

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
LUSAKA  
(CIVIL JURISDICTION)**

**2011/HP/577**

**BETWEEN:**

**MICHAEL CHILUFYA SATA**

**PLAINTIFF**

**AND**

**WALLEN SIMWAKA**

**1<sup>ST</sup> DEFENDANT**

**REBECCA CHILESHE**

**2<sup>ND</sup> DEFENDANT**

**ZAMBIA DAILY MAIL LIMITED**

**3<sup>RD</sup> DEFENDANT**

**Before The Honourable Mrs. Justice J. K. Kabuka in Chambers the  
5<sup>th</sup> day of August, 2011.**

**For the Plaintiff:                      Mr. B.C. Mutale S.C. and Mr K. Kaunda,  
Messrs. Ellis & CO**

**For the Defendants:                Mr. S. Nkonde S.C. and Mr B Mubanga,  
Messrs. S.B.N Legal Practitioners**

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**RULING**

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**CASES REFERRED TO:-**

- 1.        American Cyanamid vs. Ethicon [1975]AC 135**
- 2.        Shell & B.P. Zambia Limited vs. Conidaris & Others  
(1975) Z. R. 174**
- 3.        Fraser vs. Evans [1969] I Q B. 349**

4. **Bonnard vs Perryman [1891] 2. Ch. 269**
5. **Gulf Oil(G B) Ltd. Vs. Page & Others [1987] 3 ALL ER 14**
6. **Bestobell Paints Limited vs. Bigg [1975] F.S.R. 421**
7. **Harakas vs. Baltic Mercantile and shipping Exchange  
[1982] 1 W.L. R. 958**
8. **Quartz Hill Consolidated Gold Mining Company vs Beal  
[1882] 20 CHD 501**
9. **Shamwana vs. Levy Mwanawasa (1993 – 1994) Z. R.  
149**
10. **Attorney-General vs. Roy Clark (2008) vd. 1 Z.R. 38**
11. **Herbage vs. Pressdram [1984] 1. W. R. R. 1160**
12. **McDonald Corp vs Steel [1995] 3 ALL ER 615**
13. **Horrocks vs. Lowe [1975 AC 135 at 149**
14. **Coulson vs Coulson [1887] 3T.L.R. 846**
15. **Bonnick vs. Morris [2003] 1 A.C. 300**
16. **Reynolds vs. Times Newspaper Ltd [2001] A.C 127**
17. **Jameel vs. Wall Street Journal Europe [2006] 3 WLR  
642**

**LEGISLATION AND OTHER WORKS REFERRED TO:**

GATELY ON LIBEL AND SLANDER 8<sup>TH</sup> EDITION AT 640

HALSBURY'S LAWS OF ENGLAND VOL. 28 PARAGRAPH 108

GATLEY on LIBEL and SLANDER

GEOFFREY ROBERTSON AND ANDREW G. L. NICOL, AUTHORS OF MEDIA  
LAW LONGMAN 2<sup>ND</sup> EDITION 1990

RSC 1999 (WHITE BOOK) ORDER 18 (2)

The plaintiff issued a writ of summons in which the substantive claim was stated to be for general damages against the defendants for libel contained in articles entitled "**Sata's gay love historical**" and "**Sata condemned for gay love**", authored by the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively and published by the 3<sup>rd</sup> defendant in its ZAMBIA DAILY MAIL newspaper editions of the 14<sup>th</sup> and 15<sup>th</sup> June 2011 respectively, which articles were claimed to be defamatory of the plaintiff.

The plaintiff did cause to be filed simultaneously with the writ, an ex-parte application for an interlocutory injunction order. By this order, the plaintiff sought to have the defendants restrained from further publishing, articles and related stories on homosexuality concerning himself, pending final determination of the matter.

I directed that this application be heard *inter-partes*. When the matter came up for hearing as directed however, advocates for the parties informed the court they would be relying wholly on affidavit evidence and submissions to be filed on behalf of their respective clients.

In his affidavit in support of the application the plaintiff's contentions were that, on the 14<sup>th</sup> and 15<sup>th</sup> June 2011, the Zambia Daily Mail Newspaper carried stories on the front pages entitled "**Sata's gay love historical**" and "**Sata condemned for gay love**" respectively, which were written by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and published by the 3<sup>rd</sup> defendant. Copies thereof were exhibited to the affidavit and marked "MCS1" and "MCS2". The plaintiff further contended, the contents of the said articles were not true as he had never practiced homosexuality nor associated with any gay person. He stated, he was an aspiring presidential candidate in the 2011

general elections and the articles in issue herein were intended to discredit his reputation and put his character into question.

Hence, according to the plaintiff, unless restrained by court order it was highly probable, the defendants will continue to maliciously malign him with the consequence of a negative impact, thus diminishing his chances of being elected as President of the Republic of Zambia. Such ensuing damage, the plaintiff contended, cannot be atoned for in damages and he implored the court to grant his application.

In response, the defendants filed two affidavits. The first was sworn by the News Editor of the 3<sup>rd</sup> defendant, Zambia Daily Mail one Pauline Banda, who claimed the defence of justification. It was her position that, the words complained of by the plaintiff in the initial article entitled "**Sata's gay love historical**" were from a credible source, one Joseph Mfula and were true in substance and in fact. The article entitled "**Sata condemned for gay love**" of the 15<sup>th</sup> June 2011 was a mere follow up from the initial article.

It was the defendant's further position, the words complained of also constituted a fair comment on a matter of public interest. Specifically, they put into question, the propriety or otherwise of the conduct of the plaintiff who is aspiring for the dignified office of President of Zambia to advocate homosexuality, which is not only illegal but also morally frowned upon in Zambia. Consequently, the plaintiff exhibited bad conduct contrary to the requirements of the high office of Republican President. To augment the defences of justification and fair comment the defendants re-iterated

particulars of the same as pleaded in their defence. To the extent of relevance for our present purposes these included the following:

- (a) *In the 1980's the plaintiff was a Governor of Lusaka. and*
- (b) *.....was a friend to a Portuguese national known as Francisco Vasco Dubrito Vale who practised homosexuality.*
- (c) *In about February 2011, the plaintiff openly showed his support for homosexuality in an interview with the Danish Media by stating*  
  
*though falsely, that the Laws of Zambia recognise homosexuality, the Laws were already there and what was needed is to implement the Laws.*
- (j) *In making the interview with the Danish Media..... the plaintiff knew or ought to have known that Denmark was a pioneer in the world in accepting homosexuality and therefore the reasonable inference, that the plaintiff is capable of going to any extent for the purposes of obtaining support for his Presidential aspirations.*

*11. That 2011 is an election year and the plaintiff who is aspiring for the high office of president should be prepared to be strictly scrutinized on his character and conduct.*

*13. The plaintiff's stand to embrace the practice of homosexuality is a current and very important issue which requires debate by the public.*

The second affidavit headed supplemental affidavit in opposition was sworn by Joseph Mfula. The said deponent merely confirmed the contents of the article entitled **"Sata's gay love historical"** were allegedly true in substance and in fact. In the said article Joseph Mfula was quoted as having been introduced to Francisco Vasco Dubrito Vale by the plaintiff who was the said person's friend. The said person employed Mfula, subsequent to which he engaged him in homosexual encounters. He further claimed the plaintiff was aware of the said foreigners' sexual orientation.

In his affidavit in reply the plaintiff denied ever having a friend by the name of Fransisco Vasco Dubrito Vale or knowing the said person, at all. He further stated he did not know Joseph Mfula either and was not privy to the events he narrated which were published in the Zambia Daily Mail issue of 14<sup>th</sup> June 2011. The plaintiff contended, that he has never advocated gay rights in the past or present or during the interview with the Danish Media. In support of these contentions, he exhibited to his said affidavit, documents depicting a verbatim report of the said interview which appear as "MCS1" and "MCS2". The relevant portion thereof as highlighted on 'MCS2' reads as follows:

***SATA: "The point is the Laws have already made restrictions. Some people are saying I am talking to you people because I want to bring the gay and lesbians and I tell them to say listen, the Laws of Zambia recognise gayism, the Laws of***

**Zambia recognise lesbians. And the Laws of Zambia have provided restrictions and when you go all over the world, there is not any single country which has no restrictions for those things. Those are cheap propaganda; the laws are there. What we need is to implement the law”** (emphasis supplied).

In their submissions plaintiff’s counsel referred to the general principles guiding the exercise of the court’s discretion in the grant of injunctive relief. These were as enunciated in the renowned case of **American Cyanamid vs. Ethicon (1)**. The rationale of this case was adopted by our Supreme Court in the celebrated case of **Shell & B.P. Zambia Limited vs. Conidaris & Others (2)**. The holding in the former case was that:

***“A court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for by damages not injury that cannot be repaired.***

***The object of interlocutory injunction is to protect the plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at trial.”***

Learned counsel submitted, the plaintiff has the right to the protection of his character and integrity. He had thus established a clear right to relief. That he had intentions of contesting the 2011 Presidential elections and there was need to protect him from the defamatory and malicious publications aimed at maligning and scandalising him. Counsel further submitted, the loss of an opportunity of ascending to the office of Presidency rarely presents itself in one's lifetime and for that reason, cannot be adequately compensated by way of damages. The court was invited to take judicial notice of the fact, the plaintiff had narrowly lost the 2008 Presidential election by about 35, 000 votes and that his prospects of ascending to the Presidency were thus very high.

On whether or not injunctive relief should be granted in libel matters, counsel referred to learned authors of GATELY ON LIBEL AND SLANDER 8<sup>th</sup> Edition at 640 where they state:

***"In the case of an atrocious libel wholly unjustified and inflicting the most serious injury on the plaintiff, it would be quite proper for the court to exercise its jurisdiction"***

It was submitted on the point, the libel herein is atrocious and inflicts the most serious injury to the plaintiff as it is wholly unjustifiable and is deliberately calculated to denigrate his character. The defendant's unequivocal determination to impair the plaintiff's political prospects was evidenced by copies of the articles complained of which were exhibited to his affidavits.



On the defences of justification and fair comment, the plaintiff's submissions were that the same cannot be successfully relied on, have no merit; and the court can exercise its discretion in favour of the plaintiff if he can establish the defences are false. The following excerpt from *Halsbury's Laws of England vol. 28 paragraph 108* was called in aid of this submission:

***"It is well settled that no injunction will be granted if the defendant states his intention of pleading a recognised defence. Unless the plaintiff can satisfy the court that the defence will fail. This principle applied not only to the defence of justification but also to the defences of privilege and fair comment, consent and probably any other defence. When qualified privilege or fair comment is to be pleaded, an injunction may nevertheless be granted if the plaintiff can satisfy the court on the issue of malice (emphasis supplied).***

Further reliance was placed on the observations of Denning M.R , as he then was, in the case of **Fraser vs. Evans (3)** at page 10 that:

***"The right of speech is one which it is for the public interest that individuals should possess and indeed, that they should exercise without impediment. So long as no wrongful act is done. There is no wrong done if it is true or it is fair comment on a matter of public interest. (Emphasis supplied).***

Urging that the plaintiff having stated he was not homosexual nor had he ever associated with any gay person. The court was implored to find that

the defendant's defence was false; unlikely to succeed; and that all the defendants' stories on the plaintiff's homosexual orientation were clearly malicious.

Finally, it was submitted on behalf of the Plaintiffs, repeated publication of the defamatory matter, in two consecutive editions was an indication that the Defendant was inclined to continue with the publication of the material, unless restrained. Counsel made extensive reference to various works submitting, it is settled law that an interlocutory injunction will be granted if the plaintiff can establish the defendant was inclined to repeating the publication of defamatory materials. Excerpts to that effect were quoted from Learned Authors: CARTER – RUCK on LIBEL and SLANDER; GATLEY on LIBEL AND SLANDER and SIR HUGH FRASER on PRINCIPLES and PRACTICE OF THE LAW OF LIBEL AND SLANDER, as collective authority to injunct, by reason of repeated publication.

In rebuttal, learned counsel for the defendants, strongly submitted, injunctive relief was inappropriate in defamation cases where justification and fair comment were the pleaded defences. He cited a number of authorities starting with **Bonnard vs. Perryman (4)** where the following principle was established:

***" the court will not restrain the publication of an article, even though it is defamatory, when the defendant says that he intends to justify it or to make fair comment on a matter of public interest" (emphasis supplied)***

Reference was also made to the case of **Gulf Oil(G B) Ltd. Vs. Page & Others (5)** where Lord Denning M. R. exemplified the principle at page 9 when he said:

***"The principle has been established for many years ever since Bonnard v. Perryman [1891] 2 Ch 269. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge; but a better reason is the importance in the public interest that the truth should out. As the court said in that case 'the right of free speech is one which should be exercised without impediment, so long as no wrongful act is done'. There is no wrong done if it is true or if it is fair comment on a matter of public interest".***  
(emphasis supplied)

At page 11, Lord Denning MR went on to state:

***"There are some things which are of such public concern that the newspapers, the press, and, indeed, everyone is entitled to make known the truth and to make fair comment on it. This is an integral part of the right of free speech and expression. It must not be whittled away.... The Defendants admit that they are going to injure the Plaintiff's reputation, but they say that they can justify it; that they are only making fair comment on a matter of public interest; and therefore, that they ought not to be restrained. We cannot***

**pre-judge this defence by granting an injunction against them**". (emphasis supplied)

It was Defence Counsel's further submission, Joseph Mfula having stood by the contents of the article in the Zambia Daily Mail of 14<sup>th</sup> June 2011, which are subject of the matters, complained of as defamatory. Mfula having also stated that the same is true in substance and in fact and that he intends to justify the same at trial. In line with the *Fraser v Evans* case, also referred to and emphasised by the Plaintiff on page 5 of their submissions. This authority according to Defence Counsel ironically, only advanced the Defendants' position that, an interlocutory injunction cannot be granted where in its defence, the Defendant pleads justification and fair comment:

***...."so long as no wrongful act is done. There is no wrong done if it is true or is fair comment on a matter of public interest"***

Defence Counsel went on to submit, it would be pre-judging the defence filed by the Defendants for this court to hold the Plaintiff's version of facts is the correct one at this interlocutory hearing of the matter. Whether the defences of justification and fair comment have merit, is an issue to be determined at trial. Similarly, the issue of malice as submitted by the Plaintiff, though denied by the Defendants, is also an issue to be determined at trial, taking into account the law that it is for the Plaintiff to prove malice. Defence counsel further referred to the Learned Authors of WINFIELD AND JOLOWCZ ON TORT, 17<sup>th</sup> edition and to the case of *Cheng*

*vs Tse Chun (2000)*, a decision of the Hong Kong Final Court of Appeal which was accepted as stating English Law, where they state:

***"The law now is that the Defendant who pleads fair comment is only guilty of malice if he has no belief in what he says. If he has such a belief there is no malice even if he is pursuing his own private agenda or ambitions."(at page 559 footnote)***

Counsel concluded by submitting, even the articles being complained of are not without foundation. They were as stated by the Plaintiff in an interview given to the Danish media – and he has not denied doing so – on the issues of homosexuality vis a viz the laws of Zambia.

These were the submissions from counsel for the parties on either side. I am indeed indebted to counsel for case law cited and other authorities the court was referred to herein. The thrust of the plaintiff's claim on the material complained of, is that the articles written and published of him by the defendants headed ***"Sata's gay love historical"*** and ***"Sata condemned for gay love,"*** connote inclination towards homosexual conduct on his part and advocacy for homosexuality.

The gist of the defence is that, the plaintiff was *"friends"* with a person alleged to have been practising homosexuality. The source of this information was a partner of the homosexual individual who swore an affidavit to that effect. The defendants position is that, they intend to justify the matters complained of by the plaintiff, as being true, in both substance and fact through the if this person. The defendants contend that pending determination at the hearing, of whether the said material is

libellous or not, the court ought not to restrain further publications on the issue, as so to do would be infringing the defendants right of free speech on a matter of public interest. The plaintiff was an aspiring presidential candidate and it was in the public interest that his character disposition and suitability for the high office of Presidency be scrutinised.

The issue here, is clearly one of freedom of expression versus the protection of individual reputation. The question arising for the determination of the court is whether an order of injunction can be issued to prevent publication of defamatory material of the plaintiff where the defences of justification or fair comment on a matter of public interest, are raised.

The law on injunctive relief in defamation cases is well established. The principle being that, generally, a court will not grant an interlocutory injunction to prevent defamation, where the defences of justification; fair comment on a matter of public interest; qualified privilege or such other recognised defence is raised; unless the plaintiff can demonstrate that the matters complained of are false or if true in the case of fair comment and qualified privilege that they are actuated by malice.

The leading case on the subject is *Bonnard vs. Perryman*, earlier referred to by defence counsel. In that case, observations of Esher M.R were quoted with approval by Coleridge C. J, as follows:

***"To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not."***

***Therefore jurisdiction is of a delicate nature. It ought only to be exercised in the clearest of cases where any jury would only say that the matter complained of was of a libellous nature and where, if the jury did not so find, the court would set aside the verdict as unreasonable. The court must also be satisfied that in all probability the alleged libel is untrue, and, if written on a privileged occasion, that there was malice on the part of the defendant. It followed from those three rules that the court only on the rarest of occasions exercise the jurisdiction."***

This principle recognises the need to advance the individual's fundamental right of speech. The rationale being, there is important public interest that wrong doing must be exposed. Hence, in a later **case Bestobell vs. Bigg (6)** a 1975 decision, it was observed that:

***"There is an old and well-established principle which is still applied in modern times and which is in no way affected by the recent decision in the House of Lords in the American Cyanamid Corporation vs. Ethicon, that no interlocutory injunction will be granted in defamation proceedings where the defendant announces his intention of justifying.... That was established towards the end of the last century and it has been asserted over and over again..... Interlocutory restraint in any case that is not obvious would operate as an unjust fetter on the right of free speech and the defendant's liberty (if he is right) to speak the truth."***

In 1982, Lord Denning M.R. as he then was, in the case of **Harakas vs. Baltic Mercantile and shipping Exchange (7)** stressed the role of the court not to restrain the right to free speech by way of court order, where the defendant claims the matters complained of, are actually true. He said:

***"This court never grants an injunction in respect of a libel when it is said by the defendant that the words are true and that he is going to justify them. So also when an occasion is protected by qualified privilege this court never grants an injunction to restrain slander or libel..... unless it is shown that what the defendant proposes to say is known by him to be untrue so that it is clearly malicious..."***

Lord Denning in discharging an injunction granted by Boreham J, at first instance, held:

***"Where there is a bureau of this kind- which is specially charged with the responsibility of obtaining information and giving it to those interested to warn them of possible dangers - it is very important that they should be able to give information to people who are properly interested: so long as it is done honestly and in good faith. That is all the Bureau wish to do in this case. They should not be prevented from doing so by an injunction unless it is clearly shown that they are dishonestly and maliciously saying what they know to be untrue. There is not a shred of evidence to support a suggestion of that kind. In my opinion this injunction should***



***never have been granted: and should be discharged here and now.***” (emphasis supplied)

The question of "***express malice***" defeating the defence of qualified privilege even where the material complained of is actually true, arose for consideration in the 19<sup>th</sup> century early case of **Quartz Hill Consolidated Gold Mining Company vs. Beal (8)**. In holding that great caution is needed before granting interlocutory relief where the impugned document is prima facie a privileged communication, Jessel M.R, stated:

***"The circular appears on the face of it to be private in the nature of a privileged communication. It is issued by one shareholder to his brother shareholders, asking for their co-operation either in putting an end to the company or reconstituting it. As I said before, it may be answered that it is malicious and not entitled to protection, but that is very difficult to try upon interlocutory application. In the present case the defendant says he is acting bona fide, and there is no evidence against him. But if there were, I think a judge should hesitate long before he decides so difficult a question as that of privilege upon an interlocutory application, the circular being on the face of it privileged, and the only answer being express malice. Those are questions which really cannot be tried upon affidavit, or in the mode in which an interlocutory application is disposed of."***

The question on the principles applicable in considering the exercise of the court's discretion on whether or not to grant interlocutory injunctive relief

in defamation cases, were considered in the case of **Shamwana vs. Levy Mwanawasa (9)** which apparently, is the only Zambian decision on the point. Ngulube C. J. as he then was, but sitting in the High Court, had this to say:

***"Subject to the special consideration which applies to defamation cases, the usual considerations which apply to all other applications for interlocutory injunctions generally apply also to defamation cases. Thus for example, the plaintiff's right to relief must be shown..."***

Applying the law as outlined herein to the facts of the present case, the corollary questions raised are: has the plaintiff demonstrated that the insinuation by innuendo, of association with homosexuals and his supposed advocacy for their rights is untrue? If so, that the attack on his character is actuated by malice, on the part of the defendants, such malice being "*absolutely overwhelming*" and only intended to attack his integrity? Further, that in doing so, this being an election year, whether the objective of the publication is to reduce the plaintiff's chances of ascending to the office of the Presidency, for which he is aspiring? The plaintiff has denied any knowledge, of either the homosexual allegations, or of the persons involved in the same.

Affidavit evidence, relied on by the defendants is founded on allegations by a person who has not suggested the plaintiff was a participant in the homosexual activities, alleged. The screaming headlines suggesting actual involvement of the plaintiff in the first article; and the second being a mere reaction of an individual, premised on the assumption the said initial article

was true; are at variance with the substance of the initial article which only discloses a self – confessed supposed victim of a homosexual relationship with some other person and not the plaintiff.

In considering whether or not to grant injunctive relief the court is also guided by a number of factors. Where the defence of justification is pleaded, it must be demonstrated that the material complained of is actually untrue, the onus of doing so, being on the plaintiff. Falsehood defeats the defence of justification. When fair comment or qualified privilege are pleaded in defence, evidence of malice defeats the said defences.

Defence counsel urged interim relief on the particular facts of this case would be inappropriate as it would amount to pre – judging the defences of justification and fair comment. The case of *Fraser vs. Evans* was relied on for the submission. Counsel further urged, in this election year, Public interest in free speech would be interfered with in the event the injunction was granted.

In answer to this submission suffice to point out the freedom of free speech or freedom of expression guaranteed in Article 20 of our Constitution is not absolute but subject to restrictions. This article, to the extent of relevance in this matter, reads as follows:

***"20.(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and***

***information without interference, freedom to impart and communicate ideas and information without interference whether the communication be to the public generally or to any person or class of persons and freedom from interference with his correspondence.***

***(2)Subject to the provisions of this Constitution a law shall not make any provision that derogates from freedom of the press.***

***(3)Nothing contained in or done under the authority or any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision***

***(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons.....***

***And except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.”***

In construing Article 20, the Supreme Court in the case of **Attorney-General vs. Roy Clarke (10)** had this to say:

***(2) Freedom of expression is one of the strong attributes of a democratic society, and that to the extent permitted by the constitution itself, freedom of expression must be protected at all costs, and those who hold public offices must be prepared to suffer, and be tolerant of criticism.***

***(3) The constitution limits or constitutes freedom of expression. Freedom of expression is not limitless."***

The individual right to expression being one of the restrictions, the question then is: what should be the approach to situations where Freedom of expression versus the protection of individual reputation? Griffiths L J, in **Herbage vs Pressdram (11)** had this to say:

***"The principles which it is conceded generally apply to the grant of interim injunctions in defamation actions are helpfully summarised by counsel for the plaintiff's in his skeleton argument: first, no injunction will be granted if the defendant raises the defence of justification. This rule is so well established that no elaborate citation of authority is necessary. It can be traced back to the leading case of Bonnard vs Perryman. Secondly, no injunction will be granted if the defence raises privilege, unless the evidence of malice is so overwhelming that the judge is driven to the conclusion.....it would be perverse to acquit the defendant of malice. Thirdly, that in the face of this long established practice in defamation actions, the principles***

***enunciated by the House of Lords in American Cyanamid Corp. Vs. Ethicon Ltd. relating to interim injunctions, are not applicable in actions for defamation. These principles have evolved because of the value the court has placed on freedom of speech and I think also on the freedom of the press when balancing it against the reputation of a single individual who, if wronged, can be compensated in damages."***

The tort of defamation is anchored on the recognition of the individual's right to his good reputation. Subject to the various defences protecting the balancing of interest between freedom of speech and an individual's good reputation the law confers a cause of action on any person of whom defamatory matter is published. The defence of justification rests on the premise that the words complained of are true. Hence, a defendant who pleads justification must give particulars of the facts relied on as showing that the defamatory statement is true. In the case of **McDonald Corp vs. Steel (12)** it was held that:

***" The defendant should not plead justification unless he (a)believes the words complained of to be true ; (b) intends to support the defence at trial; (c) has reasonable evidence to support the plea or reasonable grounds for supposing that sufficient evidence to prove the allegation will be available at trial. "***

The defendants defence herein was a rolled up plea of justification and fair comment. Justification as a defence has already been dealt with in the

preceding paragraphs. In terms of Rules of the Supreme Court Order 18 rule (2) a defendant must clearly plead the defamatory comments which he contends are protected by the defence of fair comment. The statements complained of by the plaintiff in this matter include the following:

ZAMBIA DAILY MAIL EDITION OF 14<sup>TH</sup> JUNE 2011 AT PAGE 1

***"Sata's gay love historical "***

- (i) *Patriotic Front leader Michael Sata's support for homosexuality is as old as his political career with latest information revealing that he was a close associate of a Portuguese national who was deeply involved in sodomy in early 1980's.*
- (ii) *Francisco Vasco Dubrito Vale, a Portuguese national resident in the United States, is alleged to have been a homosexual, who was allegedly engrossed in acts of steamy sex which Mr. Sata was fully aware of.*
- (iii) *Mr. Mfula said in an exclusive interview on Sunday.....*
- (iv) *".....I want to tell you as it happened and as I know Mr. Sata. I knew Mr. Sata when he was District Governor, I knew him through a Mr. Fransisco Dubrito Vale, with whom he was friends. Mr. Dubrito used to invite me and my friends at his residence in Kafue where he would show us pornographic pictures and movies.*
- (v) *He would also make us drink Scotch Whisky VAT and later start kissing me and later have sex with me."*

- (vi) *.....One weekend whist I was at the residence, Mr. Sata came and he saw the circumstances we were in and did nothing about it.*
- (vii) *The debate about him ( Mr. Sata ) supporting gay rights has forced me to come out in the open. Mr. Mfula said.*

Excluding matters extraneous to contents of affidavits such as legal arguments appearing in paragraphs (g) and (h), the defendants in their affidavit in opposition gave the following as particulars relied on for the defences of justification and fair comment:

- (a) *In the 1980's, the plaintiff was Governor in Lusaka.*
- (b) *..... as Governor, the plaintiff was a friend to a Portuguese national...Francisco Vasco Dubrito Vale who practised homosexuality.*
- (c) *In about February, 2011, the plaintiff openly showed his support for homosexuality in an interview with the Danish Media by stating though falsely that the laws of Zambia recognise homosexuality.*
- (d) *In Denmark, homosexuality also known as civil union is not prohibited.*
- (e) *In making the interview with the Danish Media in February, 2011, the plaintiff knew or ought to have known that Denmark*



*was a pioneer in the world in accepting homosexuality and therefore the reasonable inference that the plaintiff is capable of going to any extent for the purpose of obtaining support and funding for his Presidential aspirations.*

(f) *That 2011 is an election year and the plaintiff who is aspiring for the high office of President must be prepared to be scrutinised.*

The first article was followed by a second on the same subject, which appeared in the ZAMBIA DAILY MAIL OF 15<sup>TH</sup> JUNE 2011 AT PAGE 1 and the heading of which read:

***"Sata condemned for gay love "***

In considering whether the statements are defamatory, learned author GATLEY on LIBEL AND SLANDER state at paragraph 27 -2:

The jurisdiction to grant interim injunction to restrain publication of defamatory statements is *"of a delicate nature"* which ought only to be exercised *"in the clearest of cases."* That was stated by Lord Esher M.R. in *Coulson and Coulson*, and it encapsulates the general approach of the court. The reluctance to grant peremptory injunctions is noted in the importance attached to the right of free speech. Thus the courts will only grant an interim injunction where:

(1) *The statement is unarguably defamatory;*

*(2) There are no grounds for concluding the statement may be true ;*

*(3) There is no other defence which might succeed;*

*(4) There is evidence of an intention to repeat or publish the defamatory statement. "*

I will now proceed to consider the affidavit evidence in the light of the requirements of above test in the order in which they appear.

*1. Is the statement unarguably defamatory?*

To suggest of a man aspiring for the highest office in the country that of presidency, that he is a law breaker for being supportive of sexual orientation which under section 156 of the Penal Code Cap. 87 of the laws of Zambia, is a criminal offence is unarguably defamatory.

*2. No grounds for concluding the statement to be true.*

In support of the suggestion in (1) facts which are purely hearsay from a source that has not categorically stated any involvement of the plaintiff in such activities discloses no grounds on which the court can come to the conclusion the statement could be true.

### 3. No other defence

The defendants pleaded justification and fair comment. Falsehood as earlier highlighted herein, defeats the defence of justification which in essence is truthfulness of the materials complained of. Fair comment, as a defence rests on "*honest comment*" and is defeated where there is overwhelming evidence of malice. According to GEOFFREY ROBERTSON AND ANDREW G. L. NICD, AUTHORS OF MEDIA LAW: The Rights of Journalists And Broadcasting Longman 2<sup>nd</sup> Edition 1990 At Pg. 54. Say:

***"In ordinary language, malice means "spite" or ill-will"; but in libel law, it generally refers to dishonest writing or reporting-the publication of facts which are known to be false or opinions which are not genuinely held.....for the careful and conscientious journalists or broadcaster, the legal meaning of "malice" provides vital protection for honest comment....."***

The importance of the Legal meaning of "Malice" in the defence of free speech was emphasised in **Horrocks vs. Lowe (13)**. Horrocks was a Tory Councillor whose companies had engaged in land dealings with a Tory contracted Local Authority. Lowe a Labour councillor launched an intemperate attack on Horrocks. At a council meeting, Lowe said of Horrocks:

***"His attitude was either brinkmanship, megalomania, or childish petulance.....he has misled the committee, the leader of his party, and his political and club colleagues."***

Although the occasion was protected by qualified privilege, which defence could only fail if the plaintiff could show the defendant was actuated by malice. Notwithstanding in ordinary parlance the utterances could be said to have been malicious, the House of Lords found that they were not malicious in law. Lord Diplock's speech, generally regarded as a classic exposition of the meaning of legal malice included the following observations:

***"what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published.....if he publishes untrue defamatory matter recklessly, without consideration or caring whether it be true or not, he is in this as in other branches of law treated as if he knew it to be false....."***

The plaintiff asserted that the heading **"Sata's gay love historical"** amongst other meanings also meant or was understood to mean that the plaintiff has been practising homosexuality since the 1980's which allegation the plaintiff denies in his statement of claim and paragraph 5 of his affidavit in support of the application.

In rebuttal the defendants did not deny publishing the materials complained of. What they denied is that the words in their ordinary and natural meaning bore and were understood to mean:

*4.1 that the plaintiff who was not only supporting gay rights now; was a friend of a Vasco Dubrito Vale who sexually molested one Mr. Joseph Mfula in 1980's. The plaintiff lied to the Danish journalist that Zambia has laws that support homosexuality and had thus lost integrity and Zambians must be wary of him as he is capable of selling the country for his selfish benefits.*

I find nothing in the facts pleaded on which the defence of fair comment could succeed.

#### *4. Intention to repeat publication*

There was here, a second article which I find establishes the requirement for meeting this test.

Coming to answering the question stated by Lord Esher, in **Coulson vs Coulson (14)** "*libel or no libel?*" I find this requirement at interlocutory stage, is what constitutes the distinction between the general principles applicable in the grant of interlocutory injunctive relief in ordinary cases in contrast to defamation cases. In ordinary cases interlocutory injunction will be granted when there is a case to be tried whereas in libel cases the converse is true, an interlocutory injunction will be granted, only where there is clearly no case to be tried.

The plaintiff's grievance as I understand it, is the "*sting*" of the articles complained of which tend to project him as not only an activist, but also a practising homosexual. Learned authors of HALSBURY'S LAWS OF

ENGLAND VOL. 28, 4<sup>TH</sup> EDITION re-issue at paragraph 189 on the defence of justification state:

***"Before pleading justification, a defendant should believe that the words complained of were true, intend to support the defence at trial and have reasonable evidence to support the plea or reasonable grounds to suppose that sufficient evidence to prove the allegations would be available at trial."***

In answer to the question "*libel or no libel?*" the court is required to take into account the whole material complained of, the onus being on the defence to disclose the facts relied on in support of their assertion of the truthfulness of the allegations. On the affidavit evidence now before me, there are no facts supporting the homosexual inclination or activism suggested by the articles. I find the said projection not supported by any facts suggesting truthfulness. Considering the timing, this being an election year and the plaintiff being an election presidential candidate. It strongly appears malice, actuated the projection of the plaintiff in the manner complained of. The defences of justification and fair comment being such as are defeated by falsehood and malice, respectively, I find, on the evidence now before me, the same may not be available to the defendants at the trial, in this regard.

The issue as I see it, is one where the journalist reporting what could be amiss or as was put in the case of **Bonnick vs. Morris (15)** where the defence of qualified privilege is raised, what is lacking is "responsible journalism". Responsible Journalism was defined to mean striking a balance between freedom of expression on a matter of public interest and

on matters of public concern on the one hand and protection of the reputation of an individual on the other hand.

In 1999, the House of Lords decision in the case of **Reynolds vs. Times Newspaper Ltd (16)** Lord Nicholls speaking for the majority set out a ten criteria test list against which "responsible journalism" can be judged. This is what has now come to be known as the Reynolds defence. This defence can be raised where it is clear that the journalist had a duty to publish an allegation, and the allegation, it later transpires, was actually wrong. The observations were as follows:

*"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 all 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 axes to 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.*

*This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case."*

In the 2006 case of **Jameel vs. Wall Street Journal Europe (17)** the Reynold's ruling was affirmed by the House of Lords. Lord Hoffmann in giving the Lead Judgment stated that, Lord Nicholl's criteria were not to be seen as obstacles or hurdles that any journalist had to overcome in order to avail him or herself of the privilege.

Considering the facts of this case against the backdrop of the Reynolds criteria. It is clear the guidance to be availed thereby, can put to rest most of the claims of plaintiffs in libel matters against journalists in our own nation, whilst at the same time promoting freedom of expression for the



common public good. This brings to fore the inescapable need for some form of effective mechanism in our jurisdiction to provide the much needed yardstick, against which the line marking "irresponsible journalism" can be drawn. This, coupled with appropriate disciplinary sanctions, would act as pre-emptory measures. It would assist in curbing the rampant journalistic malpractices lately witnessed, of which the court takes judicial notice.

However, I am unable to say at this stage of the proceedings, that the plaintiff may not be able to establish his claim at the hearing. In the circumstances of this case, where the plaintiff is aspiring for the highest office in the nation. Taking Judicial Notice of the fact he is leader of the major opposition party which has a wide following; I do not consider that damages would constitute an adequate recompense in the event of his success at trial. I find these to be exceptional circumstances, where it would be "just and convenient" to intervene and issue a restraining order limited to the suggestion as projects the plaintiff to be an activist as well as being inclined to the sexual orientation of homosexuality.

The application for interlocutory injunction is to that extent, accordingly granted. The defendants are hereby restrained either by themselves through their servants, agents or other persons howsoever from writing and/ or publishing or causing to be written and/ or published of the plaintiff, articles suggesting that the plaintiff is or tending to portray of him that he is involved in or with persons whose sexual orientation is homosexual for such purposes; or for reasons that he is similarly so inclined ; or that he is an advocate for the rights of such persons; until trial of the matter or until further order of the court. The Plaintiff through counsel having undertaken to pay such damages as the court may find the

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defendants to have suffered by reason of this order the same is hereby granted subject thereto.

Costs hereof will be for the plaintiff.

Leave to appeal is granted.

**J. K. K A B U K A**  
**JUDGE**