Banda J.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 558 OF 1988

BETWEEN:

P. T. BANDA ..... PLAINTIFF

- AND -

J. PITMAN ..... DEFENDANT

Coram: MKANDAWIRE. J.

Chizumila of Counsel for the Plaintiff
Mbendera of Counsel for the Defendant
Katunga, Official Interpreter
Longwe. Court Reporter

J U D G M E N T

Both parties in this case are legal practitioners. By a specially endorsed writ the plaintiff, Mr. P.T. Banda brought an action against the defendant, Mr. J. Pitman, for damages for libel on the footing of aggravated or exemplary damages. There is a detailed statement of claim and I shall revert to this later in this judgment.

This is a libel action based on the performance of professional duties and so I think that it is important that I give a brief account of the parties professional life before I go to the substance of the case. The plaintiff is a barrister-at-law having qualified in the United Kingdom. He was called to the English Bar in absentia on 20th November. 1967. He was later called to the Zambian Bar on 7th December, 1967. In 1981 he came to Malawi and he was called to the Malawi Bar on 31st July, 1981. For 14 years from 1967 to 1981 he worked in Zambia in private practice. The practice in Zambia is as fused as it is in our jurisdiction so that while there he worked as both solicitor and barrister. As a matter of fact, he was admitted to the Bar as Solicitor/Barrister. He dealt mainly with civil law involving commercial law, conveyances, probate. corporate work, general work pertaining to loans and loan agreements at times involving international agreements. While in Zambia he first worked at Shamwana and Company as employee and later as partner. He had also worked for Lisulo and Company as partner. Finally he opened his own firm by the name of Banda and Company. Later his firm merged with Walisilo and Company which was later renamed

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Walisilo, Banda & Company. Mr. Shamwana was the first African to set up a legal firm in Zambia after Independence. He was a legal advisor to the Party, that is the United National Independence Party. Mr. Banda, the plaintiff, assisted him in all his legal work. It was Mr. Banda's evidence that by Zambian standards, Mr. Shamwana was a prominent lawyer. Mr. Lisulo with whom Mr. Banda had also worked, was Legal and Constitutional advisor of the Party and later he became Chairman of the Legal and Constitutional Affairs Department of the Party. It was these distinguished personalities that Mr. Banda had worked with as partners while in Zambia.

When Mr. Banda came to Malawi he first joined Messrs Sacranie, Gow and Company. In May, 1982 he left and formed his own firm by the name of Masika & Company. While with Sacranie, Gow & Company, he did general litigation work from time to time and gave legal opinions either to clients or the Senior Partner himself, the late Mr. Sacranie. He also assisted in the preparation of agreements. He sometimes attended conferences and board meetings. While at Sacranie, Gow & Company, he had worked with the defendant as a professional colleague. Their relationship was cordial both professionally and socially. While at Sacranie, Gow & Company, he assisted in the preparation of several loan agreements. He did loan agreements mostly involving Indetrust, Indebank and Indefund. These three are related companies. When it came to the preparation of bills of costs his experience at Sacranie, Gow and Company was that there was no fixed scale for loan agreements. The fees would range from 1% to 2.75% of the consideration. It was the person who prepared the loan agreement that charged the fees. He cited one loan agreement involving K90,000.00 which was lent to Tobacco Control Commission. The instructions to prepare this loan agreement came in the absence of his employers. He then prepared the agreement which was subsequently approved by his employer and the clients. He prepared the bill of costs but when he took it to his employer it was adjusted upwards to 2½% of the consideration.

As Mr. Banda had prepared so many loan agreements for Indetrust while at Sacranie, Gow & Company, a special relationship developed so that when he opened his own firm these organisations, that is Indebank, Indefund and Indetrust continued to give him work at Masika & Company. It was his evidence that they did not raise any complaint about the loan agreements he prepared at his own firm. As a matter of fact, some of the work he started at Sacranie, Gow & Company followed him at Masika & Company. When preparing bills of costs he followed the scales used at Sacranie, Gow & Company.

It is not in dispute that while at his firm, Masika & Company, Mr. Banda received instructions from

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Indetrust to prepare a loan agreement in the sum of K1.5m. The borrower was Maltraco who wanted to buy ADMARC shares in PEW Ltd. This loan was to be guaranteed by I.T.M. Corporation of U.K. and a draft guarantee came together with the instructions. Upon receiving such instructions Mr. Banda drew up a draft loan agreement and Indetrust being a subsidiary of Indebank, he discussed this draft with Mr. Chilingulo who is the in-house lawyer of Indebank. The purpose of these discussions was to ensure that the draft loan agreement was prepared to the satisfaction of both Masika & Company and Indetrust. Such discussions took place in Mr. Chilingulo's office and a few amendments were made. Mr. Banda then sent the final draft to Maltraco for their perusal. He told the court that this is the normal procedure in loan agreements. All the parties have to approve the draft before the actual loan agreement is signed. At the time he sent his final draft to Maltraco, he did not know that they were represented by Messrs Sacranie, Gow & Company. Later, however, he was informed that Maltraco was represented by Sacranie, Gow & Company. At a later stage in the process a meeting was arranged to discuss the final draft as was prepared by Mr. Banda. That meeting took place in the office of the Manager of Indetrust, Mr. Kachile. The meeting was attended by Mr. Banda, Mr. Kachile, Mr. Msaka of Sacranie, Gow & Company and Mr. Chilembwe of Maltraco. Amendments were made at that meeting. It was Mr. Banda's evidence that in the art of preparing loan agreements it is very common to make amendments. Even when he was at Sacranie, Gow & Company amendments were made to the draft loan agreements. Indeed where two or three lawyers meet to discuss a draft, it is very rare that they will agree on the original draft as each lawyer's duty is to protect the interests of his client. It was further Mr. Banda's evidence that, the defendant, Mr. Pitman did not attend the meeting in Mr. Kachile's Office.

When the plaintiff was through with the preparation of the final copy he prepared his bill of costs. According to the agreement, the costs were to be paid by the borrower, Maltraco. However, Mr. Banda sent his bill of costs to his clients, Indetrust. His clients, Indetrust, did not querry the bill but he later learned that Indetrust merely forwarded it to Maltraco for settlement. There was no querry from Maltraco, that the bill was improper but it later became apparent that Maltraco had sent it to their lawyers, Sacranie, Gow & Company. Naturally Mr. Banda was waiting for payment but instead he got information that the defendant, Mr. Pitman, had written a letter about the bill direct to Indetrust. Although Mr. Pitman knew that Indetrust was represented by Mr. Banda and that the bill of costs was prepared by Mr. Banda, he did not contact his colleague. Instead he wrote direct to Indetrust without even sending a copy of the letter to the plaintiff. It is Mr. Banda's contention that the action Mr. Pitman took was unprofessional. Mr. Pitman should have contacted him or at least a copy of the letter should have been sent to him.

As that letter is the basis of these proceedings, I think it is prudent to set it out in extensio. This letter was tendered in evidence as Exhibit P2 and it reads:

"29th September, 1987

The Manager,
Indetrust Limited,
P.O. Box 358,
BLANTYRE.

ATTENTION : MR. F.W.D. KACHILE

Dear Sir,

MALTRACO LIMITED - LOAN K1.5 MILLION

We have had passed to us by our client your letter of the 21st September, 1987, in which you enclosed the bill of cost from Messrs Masika & Company in the sum of K40,390.00 of which K40,000 is professional charges and the remainder disbursements.

We are at a total loss as to how this figure of K40,000 is reached. When we consider that the draft prepared by your lawyer was substantially amended at our offices with our client and yourselves and your lawyer was not even present. We believe the Guarantee and binding of the documents were prepared by Indetrust and therefore do not believe that our clients should pay this.

The figure of K375 disbursements is also high and we querry how this is calculated bearing in mind that the final documentation was not even prepared by your lawyer.

We have advised our client that bearing in mind the work carried out by us in having to correct and amend the documentation, a fee of no more than K1.50 could be charged. Save for the initial draft the documentation was prepared by ourselves and Indebank's own in-house lawyer.

It is noted from the Loan Agreement that we are to reimburse Indetrust and therefore we have advised our clients that payment, if any, must be to you.

We therefore await hearing from you.

Yours faithfully,

J. PITMAN
for: SACRANIE, GOW & CO

cc: Maltraco Limited,
P.O. Box 478,
LILONGWE."

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After receiving this letter, Indetrust expressed reservations about the bill of costs. Mr. Banda then phoned Mr. Pitman about the letter and the latter agreed that he had indeed written such a letter but that he had not sent a copy to him. He promised to send a copy but he never did. Mr. Banda only got a copy of the letter from Mr. Stumbles who is the owner of Sacranie, Gow & Company after he had complained about Mr. Pitman's conduct.

The next witness for the plaintiff was Mr. Francis Watler Austen Kachile who was the Manager for Indetrust. It was his evidence that while at Sacranie, Gow & Company, Mr. Banda used to prepare loan agreements for Indetrust. For such work Sacranie, Gow & Company used to charge fees ranging from 1% to 2.75% of the consideration. Indetrust was happy with Mr. Banda's work so that when he formed his own firm they continued to give him work. Mr. Banda would charge fees at the same rate as Sacranie, Gow & Company.

Mr. Kachile told the court that he remembers to have instructed Mr. Banda to prepare a loan agreement for K1.5 million. The borrower was Maltraco. This loan agreement was to be prepared very quickly as Maltraco had a deadline within which to purchase the shares in PEW Ltd. After Mr. Banda prepared the initial draft there were three meetings to consider the same. The first meeting was held in Mr. Chilingulo's office where Mr. Banda and the witness considered the draft. The second meeting was held in his office and at this meeting Mr. Msaka, Mr. Banda and Mr. Chilembwe were present. The final meeting was held at the offices of Sacranie, Gow & Company but Mr. Banda did not attend that meeting. It was Mr. Kachile's evidence that at these meetings certain amendments were made. He testified that it is quite normal to make amendments to draft loan agreements. He gave one example in which the draft loan agreement was prepared by the late Mr. Sacranie himself and amendments were done at seven different meetings.

Mr. Kachile went on to say that after Mr. Banda presented the final draft he prepared his bill of costs and this was in the sum of K40,000 being professional charges. This figure represented 2.66% of the consideration which means that it was within the range Sacranie, Gow & Company used to charge. He did not raise any query about the bill but rang Maltraco about it and subsequently sent it to them. A week later, the witness got a letter from Sacranie, Gow & Company written by Mr. Pitman - Exhibit P2 in which it was suggested that K1.50 would be sufficient fees. Mr. Kachile was shocked with K1.50 and so he rang Mr. Pitman who amended it to K1,500.00. There can be no doubt that K1.50 was a typing error. Mr. Pitman must have intended K1,500 00. According to Mr. Kachile the K1,500.00 recommended by Mr. Pitman represented only 0.1% of the consideration. Mr. Kachile did not see the logic of sending the letter to him especially that Indetrust had not instructed Mr. Pitman to comment on the bill.

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The witness thought that it would have been proper if Mr. Pitman had made the representations to his counterpart, Mr. Banda and he pointed this out to Mr. Pitman. Mr. Kachile told the court that as a layman, he had no way of telling whether the bill was in order or not and that is why he thought that Mr. Pitman should have discussed the quantum of the fees with the plaintiff. He further told Mr. Pitman on the phone that that letter, Exhibit P2, may cost him (Mr. Kachile) his job and Mr. Pitman's reply was that that would serve him right for giving work to firms like Masika & Company. Be that as it may, it was his evidence that after reading this letter Indetrust started to have reservations about the bill. Indeed that letter was tabled before the Board of Directors and it was resolved that no more work should be given to Masika & Company but instead Sacranie, Gow and Company should be retained as their lawyers.

Turning to the letter, Exhibit P2, Mr. Kachile told the court that he understood it to mean that Mr. Banda had done a bad job or that he had done nothing at all. The letter says that Mr. Banda did nothing on the quarantee when in fact he had done some work on it. It is true that the binding was done at Indetrust but Masika & Company was billed for the services. At the time, Masika & Company did not have binding facilities and that is why it was arranged that the papers be bound at Indetrust but at the expense of Masika & Company.

Mr. Pitman, the defendant, is a solicitor and he qualified in the United Kingdom in 1980. After qualifying he joined Messrs Sacranie, Gow & Company. He was not quite engaged in litigation work but did corporate work, conveyances, probate and international finance among other things. While at Sacranie, Gow & Company, he worked with the plaintiff and their working relationship was quite normal although they did not work together in any specific matter. The plaintiff's work was of a general nature. When in 1982 the plaintiff opened his own firm their working relationship was normal as between lawyers working for different firms.

Mr. Pitman's evidence is that in about August, 1987, Sacranie, Gow & Company were acting for Maltraco in the matter of a loan agreement for K1.5m. Time was of the essence and everything had to be done very quickly. A meeting was then arranged at the office of Sacranie, Gow & Company to consider the draft loan agreement. At First he did not know who had prepared the draft, but in the course of the meeting he knew that it was Masika & Company. This was the first meeting on the matter and it was attended by Mr. Kachile (PW2) of Indetrust, Mr. Mbale and Mr. Chilembwe of Maltraco, Mr. Chilingulo and of course the witness himself. The plaintiff was not present. The meeting started at 8.00 a.m. and it went on up to lunch time. They went through

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the draft and substantial amendments were made. The witness then went through the draft, Exhibit D8, pointing out what amendments were made. It was Mr. Chilingulo who was making notes of the amendments. There was a second meeting which Mr. Pitman attended briefly and then left everything in the hands of Mr. Msaka. Again, the plaintiff was not there. Other participants were Mr. Mbale, Mr. Kachile. The witness could not remember if Mr. Chilembwe had also attended the second meeting. The witness did write the letter Exhibit P2 and it was quite normal for him to send it direct to Indetrust. He said he sent the bill direct to Indetrust because under Clause 8 of the loan agreement it was Indetrust who were initially to pay the bill and Maltraco would only reimburse. He had been instructed by Maltraco to contest the bill and even if he had no instructions he would still have advised that the bill was exhorbitant. It was his evidence that for all the loan agreements he prepared himself he never charged as high as 2.75%. The highest he had charged was 2% and that depended on the work done. In his view the letter he wrote was not libellous.

Turning to the meaning of the letter, he maintained that the amendments were substantial and by that he meant that the draft had been changed in many places. Some amendments related to drafting techniques while others were major resulting in changing the substance of the draft. Mr. Pitman went on to say that in loan agreements it is quite normal to have the draft amended. In the instant case although the draft had met with substantial amendments it does not mean that Mr. Banda had prepared a sloppy and incompetent document. Neither does it suggest that Mr. Banda is a cheat. Mr. Pitman denied that he told Mr. Kachile on the phone that it would serve him right if the letter cost him his job.

The next witness for the defendant was Mr. Bright McBrin Msaka. At the time of this loan agreement, he was in the employ of Sacranie, Gow & Company. He testified that there were indeed two meetings held at the offices of Sacranie, Gow & Company. Participation was as narrated by the defendant. Mr. Msaka did not understand why Indetrust did not come with Mr. Banda to the meetings. Turning to the amendments, Mr. Msaka was of the view that they were indeed substantial for the document prepared by Mr. Banda made no sense and was unacceptable to both the lender and the borrower. That, however, did not mean that Mr. Banda had prepared a sloppy and incompetent document. The witness went through Exhibit D8 indicating what amendments were made. Mr. Msaka said that it was a lie that he had a meeting with Mr. Banda and Mr. Chilembwe in Mr. Kachile's office. The only time he met Mr. Banda in Mr. Kachile's office was at the signing ceremony. Mr. Msaka conceded that Mr. Banda had amended the guarantee to the final loan agreement.

Mr. Austin Chilembwe, the Group Finance Director and Company Secretary for Maltraco was the third witness for the defence. He told the court that Masika & COmpany produced a discussion paper as it was not acceptable in its original form. He attended the meetings held at Sacranie, Gow & Company at which meetings amendments were made. He did not understand why Mr. Banda did not attend those meetings. The witness met Mr. Banda at the offices of Indetrust when the final copy was being signed. Turning to the fees charged by Masika & Co. it was Mr. Chilembwe's evidence that Mr. Pitman wrote the letter, Exhibit P2. after Maltraco had instructed Sacranie, Gow & Company to contest the bill.

The fourth and last witness for the defence was Mr. Clement Chilingulo who is the Company Secretary for Indebank. By virtue of that office he is also Company Secretary for Indebank's subsidiary companies including Indetrust. It is true that Indetrust had granted a K1.5 million loan to Maltraco. This was to enable Maltraco purchase some shares in PEW Limited. As there was a time limit within which the shares were to be purchased Maltraco wanted the money as quickly as possible. On an unspecified day Mr. Chilingulo went to the offices of Sacranie, Gow & COmpany on certain matters and it was there that Mr. Pitman brought to his attention the draft loan agreement. That was the first time he saw the draft. When he got back to his office he called for the draft from Mr. Kachile. At first Mr. Chilingulo did not know that it was prepared by Masika & COmpany. He thought it was prepared by the Manager of Indetrust, Mr. Kachile because sometimes Indetrust prepared loan agreements when they were under pressure from the client. The draft itself had a lot of errors and a number of things were left out. Then Mr. Chilingulo held meetings at the offices of Sacranie, Gow & Company. These meetings were attended by Mr. Msaka, Mr. Chilembwe, Mr. Kachile, Mr. Pitman and of course the witness. The plaintiff did not attend any of the meetings. Mr. Chilingulo told the court that he had never discussed the draft with Mr. Banda. At those meetings, extensive amendments were made to the draft and certain clauses had to be redrafted.

Turning to the defendant's letter - Exhibit P2, Mr. Chilungulo told the court that the letter presented the correct position as the draft prepared by Masika and Company was unacceptable. The witness had no ill feelings against Mr. Banda, after all the two had had dealings in the past. But in so far as the Maltraco loan agreement was concerned, the letter stated the truth and he saw nothing wrong with it. When Mr. Chilingulo saw the bill of costs relating to the loan agreement he was shocked with the amount claimed. All this, however, does not mean that Mr. Banda had prepared a sloppy and incompetent document, neither does it mean that Mr. Banda was a man of unscrupulous character.

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Towards the end of his evidence Mr. Chilingulo mentioned something which I found to be rather interesting. All along he did not know that the initial draft was prepared by Mr. Banda of Masika & Company. When he discovered that it was prepared by Mr. Banda he thought that they had done him an injustice as he had been left on the side line. So he called Mr. Banda to his office and showed him the final version as agreed by the parties. As a professional colleague he thought they had done him wrong. He then assured Mr. Banda that they would pay him all the same although he was not involved in the amendments. It certainly baffles me that Mr. Chilingulo should hold meetings at his office and the offices of Sacranie, Gow & Company to consider a draft loan agreement whose author he did not know.

Such was the plaintiff's and the defendant's evidence before this court. A lot has been said about the bill of costs that was raised by Messrs Masika and Company. In this respect I hasten to point out that this is a defamation case. I shall therefore make no attempt whatsoever to comment on the reasonableness or unreasonableness of the bill. This would not be the correct forum for that. It was in evidence that the bill was taxed by the Taxing Master in the sum of K4,000.00. I shall make no comment on the findings of the Taxing Master. It was also in evidence that the battle relating to this bill of costs is not yet over as a review to a Judge in Chambers is still pending. I shall therefore restrict myself to matters relating to the question of defamation and no more.

As stated earlier, the defendant's letter dated 29th September, 1987, set out in full above forms the basis of these proceedings. The plaintiff's case is that the letter was libellous and as a result the plaintiff was injured in his character and reputation. Perhaps at this stage I should set out the relevant parts of the statement of claim:

> "7. The said words in their material and ordinary meaning meant and were understood to mean that the plaintiff was sloppy and incompetent in his work as a legal practitioner and had, in fact, prepared a bad, incompetent and sloppy draft which had to be substantially amended by the defendant and his client.
>
> 8. The said words further or in the alternative in their material and ordinary meaning meant and were understood to mean that the plaintiff was a man of unscrupulous character and a cheat who wanted to charge for work on which he did very little or nothing and was not fit to be trusted and employed to carry out any legal work.

9. Further or in the alternative the words were calculated to disparage the plaintiff in his said profession as a legal practitioner and the said words were written maliciously and call for exemplary and or aggravated damages

10. By reason of the premises the plaintiff has been greatly injured in his credit character and reputation and in his office or occupation or profession and has been brought into hatred, ridicule and contempt and the said Indetrust Limited who used to retain him have ceased to do so, whereby the plaintiff has suffered damage. And the plaintiff claim damages on the footing of aggravated and or exemplary damages."

To this the defendant pleaded as follows, setting out only the relevant paragraphs:

"10. The defendant denies that the said words bore or were understood to bear or were capable of bearing or being understood to bear of the meanings as alleged in paragraph 7 and 8 inclusive of the statement of claim or any meaning defamatory of the plaintiff.

11. If contrary to what the defendant contends, the plaintiff has been defamed by the publication of the words contained in the said letter the defendant says that the words were published on an occasion of qualified privilege.

PARTICULARS

(a) Before the publication of the said letter and by reason of the matters pleaded in paragraphs 6 and 7 hereof inclusive, it became the duty of the defendant as solicitor of the said Maltraco Limited to contest the aforesaid bill and the defendant on instructions of the said Maltraco Limited but for no other reason did write on the 29th day of September, 1987 to Indetrust Limited stating the reasons for the objection to the bill. This letter contained the words complained of.

(b) The said words were written in discharge of the defendant's legal duty and pursuant to a duty of care owed by the defendant to Maltraco Limited and without malice towards the plaintiff and in the honest belief that the statements therein made, except as specifically amended, were true.

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(c) In the premises Indetrust Limited and the defendant acting as legal practitioner for the said Maltraco Limited had a common and corresponding interest in the subject matter and the publication of the said words.

(d) Alternatively, the defendant was under a legal duty to publish the said words to the said Indetrust Limited who had a like duty and or interest to receive them.

(e) Further or in the alternative, the defendant published the said words to the said Indetrust Limited in the reasonable and necessary protection of his clients' interests.

12. Further or in the alternative the said words were true in substance and in fact.

PARTICULARS

(a) The bill was raised in relating to work covered by Part III of the Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules 1984.

(b) The draft prepared by the plaintiff was substantially and materially amended by the defendant, Indetrust Limited's officers and Maltraco Limited.

(c) Apart from the initial draft the plaintiff was not involved in the preparation of the final document nor did he attend at any of the meetings at which the draft was amended and redrawn.

(d) The document as finally produced was not engrossed by the plaintiff and therefore the charge for disbursements by the plaintiff is grossly excessive and in any event unjustified in law.

(e) Pursuant to Rule 2 of Part III of the Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules, 1984, the said bill was referred to the Taxing Master for taxation and the Taxing Master upon taxation did not uphold it but substantially reduce the same from K40,390 to K4,000.

13. Further or in the alternative the said words were fair comment made in good faith and without malice upon the facts.

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PARTICULARS

The defendant repeats the particulars in paragraph 12(a) to (e) inclusive hereof.

14. The said words were not calculated to disparage the plaintiff in his office or profession as alleged in paragraph 9 of the statement of claim or at all and the defendant puts the plaintiff to strict proof thereof.

15. The defendant denies that the plaintiff has suffered any of the matters complained of in paragraph 10 of the statement of claim or any damage as alleged therein or at all.

16. Save as expressly admitted herein, the defendant denies each and every allegation of fact contained in the statement of claim as if the same were set out and expressly traversed herein seriatium.

So it can be seen that the defendant is pleading the defences of qualified privilege, justification and their conduct. But before I can consider these defences, it is necessary for me to determine whether or not the letter of 29th September, 1987 is indeed defamatory. If I find that it is not defamatory, then there will be no need for me to look at the defences. Publication of this letter is not denied. Mr. Chizumila submitted that the letter is plainly and clearly defamatory as it imputes incompetence on the part of the plaintiff. To say that the draft was substantially amended means that the plaintiff had prepared a bad and substandard document and that the plaintiff himself is unknowledgeable and lacks in skill. Speaking for myself, I have no difficulty in agreeing with Mr. Chizumila that this letter in its natural and ordinary meaning is indeed defamatory. The test is that of a reasonable man and the intention of the publisher is immaterial - see Gatley on Libel and Slander, Eighth Edition, paragraph 89. A reasonable man reading the letter, Exhibit P2, will understand that it was calculated to disparage the reputation of the plaintiff in the way of his legal profession. The letter would also be understood to inpute unscrupulous character on the plaintiff for charging for work on which he did very little or nothing. It is actionable without proof of special damage to talk of a professional man that he is incompetent, unknowledgeable and lacks of skill in his profession for such words are calculated to disparage his reputation in his salling - see Gatley on Libel and Slander, Eighth Edition, paragraph 168.

Having found that the letter was defamatory I now move to the defences raised by the defendant. I start with qualified privilege. Mr. Mbendera submitted that the letter written by the defendant was privileged in that he was writing on the instructions of his clients. Maltraco had instructed Messrs Sacranie, Gow and Company to contest the bill of costs raised by Masika & Company and, so it became the duty of the defendant as Legal Practitioner to protect the interests of his clients Mr. Mbendera has cited the case of Baker v Carrick (1894) 1 QB 838. On the other hand, Mr. Chizumila submitted that the letter was not privileged as the defendant had no business addressing it to the plaintiff's clients. He has drawn a distinction between this case and the Baker case. Alternatively, Mr. Chizumila submitted that if the occasion was privileged then the defendant destroyed the privilege, so that he cannot avail himself of this defence. It was also Mr. Mbendera's submission that the occasion was privileged as the parties had a common and corresponding interest in the loan agreement and the bill of costs.

Considering the circumstances of this case, I think that the occasion was indeed privileged. Both Indetrust and Maltraco had a common and corresponding interest in the loan agreement. It follows that they had a common and corresponding interest in the bill of costs especially in view of Clause 8 of the loan agreement which required Indetrust to pay the bill and Maltraco to reimburse. In the case of Adam v Ward (1917) AC 309 it was held that an occasion will be privileged where the person making the communication has an interest or a duty to make to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. The defendant only wrote on behalf of Maltraco who had an interest in the matter and the letter was addressed to Indetrust who had a corresponding interest.

In practice, however, Clause 8 was not applied strictly for what Indetrust used to do was to pass on the bill to the borrower for settlement direct with the person who raised it. This is clear from the evidence of Mr. Chilingulo. In accordance with this practice Indetrust had passed on the bill to Maltraco to settle directly with Masika and Company. Even then, I think that Indetrust still had an interest in the bill for whatever action Maltraco took would affect Indetrust's obligation under Clause 8 of the loan agreement. Apart from the question of common and corresponding interest, I find that the occasion was also privileged because in writing the letter the defendant was only acting under instructions from his clients. Having been instructed to contest the bill, it became his duty to try and protect his client's interest - see the case of Baker. Whether in the process, he had destroyed the occasion, that is a different matter but the facts show that the occasion was privileged.

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Mr. Chizumila then submitted that if the occasion was privileged, then the defendant destroyed the occasion because he had abused the occasion and was actuated with malice. It is true that a defendant who is actuated by malice destroys the privileged occasion. In the case of Angel - v - H.H. Brishellt Company Ltd. and Another (1967) All E.R. 1018, it was held that the defendant had published a libelous letter in circumstances which were privileged but nonetheless he was held liable because he had destroyed the occasion as he had written the letter under malice. What happened in that case is that the defendant had addressed a libellous letter to a third aarty with a request that the third party should pass on the letter to the plaintiff. All the three parties had some business connections but the defendant could very well have sent the letter direct to the plaintiff. The court had dwelt at length as to why the defendant had not sent the letter direct to the plaintiff. It was found in the result that in sending the letter to the third party the defendant was actuated by malice.

In the case at hand, the bill of costs was raised by the plaintiff. He then sent it to his client, Indetrust, for settlement in terms of Clause 8 of the loan agreement. On their part, Indetrust, in accordance with practice, sent the bill to Maltraco who were requested to settle it directly with Masika & Company. According to Mr. Chilingulo the advantage of this practice was that it saved time and paper work. The bill was sent to Maltraco with a covering letter the relevant part of which reads as follows:-

> "We should be grateful if you could kindly attend to the same directly with Messrs Masika & Company under advice to us. By copy of this letter we are informing Messrs Masika & Company that they should expect to receive payment directly from you as per our letter of offer to you of 5th August, reference T 90/46 paragraph 3:10".

This covering letter together with the bill were passed onto the defendant with instruction to contest the bill. It seems to me that if the defendant was bona fides in trying to protect his client's interest, he sould have contacted his counterpart, the plaintiff. It was only the plaintiff who could have explained how he arrived at the sum claimed and only he could have made any reductions. The defendant's explanantion is that he sent the bill to Indetrust because Classe 8 required Indetrust to pay and Maltraco only to reimburse. I do not think that this explanantion holds any water in view of Indetrust's letter asking Maltraco to deal

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directly with Masika & Company. As A Legal Practitioner the defendant ought to have known that it was unethical to write directly to his counterpart's client. I think that the reason why the defendant wrote such a letter to Indetrust was to destroy the plaintiff in his profession. This is quite clear from the tone of the letter and the language used therein. In the legal profession, it is quite normal to challenge a bill of costs if the paying party thinks it is excessive, but it is not done in this manner. Either the defendant should have discussed it with the plaintiff or he should simply have requested that it be taxed. It will be remembered that Indetrust used to send their work to Sacranie, Gow & Company but when the plaintiff opened his firm, Indetrust followed him there with their work. One would be justified in saying that the plaintiff wanted to win back Indetrust. I am satisified that in sending this letter to Indetrust the defendant was indeed actuated by malice and this letter did cause some commotion at the offices of Indetrust. The letter goes far beyond contesting the bill. The defendant was, in fact, telling Indetrust that they went to the wrong lawyer who charged them in excess of K40,000.00 for doing a bad job when Sacranie, Gow & Company could have charged a mere K1,500.00. Mr. Kachile's evidence was that when he phoned the defendant he had told him that the letter would cost him his job, the defendant's reply was that that would serve him right for giving work to firms like Masika & Company. This evidence fortifies my finding that the defendant was indeed actuated by malice. The defendant denied having said this but I am inclined to believe the evidence of Mr. Kachile.

Since I have found that the defendant was actuated by malice, he cannot avail himself of the defence of qualified privilege. Under paragraph 13 of his defence the defendant is pleading fair comment. Having found that he was motivated by malice, there is no point in considering this defence for a person who is acting under malice or ill will cannot make a fair comment - see the cases of Thomas v Bardbury, Agnew & Company Ltd and Another (1906) 2 KB 627.

I now move on to justification which is the subject of paragraph 12 of the defence. The basis of this defence is that what is published of the plaintiff is true. The truth of the imputation provides a complete defence to a defamation action. It is not necessary, however, to prove the truth of every word of the libel. It is sufficient if the substance or gist of the libellous statement is justified'; Sutherland v Stopes (1925) AC 47. The question I must ask myself is Are the contents of the defendant's letter, Exhibit P2, true in substance and in fact? To begin with it is common case that in this loan agreement time was of the essence as Maltraco had been given a dead line within which to purchase the shares. The plaintiff was, therefore, under pressure in so far as time was concerned

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as he had to act very quickly. It is against this background that the plaintiff set to prepare the draft. It is again common case that what the plaintiff produced was a draft. He never described his wokk as a final copy. Both parties have prepared loan agreements and they are agreed that it is quite common to make amendments to drafts. It was therefore not strange that amendments were made to the plaintiff's draft. The question then is not whether amendments were made but whether the document was in fact substantially amended. The phrase "substantially amended" is not capable of any precise definition. According to the defendant it means that the draft was changed in many places: according to Mr. Msaka it means that without the amendments the document did not make any sense but to Mr. Chilingulo it means that the draft was extensively amended. Mr. Chilembwe described the plaintiff's draft as a working paper. The plaintiff does not deny that amendments were made but his stand was that only minor amendments were made as the substance or crux of the draft was not changed. He says that in certain respects it was a matter of style or punctuations. What surprises me is that although the defendant's case is that the draft was substantially amended, the witnesses said that despite all that the document was not incompetent. One would have expected that a document that was changed in many places, amended extensively and made no sense would be sloppy and incompetent. I have myself looked at Exhibit D8, the draft on which the amendments were made. Indeed the amount of ink on this document would be very misleading. But a close look at this document, and upon reading the amendments that were made, one cannot honestly say that substantial amendments were made. It is true that amendments were made but not to the effect that the draft was materially changed. Most amendments were of a minor nature. True one or two clauses were put in but it must be remembered that the plaintiff did not have all the time in the world and these clauses did not alter the substance of the draft.. In my judgment, the defendant has failed to prove that the plaintiff's draft was substantially and materially amended. I would hold that the defendant's persistence that the draft was substantially and materially amended is only further evidence of malice. I have looked at the final copy, Exhibit D4. It is not substantially and materially different from the plaintiff's draft. Putting the two together, one can easily tell that the final copy is a product of the plaintiff's draft.

I now want to consider the allegation that the plaintiff did not take part in the amendments. The plaintiff's evidence was that after making his initial draft he discussed it with Mr. Chilingulo and a few amendments were made. He then prepared a final draft which had Mr. Chilingulo's approval before sending it to Maltraco. Then there was a meeting in Mr. Kachile's office

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where Mr. Msaka and Chilembwe were present. The defendant's case is that no meetings were held at Indetrust and that all amendments were made at Sacranie, Gow and Company and that the plaintiff did not attend. The impression created by the defendant is that the plaintiff did not at all care about his work and that in preparing the bill of costs he was reaping where he did not sow. I think the picture so painted is most unfair and malicious. Mr. Chilingulo told the court that he first saw the draft at the offices of Sacranie, Gow and Company and even after holding some meetings he did not know that it was Masika and Company who had prepared the draft. I find this to be very strange indeed. I would have thought that nobody can really sit down to consider a draft without knowing its origin. One would first have to know who prepared the draft before considering it. I therefore do not agree that Mr. Chilingulo first saw the draft at Sacranie, Gow and Company.

The plaintiff is an experienced legal practitioner and he has been preparing loan agreements for many years. It is most inconceivable that he could have sent his draft to Maltraco without first discussing it with his client, Indetrust. What the defendant wants this court to believe is that after preparing the draft, the plaintiff had nothing whatsoever to do with it. He did not care what was happening to it and the next thing he did was to attend the signing ceremony of the final version. This is most ridiculous. In my judgment, I find that he did discuss the draft with Mr. Chilingulo and before sending it to Maltraco it had the approval of Indetrust. Later, the plaintiff discussed this draft with Mr. Kachile, Mr. Msaka and Mr. Chilembwe in Mr. Kachile's office. The plaintiff was representing Indetrust and Mr. Msaka was representing Maltraco. It was natural to expect amendments as each party was protecting the interests of his client. It is therefore not true that the plaintiff did not attend any of the meetings to consider the draft. It will be noted that there is a contradiction between the evidence of Mr. Chilingulo and that of Mr. Msaka. Mr. Chilingulo said Mr. Msaka, Mr. Chilembwe held meetings in his office to consider the draft, when Mr. Msaka said there was no such meeting. In my judgment, most amendments were done at Indetrust and the plaintiff was present. If he did not attend the meeting at Sacranie, Gow and Company, it is because he was not informed. According to Mr. Kachile, it was Mr. Chilingulo who said it was not necessary to have the plaintiff there as all major points had already been agreed upon. Perhaps I should mention that it was in evidence and conceded by the defendant that even after the final document was produced the plaintiff did amend the guarantee.

It is further alleged that the plaintiff did not engross the final document and therefore the charge for

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disbursements in this respect was unjustified. Again this is not true. It is correct that the plaintiff did not have binding facilities so he asked Indetrust to do it for him at a fee. Indetrust sent him a bill for doing the job and that is the amount shown in the bill of costs as disbursements.

Turning to the bill of costs, the Taxing Master reduced it from K40.390.00 to K4,000.00. As a review of the Taxing Master's ruling is pending before a Judge in Chambers, I think it would be improper for me to say anything about the bill. All I can say is that the Manager for Indetrust did not find anything wrong with the bill as it was within the perimeters charged by Messrs Sacranie, Gow & Company. In my judgment. I find that it is not true that the plaintiff's draft was substantially and materially amended. I also find that the plaintiff did attend some meetings and the plaintiff was only charging for the work he actually did. If the bill was on the high side, that was simply a matter for the Taxing Master.. It was not his fault that he did not attend the final meeting. He was not informed about it and it was in evidence that it was not necessary for him to attend as all the major points had already been agreed upon. I also find that he did engross the final document in the sense that Indetrust did it for him on his request and at a fee. In the final analysis. I find that the defendant has failed to prove that what was published of the plaintiff is true. The plaintiff's action therefore succeeds.

I now turn to the final part which is damages. The plaintiff is calling for aggravated or exemplary damages. The only relevant local authority I have been able to lay my hands on is Malawi Railways Ltd and J.B.L. Malange - v - A.H. Burdurkhan, Civil Cause No. 196 of 1985 (unreported), Honourable Makuta,C.J., awarded the 2nd plaintiff K10,000.00 damages and these were described as substantial. In awarding these damages the learned Chief Justice had this to say:

> "In my judgement these 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 is clear that in assessing damages the learned Chief Justice was not only looking at the serious nature of the criminal imputations made of the plaintiff but the defendant's conduct as well. These, however, were not said to be aggravated or exemplary damages.

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In the circumstances of this case I think that aggravated damages are indeed called for. The defendant has shown no remorse whatever. His conduct was outrageous and wanton in the extreme and was calculated to squeeze the plaintiff out of his profession. The defendant was in the employ of a big and well established firm and yet he was putting in jeopardy the livelihood of a small firm. Libel is actionable per se but in this case the plaintiff suffered real damage. Although he was not retained in the sense that no retainer fee was paid, there was evidence from Mr. Kachile and Mr. Chilingulo that from time to time, Indebank, Indefund and Indetrust gave him some work. But when this libellous letter was received the Board of Directors of Indetrust met and resolved that no more work was to be given to Masika & Co. but instead M/S Sacranie, Gow & Co. be retained as their lawyer. It is impossible to say what would be the extent of pecuniary loss but it is abundantly clear that that resolution resulted in loss of business to the plaintiff. This may be equated to the East African case of Tanganyika Transport Co. Limited v. Ebrahim Nooray (1961) E.A. 55 that "it would be no exaggeration to describe it as a case of a Goliath trying to squeeze out of business a rival David, or at least to do him as much harm as possible". In that case both parties were transporters. The appellant had over seventy vehicles against the respondent's four but the appellant had published libellous statement with the effect of disparaging the respondent in his business. In the case of Praed v. Graham (1890) Q.B.D. 53, it was said that in assessing damages:

> "The jury .... are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before the action, after the action and during trial."

In this case the attitude of the defendant in court was clearly repulsive and full of ill will. Up to the last minute he persisted in saying that what was published of the plaintiff is true when in fact there is no merit in this contention. In the absence of any pecuniary yardstick, it becomes extremely difficult to assess a proper figure for damages. Whatever figure one arrives at, there are bound to be contrary opinions and criticisms that the figure is either too low or too high. Indeed I can only award what I consider to be a reasonable sum of damages having regard to all the circumstances of the case. Considering the aggravating factors that I have referred to, I think that a sum of K25,000 would be reasonable damages and I so order.

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The defendant is condemned in the costs of these proceedings.

Pronounced in open Court this 18th day of May, 1990 at Blantyre.

M.P. Mkandawire
JUDGE