IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: PWAMANG JSC (PRESIDING)

DORDZIE (MRS.) JSC

OWUSU (MS.) JSC

LOVELACE-JOHNSON (MS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL

NO. J4/48/2021

9TH FEBRUARY, 2022

BENJAMIN DUFFOUR …… PLAINTIFF/RESPONDENT/APPELLANT

VRS

1. BANK OF GHANA …… 1ST DEFENDANT

2. GRAPHIC COMMUNICATIONS GROUP LTD. ….. 2ND DEFENDANT/APPELLANT/

RESPONDENT

JUDGMENT

PROF. MENSA-BONSU (MRS.) JSC:-

This is a case that arose because a newspaper published an article which was intended to arouse sympathy for the leadership of the Senior Staff Association, wrongly described as a "trade union" of the Bank of Ghana. The article, apparently based on information from "reliable sources", ended up making some inaccurate statements that have landed the newspaper in difficulty and formed the basis of this action in defamation.

Background

The plaintiff/respondent/appellant (hereinafter referred to as 'plaintiff' to avoid confusion, as the parties reversed roles in the Court of Appeal and in the instant appeal) commenced action on 4th March 2011 against the 1st and 2nddefendants jointly and severally for a publication in the 30th June, 2008, issue of 2nd defendant's newspaper, 'Daily Graphic'. The High Court found the 1st defendant – Bank of Ghana - not liable for the publication, and so the Bank did not join in the appeal against the decision of the High Court. This left the 2nd defendant as the sole appellant in the Court of Appeal, and consequently, the sole respondent in the instant appeal before this honourable court. For this reason, the respondent herein will also be referred to as '2nd defendant', or simply 'defendant' as the circumstances dictate.

Facts

The facts of the case were that on 30thJune, 2008, 'Daily Graphic' published a story concerning the plaintiff captioned "Bank of Ghana dismisses two trade union leaders". The headline of the story appeared on the front page of the newspaper, but the story itself was in the inside pages, at page 24. The 2nd defendant admitted publishing the story part of which read,

> "According to reliable sources at the bank the Chairman, Mr. Benjamin Duffour and the Secretary, Mr. Frank Mensah were handed their dismissal letters last Friday and their identity cards which allowed them entry into the banks premises taken from them".

Neither the statement that they had been handed "dismissal letters" nor that their identity cards had been taken from them, as the publication alleged, was true. What was true, though, was that the 1st defendant had acted to relieve the two employees of their jobs. The publication further made an allegation that "the security personnel of the bank had been given copies of the dismissal letters". This also proved to be untrue. The story also claimed that security personnel of 1st defendant had been instructed not to let the two men into the Bank premises from that Monday morning. The plaintiff testified that it was when he was being prevented from entering the Bank's premises that morning that someone drew his attention to the publication in 'Daily Graphic'. The report can therefore not be described as false.

The plaintiff, though admitting that he had lost his job, contested the manner of captioning the story, believing that the story was given to 2nd defendant's correspondent by 1st defendant to damage his reputation. He claimed that in publishing that he had been "dismissed" by his employers, rather than the correct version of his employment having been "terminated", the publication had defamed him. He also claimed that after the publication, friends, colleagues, relatives, pastors and church members and many others who knew him, called to find out what he had done wrong. He therefore commenced action in defamation against his employer, the Bank of Ghana, and the newspaper 'Daily Graphic'.

The plaintiff averred in the writ that in its ordinary meaning, the word "dismissed" carried an innuendo. He therefore pleaded innuendo, that the implication of the word "dismissed" in the publication was that: -

"a) The Plaintiff was incompetent

b) Plaintiff has committed an offence

c) Plaintiff is of a questionable character."

He further claimed that an account of this publication, his *"personal reputation and professional integrity have been seriously damaged by the "disparaging and damnifying publication".*

By his amended writ the plaintiff claimed the following reliefs:-

"a) Twenty Million cedis (Gh¢20,000,000) general damages for defamation (a. i) Substantial damages (a. ii) Aggravated damages (a. iii) Exemplary damages.

b) A retraction of the offending "Daily Graphic" publication dated the 30th June 2008 captioned "Bank of Ghana Dismisses two trade union leaders".

c) An order of perpetual injunction restraining the defendants herein, the agents, servants, or any entity authorized by them from publishing any similar or further libelous material about Plaintiff.

d) The rending [sic] of an unqualified apology by Defendants to Plaintiff to be delivered in the same mode as was published".

In response, the 1st defendant submitted that though it had terminated the appointment of the plaintiff, it had nothing to do with the publication in the newspaper. The 2nd defendant, on its part, contended that even if those statements were untrue, they were not defamatory. The 2nd defendant further averred that the plaintiff was not entitled to the damages claimed because since the publication, he had successfully sued his employers for "wrongful dismissal" and been reinstated; and that he had also been awarded damages which was compensation enough. Consequently, he had suffered no loss. The plaintiff countered by stating that he had not sued anyone for "wrongful dismissal"; nor that his employment had been terminated due to "trade union" activities as alleged in the publication by the 2nd defendant.

Based on the pleadings the issues adopted for determination in the trial court were:-

a) Whether or not Plaintiff was ever dismissed from the 1st Defendant bank

b) Whether or not the publication on Plaintiff is defamatory

c) Whether or not the publication by 2nd Defendant is privileged

d) Whether or not Plaintiff is entitled to his claim".

The High Court found as a fact that the publication had falsely stated that the plaintiff had been "dismissed" when in reality his appointment had been terminated. Delivering its judgment on 30th November 2016, the action against the 1stdefendant was dismissed, whilst the 2nd Defendant was found liable. The High Court proceeded to

award Gh¢300,000.00 damages; and Gh¢20,000 costs in favour of the plaintiff. It further ordered the rendering of unqualified apology as well as a retraction of the story.

The 2nddefendant, dissatisfied with the judgment of the High Court, filed a notice of appeal on 9th February 2017. The grounds of appeal were that: the judgment was against the weight of evidence; and that the award of damages as well as costs of Gh¢300,000.00 damages and Gh¢20,000 respectively was excessive. The Court of Appeal delivered its judgment on 30th May 2019 and reversed the judgment of the High Court. Aggrieved by that decision, the plaintiff filed a notice of appeal to the Supreme Court on 5th July 2019. He sought the following reliefs:

i) An order setting aside the judgment of the court dated 30th May 2019 with the cost awarded

ii) An order reinstating the judgment of the trial High Court.

Grounds of Appeal

The appellant filed the following grounds of appeal:

a. The Court of Appeal erred in law in setting aside the judgment of the trial High Court that the publications on the Plaintiff/Respondent/Appellant by the Defendant/Appellant/Respondent is not defamatory.

b. The Court of Appeal erred in law in holding that the publication by the Defendant/Appellant /Respondent on Plaintiff/Respondent /Appellant is privileged.

c. Additional grounds of appeal shall be filed on receipt of the records of appeal".

No new grounds were filed, however. Therefore, essentially there are two grounds of appeal in the instant case. The plaintiff filed a Statement of Case on 9th June 2021, pursuant to leave granted by this honourable court on 3rdJune, 2021.

The main issues for determination, then, are:

1. Whether the publication was defamatory of the plaintiff.
2. Whether the defendant can set up a defence of qualified privilege.
3. Whether there was evidence of malice to dislodge the defence.
4. Consequently, whether the defence of qualified privilege would avail the defendant.
5. If not, whether costs awarded were excessive.

Ground a:

> *"The Court of Appeal erred in law in setting aside the judgment of the trial High Court that the publications on the Plaintiff/Respondent/Appellant by the Defendant/Appellant /Respondent is not defamatory."*

The Court of Appeal had the benefit of the full record, and as its mandate to re-hear the case prescribed in oft-cited cases such as *Tuakwa* v *Bosom* [2001-2002] SCGLR 61; and *Agyenim Boateng* v *Ofori & Yeboah* [2010] SCGLR 861, considered all the evidence placed before it.

Defamation- meaning

Defamation has been sufficiently defined in both the Court of Appeal judgment and the respondent's Statement of Case. In *Winfield & Jolowicz on Tort* (13th edition, 1989) W.V.H

Rogers (ed) Sweet & Maxwell, London, (International Student edition) 1990, at p.294, Defamation is defined to be,

> *"the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him."*

At p.295, the learned authors discuss the community of "right-thinking members of society" thus

> *The words must tend to give rise to the feelings mentioned in the definition. But on the part of whom? The answer is the reasonable man. The standard must be that of the ordinary citizen who is "neither unusually suspicious nor unusually naïve and [who] does not always interpret the meaning of words as would a lawyer for he is not inhibited by a knowledge of the rules of construction. He may thus more freely read an implication into a given form of words, and, unfortunately as the law of defamation has to take into account, is especially prone to do so when it is derogatory*".

Thus, in determining whether the words bore a defamatory meaning, the Court of Appeal had to take all these principles into account, and it did so. It discussed Ghanaian authorities such as the case of *Owusu-Domena* v *Amoah* [2015-2016] 1 SCGLR 790, which laid out the principles of that tort at common law. At p.801-802 of that judgment, Benin JSC restated the common law principles on the definition and law of Defamation. Quoting Halsbury's Laws of England (4th ed) (Reissue) Vol 28 page 7, para 10 he defined the tort as follows:

> *A defamatory statement is a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling trade or business."*

Benin JSC then went on to explain that

> *"There are two steps involved in establishing that the publication was defamatory: first, whether the publication was capable of a defamatory meaning… next the defamation complained of may be established from the prevailing facts and/or circumstances. Proof of either would suffice for the plaintiff."*

From these, he teased the principles that in establishing that a publication was defamatory the plaintiff must plead and lead evidence on the following matters in order to succeed: -

i) there was publication by the Defendant

ii) the publication concerned him, the Plaintiff

iii) the publication was capable of a defamatory meaning in its natural and ordinary sense.

iv) alternatively, or in addition to (iii) above, that from the facts and/or circumstances surrounding the publication, it was defamatory of him, the Plaintiff and

v) if the defendant sought the defence of qualified privilege or fair comment that the defendant had been actuated by malice, and malice in such matters would be said to

exist if there was spite or ill will on the part of the Defendant or if the court found indirect or improper motive against the Defendant in publishing the words complained of".

To this list by Benin, JSC, it would be necessary to insert a new point (v) to render the existing point (v) as (vi). The new point (v) is this: "that the defendant has no defence." This addition is important because there are other common law defences, in addition to the defences of qualified privilege and fair comment, which a newspaper or other publication outlet could plead to an action on Defamation to defeat a plaintiff's claim. There are others of equal importance, such as absolute privilege (in respect of reports of executive, parliamentary or judicial proceedings; justification; and even consent. See: Harry Street, *The Law of Torts* (6th edition), Butterworths, London. 1976, chapter 16, pp.291-331. However, this discussion will be limited to the defences at issue in the instant appeal.

Defences

(i)Justification

The defence of justification is based upon proof of truth and nothing else. The common law took the position that a person was not entitled to a false reputation. Therefore, a publication that revealed the true reputation of another by publishing the truth about the person, would relieve the publisher of liability for defamation. For this reason, for the defence of justification to succeed in an action, there must be proof that each and every fact in the publication is true. It is not enough that the story is more or less true, or contains only a few inaccuracies. Each fact must be justified, and when innuendo is pleaded, then the justification must go to that meaning as well. In *Buachie* v *Samman* [1982-83] PT II GLR 797, a decision by Ampiah J. (as he then was) in the High Court, Sunyani, turned on whether the allegation could be justified. In that case, the defendant

had written a letter to the Regional Director of Education, Sunyani, alleging an adulterous association between the plaintiff, an Assistant Director of Education, Sunyani and the defendant's wife, the headmistress of a school in the district for which plaintiff had supervisory responsibility. In the letter, the defendant had complained that the plaintiff has used his official position to have sexual intercourse with the defendant's wife, while his marriage with her was still subsisting. This same complaint was made by defendant to the parents of his wife and other persons including the head of the women's section of a secret society to which both husband and wife belonged.

The plaintiff took umbrage at this communication, complaining that it had greatly damaged his reputation and chances of promotion in the Education Service. He therefore brought action against the defendant to vindicate his reputation. In his defence, the defendant pleaded justification and qualified privilege. However, the defendant was unable to prove the truth of the allegation he had made, and the High Court correctly held that the defence of justification should fail as it was "not satisfied that a plea of justification has been established." The defendant was, however, successful on the defence of qualified privilege. This was because that defence did not depend upon the truth of the allegation, but upon whether or not the circumstances of publication were privileged, i.e. whether the statements were made on a privileged occasion to persons who had an interest in receiving same.

(ii) Fair Comment

Fair comment is a defence based upon comments made or opinion expressed in a publication on certain facts that are true. As C.P. Scott said one century ago, "Comment is free, but facts are sacred." Consequently, the defence of 'fair comment' will be defeated if the facts on which the comment is made are not true, or the comment itself is not fair. As Lord Esher M.R pointed out in the old English case of *Merrivale* v *Carson* (1887) 20 QBD 275 at 280,

> "Mere exaggeration or even gross exaggeration would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit."

In *Kemsley*v *Foot* [1952] A.C. 345;[1952] 1 All ER 501 (HL), the defence of 'fair comment' was in issue when the defendant wrote a piece titled "Lower than Kemsley". The content of this article was intended to criticize a publication whose standard of journalism he thought was of low quality. The plaintiff, Kemsley, owned a group of newspapers and he took umbrage at that disparaging description of another publication by reference to his own newspapers. Although he did not mention any of the plaintiff's newspapers in the said article, its tenor was deprecatory of the quality of journalism upon which he was commenting. By the title of the defendant's article, he was, in effect, expressing the view that the plaintiff's newspapers exhibited such low standards in journalism, that a publication that could sink lower than that was completely worthless. The defendant, setup the defence of 'fair comment', and contended that his statement was a mere expression of his opinion of the quality of those newspapers. The House of Lords determined that the defence should succeed, if honest and fair-minded people would draw the same conclusions about the quality of the plaintiff's newspapers, as the defendant did. In other words, if honest and fair-minded people would share that opinion of plaintiff's newspapers, then the comment was fair.

(iii) Qualified Privilege

For the defence of qualified privilege to avail a defendant, it must be established that the publication was made either (a) in the defendant's own interest; (b) in the interest of the one who received the information; (c) in the common interest of the maker and receiver of the information; or (d) in the public interest. In respect of what "public interest" means, the old English case of *Toogood* v *Spyring* (1834)1 CM &R 193 at p194 is

the locus classicus. In that case Baron Parke stated this principle which has been cited with approval innumerable times and has endured. He stated that a person would be liable for a defamatory publication

> *"unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral or in the conduct of his own affairs, in matters where his interest is concerned. … If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."*

See Harry Street, *Street on Torts,* at p.314.

The difficult concept of "public interest" has also been the subject of some attempts at definition in more recent cases. In *Flood* v *Times Newspapers Ltd* [2012] UKSC 11 Lord Phillips of the Supreme Court of the United Kingdom quoted with approval the definition of "public interest" by Lord Bingham of Cornhill CJ, when giving judgment in the Court of Appeal in the *Reynolds* v. Times Newspapers Ltd. [2001] 2 AC 127.In paragraph 33 of his judgment, he quoted the definition of 'public interest' thus:

> *"By that we mean matters relating to the public life of the community and those who take part in it, including within the expression 'public life' activities such as the conduct of government and political life, elections… and public administration, but we use the expression more widely than that, to embrace matters such as (for instance) the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal*

and private, such that there is no public interest in their disclosure."

This definition is helpful in explaining the nature of the concept as well as its areas of applicability. It has been said time and again that matters in the public interest must not be confused with matters that are of interest to the public. Therefore, the defence of qualified privilege is properly invoked when the public interest as restated above by Lord Phillips, is in issue.

Malice

The two defences of 'fair comment' and 'qualified privilege' may be defeated by proof of the existence of malice. 'Malice' according to the learned author of Street on Torts, supra, at p.318 means either of the following:

1. The defendant did not believe in the truth of his statement or was "recklessly careless whether the statement be true or false".

2. Wrong motive, ill will, personal spite or abuse of privilege

In *Buachie* v *Samman* (supra), the plaintiff in his evidence tried to show unsuccessfully that the defendant was actuated by malice. Consequently, the defence of qualified privilege succeeded.

Damage

In addition to all of these above, it would also be important to state that at common law, Libel, is actionable per se, because damage is presumed. On account of the presumption, there need be no specific proof of damage. However, any particular damage that has occurred may be put in evidence and the court would take cognizance of it. Such damage may be aggravated by certain circumstances, and a court may take that into consideration as well. Both the trial court and the Court of Appeal, in the

instant case, appreciated the extent of damage that a false publication in these modern days could cause as a result of modern-day communication technologies. The trial court had noted that, *"Credible papers such as the Daily Graphic are often time (sic) read online by readers and quoted in the media at large."* The Court of Appeal also noted with concern that the possibility of causing damage to another's reputation unjustifiably, had ballooned in modern times because,

> "With the advent of social media and online news dissemination, it has become much easier for any libelous content to go viral and spread beyond unimaginable boundaries".

Thus, if long before the advent of such technologies, damage from libel was presumed, because of the longevity and reach of the written word, then it is even more justifiable in the era of electronic mass media technologies that can propagate any publication beyond boundaries that anyone can tell.

Did the publication in Daily Graphic have a defamatory meaning?

In order for the appellant to succeed in this appeal as discussed above, he must first establish that the publication had a defamatory meaning and that it was understood as such, by right-thinking members of society or, in this case, ordinary readers of the newspaper, '*Daily Graphic*'. On Monday, 30th June 2008, a caption appeared at the extreme right-hand corner of a rather busy front page of '*Daily Graphic*' as follows: "*Bank of Ghana dismisses 2 union leaders***.**" In much smaller font beneath it, "*Turn to p.24*", directed one to the main story. The story on p.24, which is the story complained of in the instant appeal, began thus: (see Exhibit "B")

> "The Chairman and Secretary of the Bank of Ghana Senior Staff Association have been dismissed in the latest twist to the rumpus over the unionization of workers of the bank"

The article then went on to state that guards of the security outfit of Bank of Ghana, the plaintiff's employers, had been instructed not to let the "dismissed officials" into the premises; and also, that their ID cards were to be taken from them. In paragraph 11 of statement of claim, (see paragraph 18 of Statement of Case) it was stated that,

> "*The plaintiff avers his personal reputation and professional integrity have been seriously damaged by the said disparaging and damnifying publication*".

The appellant went to some trouble to show that the publication had lowered him in the eyes of right-thinking members of society, causing some to even shun him. He maintained that in reporting that he had been dismissed instead of 'terminated', the report had falsely portrayed him in an unfavourable light and damaged his reputation. He was, therefore, aggrieved that the Court of Appeal did not agree with the High Court which had determined that the publication was, indeed, defamatory of him.

In its judgment, the Court of Appeal spent some time discussing the issue of whether the publication's use of "dismissal" rather than the "termination", which it was eventually established to be, had defamed the respondent as the High Court had determined. This was on account of the fact that the plaintiff had pleaded that using "dismissal" instead of "termination" carried an innuendo, and was understood to mean that,

> "*a. Plaintiff was incompetent*
>
> *b. Plaintiff had committed an offence*

c. Plaintiff is of questionable character"

The trial court judge, in finding for the plaintiff, had stated on the connotation of the use of "dismissal" rather than "termination" thus:

> *"Indeed, the Plaintiff have (sic) not only proven that a publication of dismissal had been stated about him but argued that the act of dismissal connotes wrongdoing on his part which could mean he is either incompetent or committed an offence. That explanation in my view is not farfetched because a dismissal connotes some act of wrongdoing like theft, misconduct and similar vices,… In my candid opinion, the publication of the plaintiff being dismissed would connote some wrongdoing which would always pop up when the plaintiff's name is mentioned".*

At paragraph 33 of appellant's Statement of Case, the plaintiff amplified the point about the defamatory nature of the publication further:

> *"There is no doubt that any average or ordinary man on the street in seeing and reading a caption on a front page and a statement in a well reported newspaper like the Daily Graphic that one has been dismissed from his employment and his ID card which allows him to enter the bank has been taken from him (which is false) would definitely conclude or presume that the person had done something wrong, was incompetent, dishonest or there was something wrong with that person in respect of his employment".*

To this argument, the Court of Appeal stated emphatically that,

> *The Respondent, at the trial court, could not establish that by the appellant's use of the word 'dismissal' with respect to his*

> *circumstances, the ordinary reader of that newspaper article had construed it to mean the Respondent had misconducted himself as an employee in such a grave manner as to have resulted in his 'dismissal' … In our considered opinion, the Respondent did not establish that the publication was capable of any defamatory meaning…*

Consequently, the court came to the conclusion that the use of "dismissal" rather than "termination" in the circumstances was not defamatory of plaintiff. We agree with the Court of Appeal's analysis.

The standard for determining whether a defamatory meaning has been conveyed by a newspaper publication, is, as already stated above, the judgement of "right-thinking members of society", and not persons with specialist qualifications analyzing words used by a non-expert. It is true that those two words of "dismissal" and "termination" carry, in a technical sense, different consequences for the person to whom either one is applied. However, both words mean that he has been pushed out of his employment, or in common parlance, "sacked" from his job, as the average Ghanaian newspaper-reader would understand the sense of the publication. The question is: "Had the plaintiff been "been pushed out of his employment, or in common parlance, "sacked"? "Yes, he had lost his job."Does the "right-thinking member of society" who is not an expert in Labour Law know this difference between "dismissal" and "termination"? Not likely. Even the journalist who wrote the piece, and who is almost certain to be of much higher education than the average reader of '*Daily Graphic*', admitted under cross-examination that he did not know that the two words were different in meaning and connotation, hence his use of them interchangeably in the write-up. While it is true that, at common law, it is not the intention of the writer that is the controlling factor but the effect of the piece on the reader, it is nevertheless important to show that this ignorance was, likely,

shared by "right-thinking members" of the reading public, hence it was unlikely that they would presume all the uncomplimentary meanings plaintiff was reading into the publication.

It has also been suggested that the Court of Appeal had overlooked the rest of the story where it was reported that the security had been instructed not to permit plaintiff's entry into the premises. We cannot agree with that suggestion, and here is why. The plaintiff in his evidence indicated that it was when he reported for work and the security would not let him in, that he first heard of the newspaper publication and surmised the reason for his ill-treatment by the security personnel that day. If that account is accurate, then there is reason to believe that the information in the publication was not false. Unless the plaintiff could establish that the security men of his employers engaged in wrongful conduct on their own strength, it would seem that some instruction authorizing their refusal to let him into the premises had gone out – even if later denied by the Bank. It is equally unlikely that the security men took their instructions from a newspaper publication concerning him and acted thereon. The plaintiff was the Chairman of the Senior Staff Association, and consequently quite powerful in the scheme of things at the Bank. Which security man would be so imprudent as to bar such a personality from entering onto the premises, without instructions from highly placed persons in the hierarchy? Thus, one cannot give credence to the plaintiff's insistence that that aspect of the publication was also false.

Again, the fact that the Security had not taken his ID card from him as the publication had reported, did not conclusively establish that those instructions had not been issued and therefore, that the report thereon was false. Although plaintiff put in evidence the fact that he still retained his ID card and even exhibited it, that did not conclusively show that no one had been instructed to take it from him. To insist that the publication was false in respect of that allegation is to overlook the fact that there may be any

number of reasons why his ID card was not taken from him, including a failure to fully obey the instructions issued, and so it cannot be said to have been proved to be false.

In respect of the tenor and meaning of the publication itself, the opening paragraph of the article on p.24 set the parameters for the content of the entire article. It is therefore somewhat surprising for the plaintiff to pull the next statement, which is the subject of the action, and portray it completely out of context. It is said that he successfully sued his employers for wrongful termination of employment; and that it was during the course of that suit that the employers denied the allegation that they had terminated his appointment for "trade union" activities. That denial by itself is not credible, given the sequence of events on the day of publication.

In his own evidence-in-chief at the trial court, he stated that

> *"My own employers when I sued them indicated that their termination had nothing to do with unionization so I don't even see how they are saying it was about unionization…"*

He again concedes under cross-examination of 11th May 2015

> "Indeed the bank itself in its defence came out to say that the termination had nothing to do with the unionization because they themselves know that to terminate somebody's appointment because the person wants to join a trade union, was an offence. So they said it had nothing to do with that. So you writing and indicating that was the reason whereas you are not an authoritative source in Bank of Ghana to know what had actually taken place. You should have cross checked the facts from me and also from the appropriate quarters before putting on their publication".

Again, in paragraph 36 the appellant submits that:

> "The Respondent's assertion that the story was sympathetic to the struggle for unionization by Appellant is not true as according to Appellant and his employers, the Defendant bank, the purported "dismissal" had nothing to do with unionization".

From all the above evidence, it is unclear why the plaintiff believed the defence of the bank, which he found out only after he had sued them; yet found it inexcusable that the newspaper got it wrong years earlier.

On the part of the newspaper, they were certainly, by the ethics of journalism, required to cross-check facts before publishing them and they failed to do so. However, given the circumstances admitted above, would the appellant have been able to give them information that he himself claims to have discovered in the course of a suit a few years later, against his employers?

It must be noted that the tenor of the entire article, far from being condemnatory, in fact, presented the appellant and his colleague in a positive light - as victims of a bulling employer. This is the impression that was strongly conveyed to the fair-minded reader. The article showed clearly that it was believed that the action had been taken against them as office holders in the "union". Even though at the time of publication, when the plaintiff claimed he had not received the letter from the bank, he could not dispute that the article was in fact, favourable to him, and his colleague. The fact that the reason the newspaper gave was not true, did not undermine the fact that the article projected the appellant in a better light than it did the 1st defendant, his employer. How, then, could such portrayal be defamatory of him?

Again, the plaintiff admits that the information that his plight had not been occasioned by "union activities" came to him sometime after the publication when he initiated action against his employers. If he did not know why he had been terminated until he sued the employers, then the publication could not have been deliberate in assigning the wrong reason.

According to the plaintiff, describing him and his colleague as "union leaders" was defamatory of them, as the Chairman and Secretary of the Senior Staff Association are not "union officials". Thus, it would seem that the real complaint of appellant should have been the fact that the publication falsely described he and his colleague as "union leaders". However, this would have created the insurmountable hurdle of whether being called a "union leader" in the circumstances is defamatory. It is therefore not surprising that this caption, which was not altogether accurate, did not appear to offend the appellant as much as the use of the word "dismissal" instead of the more correct term of "termination".

The plaintiff even attempts to blame the newspaper for publications made two years later, in about 2010, by other news outlets when he won his case of unlawful termination against his employers. The offending publication had been made in June 2008, but the case against the employer was won two years later. The appellant stated under cross-examination on 20thMarch 2015,

> *"We had discussions with the then Governor about what has happened and its effects to us, to the extent that even the same day judgment was given my joy online and other institutions were reporting that we were actually dismissed for causing or doing certain things that is [sic] inimical to the progress of the bank. All these things we showed it to the Governor and we told him that in fact, this publication had dented our reputation*".

This means other news media outlets reporting on the case in which they successfully sued their employer for wrongful termination also used the word "dismissed". On this occasion, however, the plaintiff did not take issue with "*my joy online* and other institutions", but now insists that their false reportage in 2010 was attributable to the publication in '*Daily Graphic*' two years earlier.

Further, under cross-examination on 11thMay 2015, the plaintiff again stated:

> *"the Graphic Communications Group did its best to misrepresent facts and create a bad impression about me to the general public through their publication?... I have said its before, my termination of appointment has nothing to do with unionization of Bank of Ghana Senior Staff".*

It is unclear why the appellant is determined to slug it out with the respondent, and to even blame them for other people's reports on his successful suit. Should this development not have alerted the appellant to the fact that there seemed to be a general misconception, even among the journalists who covered the story of his successful suit, that "dismissed" and "terminated" were synonymous with each other and could be used interchangeably? Should this not have assuaged his hurt feelings and laid to rest his suspicion that the newspaper had an agenda to discredit him? In the circumstances, it cannot be said the publication did carry a defamatory meaning.

It is also the law that for a defendant to be liable, none of the recognized defences for an action in defamation should avail the person. This is a correct statement of law. The appellant has questioned the basis of the Court of Appeal's decision on qualified privilege, when they did not find the publication defamatory of him. At paragraph 44 he states thus:

> *"Could the Court of Appeal have found that the publication complained of was not defamatory and at the sometime turn around to say that it was privileged? Certainly no. It is only when a publication is found to be defamatory that a defence of qualified privilege could be invoked for protection".*

This statement, indeed, harbours a correct statement of law, for, qualified privilege is a defence that arises only when a statement which is published of the plaintiff is deemed to carry a defamatory meaning. However, there were also incorrect statements of law in the judgment of the trial court that needed to be corrected by the Court of Appeal. Indeed, the plaintiff has put this honourable court in the self-same position as what it has criticized the Court of Appeal for doing. He is contesting the applicability of the defence of qualified privilege by specifically setting it down as a ground of appeal. Having done so in ground (b) of the 'grounds of appeal', it cannot be ignored or overlooked and so must be addressed. Therefore, even though we agree with the Court of Appeal that the instant publication was not defamatory of the plaintiff, we are obliged to expatiate on qualified privilege as a defence, because the plaintiff has requested us so to do.

'Ground b'

> *The Court of Appeal erred in law in holding that the publication by the Defendant/Appellant/Respondent on Plaintiff/Respondent/Appellant is privileged*

The Court of Appeal concluded its discussion of the appeal by stating,

> *"These realities together with the fact that we find the publication to have been made honestly and without malice have swayed us to*

come to the conclusion that the Appellant is indeed protected by qualified privilege"

The plaintiff has complained about this conclusion drawn by the Court of Appeal. At the trial court, the 2nddefendant had pleaded the defences of Justification and qualified privilege. The trial court stated categorically that the defence of justification would not avail the 2nddefendant, but said little about the defence of qualified privilege which had also been pleaded by 2nd defendant. It would appear that the trial court confused the bases of the two defences of justification and qualified privilege, and so came to an erroneous conclusion when some of the statements in the publication turned out to be un true.No doubt, the statement made by the judge in the High Court was correct in respect of the defence of justification, but not so, in respect of qualified privilege. The High Court had stated in respect of the defence of qualified privilege that

"for the said defence to be available to the 2nd Defendant what had been published had to be the truth. What the 2nd Defendant had published was not the truth. The truth is that the Plaintiff had his appointment terminated"

This was an incorrect statement of law and thus needed to be corrected byan appellate court in the course of re-hearing the case. The Court of Appeal reviewed the law on the defence of qualified privilege and came to the conclusion that the statement of law by the trial court was wrong. We agree entirely with the Court of Appeal that qualified privilege is not based on the truth of the publication, but arises when the circumstances are, or the occasion is, deemed privileged.

Did the Court of Appeal make a different case for 2nd defendant?

The plaintiff complained in paragraph 43 of the Statement of Case that

> *"the Court of Appeal made a case different from the case presented by the respondent at the Court of Appeal. Thus the Court of Appeal suo motu made a case different from the respondent's case at the Court of Appeal for the respondent, which is wrong in law."*

This complaint is neither grounded in law, nor in fact, as the authorities show. At the Court of Appeal, the 2nd defendant relied on the omnibus ground that "the judgment was against the weight of evidence." In considering this ground of appeal, the appellate court had to examine the whole record. In the well-known and much-cited authority of *Tuakwa* v *Bosom* [2001-2002] SCGLR 61 at p.65 Akuffo JSC (as she then was), outlined the duty of an appellate court and held that,

> *"an appeal is by way of a re-hearing particularly where the appellant, is the plaintiff in the trial in the instant case, alleges in his notice of appeal that, the decision of the trial court is against the weight of evidence. In such a case, although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testaments and all the documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that on a preponderance of the probabilities the conclusions of the trial judge are reasonably or amply supported by the evidence".*

The same point was made in *Agyeiwaa v P&T Corp* [2007-2008] 2 SCGLR 985 when Georgina Wood CJ at p 989 stated

> *"The well established rule is that an appeal is by way of rehearing, and an appellate court is therefore entitled to look at the entire*

evidence and come to the proper conclusions on both the facts and the law."

In the later case of *Oppong* v *Anarfi* [2010-2012 GLR 159 at p.167 Vida Akoto-Bamfo JSC also stated that,

> *"There is a wealth of authorities on the burden allocated to an appellant who alleges in his notice of appeal that the decision is against the weight of evidence led. Even though it is ordinarily within the province of the trial court to evaluate the veracity or otherwise of a witness, it is incumbent upon an appellate court in such a case, to analyse the entire record, take into account the testimonies and all documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that, on the preponderance of probabilities, the conclusions of the trial judge are reasonable or amply supported by the evidence."*

All of these cases are at one in stating that when the Court of Appeal exercises its power of rehearing, it has to analyse the entire record of proceedings. Thus, with the defence of qualified privilege having formed such a prominent part of the trial court's proceedings and judgment, the duty of an appellate court was to analyse the entire record when exercising its power of re-hearing as it did, and pronounce on all the relevant matters.

For this reason, the respondent's notice of appeal to the Court of Appeal did not need to specifically raise the issue of qualified privilege. Again, the opportunity to respond to same arose at the time the defence was pleaded in the trial court, and no injustice was done to appellant on that score.

Journalism and public interest.

As already discussed above, for the defence of qualified privilege to avail a defendant, the publication must be done in the public interest. The respondent submitted that the publication was in the public interest, because as a newspaper,

> *"they have the legal, moral and social duty to inform the public about issues of public and national interests as at the time of the publication, the unionization of the Senior Staff at Bank of Ghana had become an issue of national interest.."*

However, the plaintiff maintains that even if it that were so, the 2nd defendant did not plead the defence, nor did it lead evidence to prove that its publication was in the public interest. The appellant claims in paragraph 42 that the Respondent "in its Notice of Appeal at the Court of Appeal never raised the issue of qualified privilege…" Again, at paragraph 47 of appellant's Statement of Case he takes issue with the fact that "the Respondent failed to prove that it owed any legal, moral or social obligation to the good public to make that publication." These contentions are strange, to say the least as an examination of the record shows. At p.6 of the judgment, the trial High Court stated

> *"The 2nd Defendant pleads qualified privilege to the publication since they have the legal, moral and social duty to inform the public about issues of public and national interest."*

This clearly shows that those matters were before the appellate court and had to be pronounced upon. Again, at p.17 of the High Court judgment it is there stated that:

> *"The 2nd Defendant says that the publication is not defamatory of the Plaintiff and even if it did, it had privilege to publish in the interest of the public. In my view for the said defence to be available to the 2nd Defendant what had been published had to be*

> *the truth. What the 2nd Defendant had published was not the truth. The truth is that the Plaintiff had his appointment terminated. …The defence would not therefore be available to the 2nd Defendant when what had been published was a misstatement*"

With respect, the trial judge misled himself on the question of whether a misstatement could found the defence of qualified privilege, and this led to his firm conclusion that the defence would not avail the 2nd defendant because of "misstatement". The trial court judge relied on *Benneh* v *New Times Corporation* [1982-83] PT II GLR 302 to hold that "misstatements" would defeat the defence. Unfortunately, the defence in issue in *Benneh* v *New Times Corporation* (supra) was not 'qualified privilege', but the defence of "fair comment". As already pointed out, the successful plea of fair comment depends on the fact upon which the comment is made, being true. With such a requirement of truth, it would be defeated by "misstatements". Not so with qualified privilege.

The substance of the defence of qualified privilege requires that it be made on an occasion of public interest as prescribed in the classical case of *Toogood* v *Spyring* (supra). Should the respondent, then, have led specific evidence to establish that the press functions in the public interest and that the publication was made in the usual course of business in the public interest? One would have thought that this was a fact of some notoriety, and covered by sufficient legal authority, but this assumption is not borne out by the appellant's pleading. It can be stated without any contradiction that a lot of ink has been spilt on the role of the press, and the public interest that is served by the platform that it provides. I have previously noted elsewhere the well-known role of the press that

> "The function of the press is to collect, publish and disseminate information i.e. news, for the purpose of

> informing, entertaining, holding public officials accountable, and even setting the national agenda on matters of public interest. Issues of interest to the public and matters of public interest may range from information relating to the functioning of public officials and public institutions, through the highlighting of government policy, to the private lives of public officials that impinge on their public roles. The exercise of the function of disseminating information serves various ends. It can mobilise public opinion on social issues, set the political agenda, create awareness of emerging issues of concern, give currency to new ideas and even contest old ideas by challenging conventional wisdom. .."

See H.J.A.N. Mensa-Bonsu, *The Law and the Journalist*, Friedrich Ebert Stiftung, Accra, 1997. Having indicated that it was in the public interest for events occurring at the State's central bank that could stall its work, to be brought to the attention of the public, the 2nd defendant had sufficiently invoked the "public interest" principle to ground the defence. The public interest role of the press is so notorious that judicial notice can be taken of it, therefore the 2nd defendant need not lead evidence to establish same.

Judicial notice.

When can a court take judicial notice of a fact? In S. A. Brobbey's invaluable book '*Essentials of the Ghana Law of Evidence*, Datro Publications, 2014, the learned author observes at p.104 that

> "Certain types of evidence are such that they are taken as established without the necessity to adduce facts in proof of

> them. In such situations, the court is entitled to consider or treat them as if they were admitted in evidence. … Judicial notice is an acceptance by a Judicial Tribunal of the truth of a fact without proof on the ground that it is within the tribunal's own knowledge."

In *Otoo and Ors* v. *Dwamena* [2018-2019]1GLR 23 at p31, Pwamang JSC stated:

> "It is trite learning that the doctrine of judicial notice is one of the exceptions to formal proof of facts before a court or tribunal, which is by adduction of evidence. Judicial notice may be taken only of facts which are notoriously true or are capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned".

It is thus well established, that newspaper publications involve the "public interest", which is separate and distinct from "matters of interest to the public". This role of the press is so well-known that to require the 2nd defendant to prove that the newspaper has a legal moral and social duty to inform the public would, with respect, not be a good use of the court's time.

Proof of malice

In putting forward the defence of qualified privilege, the 2nddefendant further claimed that the publication had been done in good faith and without malice. This pleading was necessary, as qualified privilege can be defeated by "malice" or absence of good faith. The defence, having been raised at the trial, should have been rebutted there by evidence of malice by the plaintiff. This was not done. The plaintiff correctly states the law in paragraph 49 of his Statement of Case, "*There is malice if there is proof that the Respondent knew at the time it made the publication that it was false or without foundation."*

However, the plaintiff failed to lead evidence at the trial court to discharge the burden of proof which had by then shifted to him, to prove malice.

On the issue of the burden of proof when malice is pleaded, the High Court in *Boachie* v *Samman* (supra) held at p. 807, that,

> *"Having thus established privilege, the burden was upon the Plaintiff to establish malice. It is required by the rules that particulars of express malice should be established in order to defeat the privilege claimed".*

This is a correct statement of the law. As set down by Section 17 of the Evidence Decree 1975, the burden of persuasion as to the existence of malice that would defeat the defence of qualified privilege shifted from 2nd defendant to the plaintiff at the trial court. The evidence, such as was led, did not show that the

> *"Respondent knew or ought to know that the publication was false as it admitted that it had not seen any dismissal of appellant at the time of publication,*

or *"that the Respondent was indifferent to the truth or falsity or otherwise the statement complained of".* The plaintiff having failed to lead evidence on the existence of malice, the defence of qualified privilege was left standing. Therefore, the totality of evidence left for the "rehearing" by the appellate court was on whether the defence had been established by the evidence led, without any rebuttal by the plaintiff.

Damage

In seeking to defend the damages awarded, the plaintiff sought to demonstrate what damage he had suffered to his reputation by the calls etc made to him by his

acquaintances. The Court of Appeal discussed this evidence and relying on *Owusu-Domena* v *Amoah* (supra) concluded that

> *"[H]e did not lead any evidence to prove how his reputation had been injured in the eyes of these people. It is more likely than not that the said people were naturally concerned that he had lost his job and called to sympathize with him."*

The question is, had the publication correctly stated "termination" instead of "dismissal", would these expressions of concern by his family and acquaintances not have occurred anyway, as it would still have meant that he had lost his job? On this ground also, the conclusion of the Court of Appeal cannot be faulted.

Is Qualified Privilege outmoded?

Despite our belief that the occasion for the publication was privileged, some submissions by the 2nd defendant cannot be allowed to pass without comment. The 2nd defendant urges on this court in paragraph 3 of the statement of case that:

> *"We would contend ... that ... where genuine mistakes are made and/or scene of the facts of the story cannot be proved to be true, the media should not be censured, since in such circumstances the public interest in the story should override the personal private reputational interests of the individual bringing the claim".*

This is an alarming posture to adopt. The public's real interest in the publication is that the story should be accurate; and be about matters that affect the public at large, or its institutions. The interest of the public is not served by false information or wrong

information carelessly or recklessly put out to cause irreparable harm to the reputation of individuals who may never recover from the unjustifiable assault.

In paragraph 4, the respondent further urges on us that

> *"There are two separate issues that the law on defamation ought not to mix or confuse: on the one hand ensuring there are appropriate remedies for the publication of genuinely libelous statements which cause serious harm to reputation, and on the other upholding the right to freedom of expression, which includes the right of all to impart and receive information, and the important constitutional role of the media as watchdog over the government and public officials"*

This is no less alarming than the previous statement. In our opinion the power of the press to make or unmake individual reputation cultivated over a lifetime, should create the necessary caution not to place commercial interests above individual right to reputation. Being the first to publish a story to gain commercial advantage, even if the story is inaccurate and could have been checked as required by the ethics of journalism, is not the most responsible way to uphold the important role of the press. The line between 'freedom' and licence will always be thin and must be watched and managed with a sense of responsibility. The law has a role to play in promoting responsible journalism and this role should not be abandoned on the altar of commercial interests. In the instant case, the evidence is clear that neither the Bank i.e the 1st defendant (such as the evidence showed) nor the plaintiff, was contacted for confirmation of the story given to the *Daily Graphic* by a "reliable source". Had the ethics of journalism been respected to the letter, this case may not have arisen at all. The 2nd Defendant fell victim to the private motives of the "reliable sources", whoever they were, and so the newspaper was fed with less than accurate information. Some cross-checking of facts

may have been helpful in showing that the 2nd Defendant had been as diligent as the law required of it.

"The defence of qualified privilege", as the 2nd defendant has observed,

> *"when properly applied is likely to promote responsible journalism, by affording a stronger and clearer defence for the media where (a) what they are publishing is in the public interest and (b) they have behaved responsibly in relation to publication"*

The2nd defendant then goes further to urge on this court that

> *"It is time for the inherited common law defence of qualified privilege to embrace a standard of "responsible journalism', by which a journalist can be measured to determine- when the journalist genuinely gets some of the facts wrong – whether he or she should nevertheless be required to pay damages"*

With respect, this position assumes that the law on qualified privilege falls short of these standards in the circumstances of this case. It does not. A journalist who complies with media ethics as set down in the *Code of Ethics of the Ghana Journalists Association* (G.J.A.) is unlikely to fail in setting up a defence of qualified privilege.

Although the so-called '*Reynolds Privilege*' of 'responsible journalism' has been abolished by the Defamation Act of 2013 in the United Kingdom, the principles stated by Lord Nicholls in *Reynolds* v *Times Newspapers Ltd.*[2001] 2 A.C. 127, are still relevant to any court confronted by a case of libel. Lord Nicholls stated at pp.204-205 thus:

> *"The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give*

appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed, and the individual harmed, if the allegation is not true.

2. The nature of the information, and the extent to which the subject matter is a matter of public concern.

3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axesto grind, or are being paid for their stories.

4. The steps taken to verify the information.

5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.

6. The urgency of the matter. News is often a perishable commodity.

7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

8. Whether the article contained the gist of the plaintiff's side of the story.

9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

10. The circumstances of the publication, including the timing."

Even though Parliament is yet to intervene to legislate on this area of law, the recommendations by Lord Nicholls would be helpful to any court in an appropriate case. However, in the instant case, the scope of the common law defence of qualified privilege is still appropriate and the *Reynolds Privilege* which the respondent herein is urging on us to adopt, does not do much for the respondent's cause.

Still on the alarming road that the respondent travels, the submission at paragraph 7 of the statement of case further urges on us thus:

"We will respectfully argue that in cases involving public figures such as politicians and union leaders as in the instant case, it is particularly important for the Court to recognize that such individuals ought to have "thick skin",and be less sensitive to public statements causing them "injury to feelings".

Additionally, such individuals are under particular public scrutiny, and there should be encouragement of media debate concerning their public roles, rather than an attempt to stifle such debate" when all is considered, large sums in damages can rarely, if ever, be appropriate in cases involving such persons".

In the first place, this submission repeats the tag of "union leaders" to which the appellant has taken exception in the instant case. The appellant denies being a "union

leader", which description he considers somewhat pejorative when applied to his elevated position of 'Chairman of Senior Staff Association' of the Bank of Ghana. Nor is he a "politician", as the expression is generally understood in Ghana to mean "a practitioner of partisan politics". Consequently, the pious exhortation of the respondent as to the requirement of "thick skin" in certain public roles is not applicable to the appellant in the instant case. As to a general policy on such cases, it may be premature to make such a determination when the appropriate occasion has not arisen.

Again, in urging this approach to public officers on us, nowhere does the respondent mention the effect of unjustified attacks on reputation earned over a lifetime, and the irreparable damage that irresponsible journalism could inflict on hapless citizens. To equate or conflate "injury to feelings" with "injury to reputation" is to misunderstand the effect and damage that falsehood can cause to an individual in the Ghanaian culture when a reputation is unjustifiably attacked. The effect of statements that attack reputations can transcend generations in closely-knit communities such as ours and affect even those yet unborn.

The longevity of these effects is compounded in the internet age, where it is acknowledged that any information placed on the internet remains there, literally forever, hence the notion "the internet never forgets". Therefore, unjustified attacks on reputation remain on the internet to continue to damage reputations in the eyes of those who may come across the information in the future. "Injured feelings" may be transient and cause minimal damage to the person's reputation and career, but "injury to reputation" is more enduring, and can have very serious consequences, and so the two are not the same, and should not be seen as such. The exhortation to develop a "thick skin" may not always be helpful in the absence of a commitment on the part of the media to strive for truth and accuracy as far as possible. People who serve in the public eye may be deemed to have consented to some unfair criticism, and even abuse, but it is

doubtful that they consent to being robbed of the reputation they may have built before going into, or while in, public service at the hands of journalists whose motives may be less than pure. Persons who choose to serve in public roles should not be left without protection against unjustified calumny by an increasingly powerful press. In our opinion, the existing defences of Justification; Qualified Privilege; and Fair Comment are adequate for the time being, and carry the necessary flexibility in application thereby providing the necessary protection to both sides of the aisle.

Conclusion

In conclusion, we agree with the Court of Appeal that given the circumstances, the publication did not have a defamatory meaning. "Right-thinking members of society are unlikely to think less of the plaintiff because he was not dismissed but terminated. Even if the words bore a defamatory meaning, the publication was privileged as it was made in the public interest. There was no evidence of malice to dislodge the defence of qualified privilege, and so it would avail the 2nd defendant, the respondent herein. The appeal fails and is, consequently, dismissed.

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G. PWAMANG
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