

BEVIN NDOVI
v
POST NEWSPAPERS LIMITED
TIMES PRINTPAK ZAMBIA LIMITED

SUPREME COURT
CHIRWA., SILOMBA, AND MWANAMWAMBWA, JJS.,
10th February, 2009 and 27th August, 2010.
(S.C.Z. Judgment No. 8 of 2011)

[1] Tort - Defamation - Defence of fair comment - Whether available

The appellant appealed against the judgment of the High Court. By that judgment, the High Court dismissed the appellant's claim for damages for defamation against the respondents.

Held:

1. A defamatory statement is one which tends to lower a person in the estimation of right thinking members of society generally, as to cause him to be shunned or avoided or to expose him to hatred, contempt, or ridicule, or to convey an imputation on him disparaging, or injurious to him in his office, profession, calling, or trade or business.

2. It is a defence to an action for defamation that the statement is a fair comment on a matter of public interest. The rationale is that criticism ought to be, and is, recognised in any civilised system of law as indispensable to the efficient working of institutions, or offices. And as salutary for private persons who make themselves, or their work the object of public interest.

3. There are three requisites of the defence of fair comment. First, the comment must be an observation, or inference from facts; not an assertion of fact. Second, is that the matter commented on must be of public interest. Third, the comment must be fair, or objective; it should not be actuated by malice. Malice vitiates fair comment.

4. To allege that the appellant; a retired civil servant had secret meetings with named politicians, who were former Cabinet and Deputy Ministers, whom he met and knew, when he was a civil servant at State House, does not lower him in the estimation of right thinking members of society generally.

5. In a multi-party political system, there is nothing defamatory for a retired civil servant having a secret meeting with politicians whom he knew.

6. Article 20 of the Constitution gives freedom to any person, to receive information, and to impart and communicate such information to the public generally.

Cases referred to:

1. Davis v Shepstone [1886] 11 A.C.187.
2. Mwanza v Zambia Publishing Company Limited (1981) Z.R. 234.
3. Times Newspapers (Zambia) Limited v Wonani (1983) Z.R. 131.

Legislation referred to:

1. Constitution of Zambia, cap 1 Article 20.
2. Defamation Act, cap 68. s.7.

Works referred to:

1. Gatley on Libel and Slander 8 Edition, (1981).
2. Winfield and Jolowicz on Tort 17th Edition, (2006)
3. Halsbury Laws of England, 4th Edition, Volume 28.
4. Oxford Advanced Learner's Dictionary, 7th Edition.

L. Kalaluka of Messrs Ellis and Company for the appellant.

N. Nchito and T.P. Chirwa (Mrs) of Messrs MNB Legal practitioners, for the 1st respondent.

O. Sinkamba of Messrs Sinkamba Legal practitioners, for the 2nd respondent.

MWANAMWAMBWA, J.S.: delivered the judgment of the Court. The appellant is appealing against the judgment of the High Court of 11th August, 2006. By that judgment, the High Court dismissed the appellant's claim for damages for defamation against the 1st and 2nd respondents.

The facts of this matter are that by a letter dated 14th July, 2004, Major Richard Kachingwe, in his capacity as Deputy National Secretary of the Movement For Multiparty Democracy (M.M.D.), wrote a letter to Hon. D. Sokontwe, the then Member of Parliament for Chembe Constituency. The letter contained two charges. One of them alleged clandestine political meetings with named persons, who included the appellant.

Hon. Sokontwe responded to the charges and denied the allegations therein. He then gave his response to the 1st and 2nd respondents, with the view that they publish it. Indeed, they published his response. On 14th October, 2004, under an article entitled: "Levy is being misled Sokontwe", the 1st respondent published the response as follows:

".....Sokontwe is alleged to have been having clandestine meetings withBevin Ndovi."

On the same date, the 2nd respondent under an article headed: "Charges Baseless", published the response as follows: "Mr. Sokontwe was alleged to have between January, and August, 2004, attended clandestine meetings especially on April, 15, 2003, in Kabulonga with Mr. B. Ndovi". These are the publications which gave rise to the suit for defamation against the 1st and 2nd respondents. Mr. Bevin Ndovi gave evidence at trial, as the appellant's 3rd witness.

Before commencing legal proceedings, the appellant demanded from the 2nd respondent, an

apology over the publication. The letter did not demand damages. It is dated 15.11.2004, and is at page 127 of the record of the appeal.

On 25th November, 2004, the 2nd respondent published an apology in the Times of Zambia, which reads as follows:

“APOLOGY Mr. Bevin Ndovi was mentioned in stories that were published on November, 14th, 2004, and November, 20, 2004, concerning the expulsion of Chembe Member of Parliament, Mr. Dalton Sokontwe from the MMD. We sincerely apologise for any insinuations as a result of the said publication and unreservedly withdraw the mention of his name. EDITOR.” However, despite this apology, the appellant went ahead with legal action against the 2nd respondent.

The 1st respondent pleaded the defence of fair comment; saying: “that the words complained of are fair comment on a matter of public interest.” That was in addition to denial of the defamatory meaning the appellant had attached to the words complained of, as per paragraph 8 of the statement of claim. That paragraph reads:

“8 In their natural and ordinary meaning the words complained of in paragraphs 5 to 7 above meant or were understood to mean that the plaintiff is an ingenious, surreptitious and deceitful fellow with clandestine overtures.”

The 2nd respondent pleaded three defences. The 1st was justification that the words complained of: “are true in substance and fact”. This defence was pleaded in summary form. No particulars were given, as required by rules of pleading in this area.

The 2nd defence was estoppel that the appellant gave the 2nd respondent: “the impression that if an apology was tendered the matter would end there.”

The 3rd defence is denial. That the words complained of are not defamatory.

After evaluating the evidence, the learned trial judge dismissed the claim as against both respondents. He held that the respondents published the words complained of in execution of their duty to inform the public on matters of public interest. He found that it was a matter of public interest that Hon. Sonkotwe, P.W.3, had been charged by his then political party, the M.M.D, for allegedly holding clandestine meetings with other people whose names included the plaintiff. He observed that it was the plaintiff's 3rd witness, Hon. Sonkotwe, who gave the charge letter to both respondents, with the intended motive for both respondents to inform the general public by publishing the same in their respective newspapers, in fulfilment of their duty to do so. He added that the question of whether the contents in the charge letter were true or not was neither here or there. That the newspaper articles were simply to inform the reading public about the fact that the appellant's 3rd witness was charged with disciplinary charges by the M.M.D, and the details of the charges levelled against him.

As regards the 2nd respondent, the learned trial judge further held that the appellant was stopped from suing the 2nd respondent after asking the 2nd respondent to apologise, which the 2nd

defendant did, but without demanding also payment of damages by way of amends.

As per amended memorandum of appeal, there are three grounds of appeal.

The 1st ground is that the trial Court misdirected itself in law and in fact when it held that the 1st and 2nd respondents have a duty to inform the public on matters of public interest then they had a duty to make a full disclosure without due regard to the veracity and possible subsequent injury to third parties.

On this ground, the gist of Mr. Kalaluka's submissions, on behalf of the appellant, is that the 1st and 2nd respondents are duty bound to check the accuracy of any material they intend to publish. That the respondents ought to have taken steps to check the accuracy of the impugned material in this matter, or at least justify the failure to take such steps. That the respondents have no special rights to share any information about others without due regard as to how it may, be injurious to the reputation of others. In support of these submissions, he referred to:

- (a) Sata v Post Newspapers Limited (No citation given).
- (b) Times Newspapers (Z) Limited v Wonani (3).
- (c) Galley on Libel and Slander 8th Edition 1981, paragraph 695 and page 117.

In response on the 1st ground on behalf of the 1st respondent, Mr. Nchito and Mrs. Chirwa submit that the learned trial judge never found or held that the duty of the 1st and 2nd respondents was that of full disclosure without due regard to the veracity and possible injury to third parties. They submit that what the learned trial judge said, and did so on firm ground, was that if counsel for the appellant conceded that the 1st and 2nd respondents had a duty to disclose all the information to the general public on matters of public interest, then they had a duty to make a full disclosure of the story. They submit that the 1st respondent had a constitutional right to inform the general public on the expulsion of Hon. Sokontwe from the ruling party, which right it could not abrogate where the statement made was true and made on a matter of public interest. That the 1st respondent had a corresponding duty to inform the general public of this information. That it would have failed in its duty if it had withheld or altered any relevant information from them.

Further, they argue that the words complained of, in themselves and in the context, are not defamatory. In this regard they referred to the definition of defamation in *Mwanza v Zambia Publishing Company Ltd* (2), and paragraphs 8, of Volume 28 of Halsbury's Laws of England (3rd Edition). In the *Mwanza* case, defamation is defined as: "Any imputation which may, tend to injure a man's reputation in a business, employment, trade, profession, calling or office carried or held by him".

Halsbury defines a defamatory statement as one: "which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt, or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling or trade or business": See Volume 28, paragraph 10 (4th Edition).

Relating the definitions to this case, the statement complained of was an allegation that Hon. Sokontwe had a private or clandestine meeting with the appellant and other named persons. They point out that at trial the appellant admitted that he knew, and met Hon. Sokontwe. That it was also proven at trial that the other persons alleged to have been at the meeting were former Ministers and Members of Parliament known to the appellant. That the appellant admitted at trial that there was nothing wrong meeting them. That being the case, they argue that the allegation that the appellant had in fact met with people that he ordinarily associated with, cannot be said to be defamatory.

They argue that the appellant himself underscored the point that there was no defamation when he testified that his niece Miselo of Chirundu, phoned him and jokingly asked if he had become a politician. And when he further testified that people phoned him believing that he had joined politics. They argue that Zambia being a democratic country, it is not defamatory of a man to allege that he has been in a private meeting with politicians, or has become involved in politics.

It was also counsel's argument that the article published by the 1st respondent was a fair comment on a matter of public interest. They point out that the 1st respondent was reporting the reaction of Hon. Sokontwe to his expulsion from the M.M.D. that the defence of fair comment enables any member of the public to comment fairly on matters of public interest. That the article regarding Hon. Sokontwe was one of national nature, and therefore, of public interest. They referred to section 7 of the Defamation Act, cap 68 of the laws of Zambia, to support their arguments.

On verification, they argue that it was not necessary because, the gist of the article was a report of Hon. Sokontwe's response to his expulsion from the M.M.D. They argue that the only duty of the reporter was to confirm the response with Hon. Sokontwe, who was in fact the source and the M.M.D, who wrote the charge letter.

On behalf of the 2nd respondent on the 1st ground, Mr. Sinkamba points out that the appellant conceded at trial that the 1st and 2nd respondents had a duty to disclose all the information to the general public on matters of public interest, then they had a duty to disclose all the facts of the story complained of. He submits that the 1st and 2nd respondents were informing the public that the 3rd appellant's witness, Hon. Sokontwe, had been charged with disciplinary offence by the M.M.D, for allegedly having clandestine meetings with named people, who included the appellant. That there is evidence on record that in fact it was Hon. Sokontwe himself who gave the charge letter to the 1st and 2nd respondents, with the intention that it be published and inform the public in fulfilment of their duty to do so. He submits that it would not have been accurate reporting if some details of the charge, such as the name of the appellant was deliberately left out. He submits that it was inconceivable to have expected the two respondents to investigate the veracity of the charges because that had no bearing on the issues, that the appellant's 3rd witness had been charged over the alleged clandestine meetings. That the question whether the contents of the charge letter were true or not is neither here nor there. The newspaper article is simply informing the public about the fact that the appellant's 3rd witness was charged with disciplinary offences by the M.M.D.

We have examined the case record and the judgment appealed against. We have also considered the submissions and have looked at the authorities cited, on the 1st ground. Two defences were pleaded and argued in the Court below, and have been raised and argued again in the 1st ground. These are the defences of fair comment, and denial that the words complained are not defamatory. In the judgment, the trial judge did not specifically deal with them. He dealt with the claim on the basis of the respondent's duty to inform the public, full disclosure in the process of doing so, and the veracity or otherwise of the statement complained of. In this judgment, we intend to deal with the two defences in relation to the evidence on record. We wish to start with fair comment.

It is a defence to an action for defamation that the statement is a fair comment on a matter of public interest. The rationale is that criticism ought to be, and is, recognised in any civilised system of law as indispensable to the efficient working of institutions, or offices and as salutary for private persons who make themselves or their work the object of public interest. The legal position is that although criticism of government and of public functionaries was not always so freely allowed, as to day, it is now fully recognised as one of the essential elements of freedom of speech which is not to be whittled down by legal refinement: See Winfield on Tort 17th Edition [2006], pages 552-553. Winfield further states that there are three requisites of fair comment. One is that the comment must be an observation or inference from facts, not an assertion of fact. Second, is that the matter commented on must be of public interest. Third, is that the comment must be fair or objective; it should not be actuated by malice. Malice vitiates fair comment.

Gatley is of the same view. He defines comment as a statement of opinion on facts. He observes: "A libellous statement of fact is not a comment or criticism on anything. It is comment to say that a certain act which a man has done is disgraceful or dishonourable; it is an allegation of fact to say that he did the act so criticised." He adds that the facts upon which the comment is based must be true. That a writer may, not suggest or invent facts, or adopt as true or untrue statements of facts made by others and then comment on them on the assumption that they are true. That if the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail: See Gatley on Libel and Slander 5th Edition [1960], paragraphs 587, 588 and 600.

At paragraph 601, Gatley illustrates the operation of fair comment by citing *Davis v Shepstone* (1). In that case, the respondent was the Resident Commissioner of Zululand, South Africa. The appellants published in their newspaper, serious allegations with reference to the official conduct of the respondent. They stated that he had not only himself violently assaulted a Zulu Chief, but had set on his native Policemen to assault others. Upon the assumption that these statements were true, they commented upon his conduct in terms of great severity. At trial, it was proved that the allegations were absolutely without foundation. And no attempt was made to support them by evidence. The defence of fair comment failed, and the appellants were found liable.

In the present case, the 1st respondent published the words complained of as follows: "Levy is being misled Sokontwe....Sokontwe is alleged to have been having clandestine meetings with Bevin

Ndovi.....”

The 2nd respondent published similar words. Their article was headed: “Charges Baseless”. And the words complained of read: “Mr. Sokontwe was alleged to have between January, and August, 2004, attended clandestine meetings especially on April, 15, 2003, in Kabulonga withMr. B. Ndovi.....”

We are of the view that the words complained of against the 1st respondent are not fair comment as defined above; but a repetition of the allegations by the M.M.D. Therefore, the defence of fair comment was not established by the 1st respondent. We agree with Mr. Kalaluka that the defence of fair comment was not available in this matter.

We now move to the defence of denial that the words complained of in their natural and ordinary meaning are not defamatory of the plaintiff.

This defence must be considered in relation to the meaning of defamation. Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally, or tends to make them shun or avoid him: See Winfield, page 515. Whether given words are defamatory is a question of law. It is not for the plaintiff, or witness to say so.

On the pleadings and evidence, we are of the view that the words complained of against the 1st and 2nd respondents, in their natural and ordinary meaning, are not defamatory of the appellant. Clandestine means done secretly or kept secret: see page 257 of the new 7th Edition of Oxford Advanced Learner's Dictionary. In our view, to say that the appellant, retired civil servant, had secret meetings with named politicians, who were former Cabinet or Deputy Ministers, whom he met and knew when he was a civil servant at State House, does not lower him in the estimation of right-thinking members of society generally. In the context in which the words were published, they do not tend reasonable people to shun or avoid him. We would add that in a multi-party political system, we do not see anything defamatory for a retired civil servant having a secret meeting with politicians whom he knew. We wish to emphasize that the appellant placed a natural and ordinary meaning to the words complained of. We agree with counsel for the respondents that they are not capable of bearing the meaning assigned to them. The appellant did not plead a defamatory innuendo meaning.

On the facts of this case, we do not accept the argument by Mr. Kalaluka that the two respondents were under duty to check the accuracy of the words complained of before publishing them. There were two versions to the story complained of. One was by the M.M.D. Their version was that the clandestine meetings took place. The other version was by Hon. Sokontwe and the appellant. Their version was that the alleged clandestine meetings never took place. The 1st and 2nd respondents published both versions. This was clearly balanced reporting. The claim and denial having been both published, there was nothing to verify. We consider the Sata and Wonani cases, distinguishable on facts, and cited out of context.

Further, on the facts of this case, we are of the view that the learned trial judge was on firm ground when he held that if counsel for the appellant conceded that the 1st and 2nd respondents had a duty to disclose all the information to the general public on matters of public interest, then they had a duty to make full disclosure of the facts of the story. That holding finds support in Article 20 of the Republican Constitution which deals with protection of freedom of expression. That article gives freedom to any person, inter alia, to receive information and to impart and communicate such information to the public generally. In this case, the two respondents received information, in the form of a response, from Hon. Sokontwe, for them to communicate to the public generally. And they did just that. We wish to emphasize that this holding is based on the facts of this case with particular regard to the concession that was made at trial. We are not formulating a new defence in defamation law.

On the totality of issues, the 1st ground of appeal fails.

Ground two is that the learned trial judge erred in law and in fact when he held that the truth or otherwise of the impugned allegation is irrelevant for the question of whether or not the defence of fair comment succeeds. We have already dealt with the defence of fair comment in detail, in the 1st ground. What we have said in that ground covers ground two as well. We do not wish to repeat ourselves.

The third ground of appeal is that the learned trial judge erred in law when he held that the appellant was estopped from suing the 2nd respondent who had apologised after being requested to do so.

Having said in the 1st ground that the words complained of are not defamatory, we do not find it necessary to consider the 3rd ground.

All in all, this appeal is dismissed with costs to the 1st and 2nd respondents. These shall be taxed in default of agreement.

Appeal dismissed.