IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 196 OF 1985

BETWEEN:

MALAWI RAILWAYS LIMITED .................................................. 1ST PLAINTIFF

- and -

J. B. L. MALANGE ................................................................. 2ND PLAINTIFF

- and -

A. H. BHADURKHAN ............................................................... DEFENDANT

Coram: MAKUTA, C.J.

Nakanga of Counsel for the Plaintiffs
Chizumila of Counsel for the Defendant
Manda, Court Reporter
Kadyakale/Kaundama, Official Interpreters

JUDGMENT

The plaintiffs are claiming damages in respect of an alleged libel contained in a letter written by the defendant and addressed to the General Manager of Malawi Railways and copied to viz; The Secretary to the President and Cabinet, The Controller of Statutory Bodies and The Controller of Lands and Valuation.

The first plaintiff is a Limited Company having its office at Post Office Box 5144, Limbe, in the City of Blantyre. It runs trains, motor cars, coaches and ships. It also owns properties including buildings for rent. The second plaintiff was, at the material time, Acting General Manager of the Malawi Railways. He is now a substantive General Manager of the Malawi Railways. The defendant is, and was at the material time, the Managing Director of A. H. B. Enterprises which deals in Imports and Exports; they are also manufacturers' representatives, commission agents etc. etc.

The alleged libellous letter was as follows:

A. H. B. ENTERPRISES

Bankers: Commercial Bank of Malawi
Lilongwe Branch

Direct Importers and Exporters
Manufacturers' Representatives, Commission
Agents, Distributors, Wholesalers and
Mobile Wholesalers throughout Malawi
Sir,

Re: MALPRACTICE, INTIMIDATION AND PROVOCATION BY MR PEGAS

I have the honour to refer to Assistant General Manager's visit Mr J.B.L. Malange on 16th January, 1985 Wednesday afternoon. After Mr Malange and Mr Pegas both walked out of Mr Pegas premises into the Malawi Railways yard, Mr Pegas returned alone and stood behind the fence dividing our premises.

I greeted Mr Pegas as usual but Mr Pegas just shouted loudly across the fence and asked me when was I shifting out of the premises? I said to him, why should I move out of these premises? He said I have been instructed by Mr J.B.L. Malange, Assistant General Manager to tell you that, you must go out of these premises, that's an order according to Mr J.B.L. Malange Mr Pegas will be occupying these entire premises and nobody else, he said these words without shame or fear and very loud.

Mr Pegas had uttered these degrading and disgraceful and most embarrassing words in the presence of my customers Mr M.M. Patel of Lusaka, Zambia, Mr J. Banda of Chilinde, Lilongwe, my junior and senior staffs, my two sons who are some of the directors in our organization including other people on his side of the fence. I was completely surprised, shocked, shameful and looked a real pathetic figure, standing amongst my employees, my sons, my visitors and it really damaged my good image and I felt very much offended.
My only action is to seek protection from this type of bad behaviour and approach of my fellow tenant Mr Pegas he has no right to intimidate me. He found me in these premises. I was the first to rent these premises. I was the one that won the tender to purchase all these premises when the Railways management wanted to sell the premises.

The late Company Secretary Mr T.K.B. Phiri had told me personally that, Mr Pegas was giving him so much money every month while paying only K150.00 per month for the Railways premises. I refused to pay any bribery towards the Railways premises like Mr Pegas because that's corruption, malpractice, illegal and unpatriotic.

Mr Pegas boasts to have a lot of control on Railways properties because several Railways employees are enjoying his money. Mr Pegas behaviour and manners on 16th January 1985 demonstrated the true picture of corrupted people he is in contact with to rob the Railways.

I cannot perceive how the management of Malawi Railways can instruct my fellow tenant to ask me to vacate the premises. The last day of Mr N.S. Husemeyer in his office as General Manager, Mr Husemeyer had made it abundantly clear that he wanted to see that, the property was sold before he left. for his new assignment though he did not elaborate but, he was very disappointed and indicated something about Mr Pegas paying too little for the premises in Lilongwe and that, I could still change the rent of Mr Pegas if I had succeeded to acquire this property.

I strongly feel that, the authorities should check on this malpractice, corruption and untrustworth which Mr Pegas seem to enjoy publicly.

We are a wholly owned Malawian Enterprises dealing in Imports - Exports - Manufacturers representatives - Commission Agent - Distributors - Wholesalers - and Travelling Wholesalers throughout Malawi.

Our organisation has a good and one of the respectable and trusted name on the international business and very well known all over the world.

At the moment we have 16,000 tonnes of Fertilizers N.P.K. 20:20:0, C.A.N. and UREA manufactured specially for A.H.B. Enterprises Malawi. We are awaiting for Office of the President and Cabinet decision to kindly allow our Ministry of Trade to issue us the import permit for our essential commodity.

We moved our head office from Limbe to the Capital City in order to render constant services to our people in the Northern rural areas etc.

Thanking you in anticipation.

Yours faithfully,

(Signed)

A. H. Bhadurkhan
MANAGING DIRECTOR

BY REGISTERED MAIL
By their statement of claim, the first plaintiffs allege that by those words in their natural and ordinary meaning the defendant meant that they conduct their business badly and inefficiently, they employ corrupt officers, they encourage corruption in their business. So far as the second plaintiff is concerned the statement of claim alleges that the words, in their natural and ordinary meaning, mean that he is corrupt and he received bribes from Mr Pegas. Furthermore, it is alleged that the words mean that the second plaintiff is untrustworthy, unfit in his office, used his office to enrich himself and he conducts his business badly and inefficiently.

Perhaps I better deal with the question of publication right at the outset. Mr Chizumila submitted in effect that since there were no witnesses from the Office of the President and Cabinet and from the Office of the Controller of Lands and Valuation it means that there was no publication to the Secretary to the President and Cabinet and to the Controller of Lands and Valuation. According to the submission, the only person to whom publication was made was the Controller of Statutory Bodies because Mr Chona, who works in the Office of the Controller of Statutory Bodies, was called to testify. I would point out that the letter was addressed to the General Manager of Malawi Railways and was copied to the Secretary to the President and Cabinet, to the Controller of Statutory Bodies and to the Controller of Lands and Valuation. There is no evidence to show that the letter was not posted to any of the addressees. As a matter of fact it is admitted that the letter was forwarded to all the addressees. It must therefore have reached the addressees. Proof that libellous letter was sent through the post is prima facie evidence of publication to the person to whom it was addressed: Warren v. Warren (1834) 1 C.M. & R. 250; Shipley v. Todhunter 1836 7 C & P 860. Moreover publication of a libel to one person is sufficient: Per Lord Penzane in Capital and Counties Bank v. Henty (1882) 7 A. C. 765.

In any case the defendant in his defence has admitted publication although he denies that he did so falsely and maliciously. Once pleadings have been settled they must be construed strictly in order specifically to enable the plaintiff to know what the real issue is. Put shortly, the object of the pleadings is to bring the parties to an issue and to prevent the issue being enlarged when the cause comes to trial. It would therefore be unfair, however subtle the method may be, to go back and ignore the admission in the pleadings: see Yanu Yanu v. Mbewe M.S.C.A. No. 8/83; Sindo v. Magombo, M.S.C.A. No. 6/82.

I now come to the question whether the publication is capable of bearing, and does in fact, bear a defamatory meaning. The point is whether the words "bribery" or "corruption" do impute criminal offences on the plaintiffs. I think each word is capable of defamatory meaning. In Webb v. Beavan (1862-63) 11 Q.B. 60 it was held that words charging the plaintiff with the commission of a criminal offence are actionable per se. In Gray v. Jones (1839) 1 All.E.R. 798 it was mentioned that "to say of a person that he is a convicted person is actionable per se, because the basis of the action is not that the words put the defamed person in jeopardy of criminal prosecution but that they cause him social ostracism."

The first plaintiff is a Limited Liability Company and the question arises as to whether it can be defamed. A corporation or a Limited Liability Company can sue for libel or slander, provided that the statement complained of would have been defamatory had it been directed against an individual and it tends to cause damage to the property or business of the organisation. Thus in South Hetton Coal Co. v. North
Western News Association (1894) 1 Q.B. 133, the plaintiff company recovered damages in respect of statements charging it with failing to provide decent and sanitary accommodation for its workmen and their families. Browne J. in Bognor Regis UDC v. Campion (1972) 2 Q.B. 169 observed thus: "Just as a trading company has a trading reputation which it is entitled to protect by bringing an action for defamation, so in my view the plaintiffs as a local government corporation have a "governing" reputation which they are equally entitled to protect in the same way - of course, bearing in mind the vital distinction between defamation of the corporation as such and defamation of its individual officers or members." I entirely agree with this observation. On the other hand it has been held that an action for libel will not lie at the suit of a corporation for an imputation of bribery and corruption. Nor would it lie in respect of an imputation of murder, incest or adultery because it could not commit those crimes. Thus in the Mayor of Manchester v. Williams (1891) 1 Q.B. 94 the plaintiff corporation failed to recover damages in respect of statements containing charges of corrupt practices in the administration of its affairs, as a corporation as such cannot be guilty of these offences.

I have examined the letter and I am of the view that there is nothing in it which brings into disrepute the first plaintiffs as such in its trading reputation. Furthermore there is nothing in it to suggest that they conduct their business badly or inefficiently. Malawi Railways cannot therefore maintain this action.

I now come to the second plaintiff. The letter was written three days after his visit to the premises of Mr Pegas. According to the defendant what prompted him to write the letter were the words which Mr Pegas uttered to him after the first plaintiff had left. Mr Pegas is alleged to have said: "I have been instructed by Mr J.B.L. Malange, Assistant General Manager to tell you that, you must go out of these premises, that's an order according to Mr J.B.L. Malange. Mr Pegas will be occupying these entire premises and nobody else." Although it may not be of significance it strikes me as an exaggeration the way the name Mr J.B.L. Malange is repeated. It sounds like an embellishment - to give colour to the presentation. The same goes with the way the name Mr Pegas is used. Mr Pegas is referring to himself thus: "Mr Pegas will be occupying these entire premises". If Mr Pegas really uttered these words he would probably have said "I will be occupying these premises ...."

Paragraph five of the letter reads: "The late Company Secretary Mr T.K.B. Phiri had told me personally that, Mr Pegas was giving him so much money every month while paying only K150 per month for the Railways premises. I refused to pay any bribery towards the Railways premises like Mr Pegas because that's corruption, malpractice, illegal and unpatriatic". Paragraph six reads: "Mr Pegas boasts to have a lot of control on Railways properties because several Railways employees are enjoying his money. Mr Pegas behaviour and manners on 16th January, 1985 demonstrates the true picture of corrupted people he is in contact with to rob the Railways". Paragraph eight reads: "I strongly feel that, the authorities should check on this malpractice, corruption and untrustworth which Mr Pegas seems to enjoy publicly".
I think the three paragraphs in their ordinary meaning are defamatory as tending to bring the person, from Malawi Railways, who was seen with Mr Pegas on 16th January, 1985 into contempt and ridicule. The words appear in a context which alleges that Mr Malange is corrupt and he received bribes. The context also alleges that Mr Malange is not trustworthy, and he cannot therefore be relied upon. They are, in my view, injurious to the character of the second plaintiff.

It is now necessary for me to consider the defences of qualified privilege, justification and fair comment. An occasion is privileged where the person who makes the communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential: Watt v. Lorgsdon (1930) 1 K.B. 130.

According to paragraph four of the letter, the defendant "is to seek protection from this type of bad behaviour and approach of my fellow tenant Mr Pegas he has no right to intimidate me. He found me in these premises, I was the first to rent these premises. I was the one that won the tender to purchase all these premises when the Railways management wanted to sell the premises". If the purpose for writing the letter was to seek protection from Mr Pegas' bad behaviour and approach, one wonders what role the Secretary to the President and Cabinet, The Controller of Statutory Bodies and the Controller of Lands and Valuation would play in the matter. There are appropriate ways to deal with such grievances and this does not seem to be one of them. By copying the letter to the Secretary to the President and Cabinet, the defendant perhaps wanted the Office of the President and Cabinet to influence the Ministry of Trade and Industry to issue an import permit for fertilizers as requested in the penultimate paragraph. Be that as it may, I fail to appreciate what interest or duty, legal, social or moral the Controller of Statutory Bodies and the Controller of Lands and Valuation have in this matter. The premises belong to Malawi Railways and the other people to whom the letter was copied have nothing to do with them. Where the publication is made so widely that it reaches persons who have no common interest, the privilege will not attach. See De Buse v. McCarthy (1942) 1 K.B. 156. Again the belief of the defendant that there was a duty to make the communication will be irrelevant in determining whether the occasion is privileged; the question is, in fact, what the defendant's duty is, not what he thinks to be his duty: see Hebditch v. Macllwaine (1894) 2 Q.B. 54. The extent of this privilege was considered in Adam v. Ward (1917) A.C. at 321 where Earl Loreburn said:

"The judge has to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion. A judge may well think that a man is justified in inculpating his accuser in order more effectively to exculpate himself, and also may well think that the defendant has not exceeded the privilege when he has expressed himself with some warmth under real provocation, though no one can be justified in using such an occasion beyond reasonable limits of self defence."
It seems to me that the privilege is exceeded once allegations of a crime, in this case bribery and corruption, are made against an individual in circumstances which such allegations cannot be supported. I accordingly hold that the defence of qualified privilege does not succeed.

I now turn to the defence of justification. The burden of proving justification is on the defendant. The particulars on which the defendant relies to establish this are set out in paragraph five of the defence. Paragraph five of the defence states that the words contained in paragraphs four, six and seven, I presume of the letter, together with the particulars thereof are true in substance and in fact. Paragraph four of the letter talks about protection from bad behaviour and approach of Mr Pegas and that Mr Pegas has no right to intimidate the defendant. It also says that the defendant was the first to rent the premises and he also won tender to purchase all the premises when the Railways Management wanted to sell the premises. The plaintiff is not disputing this.

Paragraph six says that Mr Pegas boasts to have a lot of control on Railways properties because several Railways employees are enjoying his money. It also says that Mr Pegas' behaviour and manners on 16th January, 1985 demonstrated the true picture of corrupted people he is in contact with to rob the Railways. The defendant has not adduced any evidence as to where the boasting took place and the details of the boasting. It would appear it is just an empty statement written in anger to tarnish a fellow tenant's image. The allegation about "corrupted people in contact with Mr Pegas", namely Mr Malange, has not been substantiated. No evidence has been adduced that Mr Malange is corrupt. In paragraph seven, the defendant says he cannot perceive how the Railways Management can instruct his fellow tenant to ask him to vacate the premises. The paragraph also talks about Mr Husemeyer's wish to sell the property before he left and Mr Pegas paying too little for the premises in Lilongwe and that he, the defendant, could still change the rent of Mr Pegas if he had succeeded to acquire the property. In my view Mr Husemeyer's utterances, if there were any at all, do not help the defendant because they do not throw any light on the allegations of corruption, bribery and untrustworthiness complained of.

Some reliance is placed on the fact that the second plaintiff actually visited Mr Pegas and it was after the second plaintiff had left that Mr Pegas spoke the words complained of by the defendant in his letter of 19th January. There is no dispute at all about the visit. What is in dispute is the alleged instruction given by the second plaintiff to Mr Pegas to pass to the defendant and also what took place after the second plaintiff left Mr Pegas' premises. The defendant told the court that he has no quarrel with Mr Pegas. If there is this good relationship I would have thought that the defendant would have called Mr Pegas to confirm the alleged instruction. This, he did not do. He however called his clerk, Mr Gwelele. Mr Gwelele told the court that when Mr Pegas returned from escorting the second plaintiff, the defendant greeted Mr Pegas who asked the defendant when he was moving and whether he had not received a letter from management. According to this witness the defendant did not reply and Mr Pegas was speaking loudly in English.
After that, the witness, was asked to telephone the second plaintiff. He booked a call and he was put through to the second plaintiff's secretary who was a lady. He did not know what the defendant spoke to the second plaintiff about. But he was thereafter called to the defendant's office and was handed a draft letter addressed to Malawi Railways and copied to various people. According to this evidence all this happened on 16th January. In cross-examination he said that the telephoning and the writing of the letter took place two or three days after the second plaintiff's visit.

The evidence of this witness contradicted that of the defendant. Whereas he told court that the defendant did not reply, the defendant himself stated that he asked Mr Pegas "which premises" he was supposed to vacate and "what makes you think I should leave this place". I got the impression that this witness was not sure about what he was saying and had somehow been made to practise his evidence which left much to be desired. In this respect I would mention that the letter was written after the telephone and it was dated 19th January 1985. The second plaintiff denied to have spoken to the defendant on the phone on 19th January because that was Saturday and Malawi Railways do not work on Saturday. The second plaintiff's secretary and the second plaintiff himself could not therefore have been in the office. I prefer the evidence of the second plaintiff to that of the defendant and his witness.

Further reliance is also placed on what the former company secretary, Mr Phiri, is alleged to have said to the defendant. He is alleged to have said that he was receiving money from Mr Pegas and had attempted to get some money from the defendant. It is unfortunate that the name of the deceased Mr Phiri is being brought into this case. He is no longer in this world to defend himself. I say this because it would appear the late Mr Phiri and the defendant were friends. This is evidence by the fact that at his death, according to the defendant, a sum of K300 to K400 was owing in a form of a loan. The defendant did not sue the late Mr Phiri nor did he submit his claim to the deceased's estate when it was called for. So why this attempt to tarnish his image? Let his soul rest in peace! In any case it is not late Mr Phiri who is bringing this action. The "sins" of late Mr Phiri so far as this case is concerned, which I would hasten to add there were none, cannot be visited on the second plaintiff.

Another aspect being relied upon is that Mr Pegas erected a big board bearing his trading name on the premises. When he was asked to remove it Mr Pegas refused saying that he had been authorised by the first plaintiff. In all seriousness this sounds like a comedy. I do not see how this goes to prove the truth of the allegations.

Perhaps I better mention the tender which the defendant won to purchase the property. It would appear that in November 1983 the entire former RMS premises including where the defendant is trading were advertised for sale. The defendant won and was offered to buy at K400,000 on condition that he pays K40,000 deposit and the balance to be paid immediately after effecting the necessary legal documentation. He failed to pay the deposit and the deal would appear to have fallen through. The defendant cannot blame anybody for his failure to purchase the premises. He should blame himself. The premises on which Mr Pegas is trading was won out of normal tendering process and it would appear it was defined in an advertisement of 15th and 16th November 1984.
There was therefore nothing underhand in the deal.

The allegations of bribery, corruption and being untrustworthy are therefore not true. There is no evidence adduced to prove them. Where the libel imputes a crime to the plaintiff and the defendant pleads justification there must be the same strictness of proof as on a trial for such crime: Wooton v. Sievier (1913) 3 K.B. 499, Wilnet v. Hormer (1839) 8 C & P 697. The defence of justification has not, in my view, been proved.

I now turn to the defence of fair comment. This is pleaded in paragraph six of the defence. The test to be applied is whether what the defendant wrote was an honest expression of opinion which he held upon the facts truly stated and warranted by those facts in the sense that a fairminded man might reasonably draw from them that inference. In order therefore to succeed in the defence of fair comment the defendant must prove not only that he believed the statements to be true but also that those statements were warranted in the sense mentioned above: see Peter Walker & Sons v. Hodgson (1909) 1 K.B. 239. In Joynt v. Cycle Trade Publishing Co. (1904) 2 K.B. 292, it was stated thus: "The comment must not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and, further, it must not convey imputations of an evil sort, except so far as the facts, truly stated, warrant the imputation". In my view I do not think that the facts as found can warrant the inference that the plaintiff is corrupt or untrustworthy or even received bribes. I accordingly find that the defence of fair comment has not been established.

I now come to the question of damages. In my judgment there are no mitigating circumstances. The defendant does not show any remorse. There was no provocation from the plaintiff. The allegations, in my view, were made with reckless indifference to the truth. The serious imputations of criminal activities are rude, damaging and discourteous and can have unpleasant consequences on the plaintiff's livelihood. It would appear there is some rivalry between the defendant and Mr Pegas. True they are not rivals in business because their businesses are not of the same nature. But they are rivals in their bid to acquire business premises. This certainly does not justify the making of the defamatory statements in the hope that they will influence decision. I think the circumstances of the case here do warrant some substantial damages. I award K10,000.00.

On costs, I award the costs of the action to the second plaintiff but the first plaintiff will pay costs of the defendant which relate exclusively to the allegations on which the defendant was successful.

PRONOUNCED in Open Court this 27th May, 1986, at Blantyre.

[Signature]

F. L. Makuta
CHIEF JUSTICE