

JOSEPH BANDA v ZAMBIA PUBLISHING COMPANY LIMITED (1982) Z.R. 4 (H.C.)

HIGH
SAKALA,
29TH
(1980/HP/633)

JULY,

COURT
J.
1982

Flynote

Tort - Defamation - Libel - Publishing defamatory matter as to the man's profession - Imputation of malpractices - When justified.

Tort - Defamation - Defence of justification - Necessity to prove defamatory imputation true.

Headnote

The plaintiff claimed damages for libel contained in an advertisement published in the defendant's newspaper on behalf of the plaintiff's founder employers. The advertisement was published after it was discovered that the plaintiff had made certain representations which were detrimental to the employers and advertised that the plaintiff was no longer a representative of the company. The plaintiff pleaded that the advertisement was meant to mean, and was understood to mean, that he was holding himself out as still working as a credit controller with his former employers and further that he was guilty of malpractices and was dishonest and corrupt in his dealings; and that as such he had been brought into disrepute, ridicule and unpopularity with the public.

Held:

- (i) In deciding whether the words complained of are defamatory it is necessary to consider them in conjunction with the circumstances of the publication, which in this case is the nature of the plaintiff's work which required direct dealings with the public.
- (ii) A plea of justification is a complete defence to an action for libel but to establish this defence the defendant must establish and prove that the defamatory imputation is true in substance and fact.
- (iii) In the circumstances of the case the publication of the words complained of was not defamatory, but was in fact justified

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since the plaintiff had made certain representations to the detriment of the defendant.

Cases referred to

- (1) Zambia Publishing Company v Zaloumis and Anor (1978) Z.R.10
- (2) The Capital and Counties Bank Ltd v Henty and Sons [1882] 7 A.C. 741
- (3) Slim and Others Daily Telegraph Ltd and Others [1968] 2 Q.B. 157

For the plaintiff: H. H. Ndhlovu, Jacques and Partners.
For the defendant: F. Jere, Ferd Jere, Phiri and Co.

Judgment

SAKALA, J.:

The plaintiff's claim is for damages for libel contained in the issue of the defendant's newspaper, the Zambia Daily Mail, entitled "The management of Lenco Limited". The article complained of reads as follows:

"The management of Lenco Limited would like to inform all their esteemed customers that

Mr Joseph Banda; who was employed as Credit Controller is no longer working with them. Therefore any representation made by him or, behalf of Lenco Limited will not be honoured by the Company."

The plaintiff's contention is that, by the said publication, the defendant meant and was understood to mean that the plaintiff was holding out as still working as a credit controller with his former employers and further that he was guilty of malpractice, dishonest and corrupt in his dealings and that as such he has been brought into disrepute, ridicule and unpopularity with the public in consequence of which the publication has seriously injured him in his credit and reputation and he has been brought into public scandal, odium and contempt.

The defendant does not dispute the publication of the article complained of but contends that the article is a statement of fact whose words are true in substance consisting of expression of opinion amounting to fair comment, made on matters of public interest. The defendant further denies that the words complained of in their natural ordinary meaning bore or were understood to bear any of the meanings alleged by the plaintiff..

The pleadings and the evidence disclose that it is not in dispute that the plaintiff was a credit controller in the employment of Lusaka Engineering Company Limited (hereinafter referred to as Lenco). The plaintiff resigned from the employment of Lenco by a letter dated 5th June, 1979. At the time of the publication of the words complained of, the plaintiff was no longer in the employment of Lenco. In accepting the plaintiff's resignation, Lenco indicated to the plaintiff that they would recover from him an equivalent amount of money of one month salary from his pension contributions since he had not given the required period of notice.

In support his claim, the plaintiff confirmed working for Lenco. He further confirmed resigning from Lenco by letter dated 5th June

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1979. He also confirmed being employed by his present employers. He testified that on 24th December, 1979, he read the article now complained of in the *Zambia Daily Mail* newspaper. He said after reading the article he wondered what he had done whilst at Lenco to warrant the publication of such notice in the newspaper when it was by that time six months after he had resigned from Lenco. The plaintiff stated that he felt very bad. He felt he had been defamed. He explained that in his job as credit controller with Lenco he travelled widely all over the country dealing with business houses. He did not see the basis of the article. According to the plaintiff, he felt that the article was intended to discredit him with the people he knew and with his new employers. He further explained that after leaving Lenco he did not present himself to anyone that he was still working for Lenco. Before the article he did not receive any complaints from Lenco that he was making representations on their behalf, the plaintiff told the court that after the article appeared in the newspaper he received several telephone calls from friends some of whom approached him directly, one of them being Mr Msimuko. He also received a call from his sister in Kitwe who had learnt of the article from her father in Luanshya. He was also queried in connection with the article by his bank manageress Mrs Moyo. Some merchants in Kitwe also contacted him in connection with the same article. He also found a notice of the same article at the board of Kitwe Hardware. He stated that the article was malicious because his new employers share the same customers with his previous employers.

When cross-examined, he told the court that during the time he worked with Lenco he did not come into contact with the Zambia State Insurance Corporation but Lenco had dealings with the Corporation. They bought a lot of furniture from them. He admitted that the Zambia State Insurance Corporation knew him when he was working for Lenco. He further admitted that he did not give the required notice when he resigned from Lenco. He conceded that as result of this, he was required to pay some money to Lenco. This money, he pointed out, was to come from his pension contributions. He explained that he had no complaints in connection with the first sentence in the article complained of but complaints against the sentence which suggests that he was making representations on behalf of Lenco which would not be honoured by the company. According to the plaintiff the word "representation" means false appearance. It suggested that he was going around making false appearance he denied owing any money to Lenco. He admitted

being one of those given a brief case by Lenco bought by the company. He did not know the value of this brief case. He could not remember returning the brief case to Lenco after leaving the employment with the company. The admitted getting his pension contributions in July or August in the amount of K423.68. He stated that the cheque was in the name of Lenco and not in his name. He cashed the cheque at Lenco without taking it to Lenco management. He explained that the cheque was not cashed as such but he used it to buy door and window frames from Lenco depot. The balance was given to him. Materials cost him about K200. He explained that after getting the pension cheque he went to the depot in Cha Cha Cha

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Road. He found the man in charge by the name of Levy Ngoma, who was the sales representative. He told him that he wanted to buy building materials. He further informed him that the cheque was paid to him by State Insurance for pension. According to the plaintiff, Mr Ngoma knew that he had left employment with Lenco. He did not ask why the cheque had not been in his name. According to the plaintiff the cheque was attached with remittance advice which he showed to Mr Ngoma.

In re-examination, the plaintiff informed the court that he does not deny owing Lenco some money. He further stated that when collecting the cheque from the Zambia State Insurance Corporation, he did not inform them that he was still working for Lenco.

PW2, Mr Msimuko, according to his evidence, was called to inform the court of his reaction after reading the article complained of. At the end of his evidence, the court drew the attention of both counsel to the case of *Zambia Publishing Company v Zaloumis and Another* (1). The last paragraph of which reads.

"There is one matter on which I think it may be helpful to comment. Evidence was led on behalf of the plaintiff's as to the reaction of certain members of the public, including passengers on Zambia Airways aircraft, to the libel; evidence was also led from witnesses who deposed to the meaning they attributed to the libel. The former evidence was relevant on the issue of damages, but the latter was irrelevant and therefore inadmissible."

On account of the view I take of this case, I find it unnecessary for me to review PW2's evidence in detail. It is, however, on record.

DW1, acting sales controller with Lenco, testified that he knows the plaintiff. He had been his work mate for sometime. He testified that in 1979, the plaintiff was still working with Lenco as a credit controller at the factory. In August, 1979, he was approached by the plaintiff at the showroom with a cheque which the plaintiff wanted to use to purchase some building materials. DW1 stated that he looked at the cheque; it was in the name of Lenco. The plaintiff explained to him that he had a small loan from the Zambia State Insurance Corporation for building materials. He gave him the building materials as well as the balance on the cheque. The amount of the cheque was K423.30. The witness explained that when one gets a *pro-forma* invoice the cheque is made in the name of the company from where the items have to be purchased. He stated that at the material time the plaintiff was working for Lenco as far as he knew.

In cross-examination, the witness told the court that he did not know that the plaintiff had left employment with Lenco at the time he was buying the materials. He also stated in cross-examination that the cheque was honoured but later there were some complaints in connection with the cheque.

DW2 is the chief accountant of Lenco. He testified that he knows the plaintiff whom he found working with Lenco as credit controller. He

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stated that the main duties of the plaintiff were to maintain debtors' account, reconciliation, debt collection, follow up long outstanding cases of debtors. He explained that the plaintiff was supposed to give three months' notice or one month pay on termination of services with the

company. As he did not give notice K328.20 was due from him. He further explained that when an employee leaves the company, the company obtains the pension contributions from the Zambia State Insurance Corporation on his behalf. The cheque is written in the name of the company.

In the instant case, the company followed up the pension contributions of the plaintiff with the Zambia State Insurance Corporation. They sent forms to the Zambia State Insurance Corporation in September, a reminder was also sent but there was no reply. In November, 1979, another reminder was sent. This time, they received a reply indicating that the pension contributions in respect of the plaintiff had already been settled. The witness stated that the company's reaction was that the plaintiff owed some money; they queried the Zambia State Insurance Corporation about the cheque made in the name of Lenco. They checked their daily banking deposit slips; it was discovered that in September the cheque was deposited in Lenco's account by their show-room in the amount of K423.20. The witness said they were surprised. As result, they went into details. In the process, they found that an invoice had been raised in the name of the plaintiff according to which building materials were bought by him. This witness also told the court that the plaintiff owed the company some other debts to be recovered. These are in respect of the brief case given to him valued at K59.00 and sum of K40.00 borrowed by the plaintiff as well as a sum of K8.00 part of his travel claims. He stated that the total debts the plaintiff owed the company was K432.98. This money has not yet been recovered. The witness testified further that to protect the interest of the company, as a result of the letter received from the Zambia State Insurance Corporation, the company felt it was necessary to issue an advertisement containing the words complained of prompted by the representation of the cheque by the plaintiff after he had left employment with Lenco.

The foregoing was the evidence in this case at the end of which both counsel made brief submissions. I have very carefully addressed my mind to the evidence as well as to the submissions. From the facts not dispute, publication being admitted, it would appear to me that the only question for determination is whether the words complained of are clearly defamatory of the plaintiff? The plaintiff has pleaded that by the article complained of the defendant meant and was understood to mean that the plaintiff was holding out as still working as credit controller with his former employers and further that he was guilty of malpractice, dishonest and corrupt in his dealings and that as such he has been brought into disrepute and unpopularity with the public. The defendant on the other hand contends that the words complained of in their natural ordinary meaning do not bear or were not understood to bear any meaning attributed to them by the plaintiff.

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The facts of the present case are in my view almost on all fours with the much criticised old case of *Capital and Counties Bank Ltd v Henty* (2). the brief facts of that case were these - Henty and Sons, a firm of brewers were in the habit of receiving, in payment from their customers, cheques on various branches of the Capital and Counties Bank, which the bank cashed for the convenience of Henty's at a particular branch of which X was manager. In consequence of squabble with X, Henty's sent a printed circular to large number of their customers (who knew nothing of the squabble). "Henty and Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." The circular became, known to other persons and there was a run on the bank, which sued Henrys for libel on the ground that the circular imputed insolvency. The House of Lords, by majority of four to one, held that the circular, taken in conjunction with the circumstances of its publication, did not constitute evidence from which any reasonable person would infer such an imputation; that there was no case to go to the jury; that the defendants were not liable." Salmon, L.J., criticising Henty's case in *Slim and Others v Daily Telegraph Ltd and Others* (3) said at p. 187:

"The principles are easy to formulate but difficult to apply. They were never better formulated than they were in *Capital and Counties Bank v Henty* (2) nor perhaps ever worse applied. It was there held that the words complained of were incapable of meaning to ordinary men that the bank was in financial difficulties, yet they caused a run on the bank whose customers, presumably, were ordinary men. If it is difficult to decide whether words are capable of defamatory meaning, it is still more difficult to decide what they in fact are likely to mean to the ordinary layman. Conscious as I am of the difficulties

involved and much as I respect the judge's opinion, I have formed the clear view that Mr Herbert's letters do not bear the meanings which the plaintiffs attribute to them."

The court in *Slim* case found that the letters published by the newspaper were defamatory but the newspaper's defence of fair comment succeeded. I agree with Salmon L.J.'s criticism of the *Henty's* case. But I think the most significant aspect of the decision in *Henty's* case is that the House of Lords considered the circular in conjunction with the circumstances of its publication which the House of Lords said did not constitute evidence from which any reasonable person would infer any defamatory imputation.

In the instant case, the circumstances leading to the publication of the words complained of are that the plaintiff, who was employed as credit controller had resigned from Lenco by his letter dated 5th June 1979. In his evidence, the plaintiff explained that as a credit controller he travelled widely all over the country dealing with business houses. In my opinion given the nature of the plaintiff's work at Lenco, Lenco was entitled to inform its "esteemed customers" by the most effective means, in this case a publication in the newspaper. The point for emphasis

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here is the *nature of the plaintiff's work*. If for instance the plaintiff's job had nothing to do with members of the public who dealt with Lenco, I would on my part have had no difficulty in arriving at the conclusion, that the words complained of meant and were understood to mean that the plaintiff was holding out as still working as credit controller with his former employer and that he was, guilty of malpractice, dishonest and corrupt in his dealings. For my part, bearing in mind the nature of the type of work the plaintiff was involved in with Lenco, I am unable to say that in the circumstances of this case, the words complained of were defamatory of the plaintiff.

If I am wrong on this finding and the words were held to be defamatory of the plaintiff, I propose to consider the defence's case. The defendant in its defence, although not in exact words has pleaded justification contending that the words complained of were true in substance and fact. To an action for libel a plea, of justification is a complete defence. But to establish this defence, the defendant must establish and prove that the defamatory imputation is true in substance and in fact.

In the instant case, the defendant, adduced evidence that the plaintiff resigned from Lenco. At the time of the publication of the words complained of the plaintiff was not in the employment of Lenco. The defendant has adduced further evidence that the plaintiff having resigned without giving three months' notice as per conditions of his employment he was required to pay one month salary in lieu of notice. This is not in dispute. The one month salary was to be deducted from the plaintiff's pension contributions. It is common ground that the plaintiff collected cheque from the Zambia State Insurance Corporation the name of Lenco.

It is not dispute that without the knowledge of Lenco management, the plaintiff presented this cheque to the show-room of Lenco and obtained the building materials as well as the balances of the cheque. It is not clear how the plaintiff obtained the pension cheque from Zambia State Insurance Corporation which was not in his name. But from the evidence of DW2, Lenco's Chief Accountant, I am inclined to conclude that the plaintiff must have made some kind of representations because in the normal course of the transaction the cheque ought to have been forwarded to Lenco. DW1 told the court that when the plaintiff presented the cheque he believed he was still working for Lenco. According to this witness, the plaintiff told him that he had obtained loan from State Insurance to buy building materials. The plaintiff disputes this evidence. It is significant to observe that the evidence of the collection of the cheque from the Zambia State Insurance Corporation and its presentation to the show-room of Lenco only emerged when the plaintiff: was under cross examination. I accept the evidence of DW1 in told and find as a fact that when approached by the plaintiff he believed him as working for Lenco and that the plaintiff told him that the cheque was a loan from the Zambia State Insurance. In my view, this is the only logical conclusion; otherwise how does the plaintiff explain the fact that while aware that the cheque was in the name of Lenco and while knowing that he owed Lenco some money which was to come from this very cheque, he proceeded

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to make use of it. He had the courage to admit, three years after resigning from Lenco that he owes Lenco some money. In my considered opinion this is one of those cases where it can be said that the plaintiff provoked the defendant. *Gatley on Libel and Slander*, 7th edn. cites in para. 921 in a footnote at p. 923 cases where a successful plea of justification has sometimes led to institution of criminal proceedings and the ultimate conviction of the plaintiff for the offence alleged. The present case seems to me to be good example. For the plaintiff to have successfully obtained the cheque from the Zambia State Insurance Corporation, which cheque was not in his name and subsequently making use of the proceeds of that cheque tends to suggest some criminal conduct on the part of the plaintiff. Be that as it may, I am satisfied that the plaintiff made representations to the Zambia State Insurance Corporation as well as to DW1. Lenco was therefore justified to advertise in the paper to protect its interest.

On the totality of the whole evidence, I am satisfied that the defendant has proved the plea of justification and I so find. This being the case I enter judgment in favour of the defendant with costs.

Judgment for the defendant.
