

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2010/HP/1282

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

4TH DEFENDANT

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

For the plaintiff:

Mr. B.C. Mutale SC. 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.

For the 4th defendant:

Mr. C. Sinkamba of Messrs Sinkamba Legal Practitioners.

RULING

American case

1. *New York Times v Sullivan* 376 US 254 1964.

Australian case

1. *The Ophanus v The Herald and Weekly Limited and Another* FC/94/041, 12th October, 1994.

English cases

1. *M'Pherson v Daniel* (1829) 10 B and C 263 at 272.
2. *Quart Consolidated Mining company v Beal* [1882] 20 Ch. D 501.
3. *Spill v Maule* [1869] L.R. 4 Ex, 232.
4. *Ediginton v Fitzmaurice* [1885] 29 Ch. D. 459.
5. *William Coulson and Sons v James Coulson and Company* [1887] 3 T.L.R. 846.
6. *Merivate v Carson* [1887] 20 Q.B.D. 275.
7. *Bonnard v Perryman* [1891] 2 Ch 269.
8. *R v Tolson* [1898] 23 Q.B. D 168 at 187.
9. *Clarke v Norton* [1910] V.L.R. 494.
10. *Adam v Ward* [1917] A.C. 309.
11. *Attorney General for Canada v Ritchie* [1919] A.C.909 at 1005.
12. *Broadway Approvals Limited v Odhams Press Limited* [1964] 2 Q.B. 683.
13. *Lewis v Daily Telegraph Limited* [1964] A.C. 234.
14. *Harmon Pictures N.K.V. v Osborne* [1967] 1 W.L.R. 723.
15. *Fraser v Evans* [1969] 1 Q.B. 349.
16. *London Artists v Litter* [1969] 2 Q.B.D. 375.
17. *Habbard v Vosper* [1972] 2 Q.B. 84.
18. *American Cynamid Company v Ethicon Limited* [1975] A.C. 396.
19. *Bestobell Paints Limited v Bigg* [1975] F.S.R. 421.
20. *Harrocks v Lowe* [1975] A.C. 135.
21. *Fellowes and Sons v Fisher* [1976] Q.B. 122.
22. *Duport Steels Limited and Others v Sirs* [1980] 1 W.L.R. 142.
23. *Harakas v Baltic Mercantile and Shipping Exchange* [1982] 1 W.L.R. 958
24. *Herbage v Pressdram* [1984] 1 W.L.R. 1160.

25. *Munson v Tussauds Limited* [1984] 1 Q.B. 671.
26. *Kashoggi v IPC Magazine Limited* [1986] 3 ALL E.R. 577.
27. *Gulf Oil (GB) Limited v Page and Others* [1987] 3 ALL E.R. 14.
28. *Cambridge Nutrition Limited v BBC* [1990] 3 ALL E.R. 523.
29. *Femis Bank (Anguilla) Limited and Others v Lazar and Another* [1991] 2 ALL E.R. 864.
30. *R v Secretary of State for Transport Ex parte Factor fame Limited* [No.2] [1991] A.C. 603.
31. *Joyce v Senguptya* [1993] 1 W.L.R. 337
32. *Halley v Smith* [1998] W.M.L.R. 133.
33. *Bronson v Bower* [2001] [2002] 2 W.L.R. 452
34. *Reynolds v Times Newspapers Limited, and Others* [2001] 2 A.C. 127.
35. *Branson v Bower* [No. 2] [2002] 2 W.L.R. 452.
36. *Smithline Beecham P.K.V. Opotex Europe Limited* [2003] E.W.C.A. Civ 137.
37. *Bonnick v Morris* [2003] 1 A.C. 300.
38. *Jameel v Wall Street Journal Europe* [2006] 3 W.L.R. 642.

Zambian cases

1. *Shell and BP Zambia Limited v Conidaris and Others* (1975) 174.
2. *Ndove v Natural Educational Company Limited* [1980] Z.R. 184.
3. *Zimco Properties v PAPCP Limited* (1988-1989) Z.R. 92.
4. *Shamwana v Mwanawasa* (1993-1994) Z.R. 149.
5. *Sata v Post Newspapers Limited and Another* 1993/HP/ 1395, and 1804, and HP/ 1823 (unreported).
6. *Admark Limited v Zambia Revenue Authority* (2006) Z.R. 43.
7. *Attorney General v Clarke* (2008), Volume 1, Z.R. 38.
8. *Lwali and Others v Mumbi and Others* (2009) Z.R. 64.
9. *Mapiko and Another v Chande* 2010/HP/ 690 (to be reported in the 2010 Zambia Law Reports).

Legislation referred to:

1. *Zambia National Broadcasting Corporation Act Number 20 of 2002, s. 7 (b) (c) (b), and (m).*
2. *Independence Broadcasting Authority Act Number 71 of 2002, ss. (2), (f) (g), (h), and (i).*
3. *Defamation Act, cap 68, ss. 6, and 7.*
4. *High Court Act cap 27, Order 12, Rule 1.*
5. *Rules of the Supreme Court (White Book) Order 18.*
6. *Statutory Instrument Number 69 of 1998, The High Court (Amendment) Rules of 1998.*
7. *Statutory Instrument No. 52 of 2011, The Electoral Act, 2006 (Act No. 12 of 2006), The Electoral (Code of Conduct) Regulations, 2011.*

Works referred to:

1. *Patrick Milmo, and W.V.H. Rogers Gatley on Libel and Slander, Eleventh Edition, (Thomson Reuters, Legal Limited, London, 2008).*
2. *Philip Lewis, Gatley on Libel and Slander 8th Edition, (Sweet and Maxwell, London, 1981).*
3. *Michael A. Jones, Clerk & Lindsell on Torts, Twentieth Edition, (Thomson Reuters, Legal Limited, London, 2010).*
4. *Hodge M. Malek, Phipson on Evidence, Seventeenth Edition, (Thomson Reuters, Legal Limited, London, 2009).*
5. *William Blair, Lord Brennan, Lord Jacob, and Justice Langstaff, Bullen and Leake, and Jacobs Precedents of Pleadings, sixteenth Edition, Volume 1 (London: Sweet and Maxwell, 2008).*
6. *John Mc Ghee, Snells Equity Edition (Sweet and Maxwell, London 2008).*
7. *David Price, Korieh Doudu, and Nicola Cain, Defamation Law, Procedure and Practice, Fourth Edition, (Thomson Reuters, Legal Limited, London, 2010).*
8. *David Bean, Injunctions, Tenth Edition, (Thomson Reuters, Legal Limited, London, 2010).*
9. *Geoffrey Robertson and Andrew G. L. Nicol, Media Law, Second Edition (revised) (Penguin Books, 1992).*
10. *Lord Denning, What next in the Law, (Butterworths, 1982).*

11. *Stuart Sime, A Practical Approach to Civil Procedure, Eighth Edition, (Oxford University Press London, 2005).*
12. *Halsbury Laws of England, 4th Edition, Volumes 24, and 28 (Butterworths London, 1997).*
13. *Peter F. Carter Ruck, Curter Ruck on Libel and Slander 5th, Edition, (Butterworths London, 1997).*
14. *Sir Hugh Fraser, Principles, and Practice on the Laws of Libel Slander, (Sixth Edition), (Butterworth, and Company, London 1925).*
15. *Maurice, Waite, Oxford Paterback Thesaurus, (London, Oxford University Press, 2006).*

The plaintiff on 26th November, 2010, took out of the principal registry a writ of summons, claiming for the following:

- (i) General and exemplary damages for defamation of character in the broadcast by the defendants of the television programme entitled: “Stand up for Zambia,” “the Venom of the Cobra;” and “Stand up for Zambia the “Unholy Alliance”;
- (ii) An injunction to restrain the defendants each of them whether by themselves their servants or agents or otherwise, from further publishing or broadcasting or causing to be published or broadcast, the said words and images defamatory of the plaintiff;
- (iii) An injunction restraining the 1st defendant either by himself, his agents, servants or by whomsoever from producing, distributing or selling CD’s DVD’s or any other form of transmission of the said defamatory programme;
- (iv) Any other relief the Court may deem fit; and
- (v) Costs.

The writ of summons is supported by a statement of claim. In the statement of claim it is averred that: the plaintiff is a politician, and the president of Zambia’s leading opposition political party known as the Patriotic Front.

The 1st defendant is a journalist and producer of a series of television programmes entitled “Stand up for Zambia,” “the Venom of the Cobra,” and “Stand up for Zambia, the Unholy Alliance.” The 1st defendant has further produced for commercial purposes CD’s and DVDs of the programmes referred to above.

The 2nd defendant is the national radio and television broadcaster incorporated under the Zambia National Broadcasting Corporation Act.

The 3rd and 4th defendants are private limited, companies which trade as “Muvi TV” and “Mobi TV” respectively. Both carry on telecommunication business in Zambia by way of television broadcasts.

The plaintiff avers in the main that the defendants have collectively caused to be broadcast and published weekly series of programmes complained of. The plaintiff contends that programmes complained of include words and images which are defamatory of the plaintiff. The words and images complained of having been particularised as follows:

a. Venom of a cobra

The first programme is styled as “Venom of Cobra”. In this regard, the 1st defendant is alleged to have published the following defamatory words:

- (i) *“In this edition I am attempting to take a critical look at the undoubted populous leader of the Patriotic Front, Micheal Chilufya Sata, also known as the “King Cobra.” The Anti-Third Term group Sata was referring to, consisted of 22 very senior members of the ruling party, who eventually had enough and formed the Forum for Democracy and Development FDD, and the Heritage Party (HP). You agree that the number 22 kind of follows Sata’s like no one’s business. Currently, he has 22 rebel members of Parliament to deal with, and it is a thorn in his diminishing flesh. For most founding members of the ruling MMD, the*

biggest mistake that ever happened to the party that toppled Kenneth's Kaunda's United National Independent Party (UNIP), in the first ever multi-party elections in seventeen years was to elect Sata to the position of National Secretary. Sata was elected Secretary at the 1995 MMD Convention taking over from Brigadier General Godfrey Miyanda. Little did people know that the ruling eyes of the Cobra would hypnotise almost the entire rank and file of the MMD. It was indeed the beginning of terror in the way the party was to be administered, suspensions; and expulsions became the law, and the party was to be run with an iron fist with no order and yet this is the man who claims he can run the country as President better than anyone has ever done."

- (ii) *One of the early casualties was Anderson Kambela Mazoka who by then was Branch Treasurer in Bauleni, within two years. Sata appeared to have consolidated his grip in running the MMD in his own way, his critics say that he simply went on rampage to make sure that anybody with the semblance of leadership was to be viciously hounded out of MMD. Like I have already indicated Mazoka was one of the very first people to test the venom of the Cobra. In a letter dated 7th August, 1997, addressed to Mr. Chiluba, President of the republic of Zambia, on an MMD letter head signed by Sata a copy of which is shown here, it is clear that the Cobra had schemed up something against Mazoka, some of the contents of this letter are:*

"Dear Mr. President, my findings have revealed that Mr. Mazoka has spent a lot of money on his Branch to carry out his hidden political agenda, I am told he has a huge following that can help him reach his presidential aspirations."

It goes on to say:

"He is using the small group of people whose names I will forward to you soon to execute his political task on the Copperbelt, Lusaka, North Western, Western, Luapula, and Central Provinces."

Sata further wrote the first step:

"Mr. President is to instruct the NEC to pass a resolution to dissolve his Branch in which he is Treasurer on grounds that the Branch has not been registered with my office the Secretariat."

According to Sata dealing with Mazoka the way he was proposing would keep Andy a distance away from the party, and make it difficult for him to influence the people.

Sata concluded by saying:

“I will keep informing you upon my progress achieved in this task.”

It can be deduced from this letter that Sata had set out to hurt Mazoka. Well the rest as you know, Mazoka moved on to form his own political party, the United Party for National Development (UPND) which was launched in 1998. It now beats me how the man who took over from Mazoka could be winning and dinning with Sata. Isn't a plot to keep undermining the Mazoka vision. No wonder the Pact is not working and just cannot work. Mazoka must be turning in his grave, evidently so, his soul may not rest in peace.”

(iii) *In order to consolidate his grip on running the MMD, Sata is said to have introduced all sorts of draconian rules so as to keep at bay anyone who had left on their own, or had been expelled, but rejoined in two years. Regulation No. 6 of the memo dated 1997, signed by Sata, a copy of which is shown here and addressed to all Commissioners, Provincial Chairmen,/Secretaries/Co-Cordinators and District organizers is very clear; “No member of the party who has been re-admitted to the party in less than two years shall aspire to any party election at any level.” This was a well calculated move and for some reason everyone in the National Executive Committee of the MMD seemed okey with it, or were they hypnotised by the eyes of the king Cobra.”*

(iv) *“Almost one year later, on fifth October, 1998, in a letter addressed to Hon. Michael Mabenga, Member of Parliamant, Deputy Minister, Western Province, and a copy which is shown here, Sata threatened to discipline Mabenge within fourteen days, Sata's threats were regarding a letter Mabenga had written to the President, and it reads in part:*

“Dear Hon. Mabenga, on 13th August, 1998, you wrote a letter to the President in which you levelled serious, and several allegations against the Provincial Executive Committee of Western Province. Mr. Deputy Minister as member of Parliament, you are a member of the District Executive Committee, and a member of the Constituency Executive Committee. The allegations you made against the provincial officials and myself are contrary to the party Constitution. Regulations number 7 (b, f, g, and j), I am giving you fourteen days in which you should show cause why disciplinary action should not be taken against you.”

But reading through this letter, it was clear that Sata was not happy that his Presidential ambitions had been laid bare in Western Province. Sata alleged that

Mabenga had on 28th September, 1998, met the Vice President together with 8 other Provincial Deputy Ministers. And reported that Sata, the National Secretary was campaigning for the presidency in Western province. Critics say Sata may have further been influential as he claimed this particular allegation was not reported to the President in the letter of 13th August, 1998.”

- (v) In his continuous hypnosis of the MMD National Executive Committee, Sata’s most probable ground achievement of all, was the suspension and subsequently expulsion of Ben Mwila; B.Y, as he is fondly known. B.Y. was MMD’s National Treasurer and Minister of Environment and Natural Resources at the time, but many including Sata, considered him a formidable force in view of the fact that Chiluba’s two five year terms would end in 2001, those that were close to Sata attest to the fact that the Cobra breathed a sigh of relief when B.Y. was finally expelled at the NEC meeting held at State House.”*
- (vi) For Sata the way was now as clear as could be and for him it meant putting the Third Term take in overdrive. Chiluba had not really come out to say he would go against the country’s Constitution, or indeed have it amended to seek a Third Term in office, all the politicking was left to Sata who in fact it is believed to have been the architect of the whole theme of the Third Term. It is said Sata conceived the idea knowing too well that Chiluba would not seek a Third Term, and hoping that his loyalty would earn him all the favours, and Chiluba would anoint him his successor.”*
- (vii) Sata is also reported to have caused a lot of confusion in the Lusaka City Council. The Weekly Post edition number 113 September, 3, to 9, 1993, had this as one of its headlines: “Lusaka’s Great Political Circus.” Reading through this article, Sata who had been transferred from the Ministry of Local Government and Housing to Labour and also Kabwata Member of Parliament, and the Town Clerk Wynter Kabimba, had taken centre stage. Kabimba was viewed by most councillor’s as Sata’s man.”*
- (viii) “Yes this article by Masautso Phiri revealed the tale tell signs of wrong doing and under hand methods not only on Sata, but Kabimba as well. There was the issue of the Nalubuto road and Independence Avenue houses. Hotel bills and most of all, the contract in relation to the Merzaf flats in Lusaka’s Chilenje Township.”*
- (ix) “Your see, Sata’s scheming and dirty politics go back a long way. In the UNIP one party era, he is said to have gone to an opponent’s grocery*

store somewhere in Chilenje township, and bought off all the stocks which he immediately distributed to his supporters. According to eye witnesses his opponents shop was left empty, and remained so for many many months. When Mpulungu Member of Parliament Lameck Chibombamilimo passed on, Sata issued all sorts of statements in effect pointing a finger at Rupiah Banda's administration as being responsible for the MP's passing. Yet Sata, in 1994, was said to have been behind the dirty tricks that led to Chibombamilimo's losing his position as MMD Lusaka Provincial Secretary. It is believed that the two could not see eye to eye, and it remained so for a long time. I doubt if there was any reconciliation."

- (x) *"Right now Sata's Patriotic Front is embroiled in a serious feud with Hakainde Hichelema's UPND in a relationship referred to as the PF, UPND Pact. From the time it was heard that these two parties were going into such an arrangement those that knew Sata could laugh. Today it is clear as a fine October, morning that this Pact is in real trouble. Critics are simply putting it this way if you want to know whether two Dobermans, Alsatians or Mongrels lying side by side are in good books, just throw a bone in one direction, and boy, or, boy you will be shocked how they will run for the bone, and fight to a point where the third Alsatian or Doberman, which had nothing to do with the fight will simply pick the bone and go away. By the time the two are done with the fighting, licking their wounds in the process all they will be able to pick is the scent of the bone, the Pact is being described in this manner by some people, I am getting into contact with, who say they are keen followers of "Stand up for Zambia," others are simply wondering if a ruffian or looper and a gentleman can really co-exist. The PF UPND Pact is also being referred to as a double headed snake, with hard core critics calling it a gay marriage which can't bear fruit. One person actually made me laugh when he said, "you see Chanda in the world of Adam and Eve you are able to see fruitful results. But this PF UPND Pact is like gay marriages we hear of, that do not bear any fruit that's why it will never work."*

"One thing that we all ought to bear in mind always remember that Zambia is not only about two tribes; Tonga and Bemba. No matter how big they may be perceived to be, Zambia is run by 73 tribes and perhaps a little more, all working together for mother Zambia. Now if Sata and Hichilema think they can get to State House riding on the tribal factor, they are wasting their time, resources, and energies."

- (xi) *Remember Sata as the all too powerful National Secretary of the MMD smeared venom on all who had semblance for leadership, and he was pretty sure he would clear his way to the top. He was pretty sure he had succeeded. But yes there was a sleeping giant somewhere who was awoken, and that in my view was a clear indication that Sata*

would never be President in this country. I am pretty sure that God has a plan for this country, and only He knows reasons why Sata has been rejected three times in democratically run elections. But it appears both Sata, and Hichilema have a great appetite for State House to the effect that they are failing to run their own parties.”

- (xii) *“As opposed to what Sata’s and Hichilema’s lieutenants are on record as saying, the Pact is not driven by the people, but by Sata and Hichilema. In the run up to both the 2006 and 2008 elections, Sata and Hichilema were at each other’s throats like no one’s business. Yes, like two Dobermans fighting for the highly prized bone. It is said that when the Cobra spits in your eyes, you naturally close them, and in the process you lose direction. Hichilema has been described by his critics as having lost direction politically. Hard liners in the UPND say that if Mazoka was still traversing this world we live in today, chances of him bringing the UPND in a Pact with the Sata’s PF would have been extremely slim or none at all. Some analysts also predict that when all is said and done, Hichilema will be in the political intensive care unit, and Sata will escape with minor bruises. The PF-UPND Pact is nothing but the tower of Babylon. No sugar coating of any sort will prevent it from crumbling. It’s all there to see.”*

(b) **“The Unholy Alliance.”**

- (i) *Sata has no respect for traditional leaders, he has belittled the chiefs;*
- (ii) *“He wants to get to State House at all costs;”*
- (iii) *Sata was not up to reconciliation with Mwanawasa. He offered his party, Mwanawasa was no fool, he could not take his offer.”*
- (iv) *The whole thing about the Red Card campaign is not Father Bwalya’s own baby as such, but was coined by the Patriotic Front, the Post Newspaper, and in association with some leaders of the Catholic Church.*
- (v) *“Could there be unholy alliance between the Post, the Catholic Church, and Patriotic front. Pointers are there to show that there is some element of truth.”*
- (vi) *Sata’s appetite for plot one is so great that he has even brought to his party former foes, and appointed them to senior positions in his Central Committee.*
- (vii) *Sata’s critics have always contended that the biggest mistake that ever happened to the MMD was Sata being elected as National Secretary. They say that his dictatorial ways did not take long to manifest as he almost immediately started creating his own rules. A typical example was in a circular dated 16th November, 1997, a copy of which is shown here addressed to Commissioners, Provincial Chairmen, Provincial Secretaries, Co-ordinators and district organisers. It was headed “Election Regulations.” Almost all the seven hand out regulations, are*

said to have been unpopular with party members, but Sata in his own way, and his venom took a toll on some not so lucky MMD members and officials.”

The plaintiff contends in paragraph 8 of the statement claim, that the words, and images referred to above are understood to mean:-

- (i) That the plaintiff is a schemer, and has been engaged in dirty politics for a long time;
- (ii) That the plaintiff as National Secretary of MMD manipulated former President Chiluba and the National Executive Committee (NEC) of MMD in the discipline, and expulsion of many members of the party;
- (iii) That the plaintiff was responsible for the expulsion of the late Anderson Mazoka from MMD in 1990;
- (iv) That the plaintiff was responsible for the expulsion of 22 Members of Parliament from MMD;
- (v) That the plaintiff was responsible for the expulsion of Mr. B.Y. Mwila from MMD;
- (vi) That the plaintiff does not qualify to be President of this country;
- (vii) That the plaintiff does not uphold and believe in the tenets of democracy;
- (viii) That the plaintiff caused confusion in the operations of the Lusaka City Council, and in the sale of Nalubuto Road, Independence Avenue houses, and Mezaf flats;
- (ix) That the plaintiff's condemnation of the manner the MMD treated the late Member of Parliament for Mpulungu, Mr. L. Chibombamilimo was not *bona fide*;
- (x) That the overture by the plaintiff and his party Patriotic Front to enter into a Pact with the UPND is founded on tribalism;
- (xi) That the plaintiff has schemed with the civil society, the Catholic Church, and Change of life to illegitimately remove the Government of President Banda;

- (xii) That the plaintiff has an unsatisfiable appetite for State House (or plot 1);
- (xiii) That the plaintiff does not respect traditional leaders such as the Chiefs;
- (xiv) That the plaintiff initiated the Red Card Campaign by Father Bwalya;
- (xv) That in his reconciliation with the late President Mwanawasa, the plaintiff offered to dissolve the Patriotic Front in exchange for an appointment as Vice-President of Zambia.

In view of the foregoing, the plaintiff avers that his reputation has been seriously injured, and he has suffered considerable distress and anxiety. Further, the plaintiff's political prospects of ascending to the Presidency of this Country have been dented. Therefore, unless restrained by an interim injunction, the defendants, will further broadcast and publish similar words and images defamatory of the plaintiff. Furthermore, the 1st defendant will continue to produce, distribute, and sell for commercial purposes, CD's DVD's and other materials containing the programmes "*Stand up for Zambia,*" which will contains words, and images defamatory of the plaintiff.

On the same 26th November, 2010, the plaintiff filed an *ex parte* application for an interim injunction. In the affidavit in support of the interim injunction, the plaintiff deposed as follows: that he is a politician, and the President of the main opposition political party, which enjoys massive support and following in both the urban and rural areas of Zambia. The plaintiff confirmed that he had filed a writ of summons, and statement of claim in the principal registry for defamation of character against the defendants arising from a television programme styled as "*Stand up for Zambia.*" The programme is produced by the 2nd, 3rd and 4th defendants on their television channels. The plaintiff avers that he has suffered, and continues to suffer irreparable injury by the broadcast and distribution of the defamatory programmes. In the premises, the plaintiff

seeks an interim injunction restraining the defendants from broadcasting, producing, and selling the defamatory programmes.

The application for the interim injunction was given a return date of 7th December, 2010. On the return date, Professor Mvunga SC, indicated to me that the legal process in this matter had been served on his client; the 3rd defendant, on 3rd December, 2010. Thus the late service of the documents had not given him sufficient time to obtain-instructions and file a defence. Professor Mvunga, SC, submitted that the affidavit in opposition to the interim injunction would be predicted on the defences that his client would rely on. In the circumstance, he requested for an adjournment of the matter. The request and plea by Professor Mvunga, SC, was echoed by Mr. Nkonde, SC, and Mr. Malupenga, counsel for the 1st and 2nd defendants, respectively. I allowed the application for an adjournment. And the matter was thus adjourned to 11th January, 2011, for hearing.

In the meanwhile, on 14th December, 2010, the 1st defendant filed a memorandum of appearance, and defence. The defence was later, on 16th December, 2010 amended. The 1st defendant admitted having published the programme set out in paragraph 7 of the plaintiff's statement. The contents of the paragraph 7 of the statement of claim have been quoted verbatim above. However, the 1st defendant denies that the statements in question bears or is capable of bearing the meaning attributed to it in paragraph 8 of the statement of claim. Again, paragraph 8 of the statement of claim has been quoted above verbatim. The 1st defendant has in the main relied on the defences of justification, and fair comment on matters of public interest.

In so far as the defence of justification is concerned, the 1st defendant averred as follows: that the plaintiff schemed the hounding out of the late Anderson Mazoka from the MMD. The letter from the plaintiff to the then President of MMD, Mr. Fredrick Chiluba, dated 7th August, 1997, confirms the alleged

scheme to distance the late Anderson Mazoka from the MMD, and make it difficult for him to influence the people. Further the 1st defendant asserts that during the reign of the plaintiff as National Secretary of MMD, the MMD witnessed unprecedented number of expulsions of its Members of Parliament in 2000. The plaintiff as National Secretary of MMD ensured that 22 MMD Members of Parliament who were against the Third Term campaign were expelled as MMD members. In this regard, Mr. B.Y. Mwila who was widely viewed as a potential Presidential candidate for MMD in 2001, was also expelled from the MMD.

The 1st defendant also referred to the following incidents in his defence: in 2002, the plaintiff was allegedly roughed up by members of the United National Independence Party (UNIP) because he had disturbed a rally for UNIP in Kabwata; that the underlying objective for the Patriotic Front to be in the Pact with the UPND is for the plaintiff to ride on the popularity of the UPND in Southern Province, so that the plaintiff can get to State House; the 1st defendant recalled that: in 1993, there was a standoff between the Lusaka City Council Councillors, and the plaintiff due to his alleged interference in civic matters. The plaintiff was then Minister of Local Government and Housing. The issue of interference is said to have culminated in a meeting at State House, where attempts were made to defuse the tension.

Further, the 1st defendant claims that: sometime in March, 1993, the plaintiff cancelled a trip to California in the United States of America for the then Mayor of the City of Lusaka; the late Mr. John Chilambwe, the plaintiff is said to have threatened Mr. Chilambwe with disciplinary action for insubordination. Sometime in 1994, the plaintiff was in the forefront of campaigning against Mr. Lameck Chibombamilimo as MMD, Lusaka Provincial Secretary in preference to Colonel Terry Chanda who the plaintiff claimed that was more natural than Mr. Chibombamilimo. Colonel Chanda is currently a Member of Parliament under the aegis of the Patriotic Front.

The 1st defendant also avers that before the announcement of the Pact between Patriotic Front and the UPND, the plaintiff kept on referring to Mr. Hakainde Hichilema as an “*under five*,” who is not capable of leading the nation. The 1st defendant asserts that the Patriot Front is mostly prominent in Bemba speaking areas, and the UPND is prominent in Tonga speaking areas. And in the last three presidential elections, the plaintiff has fared very badly in Tonga speaking areas. Thus the going into the Pact with UPND, the 1st defendant opined, is aimed at compensating for the lack of support for the plaintiff in Tonga speaking areas. The 1st defendant contends that the plaintiff has contested three presidential elections, and has lost all of them. Be that as it may, the plaintiff is not ready to give another person a chance to stand on the Patriot Front as a Presidential candidate. Lastly, the 1st defendant contends that the plaintiff has been disrespectful and at logger heads with his paramount Chief Chitimukulu, and the Royal Establishment. This disrespect, the 1st defendant claims, led to the plaintiff at one time being summoned to appear before the Traditional Court.

Overall, the 1st defendant contends that the plaintiff is a politician who is aspiring to be president of this country. Thus as a public figure, his conduct ought to be subjected to strict public scrutiny. The 1st defendant further contends that the words and images complained of in paragraph 7 of the statement of claim were published without malice, and are fair comment on a matter of public interest.

On 17th December, 2010, the 1st defendant filed his affidavit in opposition to an order for an interim injunction. In the affidavit in opposition, the 1st defendant maintains that he has pleaded the defence of justification, and fair comment on a matter of public interest on the conduct of the plaintiff who is aspiring to be the next President of the republic of Zambia. The 1st defendant also pressed in

the affidavit in opposition that the publication is not malicious, and is not intended to injure the plaintiff.

On 17th January, 2011, the 1st defendant filed a further affidavit in opposition, in the further affidavit, the 1st defendant deposed that he has ceased publishing “*Stand up for Zambia, the Unholy Alliance,*” and the “*Venom of the Cobra.*” The 1st defendant however admitted that he has continued to publish documentaries under the title “*Stand up for Zambia.*” The 1st defendant contends that he is able to justify the contents of the programme as being true in substance, and fact. The 1st defendant reiterated in the further affidavit that the plaintiff is not suitable to hold public office let alone be president of the republic of Zambia. To support the assertion the 1st defendant drew my attention to some cuttings of the old publications of the weekly post. The old publications referred to are comments on the plaintiff’s character, and conduct, I will address the contents of these newspaper cuttings later.

Further, the 1st defendant produced in the further affidavit a copy of the letter authored by the plaintiff dated 7th August, 1997, which the 1st defendant is relying on in alleging that the plaintiff hounded the late Mr. Anderson Mazoka from the MMD. Furthermore, the 1st defendant produced a letter authored again, by the plaintiff dated 2nd June, 2000; suspending Mr. Benjamin Y. Mwila from MMD. Lastly, the 1st defendant produced a *Post Newspaper* cutting dated 12th August, 2010, which the defendant alleges is proof that the plaintiff clearly defames his political opponents as being hypocritical and cruel leaders in relation to the provision of medical services to the Zambian public. Overall, the 1st defendant contends that the plaintiff is notorious for defaming his political opponents in very unpalatable language, yet is quick to cry foul by the 1st defendant’s criticism of his character, and conduct in the “*Stand up for Zambia*” documentaries.

The second defendant also filed its amended defence on 16th December, 2011. The second defendant admits that it published the programmes, set out in paragraph 7 of the statement of claim. However, the 2nd defendant denies that the words and images complained of are capable of bearing the meanings attributed to them in paragraph 8 of the statement of claim. In any event, the 2nd defendant contends that the words, and images complained of are true in substance and fact. The 2nd defendant contends in particular that: the plaintiff is a political schemer who as National Secretary of MMD hounded a lot of members from the party in order to consolidate his hold on the party, and ambitions for presidency of the country; the plaintiff has dictatorial tendencies, and the plaintiff's conduct is not befitting of a person aspiring for the highest office in the republic of Zambia. In justifying the aspersion against the plaintiff, second defendant has relied on the same particulars as the 1st defendant. Therefore, it is unnecessary for me to repeat them here. Overall, the 2nd defendant also contends that the plaintiff is a politician whose conduct should be subjected to strict public scrutiny.

The 3rd defendant filed its defence on 10th December, 2010. The 3rd defendant admits broadcasting and publishing weekly series of programmes entitled "*Stand up for Zambia.*" However, the 3rd defendant denies that the words and images in issue are defamatory of the plaintiff. The 3rd defendant further contends that the words and images set out in paragraph 7 of the statement of claim, were published in the *bona fide* discharge of the 3rd defendant's duty as a television company. The broadcast, the 3rd defendant maintains were made without malice towards the plaintiff, and in the honest belief that what was published is true.

The 3rd defendant further contends that the Zambian public and the electorate have a corresponding interest in the character, personality and suitability of

the plaintiff to ascend to the office of president of the republic of Zambia. The 3rd defendant also maintains that the public, and electorate had an interest in the viability of the PF/UPNF Pact to form the next government. In a sum, the 3rd defendant contends that the words and images complained of were fair, *bona fide* comments, and the occasion of their publication was privileged. Ultimately, the 3rd defendant contends that the plaintiff is not entitled to an interim injunction.

On 10th January, 2010, the 3rd defendant also filed an affidavit in opposition to the application for an interim injunction. The affidavit was deposed to by one Alfred Gregg Tembo, the head of Administration with the 3rd defendant. Mr. Tembo deposed in the affidavit in opposition as follows: that the 3rd defendant has pleaded the defences of fair comment, and qualified privilege. The 3rd defendant contends that the publication complained of was published: *bona fide* in the discharge of a public duty; without malice towards the plaintiff, and for the benefit of the Zambian public who have a reciprocal, and corresponding interest in the character, personality, and suitability of the plaintiff ascending to the office of the President of Zambia. Mr. Tembo also exhibited newspaper cuttings depicting instances when the plaintiff has disparagingly been attacking his political adversaries. I will revert to these cuttings in due course. Thus ultimately Mr. Tembo contends that the plaintiff is not entitled to an interim injunction.

The 4th defendant did not file a memorandum of appearance and defence. Consequently, on 16th December, 2010, the plaintiff obtained judgment in default of appearance and defence, pursuant to Order 12, Rule 1 of the High Court Rules. On 19th January, 2011, the defendant applied to Court to set aside the judgment in default of appearance, and defence. Eventually, on 24th June, 2011, the plaintiff, and the 4th defendant were permitted to file a consent order setting aside the judgment in default.

Prior to this, on 10th January, 2011, Mr. Mutale, SC, filed the submissions in support of the application for an interim injunction, on behalf of the plaintiff. Mr. Mutale, SC, argued from the outset that this is the proper case in which I should exercise the jurisdiction to grant an interim injunction pending determination of the matter on its merits. Mr. Mutale, SC, submitted as follows: that on the authority of *Shell and BP Zambia Limited v Conidaris and Others*,¹ it is settled injunction law that a Court will not grant an injunction unless the right to relief is clear, and unless the injunction is necessary to protect the plaintiff from irreparable injury. The *Shell BP* case goes on to qualify irreparable injury in the following terms: irreparable injury means injury which is substantial, and can never be adequately remedied, or atoned for by damages. Thus irreparable injury neither includes mere inconvenience, nor injury which cannot be possibly repaired. Mr. Mutale, SC, further drew my attention to the case of *American Cynamid Company v Ethicon Limited*². Mr. Mutale, SC, submitted on the basis of the *American Cynamid* case that the objective of an interim 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 uncertainties were resolved in his favour at trial.

In the present case, Mr. Mutale, SC, argued that the plaintiff has satisfied the requirement that he has a clear right to relief in that he has the right to the protection of his integrity. He also pointed out that the plaintiff is the President of Zambia's main opposition political party; the Patriotic Front, which enjoys massive national wide support. And has intention to contest the next presidential elections, and there is therefore need to protect him from the clearly defamatory, and malicious statements aimed at maligning and scandalising him, as demonstrated by the contents of paragraph 7 of the statement of claim.

¹ (1975) Z.R. 174.

² [1975] A.C. 396.

Mr. Mutale SC, contended further as follows: that unless the publication of defamatory statements is curtailed, the plaintiff will suffer irreparable injury which will eventually diminish his presidential fortunes. He also pressed that the opportunity, and strong likelihood of ascending to the position of republican president rarely presents itself in one's lifetime and never even comes to the majority of the citizenry. He submitted that the loss of such an opportunity to ascend to such position cannot be adequately compensated by way of damages. He urged me to take judicial notice of the fact that the plaintiff narrowly lost the 2008 presidential by-election by a margin of about 35 000 votes. In this regard he argued that that margin, is a clear indication that the plaintiff has very high prospects of ascending to the presidency of this country. He stressed that the damage caused to the plaintiff is irreparable.

Mr. Mutale SC, also submitted that although the erstwhile Chief Justice Ngulube said in the case of *Shamwana v Mwanawasa*,³ that he did not lose sight of the principle that adequacy of monetary compensation is nearly always a ground for not granting such interlocutory relief, he however submitted that an award of damages would not be sufficient compensation for the injury caused to be suffered by the defendants.

Mr. Mutale, SC, also drew my attention to the learned authors of Gatley on Libel and Slander.⁴ This is what the leaned authors had to say at page 640 regarding whether or not injunctive relief should be granted in libel matters:

“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.”

In this case Mr. Mutale, SC, submitted as follows: that the libel is atrocious, and has inflicted the most serious injury to the plaintiff because it is

³ (1993 – 1994) Z.R. 149.

⁴ 8th Edition, (Sweet and Maxwell, London).

unjustifiable, and is deliberately calculated to negatively affect the character of the plaintiff in the estimation of right thinking members of society, leading up to the elections in the course of the year. He reiterated his submission that this is a proper case in which I should exercise jurisdiction to grant an interim injunction to protect the plaintiff from further violation of his rights, and infliction of serious injury.

Mr. Mutale, SC, also submitted that the 1st defendant has gone further to produce, distribute, and sell CD's and DVD's of the programmes for commercial purposes. This is evidence, it was submitted, of the fact that the defendants have continued to publish the defamatory material complained of despite the plaintiff having instituted Court proceedings for defamation of character. He argued that the plaintiff therefore craves the indulgence of the Court by way of protection of the plaintiff from injury of his character, integrity and dignity.

Mr. Mutale, SC, further submitted that where the defendants pleads the defences of justification, and fair comment on a matter of public interest, the Court should satisfy itself that the defences so pleaded by the defendants have merit having regard to the defamatory material before the Court. This assessment it was submitted should inform the Court whether or not to grant the interim injunction sought. In aid of the preceding submission, my attention was drawn to Peter F. Carter Ruck, On Libel and Slander,⁵ at page 206. Mr. Mutale, SC argued that given the defendant's publications and the wide innuendo attached to the same, it is the plaintiff's contention that is not conceivable that the defendants can succeed in establishing the defence of justification, or any other defence that they may seek to plead at trial. The

⁵ 5th Edition (Butterworths Lodon, 1997).

plaintiff complains of in particular, the words comprised in paragraph 7 (a) and (b) of the statement of claim.

Mr. Mutale, SC, argued that it would lead to an absurdity for the Court to uphold a plea of justification and fair comment as a ground for not interfering or granting an interlocutory injunction in the absence of a critical scrutiny of the defences pleaded. Mr. Mutale SC, submitted that the plaintiff's contention is that the defences of justification and fair comment as pleaded by the defendants are rather general, lack merit, and are only intended to defeat the plaintiff's application for interim injunction.

Mr. Mutale SC, pressed that defendants have already published a series of the materials and as such no prejudice will be occasioned to either party in the event that the injunction is granted as prayed. Instead justice will be served as the further violation of the plaintiff's rights and the unjustifiable infliction of serious injury on the plaintiff dignity and integrity will be prevented pending determination of the matter.

Mr. Mutale SC, again drew my attention to the learned authors of *Carte-Ruck on Libel and Slander*, (supra) who state at page 205 as follows:

"The Court has power to restrain by injunction, the publication of libels or slanders, and this it will do when it is satisfied that there is a reasonable apprehension that a defendant unless so restrained, will continue to publish or repeat the publication of the defamatory matter of which complaint is made."

Furthermore, Mr. Mutale, SC, drew my attention to the learned authors of *Gatley on Libel and Slander* (supra). This is what they have to say at page 639:

"Where the defendant continues to publish the false or defamatory words, and immediate and irreparable injury to a person or property is likely to result, the Court has jurisdiction to grant an interlocutory injunction restraining the defendant from further publishing the words until the hearing of the action, or until further Court Order."

Mr. Mutale SC, argued that the defendant's have continued to date to televise the weekly series of the programmes. The 1st defendant has gone further to produce editions of the programmes in form of CD's and DVD's for commercial purposes. Mr. Mutale SC, submitted that this is clear evidence of the defendant's intention to continue publishing the defamatory matter and thereby continue to cause injury to the plaintiff. He also submitted that the continued publication is in itself a sufficient ground to justify the granting of an interim injunction to protect the plaintiff from further injury pending determination of the matter.

Mr. Mutale SC, in his submissions, also referred to the learned author Sir Hugh Fraser, and his book entitled: Principles and Practice of the Law of Libel and Slander.⁶ The learned authors state as follows at page 299:

"In order to obtain an interim injunction, the plaintiff must make his application promptly, he must also prove that the defendant intends to continue the publication complained of and that there is a pressing injury to a person or property threatened by the defendant's proceedings as to make it desirable that the Court should interfere."

Mr. Mutale, SC argued that the plaintiff having made his application promptly, and having deposed on oath that the defendants do not only possess intentions of continuing with the publications, but have actually continued to produce more programmes defamatory of the plaintiff and publishing them on a weekly basis. Mr. Mutale SC, reiterated that this is a proper case in which the Court should interfere, and grant the injunction sought. He pressed that unless the defendants are restrained by an injunction, the plaintiff will continue to suffer serious injury. Mr. Mutale SC, summed up his submissions by making an undertaking to abide by any order which I would make as to damages in the event that the interim injunction is granted at this stage, and later on, I form

⁶ Sixth Edition (Butterworth and Company London 1925).

the opinion that the defendants have suffered some loss or disadvantage by reason of the injunction, which the plaintiff ought to pay.

On 26th January, 2011, the plaintiff filed into Court additional submissions. In the additional submissions, the plaintiff pointed out that the 1st defendant had filed a further affidavit in opposition to the summons in support of the application for an interim injunction. Mr. Mutale, SC, submitted that in the further affidavit, the 1st defendant exhibited letters and cuttings, from the *Weekly Post* Newspaper in a bid to justify the defamatory publications. Mr. Mutale, SC, argued that the exhibits are not precise, and do not sufficiently justify the 1st defendants defamatory publications.

Mr. Mutale, SC, drew my attention to statement from the Halsbury's Laws of England⁷ as follows:

“Justification like fraud, should not be pleaded, unless there is clear and sufficient evidence to support it.”

Mr. Mutale, SC, submitted that the 1st defendant has published many unsubstantiated, unjustifiable, and malicious assertions in his publications. And yet he has only attempted to justify two issues through the exhibits marked “CC1 to CC6.” In this respect, he invited me to carefully peruse paragraph 7 of the statement of claim. Furthermore, he argued that the 1st defendant has only exhibited the letters signed by the plaintiff in his former capacity as MMD National Secretary. But has not adduced any evidence of any scheme(s) as asserted in his publication. In this respect, I was invited to examine exhibits “CC5” and “CC6” of the 1st defendant's further affidavit.

Mr. Mutale, SC, argued further that exhibits “CC5” and “CC6” in the 1st defendant's further affidavit confirm that the plaintiff was an agent of the MMD. Thus he did not execute the duties in a personal capacity. Mr. Mutale,

⁷ 4th Edition, Volume 28, paragraph 158.

SC, submitted that the exhibits which are now more than 19 years old cannot therefore be a basis for determining the plaintiff's character, and his potential as a Presidential candidate in the 2011 presidential elections. Furthermore, Mr. Mutale, SC, submitted that exhibits "CK1" to "CC4," are also more than 19 years old and relate to a period when the plaintiff was a Minister in the MMD Government. Mr. Mutale, SC, contends that it is common knowledge that status of the plaintiff changed in 2000, when he formed the Patriotic Front and became its President.

Mr. Mutale, SC, also observed that the defendants have pleaded justification as a defence. However, Mr. Mutale SC, contends that the defendant's have not furnished the particulars of the schemes, and plots allegedly undertaken by the plaintiff in his political activities. In the premises, Mr. Mutale, SC, submitted that in the absence of such particulars, the plea of justification is not sustainable. In this regard, my attention was drawn to the Halsbury Laws of England⁸ in which it is stated as follows:

"A defendant who pleads justification to a general charge must give full particulars of the facts he relies on as showing that the defamatory statement is true, to prevent the plaintiff from being taken by surprise."

Mr. Mutale, SC, further observed that the 1st defendant acknowledges in paragraph 5 of his further affidavit that the 1st defendant has continued to publish the defamatory materials complained of. Mr. Mutale, SC pointed out that the plaintiff's action is not confined to the two programmes; namely, "Stand up for Zambia," and the "Unholy Alliance" and the "Venom of the Cobra." But relates to all the programmes under the rubric of "Stand up for Zambia," that contain publications defamatory of the plaintiff. Mr. Mutale SC, reiterated that the 1st defendant has produced, and continues to distribute for commercial purposes CD's and DVD's containing programmes "Stand up for

⁸ Volume 28, paragraph 186.

Zambia". Mr. Mutale, SC, submitted that the distribution of the CDs and DVDs have exacerbated the plaintiff's injury to his character and reputation.

The 1st and 2nd defendants filed their submissions on 17th December, 2010. The 1st and 2nd defendants indicated from the outset that they are relying on the defences of justification and fair comment on a matter of public interest. In light of these defences, Mr. Nkonde, SC, submitted that this is not a proper case for the grant of an interim injunction.

In contending, that the interim injunction should not be granted, Mr. Nkonde SC, relied on a plethora of authorities. First, my attention was drawn to the case of *Bonnard v Perryman*.⁹ The *Bonnard v Perryman* case, Mr. Nkonde SC, submitted, lays down the fundamental principle that the Court will not restrain the publication of an article even through it is defamatory when the defendant asserts that he intends to justify it, or to make a fair comment on a matter of public interest. He also submitted that the *Bonnard v Perryman* case was cited with approval by the erstwhile Chief Justice Ngulube in, in the case of *Shamwana v Mwanawasa* (supra). Second, he referred me to the case of *Fraser v Evans*.¹⁰ *Fraser v Evans* case followed the decision in *Bonnard v Perryman*, I will revert to it. Third, my attention was drawn to the case of *Gulf Oil GB Limited v Page and Others*.¹¹ He submitted in this regard that the principle laid down in the *Bonnard v Perryman* case is not without exceptions as was held in the *Gulf Oil* case. I will also address the *Gulf Oil* case in more detail in due course. Be that as it may, Mr. Nkonde SC, submitted that in essence the *Gulf Oil* case is an exception to the principle stated in *Bonnard v Perryman*. However, he argued that this case does not fall within that exception.

⁹ [1891] 2 Ch. 269.

¹⁰ [1969] 1 Q.B. 349.

¹¹ [1987] 3 ALL E.R. 14.

In applying the principles adumbrated above to the facts of this case, Mr. Nkonde, SC, argued that first the plaintiff is a public figure; a leader of the opposition party, who is aspiring to be President of the republic of Zambia. Since the plaintiff is a public figure, his conduct is a matter of public interest. Second, that on the facts of this case there is no combination of claims to include conspiracy. Thus the only claim against the defendant is for libel. Third, that the Court should refuse an interim injunction when a defendant intends to rely on the defences of justification, or fair comment.

On 17th January, 2011, the 1st and 2nd defendants filed Additional submissions. Mr. Nkonde, SC, prefaced the Additional submissions by referring to the case of *Femis Bank Anguilla Limited and Others v Lazar and Another*.¹² Mr. Nkonde, SC, submitted that once conspiracy is claimed, as was the case in the *Femis Bank case*, the public interest in freedom of speech becomes irrelevant in exercising the discretion whether or not to grant an interim injunction. Thus he argued that despite the *Femis Bank* case being a claim in conspiracy, the Court still refused to exercise its discretion to grant the interim injunction. I will revert to the *Femis Bank* case later.

Professor Mvunga, SC, filed the 3rd defendant's submissions on 10th January, 2011. He submitted that while an interim injunction can be granted where an award of damages cannot atone the injury, such injunction is not available in instances such as this case. He observed that the defendant in his defence has raised the defence of fair comment, and qualified privilege. He further submitted that an injunction cannot be granted where these defences are pleaded unless the plaintiff can show that the defence will fail, or that there is malice in the publication. Furthermore, he argued that the Court has jurisdiction to restrain publication of defamatory matter even where damages

¹² [1991] 2 ALL E.R. 864.

have not accrued, but are merely eminent. In aid of this submission he relied on the Halsbury Laws of England.¹³

Professor Mvunga, SC, went on to argue as follows: it is for the plaintiff to show that the utterances, and images are defamatory, false, and published with actual malice. Further, the plaintiff must prove that he has reason to believe that publication or further publication of the words is threatened or intended. And that if this occurs, the plaintiff will suffer injury that cannot be adequately compensated by an award of damages. In support of this submission Professor Mvunga drew may attention to the case of *Munson v Tussands Limited*,¹⁴ and the Halsbury Laws of England.¹⁵ And as already stated, Professor Mvunga, SC, argued that where fair comment and privilege are pleaded, an injunction is not available unless the plaintiff can show malice in the publication. For this submission, Professor Mvunga, SC, again relied on the *William Coulson and Sons case*, (supra) and the Halsbury Laws, of England.¹⁶

Professor Mvunga , SC, argued further as follows: that in this case neither the statement of claim nor the affidavit in support show any malice. And neither is there any indication by the plaintiff that the defences will fail. In any event professor Mvunga submitted that at this stage the plaintiff cannot satisfy the Court that there was malice or that the defence will fail because these are triable issues. Further, the plaintiff can only succeed in respect of malice, if *prima facie*, if he can establish that the publication was extended to person that had no reciprocal, and corresponding interest and duty in the matter.

Professor Mvunga, SC, pointed out that this an election year, and the Zambian electorate has a reciprocal interest, and duty to weigh the character, personality, and reputation of its leaders in seeking to identify whom to put in

¹³ Volume 24, paragraph 984

¹⁴ [1984] 1 Q.B. 671 at 677.

¹⁵ Volume 28 paragraph 167.

¹⁶ Id paragraph 168.

positions of national leadership. Professor Mvunga, SC, argued that the plaintiff cannot shield himself from an inquiry of his national attributes of suitability to the office of President. Professor Mvunga, SC, went on to argue that, it is quite obvious that there is reciprocity of interest between the 3rd defendant as a television company, and the Zambian electorate. Professor Mvunga, SC, suggested that the plaintiff is merely frightened, and an injunction cannot be granted out of mere fear.

Furthermore, Professor Mvunga, SC, also submitted that an injunction is as an equitable remedy. And therefore in exercising the jurisdiction, whether, or not to grant it, the Court should always look at the conduct of the parties. In this case, he submitted that the plaintiff has an insatiable taste of disparagingly attacking his opponents, and adversaries at every opportunity. He argued that he who attacks others should also expect to be attacked by others in their defence. In such a situation, Professor Mvunga, SC, argued that equity should not intervene on behalf of the plaintiff. Lastly, he submitted that as regards the threat of intention by the 3rd defendant to repeat the publication, there is no such proof, and indeed that the plaintiff will suffer such injury as cannot be atoned in damages as envisaged in the case of *Manson v Tussands, Limited* (supra). On the basis of these submissions, arguments, and authorities, he urged me to dismiss the application for the interim injunction.

I am indebted to counsel for their well researched and spirited submissions. Generally, an injunction is available to compel a party to take certain steps; a mandatory injunction, or to restrain a party from taking steps; a prohibitory or negative injunction. An injunction may either be issued on a permanent basis; a permanent, or perpetual injunction. It may also be issued on a temporary basis; an interim injunction. The fundamental principle upon which an injunction is granted, whether interim, or perpetual, is that the injury to be inflicted would be of such a character that the claimant could not be practically compensated in damages.

Injunctions may be granted in all cases in which it appears to the Court to be “*just, and convenient*” to do so. But the words [just and convenient] do not confer an arbitrary discretion on the Court.¹⁷ The grant of an injunction being an equitable remedy is always discretionary. And this discretion belongs to the trial judge; an appellate Court may not substitute its own views on the merits of the case but may only intervene if the judge misdirected himself in law, took into account irrelevant matters, failed to take into account relevant matters.¹⁸

The principles governing the exercise of the discretion differ according to the nature of the injunction sought.¹⁹ Injunctions of all kinds may be granted on interlocutory or interim basis. Applications for interim injunctions are sometimes made when the legal validity of the claim or the factual basis for it may be uncertain. As Lord Diplock said in the leading case of *American Cyanamid Company v Ethicon Limited*:²⁰

“It was to mitigate the risk of injustice to the [claimant] during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of an interlocutory injunction... The object of the interlocutory injunction is to protect the [claimant] against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at trial.”

CYNAMID CASE

The test to be applied when considering whether an interim injunction should be granted remains that laid down by the House of Lords in the *American Cyanamid case*. The guidelines laid down by Lord Diplock have since become the leading source of the law on the subject of injunction.²¹ Prior to the *American Cyanamid case*, it was necessary for the Court to investigate the likelihood that

¹⁷ See Michael A. Jones, *Clerk and Lindsell on Torts*, Twentieth Edition, (Thomson Reuters Legal Limited 2010) paragraph 29-02 at page 1980.

¹⁸ See *Duport Steels Limited and Others v Sirs* [1980] W.L.R. 142.

¹⁹ *Id* Michael A. Jones, *supra* note 1, paragraph 29 at page 1982.

²⁰ [1975] A.C. 396 at page 406.

²¹ David Bean, *Injunctions*, Tenth Edition, (Thomson Reuters Legal Limited, London, 2010) at page 32.

a final injunction would be granted at trial. Over the years a rule had evolved that the claimant would be granted an interim injunction only if on the material before the Court, he could show a *prima facie* case that he was entitled to the right which he claimed and also that his allegation(s) that his right had been infringed was reasonably capable of succeeding.²² In time, this test had been rejected on the ground that the remedy of an interim injunction must be kept flexible and discretionary.²³ And it was held that a case must be considered on the basis of fairness, justice, and common sense.²⁴ The *American Cyanamid case* is renowned for the series of questions which have to be considered in deciding whether or not an interim injunction should be granted. As already stated, before the *American Cyanamid case*, the Court would grant an interim injunction only if the claimant could establish a *prima facie* case on the merits.²⁵ As a result, the Courts were required to examine the respective merits of the parties case. This encouraged the filing of detailed evidence supported by voluminous exhibits, and resulted in lengthy hearings.²⁶

SERIOUS QUESTION

A departure has been made from this practice. The current practice is that in an application for an interim injunction, the first question that needs to be addressed, invariably, is whether or not a claimant has raised a serious question to be determined at trial. This requirement really boils down to the proposition that a claim must not be frivolous or vexatious. The claim must also have the prospect of succeeding at trial. Therefore, assuming that there is no serious question to be considered at trial, and the prospects of succeeding

²² John Mc Ghee Snells Equity, Thirty First Edition, (Sweet and Maxwell London, 2008), paragraph 16-22 at page 406.

²³ id

²⁴ See *Harmon Pictures N.K. v Osborne* [1967] 1 W.L.R. 723.

²⁵ See *Hubbard v Vosper* [1972] 2 Q.B.84.

²⁶ Stuart Sime, A Practical Approach to Civil Procedure, Eighth Edition, (Oxford University Press London) at p 355, 2005.

at trial are in any event dim, the application for an interim injunction ought to be refused.²⁷

ADEQUACY OF DAMAGES

Conversely, if there is a serious question to be tried, the Court should go on to consider whether a claimant could if successful at trial, be adequately compensated by an award of damages. It has already been stated that a fundamental principle of injunction law is that an interim injunction should not be granted to restrain actionable wrongs for which damages are the proper or adequate remedy. Thus if the claimant can be fully compensated by an award of damages, no injunction should be granted at all. In the *American Cyanamid* case, the test was stated by Lord Diplock in the following terms: if damages in the measure recoverable at common law would be adequate remedy, and the defendant would be in a financial position to pay them, no interim injunction should normally be granted. It is important to note however, that there are instances when a case may have nothing to do with monetary compensation. In those instances, the question of adequacy of damages becomes an irrelevant consideration, and the case may fall outside the purview of the general principles upon which injunctions are granted.²⁸

BALANCE OF CONVENIENCE

In the event that there is doubt as to the adequacy of damages, and the ability of the defendant to pay them if the applicant were to succeed at trial, then the Court should proceed to consider the balance of convenience. Thus once the investigation has reached this stage, the decision of the Court whether in favour of or against an injunction will inevitably involve some advantage to one or the other side which damages cannot compensate. Therefore, the extent of this “*uncompensatable disadvantage*,” (to use Lord Diplock’s phrase in the

²⁷ See *Ndove v National Educational Company Limited* [1980] Z.R. 184.

²⁸ See *Lwali and Others v Mumbi and Others* (2009) Z.R. 64;-*Mapiko and Another v Chaande* 2010/HP/690 (to be reported in the 2010 Zambia Law Reports); *Smithline Beecham P.K. v Opotex Europe Limited* [2003] E.W.C.A. Civ. 137; and *R v Secretary of State for Transport Ex Parte Factortame Limited* [No2] [1991] A.C. 603

American Cyanamid case), either way is a significant factor in determining the balance of convenience. In many cases, it has been the decisive factor. Simply stated, the balance of convenience arises if the harm would be irreparable, and damages would not be sufficient to compensate for any harm which may be suffered as a result of the actions of the defendant.²⁹ The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer if it is granted lies on the plaintiff.³⁰ To summarise, the question of balance of convenience may be dealt with in three stages;³¹

- (i) The “*governing principle*” is that if the claimant would be adequately compensated by an award of damages if he succeeds at the trial, and the defendant would be able to pay them, no injunction should be granted, however strong the claimant’s case.
- (ii) If the claim survives the previous head, the Court must consider whether, if an interim injunction is granted, but the defendant succeeds at the trial, the defendant would be adequately compensated in damages, which then would have to be paid by the claimant, and whether the claimant would be able to pay those damages. If such damages would be an adequate remedy and the claimant would be in a position to pay them, then the defendant’s prospects of success at the trial would be no bar to the grant of the injunction.
- (iii) If there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, the Court must consider the wide range of matters which go to make up the general balance of convenience. These will vary from case to case.

In the *American Cyanamid* case, three cases were expressly mentioned. That is, status quo, relative strength of cases, and special factors.

²⁹ Per Gardner JS in *ZIMCO Properties v LAPCO Limited* (1988-1989) Z.R. 92 at p 93.

³⁰ *Shell B.P. Zambia Limited v Conidaris and Others* (1975) Z.R. 174 at p 182.

³¹ John Mc Ghee, *supra* note 22, at page 407, paragraph 16 – 23.

STATUS QUO

Where the other factors referred to above appear evenly balanced, it is advisable to maintain the status quo. Whilst it is generally accepted or acknowledged that an interim injunction is appropriate for the preservation or restoration of a particular situation pending trial; it cannot be regarded as a device by which the applicant can attain, or create new conditions favourable only to himself, and which tip the balance of the contending interests in such a way that he is able or more likely to influence the final outcome by bringing about an alteration to the prevailing situation which may weaken the opponents case and strengthen his own.³²

I have deliberately addressed the guidelines for the grant or refusal to grant an interim injunction in detail, in order to make the point that applications for interim injunctions should not be approached in a haphazard manner, or fashion. The applications must be approached, and dealt with systematically.

Before I leave the *American Cyanamid* guidelines, I would like to issue a caveat. And the caveat is that the principles established in the *American Cyanamid* case are of general application, and must not be treated as a statutory definition. In this regard, I cannot do better than quote Kerr L. J. In *Cambridge Nutrition Limited v BBC*, as follows:³³

³² Per Ngulube D.C.J. in *Turnkey Properties Limited v Lusaka West Development Limited and Others* (1984) Z.R. 85 at P. 88.

³³ [1990] 3 ALL E.R. 523 at 534.

“It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the Court to grant injunctions when it is just and convenient to do so. The American cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone, as a straight jacket. The American cyanamid case provides an authoritative, most helpful approach to cases where the function of the Court in relation to the grant or refusal of interim injunction is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial.”

It is possible therefore to grant or refuse to grant an interim injunction without applying the *American Cyanamid* guidelines, if the action is concerned with, say, a simple question of construction of a statute, a document, or a point of law. In any event, the *American Cyanamid* guidelines are primarily directed to applications where facts are in dispute. Furthermore, where the issues are of law, and do not require lengthy arguments, it is also possible to resolve, and conclude those disputes at the interim stage. To this end, the observation of Lord Denning in *Fellowes and Son v Fisher*³⁴ is instructive:

“There are cases where it is urgent and imperative to come to a decision. The affidavits may be conflicting, the questions of law may be difficult and call for detailed consideration. Nevertheless the need for immediate decision is such that the Court has to make an estimate of the relative strength of each party’s case, if a plaintiff makes out a prima facie case, the Court may grant an injunction. If it is a weak case, or it may be met by strong defence, the Court may refuse the injunction. Sometimes it means that the Court virtually decides the case at that stage. At other times it gives the parties such good guidance that the case is settled. At any rate, 99 cases out of 100, the matter goes no further.”

DEFAMATION CASES

I have already stated that the principles governing the exercise of the discretion to grant, or refuse interim injunctions differ according to the nature, and the circumstances of the interim injunction sought. The jurisdiction to grant interim injunction in the field of defamation, and malicious falsehood arises

³⁴ [1976] Q.B.D. 122 P 123.

where there has been, or there is a threatened publication of a defamatory statement, or a false statement which would give rise to a claim for malicious falsehood.³⁵ The injunction would restrain the threatened or repeated publication of defamatory statements about the claimant.³⁶ The jurisdiction to grant interim injunctions to restrain publications of defamatory statements is said to be of a delicate nature, which ought only to be exercised in the clearest cases. This is what Lord Esher M.R. said in *Coulson v Coulson*:³⁷

“It could not be denied that the Court had jurisdiction to grant an interim injunction before trial. It was however a most delicate jurisdiction to exercise because though Fox’s Act only applied to indictments and information for libel, the practice under that Act had been followed in civil actions for libel, that the question of libel or no libel was for the jury. It was for the jury, and not for the Court to construe the document and to say whether it was libel, or not. 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 decided whether it was libel or not. Therefore, the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find, the Court would set aside the verdict as unreasonable. The Court must be satisfied in all probability the alleged libel was 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 could only on the rarest occasion exercise the jurisdiction.”

Why then are Courts generally reluctant to grant interim injunctions in defamation cases? The answer to this question is in my view to be found, first, in the case of *Bonnard v Perryman*.³⁸ This was an action for libel. The plaintiff’s were Gustave Richard Bonnard, and Arthur Henry Deakin, Trading as the *Mercantile General Trust*, at Broad Street Avenue. The defendants were Charles W. Perryman, the publisher, proprietor, and editor of a weekly newspaper called the *Financial Observer and Mining Herald*, and Allen sued as a printer of that newspaper. The writ was indorsed with a claim for an injunction to restrain the defendants:

³⁵ Patrick Milmo and M.V.R. Rogers, *Gatley on Libel, and Slander*, Eleventh Edition, (Thomson Reuters Limited, London, 2008) paragraph 27 – 1 at pages 933 -934.

³⁶ *Id.*

³⁷ [1887] 3 T.L.R. 846.

³⁸ [1891] 2Ch. 269 at 284.

“from selling, circulating, or delivering or communicating to any person or persons any copy of the Financial Observer and Mining Herald of the 7th February, 1891, containing an article headed “The Fletcher Mills at Providence Island,” or from printing or publishing in the newspaper any statement imputing to the plaintiff fraudulent, or dishonest conduct in connection with the floating of “Skyes Brewery or the “City Baltimore United Breweries,” or the promotion of the proposed “Providence and National Worsted Mills Limited.”

In the course of the judgment Lord Coleridge observed as follows at page 283__
284.

*“But it is obvious that the subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before trial of an action to prevent an anticipated wrong. The right of free 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; and unless an alleged libel is untrue, there is no wrong committed. But on the contrary often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of and desire to adopt as our own the language of Lord Esher in *Coulson v Coulson*.”*

The preceding statement of the law has been endorsed and consistently applied since 1891. And the decision in *Bonnard v Perryman* (supra), was cited with approval by the erstwhile Chief Justice Ngulube in *Shamwana v Mwanawasa* (supra).

Second, another lucid explanation provided for the Court’s reluctance to grant pre-emptory injunctions is found in the case of *Fraser v Evans and Others*.³⁹ The facts of the case were that the plaintiff was a consultant in public relations. His firm was employed by the Government of Greece. And in the course of that employment, he was required to make reports for them. The firms contract which was in writing contained an express provision imposing

³⁹ [1969] 1 Q.B. 349.

on it an obligation of confidence. But there was no corresponding undertaking by the Greek government. In June, 1968, the plaintiff made a report for the Greek government on the public relations programme for Europe. It was translated into Greek in Athens, nine copies being sent to high offices of the government in Greece, or government departments, and a tenth being kept by the plaintiff, and his firm. One of the Greek translations was obtained surreptitiously, and came into the hands of a journalist employed by the defendants. He had an English translation made of it and thought that he would write an article about it for a *Sunday Newspapers* owned by the defendants. Two journalists from the newspaper interviewed the plaintiff who answered questions and was shown the English translation of the report. The plaintiff being concerned that the newspaper might publish an article on the subject in their next issue, obtained an interim injunction restraining the defendants from publishing the report, or any matter incorporating information derived from it. The newspaper admitted that the article would be defamatory of the plaintiff, but said that if they were sued they would plead justification and fair comment. Initially the plaintiff was granted an *ex parte* interim injunction. The interim injunction was later continued after the *inter partes* hearing.

On appeal to the Court of Appeal, the interim injunction was discharged, and this is what Lord Denning had to say at page 360:

*“The Court will not restrain the publication of an article even though it is defamatory when the defendant says he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since *Bonnard v Perryman*. The reason sometimes given is that the defences of justification and fair comment are for the jury which is the constitutional tribunal, and for the 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 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 if this is a fair comment on a matter of public interest. The Court will not prejudice the issue by granting an injunction in advance of the publication.”

Thus the Court will only grant an interim injunction where:⁴⁰

1. The statement is unarguably defamatory;
2. There are no grounds for concluding the statement may be true;
3. There is evidence of an intention to repeat or publish the defamatory statement; and
4. There is no other defence which might succeed.

I will immediately deal with the first three conditions referred to above. The last condition will be dealt with under the following headings: justification, fair comment on matter of public interest, and qualified privilege.

UARGUABLY DEFAMATORY

The reason for this pre-condition was forcefully explained by Lord Esher in the passage in his judgment in *Coulson v Coulson* (supra); from which I have already quoted from above. Thus it is not sufficient for a claimant to establish that the words are capable of being defamatory; the Court must be satisfied that it would inevitably come to the conclusion that they are defamatory.⁴¹

NO GROUNDS FOR THE TRUTH OF THE STATEMENT.

In practice it is customary, if not invariable for there to be some evidence even if limited to assertions by the claimant of the falsity of the allegations for in the

⁴⁰ Patrick Milimo and W. V. H. Rogers, supra note 35, at paragraph 27.2 at page 934.

⁴¹ Id. paragraph 27 – 3 at page 936.

absence of such evidence the Court may in the exercise of its discretion, and having regard to the “*delicate nature*” of the jurisdiction refuse an injunction.⁴²

EVIDENCE OF AN INTENTION TO REPEAT OR PUBLISH

The Court will not grant an interim injunction unless there is some evidence or there are grounds to infer that the defendant threatens and intends to continue the publication of the words.⁴³ However, where there has not yet been any publication of defamatory words, but there is threat of publication, the claimant need not wait for the publication to take place; he may seek to restrain publication, by means of *quia timet* order before it has taken place.⁴⁴

As Lord Dunedin put it in *Attorney General for Canada v Ritchie Contracting*:⁴⁵

“But no one can obtain a quia timet order by merely saying “Timeo,” he must aver and prove that what is going on is calculated to infringe his rights.”

DEFENCES

The *American Cyanamid* case has not affected the previous rulings that interim injunctions should not be issued in a libel action where the defendant raises a defence whether of justification, fair comment on a matter of public interest, or privilege, unless the defence would obviously fail.⁴⁶ Thus where defendant states that he intends to rely on any substantive defence, the Court will not grant an injunction even though the statement is unarguably defamatory, or the defendant threatens or intends to publish the defamatory words or similar words, unless the defendant is clearly acting in bad faith.

⁴² Id. paragraph 27-5 at page 936.

⁴³ Id. paragraph 27 – 10 at page 940

⁴⁴ Id.

⁴⁵ [1919] A.C. 999 at 1005.

⁴⁶ Patrick Milmo and W.V.H. Rogers supra note 19 at paragraph 29 – 22 at page 1993.

JUSTIFICATION

Justification means truth. It is an absolute defence in civil defamation claim that the statement in question is true, or substantially true.⁴⁷ It is irrelevant for the purposes of defamation that its publication constitutes a gross breach of privacy or confidence or that it is contrary to public interest.⁴⁸ The purpose of civil law is to compensate a claimant, not to punish a defendant.⁴⁹ A claimant is not entitled to be compensated for a reputation that he does not deserve. As Littledale said in *M'Pherson v Daniels*:⁵⁰

“The law will not permit a man to recover damages in respect of injury to a character which he either does not, or ought not to possess.”

Where the defendant contends that the words complained of are true, and asserts that they will plead, and seek at trial to prove the defence of justification, the Court will not grant an interim injunction, unless exceptionally the Court is satisfied that such a defence is one that cannot succeed.⁵¹ Where the defendant indicates that he will plead justification, the test is whether the words are so manifestly untrue that the defence must fail.⁵² It is not enough for a defendant in the face of a statement that the words are untrue to merely state that he intends to justify. 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.⁵³ A defendant is obliged to plead clearly,

⁴⁷ David Price, Korieh Duodu, and Nicola Cain. Defamation Law, Procedure, and Practice. Fifth Edition, (Sweet, and Maxwell, 2010). Paragraph 8-101 at page 57.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ [1829] 10 B and C 263.

⁵¹ Patrick Milmo and W.V.H. Rogers, *supra* note 35, paragraph 27 – 6 at page 936.

⁵² See *Holley v Smith* [1998] E. M.L.R. 133.

⁵³ Halsbury Laws of England, Fourth Edition, (Reissue) Volume 28. (Butterworths London 1997) paragraph 189 at 99.

and without obfuscation the meaning, and or meanings which he seeks to justify.⁵⁴

For the purpose of defending a libel claim there is a fundamental difference between a statement of fact, and statement of opinion.⁵⁵ The defence of justification protects a statement of fact, and the defence fair comment protects statement of opinion.⁵⁶ The fact relied on to support a plea of justification must be properly particularised, since the plaintiff ought to be able to go to trial with knowledge of the acts which it will be alleged he has committed.⁵⁷ Accordingly, a defendant who pleads justification to a general charge must give full particulars of the facts he relies on as showing that the defamatory statement is true.⁵⁸ The particulars must be relevant, and must be capable of justifying the meaning, or meanings that the defendants seek to justify.⁵⁹ It must be noticed that section 6 of the Defamation Act,⁶⁰ provides for a statutory defence of justification as follows:

“In an action for libel or slander in respect of words contained in two, or more distinct charges against the plaintiff a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true, do not materially injure the plaintiff’s reputation having regard to the truth of the remaining charges.”

The effect of the preceding provisions is therefore that no injunction will be granted even in relation to facts which are clearly untrue if there is genuine argument as to whether they materially affect the claimant’s reputation, assuming that the other matters in the publication which the defendant asserts to be true are indeed true.⁶¹ If a defendant wishes to rely on the

⁵⁴ Id.

⁵⁵ David Price, Korieh Duodu, and Nicola Cain, *supra* note 47, at paragraph 8 – 02 at page 58.

⁵⁶ Id.

⁵⁷ Halsbury Laws of England, *supra* note 55, paragraph 190, at p. 99.

⁵⁸ id.

⁵⁹ Id.

⁶⁰ Chapter 68 of the laws of Zambia.

⁶¹ See *Kashoggi v IPC Magazine Limited* [1986] 3 All E.R. 577.

statutory defence of justification, it must be specifically pleaded.⁶² It is a reflection of the importance accorded to reputation that there is a presumption that any defamatory statement is false.⁶³ The defendant can only rebut the presumption by pleading, and proving that it is true.⁶⁴ Thus the burden of proof in justification is firmly on the defendant.⁶⁵ The standard of proof is the normal civil one of the balance of probabilities.⁶⁶ In sum, justification has traditionally been regarded as the main defence to a defamation claim.⁶⁷ However, its primacy has to an extent waned in recent years.⁶⁸ Developments in fair comment, and qualified privilege have made these defences more available and attractive.⁶⁹

FAIR COMMENT

The defence of fair comment on a matter of public interest is available to everyone. However, this defence is of particular importance to the media. Freedom of expression, and press freedom is largely protected by this defence. It is important to keep in mind that this defence is concerned with the protection of comment, and not imputations of fact.⁷⁰ If the imputation is one fact, a ground of defence must be sought elsewhere.⁷¹ Further, to be within this defence, the fair comment must be recognised as comment as distinct from an imputation of fact.⁷² The comment must explicitly, or implicitly indicate at least in general terms, the facts on which the comment is being made. One constraint does exist upon this defence. The comment must represent the

⁶² Halsbury Laws of England, supra note 53, paragraph 189, at 99.

⁶³ David Price, Korieh Duodu, and Nicola Cain, supra note 47, paragraph 8 – 03 at p 59.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id. Paragraph 8 – 02, at page 58.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Reynolds v Times Newspapers Limited, and Others, [2001] 2 A.C. 127, Per Lord Nicholls of Birkenhead.

⁷¹ Id.

⁷² Id.

honest belief of its author. If the plaintiff proves he was actuated by malice, this ground of defence will fail. The defence of honest comment does not cover defamatory statements of facts. The essence of this defence lies in the law's recognition of the need in the public interest for a particular recipient to receive frank, and uninhibited communication of particular information from a particular source.⁷³

Whether a statement is a fact or not, can be a very difficult distinction particularly because in many publications there is a mixture of both.⁷⁴ In *Branson v Bower*⁷⁵ Latham L.J. approved the judgment of Cussen. J. In *Clarke v Norton*⁷⁶ where he said:

“More accurately, it has been said that the sense of comment is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation etc.”

Where the statement is a pure value judgment incapable of proof, it is likely to be regarded as a comment.⁷⁷ Where the defendant refers to certain facts, and makes it clear that the statement in question is an inference, from the fact, it will generally be considered comment.⁷⁸ This technique is often utilised by the makers of documentaries who might set out a number of facts from which they draw the conclusion that the claimant, is for example unfit for public office.⁷⁹ The conclusion will clearly be comment.⁸⁰ However, it is vital to bear in mind that where the matters in question are defamatory statements of fact in their

⁷³ Id.

⁷⁴ David Price, Korieh Duodu, and Nicola Cain, *supra* note 47, paragraph 9-03 at page 74.

⁷⁵ [2001] E.M.L.R. 800.

⁷⁶ [1910] V.L.R. 494.

⁷⁷ David Price, Korieh Duodu, and Nicola Cain, *supra* note 47, paragraph 9-03 at page 75.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

own right, they must be protected by privilege or they will have to be justified, that is proved true or substantially true.⁸¹

A bold statement with no supporting facts is unlikely to be considered a comment.⁸² For instance, to say, “*C is a disgrace to the profession of journalism,*” may sound like an opinion but in the absence of indication of the basis of the statement it is likely to be treated as a statement fact.⁸³ To say that “*C disclosed the identity of his source and is therefore a disgrace to the profession of journalism,*” clearly identifies the allegation as a comment based on the fact that he has disclosed his source.

It is said that a comment cannot exist in “*thin air.*”⁸⁴ The defendant must prove that the factual building blocks on which the comment is based are true or sufficiently true. In the example, the allegation that C has disclosed the identity of a source is the fact on which the opinion____ that he is a disgrace to journalism is based.⁸⁵ If C did not, in fact disclose the identity of a source then the comment, and defence collapses.⁸⁶ By analogy it cannot be fair comment to attack an author for something he has not written. For instance in *Merivate v Carson*,⁸⁷ the defendant published a review of the plaintiff’s play which suggested that it had an evil tendency on the basis that it treated adultery cavalierly. In fact, there was no mention of adultery in the play, and the defence of fair comment therefore failed.

The following principles emerge from this discussion.⁸⁸ The facts must either be stated or summarised in the publication or indicated with sufficient clarity to

⁸¹ See *Broadway Approvals Limited v Odhams Press Limited* [1964] 2 Q.B. 683.

⁸² David Price, Korieh Duodu, and Nicola Cain, *supra* note 47, paragraph 9 – 03 at p. 75.

⁸³ *Id.*

⁸⁴ *Id.* Paragraph 9 – 04 at 7, 79.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ [1887] 20 Q.B. D. 275.

⁸⁸ David Price, Korieh Duodu, and Nicola Cain, *supra* note 47, paragraph 9-04 at p. 79.

enable the publishees to ascertain the facts on which comment is based.⁸⁹ Where some of the facts stated are true, and some are false, the defence will succeed if the defendant would have been entitled to make the same comment solely on the basis of the true facts.

To this extent section 7 of the Defamation Act provides that:

“In an action for libel or slander in respect of words consisting partly allegations of fact, and partly of expressions of opinion, a defence of fair comment shall not fail by reason that the truth of every allegation of fact is not proved if the expression of opinion is a fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.”

In order to rely on the statutory defence of fair comment, it must be pleaded.

Ultimately, the critical question is whether or not the factual building blocks remain sufficiently strong to justify the comment. It is also clear from the preceding discussion that this defence gives more latitude to the defendants than the defence of justification. It might be thought that provided the statement is comment, and the facts on which are sufficiently true, there should be no requirement that the comment should be judged objectively as fair.⁹⁰ However, the reality is that this additional requirement is in theory very limited and in practice non-existent.⁹¹ Thus in *Branson v Bower [No. 2]*,⁹² Eady J, made it clear that the only issue is whether an honest person could express the comment on the basis of such facts as have been proved. Earlier on in *Reynolds v Times Newspapers Limited and Others*,⁹³ Lord Nicholls observed that the epithet “*fair*” as applied to the defence of comment is now meaningless, and misleading. The true test is whether the opinion, however exaggerated, obstinate, or prejudiced, was honestly held by the person expressing it.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² [2002] Q.B.D. 737.

⁹³ [2001] 2 A.C. 127.

QUALIFIED PRIVILEGE – DUTY AND INTEREST

The law of defamation always seeks to balance the competing interests of freedom of speech and the protection of reputation. There is no difficulty where the publication in question is true___ freedom to disseminate the truth must outweigh the protection of underserved reputation.⁹⁴ However, in certain circumstances, the law recognises that it is better that individuals, are free to speak their mind (and others to report what they say) without fear of being sued even if they get it wrong, and the claimant’s reputation is damaged.⁹⁵ This is the rationale behind the defence of privilege.

There are, in general, two types of privilege___ absolute, and qualified. Where the publication is protected by qualified privilege, the defence may be defeated if the claimant proves that the defendant was malicious. Malice is a term of art, and will be considered in more detail later. The categories of qualified privilege cover a wide range of situations where it is felt that freedom of expression should prevail over the protection of reputation, but not to the extent of granting a complete immunity.⁹⁶ The concept of duty, and interest is the primary method by which the common law identifies the circumstances in which it is felt desirable for people to speak their mind honestly without fear of being sued for defamation if they get it wrong.⁹⁷The *raison d’tre* for qualified privilege was stated succinctly by Lord Atkin when he said:⁹⁸

“A privileged occasion is an occasion where the person who makes a communication has any interest or duty legal, social, or moral to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.”

⁹⁴ Id. Paragraph 10 – 01 at p. 85

⁹⁵ Id.

⁹⁶ Id. Paragraph 10-03 at p 86

⁹⁷ Id. Paragraph 12 – 01 at p. 99.

⁹⁸ Adam v Word [1917] A.C. 309 at 334.

The authorities make it clear that the assessment of whether such a duty or interest arises depends to a large extent on the facts of the particular case.⁹⁹ It is important to stress that it is the occasion that is privileged. The privilege neither belongs to the communications, nor to the people whom communicate them. No individual, or organization such as a newspaper or any other section of the media can assert that it is entitled to the benefit of qualified privilege simply because of who or what that individual does or organization is or what it does.¹⁰⁰ It is the occasion of the communication which must be examined to see whether there was an interest or duty to make it and the corresponding interest or duty to receive it, having regard to its particular subject matter.¹⁰¹

Proof of actual malice will always be required before the words can be held to be defamatory. This assists free speech and full, and frank disclosure of facts. It also removes the inhibiting or chilling effect which the law of defamation imposes on the discussion of matters of public interest. As a general rule it is beneficial, and in the public interest that communication between parties with the necessary duty, and interest in the matter should not be inhibited.¹⁰² This approach recognises the fact that the question is ultimately one of striking the right balance between the competing interests.

In the context of this defence___ qualified privilege___ it is also recognised that complete factual accuracy may not always be practically achievable, nor may it always be possible finitely to establish what is true, and what is not.¹⁰³ Some

⁹⁹ David Price, Korieh Duodu, and Nicola Cain, *supra* note 47, 12 -01, at page 100.

¹⁰⁰ See *Reynolds v Times Newspapers Limited and Others* [2001] 2 A.C. 127 per Lord Hope.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

degree of tolerance for factual inaccuracy has to be accepted; hence the need for a law of privilege.¹⁰⁴ Thus a defence of privilege in the usual sense is available when the defamatory statement was published on a privileged occasion and can be defeated only by showing that the privilege was abused.¹⁰⁵ As Lord Diplock said in a well known passage in *Harrocks v Lowe*:¹⁰⁶

“The public interest that effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly, and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith in matters of these kinds is published on privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused.”

However, in the case of *Reynolds v Times Newspapers Limited, and Others*,¹⁰⁷ the House of Lords refused to do so. Lord Nicholls of Birkenhead said that to allow publications of any defamatory statement of a political character, subject only to proof of malice, would provide inadequate protection for the reputation of defamed individuals. Instead, Lord Nicholls said at page 202 that:-

“The common law solution is for the Court to have regard all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public. Its value to the public depends upon its quality as well as its subject matter. This solution has the merit of elasticity. As observed by the Court of Appeal, this principle can be applied appropriately to the particular circumstances of individual cases in their infinite variety. It can be applied appropriately to all information published by a newspaper, whatever its source or origin.”

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ [1975] A.C. 135 at p. 149.

¹⁰⁷ [2001] 2 A.C. 127.

Although Lord Nicholls uses the word “*privilege*,” it is not used in the old sense referred to above. It is the material which is privileged, and not the occasion on which it is published. Further, in terms of the “*Reynolds privilege*,” there is no question of the privilege being defeated by proof of malice because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged. The burden is upon the defendant to prove that those conditions are satisfied. It is therefore self-evident that the “*Reynolds privilege*” is a different jurisprudential creature from the traditional form of privilege from which it sprang. It is more appropriately called the “*Reynolds public interest defence*,” rather than privilege.

In the *Reynolds case*, Lord Nicholls offered guidance in the form of a non-exhaustive illustrative list of matters which depending on the circumstances might be relevant. Thus in considering whether allegations made in the press attracted qualified privilege, the matters to be taken into account depending on the circumstances included: the seriousness of the allegation; the nature of the information, and the extent to which the subject matter was of public concern; the source of information; the steps taken to verify the information; the status of the matter; whether comment had been sought from the plaintiff; whether the article contained the gist of the plaintiff’s side of the story; the tone of the article, and the circumstances of the publication including the timing. The weight to be given to these, and any other relevant factors would vary from case to case.

Thus when applying the “*Reynolds 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 isolate the defamatory statement. Privilege attaches to the publication on

the basis of its value to the public. The question whether the publication concerned is a matter of public interest is to be decided by the Court. And it is also for the Court to apply the test of public interest.

Further in terms of the “*Reynold’s defence*” an addressing the question of public interest, it is not helpful or useful to apply the classic test for the existence of a privileged occasion, and ask whether there was a duty to communicate the information, and an interest in receiving it. The “*Reynolds defence*” was developed from the traditional form of privilege by a generalisation that in matters of public interest there can be said to be a professional duty on the part of journalists to impart the information and an interest in the public in receiving it. If the publication is in the public interest the duty, and interest are taken to exist.

If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory 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. The more serious the allegation, the more important that it should have a real contribution to the public interest element in the publication.

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. As Lord Nicholls said eloquently in *Bonnick v Morris*¹⁰⁸ at page 309:

“State shortly the Reynolds privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matter of public concern. Responsible journalism is a point at which a fair balance is held between

¹⁰⁸ [2003] A.C. 300

freedom of expression on matters of public concern and the reputation of individuals. Maintenance of this standard is in the public interest, and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege.”

In *Jemeel v Wall Street Journal Europe*,¹⁰⁹ the House of Lords confirmed the public interest defence that the *Reynold’s* case conferred on the media, reminding the lower Court of the flexibility of the defence, and the dangers of using Lord Nicholls 10 factors as a series of hurdles that the defendants must win. The standard of conduct required of journalists must therefore be applied in a practical, and flexible manner. I cite the case of *Reynold* with approval.

CONSPIRACY

I will now turn to consider the concept of conspiracy in defamation cases. The rule in *Bonnard v Perryman* (supra) was circumvented in *Gulf Oil (Great Britain) Limited v Page*.¹¹⁰ The facts of the case were that the defendants owned a number of petrol filling stations which had been supplied with petrol by the plaintiff under an agreement which had given rise to litigation. In that litigation the High Court held *inter alia*, that the plaintiff had been in fundamental breach of the agreement. During a race meeting at Chaltenham on the day before the Golf Cup, the defendants flew a light aircraft over the race course towing a baner, “*Gulf exposed in fundamental breach.*” They intended to do the same the next day during the Golf Cup itself.

Gulf Oil (Great Britain) Limited, immediately applied in the Chancery Division for an interim injunction in these terms:

¹⁰⁹ [2006] 3 W.L.R. 642

¹¹⁰ [1987] Ch. 327

“... that until trial or further order in the meantime the defendants and each of them, in the case of third defendant by its directors and officers and in the case of all defendants by themselves and their servants, or agents, or howsoever be restrained from exhibiting or publishing on airborne sign or otherwise the legend “Gulf exposed in fundamental breach,” or any other word to the like or similar effect.”

The plaintiff did not seek to challenge the principle that in a libel action if a defendant intends to justify, interim relief is, as a matter of principle never granted. But they contended that where the writ is also indorsed with a claim for damage for conspiracy, and there is clear evidence of conspiracy to injure, the principle has no application. In response, the defendants asserted that if interim relief could be granted in such a case as this, it would in effect reverse the long standing principle because it would often be open to a plaintiff in a libel action to claim also in conspiracy against the reporter, editor, printers, and publishers of the libel.

The injunction was granted by the Court of Appeal. In the course of the judgment Parker L.J. said at page 3336__334A:

“It is true that there is no wrong if what is published is true provided that it is not published in pursuance of a combination and even if it is, there is still no wrong unless the sole or dominant purpose of the combination and publication is to injure the plaintiff. If, however, there is both combination and purpose or dominant purpose to injure there is wrong done. When a plaintiff sues in conspiracy there is therefore a potential wrong even if it is admitted, as it is in the present case, that the publication is true and thus there is no question of a cause of action in defamation. In such case the Court can, and in my view should proceed on the same principles as it would in the case of any other tort. The prospect that this would open the floodgates and reverse the principle applicable in libel action, is in my view unreal. A plaintiff in an action against the author and publisher of a newspaper article for example, might well establish a combination, but it appears to me that it would only be in the rarest case that purpose to injure could be made out to warrant the grant of interlocutory relief.”

Thus in the *Gulf Oil case* the plaintiff obtained an injunction prohibiting the defendant from flying an aeroplane over the race course. It was not disputed that the words were true. The Court said that the principle established in *Bonnard v Perryman* was not a complete answer to the claim for an interim injunction, for in conspiracy the wrong arose from the sole or dominant purpose of the participants causing the injury to the plaintiff.¹¹¹

The same route was sought to be followed in *Femis Bank (Anguilla) Limited and Others v Lazar and Another*.¹¹² In that case the plaintiff confronted by a series of defamatory allegations published by the defendants claimed a conspiracy to injure and applied for an interim injunction. It was refused on the grounds that freedom of speech was an important factor to be taken into account. In the course of the judgment *Sir Nicolas Browne Wilkinson V. C.* made the following observation at page 400:

“Only in the very clearest cases such as existed in the Gulf Oil case would the interference with that public interest be justified in the grant of an injunction.”

It seems unlikely that the Courts will allow the rule in *Bonnard v Perryman* to be regularly avoided by alleging conspiracy to injure.¹¹³ On the facts of this case, the question of conspiracy has not been pleaded by the plaintiff, and therefore does not arise.

MALICE

Malice or “express” malice as is sometimes called is an important concept in the law of defamation.¹¹⁴ It is a technical term of art which is not necessarily to be equated with its popular meaning.¹¹⁵ Thus it means one thing in relation to

¹¹¹ Patrick Milmo and W.V.H. Rogers supra note 35, at paragraph 27 – 18 at page 945.

¹¹² [1991] 2 ALL E.R. 864

¹¹³ Patrick Milmo and W.V.H. Rogers supra note 35, paragraph 27 – 18 at page 46.

¹¹⁴ David Price, Korieh Duodu, and Nicola Cain, supra note 47, paragraph 18-01 at p. 99.

¹¹⁵ Id.

murder, and something quite different in libel.¹¹⁶ Malice for purposes of defamation law is a dominant improper motive for publishing the statement.¹¹⁷ For practical purposes it is simpler to recognise that malice generally equates to the defendant knowing that what he is publishing is false, or being indifferent as to whether it is true or false.¹¹⁸ It is often referred to as “*absence of honest belief*.”¹¹⁹ Malice is a subjective matter, and is entirely dependent on what is going through the defendant’s mind at the date of publication.¹²⁰ How then can a claimant prove the defendant’s state of mind at the date of publication. Bowen L.J. observed in *Edginton v Fitzmaurice*¹²¹ that:

“*The state of a man’s mind is much a fact as the state of his digestion.*”

Malice is notoriously difficult to prove. The usual way to prove malice is by drawing inferences from the conduct, and the information available to a plaintiff. It may be wondered why malice is important in the law of defamation. Malice is important because:¹²²

1. It defeats a defence of qualified privilege. Malice is most commonly alleged to defeat a duty, and interest based qualified privilege;
2. It defeats a defence of fair comment. This is much more less common and more difficult to establish. Improper motivation alone will not suffice;
3. It defeats a defence of offer of amends;
4. The defendant cannot rely on justification where he maliciously refers to a “spent” conviction;
5. It is a necessary element of malicious falsehood; and
6. It aggravates the damages, and is a necessary element in a claim for exemplary damages.

¹¹⁶ See *R v Tolson* [1889] 23 Q.B.D. 168 at 187.

¹¹⁷ David Price, Korieh Duodu, and Nicola Cain, *supra* note 47, paragraph 18 – 01 at page 199.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ [1885] 29 Ch. D. 459, at 483.

¹²² David Price, Korieh Duodu, and Nicola Cain, *supra* note 47, paragraph, 18 - -2, p 200.

How then can malice be inferred? The sources of malice can be placed in four categories:¹²³

1. Extrinsic evidence; that is to say something outside the libellous statement itself;
2. Intrinsic evidence, that is to say, something contained in the libellous statement itself;
3. The circumstances of the publication; and
4. The conduct of the defendant in the course of the litigation; and at trial.

It is noteworthy that according to Cockburn C.J. in *Spill v Maule*,¹²⁴, malice may be inferred in the following circumstances:

“It may be that the language used in a libel though under other circumstances justifiable may be so much too violent for the occasion and circumstances.... as to form strong evidence of malice.... and that an inference of actual malice may be drawn from its use.”

Sir Donald Nicholls expressed the point under discussion in *Joyce v Senguta*¹²⁵ in the following terms:

“Malice is to be inferred from the grossness and falsity of the assertions and the cavalier way in which they were expressed.”

It must be noticed that there is no need for the claimant to prove malice in order to establish a cause of action in defamation.¹²⁶ The most common application of malice is to defeat a defence of qualified privilege based on the corresponding duties and interest.¹²⁷ The leading case on malice is *Harrocks v Lowe*.¹²⁸ The facts of the case were that the defendant a labour councillor in Bolton accused the plaintiff a conservative councillor in relation to dealings between his companies, and the conservative controlled authority. The

¹²³ Patrick Milmo and W.V.H. Rogers supra note 35, at paragraph 34-36 at 1181.

¹²⁴ [1869] L.R. 232 at 235.

¹²⁵ [1993] 1 W.L.R. 337, at 345 HL.

¹²⁶ David Price, Korih Duodu, and Nicola Cain, supra note 47, paragraph, 18-02, p 200.

¹²⁷ Id.

¹²⁸ [1975] A.C. 135

allegations turned out to be false but were made during a meeting of the Council, and were therefore published on an occasion of qualified privilege.

The case was tried by judge alone who held that while the defendant believed that what he said was true, he disliked the defendant, and his state of mind was one of "*gross and unreasoning prejudice.*" He held that this amounted to malice. The Court of Appeal allowed the defendant's appeal, and the House of Lords dismissed the plaintiff's further appeal. The speech of Lord Diplock is generally recognised as the classic exposition, on malice.

The following points summarise the position.¹²⁹

1. Malice is an improper motive on the part of the defendant which is the dominant motive for making a defamatory statement. In cases of qualified privilege based on duty or interest, it is any motive other than furthering the relevant interest, or discharging the relevant duty;
2. The motive with which a person makes a defamatory statement can only be inferred from what he did or said or knew;
3. Where the defendant knew that what was published was false it will generally be conclusive evidence of a dominant improper motive, although there may be occasions where a person is under a duty or interest to repeat matters which he knows to be false;
4. A defendant who is indifferent to the truth, i.e. does not care whether the statement is true, or false is treated as if he knew it to be false in such a case the defendant is said to be reckless. Recklessness is more commonly alleged than actual knowledge because it is a lower evidential hurdle to overcome;

¹²⁹ David Price, Korieh Duodu, and Nicola Cain, *supra* note 47, paragraph 18 – 03, page 201 – 202.

5. However, indifference to truth is not to be equated with carelessness, impulsiveness, or irrationality. It is in the public interest that the defence of qualified privilege is available to all persons not just those who act sensibly; and
6. It is possible that a defendant who believes what he says is true may nevertheless have an improper motive for saying it. However, this will be very rare, and judges, and juries should be very slow to draw such an inference.

The improper motive is generally said to be the desire to injure the claimant or to advance the interests of the defendant by improper means.¹³⁰ In order to establish malice it is necessary that the improper motive is the sole or dominant motive for publishing the defamatory statement.¹³¹ In most cases, the key to establishing whether the dominant motive is improper is the question of whether or not the defendant believed the statement to be true.¹³²

The burden of proving and pleading malice lies on the claimant. In sum, it is instructive to notice the observation of Lord Diplock in *Harrocks v Lowe* (supra) that judges should be careful not to draw inferences of malice where none can be found. The rationale behind this observation is that the defences of fair comment, qualified privilege, and now offer of amends, become illusory if malice is not kept under control.¹³³ Individuals will be constrained from their minds in privileged situations for fear of being accused of acting maliciously.¹³⁴

¹³⁰ Id paragraph 18 – 04 at p 202.

¹³¹ Id.

¹³² Id.

¹³³ Id. At paragraph 18 – 18 at page 212.

¹³⁴ Id.

FREEDOM OF EXPRESSION VERSUS REPUTATION.

This case primarily concerns the interaction between two fundamental human rights: freedom of expression, and protection of reputation. The high importance of freedom to impart and receive information and ideas has been stated so often and so eloquently that this point calls for no elaboration in this case.¹³⁵ It is of fundamental importance to a free society that this liberty is recognised, and protected by the law. The liberty to communicate (and receive) information occupies a central position in a free society. At a pragmatic level freedom to disseminate, and receive information on political matters is essential to the proper functioning of any democracy. This freedom enables those who elect political representatives at various levels to make informed choices. This freedom also enables those elected to make informed decisions. Similarly, there is no need to elaborate the important role played by the media in the expression and comment on political matters. It is through mass media that most people today obtain their information on political matters.¹³⁶

In the same vein, reputation is an integral part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well being: whom to employ or work for; whom to promote; whom to do business with; or to vote for.¹³⁷ Once besmirched by an unfounded allegation, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation.¹³⁸ When this happen society as well as the individual is the loser.¹³⁹ For it should not be supposed that the protection of reputation is a matter of importance only to the affected individual, and family. Protection of reputation is conducive to the public

¹³⁵ See Attorney General v Clarke (2008) VII Z.R. 38.

¹³⁶ Reynolds v Times Newspapers Limited, and Others [2001] 2 A.C. 127. Per Lord Nicholls of Birkenhead

¹³⁷ Id at p 621

¹³⁸ Id

¹³⁹ Id

good.¹⁴⁰ It is in the public interest that the reputation of public figures should not be debased falsely.¹⁴¹ In the political field, in order to make an informed choice the electorate needs to be able to identify the good as well as the bad.¹⁴² Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right.¹⁴³ Its exercise may be subject to such restrictions as are prescribed by law, and are necessary in a democratic society for the protection of others.¹⁴⁴

It is therefore clear that an application for an interim injunction in defamation cases presents, and represents a tension between the rights to expression, and the need to protect in appropriate cases, reputation. How then is this tension to be resolved? The answer in my opinion is to be found in the case of *Sata v Post Newspapers Limited and Another*.¹⁴⁵ The erstwhile Chief Justice Ngulube sitting in the High Court had occasion to consider the question whether or not the law of defamation derogates from, *inter alia*, press freedom as guaranteed by the Constitution.¹⁴⁶ And if so, what modification would reasonably be required to be imported or imposed in order to give effect to the intention of the Constitution.

The facts in the *Sata case* were that the plaintiff, (the same plaintiff in this action), a politician, a public figure, and official holding a ministerial appointment at the material time, commenced three separate suits for defamation against the defendants, for publishing in their newspaper *The Post*, various articles, and a cartoon alleged to be defamatory of the plaintiff.

¹⁴⁰ id

¹⁴¹ id

¹⁴² id

¹⁴³ id

¹⁴⁴ id

¹⁴⁵ 1993/HP/1395/ and 1804 and HP/823 (unreported). These actions were consolidated into one action.

¹⁴⁶ Article 20 (2) of the constitution, chapter 1 of the laws of Zambia provides *inter alia* that “subject to the provisions of this Constitution a law shall not make any provision that derogates from freedom of the press.”

In response to the suit, the defendant pleaded justification, and fair comment on a matter of public interest. The three actions were consolidated. The defendants argued in their defence that because the Constitution specifically recognises freedom of the press, it was necessary to modify the common law principles of defamation, and thereby give the press sufficient latitude to criticise, and scrutinise public officials. It was further argued that since there is similarity between the provisions in the *Zambian Constitution*, and that of the United States of America, the High Court should follow the approach adopted by the American Courts, as opposed to the Courts in England. Specifically, it was suggested that the Court should follow the decision in *Newyork Times v Sullivan*,¹⁴⁷ in which the Supreme Court of the United States of America laid down some principles grounded in the First, and Fourteenth Amendments to settle libel actions by public officials in order to advance the goals of freedom of press, and free speech.

It must be noticed that the First Amendment protects false, and defamatory speech critical of official conduct, unless the plaintiff can prove that the defendant knew the statement was false, or acted with reckless disregard of its truth, or falsity. In the *Sullivan case*, the Supreme Court of the United States of America also held that the First Amendment requires debate on public issues to be uninhibited, and robust. It also accepted that civil action for defamation could have a chilling effect on free speech; at least equal to that which could occur by threat of criminal prosecution.

Chief Justice Ngulube observed that the *Zambian Constitution*¹⁴⁸ recognizes both freedom of the press, and the right to reputation. He opined that a

¹⁴⁷ 376 US 254 1964.

¹⁴⁸ Article 20 of the Constitution of Zambia.

balance had to be struck. And he did not consider that a good balance can be struck by shifting the burden, or standard of proof; nor by straining to discover a new qualified privilege, nor by immunizing falsehoods to any greater extent than the Defamation Act¹⁴⁹ already provides. Chief Justice Ngulube went on to observe that:

“I accept that impersonal criticism of public conduct leading to injury to official reputation should generally not attract liability if there is no actual malice, and even pursuant to section 7 (b) of the Defamation Act, cap 70 (now cap 68) the truth of the facts alleged is not established if the reputation complained of is competent on the remainder of the facts actually proved. However, I would reject the proposition in Sullivan case to the extent that it sought to legalise character assassination of public officials, or to shift the burden of proof so that knowledge, or falsity or recklessness should be proved by the plaintiff to a degree of convincing clarity.”

In rejecting the principles in the *Sullivan case*, Chief Justice Ngulube referred to the Austrian case of *Theophamus v The Herald and Weekly Limited*, and *Another*¹⁵⁰ in which the High Court of Australia stated, *inter alia*, as follows:

“... The law of defamation whether common law or statute must conform to the implication of freedom, even if conformity means that plaintiffs experience greater difficulty in protecting their reputations. The interest of the individual must give way to the requirement of the Constitution. At the same time, the protection of free communication does not necessitate such a subordination of the protection of individual reputation as appeared to have occurred in the United States. For that reason, the defendant should be required to establish that the circumstances were such as to make it reasonable to publish the impugned material without ascertaining it was true or false. The publisher should be required to show that in the circumstances which prevailed, it acted reasonably either by taking some steps to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps or steps which were adequate. To require more of those wishing to participate in political discussion would impose impractical, and sometimes, severe restraint on commentators, and others who participate in discussion of public affairs. Such a restraint would severely cramp that freedom of political discussion which is so essential to the effective, and open working of modern government. At the same

¹⁴⁹ Chapter 68 of the laws of Zambia.

¹⁵⁰ FC/94/041 of 12th October, 19994.

time, it cannot be said to be in the public interest, or conducive to the working of democratic government to publish false, and damaging defamatory material free from any responsibility at all in relation to the accuracy of what is published.

In conclusion, Chief Justice Ngulube, observed as follows:

“...in sum, it is my considered opinion that constitutional protection of reputation, and free speech can be best balanced in Zambia when the plaintiff is a public official who has been attacked in that character by more generous application of the existing defences. The chilling effect of the litigation should thereby be mitigated to some extent, just as it would be considerably eased by the Court constantly seeking to promote free speech, and press by keeping a watchful eye on the size of the awards which perhaps are the true chilling effect especially if they involve any exemplary or punitive element. What is certain is that since both the freedom of the press and the right to reputation are recognised in Article 20, no higher value can be placed on the one as against the other nor one part of the Constitution be said to be in conflict with another part in any “unconstitutional” way, since the whole document legalises itself. The trick is to balance the competing rights, and freedoms, and principles, as I hope I have managed to explain, the solution lies in the application of the existing law in more imaginative and innovative way in order to meet the requirements of an open and democratic new Zambia. In this way the press can be given more breathing space, without the Court suggesting that freedom of press will be freedom to defame.”

The following propositions may therefore be distilled from the *Sata* case:-

- (a) Impersonal criticism of public conduct leading to injury to official reputation should generally not attract liability if there is no actual malice;
- (b) The publisher should be required to show that in the circumstances which prevailed, he acted reasonably by taking some steps to check the accuracy of the impugned material;
- (c) It is not in the public interest, or conducive to the working of democratic government to publish false, and damaging defamatory matter free from responsibility at all, in relation to the accuracy of what is published;

- (d) Whether the defendant has acted reasonably will involve consideration of any inquiry made by the defendant before publishing, that it is a matter peculiarly within the knowledge of the defendant;
- (e) The dilemma is that our Constitution attaches equal importance to freedom of the press and the right to reputation, without distinction whether such reputation belongs to a private, or public individual;
- (f) When an allegation complained of can properly be regarded as comment on the conduct of public official in the performance of his duties or on conduct reflecting upon his fitness, and suitability to hold such office freedom of speech, and press can be best served in Zambia by the Courts insisting upon a higher breaking point or a greater margin of tolerance than in the case of private attack before an obvious comment based on facts which are substantially true can be regarded as unfair;
- (g) Constitutional protection of reputation, and free speech or press can be best balanced in Zambia when the plaintiff is a public official who has been attacked in that character by a more generous application of the existing defences;
- (h) Since both the freedom of the press, and the right to reputation are recognised in Article 20, no higher value can be placed on the one as against the other nor can one part be said to be in conflict with another part in any “*unconstitutional*” way, since the whole document legalises itself; and
- (i) The trick is to balance the competing rights, and freedoms by the application of the existing law in more imaginative, and innovative way in order to meet the requirements of an open and democratic new Zambia.

I cite the preceding propositions, with approval.

On the basis of the preceding discussion, I have no doubt in mind that generally, I have the jurisdiction to grant an interim injunction to restrain the

defendants whether by themselves, or by their agents, or servants from publishing, or further publishing any matter which is defamatory of the plaintiff. However, I hasten to add that because of the Court's reluctance to fetter free speech, I cannot grant an interim injunction where the defendant(s) state, as the case is in this matter, that they intend to rely on the recognized defences___, justification, fair comment, and qualified privilege. I can only grant an interim injunction if the plaintiff conversely satisfies me that the defence, or defences raised by the defendants are likely to fail.

The starting point therefore is to consider whether the words complained of are defamatory of the plaintiff. This is a question of fact. I am therefore required to decide at the outset whether the words complained of are reasonably capable of bearing a defamatory meaning in the minds of reasonable persons. The true test according to the authorities is whether in the circumstances in which the statement was published, reasonable persons to whom the publication was made, would understand it of the plaintiff, and in a defamatory sense.¹⁵¹ In ascertaining whether or not the words complained of are defamatory, I am required to consider the statement as a whole, and interpret the words complained of in their natural and ordinary meaning. In this regard, I must ask myself the question whether a reasonable man could reasonably come to the conclusion that the words complained of were defamatory of the plaintiff.

I will therefore now proceed to consider whether the words complained of are defamatory. It is common ground that: the plaintiff is a prominent politician, and the President of Zambia's leading opposition political party known as the Patriotic Front (PF). The 1st defendant is a freelance journalist, and producer of a series of programmes styled as "*Stand up for Zambia*." The 2nd defendant is a public broadcaster. The 3rd and 4th defendants are private broadcasters, and trade as "*Muvi TV*" and "*Mobi TV*," respectively.

¹⁵¹ Capital and Counties Bank Limited v George Henty and Sons [1882] 7 A.C. 741 at 745 HL per Lord Selborne.

The primary contention in this application is that the plaintiff seeks an interim injunction against the defendants. The terms of the proposed injunction are:

“to restrain the defendants each of them whether by themselves, their servants, or agents or otherwise from further publishing or broadcasting, or causing to be published, or broadcast the said words, and images defamatory of the plaintiff.”

Furthermore, the plaintiff seeks an injunction to:

“restrain the defendants either by himself, his agents, or servants, or by whomsoever from producing, distributing, or selling CD’s or DVD’s or any other form of transmission of the defamatory programmes.”

The statement complained of has already been referred to, and reproduced verbatim in this ruling. The gist of the plaintiff’s complaint is that the words, and images complained of in their natural, and ordinary meaning are understood to mean: that the plaintiff is a schemer, and has been engaged “dirty politics” for a long time; he manipulated the discipline, and expulsion of many members, of the MMD when he was its National Secretary; that he is not suitable to be President of this country; he does not uphold, and believe in the tenets of democracy; sometime in 1993, he caused confusion in the operation of the Lusaka City Council; the motive of his party (PF) of entering into a Pact with the UPND, was because he has insatiable appetite for State House; he does not respect traditional leaders; he initiated Father Bwalya’s Red Card campaign; and he offered to dissolve his party,___ the Patriotic Front,___ in exchange for an appointment as Vice President of Zambia, in his bid to reconcile with the late president Mwanawasa.

As I stated earlier on, in considering whether an article or extract from it is defamatory the contents of the entire article must be considered.¹⁵² I will

¹⁵² See *Charteston v News Group Newspapers Limited* [1995] 2 A.C. 65.

therefore now proceed to consider the relevant portions of the statement complained of. In the first instalment it is stated as follows:

“...for most founding members of the ruling MMD, the biggest mistake that ever happened to the party that toppled Kenneth Kaunda’s United National Independence Party (UNIP) in the first ever multi party elections in seventeen years was to elect Sata to the position of National Secretary. Sata was elected at the 1995 MMD Convention taking over from Brigadier General Godfrey Miyanda. Little did people know that the ruling eyes of the Cobra would hypnotise almost the entire rank, and file of the MMD. It was indeed the beginning of terror in the way the Party was to be administered, suspensions, and expulsions became the law and the party was to be run with an iron fist with no order, and yet this is the man who claims he can run the country as President better than anyone has ever done.”

The complaint of the plaintiff is that the defendants allege that he is a schemer, and has been engaged in dirty politics; as the erstwhile secretary of MMD, he manipulated the then President Chiluba, and the National Executive Committee (NEC) of MMD in the discipline, and expulsion of many members of the party. These include, Mr. Anderson Mazoka (deceased), Mr. B.Y. Mwila, and 22 Members of Parliament. Further, the plaintiff has complained about the suggestion by the defendants that he does not believe in democracy, and that generally he is not fit to be bestowed with the responsibility of running the affairs of this country as republican President. The defendants do not of course deny that they published the statement complained of. The 1st and 2nd defendants however deny that the words complained of bear the meanings suggested by the plaintiff. The 3rd defendant’s position is that even if the words, and images complained of bear the meanings attributed to them by the plaintiff, such meanings are true, a fair comment, and privileged, save for paragraph 8 (XX) which is not reflected in any of the words, and images complained of. Paragraph 8 (XX) relates to the suggestion by the defendants that the plaintiff in his bid to reconcile with President Mwanawasa (deceased), he offered to dissolve the Patriotic Front in exchange for an appointment as

Vice-President of the republic Zambia. The fourth defendant has not yet filed any memorandum of appearance, and defence.

It must be noticed that the 1st and 2nd defendants are in the main relying on the defences of justification, and fair comment. In so far as the first instalment of the statement is concerned, the 1st and 2nd defendants have justified it on the following premises. That the plaintiff schemed the hounding of Mr. Anderson Mazoka (deceased); from MMD; that during the reign of the plaintiff as National Secretary of MMD, the party witnessed an unprecedented number of expulsions of its Members of Parliament in 2000; in 2002 the plaintiff was roughed up by members of UNIP because he had disturbed a rally for UNIP in Kabwata; and that the plaintiff's underlying objective for the Patriotic Front to enter into a pact with the UPND, was for the plaintiff to ride on the popularity of the UPND in Southern Province so that the plaintiff can get to State House. The 1st and 2nd defendants have gone further to justify the statement complained of by stating that: the plaintiff and his Patriotic Front have exhibited intolerance in his party by expelling 22 Members of Parliament for participating in the National Constitutional Conference (NCC). And that the plaintiff has stood as presidential candidate at three consecutive general elections, without being voted as candidate of the Patriotic Front at a national Convention or Congress.

Further, it is instructive to notice that on 17th January, 2011, the 1st defendant filed a further affidavit in opposition in which two copies of the letters dated 22nd June, 2000, and 1st August, 1997, were produced. These two letters are marked "CC5," and "CC6" respectively. "CC 5" is a letter addressed to Mr. B.Y. Mwila, then Member of Parliament for MMD, inviting him to exculpate himself for, first, announcing his presidential candidature for MMD on Friday, 26th

May, 2000. And second, for calling for the expulsion of the incumbent President, Mr. Chiluba (deceased) in the *Post Newspaper* Edition number 1149, of Monday 27th March, 2000. Lastly, for generally maladministering the party cards. Exhibit “CC6” is a letter written by the plaintiff, and was addressed to the erstwhile President Chiluba, stating the investigations, and findings the plaintiff had made about Mr. Anderson Mazoka (deceased). The letter also urged Mr. Chiluba to take certain measures in relation to Mr. Anderson Mazoka (deceased).

Mr. Mutale, SC, submitted that, first, the 1st defendant has exhibited the letters signed by the plaintiff in his former capacity as National Secretary of the MMD. Yet the 1st defendant has not adduced any evidence of any scheme(s) as asserted in the publication complained of. Second, he argued that exhibits “CC5,” and “CC6” confirms the fact that the defendant wrote the letters in question in his erstwhile capacity as National Secretary for the MMD. Thus the letters were not written in a personal capacity. Third, he argued that the exhibits which are now more than 19 years old, cannot be used as a criterion for determining the plaintiff’s character, and his suitability to ascend to the presidency in the 2011 presidential elections. Lastly, he argued that the status of the plaintiff changed in 2000, when he formed the Patriotic Front, and became its President. Professor Mvunga, SC, and Mr. Nkonde, SC, in their submissions did not address these allegations.

The question that I am required to resolve in relation to the first instalment of the statement is whether or not it is defamatory. To recapitulate, the nub of the complaint in this respect is that the plaintiff is a schemer; has been involved in dirty politics for a long time; manipulated President Chiluba, and the NEC to expel several members of the MMD; does not uphold and believe in the tenets

of democracy; and that generally he is not fit to ascend to the position of republican President. First, it is self-evident by “CC6” that the plaintiff recommended to President Chiluba a stratagem of how to deal with Mr. Anderson Mazoka’s (deceased) growing political influence. According to *Oxford Paperback Thesaurus*,¹⁵³ the word “*scheme*” means:

“a plan, project, plan of action, programme, strategy, stratagem, tactic, game plan, course/line of action, system, procedure, design, formula, and recipe.”

In view of the foregoing, I do not find anything defamatory about describing the plaintiff as a “*schemer*.” Second, I agree with the submission by Mr. Mutale SC, that “CC5” was written by the plaintiff in his capacity as the National Secretary for MMD. Therefore, the disciplinary action initiated by the plaintiff against Mr. B.Y. Mwila cannot fairly, and properly be said to have been personal, or calculated to hound Mr. B.Y. Mwila from the MMD.

Be that as it may, right thinking members of society are likely to frown upon any person who is alleged to be involved in “*dirty politics*,” and does not believe in the tenets of democracy in this day, and age. I have therefore no doubt in my mind that the preceding allegations are bound to lower the estimation of the plaintiff in the eyes of right thinking members of society. My finding therefore is that save for matters relating to the content of “CC5” and “CC6,” the portion of the statement referred to above is defamatory.

In the second instalment it is said that:

“...Sata is also reported to have caused a lot of confusion in the Lusaka City Council. The Weekly Post Edition Number 113 of September, 2 to 9, 1993, had this as one of its headlines. “Lusaka’s Great Political Circus.” Reading through this article Sata who had been transferred from the Ministry of Local Government and Housing to Labour and also Kabwata Member of Parliament, and the Town Clerk Wynter Kabimba had taken centre stage. Kabimba was viewed by most councillor’s as a Sata’s man”

¹⁵³ Maurice Waite, *Oxford Paperback Thesaurus*, (London, Oxford University Press, 2006).

“Yes this article by Masautso Phiri revealed tell signs of wrong doing and under hand methods not only on Sata but Kabimba as well. There was the issue of the Nalubito road and independence avenue houses, Hotel bills and most of all, the contract in relation to the Mezafl Flats in Lusaka’s Chilenje Township.”

The specific complaint in relation to the preceding portion of the statement is that the plaintiff caused confusion in the operation of the Lusaka City Council and in the sale of Nalubuto Road, Independence Avenue houses, and Mezafl Flats. The gist of the complaint, as I see it, is that sometime in 1993, the plaintiff caused confusion in the operation of the Lusaka City Council, and was also involved in wrong doing in concert with Mr. Wynter Kabimba. Again, I have no doubt in mind that these aspersions are bound to lower the estimation of the plaintiff in the eyes of right thinking members of society. This is so because right thinking members of society frown up wrong doing generally. I therefore find that the portion of the statement referred to above is defamatory.

The third instalment of the statement comprises the following:

“Your see, Sata’s scheming and dirty politics go back a long long way. In the UNIP one party era he is said to have gone to an opponent’s grocery store somewhere in Chilenje Township, and bought off all the stocks which he immediately distributed to his supporters. According to eye witnesses his opponents shop was left empty, and remained so for many months. When Mpulungu Member of Parliament Lameck Chibombamilimo passed on, Sata issued all sorts of statements in effect pointing a finger at Rupiah Banda’s administration as being responsible for the MP’s passing. Yet Sata, in 1994, was said to have been behind the dirty tricks that led Chibombamilimo’s losing his position as MMD Lusaka Provincial Secretary. It is believed that the two could not see eye to eye and it remained so for a long time. I doubt if there was any reconciliation.”

The complaint here is that the plaintiff’s condemnation of the manner the MMD treated the Member of Parliament for Mpulungu; Mr. Chibombamilimo (deceased) was not *bona fide*. I must state at once that I find this particular

pleading nebulous. Notwithstanding, I still consider the suggestion that the plaintiff 's *“dirty politics go back a long way,”* and that the plaintiff was said to be behind the *“dirty tricks”* that led to Chibombamilimo's losing his position as MMD Provincial Secretary, to be plainly defamatory.

The fourth instalment of the statement states as follows:

“Right now Sata's Patriotic Front is embroiled in a serious feud with Hakainde Hichilema's UPND in a relationship referred to as the PF/UPND pact.....

.....The pact is being described in this manner by some people I am getting in contact with who say they are keen followers of “Stand up for Zambia.” Other are simply wondering if a ruffian or looper and a gentleman can really co-exist....

The statement goes on to state that:

“One thing that we all ought to bear in mind, always remember that Zambia is not only about two tribes; Tonga and Bemba. No matter how big they may be perceived to be, Zambia is run by 73 tribes and perhaps a little more, all working together for mother Zambia. Now if Sata and Hichilema think they can get to State House riding on the tribal factor, they are wasting their time, and energy.”

The plaintiff's complaint in this regard arises from the suggestion that he drove the Patriotic Front into the pact with UPND on the basis of tribalism. The practice of tribalism in politics is no doubt frowned upon. Therefore, the aspersion that the pact was founded on tribalism is likely to be viewed dimly by right thinking members of society. I also in this context note the suggestion by the defendants that the plaintiff is a *“ruffian.”* I will address this aspersion in more detail later. Accordingly, I find the preceding instalment of the statement to be defamatory.

The fifth instalment states as follows:

“The whole thing about the Red Card campaign is not Father Bwalya’s own baby as such but was coined by the Patriotic Front, the Post Newspaper, and in association with some leaders of the Catholic Church.”

The plaintiff’s complaint here is twofold. First, that the plaintiff has schemed with civil society, the Catholic Church, and *Change for Life*, to illegitimately remove the government of President Banda. Second, that he initiated the *Red Card* campaign, by Father Bwalya. The first limb of the complaint is not founded in my opinion on the statement complained of. And therefore cannot be said to be defamatory. However, as regards the second limb, while the statement may not be factually correct, I do not still consider it to be in any way defamatory of the plaintiff.

The sixth instalment of the statement states that:

“Sata’s appetite for plot one is so great that he has even brought to the party former foes, and appointed them to senior positions in the Central Committee.”

The plaintiff is aggrieved by this allegation that he has an insatiable appetite for State House. The suggestion here is that the plaintiff’s bid for the presidency in the 2011 elections is not public spirited. Right thinking members of society are bound in my opinion to frown upon any person who desires to get to State House in order to satisfy his own ego; as opposed to rendering public service. I therefore find this aspersion to be defamatory.

The seventh instalment is terse. It simply asserts that:

“Sata has no respect for traditional leaders, he has belittled the chiefs.”

The complaint by the plaintiff is that he has been held out by the defendants as person who has no respect for chiefs. I take judicial notice of the fact that right thinking members of society tend to respect traditional leaders; especially chiefs. Therefore, any person who is said to disrespect chiefs, is likely to be

shunned by right thinking members of society. I therefore find the aspersion under discussion to be defamatory.

The last instalment of the statement states that:

“Sata was not up to reconciliation with Mwanawasa. He offered his party. Mwanawasa was no fool, he could not take his offer.”

The complaint here that is the defendants have alleged that the plaintiff in his reconciliation with President Mwanawasa (deceased) offered to dissolve the Patriotic Front in exchange for an appointment as Vice-President of Zambia. In my considered view, there is nothing in the statement to suggest the interpretation, or meaning given by the plaintiff. I do not therefore find the last instalment of the statement to be defamatory.

Before I leave the preceding averments, I would like to address some matter which was raised by the 1st defendant in the further affidavit dated 17th January, 2011. The 1st defendant has alleged in paragraph 10 of the further affidavit, that the plaintiff is notorious for defaming his political opponents in very unpalatable language. Yet he is quick to cry foul when his character, and conduct is criticised. The 1st defendant went on to produce “CC7” a copy of the *Post Newspaper* cutting, which he used to support his allegation that the plaintiff has also clearly defamed his political opponents as being hypocritical, and cruel leaders in relation to the provision of medical services in this country. I must state at once that I am constrained to address this matter because it has not been pleaded. I am fortified in taking this position by the observation of the erstwhile Deputy Chief Justice Lewanika, in *Admark Limited v Zambia Revenue Authority*,¹⁵⁴ where he said:

“Generally speaking, the purpose of pleading is to ensure that in advance of trial “the issue in dispute between the parties can be defined,” thereby enabling those matters on which issue is “joined” to be identified. Order 18 of the Rules of the

¹⁵⁴ (2006) Z.R. 43

Supreme Court sets out those matters which must be specifically pleaded before they can be relied upon by a party in its defence.”

To continue, in terms of injunction law and practice, at this stage of the proceedings, I am required to adopt the approach, and practice prescribed by the *American Cyanamid*. case, namely: I am supposed to investigate whether or not the plaintiff has raised a serious question of law; whether or not an award of damages would be adequate if the plaintiff were to succeed after the trial; in case I entertain doubt as to the adequacy of the damages, and the ability of defendants to pay them, I am required to establish where the balance of convenience lies; and finally, assuming the factors referred to above are evenly balanced, I am required to consider whether or not it is advisable to maintain the status quo. However, the practice established in applications for interim injunctions in the *American Cyanamid* case of not considering the merits of the case once it has been shown that there is a serious issue to be tried, but determining where the balance of convenience lay between the parties as regards the imposition of restraining orders is inapplicable to defamation cases. In defamation cases, I am expected, and entitled to consider the merits of the case in order to determine whether, or not an interim injunction should lie. I will therefore now proceed to consider the merits or demerits, as the case may be, of the defences put forward by the defendants. The defences will be considered under the rubric; justification, fair comment, and qualified privilege.

JUSTIFICATION

I have already stated that it is a defence to an action in libel or slander for that matter, to plead and prove that the defamatory words are true in substance, and fact. However, the plea of justification is subject to certain stringent conditions. Namely, that a defendant should not plead justification unless the

words complained of are true, and the defendant has reasonable evidence and grounds to prove the allegation. It is instructive to note that a defence of justification must be supported by full particulars of the facts, and matters relied upon. The facts should normally be allowed to speak for themselves. To spell out a conclusion, unsupported by facts is to court danger.

I will now begin weighing the defamatory statements referred to above, against the particulars of the justification. I would like to point out at the outset that the 1st, and 2nd defendants have relied on the same particulars to justify the defamatory statements. In the first instalment, the plaintiff complained about the suggestion by the defendants that he has been engaged in dirty politics for a long time. The defendants have not particularised any facts to support this allegation. Furthermore, the defendants have not put forward any particulars to justify the assertion that the plaintiff does not believe in the tenets of democracy. My finding therefore is that these allegations have not been justified.

In the second instalment, the complaint is that the plaintiff interfered with the operations of the Lusaka City Council, and was engaged in wrongdoing in concert with Mr. Wynter Kabimba. The defendants have not particularised the alleged wrong doing in relation to the: *“...Nalubito road, and Independence Avenue houses, hotel bills..... and the Mezaf flats in Lusaka’s Chilenje Township..”*

My finding therefore is that the allegations in question have not been justified.

In relation to the third instalment the defendants alleged that the plaintiffs, *“... dirty politics go back a long way.”*

And that the plaintiff was “...*behind the dirty tricks that led Chibombamilimo’s losing his position as MMD Lusaka Provincial Secretary.*”

The particulars relating to the “dirty politics” allegedly practiced by the plaintiff have not been particularised. My finding is therefore that these assertions by the defendants have not been justified.

The complaint in relation to the fourth instalment is that the plaintiff was driven into the pact with UPND on the basis of tribalism. In justifying this assertion the following particulars have been put forward. First, that before the announcement of the Patriotic Front, and UPND Pact, the plaintiff kept on referring to the UPND leader Mr. Hakainde Hichilema as an “*under five,*” not capable of leading the nation. Second, that the Patriotic Front is most prominent in Bemba speaking areas, and the UPND in Tonga speaking areas. And lastly that in the last three presidential elections, the plaintiff has fared very badly in Tonga speaking areas, and going into the pact with UPND was for the plaintiff to compensate for the lack of support in Tonga speaking areas. As regards the fourth instalment, it was also alleged by the defendants that:

“... the pact is being described in the this manner by some people. I am getting in contact with who say they are keen followers of “Stand up for Zambia,” others are simply wondering if a ruffian or looper, and a gentleman can really co-exist.”

I must state in relation to the preceding statement that the fact that a defamatory statement has been made or the fact that a defamatory rumour exists is no justification for publishing it. The position of the law is that in such instances it requires the truth to be the truth of the rumour. And not the truth of the fact that it is circulating. Lord Devlin explained this point eloquently in *Lewis v Daily Telegraph Limited*¹⁵⁵ when he said:

¹⁵⁵ [1964] A.C. 234.

“... You cannot escape liability for defamation by putting the libel behind the prefix such as “I have been told that...” or “it is rumoured that...,” and then asserting that it was true that you had been told or that it was in fact rumoured... For the purpose of the law of libel, a hearsay statement is the same as a direct statement, and that is all there is to it.”

In this particular case the suggestion is that the plaintiff is a “ruffian.” According to the *Oxford Paperback Thesaurus* (supra), the word ruffian is defined as a: “*thug, hoodlum, vandal, delinquent, rowdy, scoundrel, villain, rogue, bully boy, brute, etc.*”

The defendants have not put forward particulars to justify the insinuation that the plaintiff is a “*ruffian.*” I therefore find that the aspersion in question is not justified.

As regards the fifth instalment of the article I have already found that although the statement in question is not factually correct, I do not consider it to be defamatory.

In the sixth instalment of the statement it is stated that the plaintiff has an insatiable appetite for State House. The defendants have justified the preceding assertion by stating that the plaintiff has contested three presidential elections and lost all. And has also not been prepared to give another person chance to stand on the Patriotic Front ticket as a presidential candidate. My view of the complaint and defence, is that first, the fact that the plaintiff has previously contested three presidential elections is not itself a fact or conclusive proof that he has “*insatiable appetite*” for State House. It is possible or indeed probable that the incessant attempts to get to State House may in fact be public spirited. Whatever the case, no proof has been adduced to support the assertion that

the plaintiff has “*insatiable appetite*” for State House. Second, the defendant’s have not adduced any evidence to justify the assertion that the plaintiff “... *has not been prepared to give another person a chance to stand on the Patriotic Front as a presidential candidate.*” I therefore find that the preceding allegations have not been justified.

In the seventh instalment of the statement, the defendants have made a bold statement that the plaintiff has no respect for traditional leaders. In their defence, the defendants have alleged that the plaintiff has been at logger heads with paramount Chief Chitimukulu of the Royal Bemba Establishment. And that this led to the plaintiff being summoned to appear before the Traditional Court. My assessment of the complaint and defence, is that in the first place, the 1st and 2nd defendants published a very general statement that the plaintiff has no respect for traditional leaders. In the defence, the 1st and 2nd defendants qualified or limited their assertion to paramount Chief Chitimukulu of the Royal Bemba Establishment. Even then, the 1st and 2nd defendants have not supplied any particulars to justify the allegation that the plaintiff has no respect for paramount Chief Chitimukulu. I therefore find that the 1st and 2nd defendants have failed to justify the allegations.

Lastly, I have already held that there is nothing in the statement to suggest the interpretation or meaning given to it by the plaintiff. Overall, both the common law and statutory defence of justification put forward by the 1st and 2nd defendants are not likely to succeed at the trial of this action.

FAIR COMMENT – HONEST COMMENT

The defence of fair comment is concerned with the protection of comment, and not imputation of fact. To be within the purview of this defence, the fair

comment must be shown or demonstrated to be distinct from imputation of fact. The comment must be based upon facts truly stated. It is vital that these facts are true or privileged. A defendant must also plead with sufficient precision the comment relied upon as constituting the defence so that the plaintiff knows in advance the case he has to meet. The test is objective. A bold statement with no supporting facts is not considered as a comment and does not qualify to be protected as such. Comments cannot exist in "*thin air*." In this case the 1st and 2nd defendants have relied on the particulars put forward under the defence of justification. The 3rd defendant has not set out any facts in support of the comments. I have already held that the various assertions that sought to justify the defamatory matter are not supported by facts. Since the allegations are not supported by facts, the common law, and statutory defence of fair comment relied on by the defendants is not likely to succeed at trial.

QUALIFIED PRIVILEGE

The law recognises the importance of encouraging the communication of statements made from a social or moral stand point. Thus the defence of qualified privilege applies to certain occasions when a person(s) should be free to publish defamatory material provided they act in good faith or are made honestly. This is the rationale behind the defence of privilege. However, the defence of qualified privilege may be defeated by proof that the defendant was malicious.

There is no exhaustive definition for the occasion in which the defence arises. It is however important to stress that it is the occasion that is privileged. This privilege therefore does not belong to the communications, or the people or organisations, who communicate. Thus a claim to privilege is not dependant on who or what the organization does. A claim to privilege is dependent on the

occasion. The concept of duty and interest is the primary means by which the common law identifies the circumstances in which it is considered desirable for communications to be made freely without fear of being sued, if it turns out later that the communication was defamatory.

It must be noticed however that this branch of the law is strongly impressed with considerations of public interest. The defence of qualified privilege has been and ought to be developed in accordance with social needs. It has been argued extra judicially that if newspapers or television receive or obtain information fairly from a reliable and responsible source, which is in the public interest that they should know, then there is qualified privilege to publish it; they should not be liable in the absence of malice.¹⁵⁶ However, it must be demonstrated that the public advantage in receiving the information outweighs the private injury that may be suffered.¹⁵⁷

Although Lord Nicholls used the word “*privilege*” in the *Reynolds case*, it is not presently used in the old sense. According to the “*Reynold’s defence*” it is the material which is privileged, and not the occasion on which it is published. In the *Reynolds case*,¹⁵⁸ Lord Nichollas listed ten factors (not to be treated as exhaustive) as bearing on whether or not in the particular case qualified privilege would attach. To recapitulate, these were: the seriousness of the allegations; the nature of the information; and the extent to which the subject matter was of public concern; the source of information; the steps taken to verify the information: the status of the matter; whether comment had been sought from the plaintiff; whether they contained the gist of the plaintiff’s side of the story; the tone of the articles and the circumstances of the publication

¹⁵⁶ Lord Denning “What Next in the Law” (Butterworths, 1982) p. 192.

¹⁵⁷ See *London Artists v Litter* [1969] 2 Q.B. 375.

¹⁵⁸ 155 [2001] A.C. 127.

including the timing. In light of the “*Reynolds defence*,” the defence of qualified privilege should not in my opinion be broached in a narrow sense, or confines of whether the defendants have a duty to communicate the information complained of, and the plaintiff has a corresponding interest in receiving it.

The central issue or question in the context of the “*Reynolds defence*,” is whether or not the defendants behaved fairly, and responsibly in gathering, and publishing the statement complained of. To put it simply the question is this: has the defendant’s conduct in gathering and publishing the information contained in the statement complained of fallen short of the standard of “*responsible journalism*,”? The notion or “*responsible journalism*,” “as defined in the case of *Bonnick v Morris* (supra), is aimed at resolving the tension between freedom of expression on matters of public concern, and protection of reputations of individuals. In the long run, the requirement of “*responsible journalism*” enhances the protection of the reputations of defamed individuals. The standard of “*responsible journalism*” is objective. Furthermore, the notion of “*responsible journalism*” comes down to the price that journalists must pay in return for the claim of qualified privilege. In my considered view, it is not a dear price to pay.

In deciding whether or not a particular publication has met the threshold of “*responsible journalism*,” the Court is expected to assess the public value, and quality of the subject matter of the publication. In this regard, the Court ought to consider whether, or not the conditions of “*responsible journalism*” have been satisfied or met. In the *Reynolds case*, Lord Nicholls of Birkenhead offered guidance in the form of a non-exhaustive, illustrative list of matters, to be considered, or taken into account.

Thus in resolving the question whether, or not qualified privilege should attach to the statement complained of, the first question that I am required to

consider is whether, or not the statement complained of is a matter of public interest. In answering this question, the statement is required to be considered as a whole. It must also be noticed that the question whether the statement is of public interest really comes down to asking whether the publication is privileged because of its value to the public. In assessing the value of the statement to the public, the quality of the publication needs to be carefully considered, or measured. Thus in considering the value of the publication to the public is not useful or helpful to resort to the classic test for the existence of privileged occasion, and to ask the question whether there is a duty to communicate the information, and interest in receiving it.

I will now pass to apply the principles referred to above to the facts of this case. It is common ground that the plaintiff is a politician aspiring to be President of this country. Thus he is a public figure whose conduct is, and should of course be subject to strict public scrutiny. The critical issue which, however, I ought to consider, and resolve is, whether or not the statement complained of is in the public interest as posited above. In my considered view, first, the thrust of the statement complained of does not have as its focus, or objective, the promotion of political discussion generally, on matters of public concern in an election year. Rather the focus or “*sting*” of the statement is to demonstrate, or show to the *Zambian* public that in the view of the defendants, the plaintiff is not suitable to ascend to the presidency of this country.

Second, I have already demonstrated at length elsewhere in this ruling that the various imputation of facts, and comments complained of, and made by the defendants have no factual basis. And therefore have not been justified, and the comments founded on the unsubstantiated imputation of facts, do not, as a corollary, qualify to be protected, as fair or honest comments on matters of

public concern. The inference to be drawn in the circumstances of this case, is that the defendants, most likely than not, did not take steps to verify the information before publishing it. Consequently, the defendants did not in my opinion act fairly by failing to check the accuracy, and veracity of the portions of the impugned statement. Yet accuracy, and objectivity are perhaps the two most important ethical principles that journalists should always strive to live by; in their calling. I must state at once that it is not in the interest of freedom of expression, or indeed press freedom to publish false, and damaging material free from responsibility at all in relation to the accuracy, and veracity of what is published.

Third, it is equally instructive to note that 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. 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. These shortcomings, and omissions on the part of the defendants are in my opinion fatal.

In the circumstances, I have no doubt in mind that the statement complained of has fallen short of the standard or "*responsible journalism*." The corollary of this conclusion is that qualified privilege cannot attach to the statement complained of. In sum, I am satisfied that all the defences of justification, fair comment, and qualified privilege are not likely to succeed at trial.

I must state that it is a matter of comment, and also grave concern that the 2nd defendant; a public broadcaster, has also fallen short of the standard of "*responsible journalism*." Yet in terms of the Zambia National Broadcasting

Corporation Act,¹⁵⁹ the 2nd defendant is expected to respect human dignity, serve the public interest, broadcast comprehensive, unbiased, independent current affairs programmes, and above all, meet high professional quality standards.

I must also mention in passing that there is on the statute books the Independent Broadcasting Authority Act.¹⁶⁰ One of the primary objectives of the Act is to establish the Independent Broadcasting Authority (IBA) itself. Amongst the functions of the IBA are to oblige broadcasters to develop codes of practice and monitor compliance with those codes;¹⁶¹ to develop programme standards relating to broadcasting in Zambia, and monitor, and enforce compliance with those standards;¹⁶² to receive investigate and decide complaints concerning broadcasting services;¹⁶³ and to issue to any or all broadcasters, advisory opinions relating to broadcasting standards, and ethical conduct in broadcasting.¹⁶⁴ There is no doubt that the standard of “*responsible journalism*” is made more specific where a code of practice is adopted by broadcasters. Although the IBA Act was enacted on 31st December, 2002, it has not yet been fully implemented, or operationalised. However, even in the absence of a specific code of practice, the Electoral Code of Conduct¹⁶⁵ provides that all print and electronic media shall abide by regional Code of Conduct in the coverage of elections provided that such guidelines are not in conflict with the Code. The Guidelines, and principles for SADC Broadcasters on covering elections provides *inter alia*, that: broadcasting journalists should avoid publishing lopsided programmes; ensure that the public is supplied with

¹⁵⁹ See s. 7 (b) (c) (h), and (m) of act Number 20 of 2002.

¹⁶⁰ Act Number 17 of 2002

¹⁶¹ Id s. 5 (2) (g).

¹⁶² Id s. 5 (2) (h).

¹⁶³ Id s. 5 (2) (i).

¹⁶⁴ 164 s. 5 (2) (f).

¹⁶⁵ Regulation 13 (b) of Statutory Instrument Number 52 of 2011, The Electoral Act, 2006 (Act Number 12 of 2006), The Electoral (Code of Conduct) Regulations, 2011.

accurate, fair, impartial, information about electoral issues, and the various candidates; cover, issues of relevance and interest to the public; broadcasters should afford political parties and or candidates the right to reply where a report aired contains inaccurate information or unfair criticisms based on distortion of facts.¹⁶⁶ Overall, it is important that broadcasters should provide the public opportunity to take part in political debates on election issues. Participants of such broadcasts should be as representative as possible of different views, and sectors of society.

Before I leave this segment of the ruling, I must state that there is need for legal practitioners to exercise care, and skill in drafting pleadings relating to defamation cases. The words relied on must be set out verbatim in the particulars of claim. It is not enough to set out their substance or effect. Where the defamatory words form only part of a longer article or programme, the claimant must set out in his particulars of claim only the particular passages which he complains as being defamatory of him. In cases in which the material complained of is so long that it cannot reasonably be pleaded in the body of the particulars of the claim, the material may be included as a schedule to the particulars of claim. Where the defence of justification is pleaded, it must be supported with full particulars of the facts. Similarly, the facts on which the comment is based must be pleaded and properly particularised.

In so far as malice is concerned, it was the practice to plead in the particulars of claim that the defendant “*falsely and maliciously*” published the words complained of. However, it is no longer necessary to plead these words. The reason being that the falsity of the words is always presumed in the plaintiff’s favour, and no issue as to malice arises, unless a defence of fair comment or

¹⁶⁶ See Articles 2, 3, 6, and 7 of the Guidelines, and Principles which were adopted at the Annual General Meeting of the Southern African Broadcasting Association (SABA) in Arusha, Tanzania, in September, 2005.

qualified privilege is raised. In that event, actual malice is pleaded by way of reply. In terms of the High Court Rules, the Court or trial judge is required not later than twenty one days after appearance, and defence have been filed to give directions in respect of among other matters the reply. Overall, I invite legal practitioners to make *Bullen, and Leake, and Jacob Precedents of Pleadings*, their companion.

To conclude, the various authorities that I have referred to above establish that I have the discretion to grant an interim injunction in order to restrain libel. However, it is settled law that I cannot restrain the publication of libel, where the defences of justification, fair comment, or privilege have been raised. The rationale for this rule is the importance in the public interest that the truth should come out. The right to free speech is one in which it is of the public interest that individuals should possess and indeed should exercise as long as no wrongful act is done. However, freedom of expression is not absolute or limitless. Its exercise may be subject to restrictions as are necessary in a democratic society. Thus the right to free speech must be measured or weighed against the right to reputation.

Reputation is an essential component of the dignity of the individual. It must be respected. It must not be assailed without lawful justification. Once besmirched by unfounded allegation(s), the damage can be irreparable and everlasting, especially if there is no opportunity given to vindicate one's reputation. When this happens, it is not only the affected individual, and his family that suffer, but society may also at large suffer. Thus the protection of reputation is also in the public interest. It cannot obviously be said to be in the public interest or conducive to political discussion to publish unsubstantiated defamatory materials, free from any responsibility as to the accuracy or veracity of what is published. Therefore, there is no doubt in mind that there is

need in this case to protect the plaintiff from unsubstantiated defamatory material.

Furthermore, I have also no doubt in my mind that this is not proper case in which I can hold that if I were eventually to find the defendants liable for defamation, the plaintiff would be adequately compensated by an award of damages. In any case, most reasonable people would rather not have demonstrably false, and defamatory statements published against them, than seek an award of damages. I also recognise that damages can never properly put the plaintiff in the position he would have been had the libel not been published.

I cannot also lose sight of the context or circumstances in which the statement complained of was broadcast; namely, an election year. In my opinion it is palpably wrong for any person before or during an election to publish false statements 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 he can clearly show and adduce reasonable evidence and grounds for believing in fact that the defamatory material is true; is a fair comment on a matter of public concern; or is protected by qualified privilege as posited above.

It follows therefore that a person making or publishing such a defamatory and false statement may be restrained by an interim injunction from any repetition of that false statement or a false statement of a similar character or tenor. And for the purpose of granting such interim injunction *prima facie* proof of the falsity of the statement shall in my opinion be sufficient.

Accordingly, I hereby grant an interim injunction restraining the defendants, each one of them either by themselves, their agents, or servants from publishing or broadcasting or causing to be broadcast the programme, “*Stand up for Zambia*,” until after trial of this action. Further, the 1st defendant is restrained by himself, his agents, servants, or whomsoever from producing, distributing, or in any other form of transmission the said “*Stand up for Zambia*” programme. Needless to state that it is contempt of Court for any person notified of this Order knowingly to assist in or permit a breach of the Order. A person doing so may be fined, or sent to prison. Should I later find that this Order has caused loss to the defendants, and decide that the defendants should be compensated for that loss, the plaintiff shall comply with my Order that I will make.

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

Dr. P. Matibini, SC
HIGH COURT JUDGE