ISAAC R.C. NYIRENDA v KAPIRI GLASS PRODUCTS LIMITED (1985) Z.R. 167 (S.C.)

SUPREME COURT
GARDNER, J.S., MUWO, J.S., AND BWEUPE, AG. J.S.
7TH JUNE, 1985
(S.C.Z.) JUDGMENT NO16 OF 1985.

Flynote
Tort - Libel - Qualified Privilege - Publication of letter to members of undertaking other than those in management - Industrial Relations Act Part VII - Common interest of all workers.

Headnote
The appellant was employed as a Purchasing Manager for the respondent. After five months he was summarily dismissed and his letter of dismissal, stating that the reason for terminating his contract was his inability to perform his duties to the respondent's satisfaction as a Purchasing Manager, was circulated to senior members of the respondent company, the Senior Labour Officer, the Chairman of the Works Council and other members of the work force in the respondent company. The appellant sued the respondent for damages for libel and the defence was qualified privilege. The claim was dismissed by the High Court; and he appealed to the Supreme Court.

Held:
(i) The publication to the Senior Labour Officer was not privilege because, owing to the date of the appellant's employment, he was not an employee about whose dismissal such officer was required by statute to be informed;
(ii) By virtue of s.69 of the Industrial Relations Act, relating to the promotion of effective participation of workers in the affairs of the undertaking, matters of competence or otherwise of managers are of common interest to all members of the undertaking, that is, both management and workers, and the communication to them was privileged.

p168

Legislation referred to:
Industrial Relations Act, Cap. 157, Part VII.

For the appellant: L.P. Mwanawasa, of Mwanawasa and Company.
For the respondent: D.A . Kafunda, of Manek and Company, .

Judgment
GARDNER, J.S.: delivered the judgment of the Court.

This is an appeal from a judgment of the High Court dismissing a claim for damages for wrongful dismissal and for libel.

The appellant was employed by the respondent as a Purchasing Manager and on the 15 of May, 1978, after working for five months and ten days, he was summarily dismissed and paid his salary up to the 16th May, 1978. The letter of summary dismissal stated that the reason for terminating his contract was his inability to perform his duties to the respondent's satisfaction as a Purchasing Manager, the post for which he was employed, and copies of the letter were circulated to some senior members of the respondent's organisation, the Senior Labour Officer, Kabwe, the Chairman of the Works Council, Chairman of the Party Committee, the Personnel Officer and the Security Officer of the respondent's company. The appellant claimed that he was wrongfully dismissed without three months notice to which he was entitled, and that the sending of copies of the letter to the persons mentioned therein amounted to the publication of libellous statement about the appellant, namely that he was incompetent in his job.

The respondent defended the action on the grounds that the appellant was on probation and, by the terms of his contract, he could be dismissed on twenty-four hours notice and that the words were not defamatory of the plaintiff and were published on an occasion of qualified privilege.

The relevant conditions of employment are set out clause 2.2 to 2.5 of the contract of employment which read as follows:

2.2 The company employs the employee on probation for a period starting on the commencement date and lasting for the period specified in the contract as the probation period or if no period is stated, three months. The company will before the end of that period either confirm the appointment in writing or dismiss the employee. Until this confirmation is given the employment shall be deemed to be probationary employment.

2.3 During the probationary employment the employee shall be entitled to no benefits other than his basic salary and the housing allowance.

2.4 During the probationary employment, the employment may be terminated by either party given not less than 24 hours notice in writing to the other.

2.5 Either party may terminate the employment at any time by serving not less than 90 days written notice on the other, such notice to expire on any day in the month.

Mr Mwanawasa on behalf of the appellant accepted that the appellant could not claim to be reinstated for wrongful dismissal, but claimed that, although the appellant had received what appears to be an exgratia payment of three months salary, he was still entitled to damages of occupation of company house for which he was required to pay only ten per cent of his salary. He argued that the paying of salary until the 16th of May 1978 was consistent with a payment of salary in lieu of twenty-four hours notice and the appellant was entitled to receive three months notice. He also argued that at the time when the appellant was dismissed he had worked for more than three months and that clause 2.2 of the contract should be construed as meaning that, if the company did not confirm the appointment or dismiss the employee at the expiry of three months, the employment could be deemed to be confirmed. This was so argued by Mr Mwanawasa because he said that by the terms of that clause the employment must be confirmed or dismissed by the end of the period of three months, after that date he argued, the probationary period could not continue. This argument ignores the words "until this confirmation is given the employment shall be deemed to be probationary employment." Some meaning must be given to these words and in our view their meaning is clear. They are intended to cover the situation, as in this case, where the employer does not either confirm the appointment or dismiss the employee within three months, in which event the probationary employment is deemed to continue. Without this construction, the words would be otiose. As the probationary employment continued it follows that it could be lawfully terminated by twenty-four hours notice in writing under clause 24. This ground of appeal must therefore fail.

In addition Mr Mwanawasa asked for leave pay for the appellant in respect of three months and eleven days during which he worked until he was dismissed. There was no claim for this payment in the statement of claim, and there was no evidence led in the court below as to whether or not there was an outstanding entitlement to leave pay. This claim cannot be entertained by this court.

As to the claim for damages for defamation the learned trial judge concerned himself solly with the evidence given by the appellant, about which he had the following to say:

> "No doubt the contents of the latter may have stated that the Plaintiff was incompetent to perform his duties as Purchasing Manager and might lower him in estimation of others in his capacity as Purchasing Manager. This however, is not the evidence of the plaintiff. He states that the sending of copies of the letter to the Chairman of the Works Committee, and the Security Officer

> make him feel a suspect. As I had said earlier I cannot see anything in the contents of the letter to suggest that the plaintiff was suspect of anything that was criminal."

For those reasons the learned trial judge did not consider it necessary to consider the defence of qualified privilege. However, Mr Mwanawasa has pointed out that the claim in the Statement of Claim was in respect of an allegation of incompetence and he asked this court to deal with this aspect of the case. We agree with Mr Mwanawasa that, regardless of the plaintiff's evidence (which he argues any event does not support the judge's finding thereon), the allegation of incompetence should have been dealt with at the trial. As is set out in Gatly on Libel and Slander (8th Edition) at para.38:

> "To say of a person carrying on any trade or profession or holding any once, that he is incompetent at it, may not even lower him in the estimation of others but the words will be defamatory be cause of the injury to his reputation in his trade, profession or office."

The letter of dismissal, stating that the reason for terminating the contract was the appellants inability to perform his duties to the respondent's satisfaction as a Purchasing Manager, was a clear allegation that he was incompetent in the Office of Purchasing Manager and we have no hesitation in finding that the words were defamatory. The appellant gave evidence that he had been an exemplary employee and no complaint had ever been made about the quality of his work. This was not contradicted by any evidence led for the respondent, who did not plead justification in the Defence.

With regard to the defence that the publication to the persons referred to was made on an occasion of qualified privilege, Mr Mwanawasa argued that the Senior Labour Officer and the Chairmen of the Works Council and Works Party Committees, the Personnel Officer and the Security Officer were not persons having corresponding interests. As to the Chairman of the Works Council and similar officers, he pointed out that section 71 of the Industrial Relations Act, Cap. 517 specifically provides that every Council shall be entitled to be informed of, inter alia, on appointment of senior management executives but makes no provision or notification relating to dismissal of such executives.

Mr Kafunda on behalf of the respondent argued that the very fact that the Council must be notified in respect of appointments was an indication of their interest in the termination of such appointments.

With reference to the other people to whom copies of the letters were sent, Mr Mwanawasa argued that the Senior Labour Officer could have no possible interest in the reasons for the dismissal of the appellant and certainly the Security Officer had no common interest in such matters.

Mr Kafunda argued that the respondent was under an obligation to inform the Security Officer because the latter had duty to know who

p171

had permission to enter the premises. He gave no reason why we Security Officer had common interest In the reasons for dismissal. In respect of the whole action he argued that the question of libel can only arise if the dismissal was wrongful and if the remarks were unjustified. As to the letter argument we have no hesitation in finding that the fact of dismissal, which we found was not unlawful by virtue of the terms of the contract, had nothing to do with the defamation. The defamation arose out of the alleged reasons for dismissal. As we have said, the question of justification was not pleaded nor was there any evidence to justify the allegation that the appellant was incompetent.

As to the publication of the letter of dismissal to the various persons referred to, we note first that the Personnel Officer shall be deemed to be a member of management under the provisions of section 76(1) of the Industrial Relations Act. With regard to the other persons to whom the letter of dismissal was sent who are also employed in the respondent's undertaking, we note that the provisions of Part VII of the Industrial Relations Act, Cap. 517, which relates to the establishment of works councils, provide, by section 69, that the principal objectives of each and

every council shall be, inter alia, to promote and maintain effective participation of workers in the affairs of the undertaking for which such council is established. Therefore, whilst section 71 provides for the council to be notified of decisions relating to only the appointment of senior management executives, we agree with Mr Kafunda that the previsions generally indicate that the council has an interest also in the termination of the services of senior management executives. We would go further and say that, in view of the indication of the legislature that there should be effective participation o workers in the affairs of the undertaking, matters of competence or otherwise of managers are of common interest to all members of the undertaking, that is both management and workers. It follows therefore that all workers in the respondent's organisation had by statute a common interest the running of the organisation and were entitled to know the reasons for the dismissal of the appellant. As all the addressees except the Senior Labour Officer had a common interest by virtue of the fact that they were participants the affairs of the undertaking, the defence of qualified privilege in respect of the publication to those people must succeed.

That leaves only the publication to the Senior Labour Officer, Kabwe, to be dealt with. The Employment (Special Provisions) Regulations, S.I. 135 of 1975, provides, by Regulation 4(1)(b)(ii), that an employer has a duty to notify the Senior Labour Officer of the dismissal of any employee and the circumstances concerning such dismissal. Regulation 3(1)(d) provides that those regulations shall not apply to any employee entering in to employment after the coming into effect of the regulations, that is, the 4th of September 1976. The appellant entered the respondent's employment with effect from the 5th of December ,1977, so the regulation to which we have referred does not apply to him. There was therefore no statutory duty upon the respondent to notify the Senior Labour Officer and in those circumstances we must find that the Senior

Labour Officer had no common interest in the circumstances and reasons for the dismissal of the appellant. We find that the publication to the Senior Labour Officer was not made on privileged occasion and the appellant is consequently entitled to damages for such publication.

In considering the quantum of damages to award for this limited publication of the libels we take into account the fact that it was very serious libel indeed to say of the appellant that he was incompetent in his job. There was no suggestion by the respondent that such an allegation could be justified, and, although there is no evidence to express malice, we must take into account the fact that the making of such a statement was reckless. Against that we also take into account the fact that we have found that there was only a very limited unprivileged publication of the libel. The appellant in his Statement of Claim asked for punitive damages but we cannot find that this is a case in which there was contumelious disregard of the plaintiff's rights or other circumstances to justify the award of exemplary damages. We award the sum of K500 as compensatory damages. We have taken into account in assessing this sun the rate of inflation since the tort was committed and there will be no interest to the date of this judgment.

The appeal in respect of the claim for wrongful dismissal is dismissed .The appeal in respect of damages for libel is allowed, with an award of K500 compensatory damages to be paid by the respondent to the appellant, together with costs both in this court and in the court below.

Appeal allowed in part