

Pohiva v Kingdom of Tonga & others

¹⁰ Supreme Court, Nuku'alofa
Ward CJ
Civil Case No.194/94

21 September, October 1994

Defamation - proof article referred to plaintiff

Practice and procedure - amendment of claim - striking out

Tort - defamation - certification of plaintiff

²⁰

In a defamation action applications were taken to amend the statement of claim (by the plaintiff) and to strike out the claim (by the defendants)

Held:

1. Claim should be allowed to be amended as such was necessary so that the real substantial question can be raised between the parties.
2. The application to strike out should be refused and the plaintiff was not prevented, and could not be prevented, from calling evidence at trial that the words published referred to him although he was not named.

³⁰

Cases referred to : Baker v Medway [1958] 1 WLR 1216
Kurtz v Spence (1883) 36 Ch D 774

Statutes referred to : Defamation Act s.15

⁴⁰ Counsel for Plaintiff : Mr Appleby
Counsel for first and second Defendants : Mr Taumoepeau
Counsel for third and fourth Defendants : Mr Edwards

Judgment

There are a number of applications brought by the parties which fall for decision.

The first statement of claim filed in these proceedings was filed by the Plaintiff personally. The document on a first reading, appears to contain some inadequacies.

On the 28th March 1994 the first Defendant moved on Notice of Motion, to have the Statement of Claim struck out without having filed a Defence. On the same day the third Defendant filed a Defence.

50 There things rested until an Application was made by the Plaintiff to file an amended Statement of Claim on the 13th June 1994. Submissions in support of the strike out application were placed before the court on the 21st September at the same time as application for the filing of the amended Statement of Claim.

MOTION TO STRIKE OUT

The first Defendant advances four major grounds, the 3rd & 4th Defendants join the application and adopt the submission of the 1st Defendant.

1. That the claim.
 - (i) discloses no reasonable cause of action.
 - 60 (ii) it is scandalous frivolous or vexatious.
 - (iii) it is unclear;
 - (iv) it is an abuse of the process of the Court.
2. That the article referred to in the statement of claim did not refer to the Plaintiff.
3. That the second Defendant has no legal entity and cannot be sued.
4. That the second Defendant is not the Publisher of the Tonga Chronicle.

Since no Ruling on the Motion had been made at the time of the filing of the Application to amend made by the Plaintiff, I shall deal with the Application to amend and then consider the implications the result may have for the amended Statement of claim.

70 APPLICATION FOR LEAVE TO AMEND STATEMENT OF CLAIM

The Supreme Court 1991 as amended Order 8 R5 provides the power which is enabling of the Court to allow amendments to pleadings generally.

Pleadings generally may not be amended without leave of the Court. (cf Rules of the Supreme Court Order 20 Rule 3 U.K.)

I take the law to be as presently advised that amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings". G. L. Baker Ltd. v Medway Building and Supplies Ltd. [1958] 1 W. L. R. 1216 at 1231, per Jenkins L.J.

80 The ground which is in the present case advanced as the basis for amendment, says very little. It reads:-

"The Plaintiff has taken legal advice and the amended statement of claim more accurately states his case."

It is evident from correspondence on the Court file, addressed to "Hon. Mr. Chief Justice Ward DJ," (sic), though not evidence, from the then solicitors for the Plaintiff that the statement of claim needed amendment. A perusal of the document initially filed and now the subject of this application confirms the view of the letter writer.

90 The so-called "amended Statement of Claim" is in proper form. The Defendants (all

of them) complain that the new statement of claim in its amended form, contains new grounds. Lamentably the early document which is sought to be amended makes no reference to certain sections of publication.

Defamation pleadings have always been highly technical documents. It is, in my opinion, necessary to allow the amendment so that the "real substantial question can be raised between the parties."

Kurtz v Spence (1883) 36Ch.D.774

100 It adds parties, it eliminates other parties, it formally presents what appears to be the gravamen of the complaints of the Plaintiff. That being the case, it appears to me to be quite appropriate to amend. In so doing I have given careful consideration to the submissions of Counsel for the Defendants in setting out the opposition of their respective clients to this Application.

I am satisfied that there is no prejudice to the Defences of the respective Defendants by allowing the amendments. It seems to me that in these circumstances, disadvantages to the Defendants can be remedied in Costs.

110 As to the Parties added to the Proceedings Mr Taumoepeau (representing the second Defendant) opposes the inclusion of Baron Vaea submitting that if the Defendant is to be sued at all in should be in his capacity as Prime Minister of Tonga and not on any personal basis.)

THE MOTION TO STRIKE OUT

In paragraph 2 of the Motion of the First Defendant, the First Defendant alleges that:-

"... The article referred to in the statement of claim did not refer to the Plaintiff."

120 It is true that the name of the Defendant appears nowhere in the article of which the Plaintiff makes complaint. The English law is plain. The Court is required to consider at this interlocutory stage of the proceedings two fundamental questions:-

Are the words capable of referring to the plaintiff? (in the context of the article) AND

Are the words capable of a defamatory meaning? (in the context of the article.)

The first Defendant submits that the statement could not (as presently I understand the argument,) refer to the Plaintiff, under the Law of Tonga, and relies upon an interpretation of the Defamation Act as amended Section 15(a) which provides (in the material parts,)

"15(a) No civil action for defamation of character shall be maintainable unless it is proved that the defamatory matter complained of referred to the Plaintiff"

130 The argument is developed further. The First Defendant submits that the Law of Tonga has made exclusive provision for the Law relating to Defamation by virtue of the provisions of the Defamation Act. Accordingly there is no room to import meaning into Tongan Law by use of the Common Law of England or indeed by importing Statutes of general application of the U.K., (Civil Law Act of Tonga Ss3 and 4).

140 Do the words of Sec. 15(a) of the Defamation Act preclude the Plaintiff in the present case from proving that he was the person being referred to in the article? I hardly think so. To place such a strict interpretation on the Statute would preclude a wide class of persons indeed from pursuing action. A person who, by clear implication could defame, could then escape judgment by simply referring to S.15(a).

Sec. 15(a) does not require proof of the name of the person who claims defamation, it requires proof that the Defamatory matter referred to the Plaintiff. Such an interpretation does not in my respectful opinion, cause need for resort to the English law. The meaning of Sec. 15(a) is plain enough and I see no need at all to resort to any Law other than that of the Kingdom of Tonga for such an interpretation.

I derive some comfort from the closing submission of the learned Solicitor General, (counsel for the First Defendant.) Mr. Taumoepeau submitted that the meaning of the word "referred" in Sec. 15(a) connotes that the Plaintiff must be named or otherwise clearly identified.

For the case to go to the Jury (or the Judge) it will be necessary for that forum to consider the evidence and for that forum having regard to the weight and impact of the evidence from the witnesses called, to decide the central issue, namely, whether the words complained of referred to the Plaintiff.

I am of the view that this claim discloses a reasonable cause of action.

If S.15(a) allows of proof that the impugned article referred to the Plaintiff, then there is, subject to proper proof of the allegations in the Statement of Claim, undoubtedly a reasonable cause of action from which the plaintiff ought not be deprived in these interlocutory proceedings.

In Paragraph 3 of the Notice of Motion, the complaint in support of the Motion is redundant, and has been remedied in the new draft. Paragraph 4 of the Motion must suffer the same fate.

1. Leave is granted to the Plaintiff to amend the Statement of Claim in the form of the draft tendered in support of the Application.
2. The Motion to Strike out the Statement of Claim dated the 25th day of February 1994, is stayed.
3. The Defendants shall have leave to file amended or new Defences to the amended Statement of Claim as the case may be within a period of 28 days of this Order.
4. The Plaintiff shall be at liberty to Reply to the Defences of the Defendants within a period of 14 days after the date of filing of the Defences.
5. The costs of the Application to amend the Statement of Claim and the costs of the Motion first filed in any event to be taxed or agreed.