

GENERAL MALIMBA MASHEKE & OTHERS AND ZAMBIA DAILY MAIL LIMITED

SUPREME COURT
LEWANIKA, DCJ., SAKALA AND MAMBILIMA JJS,
18TH JUNE AND 30TH AUGUST, 2002.
(SCZ APPEAL NO. 23 OF 2002)

Flynote:

Assessment of damages – libel – amount of damages.

Headnote:

This was an appeal against an assessment of damages by the Deputy Registrar. The plaintiffs obtained a judgment in default of defence. The appellants, the plaintiffs in the court below commenced an action for libel against the Respondents – entitled “UNIP RIFT DEEPENS” which was published on the front page of the Times of Zambia dated 1st June 1998. The learned Deputy Registrar at assessment declined to award damages to one of the plaintiffs and awarded 3 million Kwacha to each plaintiff. The appellants appealed.

Held:

- (i) That it is a misdirection at assessment to consider the issue of liability.
- (ii) The learned Deputy Registrar ought to have considered or discussed the imputation of the plaintiffs and their standing in society.

Appeal allowed.

Cases Referred to:-

1. **Fungamwana and Zambia Daily Mail Vs Nalishebo SCZ No. 1 of 2000.**
2. **Michael Sata Vs Post Newspaper Limited and Printpak (Zambia) Limited 1992/HP/1395.**

For the Appellants: Mr. C. Mundia of Mundia & Company.
For the Respondent: Mr. A.K. Mukata of Nemesis Chambers

Judgment

Sakala, JS, delivered the Judgment of the Court

For convenience, we shall refer to the appellants as the Plaintiffs and the Respondent as the Defendant which designation they were in the court below.

This is an appeal against an assessment of damages by the Deputy Registrar. The Plaintiffs obtained a judgment in default of defence. The Plaintiffs commenced an action by way of a writ of summons against the Defendant claiming damages for libel. The libel was contained in an article headed “UNIP RIFT DEEPENS” published by the Defendant on the front page of the issue of the Zambia Daily Mail Newspaper dated 1st June, 1998. It was common cause that at the material time the Plaintiffs held very senior positions in their party. To appreciate the

nature of the libel, it is necessary to set out the article complained of in full. The article stated:-

Suspended UNIP Secretary General Sebastian Zulu has been accused of misusing millions of Kwacha belonging to the party meant for the districts by spending the money on personal tours.

Mr. Zulu and his camp. Have also been warned not to provoke the situation at the party headquarters, Freedom House, by forcing their way into the offices.

UNIP Secretary for Information and Publicity, Bwendo Mulengela, alleged at a Press conference in Lusaka that Mr. Zulu and his camp had misused party funds that there was documentary evidence to prove it. Mr. Mulenga said all workers in the District had not been paid their salaries for the past 22 months because the money had been used on personal errands. He added that Mr. Zulu and his camp had misused party funds and that there was documentary evidence to prove it. He added that Mr. Zulu and his camp had traveled extensively within the country and neighbouring countries using party funds at the expense of salaries for the workers.

Efforts to get a comment from Mr. Zulu at his Kabulonga resident or at his legal firm proved futile as he was reported to be out on business mission.

Mr. Mulenga named the party Chairman Malimba Masheke, Vice Secretary-General Fenwick Chifunda, Chairman for International Relations Rupiah Banda, Secretary for Youth Mwanshikanda Liso and Mr. Zulu as the culprits working against UNIP President Kenneth Kaunda. Mr. Mulengela displayed a photocopy of an invoice of a booking for a return air ticket from Lusaka-Johannesburg-Durban, issued by Steve Blagus Limited which amounted to more than US\$1,000. The ticket booking dated May 12, 1998 carried the names for Mr. George Zulu, a special Assistant for the UNIP Vice president Chief Inyambo Yeta and Mr. Liso."

The plaintiffs pleaded that by publishing and printing that the Plaintiffs misused party funds and worked against their Party President, the Defendant by the said words meant or were understood to mean that the Plaintiffs were irresponsible, dishonest, disloyal and hypocrites and therefore unfit to hold the positions they hold in the party. The Plaintiffs further pleaded that the words complained of were false, unfounded, mischievous, ridiculous and were published without regard to the Plaintiffs' right as none of them had been involved in the misuse of party funds. The Plaintiffs also pleaded that in consequence they had been seriously injured in their characters, credit and reputation and had been brought into public scandal, contempt, hatred thereby putting their lives and those of their families in danger and in ridicule in the eyes of the right thinking members of society generally and that of their party in particular.

According to the record of appeal, the Plaintiffs first obtained judgment in default of appearance. That judgment was set aside and the Defendant were given leave to file their defence within seven days. They did not do so.

The Plaintiffs thereafter obtained judgment in default of defence subsequent to the default judgment, the Plaintiffs took out a summons for assessment of damages. The Defendants did not attend the assessment of damages nor were they represented during the assessment. One of the six Plaintiff died before the hearing of the assessment. His claim abated. The other five Plaintiffs gave viva voce evidence in support of their claims.

The learned deputy Registrar considered the evidence of the five Plaintiffs. The court analysed the offending article and concluded that Mr. P. Chitambala, one of the Plaintiffs was not mentioned in the article complained of. The court declined to award damages to Mr. Chitambala. The court, however, noted that the other four Plaintiffs held very senior political positions in a major opposition party; that they held very senior Cabinet and other government positions in the past. The court pointed out that the four Plaintiffs being holders of very senior

political positions in their party, they were public figures. The court then cited passages from the cases of *Fungamwanga and Zambia Daily Mail Vs Nalishebo* (1) and *Michael Sata Vs Post Newspapers Limited and Printpak (Zambia) Limited* (2) and observed that the Plaintiffs did not plead exemplary or aggravated damages; that there were no circumstances that would have warranted an award of such damages; that there was no evidence that the Defendant was asked to apologise but refused; and that there was no evidence that the Defendant acted in contumelious disregard of the Plaintiffs' rights. On the basis that there no aggravating circumstances an bearing in mind the superior court's sentiments on the "chilling effect" of damages and taking into account that the Plaintiffs were politicians who were public figures; the learned Deputy Registrar awarded a sum of K3 million for each Plaintiff pointing out that he had taken into account the changes that had taken place in our economy since the previous awards in similar cases. Hence this appeal in this court.

Both learned counsel relied on written heads of argument in which they cited numerous authorities in support of their submissions of arguments. The written heads of argument on behalf of the Plaintiffs were based on three grounds of appeal attacking the award of K3 million, the interest of 15% and the period such interest was ordered to run.

On account of the view that we take of this appeal, we find it unnecessary to review the arguments and submissions in very great detail. Suffice it to mention that we have considered them including the authorities cited. The gist of the submissions in support of the appeal is that in awarding K3 million the learned Deputy Registrar misdirected himself on a number of findings such as that there was no evidence that the defendant was asked to apologise but refused, there was no evidence of contumelious disregard of the plaintiffs rights and that there were no aggravating circumstances when in fact the issue of apology was not contentious as there was a letter of demand; and that the learned Deputy Registrar failed to appreciate that the defendant failed to make an appearance and judgment in default of appearance had been entered. That after judgment in default of appearance was set aside, the defendant still failed to file defence and judgment in default of defence entered.

We have considered these submissions. They have merits. In dealing with the assessment of damages the learned Deputy Registrar proceeded on the basis as if he was asked to deal with the issue of liability. Thus, he found that one of the Plaintiffs, named Mr. P. Chitambala, had not been named in the article complained of and therefore not entitled to damages. This approach was a misdirection. The issue before the learned Deputy Registrar was case of assessment of damages; judgment having been entered in default of a defence. More importantly, however, the learned Deputy Registrar did not consider or discuss the imputation of the article on the Plaintiffs and the Plaintiffs' standing in society. The Plaintiffs, who had held senior positions in the party and government, had been accused of serious crimes of theft and misappropriation of Party funds through the media. The accusations were not defended despite the Defendant having been given an opportunity to defend themselves. We are satisfied that the findings of the Deputy Registrar were very serious misdirections. Accordingly, we set aside the award of K3 million. In its place, we award K10 million to each of the five Plaintiffs. The award will carry interest at 15% from the date of the writ to the date of the Judgment. The Plaintiffs are also awarded costs in the court below and in this court to be taxed in default of agreement.
