

Cloud Innovation Limited v Brian Munyao

Longwe Civil Cause Number 380 of 2022

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Allan Hans Muhome
Cause Number:	Civil Cause Number 380 of 2022
Date of Judgment:	April 02, 2025
Bar:	For the Claimant: Mr. Jai Banda For the Defendant: Mr. Andy Kaonga

Head Notes

Defamation - Defences – Fair comment – Test for fair comment is whether an honest person could hold the opinion, even if extravagant.

Defamation - Burden of proof – Justification – Defendant need not prove every defamatory statement, only the greater part of it

Defamation - Freedom of Expression – Constitutional rights – Sections 34 and 35 of the Constitution – Fair comment is a bulwark of free speech and is zealously protected by courts.

Defamation - Defences – Fair comment – Figurative language – Use of terms like 'mafia' and 'vulture' were found to be figurative and not literal, thus not defamatory.

Summary

The Claimant, an internet protocol management company, brought a claim for defamation against the Defendant, a former director of the African Network Information Centre (AFRINIC). The action arose from a tweet by the Defendant in which he referred to the Claimant as a "mafia" and "vulture" and linked it to a Chinese individual and allegations of illegally obtaining IP addresses for illicit activities, including child pornography. The Claimant averred that the words were false, made with malice, and seriously damaged its reputation. The Defendant admitted to publishing the words but contended they were not defamatory, asserting the defences of fair comment on a matter of public interest and justification. He argued that his tweet was a fair summary of a publicly available article by Associated Press, and that the terms 'mafia' and 'vulture' were used figuratively. The key legal questions before the court were whether the Defendant's statements were defamatory and, if so, whether the defences of fair comment and justification applied.

The Court dismissed the claims with costs. The Court found that the Defendant's comment was made on a matter of public interest. It accepted that the use of the words "mafia" and "vulture" were figurative rather than literal and that a fair comment, even if exaggerated or extravagant, is protected. The Court affirmed that a defendant need not prove every single part of a defamatory statement to be true, as long as the greater part is justified. The Court held that the Defendant's constitutional right to freedom of opinion and expression under sections 34 and 35 of the Constitution of the Republic of Malawi was a cardinal principle that should not be whittled down.

Legislation Construed

Judgment

1. The Claimant is an internet protocol management company based in the Republic of Seychelles. The Defendant is a Malawian and a subscriber on the Tweeter social media platform. The Claimant avers that it is a party in a pending litigation with a non-profit internet resources company called African Network Information Centre (AFRINIC) in Mauritius. On or about 30th August, 2022, one Miniu Kariuki through a Tweet had asked the question 'who is leading this onslaught on AFRINIC?' The Defendant published a response containing, allegedly, false words and defamatory of the Claimant as follows: -

A Jamaa called Lu Heng and Cloud Innovation is the name of the company that is the 'tip of the spear in this anti-afrinic antagonism'... a Chinese Mafia who allegedly obtained IP addresses used for child pornography and whole lot of dark web stuff.

2. The Defendant further referred to the Claimant as a 'vulture'. The Claimant contends that the said words were made with malice and that in their natural and ordinary meaning, meant and were understood to mean that the Claimant is unscrupulous and a mafia internet company which illegally obtained IP addresses and is involved in child pornography. The Claimant states that its reputation has been seriously damaged and lowered and therefore seeks damages and costs of this action.

3. The Defendant states that the Claimant has over 25 legal suits against AFRINIC. That he previously sat on the board of AFRINIC. The Defendant admitted publishing the alleged words, however he states that the same are not defamatory. That the words were a fair comment on a matter of public interest. That the Claimant was allocated 6,200,000 African addresses, representing 5% of total addresses for Africa. That an officer at AFRINIC allocated the addresses unprocedurally and criminal charges were laid against him. The addresses were used to host illegal activities that were not for Africa, including child pornography and gambling. This was admitted to Associated Press by one Lu Heng, who controls the Claimant. The Defendant therefore maintained that the words were a fair comment as the use of the IP addresses was not in tandem with the Registration Service Agreement with AFRINIC.

4. The Claimant's sole witness, Ian Phua, adopted his witness statement and the Tweet, which is discussed in paragraphs 1 and 2 above, was exhibited as CL 1. In cross examination, the witness acknowledged the publication of an article by Associated Press dated 23rd November 2021 titled 'African internet riches threatened by lawsuit and corruption.' He admitted that the article was still accessible online. That the article was attached to the Defendant's Tweet of 30th August 2022, after the online publication. He further admitted that the article stated that the Claimant's employees were using the addresses for improper purposes. That the article was published by many more internet news sites. He stated that the Claimant could not control users from uploading illegal content.

5. In re-examination, the witness testified that some news sites had since removed the news content as it was defamatory. He stated that the litigation between the Claimant and AFRINIC had come to an end following a Supreme Court of Mauritius Judgment

(exhibited as CIL 2) dismissing AFRINIC's appeal.

6. The Defendant testified that he is one of the founding members and former director of AFRINIC which provides IP addresses to internet providers. In allocating the addresses, the recipient must state the purposes for which they will be used and stick to such commitments. The Claimant was using the IP addresses for illegal activities such as child pornography and gambling according to an article by Associated Press exhibited as BML 1. The Defendant commented on the article through a Tweet mentioning Lu Heng as 'a Chinese mafia' and not the Claimant. He stated that the Claimant was in the habit of using the courts to stop other people from expressing their views on the issues of AFRINIC. He exhibited examples from Tanzania where the Claimant sued for defamation. He stated that the litigation between AFRINIC and the Claimant was on-going.

7. In cross-examination, the witness maintained that the Claimant was involved in illegal activities according to the news articles. That the term 'mafia' referred to the Claimant's activities such as wars waged through litigation which had crippled the activities of AFRINIC. He stated that reference to the Claimant as 'mafia' and 'vulture' was only figurative and so it is not defamatory. In re-examination, he stated that his Tweet was simply summarizing what was already in the public domain through the news article by Associated Press. He stated that the Claimant had not suffered any financial loss through the Tweet as the IP addresses had long been repossessed by AFRINIC before the Tweet.

8. The standard of proof in civil matters is on a balance of probabilities and the burden of proof lies on he who asserts the affirmative per Commercial Bank of Malawi v Mhango [2002 - 2003] MLR 43. Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally or which makes them shun or avoid him or to cut him off from society or to expose him to hatred, contempt or ridicule: Nyirenda v AR Osman & Co [1993] 16(2) MLR 681 at 702. In particular, libel is a publication by a Defendant by means of printing, writing, pictures or the like, of matter defamatory to a Claimant: Patel v Star Publications [1999] MLR 334.

9. In order for a Claimant to succeed in a claim for defamation, he or she must prove: (a) that defamatory words were uttered; (b) that the words referred to the claimant; and (c) that the words were maliciously published: Migochi v Registered Trustees of CCAP [2008] MLR 117. In defamation cases, a defendant may raise a defence of fair comment and justification of the publication complained of. If the Defendant gives a justification of the words complained of, then there is no defamation: Mlenga Mvula v FDH Bank Ltd Civil Cause Number 159 of 2017. Fair in the defence means merely that the opinion must be one that a fair person, however extreme, might honestly hold, even if the views are – extravagant, exaggerated, or even prejudiced: The Citizen and Others v McBride [2011] ZACC 11.

10. The defence of fair comment is generally regarded as the bulwark of free speech in the law of defamation. A fair comment on a matter which is of public interest is not actionable. This right is one of the aspects of the fundamental constitutional principle of freedom of expression, and the courts are zealous to preserve it unimpaired: Kemsley v Foot [1951] 2 KB. 34,45-47. 'It must not be whittled down by legal

refinements' *Slim v Daily Telegraph Ltd* [1968] 2 Q.B. 157, 170, per Lord Denning M.R.

11. In the present matter, it is not in dispute that the Defendant published on his tweet account words in reference to the Claimant. That he used words such as 'mafia' and 'vulture' in relation to the Claimant. What is in dispute is whether such words are defamatory or not.

12. The facts are that the Defendant replied to a specific Tweet that wanted information on what was actually happening with AFRINIC. The Defendant stated that a certain Chinese man and the Claimant were spearheading the onslaught and that the individual was involved in obtaining IP addresses which were used for illegal purposes. The Defendant took a step further, attaching the article by Associated Press to his Tweet. The Claimant's witness admitted that illegal content was uploaded using some of the IP addresses and the Claimant had no control over such activities.

13. This Court finds that the Defendant's comment was made on a matter of public interest. As shown by the Defendant's evidence, AFRINIC is a public organisation, not for profit, aimed at protecting and developing Africa's internet resources. This Court accepts that the use of words 'mafia' and 'vulture', in the circumstances, were more figurative than literal. An examination of the Tweet shows that the comment was more truthful, considering the article from Associated Press attached to the Tweet. The essence of the defence of fair comment is that the Defendant's statements must largely be true. In *Moore v News of the World* [1972] 1 All ER 915, Lord Denning said that: -

... a Defendant is not to fail simply because he cannot prove every single thing in the libel to be true. If he proves the greater part of it to be true, then even though there is a smaller part not proved, nevertheless the Defendant will win as long as the part not proved does not do the Plaintiff much harm.

14. As stated above, in *The Citizen and Others v McBride*, a fair comment may be extravagant, exaggerated, or even prejudiced. In this case, with such words like 'mafia' and 'vulture'. As long as it remains a fair opinion, this Court is prepared to hold that the Defendant's constitutional right to freedom of opinion and expression, under sections 34 and 35 of the Republican Constitution of Malawi 1994, are cardinal. The Claims are therefore dismissed with costs.

Made in Open Court this 2nd April, 2025.