

FREDERICK KUNONGONA MWANZA v ZAMBIA PUBLISHING COMPANY
LIMITED (1981) Z.R. 234 (H.C.)

HIGH
CULLINAN,
14TH NOVEMBER, 1980

COURT

J.

Flynote

Tort - Defamation - Libel - Whether imputations of inefficiency and unsuitability for the post held are defamatory.

Tort - Defamation - Libel - Plea of justification - When available.

Tort - Defamation - libel - Whether statement held in honest belief and or reasonable grounds could be said, to be malicious.

Headnote

The plaintiff a General Manager of UBZ brought an action for defamation. The action arises out of an article published in the issue of the defendant company's daily newspaper "Zambia Daily Mail." The article entitled "Is UBZ Meeting Its Obligations?" alleged *inter alia* that the plaintiff did not care for the masses, that he was incompetent in his appointment as General Manager of UBZ, and that he was unsuitable for the office he held. The plaintiff's plea was "popular" innuendo; while the defendant pleaded justification, fair comment and qualified privilege. The issue before the court was whether such imputations of inefficiency and unsuitability for the post held are defamatory.

Held:

- (i) Any imputation which may tend to injure a man's reputation in a business, employment, trade, profession, calling or office carried on or held by him is defamatory.
- (ii) In a plea of justification the defence that a matter of opinion or inference is true is not that the defendant truly made that inference, or truly held that opinion, but is that the opinion and inference are both of them true.
- (iii) If the defendant honestly believed his statement to be true, he is not to be held malicious merely because such belief was based on any reasonable grounds; or because he was hasty, credulous, or foolish in jumping to a conclusion, irrational, indiscreet, pig-headed or obstinate in his belief; further the

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defendant is not to be held malicious merely because he was angry or prejudiced, even unreasonably prejudiced against the plaintiff, so long as he honestly believed what he said to be true.

Cases referred to:

- (1) Sutherland v Stopes, [1925] AC 47; H. L. Printed Cases, 1924.
- (2) Mumba v Singoyi (1975) SJZ (H.C.) 79.
- (3) R. v Russel (2/12/1905) - (Unreported).
- (4) Manitoba Press Co v Martin (1892) 8 Manitoba R. 50.

- (5) Adam v Ward, [1917] A.C. 309.
- (6) Mallan v Bickford (1915) South Australia L.R. 47.
- (7) Eastern Province Co-operative Marketing Association Limited v Zambia Publishing Co. (1970) S.J.Z. 164.
- (8) Bingham v Gaynor (1911) 203 N.Y.R 27.
- (9) Webb v Times Publishing Co, [1960] 2 All E.R. 789.
- (10) London Artists v Littler, [1968] 1 W.L.R. 607.
- (11) Banks v Globe & Mail Ltd (1961) S.C.R. 474.
- (12) Horrocks v Lowe, [1972] 3 All E.R. 1098.

For the plaintiff: A M Mtopa Esq., Zulu and Company.
 For the defendant: R N Fernando Esq., HH Ndhlovu Esq., Jacques & Partners.

Judgment

CILLINAN,J.: This is an action for libel.

The action arises out of an article published in the issue of the defendant company's daily newspaper "Zambia Daily Mail" concerning the United Bus Company of Zambia (UBZ). The article is entitled "Is UBZ Meeting Its Obligations?" and contains *inter alia*, duplicate photographs of the plaintiff. The plaintiff has selected some eight extracts in the article as being defamatory. His statement of claim in part reads as follows:

"4. On Friday, 4th April, 1975, the Defendant in the aforesaid Zambia Daily Mail falsely and maliciously published of and concerning the Plaintiff to the public at large the following words, viz:

1. 1st Para: "I am a busy man, and I do not want you to waste my time do you hear? As far as I am concerned, I don't care about what the masses say: they are always complaining in Livingstone, on the Copperbelt - everywhere, I have more important things to worry about than the masses' complaints about bus services. Is that clear?"

2. 2nd Para: "So raved the General Manager of the United Bus Company of Zambia (UBZ), Mr Frederick Mwanza, as he booted me and my photographer out of his office recently after making an appointment with him".

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3. 8th Para: "However, those good old days are no more. Nobody knows now when the next bus will arrive - it may take hours before it shows up."

4. 9th Para: "In Makeni, residents and their families are lucky if they catch a bus once in a blue moon."

5. 10th Para: "Surely, how can somebody starting work at 7:30 or 8:00 hours catch a bus at 5:30 hours?"

Which wife, however loving she may be, would willingly wake up at 5:00 hours just to prepare some breakfast for her husband? Or is this the way Mr Mwanza has chosen to show the masses that he does not care "a damn" about their complaints?"

6. 14th Para: "Now let us listen to the voices of the people, which Mr Mwanza despises so

much."

7. 18th Para: "While one appreciates the fact that UBZ is not being subsidised by the Government as other parastatal organisations, one still feels that the company would make a lot of money for itself if only it employed the right people to run the buses. For it is actually poor organisation of buses that is ruining UBZ.

8. 34th Para: "The reason for this is quite clear. If bus services were efficient - if there was a bus after every fifteen minutes at a bus stop during rush hours and passengers were made to stand in clean queues by UBZ officials even before the arrival of buses to prevent the formation of crowds - pick pocketing would die a natural death or what does Mr Mwanza think?"

"5. The said words in their natural and ordinary meaning meant and were understood to mean that the plaintiff did not care for the masses, that he was incompetent in his appointment as General Manager of UBZ, and that he was unsuitable for the office he held".

The plaintiff has pleaded a "popular" innuendo in the latter paragraph. It is necessary to examine the effect of each of the eight extracts from the article to which objection is made where possible, and also their total effect. The first extract, which must be read with the second extract, obviously imputes a certain arrogance, and directly indicates a marked indifference towards the wishes of the public, the very customers of UBZ. As to the second extract, the use of the word "raved" I consider, apart from being inappropriate, indicates no more than anger: I do not see that the right-thinking man would construe the word "booted" in the physical sense, but would construe it to mean that the writer and his companion were peremptorily directed to leave the particular office: to my mind the second extract indicates no more than anger and rudeness. The third, fourth and fifth extracts must be taken together; they clearly indicate an inefficient, indeed chaotic bus service; the last sentence of the fifth extract, particularly the use of the words " . . . is this the way Mr Mwanza

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has chosen to show the masses . . ." to my mind suggests that the plaintiff as General Manager of UBZ was directly responsible for and again was completely indifferent to such inefficiency. The sixth extract clearly repeats the allegation of arrogance and indifference. I do not see that the seventh extract, in the eyes of the right-thinking man, necessarily suggests that the plaintiff was not one of the "right people": it does repeat the allegation of overall inefficiency however and in the context of the other extracts is linked to the plaintiff. The eighth extract contains no more than a helpful suggestion and does not in my view necessarily contain any imputation against the plaintiff, except to repeat the allegation of overall inefficiency as linked with the plaintiff.

Taken together the extracts to my mind directly accuse the plaintiff of arrogance and indifference towards the passengers on UBZ buses. While they may not suggest incompetence, they do in my view certainly suggest inefficiency on the part of the plaintiff. As to the alleged arrogance and indifference, the extracts must be read to suggest that the plaintiff can hardly be a fitting person to hold the post of General Manager of a national bus company established to provide a service to the common man.

The question is whether such imputations of inefficiency and unsuitability for the post held are

defamatory. The following extract is to be found at paragraph 57 of Gatley on *Libel and Slander* 7 Ed:

"Any imputation which may tend to injure a man's reputation in a business, employment, trade, profession, calling or office carried on or held by him is defamatory. To be actionable, words must impute to the plaintiff some quality which would be detrimental, or the absence of some quality which is essential, to the successful carrying on of his office, profession or trade."

I have no doubt that to impute arrogance and indifference towards the customers of UBZ and inefficiency and the management thereof to the plaintiff, is detrimental to the successful conduct of the plaintiff's business, may tend to injure him in that business, and is therefore defamatory of the plaintiff.

The defendant pleads justification, fair comment and qualified privilege. As to justification, a defendant must justify not only the statements of facts but also the statements of opinion and inferences contained in a libel. As Lord Shaw said in *Sutherland v Stopes* (1) at p.75.

"In a plea of justification the defence that a matter of opinion or inference is true is not that the defendant truly made that inference, or truly held that opinion, but is that the opinion and inference are both of them true. "

While the defendant in the present case sought to justify the statement of the plaintiff's alleged behaviour on the occasion of the press interview, and hence the imputation of unsuitability for the post held, he made no attempt to justify the imputation that the plaintiff himself was inefficient. The latter imputation alone is materially defamatory and I cannot then see how the plea of justification can succeed.

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The plea of fair comment is in the full form, that is in the form often referred to as "the rolled-up plea". I take it to be a plea of fair comment however-see the dicta of Lord Finlay in *Sutherland v Stopes* (1) at pp. 62/3, quoted in *Mumba v Singoyi*, (2) at pp. 83/85. The defendant's plea is as follows:

"In so far as the words set out in paragraph 4 of the Statement of Claim consist of statements of fact they are true in substance and in fact, and in so far as the said words consist of expressions of opinion they are fair comment made without malice on the said facts which are a matter of public interest."

The main fact alleged is of course the words spoken by the plaintiff when interviewed. The plaintiff denied using such words. He testified that he granted the interview on the basis that the visitors apparently sought permission to interview passengers on the rural bus services. Indeed the reporter, a Mr Phillip Chirwa, questioned him about Lusaka schedules. At this stage he called his secretary into his office to clarify the matter. She confirmed his impression of the agreed object of the interview. She left the office and he declined, despite the dissatisfaction and insistence of his

visitors, to discuss the Lusaka bus service, as he had not prepared any data in respect thereof. The visitors were ushered out, the interview having lasted some thirty minutes.

The plaintiff's secretary and a secretary of the Chief Accountant confirmed that nothing unusual occurred as the visitors left the plaintiff's office, but admitted that they were busy typing at the time. On the other hand Mr Chirwa testified that he and a photographer Mr Chimavu sought the interview, informing the plaintiff's secretary that he wished to hear the plaintiff's comments on complaints he had received from members of the public. When he announced this purpose to the plaintiff the latter became annoyed and shouted for his secretary. The latter in her evidence confirmed that the plaintiff was in fact annoyed when she was called into his office. Mr Chirwa testified that he suggested that the plaintiff should make some comment on the complaints which he, Mr Chirwa, had received, as otherwise the article, which the newspaper intended to publish, would be unbalanced without comment from the management. It was then that the plaintiff expressed himself as indicated in the newspaper article. Mr Chirwa testified that he brought with him to the interview a note-book and pen, which aspect is confirmed by the plaintiff's own Secretary. He testified that as the plaintiff spoke he managed to record at least the gist of his remarks, concealed by the plaintiff's high desk in doing so. He explained that he tended to conceal the act of writing from a person who when interviewed proved to be aggressive, as in the plaintiff's case.

The relatively brief contents of the notebook, produced in evidence, indicate that the words published in the newspaper article were substantially correct. Mr Chirwa was cross-examined at length by the learned counsel for the plaintiff, Mr Mtopa, on the contents of the notebook and in effect on the authenticity of the relevant entry. The notebook

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contains entries dated before and after the interview of the plaintiff. The manner of writing in the entry related to the interview is similar to that in other entries, that is, displaying no regard for the ruled lines of the notepaper, bearing all the signs of having been written hastily by one intent more on the surrounding activities. Suffice it to say that there is nothing to show that the notebook is other than a genuine document.

It is significant to note that the plaintiff, even on the evidence of his secretary, was clearly angry at the outset. It seems unrealistic to suggest that Mr Chirwa and Mr Chimavu sought permission to interview passengers. The article published, covering almost a full page and containing some 39 paragraphs, contained an amplitude of complaints from passengers interviewed, lending support to Mr Chirwa's version that they had already interviewed passengers and sought managerial comment. I do not appreciate why an interview was granted on the basis suggested by the plaintiff, when his secretary could well have informed those enquiring that the question of permission to interview passengers just did not arise. I do not appreciate why the plaintiff had prepared data in respect of rural bus services and was prepared to discuss such but not the Lusaka bus service, if it was the case that the visitors had initially intimated that they sought only permission to interview passengers. Again, if it was the case that the plaintiff refused upon request to discuss the Lusaka bus service and terminated the interview there and then, I fail to appreciate how the interview could have lasted some 30 minutes. On the issue of credibility therefore I accept Mr Chirwa's evidence and I am

satisfied that the plaintiff spoke the words contained in the first extract of the newspaper article. In as much as the second extract contains slight exaggeration of language, I find nonetheless that the first and second extracts are substantially correct.

There is fact and comment mixed in the other extracts. The defendant did not call any witness to prove the relevant complaints against UBZ. Nonetheless the plaintiff never seriously challenged any of the complaints. It is significant indeed that he selected only eight extracts from 39 paragraphs which contain a large body of complaints from named passengers. In his own evidence he admitted, with particular respect to the third extract, that "the nature of bus services were not as satisfactory as a bus service should be..." and then proceeded to detail the Company's ills and needs. As to the fourth and fifth extract he stated no more than that time tables were in existence and that buses when available were dispatched. In cross-examination he admitted to shortcomings in the services rendered. I am satisfied therefore, on a balance of probabilities, that the statements of fact contained in other than the first and second extract are also correct.

As to the aspect of fair comment I find the dicta of Lord Hewart, C.J., in *Sutherland v Stopes* (1) at p. 375, reproduced in paragraph 732 of Gatley, particularly instructive:

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"Again as Bray, J., said in *R v Russel* (3):

" When you come to a question of fair comment you ought to be extremely liberal, and in a matter of this kind - a matter relating to the administration of the licensing laws - you ought to be extremely liberal, because it is a matter of which men's minds are moved, in which people who do not know, entertain very, very strong opinions, and if they use strong language every allowance should be made in their favour. They must believe what they say, but the question whether they honestly believe it is a question for you to say. If they do believe it, and they are within anything like reasonable bounds, they come within the meaning of fair comment. If comments were made which would appear to you to have been exaggerated, it does not follow that they are not perfectly honest comment.' That is the kind of maxim which you may apply in considering whether that part of this matter which is comment is fair. Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view - could a fair minded man have been capable of writing this? - which, you observe, is a totally different question from the question. Do you agree with what he has said?"

As Bain, J., said in the Canadian case of *Manitoba Press Co. v Martin* (4) at p. 70,

"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 interest requires that a man's public conduct shall be open to the most searching criticism."

I consider that those words can well be applied to the post of General Manager of a parastatal organisation.

When it comes to statements of opinion the fifth and sixth extracts contain imputations of arrogance and indifference on the part of the plaintiff and indeed unsuitability to hold office. In view of the words uttered by the plaintiff at the interview, such imputations, in my view, arise out of such words and are no more than expressions of comment based thereon. I cannot but see that prima facie such comment is fair, on a matter of public interest.

There is the remaining imputation of inefficiency on the part of the plaintiff. It seems to me that in a situation which suggests wide spread inefficiency in a parastatal organisation, where complaints are widespread, where the General Manager thereof expresses indifference to such complaints, it is no more than fair comment to impute that the General Manager shares in the general inefficiency. I am satisfied therefore that the plea of fair comment is prima facie well founded.

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The defendant company also pleads that it was under "a public moral duty" to publish and the public had "a like interest to receive and read" the defamatory words.

There are many authorities on the scope and extent of qualified privilege. Perhaps the most widely applied dicta are those of Lord Atkinson in the case of *Adam v Ward* (5) at p. 334:

"It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

In the case of *Mallen v Bickford* (6) Murray, J., observed:

"It may be accepted as a well-established rule that some duty or interest must exist in the party to whom the communication is made as well as in the party making it. The duty or interest may be common to both parties, but this is not essential. It is enough if there is a duty or interest on one side, and a duty or or interest or duty (whether common or corresponding or not) on the other. But the duty or interest must have actual existence. Mere belief on the part of the person making the communication, however honest, that the person addressed has a duty or interest will not afford immunity".

As to whether or not qualified privilege extends to a newspaper on a matter of wide public interest I have been greatly assisted by the judgment of the late Hughes, J., (as he then was) in the case of *Eastern Province Co-operative Marketing Association Limited v Zambia Publishing Co.* (7) at pp. 169/172, which incidentally is cited at p. 226 (footnote 70) of Gatley. Hughes, J., in his learned judgment quoted paragraph 493 of Gatley, 6th Ed., (see paragraph 494 7th Ed.) based on the authority of *Bingham v Gaynor* (8):

"So no privilege will attach to a complaint as to the conduct of a public official if it is given out for publication in the newspapers in advance of its delivery to the proper authority for investigations."

That paragraph seems to say that the occasion will be privileged if the relevant authorities, rather than the public, are first informed of the complaint. That as I see it conflicts with the widely accepted dicta that an occasion is privileged where a duty or interest exists. If a publisher is not protected by qualified privilege in publishing to the public, then I fail to see how he gains such protection by first referring the complaint to the relevant authorities. Either the occasion is privileged or it is not.

Hughes, J., reviewed the dicta of Pearson, J., in *Webb v Times Publishing Co.* (9) where Pearson, J., suggested the need for a plea of " 'fair information as a matter of public interest'," holding that provided the publication has both appropriate "status" and appropriate "subject matter", that is, matter of public interest in the sense of "a legitimate and proper interest as contrasted with an interest which is due to idle

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curiosity or a desire for gossip", it is protected. In the case of *London Artists v Littler* (10) Cantley, J., had occasion to also consider the dicta of Pearson, J., at pp. 614/620. He quoted (at p. 619) the following dicta of Cartwright, J., in *Banks v Globe & Mail Ltd* (11):

"The decision of the learned trial judge, in the case at bar, quoted above, appears to involve the proposition of law, which in my opinion is untenable, that given proof of the existence of a subject matter of wide public interest throughout Canada without proof of any other special circumstances any newspaper in Canada (and seem to be therefore any individual) which sees fit to publish to the public at large statements of fact relevant to that subject-matter is to be held to be doing so on an occasion of qualified privilege."

Cantley, J., continued (at p. 619),

"The cases to which I have referred show a uniformity of approach. In my view the privilege for publication in the press of information of general public interest is confined to cases where the defendant has a legal, social or moral duty to communicate it to the general public, or does so in reasonable self-defence to a public charge, or in the special circumstances exemplified by *Adam v Ward* (5). A duty will thus arise where it is in the interests of the public that the publication should be made and will not arise simply because the information appears to be of legitimate public interest."

In my view the emphasis is to be placed on the words "special circumstances" used by Cartwright, J., and Cantley, J., in the above passages. Cantley, J., in my view succinctly summarises the test to be applied when he says that the publication must be in the interests of the public and not just of legitimate public interest.

Hughes, J., in the *Eastern Province Co-op. Marketing Association* (7) case observed (at p. 172):

"The subject matter of the published complaint consists of no more than an allegation of favouritism by the plaintiffs in dealing with their employees. This was not a matter

involving the interest of the public at large justifying its publication in the national daily press. For these reasons the defence of qualified privilege fails."

In the particular circumstances of that case I respectfully agree with that conclusion. In the present case however the multiple complaints against UBZ contained in the newspaper article were of wide and legitimate public interest. The management of UBZ affected no doubt the vast majority of the population in their daily lives, indeed in the conduct of their business. As I see it, not alone were the public interested in the contents of the article but it was in their interests that they be appraised of the widespread complaints of others and of the arrogance and indifference of the principal officer of the company. While the complaints might well have been addressed to the plaintiff's superior officers,

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nonetheless I consider the public were entitled to be appraised of the state of affairs in UBZ, so that they could in turn make representations in the matter and thus indirectly improve the services to which no doubt they made daily contribution. In my view the special circumstances of this case indicate that publication was in the interests of the public and that the defendant company was under a social if not moral duty to publish to the public at large.

The plaintiff claims that the defendant acted with malice. Here I adopt the dicta of Lord Denning in *Horrocks v Lowe* (12) at p. 1101, where he quoted thus from paragraph 774 of *Gatley* 6th Ed.:

"If the defendant honestly believed his statement to be true, he is not to be held malicious merely because such belief was based on any reasonable grounds; or because he was hasty, credulous, or foolish in jumping to a conclusion, irrational, indiscreet, pig-headed or obstinate in his belief.

To that string of adjectives, I would add that he is not to be held malicious merely because he was angry or prejudiced, even unreasonably prejudiced, against the plaintiff, so long as he honestly believed what he said to be true. Such is the law as I have already understood it to be."

While the language in the newspaper article in this case may suffer from slight exaggeration, nonetheless I see no evidence of malice therein. As to the defendant's conduct, he saw fit to subsequently publish a very long letter from a member of the public in warm praise of the plaintiff's conduct of UBZ business. I am not satisfied that the defendant acted with malice and the claims of fair comment and qualified privilege therefore succeed. I give judgment to the defendant and dismiss the plaintiff's claim.

Plaintiff's claim dismissed
