IN THE HIGH COURT OF ZAMBIA **2010/HP/1282**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MICHAEL CHILUFYA SATA	**PLAINTIFF**
AND	
CHANDA CHIMBA III	**1ST DEFENDANT**
ZAMBIA NATIONAL BROADCASTING CORPORATION	**2ND DEFENDANT**
MUVI TV LIMITED	**3RD DEFENDANT**
MOBI TV INTERNATIONAL LIMITED	**4THDEFENDANT**

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 2nd day of September, 2011.

For the plaintiff:	*Mr. L. Kalaluka of Messrs Ellis and Company.*
For the 1st and 2nd defendants:	*Mr. S.B. Nkonde, SC of Messrs SBN Legal Practitioners, with Mr. R. Malipenga of Messrs Robson Malipenga and company.*
For the 3rd defendant:	*Professor M. P. Mvunga, SC, of Messrs Mvunga Associates.*

RULING

Cases referred to:

American case

1. *Hilton v Brounskill, 481 U.S. 770 (1987).*

English cases

2. *Wilson v Church (No.2) [1879] 12 Ch D 454.*
3. *Atkins v The Great Western Railway Company [1886] 2 T.L.R. 400.*
4. *Monk v Batram [1891] 1 Q.B. 346.*
5. *American Cynamid Company v Ethicon Limited [1975] A.C. 396.*
6. *Duport Steels Limited and Others v Sirs [1980] W.L.R. 112.*
7. *Linotype-Hell Finance Limited v Baker [1992] 4 All E.R. 887.*
8. *Ketchum International Plc v Group Public Relations Holdings Ltd and Others [1996] 4 ALL E.R. 374.*
9. *Reynolds v Times Newspapers Limited, and Others [2001] 2 A.C. 127.*
10. *Bonnick v Morris [2003] 1 A.C. 300.*
11. *Jameel v Wall Street Journal (2007) A.C. 359.*

Zambian cases

1. *Nkhata and Others v Attorney General (1966) Z.R. 124.*
2. *Lynons Broke Bond v Zambia Tanzania Road Services (1972) Z.R. 317.*
3. *Shell and BP Zambia Limited v Conidaris and Others (1975) Z.R. 174.*
4. *Mulenga and Others v Investrust Merchant Bank Limited (1999) Z.R. 101.*
5. *Manal Investment Limited v Lamise Investment Limited (2001) Z.R. 24.*
6. *Nyampala Safaris Limited and Others v Zambia Wildlife Authority and Others SCZ/8/179/2003 (unreported).*
7. *Admark Limited v Zambia Revenue Authority (2006) Z.R. 43.*
8. *Nyambe v Barclays Bank (Zambia) Limited Plc (2008), Vl 2, Z.R. 195.*
9. *Kumbi v Zulu (2009) Z.R. 183.*

Legislation referred to:

1. *Supreme Court Act, cap 25 s.4.*
2. *High Court Act, cap 27, Order XLVII, Rule 5.*
3. *Rules of the Supreme Court (White Book) Order 59, Rule13.*
4. *Act Number 6 of 2011 (An Act to Amend the English Law (Extent of Application) Act.*
5. *Act Number 7 of 2011 (An Act to Amend the High Court Act), s. 10.*
6. *The Electoral (Code of Conduct) Regulations, 2011.*

7. *Act Number 14 of 2002 (An Act to Amend the English Law (Extent of Application) Act (repealed).*

Works referred to:

1. *Michael A. Jones, Clerk and Lindsell on Torts, Twentieth Edition, (Thomson Reuters Legal Limited, 2010).*
2. *William Blair QC, Lord Brennan QC, Lord Justice Jacob, and Justice Langstaff, Bullen, and Leake, and Jacobs Precedents of Pleadings, sixteenth Edition, volume 1 (London Sweet and Maxwell, 2008).*

BACKGROUND

The procedural history of this case is as follows: this action was commenced by way of writ of summons on 26th November, 2010. In the writ of summons, Mr. Sata requested for, amongst other remedies and reliefs, an order for interim injunction to restrain the defendants from publishing, or broadcasting words, and images of himself through a television programme entitled: *"Stand up for Zambia."* After considering the affidavit in support of the application for the interim injunction; the various affidavits in opposition; the statement of claim; the sundry defences; and ultimately, the written submissions by counsel, I reached without hesitation, the conclusion that is was necessary to protect the reputation of Mr. Sata through the grant of an interim injunction. Accordingly, in a ruling rendered on 2nd August, 2011, I granted the interim injunction restraining the defendants from publishing or broadcasting words, or images through the same television programme styled as: *"Stand up for Zambia,"* until after trial of this action. The defendants are wholly dissatisfied with my ruling, and have since appealed to the Supreme Court.

I have again been approached through summons, with a request that I stay the interim injunction granted on 2nd August, 2011. The summons dated 5th August, 2011, have been taken out of the principal registry, pursuant to Order

XLVII of the High Court Rules, and Order 59/13/1 of the Rules of the Supreme Court. I will revert to these orders in a moment. The summons are complimented by three affidavits.

The first is sworn by Mr. Chanda Chimba III; the 1st defendant in this action. The second affidavit is sworn by Mr. Osward Mutale. Mr. Mutale is the Controller of Television for the Zambia National Broadcasting Corporation (ZNBC); the 2nd defendant in this action. The contents of the affidavits sworn by Mr. Chimba III and Mr. Mutale are substantially similar. I will therefore deal with their contents simultaneously. The gravamen of the affidavits is simply this: on 3rd August, 2011, Mr. Chimba III, and ZNBC filed a Notice of Appeal to the Supreme Court. In the meanwhile, Mr. Chanda Chimba III, and ZNBC contend that the interim injunction granted on 2nd August, 2011, severely restricts their freedom of expression. In particular, Mr. Chimba's grievance is that as a freelance journalist, he is unable to participate in the public debates relating to the Presidential and General elections, scheduled to be held on 20th September, 2011. Similarly, the grievance of ZNBC is that the interim injunction in issue has adversely affected its broadcasts in the run up to the Presidential, and General elections.

Furthermore, the combined contentions of Mr. Chimba III, and ZNBC are as follows: the that it is unlikely that the trial of this action, and the pending appeal before the Supreme Court, will be heard and determined, before the elections on 20th September, 2011; no amount of damages will compensate them; the appeal before the Supreme Court is likely to succeed, because they maintain that I erred by making findings of fact relating to the allegations of defamation at the interlocutory stage, and by also ordering the total ban of the programme; instead of ordering a partial ban relating to the specific materials, defamatory of Mr. Sata.

The 3rd defendant; Muvi TV, also filed an affidavit in opposition on 3rd August, 2011. The affidavit was sworn by Mr. Alfred Greigg Tembo. Mr. Tembo is Head of Administration for Muvi TV. He deposed to the following: that Muvi TV has also since filed a Notice of Appeal in the Supreme Court. And since the issues raised in my Ruling are intricate, and touch on freedom of expression in the pre-election period, a stay of the injunction is necessary, pending determination of the appeal before the Supreme Court.

On 12th August, 2011, Mr. Sata, filed an affidavit opposing the stay of the interim injunction. In the affidavit, Mr. Sata deposed to the following matters: that the publication, and broadcast of *"Stand up for Zambia,"* was wholly defamatory, and its sole intention, and objective was to maliciously malign, and discredit him in the estimation of right thinking members of society. Mr. Sata further contends that participation in the public debates in the run up to the presidential and General elections is not synonymous with defaming him.

On 16th August, 2011, Mr. Chimba III, replied to Mr. Sata's affidavit. Mr. Chimba III contends that the question whether or not the publishing and broadcasting of *"Stand up for Zambia,"* is defamatory of Mr. Sata, can only be determined at trial. Further, Mr. Chimba III, denied the contention by Mr. Sata that the sole intention and objective of his programme was to maliciously malign and discredit him. Lastly, Mr. Chimba III, argued that Mr. Sata's opposition to the stay is not justified, because he cannot in any event fore tell the contents of the future programmes of *"Stand up for Zambia*."

The summons to stay the injunction, were given a return date of 11th August, 2011. On the material date, Mr. Nkonde SC, indicated that he was ready to proceed with the application on behalf of Mr. Chimba III, and ZNBC. However,

Mr. Kalaluka, counsel for Mr. Sata, was not ready to proceed because, he had not yet received instructions from his client. In the circumstances, he requested that the matter be adjourned to enable him obtain instructions, and possibly file an affidavit in opposition, which I referred to earlier on. Professor Mvunga, SC; Mr. Nkonde SC; and Mr. Malipenga, counsel for the defendants, had no objection to the application. I therefore allowed the application, and adjourned the matter to 17th August, 2011. Since I was unsure of my return to the station on 17th August, 2011, after a visit to Livingstone, I directed counsel to file written submissions on or before 16th August, 2011. As it turned out, I did not return on time for the hearing on 17th August, 2011. Thus on 17th August, 2011, Mr. Nkonde, SC, filed the submissions on behalf of his clients. And Professor Mvunga, SC, in turn filed his submissions on 18th August, 2011. Further, on 25th August, 2011, Mr. Nkonde, SC filed submissions in reply.

SUBMISSIONS

In the submissions filed on 17th August, 2011, Mr. Kalaluka argued as follows: that the application filed by the defendants is ill fated, and frivolous, because it seeks to cause me to contradict myself by *"discharging the injunction."* (I suppose Mr. Kalaluka really meant to refer to the staying of the injunction which was granted on 2nd August, 2011). Mr. Kalaluka further argued that I had considered all the relevant facts, and laws before exercising the equitable jurisdiction, and discretion to grant the interim injunction. Mr. Kalaluka went on to submit as follows: that the sole objective of the *"Stand up for Zambia*" programme was to defame Mr. Sata. And further that in any case, all the defendants have alternative means of enjoying their right to expression in the various public debates and forums available in the run up to the elections. And that the programme in issue, serves no useful purpose, other than defaming Mr. Sata.

Mr. Kalaluka also argued that for a stay of an injunction to be granted, a plaintiff is required to demonstrate that the appeal is likely to succeed on appeal. In aid of this submission, Mr. Kalaluka drew my attention to the case of *Mulenga and Others v Investrust Merchant Bank Limited (1999) Z.R. 101*, where it was held that in terms of our rules of Court, an appeal does not automatically operate as a stay of execution. And further that the Court is entitled to preview the prospects of the proposed appeal.

Mr. Kalaluka also submitted that the arguments advanced by the defendants in their affidavits in support are not new, because I considered them in my Ruling of 2nd August, 2011. He therefore pressed that the defendants have not only lamentably failed to adduce new arguments to justify the stay of the injunction, but they have also not clearly, and specifically demonstrated that their appeal has prospects of succeeding on appeal.

Mr. Kalaluka further drew my attention to the case of *Nyampala Safaris Zambia Limited, and Others v Zambia Wildlife Authority, and Others SCZ/8/179/2003* (unreported), where the following observations were made by the Supreme Court:

"A stay of execution is granted on good and convincing reasons. The rationale of this position is clear. Which is that a successful litigant should not be deprived of the fruits of litigation as a matter of course. The application must therefore clearly demonstrate the basis of which a stay should be granted."

Mr. Kalaluka went on to draw my attention to the case of *Manal Investment Limited v Lamise Investment Limited (2001) Z.R. 24*, where the Supreme Court again, held that, first, in terms of section 4 of the Supreme Court Act, a single judge has no power in matters of injunction, because it involves a decision of an appeal, or a final decision on the matter. Second, that where the High Court

has refused to grant an interim injunction, the aggrieved applicant may have no immediate remedy. Thus on the basis of the *Manal Investment Limited case*, Mr. Kalaluka submitted that where an interim injunction has been refused by the High Court, an aggrieved applicant may not have an immediate remedy. Such remedy may only be available on appeal.

Mr. Kalaluka, went on to argue as follows: that freedom of expression is not limitless. And the defendants are in any event expected to practice "*responsible journalism,"* as held in my Ruling. He also maintained that I was on firm ground when I ordered the total ban of the programme, because the ban was consistent with the claim on the writ of summons.

In addition to the foregoing, Mr. Kalaluka submitted that the defendants have not demonstrated what loss they would suffer if the injunction is not stayed. Yet, I held in my Ruling that Mr. Sata stands to suffer irreparable damage from the publications by the defendants. He also pointed out that Mr. Sata has in this case undertaken to pay damages for any loss suffered by the defendants. Lastly, he submitted that the various findings that I made, were consistent with the law and practice in defamation cases.

On 17th August, 2011, Mr. Nkonde, SC, also filed submissions on behalf of the 1st defendant. In the first, he pointed out that the application to stay the injunction was made pursuant to Order 59, Rule 13, of the Rules of the Supreme Court. Mr. Nkonde, SC, went on to argue as follows: that appeals take long to determine. In the meanwhile, the elections are scheduled to take place on 20th September, 2011. And public debates relating to elections are currently in progress. Yet, the injunction granted on 2nd August, 2011, has restricted the 1st and 2nd defendants from participating in the debates. Mr. Nkonde, SC, also

pointed out that the restriction affects future publications, broadcasting, and distribution of the programme in issue. Thus Mr. Nkonde, SC, urged me to secure a successful outcome of the appeal, by staying the injunction; else a successful appeal would be rendered nugatory. Lastly, he pressed that Mr. Chimba III seeks to resume, and broadcast the programme within the confines of the Electoral Code of Conduct.

On 18th August 2011, Professor Mvunga, SC, filed his submissions on behalf of Muvi TV Limited. The gravamen of the submissions may be stated as follows: that in the application for a stay of execution the party making the application merely needs to show that the appeal is likely to succeed. In this case the appeal is likely to succeed because it is only at the trial that evidence will emerge to prove the defences of justification, fair comment, and qualified privilege. Where fair comment, and qualified privilege are pleaded, an interim injunction, should not be granted, unless the plaintiff can show that the defences will fail, or that there is malice in the publication.

Professor Mvunga, SC, pointed out that in my Ruling of 2nd August, 2011, I run through all the defences and made findings of fact. He submitted that the most opportune time to make findings of facts, is at the end of the trial, when evidence of the facts relied on has been adduced. He argued that my findings of facts at the interlocutory stage, that the various allegations have not been justified, can on appeal be faulted.

Professor Mvunga, SC also drew my attention to the affidavit in opposition of Muvi TV Limited, which was sworn by Mr. Tembo, Head of Administration for the network. In so doing, he relied on the assertion by Mr. Tembo that the copies of the publications in the *Post Newspaper* relating to the remarks made

by Mr. Sata, marked *"AGT1," "AGT2, "AGT4," "AGT5,"* and *"AGT6,"* are few of the many instances that Mr. Sata has been disparagingly attacking his political adversaries. In view of the publications referred to above, Professor Mvunga SC, posed the question whether or not Mr. Sata had not put his character in issue, for the electorate to know his suitability to ascend to the office of President.

In so far as qualified privilege is concerned, Professor Mvunga, SC, noticed that I relied on *"Reynold's privilege,"* and "*Reynold's public interest defence."* In this respect, he submitted that it cannot be said that the common law qualified privilege has been outsted by either the *"Reynolds privilege,"* or indeed the *"Reynolds public interest defence."* Professor Mvunga SC, maintained that even if these defences were to apply, the ingredients of the defences summarised under the aegis of *"responsible journalism,"* are questions of fact that can only be established at the trial of this action.

Professor Mvunga, SC, also pointed out that in my Ruling of 2nd August, 2011, I observed that the statement complained of does not contain Mr. Sata's side of the story. Professor Mvunga, SC, argued that Mr. Sata's side of the story is known from his previous disparaging remarks of his opponents. To this end, Professor Mvunga, SC relied on the various copies of the publications from the *Post Newspapers* which are produced in the affidavit of Mr. Tembo. He pressed that he who seeks equity, must come to equity with clean hands.

Professor Mvunga, SC, readily acknowledged that his submissions ranged far, and wide; just short of arguing the appeal before me. He justified this approach by arguing that he intended to show that proposed appeal is not only meritorious, but also raises several triable issues. Let me state at once that an application for a stay of an interim injunction pending appeal, should not take

the form of trial run of the appeal before a trial judge. What is required to be demonstrated, in very broad terms, is that there is a serious and meritorious appeal, which is likely to succeed on appeal.

Lastly, Professor Mvunga SC submitted that the structure of the interim injunction which I granted on 2nd August, 2011, prohibits all future productions of the programme *"Stand up for Zambia,"* even if the future programmes were not to be defamatory. Thus the structure of the order, he maintained, has the effect of a gag order which is undesirable, particularly in an election year, when the right to expression should be uninhibited up to the poll day.

On 25th August, 2011, Mr. Nkonde, SC, filed submissions in reply. The submissions are as follows: first, he maintained that I had jurisdiction to stay the Ruling of 2nd August, 2011; pending the determination of the appeal to the Supreme Court. Second, that the appeal to the Supreme Court is meritorious, and is therefore likely to succeed. Third, that if I declined to grant the stay, the appeal by the defendants would be rendered nugatory. In aid of this particular submission, my attention was drawn to the case of *Wilson v Church [No. 2] [1879] 12 Ch D 454,* where the Court observed as follows:

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory."

Lastly, he argued that I will not contradict myself by granting the stay. This submission is reinforced by the case of *Ketchum International Plc v Group Public Relations Holdings Limited and Others [1996] 4 A:: E.R. 314,* where it was observed that:

"Where an unsuccessful defendant has to obtain leave to appeal and seeks a stay of execution, for example in a possession action, this Court will normally

grant a stay if it grants leave to appeal, since otherwise a successful appeal will be of no effect."

THE LAW

I am indebted to counsel for their submissions and arguments. The question that falls to be resolved in this application is in my opinion a very narrow one. Namely, should I, or, should I not stay, or suspend the operation of the interim injunction granted on 2nd August, 2011__ and consequently allow the defendants to resume running the programme, *"Stand up for Zambia,"* on their networks. In order to answer the preceding question, it is necessary in my opinion, to put in proper perspective the law relating to stay of execution of judgments, rulings, or orders generally. The starting point in this respect are the High Court rules. Order XLVII, Rule 5, is in these words:

"An appeal shall not operate as a stay of execution, or proceedings under the judgment, or a decision appealed from, except so far as the Court below or the Court may order, and no immediate act, or proceeding shall be invalidated, except so far as the Court below may direct."

The basic principle that emerges from the rule referred to above is that an appeal does not operate as a stay of execution. Therefore, in order for a judgment, or any decision appealed from to be stayed, the Court is required to order, or direct to that effect.

Reliance has also been placed by the 1st and 2nd defendants an Order 59, Rule 13, of the Rules of the Supreme Court. However, before I consider Order 59, Rule 13, it is instructive to note that the amended section 10 of the High Court Act is now expressed in the following terms:

"The jurisdiction vested in the Court [High Court] shall as regards practice, and procedure, be exercised in the manner provided by this Act [High Court Act], the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or any other written law, or by such rules, orders, or directions, of the Court as may be made under this Act [High Court Act], or such written, law and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England, and subject to subsection (2), the law, and practice applicable in England in the High Court of Justice, up to 31st December, 1999."

Subsection 2 of section 10 goes on to provide that:

"The Civil Court Practice, 1999 (Green Book) of England, and any civil court practice rules issued in England after 31st December, 1999, shall not apply to Zambia."

The amendment of section 10 of the High Court Act was effected by Act Number 7 of 2011, dated 12th April, 2011. It must also be noticed that section 2 of the English Law (Extent of Application) Act was also recently Amended by Act Number 6 of 2011__ an Act to amend the English Law (Extent of Application) Act. The essence of the amendment of the English Law (Extent of Applicants Act, at any rate, is simply the removal of paragraph (e), which was inserted by Act Number 14 of 2002___ An Act to amend the English Law (Extent of Application) Act, enacted on 31st December, 2002. Paragraph (e) which has now been deleted, had previously, and wholly incorporated the White Book in our own rules of procedure. (See the case of *Kumbi v Zulu (2009) Z.R. 183 at page 185).* Thus the current position is that the White Book no longer enjoys the force of law in itself. The White Book is to be resorted to, only when it is necessary to fill a *lacuna,* or gap in our own rules of procedure.

To continue with the narration of the law in point, Order 59, Rule 13 provides that:

"*13 (1) Except so far as the Court below or the Court of Appeal or a single judge may otherwise direct___*

a) *An appeal shall not operate as a stay of execution, or of proceedings under the decision of the Court below.*
b) *No intermediate act or proceeding shall be invalidated by an appeal.*

(2) On appeal from the High Court, interest for such time as execution has been delayed by the appeal shall be allowed unless the Court otherwise orders.

It is instructive to note that under Order 59/13/5, the following observation is made.

"Injunctions__ The stay of on injunction pending appeal can pose special problems. The effect of an injunction may be very serious so far as a defendant is concerned, and if it proves on appeal to have been wrongly granted, he may be left without remedy. Accordingly, it may well be appropriate where a defendant asks for a stay of injunction pending appeal to consider whether the successful plaintiff is prepared to give a cross-undertaking in damages should the appeal succeed..."

I will revert to the subject of stay of injunction, and cross undertaking in damages in due course.

In the meanwhile, I will proceed to consider the general principles relating to the stay of execution. In so doing, I will consider a line of both English, and Zambian cases, on the subject. The first such case to be considered is the case of *Wilson v Church (No. 2) (1879) 12 Ch D 454*. The facts of this case are that the plaintiff brought an action on behalf of himself, and all other holders of Bolivian bonds issued in connection with the construction of a railway against the trustees for the bond holders, and not applied to the payment of the work on the railway.

The plaintiff failed before Fry J, but succeeded on appeal. Based on prior authority, it was said that Fry J, having dismissed the action had no jurisdiction to restrain the trustees from paying the money out until the determination of the appeal. On this assumption, the Court of Appeal granted the injunction sought pending determination of the appeal to it. When the

trustees lost in the Court of Appeal, they sought a similar injunction to restrain disposal from the trust to the bond holders pending appeal to the House of Lords, which at that time enjoyed without leave. The Court again granted the injunction. In the course of the judgment, Cotton L.J. observed as follows:

"*But then there comes the question whether, or not that part of the order which directs payment to the bondholders should be stayed. I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory...*"

The second case to be considered is the case of *Atkins v The Great Western Railway Company [1886] 2 T.L.R. 400.* In this case the plaintiff had obtained judgment for £ 350. Therefore, an application was made on behalf of the defendant for a stay of execution pending a motion to the Divisional Court to set aside the judgment. The case was tried at Birmingham Assizes, and an application for a stay was refused there by the trial judge, and subsequently by a Divisional Court. There was no affidavit as to means of the plaintiff, but in support of the application, it was stated that a great deal of prejudice had been imported into the case, and that there were the strongest grounds, for the appeal.

The Master of Rolls said in the *Atkins case* that it would not undertake to say that the Court of Appeal would never listen to what happened at the trial in order to see whether they would grant a stay of execution, but, as a general rule, the only ground for such a stay was an affidavit showing that if the damages, and costs were paid, there was no reasonable probability of getting them back even if the appeal succeeded. He would not say that the Court would not interfere for some other reason, but that there were strong grounds for an appeal was no reason, for no one ought to appeal without strong grounds for doing so.

The third case relates to the case of *Monk v Bartram [1891] 1 Q.B. 346*. This case was tried by Grantham, J., with a jury, and the verdict, and judgment passed for the plaintiff. A stay of execution was applied for but refused. Subsequently, an application was made for stay pending hearing of a motion in the Court of Appeal for a new trial, the ground of the motion being misdirection. In delivering the judgment of the Court of Appeal, Lord Esther, M.R. observed as follows at page 346:

"It has never been the practice in either case to stay execution after the judge at the trial has refused to grant it, unless special circumstances are shown to exist. It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the Court will grant a stay of execution."

On the facts of the *Monk case*, no special circumstances were brought forward, the only ground being that a motion was to be made for a new trial on the ground of misdirection. Thus the application was refused.

The fourth case that will be considered is the case of *Linotype-Hell Finance Limited v Baker [1992] 4 ALL E.R. 887.* The facts of this case are that the applicant applied to the Court of Appeal for an order that execution of an order made by the trial judge sitting as a judge of the High Court in Queens Bench, be stayed pending the hearing of the defendants appeal to the Court of Appeal.

In delivering judgment of the Court of Appeal, Stanghton L.J. observed as follows: at page 888, F - H:

"In the Supreme Court Practice 1991, vol 1, paragraph 59/13/1 there are a large number of nineteenth century cases cited as to when there should be a stay of execution pending appeal. At a brief glance they do not seem to reflect the current practice in this Court; and I would have thought it was much to be desired that all the nineteenth century cases should be put on one side, and one

should concentrate on the current practice. It seems to me that if a defendant can say that without a stay of execution he will be ruined, and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution. The passage quoted in the Supreme Court practice from Atkins v Great Western Railway Company [1886] 2 T.L.R. 400; "As a general rule the only ground for a stay of execution is an affidavit showing that if the damages, and costs were paid there is no reasonable probability of getting back if the appeal succeeds," seems to be far too stringent a test today."

The fifth case to be discussed is what I consider to be a seminal Zambian case on applications for stay. This is the case of *Mulenga and Others v Investrust Merchant Bank Limited (1999) Z.R. 101*. The facts of the case were that the respondent commenced an action to recover a sum of three hundred million kwacha (K300, 000 000=00), from the appellants, which had been secured by a mortgage over the third appellant's hotel. Later, the parties entered into a consent judgment. After settling the consent judgment, the appellants applied to a single judge of the Supreme Court to stay execution of the consent judgement, on the ground that the order which was drawn was not counter signed by counsel for the appellants. The application was refused by the single judge, hence the appeal to the Supreme Court.

In a judgment delivered by the erstwhile Chief Justice Ngulube, the Supreme Court held at page 102 that:

"In terms of our rules of Court, an appeal does not automatically operate as a stay of execution, and it's utterly pointless to ask for a stay solely because an appeal has been entered. More is required to be advanced to persuade the Court below or this Court that it is desirable, necessary, and just to stay a judgment pending appeal. The successful party should be denied immediate enjoyment of a judgment only on good and sufficient grounds."

The Supreme Court went on to observe at page 102 as follows:

"In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of the proposed appeal."

The last case that I will consider is the case of *Manal Investment Limited v Lamise Investment Limited [2001] Z.R. 24*. This was an appeal against the refusal of the High Court to grant an interim injunction. In a judgment delivered by the then Acting Deputy Chief Justice Sakala, the Supreme Court observed at page 26 that:

"The point must however, be emphasized that the grant or refusal or an injunction is a matter involving the decision of an appeal or a final decision. Thus a single judge has no power to determine a matter involving a decision of an appeal, or final decision (section 4 of the Supreme Court Act, cap 25). We are mindful that this position is bound to cause difficulties in practice as the Supreme Court does not sit every day. Thus in case of urgency, where the High Court has refused to grant an interim injunction, the aggrieved applicant may have no immediate remedy, and by the time the appeal is heard, irreparable damage may already have been caused. There is therefore, need to look at the provision relating to appeal in injunction matters."

It goes without saying that the issue before me is not about the grant, or refusal to grant an interim injunction. But rather it is an application to stay the interim injunction granted on 2nd August, 2011. Thus the *Manal Investment Limited case* is therefore not germane to this application.

What emerges from consideration of the line of both English and Zambian cases is in my opinion this: in terms of the rules of Court, the entry of an appeal does not automatically operate as a stay of execution. More is required to be advanced or shown in order to persuade a trial Court, or an appellate Court for that matter, that it is desirable, necessary, or just to stay a judgment, or a ruling pending an appeal. Be that as it may, when a party is appealing, exercising his undoubted right of appeal, a Court ought to see to it that if there is a real likelihood that the appeal might succeed, it should not be rendered nugatory.

It must also be further shown either that special circumstances exist to warrant the grant of stay, or that without a stay a defendant stands to be ruined, or suffer irreparable injury. Whatever the case, some special ground, or reason should be shown to exist. It is impossible to enumerate in advance all the matters that might be considered to constitute special circumstances. But it may nonetheless be said that the allegations that there has been a misdirection; that the judgment was against the weight of the evidence; or that there was no evidence to support it; are not special circumstances on which the Court will grant a stay of execution.

It must also be noticed that in exercising the discretion whether or not to grant a stay, a Court is entitled to preview the prospects of the proposed appeal. The rationale for these stringent conditions, or criteria in exercising the discretion to grant a stay, is that a successful party should not be denied immediate enjoyment of the fruits of the judgment, or ruling, unless good, and sufficient grounds are advanced, or shown.

HILTON V BRAUNSKILL

I will now proceed to apply the law to the facts of this case. In so doing, I am persuaded to employ the framework set out in the leading American case of *Hilton v Braunskill, 481 US. 770 (1987).* The facts of the case were that the respondent, a prisoner serving a State Court sentence, filed a *hebeas corpus* petition in the Federal District Court, which found that his constitutional rights had been violated at his State Court trial, and ordered that a writ of *harbeas corpus "shall issue unless within 30 days."* The State granted a new trial. The Court subsequently denied the petitioner's motion to stay its order pending appeal, basing its denial on Third Circuit authority that, under Rules, 23 (c), and (d), a Federal Court deciding whether to release a successful *habeas*

petitioner could consider only the risk that the prisoner would not appear for subsequent proceedings, not his danger to the community, and finding that the petitioner had failed to show such risk in that case. The Court of Appeals denied the petitioners motion for a stay of the District Court order releasing the respondent.

On appeal to the Supreme Court of United States, it was held that in deciding under Rules 23 (c) and (d) whether to stay pending a District Court order granting relief to a *habeas* petitioner, Federal Courts are not restricted to considering only the petitioners risk of flight. The history of Federal *habeas corpus* practice indicates that a Court has broad discretion in conditioning a judgment granting *habeas* relief, and a Court's denial of enlargement to a successful *habeas* petitioner pending review of the habeas order has the same effect as a stay of that order. Since *harbeas corpus* proceedings are civil in nature, federal Courts in deciding under the Rule whether to release a successful *harbeas* petitioner pending the State's appeal, should be guided by the traditional standards governing stays of civil judgments. Thus the standards for granting a stay of injunction are similar to those used to evaluate injunctive relief in the first instance. The Supreme Court set forth the following factors:

1. Whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
2. Whether the applicant will be irreparably injured absent a stay;
3. Whether the issuance of the stay will substantially injure the other parties interested in the proceedings; and
4. Where the public interest lies.

I will therefore proceed to apply the framework, or criteria set out above, to the facts of this case.

ANALYSIS OF FACTORS.

HAVE THE DEFENDANTS MADE A STRONG SHOWING THAT THEY ARE LIKELY TO SUCCEED ON MERITS.

Professor Mvunga, SC, submitted with considerable force as follows: first, that in an application for stay of execution, the party making the application needs to show that the appeal is likely to succeed. In this case it is contended that the appeal is likely to succeed, because it is only at trial that evidence will emerge to prove the defences of justification, fair comment, and qualified privilege. Thus he pressed that the most opportune time to make findings of fact, is at the end of the trial, when evidence of the facts relied on has been adduced. He further pressed that it is erroneous to make findings of fact at the interlocutory stage.

Second, he submitted that the common law qualified privilege has not been outsted by either the "*Reynolds privilege's, or Reynold's public interest defence."* In the alternative, argued that even if the "*Reynolds privilege*," and *"Reynolds public interest defence,"* were to apply, their ingredients as summarised under the rubric of *"responsible journalism,"* involve questions of fact, which can only be established at the trial of the action

Third, he pointed out that in my Ruling of 2nd August, 2011, I held that the statement complained of by Mr. Sata does not contain his side of the story. Yet Mr. Sata's side of the story is discernable from the various disparaging remarks of his political adversaries as published on divers occasions by the *Post Newspaper*. Ample evidence to that effect was clearly laid before me. Lastly, he submitted that since the interim injunction affects future programmes, which may in any event not be defamatory, the interim injunction has the effect of a gag order.

I will now pass to consider these submissions. First, it is undoubted that I have jurisdiction to grant an interim injunction to restrain further publication of a libel or slander. An interim injunction however will not be granted unless it can be clearly demonstrated that there is no defence, or at least there is no defence to the claim with a realistic prospect of success. (See Michael A. Jones, *Clerk and Lindsell on Torts,* Twentieth Edition, (Thomson (Reuters (Legal) Limited 2010), paragraph 22 – 256 at p 1580; and also Lord, William Blair QC, Lord Brennan QC, Lord Justice Jacob and, Justice Langstaff, Bullen and Leake, and Jacobs Precedents of Pleadings, (sixteenth edition volume 1, (London Sweet, and Maxwell 2004), paragraph 29 – 28 at page 554).

I admit that at the interlocutory stage, the evidence is on paper, and therefore it is difficult to assess it properly, and thoroughly. However, where a claimant asserts that the defences raised by a defendant are not likely to succeed at trial, a trial judge is obliged, and expected to make a determination, or reach a finding of fact in response to such an assertion. In so doing, a trial judge can, and should, in my opinion, evaluate the material, or evidence before him at that stage of the proceedings; interlocutory stage. The evaluation in my opinion involves a delicate balancing exercise between two competing interests. Namely, the reputational rights on one hand, and the public interest in freedom of expression on the other hand. In light of the foregoing, I therefore do not accept the submission by Professor Mvunga, SC, that it is a misdirection for a trial judge at the interlocutory stage to make a finding of fact, or more precisely to undertake an assessment of the prospects of the defences succeeding at trial.

Second, the defence of qualified privilege recognises that on certain occasions a person should be free to publish defamatory matter, provided he acts in good faith, even though it may prove to be false. The scope of the defence of qualified

privilege at common law in the context of newspaper publications on matters of public interest was, however reviewed, and expanded in *Reynolds v Times Newspapers [2001] 2 A.C. 127.* For completeness sake, I will now advert to the *Reynolds's case* in detail. The facts of the case were that the claimant an Irish politician, sued the defendant newspaper for libel in respect of allegations relating to a political crisis in the Irish Republic, and to his resignation from the post of Tigoiseach. Granting the claimant a new trial judge's summing up, the Court of Appeal considered the defendants claim that such statements in newspapers relating to the conduct of individuals in public life should be covered by qualified privilege. The Court accepted that the common welfare of British democracy was best served by, *"ample dissemination to the public of information concerning, and vigorous discussion of matters relating to the public life of the community, and those who participated in it,"* but concluded that the defendants had not satisfied the test required. The defendants appealed to the House of Lords, where the law relating to qualified privilege in relation to communication by the media was thoroughly examined. In the words of Lord Steyn: *"Important issues regarding the reconciliation of the colliding right of free speech, and the right to reputation need to be considered in the light of the new landscape."*

In dismissing the appeal, Lord Steyn, Lord Nicholls, Lord Cooke, and Lord Hobhouse, held that there should not be a new category of *"political information,"* which would invariably attract a *"generic*" qualified privilege, but bearing in mind the importance of freedom of expression, such protection might be available to the defendants if in all the circumstances the judge deemed appropriate.

Lord Nicholls formulated a 10 point criteria which the Court should consider in determining whether the public was entitled to know as follows:

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

1. *The seriousness of the allegation. The more serious the charge, the more the public is misinformed, and the individual harmed, if the allegation is not true.*
2. *The nature of the information, and the extent to which the subject matter is a matter of public concern.*
3. *The source of 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. *Steps taken to verify the story.*
5. *The status of the information. The allegation may have already been the subject of investigation which commands respect.*
6. *The urgency of the matter. News is often a perishable commodity.*
7. *Whether comment was sought from the [claimant]. He may have information others do not possess, or have not disclosed. An approach to the [claimant] will not always be necessary.*
8. *Whether the article contained the gist of the [claimant's] side of the story.*
9. *The tone of the article. A newspaper can raise queries, or call for an investigation. It need not to adopt allegations as statement of fact.*
10. *The circumstances of publication, including the timing*

This list is not exhaustive. The weight to be given to the various factors will vary from case to case."

The Reynolds decision was revisited by the House of Lords in *Jameel v Wall Street Journal Europe [2007] A.C. 359*. The facts in the *Jameel case* were that the defendants published a report under the heading "*Saudi officials monitor certain bank accounts,"* and also stating that: *"[the] Focus is on those with potential terrorist ties."* There were also reports that the authorities in the USA were interested in several Saudi nationals. The claimants sued, and the jury found that the statements were defamatory of them. The defendants pleaded qualified privilege on the ground that this was clearly within the ambit of *"Reynolds privilege*." The defence failed at first instance, and before the Court of Appeal, but was upheld in the House of Lords.

In the course of the judgment, Lord Hoffman revisited the speech by Lord Nicholls in *Reynolds,* and sought to clarify what was meant by "*Reynolds privilege."* He said the use of "*privilege"* although historically accurate, may now be misleading. It is the material being published which is privileged, not the occasion, on which it is published. He suggested that it might be more accurately be called the "*Reynolds public interest defence,"* rather than "*privilege*." He went on to deliver a rejoinder to judicial criticisms of the *Reynolds* concept of *"responsible journalism,"* which had been described by Eady J as too vague, and subjective. Upholding the test, he said that it was an objective test, and no more vague than standards such as "*reasonable care"* used in other branches of law. He reiterated though that the *Reynolds* standard need to be applied in a practical, and flexible manner.

Some of the principles that have since emerged after the development of *"Reynolds privilege"* or "*Reynolds public interest defence,*" include the following: the form of qualified privilege recognised in *Reynolds* is different from the traditional common law duty, and interest based privilege. The question of whether the publisher has behaved responsibly is intimately bound up with whether the defence arises. In determining privilege, the Court can only consider the information known to the journalist at the date of publication. Whether a journalist has behaved reasonably, and responsibly, depends on what information was available when he wrote the article. (See Clerk and Lindsell on Torts (supra) paragraph 22 – 136, at page 1496). It is therefore clear from the preceding discourse that in so far as media communications are concerned, the common law defence of qualified privilege has been reviewed, expanded, and modified. Therefore, in assessing the availability of the defence of qualified privilege, it is competent in my opinion, for a trial judge to make a determination at the interlocutory stage, whether not a journalist has behaved reasonably, and responsibly. This so because in determining privilege, the trial Court can only consider the information known to the journalist at the date of

publication. In this regard, the Court may be guided by the 10 factors formulated by Lord Nicholls in the *Reynold's case*.

Third, in my ruling of 2nd August, 2011, this is what I said at R55:

"*The statement complained of does not contain the plaintiff's side of the story so to speak, or indeed proof that efforts were made by the defendants to seek comment from the plaintiff.*"

I went on to state on the same page as follows:

"In my considered view, if a journalist has to print, or air criticism of someone, the person who is the subject of the criticism should be given the opportunity to respond to the criticism in the same publication or story. The opportunity to comment or reply must be given similar weight, and audience."

It must be noticed in this context that, the Electoral (Code of Conduct) Regulations ___statutory instrument number 52 of 2011, provides under Regulation 13 (1) (a) that all print, and electronic media shall provide fair, and balanced reporting of, amongst other events, candidates during the campaign period. Fair, and balanced reporting, in my opinion entails that a person who is a subject of the reporting or criticism should be given an opportunity to respond to the criticism. In this particular case, Mr. Sata was obviously not given any opportunity to respond the various criticisms levelled against him in the statement complained of. The various disparaging remarks referred to extensively in the submission by Professor Mvunga, SC, and which in all fairness were properly attributed to Mr. Sata, were not made in response to the publication by the defendants in this action. Those disparaging remarks are not therefore the subject of these proceedings, or more specifically cause of action; however, true, or defamatory they may be. Needless to state that it is important for any case to be properly pleaded. This is so because pleadings not only enable a case to be tried with clarity, and expedition, but also define in advance the bounds of the cause of action, which cannot be extended without

leave of the Court, and without amendment to the pleadings. (See *Lyons Broke Bond v Zambia Tanzania Road Services (1972) Z.R. 317; and Admark Limited v Zambia Revenue Authority (2006) Z.R. 43*).

Furthermore, some of my findings of facts in my Ruling of 2nd August 2011, have been impeached in the context of this application. And it has been argued that they may be faulted on appeal. My general comments in response are that, the grant of an interim injunction being an equitable remedy is always discretionary. And this discretion belongs to the trial judge. An appellate Court may not substitute its own view on the merits of the case, but may only intervene if a trial judge misdirected himself in law, took into account irrelevant matters, or failed to take into account relevant matters. (See *Duport Steels Limited, and Other v Sirs [1980] W.L.R. 142*.

And if I may add, our *locus classicus* regarding the jurisdiction of an appellate Court to disturb findings of facts of the trial judge, is the case of *Nkhata and Others v Attorney General (1966) Z.R. 124*. In the *Nkhata case* it was held that a trial judge sitting alone without a jury can only be reversed on fact, when it is positively demonstrated to the appellate Court that:

a) By reason of some non-direction or mis-direction or otherwise, the judge erred in accepting the evidence which he did accept; or
b) In assessing and evaluating the evidence, the judge has taken into account some matter which he ought not to have taken into account or failed to take account some matter which he ought to have taken into account; or
c) It unmistakably appears from the evidence itself or from the unsatisfactory reasons given by the judge for accepting it, that he cannot

have taken proper advantage of his having seen, and heard the witnesses; or

d) In so far as the judge has relied on manner, and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted it is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer

I will say no more because in any event, this is only an application for a stay of an injunction.

Lastly, it is contended that the interim injunction in question has the effect of a gag order. In order to avoid repetitions, I will postpone treatment of this contention.

The net result is that in my opinion the defendants have not made a strong showing that they are likely to succeed on merits.

WILL THE DEFENDANTS BE IRREPARABLY INJURED ABSENT A STAY.

In terms of Order 59/13/5 of the Rules of Supreme Court, a stay of an injunction pending appeal is a legally tenable propostion. The jurisdiction to stay an injunction is however in my opinion, so special as to require the exercise of exceptional caution. This is so because it can pose special problems. For instance, the effect of an injunction may be very serious so far as a defendant is concerned, and if it proves on appeal to have been wrongly granted, he may be left without remedy. Thus it may will be appropriate where a defendant asks for a stay of injunction pending appeal, to consider whether the successful plaintiff is prepared to give a cross-undertaking in damages should the appeal succeed. (See *Nyambe v Barclays Bank (Zambia) Limited Plc (2008), Vl 2 Z.R. 195).* In this particular case, an undertaking as to damages was made on behalf of Mr. Sata. And in any case in the interim injunction, the

subject of this application, I said that should I later find that the interim injunction has caused loss to the defendants, and decide that the defendants should be compensated for that loss, then Mr. Sata would be required to comply with the order that I will make.

Be that as it may, in this application, the defendants have not in any event demonstrated to me in the supporting affidavits, the irreparable damage, or injury that they would suffer if the application were to be refused. By the way, irreparable damage, or injury means injury which is substantial, and can never be adequately remedied or atoned for by damages; not injury which cannot possibly be repaired. Mere inconvenience is not enough. *(See Shell BP (Zambia) Limited v Conidaris and Others (1975) Z.R. at 181).*

Furthermore, the gist of the defendants complaint in this application is that the interim injunction in issue has severely restricted their freedom of expression. The 1st defendant's complaint in particular is that as a freelance journalist, he is unable to participate in the public debates relating to the elections that are scheduled to be held on 20th September, 2011. And the 2nd defendant's complaint is that owing to the interim injunction, its broadcasts have been adversely affected. The 3rd defendants contention is that the issues raised in my Ruling are intricate, and that they touch on freedom of expression in the pre-election period. And therefore a stay of the interim injunction is necessary pending resolution of those issues by the Supreme Court.

I must state at once again, that the interim injunction in issue does not in its terms wholly ban the defendants from enjoying their freedom of expression. The defendants have only been stopped from broadcasting the *"Stand up for Zambia,"* programme, whose primary or predominant objective appeared to be to discredit Mr. Sata in the forthcoming Presidential, and General elections.

The defendants are therefore at liberty, outside the realm of the banned programme, to participate in various ways, means, and forums in connection with the forthcoming elections.

I find it particularly strange, that the 2nd defendant; a public broadcaster, claims to be constrained by my order from mounting, and broadcasting alternative programmes to enlighten the Zambian electorate, about the political parties, their manifestos, and candidates. Yet there is a whole gamut of electoral issues and activities that the 2nd defendant can devote its time, energy, facilities, and above all, ingenuity. To be sure, the order in question, does not gag the defendants. I am therefore not satisfied that the defendants will be irreparably injured absent a stay

WHETHER THE ISSUANCE OF THE STAY WILL SUBSTANTIALLY INJURE THE OTHER PARTIES INTERESTED IN THE PROCEEDINGS.

I in my Ruling of 2nd August, 2011, I said this: this case essentially concerns the tension between two fundamental rights. Namely, freedom of expression, and protection of reputation. I said that reputation is an integral part of the dignity of the individual. And once it is besmirched by an unfounded allegation(s), a reputation can be damaged irreparably; especially if there is no opportunity given to vindicate one's reputation. In the same Ruling, I also took cognizance of the context of this action; namely an election year. Thus I came to the conclusion that it is wrong for any person before or during an election to publish false statement(s) in relation to any candidate's personal character, or conduct, for the sole or dominant purpose of adversely affecting the return of such candidate, unless of course there is reasonable evidence, and grounds for believing the fact that the defamatory material is true; it is fair comment on a matter of public concern; or is protected by qualified privilege. In view of the foregoing, if I therefore stayed the injunction, there is a likelihood that the defendants will continue to injure the reputation of Mr. Sata.

WHERE DOES THE PUBLIC INTREST LIE?

In my Ruling of 2nd August, 2011, I stated that the protection of reputation is not only a matter of importance to the affected individual, and family, but is also conductive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. Furthermore, the defence of qualified privilege recognises that in certain circumstances, it is better that individuals are free to speak their mind, and others to report what is spoken without fear of being sued. This the chief justification for the defence of qualified privilege.

I have also already said that , in terms of the *"Reynolds privilege,"* and "*Reynold's public interest defence,*" it is the material which is privileged and not the occasion on which it is published. Thus the form of qualified privilege recognised in *Reynolds*, is different from the traditional common law duty, and interest based privilege. Thus when applying the "*Reynolds privilege*," and "*Reynolds public interest defence,"* the first question to be considered is whether the subject matter of the article was a matter of public interest. In answering this question, one ought to consider the publication as a whole, and not to isolate the defamatory statement. It is instructive to note that privilege attaches to the publication on the basis of its value to the public.

If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the material was justifiable. The fact that the material was of public interest does not allow the publisher to drag in damaging allegations which serve no public purpose. If the publication, including the defamatory statement, passes the public interest test, the inquiry then shifts to whether the steps taken to gather, and publish the information were responsible, and fair. Simply stated, the question here is this: whether or

not the publication has met the threshold of, *"responsible journalism."* "*Responsible journalism"* has been said to be a point at which a fair balance is had between freedom of expression on matters of public concern, and the reputation of individuals. The maintenance of this standard is in the public interest, and in the interest of those whose reputations are involved. It is regarded as the price journalists pay in return for the privilege. (See *Bonnick v Morris [2003] A.C. 300).*

It will be recalled that in my Ruling of 2nd August, 2011, I reached the conclusion that on the basis of the material before me, the defences of justification, fair comment, and privilege, were not likely to succeed at trial. More importantly, I also concluded that the conduct of the defendants fell short of the standard of *"responsible journalism."* Put quite plainly, I held in effect that the defendants did not behave fairly, reasonably, and responsibly. In view of the foregoing, it cannot therefore be in the public interest to stay the injunction, and resume the broadcasting of "*Stand up for Zambia,*" pending the trial of the action. Thus I have no hesitation in holding that in the circumstances, and on authority, the application for a stay of the interim injunction, must, therefore, be refused.

Costs follow the event. And leave to appeal is granted.

Dr. P. Matibini, SC
HIGH COURT JUDGE