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IN THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CIVIL REGISTRY
CIVIL CASE NO.85 of 2017

Between

Charles Denvar ..... Claimant

-and-

Strabag International ..... Defendant

Coram:
Honourable Justice DeGabriele

Mr. Kadzipatike	Counsel for the Claimant
Mr. Mbotwa	Counsel for the Defendant
Mr. Angel Kanyinji	Court Clerk
Mrs. Joyce Chirwa	Court Reporter

DeGabriele, J

JUDGEMENT

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1. Introduction

1.1. By way of a specially endorsed writ of summons filed on 4 April 2017, the Claimant herein, Charles Denvar commenced these proceedings against the Defendant claiming damages for defamation, exemplary damages for defamation and costs of this action. The Claimant is suing the Defendant claiming that the Defendant is vicariously liable as the defamatory words were uttered by his workshop manager during the performance of his official duties;

and that the words related to the Claimant's work. The Claimant has not sued the workshop manager who uttered the defamatory words.

2. The Claimant's Case

2.1. The Claimant filed a statement of claim reproduced below;

i. *The plaintiff was at all material times a driver working for the defendant, the defendant being a contractor constructing the Mzuzu –Nkhata-bay road, whose camp is at Mpamba in Nkhata-bay.*

ii. *The Defendant is sued herein vicariously for the tort of defamation committed by one of its Manager, Hinteregger Jurgen, in the course if performing his duties for the company. The said Hinteregger Jurgen Hinteregger is not within the jurisdiction of this court, and his current address is unknown to the plaintiff, which situation would frustrate the course of justice if it were not that the defendant is vicariously responsible for the tort.*

iii. *On or about 17th of March, 2017 while performing his duties as a driver for the defendant at Mpamba in Nkhata-bay District, the plaintiff accidentally drove over a sharp object caused one of the tyres of the truck he was driving to burst.*

iv. *The said defendant's Manager, repeatedly said the following words in the presence of the plaintiff and several other employees of the defendant referring to the defendant.*

> *"You are a monkey. No wonder you drive as a monkey. You are a monkey like your State President."*

v. *The words italicized above were uttered to the members of the public orally by the defendant's said Manager, while performing his duties as Manager for the defendant. The italicized words were spoken in the context of, and related to, the work being performed by the defendant, such that the defendant is vicariously responsible for the words.*

vi. *The defendant indorsed the said Manager's remarks, that the plaintiff herein is a monkey, by dismissing the alleged monkey from employment, immediately after the said Manager had indicated to the public that the plaintiff is a monkey. The dismissal was without notice and without following any principles of natural justice.*

vii. *The plaintiff avers that the accidental bursting of a tyre cannot, could not, and did not have to be a justification for labeling the plaintiff a monkey or for immediately dismissing the plaintiff from employment. The plaintiff avers that he was dismissed, not because of the accidental bursting of the tyre but because Management of the defendant had reached a consensus that he is a monkey, who could not work with the defendant.*

viii. *In their ordinary meaning, the italicized words, complained of herein, mean and were understood to mean that the plaintiff is a monkey, and that he conduct himself as such.*

ix. *The statement uttered by the defendant's said Manager, complained of herein, is false in that the plaintiff is not a monkey, and he does not conduct himself as one.*

x. The defamation remarks were reported in the newspapers of very wide circulation in Malawi and on the internet, such that the damage caused to the plaintiff has a wide impact on the plaintiff.

xi. Due to the remarks made by the defendant's Manager, and the defendant's subsequent endorsement of those remarks resulting in dismissal of the plaintiff from employment, the plaintiff has suffered loss and damage, particulars of which are as follows:-

a. The plaintiff has suffered loss of respect as a human being, and he has been brought into public scandal and odium, his status in society has been lowered to levels of a monkey.

b. The plaintiff is being shunned and ridicules by his associates on the basis of the false claims by the defendants Manager as indorsed by the defendant itself, that the plaintiff is a monkey.

c. The plaintiff has loss opportunities to get employment as potential employers have heard the false claims complained of herein.

WHEREFORE *the plaintiff claims:*

xii. *(a) Damages for defamation*

(b) Exemplary damages for defamation

(c) Costs of this action

2.2. The Claimant gave evidence on his own behalf. From his sworn witness statement, which has similar content to the statement of claim, and oral evidence in Court the Claimant stated that he was employed as a truck driver by the Defendant at its Road Construction Project on the Mzuzu - Nkhata-bay road. The Claimant states that on or about 17 March 2017 he accidentally drove on a sharp object which caused a tyre burst. In reaction, the Defendant's manager addressed the Claimant within the hearing of other employees and in the following manner;

> *"You are monkey. No wonder you drive as a monkey. You are a monkey like your State President."*

2.3. The Claimant stated that the words were uttered by the Defendant's manager while performing his duties and the words related to the work that the Claimant was doing; as such the Defendant is vicariously liable. The Claimant states that he was dismissed from employment immediately after this incident, and he claims that by dismissing him, the Defendant endorsed the words uttered by the said manager, that he was a monkey. He claims he was dismissed without notice, and contrary to principles of natural justice. The Claimant stated that the defamatory words were reported in the newspapers of very wide circulation in Malawi and on the internet, as shown by copies of newspapers exhibited and marked as **CD1.** The uttered words had a negative and damaging effect on him, since he suffered loss of respect, has been brought into public ridicule, being shunned by his associates, and he has lost opportunities to be employed.

2.4. In cross examination, he stated that he was employed on 16 January 2017 and was dismissed on 17 March 2017, whilst he was still within the probation period. He acknowledged that he had received a warning letter for negligence and insubordination, but stated that the reasons for the warning letter and termination were different. The witness was not given a dismissal letter but he was just told not to come back to work. The words were uttered at the camp and in the office by a workshop manager whose name he had forgotten, but he had not sued the workshop manager individually.The witness stated that the matter

was reported to Police and statements were recorded and all parties were told to return home. He claimed that the words or statement was publicised because the staff went on a strike for 7 days, the newspaper heard of it and came to the camp. The newspapers received a report from Ms Portia Kajanga of National Roads Authority about the strike. He further stated that the managers had reported the matter to the police and the police came with the newspapers, therefore the managers publicised the words.

2.5. The witness told the Court that that the workshop manager had admitted at the police station in Nkhatabay that he had uttered the words. The witness told the Court that the evidence could be easily be found at the police station if needed by the Court. In re-examination he stated that he did not sue the said workshop manager because he was deported. He heard that the workshop manager is working in Tanzania with Strabag but he did not know his address. The strike by the staff was because of what the workshop manager had said. He also stated that the strike was called by the staff because the whiteman had said the staff were monkeys and the staff were angry.

2.6. The second witness for the Claimant was Sabella Kaunda who told the Court that she worked as a guard at the Defendant's premises. The Claimant was a fellow employee, who worked as a driver and was dismissed on 17 March 2017. While she was on duty and around 1:00 pm, the Claimant came in driving the motor vehicle for the Defendant and she opened the gate for him. The Claimant parked his motor vehicle at the Company's carpark and immediately, the workshop manager Hinteregger Jurgen went towards the Claimant shouting at him and stating the words;

> "*You are monkey, No wonder you drive as a monkey. You are a monkey like your State President*",

2.7. The witness stated that she and other employees heard the words and were informed that the shouting was because the Claimant had driven over sharp objects and the vehicle's tyre burst. She and the other employees demanded that the workshop manager be removed from work because he had called the

Claimant a monkey. She was surprised that the Claimant was dismissed from work on the same day and this meant that management had endorsed the words of the workshop manager. She went to police to record statements as she had witnessed what happened. She also stated that the Claimant has lost respect and is suffering. In cross examination she stated that the Claimant was dismissed by the workshop manager because he was a monkey. She also stated that the workshop manager was not in the country when the Claimant was dismissed. There was no re-examination.

3. The Defendant's Case

3.1. The Defendant filed its statement of defence which is as follows;

1. *Strabag International GmbH states that it has been wrongly served with the writ of summons herein as its name is not Strabag International but Strabag International GmhB*
2. *On the above basis, Strabag International GmhB prays that this action be dismissed with costs*
3. *Alternatively Strabag International GmhB avers that as an organisation it never gave said Mr. Jurgen Hinteregger authority, express or otherwise to utter such words to any of its employees.*
4. *On the basis of paragraph 3 above, Strabag International GmhB states that the claim for vicarious liability ought to fail*
5. *Strabag International GmhB refers to the statement of claim and deny that such word as particularised under paragraph 4 of the statement of claim were over uttered and published by its Manager, on authority of Strabag International GmhB.*
6. *Even if such words were indeed uttered, which allegation is denied, Strabag international GmhB avers that in their ordinary meaning, the said words were ever not defamatory.*
7. *Strabag International GmhB takes great exception to the allegation that the President of Malawi was mentioned in the said statement and denies the said allegation.*

8. *SAVE as hereinbefore expressly admitted, if at all the Defendant denies each and every allegation of fact as if the same were herein set out and traversed seriatim.*

COUNTER CLAIM

9. *The plaintiff told members of the public that a Manager of Strabag International GmhB, Mr. Hinteregger called him a "Monkey" and that the words were said with the blessing of Strabag International GmhB.*
10. *The local media captured the story with the inference that Strabag International GmhB condones racism. Such allegation lacking any basis.*
11. *As a result of such allegation, Strabag International GmhB's reputation has been greatly damages.*

***WHEREFORE** Strabag International GmhB counter-claims:*

i. Damages for defamation

ii. Costs of this action

3.2. The Defendant's witness was Sven Krueger who stated that he was employed as a Commercial Manager for Strabag International GmbH in Malawi, who is the Defendant herein. He explained that the Defendant is an international construction company based in Europe which was engaged to construct and rehabilitate the Mzuzu-Nkhata Bay Road in the Northern Region of Malawi. The Defendant operates in many countries around the world and routinely interacts with a diversity of cultures and races and with that in mind the Defendant has developed and implemented a written Code of Conduct, exhibited and marked as **SIG1** which incorporates values and principles which are expected to be respected by all the Defendant's managers, supervisors, officers and both local and expatriate employees, wherever the Defendant is carrying out construction works. The witness told the Court that Mr. Jurgen was one of the expatriates employed in a supervisory role at the Mzuzu- Nkhata Bay Road Project and the Claimant was also employed at the said Road Project as a truck driver, as shown in the contract of employment exhibited and marked as **SIG2**. He stated that the Claimant was given a warning letter for careless driving on 18 February 2017, just a month after his employment.

3.3. In cross examination, the witness stated that Jurgen was in charge of maintenance of the vehicles. He confirmed that Jurgen was on duty on the material day. Jurgen is now in Austria and still working with the Defendant. He was deported from Malawi without deportation papers and he is not prohibited from re-entering Malawi. He was informed that Jurgen was arrested for using abusive language. He informed the Court that the code of conduct was a guideline for every worker wherever the Defendant was working and it is part and parcel of the contract of every employee. He also stated that there can be misunderstanding among employees that the company has nothing to do with. He told the Court that as a company they are not responsible for all offences committed by their employees in the course of their duty. The infraction between Jurgen and the Claimant was not part of their duty as the words were said under high tempers. In re-examination he stated that the Complaint was under the direct supervision of the transport manager. Jurgen was responsible for the overall maintenance of the vehicles.

4. Issues for Determination

4.1. The main issue for determination is whether the Defendant's employee is liable to a claim of defamation, and whether the Defendant is vicariously liable for such claim.

5. The Law and Analysis of evidence

5.1. It is a settled principle of law that in civil cases the standard of proof is on a balance of probabilities, and the burden of proof lies on the one who alleges. This principle is well articulated in a number of cases and this Court needs not cite the actual passages, see ***Chimanda v Maldeco Fisheries Ltd, 12 MLR, 51; Commercial Bank of Malawi v Mhango [2002-2003] MLR 43.*** The Claimant herein has to discharge the burden of proof, and prove on a balance of probabilities, that the Defendant is vicariously liable for the tort of defamation committed by its employer. There is a plethora of case law that has defined defamation as being a statement that has a tendency to injure the reputation of a person to whom it refers, a statement that tends to lower a person in the

estimation of right thinking members of the community causing him to be shunned or exposed to ridicule, see ***Khomba v Smallholder Farmers Fertilizer Revolving Fund [1999] MLR 129 (HC); Phiri v Toyota Malawi Ltd [2004] MLR 269***

5.2. For a claim of vicious liability to succeed the claimant must show that the tort was committed by the employee of the Defendant and that it was done in the course of employment, among other things. The Claimant has cited the learned authors in the book ***Salmond & Heuston on the Law of Torts, 1996, p443,*** where it is stated that an employer will usually be liable for (a) wrongful acts which are actually authorized by him, and/or for (b) acts which are wrongful ways of doing something authorized by the employer, even if the acts themselves are expressly forbidden by the employer. Court is alive to the fact that every case has to be treated based on the facts and circumstance under which the tort is said to have been committed.

5.3. The concept of vicarious liability is explained in ***Giliker: Vicarious Liability in Tort: A Comparative Perspective (Cambridge University Press)*** as follows:

> *"The doctrine of vicarious liability lies at the heart of all common law systems of tort law. It represents not a tort, but a rule of responsibility which renders the defendant liable for the torts committed by another. The classic example is that of employer and employee: the employer is rendered strictly liable for the torts of his employees, provided that they are committed in the course of the tortfeasor's employment. In such circumstances, liability is imposed on the employer, not because of his own wrongful act, but due to his relationship with the tortfeasor."*

In the case of ***Majrowski v Guy's and St. Thomas NHS Trust [2006] UKHL 34***, the concept of vicarious liability was described in the following terms by the House of Lords:

> *"[7] Vicarious liability is a common law principle of strict, no-fault liability. Under this principle a blameless employer is liable for a wrong committed by his employee while the latter is about his employer's business. The time-honoured phrase is 'while acting in the course of his employment'. It is thus a form of*

secondary liability. The primary liability is that of the employee who committed the wrong. ...[8] This principle of vicarious liability is at odds with the general approach of the common law. Normally common law wrongs, or torts, comprise particular types of conduct regarded by the common law as blameworthy. In respect of these wrongs the common law imposes liability on the wrongdoer himself. The general approach is that a person is liable only for his own acts."

5.4. The Claimant who is asserting the affirmative must show by evidence and on a balance of probabilities, that the Defendant is vicariously liable for the tort committed by his employee.

6. Whether or not the offending words were uttered?

6.1. The Claimant alleges that the workshop manager Jurgen uttered the offensive words in the hearing of his colleagues, as witnessed by Sabella Kaunda. The Claimant stated that Jurgen had admitted to have uttered the offensive words at Nkhatabay Police Station. In accordance to the ***Daily Times newspaper of 21 March 2017 (CD1)***, the lawyer for Jurgen stated that Jurgen had indeed uttered the alleged offensive words. The lawyer, Wesley Mwafulirwa was quoted as saying;

"He (Jurgen Hinteregger) indeed said 'you are driving like a monkey' but in his country Austria that is a common expression meaning you are a bad driver. In their country it is not racist at all"

6.2. The lawyer did add that the Defendant herein had done nothing wrong at all and that it respected all its clients and staff. The lawyer further stated that Jurgen had apologised but the actual written apology had not been circulated. What is undisputed from this evidence is that the words were uttered by Jurgen, Jurgen took responsibility for uttering the words, and that the words did not seem to Jurgen as being racist. The Court concludes that by stating that this was his belief that the words were not racist, and by apologising and categorically stating that the Defendant had done nothing wrong, Jurgen had said the words as a result of his own frustrations, in his personal capacity, under his personal belief, and therefore not on behalf of

the Defendant. This Court finds that the saying of the offensive words was intentional on the part of Jurgen and they were not part and parcel of what all staff at every level were expected to say. Since these were words said on the basis of his personal belief, it is the finding of this Court that the best person to sue was Jurgen himself, who by his own admission through his legal counsel, had uttered the offending words. The Claimant averred in his statement that he did not know the whereabouts of Jurgen. However in cross examination, the Claimant stated that he was aware that Jurgen was in Tanzania, still working with the Defendant. Therefore the reason for not suing him directly because he could not be traced was not true. In the least, the Claimant should have sued Jurgen together with his employer.

6.3. Having established that the offending words were uttered by Jurgen, the Court has to establish the exact offensive words that were uttered. The Claimant alleged that the words uttered were as reflected in his witness statement, that "*You are a monkey. No wonder you drive as a monkey. You are a monkey like your State President".* The witness for the Claimant simply repeated word for word what the Claimant had stated in his statement of claim. The evidence of the Claimant as reflected in **CD1** shows that the Claimant simply stated that he was called a 'monkey'.This shows the offensive words were uttered as against the Complainant only. The attempt by the Claimant in re-examination to extend the words as including all local staff is not supported by the evidence. The evidence of the witness for the Claimant categorically states that the staff went on strike because Jurgen called the Claimant a monkey. It its therefore abhorrent for the Claimant to try and add other persons as being called monkeys, simply because he is seeking sympathy.

6.4. The Claimant stated in his evidence in Court that Jurgen admitted to have uttered the offensive words at Nkhatabay Police and those statement were available as evidence if the Court required it. Knowing of the existence of the statement, the Claimant had an opportunity to provide the Court with the

exact words uttered because he stated in his evidence that the workshop manager had indeed admitted at Nkhatabay police station that he had uttered the words and that a statement had been recorded. In the absence of suing Jurgen directly and in the absence of Jurgen's independent statement of admission of the exact uttered words, the Court resorts to the evidence to establish the exact words.

6.5. The evidence shows that the lawyer for Jurgen stated in **CD1** that the uttered words were *" you are driving like a monkey"*. As the evidence of Claimant shows, it is clear the word 'monkey' was used by Jurgen against the Claimant. There is nothing in the evidence to indicate independently that the word 'monkey' was used as against anyone else. Therefore, this Court can conclude that the word 'monkey' was used while the workshop manager was addressing the Claimant. However, the Court cannot find categorically that all the words as quoted by the Claimant in his sworn witness statement were uttered. The Court finds that the words ***"you drive as a monkey"*** feature in both statement of the Claimant and that of the lawyer of Jurgen (**CD1**), therefore, the Court finds that in all probability these were the uttered words.

6.6. This being a civil case where the one asserting the affirmative must prove it was imperative for the Claimant to either obtain those statements which he stated could easily be obtained, or indeed call one of the police officers as a witness to his cause. It is established law that a party who asserts a particular fact must call witnesses to prove that fact. If the said party fails to call the said witness, failure to do so will be construed that the said witness would have brought adverse evidence. These sentiments were outlined in the case of ***Attorney General v Chirambo, Civil Cause No 444/85 (unreported)***, *where Makuta CJ, as he then was, said*

> *"... failure to call a material witness by a party who wishes to prove a fact may raise suspicion and reduce the weight of the evidence. I entirely agree with these observations. Why should a party decide not to call a material witness if he knows that the witness would confirm the fact that he is asserting? ....*

Certainly, the defendant must have a reason why he decided not to call this witness who I believe could have strengthened his case. The most likely reason I can think of, for opting not to call him, is that the witness was going to give adverse evidence".

7. Whether the offensive words uttered by the manager were defamatory?

7.1. The Claimant has cited the case of ***Maclean Tondeza v Carlsberg Malawi Limited and the Attorney General Civil Cause No. 58 of 2013 (unreported)*** which held that defamation is the publication of a statement which reflects on the person's reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make the public shun or avoid him. Such a statement tends to bring a person into hatred, contempt or ridicule. In this case, the question arises as to whether the defamatory words were published and who published the same.

7.2. This Court must consider whether the words published by the Defendant do constitute defamation. The definition of defamation, as stated in ***Gately on Libel and Slander, 8th Edition*** is that there must be published to a third party, words or matter containing the imputation which may tend to generally lower the plaintiff's status in the estimation of right thinking members of society. It follows then that the publication of the said words is what tends to lower a person in the estimation of right thinking members of the society generally, see ***Nyirenda v A. R. Osman & Co. [1993] (2) MLR 681.*** The main essence is that the words complained of must bring down the reputation of the complainant in the right thinking of reasonable people. According to Mbalame J, in ***Kwalira v Ganiza [1993] MLR 236 at 241***

"The right of each man during his lifetime to the unimpaired possession of his reputation and good name is recognized by the law of the land. He who directly communicates to the mind of another any matter untrue and likely in the natural cause of things substantially to disparage and tarnish the reputation of a third person is prima facie guilty of a legal wrong".

7.3. The Court takes cognisance of the fact that name calling among peers, families, compatriots and at the workplace do take place. Such name calling include attributing a person's behaviour or actions to a certain animal, domestic or otherwise. However, it is the context and the manner in which such name calling takes place that leads to a successful claim of defamation. It is the view of this Court that using profane language, or name calling by an employee at a workplace is very personal and is driven by the values held by such an employee. As the Court has found above and in accordance with the evidence, the words uttered were "you drive like a monkey', as compared to 'you are a monkey'. Would one set of words be more insulting or defaming than the other? It is the view of this Court that it depends on the facts and the circumstances under which the words were said and published. In this particular case, the Claimant alleges that having his driving skills compared to the driving skills of a monkey was offensive, and the police prosecutor was of the view that the language used was insulting and was enough to charge Jurgen with the offence of using insulting words. It is the view of this Court that just as uttering such words is intentional and is based on individual value systems and belief, it is equally true that being offended by such words has much to do with the beliefs of the person so insulted and the circumstances under which the words are uttered. The Claimant herein was aggrieved and as far as he is concerned the words were offensive and defamatory to him.

7.4. At law, no action for slander or libel or defamation will lie unless there has been publication of the words being complained, see ***Lamb's Case (1610) 9 Co Rep. 59.*** The Claimant has cited the case of ***Pullman v Walter Hill & Co Ltd [1891] 1 Q.B. 254*** which explains what publishing mens. In that case Lopes J stated at page at that

> *"The first question is assuming a letter to contain a defamatory matter, there has been a publication of it. What is the meaning of publication? The making known of a defamatory matter after it has been written to some person other than the person to whom it is written. ... I cannot, therefore, feel any doubt, that if the writer of a letter shows to any person other than the one to whom the letter is written, publishes it. If*

he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or must send it himself straight to the person to whom it is written."

7.5. So in this case, were the offending words published? The first instance of publication was when the words were uttered by Jurgen in the presence of Sabella Kaunda. The result was that the words, once relaid by the said Sabella Kaunda and the Claimant to the rest of the staff, caused outrage, which resulted in a strike by the staff. The effect of the uttered words was that the staff were sympathetic and rallied around their colleague to ensure that management took action to remove Jurgen from the work place. In this scenario, and even though the words were published to the staff body by Sabella Kaunda and the Claimant, the effect was not to ridicule, hate or otherwise shun or lower the Claimant's estimation in the presence of society. The effect of the words was to galvanise the staff, management and the Roads Authority into action against Jurgen.

7.6. The second instance of publication is where the Claimant has alleged that the Defendant published the uttered words in the daily papers and on the internet. His explanation is that the Defendant published the words when the Malawi Police Service was called to come and help with maintaining order when the staff were on strike. He also stated that the Public Relations Officer of the Road Authority Mrs Portia Kajanga publicised the words in the newspaper. This Court has examined the copies of the papers marked and exhibited as **CD1** and find that the Defendant herein did not publish the words in the paper. In ***The Daily Times of Monday, 20 March 2017 (CD1)***, the Defendant had not commented on the matter. Mrs Kajanga did not publish the offending words but was reported as saying, *"He (Jurgen) is not going back to work because we cannot have such a person working here. His presence affects progress of work and the good will between expatriate and local workers"*. The interviewed Police Officer stated that the Police intended to prosecute the said Jurgen for using '*insulting language.*' What is clear in copies of *The Daily Times* reports marked and exhibited as **CD1**, is that it was the Claimant himself or the newspaper reporter

and the lawyer for Jurgen who used the words '*monkey*' and published the same. The rest stated and condemned the use of insulting words and unacceptable behaviour. It is the finding of this Court that insulting language vary and are numerous. The Claimant herein publicised specific words, which indeed needed to be attributed to the person so using the same. It is therefore that clear that the evidence of the Claimant himself does not show that the said Jurgen and the Defendant had actually published the offending words in the daily papers.

7.7. The story presented by the Claimant is aimed at getting sympathy and sensationalising this whole issue. For example, in the copy of ***The Daily Times report of Tuesday, 21 March 2017 (CD1)*** the Claimant claims that he had been approached by the Defendant to withdraw the case and that in so doing he would be paid MK5 million. This Court notes that at that time there was no subsisting matter to be withdrawn as the Claimant only filed the present matter on 4 April 2017, and the Defendant had not been sued by the Claimant. Further, at that time the police were no longer intending to prosecute because the said Jurgen had been deported around that time.

8. Whether the defamatory words were published by the Defendant?

8.1. The Claimant alleges that the Defendant publicised the words uttered by the workshop manager in newspapers with top circulation and on the internet. The Claimant exhibited CD1 which has a number of copied newspaper articles. One such copy is a front page article reported by Kenneth Jali in The Daily Times of Monday, 20 March 2017. The headline was '*Racist Expatriate Faces Deportation*' and the story reads as follows:

> "*A workshop manager at Strabag International - a Germany company contracted to construct the 47 kilometre Mzuzu - Nkhatabay Road - has been arrested for racially abusing local workers. The Roads Authority (RA) has since moved in to have the 46 year old German, Hinteregger Jurgen, immediately deported. "He is not going back to work because we cannot have such a person working here. His presence affects progress of work and the good will between*

expatriate and local workers", Portia Kajanga, RA Public Relations Officer said. The whole drama started when one of Strabag's drivers, Charles Deniva, drove a water tanker on some metal bars and got the vehicle's tyre to burst. "while reversing within the camp near the place where the tanker fills water, one of the vehicle's tyres got scratched by some metal bars. This did not go well with Jurgen Hinteregger who shouted and called me a monkey and snatched vehicle keys from me," Deniva said. This did not please his fellow local drivers who witnessed the scene and resolved to boycott a night shift and entire work on the road. "The stay away continued on Saturday to the extent that staff members were called to a meeting by one of our immediate managers who recorded our grievance for presentation to management', Deniva said. The matter was on Saturday reported to Nkhatabay police where statements were recorded. Nkhatabay police spokesperson Ignatious Esau said yesterday that Jurgen Hinteregger was still being kept at Mzuzu Police Station. When we visited the police station yesterday, The Daily Times found some of Strabag senior managers trying to negotiate for release of their colleague. One of the managers whom this reporter approached for the company's side of the story refused to comment referring this reporter to the company's public relations office at its base in Tanzania. Asked on the future of the company's contract with the government, the manager said, "all is well despite the incident. Our work and contract remains intact with the government", he said. Before his repatriation, Esau said Jurgen will be taken to court this week where he will answer charges of using insulting language. Meanwhile Kajanga said work on the K16.8 billion African Development Bank and Malawi Government Funded road will continue today following a workers' agreement to return to work."

8.2. The second copied page is of *The Daily times of Tuesday 21, March 2017*, with a headline *"Racism Scandal, Expatriate deported, Driver fired"* reported by Samuel Kalimira and Mandy Pondani, and reads as follows;

"The Immigration Department has deported a 46 year old Austrian Jurgen Hinteregger Jurgen for his racist remarks towards a Malawian worker. Jurgen, a workshop manager at Strabag International, a

German company constructing the Mzuzu-Nkhatabay Road allegedly called Charles Devina a monkey after he got tyres of a vehicle belonging to the company scratched. Lawyer for the company Wesley Mwafulirwa, confirmed the deportation in an interview yesterday, despite the immigration Department refusing to confirm the development. He said the Austrial Ambassador to Tanzania confirmed with him [Mwafulira] in a telephone interview that Jurgen is now in the East Africa Country. "We are concerned with the manner in which he has been treated, after a circular was circulated about his deportation, everything was being done without his knowledge. Need I mention that he was denied bail since Saturday despite out application?" Mwafulirwa said. Immigration spokesperson Alfred Chauwa maintained that they are not yet to receive deportation orders. But Mwafulirwa insisted: "The immigration officers drove him to the border without even telling him where he was headed, only to be told by well wishers after disembarking from the vehicle that he is no longer in Malawi. We could [have been] more civilised". Commenting on his client's conduct, Mwafulirwa said Jurgen did not in any way intend to demand or cause injury to the victim by using an expression that is commonly used in his home country of Austria. "He indeed said 'you are driving like a monkey'. But in his country, Austria, that is a common expression meaning you are a bad driver. In their country it is not racist at all"., he said adding that Strabag had done done nothing wrong and that it respects all its clients. Jurgen, Mwafulirwa said, had issued a statement of apology to authorities which was yet to be served in writing to the Roads Authority, the Victim and Strabag's local members of staff among other parties.

Meanwhile, Strabag International has fired Deniva apparently for disclosing how he was victimised by Jurgen. Speaking in an interview with The Daily Times yesterday, Deniva said soon after the incident happened on Friday, the company officials told him not to be seen at the workplace again. Deniva had also faulted government for deporting Jurgen without any clear cases charged against him.He suspects mould play between the company officials and government over the deportation decision. "I went to Police today [Monday] thinking that we are going to court but I have been told that Jurgen

has been deported to his country escorted by Department of Immigration officers via Tanzania. However, they have not told me anything concerning the proceedings of the case. "I do not know what will be next over the matter. The company has fired me.Jurgen has not even apologised to me. Why is this happening within my country?" Deniva queried. However, Ministry of Home Affairs and Internal Security, Grace Chiumia said government decided to deport Jurgen and the victim will be helped later. However, Mwafulirwa said he had not yet received reports that the company had fired the driver. But Deniva claims that the company approached him to withdraw the matter and that in so doing he will be offered K5 million".

8.3. The Claimant exhibited **CD1** to show that the nation at large were shunning him and injecting him to slander and ridicule. The Court notes that, bearing in mind the way the matter was reported in the news as reflected by the document exhibited and marked as **CD1**, the reaction of the public was that the Claimant was a victim of racism and there was sympathy for him. There is nothing in the evidence exhibited by the Claimant in this Court that shows that the Claimant was subjected to slander, ridicule and was being shunned by right thinking members of the society. The evidence shows that the staff rallied behind the Claimant and chose to go on strike to show support for him. A meeting was called by management to address the matter. The Roads Authority were involved and as stated in **CD1**, the Road Authority was of the view that Jurgen should not to go back to work as his presence would affect progress of work and good will between expatriate and local workers. It is the view of this Court that had the workshop manager said the offending words as quoted in the statement of claim with the blessing of the Defendant, the Defendant's work would not have continued.

8.4.The Claimant also exhibited **CD1** to show that the abusive words were published by the Defendant. A look of the article above shows that the Claimant is the one who responded to the reporter by saying that he had been called a monkey. The Roads Authority, the police and the senior managers who were interviewed by the reporter did not mention the word monkey. The news reporter

raised the issue of racism in his headline and alluded to the fact that Jurgen racially abused local workers. This Court concludes that it was the Claimant himself who informed reporters and published to the whole world that he had been called a monkey.

8.5. It is the view of this Court that the workshop manager, Jurgen, was supposed to be held accountable through a legal process within Malawi. Indeed as CD1 shows, the police were intending to take Jurgen to court where he would answer the charge of using insulting language, before he was deported as shown by CD1. Both headline for *The Daily Times of 20 and 21 March 2017* as quoted focus their attention on racism. It was therefore imperative that the matter be brought before the courts so that the use of abusive and insulting language and racist tendencies, if any, should be legally dealt with. Deporting such a person and not prosecuting leads to. Failure of justice to both hold accountable such a persons and to protect society from further abuse. Seemingly, such failure of justice fuels the behaviour and increases impunity of such persons. The criminal justice system lost an opportunity to address this matter and come up with an appropriate judgement. The response to the lament raised by the Claimant in CD1, wondering what was happening to his country needed to come from the justice system.

9. Whether the offensive words were uttered by the manager in the course of his employment

9.1. The Claimant alleges is that the offending words were uttered at the workplace, in the presence of other employees, and the words concerned the way the Claimant performed his duties. The Defendant has submitted that while the offensive words were not said in the course of employment but rather in a private set up and under high tempers. To start with, the Court has to determine where the offensive words were uttered. The evidence of the Claimant shows three possible locations where the offensive words were uttered. In his statement the Claimant states that while performing his duties as a driver at Mpamba in Nkhata-bay District on 17 of March 2017 he accidentally drove his

truck over a sharp object which caused a tyre burst in this case he does not disclose the location. In his interview in *The Daily Times* as reflected by the document marked as CD1, the Claimant stated that, '*while reversing within the camp near the place where the tanker fills water, one of the vehicle's tyres got scratched by some metal bars. This did not go well with Jurgen Hinteregger who shouted and called me a monkey and snatched vehicle keys from me'.* The evidence of the Claimant witness Sabella Kaunda states that while she was on duty and around 1:00 pm, the Claimant came in driving the motor vehicle for the Defendant and she opened the gate for him to enter the Defendant's premises, the Claimant parked his motor vehicle at the Company's carpark and immediately, the workshop manager Jurgen went towards the Claimant shouting at him and calling him a monkey. The witness Sabella was later told of the reason for shouting, being that the motor vehicle tyre had burst after the Claimant drove it on a sharp object.

9.2. As shown above, there are three versions of the incident from the Claimant's evidence. The first version is when the Claimant was performing his duties at Mpamba but does not give a specific location. It could have been anywhere around Mpamba where the Defendant's vehicles were operating, and it is not clear whether or not both Jurgen and the Claimant were on duty. The second version is that the Claimant was reversing within the camp at a place where the tankers fill with water and the manager snatched keys from him. From this statement the possible location at which the abusive words were uttered was at the water intake and Jurgen called the Claimant a monkey and actually snatched the vehicle keys from the Claimant. This statement shows that both the Claimant and Jurgen were on duty and were at the same place. The third version is that of the Claimant's witness who states that the Claimant had parked the vehicle at the Defendant's premises and the manager shouted at him. This statement shows that the incident occurred elsewhere, and the shouting occurred at the Defendant's main premises. Looking at the totality of the evidence, the Court is left at a loss as to the exact location where the abusive words were uttered. Evidence of the exact location is crucial for the

Court establish whether or not both the Claimant and Jurgen were at that time performing their duties. If the Court were to examine third version which was witnessed by the Claimant's witness Sabella Kaunda, the evidence of the Claimant does not show whether the Claimant was parking the vehicle at the end of his shift or he had brought in the vehicle for something else. The Claimant has not offered any evidence to explain this, and the Defendant has simply stated that the abusive words were not uttered in the course of employment. It is imperative that the Claimant goes beyond a mere claim, but give evidence to substantiate his claim on a balance of probabilities.

9.3. For a defendant to be held vicariously liable, the claimant has to show that the tort was committed by the Defendant's employee and was so committed in the course of his employment. As discussed above, the manager for the Defendant, Jurgen, did utter the alleged abusive words. The question to determine at this point is whether or not he uttered the words while in the course of his employment and not on a frolic of his own. According to ***Salmond & Heuston on the Law of Torts, 1996, p443***, an employer will usually be liable for (a) wrongful acts which are actually authorized by him, and/or for (b) acts which are wrongful ways of doing something authorized by the employer, even if the acts themselves are expressly forbidden by the employer. In this case, the name calling or use of insulting or abusive words was a wrong act and it was not authorised by the Defendant as shown in the document exhibited and marked as **SIG1**. Further, the name calling was not an act which was a wrongful way of doing something authorised by the employer. According to the evidence of the Defendant, the Claimant was under the supervision of the transport officer and not the workshop manager. Had the workshop manager dismissed the Claimant there and then and given the reason for dismissal that he was a monkey, then the Defendant would have been held vicariously liable. This is the more reason why the Court has stated in the discussion above that the exact location where the abusive words were stated must be known and the evidence must place both the Claimant and Jurgen at the same place and both of them performing their duties.

9.4. The evidence shows that the Claimant was not dismissed by Jurgen. The Court is aware of the position taken in the case of ***Century Insurance Co. v Northern Ireland Rand Transport Board [1942] AC 509*** that the fact that the mode of doing a job is wrongful and unauthorized will not prevent the employer being vicariously liable for it provided that at the time the employee was doing some act authorized by the employer. Had the Claimant been able to adduce evidence in this Court of the specific time, location and circumstances of when the abusive words were uttered, the work relationship between the Claimant and Jurgen, instead of the three version he presented to the Court, then maybe this Court would have been persuaded to adopt the holding in the case of ***Century Insurance Co (supra)***.

9.5. This Court also finds that the acts of uttering abusive words, using insulting language and using racist language are intentional acts bordering on criminality. These type of words are frowned upon, but are still used by individuals based on their value system, personnel belief and conceitedness. It is therefore necessary to the claims based on the facts of each case and the critical examination of the circumstances under which the words were uttered. This Court is aware that in most cases involving vicarious liability, a claimant would seek and claim against the deeper pocket. Therefore, adopting the holding in ***Century Insurance Co (supra)*** wholly would be unfair on employers place undue pressure on the Defendant who would be required to pay hefty damages for the intentional misdeeds of his employees; especially where the Claimant has failed to clearly articulate his claim.

9.6. Indeed the Defendant did state in Court that it would be liable in a civil suit where its employees accidentally damaged another's property in the course of their duty. The Claimant has submitted that in the same way, the Defendant would be liable for the tort committed by Jurgen, regardless of the prohibition in the Code of Conduct. This Court would like to differentiate between liability that arises from an accident, and liability that arises from the wanton and intentional acts of an employee exercising his personal beliefs, contrary to a code of

conduct. The evidence shows that the words of Jurgen were not an accident, but words that he chose to say out of his belief. To this extent, the Court cannot hold the Defendant liable for the offending words that were said under a personal belief. It is Jurgen himself who has to be held liable and according to the evidence, his address is known and he should have been sued in his own personal capacity. Indeed the evidence of the Defence witness Sven Krueger in cross examination shows that Jurgen was purportedly deported from Malawi without deportation papers and he is not a prohibited immigrant as his passport was not stamped as such. There was therefore no legal impediment in suing Jurgen directly.

9.7. Since vicarious liability can be imposed on an innocent employer, the traditional way is to offer evidence that shows that the tort was committed while the tortfeasor was in the course of his employment. While on one hand it is a general fact that a wrongful act which is a criminal offence does not preclude the possibility of vicarious liability, it is equally true on the other hand that generally the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability. In a recent case, ***Prince Alfred College Incorporated v ADC [2016] HCA 37***, theHouse of Lords also made it clear that

> *"... for an act to be said to be in the course of employment something more was necessary than that the employment merely create an opportunity for the wrongful act to take place."*

There is need to have clear evidence that examines the responsibility of the tortfeasor as regards the Claimant to ensure that liability is appropriately attached. Such proof is a matter of fact and evidence which the one claiming has to adduce in court. In this case the Claimant had not adduced such evidence to the required standard.

10. Whether the dismissal of the Claimant was done as an endorsement of the words uttered by Jurgen, the workshop manager

10.1. The Court is not convinced that the dismissal of the Claimant was related to the words uttered by Jurgen. Without going through the merits or demerits of whether the dismissal was fair or not, makes the following observations;

10.1.1. As shown by the document exhibited and marked as **SIG4** and dated 21 March 2017, the Claimant was employed on 18 January 2017 and was on a three months probation. He was dismissed on 21 March 2017, when he was still servicing the probation period. The reason for dismissal was that he had spoiled a tyre through incompetent driving. The Claimant did receive a written warning on 18 February 2017 for careless driving and the letter is exhibited and marked as **SIG3**. The Claimant has claimed that he was dismissed immediately when the incident occurred. However, the matter of dismissal was only raised by him in the article reported in *The Daily Times* of Tuesday 21 March 2017, where he also stated that the reason for dismissal was that he disclosed how he was allegedly victimised by Jurgen. This is of course not true as the reason for dismissal is well articulated in the dismissal letter. The witness for the Claimant had stated that the Claimant was dismissed by Jurgen when the incident occurred. However, the evidence shows that the Claimant was dismissed on 21 March 2017 and not 17 March 2017.

10.1.2. The Claimant stated that he was told not to return to work. But as the strike proceeded he and the staff were fully involved, including the meeting with management. In cross examination the Claimant claimed that he never saw the dismissal letter, but this is not true because according to **SIG2, SIG3** and **SIG4** the Claimant signed for the dismissal letter, the receipt of his final dues and the hand over of rain suit, work suit and reflective vests on 21 March 2017.

10.2. The Claimant has cited the case of ***Banda v Pitman (1990) 13 MLR (HC)*** where it was held that the truth of the imputation provides a complete defence to a defamation action. In this case, the Claimant was dismissed on a true ground of incompetent driving, which was supported by an existing warning letter.

Therefore, by dismissing the Claimant on a clear ground of dismissal, the Defendant cannot be said to have endorsed the words uttered by the said Jurgen that the Claimant was a 'monkey'. It is the finding of this Court from the evidence before it that the dismissal was not connected to the words uttered by Jurgen. The Claimant was dismissed based on his performance as reflected by his employment record which shows that he was negligent and insubordinate. Indeed in his evidence the Claimant does admit that it was his driving that led to the tearing or bursting of a tyre of the water tanker.

10.3. For a claim of defamation to succeed, the claimant should be able to prove that the communication was made to a third party by the defendant, and the matter is untrue and likely to disparage and tarnish the reputation of another. The Claimant herein claims that the uttered words were related to the way the Claimant performed his duties. The evidence clearly shows that the Claimant was negligent in the way he drove the vehicle. The Claimant does not deny that there was a tyre burst because he reversed into or drove over a sharp object which scratched the tyre. This negligence is also supported by the warning letter, (SIG3). The words *'you drive like a monkey'* were indeed offending to the Claimant but they were uttered following his negligent driving. Consequently, one can conclude that the uttered words 'you drive like a monkey' were meant to impute careless driving.

11. Is the Claimant entitled to exemplary damages

11.1. The Claimant is claiming exemplary damages because he alleges that the claim for vicarious liability for defamation arose because of the negligence, recklessness, malice and deceit of the Defendant. He further cites the case of ***Munthali v Attorney General (1993) 16 (2) MLR 646*** which held that exemplary damages are not necessarily compensation to the plaintiff for the damage he has suffered, but they are more of a punishment on the defendant for waywardness. The Claimant has claimed that instead of punishing Jurgen, the Defendant proceeded to dismiss the Claimant. From the evidence before this Court and as stated above, the dismissal of the Claimant was not related to

the words stated by Jurgen. The dismissal was on grounds that were well articulated and also following a warning letter that proved that the Claimant was not competent in his driving performance.

11.2. The evidence also shows that the Defendant did not just sit and do anything as regards the complaint of the conduct of the said Jurgen. It is the evidence of the Claimant that after the words were uttered, there was outrage from staff and a meeting was called for the staff and management to address the issue. It is also his evidence that the matter was reported to the Roads authority which worked with the defendant in solving the matter. Further, it is the evidence of the Claimant that the matter was reported to the police and indeed the police were going to prosecute the said Juergen for using insulting language. The fact that the said Jurgen was purportedly deported without being tried was not the doing of the Defendant. Had he been prosecuted, convicted and remained in the employment of the Defendant, then the Claimant would be entitled to exemplary damages. It is the opinion of this Court that Jurgen should have been prosecuted for use of such offending language. It was only then that the Claimant would have had a sense of justice being done. By removing him for Malawi, it means the law is not enforced and the Claimant could not have his case against Jurgen heard and determined, both at civil and criminal courts. Deporting such an offending person sends wrong signals, that people can just offend and then they get sent back home without being held accountable for criminal conduct.

11.3. Further, following on the evidence of the Claimant through **CD1**, it is clear that Jurgen uttered the words in his own capacity and as regards his own belief and use of the words in his own native country. Through his lawyer, the said Jurgen takes full responsibility for uttering the words and goes on to state that he was apologising in writing. There is nothing to suggest that the Defendant went out of his way to employ a racial bigot. Had the Defendant gone out of its way to employ a racial bigot who is fond of using insulting language, then the Road Authority would have cancelled the whole project instead of moving to have the

offending Jurgen removed from the project and the country. It is the finding of this Court that there is no proven waywardness, negligence, recklessness, malice or deceit in the way the Defendant acted in the aftermath of Jurgen uttering the offending words. To this end, the Defendant cannot pay exemplary damages to the Claimant.

11. The counterclaim

11.1. The Defendant herein had filed a counter claim for defamation but did not brig any evidence to prove the claim. To this end, the Court agree with the Claimant that the counter-claim should be treated as having been waived or abandoned in its entirety. This Court will make no determination on the same.

12. Conclusion

12.1. The Claimant herein has not discharged the burden of proving on a balance of probabilities that the that a tort of defamation was committed by the Defendant's Manager in the course of his doing what he was entitled to do. This Court therefore holds that in this case and as borne by the evidence, the Defendant was not vicariously liable for the tort committed by its manager.

13. Costs

13.1. Costs are awarded in the discretion of the Court but normally follow the event. Therefore costs for and incidental to these proceedings are awarded to the Defendants. The costs will be assessment by the Registrar at a date not later than 14 days of this judgement.

It is so ordered.

Pronounced in Open Court At Mzuzu Registry this 26th Day of February 2019

Honourable D.M. DeGabriele

JUDGE