

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)
B E T W E E N:

SCZ APPEAL No.88 OF 1995

DR. LUDWIG SONDASHI

APPELLANT

AND

MULTI MEDIA ZAMBIA

RESPONDENT

Coram: Sakala, Ag. D.C.J., Chirwa and Muzyamba, JJ

8th February 1996 and 4th April 1996

For the Appellant: In person

For the Respondent: S.H. Lungu, Shamwana & Company

J U D G M E N T

Muzyamba, J.S. delivered the judgment of the court

AUTHORITIES REFERRED TO:

1. ZAMBIA PUBLISHING COMPANY LIMITED v KAPWEPWE 1974 Z.R. 294
2. KAPWEPWE v ZAMBIA PUBLISHING COMPANY LIMITED 1978 Z.R. 15
3. ABRATH v NORTH EASTERN RY (1886) 11 APA CAS 247

This is an appeal against a decision of the High Court dismissing the appellant's claim for damages for libel.

The facts of the case were that in 1987 in the Second Republic the appellant was a UNIP Provincial Central Committee member for North-Western Province. On 18th January 1987 the Sunday Times of Zambia published an article headed 'Tribal wrangle rocks Solwezi' in which it was reported that the appellant said, at a Civil Servants Union of Zambia meeting that nurses in the province who did not learn to speak local languages would not be recommended for promotion. The appellant comes from that province. The allegations were investigated by Mr. Elijah Mndanda then Chairman of the Appointments and Disciplinary Sub Committee of the Central Committee of UNIP and found to be false. In the Third Republic the appellant was appointed Cabinet Minister. In 1992 he was Minister of Labour and Social Security and Zambia National Provident Fund fell under him. On 20th March 1992 the Zambia Daily Mail published an article headed 'MPF workers. Strike. It's a Showdown - Sondashi'. The strike was about the appointment of Mrs. Dorothy Mulwile by the appellant as Director of Zambia National Provident Fund. In that article the appellant

is alleged to have told Union members of the Zambia Union of Financial Institutions and Allied Workers that if he did not appoint people from his province who would appoint them. At the trial the appellant testified that when he saw the article he telephoned the Editor and told him that he never uttered the words attributed to him and demanded for a retraction. No retraction came and the matter ended there. Against this background, the respondent in its weekly issue of the National Mirror for the week January 18th - 24th, 1993 invited the general public to make general comments and rate the Ministers. The invitation at page 60 of the record reads in part:

"JUDGE YOUR MINISTERS

It is now 13 months since the MMD government came to power. During this period a lot has happened. Some of the Ministers have already made headlines while others seem to be still "feeling" their way. We give you a rare opportunity to rate your Ministers. You can cut this page and send it to the Editor, or you can send a copy of it. We shall consider the results and publish them in a future issue. Next month you will have a chance to assess deputy Ministers."

There then followed the names of all the Cabinet Ministers at the time. Then in its weekly issue for the week 8th - 14th February 1993 the respondent published the offending article in which appear also comments affecting other Ministers. The article is in this manner:

"Mr. Sondashi is also branded an established tribalist, typical dictator, fairly nice minister, a Minister who welcomes new ideas but needs to work closely with people and he has betrayed the entire labour forces because of too much pruning, retrenchments and sacking of people".

The appellant then commenced an action against National Mirror for damages for libel. Later the name of the respondent who are the proprietors of the weekly issue was substituted. The learned trial Judge considered the defence of fair comment put up by the respondent and upheld it and dismissed the claim. In so doing she said at pages 11 - 12 of the record:

"In this case, the public was invited to judge their Ministers and they responded. The Plaintiff has shown that other newspapers had carried articles portraying him as tribalist. He cleared himself on the article which appeared in the Times of Zambia in 1987 but not the one in the Sunday Mail involving events at Zambia National Provident Fund when the Plaintiff was Minister of Labour and Social Security in March 1992. Ironically, the Defendant invited the public to Judge their Ministers in January 1993 when the Minister was still Minister of Labour and Social Security. It cannot be ruled out therefore that this could have been the basis for readers to have formed their opinions and to have judged the Plaintiff the way they did. To the extent that the article complained of also contained positive comment about the Plaintiff from some other readers, I find that the article was well balanced and there was no malice. More so that the article was not confined to the Plaintiff alone but all the Ministers serving at that time. The defence of fair comment on a matter of public interest therefore succeeds. The Plaintiff's claim is dismissed with costs".

There are 6 grounds of appeal as follows:

1. The learned trial Judge erred in law and fact by her failure to determine that the burden of proving that the comment was fair rested on the defendant and for her finding that the onus of "clearing himself" against the allegations of tribalism rested on the Plaintiff.
2. The learned trial Judge erred in law and fact by the failure to recognise and ensure that the defence of fair-comment does not succeed unless the statements so made are (a) fair, (b) statements upon which the comment is based are true, (c) that the statements were made honestly and (d) that the statements were facts not expressions of opinion.

3. The learned trial Judge erred in law and fact by finding that all the statements published by the defendants were fair, and that they were expressions of opinions and not facts and that they were not malicious.
4. The learned trial Judge misdirected herself in finding that the defamatory statements contained in the National Mirror article namely, that "he is a tribalist and typical dictator", "he has betrayed the entire labour force because of prunings, retrenchments and sackings of the people" can be cured by a balanced article.
5. The learned trial Judge misdirected herself when she found that a person holding public office was open to most searching criticism without qualifying that any man's moral character was not permissible subject of adverse and untrue comment.
6. The learned trial Judge erred in law and fact in admitting hear-say evidence of the article published in the Zambia Daily Mail of March 20, 1992.

Grounds 1 and 6 are inter-related. We shall therefore treat them as one. Equally grounds 2, 3 and 4 are inter-related and we shall also treat them as one.

It is common cause that a person defamed has no legal duty or obligation to clear himself of the defamatory allegations against him. That the duty to do so lies upon the author of the offending words. As regards the ground of appeal that the Daily Mail Article of 20th March 1992 was hearsay and ought not to have been admitted in evidence, the appellant agreed with the court that it was not hearsay and that it was admitted in evidence not as proof of its contents but as one of the materials upon which the general public based its opinion poll. This therefore disposes of grounds 1 and 6.

We will now deal with ground 5 and then grounds 2, 3 and 4.

At page 11 of the record the learned trial Judge said 'according to Hatley on Libel and Slander one who undertakes to fill a public office offers himself to public attack and criticism and it is now admitted and recognised that the public requires that a man's public conduct shall be open to the most searching criticism'. It was argued by the appellant that the learned trial Judge misdirected herself by failing to qualify the statement and find that a man's moral character was not subject to adverse and untrue comment. We fail to appreciate the appellant's argument here because the learned trial Judge merely recited an extract from the learned Author and then applied it to the facts of this case. Whether or not she applied it correctly is a different issue but certainly the question of qualifying the extract does not arise as she is not its Author. Moreover, the issue before her was not to what extent could a person holding a public office be criticised or be open to criticism but rather whether or not the criticism is/was malicious or a fair comment. This brings us to the last grounds 2, 3 and 4. On these grounds, the appellant argued that the words complained of were defamatory of him and to support this argument he cited the cases of ZAMBIA PUBLISHING COMPANY LIMITED (1) and KAPHEPWE (2) where this court held that to refer to a politician as a tribalist was defamatory and that the words betrayal of the interests of masses were defamatory and actionable. At page 10 of the record the learned trial Judge found that the words complained of were demeaning. In essence that they were defamatory. There is no cross appeal on this finding. Quite clearly therefore this is not an issue before us. The only issue is whether or not the words were uttered or published maliciously or were a fair comment and it is for the appellant to prove malice. Once malice is proved then the defence of fair comment falls away. On the question of malice the appellant argued that the respondent was reckless in publishing the article in that it made no effort to verify the opinion poll. That had it made any effort it could have found that the 1987 allegations against him were investigated and found false. Equally, that it could have found that he denied the allegations made against him in the Daily Mail Article of 20th March 1992. He further submitted that for the defence of fair comment to succeed it must be shown that the expression is one of opinion and not fact and made honestly. That an opinion based on non-existent facts cannot be said to be honest and therefore that the publication was made falsely and maliciously. And Counsel for the respondents, Mr. Lungu argued, and it is common cause that the 1987 events in Solwezi and the Daily Mail Article of 20th March 1992 might have influenced the public in expressing their opinion in the manner they did about the appellant. That the opinion poll based on these facts could not be said to be malicious but honest.

In support of his argument he cited SALMOND ON TORTS, 13th Edition at page 387 where the learned author says:

"It is essential to the plea of fair comment that defamatory matter must appear on the face of it to be a comment and not a statement of fact. To come within a plea of fair comment the facts on which the comment is based must be stated or referred to and the imputation must appear as an expression of the defendant's opinion on those facts."

Also at pages 389 and 391 where the Learned Author says respectively that 'the comment must not misstate facts; no comment can be fair which is built upon facts which are invented or misstated' and that 'the comment must be honestly believed to be true and not inspired by any malicious motive.'

We have carefully considered the evidence on record and the arguments on both sides and the authorities cited in support of these arguments. We are satisfied that the words complained of were a publication of the opinion poll expressed by the general public. We are also satisfied that the public opinion was based on the newspaper articles which were produced in court. We are further satisfied that at the time of the opinion poll the general public were not aware that the allegations against the appellant had been proved false or that the appellant had denied them. We are also satisfied that the respondent did not verify the opinions expressed by the public. The obvious question is were the comments not honest and was the publication of those comments inspired by malice. The answer to the first part of the question is obviously no because the general public believed that the facts upon which they expressed their opinions were true as they were not aware that the appellant had either denied those allegations or had been cleared.

As regards the second part of the question the fact that the respondent did not verify the opinions is not per se evidence of malice. And as Lord Bramwell said in ABRATH (3) 'a man may be the publisher of a libel without a particle of malice or improper motive'.

The court must therefore consider the offending article in its entirety and the occasion on which it is made to construe malice. The article in this case is a reproduction of

the public opinion about the appellant and it has two facets, the positive and negative things about the appellant. In resolving this issue this is what the learned trial Judge said, at page 12 of the record:

"To the extent that the article complained of also contained positive comment about the plaintiff from some other readers, I find that the article was well balanced and there was no malice. More so that the article was not confined to the plaintiff alone but all the Ministers serving at the time".

We would agree with the learned trial Judge that the way the article was published negatives any improper motive or malice on the part of the respondent. Had the respondent only published the negative aspect of the public opinion then the position would have been otherwise.

We would therefore, for the foregoing reasons refuse the appeal with costs to be taxed in default of agreement.

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E.L. SAKALA
SUPREME COURT JUDGE

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D.K. CHIRWA
SUPREME COURT JUDGE

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W.M. MUZYAMBA
SUPREME COURT JUDGE