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IN THE HIGH COURT FOR ZAMBIA **2017/HP/2161**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

CHISHIMBA KAMBWILI **PLAINTIFF**

AND

DAILY NATION NEWPAPERS LIMTED **1ST DEFENDANT**
RICHARD SAKALA **2ND DEFENDANT**
OSCAR MALIPENGA **3RD DEFENDANT**
AARON CHIYANZO **4TH DEFENDANT**
SIMON MUNTEMBE **5TH DEFENDANT**

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Plaintiff : *Mr. M. Kasaji- Messrs C. L. Mundia and Company*
For the Defendants : *Ms. M. Phiri – Messrs Makebi Zulu Advocates*

R U L I N G

Cases referred to:

1. **William Coulson v. James Coulson (1887) 3 T. L. R 846.**
2. **American Cyanamid v. Ethicon (1975) All E.R 504.**
3. **Bonnard v. Perryman (1891) 2 Ch. 269.**
4. **Capital and Countries Bank Limited v. George Henty and Sons (1882) 7 A.C 741.**
5. **Silkvin v. Beaverbrook Newspaper Ltd (1958) 2 ALL. ER. 516.**

6. **Smithline Beecham P.K. v. Opotex Europe Limited (2003) CWCA 137.**
7. **Shell and BP (Z) Limited v. Conidaris and others (1975) Z.R. 174.**

Legislation and other work referred to:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia.**
2. **The Rules of the Supreme Court, 1999 Edition (White Book).**
3. **Patrick Milmo and W.V.H. Rogers (Eds), Gatley on Libel and Slander, Eleventh Edition (Sweet and Maxwell & Thomson Reuters) London, 2008.**
4. **Anthony M. Dugdale and Michael A. Jones (Eds), Clerk and Lindsel on Torts 19th Edition, (London, Sweet and Maxwell, 2006).**
5. **Halsbury's Laws of England, Fourth (4th) Edition, Volumes 24 and 28 (Butterworth's) London 1979.**
6. **Bryan A. Garner, The Black's Law Dictionary, Ninth (9th) Edition, 2009.**

This ruling relates to an application made by the Plaintiff for an order of interlocutory injunction. By this order the Plaintiff seeks to restrain the Defendants whether by themselves, their servants or their agents or otherwise, from publishing and running articles and reports that are defamatory to the Plaintiff namely that he is a criminal, thief, crook, unreliable, untrustworthy, a dishonest person among other descriptions or words to the like effect.

That the Defendants should further be restrained from publishing or further publishing or permitting or causing to be published the same

and/or similar articles against the Plaintiff until after the trial of this action or until further Order.

The application is made pursuant to Order 27 rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia and is supported by an affidavit deposed to by the Plaintiff. He deposed as follows:

That he was a Member of Parliament under the Patriotic Front Party for Roan Constituency in Luanshya District of the Copperbelt Province, Zambia; that the 1st Defendant was a Daily Mail Newspaper with wide circulation throughout the Republic of Zambia and was on the website www.dailynation.news; that the 2nd Defendant was the Editor-in-Chief of the 1st Defendant Newspaper; that the 3rd and 4th Defendants were news reporters in the employment of the 1st Defendant.

He explained that the 1st Defendant in its Daily Nation Newspaper under issue number 1778 published false and malicious articles captioned **"KAMBWILI IMPLICATED IN US$4 MONGU STADIUM DEAL"** and **"KAMBWILI ARREST ORDEAL"** the basis of which was unfounded as he had never been at any time a criminal, thief, crook or a dishonest person among other descriptions the 3rd Defendant had placed on him.

It was further deposed that the Newspaper further published an article under the caption **"KAMBWILI A PATHOLOGICAL LIAR"** on its website on the 29th day of September 2017, which article was reported by the 4th and 5th Defendants.

That he had always been a law abiding citizen dedicated to the service of his country in various capacities being, *inter alia,* as Member of Parliament and as Cabinet Minister; that the statement was an orchestrated campaign by the Defendants to seriously injure his reputation in the eyes of right thinking members if society and to destroy his political career and his business interests.

He produced photocopies of the Newspaper extracts of the publications by the Defendants which publications he alleged were highly libelous and therefore destructive to his reputation in the eyes of the right thinking members of society. That he believed in the concept of free press but he also believed that his rights were to be protected by this Court.

The Plaintiff further explained that it was completely and utterly untrue to state or suggest either expressly or impliedly or by innuendos that he had committed crimes or he had been in any way associated in the commission of any crime, plunder of the national

resources, or in any manner or at all as alleged by the Defendant in their malicious and unjustified statements; that the said allegations contained in the Defendants' articles were extremely damaging to his reputation and were likely to cause him irreparable harm particularly to his political career and business interests.

I declined to consider the application *ex-parte* and directed that it be heard *inter-partes*.

The Defendants filed an affidavit in opposition which was deposed to by **RICHARD SAKALA**, the 2nd Defendant herein.

He deposed that paragraphs 9 and 10 of the Plaintiff's affidavit in support were admitted save as and only to the extent that the article complained of was neither uttered falsely nor was it defamatory for all intents and purposes.

It was further deposed that contrary to paragraphs 11 to 13, the words complained of were fair comment on a matter of public interest; that the words complained of in paragraph 15 of the Plaintiff's affidavit were not made with malice.

In relation to paragraphs 16 and 17 of the affidavit in support, it was deposed that it was not necessary to restrain the Defendants herein

from further publishing any story in relation to the matters at hand and that the said Plaintiff would not suffer any irreparable injury should the injunction not be granted; that even if the injunction were to be vacated and the Plaintiff did, in any way suffer injury, the same could be redressed by way of award for damages.

That he had been advised by his advocates and he verily believed the same to be true that this was not a proper case in which the Court may refuse to grant an Injunction; that no prejudice would be occasioned to the Plaintiff.

At the hearing of the application, learned counsel for the Plaintiff Mr. M. Kasaji relied on the affidavit in support and the submissions. Learned counsel for the Defendants Ms. M. Phiri equally relied on the affidavit in opposition and the skeleton arguments. I will not endeavour to replicate the submissions suffice it to mention that I shall be referring to them as and when it is necessary.

By this application, I have been called upon to determine whether the Defendant is entitled to an Order of interlocutory injunction to restrain the Defendants from publishing and running articles and reports that are defamatory to the Plaintiff namely that he is a criminal, thief,

crook, unreliable, untrustworthy, a dishonest person among other descriptions or words to the like effect.

That the Defendants should further be restrained from publishing or further publishing or permitting or causing to be published the same and/or similar articles against the Plaintiff until after the trial of this action or until further Order.

The jurisdiction of the court to grant an interim or interlocutory injunction in the field of defamation arises where there has been or there is a threatened publication of a defamatory statement or falsehood. The order of injunction then would restrain the threatened or repeated publication of defamatory statements about the claimant.

However, the jurisdiction of the court to grant an order to restrain publication of defamatory statements is of a delicate nature which ought only to be exercised in the clearest cases. This was stated by Lord Esher in the case of **William Coulson v. James Coulson** (1). The reluctance to grant peremptory injunctions is rooted in the importance attached to the right of free speech and because the questions that arise during the proceedings such as whether the meaning is defamatory, whether justification or fair comment are applicable and malice are generally for determination at a later stage.

In this regard, interim or interlocutory injunctions in defamation actions are granted on different principles from the general principles governing the grant of interlocutory injunctions as the court is entitled to consider the merits of the case in order to determine whether or not an interim injunction should lie. Thus the practice established in applications for interlocutory injunctions by the **American Cyanamid v. Ethicon** [2] case of not considering the merits have been rejected as inappropriate in defamation.

Having said that, the Order sought herein is to prevent the repetition of a wrong. Therefore, I consider it appropriate to quote a passage from the judgment of Lord Coleridge, C.J, in the case of **Bonnard v. Perryman**[3] where after affirming the court's power to grant interlocutory injunctions as a matter of jurisdiction he went on to say that:

> **"But it is obvious that the subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong**

committed; but, on the contrary, often a very wholesome act is performed in the 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".

To this end, the authors of Gately on Libel and Slander state that the court will only grant an injunction where the claimant satisfies the court on the following:

(1) The statement is unarguably defamatory;

(2) There are no grounds for concluding the statement may be true;

(3) There is no other defence which might succeed;

(4) There is evidence of an intention to repeat or publish the defamatory statement.

In addition to these factors, paragraph 167 of the **Halsbury's Laws of England** states that the claimant should prove that if further publication of the words threatened or intended takes place, he will suffer injury of such a nature that damages would not be an adequate remedy.

In view of the foregoing statement of the law, I shall proceed to consider whether or not the Plaintiff has satisfied the above conditions to enable this Court grant the Order of injunction sought.

1. STATEMENT UNARGUABLY DEFAMATORY

When considering this condition, it is not sufficient for a claimant to establish that the words are capable of being defamatory; the court must be satisfied that a jury would inevitably come to the conclusion that they were defamatory.

A determination of whether the words complained of by the Defendant are capable of bearing a defamatory meaning is a question of fact. Lord Selborne in the case of **Capital and Countries Bank Limited v. George Henty and Sons** [4] stated that:

> **"The true test is whether in the circumstances in which the statement was published, reasonable persons to whom the publication was made would understand it of the Plaintiff and in a defamatory sense."**

Therefore, in ascertaining whether or not the words complained of are defamatory, I am required to consider the statements as a whole and interpret words complained of in their natural and ordinary meaning.

The Plaintiff contends that the Defendants published false and malicious articles captioned **KAMBWILI IMPLICATED IN US$4M MONGU STADIUM DEAL** and **KAMBWILI ARREST ORDEAL** and **KAMBWILI A PATHOLOGICAL LIAR.**

The Plaintiff contends that the allegations contained in the articles are extremely damaging to his reputation and are likely to cause him irreparable harm to his political career and his business as he has never committed any crime, or associated with plunder of national resources.

The question I ask myself then is this: In the circumstances, in which the said statements were published, can reasonable persons to whom the publication was made understand it of the Plaintiff and in a defamatory sense?

The learned authors of Clerk and Lindsell on Tort state that in considering whether a statement is capable of a defamatory meaning, the court should give to the material in question its 'natural and ordinary meaning'. The same authors state that a suggestion that a person is suspected of crime without imputation of actual guilt may be libelous.

To begin with, the Defendants have not denied having published the articles complained of. They contend that the articles were not uttered falsely and were not defamatory as they were fair comments on matters of public interest.

Guided by the authorities I have referred to above, I am of the considered view that the imputations made against the Plaintiff who has been mentioned by name in the articles are *prima facie* defamatory as they impute conduct which right thinking persons can consider to be criminal or dishonest.

In this regard, I find that the Plaintiff has satisfied this condition that the words complained of are unarguably defamatory.

2. THERE ARE NO GROUNDS FOR CONCLUDING THAT THE STATEMENTS ARE TRUE

According to the authors of Clerk and Lindsel on Tort at paragraph 22-256, they state that:

> **"The general principle is 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. The claimant to obtain an interim injunction has been**

required to demonstrate practically that there is no defence to the claim with a realistic prospect of success."

Therefore on this pre-condition, paragraph 27.6 of Gately on Libel and Slander states that:

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

In this regard, it will not be usual for the claimant to be able to prove on an application for an interlocutory injunction that the words are false.

However, the same authors state that the general rule has been that where the defendant contends that the words complained of are true and asserts that he will plead and seek at trial to prove the defence of justification, the court will not grant an interim injunction.

In the present case, the Defendants have not pleaded justification but fair comment. Thus I find that this condition does not apply to this case.

THERE IS NO OTHER DEFENCE WHICH MIGHT SUCCEED

According to the authors on Gatley on Libel and Slander, the court will not normally grant an interim injunction where the threatened publication will on its face be privileged. The only exception is where the defendant is clearly malicious.

Further, the same authors go on to state that where the intended defence is fair comment, the position is similar to where the intended defence is that of justification.

Fair comment protects statements of opinion or comment on matters in the public interest and not imputations of facts. This is because there are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters, it is desirable that all should be able to comment freely and even harshly so long as they do so honestly and without malice.

Therefore, freedom of expression and press freedom are largely protected by this defence. Lord Diplock put it this way in the case of **Silkvin v. Beaverbrook Newspaper Ltd** (5) when he stated that:

> **"The right of the public which means you and me and the newspaper editor and the man who but for the present bus strike would be on the Clapham omnibus to express their views honestly and fearlessly on matters**

of public interest even though that involves strong criticism of conduct of public people."

Thus if the defendant asserts that he will raise such a defence and prove the truth of the facts supporting the comment, then if the matter appears to be one of public interest and the claimant cannot establish malice, an interim injunction will not be granted.

Without delving into the merits of the defence, the Defendants have raised one of the substantive defences in defamation proceedings which is fair comment. I have also noted that in the Defence, they have averred that the articles complained of by the Plaintiff are not facts but are a fair comment which emanated from reasonable concerns by members of the public as the public have a legitimate concerns over public facilities; that the 1st Defendant as a media institution has therefore a duty to inform the public on matters of public interest.

Going by the subject matter of the articles, it appears they relate to matters of public interest as the Plaintiff has ventured into public life and *prima facie* there is nothing to show that the articles were published maliciously.

For this reason, I find that there is a defence which might succeed. I wish to pause here and just add that by the use of the word 'might' it

to a person or property is likely to result, the Court has jurisdiction to grant an interlocutory injunction restraining the defendant from further publishing the words until the hearing of the action, or until further Court Order."

Further, it was stated in the case of **Smithline Beecham P.K. v. Opotex Europe Limited** (6) that the Court will not grant an interim injunction unless there is some evidence or there are grounds to infer that the defendant threatens and intends to continue the publication of the words.

In the present case, the Plaintiff seeks to restrain the Defendants from publishing or further publishing or permitting or causing to be published similar articles against him.

While I do acknowledge that the Defendants have published the articles complained of, there is no evidence or any grounds to infer that the Defendants have threatened and intend to continue the publication of similar articles. If the Defendants had pleaded justification that the words complained of are true, this would have been a ground for this Court to infer that the Defendants intend to continue publication of similar articles as they are justified that the articles published are true. However, they have not.

For the above reasons, I find that the Plaintiff has not satisfied this condition that there is evidence of an intention to repeat or publish words complained of.

The net result of my findings is that the Plaintiff has only satisfied one condition that I have referred to above which this Court should consider before an interlocutory injunction can be granted in a defamatory action

That said, however, the Plaintiff also has to show that damages would not be an adequate remedy. I shall therefore proceed to consider whether damages would be an adequate remedy in this case.

ADEQUACY OF DAMAGES

Tort law aspires to provide claimants with a complete remedy for every injury. The two most common remedies are damages and injunctions which are orders granted to refrain from wrongful conduct or to undo its consequences.

Unlike compensatory damage awards which claimants are entitled to upon presenting adequate proof of liability, injunctions are granted at the discretion of the court. Under general principles of equity, the

court must first determine the adequacy of a remedy in law before resorting to equitable relief.

According to paragraph 29/L/5 of the White Book on the guidelines on the adequacy of damages as a remedy, one of the fundamental principles of injunction law that the courts must determine when considering whether to grant an injunction or not is whether if a plaintiff succeeded at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction.

If damages would be adequate remedy, and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the plaintiff's claim appeared to be at that stage.

If on the other hand damages would not be an adequate remedy, the court should then consider whether if the injunction were granted, the defendant would be adequately compensated under the plaintiff's undertaking as to damages. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

In considering the above principles, the question I ask is this: if the Plaintiff were to succeed at the trial in establishing his claims set out in the statement of claim, would he be adequately compensated by an award of damages for the loss caused by the refusal to grant an interlocutory injunction?

In answering this question, I am guided by paragraph 955 of the Halsbury's Laws which provides that:

> **'The Plaintiff must as a rule show that an injunction until the hearing is necessary to protect them against irreparable injury; mere inconvenience is not enough.'**

According to the **Shell and BP (Z) Limited v. Conidaris and others** [7] case 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".**

The Plaintiff herein contends that the Defendant's articles are extremely damaging to his reputation and are likely to cause him irreparable harm particularly to his political career and his business interests.

discretion and grant an interlocutory injunction. The application is therefore dismissed for lack of merit with costs to the Defendants.

Delivered at Lusaka this 30th day of June, 2020

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M.C. KOMBE
JUDGE