

CHIEF BRIGHT NALUBAMBA AND ZAMBIA CO-OPERATIVE FEDERATION  
LIMITED v MULIYUNDA WAKUNGUMA MUKUMBUTA (1987) Z.R. 75 (S.C.)

SUPREME COURT  
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.  
3RD SEPTEMBER, AND 22ND SEPTEMBER, 1987  
(S.C.Z. JUDGMENT NO. 20 OF 1987)

Flynote

Civil procedure - Defamation - Express malice - Necessity to plead.  
Tort - Defamation - Qualified privilege - Common interest.

Headnote

The first defendant was employed by the second defendant and circulated a letter to various organisations defamatory of the plaintiff who was also employed by the second defendant. In his statement of claim the plaintiff did not plead express malice. The first defendant pleaded, by way of defence, a common interest with the organisations circulated. At the trial, the court allowed in, at the instance of the plaintiff, a number of documents that dealt with matters of fact not pleaded by the plaintiff. The plaintiff did not amend his statement of claim to allege those matters. The court, in giving judgment, took into account the material matters raised in the documents. It found, by relying upon the documents, that although there was a common interest the defence of qualified privilege was defeated by malice and gave judgment for the plaintiff. The defendant appealed.

p76

**Held:**

- (i) The effect of the court's riling the documents was to allow an amendment to the pleadings and the admission of the documents was wrong. A party must plead all material facts on which he means to rely at the trial.
- (ii) That when there is a common - interest between the defendant and all the addressees of a circulated letter, without a plea of express malice, the defence of qualified privilege must succeed.

For the appellants: R.M.A. Chongwe, Chongwe and Co.

For the respondent. D.M.Luyuwa , Mwisya and Co.

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**Judgment**

**GARDNER, J.S.:** delivered the judgment of the court.

This is an appeal from a judgment of the High Court awarding damages for libel. In this judgment we will refer to the 1st appellants and second appellants and the respondent as the 1st and 2nd defendants and the plaintiff respectively.

The facts of this case are that the plaintiff was employed by the 2nd defendant as Managing Director and the 1st defendant is the Chairman of the defendant's Board of Directors. The 1st

defendant sent a circular letter on behalf of the 2nd defendant to a number of addressees and that letter was alleged by the plaintiff to contain defamatory statements about himself. The relevant portion of the Statement of Claim read as follows:

- "2. In a circular letter dated the 1st February, 1984, signed by the first defendant as Chairman of the second defendant addressed to all General Managers of affiliated organisations, Principal Marketing and Co-operative Officers and copied to Permanent Secretary, Ministry of Co-operatives, the Director of Marketing and Co-operatives, the Regional Director I.C.A. Regional Office, Mosh Tanzania, the Director, I.C.A. Headquarters, London, the Director, Swedish Co-operative Centre Stockholm, Sweden and the first defendant falsely and maliciously wrote and published of the Plaintiff and of him in the way of the said occupation employment and office and in relation to his conduct therein the following words."
2. "To suspend the Chief Executive of the Federation Mr M. W. Mukumbuta pending investigations into charges of failing to seek Board authority misrepresentation insubordination and disclosing confidential Government matters without authority . . . any other charges brought against during the course of investigation."
  3. "The said words are defamatory in their ordinary meaning and also by the words the First Defendant meant and was understood to mean that the Plaintiff had committed an offence under Official Secrecy Act and was unfit to retain his said employment or office and should be removed therefrom and was unreliable man . . . ."

p77

The Statement of Claim continued with an averment that the plaintiff had been injured in the way of his occupation, employment and office, and claimed damages. In the Defence on behalf of both defendants, paragraph 2 of the Statement of Claim was admitted, but paragraph 3 was denied on the grounds that the words used were - not understood to bear nor were capable of bearing or being understood to bear any meaning defamatory of the plaintiff. The fourth paragraph of the defence was a defence of qualified privilege on the ground that the plaintiff was employed as Managing Director of the 2nd defendant and the 2nd defendant published the statement complained of to the addressees because they all had a like duty and an interest to receive such information.

The judgment of the learned trial commissioner contained the following findings:

"I find from the pleadings that although on the face of it Document No. 1 appears to have been addressed to interested parties the manner in which it was written and the correspondence to addresses of the other documents were not made in good faith. There was the desire to tarnish the plaintiff's standing in society. Some of the documents which should have been marked confidential or secret were open to anyone's eye. It can safely be presumed that many people not concerned with the matter read some of the letters and went away convinced the plaintiff was not fit to hold any office of trust and responsibility. On a balance of probabilities I find the plaintiff has proved his case I enter judgment for the plaintiff. . . ."

Mr Chongwe on behalf of the defendants argued that a number of documents were admitted in

evidence and referred to by the learned trial commissioner when such - documents were not part of the pleaded libel nor were they admissible by virtue of any of the pleadings. In this respect Mr Chongwe referred us to Order 18 Rule 7 of the Supreme Court Practice (The White Book) and note 5 thereon to which reads in part:

"Each party must plead all the material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. . . . Moreover, if the plaintiff succeeds on findings of fact not pleaded by him the judgment will not be allowed to stand. "

On this authority, and on the authorities of the case cited in support thereof, Mr Chongwe argued that no documents alleging further libel, aggravation of the first alleged libel or put forward to prove malice to defeat the defence of qualified privilege should have been admitted in evidence or referred in the proceedings, he drew our attention to comments made by the learned trial commissioner in the course of the proceedings, indicating that the learned trial commissioner was at first of the same view. Mr Chongwe had objected to reference by the plaintiff in his evidence other than documents referred to in the Statement of Claim and the learned trial commissioner commented that one of the letters had not been properly pleaded or referred to in the Statement of Claim and went on to say "while the procedure in law should be followed,

p78

I find that legal technicalities can occasion a lot of injustice in a trial. As commented above and following Mr Mwisya's submissions these letters form part of the bone of contention. It will stand for the administration of justice to allow them without - prejudice the inclusion of the letters in the bundles and the admission of the letter." Mr Chongwe argued that the learned trial commissioner was right in his earlier comments about the requirement for the letter to be pleaded and wrong when he said that the letters can be admitted without prejudice; whatever that may have meant.

On this point Mr Luywa maintained that apart from the fact that the documents were properly admitted the learned trial commissioner did not rely upon them for his finding because he commenced such finding with the words:

"I find from the pleadings that. . . ."

As to the necessity to put in a reply alleging express malice to answer the defence of qualified privilege under the terms of Order 82 Rule 3 of the White Book, to which his attention was drawn by the court, Mr Luywa argued that this did not apply because, by admitting the truth of paragraph 2 of the Statement of Claim, which alleged that the words complained of were maliciously written, the defence of qualified privilege was not open to the defendants. He argued that by admitting that the words were maliciously written the defendants were misleading the plaintiff if they later attempted to plead qualified privilege which could only stand in the absence of malice.

Finally on this point Mr Luywa argued that the plaintiff gave evidence which was quite clear as to what was alleged against the defendants and it was for the defendants to give evidence in contradiction if they were able to do so. In the event he pointed out the defendants called no

evidence.

In resolving this issue we agree with Mr Chongwe that the remarks made during proceedings by the learned trial commissioner appeared at first sight to be contradictory. However, on a closer examination, the learned commissioner's words indicated that, whilst there were some irregularities and deficiencies in the pleadings, he would overlook these in order to allow justice to be done between the parties. Unfortunately in this respect he said that he would admit the documents "without prejudice." In the course of a trial nothing said or produced in open court can be without prejudice, and the effect of the learned trial commissioner's ruling on the documents was to allow an amendment of the pleadings without formal application therefore, and without giving an opportunity to the defendants to apply for an adjournment to answer the considerable extension of the original pleadings. In our view the admission of the documents by the learned trial commissioner was wrong, and his reference to them in his judgment was equally wrong. In this latter respect we cannot agree with Mr Luywa that the learned commissioner's words in his judgment indicated that he was coming to his conclusion solely on the pleadings. It is, instead, quite clear that the use of the words "and the correspondence to addresses of the other documents were not made in good faith. There was the desire to tarnish the plaintiff's standing in society," indicate that the learned trial commissioner was taking into account the contents of the letters complained of to the detriment of the defendant's case.

With regard to Mr Luywa's argument that, because the defendants had admitted in the pleadings that the words complained of were written maliciously, there was no need for a reply alleging express malice to answer the defence of qualified privilege, and, indeed, that such a defence was not now open to the defendants,

p79

we would refer to note 4 of Order 82 Rule 3 in the White Book. This note reads as follows:

"82/3/4 . . . In his statement of claim the plaintiff pleads that the defendant 'falsely and maliciously published' or 'falsely and maliciously spoke and published' the words complained of. But if the libel or slander is published without lawful excuse the law conclusively presumes that the publisher is actuated by that malice, which gives the injured party a cause of action and accordingly (notwithstanding O.18 r.12 (1) (b)), the plaintiff need not give particulars of the facts on which he relies in support of the allegation of malice. This is sometimes called 'malice in law.' But if there is a lawful excuse for the publication (as for example, where it is an occasion of qualified privilege) by which the inference of law is prima facie rebutted, the onus is thrown upon the plaintiff of proving their existence as fact of the malice necessary to maintain the action. The latter is sometimes called 'malice in fact' or 'express malice' (see e.g. *Harris v Arnott* (No. 2)(1890), 26 L.R. Ir. at p. 75; *Jones v Hulton*, [1909] 2 K.B. at p. 477) and the plaintiff must serve a reply pleading malice and giving the particulars referred to in para. (3) of this rule."

It will be seen from this comment that the original allegation of malice, which is presumed if there is no lawful excuse for the publication, is quite different from the express malice which defeats the defence of qualified privilege. In this case, by admitting the publication, albeit maliciously, of the

words complained of, and following such admission by a plea of qualified privilege, the contradiction in the defendants' position was more apparent than real. Mr Luywa is quite right when he says that the defence of qualified privilege can only succeed in the absence of malice. It follows therefore that, when it is put forward, the defendants are averring that there is no such express malice as will defeat the defence.

We find therefore that the learned trial commissioner was wrong to rely on the inadmissible letters in any way.

Of our own motion we raised with both counsel the question of whether or not the addressees of the circular letter complained of had sufficient common interest with the defendants' to justify the publication to them of the reasons for the plaintiff's suspension from duty. Our attention was drawn by Mr Chongwe to the evidence of the plaintiff himself that all the addressees had some association with the 2nd defendant. Mr Luywa argued that, whilst all the addressees would have had an interest in knowing who was the Managing Director of the 2nd defendant and therefore had an interest in knowing the reasons for the suspension, they had no common interest in knowing the reasons for the suspension. In fact argued Mr Luywa, some of the addressees were subordinate to the plaintiff and it was improper for them to hear such details.

We observe from the words of the learned trial commissioner's judgment that he

p80

impliedly found that all the addressees had sufficient common interest, but that the defence of qualified privilege was defeated by malice. Neither of the parties raised the question of the adequacy of the common interest either by way of appeal or by way of cross-appeal, and, although, by reason of the findings which we have made this court is at large, and is in as good a position as the court below to come to a conclusion on the pleadings and the evidence presented there, we do not consider that we have heard any argument to justify our interference with the implied finding by the learned trial commissioner that there was sufficient common interest between all the addressees and the defendants to justify the defence of qualified privilege. If we were called upon to decide the issue we would be of the view that the Managing Director of the 2nd defendant organisation must be a man of integrity and if there is a doubt about his integrity those doubts should be made known to all affiliated members of co-operative movements whether such members be below or above the rank of the person concerned. We would therefore find that there was a common interest with all the addressees of the letter complained of.

Although the defendants claimed in their Defence that the words referred to in the Statement of Claim were not defamatory of the plaintiff this question was not argued and the learned trial commissioner's judgment, although making no specific finding thereon, was delivered on the basis that the words were defamatory. We are quite satisfied that the words were defamatory consequently the plaintiff must succeed unless the defendants can establish the defence of qualified privilege without express malice. As we have indicated, there was a common interest between the defendants and all the addressees of the circular letter complained of and there was no plea of express malice or was there any admissible evidence of any express malice. It follows therefore that the defence of qualified privilege must succeed.

The final ground of appeal in respect of damages falls away. For the reasons we have given the appeal is allowed and the judgment of the High Court is set aside. The defendants' will be awarded the costs of this appeal and in the court below.

Appeal allowed

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