

**IN THE HIGH COURT FOR ZAMBIA
2014/HP/548
AT THE PRINCIPAL REGISTRY
AT LUSAKA**

(Civil Jurisdiction)

BETWEEN

LUDWIG SANDAY SONDASHI

PLAINTIFF

AND

DAILY NATION NEWSPAPER LIMITED

DEFENDANT

Before: Hon. Judge B.M.M. Mung'omba on this 28th day of April, 2015.

For the Plaintiff: Mr. B. Kang'ombe of Messrs Kang'ombe & Associates

For the Respondents: Mr. Muchende of Messrs Dindi & Company

J U D G M E N T

Cases referred to:

1. ***Sim vs. Stretch [1936] 2 ALL ER 1237.***
2. ***Benny Hamainza Wycliff Mwinga vs. Times Newspapers Ltd.***
3. ***Zambia Publishing Company Ltd vs. Eliya Mwanza [2979] ZR 76.***
4. ***Albert Jefferson Mkandawire vs. Zambia Publishing Company Limited (1979) ZR 238.***
5. ***Brent Walker Ground Plc vs Time Court Ltd [1991] 2 G.B. 33.***
6. ***Slim vs. Daily Telegraph Ltd [1968] 2 Q.B. 157.***
7. ***Cassel vs. Brome [1992] ALL ER 6; Isaac R.C Nyirenda vs. Kapiri Glass Products Limited [1985] ZR 167.***

8. ***Isaac R.C Nyirenda vs. Kapiri Glass Products Limited [1985] ZR. 167.***
9. ***Sata vs. Post Newspaper Limited and another [1995] ZR 113.***
- 10 ***Simon Kapwepwe vs. Zambia Publishing Company Limited (1978) ZR 15***
- 11 ***New York Times vs. Sullivan 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).***
- 12 ***Gertz vs. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 [1974].***
- 13 ***Parmiter vs Coupland (1840) 6M & W 105 at 108, 151 ER 340 at 341 - 342.***
- 14 ***Rodger Chitengi Sakuhuka vs Sassassalu Nungu Attorney-General Times of Zambia Limited, Times Printpak Zambia, Limited Newspaper Distributors Limited (2005) ZR 39 (SC).***
- 15 ***Attorney-General vs Roy Clark (2008) ZR 38***

Legislation referred to:

1. ***Article 20 (1) and (2) of the Constitution of Zambia***
2. ***Section 9 of Defamation Act Chapter 68 of the Laws of Zambia.***

Works referred to:

1. ***Bullen and Leake and Jacobs' Precedents (20th edn.).***
2. ***Winfield and Jolowicz on Tort 16th Edition 2002.***
3. ***Gatley on Libel and Slander, 8th Edition.***

The Plaintiff in this matter, ***Dr. Ludwig Sanday Sondashi***, commenced this action against the Defendant on 9thApril, 2014, by way of Writ of Summons and statement of claim taken out of the Principle Registry.

According to the Plaintiff, the Post Newspaper Limited, on 5thFebruary, 2014 did publish an article entitled ***"FDA RULES OUT JOINING***

OPPOSITION ALLIANCE". This article, avers the Plaintiff, followed an interview he had given to the reporter of the said Post Newspaper where he stated, *inter alia*, that his [political] party, styled FDA, could not go into an alliance with a party that had a record of promoting corruption like the MMD.

Subsequent to the above stated article in the Post Newspaper, the Defendant published an article, in its Daily Nation Newspaper of 8th February, 2015 at page 7, headed "**Sondashi Angers MMD**" which had the following words:

"...Dr. Kaingu said that as Vice President of the former ruling party he was aware of why Dr. Sondashi was fired by the late President Chiluba and that it would be prudent for the former MMD Member to tell the nation [why] he was sacked. I remember Dr. Sondashi was Minister of Works and Supply, I am giving him till Monday to tell the nation why he was fired failure to which I will have no option but to spill the beans for the people of Zambia to know the kind of MMD he belonged to and why he was fired by the then President.....MMD is not a corrupt party, this party has gone through serious transformation and I want Dr. Sondashi to know that the MMD he left or that fired him is not the same MMD today".

It is against the above article in the Daily Nation Newspaper of 8th February, 2014 that the Plaintiff now claims for; damages, interest, any other relief the Court may deem fit and costs. He further seeks an order of injunction restraining the Defendant, whether by itself, its agents, servants or otherwise from further publishing or causing to be published the said or similar words defamatory of the Plaintiff.

The Plaintiff avers that by the publication of the said words complained of, (which he feels were malicious and unjustifiable attack), in their natural and ordinary meaning, the Defendant meant and was understood to mean that

the Plaintiff was a corrupt person who was unfit to practice law and vie for the Presidency of the Republic of Zambia.

In paragraphs 8, 9 and 10 (reproduced hereunder) of the Statement of Claim the Plaintiff contends that:

“That since he initially accused the MMD of promoting corruption, the statements complained aforesaid, attributed to Dr. Kaingu and subsequently published by the Defendant, insinuate or imply that the Plaintiff is a corrupt individual and taints his reputation as a respected member of the legal fraternity and as a potential candidate for President for the presidency of the Republic of Zambia.

That his integrity, reputation and standing in the eyes of right thinking members of the society, has been tainted and has thus been defamed.

In consequence, the Plaintiff claims to have been seriously injured in his character, credit and reputation and in the way of his occupation and has been brought into public scandal, odium and contempt, and has suffered damage.”

The Defendant has denied liability in this matter. It does not dispute publishing the article containing the words complained of. However, the Defendant contends that the said words were an accurate report of the statement issued by the Movement for Multiparty Democracy (MMD) through its Vice President one Dr. Michael Kaingu. It asserts that the said report was a fair comment upon a matter of public interest and free political debate arising from a statement attributed to the Plaintiff to the effect that his party, *FDA, could not go into an alliance with a party that had a record of promoting corruption like the MMD.*

The Defendant further argues that the report in question was without malice and in so far as is necessary the 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. In so far as the Defendant is concerned, the statement issued by the MMD, through its Vice President, was a fair comment in furtherance of free political debate and does not mention that the Plaintiff is or was corrupt; save to challenge the Plaintiff to explain to the nation why he was fired.

The Defendant alleges that it was under a duty as a member of the press to accurately publish the report complained about in furtherance of its freedom of the Press as enshrined under ***Article 20 (1) and (2)*** of the ***Constitution of Zambia*** especially given that it was a rebuttal to a statement attributed to the Plaintiff. In concluding its defence, the Defendant contends that 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.

In support of his claim the Plaintiff relied on his Bundle of Documents and his own evidence on oath. He narrated that he is a Practicing Lawyer and the President of Forum for Democratic Alternatives (FDA). He is also the inventor of the Sondashi Formula (SF2000). He is a public figure having served for 35 years in Government of the Republic of Zambia at Cabinet Minister Level. During the 35 year-period, the Plaintiff served under UNIP, MMD led by late President Chiluba, and late President Mwanawasa.

According to the Plaintiff his resignation from MMD was on account of corruption in the party. On this point he drew my attention to document 1 in the Plaintiff's Bundle of Documents. The Plaintiff confirmed having given an interview to the Post Newspaper resulting in an article headed "FDA rules out joining the opposition alliance". After that article was published by the Post Newspaper, the Plaintiff said he was surprised to see an article in the Defendant's newspaper entitled "Sondashi Angers MMD". This is the document at page 12 of the Plaintiff's Bundle of Documents. The Plaintiff

stated that in this article, the Defendant quoted Dr. Michael Kaingu, then Vice President of MMD for politics who gave him three days within which to tell the nation why he was fired from government, failing which Dr. Kaingu would spill the beans for the Zambian public to know why the Plaintiff was fired. He did not respond to the ultimatum in the article because he wanted Dr. Kaingu to spill the beans. To his surprise Dr. Kaingu did not spill the beans. According to the Plaintiff, failure to spill the beans meant that by Dr. Kaingu was not telling the truth.

The Plaintiff also argued that the report by the Defendant that he was fired by late President Chiluba as Minister of Works and Supply was not true because he never held that position.

In his view, the article containing words complained of was defamatory because it was imputing that he was corrupt. He took the article as malicious and not even fair comment because it was not accurate.

Later, he instructed his lawyers to request the Defendant to apologize but to no avail. The Plaintiff referred me to document 13 and 15. He maintained that the article in issue was imputing that he was corrupt and it would affect his political vocation.

It is for the foregoing that the Plaintiff is seeking the reliefs outlined earlier in this judgment.

When cross-examined by Mr. Muchende, Counsel for the Defendant, the Plaintiff confirmed that he is a lawyer and the President of FDA, hence, he is a politician. He stated that while he was aware that people of his caliber are supposed to have higher tolerance and thick-skin, this does not allow defamation. According to the Plaintiff, politicians should not be ordinarily defamed nor is the bar of tolerance for them higher since the law is the same. He maintained that having belonged to MMD, he was well aware of

how corrupt the party it is. The Plaintiff was then made to read paragraph 3 of the article in issue at page 12, he confirmed that the words were defamatory and he was injured. However, he agreed with Mr. Muchende that what he had read in paragraph 3 is the statement made by Dr. Kaingu. In his view, Dr. Kaingu imputed that the Plaintiff was corrupt and that it was on that basis he requested the Defendant to apologize.

When asked to read paragraph 6 of the document at page 4, the Plaintiff admitted that MMD had the right to exculpate themselves. However, he pointed out that in exculpating themselves, MMD cannot say that the Plaintiff is corrupt as imputed. He also admitted that after the 5 days' ultimatum passed, Dr. Kaingu did not spill the beans and that members of the public do not have an idea as to why he was fired or resigned from government. According to the Plaintiff, because Dr. Kaingu raised the issue of spilling the beans, he should have spilled it after the 5 days. He maintained the beans were not spilled because Dr. Kaingu did not tell the truth.

Further, the Plaintiff admitted that he can be challenged by his political competitors and he has always stood for that challenge. In this matter, the Plaintiff stressed that since the Defendant was told of spilling the beans, he expected the Defendant to follow Dr. Kaingu so that he spills the said beans. He stated that although he would want to see the press enjoy the freedom under Article 20 of the Constitution, the press must tell the truth.

After reading paragraph 6 of the document at page 9, the Plaintiff testified that the Defendant had a duty to report what Dr. Kaingu had said. However, he stated that the Defendant had manipulated what Dr. Kaingu had said as evidenced by what his lawyer had written to the Defendant clarifying the matter. It was his position that the Defendants were careless because they did not call him to verify whether he agreed with what Dr.

Kaingu had said before publishing the article in question. The Plaintiff said had the Defendant called him, he would have disputed what Dr. Kaingu had said because there was falsehood. He waited for Dr. Kaingu to spill the beans.

In re-examination, the Plaintiff maintained that the article in question was malicious because the Defendant, even after being alerted of its falsity, it never corrected the situation. After getting the statement from Dr. Kaingu, according to the Plaintiff, the Defendant never consulted him but went ahead to publish the article in issue.

The Plaintiff further alleged that the beans, Dr. Kaingu had threatened to spill (which he has up until now not spilled), was to tell the nation that the Plaintiff was fired because he was corrupt. In his view, the article in issue cannot be said to be fair comment because in order for fair comment to avail the Defendant, the article must be accurate. Finally, the Plaintiff stated that since the Defendant was told that the article was not truthful; it should have retracted it or apologized to him. He would have been happy with the apology, but the Defendant did not offer any.

This was the evidence adduced in support of the Plaintiff's case.

The Defendant adduced evidence by calling one witness, one George Nelson Zulu. He is the reporter who authored the article containing the words complained of. His story was that the prior to authoring the said article there was an interview given by the Plaintiff, who is the President of FDA, about why he was not keen in joining the alliance of MMD and other political parties in the opposition because MMD was corrupt party.

Arising from that story, this witness called Dr. Kaingu who happened to be the vice President of MMD for politics to get his comment on the statement made by the Plaintiff and published by the Post Newspaper. Dr.

Kaingu reacted to the Plaintiff's statement by issuing the words in the article complained of. According to this witness, instead of responding to Dr. Kaingu's challenge within the given ultimatum, the Plaintiff sought to commence these proceedings against the defendant.

Mr. Zulu further testified that the 'beans' Dr. Kaingu meant is not known up to now because the Plaintiff did not respond to the issues. It was his testimony that it is not known why the Plaintiff was dismissed from government. He stated that the story in question arose because the Plaintiff accused MMD of being a corrupt party. That the Defendant gave fair coverage to Dr. Kaingu and the Plaintiff. He also stated that after perusing through the article in question, he does not find any mention that the Plaintiff is corrupt. The only challenge raised by Dr. Kaingu was the Plaintiff to explain to the nation, within the 5 days ultimatum, why he was fired from government failing which Dr. Kaingu would spill the 'beans'.

When cross-examined by Mr. Kang'ombe, Mr. Zulu stated that he had been practicing as journalist for 10 years. He denied that the article in issue was malicious because the story did not come from the Defendant but from Dr. Kaingu. Further that the story was published with the consent of Dr. Kaingu who knew why the Plaintiff was fired from government. The witness maintained that up to now, he is still waiting for the beans to be spilled by Dr. Kaingu.

The Defence witness informed me, when re-examined by Mr. Muchende, that the article in issue was a mere response to what the Plaintiff asserted about the MMD being a corrupt party. When referred to paragraphs 7 to 10 of the statement of claim, this witness stated that the Plaintiff has not complained of being fired or dismissed rather his disquiet or discomfort centers on the issue of corruption. Finally, Mr. Zulu testified that nowhere in the article in issue is there a mention that Dr. Sondashi is corrupt or that he was fired because of being corrupt.

The foregoing was the evidence in this case; at the end of which both counsel filed written submissions. I am grateful to both Counsel for their industry.

On 12th February, 2015, the Plaintiff filed into Court written submissions. After making reference to the words complained of, Counsel submitted that the said words were a bitter, malicious and unjustifiable attack on the Plaintiff and were clearly defamatory of him, as the words meant and were understood to mean that the Plaintiff was also corrupt like the MMD. The English case of ***Sim vs. Stretch [1936] 2 ALL ER 1237*** ⁽¹⁾ and the book entitled Winfield and Jolowicz on Tort (16th Edition, 2002), at page 404, were drawn to my attention on the definition of the term defamation.

It was further submitted by Counsel that the defamatory statement and or imputation was published by of the concerning and the Plaintiff has proved reference to him as required by law. To buttress this position Counsel cited the case of ***Benny Hamainza Wycliff Mwinga vs. Times Newspapers Ltd.*** ⁽²⁾

Counsel submitted, in the alternative, that the article in question was defamatory by innuendo or imputation. Since the Plaintiff had initially accused the MMD of promoting corruption, Counsel stated that the words attributed to Dr. Kaingu and published by the Defendant insinuate or imply (impute) that the Plaintiff was corrupt and taint his reputation. The case of ***Zambia Publishing Company Ltd vs. Eliya Mwanza [2979] Z.R 76*** ⁽³⁾ was called in aid. In that case it was held that:

'...to impute dishonesty of a man when he is holding a particular office which he has since left is still defamatory of him in general'.

Counsel stressed that the words published came on the heels of the Plaintiff accusing the MMD of being corrupt. Coupled with the ultimatum issued by the Dr. Kaingu, Counsel submitted that any reasonable person would conclude that the Plaintiff was not only fired but was so fired because of being involved in corruption, dishonesty or such similar vice. It was submitted further that there was malice in the word complained of especially that the Plaintiff was not fired by former President Chiluba. At this point Counsel referred me to the case of **Albert Jefferson Mkandawire vs. Zambia Publishing Company Limited (1979) ZR 238** ⁽⁴⁾ where the Court stated that

'...to write of a man that he had fallen below the standards of his profession may be treated as defamatory of him especially when the comment is based on untrue facts'.

Counsel submitted that the Defendant cannot invoke section 9 of the Defamation Act Cap 68 as a defence in this matter because the publication was made with malice. Nor can the Defendant claim that the publication was in furtherance of freedom of the press as enshrined under Article 20 (1) and (2) of the Constitution, Cap 1. According to the Plaintiff, for the defence of fair comment and freedom of the press to hold, the comment must be an honest expression of the opinion based upon true facts existing at the time the comment was made. And the defence may be available where the comment is based upon an untrue statement made by another on a privileged occasion, provided that the Defendant can also prove that he gave a fair and accurate report of the occasion on which the privileged statement was made. In support of the preceding proposition, the authorities in **Brent Walker Ground Plc vs Time Court Ltd [1991] 2 G.B. 33**,⁽⁵⁾ **Slim vs. Daily Telegraph Ltd [1968] 2 Q.B. 157** ⁽⁶⁾ and Gatley On Libel And Slander, 8th Edition were drawn to my attention.

Finally Counsel submitted that in the event that the Plaintiff succeeds and is awarded judgment, he should be awarded general or compensatory damages which should include an element of exemplary damages. And that the Court has to take into account inflation and devaluation of the kwacha over the years as mitigated by the recent rebasing of the currency has to also be considered. On this proposition the following authorities were relied upon; **Cassel vs. Brome [1992] ALL ER 6;** ⁽⁷⁾ **Isaac R.C Nyirenda vs. Kapiri Glass Products Limited [1985] ZR. 167;** ⁽⁸⁾ and **Sata vs. Post Newspaper Limited and another [1995] ZR 113.**⁽⁹⁾ Counsel further drew my attention to the case of **Simon Kapwepwe vs. Zambia Publishing Company Limited (1978) ZR. 15** ⁽¹⁰⁾ and urged me to consider that the primary object of awarding damages for defamation is to offer vindication and solatium and that money cannot really be compensation in cases like the present one.

Having regard of the foregoing authorities on damages, Counsel has assessed the Compensatory damages, by way of solatium, in the sum of K1,000,000.00.

On behalf of the Defendant, Mr. Muchende submitted that the law on libel, with regards to public figures, is one that requires striking a delicate balance and meticulously identifying the line between the freedom of the Press and the protection of reputations. This is because Article 20 (1) and (2) of the Constitution of Zambia Chapter 1 protects freedom of the press while Article 20 (3) (b) of the same Constitution also protects reputations. In his view, the question in the present case is whether the Defendant can be said to have crossed the line into the realm of the exceptions to the freedom of expression and the press.

Counsel drew my attention to decision of the Supreme Court of the United States of America in **New York Times vs. Sullivan 376 U.S. 254,**

84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) ⁽¹¹⁾ in which the Court seems to have balanced the Plaintiff's interest in preserving his reputation against the public's interest in freedom of expression in the area of political debate. In that case, the Court held that in order to protect the free flow of ideas in the political arena, the law requires that a public official who alleges libel must prove actual malice in order to recover damages. The Court further stated that The First Amendment (akin to Article 20 of the Zambian Constitution) protects open and robust debate on public issues even when such debate includes 'vehement, caustic, unpleasantly sharp attacks on government and public officials.'

In our jurisdiction, Counsel referred me to the High Court decision in **Sata vs. Post Newspaper Limited and Another [1995] Z.R 113.** ⁽⁹⁾

Mr. Muchende observed that what comes out very clearly from the article in issue is that the statements complained about were made in furtherance of free political debate. He contended that the action of the Plaintiff is therefore nothing more than a thinly veiled attempt to silence the Defendant by putting them through a costly and complicated legal process. It was the Defendant's argument that this action goes against our democratic ideals and is in itself an abuse of our judicial system.

Counsel was resolute that the Plaintiff is a public figure. On this point I was referred to yet another United States case of **Gertz vs. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 [1974].**⁽¹²⁾ The Court, in refining its definition of the term 'public figure', held that;

'...public figures are those who thrust themselves into the public eye and invite close scrutiny. And that by voluntarily placing themselves in the public eye all public figures relinquish some of their privacy rights.

Again Mr. Muchende drew my attention to the **Sata** case cited above.

On these authorities, Counsel vehemently posited that the Plaintiff has demonstrated signs of being overly sensitive for a politician who (himself) attacks his opponents with venomous speeches, alleging that his opponents are corrupt, by coming to Court for simply being challenged to explain why he was sacked as Minister. It is inconceivable; according to Mr. Muchende, that the words complained about meant or can be understood to mean that he is corrupt; even by any stretch of imagination. This is because, submitted Counsel, the Plaintiff and the witness for the Defendant both stated that Dr. Kaingu did not and is yet to 'spill the beans.' In Counsel's view, to argue otherwise would amount to speculation on a matter, which has not been decided or concluded.

Learned Counsel proceeded to argue that the principle defense in this matter is essentially to the effect that the words complained about were fair comment in furtherance of free political debate and do not mention (anywhere) that the Plaintiff is or was corrupt; save to challenge him to explain why he was sacked. In this respect Counsel feels that there is, in fact, nothing sinister or atrocious in the article complained about as Dr. Kaingu has never "spilt the beans.' Hence, pointed out learned Counsel that the Plaintiff cannot, as a politician who survives by criticizing others, expect them to treat him with kid gloves. It is only fair that the opponents of the plaintiff make inquiring or searching criticism against him, including giving him ultimatums to explain certain interesting matters of public interest.

The Defendant has also pleaded qualified privilege as a media enterprise under the ambit Section 9 of the Defamation Act Cap 68 of the Laws of Zambia. In as far as the Defendant is concerned; the article concerning the press release, by the MMD Vice-President Dr. Kaingu, in response to the allegations attributed to the Plaintiff, was therefore privileged material for the publication by the Defendant. He submitted that the Plaintiff cannot and should therefore recover from the Defendant for

publishing a fair and accurate report of the press release issued by Dr. Kaingu to counter the Plaintiff's allegations of corruption against them. Counsel takes the view that, that would otherwise be killing the messenger and an affront to the spirit and reasonable requirements of a functioning democracy.

Mr. Muchende further opined that the Plaintiff did not even attempt to bring evidence to suggest that the Defendant published the article complained about with spite or malice. On the principle of spite and malice in defamation cases, Counsel called to aid the learned authors ***Bullen and Leake and Jacobs' Precedents of pleadings (20th edn.)***. At page 1174, the authors explained that:

He stressed that the article complained about raises no issues of misstatements the Plaintiff attempts to portray on the basis that the he was Minister of Legal Affairs and not Minister of Works and Supply. Mr. Muchende strongly relied on the ***Sullivan*** Case where the Court maintained that erroneous statements are inevitable in free debate and must be protected if freedom of expression is to have the 'breathing space' it needs to survive.

In conclusion, the Defendant submitted that the Plaintiff has not demonstrated to Court that the words complained about carry a defamatory intonation. Further, that the Plaintiff has not demonstrated the statement is one that can transmit falsehood granted that the statement complained about merely challenges him to give an explanation rather than making a libelous allegation or imputation. All in all, the Defendant submitted that the statement complained about has a substratum, which is that the plaintiff was the first to make a statement alleging corruption in the MMD. Finally, Counsel stated that the MMD simply asked the Plaintiff, Dr. Sondashi, to explain why he was removed from the position of Minister during the MMD era.

In conclusion the Defendant implored the Court to dismiss the Plaintiff's case, for defamation with costs.

The following question of law is sought to be determined by this Court, which is whether the article complained of by the Plaintiff and published by the Defendant was defamatory.

I propose to begin by looking at the definition of defamation.

In considering some of the definitions of the word defamation I have found that there are a number of attempted definitions which are illustrative. None of them however is exhaustive. I will highlight a few.

The classic definition is that given by Lord Wensleydale in ***Parmiter vs Coupland (1840) 6M & W 105 at 108, 151 ER 340 at 341 - 342.***⁽¹³⁾ He said that in cases of libel it was for the Judge to give a legal definition of the offence which he defined as being:

"A publication, without justification or lawful, excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule....."

Winfield and Jolowicz on Tort 18th Edition at page 570 defines defamation in similar terms.

The Supreme Court in ***Rodger Chitengi Sakuhuka vs Sassassalu Nungu, Attorney-General Times of Zambia Limited, Times Printpak Zambia, Limited Newspaper Distributors Limited (2005) ZR 39 (SC)***⁽¹⁴⁾ stated that:

"Libel is the publication of a matter, usually words, conveying a defamatory imputation as to a person character, office vocation.

Further that:

“Any imputation which may tend to injure a man’s reputation in business, in employment, calling or office carried on or held by him is defamatory.”

I now turn to consider the law pertaining to defamation.

It is important to note that freedom of expression is not limitless and is subject to the provisions of Article 20 of the Constitution and all other legislation.

In this regard freedom of expression is subject to the Defamation Act, Chapter 68 of the Laws of Zambia.

In our jurisdiction freedom of expression is enshrined in Article 20 of the Constitution.

The public figure of law of defamation was first delineated in ***New York Times vs Sullivan***.⁽¹¹⁾

The Court declared that the **First Amendment** protects open and robust debate on public issues even when such debate includes:

“vehement caustic, unpleasantly sharp attacks on Government and public officials”

The approach to be taken or adopted when dealing with defamation matters of this nature was lucidly articulated by the erstwhile Ngulube CJ, in ***Sata vs Post Newspaper Limited & Another (1995) ZR 113***⁽⁹⁾ (following the decision in the aforecited Sullivan case) at page 2 of the Judgment as follows:

“Since those in public positions were taken to have offered themselves to public attack, impersonal criticism of public conduct leading to official reputation should not attract liability, provided that criticism contained no actual malice.....a balance had to be struck between

freedom of the press and the right to reputation guaranteed by Article 20.”

The wisdom to be gleaned from the **Sullivan & Sata** cases is that a balance has to be struck between freedom of the press and the right of the reputation. What is also a key element is that the criticism should be devoid of malice. If the criticism or alleged attack is on the reputation of a public figure as opposed to a private figure the principle is that the public figure relinquishes some of his privacy rights and should be thick skinned as they voluntarily place themselves in a position which invites close scrutiny. A Plaintiff who is a private citizen on the other hand has not entered public life and therefore does not relinquish his/her interest in protecting their reputation.

The case of **Gertz vs. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L. Ed. 2d 789 [1974]** ⁽¹²⁾ is authority for the definition of a public figure who by placing themselves in the public eye consequently relinquish some of their privacy rights.

Ngulube CJ in **Sata vs Post Newspapers** ⁽⁹⁾ echoed similar sentiments when he expressed himself thus:

‘.....authorities.....show that the limits of comment on a matter of public interest are very wide indeed, especially in the case of public persons. When under attack, those who fill public positions must not be too thin-skinned. They are also taken to have offered themselves to public attack and criticism and public interest requires that public conduct shall be open to the most searching criticism’.

Another important principle to be taken into consideration in defamation cases is that of the existence of spite or malice. The case of **New York Times vs Sullivan** ⁽¹¹⁾ set forth the test to be applied in considering whether a public official who alleges libel must prove actual

malice. The authors of **Bullen and Leak and Jacobs** in Precedents of Pleadings have stated at page 1174 that:

'.....the existence of malice may sometimes be inferred from the fact that the language of the libel is unnecessarily exaggerated or violent..or it may be inferred from the mode or extent of the publication.....proof that the defendant was actuated by an indirect motive, such as anger or gross and unreasoning prejudice, in making defamatory communication complained of is evidence of malice'.

I have anxiously considered the matter before me and all the spirited submissions and arguments in the light of the authorities I have quoted above. The Plaintiff's claim rests on the footing that the Defendant published an article on 8th February, 2014 which he believes contained words that were malicious and an unjustifiable attack on him. That the words complained of and particularly set out in the statement of claim meant and are understood to mean that the Plaintiff is a corrupt person unfit to practice law and aspire for the Presidency of Zambia. According to the Plaintiff he had been seriously injured in his character, credit and reputation and in the way of his occupation he had been brought into public scandal odium and contempt and has suffered damage.

The Defendant on the other hand is contending that the words complained of are an accurate report issued by the Movement for Multi-party Democracy (MMD) through its Vice President one Dr. Michael Kaingu. In the Defendants opinion the report was a fair comment predicated upon a matter of public interest and free political debate. The Defendant strongly denies any malice in the report or that the words are defamatory.

Having defined what constitutes defamation I now turn to determine whether or not the article complained of is defamatory.

At the expense of repetition I believe its important to highlight the article complained of, (the subject of this suit):

“...Dr. Kaingu said that as Vice President of the former ruling party he was aware of why Dr. Sondashi was fired by the late President Chiluba and that it would be prudent for the former MMD Member to tell the nation [why] he was sacked. I remember Dr. Sondashi was Minister of Works and Supply, I am giving him till Monday to tell the nation why he was fired failure to which I will have no option but to spill the beans for the people of Zambia to know the kind of MMD he belonged to and why he was fired by the then President.....MMD is not a corrupt party, this party has gone through serious transformation and I want Dr. Sondashi to know that the MMD he left or that fired him is not the same MMD today”.

The Plaintiff has contended that this article by implication means he is a corrupt person who is unfit to practice law and aspire for Office of Presidency. He has also contended that the publication is malicious and an unjustified attack on his reputation.

In analyzing the above passage in order to establish whether it is defamatory or not I have applied the test articulated in the various authorities I have cited earlier in this Judgment which is whether the words complained of tend to lower the Plaintiff in the estimation of right thinking members of society generally.

It is not in dispute that the words published by the Defendant in the article fell from the mouth of Dr. Kaingu in reaction to the Plaintiff casting aspersions at the political party Movement for Multiparty Democracy MMD alleging that it was corrupt.

Dr. Kaingu simply said he would spill the beans if the Plaintiff failed to explain why he had been fired. Dr. Kaingu did not explicitly state that the

Plaintiff was corrupt. However, by the submissions made by the Plaintiff's Counsel it is being urged upon me to draw an inferential meaning that is to say that it was implied that the Plaintiff was corrupt. Counsel for the Plaintiff has argued in the alternative that the article in question was defamatory by *innuendo or imputation*.

The innuendo or imputation, according to the Plaintiff, emanates from the fact that since he (Plaintiff) had initially accused the MMD of promoting corruption, then the words attributed to Dr. Kaingu and published by the Defendant, insinuate or imply (impute) that the Plaintiff was corrupt and taint his reputation.

Counsel referred the Court to the case of ***Zambia Publishing Company Ltd vs. Eliya Mwanza [1979] ZR 76*** ⁽³⁾ where it was held that “... *to impute dishonesty of a man when he is holding a particular office which he has since left is still defamatory of him in general*”.

While I agree that this is good law, the principle cannot aid the Plaintiff in the case before the Court.

This is so because the nature of the libel and the imputation of dishonesty in the ***Zambia Publishing*** case, as compared with the imputations allegedly contained in the words in the present case, are distinguishable.

In the ***Zambia Publishing case***, it was alleged, in an article entitled '***ZRAWU accused of payment scandal***' that the Plaintiff was drawing salaries after he had resigned from the post, and secondly that he resigned because someone else was made Acting General Secretary instead of himself being appointed.

As such the Plaintiff contended that the words were understood to mean that the he unjustly and dishonestly continued to receive salaries after he had resigned and that he resigned because of jealousy for not being appointed to the post of Acting General Secretary.

The Court agreed with the Plaintiff that to publish of a man that he has drawn a salary to which he is not entitled indicates, in the context of the article complained of, that he was doing so dishonestly and the imputation is clearly defamatory.

In the present case, however, and as noted already, the Plaintiff was merely challenged to give an explanation as to why he was fired from government. He did not do so.

The fact that the Defendant proceeded to publish them is the Plaintiff's bone of contention. According to the Plaintiff the words were malicious and an unjustifiable attack on his character. In a nutshell my understanding of the Plaintiff's grievance is that there was irresponsible journalism by the journalist involved and the conduct of the newspaper.

The gist of his argument is that had the newspaper been responsible enough and conducted proper investigations it would have discovered that he had not been fired by President Chiluba nor was he Minister of Works and Supply at the time.

I remind myself that the law of defamation is concerned primarily to maintain the proper balance not to regulate the practice of journalism. An important object of the law of defamation is to provide a means of those defamed to achieve vindication.

In order to determine whether or not the Defendant did defame the Plaintiff I will apply the principles of defamation to the present case. From the facts before me the inference that can be drawn from the publication

which I have quoted in the preceding paragraphs do not in my view impute corruption on the part of the Plaintiff. The so called beans were never spilt. The publication merely alleges the Plaintiff was fired as Minister of Works and Supply. It also challenges him to state why he was fired. The publication does not by any stretch of imagination allege or impute that he was fired on account of being corrupt.

Further, I do not see how an allegation that somebody was fired from a political office can have an effect on his standing in society as Counsel or occupation of the office of Counsel. As regards his standing as politician, that I shall deal with in the passages that will follow later. I have already defined libel as being a publication which conveys a defamatory imputation as to the person's characters' office or vocation. In civil matters the onus of proving of any allegations rests upon the Plaintiff. The standard of proof being on a balance of probabilities (***see Masausto Zulu vs Avondale Housing Project (1982) ZR 172.***)

It was incumbent upon the Plaintiff to prove to my satisfaction on a balance of probabilities that indeed the publication is defamatory. In his attempt to do so he merely expressed his misgivings at the fact that Dr. Kaingu did not subsequently spill the beans. This in my view does not satisfy the test set for proving defamation. I find there was no defamation consequent upon which the other defences raised of fair comment and qualified privilege do not arise. As such, I have not considered them as it would be an exercise in futility.

I find as a fact that the Defendant newspaper in publishing the article was merely exercising its freedom of expression and the press and did not violate the Plaintiffs freedom of reputation.

The fact that the Plaintiff is a politician and as such a public figure cannot pass without comment. The Plaintiff being a public figure a fact he has strongly advanced, having served several years in successive

governments, being inventor of the herbal medicine Sondashi Formula S.F 2000, President of a political party – Forum for Democratic Alternative (FDA) as well as having run the recently held Presidential race this year 2015, leaves me without a shred of doubt that he is a household name thrusting him into public notoriety. As guided by the ***New York Times vs Sullivan*** ⁽¹¹⁾ case and **Chief Justice Ngulube** in the ***Sata vs Post Newspapers*** ⁽⁹⁾ case he should have developed a thick skin.

I align myself with the case of the ***Attorney-General vs Roy Clark (2008) ZR 38*** ⁽¹⁵⁾ where Chitengi JS in delivering the Judgment on behalf of the Supreme Court stated:

“And in this Judgment, we re-affirm what we have said in the previous cases that freedom of expression is one of the strong attributes of a democratic society and that to the extent permitted by the Constitution itself, freedom of expression must be protected at all costs and those who hold public offices must be prepared, to suffer, and be tolerant of criticism.”

I have noted from the submissions that Mr. Kang’ombe, Counsel for the Plaintiff has stated that the Plaintiff performed poorly in the elections as a consequence of the publication. I have noted the arguments but have not considered them in arriving at the decision I have made because the issue of his performance at the election was not specifically pleaded and neither were facts led in his evidence in chief.

All in all I find that the Plaintiff has failed to prove his case on a balance of probability. The allegation of defamation has not been borne out by the evidence and I accordingly dismiss it forthwith. The reliefs sought consequently fall away.

Costs will follow the event, to be taxed in default of agreement.

Leave to appeal to the Supreme Court is hereby granted.

Delivered at Lusaka this 28th Day of April, 2015

Judge Betty Majula-Mung'omba
HIGH COURT