BONAVENTURE BWEUPE v THE ATTORNEY-GENERAL, AND ZAMBIA PUBLISHING COMPANY LIMITED, AND TIMES NEWSPAPERS ZAMBIA LIMITED
(1984) Z.R. 21 (H.C.)

HIGH COURT
SILUNGWE, C.J.
29TH MAY 1984
(CASE NO. 1978/HP/466)

Flynote
Tort-libel - Fair Condiment - Apology demanded from Plaintiff - Effect of on defence of fair comment.

Headnote
The plaintiff was a High Court judge who delivered a ruling in a case heard in open court to the effect that UNIP special constables did not exist in law.

Reacting to that ruling, the then Minister of Home Affairs under whose auspices the special constables fell, made certain statements which were published by the second and third defendants. In the said publication the second defendant included the Minister's demand for an apology from the plaintiff. The third defendant did not include this in its publication of the Minister's reaction.

The plaintiff contended that the words spoken by the Minister and repeated by the second and third defendants were defamatory of him. The defendants argued that the words complained of amounted to fair comment, noble without malice, upon a matter of public interest, namely, a ruling delivered by the plaintiff in his capacity as a judge of the High Court.

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Held:
(i) A demand for apology from a judge or judicial officer goes beyond the defence of fair comment.
(ii) It is totally improper that a member of the public should take upon himself to call upon a judge or any judicial officer acting in the exercise of his judicial function to apologise to him, no matter how wrong that judge or other judicial officer may be.

Cases cited:
(1) The People v R. B. Chimbavi and Others, HP/122/1974.
(2) Sim v Stretch [1936] 52 T.L.R. 669.
(3) Frederick Kunongana Mwanza v Zambia Publishing Company Limited, (1981) Z.R. 234.
(4) Slopes v Sutherland, cited from House of Lords, Printed cases, 1924, at p. 375.
(5) Merivale v Carson, [1887] 20 Q.B. 280 at p. 281.
(6) R v Russell, Unreported, December 2, 1905, cited in Fraser's Law of Libel (7th Edn.) at p. 108.

(7) Andre Paul Terence Ambard v The A-G of Trinidad and Tobago, [1936] All E.R. 704.

Other works referred to:
Halsbury's Laws of England (4th Edn.) Vol. 28, para. 131.
Gatley on Libel and Slander, (8th Edn.) para. 728.

For the first defendant: A. M. Kasonde, Principal State Advocate.
For the second defendant: M. S. Bander, of Chigaga and Company .
For the third defendant: J. H. Jearey, of D.H. Kemp and Company.

Judgment

SILUNGWE, C.J.: delivered the judgment of the court.

This is an action for libel brought by the plaintiff, who was at the material time, and, who still is, a judge of the High Court in the Republic of Zambia. The action is against the first defendant - The Attorney- General who is being sued under the State Proceedings Act; the second defendant-the Zambia Publishing Company Limited-the proprietor and publisher of the Zambia Daily Mail and the third defendant - Times Newspapers Zambia Limited. The words complained of appeared on the front pages of the Zambia Daily Mail and the Times of Zambia of February 17, 1975 which the plaintiff claims were falsely and maliciously printed and published, or caused to be printed and published, In those papers. Those words are set out in paragraph 3 of the Statement of Claim and are reproduced here below:

"*The Zambia Daily Mail*

> The Minister of Home Affairs, Mr Aaron Milner has demanded an apology from the Lusaka Judge Mr Justice Bonaventure Bweupe

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> for saying that UNIP special constables were not recognised by the law. Mr Milner said in Lusaka yesterday the judge was either misinformed or had not read his law volumes properly. 'The President directed that we should form the special constabulary to help eradicate crime. Can you imagine a Head of State praising something which is illegal.' Mr Milner asked amid shouts of 'Shame, shame' from the leaders. 'Special constables exist by law and an officer in charge of police is given authority to have, under his charge, these constables. In fact they were there even during colonial days,' he added. The judge is learned and should know the law to give the right judgment but I am shocked to read his remarks in the press and I demand an apology from Judge Bweupe,' he said."

"*The Times of Zambia*

> The Minister has criticised Lusaka Judge Mr Justice Bonaventure Bweupe for his 'ignorance' of the legality of special constables. He said the judge should have done his homework before making such a misleading statement. 'It is unfortunate for a judge to say that the law does not recognise the existence of special constables because, under the Police Act, a police officer can appoint a special constable to help him carry out his duties,' he said. According to chapter four, section 10 of the Police Ordinance:

'Every special constable under this ordinance shall have the sane powers, privileges and protection and shall be liable to perform the same duties and shall be amenable to the same penalty and to be subordinate to the same authority as police officers."

The Statement of Claim concludes in paragraph 4 and 5 as follows:

4. By the said words the defendants meant and were understood to mean that the plaintiff was not a fit and proper person to hold the office of a High Court Judge in the Republic of Zambia.
5. The plaintiff has in consequence been seriously injured in his character, credit and reputation and in the way of his said Office and has been brought into public scandal, odium and contempt."

All the three defendants denied in their respective defences that the words complained of bore or were understood to bear, or were or are capable of bearing, the meaning alleged in paragraph 4 of the Statement of Claim or any other meaning defamatory of the plaintiff and that the words complained of are fair comment, made without malice, upon a matter of public interest, namely, a ruling delivered by the plaintiff, in his capacity as judge of the High Court, at Lusaka, on February 14th, 1975, in the case of *The People v R.B. Chimbavi and Others,* (1).

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The history of this action may be shortly stated. In February, 1975, a Mr R.B. Chimbavi and three others appeared before the plaintiff, in his capacity as puisne judge, on a criminal charge of aggravated robbery. At the end of the case for the prosecution, the plaintiff made a ruling in which he found that the identity of the four accused persons had not been established, and consequently, found that they had no case to answer and acquitted them. During the course of his ruling, he said that Gideon Daka, PW3 in that case, together with two special constables, had conducted an illegal search of a house belonging to the first accused in his absence, and that they had taken therefrom, and conveyed to a police station a bundle of goods, some of which were said to be part of the property stolen during the commission of the aggravated robbery.

In the last but one paragraph of his ruling, the plaintiff said:

"May I warn the so called Special Constables that they did not exist in law. The law does not recognise their existence because they acted outside the ambit of its intendment. They have no powers to search other people's houses without a search warrant. Indeed they can assist the Police in the detection of crime just in the same way as any citizen can, but illegal acts would expose them to prosecution."

Two days later, that is, on February 16th, 1975, Mr Aaron Milner, then Minister of Home Affairs, addressed Party officials drawn from all over Lusaka at the Twentieth Century Cinema in the course which he uttered the words complained of. Those words have not been disputed in the pleadings.

In his evidence, the plaintiff said that, when he read the passages referred to in both the Zambia Daily Mail and the Times of Zambia of February 17th, 1975, he was shocked and demoralised and

that he collapsed he started sweating and was on the verge of shedding tears because he felt a serious crisis was imminent. He explained that, by referring to "the so called Special Constables. . ." he meant that they had "acted outside the provisions of the law and that, as such, they were not Special Constables in the eyes of the law,"

He said that, at the time of the ruling referred to above, he was familiar with sections 48, 49 and 52 of the Zambia Police Act. Cap. 133, which provided for the appointment and the functions of special constables. And so, he did not question the appointment of special constables as the law relating thereto was very clear.

The plaintiff conceded that the following sentence in his ruling:

> "May I warn the so called Special Constables that they did not exist in law", when read in isolation, was capable of being interpreted to mean that special constables did not exist. He said, however, that when the paragraph containing that sentence was read as a whole, "It would not give two interpretations"

When cross-examined by Mr Banda, on behalf of the second defendant, the plaintiff said, *inter alia* that if he were to hear today a case factually similar to the one which gave rise to his ruling, he would repeat

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the ruling, save that he would now be more careful to quote relevant sections of the law so as not to make the ruling ambiguous and thereby forestalling lawyer's criticism of deficiency in the ruling.

When Mr Kasonde, on behalf of the first defendant, and, Mr Jearey on behalf of the third defendant, cross-examined the plaintiff on the lack of any reference in the ruling to a specific law, he conceded that the absence of reference to specific law made the ruling deficient. He agreed with Mr Jearey that the correct use of language was important for lawyers and imperative for judges.

Referring to the offending passages, as published by the second and third defendants, the plaintiff agreed that Mr Milner, in his capacity as minister responsible for the police, including special constables, was entitled to be concerned with what he had said in his ruling but that in doing so, the minister went beyond fair comment and imputed incompetence, unfairness, lack of impartiality and unfitness to be on the High Court Bench. He would have been contented with an apology from Mr Milner. Efforts were made to obtain one but to no avail. Had he succeeded in getting the apology, he would not have instituted this action.

The plaintiff called one witness on his own behalf, Mr Valentine Kayope, who had been a friend of his since 1958. Mr Kayope said in his evidence that, on reading the offending articles in the Zambia Daily Mail and the Times of Zambia of February 17th, 1975, his reaction was one of shock and revulsion as it was wrong for anyone to question the integrity of a Judge. Judges, he said, should not be open to criticism and that the only way of criticising them lay in an appeal to the Supreme Court. He testified that the wholesale condemnation of the plaintiff by a senior cabinet minister "indicated that the judge was not qualified to be a judge. "

All the three defendants rested their respective cases on their pleadings and called no witnesses on their own behalf. All of them pleaded the defence of fair comment. It was submitted by learned counsel on their behalf that the minister's comment was honest and fair.

Mr Kasonde, on behalf of the first defendant, conceded that the minister's demand for an apology from the plaintiff as reflected in the second defendant's publication, would appear to be outside fair comment but that, in the light of paragraph 1593 at page 847 of Clerk and Lindsey on Torts, 12th edition, the comment was covered and so it remained fair comment. The paragraph referred to, which relates to "public interest" reads as follows:

> "Matters of Church and State. Everything which directly effects the welfare of Church and State is clearly a matter of general public interest. There can be no dispute as to the right of criticism with regard to the policy of the Government, the administration of justice, the proceedings of the legislature, the conduct of the executive in civil and military affairs, and generally the manner in which all those who may be called public servants discharged their duties,"

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Granted, as Mr Kasonde said, that the demand for an apology went beyond fair comment, I can see nothing in the foregoing passage to ameliorate or alter that position.

Mr. Jearey submitted that the question was not whether the minister had been right of wrong, but whether his opinion could have been expressed by a fair-minded and reasonable person. He went on to say that the plaintiff s ruling had raised public doubt on the status and legality of special constables. He submitted that, although the minister had responded in terms which were strong, his comment was not outside fair comment.

The issue is whether the words complained of by the plaintiff constitute libel. It is trite law that libel is the publication of a matter, usually words, conveying a defamatory imputation as to a person's character, office or vocation. As Lord Atkin observed in *Sim v Stretch,* (2) there is no wholly satisfactory definition of a defamatory imputation. Any imputation which may tend "to lower the plaintiff in the estimation of right-thinking members of society generally," "to cut him off from society or "to expose him to hatred, contempt or ridicule", is defamatory of that person. In *Frederick Kunongona Mwanza v Zambia Publishing Company Limited,* (3), Cullinan, J., held that, any imputation which may tend to injure a man's reputation in business, in employment trade, profession, calling or office carried on or held by him, is defamatory.

In the instant case, it is not seriously disputed that the words complained of were prima facie defamatory of the plaintiff. Indeed, the plaintiff stated in his evidence that, as a result of the publication aforesaid, he was deserted by his friends, except those who were close to him, his only witness, Mr Valentine Kayope, being among them.

The caption in the Daily Mail reads: "Minister puts Judge in Dock" and the paper goes on to state what is already reproduced, including the calling upon the plaintiff to apologise to the minister. I am

of the opinion that the words appearing in the Daily Mail were prima facie defamatory of the plaintiff, as they resulted in his being deserted by his close friends and tended to expose him to hatred.

For the same reasons, I find that the article in the Times of Zambia was prima facie defamatory of the plaintiff. The question is whether the defence of fair comment is available to the defendants.

The defence of fair comment has been recognised since the Victorian times. The defence is in the nature of a general right, and enables any member of the public to comment fairly on matters of public interest. It is based on facts and inferences which are proved to be true, See Halsbury's Laws of England, 4th Ed., Vol. 28, paragraph 131.

As to the meaning and latitude of fair coment, I would like to refer to paragraph 728 of Galley on Libel and Slander, 8th Ed., which reads:

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> "728. The latitude of fair comment. In the following passage from his summing-up in *Stopes v Sutherland*, (4) Lord Hewart C.J., points out the latitude of fair comment:
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> 'What is it that fair comment means? It means this-and I prefer to put it in words which are not my own; I refer to the famous judgment of Lord Esher, M.R. in *Merivale v Carson* (5): 'Every latitude,' said Lord Esher, 'must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say [not whether they agree with it, but whether any fair man would have made such a comment....Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this-would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said?' Again, as Bray L., said in *R v Russell* (6): 'When you come to a question of fair comment you ought to be extremely liberal, and in a matter of this kind-a matter relating to the administration of the licensing laws-you ought to be extremely liberal, because it is a matter on which men's minds are moved, in which people who do know entertain very, very strong language, every allowance should be made in their favour. They must believe what they say, but the question whether they honestly believe it is a question for you to say. If they do believe it, and they are within anything like reasonable bounds, they come within the meaning of fair comment. If comments were made which would appear to you to have been exaggerated, it does not follow that they are not perfectly honest comments.' That is the kind of maxim which you may apply in considering whether that part of this matter which is comment is fair. Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view-could a fair-minded man have been capable of writing this?-which, you observe, is a totally different question from the question, do you agree with what he has said?"

The defendants have pleaded, and it is submitted on there behalf, that the defence of fair comment is available to them all. That the comment was made upon a matter of public interest, namely,

judicial proceedings held in open court, cannot be doubted. On the pleadings and the evidence before me, I am satisfied that, not only was the comment made on a matter of public interest, but also that it was honestly made by a person whose responsibility and concern it was to curb crime, including robberies, and whose mind was obviously moved by the plaintiff's ruling which, on the face of it, was inclined to raise public doubt as to the status and legality of special constables.

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I now have to decide whether the comment was made fairly. I will start in the reverse order of defendants and consider first the position of the third defendant.

In his evidence, the plaintiff freely stated that, on the basis of his ruling aforesaid, the special constables in that case did not exist as they had acted ultra vires by conducting an illegal search. Surely, that, in itself, is an immoderate statement because, the fact that a police officer, or for that matter, any other worker, makes a mistake does not ipso facto imply that that person is non-existent, as such. Indeed, practising lawyers and judges, like everyone else, are bound to make mistakes, albeit sparingly, but this does not mean that when they do, they cease to be practising lawyers, judges, etcetera. The adage "to err is human" is as significant as it is true.

Although judges, as such, should generally not be exposed to criticism because of the nature of their work, a member of the public, acting in good faith, may genuinely exercise a right of criticism, within proper limits and without in any way attempting to impute improper motives or to impair the administration of justice. Lord Atkin put the matter succinctly in *Andre Paul Terence Ambard v The A.- G. of Trinidad and Tobago*,(7) at page 709, when he said this:

> "But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong [is] committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public, a public act done in the seek of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men."

It is expected, however, that members of the public will exercise restraint in voicing public criticism of judges or other judicial officers, as to do otherwise may well amount to treading on dangerous ground.

It seems to me that, in the circumstances of this case, Mr Milner was exercising his genuine right of criticism and that he did so without malice or intention to impair the administration of justice, insofar as the third defendant is concerned. I agree that strong words were used but do not consider that these went beyond the defence of fair comment. This, however, should not be understood as giving a licence to administers or other members of the public to air their criticisms against judges or other Judicial officers as to do so may, in a proper case, amount to contempt of court or constitute defamation. In view of what I have said

above, it follows that I would uphold the third defendant's defence of fair comment and dismiss the action against them. In the circumstances of the case, there will be no order as to costs.

Insofar as the second and first appellants are concerned however, and, as Mr Kasonde properly conceded, the demand for an apology went beyond the defence of fair comment. It is totally improper that a member of the public should take it upon himself to call upon a judge, or any other judicial officer, acting in the course of his judicial function, to apologise to him, no matter how wrong that judge or other judicial officer may be. I, therefore, find for the plaintiff as against the first and second defendants.

I must now consider what quantum of damages should be awarded to the plaintiff. In his submission, Mr Kasonde said that nominal damages only could be given. I agree that the circumstances of this case attract no more than nominal damages. I will award a total of K500.00n to be shared equally by the first and second defendants.

Costs will follow the event and are to be taxed, in default of agreement.

Delivered in open Court at Lusaka this 29th day of May, 1984.

Judgment for the Plaintiff

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