

TOBAIWA MUDEDE
versus
TREVOR NCUBE
and
ZIMIND PUBLISHERS (PRIVATE) LIMITED
and
SOVEREIGN PUBLISHERS (PRIVATE) LIMITED
and
PUBLICATIONS DISTRIBUTIONS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUNGWIRA J
HARARE, 19-23 February 2001, 19-21 November 2001 and 28 July 2004

Civil Trial

Mr *P Masamba*, for the Plaintiff
Advocate *E Morris*, for the defendants

MUNGWIRA J: The plaintiff's claim is for damages for defamation.

The claim is founded upon an article published on 9 April 1999 in a weekly newspaper, *The Zimbabwe Independent*. The article is entitled "BIG NAMES MISSING FROM BOKA SCAM LIST".

The plaintiff avers that the article stated of plaintiff that:

- 13.1 "Senior Government officials who benefited from United Merchant Bank loans are likely to escape repayment as their names have gone missing from the list of the defunct Bank's debtors made public this week The Independent has its own list of high ranking debtors."
- 13.2 "On Wednesday, UMB Liquidator, Peter Bailey, revealed the names of the debtors but the list (see page 31) did not contain certain Senior Government and ZANU(PF) Officials who it is known received loans from the Bank owned by the late Roger Boka."
- 13.3 "In his preliminary report, Bailey said: 'Between the time the Bank closed and (when) its licence was withdrawn there was a deliberate removal and destruction of records'".
- 13.4 "Investigations by the Independent yesterday revealed that the records of several companies mentioned in the Liquidator's report were not available at the Registrar of Companies".
- 13.5 "Registrar General, Tobaiwa Mudede, who is listed as a Director of UMB, is believed to have received a loan from the Bank. The size of the loan could not be ascertained",
whereas the plaintiff's name did not in fact appear on the list of debtors.

It is the plaintiff's case that the article, and in particular the above quoted portions, read alone, and in the context in which the article was published is wrongful and *per se* defamatory of plaintiff in that it makes or imputes the following defamatory remarks of and concerning plaintiff:

- 15.1 that Plaintiff, who is a Senior Government Official, is likely to avoid repaying a debt allegedly owed to United Merchant Bank;
- 15.2 that Plaintiff, on his own, or together with other Senior Government Officials, has/have caused his/their name/names to be removed from the list of United Merchant Bank's list of debtors in circumstances which are improper, dishonest, corrupt and unlawful; and
- 15.3 that Plaintiff, on his own, or together with other Senior Government Officials has/have, or is/are likely to benefit from the removal of his/their name/names from the list of debtors of United Merchant Bank in circumstances which are improper, dishonest, corrupt and unlawful; and
- 15.4 that Plaintiff "who is listed as a Director of UMB" has caused or benefited from the removal of "the records of several companies mentioned in the Liquidator's report" from the office of the Registrar of Companies in circumstances which are improper, dishonest, corrupt and unlawful; and
- 15.5 that Plaintiff has failed to repay a loan owed allegedly to United Merchant Bank in dishonourable and dishonest circumstances; and
- 15.6 that Plaintiff is not credit-worthy and lacks integrity; and
- 15.7 that Plaintiff conspired with other "Senior Government Officials" to remove and/or destroy official and public documents from the offices of United Merchant Bank and the Registrar of Companies to further his/their own improper motives and protect their ill-acquired gains; and
- 15.8 that Plaintiff is dishonest, unprofessional, and corrupt, and is not fit to occupy the position and enjoy the status which he occupies and enjoys in society.

The defendants admit that the words complained of were written but deny that, save for those words quoted in paragraph 13.5 above, they referred to the plaintiff.

The entire contents of paragraph 15 are denied.

The defences raised are that the defendants were justified in publishing the article complained of, the contents of which were substantially true and were in the public interest.

The defendants further state that the article was published on a privileged occasion in that it contained matters about which the defendants were entitled to inform their readers, who were in turn entitled to receive the information.

The third and fourth defendants state that they were unaware of the contents of the article and had no intention of defaming the plaintiff. They, accordingly, deny that they acted wrongfully or unlawfully.

The defendants, in short deny that the plaintiff was defamed or suffered injury to his reputation or any damages as a result of the publication of the article. In regard to the amount sought as damages it was the defendants' contention that the sum was, at the time, outrageous and so out of line with amounts awarded for defamation in Zimbabwe as to be motivated by avarice, rather than a desire for just recompense. The defendants in the circumstances sought an order of costs on the punitive scale.

In support of the plaintiff's case evidence was led from two witnesses.

The first of these witnesses was the plaintiff. His evidence constitutes the bulk of the court record.

The defendant stated that he is a legal practitioner by profession and that he currently holds public office, he being the Registrar General, a post he has held since 1983.

He further gave evidence of his membership of different bodies and organisations, such as the Sports Council of Zimbabwe, the Boxing Control Board and the College of Rural Education, amongst others.

He extolled his virtues and the achievements made by his department during the period of his tenure. One of the achievements he listed was the computerisation of his department which had resulted in increased efficiency and better access to documents by members of the public. He further described his involvement at international level in the restructuring and designing of world travel documents and locally in the design of identity documents and passports and went so far as to display some of his handiwork.

He testified as to how, after the publication of the offending document, Exhibit 1 at pages 27-28 of plaintiff's bundle of documents, his wife had received various calls from certain persons who had advised her that she was in danger of losing her home. Other persons had enquired wanting to know what was happening.

He being a senior government official, he was of the opinion that the content of the article was such as to lead to a conclusion that he was seeking to avoid payment of his debts and also that he had connived in the removal of his name from the list of United Merchant Bank debtors. He described the situation brought about by the publication as 'painful' and 'highly unspeakable'.

He stated that he had no link to the administration of the defunct bank.

He, could not, he said, have received the alleged loan as if he had his regular bank account would not have reflected an overdraft status. If that had been the case he would, further, not have instituted the present proceedings.

He took issue with the fact that the article 'imputed' him to be a director of UMB United Merchant Bank (UMB), and sought to clarify the position by going into a great deal of detail about the nature of his relationship with the late Roger Boka, the founder of UMB.

He stated that he had known Boka for a long time and for a period which extended way back to a time before Boka became a wealthy man. They had it in common that they were both former teachers. His friendship with Boka was, according to him, so close that he visited Boka during the final days of his life when others were shunning him.

As a friend to Boka and in his capacity as a legal practitioner he had worked with and assisted Boka in many respects. This, he did out of hours, that is in the evenings and on weekends in the same manner as he did with the other organisations with which he was involved.

Boka having observed that he was a 'resourceful' person had invited him to be director in his businesses. He had declined the offer on the basis that it would have been difficult for him to balance the duties of a director with those of his office.

He had, however, informed Boka that he would avail himself whenever he was not on duty and Boka had indicated that he would call upon the witness whenever he needed assistance. He stated that at no time did he attend any board meetings and if a check was conducted it

would be found that his name did not appear in any of the minutes of meetings held by Boka's company or companies.

He elaborated as to the form of assistance which he rendered to Boka. This consisted partly of discussions about mining matters. At the time that Boka came up with the idea of establishing a bank he had requested the witness to assist him with the drafting of articles of association as the witness had previously worked in the office of the Registrar of Companies. After the witness had prepared a draft he had advised Boka to instruct his legal practitioners to peruse the draft document.

When Boka launched into the tobacco industry the witness had with Boka looked into the Finance Act and other legislation pertaining to the tobacco industry.

He had been especially keen on this project as it was at that stage an area dominated by white people and he was motivated by the thought of the introduction of indigenous players in the tobacco industry. His efforts had in fact brought about amendments to the legislation governing the tobacco industry.

Commenting on the averment that the publication brought into question the issue of his being a creditworthy individual, he said that it made it difficult for him to present himself as a credible borrower. He went on to say that the article also touched on his professionalism as it implied that he was incapable of managing his financial affairs with the result that he would be prejudiced before any prospective employer.

As for his averment that there was the imputation of his having conspired with other government officials, he commented that the allegation by the paper was speculative and "confabulative", whatever that might mean.

He considered the article 'hurtful' and stated that one would have to take a statistical census or sample survey of how many people had come to view him unprofessional pursuant to the publication. He was of the opinion that had he been unworthy it is not likely that he would have been appointed to the various responsible posts that he holds in different organisations.

In his view the particular paper was wont to publish articles which reflected the plaintiff in a bad light. The paper was, as far as he was concerned, bent upon pursuing him and damaging him in his good reputation.

An attempt was made to produce a large file of newspaper cuttings of other articles published by the same paper. It was the plaintiff's contention that the defendant was motivated by malice. These unrelated documents were disallowed for the reason that they had not been discovered and insufficient notice of the intention to produce the documents had been given. These documents also raised numerous collateral issues which required separate and distinct investigations before their relevance could be established. A further consideration was that the resultant prejudice of admitting the articles in evidence far outweighed any evidential value sought to be placed on the articles.

The plaintiff stated that a pattern had emerged whereby the particular paper made it a point to attack senior government officials such as himself as is evidenced by the fact that the paper had proceeded to publish the offending article disregarding his denial of the loan.

His version of the level of investigation conducted by the reporter responsible for the article is that he was, a few days prior to the publication of the article, pestered by a reporter by the name of Hungwe who had gone to the extent of questioning him about his place of birth. He indicated that the manner in which the reporter pursued him left him feeling 'exposed' and 'fair game'.

He admitted that he had received a telephone call from the reporter who had informed him that he had received a report that the plaintiff had received a \$20 000 loan from UMB. The reporter had gone on to question him as to the use to which he had put the amount received, a question the witness found offensive. He had told the reporter that even if he had received the alleged loan it was not the business of the reporter to enquire into what the money had been used for. He had been further informed by the reporter that numerous persons were involved in the matter including public servants, commercial farmers, private individuals and companies.

His response to that information had been to tell the reporter to contact those involved after which he could then expose them.

What had been published was, he stated totally different from what he discussed with the reporter. He later went on to say that he had denied categorically that he had received a loan.

He was asked to elucidate if the foregoing exchange had taken place in the course of a single conversation. His response was that the reporter had first telephoned him to enquire into the existence or otherwise of the loan and he had denied the allegation and that it must have been in a subsequent conversation that the reporter had mentioned the sum of \$20 000.

Asked to comment on whether or not he received by way of a telefax, a document, Exhibit 2, in which the reporter had set out questions concerning the loan, for him to answer. He remarked that he had no independent recollection of the particular issue but could only comment that this would have occurred at more or less the time of the telephone conversation of which he had testified.

His attention was drawn to another document, Exhibit 3, at pages 2-3 of the bundle of documents, which appeared to be his response to the questions in Exhibit 2.

He accepted that he was the author of Exhibit 3 but indicated that he could not recall when the documents were delivered. He remembered however, that after receipt of the telephone calls he had decided that it was best that the query be addressed to him in writing for record purposes.

When asked if he had ever received any money from Boka or any of Boka's companies, he denied receipt of a cheque from UMB but conceded that he had received an initial amount of \$20 000 from Boka Tobacco and after that a further sum of \$25 000 from Boka Enterprises. In respect of the second amount, he referred the court to one Rudo Boka for an explanation as to the purpose of the payment, she having been the administrator of Boka Enterprises.

He was asked what the two payments represented and again referred the court to Ms Boka. He did however go on to state that he did

some public relations work for Boka who wanted to convert his Tobacco company from a private to a public company.

Boka, was he said at the time in the process of selling shares in respect of the public company and had asked the witness to conduct a public relations exercise on his behalf. This work required him to meet certain travel and other unspecified expenses. The witness claimed that the work which he did was such that the amounts in question would not have sufficed to compensate him for his efforts. He was convinced that the testimony of Ms Boka would corroborate his evidence on that aspect.

As a result of his efforts he had succeeded in selling shares to certain persons. He mentioned specifically a certain permanent secretary, namely, Ms Tendai Bare and a Mrs Machirori as having been some of the persons who purchased shares from him.

He stated that he at times went overseas on holiday and whilst on those trips he would sell shares to persons with whom he came into contact and Boka would give him money to cover the travel expenses incurred when he visited potential clients.

Upon his return to Zimbabwe he would hand the payments for the shares to Boka who would issue share certificates which would be handed to him to forward to the purchasers of the shares. His secretary kept a record of the clients who purchased shares.

From what I was able to make out his evidence was that the public relations work accounted for the amount of \$20 000 and that he could not recall the circumstances under which he received the payment of \$25 000. He attributed this lack of recollection to the lapse of time and added that he had in any event received other amounts which he was no longer able to recall. He had not considered it necessary to maintain records of the payments as he had not anticipated trouble. In addition to that Boka was his friend which made it further unnecessary for him to record the payments. It was, he said, irrelevant that he could not remember the exact reason for his having been given the money as neither amount constituted a loan, the issue before the court being that of a loan.

He emphasised that if he had received a loan he would have made a simple admission of that fact and it would have been in the public interest

for him to make such an admission he being a person who is responsible for the administration of a substantial amount of public funds.

The witness testified to a letter of demand in which there had been a request for a retraction which letter had been met with a negative response by the defendants.

The examination in chief was concluded with the comment from the witness that he was unaware of the reasons which led to the problems experienced by UMB.

When subjected to cross examination the witness again boasted of his having effected changes and improvements in his department. He accepted that he was in his role as the Registrar General one of the most influential persons on issues which affected the day to day lives of the country's citizens and that as such it was required of him that he be a person of the utmost integrity.

In response to a question as to why he had interpreted the portion of the newspaper report contained in paragraph 15.5 of the declaration to mean that it implied that as a senior official he was likely to avoid paying the debt owed to UMB he stated that that was his construction of the report but that another person might construe it differently.

He was asked if that meant that he was making a concession to the article as framed being open to different interpretations. His answer was that some people might place a broad interpretation on it whilst others might adopt a narrow view. In his opinion the interpretation could be either subjective or objective.

He referred to there being in existence different categories of people who might be involved in interpreting the article such as the authors of the article and those named in the article who might be perceived to interpret the article differently.

Asked if in reading the article the average reader would assume his involvement in the destruction of records the witness responded by saying that the article referred to officials of ZANU PF. He stated that although the article mentioned that he had had dealings with the bank with no specific reference to a loan or matters of credit, as the issue revolved around

borrowings from the troubled bank the article would make people shun the witness in that it implied that he was one of the culprits.

It was put to the witness that it was not defamatory to say that one had received a loan. The witness was of the view that it would be defamatory to adopt the position that the borrower had not 'taken a position' to repay the loan or was likely 'to escape' repayment. As for the other persons whose name was mentioned, his position was different as he had agreed to pay, whereas in his case he was denying the existence of the loan.

He stated that he had not personally received calls about his being in danger of losing his home but that he had received telephonic enquiries from abroad from concerned friends and relatives. He was uncertain as to the reason why the person or persons who called his wife had talked of the loss of his home.

He could only speculate that the person or persons were linked to those he suspected of persecuting him. The defence sought an explanation as to why the witness had in his evidence in chief given the impression that the callers were representative of members of the general public who had read the article and were acting in response thereto and why he blamed the newspaper for what was possibly the conduct of some lunatic. The answer given was that that was a point the witness had tried to make in his evidence in chief.

He had, he stated, not received similar calls prior to the publication of the article and therefore believed that there was a connection between the article and the calls.

The next question put to the witness was as to whether it amounted to a reasonable assumption that someone would deduce from the content of the article that the plaintiff would lose his home. His attitude was that that may have been an unreasonable assumption but that he could not simply dismiss the possibility reasonable or not. He went on to say that it was only natural that he being the victim would take some action.

As to whether, as a person with legal qualifications, he was aware that in a matter of this nature he was dealing with the perception of a reasonable man as to whether the content of the article was such as would

lower him in the esteem of a right thinking reasonable man he stated that the definition of a reasonable man was not clear cut and depended on how one might have acted. He explained that one might consider a certain course of conduct “unreasonable when reasonable and vice versa”. He had he stated not mentioned the people who had called his wife as having had any effect on his reputation as he had not been asked. He went on to say that he had not in his evidence in chief mentioned everything and that it did not follow that when one is asked a question that one would automatically mention everything. He at the end of the day attributed any shortcomings that there might be to a problem of language.

Counsel for the defence put it to the witness that his summary of evidence omitted to make mention of the persons who had called the witness’ wife and that this was most likely an afterthought on his part. The response elicited was that it was a fact that these people referred to existed. He was invited to call these people to give viva voce evidence on his behalf to avoid being disbelieved on this aspect. The witness stated that he was prepared to call the persons who were available locally as it would be expensive to procure the attendance of those overseas.

The witness was asked if he was aware of the dates of publication of other newspaper reports pertaining to the issue of the collapse of the Boka Empire and the destruction of bank records. He said he had only become aware of these after the publication of the present article. It was put to him that this could not be true as these press reports were common knowledge. Whilst accepting that the reports were common knowledge he said that he himself was unaware of the details contained in the reports. He had, he stated, only become aware of the allegation of missing records when the article in issue was published. His attention had, he said, been drawn to the various reports which talked of the destruction of documents and which did not implicate him on being told that there was nothing new in the report published by the defendants which was not known to the public.

He had become concerned solely for the reason that the article in question made specific reference to him.

Commenting on the likelihood of the public forming an assumption that he was involved in any dishonest or untoward conduct given that he admitted to having had dealings with the UMB his response was as follows:

“If only you are directly involved in operations, possible ... if not impossible.”

He went on to add that the first people upon whom suspicion would fall are those involved in the operations, in other words in the administration of the institution and that he himself would not have had access to vital documents in UMB.

He was questioned on the issue of his having been a director of UMB. His answer was that, as he had previously explained, “he was not really a director”, he being a busy person. Boka had, according to the witness, informed him that he would list him and would call upon him from time to time whenever the need arose. Asked if he was in fact listed as a director, he stated that Boka “may” have listed him in his documents as he had not refused to render assistance and that sight must not be lost of the fact that Boka was a long time friend who he had helped over the years.

He however sought to enquire if any proof had been found of his attendance at company board meetings.

He was requested to comment on whether or not a question had put to him to the effect that as he was reported to have admitted to dealings with UMB he fell into the same class of persons as Nsimbi who had admitted owing money as opposed to that class of persons which was seeking to avoid payment. He stated that he would not have denied that he had dealings with the bank but that the main issue was that of his having denied categorically the existence of a loan.

On being asked if he was aware if Boka was going to place him on his list of company directors as a director who would avail himself whenever possible, his answer was: “that’s the sort of agreement/discussion we had”

The plaintiff was taken to task on why he had, in the circumstances expressed surprise when put to him that he was a director of Boka’s

company. He said that he had in fact not been taken by surprise and that if he had been appointed a director that had very little to do with him.

In conclusion he conceded that he may have been on Boka's list of directors albeit he attended no meetings.

He was unable to deny that some bank documents might have reflected that he was a director.

He disputed that when cross examined his evidence on this aspect was at variance with that tendered in his evidence in chief.

When referred to Exhibit 8, a letter to the Liquidators of UMB, KPMG, in which he had requested that he be furnished with a form CR14 for the Boka company, he admitted that he had done so in his capacity as a director of the same as he wished to obtain all the facts pertaining to his alleged indebtedness to UMB.

He was questioned on how that information would have assisted him and he said he wanted it for record purposes as he was still to pursue this case.

It was put to him that despite that explanation he had not made discovery of the said letter. His reply was that he could not remember everything and could not be expected to go into the minutiae of all the documents gathered for the express purpose of litigation.

When it was suggested by defence counsel that the letter to KPMG was in fact designed to help him determine exactly how much the liquidators might know and that having received a reply, Exhibit 9, from Mrs Cooper of the liquidators he had assessed that they had no evidence against him thus his omission to mention his directorship. The response of the witness was a denial with his attitude being that although he may not have mentioned this he had admitted to his friendship and dealings with Boka.

The plaintiff was adamant that Boka had not paid him for the many services that he had rendered.

The only money that he received was, he said, solely to enable him to meet his travelling expenses. He would be given this money without completing any paperwork and neither did he give account of his travels. He mentioned briefly that he had visited a number of farmers locally and

had also seen people overseas. He described the \$20 000 as amounting to next to nothing for a trip to the United Kingdom. He stated that the sum of \$25 000 could not be considered as compensation and that at best it could be described as a 'sign of appreciation'.

The witness having denied that the amount of \$25000 emanated from UMB, it was put to him that it had emerged during the investigations into the defunct bank and was generally accepted that Boka treated his companies as an indivisible entity from which he would make payments indiscriminately. The witness claimed that that was not within his knowledge.

He was questioned about a further amount of \$10 000. His comment was that that amount was not relevant to the present inquiry.

Counsel for the defence then put it to the witness that in instituting defamation proceedings the witness had subjected his character to scrutiny. The immediate reaction of the plaintiff was to describe the amount of \$10 000 as a paltry figure after which he proceeded to explain that the fact that he was a public servant did not debar him from engaging in other activities and transactions. It would, he said, in the circumstances be improper to regard every cent which was over and above his salary and which went into his bank account as a gift. He stated that counsel for the defence was making a mistake in thinking that civil servants should depend solely upon their salary and further went on to explain that he received allowances for serving on various organisations.

He reiterated that because one received a salary as a civil servant one could not be expected to remain a slave to his salary "as it would result in (one's) remaining poor and failing to feed (one's) family".

He was asked if what he meant was that his salary was inadequate for him to fend for his family such that he was compelled to seek other forms of remuneration.

The witness expressed surprise at the question and stated that even before independence there were many civil servants who owned farms, properties and businesses and that there was nothing wrong in a civil servant, working for the present government receiving 'anything, even if it is an allowance or reward'.

The question was repeated and this time the answer was that counsel for the defence had a problem with grammar and was failing to understand or to appreciate the witness' evidence. He then went on to say that he was giving a mere 'analogy' without referring to specifics and that his response was premised upon counsel's belief that civil servants should survive on their salaries and that to earn or obtain anything over and above a salary amounted to a crime.

Asked why he was failing to address the issue of the \$10 000 cheque the witness said that discovery had been sought and ought to have been limited solely to the UMB loan matter. He had not for that reason considered it necessary to divulge any other details and in particular those in connection with his Barclays bank account.

After the witness had indicated that he had no recollection of when it is that he undertook the overseas trip but had in his possession papers related to the shares which he sold and that the amount of \$20 000 enabled him to get around, it was put to him that the \$20 000 cheque issued in 1998 related to a farm in Raffingora. The witness' response was that he was not prepared to answer the question but he went on to deny that there was any connection to such a farm. He went on to add that he thought it referred to a certain Tendai Bare who was based at the Commonwealth Secretariat in London and whose husband was the Chairman of the Tobacco Research Board which is the organisation that owned the Raffingora farm. It was, he said, possible that Bare had used the Raffingora address.

He then proceeded to give a somewhat convoluted explanation in regard to his handling of the share transactions. He was asked if these transactions could have taken place in or about June to July 1997. He acknowledged that as a possibility before confirming that the company in respect of which he traded shares was at the time registered as a private company, but that it was Boka's intention to go public.

He was of the view that this enquiry into the share dealings was irrelevant to the issue of defamation as the Boka Tobacco Auction Floors were a separate entity connected to the defunct bank.

Immediately he was confronted with the fact that by law a private company cannot offer shares to the public, an exercise he had confessed to, the witness' reaction was to direct the defence to Ms Boka as the person best placed to answer that question as his role was solely that of issuing invitations to certain persons to purchase shares.

He was asked if he was aware of the provisions of the Companies Act which restrict the offer of company shares to members of the public. His response was that he had no prospectus or other documents related to the status of the tobacco company.

He was extremely reluctant to comment on the money received, the purpose of receipt of the money, and again stated that the person responsible for the administration of the company's affairs was best placed to testify as to the reason for the payment. He was of the opinion that if the money represented remuneration there would have been evidence that was in regular receipt of payments.

He complained about having been hounded by the Independent reporter and the intrusive nature of the questions he was required to answer. He later appeared to do an about turn as he seemed to accept the defence's version of the circumstances in which he came to meet the reporter at his office and the preceding and ensuing telephonic communications. He had, he stated, denied in his conversation with the reporter in that the amount in issue was a loan. After he had spoken to the reporter, who had refused to divulge his sources, he had conducted his own investigation into the matter.

He was asked if his conduct in writing the letter dated 18 March 1999 was not extraordinary if he had made an outright denial telephonically and in person as he in the letter sought details of the loan and other particulars. His answer was that he considered that to be the proper course of action as he had been shown the cheque number and for the reason that he wanted the reporter to reveal in black and white the information he had refused to divulge. It was, in addition, his intention to assist his legal representatives in the event he had to resort to litigation as he had foreseen the possibility of publication. The letter was not, he

stated, designed to forestall publication but to get the reporter to justify his allegation and was fuelled by his desire to obtain proof of the allegations against him. He was asked if he was not aware of the cheque details and chose to say that he was entitled to seek details from the person making the allegations. Asked what a reasonable man reading the letter might deduce from the content, he said that he was unable to define who or what might be considered a reasonable man and that different people might hold differing views.

It was then put to him that the content of the letter would suggest to the reasonable man that the loan did exist. His answer was that it was not a question of assumption and that what mattered was the truth of the matter.

As to why if he knew or feared that publication would take place he did not make a clear denial, his attitude was that the reporter ought to have taken the trouble to get to know all the facts of the matter.

It was put to the witness that the reporter would tell the court that he had received a list of names who had told him that the amounts appearing on the list represented loans made by the Boka bank. The witness confirmed that the reporter had informed him that there were other persons, commercial farmers and other important persons whose names also featured on the list in his possession. On being asked why he felt that his case was special if others on the list had been contacted and quizzed by the reporter he responded that the reporter had advised him that he had been sent by his superior, the 1st defendant. He denied having mentioned at any stage to the reporter that he was being used by the 'whites' and that he would not entertain the reporter until he had written a story about the white persons who had benefited from UMB loans. He further disputed that he had opened the letter which the reporter had come to deliver and that after perusing the letter he had asked the reporter why he was interested in following up such a paltry amount when other senior government officials had borrowed greater amounts. He thereafter proceeded to say that he had mentioned that the figure was small and that he had no knowledge of the involvement of other top state officials.

It was put to the witness that he had later held a telephone conversation with the reporter in which he had confirmed that he had had dealings with Boka. His reply was that he had denied the existence of a loan and had remonstrated with the reporter for asking him to explain the use to which the money had been put and that as the matter was pending before the Master of the High Court, the issue would arise in that forum.

The witness further disputed that he threatened to report to the relevant authority the unethical practice of banks disclosing information to the press.

Having been asked by counsel for the defence to confirm his averment that the article had damaged him in financial terms as it had made it difficult for him to present himself as a credible borrower he was taken to task on various issues pertaining to his financial status.

It was drawn to his attention that the defendants had had a great deal of trouble in getting the witness to produce his bank statements and that in matter of fact the witness' creditworthiness had been damaged long before the current issue arose and that this was evident from his admission that he had substantial overdrafts. Examples of the parlous state of his finances and his lack of creditworthiness were given and reference was made to an entry in Dun's gazette arising out of a default judgment granted against the witness. Mention was made of the plaintiff having issued certain cheques which were dishonoured.

The plaintiff accepted that in 1995 he had exceeded the overdraft limit on his Barclays bank account but disputed that he had been reprimanded by his bankers.

He explained that the bank had merely written to him. He explained that whenever he had difficulties he would inform his bankers who would then authorise the excess.

The plaintiff's attention was drawn to two cheques marked 'refer to drawer, which cheques he had issued in 1997. His comment was that he had been the holder of a current account and that he had borrowed money to redeem his house from a building society. He did not deny that the cheques had been dishonoured but merely explained that this had not happened intentionally.

He was then directed to the default judgment which resulted in the Dun and Bradstreet entry of October 1997. In regard to this, the plaintiff launched into a lengthy account of how he had contested the debt which arose out of a claim for school levies by the Churchill School Development Committee. He explained that at the time he was looking after his disabled brother's son who was a pupil at the school. His contest with the school was that the amount due for the levies was the responsibility of the Social Dimensions fund administered by the Department of Social Services. He at the time had had many pressures and demands upon his pocket as he was looking after not only his nephew but other relatives. His intention had been to take up the matter as a test case on behalf of not only his nephew but also other disadvantaged persons. He had drawn the matter to the Ministry of Education.

The plaintiff stated that he made the decision to pay the school after discovering that litigation would be a costly affair.

After receipt of the judgment he had approached a Regional Magistrate, and had advised him that he had not been served with court documents and had thus been unaware of what was happening. The Regional Magistrate, had after having been told that judgment had been entered incorrectly, requested that there be proper service.

The plaintiff on his own admission made a direct approach to the presiding magistrate and after he had sat with the magistrate and discussed the matter the magistrate had it appears rescinded the judgment and had directed that proper service be effected. Counsel for the defence put it to the plaintiff that it could not possibly be true that he had had the judgment rescinded in this manner but the plaintiff insisted that this was so and that he even had a witness to corroborate him on that aspect. He further went on to say that consequent upon his discussion with the magistrate and in pursuance of the magistrate's directive the messenger of court had been stopped from effecting the removal of property from his home.

The plaintiff testified to his not having taken seriously warnings issued by his bank in regard to the manner in which he was conducting his

account as matters between himself and the bank would generally be resolved. The bank was at the time holding as security the title deeds to one of his properties.

The plaintiff was questioned as to how as a lowly paid civil servant who was constantly in debt, he had come to own two properties in the low density suburbs. He explained that he had borrowed money from Zimbank which he had paid off slowly after which he had commenced the building of his second house.

Ms Rudo Boka was the plaintiff's second and final witness.

According to her testimony the plaintiff was a close friend to her late father. She described her role in the management of her late father's various companies such as the tobacco auction floors and gold mines but stated that she was not involved in the running of and had little knowledge of the affairs of UMB.

She told of how as part of the strategy of marketing the tobacco auction floors various individuals including the plaintiff had been approached to give publicity to the launch of the floors and to assist with the share offer.

When asked about the cheque, issued on 16 July 1997, of \$20 000 she explained that the cheque represented a payment made to the plaintiff in connection with the launch of and promotion of the tobacco floors. The amount was to be used for travel and subsistence allowances and out of pocket expenses.

She was referred to the list on which the plaintiff's name appears alongside the names of others. Her evidence in that respect was that the page was from a book where cheque numbers and cheque payments issued for the marketing of the tobacco floors were recorded which book had no connection with UMB transactions.

She stated that the \$25 000 cheque deposited into the plaintiff's Barclays bank account was drawn against the Boka Enterprises account as at the time the tobacco floors did not have a bank account.

There were, according to the witness, no formalities involved in making the payments as the payments were mere gestures of friendship.

This witness denied any knowledge of any loans made to the plaintiff by UMB or any of the other Boka companies.

Under cross-examination the witness explained that the book from which the list of names was extracted was at the time being used to note payments as the company was relying on manual records whilst awaiting finalisation of the process of computerisation. In so far as she was concerned the book did not reflect any loan payments.

She was immediately referred to one of the names on the list, a Zenzo Nsimbi. Her comment was that the amount of \$150 000 appearing against that name could have been paid for marketing. Upon being informed that Nsimbi had admitted to the amount having been a loan she pleaded ignorance of that fact.

She was further questioned as to how Barbours department store could have helped with marketing. The response was that the store could have supplied stationery and uniforms. She went further to state that there were supporting documents in respect of each payment which were not available to her as the company had been a specified.

In response to another question she conceded that it was incorrect to say that all the names recorded on the list were connected to marketing related activities and proceeded to talk of offers of seasonal cropping finance having been made to tobacco growers as part of the marketing strategy.

Her attention was drawn to another name appearing on the list, that of Solomon Tawengwa who had admitted to having received a loan from her late father. Her comment was that his payment was for the purpose of financing his crop and that the procedure was that a stop order would be lodged against the proceeds from his tobacco sales. She, in short, admitted that that amount was a loan.

She was asked how, in the circumstances, it was possible to distinguish loans from other payments. The answer given was that that information would be recorded as a narrative to the requisition. Because the company was experiencing a spate of frauds other amounts had been paid to Gollop and Blank, legal practitioners whose names appeared on the list for disbursement.

Her testimony was that the list in her possession was of those who had borrowed money from the other Boka companies which did not include UMB.

It was put to her that her late father had treated his companies/businesses as a conglomerate and extended loans willy-nilly without regard to which company was doing what. Her answer was to the effect that she could not rule out that possibility although the bank loans were normally recorded on forms.

The witness was referred to an advertisement in the Herald newspaper of 8 April 1998 which stated that the Board of Directors of the tobacco company had on 10 January 1998 passed a resolution to comply with the requirements of the Companies Act in order to enable the company to go public. Her comment on the article was that it was the intention of the company to launch the share offer in April 1998 (see Exhibit 12). She accepted that initial efforts to go public were unsuccessful and that eventually because of her father's ill-health, his subsequent death and the liquidation of the companies the share offer had not taken place.

Asked how shares could in the circumstances have been sold she said that sometime in 1997 a prospectus filed with the Registrar of Companies had been found to be faulty. Thereafter there had been a number of representations to the Companies office which did not yield fruit. The sale of shares had commenced in 1998 and the plaintiff assisted because of the relationship he had with the plaintiff's late father. Her father, as she saw, it preferred traditional ways of marketing and mistrusted 'white run' organisations.

The witness indicated that she was not in a position to comment on whether or not the plaintiff had been requested to solicit for money for the shares. When referred to the list of creditors on the 5th interim liquidation and distribution account she admitted that no shares were ever issued.

When asked about those who had paid for but not received shares and who had filed their claims, she stated that UMB underwrote all the shares for the tobacco floors and that the issue could only be resolved after consultation with the Reserve Bank.

The defendants led evidence from three witnesses, the first of whom was the reporter responsible for the offending article, Brian Hungwe.

His testimony was to the effect that at no time did the plaintiff ever deny the existence of the loan.

His account of events was that he, on a certain Friday, received a telephone call from a certain woman who had refused to identify herself but who was claiming to be an employee of UMB. She had told the witness that she had in her possession certain documents, evidence of loans made to senior government officials.

Upon meeting the woman she had related to him how she had come to be working for UMB in the loan department. She had handed over to him the list, Exhibit 14, on which appeared the names of several high ranking government officials, law firms and other prominent persons. She had informed him of her fear that loan documents might be destroyed.

The witness had after the meeting with the woman contacted Zenzo Nsimbi who was then a deputy Minister. He who had admitted to having borrowed money from UMB for his engineering company.

He had not confirmed the position of Solomon Tawengwa's loan as the loan had been confirmed in an article published by the Financial Gazette.

The witness stated that he had initially attempted to convey the details of his enquiry to the plaintiff by way of a facsimile document. Having been informed by the plaintiff's secretary that the machine in plaintiff's office was not working he had decided to deliver the document in person. He explained that he was intent upon obtaining comment from the plaintiff as his then editor, the first defendant was particular about his reporter's looking into both sides of a story in order that the paper achieved balanced reports. He testified to having in this instance received specific instructions to speak to all interested persons as the matter was one of public interest.

Whilst the witness was in the office of the plaintiff's secretary the plaintiff had emerged from his office. Upon being informed of the witness' identity, the plaintiff had invited the witness into his office. Before the witness could extract his written questionnaire from an envelope the

plaintiff had launched into an account of his personal history and had added that he had learnt not to trust white people. The plaintiff had thereafter told the witness that the paper for which the witness worked was owned by white people who were using the witness for their own ends. The plaintiff had further asked the witness why he was concentrating on stories which centred on prominent people.

After the plaintiff had been handed the contents of the envelope in the possession of the witness he had perused the contents. His reaction had been to laugh and to question the witness as to why he was concerning himself with such a small amount. He had then told the witness that the interview was over as there were people who were waiting to see him. He had concluded the meeting by telling the witness that the information in his possession was confidential and that he intended to bring to account all banking institutions involved in divulging confidential client records.

The Some time after he had left the plaintiff's office he had taken a call from the plaintiff which call was received by his news editor, Vincent Kahiya who had expressed surprise at the call.

In the course of that telephone conversation the plaintiff had advised the witness that the matter was pending before the master of the High Court and that in the circumstances it would be improper for him to release any information.

According to the witness the plaintiff was reluctant to confirm whether or not he had borrowed money from Boka and confined himself only to an admission that he had had dealings with UMB. The witness had thereafter worked on the story which had seen the light of day in the publication for the April 9 to 15 week.

The witness accepted that he had before the publication of the offending article worked on various other stories on the plaintiff's department.

He referred specifically to one story in connexion with the upgrading of computer equipment in the plaintiff's department by an Israeli company and another story about mayoral elections. It was he said, in connexion with another story that he had questioned the plaintiff as to his place of

birth. He stated that on that occasion he held a face to face interview with the plaintiff and that this interview took place a few weeks after the publication of the UMB story.

With regard to the Israeli company story he seemed to recall that his paper had received a response from the plaintiff's office.

Upon being requested to comment on the offending article, *vis-à-vis* the allegation of defamation the witness stated that it was never the intention of his paper to suggest that the plaintiff was responsible for the missing bank records. There was, he explained, at the time a general feeling amongst the journalistic fraternity that the late Boka had personally destroyed his bank's records for the reason that his bank was under investigation. The matter, he said, was the subject of much discussion.

The witness indicated that to his knowledge UMB controlled the affairs of a number of Boka's other businesses.

The witness was asked by counsel for the plaintiff to describe the method used in gathering a story. His response was that stories are initially presented at editorial meetings where the editorial team shares ideas and investigates the plausibility of potential stories. Once the editor is satisfied that the story is credible he then authorises follow up on the story. In this particular case it was incumbent upon the reporter to contact persons whose names appeared on the list. As the list was lengthy he made efforts to contact only 4 or 5 people on the list.

The usual procedure was to fax through questions to the party involved and if the fax yielded no results telephonic contact would be established.

It was according to the witness recommended that journalists met face to face with interviewees.

It was a further requirement that information emanating from a source be checked out by way of an investigation into the background of the source and any possible motives for divulging information established.

The witness had in this case carried out discrete enquiries with the informant's workmates and certain of his friends who were employees of UMB. Once he had established that the source was genuine he had

contacted some of the names on the list in an effort to establish the credibility of the information in his possession.

He had as he had stated previously not contacted Tawengwa as the information on the list had been confirmed by the Financial Gazette article. Tawengwa had not at any stage sought to refute the allegation that he had received a loan from UMB.

Gollop and Blank legal practitioners had been contacted along with Zenzo Nsimbi and the plaintiff. Gollop and Blank had denied receipt of the amount mentioned on the list. Nsimbi had confirmed the amount given to him as a loan. Efforts to contact two others had been unsuccessful and he had been unable to obtain their telephone numbers. He had not in his story included the full contents of the list as this was not a requirement. Attempts had been made to contact Ms Boka to no avail and efforts to obtain information from Zimbank had been fruitless as the bank had claimed client confidentiality. He denied having seen a letter allegedly written by the plaintiff on 19 March 1999.

He had in his initial call to the plaintiff's office informed the plaintiff's secretary of the purpose of the call but was unaware if the plaintiff was aware of the purpose of his visit at the time he met him. He indicated that it was possible that the lecture by the plaintiff which preceded the opening of the envelope which he had on his person was prompted by the plaintiff's perception of the particular paper which was that the paper was out to tarnish his reputation. The plaintiff was to the witness' knowledge generally unhappy with criticism no matter how constructive and was particularly wary of and suspicious of enquiries by the private media. The witness' attitude was that the plaintiff being the holder of public office should accept fair criticism.

His paper, he stated, gave credit were it was due but as long as there continued to be problems in the witness' department it was the duty of the press to bring the shortcomings to the attention of members of the public.

The witness took issue with the plaintiff's statement that he had benefited his department by upgrading the computer system as the exercise involved the payment of substantial funds to a foreign contractor

whereas the work could have been carried out by a local firm. He went further to add that he had in his possession documents which he was in a position to produce to the effect that the contract awarded to the Israeli company was in contravention of a Treasury directive resulting in the country having lost millions of dollars.

After his meeting with the plaintiff had come to an abrupt end his intention was, he explained, to report only that an effort had been made to obtain a comment from the plaintiff who had been reluctant to give the paper any details other than to comment that the amount in issue was small.

When the plaintiff had contacted him to tell him that the matter was pending before the Master of the High Court coupled with the threat that the plaintiff was to take up the matter of breach of confidentiality with the bank in that the bank had released customer information, the witness had taken this as confirmation of the loan but had desisted from foisting his own interpretation on members of the public, that is readers of the paper. He had reported only what he had been told.

The plaintiff was as far as he was concerned twice afforded the opportunity to respond to the allegation but had failed to do so and had at best made indirect comments. The other persons contacted had been direct and forthright.

The witness was unable to comment on the reason why the liquidator did not proceed against the plaintiff. He could only say that it was common knowledge that UMB records had been destroyed and that the list available to the liquidator was not comprehensive as is evidenced by the list in the possession of the newspaper. That state of affairs was, he remarked, confirmed in the report of the then Reserve Bank Governor to the Minister of Justice.

The second witness for the defence was William Spencer Nyamangara, Managing Director, of the 3rd and 4th defendants.

His testimony was to the effect that there are three stages to the production of a newspaper, the first of which is the editorial stage which comprises the writing of the story and thereafter the printing and distribution stages.

He described the aversion of editors to interference by printers who he said had no editorial input or influence upon the content of a story, the result being that there would be no way in which the third defendant could have known if the contents of a paper were true or not and there was no means of verification of contents.

Once printed the papers would be bundled and delivered to a distributor, in this case the 4th defendant. The distributor would only become aware of the contents after delivery in much the same manner as would occur with ordinary members of the public.

In the circumstances there was and could never have been any intention to damage the reputation of the plaintiff by either the 3rd or 4th defendants.

In response to a question in cross-examination the witness stated that the printer would receive the paper from the editorial stage which paper would be printed on white, A3 size paper. The printer would then photograph and convert to film the paper which would then be combined with other pages to make up what is referred to as an imposition. The material furnished would come with instructions as to where photographs were to be inserted.

The third defence witness was Theresa Grimmel, formerly Cooper, a director of KPMG the company responsible for the liquidation of UMB. In the course of her duties she assisted Mr Bailey, the liquidator in the receiving noting and verification of creditors' claims, pursuing debtors, drawing up liquidator's reports, negotiation of sales of assets and staff matters among other things.

Mr Bailey's role was to manage the estate. She submitted documents which contained the list of the creditors of UMB. Her evidence was that the creditors claims related to the tobacco floors shares purchased by the creditors. These she stated were in each case supported by a deposit slip into the UMB account and a letter from the Boka tobacco auction floors. All the documents without exception bore 1998 dates. To her knowledge there were no share transactions recorded for the year 1997. She added that she would have come to know of transactions in

1997 only if a creditor had launched a claim. She had no record of any external creditor.(See Exhibits '17', '18' and '19') February 1998 was according to the liquidators records the earliest date on which share transactions were conducted.

The fifth liquidation and distribution account of UMB was produced through the witness, Exhibit 19.

The witness stated that the plaintiff's name did not appear on the list of debtors in her possession. She acknowledged that she had read the offending article and that the names of the persons appearing on the list had been checked against the names on the liquidator's list and that follow ups were made were the liquidator had in his possession information about the individual.

In response to a question by counsel for the defence as to the possibility of some subscribers or creditors having failed to lodge their claims she said that she was aware only of the claims lodged with the liquidators but that there could be that possibility. She was unable to comment on whatever documents might have been destroyed or gone missing.

The witness was presented with certain documents which purported to be from subscribers to the share issue whose names did not appear on the liquidator's list. The witness' only comment was that the onus was upon each individual creditor to file his claim with the liquidator as the liquidator was under no obligation to seek out creditors. She however seemed to accept that those documents might be considered evidence of the fact that the liquidator's list was not reflective of all the persons who had subscribed to shares.

The final witness for the defence was Advocate Mazonde who at the relevant time held the post of Provincial Magistrate.

He was referred to Exhibit '10', an extract from the Clerk of Court's file in the case which resulted in the issue of a default judgment against the plaintiff. He denied that the signature appearing on Exhibit '10' was his. He was referred to an appearance to defend which reflects an irregularity in that appearance was entered a day before the date of

service of the summons commencing action, Exhibits '20' and '21'. The witness could not recall receipt of a letter from the legal practitioners of the plaintiff in that case, in which it was noted that the appearance was defective, Exhibit 22. Issue was taken with the response to the letter, Exhibit '11' which resulted in a complaint to the Chief Magistrate by the same legal practitioners. The witness' response was that if a complaint had been filed an explanation would have been sought from him by the Chief Magistrate. He was not aware that a Ms Rutsate of the Chief Magistrate's office had written to the legal practitioners advising the lawyers to take the matter on review if they were dissatisfied, Exhibit 25.

The witness indicated that it was a fact that certain junior members of staff had lost their jobs with the courts after having held themselves out as magistrates to members of the public.

The witness said that he knew the plaintiff in his official capacity as the Registrar General. He had no recollection of his having been approached by the plaintiff in connection with the case before the Magistrates Court and would have recalled the occasion if it had taken place.

The witness was asked if he would have upon being approached set aside an existing judgment. His response was that he would have advised anyone making such a request to him to take the proper procedural steps in the form of the filing of a formal application for the rescission of the judgment as it would have been improper to do otherwise.

Counsel for the defence asked the witness if he was familiar with members of staff in his establishment and the witness indicated that he was familiar with Ndiweni, whose name appears on Exhibit 11. He denied that the other person whose name appears on the same exhibit, that is Bwamaka, was stationed at his courthouse.

As to the possibility of the plaintiff having entered the date on the appearance to defend erroneously, the witness stated that he was not in a position to comment. It was further put to the witness that a defendant who was unfamiliar with magistrates court procedures could have taken it for granted that a judgment had been rescinded on the strength of

documents emanating from that court the witness said that could be a possibility. He however added when a magistrate he had dealt with many people who had no legal background and that these persons whenever necessary would be referred to the legal advice centre manned by Ministry officials for assistance.

The witness was referred to documents from a case he had handled as a magistrate and was asked to comment on the signature on these documents, Exhibits 27, 28 and 29, as he had denied that the signature on Exhibit 10 was his. He disagreed that there were similarities in the documents. He was adamant that he would have remembered had he handled the case against the plaintiff especially if the matter was to have been subjected to review.

He was of the view that had events in the case under scrutiny occurred in the manner described by the defence and as is reflected in Exhibits 10 and 11 the Chief magistrate was unlikely to have swept the matter under the carpet and a request for a report would have been made to the witness.

Upon re-examination the witness stated that he considered Exhibits 10 and 29 to be forgeries.

I have recounted in fair substance the evidence before this court and in particular that of the plaintiff. I considered this necessary for the reason that having done so I do not believe that the need arises for me to enter into a detailed analysis.

The evidence of the plaintiff, in my view, speaks for itself. He unfortunately, for one who had made much of his being well versed in the law he professing to be a qualified legal practitioner, made a very poor showing. He, by the words of his own mouth unleashed a can of worms. The plaintiff did himself a gross disservice. His description of his dealings with the late Roger Boka, the business of the sale to members of the public of shares in a private company and the circumstances in which he obtained 'rescission' of a court judgment without recourse to the laid down procedures are a few of the instances of this self betrayal that I refer to. Some of his revelations left one agog with incredulity given the nature of the case and that here was a man of substance and who had gone to the

lengths of litigating to preserve his good name. It was somewhat difficult to avoid developing a feeling of discomfiture at the patent embarrassment that he occasioned to himself particularly when one takes into account his position in the land.

The plaintiff appeared to have little grasp of the concept of defamation or what it is that was required of him to establish a case against the defendants. Much of his evidence on the nature of his communications with the reporter responsible for the article tended to be vague and inconclusive. He was unconvincing and elements of self contradiction arose throughout his testimony. At the end of the day, and regrettably so, one was left with little choice but to consider suspect his version of events.

The evidence of Ms Boka did little to enhance the plaintiff's case. She took refuge in ignorance and one could not avoid forming the impression that she had greater insight and knowledge into the subject matter of the inquiry but was wary of proffering any detailed or specific information lest she might be subjected to searching questions which would not be in her best interests. She, I found, exhibited an astuteness of character and sense of self preservation that evaded the plaintiff.

Contrary to expectation, the plaintiff having promised that all would be revealed by the witness, the court was left none the wiser by her evidence. In essence she did little or nothing to place before the court incontrovertible evidence of the fact that the amount paid out to the plaintiff was indeed for the purpose that he said it was. In fact the plaintiff had stopped short of stating the reason for all the payments and had said Ms Boka who was in charge of the administration would shed light on the reason for the payments.

Ms Boka initially denied that there appeared on the list given to the reporter by his informant, the names of persons to whom loans had been advanced but capitulated when confronted with the evidence that two of the persons named had admitted to having obtained loans from UMB. On her admission the company was never registered as a public company and all that had been done in 1997 had been to prepare and submit to the Registrar of Companies a prospectus which had been rejected and the

resolution to go public had been passed in early 1998 whereas the plaintiff claims to have sold shares in 1997.

Ms Boka was amenable to the suggestion by the defence that her late father tended to operate as if his various businesses were an indivisible entity.

After weighing up her evidence together with that of the plaintiff I would take the evidence that the payment was marketing related with a pinch of salt.

The testimony of the defendant's witnesses was straightforward and makes sound reading. There is no doubt to my mind that the evidence of the defendants is preferable and more in accordance with logic.

Having determined the question of credibility I now turn to the article itself. It is first and foremost incumbent upon this court to determine whether the contents thereof are defamatory in nature.

Defamation was well described in a 1970 British Columbia Court of Appeal decision of *Murphy v La Marsh*:

"(Defamation is where) a shameful action is attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful course of action (he lives on the avails of prostitution), (or) a shameful condition (he has smallpox). Such words are considered defamatory because they tend to bring the man named into hatred, contempt or ridicule. The more modern definition (of defamation) is words tending to lower the plaintiff in the estimation of right-thinking members of society generally."

The concept of the 'right thinking' or reasonable person was described thus by HOLMES JA in *Dorfman v Afrikaanse Pers Publikasies (Edms) Bpk en andere* 1966 (1) PH J9 (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 an inquiry the court must eschew any intellectual analysis of the contents of the report and of its implications, and must be careful not to attribute to an ordinary reader a tendency towards such analysis or an ability to recall more than an outline or overall impression of what he or she has just read. Furthermore, in view of the mass of material in a newspaper it is in general unlikely that the ordinary reader would peruse and ponder a single report in isolation."

Burchell in *The Law of Defamation in South Africa* at p 84 states that:

"The ordinary reader has also been described as a "reasonable", "right-thinking" person of average education and normal intelligence; he is not a man of "morbid or suspicious mind", nor is he "supercritical" or abnormally insensitive.....The concept has also been expressed asthe 'fictitious, normal, well-balanced, right-minded and reasonable reader'. cf *Channing v S A Financial Gazette Ltd & ors* 1966 (3) SA 470; *SA Associated Newspapers Ltd v Schoeman* 1962 (2) SA 613 (A)."

The steps to be taken in determining if a publication is defamatory are well established and can be summarised as follows:

- one must establish what imputations arise from the publication upon a consideration of the natural ordinary or grammatical meaning of the words alone, directly or inferentially;
- secondly one should test each interpretation to see if it satisfies the definition of what amounts to defamatory matter;
- lastly one must test to see if the defamatory imputations are 'of and concerning' the plaintiff.

The statements which are the cause of complaint have been extracted from a fairly lengthy article and must be read in the light of the article as a whole.

The offending article essentially dealt with an episode in, what was then, the ongoing saga of the United Merchant Bank debacle.

The article starts off by saying that senior Government officials who benefitted from the bank were likely to escape repayment of the loans that they had received as their names were missing from the list of debtors made public by the liquidator and that this information was based on a list which was in the possession of the newspaper. The report proceeds to refer to a preliminary report by the liquidator in which it was said that from the time of the closure of the bank 'there was a deliberate removal and destruction of records' as a result of which the liquidator was obliged to reconstruct the events pertaining to the defunct bank from records compiled by an investigator into the affairs of the bank who was the then Reserve Bank governor, Dr Tumba.

Thereafter the article talks of the disappearance of certain of the bank's assets which assets were allegedly sold before the liquidator assumed control of the bank's affairs. In addition mention is made of the

unavailability of the records of several companies mentioned in the liquidator's report.

The paper then talks of its own investigations which had revealed that the then Minister of Transport and Energy, Zenzo Nsimbi had received a loan from the Boka bank whereas his name did not appear on the list of debtors compiled by the liquidator. Nsimbi is said in the article to have confirmed his indebtedness to the bank.

The article then refers back to the opening paragraph concerning the existence of unlisted debtors amongst whom were senior government officials who had refused to comment on the matter.

It is then that mention is made of the plaintiff who it is said was listed as a director of the Boka bank and who was also believed to have received a loan from the same, the extent of which loan the paper had been unable to ascertain. It is further stated that the plaintiff had upon inquiry by the paper confirmed that he had had dealings with the bank but had refused to comment further on the issue and was demanding to know the source of the information in the hands of the paper. The pertinent portion of the article concludes by quoting the plaintiff's response as follows:

"I have to know where you got that information from, said Mudede.

"The issue is before the Master of the High Court. It is not proper for such information to be made public because no advertisement was placed in the newspapers advising those owing money to Boka to come forward and declare. I will have to consult my lawyers," he said, "I would want you to expose white commercial farmers that benefitted from the Boka loans first before you can get a comment from me," said Mudede."

I did not hear the plaintiff to put forward any real argument that he was incorrectly quoted in respect of the foregoing.

In *Zvobgo v Mutjuwadi & Ors* 1985 (1) ZLR 333 (HC) at 337 SANDURA JP, as he then was, states:

"Bearing in mind that a defamatory statement is one which tends to diminish the esteem in which the person to whom it refers is held by others, the question which I must now answer is whether the words complained of by the plaintiff could or might be regarded as defamatory by a reasonable person of normal intelligence who has knowledge of the circumstances."

Looking at the offending article and the circumstances it strikes me that each of the paragraphs complained about has been taken out of context and cannot on a plain, ordinary and grammatical construction bear the meaning attributed to it by the plaintiff.

None of the content of the article gives rise to an insinuation that the plaintiff deliberately and being motivated by dishonesty sought to avoid repaying a debt to UMB. Neither do any of the paragraphs individually or collectively impute that the hand involved in the destruction of the bank records was that of the plaintiff.

The article in no way suggests that the plaintiff was personally involved in the removal of names from the list of debtors. In other words there is no implication of blame on the part of the plaintiff in the destruction of the records or removal of names from the list.

It is further completely untrue, as averred in paragraph 15.3 of the declaration, that the article states directly or implies that the plaintiff was likely to benefit from the removal of his name from the list of debtors 'in circumstances which are improper, dishonest, corrupt and unlawful.' Paragraph 15.4 is a mere variation of the same theme.

The background to those aspects of the report were adequately explained by the defendant's witness who stated that it was common knowledge and had previously been reported that it is Boka himself who was believed to have destroyed records after his bank fell under investigation. This piece of evidence was not rebutted. The plaintiff had himself, as I have previously stated considerable difficulty in elucidating his complaint by reference to the article.

The averments in paragraphs 15.5 to 15.8 inclusive are best attributed to flights of fancy and bear no relationship to the content of the offending article.

Whilst the fact of the publication is not in issue, the article, with particular reference to the offending paragraphs, cannot be reasonably interpreted in the manner pleaded by the plaintiff. As framed the article does not state a conclusion but is open for readers to draw their own conclusions. The plaintiff in instituting these proceedings has displayed undue sensitivity in a matter which was of unquestionable public interest.

To arrive at that conclusion all that is necessary for me to do is to publish in *extenso* the Fifth Interim Liquidation and Distribution Account which was presented to this court as Exhibit 19.

(*Exhibit 19 form part of the judgment)

The most that one might say from a reading of the article is that the plaintiff received a loan from Boka's bank but the fact of receipt of a loan is not defamatory *per se*. Even if one was able to say that a *prima facie* case of defamation has been established, which is not the finding of this court, there is evidence including that of the plaintiff himself that he received sums of money from the late Boka in circumstances which called for some explanation.

It has often been stated that it must always be borne in mind that the law of defamation seeks to balance two competing interests, namely the protection of reputation and the right to disseminate information, due regard being had to the rights of freedom of speech and freedom to transmit information which are vital ingredients of a democratic society.

In outlining the responsibilities of the media Professor Feltoe states the following:

“The media especially mass circulation newspapers and national radio and television broadcast media, reaches substantial numbers of persons. Because of this, a great responsibility rests with the press to report in a professional and responsible fashion. This means that it has a duty to check facts carefully and to try to ensure that stories are not published which will unjustifiably harm the reputation of persons.”

I am in the circumstances of this case unable to conclude that any of the defendants reneged on the above stated responsibilities. In the result I am obliged to make the determination that to order in favour of the plaintiff would have the result of preventing the dialogue and debate necessary to seek the truth. In light of this finding I do not consider it necessary to dwell upon any of the other aspects of this matter or the defences raised by the defendants.

Accordingly the plaintiff's case is dismissed with costs.

Messrs Dube, Manikai and Hwacha, plaintiff's legal practitioners.
Messrs Atherstone and Cook, defendants' legal practitioners.