IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

CIVIL CAUSE NO 177 OF 2016

BETWEEN

EZEKIEL MANGANI, JUSTIN CHIKAONDA & 243 OTHERS.....PLAINTIFFS

-AND-

SOBHUZA NGWENYA.....1ST DEFENDANT

-and-

FDH BANK LIMITED.....2ND DEFENDANT

-and-

FDH FINANCIAL HOLDINGS LIMITED.....3RD DEFENDANT

CORAM

H/H B. CHITSAKAMILE, ASSISTANT REGISTRAR

Mr Majamanda, Mr Mlambe for the Defendants (Applicants)

Mr Mumba for the Plaintiffs (Respondents)

Mr Alexander Tepeka, Official Interpreter

RULING

Introduction

The plaintiff took out the present summons to strike out action under Order 18 Rule 19 of the Rules of the Supreme Court arguing that the filed statement of claim discloses no reasonable cause of action and is frivolous, vexatious and embarrassing.

The matter arises from the acquisition of Malawi Savings Bank Limited(MSB) from the Government of Malawi by the 3rd defendant which necessitated its merger with the 2nd defendant. During the process of the merger, the plaintiffs who were employees of MSB or FDH herein were laid off in what could be called a retrenchment.

After the retrenchment, the 1st defendant granted a radio interview in Chichewa on Zodiak Broadcasting station in which he responded to questions regarding the criteria used declare certain individuals redundant. It is the excerpt of this interview that prompted the plaintiffs to commence an action in libel against the defendants stating that the said interview represented them to ordinary right thinking members of the society to have been retrenched for lack of qualifications, skills and competencies or because of poor performance.

It is imperative that I set out the said excerpt of the interview in full as I do below;

"Criteria yoti uyu ali pantchito uyuyu sali pantchito inapangidwa malingana ndi dongosolo lomwe linapangidwa.Mwina anthu atamvetsetsa dongosolo limeneli.(The criteria used to determine who should lose their jobs was made in line with the strategy that was developed.Perhaps if people understand this strategy)

Chifukwa choti choyambilira kuti tione kuti munthu uyu ntchito yake palibe nchoti tinakonza kuti company structure ikhala motere.(Because in the first place, to determine that this person's job is redundant , we first came up with a company structure)

Ndiye tikaona structure ija munali zintchito; tiyerekeze kuti ntchito ineyo ndi wopereka ndalama pa counter ku bank kuja.Ntchito ija timayilongosola imene pachizungu timanena kuti job description; kuyilongosola bwino bwino kuti ntchitoyi munthu wogwira ntchito imeneyi wayenela kuti akhale ndi zakutizakuti.(Now even you look at the structure, there were several jobs, for example, say my job is a bank teller at the bank.So we described the job which in English is called Job Description, explaining clearly about the job requirements so that the person to do that job should have the following qualifications)

Nde zikapezeka kuti munthu amene alipo wogwila ntchito imene ija akukwaniritsa zimene zili pa ntchito ija munthu uja amapezeka kuti akulowa pa ntchito ija.(If it turns out that the person who is holding that position possesses the qualifications for that job, that person was being offered the position)

Koma nthawi zina zimapezeka kuti mwina ntchito imene ija ikupezeka kuti mwina pali anthu ochuluka amene amayenera kuti agwire ntchito imene ija

kusiyana ndi anthu amene alipo pakali panonde nchifukwa chake kunapezeka kuti ena akuchotsedwa ntchito.(But sometimes it could happen that there were several people on the same job hence others were dismissed.)

Ndiye komanso njira ina ndiyonena kuti mwina ntchito imene ija amayenera kuti alowepo munthu uja mwina yofunika zinthu zimene munthu uja alibe, nkuthekanso kuti mwina anthu ena sanaipeze ntchito yao chifukwa choti zimene zinawalinganiza kuti ntchito imene akugwilayomalinga ndi mmenneyafotokozedwera mu strategy muja mwina zimene zija palibepo.(Again, another criterion was that if the position which that employee was supposed to occupy had specific requirements which that person did not possess, it could also happen that others failed to secure any position because they did not have the qualifications for that position described in the strategy.)

So amene anacotsedwa ntchito aliyese wa ku FDH wa ku Malawi Savings Bank anaikidwa muchimbale chimodzi nkumasankhamo kuti uyu akupita apa uyu akupita apa malingana ndi zomwe zimawalinganiza.(So those that were dismissed , from FDH and Malawi Savings Bank were put in a pool(basin0) and were being selected from that pool, fitting them in various positions according to their competencies/qualifications)

Komaso china chimatengela kuti zinthu zimene zikhale ndi mmene munthu uja amagwilira ntchto kuti ntchitoyi amaitha kapena samaitha. (Furthermore, another determining factor was performance, whether the person is a performer or not.)

Zinthu zimenezi mukaziika pa sikelo mmatha kuona kuti mwina enawa ntchitoyi pakati pa anthu awiri pakati pa awa amene amaitha kwambiri ndi uti ndiye mmamutenga amene uja kuti atenge ntchito imene ija malingana ndi kuthekera kwa munthu uja" (When you weigh these factors , you can assess that some of these people, between two people, between this one and that one, you can tell who knows the job best and you take that person to occupy the position according to the capabilities / qualifications of that person)

As indicated, the defendants feel the words herein above are innocent and not capable of raising any triable issue hence the application.

The Parties' Arguments

The defendants argued that there was no nexus between the facts relied by the plaintiffs and the tort of libel. They indicated that the said words were a mere general explanation of what happens during mergers of companies i.e that some roles become duplicated and some people become redundant and are laid off. They further argued that the defendants had the power to assess which people would continue to be in their employ by looking at many factors including performance and qualifications of employees. Thus, according to the defendants, the words complained of were not defamatory at all.

Further, the defendants submitted that at the time of publication, the words complained of did not refer to the Plaintiffs as required by law. They argued that liability is not incurred where an innocent statement is thought to be defamatory by subsequent events. According to the defendants, at the time of utterance the alleged defamatory words did not make reference to anyone and the retrenchment occurred later.

The defendants invited the court to look at the alleged defamatory words as appear in the statement of claim and determine.

Further to attacking the words, the defendants also attacked the pleadings, namely, the statement of claim. They argued that the same has irrelevant averments which were also embarrassing. Specifically, they referred the court to paragraphs 3 and 7 of the statement of claim which respectively talk about the acquisition happening amidst public outcry and outrage and makes reference to one Dr Thom Mpinganjira yet he is not alleged to have made defamatory statements. Further they attacked paragraph 18 stating that it was irrelevant.

In his reply, counsel for the plaintiff argued that the alleged defamatory words were uttered between 10th April after the retrenchment that occurred between 5th and 7th April. He stated that the arguments that the subsequent events would not make matter defamatory was not applicable in this case. In counsel's argument the statement complained of classified the retrenched people to have been poor performers and lacking of requisite qualifications which was defamatory. He emphasized that an action that is struck out under Order 18 rule 19 is one which is obviously unsustainable. He insisted that the statement of claim shows that there is an issue for determination namely whether or not the excerpt of the radio interview was defamatory. He thus urged the court to dismiss the defendants' application with costs.

As for the pleadings, counsel argued that though he conceded that certain paragraphs were irrelevant, this was not a fatal irregularity as it could be cured by an order for amendment.

I must state that counsel for both parties referred the court to myriad of authorities which I have had recourse to in making this determination.

Applicable Law

Order 18 rule 19 of the Rules of Supreme Court is germane to the issue herein. The said Order 18 rule19 states :-

> **"The Court may at any stage of the proceedings order to be struck out...any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –**
>
> **(1)(a).....**
>
> **(b)it is scandalous, frivolous or vexatious..."**

The Court has therefore a general jurisdiction to expunge scandalous matter in any record or proceeding. See; **Re Miller (1884) 54 LJ Ch 205**.

Further, **Selbourne LC** in **Christie v. Christie (1873) LR 8 Ch Ap 499** at **503** said the following, which is illuminating:-

> **"The sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed"**

In the same way the court has jurisdiction under Ord.18 r.19(1)(b) to strike out frivolous or vexatious process. Order18/19/16 of the Rules of Supreme Court states that by these words are meant cases which are obviously frivolous or vexatious, or obviously unsustainable. See; **Attn Gen of Duchy Of Lancaster v. L & N.W Ry [1892] 3 Ch. 274 at 277**

A cause of action could be defined as the entire set of circumstances giving rise to an enforceable claim. It is in effect the fact or combination of facts which give rise to a right to sue and it consists of two elements namely, the wrongful act of the defendant which gives the plaintiff his cause of complaint

and the consequent damage. A decision on whether or not a plaintiff has reasonable cause of action can only be made after an examination of the facts pleaded in the statement of claim. It has nothing to do with the nature of the defence which the defendant may have to the plaintiff's claim. The court does therefore confine itself only to the averments in the statement of claim in its assessment of whether or not the plaintiff has a reasonable cause of action.

Lord Pearson in **Drummond-Jackson v. British Medical Association [1970] 1 All E.R. 1094 C.A.** defined a reasonable cause of action as one with some chance of success when only the allegations in the pleading are considered. Similarly, a reasonable defence is one with some chance of success when only the allegations in the pleading are considered. It is enough if the pleading raises some question fit to be decided by a Judge or jury. See **Davey v. Bentinck [1893] 1Q.B. 185.**

In **De Medina v Grove** the judgment of Wilde CJ (with whom Maule J, Cresswell J, Williams J, Parke B and Rolfe B agreed) began:

"The law allows every person to employ its process for the purpose of trying his rights, without subjecting him to any liability, unless he acts maliciously and without probable cause."

On defamation

This Court is aware of the trite law on defamation as submitted on by both parties in this matter. Anyone who publishes any matter that is untrue and is likely to injure the reputation of another is guilty of defamation. **See Migochi v Registered Trustees of the CCAP [2008] MLR 117.**

The Court must determine whether there was publication of words complained of. The Court must further consider whether the published words complained of refer to the plaintiff. The Court must again consider whether the words complained of convey a defamatory meaning in their ordinary meaning to a reasonable member of the society. The parties have correctly

cited the relevant case law. See **Byrne v Dean [1937] 1KB 818, Fida Faiti and 9 others v. Malawi Telecommunications Limited Civil Cause Number 3147 of 2006(unreported)**

In Monica Chindongo v K. Cremer and Others (Civil Cause No. 3654 of 1998), the court made the following statement that I find instructive;

"A defamatory statement or matter is one which has a tendency to injure the reputation of the person to whom it refers: Salmond and Heuston on Law of Torts 19th Ed at page 155 cited with approval by Tambala, JA, in a Supreme Court of Appeal decision in PTC -v- Ng'oma, MSCA Civil Appeal No. 30 of 1996 (unreported). The essential feature of defamatory matter is, therefore, its tendency to damage the reputation or good name of the plaintiff, Tambala, JA, further stated in that case. It is therefore not what the plaintiff feels about herself upon defamatory matter. There has to be a publication of the defamatory matter to some person other than to the plaintiff. And what matters is the effect of the defamatory matter on that other person, in particular as to whether that matter in that person tends to injure the reputation of the person to whom it relates. To such person or persons, since such publication, the plaintiff is henceforth held in contempt and he or she suffers from ridicule. Thus, the test is whether the words tend to lower the plaintiff in the estimation of right thinking members of the society generally: Per Lord Atkin in Sim -v- Stretch (1936) 2 ALL E.R. 1237 at 1240. In the case of words defamatory in their ordinary sense the plaintiff has to prove no more than that they were published".

In **Berkoff v. Burchill and another** , Neill LJ said to cap it all that **"speaking generally, the law recognizes in every man a right to have the estimation in which he stands unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action".**

Determination

In the matter at hand, I have been urged to take a look at the statement of claim and determine whether there is a cause of action with reasonable chance of success. I was invited to look at the words complained of as pleaded in the statement of claim and see whether a reasonable cause of action could arise therefrom.

This court indeed has power to strike out hopeless actions at this stage and on the strength of the Order under which the application is made. As Lord Denning stated in the **Drummond Jackson case** this is to avoid parties being put **"to the expense and trouble of a long trial when it could all have been avoided by a preliminary move"**

I have thus accordingly considered the statement of claim in the light of the relevant law to determine whether it raises some questions which need to be examined by a judge at trial.

To begin with, the action herein is between 245 persons and the defendants. The plaintiffs allege that by the statement above-quoted that they are viewed by ordinary reasonable members of the society to be lacking of qualifications, competencies, skills, vision and that they are poor performers to be retained in the employ of FDH bank.

Now, the words complained of and quoted above are in general terms. In uttering those words the 1st defendant was giving out information as to the criteria used to retain other staff and lay off others. The words bring out several factors that contributed to one being laid off or retained as the case may be namely; qualifications or lack thereof, competence or lack thereof, possession of requisite skills or not, there being too many people satisfying the qualities for a specific job, and generally the need to maintain a particular company structure.

The words complained of have not singled out which one of the 245 plaintiffs was dismissed because of what reason. It is true that some applicants may have been laid off after being deemed non-performers or lacking capacity in some way. It is again true that some of the plaintiffs were laid off simply because the new company structure could not accommodate them and for some because though they were capable, there were just too many on that position and they could not be kept.

The words as quoted verbatim do not give leads to a reader or a listener to determine which one of the 245 plaintiffs was laid off because of what. In my view the words represent an innocent general statement of what is normal in a merger of two companies. In themselves the words are not capable of bearing the meaning attached to them by the plaintiffs. They are general and honest statements.

In my understanding of the tort of defamation, defamatory statements about a group or class of people are generally not actionable by individual members of that group or class except in two situations namely (1) where the group or class is so small that the statements are reasonably understood to refer to the individual in question; or (2) the circumstances make it reasonable to conclude that the statement refers particularly to the individual in question. See; **Restatement (2d) of Torts, 564A (1977)**.

The American case of **Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952),** provides a good illustration of this general rule. In that case, the defendants wrote that "most of the [Neiman-Marcus] sales staff are fairies" and that some of the company's saleswomen were "call girls." Fifteen of the 25 salesmen and 30 of the 382 saleswomen at the store brought suit for defamation. Applying New York and Texas law, the court held that the salesmen had a valid cause of action, but the saleswomen did not. Even though the statement referred to "most of" the salesmen, without naming names or specifying further, the statement could be understood to refer to any individual member of this small group. The group of saleswomen, however, was so large that a

statement that some of them were "call girls" would not be understood as referring to any individual member of the group.

In the case at hand, though the words herein could indeed be said to refer to the plaintiffs herein, none of the plaintiffs can say that of the reasons for lay-off identified by the 1st defendant, the society would think this "defamatory" one refers to them. The words are too general and in them are elements that cannot be said to be defamatory ie; there being too many qualified people on a post and simply not fitting into new company structure. It would be malicious for all the 245 plaintiffs to think the society would only be thinking the "defamatory" about them.

Disposal

My considered view is that this action is plainly unarguable. It would unnecessarily put the defendants to expense to allow this matter proceed to trial when it clearly has no chance of success. For that reason, I allow the defendants' application and proceed to strike out the action for disclosing no reasonable cause of action with costs.

Pronounced in chambers this 24th day of August 2017

Benedictus Chitsakamile

ASSISTANT REGISTRAR