

**JONATHAN.W.M KALONGA AND ZAMBIA PRINTING COMPANY LIMITED v
TITUS CHISAMANGA AND JOYCE VINKUMBA (1988 - 1989) Z.R. 52 (S.C.)**

SUPREME COURT
NGULUBE, D.C.J., CHOMBA AND GARDNER, JJ.S.
27TH FEBRUARY AND 1987 30TH AUGUST, 1988
(S.C.Z. JUDGMENT NO. 10 OF 1988)

Flynote

Tort - Defamation - Exemplary damages - Publication to restricted group - Apology after writ served - Quantum of damages.

Headnote

In this case the first and second respondent were employed by the second appellant as a machine operator and book-binder respectively. The second appellant was general manager of the first appellant. At the material time the first appellant, at a meeting of the company, made allegations defamatory of the respondent and the following day set out those allegations in a letter sent to various very senior interested parties of the company. Both respondents sued claiming, *inter alia*, damages contumeliously committed against the first appellant for defamation in an endorsement to the writ. No formal pleadings were filed. After the issue of the writ the first appellant made an apology to the respondent. The Deputy Registrar assessed damages against both appellants to include exemplary damages on the basis that there was no apology. The appellants appealed.

The appellant argued that the Court should have taken into account when assessing damages that the publication was restricted and an apology was tendered. The appellants further argued that as there was only a claim against the first appellant in the endorsement no award could be made against the second appellant and that as exemplary damages were not pleaded as such they could not be awarded.

Held:

Where publication of the defamation is restricted, that was a matter which should be taken into account to reduce the damages. An adequate apology, no matter that it was tendered late, has the effect of extenuating the seriousness of the defamation and therefore of the quantum of damages.

Cases referred to:

- (1) Times Newspaper (Z) Ltd. v Wilfred Wonani (1983) Z.R. 131
- (2) Times Newspaper (Z) Ltd. v Lee Chisulo (1984) Z.R. 83
- (3) Cobbett Tribe v Zambia Publishing Company Ltd (1973) Z.R. 9
- (4) Rookes v Barnard [1964] A.C. 1129

Legislation referred to:

Rules of the Supreme Court 1985 (England)

Works referred to:

Halsbury Laws of England 3rd ed

For the appellants: Mr Kinariwala, Legal Services Corporation.
For the respondent: H. Silweya, Silweya and Company.
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Judgment

CHOMBA, J.S.: delivered the judgment of the Court.

This is an appeal arising from an award of damages made by an acting Deputy Registrar of the High Court against the two appellants, who in the Court below were, and to whom in this judgment we shall refer to as the first and second defendants respectively. The respondents, to whom we will refer to as the plaintiffs, instituted civil proceedings in separate actions against the defendant claiming damages for:

- (i) depriving each plaintiff of two days' wages;
- (ii) defamation of character alleged to have been committed both by word of mouth and by a letter dated 30th November 1983 addressed to both plaintiffs separately, accusing them of theft of examination papers and other educational books.

On their part, the plaintiffs have also cross-appealed against the said award of damages. The first defendant was the general manager of the second defendant, a parastatal company dealing in the printing of books.

At the time material to these proceedings, the first plaintiff was employed by the second defendant as a machine operator, while the second plaintiff was employed by the second defendant as a book-binder. The cause of action being common to both matters, the two separate actions were consolidated at the time of assessment of damages, and even at the time of the prosecution of the appeals before us they were argued as one. Therefore, we propose to treat them as one case for the purposes of this judgment.

In each of similar writs filed by the plaintiffs, the endorsement read virtually in identical terms as follows:

- "A. As against both the first and second defendants jointly and separately, the recovery of K . . . being the plaintiff's earnings for two days wrongfully and without lawful justification, and/or negligently allowed to be deducted from the plaintiff's salary from the 30th day of November and 1st December 1983; and an order of interim injunction restraining both the first and second defendants from dismissing the plaintiff from his/her current employment with the second defendants on the grounds that the plaintiff has sued the defendants or using any other ground in disguise to dismiss, frustrate and/or make him any more uncomfortable than he already is so as to make him resign before the end of the proceedings in Court in this action and generally for the maintenance of the *status quo* until further Court (orders) or final determination of this action by the Court.
- B. As against the first defendant alone and separately damages and losses suffered and being

suffered by the plaintiff for both slander and libel contumeliously committed and occasioned by the said first defendant in his statement to persons present at a meeting at the first defendant's office on the 29th day of November 1983, falsely stating at both occasions expressly and by innuendo that the plaintiff is a thief and was involved in the unauthorised sale of examination papers and disappearance of educational books brought to the premises of the second defendant by customers. The said first defendant made false statements, accusations, and/or charges maliciously and knowing the same to be untrue and unsupported by any evidence against the plaintiff and/or any conviction of the plaintiff in any Court of law."

The only difference in the endorsement on the writs relates to the amount claimed in respect of wages withheld over the two days, namely

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30th November 1983 and 1st December 1983 and also as to gender, having regard to the fact that the first and second plaintiffs are a man and woman respectively. In this regard, the first plaintiff's claim was for K19.98 while that of the second plaintiff was for K15.94.

The defendants failed to enter appearance to the writs and, therefore, judgments in default were entered against them severally. The two actions were eventually set down for hearing as to assessment of damages by the learned acting Deputy Registrar.

The short facts as determined by the learned acting Deputy Registrar were as follows:

On the 29th November 1983 the first defendant convened a meeting in his office and present were ten (10) members of staff, including both plaintiffs. The purpose of the meeting was to consider a report of theft of examination papers and National Education Company of Zambia (NECZAM) books. It was made apparent at the meeting that the two plaintiffs were the suspects. However, it transpired that no conclusive evidence against the plaintiffs was found. This notwithstanding, the first defendant on the following day wrote identical letters to the plaintiffs in the following terms:

"Dear . . .

re: **SUSPENSION FROM WORK**

This is to inform you that you have been suspended from duties for two days without pay with effect from today the 30th November 1983. You will report for duties on 2nd December 1983.

The suspension is in relation to the charges made against you by management and workers' representatives yesterday. You were suspected to have involved yourself with the disappearance and unauthorised sale of examination papers and educational books brought to us by customers for printing. All workers in this company are entrusted with the responsibility of handling confidential materials and money for final printing and production, but it seems you cannot be trusted as expected by management.

After the suspension period, you should report to the Acting Works Manager directly for further redeployment within Zambia Printing Company divisions. This suspension should be

treated as a final warning. Any further offences will force management to dismiss you from work instantly.

Yours sincerely,
ZAMBIA PRINTING COMPANY
(Signed)
J. W. KALONGA
GENERAL MANAGER
CC. Group Chief Accountant
CC. Personnel Manager
CC. Acting Works Manager
CC. Works Committee Chairman
CC. Works Council Chairman.'

At the hearing of the issue of assessment of damages the second plaintiff gave evidence but the other plaintiff was not called to testify on the ground that the substance of their respective cases was common cause. The evidence which the first plaintiff gave was as per the endorsement in the writ of summons and therefore, there is no need to review it in extenso. In outline the evidence of the second plaintiff was as per the short facts already reproduced herein and as determined by the learned acting Deputy Registrar.

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After reviewing the foregoing facts the learned acting Deputy Registrar couched the last paragraphs of his award in the following terms:

" In the case in question, the respondents wrote the letters of suspension on 30th November 1983 knowing very well that there was no evidence whatsoever to implicate the applicant as at 29th November 1983 when a meeting was convened to examine the report against each applicant.

As I have observed earlier on in this ruling that although there was an apology letter sent to the applicants, that was after these Court proceedings were initiated and communicated to the respondents and as such the apology will be ignored.

Had the defendants cautioned themselves in the light of poor investigations carried out they would have saved themselves from the position in which they find themselves now. I would, therefore, assess the damages at K3,000 from the first defendant and K3,000 from the second defendant as compensatory damages making it a total of K6,000. I would not consider exemplary damages in this case. Since those were not specifically pleaded, costs to be agreed or taxed."

It is fitting to state at this juncture that in as far as the claim relating to wages withheld from the plaintiffs was concerned, the defendant wrote letters to both plaintiffs intimating that the letter of suspension written to them on 30th November 1983 had been withdrawn and, therefore, that the wages withheld were to be paid to them. This undertaking was eventually respected and the payments were made. Therefore, for the purpose of this appeal, the only issue remaining relates to the award in respect of the alleged slander and libel.

At the hearing of the appeal before us, Mr *Kinariwala* of the Legal Services Corporation appeared for the defendants while Mr H. *Silweya*, of *Silweya and Company*, appeared for the plaintiffs. In the Memorandum of Appeal, the defendants put forward the following grounds of appeal:

- "(i) The acting Deputy Registrar erred in law in awarding compensatory damages in the sum of K3,000 against the second appellant when the respondent had in the writ of summons claimed damages in the alleged slander and libel against the first appellant only;
- (ii) The learned acting Deputy Registrar erred both in fact and in law in holding that exhibit "P1" was in any way libellous of the respondent;
- (iii) Having regard to the fact that the first appellant at all material times, namely, at the meeting held on 29th November 1983 as well as in addressing exhibit "P1" to the respondent, acted as the servant of the second appellant, the learned acting Deputy Registrar should have held that no personal liability could be attributed to the first appellant even if "P1", the letter dated 30th November 1983 addressed to the respondent, could be regarded as libellous to the respondent;
- (iv) In the *alternative*
The awarding of compensatory damages in the sum of K3,000 made by the learned acting Deputy Registrar against the first appellant is so manifestly excessive that no reasonable tribunal directing itself properly to the facts before it and the law applicable could have ever awarded the same;
- (v) In the further alternative
The award of compensatory damages in the sum of K3,000 made by the learned acting Deputy Registrar against the first appellant is not supported by the weight of evidence on record.

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Wherefore the appellants and each of them pray that:

- (a) In so far as the second appellant is concerned, the appeal be allowed, the award of compensatory damages in the sum of K3,000 made against it by the Court below be set aside and that the costs of this appeal be provided;
- (b) in so far as the first appellant is concerned, the appeal be allowed, the award of compensatory damages in the sum of K3,000 made against him by the Court below be set aside and that the costs of this appeal be provided for;
- (c) In the *alternative* in so far as the first appellant is concerned, the appeal be allowed, the award of compensatory damages in the sum of K3,000 made against him by the Court below be set aside and be substituted by such nominal award of compensatory damages as to this Honourable Court may appear to be just and reasonable having regard to the circumstances of the case."

In their cross-appeals, the plaintiffs advanced two identical grounds as follows:

- "(a) That the learned acting Deputy Registrar erred and misdirected himself as to the facts in stating that exemplary damages were not pleaded by the appellant when the plea for damages against the first defendant clearly appears in the claim endorsed at the back on the writ of summons and by the evidence on record;

- (b) that the learned acting Deputy Registrar erred in law in awarding compensatory damages only of K6,000 in exclusion of any sum that might have been considered just under the head of exemplary damages prayed for."

For the defendant's side the only person to give evidence was the first defendant and suffice to state that he denied both the slander and libel charges.

The argument in support of the first ground of appeal is briefly that the plaintiffs had, by their own expression in the endorsement on the writ, made a preference by making a claim against the first defendant only. The relevant part of the endorsement reads as follows: 'As against the first defendant alone and separately, damages and losses suffered and being suffered by the plaintiffs for both slander and libel . . . '

In response Mr *Silweya* argued that despite the choice of words in the writ the intention was to claim against the second defendant also, since, being the employer of the first defendant, the second defendant was vicariously liable. He referred to the supporting affidavit at paragraph 6 where the claim is stated to be against both defendants. He submitted that since there were no formal pleadings in this case the best he could do as counsel for the plaintiffs was to express the joint liability of the defendants only in the affidavit.

As we shall be stating in dealing with the third ground of appeal, when a servant commits a tort in the course of his employment his master is vicariously liable. However, the party who is injured by such tort is not compelled to sue the master jointly with the servant. At paragraph 241 of the 37th volume of the 3rd edition of Halsbury's *Laws of England* it is stated as follows under the rubric 'vicarious liability': 'The person who actually commits a tort is in general liable although in committing it he is acting as a servant of another person . . . '. Since the servant is personally liable, the injured party is free to elect to sue either the servant alone or to sue the servant and master jointly.

In the present case the plaintiffs, by their own writ, chose to single out

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the first defendant alone and separately in relation to the claim for damages for slander and libel. They cannot at this juncture be heard to say that the clear words they themselves have used were intended to convey a different state of affairs. We cannot therefore accept the submission from Mr *Silweya* that the intention of the plaintiffs should be discerned from the affidavit. We are constrained to repeat the obvious that a claim need not be stated only in the formal statement of claim. An endorsement on the writ is as good a statement of claim as a formal statement in a pleading.

We consequently allow the first ground of appeal.

The second ground was abandoned and therefore needs no further attention in this judgment.

In the third ground the defendants through their counsel, Mr *Kinariwala*, argued that in as far as the first defendant was at all times acting as a servant of the second defendant, no personal liability

should be attributed to the first defendant in relation to both the slander and the libel. This argument is not consonant with the legal position. The passage we have just quoted from Halsbury's *Laws of England* when dealing with the first ground is the one which reflects the correct position. That this is so is further buttressed by a passage to be found in paragraph 177 on page 108 of the 11th ed. of '*Clerk and Lindsell on Torts*' where it is stated that: 'The agent who commits a tort on behalf of his principal and the principal are joint tort feasers; so are the servant who commits a tort on behalf of his principal and the principal joint tort feasers; so are the servant who commits a tort in the course of his employment and his master.' In the light of these authorities we find no substance in the third ground and we reject it.

In ground four it was submitted that the K3,000 awarded to each plaintiff was so manifestly excessive that no reasonable tribunal directing itself properly as to the facts before it and the law applicable could have awarded that amount. This submission was based on two premises. Firstly, it was argued that the publication of the alleged slander was restricted to only 10 workers who attended the meeting on 29th November 1983 when the plaintiffs were accused of stealing examination papers and educational books. In addition the letter of 30th November 1983 in which the same torts were repeated was circulated only to a few officers. Secondly, it was argued that the fact that an apology was communicated to the plaintiffs by letters written to them on 20th March 1984 ought to have been taken into account by the learned acting Deputy Registrar in assessing the damages. If he had done so, it was argued, a lesser award would have been made.

Mr *Silweya* has argued on this ground that an award of damages is within the discretion of a trial Judge or Court and can therefore only be interfered with by an Appellate Court if it is either too high or too low so as to be erroneous in law. However, he conceded that in disregarding the apology tendered to the plaintiffs the Acting Deputy Registrar had misdirected himself. He also conceded that if the publication of the torts was restricted, that was a matter which should have been taken into account to reduce the damages.

In his ruling the learned acting Deputy Registrar did not address his

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mind to the issue that the publication of the slander on 29th November 1983 when the plaintiffs were accused of theft was restricted only to those workers present at the meeting and those officers who received copies of the letter dated 30th November 1983. The evidence was that only 10 persons were present at the meeting on 29th November 1983 and only four officers of the second defendant company, namely, the Group Chief Accountant, the Personnel Manager, the Acting Works Manager and the Works Committee Chairman received copies of the letter of 30th November 1983. It can therefore be said that the publication was restricted to fourteen persons but it would appear that this number includes the two plaintiffs themselves.

As regards the apology, this is what the learned acting Deputy Registrar had to say in his ruling - 'As I have observed earlier on in this ruling, although there was an apology letter sent to the applicant that was after these court proceedings were initiated and communicated to the respondents and as such the apology will be ignored.' The applicant referred to in this context is the second plaintiff who gave evidence, but as the circumstances of the two cases of the plaintiffs are on all

fours, this reference should be understood to be a reference also to the first plaintiff.

In the case of the *Times Newspapers (Z) Ltd v Wilfred Wonani* (1) this Court held, in the words of headnote (iii), that - 'an adequate apology is an important mitigating factor, since the object of awarding compensatory damages is never the infliction of punishment on the defendant.' In the case of the *Times Newspaper (Z) Ltd v Lee Chisulo* (2) we even went further and held that an adequate apology will in most cases virtually expunge the damages arising out of a defamation. We added that that was so even where such apology was tendered late.

Mr *Silweya* was right when he cited the law which lays down the rule that an appellate court will interfere with an award of damages only if such award is either too high or too low so as to be erroneous in law. This statement of the law was invoked in the *Chisulo* case (2) where this Court stated that an Appellate Court will not interfere with an assessment of the damages unless the lower Court had misapprehended the facts or misapplied the law, or where the damages are so high or so low as to be an entirely erroneous estimate of the damages to which a plaintiff is properly entitled.

There were two misdirections which the learned acting Deputy Registrar committed in regard to this ground: he failed to apply his mind to the fact that the publication of the words under consideration was restricted. In their submissions before us, both counsel for the respective parties were united in stating that the learned acting Deputy Registrar erred in not taking this fact into account when assessing the damages. However, it is not clear to us whether the acting Deputy Registrar's mind was directed to this factor during the hearing before him. Quite clearly, if his mind was not directed to this issue we would hesitate to hold that this misdirection, per se, would be fatal to the assessment. What we do find fatal is the glaringly wrong view he took of the law on the effect of an apology, no matter how belated, on the quantum of damages. An adequate apology, no matter that it is tendered late, has the effect of extenuating the seriousness of the tort of defamation and therefore of the quantum of damages.

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We consequently hold that the learned acting Deputy Registrar assessed the damages upon a wrong understanding of the legal position. On the authority of *Chisulo* (2), we have power to, and do in fact, interfere with the award.

We are now in a position to make our own assessment. Taking everything into account, we are of the view that a proper award in this case is one of K500 for each of the plaintiffs.

Regarding the fifth ground, this is merely an alternative of the fourth ground. As we have resolved the latter ground in favour of the defendants, we find no need to enter upon a discussion of this ground.

This leads us to the cross-appeal by the plaintiffs. In the first ground it is stated that the learned acting Deputy Registrar misdirected himself in fact in stating that exemplary damages were not pleaded. The argument in support of this ground is that, despite the failure to actually use the expression 'exemplary damages', the endorsement on the writ did amount to a claim of exemplary damages. To this argument Mr Kinariwala submitted that the endorsement did not amount to a

sufficient plea of exemplary damages. He further argued that there was no evidence to support and award for exemplary damages.

In each writ of the plaintiffs at page 11/1 of the record, endorsement B reads as follows: "As against the first defendant alone and separately, damages and losses suffered and being suffered by the plaintiffs for both slander and libel contumeliously committed and occasioned by the said first defendant in his statement and announcement to persons present at a meeting at the defendants' office on the 29th day of November 1983 and later by a letter dated 30th November 1983 falsely stating at both occasions expressly and by innuendo that the plaintiff is a thief and was involved in the unauthorised sale of examination papers and the disappearance of educational books brought to the premises of the second defendant by customers. The said first defendant made false statements, accusations and/or charges maliciously, and knowing the same to be untrue and unsupported by any evidence against the plaintiff and/or conviction of the plaintiff in a Court of law."

The rule of law on the pleading of exemplary damages requires that such damages must not only be specifically pleaded, but also that the facts relied on should be set out. The object of this rule is to give the defendant a fair warning of what is going to be claimed with the relevant facts and thus to prevent surprise at the trial; to avoid the need for an adjournment of the trial on this ground and at the same time to extend the ambit of the discovery at the trial (see Order 18, Rule 8/6 of the R.S.C., White Book 1985 Edition).

Despite the failure to use the expression "exemplary damages" it is clear to this Court that the claim was for damages in respect of a tort committed in contumelious disregard of the plaintiffs' rights. The word "contumelious" was actually employed. The new edition of Chambers 20th Century Dictionary defines this word as "haughtily insolent" and the noun "contumely" is shown as meaning "scornful insolence."

Doyle, C.J., stated, *inter alia*, in the case of *Corbett-Tribe v Zambia Publishing Company Ltd* (3) as follows: 'Prior to *Rookes v Barnard* (4), it was generally accepted that Mayne and Macgregor on damages (12th Edition

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(1961) paragraph 207) correctly stated the position in respect of punitive or, as they are now generally called, exemplary damages, where it was stated that such damages can only be given "where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiffs' rights."

As can be seen, therefore, the concept of exemplary damages is that the tort complained of should have been committed out of, for example, insolence. When this is so, Doyle, C.J., equates the position, on the authority of *Corbett-Tribe* (3) with a tort committed in contumelious disregard of the plaintiffs' rights. In our case the plea was that the slander and libel were contumeliously committed. Surely that description of the manner in which the torts were committed connotes the same concepts as that discussed in the short passage just cited from Doyle, C.J.'s, judgment. In addition the facts relied on were set out on the endorsement and these showed that the slander and

libel complained of were committed at the meeting held on 29th November 1983 and by the letter dated 30th November 1983. All these matters, in our view were enough to give the first defendant a warning of what was going to be claimed at the trial and so that the latter should not be taken by surprise at the trial.

Moreover, in his ruling at page 9 of the Record of Appeal, the learned acting Deputy Registrar held as follows in one paragraph: 'In the case in question the respondents (meaning the defendants in this appeal) wrote the letter of suspension on 30th November 1983 (that is the letter mentioned in the endorsement on the writ) knowing very well that there was no evidence whatsoever to implicate the applicants at 29th November 1983 when a meeting was convened to examine the report against each applicant.' The implication of this finding by the learned acting Deputy Registrar is quite clearly that the letter of accusation was written with insolence despite the lack of evidence implicating the plaintiffs in the alleged theft of examination papers and educational books. It can be concluded, therefore, that that letter was written and that the resultant tort of libel was committed, in contumelious disregard of the rights of both plaintiffs.

In the final analysis we find that the learned acting Deputy Registrar fell into error when he held that no exemplary damages were pleaded. The first ground in cross-appeal is therefore upheld. It must follow that in as much as the learned acting Deputy Registrar did not award exemplary damages he was equally in error. Consequently the second ground of the cross-appeal also succeeds. For the purpose of clarity we wish to state that of the two torts pleaded only the libel contained in the letter dated 30th November 1983, constitutes a contumelious disregard of the plaintiffs' rights. This is because it was written after the meeting of 29th November 1983, had failed to vindicate the accusation that the plaintiffs were thieves.

In assessing the damages to award under the head of exemplary damages we take into account that the libel was published only within the domestic confines of the Zambia Printing Company Ltd, namely, to three officers of that company named in the letter of 30th November 1983, the Chairman of the Works Council and the Chairman of the Works Committee.

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In addition, the evidence was clear that examination papers and educational books did disappear in circumstances suggestive of theft. The first defendant, as the then General Manager of the second defendant company, had clearly the duty to ascertain the culprits, although in doing so he became over-zealous and rash. Taking these circumstances into account we awarded K500 as exemplary damages to each of the plaintiffs. The total amount awarded to each plaintiff is therefore K1,000.

In view of the foregoing, each party will bear his own costs of this appeal.
Cross-appeal allowed.
