DALAM MAHKAMAH TINGGI DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN MALAYSIA
GUAMAN SIVIL NO.: WA-23CY-14-03/2017

ANTARA

NORAZLANSHAH BIN HAZALI …PLAINTIF

DAN

MOHD DZIEHAN BIN MUSTAPHA ...DEFENDAN

JUDGMENT

[1] This is an action in defamation brought by the Plaintiff.

[2] The Plaintiff, Dato Dr Norazlanshah Bin Hazali is a Visiting Professor at the Faculty of Health and Life Sciences, Management & Science University in Shah Alam, Selangor. The Defendant, is a government servant with the Pharmaceutical Practice & Development Division, in the Ministry of Health.

[3] It was the Plaintiff's case that the he had been defamed by three postings published in a facebook account with the address https://www.facebook .com/mohd.dziehan. The alleged libel was pleaded in paragraph 5 of the statement of claim in the following manner:

"5. Defendan telah menulis kenyataan fitnah *(libel)* dibawah (selepas ini disebut 'Kenyataan Fitnah tersebut') pada tarikh dan masa seperti berikut:

a. Pada 28 Januari 2017 jam 6.58pm;

"Siapa ni...owner dia ker? Owner dia mmg dlm siasat. Laporan lengkap kpd pihak university usim sedang dilengkapkan. Di UIA beliau telah disingkirkan. Kita tggu tindakan usim pula"

b. Pada 28 Januari 2017 jam 7.37pm;

"UIA dh buang dia
Now di usim"

c. Pda 28 Januari 2017 jam 7.48 pm;

"Dia putus kan kawan dgn semua org yg tegur dia" "

[4] The Plaintiff then pleaded what he asserts the aforesaid publications meant in paragraph 6 of the statement of claim:

"6. Di dalam maksud semula jadi dan biasa, Kenyataan Fitnah tersebut bermaksud dan difahamkan membawa maksud bahawa:

a. Plaintif ketika itu bekerja sebagai tenaga pengajar di Universiti Sains Islam Malaysia (USIM) sedang disiasat dan sedang menunggu tindakan disiplin; Plaintif telah dibuang daripada jawatan terakhirnya oleh Universiti Islam Antarabangsa (UIA);
b. Plaintif bersifat tidak boleh menerima teguran daripada semua orang dan mereka yang berbuat demikian akan diputuskan persahabatan."

The Plaintiff's case

[5] The postings of the impugned words pleaded above were admitted into evidence in the form of "screen shots" that is to say images of the impugned words as they would appear on the screen of a computer if one were to access the facebook account referred to above. These images were then printed out on paper, as a document. In this case, the screenshots of the impugned words pleaded were, by consent, admitted into evidence on the basis that their authenticity were not disputed save for their contents.

[6] The Plaintiff, who testified as PW1, testified that he was informed by his wife, Dato Mashita Masri, about the impugned postings on the 28th of January 2017. Dato Mashita Masri had, in turn, been told of the posting by one Zuraini Hashim on that same day. The Plaintiff testified that the postings had downgraded his reputation and dignity as a lecturer, academician and scientist. He also testified that his family members felt ashamed, depressed and were looked down upon from rural people to academics.

[7] The Plaintiff also testified that he was the founder of health products that are marketed and sold under the brand name of "ByDrAzlan". In this regard admitted into evidence, by consent, were photographs bearing the picture of the Plaintiff on billboards. The Plaintiff however, could not quite remember when the billboards were put up, before or after the alleged defamation. He also testified that his image is used in the marketing of these health products. According to the Plaintiff, and set out in his answer to question 9 of his witness

statement (WS-PW1), at the time when the impugned publications were published he was holding the position of a lecturer at Universiti Sains Islam Malaysia. Prior to that, he was at International Islamic University Malaysia and he claimed to be known by academicians as well as members of the public through his research, written journals and articles. Also admitted into evidence by consent were newspaper "advertorials" and articles by the Plaintiff. However, the fact that the Plaintiff had healthcare products advertised and sold under the brand "ByDrAzlan" were never pleaded in the statement of claim.

[8] Under cross-examination the Plaintiff agreed that the three sets of statements that were impugned and pleaded in the statement of claim do not refer to him, his product or the brand name of his product. The Plaintiff did insist that "di UIA beliau telah disingkirkan" and "kita tunggu tindakan USIM pula" referred to him. However, he later clarified that that was because the Defendant knew him. There was also in evidence, a media statement by the Plaintiff refuting the impugned statements. This media statement was admitted into evidence, by consent of the parties, on the basis that it is authentic and that its contents are true i.e. as a Part A document.

[9] Dato Mashita Masri, the Plaintiff's wife also testified. She testified as PW2. PW2 testified that she was the owner of "Mataayer" which is the producer of the products with the brand name "ByDrAzlan". She testified that the sales of the products under the brand name "ByDrAzlan" suffered losses allegedly due to the alleged defamatory statements. PW2 testified that the total sales of the product for the period from 27th December 2016 until 3rd January 2017 was

RM102,523.00, which was normal. However for the period from 22nd January 2017 to 3rd February 2017, the total sales of the product was RM66,665.00. She also testified that on the date the defamatory statements were made i.e. 28th January 2017, there was no sale of the products and this was something that had never happened before. PW2 also referred to two graphs, which were admitted by consent as Part B documents said to be computer generated graphs, in support of her testimony. These graphs themselves were undated and without any particulars save for the dates and the sales figures in ringgit on the graphs. No other evidence, documentary or otherwise, was led in regard to the sales of the product.

No case to answer

[10] At the close of the Plaintiff's case, the Defendant elected not to adduce any evidence and submitted no case to answer. The effect of submitting that there is no case to answer and in electing not to call evidence was recently stated by the Federal Court in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 2

CLJ 1037. In delivering the judgment of the Court, Azahar Mohamed FCJ stated thus:

> "… the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability the existence of a legally enforceable settlement agreement (see *Ranbaxy (Malaysia) Sdn Bhd v. El Du Pont De Nemours and Company [2011] 1 LNS 16*; [2011] 1 AMCR 857). In other words, it was upon the plaintiff itself, and certainly not the defendant, to discharge the burden of showing the settlement agreement had come into existence. It is for the plaintiff to prove its case and satisfy the court that its claim is well-

founded before the court grants judgment on the claim (see *Pemilik Dan Kesemua Orang Lain Yang Berkepentingan Dalam Kapal "Fordeco No 12" Dan "Fordeco No 17" v. Shanghai Hai Xing Shipping Co Ltd [2000] 1 CLJ 605*; [2000] 1 MLJ 449, *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd And Other Appeals [2004] 4 CLJ 282*; [2004] 4 MLJ 105 and *Teh Swee Lip v. Jademall Holdings Sdn Bhd [2014] 8 CLJ 451*; [2013] 6 MLJ 32). It is true that in the present case the defendant elected not to call any witnesses. However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. By reasons of the legal principles, the fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in law. In this regard, in adopting the approach of the case of *Storey v. Storey* [1961] P 63, Suriyadi JCA (as His Lordship then was) in *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369* recognised this to be the case as can be seen from the following passage of His Lordship's judgment:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the Court should find that the burden of proof has not been discharged."

[11] Thus the issue that the Court needs to consider in this case is whether the Plaintiff had discharged its burden of proving his case against the Defendant such that without calling any evidence, judgment must be entered against the Defendant.

[12] The Defendant admitted that the impugned statements pleaded were posted by him. It was, however, the Defendant's primary contention, which was also pleaded, that the impugned statements did not refer to the Plaintiff.

[13] In an action in the tort of defamation, it is settled law that the Plaintiff is required to prove the publication of a defamatory statement and that he was the person defamed (See *Dato' Sri Dr Mohamad Salleh Ismail & Anor v Nurul Izzah Anwar & Anor* [2018] 9 CLJ 285 paragraph 27, CA). The Plaintiff must prove that the defamatory statements were published "*of the Plaintiff*" or could be understood to refer to the Plaintiff. In *Pardeep Kumar a/l Om Parkash Sharma v Abdullah Sani Bin Hashim* [2009] 2 MLJ 685, Suriadi Halim Omar JCA explained:

> "[24] To succeed in an action of slander, as in libel, a plaintiff has to prove that the matter complained of, which emanated from the defendant is defamatory, refers to him (an issue of identification) and was transmitted to a third person (publication). The burden of establishing those ingredients at the outset rests on the plaintiff."

Did the impugned statements refer to the Plaintiff?

[14] The impugned statements pleaded clearly made no reference to the Plaintiff's name. There is reference to an investigation and a report by University Sains Islam Malaysia being completed. There is also a statement of a dismissal by the International Islamic University of Malaysia.

[15] There was however, no evidence led as to how these statements may be said to refer to the Plaintiff. There was no evidence led as to whether there were in fact any lecturers investigated or dismissed at these universities at the material and other circumstances such that the statements could be said to refer to the Plaintiff. How the

impugned statements could be said to refer to the Plaintiff was also not pleaded.

[16] There was then the issue of whether certain screenshots of statements made by others in the facebook account in question were admitted into evidence. These screenshots were intended to throw more light on who the impugned statements were meant to refer to. At the outset, and with the agreement of the parties, the Court made it clear that all documents that were agreed to, and what have come to be known as Part A documents and Part B documents, were admitted into evidence. Part A documents being documents the authenticity and contents of which were admitted and Part B documents being documents the authenticity of which were admitted but not their contents. Certain documents that were in Part C, that is to say documents the authenticity and contents of which were not admitted and must therefore be the subject of formal proof, were agreed to and converted to Part B documents during the course of the trial (See *Tiow Weng Theong v Melawangi Sdn Bhd* [2018] 1 LNS 869, CA) . Foremost among these were the screenshots of the impugned statements. However, there were other screenshots in Part C that were not agreed to. Among those were the comments posted by other persons in respect of which formal proof was required by the Defendant.

[17] What was done by counsel for the Plaintiff, after admitting PW2's witness statement, was to put to PW2 the following questions:

"SA Who made all the screenshots from page 27 until 41 that will be Bundle, refer to your Bundle B1 Tab 7 pages 27 until 41, basically the whole Tab 7. Just go through one by one, my question regarding page 27-41.

MASHITA Ok

SA I repeat my question who made all these screenshots all the screenshots pages 27-41?

MASHITA I did. I sent them all these to our lawyer"

[18] Bundle B1 contained documents categorised into Part A, Part B and Part C documents. As mentioned, these screen shots were Part C documents. No further evidence was led in respect of these screenshots. No evidence was led as to the maker of the contents of these screenshots and none were called to testify. There was no testimony as to how the screenshots were produced although under cross-examination, PW2 agreed that these documents were computer generated. If they were to be admitted as computer generated documents under section 90A of the Evidence Act 1950, there was no attempt to meet the requirements under section 90A(2) of the Evidence Act 1950 by proving that:

(a) the documents were produced by a computer in the course of its ordinary use or

(b) by tendering to the Court a certificate signed by a person who, either before or after the production of the documents by the computer, is responsible for

(i) the management of that computer or

(ii) for the conduct of the activities for which that computer was used.

(See *Gnanasegaran a/l Perarajasingam v Public Prosecutor* [1997] 4 CLJ 6, CA; *Ahmad Najib Aris v PP* [2009] 2 CLJ 800, FC; *Mok Yii Chek v Sovo Sdn Bhd & Ors* [2015] 1 LNS 448; *KTL Sdn Bhd & Anor v Leong Oow Lai & Other Cases* [2014] 1 LNS 427).

[19] In fact these screenshots, being Part C documents, were also not sought to be marked as exhibits. The provisions under section 90A of the Evidence Act 1950 cater for advances in technology, while at the same time providing safeguards for ensuring the authenticity of computer generated documents. These provisions should not be viewed as mere technicalities. Much mischief can be achieved by computer wizardry and the safeguards in the Evidence Act 1950 go some way towards protecting against them. Parties to a litigation are entitled to demand that the law, as is prescribed in section 90A of the Evidence Act 1950, is adhered to. These screenshots were therefore neither proven nor admitted into evidence.

[20] In regard to the media statement that was admitted, it was a statement by the Plaintiff. In this media statement, the Plaintiff set out the impugned statements and sought to refute them. By doing so however, it was the Plaintiff who had associated himself with the impugned statements – not the Defendant. This media statement therefore does not assist the Plaintiff to establish that the impugned statements published by the Defendant actually referred to the Plaintiff, or were published of and concerning the Plaintiff.

[21] Having regard to the foregoing, the Court is perforce to hold that it was not proven that the impugned statements referred to or were "of and concerning" the Plaintiff.

Damages

[22] Notwithstanding the foregoing and for completeness, I also find that no actual loss was proven to have been suffered by the Plaintiff. The graph that was led in evidence by the Plaintiff was for the period between 22nd January 2017 and 3rd February 2017. PW2, in her answer to question 9 in her witness statement, said that:

> "Nevertheless, for the sales period from 22 January 2017 until 3 February 2017, the total sale of ByDrAzlan products is RM66,665.00 which is a sharp fall from the normal sales. In fact, on the date the Defamatory Statements were made on 28 January 2017, there was zero sale which had never happened before."

It was an agreed fact, and pleaded in the statement of claim, that the impugned statements, were made on the 28th January 2017 from 6.58 p.m. onwards. Therefore if the drop in sales commenced from 22nd January 2017, it could not be because of the impugned statements. In fact the graph itself clearly depicts a drop in sales commencing 27th January 2017 to 28th January 2017. It also depicts a rise in sales from 28th January 2017 to 31st January 2017. In addition, PW2 in her answer to question 1 in her witness statement (WS-PW2), testified that she was the owner of "Mataayer" which is the producer of the products with the brand name "ByDrAzlan". In Bundle B1, admitted as a Part A document, is the search result from the Companies Commission of

Malaysia on “Mataayer”. This document states that “Mataayer” is a sole proprietorship and the proprietor named is PW2. Thus, it would seem that the alleged loss and damage in the sale of the products marketed under the brand name “ByDrAzlan”, were in fact loss and damage suffered by the sole proprietorship “Mataayer”, which was is in fact PW2 and not the Plaintiff. PW2 however, is not a party to this action. In addition, if the alleged loss in sales were losses in sale by the Plaintiff, they were never pleaded as such. Thus even accepting the evidence of the Plaintiffs and what was stated in the graph tended in evidence, they do not establish that there was any actual damage suffered by the Plaintiff.

Conclusion

[23] Having regard to the evidence led and matters aforesaid, this Court holds that the Plaintiff’s claim in the tort of defamation against the Plaintiff is not proven. The Plaintiff’s claim is therefore dismissed with costs. After hearing counsel for the parties, costs was awarded to the Defendant in the sum of RM7,000.00

Dated this 21st Day of November 2018

-sgd-
(DARRYL GOON SIEW CHYE)
Judicial Commissioner
High Court of Malaya
Kuala Lumpur
(Civil NCvC 2)

CASES CITED

Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 2 CLJ 1037

Dato' Sri Dr Mohamad Salleh Ismail & Anor v Nurul Izzah Anwar & Anor [2018] 9 CLJ 285 paragraph 27, CA

Pardeep Kumar a/l Om Parkash Sharma v Abdullah Sani Bin Hashim [2009] 2 MLJ 685

Tiow Weng Theong v Melawangi Sdn Bhd [2018] 1 LNS 869, CA; [2018] MYCA 210

Gnanasegaran a/l Perarajasingam v Public Prosecutor [1997] 4 CLJ 6, CA

Ahmad Najib Aris v PP [2009] 2 CLJ 800, FC

Mok Yii Chek v Sovo Sdn Bhd & Ors [2015] 1 LNS 448

KTL Sdn Bhd & Anor v Leong Oow Lai & Other Cases [2014] 1 LNS 427

Khalid Yusoff v Pertubuhan Berita Nasional Malaysia (BERNAMA) & Ors [2014] 8 CLJ 337

Credit Guarantee Corporation Malaysia v SSN Medical Products Sdn Bhd [2017] 6 CLJ 129

SS Saw v Siew Heen Yuen & Ors [2009] 2 CLJ 140

Institute of Commercial Management, United Kingdom v New Straits Times Press (Malaysia) Bhd [1993] 1 MLJ 408

Sandison v Malayan Times Ltd & Ors [1964] MLJ 332

Choo Fook Choo v The China Press [1999] 1 CLJ 461

Lim Guan Eng v Utusan Melayu (M) Bhd [2012] 2 CLJ 619

Ratus Mesra Sdn Bhd v Shaikh Osman Majid & Ors [1999] 8 CLJ 499

Takako Sakoa v Ng Pek Yuen & Anor [2010] 1 CLJ 381; [2009] 6 MLJ 751

Mohd Nor Afandi Mohamad Junus v Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369

Ng Ben Thong & Ors v Krishnan Arumugam [1998] 5 MLJ 579

Ansari Abdullah v Shalmon Sanangan [2016] 7 CLJ 73

Mohd Khaidir bin Ahmad v Mohd Iqbal bin Zainal Abidil [2018] MYCA 257

Chew Peng Cheng v Anthony Teo Tiao Gin [2008] 5 MLJ 577

Soh Chun Seng v CTOS-emr Sdn Bhd [2003] 4 MLJ 180

Melawangi Sdn Bhd v Tan Hood Tee [2017] 1 LNS 2

Knupffer v London Express Newspaper, Limited [1944] A.C. 116

Halim bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors [2001] 6 MLJ 353

Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd [2010] 9 MLJ 320

Jaafar bin Shaari & Anor (suing as administrator of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693

Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3) [2005] 5 MLJ 561

Credit Guarantee Corporation Malaysia Bhd v SSN Medical Products Sdn Bhd [2017] 6 CLJ 129

Lim Kit Siang v Datuk Dr Ling Liong Sik & Ors [1997] 5 MLJ 523

Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393

S. Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173

Janagi v Ong Boon Kiat [1971] 2 MLJ 196

Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd [2016] 8 MLJ 739

AlliedBank (Malaysia) Bhd v Yau Jiok Hua [1998] 6 MLJ 1

Chong Khee Sang v Pang Ah Chee [1984] 1 MLJ 377

UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428

Mohamad Safuan bin Wasidin & Anor v Mohd Ridhuan bin Ahmad [1994] 2 MLJ 187

Tempil Perkakas Sdn Bhd v Foo Sex Hong [1996] 2 MLJ 542

Big Blue Taxi Facilities Sdn Bhd v Pusat Pembangunan Reka Bentuk (M) Sdn Bhd [2018] 9 MLJ 147

Yeo Ing King v Melawangi Sdn Bhd [2017] 1 CLJ 512

LEGISLATION AND LEGAL TEXT CITED

Section 90A, S.114(G) of the Evidence Act 1950

Order 78 Rule 3(1) Rules of Court 2012

COUNSEL FOR THE PLAINTIF:

Shahrul Azwad bin Ismail
(Shahrulazwad & Co
B-3-14, Laman Suria
Jalan 2/1, Taman Kajang Utama
43000 Kajang
Selangor
Tel : 012-977 5573)

COUNSEL FOR THE DEFENDANT:

M Raja
(Ram Yogan Sivam
No. 1-2, Lorong 8/1D
Seksyen 8
46050 Petaling Jaya
Selangor
Tel : 03-7957 7535
Faks: 03-7957 7534
Emel: ramyogan@gmail.com)