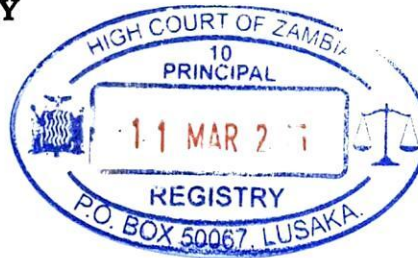


IN THE HIGH COURT FOR ZAMBIA
 AT THE PRINCIPAL REGISTRY
 HOLDEN AT LUSAKA
 (CIVIL JURISDICTION)

2016/HP/0541



BETWEEN:

MWILA CHIBILITI

PLAINTIFF

AND

CEPHAS CHABU

1ST DEFENDANT

NATIONAL SAVINGS AND CREDIT BANK

2ND DEFENDANT

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

FOR THE PLAINTIFF: MR. K. MUSAILA OF MESSRS CHONTA MUSAILA &
 PINDANI ADVOCATES

FOR THE 2ND DEFENDANT: MR. M. CHILESHE & MR. A. SIMUNYOLA OF
 MESSRS ERIC SILWAMBA JALASI LINYAMA LEGAL PRACTITIONERS

JUDGMENT

Cases Referred To:

1. *Matthews Makayi and another v. Muhetu Wachata and Another* (1992) Selected Judgment
2. *Aspro Travel Limited v. Owners Abroad Group Plc*
3. *Sata v. Post Newspapers Limited & Another*
4. *Revin Ndovi v. Post Newspapers Limited, Times Printpak Zambia Limited*
5. *Khalid Mohamed v The Attorney General* (1982) ZR 49 (S.C)
6. *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) ZR 172 (S.C)

7. *Nalubamba & Another v. Mulambuta (SCZ) Judgment 20 of 1987*

Legislation referred to:

1. *The Defamation Act, Chapter 68 of the laws of Zambia.*

Other works referred to:

1. *Phipson on Evidence 17th edition in paragraph 6-06 at page 151.*
2. *Lindsell on Torts, 12th edition.*
3. *Bullen and Leak and Jacobs in Precedents of Pleadings 1974*

This action was commenced by way of writ of summons and statement of claim both filed on 18th March, 2016. The Plaintiff stated therein that he was a legal practitioner employed by the 2nd defendant herein and that the 1st defendant was employed as the Managing Director of the 2nd defendant. The Plaintiff pleaded that on or about 16th March, 2016, the 1st defendant, in his capacity as Managing Director of the 2nd defendant, caused to be written a letter of dismissal to one Maxwell Saya, another employee of the 2nd defendant, and copied to the 2nd defendant's director-Legal/Company Secretary, Director-Finance, Board Chairman and

all Board Members a letter wherein the following words were falsely and maliciously said of the Plaintiff by the 1st defendant:

“On Thursday, 12th November, 2015, at 15:29 hrs, whilst acting together with former Director- Legal/Company Secretary, Mr Mwila Chibiliti and Director- Risk Management and Compliance, Mr Brian Chanda, you illegally retrieved government documents (emails relating to Le Point Magazine dated 8/01/2015) from the bank’s email server which were subsequently published in the Post Newspaper of 18th November, 2015, and 19th November, 2015, respectively.

The publication of these emails brought scorn, ridicule and reputation damage not only to the bank but the State as well, being the shareholder of the institution.

You have consequently undermined customer confidence in the bank and made a mockery of Government’s recapitalization of the Institution.

This further brings in question your motivation for your action, particularly that the said Act was done a day before the breakout of fire which gutted the 7th floor of the Savers House on 13/11/2-15.

You are fully aware that all assets including documents relating to bank, ultimately belong to the State. Therefore, any unauthorized and malicious usage of such documents borders on gross misconduct which is in breach of Section 2, Clause 15 of the Disciplinary and Grievance Code, and the Banking and Financial Services Act Section 50, Clause 1,2 and 3.”

The Plaintiff went on to plead that by the following words, the defendants meant and were understood to mean the following:

- (i) **that the Plaintiff connived with Mr. Maxwell Saya and Mr Brian Chanda and illegally retrieved emails from the 2nd defendant’s email server;**

- (ii) that the Plaintiff supplied to the Post Newspaper the emails allegedly published by the Post Newspaper on 18th and 19th November, 2015;**
- (iii) that the Plaintiff caused scorn, ridicule and reputation damage to the 2nd defendant and the State;**
- (iv) that the Plaintiff undermined the 2nd defendant's customer confidence;**
- (v) that the Plaintiff made a mockery of the Government's recapitalisation of the 2nd defendant;**
- (vi) that the Plaintiff had improper motives for the alleged aforesaid actions;**
- (vii) that the Plaintiff had a hand in the fire that gutted the 2nd defendant's premises on 13th November, 2015;**
- (viii) that the Plaintiff engaged in unauthorised and malicious usage of State documents.**

The Plaintiff averred that by reason of the aforesaid, he has been injured in his credit and reputation and has been brought into public scandal, contempt and ridicule. The Plaintiff thus claims damages for defamation arising from the defendants' letter dated 16th March, 2016, exemplary damages arising from the publication of the said letter; interest on amounts found due; an apology and retraction of the letter by the defendants; any other relief the Court may deem fit; and costs.

In the defence dated 6th April, 2016, the defendants denied that the words used in the letter complained of bore or was capable of bearing any of the meanings alleged by the Plaintiff in his statement of claim

and that the said words complained of, in their natural and ordinary meaning, are true in substance and fact.

The defendant averred that on 8th January, 2015, the 2nd defendant received from the French Embassy an email regarding Le Point, which was, inter alia, copied to the Plaintiff and that on 12th November, 2015, the Plaintiff retrieved the said email and unlawfully shared it with Maxwell Saya and Brian Chanda, without the authority of the 1st defendant. That if, the said letter was published to Maxwell Saya, or to the Chairman and Board Members or any other person in the employment of the 2nd defendant, which is not admitted, the same was published on an occasion of qualified privilege, in that the letter was about disciplinary action taken against Maxwell Saya, relating to misconduct perpetrated with the Plaintiff, whilst in the employ of the 2nd defendant, together with one Brian Chanda, which was a matter of common interest between the defendants and the recipients of the letter.

In the reply dated 17th February, 2020, the Plaintiff denied the allegations that the words complained of were true in substance and fact. That although the Plaintiff admits having been copied in the

email regarding Le Point, the Plaintiff denies having unlawfully retrieved and shared the email with Maxwell Saya and Brian Chanda. That the letter complained of clearly adopted the allegation that the Plaintiff was guilty and that the words complained of are therefore not protected by qualified privilege but were rather published maliciously.

The particulars of the malice are that the defendants had no honest belief in publishing the words complained of, namely that:

- (i) The 1st defendant had, prior to the Plaintiff's resignation on 22nd December, 2015, wrongfully and unlawfully dismissed the Plaintiff from the 2nd defendant's respondent employment. The 1st defendant was only reinstated by the Ministry of Finance;**
- (ii) When the 1st defendant was suspended by the 2nd defendant for alleged wrongdoing, the Plaintiff was appointed as the 2nd defendant's acting Managing Director to the 1st defendant's chagrin;**
- (iii) The 1st defendant had a history of disregarding legal advice given by the Plaintiff to the 2nd defendant;**
- (iv) The 1st defendant maliciously and without foundation reported the Plaintiff to the Police for arson on the pretext that the Plaintiff had tried to sabotage the 1st defendant;**
- (v) At no time did the defendants contact the Plaintiff after he had resigned and prior to the publication of the words complained of despite the 2nd defendant having on 31st December, 2015, having stated as follows to the Plaintiff: ...it was with a sense of loss that the Board accepted your resignation. The Board noted your tremendous contribution to its own smooth running and the guidance**

rendered to the Chair and the entire Board. While the Board would have wanted you to continue as Company Secretary, it felt it was best to accept your decision, and reluctantly accepted your resignation;

- (vi) In the premises, at no time did the defendants have any or any sufficient grounds for honestly believing that the words complained of were true;**
- (vii) Notwithstanding the foregoing, and although it is well aware that the fundamental factual basis of the words complained of is false, the 2nd defendant has not made or offered any correction or apology to the Plaintiff in respect of the words complained of;**
- (viii) In the premises, if the words in question are privileged, (which is denied), they were published maliciously with an absence of honest belief.**

When the matter came up for trial on 26th September, 2022, PW1, the Plaintiff herein, told the Court that he was employed by the 2nd defendant in 2010, as a Legal Officer and served until December, 2015, when he resigned at the position of Acting Managing Director although his substantive position was Legal Counsel and Board Secretary and Director Legal Services.

The Plaintiff (PW) testified inter alia that his concerns with the Risks department and Administration department under which procurement fell, was about the contract with a French magazine to place an advert in the said magazine at the price of K35,000 Euros and that he was concerned about how the procurement was done and what the business sense was for the bank to place an advert in

a magazine based in France. He further testified that his relationship with the Managing Director was hostile as the 1st defendant had decided in mid-2015, to dismiss the Plaintiff, one Mr Maxwell Saya and one Mr Brian Chanda from employment. That the two were only reinstated by the Ministry of Finance since there was no Board at the time and that, that's the time the Plaintiff was appointed Acting Managing Director upon his reinstatement. That he resigned as Board Secretary on 22nd December 2015, as per letter at page 1 of plaintiff's bundle of documents. He also testified that the Board expressed shock at his resignation as the Board appreciated his services. The Plaintiff testified that he suffered at the time and continued to suffer because the Board was aware that the Managing Director or 1st defendant herein, had referenced his name in Mr Saya's letter of dismissal which was copied to all the Board members and that the Board should have given the Plaintiff an opportunity to explain what transpired. That Mr. Saya showed the Plaintiff the letter which was seen by a number of people, and that it was on that basis that the plaintiff took action against the bank and 1st defendant. That as a lawyer he suffered embarrassment and injury to his reputation specifically because one Mr. Vincent Mwanza, who was a

Board member at the time, also called him about the allegations hence the Plaintiffs claim for damages for defamation arising from the defendant's letter dated 16th March, 2016, and exemplary damages arising from the publication of the said letter, interest on amounts found due, an apology and retraction of the letter by the defendants.

The plaintiff filed written submissions in which he inter alia submitted that the defamatory statement in issue was malicious and referred to the Plaintiff. That the said statement was published to members of the Board and others in the management of the 2nd Defendant. That the 1st defendant had a history of disregarding legal advice given by the plaintiff to the 2nd defendant and that he maliciously and without foundation reported the Plaintiff to the police for arson on the pretext that the Plaintiff had tried to sabotage the 1st Defendant. That at no time did the defendants contact the Plaintiff after he had resigned and prior to the publication of the words complained of despite the 2nd defendant's hearing on 31st December, 2015, stated that the Board inter alia noted the plaintiff's tremendous contribution to its smooth running and guidance to the Board.

In the premises, that at no time did the defendants have any or sufficient grounds for honestly believing that the words complained of were true. The defendants on the other hand, in their defence have pleaded the defence of qualified privilege which is a defence in defamation cases that protects certain statements made in good faith and without malice, even if they turn out to be false. This defence applies when the person making the statement has a legal, moral or social duty to communicate it, and the recipient has corresponding interest in receiving the information.

The defendants denied in their defence that the said words bore or are capable of bearing any of the meanings alleged in paragraph 5 of the statement of claim or any meaning defamatory of the plaintiff. That the words complained of in their natural and ordinary meaning are true in substance and fact. The particulars in the defendants' defence allege that on 8th January, 2015 the 2nd Defendant received from the French Embassy an email regarding Le Point, which was inter alia, copied to the Plaintiff and secondly that on 12th November, 2015, the plaintiff retrieved the said email and unlawfully shared it with Maxwell Saya and Brian Chanda, without the authority of the 1st defendant.

The defendant's further state that if, the said letter was published to Maxwell Saya or to the Chairman and Board members or any other person in the employment of the 2nd defendant, which is not admitted, the same was published on occasion of qualified privilege, in that the letter was about disciplinary action taken against Maxwell Saya, relating to misconduct perpetrated with the Plaintiff, whilst in the employment of the 2nd defendant, together with Brian Chanda, which was a matter of common interest between the defendants and the recipients of the said letter.

I have carefully considered the evidence on record together with the written submissions from the plaintiffs for which I am indebted. The plaintiff's 1st claims are for damages for defamation arising from the defendant's letter dated 16th March, 2016, and exemplary damages arising from the publication thereof.

The issue for determination is whether the quoted words were defamatory in their natural and ordinary meaning since it is common cause that they were published of the plaintiff.

A defamatory statement as held in the case of **Matthews Makayi and another v. Muhetu Wachata and Another (1992) Selected**

Judgment¹ which endorsed Gatley on Libel and Slander 7th edition paragraph 57 is as follows:

“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.”

The meaning of defamation is thus the publication without justification or excuse, of that which is calculated to injure the reputation of another or to lower him in the estimation of his fellows and right-thinking members of the public by exposing him to hatred, contempt or ridicule.

Section 7 of the **Defamation Act, Chapter 68 of the laws of Zambia** provides that:

“In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expressions of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.”

It is trite that before it can be determined whether or not particular words bear a defamatory meaning, it is necessary for the Court to

determine their meaning See *Halsbury's Laws of England Fourth Edition Volume 28 at paragraph 43*. Thus, in this case, I need to determine the natural and ordinary meaning of the words contained in the notice and which words the Plaintiff contends are defamatory of him.

In **Aspro Travel Limited v. Owners Abroad Group Plc**² Schieman

LJ stated that:

“the ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only general knowledge and not fettered by any strict legal rules of construction would draw from the words.”

In the case of **Sata v. Post Newspapers Limited & Another**³. It was held that the Plaintiff could not be called a political prostitute for joining a party of his own choice after reintroduction of a new political dispensation of other parties. The court found that the allegation was patently injurious to the Plaintiff in his private and personal character and in his political and official character. In the case of **Revin Ndovi v. Post Newspapers Limited, Times Printpak Zambia Limited**⁴. Fair comment could not avail the Defendant where the allegation made could not fairly and reasonably be inferred from the

facts. It followed that the editorial amounted to a flagrant attack on the very core of the personal character and the private and public reputation of the Plaintiff.

Clerk and Lindsell on Torts 12th edition states that:

“The law recognizes the right of every person, during life, to possession of a good name. a person who communicates to a third party a matter which is untrue and likely in the course of things substantially to damage the reputation of a third person is, on the face of it, guilty of a legal wrong for which the remedy is a claim in tort for defamation.”

The authors of Bullen and Leak and Jacobs in Precedents of Pleadings stated at page 1174 that:

“... The existence of malice may sometimes be inferred from the fact that the language of the libel is unnecessarily exaggerated or violent ... Or it may be inferred from the mode or extent of the publication proof that the Defendant was actuated by an indirect motive, such as anger or gross and unreasoning prejudice, in making defamatory communication complained of, is evidence of malice.”

Winfield on tort 17th edition (2006) pages 552 – 553, states that there are three requisites of fair comment. One is that the comment must be on observation or inference from facts, not an assertion of fact. The matter commented upon must be of public interest. Third is that the comment must be fair or objective; it should not be activated by malice as malice vitiates fair comment.

Gartley is of the same view. He defines comment as a statement of opinion on facts. He observes that:

“A libelous statement of fact is not a comment or criticism on anything. Its a comment to say that a certain act which a man has done is disgraceful or dishonorable; it is an allegation of fact to say that he did the act so criticized.”

The facts upon which the comment is based must be true. Gartley on Libel and Slander 5th edition (1960) paragraph 587, 588 and 600. 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. In the **Revin Ndovi v. Post Newspapers, Times Printpak Zambia Limited** case supra, it was held that:

“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.”

I am fortified by the cases of **Khalid Mohamed v The Attorney General (1982) ZR 49 (S.C)**⁵ in which the Supreme Court held that a plaintiff cannot automatically succeed whenever a defence has failed, he must prove his case, and the case of **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (S.C)**⁶ in which

the Supreme Court stated that where a plaintiff alleges, it is generally for him to prove those allegations as a plaintiff who has failed to prove his case cannot be entitled to a judgment whatever may be said of the opponents case.

In the case of **Nalubamba & Another v. Mukambuta (SCZ) Judgment 20 of 1987**⁷ which is on all forms as the case in casu; the Supreme Court held that there was sufficient common interest between all the addressees and the defendants to justify the defence of qualified privilege. That there was a common interest with all the addressees of the letter complained of. Although the defendants claimed in their defence that the words referred to in the statement of claim were not defamatory of the Plaintiff, this question was not argued.

The Supreme Court in the Nalubamba case, supra, found that there was a common interest with all the addressees of the letter complained of. Similarly in the case in casu, I find that there was a common interest with all the addressees of the letter in issue and I am further satisfied that the Defendants have established the defence of qualified privilege without express malice as the pleadings in their

defence, show that the letter was about disciplinary action taken against one other employee by the name of Maxwell Saya relating to misconduct perpetrated with the plaintiff, whilst in the employment of the 2nd defendant, together with Brian Chanda, which was a matter of common interest between the defendants and the recipients of the said letter. I am therefore satisfied, even if there is a plea by the plaintiff of express malice, which is unfounded as there is no admissible evidence of any express malice on record. It follows therefore that the defence of qualified privilege must succeed.

I accordingly dismiss the Plaintiff's case.

I award no costs.

Leave to appeal is granted.

Dated at Lusaka this.....11th.....day of.....March.....2025



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ELITA P. MWIKISA
HIGH COURT JUDGE