

IN THE CONSTITUTIONAL COURT OF ZIMBABWE

CASE NO. CCZ 7/15

HELD AT HARARE

In the matter between:

MEDIA INSTITUTE OF SOUTHERN AFRICA

1st Applicant

(Zimbabwe Chapter)

NQABA MATSHAZI

2nd Applicant

SYDNEY SAIZE

3rd Applicant

GODWIN MANGUDYA

4th Applicant

ROGER DEANE STRINGER

5th Applicant

And

MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY

AFFAIRS

1st Respondent

MINISTER OF INFORMATION, MEDIA AND

BROADCASTING SERVICES

2nd Respondent

THE ATTORNEY GENERAL OF ZIMBABWE

3rd Respondent

FIRST, SECOND AND THIRD RESPONDENT'S OPPOSING AFFIDAVIT

I the undersigned **PRINCE MACHAYA** do hereby make oath and state that:

1. I am the Attorney General and the principal legal adviser to the Government of the Republic of Zimbabwe. I am cited as the 3rd Respondent in the above proceedings, and have been duly authorised to depose to this affidavit on behalf of both 1st and 2nd Respondents. The matters of fact which I depose to herein are within my personal knowledge and true and correct to the best of my knowledge and belief I have had sight of the Applicants' founding affidavit and respond thereto as follows hereinafter:

2. AD PAR 1 – 15

I have no knowledge of the matter referred to in paragraphs 1,2,3,4,5,6,7,8,12,13,14 and 15 and do not admit the same. I, however, admit the contents of paragraphs 9, 10 and 11.

3. AD PAR 16 – 17

3.1 The Applicants are entitled to their rights to freedom of expression and freedom of the media as guaranteed under section 61(1) and 61(2) of the New Constitution. The enjoyment of these rights is, however, qualified under section 61(5)(c) which specifically mentions that;

"Freedom of expression and freedom of the media exclude malicious injury to a person's reputation or dignity."

3.2 The right to **human dignity** is specifically guaranteed under section 51 of the Constitution and it is a right which must be respected and protected. Section 96 of the **Criminal Law Codification and Reform Act** Cap 9:23 seeks to protect the right to human dignity as required by section 51 of the Constitution through criminalising defamation. Any harm to a person's reputation affects their dignity.

3.3 What section 96 of the criminal code therefore seeks to do is to guarantee and protect the right to dignity. It is not in violation of section 61(1) and (2) of the Constitution. Section 96 of the Criminal Code fosters responsible journalism and ensures therefore that in exercising their right to freedom of expression and freedom of the media, journalists verify their facts prior to publication as being truthful.

4. AD PAR 18 – 20

No issues arise.

5. AD PAR 21 – 22

5.1 Section 96 of the Criminal Code is not incompatible with section 61 of the Constitution. To suggest so is to generalise issues. While section 61(1) and (2) of the Constitution guarantee freedom of expression and freedom of the media, section 61(5)(c) of the Constitution places limitations on the rights guaranteed under section 61(1) and (2) by specifically stating that-

*"Freedom of expression and freedom of the media
exclude*

(c) malicious injury to a person's reputation or dignity"

5.2 Section 96 of the Criminal Law Code by criminalising intentional harm to the reputation of another is therefore in compliance with the provisions of section 61(5)(c) Freedom of expression and freedom of the media do not include malicious injury to the reputation or dignity of another. The only way the State can guarantee protection of the inherent right to human dignity is by criminalising any conduct that causes malicious injury to another person's reputation or dignity.

6. AD PAR 23 – 33

No issues arise.

7. AD PAR 34 – 43

Under the framework of the new Constitution freedom of expression and freedom of the media are limited rights by particular reference to section 61(5)(c). Applicants should therefore not be selective in their reading of section 61 of the Constitution by only making reference to sections that are favourable to their case. A full reading of the provisions of section 61 of the Constitution cannot escape the clear meaning of section 61(5)(c).

8. AD PAR 44 – 48

Any communication process that causes serious intentional harm to the reputation of another also infringes on other people's rights. Criminal defamation as defined in the Criminal Code is a justifiable limitation on the right to freedom of expression and freedom of the media. Where genuine errors are made in the communication process, journalists cannot be charged with the crime of Criminal Defamation because there is lack of intent to cause harm. However where there is intentional harm to reputation, then there is every need to attach criminal sanctions, to such harm.

9. AD PAR 49 – 51

In terms of section 86(1) and (2) of the New Constitution, the rights and freedoms guaranteed in Chapter 4 are subject to limitation under a "law of general application, to the extent that the law is reasonable and justifiable in a democratic society based on openness, justice, human dignity". Zimbabwe is a country that upholds human dignity and section 51 of the Constitution which guarantees the inherent right to human dignity specifies that the right to dignity must be protected. The **Criminal Law Codification and Reform Act** Cap. is a law of general application and section 96 is particularly crafted to guarantee expeditious redress and protection from injury to one's reputation.

10. AD PAR 52- 53

Civil Remedies are long and protracted. Criminal Defamation guarantees a quicker remedy to one whose reputation has been injured. **Intentional** injury to a person's reputation causes a permanent life scar to one's personality and dignity and it should equally be sanctioned with a speedy legal remedy. Civil remedy does not provide adequate means to deter and prevent defamation by the media.

11. AD PAR 54 – 59

The provisions of section 96 of the criminal code will not be applied indiscriminately. The criminal sanctions will only apply to one who has been convicted and found criminally liable upon the State successfully proving the essential elements of the offence. There is therefore no need for apprehension as the State carries an onerous burden of proof on its shoulders in proving criminal defamation. The offence is justified to protect personal reputations and does not go further than necessary to accomplish that goal. Those who express themselves truthfully without unnecessarily causing intentional injury to the reputation of others need not fear the law on criminal defamation. The law does not allow the unjustified maligning of other people's reputation. Criminal Defamation is therefore a necessary restraint to the rights of freedom of expression and freedom of the media.

12. AD PAR 60 – 62

In the circumstances, I humbly submit that the criminalisation of defamation is a reasonable and justified limitation to the right of freedom of expression in an open and democratic society. In view of

the above and the provisions of section 61(5)(c) of the Constitution I
urge the Court not to declare S96 of the **Criminal Law Codification and
Reform Act Cap 9:23** unconstitutional.

13. Accordingly I pray that the offence of Criminal Defamation as defined
in section 96 of the Criminal Code should remain in the statute books
and not be struck down as being null and void. In the circumstances I
urge this Court to dismiss the application with costs.

THUS DONE and SWORN to at HARARE this 9th day of MARCH 2015.


PRINCE MACHAYA

Before me


COMMISSIONER OF OATHS

