MICHAEL CHILUFYA SATA v POST NEWSPAPER LIMITED, PRINTPAK ZAMBIA LIMITED AND THE ATTORNEY GENERAL (1994) S.J. 104 (S.C.)

SUPREME COURT
CHIEF JUSTICE OF ZAMBIA
11TH OCTOBER, 1994
1992/HP/1325 AND 1804 AND 1993/HP/821

Flynote

Defamation - Libelous publication - Defence of fair comment - Objections by public officials to disclosure of certain public documents - Ruling on public interest immunity

Headnote

The respondents pleaded the defence of fair comment on a matter of publiic interest to three actions for libel. They also gave particulars of matters they said wrre true facts which were otherwise not set out or appearing in the publications complained of. The defendants issued and served summonses to testify and to produce documents on a variety of proposed witnesses, some of whom were public officials and/or servants. The public officials raised objections as to being called to testify or produced documents. Their objections were resolved in this ruling.

Held:

(i) Public interest immunity cannot be waived
(ii) The class of documents not to be disclosable, there can be no question of ordering production for a private inspection by the Court regarding the contents.

Cases referred to:

1. Auten v Reyner and Others (1960) 1 All E.R 69
2. Conway v Rimmer (1968) 1 All E.R. 874; (1968) A.C. 910
3. Rogers v Secretary of State for The Home Dept (1973) A.C. 330; also (1972) 2All E.R. 1057

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4. R. v Governor of Brixton Prison, *ex parte* Osman (No.1) (1992) 1All E.R. 108
5. Air Canada v Secretary of State for Trade (1983) 1 All E.R. 910 at 925 (1983) 2 A.C. 394 at 446; and at 917 and 435 per Lord Fraser
6. Evans v Chief Constble of Surrey Constabulary (Attorney General Intervening) (1939) 2 All E.R. 594
7. Makanjucia v Commissioner of Police of the Metropolis (1992) 3All E.R. 517
8. Senior v Holdsworth,(1975) 2 All E.R. 1003; (1975) Q.B. 23
9. Duncan v Canmell, Laird & Co. (1942) A.C. 524
10. Heuff v Mbewe (1965) Z.R. 111
11. Re: Grosvenor Note, London (No. 2) (1964) 3 All E.R. 354
12. Wednesday Corporation v Ministry of Housing and Local Government (1965) 1All E.R. 186
13. Halford v Sharples and Others (1992) 3 All E.R. 624

14. Burmah Oil Co. Ltd v Bank of England and Attorney General (1979 3All E.R. 700 at 704, (1980) A.C. 1090 at 1108 per Lord Wilberforce

For the plaintiff: Mundia F.Sikatana
For the 1st defendant: S.Sikota and S.Nkonde
For the 2nd defendant: E.Lungu
For the State: S.de Silva, Senior State Advocate.

Ruling

CHIEF JUSTICE OF ZAMBIA: delivered the Judgment of the court

The trial in this case involves three actions for libel to which the defendants have pleaded fair comment. They have advanced a classical "rolled up plea" which asserts that those allegations consisting of fact are true and those consisting of comments are fair comment on matters of public interest.

They have also given particulars of matters they say are true facts which are otherwise not set out or appearing in the publications complained of. The defendants have issued and served summonses to testify and to produce documents on a variety of proposed witnesses, some of whom are public officials and/or servants. I am informed that this ruling may assist resolve the problems raised by the public servants some of whom are said to be relevant to testify or to produce official documents. The problem that I have is that I can only properly deal with the specific objections taken up by Mr De Silva in respect of a single Government department, namely, the Anti Corruption Commission. As to the rest, I may perhaps make a passing reference in the course of this ruling but the best course may be for all those in doubt to consul the Attorney General's Chambers on their own particular document or evidence; especially in this ruling does not resolve their own precise position. A global ruling covering every one and every document in advance is clearly not feasible since no blanket ban or disclosure order can be prescribed and there was no suggestion that all the

documents or all the evidence will fall into exactly the same category as to class or content. Undoubtedly, the documents concerned belong to persons who are not parties to the litigation and they may have their different grounds for wanting to resist disclosure or production, such as grounds of public policy or privilege. One crosses the bridge when one gets there.

The Attorney General has applied to set aside a subpoena duces rcum and ad testificandum served on the Director of Operations in the Anti Corruption Commission on the ground that there is objection to the disclosure and production of certain documents, as a class, if I understood correctly. According to Mr de Silva, the documents concerned include records of investigations and information gathered in the courses of the investigation of a crime. Mr Sikota informed me that the defendants seek only the production of three reports concerning the plaintiff and relevant to some facts pleaded, namely a report relating to the delivery of water to the plaintiff's house in Avondale, a report relating to the Merzaf contract, and a report of the investigation relating to the depositing of K1.2 billion in a commercial bank.

There was an issue whether Mr de Silva, on behalf of the Attorney General, was properly before the court. My reply then in the affirmative is ambly supported by authority. For present purposes, I need refer to *Anten v Ryner and others* (1) which expresses a view which I share that the Attorney General has the right to appear and to claim, in the face of the Court, privilege or public interest immunity on behalf of Ministries, Government departments and government agencies without making an affidavit. The facts of *AUTEN* are also relevant, and I will allude to them shortly. In the normal course the common practice is for an affidavit

objecting to disclosure to be filed by a relevant Minister: see for example, where the State is a Party, s.25 of the State Proceedings Act Cap. 92. The other issue raised was that, according to Mr de Silva, the Minister of Home Affairs declined to make an affidavit, stating that he did not see any damage to the public interest in the production of the reports. Mr de Silva approached the Vice President who shared the Minister's view and coined that disclosure and production might very well be beneficial and help to clear the air.

An embarrassed Mr de Silva felt constrained to abandon any objections based on damage to the public or national interest and proceeded to argue his objection on the independent principle that information given during investigations of a crime is absolutely privileged and should not be disclosed if the interests of the State are to be protected, subject to the discretion of the court when balancing two equally important public interest or policy consideratons, that is, the public interest that harm shall not be done to the nation or the public service and the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. The formulation of the interests to be balanced was given by Lord Reid in *Conway v Rimmer*(2) and has been universally accepted. Follwing disclosure of the view taken by the Minster and the Vice President, the question arises whether an objection of State interest can be waived. I have endeavoured to do some homework and note that PHIPSON ON EVIDENCE, 14th Edition, suggests at par. 19-08 that the objection of state interest if well grounded "can not be waived by the Crown (in our case, the State) or any other person," citing *Rogers v Secretary of State for the Home Department* (3). I have looked at other decided cases, including *R v Governor of Brixton Prison*, ex parte OSMAN
(No. 1) (4) where Mann, L J concluded, at p. 118:

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> "public interest immunity is not a matter which can be waived (see *Air Canada v Secretary of State for Trade* (5). Indeed it has been said that it is the court's own bounder duty ot assert public interest immunity."

Even more forcefully put was the finding in *Evans v Chief Constable of Surrey Constabulary (ATTORNEY GENERL INTERVENING*) (6). I quote from the headnote:

held (1) public interest immunity was not a 'privilege', within the meaning normally given to that word when consideration discovery, which could be waived.

It was an issue which,if facts were disclosed on which it could arise, had to be considered, if necessary by the court itself . Once public interest immunity was properly raised, the burden was on the party seeking disclosure to show why the documents should be produced for inspection by the court privately. Discovery involved two stages; disclosureof the existence of a document and production of that document for inspection. Normally the court would only order production in the first place, which order could be the subject of appeal, and it was only thereafter that the court would inspect the document. Before a question of public immunity coube be raised, the document had to be disclosable within the rules of iscovery normally applicable in litigation. If a public interest claim was raised, it was necessary for those who sought to overcome it to demonstrate the existence of a counteracting interest calling for disclosure of the particular documents involved. It was only then that the court could proceed to the balancing process."

It is apparent that I will rely on EVANS on other issues a little later; but on the point concerning waiver, I rely on it too for the conclusion I am about to reach. During my research, I also perused the case of *Makanjuola v Commissioner of Police of the Metropolis* (7) and I would like to quote a passage from the judgement of Bingham LJ (with which Lord Donaldsden MR

agreed) at page 623 where he said

> "where a litigant asserts that documents are immune from production or dosclosure on public interest grounds he is not (if the claim is well founded) claiming a right but observing a duty. Public interest immunity is not a trump card vouchsafed to certain privileged players to play when and is they wish. It is an exclusionary rule, imposed on parties in certain circumstances, even where it is to their disadvantage in the litigation. This does not mean that in any case where a party holds a document in a class prima facie immune he is bound to persist in an assertion of immunity even where it is held that, on any weighing of the public interest in withholding the document against the public interest in disclosure for the purpose of furthering the adminstration of justice, there is a clear balance in favour of the latter. But it does, I think, mean: (1) that public immunity cannot in any ordinary sense be waived, since, although one can waive rights, one cannot waive duties;

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(2) that, where a litigant holds documents in a class prima facie immune, he should (save perhaps in a very exceptional case), assert that the documents are immune and decline to disclosure then, since the ultimate judge of where the balance of public interest lies is not him but the court and (3) that, where a document is, or is held to be, in an immune class, it may not be used for any purpose whatever in the proceedings to which the immunity applies and certainly cannot (for instance) be used for the purpose of cross examination."

I am in agreement with the authorities which I have referred to so that, despite the apparent consent of the Minister and the Vice President and notwithstanding Mr de Silva's stance, I conclude that public interest immunity cannot be waived and the point should still be considered and taken by me even proprio notu, as the tribunal that is in duty bound to consider the matter. It follows that I do not accept a submission by Mr Sikota to the contrary, especially that he relied on citations in PHIPSON dealing with abuse of process which was not the issue under discussion here.

This brings me to the arguments and submissions that I heard. Mr de Silva relied on the common law rule based on public interest policy that documents in investigations into a crime must not be disclosed. He also relied on *Senior v Holdsworth* (8) to support the proposition that a summons covering the entirety of a record is bad in law and liable to be struck out. He submitted that the interests of the State require that investigating agencies should receive protection aginst disclosure or production for their communications related to the investigation of a crime. Mr Sikota argued in reply that the case of SENIOR should be distinguished because, unlike in that case where a whole days's video tape which would be costly was requested when only a small portion was relevant, here, only large readily available reports were required. He submitted that the investigation reports covered material relevant to the pleadings and on which some witness had already been examined or cross examined.

He asked that the evidence be allowed in the interests of transparency and free flow of information, interest which, needless to say are quite novel in the context of the matter under discussion. Indeed even article 20 of our constitution recognises that there must be limits for good cause on the free flow of information. Mr Nkonde argued very briefly but forcefully against class immunity for documents, regardless of contents, and commended the decision in *Conway v Rimmer (8)* which called for a balancing between the contending public interests already allude to against the rigid principle of privilege enunciaed by *Duncan- v-Cammell, Laird & (C)* (9). He invited me not to decide without first inspecting the documents privately and called for the putting of executive power into legal custody. Understandably, Mr Sikota, for the

plaintiff, had no interest in this debate.

I have given very anxious consideration to the submission and the issues. I have visited many authorities during my research but for reasons of economy I can not discuss all the books and cases I have looked at. Let me stress at the outset that I am dealing with this matter only in the context of private civil litigation. I should perhaps mention that our own law reports are not terribly rich on the subject since I could only find *Neuff v Mbewe* (10), a commendable contribution from the Subordinate Courts which reviewed such famous authorities as *Duncan v Carwell Laird & Co. Ltd* (Supra); Re

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Grosvenor Hotel, London (No. 2 (11) and Wednesbury Corporation v Ministry of Housing and Local Goverment (12). There, the learned magistrate came down in favour of greater preparedness to uphold a state privilege objection as to class in litigation to which the State was not a party, having found that disclosure or production of the document (a libellous matter in the possession of a Permanent Secretary, a copy of which was somehow already available to the complainant seeking production)., would be injurious to the public interest. I will also mention that I have looked at S. 64 of the Corrupt Practices Act No. 14 of 1980, regarding the statutory protection of informers. The authorities that I do want to allude to include *Auten v Rayner and others* (Supra) (1) as well as the earlier report of the same case in (1958) 3All ER 565. The Subpoena duces becum was served on the Director of Lpublic Prosecution's office and the documents protected in that case included records of criminal investigations and related correspondence and memorandum, reports of the defendant Police Officer and other officers; memoranda between the DPP and counsel and which later the court found to have been, in any event, also covered by the same privileges as would apply between any client and solicitor. The Police reports had earlier in the same case (the 1958 report) been ruled not disclosable as a class. Other cases worth mentioning here include the *Akanjuola* case (Supra) which, apart from suppoorting the proposition that immunity for a class of documents protected by public interest immunity cannot be displaced by consent to disclosure, also illustrates non production in civil proceedings of statements taken by the police during investigations. Another is *Halford v sharples and others* (13) which was to similar effect. However, the case that I find to be most helpful for the purpose of this exercise is that of *Evans v Chief Constable Ofsurrey Constabulary* (ATTORNEY GENERAL INTERVENING) (6). It concerned a police report submitted to the DPP in the course of a criminal investigation and Wood, J., in a well researched and well reasoned judgment reviewed the major authorities and identified the salient principles in such cases as the one now being considered.

I am indebted to the learned judge in that case. I hope that I do not do him an injustice when I paraphrase his analysis. After observing that the law on this topic was not static, he summarised the principles now applicable as including these and I quote:

> "First, these issues are interlocutory, and my decision is one made within the discretion or substantially within the discretion of a judge at first instance: see *Burmah Oil (C). Ltd v Bank of England and Attorney General* (14) per Lord Wilberforce."

I agree with this principle and it is only right and proper that any party aggrieved by the decision of the trial judge should be free to lodge an interlocutory appeal to a senior court before the trial in civil proceedings can be concluded. I continue to quote Wood J.:

> "Second, public interest immunity is not a 'privilege' (within the meaning normally given to that word considering discovery) which can be waived. It is an issue which if facts are disclosed on which it could arise, must be considered if necessary, by the court

itself: see the AIR CANADA (5) case per Lord Fraser."

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I respectifully concur with the formulation of the principle which I have quoted. I am aware that I have not promised to be specifically helpful to public officers who await this ruling which deals with an objection on behalf of the Anti Corruption Commission. However, this much I can say: I agree with the learned authors of Halsbury's Laws of England, 4th Edition, Vol. 13 at paragraplh 83 when they indicate that it is the duty even of the parties themselves in private civil litigation to draw the attention of the state to the possibility that disclosure or production of documents would or might be injurious to the public interest. In our case, the Attorney General and his lawyers and any other responsible person or witness has the duty to raise objection once they learn, in whatever way, of the possibility or likelihood of injurious disclosure or production. I also agree that as a last resort, the court can raise the issue of its own motion. Needless to point out, while a privilege can be waived, a duty can not. I continue to quote Wood, J., and move on to the third principle:

> "Third, once public interest immunity is properly raised, the burden is on the party seeking disclosure to show why the documents should be produced for inspection by the court privately."

The authority cited for this is the *Air Canada* case (supra) and the remarks by Lord Fraser to the effect that the documents must not only be relevant to the matters in issue, but must also be necessary for disposing fairly of the cause. In our case, I am alive that in the context of the ongoing trial, the documents concerned, have never been available to the public nor legitimately to any of the private parties to this case, if any have in fact somehow already seen them. Even prior irregular access would not affect the principle. As will shortly appear, this principle is also imprtant because of the stages involved in resolving this issue. I now continue to quote Wood, J.:

> "Fourth, discovery involves two stages, disclosure of the existence of a document and production of that document for inspection. In the *Air Canada* case it was decided that in the first place the court normally should only order production, which order can be the subject of appeal, and it is only thereafter that the court should inspect the document. See also *Conway*'s case (1958) 1All E.R. 874 at 889 (1968) A.C. 910 at 953 per Lord Reid. There would seem to be two occasions where this sequence should not followed. The first is where the court has 'definite ground for expecting to find material of real importance to the party's seeking disclosure) see the *Air Canada* case (1983) 1 All E.R. 910 at 917, (1988) 2AC 394 at 491 per Lord Fraser) and second, where in exceptional cases the court finds it necessary to inspect the document to verify the fact that a 'class' claim is validly made: see the *Burmah Oil* (14) case (1979) 3 All E.R. 700 at p. 706 per Lord Wilberforce where he says:
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> > 'A claim remains a class even though something may be known about the contents; it remains a class even if parts of documents are revealed and parts disclosed. *Burmah* did not, I think, dispute this. And, the claim being a class claim (must state with emphasis that there is not the slightest ground for doubting that the documents in question fall within the class described; indeed the discriptions themselves and

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> > references in disclosed documents make it clear that they do. So this is

> not one of these cases, which in anyway are exceptional where the court feels it necessary to look at the documents in order to verify that fact. We start with a strong and well fortified basis for an immunity claim."

I consider the quotation very apty. When I come to the exercise of the balancing process, I have to place the documents in one of two usual classes, either the 'class' case of documents or the 'contents' case of documents. For an elaboration and examples of this categorisation, which would be beyond the requirements of my ruling, I recommend a more leisurely perusal of the full texts of the reports herein cited as well as such reference books as Halsbury's Laws of England, 4th Edition, volume 13 at para 91; Phipson on Evidence, 14th Edition par. 19-02 at seq., and de Smith's Judicial Review of Administrative Action, 4th Edition from page 35 to page 46. The authorities I have cited clearly show that the objection I am considering relates to the 'class' case of documents. I am mindful also that during the course of the trial, what was referred to as a summary extracted from the reports of the investigations by the Anti Corruption Commission and said to have been distributed at a State House press conference has already been used to examine and cross examine some witnesses. The fact that only a summary of extracts was considered for public release is significant and can not support Mr Sikota's argument that the whole document might as well be revealed. Immunity can not be lost on such grounds and would, in any case not be automatically lost even had the full document already been "leaked" or otherwise irregularly obtained. I find that there is no occasion for me to depart from the sequence proposed by Wood J in his fourth principle.

I now quote his fifth principle:

> "Fifth, before any question of public interest immunity can be raised the document must be disclosable within the rules of discovery normally applicable in litigation."

The authorities quoted is the *Burmah Oil* case (Supra) and the remarks of Lord Scarman to the effect that the judge faced with a public interest immunity claim should ask himself (or herself) whether production could be said to be necessary for fairly disposing of the case since, if it be shown that production was not necessary, it would be unnecessary to balance the interest of justice against the interest of the public service. As will shortly appear when I have set out the sixth principle formulated by Wood, J., the foregoing is also relevant consideration to deter " fishing expeditions" into the documents of persons who are not even parties to the civil action. Again I quote Wood, J.:

> "Sixth, if a public interest immunity claim is raised, and it is usually only raised on sound or solid ground, it is necessary for those who seek to overcome it to demonstrate the existence of a counteracting interest calling for disclosure of the particular documents involved. It is then, and only then, that the court may proceed to the balancing process."

The *Burmah Oil* case is cited in support of the foregoing. It is clear from the authorities I have referred to that the courts have been reluctant, in civil proceedings between parties as much as in civil proceedings involving the State,

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to lay open to disclosure and production documents containing reports and information related to investigations of crime. As a class, the reasons for this are self evident since it is in the widest possible interest of the public and the nation as a whole that the machinery put in place for the prevention, and detection of crimes and the prosecution of offenders should not be undermined. The onus was on the defendants in this case to satisfy me that they would be deprived of the means of proper presentation of their case. I assume that in pleading fair

comment based on facts which are true, they had some material to support it. I would be surprised if they did not have such material even at the time of the publications. Quite clearly, a party seeking disclosure in the absence of sopme material to support the pleadings would,in the words of the Lord Fraser in the *Air Canada* case," merely be fishing". Let me leave the *Evans* case by quoting headnote No. 3:

> "3. Furthermore, it would be contrary to the public interest for the report to be the subject of disclosure since it was important in the functioning of the process of criminal prosecution that there should be freedom of communiation between police forces around the country and the Director of Public Prosecutions in seeking his legal advice, without fear that those documents would be subject to inspection, analysis and detailed investigation at some later stage."

The defendants have not satisfied me that there is a counteracting interest to override the plainest public interest that work of the Anti Corruption Commission should not be undermined now or in future by disclosures in private civil litigation of their reports and other informtion sorrounding their investigations into suspected crimes.

It follows also that, because I find the class of documents not to be disclosable, there can be no question of ordering production for a private inspection by the Court regarding the contents. The press conference handout containing extracts or a summary which the state had deliberately made public is another matter altogether and is not the subject of this ruling. I have already dealt with the question of the consent by the Minister and the Vice President to disclosure. Because of the intimation that there may be others similar objections in respect of other witness summonses , I express the hope that the next objection will take the more usual course of being supported by an affidavit or certificate from an apropriet person. In this regard I would like to associate myself with the sentiments expressed by Lord Pearson in the *Rogers* case (3) when he said (quoting from (1978)AC at 405-406):

> "It seems to me that the proper producer is that which has been followed ,I think consistently, in recent times. the objection to disclosure of the documents information is taken by the Attorney General or his representative on behalf of the appropriate Minister, that it to say, the political head of the government department within whose sphere of responsibility the matter arises, and the objection is expressed in or supported by a certificate from the appropriate Minister. This procedure has several advantages:

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''(i) The question whether or not the desclosure of the document or information would be detrimental to the public interest on the administrative or executive side is considered at a high level.

(ii) The court has the assistnce of a carefully considered and authoritative opinion on that question.

(iii) The Attorney General is consulted and has opportunities of promoting uniformity both in the decision of such questions and in the formulation of the grounds on which the objections are taken. The court has to balance the detriment to the public interest on the administrative or executive side, which would result from the disclosure of the document or information, against the detriment to the public interest on the judicial side, which would result from non disclosure of a document or information which is relevant to an issue in legal proceedings. Therefore the court, though naturally giving great weight to the opinion of the appropriate Minister conveyed through the Attorney General or his representative, must have the final responsibility of deciding whether or not the document or information is to be disclosed."

For the reasons I have endeavoured to adumbrate, I uphold the Attorney General’s objection and order the setting aside of the summons to produce the protected documents served on the Director of Operations at the Anti Corruption Commission.

Attorney General's objections upheld.

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