

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

2018/HP/1361



**BETWEEN:**

LEVIS MUMBA

**PLAINTIFF**

**AND**

ZAMBIA NATIONAL BROADCASTING CORPORATION

**1<sup>st</sup> DEFENDANT**

ATTORNEY GENERAL

**2<sup>nd</sup> DEFENDANT**

GEOFFREY CHUMBWE

**3<sup>rd</sup> DEFENDANT**

**Before Honourable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 25<sup>th</sup> day of March 2020.**

*For the Plaintiff: Mr. M. J. Katolo, Mrs P. C. Hampungani & Mr. B. T. Mulungushi, Messrs Milner & Paul Legal Practitioners*  
*For the 1<sup>st</sup> Defendant: Ms. M. Undi Messrs Eric Silwamba, Jalasi & Linyama Legal Practitioners & Mr. M. Zaza, In House Counsel*  
*For the 2<sup>nd</sup> Defendant: Mr. P. Ndovi, Senior State Advocate & Ms. J.M. Mazulanyika Assistant State Advocate, Attorney General's Chambers*  
*For the 3<sup>rd</sup> Defendant: Mr. C. Banda, State Counsel & Mr. D. K. Kasote, Messrs Chifumu Banda & Associates*

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## **J U D G M E N T**

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**Cases Referred To:**

1. *Parmiter v Coupland* (1840) 6M & W 105 at 108, 151 ER 340 at 341-342
2. *Rodger Chitengi Sakuluka v Sassassali Nungu, Attorney General, Times of Zambia Limited, Times Printpak (Z) Limited, Newspaper Distributors Limited* (2005) ZR 39 (SC)
3. *Albert Jefferson Mkandawire v Zambia Publishing Company Limited* (1979) ZR 238 (S.C)
4. *Tolley v Fry* (1930) 1 CB 469
5. *Times of Zambia v Simon Mwansa Kapwepwe* (1973) ZR 292
6. *Gertz v Robert Welch, Inc.* 418 U.S 323, 94 S.C.T 2997, 41 L.ED 2D 789 (1974)
7. *Moving Unit Video Television (T/A Muvi TV Limited) v Francis Mwiinga Maingaila Selected Judgment No. 18 of 2019*

8. *Bevin Ndovi v Post Newspaper Limited and Times Printpak Zambia (2011) Vol. 1 472*
9. *Reynolds v Times Newspapers Limited (2001) 2 AC 127*

**Legislation Referred To:**

1. *Defamation Act, Chapter 68*
2. *Local Government Act No. 2 of 2019*

**Other Works Referred To:**

1. *The Black's Law Dictionary, 9<sup>th</sup> Edition by Bryan A Gardner Thomson West Publishers USA 2009*
2. *Gatley on Libel and Slander 9<sup>th</sup> Edition by Adam Speker, Chloe Strong & Godwin Busuttill Sweet & Maxwell, London 2013*
3. *Salmond and Heuston on the Law of Torts 12<sup>th</sup> Edition Sweet & Maxwell, London 1957*
4. *Winfield and Jolowicz on Tort by W.V.H Rogers 18<sup>th</sup> Edition Sweet & Maxwell, London 2010*
5. *Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 28*
6. *Bullen and Leake and Jacobs in Precedents of Pleadings Volume 1, 17<sup>th</sup> Edition Sweet & Maxwell, London 2011*

1. **Introduction**

- 1.1 The plaintiff is the former Town Clerk of Chongwe Municipal who served in office from September 2017 up to the date of his dismissal on 7<sup>th</sup> March 2018. Prior to that date, he was suspended and charged with the offences of abuse of authority and dishonest conduct under the 1996 conditions of service of local government officers by the Local Government Service Commission (LGSC) who is represented by the 2<sup>nd</sup> defendant. The Secretary of the LGSC, wrote the minute of suspension to the plaintiff on 18<sup>th</sup> January 2018. Later the plaintiff's suspension was carried as a news item by ZNBC (the 1<sup>st</sup> defendant) and its source was attributed to the chairperson of the

LGSC. Further articles were published by the LGSC and the Mayor of Chongwe Municipal Council, Mr. Geoffrey Chumbwe (3<sup>rd</sup> defendant) and carried as news items by the Daily Nation Newspaper and Prime TV (which are not party to these proceedings and ZNBC the 1<sup>st</sup> defendant).

- 1.2 The plaintiff averred that his suspension was sensationalized and conveyed in a manner that defamed him. He asserted that the news items injured his reputation amongst the members of the public and was aggrieved by the defendants' actions. The issue before this court is *whether the articles published by the defendants were defamatory and ruined the plaintiff's reputation?*

## 2. **Pleadings**

- 2.1 By an amended writ of summons and statement of claim filed into Court on 13<sup>th</sup> September 2018, the plaintiff sought the following orders against the defendants:

- “(i) Damages for libel.*
- (ii) An injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from publishing the same or similar statements in the future.*
- (iii) Damages for mental distress, anguish and anxiety.*
- (iv) Unreserved apology*
- (v) Interest*
- (vi) Other reliefs the Court may deem fit.*
- (vii) Costs”*

- 2.3 The **plaintiff** pleaded that on 18<sup>th</sup> January 2018, the Chairperson of the Local Government Service Commission represented by the 2<sup>nd</sup> defendant held a press briefing at the Government Complex where he falsely alleged that "*the Plaintiff and other officers of the Chongwe Municipal Council paid themselves commutation of leave days in excess of accumulated leave days*". He also averred that the plaintiff paid himself social holiday allowance contrary to the provisions of the Local Government Circular No. MLGH/101/8/4 dated 13<sup>th</sup> August 2014.
- 2.4 The news item was carried by the Daily Nation newspaper edition of 19<sup>th</sup> January 2018 and the 1<sup>st</sup> defendant (ZNBC) during its prime news with a caption "*Chongwe Municipal Council Town Clerk and management suspended*". He also averred that when asked for a comment, the Chongwe Mayor, Mr. Godfrey Chumbwe (3<sup>rd</sup> defendant) confidently stated that calm had returned to the Council because we could not have a criminal masquerading as a chief executive. The plaintiff was accused of paying himself holiday social allowance, a salary advance and leave commutation in breach of the local government circular.
- 2.5 The plaintiff stated that the 1<sup>st</sup> defendant's news item contained falsehoods and untruthful statements which were conveyed to the

- 2.7 The plaintiff averred that the words complained of in their natural and ordinary conveyed that he was unreliable and unfit for public office because he was described as a common criminal, fraudster and abuser of public authority.
- 2.8 The plaintiff stated that his advocates demanded an unqualified apology and retraction of the news items from the defendants and they did not respond.
- 2.9 The plaintiff averred that the defamatory words were widely circulated through electronic and social media. Further, the words injured his reputation and exposed him to hatred, public odium, embarrassment and ridicule. He consequently suffered damage more so that he is a senior member of the legal profession.
- 2.10 The **1<sup>st</sup> defendant** entered appearance and filed a defence into Court on 29<sup>th</sup> August 2018. It was bemused that the Daily Nation newspaper, which carried a news article about the plaintiff was not a party to these proceedings. The 1<sup>st</sup> defendant denied that its news item was defamatory because the plaintiff had been suspended from work. In any case, the plaintiff who was a public figure was inclined to criticism and public scrutiny. Thus, its publication was made in good faith and without malice on a matter of public interest.

- 2.11 According to the 1<sup>st</sup> defendant, the plaintiff paraphrased its words and they could not be understood in the context of its publication. It urged the Court to dismiss the plaintiff's claims.
- 2.12 The 2<sup>nd</sup> **defendant** entered appearance and filed a defence and counterclaim into Court on 6<sup>th</sup> September 2018. It denied that it falsely accused the plaintiff and other officers of the Chongwe Municipal Council of paying themselves commuted leave days in excess of their entitlement. In any case, the plaintiff sued it in the Industrial Relations Court under cause no. Comp no. IRCLK/102/2018 - *Levis Mumba v The Attorney General*. It was averred that circular MLG/H/101/8/4 relied on by the plaintiff reinforced circular MLGH/71/6/93 abolishing social holiday allowance. As such, the plaintiff had no right to pay himself social holiday allowance.
- 2.13 The 2<sup>nd</sup> defendant denied that it uttered libelous words against the plaintiff because the statement of the Chairperson of the LSGC was based on truthful facts. It had no control on how the public perceived the plaintiff after its statement.
- 2.14 The 2<sup>nd</sup> defendant averred that the plaintiff mounted unnecessary litigation and counterclaimed the following orders:

- “1. A declaration that the action of the plaintiff is an abuse of Court process.
2. A declaration that the plaintiff is not entitled to an unreserved apology and K1,200,000.00 as exemplary damages in the same breath.
3. An order stopping the plaintiff from deploying piecemeal scattered litigation over the same transaction because nothing stops him from raising all his issues in the Industrial Relations Court where he has sued under cause no. Comp no. IRCLK/102/2018.
4. An order dismissing the plaintiff's entire action for being an abuse of Court process.
5. Any other relief the Court may deem fit
6. Costs.”

2.15 The 3<sup>rd</sup> defendant entered appearance and filed a defence into Court on 10<sup>th</sup> September 2018. He denied that he neither defamed the plaintiff nor uttered the words in the plaintiff's statement of claim. The words that he spoke were reproduced in the Daily Nation newspaper on 24<sup>th</sup> January 2018. In any event, his comments were made as Mayor of Chongwe Municipal Council on a matter of public interest. Further, he referred to the Town Clerk and other senior management officers at the council who were facing investigations for alleged financial irregularities and payments.

2.16 The 3<sup>rd</sup> defendant contended that his statement against the plaintiff was made in good faith and without malice. Thus, the plaintiff was not entitled to damages.

### 3. Trial course

- 3.1 The matter came up for trial on 30<sup>th</sup> May, 10<sup>th</sup> and 14<sup>th</sup> October 2019, and the plaintiff testified as **PW1**. He told the Court that at the material time of the dispute and had been serving as Town Clerk of Chongwe Municipal Council. He was appointed on 15<sup>th</sup> August 2017 but took up office sometime in September 2017. On 18<sup>th</sup> January at 18.00 hours, a colleague called PW1 and told him to watch the ZNBC 19.00 hours news and he saw a caption that read *'Town Clerk for Chongwe and others suspended.'* PW1 averred that he only learnt of his suspension on television when the newscaster Mr. Hebert Mutabi stated that he was alleged to have abused his authority and acted dishonestly.
- 3.2 PW1 testified that he thereafter, instituted a suit against the 3<sup>rd</sup> Defendant, Mr. Geoffrey Chumbwe for uttering that *"confidence has now returned to the Council with the suspension of this Town Clerk and the directors. We cannot allow fraudsters to be masquerading as chief executives in the Council. No officer in the council should be allowed to do money laundering."* PW1 further testified that he was certain that the news item referred to him because he was the only Town Clerk at the material time and the news item was produced at page 1 of the 1<sup>st</sup> defendant's bundle of documents. PW1 went on to testify that Prime News aired another news item on his suspension



and was alarmed that his situation had been sensationalized in the media. PW1 averred that at the time of the publications, he had not been charged nor given an opportunity to present his side of the story to ZNBC in order to balance the story. Further, he was only charged forty-eight hours after the news story had been published.

3.3 According to PW1 the word fraudster implied that he was a criminal and the ZNBC published story against him was malicious and not in the public interest. In addition, it repeatedly aired the story on ZNBC television and all its local stations. According to PW1, its intention was to portray him as a dishonest person. He also testified that contrary to the allegations against him, he did not pay himself a social holiday allowance or a salary advance in breach of the Ministry of Local Government conditions of service. Rather that under clause 116 of the 1996 conditions of service, salary advances were allowed. Since he had over 108 leave days, he decided to commute 30 days in accordance with the regulations.

3.4 PW1 testified that he sued the Attorney General because of the defamatory words uttered by Mr. Amos Musonda, the Chairperson of Local Government Service Commission (LGSC). Mr. Musonda portrayed that PW1 had no leave days when he was aware of the 108 days. He accused PW1 of paying himself social holiday allowance

when the fact was untrue. PW1 averred that he paid back his salary advance of ZMW 4,300 through deductions in January- ZMW 1,000 February -ZMW 1,300 and March -ZMW 2,000.

- 3.5 PW1 also testified that his other colleagues at the Chongwe Municipal Council applied for commutation of leave days through their heads of department and after approval, the documents were processed by the Finance and Human Resource departments. In PW1's case, his forms were submitted to the Director of Human Resource (DHR) but not immediately processed because some files went missing. To resolve the situation, PW1 asked the affected officers to fill in fresh forms which the DHR refused to sign.
- 3.6 PW1 denied that he signed blank forms in the second instance and asserted that the forms were kept by DHR. Notwithstanding, he received payment. PW1 averred that he had 108 leave days which he accrued from Ndola - 41 leave days, 16 days from Livingstone, 21 days from Mongu, 37 days from Chinsali and Lusaka City Council. He only received 28.5 leave days pay at his previous posts. PW1 went on to testify that the words in the defamatory statement suggested that he joined the Council to enrich himself, and was just a criminal involved in money laundering when in actual sense not.

- 3.7 PW1 averred that he felt humiliated, embarrassed and ridiculed by the defendant's words because he had never been accused of fraudulent behaviour in his ten year working life with the local government. In addition, he did not have a criminal record and was never subjected to disciplinary sanction except at Chongwe Municipal Council where he was stationed for three months. He averred that as a devout catholic who sat on a number of boards including radio stations, water boards, schools, no one had ever accused him of abuse of authority and dishonest conduct. PW1 stated that he was a person of high moral integrity and had sufficient leave days. The disciplinary hearing did not establish that he paid himself social holiday allowance or conducted himself dishonestly. It however, recommended his dismissal because PW1 was arrogant and disagreed with the current regime.
- 3.8 PW1 stated that the defendants ruined his life because whenever he applied for employment, prospective employers would question him on the allegations which were widely spread on ZNBC, Zambian Observer, Daily Nation newspaper etc. To particularize his claim, PW averred that he once applied to be a partner in a law firm but the 2<sup>nd</sup> Defendant wrote a letter to the Legal Practitioners Committee

produced in its bundle of documents that he could only work in a firm and not co-manage it.

3.9 It was PW1's evidence that he asked the defendants through his lawyers, to retract the damaging statements but they refused to apologize averring that the matter was of public interest. PW1 added that his self-esteem had drastically reduced because he was shunned by other people. He prayed to Court to order the defendants to apologize and retract the published defamatory statements. He also asked for exemplary damages, interest and costs.

3.10 In **cross-examination by the 1<sup>st</sup> defendant**, PW1 averred that although the audio recording of defamatory words was not before Court, a hard copy from ZNBC was produced in the 1<sup>st</sup> defendant's bundle of documents. He conceded that the report did not refer to the word criminal. He stated that he had 146 leave days from his previous work stations as opposed to 108 days. PW1 further conceded that he attended the Society for Local Authorities Chief Executives (SOLACE) meeting in Ndola and received 5 days subsistence allowance. However, he only attended the meeting for 2 days because Mr. Chumbwe summoned him for a meeting with two European Union officials and Mr. Silumesi in Chongwe.

officers were suspended. He however, found it bemusing that staff matters were discussed in the public.

3.12 In **cross-examination by the 3<sup>rd</sup> defendant**, PW1 testified that his supervisors were the councilors and Mayor. The Mayor was responsible for chairing meetings of the Council and while he served as secretary. According to PW1, Mr. Chumbwe insinuated that he was a criminal and had abused his authority through money laundering activities. As such, the public had lost confidence and their respect for him. He did not know if the public services at Chongwe Municipal Council were affected by the suspension. PW1 admitted that he was charged with abuse of office and Mr. Chumbwe's statement as recorded by Mr. John Kombe of Daily Nation Newspaper was quite accurate.

3.13 In **re-examination**, PW1 stated that the functions of human resources and administration were under one department at the council. He averred that he had a choice on who to sue and out of choice did not pursue the other media agencies. PW stated that the disciplinary committee was aware of the number of the leave days he accrued in council service.

- 3.14 **PW2** was **Muyangwa Muyangwa** a retired army captain and a colleague of PW1 who testified that on 18<sup>th</sup> January 2018 while at the 1<sup>st</sup> Infantry Brigade Mess near St Mary's School in Woodlands, he listened to the ZNBC 19.00 hours. He saw a caption that the Chongwe Municipal Council Town Clerk had been suspended on account of financial irregularities and other malpractices. He called PW1 because the news item disturbed him. PW2 added that he knew PW1 as a man of integrity from their Catholic Association (deanery). Also that, when PW1 was transferred to Chongwe, he applied for a land but he advised him to follow procedure.
- 3.15 In **cross-examination by the 1<sup>st</sup> defendant**, PW2 averred that he had a personal relationship with PW1. The news item shocked him because PW1, a former seminarian would not involve himself in fraudulent activities.
- 3.16 In **cross-examination by the 2<sup>nd</sup> defendant**, PW2 stated that he had never heard of any adverse reports against PW1.
- 3.17 The **3<sup>rd</sup> defendant** did not **cross-examine** the witness.
- 3.18 The plaintiff's third witness **Tiyamike Melody Zulu (PW3)** happened to be PW1's sister in law. Her evidence was that while at her home in Chingola watching the ZNBC 19.00 hours news of 18<sup>th</sup> January 2018,

she saw a news caption that PW1 had been suspended on account of dishonest conduct, abuse of office and involvement in fraudulent activities. PW3 was shocked by the news because she knew PW1 as a man of integrity, former seminarian and devout catholic. Accordingly, she believed that ZNBC negatively portrayed PW as a dishonest person. She added that after PW1 was dismissed from council service, he struggled to find employment.

3.19 In **cross-examination by the 1<sup>st</sup> defendant**, PW3 responded that PW1 worked as Town Clerk for Chongwe Council.

3.20 In **cross-examination by the 2<sup>nd</sup> defendant**, PW3 explained that she did not live with PW1 but interacted with him at several family gatherings.

3.21 In **cross-examination by the 3<sup>rd</sup> defendant**, PW3 stated that she had known PW1 for about 5-6 years and always wished him well. The news item referred to PW1 as fraudulent, dishonest and an abuser of office.

3.22 In **re-examination**, PW3 replied that she maintained healthy contact with PW1.

3.23 That marked the close of the plaintiff's case.

3.24 **1<sup>st</sup> defendant's case**

- 3.25 The 1<sup>st</sup> defendant's witness **Arnold Tutu (DW1)** on assignments editor at ZNBC for 7 years, testified that he vetted television and radio news scripts before they are aired for accuracy and quality control. Sometime in January 2018, ZNBC received information that the Local Government Service Commission (LGSC) would hold a press briefing at the Government Complex in Lusaka. He sent a reporter who covered the address of the LGSC chairperson, Mr. Amos Musonda.
- 3.26 DW1 stated that the main items in Mr. Musonda's speech were broadcast on ZNBC television and radio. They referred to PW1 and other senior management officers at Chongwe Municipal Council who had been suspended. Efforts to contact PW1 proved futile because he did not answer his mobile phone.
- 3.27 In **cross-examination by the plaintiff**, DW1 replied that the ZNBC reporter tried to reach PW1 on his MTN number before the story was published. He was not aware of PW1's Airtel line. DW1 did not verify if PW1 paid himself social holiday allowance because ZNBC operated under the impression that the information from the LGSC was authoritative and correct, as an oversight institution. He conceded that the news item also referred to occurrences at Kalulushi and Luanshya councils.



3.28 In **cross-examination by the 2<sup>nd</sup> defendant**, DW1 repeated that Mr. Mumba's speech contained information on the Kalulushi and Luanshya councils.

3.29 In further **cross-examination by the 3<sup>rd</sup> defendant**, DW1 replied that the story of PW1's suspension was broadcast during the ZNBC 13.15 and 19.00 hours news.

3.30 In **re-examination**, DW1 responded that the ZNBC reporter was accurately and truthfully covered the LGSC press statement and there was no need to verify the information. The factual contents were that the Chongwe Municipal Council senior management officers had all been suspended. Thus, ZNBC had an obligation to inform the nation about the development.

3.33 **2<sup>nd</sup> defendant's case**

3.34 The 2<sup>nd</sup> defendant's first witness was **Peter Mutale (DW2)** who told the Court that he was responsible for processing appeals and disciplinary cases at the LGSZ. He admitted that the LGSZ issued a statement about PW1's suspension and was aware of its contents, that PW1 had been suspended on 18<sup>th</sup> January 2018 for abuse of office and dishonest conduct. DW2 averred that PW1 commuted 8 days in excess of his 22 leave days at the council. Further, he

attended a SOLACE meeting in Ndola between the dates 18<sup>th</sup> - 30<sup>th</sup> November 2018 for a day but paid himself subsistence allowance for five days.

3.33 On 11<sup>th</sup> January 2018 an investigative team set up by the LSGC travelled to Chongwe Municipal Council and prepared a report which was in the 2<sup>nd</sup> defendant's bundle of documents and stated the financial irregularities at the council. DW2 testified that PW1 was implicated and at a press conference held on 18<sup>th</sup> January 2018 by the Chairperson of the LGSC, the nation was informed of the suspension of the principal officers at Chongwe Municipal Council. They irregularly paid themselves social holiday allowance which was abolished on 13<sup>th</sup> August 2014 by a Ministry of Local Government circular. The LGSC Chairperson alleged that the affected officers disguised the social holiday allowance as a salary advance and commutation of leave days when they had insufficient days. According to DW2, PW1 who was aware of the directive decided to defy it by paying out the allowance.

3.34 It was DW2's further evidence that the Chongwe Municipal Council management in collusion with PW1 held a meeting on 3<sup>rd</sup> October 2017 where management decided to pay itself social holiday allowance. The resolution was not tabled to the full council and this

provoked the allegation of abuse. DW2 averred that PW1 was subsequently charged and suspended from office on 18<sup>th</sup> January 2018. He denied that Mr. Musonda's press statement was defamatory and against PW1. All it said was that the latter had been charged for dishonest conduct and abuse of office contrary to the Local Government Rules.

3.35 In **cross-examination by the plaintiff**, DW2 responded that PW1 was employed by the LGSC in 2010. He accrued leave days from various councils namely Chinsali Municipal Council, Lusaka City Council, Livingstone City Council and Mongu Municipal Council although he was not aware of the details. He asserted that there was a circular proscribing the transfer of leave days between councils even though the LGSC owned PW1 money for leave days accrued in service. DW2 admitted that he was a member of the investigative and disciplinary committees in PW1's case. He did not make a personal recommendation against PW1.

3.36 DW2 stated that a voucher was not prepared for the social holiday allowance. However, PW1 received ZMW 15,000 for the commuted excess leave days and a salary advance according to his application forms. He did not know if PW1 paid the salary advance but asserted that PW1's commutation of 30 leave days was in excess of his

entitlement of 22 days, at Chongwe Municipal Council. DW2 was not aware if the Council had sufficient funds to support the payments. He insisted that the LGSZ acted professionally when it dismissed PW1 from employment after receiving a complaint from Mr. Chumbwe, which was thoroughly investigated. DW2 averred that PW1's defence was that he had a bad relationship with the Mayor. However, he was not dismissed from work because of his attitude.

3.37 In **cross-examination by the 1<sup>st</sup> defendant**, DW2 testified that an officer could only claim leave days accrued at a particular council. However, PW1 did not follow procedure when he authorized the payment of leave days. He admitted that the media carried a story on PW1's suspension averring that the broadcast to public was necessary because it concerned the services at the council which had been disrupted.

3.38 In **cross-examination by the 3<sup>rd</sup> defendant**, DW2 replied that councils were government grant aided institutions. Each council had a payroll and employees were paid by such council. The councils where PW1 accumulated leave days were responsible for paying his benefit. He explained to the Court that the procedure on commutation of leave days begun with the head of department's approval, followed by an assessment by the department of human

resources and administration. Thereafter, the Town Clerk would give approval and the department of finance would prepare the payment. DW2 averred that a person could only qualify for commutation of leave days if he/she had sufficient days and a salary advance differed from commutation of leave days. He maintained that PW1 was found guilty of dishonest conduct and abuse of office. He was dismissed from employment on 18<sup>th</sup> January 2018.

3.39 In **re-examination**, DW2 averred that Chongwe Municipal Council management paid itself social holiday allowance after the resolution of 3<sup>rd</sup> October 2018. They disguised the allowance as salary advance and commutation of leave days. At the disciplinary hearing PW1 admitted that he signed blank forms and did not how the initial ones were misplaced.

3.40 The next witness was **Grace Nampoko Kanyanta** who testified as **DW3**. She was the erstwhile acting Director HRA at Chongwe Municipal Council. She told the Court that she was in charge of processing conditions of service and she travelled with Mr. Zulu, Director Housing and Social Services to Luanshya Municipal Council at PW1's directive to inquire about the payment of social holiday allowance. She averred that they had meetings with the Town Clerks for Luanshya, Kalulushi, Ndola and the Council Secretary for Masaiti

and learnt that Luanshya and Kalulushi councils still paid social holiday allowance, while Masaiti and Ndola had abolished it. DW3 stated that they reported their findings to PW1 and he insisted that the officers at Chongwe Municipal Council were entitled to social holiday allowance under a statutory instrument no. 115 of 1996 and the terms and conditions of the Local Government Service 1996.

3.41 DW3 went on to testify that on 3<sup>rd</sup> October 2017, senior management (PW1, Director Finance, Director Engineering Mr. Peter Banda, Director Planning Ms. Misozi Banda, Director Infrastructure, Director Health and herself) met to discuss the social holiday allowance and others. Afterwards, they resolved to pay the Town Clerk ZMW 15,000 based on his experience from previous work stations and the directors would receive ZMW 13,000. For the other cadre of staff, such as auditors, accountants etc., PW1 directed the Director Finance to determine their entitlement. The minutes were not availed to the council and a further meeting was held by the directors on 12<sup>th</sup> December 2017 at the Director Housing and Social Services office, where the payments were discussed.

3.42 According to the witness, PW1 directed that social holiday allowance would be paid as commutation of leave days. DW3 told him that some directors had insufficient leave days but told her that the leave

days would be deducted in the future. Instead of referring the matter to the Council's Finance and Human Resources General Purposes Committee and thereafter the full Council, PW1 directed DW3 to collect the application forms for the other directors. They followed the instructions because PW1 was their supervisor. Later PW1 pressured DW3 into filling the sections on human resource so that he could sign them. She declined because his motive was not good and hid the forms. However, payments were processed without her involvement.

3.43 DW3 testified that she earned 4 leave days per month while PW1 earned 4.5 days. Further, an applicant could only commute a total of 90 days and where an officer required more days, the Town Clerk and Finance Committee were required to approve the application. According to DW3 the leave forms in this case were not genuine because they were used to disguise the social holiday allowance payment. It was DW3's evidence that under normal circumstances, the Town Clerk would approve the leave and send back the forms to her office for processing. Thereafter, they would be returned to the Town Clerk for his signature. In this case, the applicants irregularly filled in leave forms without a calculation of their entitlement and PW1 approved the leave forms without the input of the DHR.

- 3.44 DW3 went on to testify that she reported the matter to the Mayor because she feared for her job. When PW1 approached her, she concocted a story that she misplaced the leave forms. Notwithstanding, cheques were irregularly cut and paid out to the beneficiaries including herself. The group accountant deposited DW3's into her bank account. Afterwards, the Mayor called senior management officers to his parlour where he expressed his dismay about the payment. Although some directors apologized, they all received charge letters.
- 3.45 DW3 appeared before a disciplinary hearing and was suspended for 8 months for dishonest conduct and incompetency. On the other hand, PW1 was charged by the LGSC for obtaining ZMW 4,000 without attending a SOLACE meeting in full, dishonest conduct and abuse of office.
- 3.46 In **cross-examination by the plaintiff**, DW3 testified that the PW1 approved the SOLACE payment but did not attend the meeting in full. She was not aware that the Mayor asked PW1 to return to Chongwe before the meeting begun. It was DW3's evidence that PW1 instructed the officers to backdate the leave forms filled on 12<sup>th</sup> December 2017. She was demoted from her acting position of DHR after she was reinstated. DW3 averred that she only had 20 leave



days but was asked to commute extra days and the balance was paid as a salary advance. She added that the Council recovered its money and it did not suffer loss. After the meeting with the Mayor, she attended two disciplinary meetings, the first in January 2018 for the charge of dishonest conduct and in June 2018 for incompetency.

- 3.47 In **cross-examination by the 1<sup>st</sup> defendant**, DW3 responded that the computation of leave days was altered and it was wrong for officers to commute days they were not entitled to.
- 3.48 In **cross-examination by the 3<sup>rd</sup> defendant**, DW3 averred that the payments for social holiday allowance were discussed and agreed at the October management meeting. She went on to state that the Town Clerk was the controlling officer of the Council, while the Mayor was the political head. According to DW3, the Mayor told her to keep the forms so that he could consult the LGSC. The first recovery on her salary was made at the month end of January 2018. The payment vouchers were manipulated before the LGSC carried out its investigation and after her meeting with the Mayor.
- 3.49 In **re-examination**, DW3 replied that PW1 approved the payments for the SOLACE meeting. DW3 hid the forms from PW1 so that

payments would not be processed. She did not intend to commute leave days that she was not entitled to.

3.50 The next witness was **Eunice Mapala (DW4)** former Chief Accountant at Chongwe Municipal Council. She averred that on 12<sup>th</sup> December 2017, the group accountant gave her an application form for commutation of leave days which had already been signed by PW1. She took the group accountant to task but was told that the Director of Finance instructed him to give her the form. She signed and returned the form to the group accountant. Her evidence was no different on how the leave forms had not been processed by the DHR. She however, went on to explain the processes of payments at the council which begun with a payment voucher prepared by the accounts department. It would then be verified by the audit section and later taken to the Director of Finance for approval. Thereafter, the Town Clerk would authorize payment. Cheques would be cut, signed and given to the recipients.

3.51 DW4 averred that her form was sent to human resource department on 12<sup>th</sup> December 2017. The next day, her account was credited with ZMW 8,000 as payment for social holiday allowance, although the documents showed that she received ZMW 7,616.64. On 21<sup>st</sup> December 2017, the Director of Finance informed her of a meeting at

the Mayor's parlour. He had been informed that officers in management had commuted leave days which they were not entitled to. Among these were herself, Directors Finance, and Human Resource and Administration and Planning, Group Accountant, Internal Auditor and Council Advocate.

3.52 The Director Finance asked her to contain the situation but she could not locate the payment vouchers. She then asked the affected officers to fill in forms for actual leave days accrued and the excess amount would be paid as salary advances. DW4's evidence on the quantum of payments and how a salary advance differed from commutation of leave days in the coding system was no different from what the Court had heard. DW4 further testified that after the LGSC was informed of the situation, it set investigators to the Council. All the affected officers were suspended and she was later posted to Chingola Municipal Council but demoted to rank of group accountant.

3.53 When **cross-examined by the plaintiff**, DW4 testified that she worked with the plaintiff for two years and six months and did not know him as a fraudster. However, he did not follow financial regulations when he approved the payments because social holiday allowance was abolished by the Ministry of Local Government

circular. She was not aware that DW3 hid the leave forms but had only accumulated 18.5 leave days. She received payment for 27 days and the balance was paid as a salary advance. The payment vouchers were backdated to 11<sup>th</sup> December 2017 and the Director of Finance asked her to adjust the payments. DW4 stated that the salary advances were recovered from January 2018. The payment of subsistence allowance for SOLACE meeting was not irregular. DW4 averred that she never returned to Chongwe Municipal Council and was happy to be in Chingola.

- 3.54 In **cross-examination by the 1<sup>st</sup> defendant**, DW4 averred that the irregular payments were made with PW1's knowledge and approval.
- 3.55 In **cross-examination by the 3<sup>rd</sup> defendant**, DW4 replied that the money paid as commutation of leave days was agreed at the senior management meeting. PW1 commuted 30 leave days when he had 22 and was to be paid ZMW 15,072.63. It was however, adjusted to ZMW 10,546.75 and the excess of ZMW 4,300.00 was disguised as a salary advance. She did not know if PW1's salary advance was recovered.
- 3.56 In **re-examination**, DW4 responded that she filled in leave for 27 days to cover the amount she was paid. She was charged with

dishonest conduct for receiving a payment on false account. She also stated that the money paid to the affected officers matched what was approved at the management meeting.

3.57 **3<sup>rd</sup> defendant's case**

3.58 The 3<sup>rd</sup> defendant testified as **DW5**. He told the Court that he was elected Mayor of Chongwe Municipal Council in August 2016 and his principal duties were to superintend policy matters, preside over council meetings and to supervise the Town Clerk. DW5 went on to testify that he did not attend the LGSC meeting of 18<sup>th</sup> January 2018 but was apprised of the outcome by a ZNBC reporter who sought his reaction. According to DW5, he supported the action of the LGSC because the public had lost confidence in the Council. He also stated that a reporter from the Daily Nation called him over the LGSC meeting and he reaffirmed his support of its decision because a number of councils in the country were suffering from the abuse of authority and dishonest behaviour by their town clerks and directors.

3.59 DW5 admitted that the Daily Nation newspaper edition of Wednesday 24<sup>th</sup> 2018, carried an article which was attributed to him on the suspensions of senior management at Chongwe Municipal Council. However, the plaintiff's amended statement of claim at paragraph 10

was misleading because it departed from the content of the news item. DW5 denied that he referred to an officer or individual in his statements but gave a general statement about the conduct of the Chongwe Municipal Council officers as a member of Local Government Association of Zambia (LGAZ). Altogether 12 officers at the council had been suspended. Three officers were dismissed while the other nine were reinstated and transferred to other districts with some demoted.

3.60 DW5 maintained that there was nothing wrong with his statements because the council was a public institution and accountable to the public. He added that Zambezi, Kalulushi and Livingstone councils had also been subject of abuse of resources.

3.61 In **cross-examination by the plaintiff**, DW5 respondent that he did not listen to ZNBC news on 18<sup>th</sup> January 2018 but maintained his support for the suspensions because they were meant to restore confidence in the local authority. He denied that he uttered the words that there was need to weed out fraudsters masquerading as council chief executives. DW5 trusted ZNBC and his words in its statement could be interpreted to mean dishonest character. He averred that he only worked with PW1 for four months and could not state whether he was a man of integrity. DW5 conceded that when he reported the

officers to the LGSC, he did not consult the full council because other councilors unlike him were not full time employees. DW5 admitted that he received advice from DW3 that the management payments were illegal.

3.62 DW5 accused PW1 of undermining his office by failing to comply with his instructions. For instance, he refused to compile minutes of the meeting that discussed the irregular payments without explanation. DW5 denied that he neither had a bad working relationship, defamed him nor discussed the issue of his property rates with PW1. He also denied that he asked PW1 to abandon the SOLACE meeting in Ndola for another one in Council with some Belgians and Mr. Mwenda Silumesi who wanted to build a hotel. DW5 averred that PW1 merely registered his name at the Ndola meeting and returned to Chongwe without reporting to his office. DW5 went on to testify that Chongwe Municipal Council owed NAPSA over ZMW 10 million in pension contributions and he instructed PW1 to ask the Galaun management to consider if it could sell land to NAPSA in a debt swap arrangement.

3.63 DW5 stated that management used the money raised from the quarantine on buying vehicles and repairing a grader instead of offering services to the public. DW5 averred that the words *fraudster masquerading as a CEO* were not defamatory depending on the

circumstances. After he reported the irregularities to LGSC, he was not aware how the matter progressed, but the leave days were deducted in full from the affected officers. He also stated that the affected officers disguised the social holiday allowance as commutation of leave days and salary advance.

3.64 In **cross-examination by the 1<sup>st</sup> defendant**, DW5 averred that the decision to pay commutation of leave days and salary advances in the face of limited resources amounted to abuse of office. Some junior officers who had earlier applied for salary advances or funeral grants were not paid their money, when their requests were earlier in time. DW5 stated that his comments to the ZNBC reporter concerned a matter of public interest and could not be considered to be defamatory of PW1.

3.65 In further, **cross-examination by the 2<sup>nd</sup> defendant**, DW5 testified that PW1 was at times insubordinate towards him. After DW3 was told of the payments he called PW1, the Chairman of Finance and the local union to a meeting. The others sat in as witnesses while he addressed PW1. According to the witness, PW1's action amounted to money laundering because after he summoned the affected officers, they begun to falsify and backdate the documents. DW5



averred that even though the Council recovered its money, it did not change the fact that the officers sought to swindle it.

3.66 In **re-examination**, DW5 denied that he uttered some of the words attributed to him in the ZNBC report. He admitted that he uttered the words dishonest and abuse of office in reference to the management group because the officers irregularly paid themselves money. He first received the news of the officers abuse from the chairperson of the union.

3.67 The last witness was **Samuel Mumpa (DW6)** the Director Human Resources and Administration at Chongwe Municipal Council. He testified that in January 2018, he was transferred from Chipata to Chongwe after the entire management had been suspended for abuse of authority and dishonest conduct. Altogether, twelve officers were suspended that is PW1, directors, officers from accounts, human resource and the fire department. Mr. Chumbwe issued a statement in the media on the events at the council and assured the public that it would continue to offer services. Eventually, PW1, Director of Finance and Internal Auditor were dismissed and only PW1 sued the defendants.

3.68 In **cross-examination by the plaintiff**, DW6 replied that the commutation of leave days and salary advances were a condition of service for council employees and the conditions differed in substance. Payments depended on the availability of funds. However, in this case, the social holiday allowance was converted into commutation of leave days and salary advance contrary to financial regulations.

3.69 The witness was not **cross-examined** by the **1<sup>st</sup> defendant**.

3.70 In **cross-examination by the 2<sup>nd</sup> defendant**, DW6 averred that an officer was only authorized to commute leave days that he/she had earned. Further, the social holiday allowance was abolished by a circular issued by the Permanent Secretary Ministry of Local Government.

3.71 The witness was not **re-examined**.

#### 4. **Submissions**

4.1 After the close of trial, learned counsel for the parties filed written submissions into Court for which I am grateful.

#### 4.2 **Plaintiff**

4.3 In the case of the plaintiff, submissions were filed into Court on 31<sup>st</sup> October 2019 where his learned counsels led by Mr. M. J Katolo submitted that the plaintiff had proved his case of defamation against the defendants. He averred that the words complained of in their natural and ordinary meant the plaintiff was unreliable and unfit to be trusted with public office. Further, that he was a common criminal, fraudster and an abuser of public authority. Counsel called in aid the case of **Parmiter v Coupland**<sup>1</sup> where Lord Wensleydale stated of libel that:

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

4.4 Counsel further cited the case of **Rodger Chitengi Sakuluka v Sassassali Nungu and 4 others**<sup>2</sup> where the Supreme Court stated that libel constituted the publication of a matter usually conveying defamatory imputation on one's character, office or vocation. Counsel next adverted to the learned authors of the **Black's Law Dictionary 9<sup>th</sup> edition**, **Gatley on Libel and Slander 9<sup>th</sup> edition** at page 17, **Salmond and Heuston on the Law of Tort 12<sup>th</sup> edition** and the case of **Albert Jefferson Mkandawire v Zambia Publishing Company Limited**<sup>3</sup>, to buttress his definition of libel and its contents.

4.5 Counsel went on to submit that three elements of libel namely; publication of false statement, reference to the plaintiff and defamation imputation had all been proved. To fortify his assertion, counsel stated that the ZNBC news item about the plaintiff who was the Town Clerk of Chongwe Municipal Council at the material time referred to him in defamatory language. The statement was communicated to the public on ZNBC television and published by the Daily Nation newspaper and other social media platforms. Thereafter, the plaintiff received several calls from some of his family members and friends who were dismayed by the report.

4.6 Counsel also contended that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' statements against the plaintiff were defamatory and called in aid the learned authors of **Winfield and Jolowicz on Tort 18<sup>th</sup> Edition** at paragraph 12-3 who say of a defamatory statement that:

**"...it reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him."**

Counsel also referred the Court to the case of **Tolley v Fry**<sup>4</sup> where it was stated that:

**"Words are not defamatory, however, much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of his reputation in the eyes of right thinking men generally. To write or say of a man something that will disparage him in the eyes of a particular section of the community is not actionable within the large defamation."**

Counsel went on to submit that the plaintiff who was a legal practitioner of 14 years and had served as town clerk in a number of councils in the country without incidence, proved that the accusations against him were defamatory. Further, he was a former seminarian and devout Catholic who dutifully practiced his faith and had never been accused of abuse of authority or dishonest conduct. Counsel argued that the allegation against the plaintiff commuted more leave days that he was not entitled to was defamatory.

4.7 He further submitted that the plaintiff's evidence showed that he never received social holiday allowance. Thus, the defendants statements were malicious and calculated to portray the plaintiff as a dishonest person when he was entitled to salary advances under clause 116 of the 1996 Local Government conditions of service; and had over 180 leave days in service of which he commuted 30 days. Further, the statements were also calculated to lower the plaintiff's estimation in the eyes of the right thinking members of society.

4.8 Counsel submitted against the 3<sup>rd</sup> defendant, that his words on the plaintiff's suspension that is to weed out fraudsters from the council was defamatory. The plaintiff was consequently portrayed as a criminal who had stolen council funds when it was not the case.

Against the 1<sup>st</sup> defendant, counsel averred that it exaggerated the plaintiff's suspension by publishing statements which were not uttered at the press briefing of the 2<sup>nd</sup> defendant. In addition, that news item against the plaintiff was not balanced as required by the law. He cited the learned authors of **Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 28** at paragraph 623 who say that steps should be taken to gather and publish the information in order to be responsible and fair to the parties involved. He buttressed his submission by citing the case of **Times of Zambia v Simon Mwansa Kapwepwe<sup>5</sup>**, where the Supreme Court stated that:

**"Journalism is a profession calling for highest standard of integrity and responsibility. The news media have tremendous influence, particularly in a comparatively small country where competition between the media is minimal. The publication of this libel without any attempt to verify the facts, and the Defendants subsequent conduct, represents the height of irresponsibility."**

4.9 Counsel also referred the Court to section 7 of the Defamation Act on the defence of fair comment as follows:

**"In an action for libel or slander in respect of words consisting partly of allegations of facts and partly of expressions of opinions, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the word complained of as are proved."**

Counsel went on to submit that while the defence of fair comment was available to facilitate freedom of expression by allowing

individuals to comment on matters of public interest; the defence was not available to the defendants because the plaintiff did not receive social holiday allowance and had sufficient leave days. Hence, the defendant's publications against him were malicious.

4.10 He then adverted to the learned authors of **Bullen and Leak and Jacobs in Precedents of Pleadings** who state of malice 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 defamatory communication complained of is evidence of malice."**

According to counsel, the defendants' reckless actions proved that the words complained of were not true in substance or fact. He averred that the law presumes every person to be of good repute until proven otherwise. Thus, the defendants could not justify their falsehoods and in concluding, prayed to Court to grant the plaintiff the reliefs sought.

4.11 1<sup>st</sup> defendant

4.12 The written submissions of the 1<sup>st</sup> defendant were filed into Court on 15<sup>th</sup> November 2019 by its learned counsel, Ms. M. Undi. She contended that the defendant's publication was made in fair comment, good faith and without malice. Further, the publication

concerned a matter of public interest because the plaintiff was a Town Clerk. In any case, he had instituted another suit in the Industrial Relations Division under complaint no. *IRCLK/102/2018 – Levis Mumba v Attorney General* and could recover in that cause. Counsel argued that although the plaintiff proved that he was mentioned in the publication, the 1<sup>st</sup> defendant's news item merely recounted the words of the LGSC Chairperson at his briefing of 18<sup>th</sup> January 2018. The words were that the plaintiff and some directors at Chongwe Municipal Council had been suspended.

4.13 Counsel asserted that it was a fact that the Chongwe Municipal Council management staff had all been suspended. The plaintiff was charged with the offences of abuse of authority and dishonest conduct for payment of social holiday allowance and commutation of leave days beyond his entitlement. Thus, as a public figure, he was subject to scrutiny and his suspension was rightfully announced by the 1<sup>st</sup> defendant. Counsel went on to cite the case of *Gertz v Robert Welch, Inc.*<sup>6</sup> which defines a public figure as follows:

**“....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.”**

4.14 Counsel asserted that the plaintiff failed to prove that he was defamed because the press statement referred to other officers who



were facing similar charges and was not a personal attack on him.

Counsel then referred the Court to the learned authors of Bullen and

Leake and Jacob's: **Precedents of Pleadings, Volume 1, 17<sup>th</sup>**

**Edition** who at page 632 state:

**"The test of whether a statement is defamatory is objective. The authorities on the meaning of defamatory are comprehensively reviewed in Thornton v Telegraph Media Group Ltd (2010) EWHC 144 (QB); (2010) E.M.L.R. 25, in which it was held that all the authorities require, or imply that in order to be actionable, the defamatory allegation must meet a certain threshold of seriousness. Allegations about a person's conduct of his business or profession (i.e. "business libels") are unlikely to be defamatory if the allegation criticizes the claimant's standard of work, in a business or profession where different standards are acceptable. What the defendant intended his words to mean are immaterial (Slim v Daily Telegraph (1968) 2Q.B 157 at 172; Berkoff v Burchill (1996) 4 All ER 1008). The reaction of the publishee or publishes is also immaterial."**

- 4.15 On that basis Counsel argued that plaintiff's reaction to the press statement was subjective and did not meet the objective threshold of defamation. The information against him was truthful and the 3<sup>rd</sup> defendant merely expressed his opinion on established facts. Counsel averred that the ZNBC reporter tried to contact the plaintiff after the press briefing but he did not pick up the call. Thus, the facts in case of **Moving Unit Video Television (T/A Muvi TV Limited) v Francis Mwiinga Maingaila<sup>7</sup>** were distinguishable. In that case, Muvi TV Limited was found to have published defamatory material without contacting the respondent for his side of the story. In that regard, the Supreme Court held that:

“Put in the context of television broadcasting, which is what this appeal is all about, we must state that it is crucially important that there should be a free press that keeps the public informed, especially on matters of public interest. This free press should not be stifled by highly restrictive defamation laws or judicial interpretation of those laws which unduly oppresses the press and undermines dissemination of information. At the same time, the law cannot ignore the fact that the broadcasting media is an extremely powerful agency which is able to reach enormous numbers of members of the public instantly. If and when, such media publishes defamatory material, the end result is devastatingly harmful to the subject’s reputation. It could irreparably ruin a good name built over years....

For now, suffice it to note that in the present case, not only did the appellant fail to get the respondent’s side of the story; it also chose not to disclose the result of the medical examination, or at least to state that such examination had been done but the results were yet unknown to the appellant. This in itself raises serious questions about the motive behind the appellant’s broadcast. Our considered view is that the broadcast was most probably malicious.”

4.16 In concluding counsel reiterated that the 1<sup>st</sup> defendant merely conveyed the LGSC Chairperson’s speech on the suspensions at Chongwe Municipal Council. The public had a right to receive the information and she prayed to Court to dismiss the plaintiff’s case with costs.

4.17 **2<sup>nd</sup> defendant**

4.18 Ms. J.M. Mazulanyika learned counsel for the 2<sup>nd</sup> defendant filed written submissions into Court on 18<sup>th</sup> November 2019. She averred that the plaintiff paid himself social holiday allowance under the pretext of commutation of leave days and salary advance. He also attended the SOLACE meeting in Ndola for a day and yet paid himself subsistence allowance for five days. Counsel also averred

that the plaintiff had only accrued 22 leave days at Chongwe Municipal Council as opposed to the 30 days he commuted. Thus, he offended the Local Government conditions of service. In any case, the LGSC's press statement of 18<sup>th</sup> January 2018, about the plaintiff's misconduct was made after the malpractices of management at Chongwe Municipal Council had been thoroughly investigated.

4.19 She added that the plaintiff had no right to authorize the payment of leave days accrued at different council stations given that all councils were body corporates and responsible for their liabilities according to section 6 of the Local Government Act no. 2 of 2019, which repealed the old act, Chapter 281 and had similar provision. According to counsel, Chongwe Municipal Council was not responsible for paying the plaintiff's other accrued leave days. She concluded with a prayer to Court urging it to dismiss the plaintiff's case with costs.

4.20 **3<sup>rd</sup> defendant**

4.21 The 3<sup>rd</sup> defendant's written submissions were filed into Court on 18<sup>th</sup> November 2019. Leading the team, learned State counsel Mr. C. Banda and Mr. D. Kasote stated that the 3<sup>rd</sup> defendant never published any defamatory statement against the plaintiff. He merely

commented about the situation at Chongwe Municipal Council after he received inquiries from a reporter at Daily Nation newspaper and ZNBC. His comments were published as news items on 18<sup>th</sup> and 24<sup>th</sup> January 2018 respectively. Counsel averred that the 3<sup>rd</sup> defendant's statement was made in good faith and without malice. What was portrayed in the plaintiff's statement of claim differed from the substance of the articles produced in Court.

- 4.22 Relying on the case of **Bevin Ndovi v Post Newspaper Limited and Another**<sup>8</sup> Counsel argued that the 3<sup>rd</sup> defendant's statement met the test of fair comment because the matter involved public interest. However, the plaintiff introduced words that were never uttered by the 3<sup>rd</sup> defendant when he pleaded that "Mr. Chumbwe said *there is need to weed out fraudsters masquerading as council chief executive officers*".

Counsel then cited the case of **Albert Jefferson Mkandawire**<sup>3</sup> (**supra**) to illustrate that the defence of fair comment was available to the 3<sup>rd</sup> defendant because the words complained were fair comment, based on an accurate report of a statement of facts and concerned public interest. In concluding, counsel prayed to Court to dismiss the plaintiff's case with costs.

5. **Determination**

- 5.1 I have considered the pleadings, evidence adduced, submissions of the parties and the authorities cited therein. It is indisputable that the plaintiff served as town clerk for Chongwe Municipal Council from September 2017 till 7<sup>th</sup> March 2018. On 11<sup>th</sup> January 2018 the LSGC appointed an investigative team *“to establish facts about the conduct of senior management staff at Chongwe Municipal Council regarding illegal payments; and to ascertain if there was mismanagement of financial resources by senior management staff at the Council.”*
- 5.2 On 18<sup>th</sup> January 2018 the plaintiff was suspended and charged with the offences of abuse of authority and dishonest conduct under the 1996 conditions of service of local government officers in division I, II and III by the Local Government Service Commission (LGSC) vide minute LGSC/CHO/1. It was written by the secretary of the LSGC, Mr. Lazarous Mulenda. On the same day, the Chairperson of the LGSC (represented by the 2<sup>nd</sup> defendant) held a press briefing at the New Government Complex in Lusaka where he announced the plaintiff's suspension and other directors at Chomgwe Municipal Council. Later in the day, ZNBC (1<sup>st</sup> defendant) carried the news item on the suspensions during its 13.00 and 19.00 hours news.

5.3 In addition, the Daily Nation newspaper (which is not party to these proceedings) published articles on the plaintiff's suspension which were attributed to the LGSC and the Mayor of Chongwe Municipal Council, Mr. Geoffrey Chumbwe (the 3<sup>rd</sup> defendant). The plaintiff was summoned to the LSGC disciplinary committee meeting of 25<sup>th</sup> February 2018 and after processing his case, it recommended his dismissal. He was relieved of his position on 7<sup>th</sup> March 2018 under minute LSGC/080 written by Mr. Mulenda. Arising from the facts, the issue for determination **is whether the articles published by the defendants were defamatory and ruined the Plaintiff's reputation?**

5.4 The **plaintiff** contended that the defendants defamed him through their statements, which were also malicious. He was humiliated by the Chairperson of the LGSC at the press briefing of 18<sup>th</sup> January 2018. Further, the 1<sup>st</sup> and 3<sup>rd</sup> defendants sensationalized his suspension without his knowledge and portrayed him as a thief, fraudster and money launderer, when he had an impeccable 10 years service record in the local government. In his private life, he was a devout catholic who served on a number of charitable organisations and had no blemishes. The plaintiff contended that when the libelous statements were published, he was not given opportunity to present

his side of the story to the 1<sup>st</sup> defendant. Thus, he had no way of responding to the allegations against him. He also forcefully argued that he did not receive social holiday allowance disguised as a salary advance and commutation of leave days. If anything, the salary advance and leave days. If anything the salary advance and commutation of leave days paid at Chongwe Municipal Council were part of his conditions of service under clause 116 of the 1996 Local Government conditions of service.

5.5 The plaintiff averred that he had 108 leave days from his 10 years' service and only commuted 30. All in all, he insisted that the defendants' statements ruined him because whenever he applied for employment, he was questioned on the allegations. In addition, he had been generally shunned by members of the public and lost respect.

5.6 In response, the 1<sup>st</sup> **defendant** conceded that it aired the LSGC Chairperson's press briefing of 18<sup>th</sup> January 2018 during its prime time news on television and radio. It however, averred that its reporter tried to contact the plaintiff but he did not answer his mobile phone. It denied that its publication on the plaintiff was defamatory because it merely conveyed a summary of the LSGC Chairperson's speech. In its view, the statement was fair comment, made in good

faith and without malice on a matter that concerned the plaintiff as Town Clerk. The 1<sup>st</sup> defendant argued that it was a fact that the management staff at the council had all been suspended. Further, the plaintiff was charged with the offences of abuse of authority and dishonest conduct for receiving social holiday allowance and commutation of leave days beyond his entitlement.

- 5.7 The 2<sup>nd</sup> defendant admitted that the Chairperson of the LGSC issued a statement about the plaintiff's suspension on 18<sup>th</sup> January 2018. Further, he had been charged with the offences of abuse of office and dishonest conduct. The plaintiff was alleged to have irregularly commuted 8 days in excess of his 22 leave days accrued at Chongwe Municipal Council. In addition, the plaintiff attended a SOLACE meeting in Ndola sometime in November 2018 and paid himself 5 days' subsistence allowance. However, he only attended the meeting for a day and did not account for the resources. The defendant stated that an investigative team was set up by the LSGC and it travelled to Chongwe Municipal Council on 11<sup>th</sup> January 2018. It prepared a report which showed that there were financial irregularities at the Council and some payments were questionable. Accordingly, the plaintiff was suspended and charged with abuse of office and dishonest conduct. At the same time, a press briefing was



held on 18<sup>th</sup> January 2018 by the Chairperson of the LSGC to inform the nation.

5.8 The 2<sup>nd</sup> defendant argued that since it was a fact that the principal management officers at Chongwe Municipal Council had all been suspended for irregularly paying themselves social holiday allowance, which was abolished on 13<sup>th</sup> August 2014, there was nothing wrong with the statement. It also argued that the allowance which was disguised as a salary advance and commutation of leave days was irregular.

5.9 The 3<sup>rd</sup> **defendant** contended that he publicly expressed support for the LSGC's decision because the public had lost confidence in Chongwe Municipal Council. He alleged that his interviews with the ZNBC and Daily Nation newspaper reporters were made in good faith and without malice because the facts about the allegation had been investigated by the LSGC. He asserted that management staff at Chongwe Municipal Council paid themselves social holiday allowance when it had been abolished. Further, they disguised the payment as salary advances and commutation of leave days when they had inadequate days. He argued that there was impropriety in the manner that the allowances to senior management had been prioritised over junior officers who earlier applied for various payments

but were not considered. Additionally, the limited resources of the council were diverted from needy service delivery areas without justification.

5.10 The 3<sup>rd</sup> defendant also argued that he supported of the decision of the LGSC because a number of councils in the country had suffered from the abuse of authority and dishonest behaviour by their managements. His comments did not refer to the plaintiff but staff at Chongwe Municipal Council. Notwithstanding, the plaintiff abused Council money when he absconded from the SOLACE meeting in Ndola and it mattered less that his salary advance had been recovered because it had deprived the council of resources. The defendant denied that he uttered the words dishonest and abuse of office only in reference to plaintiff, but rather to describe the dilemma of the management staff of the Council.

5.11 Having set forth the rival positions, I will begin my decision by defining the word defamation. In this regard, I am ably guided by the learned author of **Black's Law Dictionary 9<sup>th</sup> edition** who states that:

**"Defamation is the act of harming the reputation of another by making a false statement to a third person."**

5.12 In addition, one of the leading authorities cited as definitive on the law of defamation is the learned author **Gatley on Libel and Slander 9<sup>th</sup> edition** who at page 117, adopted what was said in the case of **Thomas v CBc** as follows:-

"The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right-thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory."

5.13 It is also worth stating that the learned authors of **Halsbury's Laws of England 4<sup>th</sup> Edition Volume 28** at page 8 equally say:-

"A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."

In the present case, the tort this is the subject of this dispute is libel and defined in the **Black's Law Dictionary (supra)** as follows:

"The act of making such a statement; publication of defamatory matter by written or printed words, by its embodied in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words."

5.14 The learned author of **Gatley on Libel and Slander (supra)** breathes life into the tort of libel when he expresses that a statement is defamatory of the person of who it is published if it tends to lower him in the estimation of right thinking members of the society generally or it exposes him to public hatred, contempt or ridicule or it causes him to be shunned or avoided. He further elucidates that for the tort of defamation by way of libel to succeed the following elements must be proved by the claimant:

- i. The libel must be published by the defendant.
- ii. The published words must refer to the Plaintiff i.e. identify him.
- iii. The statement as published must be false and defamatory of the plaintiff.
- iv. It must be published i.e. communicated to at least one person other than the claimant.
- v. That the publication must not only be malicious in the way of being spiteful or ill willed but there must be evidence of lack of justifiable cause to publish the words complained of. In addition, there must be evidence to show that the defendant knew the words complained of were false or did not care to verify them.
- vi. The words must be defamatory and must tend to lower the Plaintiff's reputation in their estimation of right minded persons in the society or they must tend to cause the Plaintiff to be shunned or avoided by other person.

- 5.15 The learned author on **Gatley on Libel and Slander (supra)** further states that abusive words are not defamatory *per se* but must be shown to have been construed by the audience as being defamatory and not simply abusive. Therefore, a plaintiff bears the burden of proving defamation from the position of a reasonable man that is to say, if that reasonable man placed in a plaintiff's position would have understood the words to be defamatory.
- 5.16 In the instant case, some of the issues framed by the plaintiff are not in dispute. For example, the defendants admit that the Chairperson of the LSGC in his press briefing of 18<sup>th</sup> January 2018, held at the Government Complex building the plaintiff and other senior management staff Chongwe Municipal District Council suspensions were announced. The 1<sup>st</sup> defendant which enjoys national coverage carried the story on its television and radio stations prime news on the same day. The 3<sup>rd</sup> defendant admitted that he commented on the plaintiff's suspension after the press conference and upon receiving an inquiry from reporters at ZNBC and Daily nation newspaper. The article in the newspaper was carried as a news item on 24<sup>th</sup> January 2018.

**council, we cannot have a criminal masquerading as a chief executive officer.”**

The plaintiff also alleged that the 1<sup>st</sup> defendant went on to publish that: **“the plaintiff had paid himself holiday social allowance, salary advance and leave commutation in breach of the Local Government Circular.”**

In juxtaposition, the ZNBC news item produced in the 1<sup>st</sup> defendant’s article states:

**“And Chongwe Mayor GEOFFREY CHUMBWE said the suspension of management at Chongwe Council will help restore public confidence in the local authority”.**

In paragraph 10 of the statement of claim, the plaintiff pleaded that the 3<sup>rd</sup> defendant uttered these words:

**“I totally support the suspensions because abuse of authority and resources borders on money laundering. This must not be tolerated in any council.”**

These words were captured verbatim in the Daily Nation newspaper of 24<sup>th</sup> January 2018. However, the allegation in the pleading went on to say:

**“.....The suspension of management at Chongwe Municipal Council should serve as a lesson to those who want to use the council to enrich themselves at the expense of service provision. Now confidence has returned to the council with the suspension of this person who was masquerading as a chief executive when he is a fraudster.”**

- 5.18 I have gone to great lengths to reproduce what was stated in the amended statement of claim in parenthesis to the news articles. What is immediately striking is the glaring variance between what was said in the news articles produced in evidence of the parties and the averments in the plaintiff's amended statement of claim.
- 5.19 Applying the first ingredient to the facts of this case, I find that the defendants statements referred to the suspensions of senior management staff at Chongwe Municipal Council, including the plaintiff. I will later in the judgment address the issues, whether the defendants' publications were libelous or not.
- 5.20 Moving on to the second ingredient, the question is *whether the published words referred to the plaintiff?* As I have stated above, the plaintiff was mentioned in the news articles as one of the officers of

the council who had been suspended. I also find that the plaintiff was referred by title and not singled out by name.

5.21 On the third ingredient, that is, *whether the published statements by the defendants were false and defamatory?* the plaintiff contended that he was defamed. As a result, his distinguished service in local government and standing as a member of the Catholic faith and legal profession were brought into disrepute. In response, the 2<sup>nd</sup> defendant argued that the investigations carried out by the LGSC on 11<sup>th</sup> January 2018 were credible. The suspensions were effected after it was established that the senior management staff at Chongwe Municipal Council irregularly paid themselves money they were not entitled to. According to the 2<sup>nd</sup> defendant, the plaintiff commuted excess leave days, which he had not accrued at the council and contrary to section 6 of the Local Government Act. The 2<sup>nd</sup> defendant also argued that the plaintiff paid himself five days subsistence allowance for a SOLACE meeting which he absconded after the first day. The 3<sup>rd</sup> defendant supported the allegation by asserting that he never asked the plaintiff to abandon the meeting.

5.22 After considering the rival positions, it is indisputable that the plaintiff who was Town Clerk at Chongwe Municipal Council was suspended from office and charged with the offences of abuse of office and



dishonest conduct. He received a charge/suspension letter on 18<sup>th</sup> January 2018 and appeared before a disciplinary committee on 26<sup>th</sup> February 2018. After the hearing, the plaintiff was recommended for dismissal and separated from Local Government Service on 7<sup>th</sup> March 2018.

5.23 It is also a fact that at the material time, the plaintiff had only acquired 22 leave days at Chongwe Municipal Council but had more leave days in-service with the LGSC. It is trite law that councils are established as body corporates under section 6 of the Local Government Act. They bear their own responsibilities and liabilities which are not transferable. According to the conditions of service, benefits accrued by council employees can only be claimed at respective duty stations. In this case, the plaintiff accrued 22 leave days at Chongwe Municipal Council and was therefore, only entitled to payment of those leave days. Hence, there was nothing defamatory about this fact.

5.24 After closely examining the news articles complained of, I find that the plaintiff was not referred to as a criminal element or fraudster. Instead the allegation stemmed from his amended statement of claim. His motive for the malicious drafting was not clear and one cannot help but assume that the plaintiff deliberately contrived the allegations

so as to mislead the Court and endear it to his position. This is very unfortunate and discomfoting given that the plaintiff is a lawyer who is represented by counsel. Thus, it bore on them as officers of the Court to be truthful in the manner that the plaintiff's case was pleaded in Court.

5.25 As regards the fourth ingredient, that *whether the article was published?* and communicated to a third party, the facts clearly show that the information about the suspensions of senior management officers at Chongwe Municipal Council was shared with the public through the news items. The point of departure, as I have indicated, is that the information was truthful and not malicious. Thus, I find that the words complained of by the plaintiff were incapable of lowering his reputation or estimation amongst the right members of society. Besides, other than his mere word of mouth, the plaintiff did not produce any evidence to show how he was shunned, avoided or rejected by society when he tried to solicit employment.

5.26 I am mindful that the defendants all pleaded the defence of fair comment, averring that the articles attributed to them contained truthful facts about the plaintiff and other management staff who had been suspended at the council. They also pleaded that the suspensions were of public concern and they had a right to comment

on the information. Section 7 of the Defamation Act on the defence of fair comment provides:

**“In an action for libel or slander in respect of words consisting partly of allegations of facts and partly of expressions of opinions, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the word complained of as are proved.”**

Accordingly, fair comment allows third parties to express their opinions on matters of public interest. It holds that one can successfully hold the defence if there is truth in the statement and if a reasonable person could also have held the same view.

- 5.27 In the persuasive case of **Reynolds v Times Newspapers Limited**<sup>10</sup> *an action was taken out by the former Prime Minister of Ireland in respect of stories of how he had conducted himself in office. Given the political context to the story, the defendant argued that the story would automatically attract privilege and that the claimant was required to show that the defendant had acted with malice. However, Lord Nicholls in the House of Lords held that such an approach would swing the pendulum too far away from the protection of reputation, and it instead proposed a number of guidelines that a defendant should observe where it wishes to argue that a publication was responsible and in public interest.*

5.28 Those non-exhaustive guidelines, listed by **Lord Nicholls**, require the person publishing the story to consider:-

- i. The seriousness of the allegation, i.e. if the allegation is not true what will be the level of misinformation to the public and what will be the corresponding harm to the individual.
- ii. The nature of the information and the extent to which the subject-matter is a matter of public concern.
- iii. The source of the information and whether it is reliable or motivated by malice and/or avarice.
- iv. Whether suitable steps have been taken to verify the information.
- v. Whether the allegation in a story has already been the subject of an investigation which commands respect.
- vi. Whether it is important that the story be published quickly
- vii. Whether comment was sought from the claimant, or whether that was not necessary in the context of the story.
- viii. If the article or story includes the gist of the claimant's version of events.
- ix. Whether the article or story is written in such a way as to amount to statements of fact, or whether it raises questions and is suggestive of the need for further investigation.
- x. The timing of the publication.

5.29 The evidence before me shows that the allegations against the plaintiff and other senior management officers at Chongwe Municipal Council were founded by the LGSC investigation. In my opinion, the LGSC is the only organ empowered to enforce discipline and ethical standards in the country's local government service and therefore, commands respect.

5.30 As I have stated, it is not in dispute that the plaintiff was informed of the grounds of his suspension in his charge letter dated 18<sup>th</sup> January 2018. On the same day, the Chairperson of the LGSC simultaneously conveyed to the public that senior management officers at the council had been suspended. On the basis of these facts, I find that the public had a right to receive the information on the status of operations at Chongwe Municipal Council and there was no malice involved.

5.31 Whether suitable steps had been taken to verify the information, the evidence of the 1<sup>st</sup> defendant's witness that the plaintiff did not answer his phone was not gainsaid. Instead, the plaintiff in the cross-examination of DW1 seemed to suggest that he had an MTN number. It is not clear if the plaintiff meant to insinuate that his other contact number was unreliable and as a result, he was not contacted. The fact that he did not dismiss DW1's evidence weighs against him. Consequently, I find that the defendants have successfully raised the defence of fair comment.

5.32 Accordingly, I hold that the plaintiff has failed to prove his case against the defendants and it fails.

5.33 The 2<sup>nd</sup> defendant counterclaimed a declaration that the plaintiff's claim amounted to an abuse of Court process. Further, he was not

entitled to an apology nor damages for libel. It also contended that the plaintiff's action amounted to a multiplicity of actions. During the course of trial, the 2<sup>nd</sup> defendant never led any evidence on its counterclaim. Therefore, I will not make any analysis of it.

6. **Final Orders**

These are the final orders of this Court:

- i) The plaintiff's claim for damages for libel, mental distress, anguish, anxiety, unreserved apology, interest and costs are dismissed for lack of merit.
- ii) The 2<sup>nd</sup> defendant's counterclaim has not been proved and is dismissed.
- iii) The defendants are awarded costs to be borne by the plaintiff and taxed in default of agreement.

Dated this 25<sup>th</sup> day of March 2020.

  
M. Mapani-Kawimbe  
**HIGH COURT JUDGE**