

N6589

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

WS NO. 1399 OF 2013

BETWEEN

OWEN WARKA

Plaintiff

AND

JIRU AGAI

First Defendant

AND

KAKOMA AGAI

Second Defendant

AND

ROBERT AGAI

Third Defendant

AND

SOKRIM LOIN

Fourth Defendant

AND

SOGERAM DEVELOPMENT CORPORATION LIMITED

Fifth Defendant

Waigani: Cannings J

2015:21st October & 30th November

2017:11th January

DEFAMATION – whether a letter to the head of a governmental body complaining of conduct of an officer of that body was defamatory of the officer – whether defamatory material was published – defences of public interest, fair comment, truth.

The defendants wrote a letter to the head of a governmental body complaining about the conduct of the plaintiff, an officer of the body, and alleging that he was involved in misconduct. The plaintiff was aggrieved by the content of the letter and commenced proceedings against the defendants, claiming damages for defamation. At the trial the defendants conceded writing and sending the letter and that its content had been published but denied liability on the ground that the content was not defamatory of the plaintiff, but if it was defamatory, its publication was lawful by virtue of three defences under the *Defamation Act*: the public interest defence under Section 8(2); the fair comment defence under Section 9(1); the truth defence under Section 10.

Held:

- (1) The elements of a cause of action in defamation are that: the defendant made a defamatory imputation of the plaintiff; the defendant published it; and the publication was unlawful in that it was not protected, justified or excused by law (*Defamation Act*, Sections 5, 24; *Theresa Joan Baker v Lae Printing Pty Ltd* [1979] PNGLR 16).
- (2) The defendants' letter insinuated that the plaintiff attempted to bribe the first defendant so the first defendant would give his approval for a project in which the plaintiff had an interest. It contained defamatory imputations, which were published, at least, to the recipient of the letter.
- (3) As to the three defences pleaded: (i) the letter was not a "report" of "proceedings" of a statutory body, hence the *Defamation Act*, Section 8(2)(f) defence failed; (ii) the defamatory imputations had some purported factual basis and amounted to serious allegations against a public officer and constituted fair comment respecting the conduct of a public officer in the discharge of his public functions and the character of that person (the plaintiff) so far as his character appears in that conduct,

hence the *Defamation Act*, Section 9(1)(c) defence succeeded; (iii) the defendants failed to prove that the defamatory statements in the letter were true, hence the *Defamation Act*, Section 10 defence failed.

- (4) Though only one defence succeeded, that was sufficient to render publication of the defamatory matter lawful. The plaintiff failed to establish a cause of action in defamation and the proceedings were dismissed, with costs.

Cases cited:

The following cases are cited in the judgment:

Boyd v Mirror Newspapers [1980] 2 NSWLR 449

Hansen v Border Morning Mail Pty Ltd (1988) ATR 80,188

Hunt v Star Newspaper [1908] 2 KB 309

Hutton v Jones [1910] AC 20

PNG Aviation Services Pty Ltd v Michael Thomas Somare [1997] PNGLR 515

Rabaul Shipping Limited v Cyril Mudalige (No 2) (2009) N3783

Theresa Joan Baker v Lae Printing Pty Ltd [1979] PNGLR 16

TRIAL

This was a trial on liability for defamation.

Counsel:

B W Meten, for the Plaintiff

R J Mann-Rai, for the First, Second, Third and Fourth Defendants

11th January, 2017

1. CANNINGS J: The plaintiff, Owen Warka, is an officer of the National Forest Service, based in Madang. He was in 2012 the Forest Project Supervisor for the Sogeram Timber Resource Permit (TRP) project undertaken by

Woodbank Ltd.

2. The first, second, third and fourth defendants are forest resource owners in the Sogeram TRP project area. On 5 October 2012 they wrote a letter to the Managing Director of the National Forest Service, complaining about the conduct of the plaintiff and alleging that he was involved in misconduct.

3. The plaintiff was aggrieved by the content of the letter and commenced proceedings against the defendants, claiming damages for defamation. The fifth defendant, Sogeram Development Corporation, is the landowner company owned and controlled by the first, second, third and fourth defendants and other forest resource owners. The proceedings against it have been dismissed for failure to disclose a reasonable cause of action.

4. The first, second, third and fourth defendants concede that they wrote and signed the letter of 5 October 2012 and that its content was published, but deny liability. They say the content was not defamatory of the plaintiff, but if it was, its publication was lawful by virtue of three defences under the *Defamation Act*:

(a) the public interest defence under Section 8(2);

(b) the fair comment defence under Section 9(1);

(c) the truth defence under Section 10.

ISSUES

5. The elements of a cause of action in defamation are:

- the defendant made a defamatory imputation in relation to the plaintiff,
- the defendant published it, and
- the publication was unlawful in that it was not protected, justified or excused by law (*Defamation Act*, Sections 5, 24; *Theresa Joan Baker v Lae Printing Pty Ltd* [1979] PNGLR 16).

6. Here, it is agreed that the letter was published, so the primary issues are:

- (1) was the letter defamatory of the plaintiff? and, if it was
- (2) was its publication unlawful?

If both issues are decided in favour of the plaintiff, a cause of action will be established and the defendants will be liable in damages. If one of the issues is decided against the plaintiff, his case will fail.

7. Before addressing those issues I comment on two curious aspects of the plaintiff's case. First, he has not given evidence. Five affidavits tendered by the plaintiff have been admitted into evidence, but none is an affidavit of the plaintiff and he has not given oral testimony. Secondly a copy of the letter that is the subject of the case has not been adduced in evidence. The text of the letter is pleaded in the statement of claim but that is all. The defendants have not submitted that these apparent deficiencies in the evidence are significant. They admit that they wrote and sent the letter and agree that its content is accurately pleaded in the statement of claim. So I will determine the two major issues on their merits and regard the apparent deficiencies in the evidence as inconsequential.

1 WAS THE LETTER DEFAMATORY OF THE PLAINTIFF?

8. The letter, addressed to the Managing Director of the National Forest Service, stated:

Dear Mr Kanawi Pouru,

Subject: Statement of an attempt of bribery involving the PNGFA officer of Sogeram TRP and officials of Woodbank Pacific Limited

I, Jiru Agai of Kikirai village, Transgogol, Madang, do hereby make a statement with facts according to my own knowledge is true and correct.

I do recall on the 5th of August of this year (2012), I was attending a

night meeting at Kwanang, Wabusariki village. At around 10.00 pm I was approached by some Woodbank Pacific Limited workers, who came looking for me during the meeting and asked me to follow them. I went with them to their vehicle and identified all five (5) of them as village councillor Eric Sinwara, Max Kambasil, Nambi Kambasil, Nathan his surname I don't know, and a Tolai jinker driver.

They told me to get on the Toyota Landcruiser so they could take me to Musak and talk to me about constructing a bridge over Sogeram River. I got on their vehicle and we went to Musak village near the Sogeram River. They showed me steel bars and materials which they said that Woodbank Pacific will use to make a bridge with. They said that we only need your approval for work to begin.

It was late night and while I was wondering about their intent to talk to me about such issues at an inappropriate time when they offered me K1, 000.00 cash. They said that Mr Jeffery Lin (a Malaysian Manager of Woodbank Pacific) wants you to sign and get this money by tomorrow. They said that Mr Owen Warka will see me about it at the meeting organised for tomorrow. I didn't want to follow them back so they left me and went back to wherever they came from.

The next morning, Owen came with his family members to the meeting he had organised and took me aside and asked me if I had signed and received that one grand or not. I told him that it is not for me to decide but for the entire clan to pass a resolution for my elder brother who is our clan leader to do so. Because not many people turned up to attend Owen's meeting, the meeting was cancelled. Some people who turned up for the meeting and saw what happened were Woodbank workers and Sokrim Loin, the SDC [Sogeram Development Corporation] Interim Chairman, Robert Agai, Kakoma Agai and some others.

That night, Owen Warka came to my house with some Igoi people, bringing me foodstuff to entice and take me to town next day for a spin. I refused, citing work reasons and they left. Later the following Saturday (08/09/12) he once again attempted to get me to sign and get

(*Boyd v Mirror Newspapers* [1980] 2 NSWLR 449; *Hutton v Jones* [1910] AC 20). My assessment is that the letter imputes by insinuation, viewed from the perspective of a reasonable person reading it, that the plaintiff:

- had colluded with the project developer, Woodbank, to covertly offer money to the first defendant, so that he would allow Woodbank to build a bridge across the Sogeram River;
- was not objective in his management and supervision of the project;
- had been compromised by Woodbank and was involved in corrupt activities;
- was engaged in bribery;
- was not doing his job properly and was not honest;
- was not a person of integrity.

Such imputations were likely to injure the reputation of the plaintiff and to injure him in his profession. They are defamatory imputations by virtue of Sections 2(1)(a) and (b) of the *Defamation Act*. The plaintiff has proven on the balance of probabilities that the letter is defamatory of him.

2 WAS PUBLICATION OF THE LETTER UNLAWFUL? OR DO ANY OF THE THREE DEFENCES RELIED ON BY THE DEFENDANTS APPLY?

(a) Public interest defence: Defamation Act, Section 8

11. The defendants rely on Section 8(2)(f) (*protection: matters of public interest*) of the *Defamation Act*, which states:

For the purposes of this Act, it is lawful to publish in good faith for the information of the public ...a fair report of the proceedings of a local authority, board or body of trustees or other persons, duly constituted under a law, or by or under the authority of the Head of

State, acting on advice, for the discharge of public functions, so far as the matter published relates to matters of public concern.

12. For a defence under Section 8(2)(f) to succeed, the following elements must exist:

1 the defamatory material must be a “fair report”;

2 the report must be of “the proceedings” of a body;

3 the body must have the following characteristics: (a) it must be a local authority, a board, a body of trustees, or a body of other persons, (b) which has been duly constituted under a law or by or under the authority of the Head of State, acting on advice, (c) for the discharge of public functions;

4 the defamatory material must be published “in good faith for the information of the public”, which means by virtue of Section 8(3) that:

the person by whom it is made is not actuated in making it by ill-will to the person defamed or by any other improper motive, and ... the manner of the publication is such as is ordinarily and fairly used in the publication of news; and

5 the published matter must relate to “matters of public concern”.

I find that none of those elements exist, in that:

- the defendants’ letter was not a “report”, as it was a letter addressed to one person, thus element 1 does not exist;
- it did not relate to the “proceedings” of a “body”, as it was making allegations about the conduct of a particular person, thus elements 2 and 3 do not exist;
- it was not published for the information of the public and it did not relate to a matter of public concern, as it was a private letter, addressed to one person, thus elements 4 and 5 do not exist.

13. The result is that the public interest defence fails.

(b) Fair comment defence: Defamation Act, Section 9

14. The defendants rely on Section 9(1)(c) (*protection: fair comment*) of the *Defamation Act*, which states:

For the purposes of this Act, it is lawful to publish a fair comment ... respecting:

- (i) the conduct of a public officer or public servant in the discharge of his public functions; or**
- (ii) the character of any such person, so far as his character appears in that conduct.**

15. For a defence under Section 9(1)(c) to succeed, the following elements must exist:

- 1 the defamatory imputations must be *comments*, as distinct from statements of fact (*PNG Aviation Services Pty Ltd v Michael Thomas Somare* [1997] PNGLR 515);
- 2 the defamatory imputations must be *fair* comments, bearing in mind that under Section 9(2) the question whether a comment is or is not fair is a question of fact and to qualify as a fair comment a statement must have some purported factual basis, which is true; the rationale being that if a reasonable, unprejudiced reader is given the opportunity to form his or her own judgment on whether the comment is justified, the force of the defamatory statement is neutralised (*Hunt v Star Newspaper* [1908] 2 KB 309; *Rabaul Shipping Limited v Cyril Mudalige (No 2)* (2009) N3783); and
- 3 the *subject* of the comment must be:
 - (i) the conduct of a public officer or public servant in the discharge of his public functions; or
 - (ii) the character of any such person, so far as his character appears in that conduct.

16. I find that all of those elements exist, in that:

- the defamatory imputations are in the form of allegations of misconduct and statements of concern, which the defendants are suggesting require investigation and, as the letter was addressed to just one person and not copied to any other person, are properly regarded as comments, as distinct from statements of fact;
- the defamatory imputations are fair comments, given that they have a purported factual basis;
- the plaintiff, a member of the National Forest Service (which is established by the *Forestry Act* 1991) is a public officer and the defendants were commenting on his conduct in the discharge of his public functions as a Forest Project Supervisor and his character, so far as his character appeared in that conduct.

17. The result is that the fair comment defence succeeds.

(c) The truth defence: Defamation Act, Section 10

The defendants' argument is that publication of anything in the letter deemed to be defamatory is rendered lawful by the "truth" defence in Section 10 of the *Defamation Act*, which states:

For the purposes of this Act, it is lawful to publish defamatory matter if it is true, and if it is for the public benefit that the publication complained of should be made.

18. The truth defence has two elements:

- 1 the defamatory matter in the letter must be true (it is for the defendant to prove that the defamatory matter is true in substance and effect, and it is irrelevant whether the defendant had a genuine belief in the truth of the matter (*Hansen v Border Morning Mail Pty Ltd* (1988) ATR 80)); and
- 2 it must be for the public benefit that that matter be published (the question whether the public discussion of a subject is for the public benefit is by virtue of Section 13(b) of the *Defamation Act* a question of fact).

19. I am not satisfied as to the existence of the first element. The defendants have been unable to prove at the trial that the allegations against the plaintiff are true. They have given evidence in support of the allegations but there is contrary evidence that has been given on behalf of the plaintiff (but again, it must be noted, not by the plaintiff himself) that the first defendant misinterpreted the actions of the plaintiff and that he and the other defendants made up the allegations to disrupt the plaintiff's work. There is also evidence that the first defendant was convicted by the Madang District Court of spreading false reports contrary to Section 11(c) of the *Summary Offences Act* and that the conviction was in relation to making the allegations against the plaintiff that are the subject of the present case.

20. I consider that the second element exists as it was for the public benefit that the defamatory letter was sent to the Managing Director of the National Forest Service. It was published only to one person and it was making serious allegations of misconduct. I have found that it has not been proven that the allegations were true. But nor has it been proven to my satisfaction that the allegations were untrue.

Both elements must exist for the truth defence to succeed. The first does not exist. Therefore the defence fails.

CONCLUSION

21. Though only one defence has succeeded, that is sufficient to render publication of the defamatory matter lawful. The plaintiff has therefore failed to establish a cause of action in defamation and the proceedings will be dismissed, with costs.

ORDER

- (1) The plaintiff has failed to establish a cause of action in defamation and the proceedings against the first, second, third and fourth defendants are dismissed.
- (2) Subject to any prior specific costs orders, the plaintiff shall pay the first, second, third and fourth defendants' costs of the proceedings on a party-party basis, which shall, if not agreed, be taxed.

Judgment accordingly,

Meten Lawyers: *Lawyers for the Plaintiff*
Mann-Rai Lawyers: *Lawyers for the Defendants*