

CIVIL CAUSE NO. 164 OF 1979



BETWEEN:

P.E. NAPHAZI ..... PLAINTIFF

and

PROTEA ASSURANCE COMPANY LIMITED ..... 1ST DEFENDANT

and

CHRISTOPHER PAUL RODRIC ..... 2ND DEFENDANT

and

R.G. HENDERSON ..... 3RD DEFENDANT

Coram: Jere J.

For the Plaintiff: Nakanga of counsel  
For the Defendants: Savjani of counsel  
Official Interpreter: Sonani  
Court Reporter: Brown/Kelly

JUDGMENT

The plaintiff originally sued three defendants, Protea Assurance Company Limited, Christopher Paul Rodric and R.G. Henderson. At the close of the plaintiff's case this court ruled that there was no case made out against the first and second defendants. The plaintiff then proceeded to amend his statement of claim to suit the evidence that was given against the third defendant by one Mr. Henry Mussa. I reluctantly allowed the amendment and the case proceeded on the amended statement of claim. The third defendant (hereinafter referred to as 'the defendant') also amended his defence, so the court has heard evidence both for the plaintiff and for the defendant.

By his amended statement of claim the plaintiff alleges that:-

- "5. In or about March 1978 the 3rd defendant falsely and maliciously spoke and published of and concerning the plaintiff to Henry Mussa and other bystanders whose names are at present unknown to the plaintiff the words following, that is to say 'Your friend is out of job'. 'Which friend?'



'Naphazi' (meaning the plaintiff). 'Why?'  
'Something to do with cash.'

6. The said words in their material and ordinary meaning meant and were understood to mean that the plaintiff was dismissed from his job because he stole or misappropriated money.
7. By reason of the premises the plaintiff has been greatly injured in his credit, character and reputation, and has been brought into public scandal, ridicule and contempt and general loss in that he has and is failing to get employment."

This, however, was denied by the defendant.

The defendant pleaded five defences in the alternative. They are as follows:-

- "1. The 3rd defendant denies that the said words bore or were understood to bear or were capable of bearing or being understood to bear any of the meanings set out in paragraph 6 of the amended statement of claim.
2. Alternatively the 3rd defendant pleads that the said words were published on an occasion of qualified privilege.

#### PARTICULARS

The 3rd defendant was employed as manager by Mandala Limited in respect of its insurance division and Lloyd's Agency. Mandala Limited established an office in Lilongwe towards the end of 1977 under the charge of the said Henry Mussa and the 3rd defendant was responsible for both the said Lilongwe office and for the said Henry Mussa and at the time when the 3rd defendant published the words complained of the 3rd defendant was advising the said Henry Mussa how to handle the finances of the Lilongwe office and the reference to the plaintiff was made in this context for the benefit of the said Henry Mussa and the said Mandala Limited.

In the premises the 3rd defendant and the said Henry Mussa had a common corresponding interest in the subject matter and the publication of the said words.

3. Alternatively, the 3rd defendant was under a legal social and/or moral duty to publish the said words to the said Mr. Henry Mussa who had a like duty and/or interest to receive.

4. Alternatively, the defendant published the said words to the said Henry Mussa in the reasonable and necessary protection of his own interests and Mandala Limited's interests.
5. Alternatively, the said words were true in substance and in fact."

The evidence of the plaintiff Mr. Naphazi is that he was employed in 1972 by Protea Assurance Company first as an accounts clerk and finally as a sales support and general clerk.. It was his evidence that while so employed he came under the supervision first of a Mr. Godfrey, who never authorized the use of petty cash for personal reasons. However, when Mr. Godfrey left his immediate superior officer was one Mr. Rodric, the second defendant. It was the plaintiff's evidence that Mr. Rodric used to get money from the petty cash, and when he told Mr. Rodric that Mr. Godfrey would never have allowed that kind of behaviour Mr. Rodric answered that company money can be taken provided it is replaced promptly. I have my doubts about the truthfulness of this statement in view of what will become clear later in this judgment.

The plaintiff had never visited the Northern Region, so he arranged to go there well in advance. He made his bookings, but he had no money. He was hoping that he would receive his commission and other moneys due to him. At that time, about December, Mr. Rodric had left the place; he had also gone on leave. Mr. Rodric was due to start on a Monday just before Christmas. The plaintiff's evidence is that he was waiting for the money from Salisbury, where the company had its head office, but nothing came, so on the Saturday he again checked for mail from Rhodesia, but there was nothing. He returned to the office and collected K260.20. It is his evidence that he took this money from the company's safe. He then left a note in the office on Mr. Rodric's desk so that on his return to the office on the Monday Mr. Rodric should know what he, Naphazi, had done. The plaintiff then left for leave at the beautiful Nyika Plateau in the Northern Region.

In cross-examination the plaintiff stressed that he had taken company money from the company's safe. He denied that he had taken moneys which were paid as a premium by a customer. However, in the admitted letter that he wrote to Mr. Rodric, which was dated 17th December 1977, he states where this money came from. There has been some objection to the admissibility of this letter, and even suggestions that it was written by the plaintiff when he was forced to do so by Mr. Rodric. I think in so far as this letter is concerned the objections are baseless. The letter reads as follows:-

"I could get me cheque so if you receive on Monday bank it. My a/c no. is 411845.

As you know I budgeted for my trip up north taking into account the bonus. Now that this has not come through I have been forced to use Co's money.

J.P. Dumas came in to pay his motor premium so he paid K260.20 and I have taken this. I'll be back on 23/12/77 so I'll call in the office in the afternoon to return this money from my meat business."

It is clear therefore that in the absence of his superior the plaintiff collected the sum of K260.20, the amount that was paid by a customer to the company. He took this money without authority. There is no doubt about that.

The plaintiff returned from the Nyika Plateau after Christmas, went to the office, and met Mr. Rodric. He explained to him what had happened in respect of the money he was expecting from Salisbury. It was his evidence that Mr. Rodric acknowledged his taking the K260.20. It was further his evidence that Mr. Rodric agreed that he should pay this money as soon as he received his commission from Salisbury. Mr. Rodric then left for Salisbury in order to discuss his replacement in Malawi, since his tour had ended. Before he left the plaintiff reminded him about his housing problems and asked Mr. Rodric to inquire from Salisbury about this matter. However Mr. Rodric's answer was that he thought that Salisbury would not support him because he, plaintiff, had stolen K260.20. The plaintiff was shocked on hearing these words, and asked Mr. Rodric what he meant. Mr. Rodric said that he was going to tell Salisbury that he, plaintiff, had stolen the money. This was some time around 10th to 20th January 1978. Mr. Rodric went to Rhodesia and then returned. The plaintiff asked him about his visit to Rhodesia, and Mr. Rodric informed him that he had a good journey but said nothing more, and he appeared unfriendly. Late that evening the plaintiff saw Mr. Rodric who informed him that he had told Salisbury about the money but said that he should not worry, the matter would be sorted out. He told the plaintiff that the manager from Salisbury would be coming to Blantyre to look into the matter. The plaintiff complained to Mr. Rodric that he, Rodric, instead of raising the issue of a house had raised the issue of the theft of the money, so he was suspended there and then.

It was the plaintiff's evidence that some time in January he was persuaded to write a letter to Salisbury giving his side of the story. This he did, and this letter was tendered by the defence and is marked DX3. In this letter the plaintiff confesses to the taking of the money and asks for forgiveness. He also explains that he failed to repay the money quickly because he had financial commitments and whatever moneys he had he used to pay school fees and other things. He sought forgiveness and promised that this kind of behaviour would not be repeated, saying he regretted having taken the money.

Again this letter was attacked as having been obtained by force or under duress. I cannot accept this kind of objection. The letter largely amplifies DX1. I am of the view that DX3 is a correct statement of what happened.

It was the plaintiff's evidence that after he had failed to convince his superior from Salisbury he tendered his resignation, and he produced a document to that effect. It is most interesting to look at his letter DX2A addressed to the manager in Salisbury. It says:-

"In view of my grave misdemeanour over the amount of K260 I feel I have no other course other than to offer my resignation to the company, which I hereby do."

This letter was written on 7th February 1978, and there is another letter written on the same date in which the plaintiff confesses to taking the amount of K260 from Mr. Dumas which was paid by him on 19th October 1977. It was his promise that this kind of thing would not be repeated.

Again there have been objections about these letters, and I feel the objections are baseless.

The plaintiff then effectively tendered his resignation, which was accepted. He wrote a letter asking for moneys due to him from headquarters in Salisbury. This letter was written on 2nd March 1978, and is DX3. A reply to his letter seeking moneys was sent to him on 7th March 1978. This is an extremely rude letter written by the manager from Salisbury in which he clearly states that after the plaintiff had misappropriated company funds he should not expect any more moneys from the company, and in which the manager calls for the immediate repayment of the car advance to him and threatens the plaintiff with dire financial consequences if he, plaintiff, does not repay this money.

The plaintiff was trying to look for a market to dispose of the car so that he could pay back the money that he had taken on loan and the money that according to the letter from Salisbury addressed to him he had misappropriated, so he rang his friend in Lilongwe, Mr. Henry Mussa. Mr. Mussa works for Mandala Insurance Department. The plaintiff asked him to look for a customer to buy his car. Mr. Mussa stated that there would be no problem, but before the end of the conversation Mr. Mussa said that he had heard that the plaintiff had left Protea Assurance Company and that his boss, one Mr. Henderson, the defendant, had told him that he, plaintiff, had stolen money from Protea Assurance Company and that he had been dismissed. According to the plaintiff he asked where Mr. Henderson had collected this information, and it was his evidence that Mr. Mussa said he had got the information from Mr. Rodric of Protea Assurance Company. The plaintiff was furious, and went to Mr. Rodric and asked him who was circulating the rumour that he had misappropriated company money. Mr. Rodric answered that that kind of rumour was bound to circulate. Nowhere in his evidence did the plaintiff try to say that the rumours were incorrect. From then on he started looking for another job, but failed to obtain any employment. This is in so far as his earlier evidence is concerned, on which he bases his claim against the defendant.

Mr. Mussa gave evidence on oath. He said that he had known the plaintiff for some time, and that Mr. Henderson knew that the plaintiff was a friend of his. He, Mussa, knew that Mr. Rodric was also a good friend of Mr. Henderson. It was his evidence that the plaintiff had asked him to find a buyer for his vehicle, and at that time he, Mussa, knew that the plaintiff had left the company. It



was his evidence that Mr. Henderson as his boss used to come to Lilongwe on routine visits to check how he was performing his duties. He used to instruct him what to do, and at that time when he came into the office Mr. Henderson was emphatic that the moneys that he, Mussa, received from clients must be banked, however small the amounts might be. He also instructed him that at no time should he use the petty cash float. He said that he should be very careful about such money, and that he should not borrow even overnight from the petty cash. Then Mr. Henderson went on to say that he was telling him all that because his friend Mr. Naphazi had lost his job, and when asked why Mr. Henderson said "Something to do with cash". It was the evidence of Mr. Mussa that to him that sounded as though money had been stolen. Two weeks after that conversation the plaintiff telephoned asking whether he could get a customer to buy his car. He, Mussa, then told the plaintiff what had transpired between him and Mr. Henderson, and he asked the plaintiff what had happened. The plaintiff told his story in which he said he had a system at Protea Assurance Company of taking money from the float and then returning the same, but his boss had disagreed with that practice. After that he got a letter that the job was finished. Then the plaintiff asked the witness who had told him, and he revealed that it was his boss Mr. Henderson. In cross-examination Mr. Mussa said that this advice was purely for his benefit so that he might get on well in a job that was highly responsible.

The evidence of Mr. Henderson the defendant is substantially an admission of what Mr. Henry Mussa told the court. It was his evidence that at the material time he was working for Mandala Insurance Company and in that capacity he established a Lilongwe branch of the same company. Before deciding which Malawian should man the place he had observed that there was friendly competition between Mr. Ngosi and Mr. Mussa. In his view Mr. Mussa was better than Mr. Ngosi and should therefore be given the opportunity to run the Lilongwe branch. The witness had been going to Lilongwe constantly to instruct, supervise and guide Mr. Mussa, and it was on one of these occasions when he was in Lilongwe that he advised Mr. Mussa about how to handle moneys belonging to the company. He said he told Mr. Mussa to be careful, and that he should always bank the money however little it might be, and never try to borrow from his petty cash. He went on to warn Mr. Mussa that he did not want what had happened to the plaintiff to happen to him, Mussa. The actual words were that what happened to his friend should not happen to him. When asked what had happened he said the plaintiff had lost his job, and when asked why he said "Something to do with cash". In his evidence he said he told Mr. Mussa about this because he wished him well in his new career, knowing presumably that Mr. Ngosi was not very far off and could well take the job.

It was his further evidence that he had not received a letter from the plaintiff complaining about this statement, but he received a writ, and he went to see Mr. Savjani of Savjani and Company and there happened to meet the second defendant, who had also been sued for defamation. It was at that stage that he learned the details of how the plaintiff had left his employment. However, the first statement of claim as drafted by the plaintiff was not substantiated by the evidence adduced, but the amended statement of claim as drawn

to suit the evidence given by Mr. Mussa gave the defendant some worry and he had therefore obtained letters emanating from the plaintiff to the first and second defendants which, as I have already stated, would constitute an unqualified confession by the plaintiff. As a result Mr. Henderson said he got hold of those letters that have been exhibited in this court.

Although he was largely explaining why these letters were tendered in the first instance, I am satisfied that there is nothing wrong in Mr. Henderson's delay in obtaining these letters because in respect of the statement of claim as originally drafted he did not require them.

This is therefore the evidence before me. In my view it establishes that the plaintiff obtained the moneys from the first defendant in October 1976 and that such moneys had been paid in as premiums by one Dumas, a client of the first defendant, and that around 17th December the plaintiff left for the Northern Region on holiday and this holiday was financed with the company's money initially paid in by the company's client. The plaintiff explained to his immediate superior what he had done, for indeed he took this money without authority. When he came back his superior indicated that he did not approve of this conduct. The matter was reported to head office, who completely disapproved of his borrowing money without authority, and he was forced to resign. He wrote letters to that effect, and his resignation was accepted. It must be noted that at the time of his leaving he had failed to pay back the moneys that he had taken. There is also further evidence that he had written a number of letters to his employers trying to apologize, but these letters were of no avail, and when he tried to claim some moneys from the company the company replied in extremely rude terms that he should not expect any leniency after he had misappropriated the company's funds. Very briefly this is the evidence, details of which have already been gone through.

The complaint is that the words which are admitted by the defendant were defamatory. Paragraph 6 of the statement of claim states that the ordinary meaning of these words was that the plaintiff was dismissed from his job because he stole or misappropriated money. It becomes my duty as a judge of fact to determine whether these words are defamatory. Would an ordinary person understand these words to mean that the plaintiff had lost his job because he had stolen money? I do not think that the material and ordinary meaning of these words imports any criminal offence, that is to say that he had stolen money, for this statement is extremely vague. There could be more than one meaning attached to these words, e.g. a person might think that the one who had lost his job had stolen money, or alternatively, perhaps, that he had failed to repay a debt that he owed to his employers, or the words might mean that he had had some difference of opinion about the accounting system in the company, as he himself had said to Mr. Mussa. In my view the other meanings attached to these words are not the product of some strained or forced or utterly unreasonable interpretation: see Salmond on Torts, 16th Edition, page 148. A good example where the words were held to be incapable of defamatory meaning is Capital and Counties Bank v. Henty, 7 App. Cas. 741.

For a slander to be actionable per se it must impute a criminal offence, that is to say, the words which impute to the plaintiff the commission of a crime for which he can be made to suffer corporally, that is physically, by way of punishment, are actionable without proof of special damage. I have my doubts that the ordinary meaning of these words is that the plaintiff had stolen the money. This is different from cases where the plaintiff has been accused of being a thief or a blackmailer. I therefore do not agree that these statements are actionable.

In case I am wrong, I would consider the various defences pleaded before me. I would first take the defence of justification. The defendant says that these words are materially true. It must be noted that Mr. Henderson had heard from Mr. Rodric, so Mr. Henderson must prove that the words are substantially true. It must be remembered from the evidence that I have already referred to that the plaintiff took K260.00. This money belonged to Mr. Dumas, a customer of the first defendant. He took this money without permission. He was forced to resign because he had taken this money. He even failed to repay the money. For this reason he lost his job. This is the evidence before me, so whatever the words may be Mr. Henderson has established on the balance of probabilities that the words complained of were substantially true, so he succeeds completely on the defence of justification. I can hardly conceive of any other case that so completely establishes the defence of justification.

The next defence to consider, assuming the words do import a defamatory meaning, is that of qualified privilege. The defence was that the occasion was a privileged one. The law applicable in this case seems to me to be stated in Salmond on Torts, 16th Edition at page 168, paragraph 58:-

"A communication which is volunteered, without any inquiry on the part of anyone possessing a lawful interest, is unprivileged, unless there is some such confidential or other relation between the parties as creates a duty to speak without being asked. Thus the relationship of master and servant will justify the servant in telling his master facts which concern his interest in relation to the matters entrusted to the servant."

A good example is Lawless v. The Anglo-Egyptian Cotton and Oil Company (1868-9) 4 QBD 262. The facts are distinguishable from the instant case. The other case is Hunt v. Great Northern Railway Company (1891) 2 QB 189. Here too the facts can be distinguished from the present case in that the plaintiff was not employed by the defendant and it was necessary for the defendant to publish the defamatory statement to the workers of the company.


In the instant case can it be said that there was a duty or confidential relation which obliged the defendant to speak to Mr. Mussa in the manner he did? It was given in evidence that the defendant preferred Mr. Mussa to Mr. Ngosi, so he wanted Mr. Mussa to succeed in his new job. It was not suggested in evidence that Mr. Mussa was failing in his duties. I do not think that a situation



had arisen giving a duty to the defendant to speak to someone who was not remotely connected with the company. I do not see how a question of confidentiality arose in this case. I think this was mere gossip. I hold that the occasion was not privileged. This aspect of the decision is purely academic, since the defendant succeeded on the plea of justification, and, further, since the words are not defamatory.

The plaintiff's claim is dismissed with costs.

Pronounced in open court this 8th day of October, 1980, at Blantyre.

  
N.S. JERE  
JUDGE