editor's memorandum. He treated the "retraction" as an apology.

Kahiya confirmed that on the date of publication, around 14 000 copies of the newspaper had been sold, and it could be that at least that number of people read the article. Another 150 copies had gone to South Africa. As for their website, Kahiya said they did not keep a daily record of the "hits" since they did not consume such data. It was therefore not possible to say how many people had read the Zimbabwe Independent on line. Asked whether they would write the same type of misleading article, Kahiya said it was not likely to ever happen again.

In re-examination, Kahiya said the article had indicated in its second paragraph that the plaintiff would not have handed down the judgment without consulting the assessors, because that is what they believed.

Kahiya's account of the events leading to and surrounding the publication of the article in question, was given with confidence. There, however, were parts of his evidence that in my view lacked credibility. One example is what he said was the intended meaning of the word 'judgment' in the article complained of. Kahiya was also somewhat evasive under cross-examination, when confronted with questions concerning his understanding of the word "blocked".

Kahiya was the last witness to give evidence in these proceedings.

2 THE ISSUES

The issues to be determined in this matter were agreed at the pre-trial conference and I will consider these in the

light of the evidence placed before the court, as outlined above, but not necessarily in the order given.

The issues are as follows;

(a) whether or not the Zimbabwe Independent is "widely" circulated as alleged or at all;
(b) whether or not the words complained of are false, malicious or defamatory of the plaintiff as alleged or at all,
(c) whether or not the said words meant and were understood to mean, by the general readership locally and internationally that:-

(i) the plaintiff had reached a decision on Tsvangirai's treason trial/case without discussing the evidence with the assessors;
(ii) the assessors stopped plaintiff to

deliver a single man's judgment;

(iii) had the plaintiff not been so stopped he would have acted wrongfully, unlawfully and
illegally; and

(iv) the plaintiff was a corrupt and unjust person as alleged or at all;

(d) whether the words complained of, published together with other words, would have disabused any reasonable reader to the meaning attributed to those words as alleged
or at all;

(e) whether the said words were published on a privileged occasion as alleged or at all;

(f) whether the words complained of were substantially true, in the public interest or fair comment as alleged or at all;

(g) whether the plaintiff suffered damages in his good name, fame and reputation and has sustained damages;
and;

(h) whether the plaintiff is entitled to damages in the sum claimed or any amount.

3 MEANING OF THE WORDS COMPLAINED OF

In his book, "The Law of Defamation in South Africa" 1st Ed at p 85 the learned author, Jonathan Burchell writes as follows about the significance of the meaning of the words complained of, in defamation cases:

> **"As has been seen, the meaning to be attached to words is probably the most important single factor in a defamation case, since it is of cardinal significance at so many stages' (Report of the committee on Defamation (Faulks committee) (Cmnd 5909 (1975) para 92"**

It is an established rule of the law that that the ordinary meaning of words is determined by looking at the context in which they were uttered.[1] According to Burchell (supra, at pg 88), it is the judge who must decide both whether the words in their ordinary significance are *capable* of bearing a defamatory meaning and whether a reasonable reader *would* regard the words in a defamatory light. The reasonable reader is aptly described by the learned judge in the case of *Demmers v Wyllie and Others,* 1980 (1) SA 835 at 840, in these terms;

> **"(The reasonable person or reasonable man) is a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed to them."**

Having established the correct approach in considering the ordinary meaning of the words complained of, it follows that such context must be defined.

In the case at hand, the immediate context would be the newspaper article in which the words complained of appeared. In its turn, the article would have to be considered within the context represented by the newspaper as a whole, that is, the Zimbabwe Independent.

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[1] *John v Rand Daily Mails* 1928 AD 190 at 240 cited on p 84 of Burchell's 'The Law of Defamation in South Africa' 1st ed

The article read as follows:

"TSVANGIRAI TREASON JUDGMENT BLOCKED

Assessors in Movement for Democratic Change leader Morgan Tsvangirai's treason case have blocked Judge President Paddington Garwe from passing his judgment before they could review transcripts of the trial, the Zimbabwe Independent has gathered.

Garwe was last week obliged to indefinitely postpone the judgment when the two assessors, Major Misheck Nyandoro and Joseph Dangarembizi, demanded recorded transcripts of the proceedings. The judgment should have been handed down yesterday but had to be postponed after the assessors raised objections.

Tsvangirai is accused of plotting to assassinate President Robert Mugabe ahead of the presidential poll in 2002. The outcome of Tsvangirai's treason trial is crucial in efforts to find an internal settlement in Zimbabwe. Diplomatic sources this week said Nigeria and South Africa were watching the proceedings with keen interest.

Legal experts said, procedurally, assessors should have been given tapes and transcripts to enable them to make informed assessments and a meaningful contribution towards the Judge's verdict.

The experts said the in the Tsvangirai case, the Judge would not have made a ruling without the views of the assessors.

"A verdict is an issue of majority vote," law lecturer and NCA head Lovemove Madhuku said. "In the case of Tsvangirai, at least two out of the three should concur on whether he is guilty of not".

Sources in the justice system this week said the only records the assessors had were notes which they scribbled during the lengthy trial.

The sources said by late yesterday the assessors had not been availed with the necessary documentation and audio tapes.

"The assessors have not yet received the recorded transcripts they asked for," a source said. "What this entails is that there will be a lengthy delay in handing down judgment."

It is still not clear how a date for the judgment was set before the assessors were ready.

Tsvangirai's trial started in February last year and ended in February this year. Charges against Tsvangirai arose from secretly recorded meetings between him and Ari Ben-Menashe, president of a Canadian-based public relations firm, Dickens & Madson, in which the idea of "eliminating Mugabe" was brought up.

Defence lawyers have argued that the videotape on which the alleged plot to assassinate Mugabe was based was defective and could not be relied on."

On the evidence before the court, particularly that from the defendants and their witnesses, there was an even wider context within which I am satisfied the words complained of must be understood. This was the environment that led to the

investigations into the matter being carried out by the Independent. The environment was described as being charged with speculation and rumour concerning the reasons for the postponement of the Tsvangirai judgment. The speculation and rumours were attributed to some print and electronic news items originatig outside Zimbabwe, but nevertheless accessible to some Zimbabwean readers. These news items, the court was informed, contained such sensational content as;

"Lay assessors block Judge's guilty verdict on Tsvangirai", "Assessors vehemently disagreed with the Judge's guilty verdict and refused to rubberstamp his decision", "assessors were enraged" and **"assessors revolt".**

This, then, is the context within which I must now consider the meaning of the words complained of. In doing this, I shall derive some useful guidance from the following words by Holmes JA in *Dorfmann v Africaanse Pers Publikasies (Edms) Bpk en andere 1966 (1) PH (A) at 45;*

> **"A court deciding whether a newspaper report is defamatory must ask itself what impression the ordinary reader would be likely to gain from it. In such enquiry the court must eschew any intellectual analysis of the contents of the report and of its implications and must also be careful not to attribute to ordinary reader a tendency towards such an analysis or an ability to recall more than an outline or overall impression of what he or she has just read…….."**

Much though it is important to consider the ordinary meaning of all the words complained of, it is evident from the evidence placed before the court that the two words within the offending statement that were the subject of dispute vis-a-vis their ordinary meaning, were, **'blocked'** and **'judgment.'** The plaintiff submitted that the ordinary meaning of the word 'blocked' was 'stopped'. Further, therefore, that the word, used in the context that it was, was understood by the ordinary reader to mean that the assessors had stopped him from passing his (prepared) judgment on the Tsvangirai case without the assessors' input.

The defendants deny that the word "blocked" was used in the sense alleged by the plaintiff. In the defendant's heads of argument, recourse is had to the Oxford English Dictionary definition of the word blocked, which is given as –

> **"To obstruct or close with obstacles, to obstruct the way of course; to postpone or prevent".**

It is accordingly argued for the defendants that if looked at as a whole, the article in question did not suggest that the assessors had prevented or obstructed the judgment altogether, in the sense that no judgment would ever be given, but merely that the passing of any judgment was to be 'delayed' or postponed to a day later than that originally set.

I am not persuaded by the defendants' argument.

The ordinary reader, in my view, would have understood the word "blocked" to mean "stop" or as defined in the English Oxford dictionary, "put obstacles in the way of, prevent". To expect the reader, even after reading the entire article, to understand the word "blocked" to mean "delayed" would, in my view, be to expect too much from him. Furthermore, the word 'delayed' is not mentioned anywhere in the article. Instead, what the ordinary reader would understand is that the judgment had been stopped, because the assessors had made certain demands. This, as suggested in the second paragraph of the article, had "obliged" the plaintiff to postpone the judgment.

In the passage cited below, Burchel, in his book, The Law of Defamation in South Africa at p 85 describes a reasonable reader and the manner in which he is likely to assimilate what he reads in a newspaper article;

> "… **The reasonable reader does have shortcomings – he often skims through a publication, he may have a capacity for implication and be prone to draw derogatory inferences. He may also be guilty of a certain amount of loose thinking and will jump to conclusions more readily than a man trained in the caution of the law." (*Johnson***

***v Rand Daily Mails* (supra) Similarly the reasonable reader does not engage in elaborate and overly subtle analysis. Most importantly the ordinary or natural meaning of words includes what the ordinary or reasonable person will infer from them" (my emphasis)**

I am satisfied that a reasonable reader, such as the one described above, having read the article in question, would not have given to the word "blocked" used twice in the top part of the article, a meaning which would not reasonably be attributed to it. Such reader, I am satisfied, would not have engaged in an exercise to subtly, elaborately or intellectually analyse the word inorder to come up with a meaning different from the one ordinarily assigned to it. It is important in this respect to remember that the ordinary meaning of a word is not always its dictionary meaning.

In relation to the word 'judgment' the defendants submit that, in the context in which it was used, 'judgment' was meant to convey the meaning that the process of passing judgment had been delayed. I am again not persuaded by this argument. The ordinary reader who reads about anything to do with the courts or a judge, would, in my view, understand the word to mean the verdict or the judge's decision on the matter. An ordinary reader is not likely to appreciate the fact that there is a process attached to the passing of a judgment, much less the nature of such process. To then expect such reader to understand the words "pass his judgment" to mean a process whose existence and nature the reader is not aware of would, in my view, be to do precisely what the leaned judge quoted above said should not be done, that is, attribute to the ordinary reader **'a tendency towards such (intellectual) analysis'.** This is particularly so, given what has already been referred to, that is, the lack of an ordinary reader's capacity to read more into the words that he or she reads, than what has been printed. In any case, the word 'his' placed immediately before 'judgment' in the statement complained of would tend to negate the suggestion

that the word 'judgment' was meant, or understood, to refer to the 'process of passing judgment'.

As already indicated, the meaning of the words complained of must be understood within the context of the article as a whole. The defendants contend that if the words complained of were to be read within such context, it would be evident that the defendant was not suggesting that the plaintiff had reached a decision or prepared a judgment without consulting or conferring with the assessors. To bolster this argument, reference is made to paragraphs 6 and 8 of the articles in which "sources" are quoted as saying in effect, that the plaintiff would not have made a ruling without the assessors' views, and that, since the assessors were yet to see the transcripts in question there would be a lengthy delay in handing down judgment.

The plaintiff denies this was the effect of the legal experts' comments and argues that the experts quoted were simply commenting on the law and the suggestion put to them that the plaintiff had to be stopped by the assessors from passing his judgment. He argues therefore that what the legal experts said would have had no effect on the reader's understanding of the meaning of the words complained of.

I find the Plaintiff's argument to be persuasive.

On the authority cited above, the court, in deciding what impression an ordinary reader would gain from the words complained of, must be careful not to attribute to the reader,

'an ability to recall more than an outline or overall impression of what he or she has just read ……'

Applied to the circumstances of this case, I am of the view that an ordinary reader would not have had his understanding of the words complained of, as already determined, altered by what the legal experts were quoted as having said. The legal experts were commenting on issues to

do with the law. Before a reader's understanding of the offending words could shift to what the defendants aver was their real meaning, such reader would, in my view, have to resort to some 'intellectual analysis' of the article in question. As already indicated, an ordinary reader normally does not possess a tendency towards such type of analysis, especially when it concerns an area of specialisation that he or she may not be schooled in.

Going back to the words complained of in the light of what I have determined the ordinary reader would have understood the words 'blocked' and 'judgment' to mean, I am satisfied such reader would have understood that the assessors had stopped the plaintiff from passing his (single man's) prepared judgment in the Tsvangirai case. Further to that, the reader would have understood that the Plaintiff wished to do this improperly if not corruptly, without consulting the assessors. The ordinary reader would also have understood that as a result of the assessors' demand for recorded transcripts of the trial proceedings, and their 'raising of objections,' the plaintiff was obliged to indefinitely postpone the judgment. As for what the legal experts are quoted as having said, my view is that an ordinary reader would have gained the impression that the Plaintiff had attempted to do that which the experts said would have been improper or corrupt.

I have no doubt in my mind that the foregoing is what a reasonable reader, having read the offending words within the context already outlined, would have understood to be the meaning of those words complained of.

My finding, therefore, is that the words complained of, understood by the ordinary reader to mean what I have determined, were capable of bearing the defamatory meaning alleged by the Plaintiff. I also find that a reasonable reader would regard the words in such a light.

Having so determined, it now behoves me to consider the defences that the defendants have put forward.

4 DEFENCES

Birchell (supra at page 85) makes the point that the meaning attached to the words complained of is;

> "……**relevant to defences such as fair comment, where a distinction must be drawn between fact and comment, truth for the public benefit (justification in the narrow sense) and privileged occasion. It is also important in regard to the assessment of damages**"

The defences put up by the defendants must therefore be considered in the context of what I have determined was the ordinary meaning of the words complained of.

4.1 PRIVILEGED OCCASION

The defence of qualified privilege, which is what, in effect the defendants are claiming, rebuts the inference of unlawfulness that arises on the publication of defamatory mater referring to the plaintiff.[2] The defendant must adduce evidence of a privileged occasion. The plaintiff can, however, show that the defendant has forfeited his right to the protection offered by the defence by proving that he, the defendant, was actuated by an improper motive. According to Birchell, the right to publish defamatory matter on a privileged occasion is "abused" or exceeded by improper motive.

Of the three major categories of occasions that enjoy qualified privilege, the defendants rely on the one relating to the discharge of a duty to a person who has a corresponding right to receive the information. Specifically, the defendants as publishers of a national newspaper, regard it as their duty to publish information that is in the interest of the public to read. The plaintiff quite rightly does not dispute the defendant's duty to publish such

[2] Burchell, *Supra* at p 244

material for the consumption of the public. He, however disputes that the defendants genuinely believed in the truth of the words, or that they had published them without any defamatory intention. In other words, the plaintiff is alleging an improper motive on the part of the defendants. To determine whether or not the defendants did have an improper motive in publishing the article in question, it is necessary again, to consider the circumstances leading up to the publication of the words in question.

That the Tsvangirai trial and its outcome were a matter of public interest is not in doubt. The defendants sought to establish the truth behind the postponement of an eagerly awaited judgment, amid highly speculative, and on their evidence, highly defamatory allegations concerning the reason for the postponement of the judgment. All the stories turned out, upon the defendants' investigations, not to be true. Specifically, no guilty verdict and consequently, no judgment, had been passed. No objections had been raised by the two assessors, nor had they stopped the plaintiff from passing any judgment, for the simple reason that no such judgment existed. Not only did the defendants establish this truth from other sources not mentioned in the article, they actually quoted a number of legal experts who indicated, in fact, that what the plaintiff was alleged to have done, i.e. reach a verdict without the input of the assessors, would have both been unprocedural and against specific provisions of the High Court Act. Yet in the first part of the article which is in the form of a summary of what they had "gathered" from their investigation, the defendants published words that were, distinctly, at variance with the content of what they had gathered. An active role in 'blocking' the passing of what was referred to as "his (i.e. plaintiff's") judgment before they could read the transcripts, is attributed to the assessors. The plaintiff is said, in the words immediately

following the offending statement, to have then been "obliged" to postpone the judgment.

The variance between what the defendants established to be the true facts concerning the postponement of the judgment, and what they went on to report, is in my view difficult to explain except in terms of their being driven by an improper motive.

I am satisfied, in the result, that the plaintiff has proved that the defendants have forfeited their right to the protection of the defence of qualified privilege.

4.2 TRUTH FOR THE PUBLIC BENEFIT (JUSTIFICATION)

The defendants have, in the alternative, pleaded truth for the public benefit. It is contended that they genuinely believed in the truth of the said words; published them without any defamatory intention, and received them from an impeccable source on whose words they were entitled to rely.

According to Burchell's "*The Law of Defamation in South Africa*", at p 211, the statement alleged to be true need not be true in every minute detail, although as a general rule, only the material allegations or "sting" of the charge, must be true. Applying this to the circumstances of this case, it is evident that the material allegations stemming from what I have determined was the ordinary meaning of the words complained of, were that the two assessors in the Tsvangirai trial "blocked" or stopped the plaintiff from passing his (single man's) judgment without consulting the assessors. Further, that the plaintiff was then obliged to postpone indefinitely, the handing down of such judgment.

The totality of the evidence before the court establishes that there was in fact, no dispute as to what the true state of affairs was concerning the judgment in question. The plaintiff avers that he had not prepared any judgment at the time the article in question was written.

The defendants, through Kahiya and Mutero concede that their investigation had also established the same fact. The plaintiff argues that if there was no judgment prepared, there could therefore, not have been anything for the assessors to stop or block. The defendants again concur with this assertion.

Applying Burchell's explanation of the defence of truth for the public benefit, to the circumstances of this case, it seems to me that the material allegation in the article complained of, was untrue. Given the wider context referred to, where in certain circles rumours and speculation were rampant concerning the postponement in question, the plaintiff, I find, is correct in his assertion that the defendants, having established that the assessors had neither blocked the plaintiff from passing a judgment that did not exist, nor made objections or demands, nevertheless went on to write "that which was in the rumour mill". The respondents in other words had an opportunity to correct such rumours, but chose not to do so. Instead they wrote what they knew to be untrue.

The argument is also made for the defendants that, in so far as the use of the word "blocked" in the article was to a degree sensational, or an exaggeration, such exaggeration should not be held against the defendants. The defendants cite the following passage in Burchells's *The law of Defamation in South Africa* at page 211.

> "**The fact that there is some exaggeration in the language used will not deprive the defendant of his defence of truth for the public benefit unless the exaggeration is such as is calculated to convey a wrong impression to the detriment of the plaintiff's reputation**." **(my emphasis)**

I find that the language used in the statement complained of went beyond mere exaggeration. This is because the defendants, having established the truth (and in the process disproved the many stories doing the rounds),

concerning the circumstances surrounding the postponement of the judgment in question, went on to publish in a prominent part of the article, statements that directly contradicted such truth. The inference of an improper motive, to wit, that of conveying a wrong impression to the detriment of the plaintiff's reputation, is in my view difficult to escape. This inference is bolstered by the fact that the defendants used exactly the same word "blocked' that was used in one article they had specifically pointed out as having been defamatory of the plaintiff. The defendants sought to distance themselves from it. The article, which appeared in a British newspaper, the Daily Telegraph, was entitled:

"... Lay Assessors <u>Block</u> Judge's guilty verdict on Tsvangirai".

Thus, while on the one hand distancing themselves from the Telegraph article, the defendants have on the other inexplicably borrowed a strong word from the same article, and used it in their article. I therefore find there is merit in the Plaintiff's assertion that the defendants deliberately, and to his detriment, set out to perpetuate an impression they knew was a misrepresentation of the true state of affairs.

The defence of truth for the public benefit is therefore, not one that is available to the defendants.

4.3 FAIR COMMENT

The defendants also rely on the defence of fair comment and submit that, in so far as the words complained of were comment, they were fair. According to Burchell, (*supra)* the requirements for this defence are that the allegation in question must be a comment (opinion), that it must be fair, that the factual allegations on which the comment is made must be true and that the comment must be on a matter of public interest. I am satisfied the last two requirements have been met *in casu*. This leaves the first two.

In order to establish whether the words complained of constituted fair comment, it is necessary to consider firstly, whether the words were in fact comment (opinion) and if so, whether such comment was fair given the facts upon which it was founded. The following statement by *Field J in O'Brien v Marquis* of Salisbury[3] is instructive in this respect:

> **"comment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking and those to whom the words are addressed, and from which his conclusion may be reasonably inferred".**

In *casu*, the writer and editor of the article in question not only stated that they had consulted a number of legal experts on the role of assessors in criminal trials, the writer also quoted what were presented as the exact words used by such experts. In addition to this, Kahiya and Mukaro told the court that the process involved in criminal trials in the High Court, where assessors sit with a Judge, and the role of the latter in such process, had been fully explained to them by the legal experts that they had consulted.

The words complained of are presented in such a manner that they constitute the writer's own summation or conclusion of what the legal experts had informed him, or in other words, what the defendants' own investigations had established. To that extent, and on the basis of the *dictum* cited, the words complained of constituted comment.

What has to be determined next is whether such comment was fair given the facts on which they were based.

It is not in dispute that the need arose and was acknowledged, for the assessors to first read the transcript of the trial before they could contribute meaningfully to the process that would have culminated in the preparation and passing of the judgment in question. This necessitated the

[3] (1889) 6 TLR 133, cited in Birchell's, supra at p 223

postponement of the handing down of the judgment from the date originally scheduled for it. The plaintiff maintains it was at his instigation that the transcripts were prepared. I find nothing in the evidence led before the court, to seriously challenge this assertion. Indeed Dangarembizi, the assessor, aside his shortcomings as a witness, denied ever requesting the transcripts. The words complained of, which, as I have found, constituted the writer's own comment based on these facts, gave the impression that the plaintiff was all set to deliver his judgment had he not been "blocked" by the assessors, who had demanded copies of the transcript. This can, in my view, hardly be said to be a correct interpretation of the facts. Even allowing for the exaggeration that normally characterises the reporting of facts or events in newspaper articles, the words in my opinion, exceeded the limits of exaggeration, and can hardly be said to be fair comment.

I am also not satisfied the offending words could have been reasonably inferred from the facts as stated above. Such words would be difficult to defend against an allegation of malice. See in this respect the definition of "fair" in relation to comments, that is contained in *Mcguire v Western Morning News Co Ltd* [4] as

> **"any genuine (honest) expression of opinion is fair if it is relevant, and if it is not such as to disclose in itself actual malice"**

The defendant's use of words such as "blocked" and "demanded" when they knew very well that this was not what had happened, to my mind smacks of dishonesty and malice. Indeed no explanation was tendered as to why, if all they meant to say was that the judgment had been postponed, such word had not been used instead of the misleading word "blocked". It is telling, that in the 'retraction' tagged on

[4] (1903) 2 KB 100 at 110 & 112

to the editor's memo, care was taken to use the word "delayed".

I find in the face of all this that the defendants have failed to prove the defence of fair comment.

4.4 Lack of *Animus Injuriandi*

The other defence put up by the defendants is lack of *animus injuriandi*. It is contented for the second and third defendants that they had, in their evidence, proved their lack of *animus injuriandi* since they had published the article –

(a) in the public interest
(b) believing the same to the true
(c) with no intention of defaming the plaintiff
(d) without being negligent and,
(e) relying upon a source that it was reasonable for them to rely on.

I have already made my determination in respect of points (a) and (b), above. As for point (e), while it was reasonable for the defendants to rely on Dangarembizi as a source of information, I find that their presentation of the information gathered, in the offending artice, suggests an intention to defame the Plaintiff. Despite his shortcomings as a witness, I doubt that Dangarembizi ascribed to himself and his co-assessor, an aggressive role in 'demanding' the transcripts in question and 'blocking', the Plaintiff from passing 'his' judgment.

The plaintiff disputes that the defendants lacked *animus injuriandi* and charges that there was no connection between the words complained of and what the defendants had established as a matter of fact. In these circumstances, it is the plaintiff's argument, they intentionally wrote an article defamatory of him.

I do not find the plaintiff's contention to be without merit.

According to Burchell *animus injuriandi* is defined as subjective intention (on the part of an individual as opposed to the mass media) to defame or injure the reputation of the plaintiff. He goes on to say that this intention covers *dolus directus*, *dolus indirectus* and *dolus eventualis*. These are terms that are self explanatory.

There is much in the evidence before the court to suggest the defendants, in writing and publishing the words complained of, were motivated by *dolus directus* as well as the other forms of *dolus*.

As already indicated, the defendants, having established the true state of affairs concerning the postponement of the Tsvangirai judgment, nevertheless went on to write what was not true, that is, that the judgment had been 'blocked' by the assessors. I am not persuaded by their submission that they in fact meant to convey the meaning that the judgment had been delayed. This impression is bolstered by the hesitation exhibited by both Mukaro and Kahiya in answering questions put to them under cross-examination, over their understanding of the word 'blocked'. Mukaro went so far as to submit he had actually meant to say 'delayed', rather that 'blocked.' In any case, given the way that the word "blocked" is used in the first paragraph of the article, substituting it with the word "delayed" would have resulted in an inelegantly, if not ungrammatically constructed sentence. One normally does not "delay" someone "from" doing something. In my view, d*olus directus* is, in the light of this, established.

Even if the two defendants, that is Kahiya and Mukaro, had not had the aim and object of defaming the plaintiff, they must, nevertheless, have foreseen the possibility of defaming him as substantially certain, when they published the words complained of. As discussed above, the two defendants reduced what were essentially rumours doing the

rounds concerning the postponement of the judgment, to writing, and published them in a local newspaper. They can not, in my view, be said not to have foreseen the eventual harm to the plaintiff, of the statement complained of. In these circumstances the defendants' submission that they were not negligent is difficult to sustain.

When all is told, I find that the two defendants, Kahiya and Mukaro have failed to prove the defence of lack *animus injuriandi*.

Taking into account all the evidence led for the plaintiff and that led for the defendants, I find in the final analysis, that the defendants have failed to establish any of the defences that might have exonerated them vis-à-vis the plaintiff's claim for defamation.

What has to be determined next is the question of damages.

5. NATURE AND ASSESSMENT OF DAMAGES

The parties in their closing submissions have addressed the question of the nature of damages that the court should award to the plaintiff. The plaintiff argues that courts have accepted damages for defamation that were intended to vindicate the plaintiff's character and act as a *solatium*. Also, that in other cases, ''punitive'' and exemplary damages have also been granted. He, however, urges the court to award damages that take into account the aggravating factors of the defamation, as outlined by him in his evidence, which I have dealt with above. By this, I understand the plaintiff to wish for damages that would both ''punish'' the defendants, and vindicate his character. The defendants, on the other hand, submit that the concept of punitive or exemplary damages is not part of our law. The parties therefore have opposing views on this issue. Neither has referred me to any

authorities to support their respective positions. The learned authors, PJ Visser and JM Potgieter in their book ''*Law of Damages*'' (*supra*) at page 41 state that there is no agreement on the question of whether the amount of satisfaction should also serve the purpose of punishing the defendant for his conduct, which purpose has to be reflected in a larger amount of satisfaction. The authors go on to say that, despite the controversy surrounding this matter, case law accepts that the object of punishment must be taken into account by the court in determining the quantum of satisfaction for defamation[5] Thus ''punitive'' or exemplary'' damages have been awarded where, for example, the defendant acted with a malicious motive, was aware of the untruth of his remarks and where the defamation was of an exceptionally serious nature.[6]

Burchell, (supra, at page293) however, suggests an approach that I find has some appeal;

> **''But even the critics of ''punitive'' damages would, I think, accept that factors aggravating the defendant's conduct may serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a *solatium*.''**

This approach can in my view be properly adopted *in casu*, where as I have found, and as indicated below, certain factors aggravated the defendant's conduct.

Assessing the appropriate damages in a defamation case is always a difficult task. As the learned Judge correctly observed in *Counsel & Co Ltd v Broome* [1972] AC 1027 at 1027G, the whole process of assessing damages where they are ''at large'' is essentially a matter of impression and not

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[5] *Galb v Hawkis* 1960 (3) SA 687 (A) at 693; *SA Associated Newspapers Ltd v Samuels* 1980

[6] *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442A (1) SA 24A at 27-8

addition[7]. In casu, before computing the damages that I consider to be appropriate in the circumstances of this case, it is pertinent to consider the parties' submissions' regarding the factors that may aggravate or mitigate such damages.

The plaintiff urges this court to consider his legal standing within the judiciary and the legal profession as a whole; the fact that he is an international consultant on criminal justice; that 13 681 copies of the Independent Newspaper were sold within Zimbabwe while 150 were sold in South Africa; and that there had been ''hits'' on the newspapers website. He also makes mention of the fact that there had been no apology or retraction from the defendants. The plaintiff also takes issue with what he regarded as the serious nature of the imputation in issue, saying it had grave implications for him, given his standing within the judiciary and the system that he represented.

As is evident from the foregoing, the defendants dispute most of the defendant's assertions.

5.1 Plaintiff's Reputation

The defendants do not dispute that the plaintiff is a senior judge in the country's judicial system, nor that he has occupied and continues to occupy, influential positions nationally and internationally. They also do not dispute that the plaintiff has an international reputation. The defendants argue, however, that contrary to the plaintiff's assertions, he was a controversial figure and one who enjoyed some ''notoriety''. In support of this latter assertion, the defendants urged the court to have regard to a number of media articles, almost all from the international electronic

[7] Cited with approval in Zvobgo's case *(Supra)*

media, that had been tendered as exhibits and which had made more serious allegations against the plaintiff, for instance, that he had already reached a guilty verdict and was ready to hand it down but for the forceful intervention of the assessors. The articles on that subject were all published around the same time as the article complained of, with most having been published a few days prior to the article in question. In one or two of the articles, mention is made of publications going back several years, in which serious allegations against the plaintiff had been made concerning other matters.

Burchell, in his book *The Law of Defamation in South Africa*, (*supra)* correctly notes that in our law, evidence that other people had made similar defamatory statements about the plaintiff is not admissible to show that the plaintiff already had a tarnished reputation. The reasons for that were succinctly set out in the English case *Associated Newspapers Ltd v Dingle*[8] where LORD DENNING wrote:-

> **''Our English law does not love tale-bearers. If the report or rumour was true, let him justify it. If it was not true, he ought not to have repeated it or aided in its circulation. He must answer for it just as if he started it himself. Newspapers in particular must not speak ill about people for the spice it gives readers. It does a newspaper no good to say other newspapers did the same. They must answer for the effect of their own circulation without reference to the damage done by others. They may not even refer to other newspapers in mitigation of damages…'' (**my emphasis)

While it is part of our law that evidence of the general bad reputation of a plaintiff may be pleaded in mitigation of damages, in cases of this nature,[9] I am not satisfied the exhibits relied upon by the defendants in their endeavour to show that the plaintiff had a bad reputation constitute

[8] 1964 AC 371 (HL)
[9] Hoffman & Zeffert 73

''evidence' for this purpose. They are at best allegations, which the plaintiff says were not proven, made against him in some sections of the foreign media. The plaintiff asserts, seemingly with some justification, that the articles exhibited hostility towards him because of who and what he was.

I will disregard the other ''evidence'' of the plaintiff's bad reputation that the defendants sought to put before the court, for the reason that such evidence was mentioned for the first time in the defendants' closing submissions. This meant that the allegations in question were never put to the plaintiff so as to give him a chance to answer to them.

It cannot be disputed that the plaintiff as Judge and Judge President of the High Court, presided over many criminal trials where he must have sat with assessors. He therefore fully appreciated the role that the assessors play in such trials. The defendants have sought to convince the court, that the plaintiff's impressive professional record as well as his integrity as a judge, are so greatly undermined by the bad reputation they claim he has, that any damages they may be liable for, should be mitigated.

I am not persuaded by the defendants' arguments and find that they have failed in their effort to mitigate any damages on the basis of the plaintiff's alleged bad reputation.

5.2 Extent of Publication

While the circulation figures cited in the papers before the court are not disputed, the defendants argue that such circulation was ''minimal' in relation to the population of Zimbabwe, and other publications.

The extent of the circulation of the article complained of has a direct bearing on the quantum of damages, since the wider the publication, the heavier the damages will be, and vice versa. It needs no emphasis that the greater the number of people who access the publication, the greater the loss of a plaintiff's reputation. The Zimbabwe Independent is a weekly publication and the extent of its circulation can hardly be compared to that of, say, a daily newspaper. Since I do not consider it particularly useful to consider the extent of the publication (in this case 13 681 copies) in relation to Zimbabwe's total population in the absence of statistics concerning levels of literacy, estimated readership by age, geographical location, economic and professional status of the readership and others, a determination on the extent or otherwise of circulation cited can only be based on a value judgment. I will accept that 13 681 copies, while not a great number vis-à-vis the Zimbabwean population, nevertheless is not a negligible figure when considered against the background that the newspaper was distributed nationwide. It seems to me unlikely that the defendants would deliberately aim to produce a ''minimal'' number of copies of what is clearly their flagship newspaper. The probabilities are that the publishers of the newspaper would wish to publish and sell a sufficient number to keep the weekly publication viable. The possibility can also not be discounted, that readers will share interesting or sensational news with those who may not have bought the newspaper. Other newspapers also tend to pick up a story published in one publication, and repeat it in their own publications. While the defendants averred no particular effort had been made to establish the number of 'hits' regarding the website, in this world of sophisticated

communications technology, it would not be an exaggeration to surmise that a sizeable number of people, both within and without Zimbabwe, did access the article on the internet. At least one article in a foreign newspaper picked up the story and repeated it, including the defendant's other exhibits. The possibility can therefore not be discounted, that readers outside Zimbabwe who knew the Plaintiff, or of him, may have accessed the article in question.

As an aggravating factor, I find that the extent of the publication of the Zimbabwe Independent in question and therefore the article complained of, was fairly wide.

5.3 Nature and Gravity of Defamation

The seriousness of the defamation alleged has a direct bearing on the quantum of damages - thus the graver the defamation, the higher the award of damages, and vice versa. According to Burchell (*supra*) the gravity of the imputation often depends on the standing of the plaintiff. As an example Burchell cites a[10] case where the allegation that the Deputy Attorney General had deliberately misled the court was regarded as a particularly serious defamation calling for a high award of damages. An analogy can in my view be drawn between that case and the one at hand. The plaintiff had been a judge and Judge President of the High Court for over 10 years at the time the article in question was published. His impressive record as a judicial officer before that has already been referred to. It cannot be disputed that during his tenure as, firstly a judge and then later, Judge President of the High Court, he must have presided over countless criminal trials in which he had, perforce, to sit with assessors. It cannot be doubted under these

[10] SA *Associted Newspapers Ltd v Yutar.* 1980(1) SA 537-41 E-F

circumstances that he must have fully appreciated what the role of assessors was in criminal trials and must also, be taken to have been fully acquainted with the law and rules regarding such role.

To suggest, against this background, and given his position as the most senior High Court judge then, that he would have attempted to so depart from established procedure as to wish to improperly exclude the assessors in the process of formulating and handing down judgment in a case that they had heard together, in my view, was highly damaging to his professional integrity. For that reason I consider the defamation in question, to be particularly grave.

5.4 Retraction and Apology

The defendants refused to retract the statement in question, or tender an apology. They disputed the plaintiff's assertion that the article was defamatory of him. In a letter written in response to the plaintiff's request for a retraction, dated 5 August, 2004 (exh 7), the defendant's legal practitioners stated that the article was not defamatory and that therefore, no apology was to be rendered. However, in their next edition of the newspaper, the defendants published in its "Readers Forum" column, a statement that had been issued by the Registrar of the High Court, commenting upon and replying to the article complained of. The second defendant, in response to the Registrar's statement, published at the end of his editors memo and on the same page as that on which the registrar's statement appeared, the following statement:

> **"Last week we informed readers that the judgment in Morgan Tsvangirai's treason trial, initially due on July 29, had been <u>postponed</u> to give the assessors a chance to go through the trial transcript. The court's registrar took issue with our story and sent us a statement to publish which you may have already seen in the Herald. It appears in full (opposite top) on this page. I must place it on record that contrary to the registrar's contention. We**

did not suggest that the Judge President had already prepared a judgment. Nor was it our intention to do so". (My emphasis)

It is noteworthy that the defendants avoided use of the word blocked and instead used "postponed," a word they had not used in the original article.

The plaintiff took issue with the fact that the Editor's statement was not placed where readers would have seen and read it. I find the plaintiff's position on this matter to be well founded. Although, contrary to what the plaintiff stated, the editor's statement was not in "small print" there is in my view no doubt that such a statement would have had more impact had it been printed immediately below the Registrar's response to the words complained of. The comments were, after all, made in response to the Registrar's statement. I do not find the defendant's argument to be persuasive, that because the editor's memo is more widely read than other articles in the newspaper, the statement in question, being tagged on to the end of the editor's memo, would likewise have been widely read. As contended for the plaintiff, the headline to the editor's memo, which read "Windshield Smash" had no relationship at all to the article complained of. The title to an article normally is a persuasive factor in a reader's choice to read the article beneath it.

Thus the reader who read the Registrar's statement may not have been interested in the editor's memo, and vice versa. It is the former who would have had an interest in the editor's statement on the same issue, and would have read it had it been printed immediately below the Registrar's statement. The likelihood of a reader drawn to the editor's memo by its title, not being able to make any proper sense of the unrelated statement tagged to the end of the article, cannot in my view be discounted.

When this is taken together with the fact that such statement was only issued in response to the Registrar's

statement and not in an endeavour to correct the erroneous impression created in the article complained of, the conclusion is inescapable that the defendants had no serious intention of correcting the erroneous impression created by the article complained of. In short they remained remorseless.

Legal authorities on the matter state that a retraction and apology must not be reluctant,[11] or grudging[12]. It must rather be prompt and receive the same prominence as the offending publication. To the extent that the defendants' statement might be termed a retraction of sorts, it clearly was neither prompt (they refused to retract when asked to do so by the plaintiff before the matter was taken to court) nor was it as prominently displayed as was the article complained of. The timing and brevity of the statement in my view suggests reluctance on the part of the defendants, to make it, and also that it was grudgingly not spontaneously made. The defendants maintained this recaciltrant attitude up to and during the trial, as indicated by the evidence that they gave. The learned authors PJ Visser and JM Potgieter, in their book, '*Law of Damages*', first edition, make the point that the refusal by the defendant to respond to requests by the plaintiff to apologise, or any other conduct from which it can be deduced that the defendant did not regret their actions, are aggravating factors in the assessment of damages.

While an appropriate retraction and apology are important factors in reducing the amount of damages, *in casu*, I find therefore that the absence of such retraction and apology has the opposite effect. Despite this conclusion, I will, however, consider in their favour the fact that the

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[11] *Ward Jackson v Cape Times Ltd* 1910 WLD 257 at 263
[12] *Dymes v Natal Newspaper Ltd* 1937 NPD 85 at 97

defendants, even though they did so in response to a complaint from the Registrar, did print a statement in which they attempted to correct, at least in part, the impression created by the article complained of.

5.5 Quantum of Damages

As indicated, the quantum of the damages to be awarded to the Plaintiff will, among other factors, be considered against the background of what I have found to be aggravating and mitigating circumstances in this case.

The defendants take issue with the plaintiff's revised claim of $75 million in damages, which they refer to as exceedingly high. They make reference to a ''gold digging' claim and its effect on an award, that they observe was recognized in our jurisdication by REYNOLDS J in *Zvobgo v Kingstons Ltd*[13]. Citing the case of *Mukarati v Zimbabwe Newspapers* 1117/96, the defendants argue that while damages for defamation are primarily intended to vindicate the plaintiff's character and to act as *solatium*, they are not meant to make the injured party a rich man. They submit in this respect that the plaintiff, should he succeed in his claim, should be entitled to no more than $7 million. Asserting that the plaintiff's claim **''makes one gasp by its sheer excess and by the amount it varies with other judgments for this type of delict**,'' the defendants submit, therefore, that if the plaintiff is successful in anyway in this case, he should be deprived of his costs. Conversely, that if he is unsuccessful, he should be made to pay costs on the higher scale.

I have no hesitation in dismissing this argument. A plaintiff should have the right to claim an amount that he

[13] 1986 (2) ZLR 310

feels would vindicate him. The court in my view, correctly observed in this respect, in *Zvobgo v Kingstons Ltd*[14] as follows,

> **''Furthermore, it is my view that the mere fact that a party's claim exceeds the sum that is eventually awarded to him will not normally entail a punitive order of costs against a successful plaintiff. If this were the general rule, the claims brought in such cases would invariably be too low.**
>
> **…furthermore I do not think that a claim that is ultimately held to be inflated necessarily reveals ''an unseemly degree of cupidity''. The difficulties experienced by courts in assessing damages in cases of this sort has already been mentioned. Why should the plaintiff, or even his legal representative, be in any better position than the court in arriving at the ''correct amount?''**

That the plaintiff was a public figure cannot be denied. Public figures generally attract criticism. However, as correctly pointed out by the learned Judge in *Zvobgo v Kingstons Ltd*[15]-

> **''It is an obvious fact that no public figure can expect to escape criticism, disapproval, complaint and even hostility at times in respect of some of his decisions and actions. Provided that these protests are kept within the bounds of moderation, and do not impute improper, immoral or otherwise dishonourable conduct to the plaintiff, the author's constitutional rights of free expression will be protected.''**

I have already found that the words complained of exceeded the ''the bounds of moderation'', since they imputed dishonourable conduct to the plaintiff.

5.5.1 Inflation

Apart from the aggravating and mitigating factors of this case, I have in assessing the quantum of damages that is to be awarded to the plaintiff, and which I consider would meet the justice of this case, also taken into account the issue of inflation. Inflation was used by the Plaintiff as

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[14] 1986 (2) ZLR 310 at 323 (HC)
[15] 1986 (2) ZLR 310 at 330 (HC)

justification for revising upwards to $75 million his original claim of $250 000.00. While the defendants dispute the correctness of the plaintiff's action in this respect, this court can and does take judicial notice of the hyperinflationary environment then and currently obtaining in Zimbabwe. Inflation statistics are now and again published in the national media and are therefore public knowledge. There is at the moment little indication as to whether these inflation statistics will come down, or whether they will maintain their upward trend. The plaintiff submits inflation was at 1 200% per annum around August 2006. Around the time this judgment was written, inflation had been cited at 4 500% as of May 2007, 7 634% as of July 2007 and 6 592,8% as of August, 2007[16].

The plaintiff has cited a number of Zimbabwean and South African authorities [17] that have accepted that inflation in as far as it erodes the value of money, is a factor to be considered in assessing damages. He submits that in pegging his claim at $75 million, he had taken into account the ''real possibility'' that it will be a while before this matter in concluded. He expected that even if this court found for him, the defendants would, in all probability, appeal, which would mean a further one or two years before finalisation of the matter. In addition to current inflationary trends, the plaintiff has, in coming up with the figure of $75 million, therefore factored in future rises in inflation statistics. The authorities that he cited, which took into account inflation in the assessment of damages, clearly were concerned with the erosion of the value of money due to inflation over a number of years preceding the time

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[16] Source, the Sunday Mail Newspaper of 23 September, 2007 at page B2

[17] *Mtetwa v Tenda Transport & Two Ors* HH 89-2000
Shamuyarira v Zimbabwe Newspapers 1994 (1) ZLR 445, and *Buthelezi v Poorter & Ors* (*supra)*

the assessments concerned were made. None of these authorities speculated, as the plaintiff is in fact doing, as to the impact of possible future inflation on the amount claimed between the date of judgment and the finalization of any appeal the defendants may file. I know of no authority and the plaintiff has not pointed me to any, that justifies such speculation. Indeed, while the court may take judicial notice of inflation figures that are currently common knowledge, it cannot base its assessment on speculation as to the rate at which inflation may continue to rise, nor can it do so on the basis of whether it will rise at all. There is therefore no basis for taking future inflation into account.

The plaintiff has also cited awards given in past cases, but has observed, correctly, that such figures were now ''meaningless'' owing to inflation. I do not propose to undertake a mathematical computation of these amounts in order to get an idea of what their value would be in terms of today's currency. Indeed such a task is quite beyond me! I will instead be guided by and attempt, in my assessment of the damages due to the plaintiff to reflect ''**the state of economic development and general economic condition of the country**'' [18]

Costs

The plaintiff had, in his response to the defendant's response to his closing submissions, sought to claim against the defendants, costs on the higher scale and *de bonis propris*. This prayer was prompted by what the plaintiff listed as instances of ''unethical conduct'' displayed by the defence counsel in this case. Defence counsel did not take kindly to these charges and the request for punitive costs, and some heated exchange was communicated between the

[18] Per Barlett J in the Chinamasa case (*Supra)*

parties. The vehement response by defendants' counsel however, was unnecessary as it came after counsel for the plaintiff, Mr *Chihambakwe* had, in a letter dated 12 February 2007, withdrawn the claim for punitive costs and settled, instead, on the usual party and party scale. As already mentioned, the defendants in praying for a dismissal of the plaintiff's claim, prayed for costs of two counsel at an attorney and client scale. They also assert that even if he succeeds in his claim the plaintiff should not be awarded any costs.

Despite bitter exchanges between the parties in which accusations of unethical conduct were levelled against defendant's counsel, irrelevant and unproved allegations of unprofessional conduct levelled against the plaintiff, among other assertions, I see nothing in what happened, to justify a departure from the ordinary rule that costs should follow the cause.

6.Order

As is evident from the foregoing the Plaintiff succeeds in his claim, and I make the following order:-

The defendants shall pay to the plaintiff, jointly and severally, the one paying, the other to be absolved,

(i) damages for defamation, in the sum of $70 000 000,00 (seventy million dollars),together with interest at the prescribed rate from the date of judgment to the date of payment in full; and

(ii) costs of suit.

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners

Atherstone & Cook, respondent's legal practitioners