PATRICK FUNGAMWANGO, ZAMBIA DAILY MAIL vs MUNDIA NALISHEBO

SUPREME COURT
CHIBESAKUNDA, J.S.
15TH JUNE, 1999 AND 27TH JANUARY, 2000.
APPEAL NO. 133/99

Flynote
Civil Law - Defamation of Character - Defense of Qualified privilege - whether applicable.
Defamation of character -quantum of damages - whether excessive.

Headnote
The respondent brought an action of defamation against the appellants in respect of three defamatory publications. The court held that two of the articles were about the respondent. The court also held that although the first article did not mention the name, the respondent had been suspended and that there was evidence that his friends, as a result of these publications, which were defamatory of the respondent, shunned him. The court awarded the respondent a total sum of K90,000,000 (45,000,000.00) general damages and (45,000,000.00 for exemplary damages). On appeal it was argued that the defence of qualified privilege was available to the appellants. Further that the quantum of damages awarded was excessive.

Held:
(1) The three publications referred to the respondent.
(2) The appellants did not try to check on the truthfulness or otherwise of the stories before publication.
(3) The conduct of the appellants was such that one could infer their own malice because they published the articles recklessly without bothering to check the facts.
(4) Taking into account the economic circumstances prevailing in the land the quantum of damages must be reduced to K30,000,000.00.

3Appeal allowed.

Cases referred to:

1. Mc. Carten Turking Breen v. The Telegraph plc. May 20th 1996.
2. Times Newspaper Zambia Limited v. Leemans Nyirenda & Veronica Mvunga S.C.Z. No. 14 of 1996.
3. Smith v. Steadfield (1911 – 1913) A.E.R., Page 362.
4. Kapwepwe v. Zambia Publishing Company Limited 1978 Z.R. 15.
5. Michael Chilufya Sata v. The Post Newspapers & Printpak Zambia Limited (1994) 1992/H.P./1395 .
6. Halsbury'Laws of England Vol. 24 page 54.
7. Clark v. Molyneux, 1997 3 Q.B.D., 237 pages 24, 82, 48.
8. Egger Vis & Others 1965 I.Q.B.C. P. 248.
9. Knuppfer Vs. London Express Limited (1994) A.C. 166.

For the Appellants: A. Wright, Malambo & Silwamba
For the Respondents: S. Sikota, Central Chambers Professor. P. Mvunga

Judgement

CHIBESAKUNDA, J.S.: delivered the Judgement in Court

In this appeal, although the appeal lies against both the findings of the lower court on the claim of damages for libel and punitive damages, the main issue before us is that of the quantum of damages. Mutale, J. at the High Court level awarded to the respondent a sum of K90,000,000.00 – (K45,000,000.00 general damages and K45,000,000.00 for exemplary/punitive damages).

The articles complained of, which gave rise to the claim and award of damages are as follows:-

> "Zambia Daily Mail, Monday, November 25th, 1996"
> WE PAID NEWSMEN FOR A FAVOUR – Z.I.M.T.
>
> A senior member of a non-government organisation (N.G.O.) has alleged that some journalists had received money from his organisation to facilitate biased coverage during the election period.
>
> And information and Broadcasting Permanent Secretary Laura Harrison said that the matter was a police case, saying those named would be asked to exculpate themselves before any action is taken.
>
> Zambia Independent Monitoring Team (Z.I.M.T.), vice-president Isaac Zimba alleged at press briefing yesterday that some journalists, whom he named, had been given substantial sums of money to give his organisation prominence in their coverage.
>
> Mr. Zimba alleged that one journalist had been given a substantial amount of money but has to date failed to account for the funds.
>
> Ms. Harrison in response to the allegations said as far as she was concerned the matter was already a police case and those mentioned would be given an opportunity to exculpate themselves before action is taken.
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> "As government we have a set procedure in which we operate and first we shall have to put the people mentioned on defence to exculpate themselves before we proceed with any action. These are serious allegations and we shall take appropriate action." She said. Ms. Harrison said that such behaviour was unacceptable as it compromised the profession."
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> "Zambia Daily Mail, Tuesday, November 26th, 1996"
> 6 NEWSMEN BANNED
> Scribes were paid to discredit polls?
>
> Six public media journalists reported to have conspired with Zambia Independent Monitoring Team President Alfred Zulu to discredit the just ended national elections have been suspended indefinitely.

Zambia National Broadcasting Corporation Board Chairperson who is also Permanent Secretary

for Information and Broadcasting Services Laurah Harrison, at a press briefing in her office announced the immediate suspension of Zambia Information Services Acting Deputy Editor, Nalishebo Mundia, Z.N.B.C. Commercial Manager, Abias Moyo, Z.N.B.C. Sub-Editor, Gershom Musonda, Manager radio 2, Charles Banda, and Kitwe-based Z.N.B.C. news Editor, Dominic Chimanyika.

Ms. Harrison said Z.N.B.C. producer Chibamba Kanyama is already on suspension for allegedly having received money from the Committee for a Clean Campaign. The journalists from Z.N.B.C. and Z.I.S. were allegedly serving as paid board member of Z.I.M.T. and were tasked to project a positive image of the organisation and promote the ideals of the opposition.

Z.I.M.T. Vice-President Isaac Zimba at the weekend named the suspended journalists, some donors, diplomats and former President Kenneth Kaunda as being involved in the conspiracy to declare the November 18 polls not free and fair.

Mr. Zimba alleged that the public media had been 'infiltrated' by hand-picked journalists who were on the payroll of Z.I.M.T. to influence public opinion on government and the election.

Mr. Zimba also alleged that the journalists were board members who were paid K200,000 per month by the organisation in addition to their Z.N.B.C. salaries."

"BETRAYAL OF A NATION PRESS STATEMENT

BY ISAAC ZIMBA VICE PRESIDENT

These journalists were appointed by Mr. Zulu contrary to the requirements of the law which demands that the board can only be changed by a General Meeting of an organisation. The journalists were recruited to Z.I.M.T. to project a positive image of the organisation and promote the ideals of the opposition.

These journalists include Z.N.B.C. Commercial Manager Mr Abias Moyo, Sub Editor, Mr Gershom Musonda – Manager Radio 2, Charles Banda in Kitwe Mr Dominic Chimanyika.

Zambia Information Services had been infiltrated through Mundia Nalishebo who has always been at hand to render assistance to Z.I.M.T. These Board members are paid K200,000 per month.

What is most disturbing is that Electronic Media has been used against a wider interest of the nation to promote C.C.C., F.O.P.D.E.P. and Z.I.M.T. For example C.C.C. gave Mr Chibamba Kanyama the sum of K21 Million Kwacha through his private personal company called Kabamba Chinyama Agencies to run the Race to Manda Programme. To date Mr Kanyama has failed to account for the money."

The brief facts of the case, which were not disputed, are that:

a. Zambia held the Presidential, Parliamentary and General Elections in November 1996;

b. A non-governmental organisation (N.G.O.), Zambia independent Monitoring Team (Z.I.M.T.), had established before declaring the election as not free and fair; and

c. They were rigged.

The respondent at the time was acting Director of the Zambia Information Services (Z.I.S.); the first appellant was an employee of the second appellant. The first appellant wrote the articles complained of. The first publication was on 25th November 1996. This was a press statement by the permanent secretary then, Ms. Laura Harrison, of Ministry of Information and Broadcasting Services who was the Chairperson of Zambia National Broadcasting Corporation (Z.N.B.C.). On 26th November 1996 there was another publication – a paid up advertisement of the press statement by Isaac Zimba , Vice-President of Z.I.M.T., called "Betrayal of a Nation". In this paid up advertisement, the respondent was named as one of the six journalists, who had conspired with donor communities, diplomats and former President Dr. K. Kaunda to fabricate stories on the 1996 Presidential and Parliamentary Elections. This article alleged that the six journalists had been put on Z.I.M.T. pay roll to be paid a stipend of K200,000.00 per month in order to be publishing false stories to build a good image of Z.I.M.T. in certain quarters. There was common ground that these publications led to the six journalists including the respondent to being suspended from their jobs in Z.N.B.C. The court below accepted all these facts and held that the two articles were about there respondent. The court held that although the first article did not mention the name, the respondent had been suspended and that there was evidence that his friends, as a result of these publications, which were defamatory of the respondent, shunned him. The court also found that the behaviour and conduct of the appellants was a gross affront to the rights of the respondent, in that they did not check the stories before publication, nor did they even attempt to talk to the respondent. They adopted a cavalier and reckless attitude towards the truthfulness or otherwise of the statements they published.

Before us the appellants relying on their heads of argument, submitted that they were going to only argue two grounds, that is grounds 3 and 4 and the quantum of damages. On grounds 3 and 4 they argued that the learned trial Judge misdirected himself at law when he decided that the appellants had neither public interest, nor duty to publish the words and/or articles complained of by the respondent. They argued that the learned Judge below misdirected himself on law when he held that the defence of qualified privilege was not available to the appellants. Citing *Halsbury's Law of England* (6), they argued that, on grounds of public policy or the general welfare of society the law affords protection on certain occasions to persons who act in good faith and without malice and indirectly or improperly make a statement about the other which in fact are untrue and defamatory. Such occasions are called "Qualified Privilege". They argued that the appellants were entitled to the defence of qualified privilege since the respondent did not prove that publication of the words complained of was done with malice. They made reference to *Halsbury's Laws of England* to the definition of malice, *Smith v Steadfield* (3) and argued that since the publication of the article, "the Betrayal of the Nation," was procured by Z.I.M.T. and the other article was a coverage of a press conference, neither Isaac Zimba nor Ms. Laura Harrison were actuated by malice, the appellants qualified for the defence of qualified privilege. Furthermore, they submitted that the trial court misdirected itself in placing emphasis on the fact that the appellant made no inquiry on the truthfulness or otherwise of the statements they published. According to them as was held in *Clark v Molyneux*, 1997 (7), the test is not whether or not the person who published made an inquiry in the truthfulness or otherwise of the statement but whether the person who published believed the statement to be true. They went on to refer to Section 9(1) of the Defamation Act, Cap. 68 which affords a publisher the statutory defence of qualified privilege except where the plaintiff can prove malice. They referred to section 9 (2), which provides that:

> "the defence is not available" if it is proven that, the Defendant has been requested by the Plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction and has refused or neglected to do so.,lkoi98."

On the question of quantum damages they argued that the damages which were awarded to the respondent were unduly excessive. They made references to a number of this Court's decisions which have established the principle that exemplary damages/special damages must at all times be specifically pleaded, together with the set of facts thereof, in particular the case of *The Attorney-General v. Martha Mwiinde* S.C.J. Judgement No. 4 of 1987 (1986). They argued that in this case the pleading did not include any references to special damages and that the respondent did not even establish by way of evidence the loss to make it possible for the court to determine the amount. They argued citing the case of *Kapwepwe v. Zambia Publishing Company Limited* (4) that even if the appellants may have acted in contumelious behaviour with regard to the complainant's rights the court must not automatically grant punitive or special damages. The court should consider first the total sum as an award for compensation and that this sum should take into account the aggravating conduct by the other side. They made reference to the case of *Michael Chilufya Sata v. The Post Newspapers Limited* (5) in which the court in its' assessing damages inter alia considered the fact that the court should not send chilling messages which would freely retract from the whole notion of freedom of the press.

The respondent in response relied on heads of argument filed and argued that the court did not misdirect itself in reaching the verdict which it did and in awarding the damages. They argued that it is a well established principle of law that the defence of qualified privilege is available in certain circumstances and that this defence falls into two categories:

1. Where the statement in question is
a. made by a persons who has
(i) a duty to make this statement or
(ii) an interest in making it and
b. the recipient/s of the statement has a duty or interest in receiving it.

2. Fair and accurate reports of certain proceedings or documents and statements.

They argued that in this case, the defence even if it was available was lost on account that the appellants did not exercise reasonable caution in getting the truth.

They also argued that press conferences are not public meetings and as such, no qualified privilege would attach to them vide *Mc. Carten Turking Breen v. The Telegraph plc.* (1). They furthermore added that since this was a paid up advertisement that itself removed any claim of malice or good faith as the main ingredient in the defence of qualified privilege. They argued that the appellants treated the whole episode in a cavalier fashion and recklessly with no regard to the impact of these publications. They refuted the suggestion that the appellants were merely agents of Zambia Daily Mail and Laura Harrison because no such relationship existed. Dealing with the quantum of damages, according to them the cases of *The Attorney-General v. S. M. Kapwepwe* (4), *Phillip Mhango v. Dorothy Ngulube and Others* and *The Times of Zambia v. Leemans Nyirenda and Veronica Mvunga* (2), would support the submission that the amount of K45,000,000.00 as general damages was sound taking into account on all the facts that aggravated the injury the respondents suffered.

We have taken time to seriously ponder over this case. We are satisfied that the learned trial Judge was on firm ground when he held that the articles complained of referred to the respondent. There is no doubt in our minds that the three publications referred to the respondent and that he could be identified as such. Indeed the respondent's name appears in two out of the three articles complained of and we are satisfied that even where his name was not mentioned, since the complained articles were read within the period of such publication

(two days or so) one could rightly in our view conclude that even the article published on 25th November, 1996 referred to respondent. This is the only reasonable innuendo to draw from that publication. We are satisfied that the law in *Knuppfer v. London Express Limited* (9) (1994) A.C. 166 does not apply, as this defamation was not directed at a class. We have addressed our minds to the common law and defense of innocent dissemination. This defence requires the person disseminating the information to establish that he did not know and had no reason to believe that the publication in question contained defamatory materials. In other words, he takes precaution. In the book Defamation and Law "Procedures and Practice" by David Prince and published by Sweet Maxwell 1997 page 108, the learned authors further state that a person who publishes for commercial purposes cannot claim under this defence. If he adopts a reckless disregard attitude towards the truthfulness or otherwise of such publication, the burden shifts to the publisher to establish the precautions he took before publication. In this case the appellants own witnesses at page 133 of the record of appeal testified that they did not try to check on the truthfulness or otherwise of the stories before publication.

So this defense is not available to the appellants.

We also agree with Mr Sikota that the appellants even added their own words, "Betrayal of the Nation", and even the words, "We paid newsmen for a favour – Z.I.M.T." We therefore uphold the learned trial Judge's findings on this point. The appellants have sought to persuade us to hold contrary views of the learned trial Judge that they are covered by the defence of qualified privilege. In general, damages lie for malicious publication of statements, which are false in fact and injure the character of another person. Malice in general is inferred from publications of false words unless such publications are made falsely by a person in discharging some public or private duty, whether legal or moral. In such cases the occasion prevents such inference of malice. There are three elements for the defence of qualified privilege to be available:

a. The occasion must be fit for qualified privilege;
b. The matter must have reference to the occasion; and
c. It must be published passing it from right and honest motives.

We are satisfied that the learned trial Judge was correct in holding that the two occasions may have been fit for such announcements. Also the news used had reference to the occasion – the occasion being that Z.I.M.T. had declared the 1996 Presidential and General Parliamentary Elections as not free and fair. Z.I.M.T. had declared that the elections had been rigged.

So the publication made reference to the occasion. But on the last ingredient we are not satisfied that the publication was based on right and honest motives because the publishers adopted a cavalier attitude as to truth or otherwise of the words, thus establishing that this publication was covered with malice. This was confirmed, in our view, by the usage of added strong words. The appellants had quite spiritedly canvassed the rule in *Egger v. Viscount* (8) submitting that although under the settled law of respondent superior an innocent principle is liable for the fraud or malice of his agent within the scope of that agent's authority, there is no principle equivalent to the respondent's inferior. Their point is that malice of the principal (Isaac Zimba and Laura Harrison) should not be attributed to the appellants as agents. We accept this argument. But in this case we are of the view that the conduct of the appellants was such that one could infer their own malice because we accept that they published these articles recklessly, without bothering to check the facts, without even talking to the respondent and also added some of their own words to the ones used by Isaac Zimba or Laura Harrison. Because of these reasons stated, we are unable to disturb the findings of the learned trial Judge.

As regards the quantum of damages we hold the considered view that both the Zambian and English authorities underscore the importance of balancing the protection of fundamental right to freedom of speech, freedom by the press on one hand and protection of individual's reputation on the other. In a case where a claimant is a public official who has been attacked in his character, the right to privacy may even by equivocal. We therefore take note of this cardinal ingredient in the development of democracy and human rights culture. The Honourable Mr. Chief Justice in the case of *Michael Chilufya v. Post Newspapers Limited and Printpak Zambian Limited* (5), had this to say on this same point:

> "..... it is my considered opinion that the constitutional protection of reputation and free speech or press can be balanced in Zambia where the plaintiff is a Public Official who has been attacked in that character, by a more generous application of the existing defences. The chilling effect of litigation would thereby be considerably cased by the Courts constantly seeking to promote free speech and press by keeping a careful eye on the size of awards which perhaps are the true chilling factor especially if they involve any exemplary or punitive element."

It is very obvious in this case that there are aggravating circumstances. The appellants showed contumelious disregard of the respondent's rights. Their conduct was reckless. They showed malice by failure to cross check the truthfulness and otherwise of the statements they published because there was ample opportunity for such cross checking before publication.

The appellants unsuccessfully tried to rely on the defence of qualified privilege. They have never apologised up to date. In addition, the statements published by the appellants allege criminal activities by the respondent, more or less bordering on treason. These are all aggravating factors. In our view, because of these aggravating factors, we are satisfied that although the respondent pleaded for exemplary damages without stating the particular facts, he is entitled to exemplary damages. However, taking into account the economic circumstances prevailing in this country and also the cardinal consideration, namely our courts should not send chilling messages to the newspapers, and the cardinal principle of freedom of the press, we have to disturb the quantum of damages awarded by the learned trial Judge. We order that the appellants pay to the respondent a sum of K15,000,000.00 as general damages and K15,000,000.00 as exemplary damages. We also order that the costs here and in the court below are to be borne by the appellants, to be taxed in default of agreement.
