



REFERENCE No. 1 of 2003

IN THE COMESA COURT OF JUSTICE

KHARTOUM, SUDAN

**Coram:** Akiwumi LP, Korsah, Nyankiye, Kalaile and Ogoola LJJ

**Registrar:** S.H. Zwane, Esq.

**KABETA MULEYA (DR).....APPLICANT**

**VERSUS**

**THE COMMON MARKET FOR.....RESPONDENT  
EASTERN AND SOUTHERN AFRICA**

**For the Applicant**

P. Mvunga, Esq.

**For the Respondent**

J. Sangwa, Esq.

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**JUDGMENT OF THE COURT**

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Lord Justice Kalaile delivered the judgment of the Court

On 4<sup>th</sup> April, 2003, the Applicant filed in the Registry of this Court a Reference against the Respondent and Erastus J.O. Mwencha, the Secretary General of the Respondent. Upon a subsequent application having been made, Erastus J.O. Mwencha was struck out as one of the Respondents. The Reference, which complains about a defamatory Press Release by the Respondent, prays for the following orders and reliefs:-

- (i) damages for libel;
- (ii) an injunction restraining the respondents whether by themselves, their servants or agents or otherwise, from further publishing or causing to be published the said or similar words defamatory of the plaintiff;
- (iii) costs;
- (iv) further or any other relief that the Court may deem fit.

The Applicant is a former employee of COMESA in the capacity of Director of Administration and Finance and is currently employed by the Government of the Republic of Zambia as Director-General of the Zambia National Tender Board.

On 23<sup>rd</sup> April, 2002, the Respondent issued the following Press Release:

**“COURT REFUSES MULEYA’S APPLICATION  
TO RETURN TO COMESA SECRETARIAT**

1. *The Comesa Court of Justice today 23<sup>rd</sup> April, 2002 delivered their judgment in the matter of a former staff member Dr. Kabeta Muleya who had applied for re-instatement at the COMESA Secretariat as Director of Administration and Finance.*
2. *The Court decided that they could not order re-instatement or the grant to him of a new contract since the COMESA Council of Ministers had already taken a decision on the issue. The Court agreed that in law you cannot order specific performance of an institution that has already decided on the basis of poor performance of an employee that they do not require his services.*
3. *The Court also decided that the decision of the Council of Ministers on the advice of the Bureau and the Secretary General's recommendation, was properly taken.*
4. *However the Court observed that the process of evaluation was not clearly spelt out and this led to ambiguity as to whether the process of Dr. Muleya's assessment was complete. Despite that the Court ruled that they cannot order that a new evaluation process for Dr. Muleya be carried out.”(emphasis supplied)*

On the following day, the 24<sup>th</sup> April, 2002, the Registrar of the COMESA Court issued the following Press Release with a view to correcting the import of the Respondent's Press Release:

*“Firstly, we would like to point out to all concerned or interested that the Press Release issued*



by the Secretariat yesterday concerning Dr. Muleya vs. Comesa and Erastus Mwencha, Reference No. 2/2001, whose judgment was delivered by the Court yesterday, is not objective so far as the findings of the Court are concerned in that it only substantially reflects what is favourable to the Secretariat. Secondly, we believe it is the duty of the Court itself through the Registrar to issue Press Releases concerning Court matters more particularly Court judgments as they are liable to be intentionally or unintentionally misconstrued depending on the interest to be served. This is invariably the case where the issuer is an affected party or has an interest in the matter as seems to have been the case here. The correct position regarding the Court judgment is reflected in the Court's Press Release and judgment attached hereto. (emphasis supplied)

#### **PRESS RELEASE**

#### **COURT PASSES JUDGMENT IN MULEYA CASE**

The Comesa Court of Justice yesterday 23<sup>rd</sup> April, 2002 delivered its judgment in the matter of Dr. Muleya vs. Comesa and Erastus Mwencha, Reference No. 2/2001. The judgment of the Court was delivered by the Honourable Lord Justice James Kalaile. In passing its judgment, the Court initially observed that Dr. Muleya had prayed for the following declarations and orders:

- "(a) a declaration that the Staff Appraisal Report in the Applicant's respect be invalidated;
- (b) that the Applicant should continue in his post after expiry of contract of service and a new Staff Performance Appraisal Report be completed for Renewal of Contract;
- (c) that the new Staff Performance Appraisal Report be subjected to the usual bottom-up approach of the organs meetings; and
- (d) that the Report of the Bureau should be invalidated because the Bureau is not part of the decision making process in the renewal of contracts as it is the Secretary-General of Comesa who should submit the Staff Performance Appraisal Report to the Council of Ministers through the Administrative and Budgetary Matters Committee and Inter Government Committee."

After evaluating the submissions made, the Court made the following findings:

"On the whole, having taken into account the catalogue of seemingly contrived irregularities cited by counsel for the Applicant, and having duly considered the submissions of counsel for the Respondents on the validity of the Staff Performance Appraisal Report, we find that the Appraisal Report on Dr. Muleya is fundamentally vitiated because it was not made by the Secretary-General who was the officer who under the PRINCIPLES and the Rules should have evaluated the Applicant. Accordingly, Dr. Muleya's prayer for the Court to invalidate the Appraisal Report is hereby granted.

Nonetheless, the Court is unable to grant the prayer that the Applicant should continue in his post after the expiry of his contract of service, and the prayer that a new Appraisal Report be completed for renewal of contract. This is because those prayers have been overtaken by events. Above all, contracts of employment cannot be the subject of specific performance in the absence of special circumstances – see Martin Ogang v. Eastern and Southern African Trade and Development Bank (P.T.A. Bank) & Dr. Michael Gondwe, Reference 1A/2000 (reported in the CCJ Reports of 2001). See also the case of College of Medicine of University of Lagos v. Adegbite and Thomas (ALR 1973). For similar reasons, we cannot grant an order that a new Staff Performance Appraisal Report be subjected to the usual bottom-up approach of Comesa policy organs meetings". (emphasis supplied)

The Court's conclusion was as follows:

"..... the Applicant has succeeded on the principal prayer for a declaration that his Staff Performance Report was invalid. On the other subsidiary prayers, the Applicant has been unsuccessful. In the particular circumstances of this Reference the Court awards the Applicant his costs for this Reference."

It is the Applicant's case that nowhere in its judgment did the Court state that:

"...in law you cannot order specific performance of an institution that has already decided on the basis of poor performance of an employee that they do not require his services".



What the Court said was:

*"...above all, contracts of employment cannot be the subject of specific performance in the absence of special circumstances".*

We agree with the Applicant's submission on this point, and, we also agree with the observations stated in the Registrar's Press Release of 24<sup>th</sup> April, 2002 that the COMESA Press Release of 23<sup>rd</sup> April, 2002 was biased in favour of portraying the good side of COMESA whilst highlighting the poor performance of the Applicant.

Although the Applicant did not specifically complain of it, paragraph 3 of the Respondent's Press Release also distorts the Court's decision. The Court did not decide that the decision of the Council of Ministers on the advice of the Bureau and the Secretary-General's recommendation, was properly taken. What the Court said was that:

*"...the final prayer was for an order that the Report of the Bureau of the Council be invalidated on the grounds that the Bureau is not part of the decision making process in the renewal of contracts. It was contended that it is the Secretary-General of COMESA who should submit the Appraisal Report to the Council of Ministers through the Administrative and Budgetary Matters Committee and the Inter Governmental Committee. Again, we are unable to grant this prayer for two reasons. Firstly, the Applicant did not adduce any evidence that it was the Bureau, which submitted the Appraisal Report to the Council of Ministers. Secondly, there is abundant evidence on record that it was the Secretary-General himself who submitted a report on Dr. Muleya to the Council of Ministers."*

There is sufficient evidence on record that the words complained of were widely published both locally and internationally on the internet, in The Zambia Daily Mail of 24<sup>th</sup> April, 2002, as well as on Radio Phoenix.

The Respondent did not dispute publication of the words complained of. The Respondent pleads justification and relies on the following passage from Gatley on Libel and Slander, 8<sup>th</sup> Ed., page 151, paragraph 354:

*"Justification limited to imputation. The defendant must prove the truth of the very imputation complained of; he may not under a plea of justification prove the truth of other facts damaging to the plaintiff's reputation, even if they are in the same sector of the plaintiff's life, and would be no less damaging to the plaintiff's reputation than the imputation complained of."*

Counsel for both parties also cited from the same edition of Gatley on Libel and Slander the following passage which appears at page 150, paragraph 352, under the heading "Proof of Imputation":

*"...to establish a plea of justification, the defendant must prove that he believed that the imputation was true, even though it was published as belief only."*

According to the submissions by counsel for the Respondent, one must prove that the defamatory imputation is true, and, in this case, what comes out is that Dr. Muleya's performance whilst at COMESA was unsatisfactory, hence, his services were terminated. But is this what the Court said in its judgment of 23<sup>rd</sup> April, 2002? Certainly not. Nor did the Court agree, as implied in the Respondent's Press Release, that specific performance cannot be ordered on the basis of the poor performance of an employee. Indeed, later in his submissions, counsel for the Respondent categorically stated that the issue of the Applicant's performance was never adjudicated upon by the Court. He argued that the sting goes to the Applicant's performance whilst employed at COMESA. On its part, the Court finds that the sting in the defamatory Press Release is that the Court stated that it could not grant specific performance on the basis of poor performance. What the Respondent's Press Release did, was to impute that the Court decided not to order specific performance on the basis of the Applicant's poor performance. This was decidedly incorrect. It is not the same as stating that specific performance cannot be granted in contracts of employment in the absence of special circumstances. We entirely agree with the passage cited from Atkins Court Forms, 2<sup>nd</sup> Ed., 1994, Vol. 25, which states that –

*"...the scope of the defence of justification does not depend upon the way in which the plaintiff pleads his case but on the meaning or meanings which the words are capable of bearing."*

Now, the words complained of are clearly imputing that it was the Court's decision that it could not re-instate the applicant as Director of Administration and Finance in COMESA on the basis of his poor performance. The public clearly understood the Respondent's Press Release as stating that it was the Court's decision not to re-instate the Applicant in his former post because of his poor performance. Quite clearly the sting was established and the plea of justification cannot hold.

Professor Mvunga informed the Court that he cross-examined Mr. Erastus J.O. Mwencha under protest because Mr. Mwencha's evidence related to Dr. Muleya's



poor performance which had no relevance to the Secretariat's Press Release in the form it was published.

We now turn to the hazy subject of damages. The Applicant was libelled on 23<sup>rd</sup> April, 2002 and we are satisfied that the publication of the libel was world-wide, bearing in mind that the publication was carried on the electronic media as well as in the print media. However, within a month of publication of the libel, the Applicant was appointed Director-General of the Zambia National Tender Board.

Be that as it may, the Applicant had unsuccessfully attempted to secure employment from the private sector until his Government, the Government of Zambia, offered him his present prestigious post. From the evidence before us, this was the reaction of the Government of Zambia to what it saw as shabby treatment of the Applicant by COMESA. Nevertheless, it is not clear whether the Applicant's attempts at securing employment were made after the publication of the libel or after he failed to have his contract renewed by COMESA.

In determining the quantum of damages the Court will bear in mind the extent of the publication. Counsel for the Respondent made a feeble attempt at playing down the extent of the publication. As we pointed out earlier in this judgment, the Respondent does not deny that there was publication of the Press Release complained of. From the evidence given by Ms Kasote of The Daily Mail, the publication was on the Website, and the Daily Mail distributes 20,000 copies a day. Again, another witness Mr. Miyanda testified that he heard the defamatory Press Release on Radio Phoenix. Lastly, Mr. Mathew Phiri grudgingly conceded that the Press Release was on e-mail although he maintained that he did not see it on the Website. This is in contradiction to the crystal clear evidence of Ms Kasote to which we made reference earlier on. Anyway, the Court is satisfied beyond reasonable doubt that there was widespread publication within and outside Zambia in the print and electronic media of the Press Release complained of by the Applicant.

We have considered all the circumstances of this case. In particular that the Respondent persisted in a smear campaign against its former employee even when he was unemployed. Further, the Respondent declined to retract and make amends for the defamatory publication, even after the Press Release of the Registrar of the Court was issued, and e-mailed to all COMESA Staff members including the Secretary General and the Public Relations Officer, Mweusi Karake, who in his rather unbelievable evidence before this Court, claimed sole responsibility for the idea,

preparation and distribution of the Respondent's Press Release. We are satisfied that the amount of US\$2,000 (Two Thousand United States American Dollars) would be adequate damages for the Respondent's libelous Press Release.

We have considered the second prayer seeking for the grant of an injunction to restrain the Respondent from further publishing similar defamatory words. We have decided that in the circumstances of this case it would not be necessary to grant such a relief, as the Respondent will no doubt be guided by this judgment.

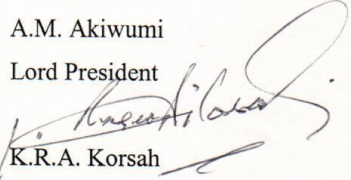
The Respondent shall also pay the Applicant's costs of this Reference.

It is so ordered.

Dated and delivered at Khartoum, Sudan, this 1<sup>st</sup> day of July, 2003.

  
A.M. Akiwumi

Lord President

  
K.R.A. Korsah


Lord Justice

  
A. Nyankiye

Lord Justice

  
J.B. Kalaile

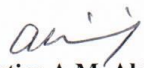
Lord Justice

  
J.M. Ogoola

Lord Justice



In pursuance of Article 37.2 of the Treaty Establishing the Common Market for Eastern and Southern Africa and Rule 46.1(b) of the Rules of the Court of Justice of the Common Market for Eastern and Southern Africa the foregoing Record Hearing is hereby signed by the Lord President this 1<sup>st</sup> day of July, 2003 at Khartoum, Sudan.

  
**Lord Justice A.M. Akiwumi**  
LORD PRESIDENT