IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2438 OF 2000

BETWEEN:

DICK CHAGWAMNJIRA T/A

CHANGWAMNJIRA AND COMPANY............................PLAINTIFF

and

NATIONAL PUBLICATIONS LTD....................1ST DEFENDANT

SECUCOM INTERNATIONAL.........................2ND DEFENDANT

CORAM: HON. JUSTICE KAPANDA

Mr C. Mhango, of Counsel for the Plaintiff

Absent, Counsel for the Defendants

Mr Balakasi, Official Interpreter/Recording Officer

Kapanda, J

JUDGMENT

Introduction

On the 26th day of July 2000 the Plaintiff took out legal action, by way of a Writ of Summons, against the Defendants viz Nation Publications Limited (the 1st Defendant) and Secucom International (the 2nd Defendant). In the Writ of Summons on the record the Plaintiff is claiming for exemplary damages for libel allegedly published in the 1st Defendant's, The Nation, of 26th July 2000. The Plaintiff is further praying for an order of injunction restraining the Defendants from further publishing the so called libelious article. Moreover, the Plaintiff is claiming for costs of this action.

It is on record that a judgment was entered against the 2nd Defendant. Thus this judgment does not concern itself with the liability of the 2nd Defendant. As regards the 1st Defendant it is observed that there is a statement of defence to the Plaintiff's cause of action which was served on the legal practitioners for the Plaintiff on the 15th day of September 2000. In its statement of defence the first Defendant has essentially denied the Plaintiff's allegations of fact in the statement of claim attached to the Writ of Summons of the said 26th day of July 2000.

As a result of the first Defendant's denial the parties, viz the Plaintiff and the 1st Defendant, joined issues on the law suit commenced by the Plaintiff. Consequently, it became necessary for this matter to be set down for trial and hearing so that the parties could adduce evidence in support of their respective allegations of fact made in their pleadings. In this regard the Plaintiff caused this matter to be set down for hearing on the 15th day of June 2001. A formal Notice of Hearing was issued and served on the first Defendant, through its Legal Practitioners, on the 31st day of May 2001.

On the appointed day for the hearing of this case neither the fist Defendant nor its Counsel made any appearance. I proceeded to hear the Plaintiff's case, in the absence of the first Defendant and/or its Counsel, pursuant to the provisions of Order 35/1/1 of the Rules of the Supreme Court. Surprisingly, the Plaintiff did not offer evidence to prove the allegations of fact in his statement of claim. Instead the Plaintiff made an oral application for the disposal of his action on a point of law under the provisions of Order 14A of the Rule of the Supreme Court. It was evident that learned Counsel for the Plaintiff is inviting this court to make a determination on the issue raised by the Plaintiff by looking at the pleadings exchanged between the parties herein.

It is important, therefore, that before proceeding to make any determination action on the application by the Plaintiff, the pertinent parts of the said pleadings should be set out in this judgment. The said relevant parts of the pleadings will only be those in respect of the Plaintiff and the first Defendant.

Pleadings

Starting with the Plaintiff it will be noted that he has made the following apposite allegations of fact:-

"1. The Plaintiff is and was at all material times a Legal Practitioner carrying on business as Chagwamnjira and Company.

2. The first Defendant is and was at all material times the publisher and printer of The Nation, a newspaper with a very substantial circulation in Malawi and abroad.

3. The second Defendant is a company incorporated in accordance with the Company Laws of Malawi.

4. On the 26th day of July 2000 the Defendants and each of them caused to be printed and published a Public Notice in the first Defendant's newspaper aforesaid the following words defamatory of the Plaintiff namely:-

"Money Thirsty

Because of his poor knowledge of the legal aspects of business contracts Mr Majyambere sought legal advise in Malawi from Mr Dick Chagwamnjira, a legal practitioner in Blantyre. This lawyer was also recommended to Secucom by Mr Majyambere to assist within the framework of negotiations pertaining to the future ID contract. Secucom consulted Mr Chagwamnjira on matters concerning the contractual relationship with the Ministry for Home Affairs, Ministry of Finance, the Reserve Bank and the Ministry of

Justice.

At this time, Secucom was seeking the legal opinion of Mr Chagwamnjira about the nature of the long-term payments proposed to Secucom by the Government of Malawi. The core of the contract proposal was being prepared by the company Headquarters legal department, Mr Chagwamnjira's remarks on the contract proposal were merely editorial consisting of a few modifications.

The agreed fees were K20.000.00, but to the surprise of Secucom, the invoice sent by the lawyers's office was for an amount of 34,671,278.04 kwachas. Sometime, the quest for imaginary money can drive some people crazy---

Immediately after this incident, once the contract was signed, he proposed to Secucom to become its company lawyer in Malawi on a year to year contract for 5 million kwachas fees. Secucom refused categorically to deal with him but he insisted on introducing another lawyer Mr Edwin Banda. Secucom kept on refusing his proposal. With even more insistence, Mr Chagwamnjira said he was the best lawyer in Malawi and that he never lost a case in court. Again he threatened to sue Secucom for allegedly unpaid fees. He said he would win and get 10 per cent out of the government contract. Secucom kept its position: no collaboration with him.

Big appetite for money

Coming back to Mr Chagwamnjira and another lawyer Mr Banda, they issued the so-called commission contract dated 23rd July 1999, bearing Mr Weinstein's signature as general manager of Secucom International Holding Ltd---

The forged document has since been the basis of suspicion by the Ant-Corruption Bureau of alleged corrupt practices and became the main topic of stories in the press media. But one has a hard time to understand how a respectable institution such as the ACB gave the matter of investigation to poorly skilled hunters, not even analysing a fundamental fact, such as the difference between the date of signature of the so-called commission agreement and the date of formation of Secucom International Holdings Ltd. A close look at the document and a search for the original (which anyway has never existed), and not the use of copies, would have saved the reputation of the good offices of the ACB which now hangs in the balance.

Without any proof, without even studying the details of documents brought to them, the ACB issued a restriction notice which gave the public the impression that Secucom International Holdings Ltd, had used corrupt practices to win the contract. Strangely enough, the information about the restriction notice was transmitted to the Secucom International Holdings Headquarters in Geneva by guess who? Mr Chagwamnjira's offices.

How come that such a highly confidential document was in the hands of the lawyer and stamped by his offices? The normal procedure was for the ACB to serve the restriction notice directly from their offices. The Holding Company Secretary General thought it

was again a forced document but it was not the case. The restriction notice was real. At last, an authentic document could come out of Mr Chagwamnjira's offices---

When money is not enough

Let us come back to Mr Chgwamnjira and Mr Banda. The crazy amounts they were hoping to get from the commission contract was a bait for Mr Majyambere. The next action undertaken by Mr Banda was to register the commission document which nobody has ever seen the original of. For these legal practitioners, attempting to get money was like navigating on troubled waters without destination.

With this simple piece of paper, they managed to have summons issued with Mr Majyambere as Plaintiff and Secucom International Holding Ltd as first respondent and Dr. Anatole Weinstein as second respondent. They obtained, from the High Court of Blantyre, a default judgment which was obtained dubiously after a defence had already been served---

More manipulating the judicial procedures, they obtained an order for registration of the judgment outside Malawi and an order for the arrest of Dr. Anatole Weinstein. They were may be hoping that the sight of a police officer will force Dr. Weinstein to pay these incredible counterfeit amounts. But wait, every one's appetite comes before eating. Curiously another document called Order for the arrest of second judgment debtor dated 22nd June 2000 was issued after and upon the reading of the affidavit of Mr Edwin Banda. The claim, all of sudden, was US Dollars 6 588 851.53!"

5. In their nature and ordinary meaning the said words meant and were understood to mean the following:-

(a) That the Plaintiff is a lawyer who is driven by the quest for imaginary money and has no regard for ethics as a legal practitioner.

(b) That the Plaintiff is a lawyer of a dubious character and forges documents in his practice as a legal practitioner.

© That the Plaintiff is a lawyer of a dubious character and abuses the court process in his practice as a legal practitioner.

(d) That the Plaintiff is a lawyer who manipulates the court process without regard to court procedures and the law in his practice as a legal practitioner.

6. In consequence the Plaintiff's reputation has been seriously damaged and the Plaintiff has suffered considerable distress and embarrassment.

7. The Plaintiff will rely on the following facts and matters to support a claim for exemplary damages:-

Particulars

(a) The words complained of were published in a pull-out under the banner "Public Notice" in the first Defendant's newspaper aforesaid.

(b) Before the publication of the said words the Plaintiff pleaded with the first Defendant not to publish the said words without hearing the Plaintiff. The Defendant paid on heed to this plea and printed and published the said words defamatory of the Plaintiff.

(c) The first Defendant published a disclaimer at the foot of the said words having full knowledge that the said words were defamatory of the Plaintiff.

(d) In the premises the Defendant and each of them published or caused to be published the said words knowing they were false or recklessly, not caring whether they were true or false, having calculated that the benefits to them in terms of increased circulation would outweigh any compensation payable to the Plaintiff.

8. Unless restrained by this Honourable Court the Defendant and each of them will further publish or cause to be published the said or similar words defamatory of the Plaintiff.

9. And the Plaintiff claims:-

(a) Exemplary damages for libel.

(b) An injunction restraining the defendants and each of them, whether by themselves, their servants, or agents or otherwise from further publishing or causing to be published the said or similar words defamatory of the Plaintiff.

(c) Costs of this action."

And the 1st Defendant, after admitting the allegations of fact in paragraphs 1 and 2 of the Plaintiff's statement of claim, has made the following averments in defence of the Plaintiff's action:-

"2. The first Defendant admits having published the words referred to in paragraph 4 of the statement of claim but makes no admission as to the effect and meaning of the said words.

3. The words referred to in paragraph 4 of the statement of claim were published as an advertisement under a Public Notice from the second Defendant and the first Defendant clearly published a disclaimer for liability for the contents of the said Public Notice.

4. No admissions are made as to the natural ordinary or innuendo meanings of the Public Notice.

5. The said words were published on an occasion of qualified privilege.

Particulars

(a) The first Defendant publishes a daily Newspaper which has nationwide circulation on various issues including alleged acts of corruption.

(b) The issue that was the subject matter of the Public Notice concerned the contract for the production of National Identity Cards and was one of public interest and the media had published several articles on the issue concerning Secucom International before the publication of the said Public Notice.

(c) The Public Notice was in reply to the articles that had been published in the medial and the public was interested to know what had actually happened in the awarding of the contract for the production of National Identity Cards.

(d) In the premises the first Defendant and Secucom International had a common and corresponding interest in the subject of the notice complained of in furtherance of legal duty and good journalistic ethics and to counteract adverse effects of the articles that the medial had been publishing on the image of Secucom International.

6. The first Defendant admits paragraphs 7(a) of the statement of claim and 7(b) as far as it refers to the fact that the Plaintiff faxed the first Defendant a letter not to publish the said words before hearing him. The rest of paragraph 7(b) is denied.

7. Paragraphs 7(c) and 7(b) of the statement of claim are denied.

8. The first Defendant denies being liable for the exemplary damages for libel in paragraph 9 of the statement of claim."

I will now move on to deal with the Plaintiff's application to have the 1st Defendant's defence dismissed on a point of law pursuant to the said provisions of Order 14A of the Rules of the Supreme Court. As pointed out above the Plaintiff's said application was made viva voce at trial of the action herein.

The Application

The Plaintiff's said application is essentially that the action which he commenced against the 1st Defendant should be disposed of under Order 14A as read with Order 18 rule 19 of the Rules of the Supreme Court. The basis upon which the application is made, according to learned Counsel for the Plaintiff, is that in view of the fact that the Plaintiff, obtained judgment against the 2nd Defendant, who was the author of the so called offending material, and considering that the first Defendant has admitted publishing the alleged offending material, then the first Defendant has no defence to the Plaintiff's claim thus the only question that remains to be decided is a question of law viz whether or not the defence of qualified privilege can be allowed to stand in the circumstances of this case where the Defendant is a newspaper organisation.

Arguments

In his oral arguments Counsel for the Plaintiff has submitted that if there is any defence that the first Defendant has, after admitted that it published the article complained of and due regard being had to the fact that there is judgment against the 2nd Defendant, is that of qualified privilege. It has further been argued by the Plaintiff, through Counsel, that the said defence of qualified privilege, raised by the first Defendant, does not disclose any defence at all in that it rarely extends to newspapers.

It is the further contention of the Plaintiff's Counsel that, since malice is presumed where words complained privilege can not succeed because of the judgment entered against the second Defendant which entails that there was malice on the part of the second

Defendant. Consequently, it follows that first Defendant can not prove that there was no malice since they were only carriers of the second Defendant's defamatory statement and the first Defendant does not have facts of its own to show that there was no malice thereby proving the defence of qualified privilege.

The foregoing are, in a nutshell, the submissions of Counsel for the Plaintiff in support of the application to have the action herein disposed of under the provisions of Order 14A of the Rules of the Supreme Court. It is significant to note that the first Defendant was not heard in argument in respect of this application.

Law and Findings

Order 14A Application

The law on Order 14A applications has been ably summarised by my learned brother judge, Tembo,J. In the case of Finance Bank of Malawi -vs- Brian Hankes and Three Others Civil Cause No. 108 of 1989 (unreported) (High Court). I will, therefore not restate and/or repeat the law but rather just apply the principles of law to the present case. In my judgment the matter before me is not a suitable one to be disposed of under Order 14A of the Rules of the Supreme Court. I am of this view because of the following reasons:-

Firstly, the pleadings that were exchanged between the Plaintiff and the 1st Defendant show that there is a dispute of facts regarding the meaning to be attached to the words complained of and the alleged fact that the Plaintiff's reputation has been damaged or that the Plaintiff has suffered considerable distress and embarrassment particularly where the Plaintiff has not testified before this court in respect of the averments in paragraphs 5 and 6 in view of the denial of these allegations by the first Defendant as seen in paragraphs 2, 3 and 4 of the first Defendant's statement of Defence.

Secondly, and most importantly, it is observed that the Plaintiff's application has been made viva voce but this application is not so made in the course of an interlocutory application as per the requirement of the rules under Order 14A of the Rules of the Supreme Court. It must be noted that when the rules say that the application under the said Order 14A can be at any stage of the proceedings it does not mean that an oral application can be made at trial. The rules of practice allow an oral application during the hearing of an interlocutory application. I do not think that the proceedings before me are of an interlocutory nature. This is a trial where the court is going to make a final determination regarding the rights of the parties herein. In my view the Plaintiff ought to have made this application by way of a summons or motion in vies of the fact that he wanted this court to make a final determination on the matter.

Finally, it is my considered opinion that at the trial of this action, in view of the absence of the first Defendant, the Plaintiff should have proceeded to prove the allegations of fact in the statement of claim instead of making an application for the disposal of under Order 14A of the Rules of the Supreme Court. I am of this view that because an application under the said Order 14A almost invariably requires that the other part should be heard - Order 14A/1-2/7 of the Rules of the Supreme Court. Indeed it is trite law of procedure

that where a Plaintiff appears but the Defendant does not appear the Plaintiff is only required to prove his claim and the proof will be limited to the allegations in the statement of claim - Barker -vs- Furlong [1891]2 Ch. 179.

For the reasons given above the Plaintiff's application is dismissed. It is therefore ordered that this action shall proceed to trial in the normal way. I make no order.

Pronounced in open Court this 16th day of July 2001 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE