

IN THE HIGH COURT OF ZAMBIA

2010/HP/1176

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

**TRANSPARENCY INTERNATIONAL
ZAMBIA**

PLAINTIFF

AND

**CHANDA CHIMBA III
ZAMBIA NATIONAL BROADCASTING
CORPORATION**

**1ST DEFENDANT
2ND DEFENDANT**

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

For the applicant: Mr. D Tembo of Messrs Musa Mwenye Advocates.

For the 1st defendants: Mr. D. Ngwira of Messrs SBN Legal Practitioners.

R U L I N G

Cases referred to:

1. *Coulson (William), and Sons v Coulson (James) and Company [1887] 3 T.L.R. 846.*
2. *Procter v Bayley [1889] Ch. D 390.*
3. *Bonnard and Another v Perryman [1891] 2 Ch. D. 269.*
4. *Tatcliff v Evans [1892] 2 Q.B.528.*
5. *Watkins v Hall [1908] 3 Q.B. 399.*
6. *Clarke v Norton [1910] V.L.R. 494.*
7. *Adam v Ward [1917] A.C. 309.*
8. *Fraser v Evans [1969] 1 ALL E.R. 8.*
9. *American Cynamid Limited v Ehicon [1975] A.C. 396.*
10. *Laudi den Hartog N.V. v Sea Bird (Clean Air Fuel Systems) Limited [1975] F.S.R. 502.*

11. *Celanese Corporation v A.K. 30 Chamie UK Limited* [1976] F.S.R. 273.
12. *Gulf Oil (GB) Limited v Page, and Others* [1987] 3 ALL E.R. 14.
13. *Shamwana v Mwanawasa* (1993-1994) Z.R. 149.
14. *Tse Wai Chun Paul v Albert Cheng* [2001] E.M.L.R. 31.

Legislation referred to:

1. *Defamation Act, cap 68 ss. 6 and 7*
2. *Rules of the Supreme Court, Order 20, Rule 3.*

Works referred to:

1. *Michael A. Jones, Clerk, and Lindsell on Torts, Twentieth Edition, (Thomson Reuters (legal) Limited, 2010).*
2. *Philip Lewis, Gatley on Libel, and Slander, Eighth Edition, (Sweet, and Maxwell London, 1981).*
3. *Ian S. Goldrein, Commercial Litigation: Pre-Emptive Remedies, (London: Sweet, and Maxwell, 2005).*
4. *Halsbury Laws of England, 4th Edition, Volume 28.*

I was approached in this matter by Transparency International Zambia (TIZ) by way of writ of summons, dated 1st November, 2010. The plaintiff's claims are for:

1. Damages for libel for defamatory words broadcast, and published by the defendants concerning the plaintiff in a television documentary called "*Stand up for Zambia,*" broadcast on 12th October, 2010, between 20:00 hours, and 21:30 hours, on the 2nd defendant's television;
2. Exemplary damages;
3. An order of injunction restraining the defendants whether by themselves, their agents, or servants, or otherwise whomsoever from further publishing or broadcasting or causing to be published or broadcast, the said malicious and defamatory words and images or any words and images similarly defamatory of the plaintiff;
4. Interest at current bank lending rate on all sums found due;
5. Any other relief the Court might deem just and fit; and

6. Costs of this action.

The plaintiff's claims were elaborated in a statement of claim, also dated 1st November, 2010. In the statement of claim, the plaintiff avers that the 1st defendant Mr. Chimba III is a media practitioner, and producer of the documentary styled as: "*Stand up for Zambia.*" The documentary is aired on the 2nd defendant's television; Zambia National Broadcasting Corporation (ZNBC). On or about 12th October, 2010, between 20:00 hours and 21:30 hours, TIZ claims that Mr. Chimba III broadcast through ZNBC, a documentary as earlier on noted, styled "*Stand up for Zambia.*" The complaint of TIZ is that the documentary contained defamatory words and images. The defamatory words and images complained of, referred to TIZ's President; Mr. Reuben Lifuka, and its Executive Director; Mr. Goodwell Lungu. The words complained of were in the following terms:

"One thing is baffling though, the fact that Mmembe's Non-Governmental civil society organisations allies like Goodwell Lungu's Transparency International Zambia, and Simon Kabanda's Citizens Forum are conspicuously mute over the apparent sufferings of workers at this newspaper. Is it because they too operate more or less the same way? Not really concerned about staff welfare? They seem to be operating from outer space for knowing the pace at which they react to and comment on issues they claim government is not doing enough on. It is really baffling that they have chosen to remain mute over the sufferings of the workers at Mmembe's Post. Right now Goodwell's Transparency International Zambia is in a very serious quandary over staff welfare. According to a letter to the Chapter President dated 30th August, 2010, co-signed by Goodwell Lungu, a copy of which is shown here, staff have cried foul over certain fringe benefits that have been curtailed like salary advances... Reading through the letter, tale signs of bad governance in this institution are very evident. Yet, Reuben Lifuka, and Goodwell Lungu himself are on record criticizing government for anything and everything. What again I may refer to as playing holier than thou.

Yes! One of these organization's (showing logo of plaintiff) famous chorouses is good governance for which they claim Rupiah's administration is not doing enough on. You, and I know that these NGO's are supposed to be partners with government in as far as development is concerned, yet they fight

government day in day out apart from spending a lot of time and money on workshops and seminars in expensive hotels, motels, and lodges... so what about governance within their ranks? You may wish to know that in fact Goodwell's Transparency International Zambia falls far short on good governance. You see these same NGO's thrive on collecting money from all over the world in the name of you and I... just how many people say in Mambolomoka in Western Province, Kayombo, or Dikalonga in North-Western province, Malonkoto, Dingeza, Singanajula, or Siyameja in Southern Province and Nsama in Northern Province, know the existence of some of these otherwise vocal NGO's who purport to work for the people? These NGO's also use every opportunity to de-market and de-campaign Zambia abroad. They solicit money on the pretext of fighting poverty and corruption, yet together with other foreign sponsors seem to be condoning Mmembe's presumed misdeeds. When I said I had taken a stand against all those that are forever criticizing the Head of State and Government, and in most cases insulting and using disparaging remarks, I meant just that, and I have no apologies to make. So because I made this clear, Mmembe's Post in collusion with Goodwell's Transparency International Zambia, have perpetually fixed a reporter and fixed photographer on my tail all because I said I was going to go far and expose all people and organizations that were forever criticizing Government; that's the crime I have committed. Frank Bwalya, the disgruntled catholic priest is also said to be producing a documentary on me to sort of counter what I am doing, but even in this Mmembe's Post and Goodwell's Transparency International Zambia are heavily involved. You will recall that Mmembe's Post carried a story that according to information from Goodwell's Transparency International Zambia, I had chosen to do these documentaries because I had been separated from the organization. This implied that I was fired from Goodwell's Transparency International Zambia. I was never ever employed by this organisation but for four years, I effectively presented and produced Transparency and Integrity forum, a live phone in programme on Zambia National Broadcasting Corporation (ZNBC) TV and Radio 4 sponsored by Goodwell's Transparency International Zambia. I was merely a media consultant contracted as and when there was something to do. In a future episode, I may share with you some inner dealings of this organization that claims to be fighting corruption. Dealings that may otherwise be deemed clandestine. But for Mmembe's Post and the holier than thou he plays in what I have already referred to as his drama movie, it is clear he and his newspaper may be involved in some serious scam with somebody or a group of people..."

TIZ contend that the words and images outlined above, in their natural and ordinary meaning, were understood to mean that:

- (i) The plaintiff collects money from donors and co-operating partners and fraudulently uses the name of the Zambian people to collect money;
- (ii) The plaintiff dishonestly purported to work for the Zambian people when in fact not;
- (iii) The plaintiff is and has dishonestly misused donor money by hosting workshops and seminars in expensive hotels, motels, and lodges;
- (iv) The plaintiff is guilty of bad corporate governance;
- (v) The plaintiff is not concerned about the welfare of its staff, and is therefore a bad employer;
- (vi) The plaintiff has maliciously placed a reporter to monitor the 1st defendant's movements to cover up its wrong doing;
- (vii) The plaintiff is involved in a malicious and dishonourable plot to publish a documentary to counter the 1st defendant's "*Stand up for Zambia*," television documentary;
- (viii) The plaintiff is involved in dishonourable, and clandestine activities;
- (ix) The plaintiff is involved in de-marketing and de-campaigning the nation abroad using every opportunity;
- (x) The plaintiff together with the *Post Newspapers* is involved in a serious scam; and
- (xi) The plaintiff is a scandalous, dishonourable, and fraudulent organization.

TIZ further contends that the words and images referred to above were calculated to disparage TIZ, and to cause injury to TIZ's reputation, which has been lowered in the estimation of reasonable and right thinking members of society. TIZ contends that unless Mr. Chimba III, and ZNBC are restrained by an order of interim injunction, they will continue to broadcast similar words and images defamatory of TIZ.

On 1st November, 2010, TIZ filed an affidavit in support of summons for an interim injunction. The affidavit was sworn by Mr. Goodwell Lungu, the Executive Director of TIZ. The affidavit in support essentially repeated the averments in the statement of claim. Thus it is unnecessary to recite the contents of the affidavit. On 19th November, 2010, Mr. Chimba III, and ZNBC filed a memorandum of appearance and a defence.

Later, on 16th December, 2010, Mr. Chimba III, filed an amended defence without leave pursuant to Order 20, Rule 3, of the Rules of the Supreme Court. In the defence, Mr. Chimba III admits that on 12th October, 2010, ZNBC broadcast a documentary styled as "*Stand up for Zambia.*" He contends that the words and images complained of in this action are part of a much larger documentary styled as "*Stand up for Zambia.*" He however denies that the words and images complained of, import the meaning assigned to them by TIZ. In the alternative, he contends that if the words and images bear the meaning contended by TIZ, then nonetheless the words and images are true in substance and in fact. He contends that the words and images are true in substance because:

- (a) TIZ purports to work for the Zambian people when many people in rural Zambia may not know about the plaintiff's existence;
- (b) TIZ has spent a lot of time and money on workshops, and seminars in expensive hotels, motels, and lodges, espousing good governance, yet good governance is lacking within TIZ;
- (c) TIZ falls far short on good governance within its ranks;
- (d) TIZ has been insensitive to deal with its worker's grievance, expeditiously;
- (e) TIZ in league with others is engaged through a reporter and photographer in finding faults in him;

- (f) TIZ is involved in and associated with plans by Frank Bwalya to produce a documentary on him to counter his documentary;
- (g) That some inner dealings of TIZ may be deemed clandestine;
- (h) That TIZ uses every opportunity to de-campaign and de-market Zambia abroad;
- (i) That TIZ has spread information that he has chosen to produce the documentaries, because he was separated from TIZ; and
- (j) Instead of being responsible partner to government in developing TIZ is not.

Mr. Chimba III further contends in the defence that the words or images complained of are a comment on a matter of public interest. In this regard, he maintains that TIZ's objectives require that it stands to public scrutiny. Mr. Chimba III also contends that he will rely on sections 6 and 7 of the Defamation Act.

On 23rd November, 2010, Mr. Chimba III, filed an affidavit in opposition to the interim injunction. In the affidavit in opposition, he repeated the averments in the defence. Thus, again it is unnecessary to recite the contents of the affidavit in opposition. Be that as it may, he pressed that there was no malice practiced in the publication of the documentary. And no damage has or is likely to be suffered by TIZ, if the injunction is not granted to TIZ, in view of the fact that the words complained of are true in substance and in fact.

On the same day; 23rd November, 2010, Mr. Oswald Mutale also filed an affidavit in opposition on behalf of ZNBC. Mr. Mutale is the Controller of Television of ZNBC. He also repeated Mr. Chimba III's averments in the

defence. For that reason, it is also unnecessary to recite the contents of the affidavit.

However, on 17th December, 2010, Mr. Mutale filed a supplementary affidavit in opposition. In that affidavit, Mr. Mutale pointed out that on 16th December, 2010, ZNBC filed an amended defence. In the amended defence, Mr. Mutale contends that ZNBC has pleaded the defences of justification and fair comment on a matter of public interest. And that there was no malice practiced in the publication of the documentary. And further no damage has or is likely to be suffered by TIZ, because the words, and images complained of are true in substance and fact. Lastly, he contends that ZNBC is a public broadcaster, which has a duty to inform the public and enjoys the right to free speech.

Mr. Lungu had earlier on, on 3rd December, 2010, filed an affidavit in reply. Mr. Lungu contends in the affidavit in reply as follows: that the documentary in question is defamatory as contended in the statement of claim. He denied that TIZ is unable to pay its staff salary advances. The objective of the letter dated 30th August, 2010, was to urge employees to protect donor funds, and enhance accountability of the funds. Mr. Lungu also denied the allegation that TIZ thrives on collecting money from across the world, in the name of the people of Zambia. He maintains that TIZ receives its funding mostly from Transparency International, based in Berlin, Germany. TIZ also receives funding from locally based institutions such as Embassies. And at one time, TIZ received funding from the Government of the republic of Zambia through the Anti-Corruption Commission. Thus he denied the allegation that TIZ has gone around the globe to collect funds to run its programs. Mr. Lungu in his affidavit in reply went to great length to deny the specific averments in Mr. Chimba's III, and ZNBC's defences. Nonetheless it is significant to note that

Mr. Lungu contends in the affidavit in reply that the defence of justification as posited by Mr. Chimba III, and ZNBC is destined to fail. As a result, Mr. Lungu urged me to grant the relief sought; an order for interim injunction.

On 3rd December, 2010, Mr. Tembo filed into Court submissions on behalf of TIZ. From the outset, Mr. Tembo contends that the words and images complained of are defamatory. Mr. Tembo submitted that according to *Phillip Lewis, Gatley on Libel and Slander, Eighth Edition, (Sweet and Maxwell London, 1981)*, it is stated that:

“In cases of libel and slander actionable per se, the plaintiff need not prove actual damages for the law presumes, that some damages will follow in the ordinary course of things, from the mere invasion of his absolute right to reputation.”

Mr. Tembo also drew my attention to the case of *Tatcliff v Evans [1892] 2 Q.B 528*, where it was observed that:

“Where disparaging words are spoken of a person and either actual injury has flowed from them or they were spoken of him in a way of his trade in contemplation of the law damage has accrued to the person defamed.”

Mr. Tembo submitted that a similar position was taken by Blackburn, J in the case of *Watkins v Hall [1868] 3 Q.B. 399*. Mr. Tembo contends that in this case, there is a real threat of Mr. Chimba III, and ZNBC repeating the broadcasting of the defamatory material. In view of the eminent repetition, Mr. Tembo referred me to dictum in *Procter v Bayley [1889] 42 Ch D 390*, that:

“The Court will grant such an injunction if it is satisfied that the words are injurious to the plaintiff and there is reason to apprehend further publication by the defendant.”

Mr. Tembo has argued that there is a lot of falsehood and malice in the publications by Mr. Chimba III, and ZNBC.

Mr. Tembo submitted that Gatley on Libel and Slander, (supra), states in paragraph 1336 that:

“under the plea of justification, the onus is on the defendant to show that the alleged libel is true... the evidence tendered in a rebuttal of a plea of justification must go to disprove the specific charge made by the defendant.”

Mr. Tembo contends that TIZ’s reply has challenged Mr. Chimba III’s and ZNBC’s defence of justification. Mr. Tembo thus maintains that the defence of justification is bound to fail in this matter. And therefore, the application for an interim injunction should not be refused. Mr. Tembo also submitted that I have inherent jurisdiction to grant the interim injunction. In aid of this submission, Mr. Tembo relied on the case of *Bonnard and Another v Perryman [1891] 2 Ch.D 269*, where it was observed that:

“The Court has jurisdiction in an action for libel to grant an injunction at any stage of the cause restraining the publication of the libel, but this jurisdiction should be exercised with great caution. Although the publication, if untrue, would clearly be libelous, an interlocutory injunction will not be granted where the defendant pleads justification unless the Court can be sure that this defence cannot be sustained at trial, and that the plaintiff will receive more than nominal damages.”

Further, Mr. Tembo drew my attention to Halsbury Laws of England, 4th Edition, paragraph 170, where it is stated that:

“The High Court may grant an interlocutory injunction restraining himself or by his servants or agents or otherwise from publishing or further publishing matter which is defamatory or a malicious falsehood.”

Mr. Tembo pointed out that paragraph 170 of Halsbury Laws of England (supra) goes on the state that:

“It is not necessary to show that there has already been an actionable publication or that damage has been sustained.”

Mr. Tembo contends that in this case, Mr. Chimba III, and ZNBC have been economical with the truth. And caused the publication of the documentary with intent to cause maximum injury to TIZ. Mr. Tembo maintains that the defence of justification is not likely to succeed. Mr. Tembo further drew my attention to Lord Coleridge observation. In *Bonnard v Perryman* (supra) at page 284:

“But it is obvious that the subject matter on in action for defamation is so special as to as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent anticipated wrong. The right of free speech is one which it is for the public interest that individual 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 publications, 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.”

Mr. Tembo pointed out several instances that he considers to be falsehoods. First, he contends that TIZ was only made aware of Frank Bwalya’s alleged documentary through a *Post Newspaper* online publication which quoted a mobile phone short message system (sms) from Frank Bwalya to Mr. Chimba III thanking him for scandalizing Frank Bwalya, and his Church. Second, he contends that it is in the sms message that Frank Bwalya claimed that he was making a documentary on Mr. Chimba III. Third, TIZ categorically denies any involvement in the production of a documentary relating Mr. Chimba III. Fourth, he contends that paragraph 7 of the affidavit in support,

demonstrates that the 1st, and 2nd defendants have no defence. And as such, have admitted that the statement complained of is false, and malicious. The plaintiff pressed that the 1st, and 2nd defendants have admitted as having alleged the following:

- (a) that TIZ is and has dishonestly misused donor money by attending workshops and seminars in expensive hotels, motels, and lodges;
- (b) that TIZ has maliciously placed a reporter to monitor Mr. Chimba III's movements to cover up its wrong doing;
- (c) that TIZ is involved in dishonourable and clandestine activities;
- (d) that TIZ is involved in de-campaigning, and de-marketing Zambia abroad using every opportunity;
- (e) that the plaintiff together with the *Post Newspapers* is involved in a serious scam; and
- (f) that the plaintiff is a scandalous, dishonourable, and fraudulent organization.

In view of the foregoing, Mr. Tembo drew my attention again to paragraph 172 of the Halsbury Laws of England which states that:

"It is well settled that no injunction will be granted if the defendant states his intention of pleading a recognized defence, unless the plaintiff can satisfy the Court the defence will fail. This principle applies not only to the defence of justification, but also to the defences of privilege, fair comment, consent, and probably any other defence."

Mr. Tembo argued that Mr. Chimba III's and ZNBC's defence of justification is bound to fail. And since it is bound to fail, Mr. Tembo argued that the injunction sought by TIZ should be granted. Lastly, Mr. Tembo argued that unless Mr. Chimba III and ZNBC are restrained, they will continue to publish similar words, and images defamatory of TIZ.

On 17th December, 2010, Mr. Ngwira filed submissions on behalf of Mr. Chimba III and ZNBC. In the main, Mr. Ngwira opposes the grant of an interim injunction in this matter. He submits that there a plethora of authorities governing the grant of interim injunction in matters of this nature. To begin with, he drew my attention to the case of *Gulf Oil (GB) Limited v Page and Others* [1987] 3 ALL ER. 14. In this regard, he submitted that in the *Gulf Oil* case, Warner, J, after referring to the cases of *Bonnard v Perryman* (*supra*), *Fraser v Evans* [1969] 1 ALL E.R. 8; refused an interim injunction on the ground that the truth of the words was not in issue. And further that in libel action, if a defendant intends to justify, an interim relief is as a matter of principle never granted. Mr. Ngwira submitted that the *Gulf Oil* case followed the principle that was laid down in *Bonnard v Perryman* that:

“The Court will not restrain the publication of an article even though it is defamatory, when the defendant says that he intends to justify it or to make a fair comment on a matter of public interest.”

Mr. Ngwira submitted that the decision in the *Bonnard v Perryman* (*supra*) case was cited with approval by the erstwhile Chief Justice Ngulube in *Shamwana v Mwanawasa* (1993-1994) Z.R. 149. Furthermore, Mr. Ngwira submitted that in the case of *Fraser v Evans* (*supra*) Lord Denning M.R. observed as follows at page 9:

“The principle has been established for many years since Bonnard v Perryman [1981] 2 Ch 269. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal and not for a judge; but a better reason is the importance in the public interest that the truth should out. As the Court said in that case, “the right of free speech is one which it is for the public interest that individuals should posses, 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 it is fair comment on a matter of public interest.”

Lord Denning went on to state at page 11 that:

“There are some things which are of such public concern that the newspapers, the press and indeed everyone is entitled to make known the truth and to make fair comment on it. This is an integral part of the right of free speech and expression. It must not be whittled away... The defendant admits that they are going to injure the plaintiff’s reputation, but they say that they can justify it; that they are only making fair comment on a matter of public interest, and therefore, that they ought not to be restrained. We cannot pre-judge this defence by granting an injunction against them.”

Mr. Ngwira submitted that the principle established in the *Bonnard v Perryman (supra)* case is not without exception because in the *Gulf oil case (supra)* it was observed as follows:

“it is true that there is no wrong if what is published is true provided that 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 a 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 that there is no question of a cause of action in defamation. In such a case, the Court can, and in my view should proceed on the same principles as it would in the case of any other Court.”

In summary, Mr. Ngwira submitted that the Court acknowledged that:

- (1) there is no wrong done if what is published is true provided that is not published in pursuance of a combination;
- (2) even if there is a combination, there is still no wrong unless the sole or dominant purpose of the combination and publication is to injure the plaintiff; and
- (3) if however there is both combination and purpose or dominant purpose to injure the plaintiff, there is a wrong done and an interim injunction can be granted.

Mr. Ngwira submitted that the third formulation referred to above is an exception to the rule laid down in the *Bonnard* case. Mr. Ngwira also drew my attention to the dictum of Ralph Bison L.J. in the *Gulf Oil* case as follows:

"I agree that the judge was not right to refuse relief on the ground that in this case, the principle established in Bonnard v Perryman constituted a bar. Although that principle, which is applied in defamation cases is not directly applicable in its terms to a case where the basis of claim is conspiracy to inflict deliberate damage without any just cause, nevertheless it seems to me that the principle, namely the individual and the public interest in the right of free speech, is a matter of great importance in the consideration of the question whether in the exercise of the Court's discretion an interlocutory injunction should be made and, if yes, what should be the extent of any restriction on publication of any statement pending trial. The plaintiff made out, as I think, an arguable case that the aerial display was carried out by the defendants as part of a concerted plan to inflict deliberate damage on the plaintiffs thereby without any just cause. Due regard being given to the principle of free speech, the plaintiffs were in my judgment entitled to the limited injunction granted by this Court."

Mr. Ngwira pressed that this matter does not fall within the exception to the principle established in the *Bonnard v Perryman (supra)*, because there is no combination of claims such as conspiracy or other separate action, alleged by TIZ. Mr. Ngwira argued that the only claim before me is one for libel. I would like to state at once that on the facts of this case, the question of conspiracy does not arise because it was not pleaded by the plaintiff. Therefore, it is *atiose* for me to address this issue. However, I did address this issue *obiter dicta* in the case of *Sata v Chimba and Others 2010/HP/1282*, (unreported), in a ruling rendered on 2nd August, 2011.

Lastly, based on the principle enunciated in the *Bonnard v Perryman (supra)*, Mr. Ngwira urged me to refuse the injunction. He argued that Mr. Chimba III, and ZNBC will at trial rely on the defences of justification and fair comment.

Thus to grant an interim injunction, Mr. Ngwira argued, further would amount to pre-judging the defences.

INTERIM INJUNCTION - GENERAL

I am indebted to counsel for their submissions and arguments. Lord Diplock in the celebrated case of *American Cyanamid Company Limited v Ethicon Limited* [1975] A.C. 396, defined an injunction at page 405G, as an order of the Court directing a party to the proceedings to do or refrain from doing a specified act. An interim injunction is granted as a matter of discretion in cases where monetary compensation would afford an inadequate remedy to an injured party. An interim injunction remains in force until the final hearing, or final determination by the Court of the rights of the parties on the merits. There are two matters which normally concern the Court when faced with an application for an interim injunction. The first is the maintenance of a position that most easily enable justice to be done, when its final order is made.

Second, the interim injunction regulates the acts of the parties in a way, or manner that is most just, and convenient in the circumstances of a particular case. It must always be borne in my mind that the primary purpose of an interim injunction is to regulate the position of the parties pending trial, whilst at once, avoiding reaching a decision on issues which could only be resolved at trial.

THE GENERAL PRINCIPLES GOVERNING THE GRANT OF RELIEF OF AN INTERIM INJUNCTION.

The learned authors of Commercial Litigation; Pre-emptive Remedies, (London, Sweet, and Maxwell, 2005), state at page 2-3, in paragraph A 1005,

that the following general principles governing the grant or refusal to grant interim injunctions may be distilled from the opinion of Lord Diplock in the *American Cyanamid case*:

- (a) the claim must not be frivolous, or vexatious; in other words, there must be a serious question to be tried;
- (b) the Court should not try to resolve conflict of evidence or undertake a detailed consideration of the law. Rather if there is a serious question to be tried, it should proceed to consider the balance of convenience;
- (c) as to the balance of convenience, the Court should first consider whether if the claimant were to succeed at trial in establishing his right to permanent injunction, he could be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application, and the time of trial.
- (d) If the common law damages would be an adequate remedy, and the defendant would be in a financial position to pay them, no interim injunction should normally be granted however strong the claimant's claim appeared;
- (e) If, however, damages would not provide an adequate remedy for the claimant in the event of his succeeding at trial, the Court should then consider whether, if the defendant were to succeed at trial in establishing his right to do that which was sought to be restrained, the defendant would be adequately compensated by an award of damages under the claimant's undertaking in damages.
- (f) If damages in the measure recoverable under that undertaking would be an adequate remedy, and the claimant would be in a financial position to pay them, there would be no reason upon this ground to refuse an interim injunction.

- (g) Where there is doubt as to the adequacy of the respective remedies in damages available to either party or both, then the general balance of convenience arises; and
- (h) Where factors relevant to the general balance of convenience are evenly balanced, the Court will generally take such measures as may be necessary to preserve the status quo.

Whenever a Court is faced with an application for an interim injunction, and before granting the interim injunction, it must consider carefully all the relevant evidence at the time the injunction is sought. The Court should also always exercise caution before granting an interim injunction. Thus in *Landiden Hartog N. V. v Sea Bird (Clean Air Fuel Systems) Limited* [1975] F.S.R. 502 Whitford J said at page 204:

“... relief by way of injunction is relief which is never lightly granted, and in interlocutory proceedings the Court in any event must be satisfied that there is a real apprehension that if steps be not taken to preserve a party’s interest in property, then irreparable damage made be done.”

It is therefore essential for an applicant for an interim injunction to demonstrate that he would suffer substantial prejudice, or hardship in a material respect if he were confined to other remedies such as damages. Thus in *Calieanese Corporation v AK 30 Chemie UK Limited* [1976] F.S.R. 273, Whitford J, observed as follows at page 275:

“...the grant of interlocutory relief has always been considered the grant of relief of a somewhat exceptional character, and it is inappropriate to grant relief of this nature unless it is absolutely vital in order to protect the legitimate interests of the plaintiff that such relief be granted.”

GRANT OF INTERIM INJUNCTION IN DEFAMATION CASES.

The general principle is that the Courts have discretion to grant interim injunction in defamation cases before the trial of an action. However, it is a most delicate jurisdiction to exercise. It is a jurisdiction to be exercised in the clearest cases. (See *Coulson (William), and Sons v Coulson (James), and Company* [1887] 3 T.L.R. 846). The rationale for this principle is to be found in a passage of Lord Coleridge C.J., in the case of *Bonnard v Perryman* (supra) page 284. After affirming the Court's power to grant an interim injunction Lord Coleridge C.J, said 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 the trial on an action 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; 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."

Lord Denning, also expounded the rationale in *Fraser v Evans* (supra) in the following terms 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 a 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 defence of justification, and fair comment are for the jury, which is the constitutional tribunal, and not for the judge. But a better reason is in 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 it is fair comment on a matter of public interest. The Court will not prejudice the issue by granting an injunction in advance of publication."*

Thus the so called rule against prior restraint (in *Bonnard v Perryman*) has provided that an interim injunction will not be granted in defamation proceedings where the defendant intends to rely on a substantive defence such as justification, fair comment, or qualified privilege for a plaintiff to obtain an interim injunction, he is required to demonstrate practically that there is no defence to the claim with a realistic prospect of success. (See Clerk, and Linsell on Torts, Twentieth Edition, (Thomson Reuters Legal Limited 2010) paragraph 22 - 256, at pages 1579-1580). In *Shamwana v Mwanawasa* (supra) the erstwhile Chief Justice Ngulube observed at page 152, that paragraph 168 of the Halsbury's Laws of England Volume 28 summaries the position as follows:

"It is well settled that no injunction will be granted if the defendant states his intention of pleading a recognized defence, unless the plaintiff can satisfy the Court that the defence will fail. This principle applies not only to the defences of justification, but also to the defences of privilege, fair comment, consent, and probably any other defence."

DEFENCES

The main defences relied upon in actions for defamation are justification, fair comment, and privilege. However, in this action only two defences have been invoked. Namely, justification, and fair comment. Therefore, the discussion of the defences will be confined to these two defences.

JUSTIFICATION

According to the learned authors of Clerk, and Linsell on Torts (supra) paragraph 22 - 73, at page 1449, the defence of justification is explained in the following terms:

"It is a complete defence to an action for defamation for the defendant to plead justification, that is, that the statement is true. The burden of proof is

on the defendant. Where evidence that would support a plea of justification comes to the defendant's knowledge well after the commencement of the proceedings, he may be allowed to amend his defence to include such a plea, but his conduct in entering a plea of justification at a late stage will be subject to a careful investigation by the Court, and the more serious the nature of the allegation, the more clearly satisfied the Court must be that no prejudice is caused to the claimant which cannot be remedied by monetary compensation..."

Where a defendant indicates that he will rely on the defence of justification, it is not enough to merely state that he intends to justify. The facts relied on to support the plea of justification must be properly particularized. The defendant must also have reasonable evidence, and grounds to support the plea. The particulars must be relevant, and must be capable of justifying the meaning, or meanings as the defendant seek.

At common law the defendant had to justify everything in the defamatory publication. Thus where a libel contained several charges, in order for a defence of justification to succeed, it is necessary to prove that the substance or sting of each charge was true. (See Clerk, and Lindesll on Torts (supra) paragraphs 22 - 81, and 22 - 82 at pages 1454 - 1455).

Section 6 of the Defamation Act, (chapter 68 of the laws of Zambia), has since altered the position at common law when it provides that:

"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 statutory defence of justification therefore is that, although the defendant is still required to prove the truth of the defamatory sting of the publication, he need not prove the literal truth of every fact which he has stated. Where the charge against the plaintiff is general in its nature, he is entitled to particulars of the facts relied upon in support of the plea of justification. (See Clerk, and Lindsell on Torts, (supra) paragraph 22 - 79, at page 1453). If however, a defendant wishes to rely on the statutory defence of justification he must specifically plead it.

FAIR COMMENT - HONEST COMMENT

The learned authors of Clerk, and Lindsell on Torts, (supra) describe the defence of “*fair comment*” in the following terms in paragraph 22 - 164, at page 1519 - 1520:

“The defence of “fair comment” protects statements of opinion, or comment, on matters in the public interest.

...Everyone has the right to comment within the limits of fair comment whether he is a writer, reporter, newspaper editor, or ordinary citizen in a letter to a friend, or by way of spoken comment.”

The modern authoritative statement of the law of fair comment is to be found in the case of *Tse Wai Chun Paul v Albert Cheng [2001] E.M.L.R.31*, where in the Court of Final Appeal of Hong Kong, Lord Nicholls outlined the history, and principles, relating to the defence of fair comment. The defendant must overcome four hurdles in order to establish the defence:

1. The statement must be comment, and not fact;
2. The comment must have sufficient factual basis (that is, the comment must be based on facts which are themselves sufficiently true);

3. The comment must be objectively “fair” i.e. must be an opinion which an honest person could hold. This is an objective test, but should not be confused with reasonableness; and
4. The subject matter must be of public interest.
- 5.
6. Where these are surmounted, the defence will succeed, unless the claimant proves that the comment was made maliciously (see Clerk, and Lindsell on Torts (supra) paragraph 22 - 165 at p. 1520).

FACT OR COMMENT

It must be noticed that whether a statement is fact, or comment can be a very difficult distinction given that in many publications there is a mixture of both. It has been said that the sense of comment is something which is or can reasonably be inferred to be deduction, inference, conclusion, criticism, remark, or observation (See *Clarke v Norton [1910] V.L.R. 494 at 499*).

Where the statement is a pure value judgment, incapable of proof, it is likely to be regarded as a comment. However, where the defendant refers to certain facts, and makes it clear that the statement in question is an inference from facts, it will generally be considered comment. But a bold statement with no supporting facts is unlikely to be considered a comment. (See Clerk and Lindsell on Torts, (supra) paragraph 22 - 166 at page 1521).

The defence of fair comment is not limited to pure value judgment. A statement which appears to be factual, and which is either true, or false may nevertheless be regarded as a comment where it is apparent that it is an inference drawn from other facts. In contrast a statement to the effect that a claimant has been guilty of a particular act is likely to be considered factual, unless it is apparent that it is merely an inference drawn from other facts.

(See Clerk, and Lindsell on Torts, (supra) paragraph 22 - 166 at pages 1522 - 1523).

The context in which the statement appears is relevant. Bold headlines, and assertions in news stories are more likely to be considered statements of facts Whereas criticisms in reader articles, letters, or personal columns are more likely to be considered comment. The reader understands that the statements represent personal views of the columnist. Prefacing statements with the words "*in my opinion*," or my "*judgment*" may help, but is not necessary if it is clear from the context that they are comment. (See Clerk, and Lindsell on Torts (supra) paragraph 22 - 166 at page 1523).

The words which are alleged to be comment must be stated within the publication. This is in contrast to the supporting facts which need not be directly stated. A comment cannot be an implication which the reader might draw from the publication but which is not stated. The reader should be able to point to specific words in the publication, and recognize them as comment. A defendant in his defence should generally identify the particular words of the publication which he alleges to be comment. In deciding whether a statement is comment, consideration may only be given to the publication which is the subject matter of the claim, and not other publication to which it refers. Where the defendant has failed to distinguish clearly between the facts on which he wishes to make, the statements may be regarded as factual. Hence the importance of clearly identifying the comment. Whether a statement is fact, or comment is to be determined by how it would be understood by the ordinary reader. (See Clerk, and Lindsell on Torts, (supra), paragraph 22 - 166, at page 1524).

SUFFICIENT FACUTAL BASIS

The defendant must prove that the factual blocks on which the comment is based are true, or sufficiently true. The facts must be either stated or summarized in the publication, or indicated with sufficiently clarity to enable the publishers to ascertain the facts on which comments is based. Where some of the facts stated in the publication are true, and some are false, the defence of fair comment will succeed if the defendant would have been entitled to make the same comment, solely on the basis of the true facts. To this end, section 7 of the Defamation Act provides that:

“In an action for libel or slander in respect of words consisting of partly allegations of fact, and partly 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.”

Whenever the statutory defence of fair comment is relied on, it must be pleaded.

I will at this juncture turn to consider whether or not the words complained of by the plaintiff bear the defamatory meaning attributed to them in paragraph 5 of the statement of claim. First, the plaintiff’s are said to have stated as follows in the body of the statement complained of:

“You see these same NGO’s thrive on collecting money from all over the world in the name of you, and I ... just how many people say in Mambolomika in Western Province, Kayombo, or Siyameja in Southern Province, and Nsama in Northern Province, know the existence of some of these otherwise vocal NGO’s who purport to work for the people? These NGO’s also use every opportunity to de-market and de-campaign Zambia abroad. They solicit money on the pretext of fighting poverty, and corruption, yet together with other foreign sponsors seem to be condoning Mmembe’s presumed misdeeds.”

The complaint of the plaintiff in relation to the preceding portion of the statement is that, in their natural and ordinary meaning, the words referred to above suggest, first, that the plaintiff collects money from donors and co-operating partners, and fraudulently uses the name of the Zambian people to collect money. Second, that the plaintiff dishonestly purports to work for the Zambian people when in fact it does not. Third, that the plaintiff is involved in “de-marketing” and “de-campaigning” the nation abroad. I therefore endorse the plaintiff’s interpretation of the words complained of and confirm that the passage complained of is indeed defamatory.

Second, the defendants asserted in the statement complained of as follows:

“You, and I know that these NGO’s are supposed to be partners with government in as far as development is concerned, yet they fight government day in day out apart from spending a lot of time, and money on workshops, and seminars in expensive hotels, motels, and lodges so what about governance within their ranks.? You may wish to know that in fact Goodwell’s Transparency International Zambia falls far short on good governance.”

The interpretation that the plaintiff has placed on these words is that the plaintiff is and has dishonestly misused donor money by hosting workshops, and seminars in expensive hotels, motels, and lodges. And further that the plaintiff falls far short on good governance. The insinuations made by the defendants are clearly defamatory

Third, the defendants stated in the statement complained that:

“One thing is baffling though, the fact that Mmembe’s Non – Governmental Civil society organizations allies like Goodwell Lungu’s Transparency International Zambia, and Simon Kabanda’s Citizen’s Forum are conspicuously mute over the apparent sufferings of workers at this newspaper. Is it because they too operate more or less the same way. Not really concerned about staff welfare? They seem to be operating from outer space for knowing the pace at which they react to and comment on issues they claim Government is not doing enough on. It is really baffling that they

have chosen to remain mute over the sufferings of the workers at Mmembe's Post."

The complaint by the plaintiff here is the suggestion by the defendants that the plaintiff is not concerned about the welfare of its staff, and consequently is a bad employer. The allegation is in my view clearly defamatory.

Fourthly, the defendants continued as follows:

"When I said I had taken a stand against all those that are forever criticizing the Head of State, and Government, and in most cases insulting, and using disparaging remarks, I meant just that, and I have no apologies to make. So because I made this clear, Mmembe's Post in collusion with Goodwell's Transparency International Zambia, have perpetually fixed a reporter, and fixed a photographer on my tail all because I said I was going to go far, and expose all the people, and organizations that were forever criticizing Government; that's the crime I have committed."

The complaint of the plaintiff in this regard is that it has maliciously placed a reporter to monitor the 1st defendant's movements in order to cover up its wrong doing. It stands to reason that any person who in a free society, like Zambia, assigns another person to monitor movements of the other in order to cover up his wrong doing, is likely to be frowned upon. Therefore, the allegation that the plaintiff assigned a reporter to monitor the 1st defendant's movements in order to cover up its wrong doing is patently defamatory.

Fifth, the defendants went on to state in the statement complained of that:

"Frank Bwalya, the disgruntled catholic priest is also said to be producing a documentary on me sort of counter what I am doing, but even in this Mmembe's Post and Goodwell's Transparency International Zambia are heavily involved...."

The plaintiff is aggrieved about the allegation that it is involved in a malicious, and dishonourable plot to publish a documentary to counter the 1st defendant's "Stand up for Zambia" television programme. In my view, "Stand up for Zambia" television was a largely lopsided programme whose primary focus was to discredit the candidature of the opposition leader Mr. Michael Chilufya Sata, in the forthcoming elections. Therefore, the allegation, or suggestion that the plaintiff was in concert with Mr. Goodwell Lungu, and Mr. Fred Mmembe contemplating launching a similar programme to discredit the 1st defendant would have the effect of lowering the standing of the plaintiff in the eyes of right thinking members of society.

Sixth, the defendants promised that:

"in a future episode, I may share with you some inner dealings of this organization that claims to be fighting corruption. Dealings that may otherwise be deemed clandestine."

The plaintiff's complaint is that a picture has been painted by the defendants that it is involved in dishonourable, and clandestine activities. I take judicial notice of the fact that one of the primary objectives of the plaintiff is to fight the scourge of corruption. Therefore, the suggestion that the plaintiff is involved in clandestine activities that run counter to its professed fight against corruption is likely to lower the estimation of the plaintiff in the eyes of right thinking members of society.

The defendants concluded by stating that:

"But for Mmembe's Post, and the holier than thou he plays in what I have referred to as his drama movie, it is clear [that] he, and his newspaper may be involved in some serious scam with somebody, or a group of people..."

This statement cannot in my opinion be properly, and fairly be the basis of the plaintiff's complaint that the plaintiff together with the *Post Newspapers* is involved in a serious scam. In a word, the plaintiff has not in that passage referred to above, been identified and associated with the aspersion complained of.

The next stage of the inquiry is to determine whether or not the plaintiff has satisfied me that the defences relied on by the defendants are not likely to succeed. Both defendants have relied on the defences of justification, and fair comment on a matter of public interest. In so doing, both defendants contend in their defence that the words complained of are true in substance, and fact to the extent that: the plaintiff collects money from donors, and co-operating partners, and uses the name of the Zambian people to collect money, but the existence of the plaintiff in rural Zambia is absent; the plaintiff purports to work for the Zambian people when many people in rural Zambia may not know about the plaintiff's existence; the plaintiff has spent a lot of time, and money on workshops, and seminars, in expensive hotels, motels, and lodges, espousing good governance, yet good governance is lacking within the plaintiff; the plaintiff falls far short on good governance within its ranks; the plaintiff has been insensitive to deal with its workers grievances expeditiously; the plaintiff in league with others is engaged through a reporter, and photographer in finding faults in the 1st defendant; the plaintiff is involved in, and associated with plans by Frank Bwalya to produce a documentary on the 1st defendant's documentaries; that some inner dealings of the plaintiff may be deemed clandestine; that the plaintiff uses every opportunity to "*de-campaign*," and "*de-market*" Zambia abroad; that the plaintiff had spread information that the 1st defendant has chosen to do these documentaries because he was separated from the plaintiff; and that instead of being a responsible partner to Government in developing the country, the plaintiff is not. In my opinion, the preceding analysis does not

constitute a justification of the matters complained of. It is merely a summary of the matters complained of by the plaintiff.

I will now turn to consider the particulars of the justification advanced by the defendants in relation to the defamatory material. The particulars of the justification advanced by the 1st and 2nd defendants are similar. And therefore, they will be dealt with concurrently. First, the complaint of the plaintiff is that the defendants allege that it collects money from donors, and co-operating partners, in the name of the Zambian people. Yet the existence of the plaintiff in rural Zambia is absent. In response, the defendants contend that although the plaintiff has been operation since January, 2001, it concentrates its activities along the line of rail especially in Lusaka. Further, both defendants alleged in paragraph 5.4 in the affidavit in opposition dated 23rd November, 2010, that the plaintiff together with other Non-Governmental Organizations:

“...thrive on collecting money from all over the world in the name of the 1st defendant, and other people...”

In the reply dated 3rd December, 2010, the plaintiff denies that it neither collects money in the defendant’s name or any other name, nor does it do so all over the world as alleged. The plaintiff contends that it receives its funding mostly from Transparency International in Berlin, or locally based institutions, mostly embassies, including at one time from the Government of the Republic of Zambia through the Anti-Corruption Commission. The plaintiff also exhibited in the reply copies of its bulletins marked “GL3” and “GL4,” showing its sources of financing. Therefore, my finding is that the defendant’s particulars of justification do not justify the assertion, and aspersion that the plaintiff collects money in the name of 1st defendant, and the Zambian people at large, to fund its programmes, and activities.

Second, the defendants have alleged that the plaintiff spends a lot of time, and money on workshops, and seminars in expensive hotels, motels, and lodges, espousing good governance. Yet good governance is lacking within the plaintiff. The defendants contend that the plaintiff has been holding workshops, and seminars in expensive places in Lusaka. These include, *Southern Sun Hotel, Cresta Golf-view Hotel, Tecla Lodge, and Chita Lodge*. The defendants contend that the plaintiff's premises at stand 3880, Kwacha Road, Olympia Park, Lusaka, are large enough to host most of the plaintiff's workshops, and seminars. Further, the defendants alleged that on 18th November, 2010, the plaintiff held a plain language workshop for about five hours at Tecla lodge. Furthermore, it is alleged that the plaintiff has been holding these workshops in bid to promote good governance, when in fact, good governance is lacking in the plaintiff's organization. Whilst the plaintiff's core value, and emphasis is promotion of good governance. The defendants went on to assert that the plaintiff's mission statement is the promotion of a society based on a culture of honesty.

The plaintiff in its reply has not challenged the allegation that it conducts its business in "expensive" hotels, motels, or lodges. Instead it has challenged the assertion by the defendant that it does not observe the tenet of good governance in the manner it conducts its internal affairs. In refuting the allegation, the plaintiff contends in paragraph 22 of the affidavit in reply that it has stood up to public scrutiny. And has been so transparent in its dealings, that it even avails minutes relating to the tenders it administers to interested third parties. The plaintiff went as far as disclosing that the 1st defendant was at one time availed the minutes of the Tender Committee meeting when he queried the plaintiff's decision not to award him a contract to present the plaintiff's programmes on television. In this regard, the plaintiff produced, and marked as exhibit "GL7" of the affidavit in reply, minutes of the Tender Committee meeting held on 27th November, 2009,

held at the plaintiff's offices. Thus whilst the plaintiff has not challenged the allegation that it conducts its business at various hotels, motels, and lodges, around the city of Lusaka, the defendants have also not been able to demonstrate that the plaintiff does not comply with the tenet of good governance in the management of its internal affairs.

Third, the defendants alleged that the plaintiff is notorious for, and has on numerous occasions criticized the Government for bad governance in the manner it handles the welfare of its workers, especially as regards the poor conditions of service; contending that this is a recipe for corruption amongst Government workers. Yet the letter from the plaintiff's Goodwell Lungu to the Chapter President, Mr. Reuben Lifuka, dated 30th August, 2010, reveals a tale of bad governance in the plaintiff's organization. The letter in question which has been produced by the 1st defendant in the affidavit in opposition dated 23rd November, 2010, and is couched in the following terms:

TRANSPARENCY INTERNATIONAL ZAMBIA

*Stand Number 3880
Kwacha Road
Olympia Park
P.O. Box 37475
Lusaka, Zambia.
Tel: +260 - 1 - 290080
Fax +260 - 1 - 293649*

To: The Chapter President, Mr. Reuben Lifuka.

Cc: The Board Treasurer.

From: TIZ Management.

Date: 30th August, 2010

SUBJECT: RE: TIZ STAFF APPEAL.

1. Introduction

1.1. *This is a passionate appeal to the Board of Directors from Transparency International Zambia (TIZ) Staff following a Board resolution made in 2009, that salary advances, and loans should be abolished from being granted to members of staff. Members of staff have consistently appealed to management to re-engage the Board with a view to re-introducing only salary advances so that they can have funds to assist with their various financial needs due to the following reasons:*

- a) *The Board initially passed a resolution to stop paying staff time which accepted although the Board in its resolution indicated that a way could be developed to pay using a reward system through a well organized salary structure ensuring that the extra project funds were paid using such a system;*
- b) *This was followed by another Board resolution to stop paying leave pay which staff accordingly accepted;*
- c) *The Board also passed a resolution to stop paying long term loans which staff again accepted; and*
- d) *Another related resolution was to stop paying salary advances which staff have failed to comprehend with, and are appealing again in this memo.*

2.0. Background and Management Efforts so far.

2.1. *All the above resolutions have made staff to compare TIZ to other sister civil society organizations to know what their practices are on the above subject matters. They have consistently appealed to management to only plead with the Board to appeal for consideration for salary advances only. The comparison with other organizations is that in all our sister organizations that include: Caritas Zambia, Southern African Centre for Constructive Resolution of Disputes (SACCORD), Zambia Civic Education Association (ZCEA), Civil Society for Poverty Reduction (CSPR). Anti-Voter apathy Project (AVAP), The Centre for Trade Policy, and Development (CTPD), and Jesuit Centre for Theological Reflection (JCTR) to mention but a few, pay salary advances, and loans. The provision to provide salary advances exist, and the commonality in all these organizations is that one cannot obtain two advances at any given time but only one at a time, and an application can only be granted once one clears the previous advance. In all these cited organizations, the staff should be able to be paid 75% of their net pay every month, and their borrowing deduction should only amount to 25% of the net pay every month. We can also maintain as the cooperating partners had advised us in the past to ensure that no advances or personal loans went beyond each financial year. As management further, we propose that staff who have clocked six months on the job can be allowed to apply for a maximum of three months to qualify for a*

three months deduction advance. In this way, the institution will guarantee assisting staff with full security. We have also re-designed the salary advance form to suit the new conditionality proposed attached.

3.2.1. We submit this appeal for your kind prompt action on this matter as members of staff have continued enquiring in view of schools re-opening next week among other key pressing needs. We shall be grateful if a decision may be communicated to management this week so that staff can be told of the status of the appeal to enable them plan ahead in case of seeking some alternatives.

In the reply the plaintiff went on to produce “G4” a copy of the memorandum from the Board clarifying the misconception of the letter of 30th August, 2010. “GL1” which was produced in the plaintiff’s reply. And is couched in the following terms:

TRANSPARENCY INTERNATIONAL ZAMBIA

*Stand Number 3880
Kwacha Road
Olympia Park
P.O. Box 37475
Lusaka, Zambia.
Tel: +260 - 1 - 290080
Fax +260 - 1 - 293649*

INTERNAL MEMO

To: The Executive Director, Mr. Goodwell Lungu.

Cc: Board President; Programme Manager; and Finance; and Administration Officer.

From: Board Treasurer.

Date: 20th September, 2010.

Subject: RE: TIZ STAFF APPEAL ON SALARY ADVANCE

Reference is made to your memorandum dated 30th August, 2010, to the Chapter President, and copied to my office in which you raised a number of issues. Reference is also made to the Board Meeting of 17th September, 2010, in which there was a resolution with regards to this issue. I have now been directed to communicate to all members of staff through your good office the following:

- a) This is to clarify that at no time did the Board of Directors pass an express resolution to stop paying salary advances to members of staff.*
- b) The Board of Director's position was, and still remains that in the interest of protecting donor funds and to avoid unnecessary, audit queries, unnecessary advances should be stopped, and only be approved, and given to members of staff in extenuating, or exceptional circumstances.*
- c) Your good office should be able to determine what could be extenuating, or exceptional circumstances in any given set of facts when a member of staff applies for an advance.*
- d) No member of staff should apply for a salary advance when they have not yet finished paying back for an earlier salary advance applied for, and approved.*

I hope this clarification will bring this matter to rest as the Board of Directors was concerned with possible misunderstanding of staff due to the Board decision on paying salary advances. Please do communicate to all members of staff accordingly. Please also remind staff that the Board decision is in line with the staff policy that allows salary advances to be given at your office's discretion.

Kalunga Sampa

Board Treasurer

20th September, 2010.

Chapter President Resolution on Behalf of the Board

The plaintiff contends in the reply that the preceding internal memorandum is not evidence of the allegation that the plaintiff is in a very serious quandary over staff welfare. The plaintiff maintains further that the memorandum referred to above was not aimed at stopping the payment of salary advances, or other fringe benefits to staff. The memorandum was aimed at protecting donor funds, and enhancing accountability. The plaintiff thus contends that the allegations of the defendants were clearly defamatory by failing to state the full facts relating to the matter. Further, in light of the letter of 30th August, 2010, referred to above, and the internal memorandum dated 20th September, 2010, it cannot be properly, and fairly said that the plaintiff has been insensitive in its dealing with workers welfare.

Fourth, the defendants allege that the plaintiff in league with others, engaged a reporter, and a photographer in finding faults in the 1st defendant. To support this allegation, the 1st defendant has said that during the long weekend of July, 2010, he received an anonymous call that the plaintiff in league with others had arranged a camera crew which was positioned at the 1st defendant's flat. And indeed he found a camera crew opposite his flat in Northmead, Lusaka, when he went home. The crew is said to have ran away when he spotted them. This particular allegation has gone unanswered by the plaintiff.

Fifth, the defendants allege that the plaintiff is involved in, and associated with plans by Frank Bwalya to produce a documentary on the 1st defendant to counter his documentaries. To support this allegation, the defendants have said that on 14th July, 2010, Frank Bwalya sent a short message service (sms) to the 1st defendant in the following terms:

"thank(s) for scandalizing my name, and my church. I have a lot of information on you from people that have been hurt because your defamed me. I can't believe that many people know your scandals. I am making a documentary on you. It will be ready soon. You will soon test your very bitter medicine."

The defendants further allege that the plaintiff funded Frank Bwalya's advertisement for the launch of *"Change Life Zambia,"* and the plaintiff's Goodwell Lungu addressed the public at the launch of *Change Life Zambia,* at Buchi Hall, Kitwe, and further that the plaintiff works in league with Frank Bwalya's *"Change Life Zambia."* The plaintiff denies that it was aware of Frank Bwalya's alleged documentary. The plaintiff maintains that it was only made aware of the alleged documentary through a *Post Newspaper* online publication which quoted the message referred to above. Thus the plaintiff categorically denies any involvement in the planned documentary.

Furthermore, the plaintiff denies in the reply that it funded Father Frank Bwalya's launch of *"Change Life Zambia,"* by paying for the advertisement. The plaintiff contends that whenever the plaintiff sponsors an advertisement, it uses an advertising agency by the name of *"Zambia Inside,"* which appears at the corner of every advertisement in small letters. The plaintiff maintains that the advertisement in issue had the inscription *"Post Newspapers Limited."* And was therefore not sponsored by the plaintiff. The plaintiff produced exhibits marked "G44" to "GL15" to support its assertions.

Furthermore, the plaintiff contends that the meeting which was held at Buchi Hall on 27th February, 2010, was not the launch of *Change Life Zambia.* But rather a *"Save Zambia Conference,"* which was organized by *Change Life*

Zambia, in partnership with the plaintiff, Citizens Forum, Southern African Centre for Construction Resolution of Disputes (SCCORD). In view of the foregoing, I am of the opinion that the defendants have not succeeded in justifying the allegation that the plaintiff sponsored Frank Bwalys's advertisement

Sixth, the defendants alleged that some inner dealings of the plaintiff may be deemed clandestine. To support this allegation, the defendants said that during the period of 2008 Presidential bye-elections, the plaintiff channeled financial resources by way of paying air time on QFM, for so called correlation of election results, and bought time for so called plaintiff's members, and monitors, including the 1st defendant, with the underlying motive of ensuring that the Patriotic Front (PF) candidate was not cheated in the election. The plaintiff's position as stated in paragraph 14 of the reply is that "*contrary to paragraph 5 of the particulars of justification in affidavit in opposition, the 1st defendant himself is on record as having carried out activities for and or behalf of the plaintiff in places outside the line of rail such as Chipata.*"

It is not very clear to me whether the activities referred to above include or mean the "*clandestine dealings*" referred to by the defendants. Whatever the case, the allegation by the defendants have not in my view been denied.

Seventh, the defendants alleged that the plaintiff has spread information that the 1st defendant has chosen to do these documentaries because the 1st defendant was separated from the plaintiff. To support this allegation, the defendants have said that on 10th May, 2010, the *Post Newspaper* carried a story confirming the allegation referred to above. Furthermore, the defendants assert that in a press statement dated 15th October, 2010, the

plaintiff stated that the 1st defendant started to defame the plaintiff through the “*Stand up for Zambia.*” programme after the 1st defendant was not awarded another contract by the plaintiff in 2008. In the reply, the plaintiff denies that it was the source of the story reported by the *Post Newspapers*. Instead, the plaintiff contends that the source of the story was Government. In any case, the plaintiff maintains that it was not quoted in the story in question. Clearly, the allegations by the defendants have not been substantiated.

Lastly, the defendants alleged that instead of the plaintiff being a responsible partner to government in developing the country, it has not been. To support this allegation, the defendant said instead of promoting good governance through the rule of law, the plaintiff has been in the forefront of fighting the Government through the *Red Card* campaign, and advocating for the illegal conduct of hooting on public roads, in relation to the acquittal of Dr. Fredrick Chiluba. And the decision of the Director of Public Prosecutions not to appeal the acquittal. The defendants contend that the plaintiff is aware that the acquittal was a product of the judicial process. And the discretion to appeal, or not to appeal, is the preserve of the Director of Public Prosecutions.

Further, the defendants maintain that in 2008, the plaintiff chose to fight Government on the issue of payment of the mid-term gratuity for members of Parliament, even when the plaintiff knew, or ought to have known that the gratuity was an entitlement to the members of Parliament. Finally, the defendants assert that the plaintiff has been in the forefront in fighting Government on the removal of the famous “*abuse of office clause*” from the Anti-Corruption Commission Act. In my opinion the fact that the plaintiff took the position it did on the various issues outlined above, it is not a reflection

that it is “*irresponsible*” as suggested by the defendants. It is to be expected that in a democracy citizens, and other entities will take divergent views on different matters of public interest.

The defendants have in the alternative pleaded the defence of fair comment on a matter of public interest. In particular, the 1st defendant maintains that the following are fair comments on a matters of public interest: wit.

1. *“These same NGO’s thrive on collecting money from all over the world in the name of you, and I Just how many people say in Mambolomoka in Western Province, Kayombo, or Dikalong’a in North Western Province, Makonkito, Dengeza, Sinanjolo, or Siyameja in Southern Province, and perhaps even Lupiya in Luapula, and Nsama in Northern Province, know the existence of some of these NGO’s who purport to work for the people?”*
2. *“These NGO’s are supposed to be partners with Government in so far as development is concerned, yet they fight Government day in day out apart from spending a lot of time, and money on workshops, and seminars in expensive hotels, motels, and lodges.*
3. *“Right now Goodwell’s Transparency International Zambia is in a very serious quandary over staff welfare.”*
4. *“According to a letter to the Chapter President, dated 30th August, 2010, co-signed by Goddwell Lungu, a copy of which is shown here, staff have cried foul over certain fringe benefits that have been curtailed like salary advances.... Reading through the letter, tale tell signs of bad governance in this institution are very evident.”*
5. *In a future episode, I may share with you some inner dealings of this organization that claims to be fighting corruption. Dealings that may otherwise be deemed clandestine”*

The 1st defendant contends that the preceding words were published without malice. And constituted a fair comment on a matter of public interest. Namely, the propriety or otherwise of the conduct of the plaintiff to espouse, and play holier than thou to government on good governance. Yet the plaintiff has revealed evidence of bad governance within itself. And also encouraged illegality, and bad conduct. The 1st defendant also relies on the same particulars of facts pleaded in relation to the defence of justification. Lastly, the 1st defendant pleaded both the statutory defences of justification, and fair comment, as provided for under sections 6, and 7 respectively of the Defamation Act.

The 2nd defendant also pleaded in the alternative the defence of fair comment. In so doing, the 2nd defendant maintains that the words contained in paragraph 4 of the statement of claim comprise expressions of opinion. And further, the 2nd defendant contends that the words were published without malice, and constituted a fair comment on a matter of public interest. The 2nd defendant similarly contends that the plaintiff has not only disclosed evidence of bad governance within itself, but also encouraged, or tolerated illegality and bad conduct. Furthermore, the 2nd defendant also relies on the statutory defences of justification and fair comment. Finally, the 2nd defendant indicated that it would in addition, rely on the indemnity agreement entered into between the 2nd defendant and the 1st defendant. In the main, the plaintiff contends that the defendants have failed to justify the various allegations, or prove that the various comments were made on matters of a public interest.

Where a defendant indicates that he will plead justification, it is not enough to merely state that he intends to justify. Before pleading justification, a defendant should believe that the words complained of are true. In addition,

a defendant must also have reasonable evidence or grounds to support the plea for justification. It is important to notice that the defence of justification protects a statement of fact(s). The rationale for this is that a plaintiff ought to go to trial with the knowledge of the acts which it is alleged he has committed. Although a defendant at common law is required to prove the literal truth of every fact which he has stated, the effect of the statutory defence of justification is that a defendant is now only required to prove the truth of the defamatory sting of the publication.

The defamatory sting of the publication complained of in this action is as follows: that the plaintiff falls short on good governance; it misused donor money by holding workshops, and seminars in expensive hotels, motels, and lodges; and lastly that it is involved in dishonourable, and clandestine activities. In my opinion, the defendants have not been able to adduce reasonable evidence to support these allegations.

I will now turn to consider the defence of fair comment. The defence of fair comment protects statements of opinion. The comments must explicitly, or implicitly indicate the facts on which the comments are based. The facts upon which comments are based must be true, or at least substantially true. The facts must be verified, and the affected person must be given an opportunity to comment. A bold statement without supporting facts is unlikely to be considered comment. The facts on which the comments rely on must be stated or summarized in the publication, or indicated with sufficiently clarity to enable the publishee to ascertain the facts on which the comments are based.

In this case, the gist of the comments made by the defendants are that: the plaintiff thrives on collecting money from all over the world in the name of the Zambian people; that the plaintiff is extravagant in the manner it expends donor funds on workshops, and seminars; that the plaintiff is in a serious quandary, or quagmire over its staff welfare; and lastly that the plaintiff is involved in clandestine activities.

As the analysis above has clearly demonstrated, these comments have no factual basis. Thus my overall assessment of these defences (justification, and fair comment), is that at this stage of the proceedings, the defences have no realistic prospect of success. Since the defences have no realistic prospect of success, I am inclined to allow the application for an interim injunction. Accordingly, the defendants are restrained whether by themselves, their agents, or servants from further publishing, or broadcasting, or causing to be published or broadcast, words, or images, defamatory of the plaintiff. It is contempt of Court for any person notified of this order to assist in or permit a breach of the order. A person doing so may be fined or sent to prison.

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

Dr. P. Matibini, SC
HIGH COURT JUDGE