PROTON PARTS CENTRE SDN BHD A

v.

MOHAMED ZAINAL & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA B
RAUS SHARIF JCA
SULONG MATJERAIE JCA
HISHAMUDIN MOHD YUNUS JCA
[CIVIL APPEAL NOS: B-03(IM)-176-2007 & B-03-177-07]
29 JULY 2009 C

CIVIL PROCEDURE: *Striking out - Claims - Application for - Whether plaintiff's claim disclosed reasonable cause of action - Whether there was cause of action in slander - Whether there was basis for second and third defendants to be made parties to proceedings - Rules of the High Court 1980, O. 18 r. 19(1)(a)* D

TORT: *Defamation - Slander - Allegation of - Whether preventing plaintiff from entering premises amount to tort of slander - Defamatory words - Whether uttered - Whether conduct of person amounted to slander - Rules of the High Court 1980, O. 18 r. 19(1)(a)* E

The plaintiff's writ action against the defendants was for a claim for damages for an alleged tort of slander. The plaintiff submitted that the cause of action against the defendants was based on the act of the first defendant preventing the plaintiff from entering his office, and in sealing his office in the full view of the employees working in the premises. The defendants applied before the Senior Assistant Registrar under O. 18 r. 19(1)(a) of the Rules of the High Court to strike out the plaintiff's claim as disclosing no reasonable cause of action. Their applications were dismissed and hence this appeal. F G

Held (allowing the appeal)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court: H

(1) The mere act of the security officer of the first defendant company in preventing the plaintiff from entering the premises of his office and in sealing the premises could not in law amount to tort of slander. There were no defamatory words uttered by the officer concerned, nor any gestures made by him. Therefore, there could not be a cause of action in slander. The conduct (as opposed to words and gestures) of a person did not amount to slander. (para 12) I

A **(2)** With regards to the second defendant (the chairman of the board of directors of the first defendant and the chief executive officer of the third defendant) and the third defendant (a public listed company and majority shareholder of the first defendant), there was no basis at all for making them
B parties to the proceedings. As for the third defendant, there was yet another reason why the action against them ought to be struck out. The third defendant was not properly cited in the writ and statement of claim. The registered name of the third defendant, as a company, was 'Perusahaan Otomobil
C Nasional Bhd'. They had been wrongly cited in the writ and statement of claim as 'Proton Berhad'. There had been no proper and legally effective amendment at all. (paras 16 & 17)

Bahasa Malaysia *Translation Of Headnotes*

D Tindakan writ plaintif terhadap defendan adalah bagi tuntutan untuk gantirugi atas tuduhan perbuatan salah memfitnah. Plaintif telah berhujah bahawa kausa tindakannya terhadap defendan adalah berdasarkan perbuatan defendan pertama menghalang
E plaintif dari memasuki pejabatnya, dan dengan mengunci pejabatnya di hadapan pandangan kesemua pekerja di dalam premises tersebut. Defendan telah memohon kepada Penolong Kanan Pendaftar di bawah A. 18 k. 19(a) Kaedah-Kaedah Mahkamah Tinggi untuk membatalkan tuntutan plaintif atas sebab tidak
F mengandungi kausa tindakan yang munasabah. Permohonan mereka telah ditolak maka sebab itulah rayuan ini dibuat.

Diputuskan (membenarkan rayuan)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

G **(1)** Tindakan pegawai keselamatan defendan pertama semata-mata dalam menghalang plaintif dari memasuki premise pejabatnya dan menutup premis tersebut tidak boleh dianggap dari segi undang-undang sebagai perbuatan salah memfitnah. Pegawai
H yang terlibat tidak ada mengatakan kata-kata menghina atau mencemar, namun dia tidak melakukan apa-apa gerak isyarat. Oleh yang demikian kausa tindakan bagi fitnah tidak tertimbul. Perbuatan (yang lainnya dari kata-kata atau gerak isyarat) seseorang tidak boleh dianggap sebagai memfitnah.

I **(2)** Berkenaan dengan defendan kedua (pengerusi lembaga pengarah defendan pertama dan pegawai tinggi eksekutif defendan ketiga) dan defendan ketiga (sebuah syarikat awam

bersenarai dan pemegang saham majoriti defendan ketiga), tiada apa-apa dasar untuk menjadikan mereka sebagai pihak di dalam prosiding. Untuk defendan ketiga, terdapat satu lagi sebab kenapa tindakan terhadap mereka harus dibatalkan. Defendan ketiga tidak dinamakan dengan betul di dalam writ dan pernyataan tuntutan. Nama berdaftar defendan ketiga sebagai syarikat adalah 'Perusahaan Otomobil Nasional Bhd'. Mereka telah salah dinamakan di dalam writ dan pernyataan tuntutan sebagai 'Proton Berhad'. Memang tiada pembetulan yang sah dan efektif dari segi undang-undang dibuat sebelum ini.

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(a)

Other source(s) referred to:
Clerk & Lindsell on Torts, 17th edn, p 1026, para 21-28
David Price, *Defamation Law, Procedure & Practice*, 2nd edn, p 35
Winfield & Jolowicz on Tort, 14th edn, p 314-315

For the appellants - Justin Voon (Hee Seong Wing with him); M/s Sidek Teoh Wong & Dennis
For the respondent - Walter Pereira (Balbir Singh with him); M/s Kamarudin & Partners

[Appeal from High Court, Shah Alam; Civil Suit No: MT1-22-502-2003]

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] These two appeals, namely, B-03-(1M)-176-2007 and B-03-177-2007 are related and heard together before us. They originated from the High Court of Shah Alam Civil Suit No. MT1-22-502-2003.

[2] At the High Court the plaintiff's writ action against the defendants was for a claim for damages for an alleged tort of slander. The defendants applied before the Senior Assistant Registrar under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 to strike out the plaintiff's claim as disclosing no reasonable cause of action. Their applications were dismissed with costs.

[3] They appealed to the judge in chambers. But their appeals were dismissed with costs by the learned judicial commissioner.

[4] They now appeal to this court.

[5] We have allowed the appeal with costs. We now give our reasons.

[6] In our judgment, on the facts, we accept the submission of the defendants (the appellants before us) that the plaintiff (the respondent before us) has no cause of action in slander against them.

[7] The plaintiff was the managing director of the first defendant company. The second defendant is the chairman of the board of directors of the first defendant and the chief executive officer of the third defendant. The third defendant is a public listed company and is the majority shareholder of the first defendant.

[8] We have carefully examined the statement of claim. In order to appreciate the averred facts and the cause of action we need only to consider paras 7-12 of the statement of claim. They read:

> 7. On 4/2/2003, the plaintiff went to work as normal at 7.55 a.m. but the plaintiff was prevented by the Chief of Security from entering into the office premises and was informed that his office has been sealed. There was no notice of any nature given to the plaintiff neither prior to this incident nor on that date. The plaintiff has an unblemished work record also never been reprimanded or warned of any wrongdoing in his entire career with the 1st and 3rd defendants.
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> 8. The act of preventing the plaintiff from entering into the office premises and the sealing of his office was done in full view and or knowledge of the employees working at the premises.
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> 9. At 8.58 a.m. on 4/2/2003, the plaintiff immediately faxed a letter to the 2nd defendant who is also the Chairman of the Board of Directors of the 1st defendant to seek an explanation.
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> 10. As of 9.00 a.m. the next day, 5th February 2003, the plaintiff still was not given any explanation to his being prevented from entering his office. The plaintiff sent another fax to the 1st defendant wherein he considered himself constructively dismissed.

11. On Wednesday, 5th February 2003, the plaintiff received a letter from the 1st defendant dated 4th February 2003 in reply to his memo / fax of 4th February 2003 stating that the board of the 1st defendant had on 29th January 2003 decided that the plaintiff was to go on leave with full pay pending completion of the investigation of various alleged irregularities in the management of the company.

12. Despite the board's decision of 29/1/2003 there was no communication and or attempt to communicate to our client of the board's decision of 29/1/2003 until 4.30 p.m. of Tuesday 4/2/2003. The plaintiff was not present nor informed of the meeting of the board on 29/1/2003.

[9] For the purpose of this judgment, we will assume that the facts as averred in the above paragraphs are true.

[10] The learned counsel for the plaintiff, Encik Walter Pereira, submits that the cause of action against the defendants is based on the act of the first defendant in preventing the plaintiff from entering his office, and in sealing his office in full view of the employees working in the premises.

[11] In urging us to rule that the conduct of the first defendant in sealing; preventing the plaintiff from entering his office, amounts to slander. Learned counsel referred us a textbook entitled *Defamation Law, Procedure & Practice* (2nd edn) by David Price wherein the learned author states (at p. 35):

> Defamatory matter communicated by word of mouth is slander except, arguably, when the speaker is reciting from a document. Defamatory gestures and conduct are slanders. Occasional claims are brought where the claimant has been physically removed or escorted from the defendant's premises, for example, on the summary termination of employment. It is suggested that the conduct of the defendant or his agents conveys the impression to bystanders that the claimant has been guilty of improper behaviour.

[12] With respect we are unable to accept the above submission. We are of the view that the mere act of the security officer of the first defendant in preventing the plaintiff from entering the premises of his office and in sealing the premises cannot in law amount to the tort of slander. There were no defamatory words uttered by the officer concerned, nor any gestures made by him.

Therefore, there cannot be a cause of action in slander. We are unable to agree with the contention that the conduct (as opposed to words and gestures) of a person may amount to slander.

[13] We have referred to two classic works on the law of tort. However, it appears to us that none supports the proposition as advanced by the learned counsel for the plaintiff with regard to conduct. According to *Clerk & Lindsell on Torts*, (17th edn at p 1026, para 21-28):

> Slander distinguished from libel. Slander is defamation communicated in some non-permanent form by spoken words, or other sounds, or by gestures.

[14] And Winfield & Jolowicz, on *Tort* says (14th edn at p 314-315):

> Liability for defamation is divided into two categories of libel and slander, and this division has important consequences. A libel consists of defamatory statement or representation in permanent form; if a defamatory meaning is conveyed by spoken words or gestures it is slander.

[15] The above two authorities above appear to suggest that the tort of slander is confined to words and gestures only. It does not extend to conduct.

[16] With regards to the second and third defendants, having examined the pleadings, we find that there is no basis at all for making them parties to the proceedings.

[17] As for the third defendant, there is yet another reason why the action against them ought to be struck out. They have not been properly cited in the writ and statement of claim. The registered name of the third defendant, as a company, is 'Perusahaan Otomobil Nasional Bhd'. But they have been wrongly cited in the writ and statement of claim as 'Proton Berhad'. The plaintiff maintains that he has amended the writ and statement of claim so as to correct the misnomer. However, the truth is that there has been no proper and legally effective amendment at all. Till the date of the hearing of this appeal (and this is conceded by plaintiff's counsel himself), the amended writ and statement of claim filed are not even sealed and signed by the Registrar of the High Court (see pp. 322 and 326 of the Appeal Record).

[18] Accordingly, we are unanimous that this appeal be allowed with an agreed cost of RM10,000 incurred here and below to be borne by the plaintiff. Deposit to be returned to the defendant.