

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

2014/HP/1006

BETWEEN:

GIVEN LUBINDA



PLAINTIFF

AND

**EMOND LIFWEKELO
DAILY NATION NEWSPAPER LIMITED**

**1ST DEFENDANT
2ND DEFENDANT**

**Before The Honourable Mr. Justice I. C. T. Chali, in Chambers at
Lusaka, the 19th day of August 2014.**

For the Plaintiff: Mr. K. Kaunda, Messrs. Ellis & Company

For the 1st Defendant: No appearance

For the 2nd Defendant: Mr. M. Muchende, Messrs. Dindi & Company

RULING

Cases referred to:

1. Fraser v. Evans (1969) 1 QB 349.
2. Michael Chilufya Sata v. Chanda Chimba III & Others, (2011) 1 ZR 519.
3. Shell & BP Zambia Ltd v. Conidaris & Others (1975) ZR 174.

Legislation referred to:

Constitution of Zambia, Chapter 1 of the Laws of Zambia.

The Plaintiff's action was for, *inter alia*, damages for alleged libel contained in an article titled "UPND WRITES OFF LUBINDA" attributed to the 1st Defendant which appeared at page 4 of the SUNDAY NATION Edition of 18th March 2014, Vol.3 issue 747, a publication of the 2nd Defendant.

Pending the hearing and determination of the action, the Plaintiff applied for an order of interim injunction restraining the Defendants from uttering and publishing similar and other defamatory statements of the Plaintiff. The application was supported by an affidavit sworn by the Plaintiff to which was exhibited an extract of the offending publication. The article in issue reads:

"UPND writes off Lubinda

UPND has written off Kabwata Patriotic Front (PF) Member of Parliament Given Lubinda as a factor in the current political dispensation because he has allegedly exhibited high levels of political paranoia following his survival from being expelled from the ruling party.

UPND Kabwata constituency Publicity and Information Secretary Edmond Lifwekelo said it was not surprising that Mr. Lubinda, the former Foreign Affairs Minister had resorted to parroting the views of the people who loathed him, because he was looking for political and economic survival from the party.

Mr. Lifwekelo said while it was difficult to comment on Mr. Lubinda's assertions that there was no strong opposition in Zambia, it would be incorrect for the opposition to fail to correct the misconception that the PF was as popular as it was in 2011.

Mr. Lifwekelo said Mr Lubinda had been blinded by his desire to get back a government job and that the Kabwata Parliamentarian had become political myopic and disoriented following a surge of anti-Lubinda campaigns that were meant to hound him out of the ruling party.

He said Mr. Lubinda was looking for empathy from the cartel that started the campaign to expel him out of the party and advised that it was politically wrong for the Kabwata MP to write off the opposition because more than 90 percent of Zambians were angry with the PF and its form of governance.

Mr. Lifwekelo explained that it was clear Mr. Lubinda had lost touch with the current political realities and hoped that soon the Kabwata legislature would be shocked when Zambians would show the PF the exit door from government.

"We do not know how much Lubinda knows about the opposition and it would appear that he has become disoriented and myopic following the surge of demonstrations meant to hound him out of the ruling party."

“Mr. Lubinda could only be trying to blind his masters that the PF is still popular but we know that deep down his political heart, he has seen that the tides have changed and that the PF stands no chance under President Michael Sata or any other candidate in 2016. Let him understand that the popularity the PF enjoyed in 2011, has since evaporated and Zambians are so angry that they want change now,” Mr. Lifwekelo said.

He said Mr. Lubinda had on several occasions pleaded with the UPND members to support him because his time in the PF had expired.

Mr. Lifwekelo has challenged the Kabwata MP to deny that he had been courting the UPND because he was sure the PF would never win an election in its current state.

He said Mr. Lubinda had in the not so distant past been claiming that he was no longer a PF member and that he was more comfortable with the UPND than any other opposition political party.”

In his supporting affidavit, the Plaintiff deposed, among other things, as follows:

- “5. That the story in the article is false, malicious and intended to injure my reputation.**

6. **That I believe this is the reason the said article does not state the names of the reporter.**
7. **That I verily believe that the Defendants will continue to utter and publish stories related to the article, and other defamatory statements about me.**
8. **That the damage or injury to my reputation by the continued publication of such articles cannot be adequately atoned for in damages.”**

The 1st Defendant had not appeared to the Writ of Summons or filed any opposing affidavit. However, the 2nd Defendant had caused an appearance to be filed together with a defence. In the said defence, the 2nd Defendant pleaded partly as follows:

- “1. The said words were an accurate report published in the said Newspaper of the statement issued by the 1st Defendant.**
- 2. The said report was a fair comment upon a matter of Public interest and free Political debate arising from a statement attributed to be Plaintiff to the effect that “there was no strong Opposition in Zambia.”**

3. The said report was without malice and in so far as is necessary the 2nd Defendant will rely on section 9 of the Defamation Act Cap. 68 of the Laws of Zambia as read with Part II of the Schedule therein;

Particulars

- (a) The 1st Defendant who issued the statement is and was the Publicity and Information Secretary for a lawfully recognised Opposition Political Party in Zambia by the name of United Party for National Development (UPND).
- (b) The Plaintiff is a Politician, Public figure and Member of Parliament for Kabwata Constituency under the Patriotic Front (PF).
- (c) Prior to the report complained about, the Plaintiff did issue a statement to the effect that there was no strong Opposition in Zambia.
- (d) The Opposition UPND through the 1st Defendant issued a statement responding to the allegation of the Plaintiff aforesaid.
- (e) The statement of the 1st Defendant insofar as the 2nd Defendant is concerned was an honest expression of a genuine opinion in furtherance of free political debate

(f) and hence its inclusion of vehement, caustic and unpleasantly sharp attacks on the Plaintiff who is a Public official and vocal Politician.

(g) The Plaintiff volunteered to the public or political life and he knew or ought to have known that he would be a subject of political attack especially when he attacks his Opponents.

(h) The charges made against the Plaintiff were not out of thin- air but are true in the sense that attempts were made to hound the Plaintiff out of the PF and yet he has continued to issue statements which appear to be calculated to appease the PF.

In deciding whether or not to grant an injunction, I have borne in mind every person's right to freedom of expression as particularly enshrined in Article 20(1) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia, that is to say:

“...freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons...”

The said fundamental freedom can only be abridged by laws that are **“reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons....”**

In my view, that freedom, which is also enjoyed by corporate bodies such as the 2nd Defendant, ought not to be taken away lightly especially by an interlocutory or interim order of injunction.

In its decision in the case of FRASER v. EVANS (1969) 1 Q.B. 349, the English Court of Appeal gave the guidelines as to why the legal right ought not to be rashly interfered with. In the words of Lord Denning at pages 360 and 361 of the report:

“The Court will not restrain the publication of an article even though it is defamatory when the defendant says he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since (the case of) BONNARD v. PERRYMAN. The reason sometimes given is that the defences of justification and fair comments 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 be out. As the Court said in the (BONNARD 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 wrong act is done.” There is no wrong done if it is true, or if it is a fair comment on a matter of public interest. The Court will not prejudice the issue by granting an injunction in advance of the publication.”

In the case of Zambia where there are no trials before a jury, it is the Judge who must decide the question of libel or no libel, but generally only after the trial of the action.

As Dr. Matibini, SC, J said in his decision in the case of MICHAEL CHILUFYA SATA v. CHANDA CHIMBA III & THREE OTHERS (2011) 1 ZR 519 at page 555:

“The Court will only grant an interim injunction (restraining publication) where:

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

In the instant case, the 2nd Defendant did not just make a general, or what used to be called a “rolled up plea”, of justification or fair comment on a matter of public interest, but it gave particulars of the facts upon which the comment alleged to be fair was based. In other words, the Plaintiff was not only given notice of the case he was going to meet at the trial, but he was also given the particulars of the facts which would be relied on by the 2nd Defendant in support of the plea.

Now for the Plaintiff to ask me to take away the 2nd Defendant’s right to freedom of expression in respect to the Plaintiff under these circumstances would be to judge that defence peremptorily.

The second aspect I addressed my mind to were the principles upon which injunctions are generally granted. It is also related to the principle I have just dealt with. The principles are laid out in several Zambian cases, including, but not limited to that of SHELL & BP ZAMBIA LIMITED v. CONIDARIS & OTHERS (1975) ZR 174 which was cited even by Counsel for the Plaintiff. In that case, the Supreme Court held:

“A Court will not generally grant an interlocutory injunction unless the Plaintiff’s right to relief is clear and unless the injunction is necessary to protect the Plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means injury which is

substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired.”

Firstly, in the light of the defence raised by the 2nd Defendant, the Plaintiff's right to relief was not clear. It may only be clear after the trial, if he succeeds in demolishing the defence pleaded.

Secondly, and as Counsel for the 2nd Defendant pointed out in his submissions, the Plaintiff claimed damages, including punitive damages, for the alleged libel. It is trite that the object of an injunction is to protect the Plaintiff against injury by violation of his rights for which he may not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.

In my opinion, the Plaintiff could be compensated in damages if he succeeded in the action at the trial. The Plaintiff had not shown that the 2nd Defendant is a “man of straw” as not to be able to pay such damages as may be awarded against it.

Lastly, the Plaintiff did not show by evidence that the Defendants intended to repeat or publish the same or similar alleged defamatory statements or comments of him. The fear, in my view, appeared speculative and remote. I came to the conclusion that there was no immediate possibility of injury to the Plaintiff for which he required the protection of the Court by an order of injunction.

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For the reasons given, the Plaintiff's application for an interim injunction is refused and is accordingly dismissed.

I order the costs of the application to be costs in the cause.

Delivered in Chambers, the 19th day of August, 2014.


I.C.T.Chali
JUDGE