

SITWELL GUMBO  
versus  
PORTCULLIS (PVT) LTD t/a FCB

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 23, 26, 27 March & 6 November 2013

*Plaintiff in person*  
*L. Uriri*, for the defendant

ZHOU J: This is an application for absolution from the instance which was made by the defendant at the close of the plaintiff's case. The plaintiff's claim is for damages for defamation arising out of alleged communication which was made by the defendant to Stanbic Bank of and concerning the plaintiff. The background facts may be summarised as follows:

The defendant is a company which trades under the name Financial Clearing Bureau. Its business is to gather information about the creditworthiness of potential clients, business partners and employees of financial institutions. It maintains a database of names of persons and information relating to such persons which may be of interest to banks in determining the creditworthiness of potential clients or employees. That information includes criminal records, civil judgments and other related matters which might help the financial institutions in deciding whether or not to do business with or to employ a person. Financial institutions interested in obtaining information from the defendant join the Financial Clearing Bureau. An institution which has become a member of the Financial Clearing Bureau may receive 'credit protection information' from the Bureau. The information is given in confidence. Members pay fees to the defendant in order to maintain their membership.

The plaintiff gave evidence to the following effect:

In March 2010 he was offered employment as a teller by Stanbic Bank, a commercial bank. The employment contract was to commence on 1 April 2010. The offer of employment was contained in a letter dated 19 March 2010. He stated that the offer was made to him after he had undergone medical examinations and clearance by the Zimbabwe Republic Police. The plaintiff duly accepted the employment offer. On 1 April 2010 the plaintiff reported for duty but was presented with a document which, according to him, had originated from the

defendant and was on the latter's letterhead. The document was inscribed with the word "TRACE" which was in bold print. It had a subheading: "Sitwell Gumbo arrested". He stated that after reading the document he realised that it had been prepared by one Edson Mwazikana in connection with disciplinary proceedings which had been instituted against him when he was employed by Beverley Building Society. Edson Mwazikana was a security officer at Beverley Building Society. Plaintiff tried to explain to Samantha Chikonzo who had shown him the document. According to the plaintiff, he advised Chikonzo that he had been acquitted of the charges. He stated that he had, indeed, been taken to a police station at some point by a police officer who wanted to question him about allegations of fraud involving some cheques. Stanbic Bank indicated that the plaintiff's offer of employment had to be terminated because of the facts referred to above. He was given a letter which was prepared on the same date, 1 April 2010. The letter reads as follows in the relevant parts:

"Dear Sitwell

**Offer of Employment**

We make reference to our letter dated 19 March 2010 wherein we offered you employment with the bank with effect from 1 April 2010.

This offer was subject to your successfully meeting our conditions in respect of criminal record, financial and civil convictions upon which failure the Employer may terminate the contract of employment with immediate effect. We have since been informed of your alleged arrest through an FBC (Financial Clearing Bureau) search.

We regret to inform you that this discovery has necessitated the withdrawal of our earlier offer.

Thank you for your expression of interest in our bank and we wish you well in your future.

Yours faithfully

S. CHIKONZO

HUMAN RESOURCES OFFICER"

After the 1<sup>st</sup> April 2010 the plaintiff exchanged letters with Stanbic Bank regarding the termination of the employment contract. The bank maintained its position that it would not reinstate the contract. On 18 May 2010 the plaintiff wrote a letter to the defendant demanding a retraction of the adverse reports made concerning him to Stanbic Bank, C.B.Z. Bank and some named retailers. He demanded the removal of his name from the defendant's database of persons who had 'trace'. Finally, he demanded payment of a sum of US\$31 548 as damages. The defendant responded on 19 May 2010 by stating that it had a person who had the same names as the plaintiff who had "traces" in its database. In that letter the

defendant briefly explained its operations, and denied any wrongdoing in relation to the plaintiff.

The plaintiff also placed before the court a document suggesting that sometime in 2007 CBZ Bank had sought and obtained information from the defendant. The document, exhibit 5, gives the plaintiff's particulars and enquiries made in connection with him. It is a photocopy. It also contains information provided by Mwazikana, Security Officer at CBZ where the plaintiff had worked previously. He also produced documents relating to the allegations of misconduct which were instituted against him by his previous employers on allegations of fraud. There was also produced a document confirming the retrenchment package given to the plaintiff when he left Beverley Building Society.

The principles which apply to an application for absolution from the instance at the close of the plaintiff's case are settled. The *locus classicus* on those principles is the case of *Gascoyne v Paul & Hunter* 1917 TPD 170 at 173, which was cited in the case of *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goldridge (Pvt) Ltd* 1971 (1) RLR 1(A) at 4C:

“The *locus classicus* of the cases dealing with the procedure of absolution from the instance is the old Transvaal case of *Gascoyne v Paul & Hunter* 1917 TPD 170. In that case, it was pointed out that an application for absolution from the instance stands much on the same footing as an application for discharge of an accused at the close of the evidence for the prosecution. . . .but it is stressed that it would indeed be curious if in civil cases we were to apply a more stringent rule of practice than in criminal cases. It would seem to me that as in a criminal case the onus of proof is always higher than in a civil case, evidence which in a criminal case would be insufficient to justify refusing an application for the discharge of an accused, might well in a civil case be sufficient to justify refusing an application for absolution from the instance. . . . The test, therefore, boils down to this: is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make; a definition which helps not at all.”

See also *Dube v Dube* 2008 (1) ZLR 326(H) at 328A-D; *Bailey NO v Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484(H) at 487A-E

The test is, therefore, whether at the close of the plaintiff's case there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him. See *United Air Charters v Jarman* 1994 (2) ZLR 341(S) at 343B-C; *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87(S) at 94C-H.

I am mindful of the fact that at this stage the Court has not heard all the evidence but only the evidence tendered on behalf of the plaintiff. Absolution from the instance at the close of the plaintiff's case is, therefore, not a remedy that a court would readily grant upon the mere asking for it. *Dube v Dube(supra)* at 329A; *Baily NO v Trinity Engineering (Pvt) Ltd &Ors(supra)* at 487D.

The plaintiff admitted in cross-examination that the circumstances in which the defendant communicated the material complained of to Stanbic Bank (and, indeed, to any other bank which would be its member) were covered by qualified privilege. Privilege exists where one person has a duty or right or legitimate interest to communicate certain material to another person who has a corresponding right or duty or interest to receive such communication. The duty, right or interest may be legal, moral or social. See Neethling, *Law of Delict*, p. 155; *Nyandoro v Kamchira* 1997 (1) ZLR 522(H) at 529C-F. In the instant case there was a contractual duty on the part of the defendant to furnish to Stanbic Bank any information which might be relevant in its assessment of the plaintiff as an employee. Information such as that the plaintiff once had allegations of fraud being made against him and that he was at some point arrested by the police would be of interest to any prospective employer. Whether the plaintiff understood the invitation to the police station as an exercise to merely "question" him or as an arrest is immaterial. The fact is that there was an investigation involving some cheques which had been fraudulently issued or circulated and his name was mentioned in connection with it. There were also disciplinary proceedings which were instituted against him by his previous employer. An organisation such as the defendant would be failing in its duty if it failed to disclose such information to its members. It is clear that both the occasion and the communication between the defendant and Stanbic Bank were privileged.

Where the occasion and communication are privileged it is not necessary for the defendant to prove that the defamatory material was true. See *Musakwa v Ruzario* 1997 (2) ZLR 533(H) at 536A. The defence of qualified privilege is forfeited if it is shown that the publication of the material was actuated by malice or some other improper motive. *Nyandoro v Kamchira (supra)*. No evidence of malice or an improper motive was placed before the Court by the plaintiff in the instant case. The evidence given by the plaintiff showed that there was a genuine business relationship between the defendant and Stanbic Bank. The letter from the bank referred to above stated that the FBC had informed the bank of his alleged arrest.

The plaintiff produced a document which was marked exhibit 5. That document largely contains accurate information such as that the plaintiff was at some point employed by Beverley Building Society and allegations of misconduct were made against him and that he was found not guilty of the misconduct allegations. It is also true that the plaintiff accepted a voluntary retrenchment package from his former employer. The furnishing of that information to Stanbic Bank cannot be an act of malice.

In the circumstances, the plaintiff failed to lead evidence upon which a court reasonably applying its mind might or could find the defendant to be liable.

Accordingly, the application for absolution from the instance is granted. The plaintiff shall pay the defendant's costs.

*Atherstone and Cook*, defendant's legal practitioners