

ZAMBIA PUBLISHING CO LTD v ELIYA MWANZA (1979) Z.R. 76 (S.C.)

SUPREME COURT
GARDNER, BRUCE-LYLE, J.J.S., AND CULLILAN, A.J.S.
18TH JANUARY AND 6TH FEBRUARY, 1979
S.C.Z. JUDGMENT NO. 7 OF 1979

Flynote

Damages - Compensatory damages - Award in libel cases.

Civil procedure - Pleadings - Exemplary damages - Whether required to be specifically pleaded.

Tort - Defamation - Imputation of dishonesty - Allegation of drawing a salary which one is not entitled to - Whether defamatory - Imputation of dishonesty when one is holding a particular office which he has since left - Award of damages.

Headnote

This was an appeal by the defendant against an award of the sum of K15,000 damages for libel. The alleged libel was contained in an article published in the defendant's newspaper. It alleged that the plaintiff was drawing salaries after he had resigned from the post, and secondly that he resigned because someone else was made Acting General Secretary instead of himself being appointed.

The plaintiff contended that he was still the Assistant General Secretary and that the words complained of were published about him in the way of his said office. He further contended that the words were understood to mean that the plaintiff unjustly and dishonestly continued to recede salaries after he had resigned and that he resigned because of jealousy for not being appointed to the post of Acting General Secretary. The defendant argued inter alia that the judge erred in taking into account sufferings, mental anguish and social isolation since these were not pleaded.

p77

Held:

- (i) Exemplary damages must be specifically pleaded.
- (ii) To impute dishonesty of a man when he is holding a particular office which he has since left is still defamatory of him in general but damages in relation to that office *fall away*.
- (iii) To publish of a man that he has drawn a salary to which he is not entitled indicates in the context of the article complained of that he was doing so dishonestly and the imputation is clearly defamatory.
- (iv) injury to reputation and natural hurt to feelings need not be pleaded or proved.
- (v) The award of K15,000 compensatory damages was high taking into account the circumstances of the case. An award of K7,500 would be appropriate.

Cases referred to:

- (1) Zambia Publishing Co. Ltd v Kapwepwe (1974) Z.R. 294.
- (2) Cobbett - Tribe v Zambia Publishing Co. Ltd (1973) Z.R. 9.

- (3) Cassell v Broom, [1972] 1 All E.R. 801.
(4) Flint v Lovell, [1934] All E.R. 200.

For the appellant: M.S. Banda, Jaques & Partners.
For the respondent: M.A.A. Yousuf, Yousuf & Yousuf.

Judgment

GARDNER, J.S.: This is an appeal by the defendant against an award by the High Court of the sum of K15,000 damages for libel.

The alleged libel was contained in a newspaper article published in the defendant's newspaper on the 14th December 1974. The words complained of were published under the heading "ZRAWU accused of payment scandal" and continued:

"The Zambia Railways Amalgamated Workers' Union (ZRAWU) head office has again been put to trick by its own executive committee. This time, it has been accused of paying salaries to a top union official who resigned from the Union five months ago members have been complaining about Mr Mwanza's salaries since he resigned last July . . .

According to the ZRAWU executive sources, Mr Mwanza resigned in July this year immediately after Mr Ananiya Simwanza, general secretary was seconded to the Combined Union Stores in Kitwe. Instead of the union appointing Mr Mwanza as acting general secretary, they brought the national president Mr Reggie Nkonde from Lusaka to the head office in Kabwe to act while Mt Simwanza was in Kitwe managing the Union Store temporarily. This action is believed to have annoyed Mr Mwanza so much that he resigned his union post."

p78

The statement of claim set out that the plaintiff was at all material times Assistant General Secretary of ZRAWU and that the defendant had falsely and maliciously printed and published about the plaintiff and of him in the way of his said office the words complained of; it was claimed that the words within the general context of the article were meant and were understood to mean that the plaintiff had resigned in July, 1974, when he had not done so and that having resigned he unjustly and/or corruptly continued to receive salaries to which he was not entitled for a period of at least five months. It was further claimed that the words meant and were understood to mean that the plaintiff was disloyal to his union and fellow comrades and was doing a disservice to his union by refusing to serve it due to petty jealousy and a personal grudge against Mr Reggie Nkonde. The final paragraph of the statement of claim read as follows:

"(5) The plaintiff has in consequence been seriously injured in his character, credit and reputation and in the way of his said office, has been brought into public scandal, odium and contempt. AND the plaintiff claims damages".

There was evidence to the effect that the plaintiff was Assistant Secretary in ZRAWU and resigned from that position on the 13th of December, 1974. The day after his resignation the offending article was published by the defendant.

There was also evidence that the plaintiff was an active and highly respected member of the community having been, inter alia, Manager of the Zambia National Football Team, Chairman of Kabwe Warriors (a well known Zambian football team), a senior and active leader in the Reformed Church of Zambia in Kabwe, Chairman of the PTA of Mwashu School and a businessman. In his capacity as Chairman of the Zambia National Football Team he travelled widely with the team and his name was much publicised so that he was known throughout the country.

The plaintiff said, that, after the article was published, even his own wife and family insulted him. There was also evidence that the plaintiff was suspended from the committee of elders of his church as a result of the published article and the plaintiff lost his position as Chairman of the Kabwe Warriors team and ceased to be a Manager of the Zambia National team because doubts were raised about his integrity.

The defendant did not call any evidence but relied upon the argument that the article was not defamatory of the plaintiff because by letter dated the 16th of September, 1974, the plaintiff had given notice to ZRAWU that he intended to resign at the end of October, 1974. Although this letter was in fact written there was no dispute about the fact that the plaintiff's actual date of resignation was the 13th of December, 1974, and it was quite clear from the evidence that it was untrue to say that he had resigned in July and drawn a salary for five months without working.

On the 17th of December 1974, the plaintiff's solicitors wrote to the defendant pointing out the inaccuracy of the article and requesting

p79

an apology; despite further reminders no apology was forthcoming, and writ was issued.

The learned trial judge in his judgment found that the statement that the plaintiff had received salary to which he was not entitled was clearly defamatory and its publication damaged the reputation of the plaintiff. The learned judge went on to say:

"He was shunned avoided and ridiculed at times and to make matters worse insulted by his own wife and members of his own family . . . On the question of damages I find that the suffering, mental anguish, social isolation and other attendant matters have to be taken into account."

He then awarded K15,000 damages.

On behalf of the defendant, Mr Banda argued three grounds of appeal which could be summarised as follows:

- (1) that in assessing damages the learned trial judge failed to consider fully the various judgments of the Supreme Court, and in particular *Zambia Publishing Co. Ltd. v Kapwepwe* (1);
- (2) that the learned trial judge misdirected himself by taking into account the damage to the

plaintiff in his office of Assisting Secretary to ZRAWU when in fact at the time of the publication the plaintiff no longer held that office;

(3) that by taking into account the sufferings, mental anguish, social isolation and other attendant matters, the learned trial judge misdirected himself because no such matters were pleaded in the statement of claim;

(4) that the words complained of were not defamatory in that they were at least partially true because the plaintiff had given notice of his intention to resign from Union by the end of October 1974.

Mr Yousuf, on behalf of the plaintiff, argued that the award of K15,000 should not be reduced, having regard to the high public esteem of the plaintiff compared with the claimants in the cases of *Zambia Publishing Co. Ltd v Kapwepwe* (1), and *Cobbett - Tribe v Zambia Publishing Co. Ltd* (2), and having regard to the decline in the value of money since those cases were decided. He also argued that, in all cases claiming general damages for libel, it is proper for courts to take into account mental suffering, pain of a false accusation and mental pain or anxiety, as referred to in *McGregor on Damages*, 13th ed. para 1300, and that these considerations were covered by the pleadings which claimed that the plaintiff had been seriously injured in his character, credit and reputation. As to the question of whether or not the words complained of were defamatory, Mr Yousuf forcefully argued that to accuse a man of dishonestly receiving a salary for five months for doing no work was an imputation of dishonesty and clearly defamatory as found by the learned trial judge.

p80

During the course of the appeal the question arose as to whether this court, if it were to set aside the award of K15,000 damages, which was not defined and, therefore, accepted as being compensatory only, could take into account the conduct of the defendant in considering whether or not exemplary damages could be awarded by this court. In the event this question is answered by R.S.C.O. 18, r. 8 (3) of the English Supreme Court Practice 1976 (the White Book) which provides, by an amendment which came into force on the 1st of January, 1973, as follows:

"(3) A claim for exemplary damages must be specifically pleaded together with the facts on which the party pleading relies."

Although this amendment was probably introduced as a result of the decision of the House of Lords in the case of *Cassell v Broom* (3), which limited the circumstances in which exemplary damages could be claimed to three specific categories, and, although this court in *Zambia Publishing Co. Ltd v Kapwepwe* (1) disagreed with that case so far as it imposed a limited number of categories, the amended rule still applies to pleadings in this country under the provisions of the High Court Act, Cap. 50, s. 10. In this case a claim for exemplary damages was not included in the statement of claim and therefore such damages cannot be considered.

In arguing his second ground of appeal, which was dealt with as ground (1) in his heads of argument, Mr Banda quoted from *Gatley on Libel and Slander*, 7th ed. para. 168, which indicates that words which are calculated to disparage the reputation of the plaintiff in the way of any office held by him are actionable without proof of special damages but in such cases the plaintiff must

have held the office at the time when the words complained of were published. The paragraph in question deals with cases of slander which are actionable *per se*. The case before us is one of libel and in the words of the learned editor of *Gatley on Libel and Slander* at para. 143 "If the plaintiff proves that a libel has been published of him his cause of action is complete." As a general argument of course, it could be said that when, as in this case, the plaintiff has resigned from his office before the publication of the offending words, his damages in relation to that office fall away. However, to impute dishonesty of a man when he was holding a particular office, which he has since left, is still defamatory of him in general.

I now have to consider my view of the judge's finding that the words used were defamatory of the plaintiff. To say of a man that he has for five months, or indeed for any other period, been drawing a salary to which he is not entitled indicates in the context of the article complained of that he was doing so dishonestly, and I have no hesitation in agreeing with the learned trial judge that this imputation was clearly defamatory. The defendant did not put forward a defence that the words were true and, on the evidence, they were quite plainly untrue. The argument that the article was partially true has no merit whatsoever. The plaintiff did not resign in October as he originally intended to do; but, most importantly, he never at any time drew pay for a period during which

p81

he did not work. No other defence has been pleaded and the learned trial judge rightly found that the plaintiff was entitled to damages for libel.

In dealing with Mr Banda's ground of appeal to the effect that the learned trial judge should not have considered "the sufferings, mental anguish, social isolation and other attendant matters", I agree with Mr Yousuf that these considerations should properly be taken into account by any court considering damages for defamation in the light of the principles laid down in the cases referred to in para. 1300 of *McGregor on Damages*, 13th ed. and, although they may not be entirely covered by the words "injured in his character, credit and reputation", as set out in the statement of claim, I infer, from the comments of the learned editor of *Atkins Court Forms*, 2nd ed. (1975 issue), Vol. 25 at p. 72, that injury to reputation and natural hurt to feelings need not be pleaded or proved. I say that I infer this because the text specifically states that injury to reputation need not be pleaded or proved. This is followed immediately by a reference to natural hurt to feelings without any reference to necessity to plead and, thereafter, there is discussion on the necessity to plead aggravated damages, wherein the text states that it is apparently not essential to plead the facts of aggravated damages but indicates that it is desirable to do so. I would hold, therefore, that the learned trial judge did not misdirect himself when he took into account mental anguish and other matters.

I come now to the question of the quantum of the awarded sum. As I have already pointed out, the reference, in the statement of claim and in the argument, to the damage to the plaintiff's reputation in his office is not strictly relevant in the case of libel, but the general allegation his dishonesty in that office obviously affects his reputation in relation to any other office to which he may aspire in the future. I have taken note of the fact that in the case of *Cobbett - Tribe v Zambia Publishing Co. Ltd* (2), the claimant, who was a practising advocate and Vice - President of the Law Society of Zambia, was accused in a newspaper of being one of a "bunch of ignorant lawyers who hardly

understand the law and are fortune seekers". Doyle, C.J., in that case had no hesitation in finding that the words were defamatory and awarded the sum of K2,000 compensatory damages. This award was made in January, 1973. Subsequently, other cases have been decided in connection with appropriate damages for defamation, and in particular the case of *Zambia Publishing Co. Ltd v Kapwepwe* (1). In that case compensatory damages of K15,000 were awarded for the publication of a cartoon indicating that the claimant was tribalistic and was in the pay of a foreign country opposed to the interests of Zambia. There was also a claim on account of an allegation that the cartoon depicted the claimant as a weak man. This court rejected the latter claim; but, in any event, Doyle CJ, held that the award was entirely excessive. The other two members of the court agreed with him and the award for compensatory damages was reduced to K7,500.

In considering the powers of this court to interfere with the assessment of damages by a judge sitting alone I have referred to the well

p82

established authority of the case of *Flint v Lovell* (4), in which Greer, L.J., said at p. 202:

"This court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled."

With respect I entirely agree with that statement of principle and indeed, it has been followed with full approval since it was first made. I have also considered Mr Yousuf's arguments that in the case at present before us the plaintiff was a highly respected figure in the community because of his association with nations sporting bodies and was known throughout the country as a man of high reputation; that the plaintiff in the *Cobbett - Tribe* case (2), although a highly respected member of the community was known to fewer people than the present plaintiff, and that the claimant in the *Kapwepwe* case (1) was, although known through out the country, of high repute only to a limited number of the community. I have also taken into account the declining value of money since the authorities in 1972 and 1974 to which I have referred. Despite these considerations however, I am bound to say that I find that the award of K15,000 compensatory damages as being so extremely high as to be an entirely erroneous estimate of the damages to which the plaintiff is entitled. For this reason I would set aside the award made by the learned trial judge and assess a new award after taking into account the plaintiff's high reputation, the actual results of the libel and the potential results of the libel. I would also take into account the nature of the libel and the imputation of dishonesty as compared with the imputations contained in the other cases to which I have referred.

During the course of the appeal it was drawn to our attention that, although an apology was requested from the defendant, it did not seek the protection of s. 12 of the Defamation Act, Cap. 70, by publishing such an apology. In my view, apart from the fact that there is no mitigation of damages, this is an aggravating factor to be taken into account and I would accordingly award

compensatory damages in the sum of K7,500.

The appeal should be allowed, the award of K15,000 damages set aside and, in its place, there should be substituted an award of K7,500 compensatory damages. The plaintiff having been successful in the court below, the order for costs in that court should stand. The defendant having been a successful appellant in this court should be awarded the costs of this appeal.

Appeal allowed
