

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

2020/HP/0216



BETWEEN:

NATIONAL PENSION SCHEME AUTHORITY

PLAINTIFF

AND

CHARLES MILUPI

1st DEFENDANT

NEWS DIGGERS MEDIA LIMITED

2nd DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 17th
DAY OF AUGUST, 2020**

For the Plaintiff : Messrs Corpus Legal Practitioners

For the 1st Defendant : in person

For the 2nd Defendant : Messrs Mwenye & Mwitwa Advocates

R U L I N G

CASES REFERRED TO:

1. *Metropolitan Saloon Omnibus Co Ltd v Hawkins 1859 4 H& N 87*
2. *South Hetton Coal Co Ltd v North Eastern News Association Ltd 1894 1 QB 133*
3. *Bryne v Deane, 1937 1 KB 818*
4. *Die Spoorhoed v South African Railways 1946 A.D 999 at 1012*
5. *New York Times Co v Sullivan (No 39) 376 US 254 (1964)*
6. *Letung v Cooper 1965 1 QB 232*
7. *Bonaventure Bweupe v The Attorney-General, and Zambia Publishing Company Limited, and Times Newspapers Zambia Limited 1984 ZR 21*

8. *William David Carlisle Wise v E.F. Harvey* 1985 ZR 179
9. *Joyce v Sengupta and another* 1993 1 ALL ER 897
10. *Derbyshire CC v Times Newspaper Limited* 1993 AC 534
11. *Spring v Guardian Assurance PLC and others* 1994 3 ALL ER 129
12. *Sata v Post Newspapers Limited and another* 1995 ZR 9
13. *Fred Mmembe, Bright Mwape v The People and Fred Mmembe Masautso Phiri Goliath Mungonge v The People* 1996 SJ
14. *Posts and Telecommunications Corporation v Modus Publications* 1998 (3) SA 1114 (ZSC) at 1123
15. *Associated Chemicals Limited v Hill and Delamain Zambia Limited and Ellis and Company (as a law firm)* SCZ No 2 of 1998
16. *Ruth Kumbi v Robinson Kaleb Zulu* SCZ No 19 of 2009
17. *Bitou Municipality and Lonwabo Ngoqo v Memory Booysen and Paul Jordan (Western Cape High Court)* Case No 1359/2010
18. *Transparency International Zambia v Chimba and another* 2010/HP/1176
19. *Michael Chilufya Sata v Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Limited, Mobi TV International Limited* 2011 Vol 1 ZR 519
20. *Isaac Lungu v Mbewe* SCZ Appeal No 114 of 2013
21. *Peter Crudus v Jonathan Calvert, Heidi Blake and Times Newspaper Ltd* (2015) EWCA Civ 171

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England, 1999 Edition*
2. *The Anti Corruption Commission Act, No 3 of 2012*
3. *Defamation Act, Chapter 68 of the Laws of Zambia*
4. *National Pension Scheme Act, Chapter 256 of the Laws of Zambia*
5. *Minister of Finance (Incorporation) Act, Chapter 349 of the Laws of Zambia*
6. *The English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia*

OTHER WORKS REFERRED TO:

1. *Clerk and Lindsell on Torts, 19th Edition, Sweet and Maxwell 2006*
2. *Equity and Trusts (2009 Sweet & Maxwell, 2nd Edition*
3. *Gatley on Libel and Slander, 6th Edition, 1967*
4. *Halsbury's Laws of England, 4th edition, 2001 Re-issue*
5. *Halsbury's Laws of England, 4th Edition, Vol 28*
6. *Oxford Advanced Learner's Dictionary, 8th Edition*

7. *Winfield and Jolowicz on Tort, 18th Edition*

This is a ruling on an application made by the 2nd defendant for an order to strike out the writ of summons and statement of claim, and to dismiss the action for not disclosing a cause of action, made pursuant to Order 18 Rule 19 of the Rules of the Supreme Court of England, 1999 edition.

The background leading to the application is that the plaintiff commenced this action on 12th February, 2020, by writ of summons claiming;

1. *Damages for libel;*
2. *Damages for malicious falsehood;*
3. *Interest on all the amounts found due as damages;*
4. *An injunction restraining the defendants, whether by themselves, their agents or otherwise from further publishing or causing to be published the said words or any similar words defamatory of the plaintiff;*
5. *Costs;*
6. *Any other relief that the court may deem fit.*

The gist of the claim, as can be seen from the statement of claim, is that the plaintiff's principal objective is to provide social security to the Zambian labour force, by deducting monthly contributions from them, and investing the contributions in viable projects in order to grow the fund that will be available for the payment of pension benefits to the plaintiff's members, when they reach retirement age.

That in furtherance of that objective, the plaintiff resolved to invest in a project named as the Twin Palm River View Park Infrastructure Development (River View Park), in the east of Lusaka. To that effect, the plaintiff invited the public to submit bids to undertake the development of the said project. The claim is further that among the bidders was Avic International Limited who bid at USD\$25.8 million, and after the plaintiff's internal procedure, as well as the law on procurement, was awarded the tender to develop River View Park.

However, between 23rd June, 2019 and 29th June, 2019, the 1st defendant issued, and the 2nd defendant caused to be published words defamatory of the plaintiff, alleging corruption and mismanagement of the member's funds by the plaintiff, in relation to the contract that was awarded to AVIC International Limited. In particular, the plaintiff claims that on 23rd June, 2019, the 2nd defendant quoting the 1st defendant published the following words;

“A National Pension Scheme Authority (NAPSA) evaluation committee for the Twin Palm- proposed River View Park Infrastructure Development Project has recommended the awarding of a construction tender to AVIC International Zambia Limited at a bid of US\$25.8 million against the construction company's willingness to do the work for US\$21.63 million.

We are eager to read a press statement where NAPSA will explain how and why they made this recommendation because as far as we gathered, the quantity surveyor engaged, advised that AVIC International's bid was

unrealistic, and would also take a longer completion period compared to other bidders.

What we know is that the NAPSA evaluation committee decided that AVIC International's bid was on the lower side to successfully run the fleet of heavy equipment proposed in their tender, and they concluded on behalf of the bidder that if they don't adjust the offer upwards, they would risk having challenges in servicing and maintaining the heavy equipment to be used in the works...

Whatever the justification for this recommendation, Zambians deserve to know how that US\$4 million will be broken down. Like Milupi is arguing, there is no way that AVIC International can forget to include VAT or contingencies in their cost estimates, only to be reminded by the evaluation committee. In the face of the public, this awarding of contract smells corruption and abuse of public funds. So NAPSA must not keep quiet and pretend like there is no scandal here. We challenge them to face the owners of that pension money and explain their grounds for this suspicious recommendation, not just urging the public to ignore the story.

This brings us to the issue that we have been talking about regarding Chinese companies and corruption. In our view, China is very willing to do clean business in Africa and Zambia in particular, but we, the citizens in positions of power, want to benefit corruptly from their businesses. Here

is a case where a Chinese company says we are ready to do this job for US\$21 million, but the institution being charged says no, that money is too little, we want to give you USD\$4 million extra. Why?

If NAPSA meant well, they would have invited all the bidders and told them that we have noticed that you have excluded VAT and contingencies in your bids, can you please include that and resubmit your documents for consideration. After that, you explain to the public, the owners of the money, why that decision was taken. That's what a transparent evaluation committee would do.

There is no other explanation why American companies, European companies don't get these government contracts, other than the fact that they are not willing to give kickbacks! It's almost impossible for a German engineering company to give kickbacks to a government official for an awarded contract. But China doesn't mind. Whatever you tell them, they do. If you advise them to double the bid price so that the other 100 percent goes into the President's pocket as kickbacks, they will do just that".

The plaintiff contends that the above words in their natural and ordinary meaning were meant, and were understood to mean, that the plaintiff corruptly awarded the tender to develop River View Park to AVIC. Further, that the words were maliciously published and were calculated to cause, and did in fact cause damage to the plaintiff's integrity, as well as its business.

Further, that the words published through the 2nd defendant's print and online platforms were libelous and to the detriment of the character and reputation of the plaintiff, whose sole mandate is to provide social security to its members. The plaintiff also contends that the words published generated various comments from members of the public, who condemned the plaintiff in a disparaging manner, thereby lowering the plaintiff in the estimation of right thinking members of society, and has affected the confidence the members of the Scheme had towards the plaintiff.

It is further contended that the defendant's publication was calculated at causing pecuniary damage to the plaintiff in respect of its business, and that its' business reputation has been seriously injured, resulting in pecuniary loss in addition to damage to the plaintiff's reputation.

On 21st February, 2020, the 2nd defendant filed a conditional memorandum of appearance, and on 25th March, 2020, filed the application subject of determination. An order for substituted service on the 1st defendant was granted on 28th February, 2020 by the Deputy Registrar, but the 1st defendant has not responded to the application.

In the affidavit in support of the application, which is deposed to by Mukosha Funga, a News Editor in the employ of the 2nd defendant, she states that the plaintiff's claims against the defendant are based on the article that was published by the 2nd defendant on 23rd June, 2019, alleging that the said article imputes that the plaintiff corruptly awarded the tender to develop River View Park to AVIC.

She further deposes that she has been advised by her advocates that the plaintiff, being a public body and performing government functions, is not entitled to bring an action for defamation. The averment is also that a body corporate cannot bring an action for defamation or malicious falsehood on allegations of corruption.

In the skeleton arguments that were filed on 25th March, 2020, the 2nd defendant states that the plaintiff is a body corporate, and is established under the ***National Pension Scheme Authority Act, Chapter 256 of the Laws of Zambia***. That it is charged with the functions of implementing government policy relating to the National Pension Scheme, (the Scheme) in accordance with the Act, and it controls and administers the Scheme.

It is argued that ***Order 18/19/2 of the Rules of the Supreme Court of England, 1999 edition*** empowers a court to amend any pleading or indorsement, even where no cause of action is disclosed, but this cannot be granted where the claim cannot be improved by amendment. As to what amounts to a cause of action, the 2nd defendant relies on the case of ***Letung v Cooper*** ⁽⁶⁾ where Lord Diplock stated that a cause of action is;

“A factual situation, the existence of which entitles one person to obtain from the court a remedy against another person”.

It is argued that this position was adopted in the case of ***William David Carlisle Wise v E.F. Harvey*** ⁽⁸⁾. Further reference is made to

Order 18 Rule 19/10 of the Rules of the Supreme Court of England which provides that;

“A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered”.

With regard to whether an elected government, a public body or indeed any other institution performing government functions may bring an action for defamation, reliance is placed on **Winfield and Jolowicz on Tort, 18th Edition** at paragraph 12-218, which states that;

“However, in English law, a government body (whether a local authority or an organ of central government cannot sue even if a statement in no way concerns its’ governing reputation”.

On the rationale for denying government bodies the right to sue for defamation, the 2nd defendant relies on the South African case of **Die Spoorhoed v South African Railways** ⁽⁴⁾, stating that it was held in that case that;

“....any subject is free to exercise his opinion upon the management of a country’s affairs, without fear of legal consequences. It would be a serious interference with the free expression of opinion if the wealth of the State derived from the State’s subjects, could be used to launch against those subjects actions for defamation because they have falsely and unfairly it may be, criticized or condemned the

management of the country..... it would be difficult to assign any limits to the Crown's right to sue for defamation once its' right in any case were recognized".

The case of ***Posts and Telecommunications Corporation v Modus Publications*** ⁽¹⁴⁾ is relied on with regard to whether a particular corporation is a government body or not, stating the said case laid down criteria which is helpful in establishing so. These are;

- a) Whether the functions of the corporation are government functions.
- b) Whether, if the body is not a statutory trading corporation, it performs government functions either at a local or national level.
- c) Whether, if the body concerned, is at least largely or effectively, a monopoly, providing what are generally regarded as essential services traditionally provided by government, it would be contrary to public policy to criticize.

The 2nd defendant argues that it is undeniable that the plaintiff is an organ of central government, and is a public body performing government functions. Further, that the plaintiff is a creation of statute, and both its governing board and Chief Executive Officer are appointed by the government through the Minister, responsible for Labour and Social Security.

The 2nd defendant also states that under Section 4 of the NAPSA Act, the plaintiff's main function is to implement government policy relating to the Scheme, in accordance with the Act, and to control and administer the Scheme. Therefore, notwithstanding that the plaintiff is

a body corporate, it is an organ of the Republic of Zambia. The argument is also that by the very nature of the plaintiff's core business, the manner in which it carries out its' functions is an important subject of public interest.

In this regard, the 2nd defendant argues that the plaintiff manages the country's largest pension scheme, and the workers and employers on behalf of workers are mandated to make contributions to the Scheme. Thus, the members, employers and the general public have a right to scrutinise, and if need be, criticise the plaintiff's decisions and actions without any fear of actions for defamation arising therefrom.

Further in the arguments, the 2nd defendant states that the plaintiff is the custodian of people's money, which is contributed with the hope that it will be used in future, when they stop working. As such, any mismanagement of these funds by the plaintiff could have adverse effects on the livelihood of the members of the Scheme.

Therefore, it is in the public interest that the plaintiff should not have the right to use any money that is contributed by the members and the employers, to sue the contributors and owners of the same money or any other member of the public for questioning or criticizing its manner of management, even where the statements would be defamatory to an ordinary person or private corporate body.

The case of ***Derbyshire CC v Times Newspaper Limited*** ⁽¹⁰⁾ is cited as a case where the court was faced with facts similar to this matter. The 2nd defendant argues that in that matter, a publication by the defendant was alleged to be defamatory, which questioned the

appropriateness of the plaintiff's investment decision involving a pension fund. That the House of Lords in that matter upheld the observations that were made in the South African case of **Die Spoorhood**, and noted that the observations may properly be regarded as no less applicable to a local authority, as to a department of central government.

The 2nd defendant states that the House of Lords in dismissing the appeal noted that since it was of the highest public importance that a democratically elected government body should be open to uninhibited public criticism, and since the threat of civil actions for defamation would place an undesirable fetter on freedom to express such criticism, it would be contrary to the public interest for institutions of central or local government to have any right at common law to maintain an action for damages for defamation.

The 2nd defendant argues that it was stressed in that matter, that it is of the highest public importance that a democratically elected government or body, or indeed any government body, should be open to uninhibited public criticism. The 2nd defendant further argues that the plaintiff in the statement of claim alleges that the alleged publication by the defendants generated various comments from members of the public, which condemned the plaintiff in a disparaging manner, and lowered the esteem of the plaintiff in the minds of right thinking members of society.

Further, that the publication also affected the confidence of the members of the Scheme towards the plaintiff, and that the plaintiff's business reputation has been seriously injured, resulting in pecuniary

loss. The 2nd defendant however contends that the plaintiff's action is incompetent, and that it does not disclose any cause of action worth trying, as far as the claim for defamation is concerned. As authority, the case of *Bitou Municipality and Lonwabo Ngoqo v Memory Booysen and Paul Jordan (Western Cape High Court)* ⁽¹⁷⁾ is relied on.

The 2nd defendant states that in that matter, JHM Traverso stated as follows;

“Even if this were so, I fail to see how this differs from the effects of persistent allegations of government corruption. Whatever the distinctions are that one may make between central and provincial and local government-it does not detract from the fact that a local authority fulfils the government functions to which reference has already been made. None of the other considerations.....can affect the underlying ratio, management of the affairs without fear of legal consequences”.

The 2nd defendant argues that by virtue of the above, the plaintiff has no legally recognized right to bring an action for defamation against anyone, in an event that the words complained of, are manifestly defamatory. Therefore, no amendment to the statement of claim would alter this position to disclose a cause of action, because the basis of the cause of action is the alleged defamatory article.

Secondly, the 2nd defendant argues, that the plaintiff alleges that the article allegedly published by the 2nd defendant meant and was

understood to mean that the plaintiff corruptly awarded the tender to develop River View Park to AVIC. However, the 2nd defendant's position is that a body corporate cannot sue for defamation or malicious falsehood on allegations of corruption. ***Oxford Advanced Learner's Dictionary, 8th Edition*** is referred to as defining corruption as;

“Dishonest or illegal behavior, especially of people in authority”.

Further reference is made to the definition of corruption in ***Section 3 of the Anti Corruption Commission Act, No 3 of 2012***, which is;

“Corruption means the soliciting, accepting, obtaining, giving, promising or offering of gratification by way of a bribe or other personal temptation or inducement, or misuse or abuse of a public office for advantage or benefit for oneself or another person and corruption shall be construed accordingly”.

The argument is that from the foregoing, in this jurisdiction, corruption cannot be committed by a legal or fictitious person, such as a body corporate, but only by natural persons. Therefore, the plaintiff being a body corporate cannot sue for defamation or malicious falsehood on allegations of corruption.

The 2nd defendant also argues on the elements of defamation, stating that in the case of ***Peter Crudus v Jonathan Calvert, Heidi Blake and Times Newspaper Ltd*** ⁽²¹⁾, the Court of Appeal in England made it clear that for there to be malicious falsehood, the words complained of must be capable of being understood against the plaintiff in a

damaging way. Further, that in the case of ***Bryne v Deane*** ⁽³⁾, it was stated that for the words to be defamatory to someone, they must be those, to which right thinking members of society would understand to be defamatory.

The argument by the 2nd defendant is that by its' nature, a corporate body cannot commit corruption, and therefore, no right thinking person would believe any words to mean that a corporate body is corrupt. That it is only the individual officers of a body corporate that may be perceived as corrupt. The case of ***Associated Chemicals Limited v Hill and Delamain Zambia Limited and Ellis and Company (as a law firm)*** ⁽¹⁵⁾ is relied on, stating that it was stated in that matter that;

"As the learned authors of Palmer's company Law (22nd Ed.) suggest in chapter 18, a company is:

".....not, like a partnership or a family, a mere collection or aggregation of individuals. In the eyes of the law it is a person distinct from its members or shareholders, a metaphysical entity or a fiction of law, with legal but no physical existence."

The 2nd defendant argues that the fictious and non-physical existence of a body corporate makes it incapable of soliciting, accepting, giving, promising or offering gratification by way of a bribe or other personal temptation or inducement, among other things, which corruption entails. That such, can only be done by natural persons, and where

such allegations are made against individual officers of a corporation, it is not for the corporation to bring an action.

Gatley on Libel and Slander, 6th Edition, 1967 at page 409 in paragraph 890 is also relied on. It states as follows;

“A corporation cannot maintain an action for libel or slander for any words which reflect not upon itself, but solely upon its’ individual officers or members”

Thus, it is the 2nd defendant’s argument that if the alleged words were defamatory, or in any way injurious, as far as the allegations of corruption are concerned, they did not affect the plaintiff, but its’ individual officers. Consequently, the plaintiff cannot feel aggrieved, and sue in the place of its’ officers, and it lacks locus standi to commence these proceedings.

The 2nd defendant also argues on whether a corporation can sue on allegations of corruption, and relies on the case of **Metropolitan Saloon Omnibus Co Ltd v Hawkins** ⁽¹⁾, where it was stated that;

“That a corporation at common law can sue in respect of libel, there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation or murder, incest, or adultery because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individual members composing it could”.

Also relied on in this regard, is the case of ***South Hetton Coal Co Ltd v North Eastern News Association Ltd*** ⁽²⁾ where Lord Esher MR stated that;

“Whether the jury are of the opinion that what has been published with regard to the plaintiff would tend in the minds of people of ordinary sense to bring the plaintiff into contempt, hatred, or ridicule or injury to his character,- the question is really the same by whomsoever the action is brought- whether by a person, a firm or a company. But though the law is the same, the application of it, is no doubt different with regard to the different kinds of plaintiffs. There are statements, which with regard to some plaintiffs, would undoubtedly constitute a libel, but which if published of other kinds of plaintiffs, would not have the same effect”.

It is submitted that while most of the authorities cited emanate from defamation cases, they cover malicious falsehood as well, as the two torts are closely related, and can be founded on the same facts. This is because in both cases, the statement complained of must be one which is capable of causing damage to a party in the eyes of right thinking members of society, and such statement must relate to something that the aggrieved person is capable of doing.

Further, that from the authorities cited, it is clear that certain statements may be damaging to natural persons but not to bodies corporate. It is stated that a person can only sue on a statement that imputes on that party, something that they are capable of doing, and

in this regard, a statement alleging corruption cannot do damage to a body corporate, though it may be damaging to the individual officers of a body corporate, because a body corporate by its' very nature cannot commit corruption.

Thus, only the officers of a body corporate can sue in defamation or malicious falsehoods in a relation to the statement alleged to have been made in this matter.

On 21st May, 2020, the plaintiff filed an affidavit in opposition, which is deposed to by Justin Mwiinga, a Senior Procurement Manager at the plaintiff. He admits therein, that the plaintiff is a body corporate as alleged by the 2nd defendant, and adds that the plaintiff's functions are as enshrined in the ***National Pension Scheme Authority Act, Chapter 256 of the Laws of Zambia.***

He further avers that the plaintiff by virtue of being a body corporate, exercises the rights of a legally established body corporate, such as entering into contracts with both natural and corporate entities, for purposes of undertaking its' day to day business. The deponent goes on to state that the plaintiff has shares in fourteen (14) Zambian companies, and has substantial investments across many sectors of the Zambian economy, such as tourism, mining, energy, agribusiness, construction and manufacturing.

Therefore, it has a corporate image and reputation, and it invests substantially to maintain that corporate image and reputation, as shown on exhibit 'JM1' to the affidavit, being the plaintiff's annual

budget. It is deposed that the plaintiff's corporate image is crucial to the success of the plaintiff's objectives and business ventures.

Further in the affidavit, the deponent states that contrary to the 2nd defendant's assertion that the plaintiff's claims are only based on the article dated 23rd June, 2019, this is not true, but rather, the claims are based on a series of articles, published between 23rd June, 2019 and 29th June, 2019, as pleaded in paragraph 8 of the statement of claim.

The deponent also deposes that the plaintiff is independent of the government, and performs all acts and decisions that any other company may by law undertake or perform. To support this position, it is averred that as shown on exhibit 'JM2', to the affidavit, being the approval of the plaintiff's expenditure, the plaintiff joined several other corporate entities in assisting the government in its efforts to contain the corona virus (covid 19) outbreak, by donating ZMW1, 000, 000.00 to the government, as part of its corporate social responsibility.

The plaintiff in the skeleton arguments and list of authorities that were filed on 21st May, 2020 refers to **Section 3 of the National Pension Scheme Authority Act, Chapter 256 of the Laws of Zambia**, which establishes it as a body corporate. The argument is that by being established as a body corporate, the plaintiff has independent legal existence at law.

Further, that this entails that the plaintiff can do anything that a person can do, and it is subject only to the law and the practical difficulties inherent in its legal personality. The plaintiff also argues

that it has a reputation that is separate and distinct from the Government of the Republic of Zambia, and it is therefore not correct to equate the plaintiff to the government merely because its main objectives fall within the general functions of the government.

On the functions of the plaintiff, **Section 4 of the NAPSA Act** is referred to, and **Section 8 of the said Act** is referred to, stating that it sets up the Scheme, with the plaintiff as trustee for the said Scheme. The argument is further that the plaintiff in line with its functions, implements, controls and administers the Scheme, and nowhere in the Act, does it state that the plaintiff is an agent or an extension of the Government.

Still on the independence of the plaintiff, **Section 5 (2) of the Act** is relied on, stating the Section provides that the plaintiff is not subject to the control, or direction of any person or authority. The plaintiff also argues that **Section 3 of the Act** provides that it is a body corporate with a right to sue and be sued, and that pursuant to **Section 12 (1) of the State Proceedings Act**, the government can only be used through the Attorney General.

It is also argued that it is absurd to assert that the plaintiff is a government institution merely because one of its functions falls within the general functions of the government. That the arguments by the 2nd defendant that the plaintiff is a government institution entails a radical change to corporate law as we know it.

By way of demonstration, the plaintiff states that the Zambia Centre for Accountancy Studies (ZCAS) is a body corporate that is established

under **Section 4 of the Zambia Centre for Accountancy Studies Act, Chapter 391 of the Laws of Zambia**. It is stated that if we were to agree with the 2nd defendant's argument, then ZCAS is an arm of the government, as it provides tertiary education, a function which falls within the general functions of the government.

The plaintiff's contention is that sustaining the 2nd defendant's argument, would fly in the teeth of **Section 4 (1) of the ZCAS Act**, and would defeat the purpose of incorporation. Reliance is placed on **Halsbury's Laws of England, 4th edition, 2001 Re-issue** in paragraph 8 at page 31, which states that;

“The fact that a person or body exercises functions of a public nature does not conclusively establish that such a person or body is a public authority”.

It is stated that the plaintiff is not an alter ego of the government, since it is independent and autonomous. That it is a separate entity that has a right to sue for defamation. The plaintiff argues that the case of **Derbyshire CC v Times Newspaper Ltd** ⁽¹⁰⁾ relied on by the plaintiff is not applicable, as in that matter, the court interpreted **Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953)**, which is not binding on Zambia.

Further, what was in consideration in that matter was the local authorities (councils) that fell under the control of a political party. However, in this matter, it is clear that the plaintiff does not fall under the control of any political party.

It is also argued that the court in that matter considered defamation and not malicious falsehood, and in this matter the plaintiff has sued for malicious falsehood, which is distinguishable from defamation. The plaintiff similarly argues that the case of ***Die Spoorbond v South African Railways*** ⁽⁴⁾ also relied on by the 2nd defendant does not apply.

This the plaintiff argues, is on account of the fact that the Supreme Court in that matter held that the South African Railways and Harbours, a government department of the Union of South Africa was not entitled to maintain an action for defamation in respect of a publication alleged to have injured its reputation as the authority responsible for running the railways. On this account, the plaintiff argues that it is not a government department.

The plaintiff also states that international decisions have persuasive value, but our courts must apply international cases vis a vis our Zambian law and environment, as stated in the case of ***Sata v Post Newspapers Limited and another*** ⁽¹²⁾. It is further argued that in our jurisdiction, it is trite law that freedom of expression is not limitless, and the Supreme Court in the case of ***Fred Mmembe, Bright Mwape v The People and Fred Mmembe Masautso Phiri Goliath Mungonge v The People*** ⁽¹³⁾ in interpreting Article 20 of the Constitution stated as follows;

“When interpreting constitutional provisions regarding the fundamental rights and freedoms for the purpose of ascertaining the validity of a subordinate law, I find it absolutely necessary to bear in mind the injunction in

Article 11 that, far from being absolute the rights and freedoms are subject to limitations " designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest".

That it was further held in that case that;

" (1) That no one could seriously dispute that side by side with the freedom of speech was the equally the very important public interest in the maintenance of the public character of public men for the proper conduct of public affairs which requires that they be protected from destructive attacks upon their honour and character. When the public person was the head of state the public interest was even more self-evident.

(2) There was nothing in art 20 which immunized defamation: a law met the test of being reasonably required if it had as its aim at least one of the interests or purposes listed in art 20(3)".

The other case relied on in this regard is *Michael Chilufya Sata v Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Limited, Mobi TV International Limited* ⁽¹⁹⁾. The plaintiff argues that in our jurisdiction, freedom of speech is as equally as important as the public interest to maintain the public character of public men for the proper conduct of public affairs, which requires

that they be protected from destructive attacks upon their honour and character.

That this is evident from the fact that it is a criminal offence to defame the President of the Republic of Zambia, as provided in **Section 69 of the Penal Code**, and that **Section 65 of the said Penal Code** criminalizes the publication of false news with intent to cause fear and to alarm the public. It is the plaintiff's argument that as can be seen above, in Zambia, the freedom of speech is not limitless, and that there has always been a balance between the freedom of expression and the protection of the sanctity of public officers and the institutions that they occupy.

That consequently, the intention of the legislature is that a public body and/or institution should be protected from destructive and baseless attacks in the conduct of public affairs. The plaintiff goes on to state that to argue that a person exercising government functions cannot sue for defamation will open the flood gates of unfounded allegations, insults, and baseless reporting by newspapers without due regard to the need to protect the credibility, prestige and public confidence of persons exercising such functions.

That in any event, in Zambia, it is not alien to actions where the State has been sued for defamation, and the case of ***Bonaventure Bweupe v The Attorney-General, and Zambia Publishing Company Limited, and Times Newspapers Zambia Limited*** (7) is cited as an example. The plaintiff also refers to the United States of America, arguing that in that country, public officials can sue for defamation

and succeed if they can prove the existence of actual malice. As authority, the case of *New York Times Co v Sullivan* ⁽⁵⁾ is relied on.

The plaintiff also argues in the alternative, stating that should I find that the claim for defamation cannot succeed, as the plaintiff also claims damages for malicious falsehood, and this tort, and that of defamation require different elements in order to be proved, the plaintiff is not precluded from suing for damages for malicious falsehood. In this regard, reference is made to the case of *Spring v Guardian Assurance PLC and others* ⁽¹¹⁾, stating that it was stated in that case that;

“As to the first question, the starting point, in my view, is that the suggested claim in negligence and the torts of defamation and injurious and malicious falsehood do not cover the same ground....they are separate torts, defamation not requiring proof by a plaintiff that the statement was untrue(although justification may be a defence) or that he suffered economic damage, but being subject to defences quite different from those in negligence, such as the defence of qualified privilege, which makes it necessary to prove malice. Malicious falsehood requires that a statement is false, that harm has resulted and that there was express malice. Neither of these involves a duty of care. The essence of a claim in defamation is that a person’s reputation has been damaged.....”

Reliance is also placed on the case of *Joyce v Sengupta and another* ⁽⁹⁾ which considered the difference between malicious falsehood and defamation, and it was stated in that matter that;

“I should comment briefly on the difference between defamation and malicious falsehood. The remedy provided by the law for words which injure reputation is defamation. Words may also injure a person without damaging his reputation. An example would be a claim that the seller of the goods or land is not the true owner. Another example would be a false assertion that a person has closed down his business. Such claims would not necessarily damage the reputation of those concerned. The remedy provided for this is malicious falsehood, sometimes called injurious falsehood or trade libel. This cause of action embraces particular types of malicious falsehood such as slander of title and slander of goods, but is not confined to those headings.

Falsity is an essential ingredient of this tort. The plaintiff must establish the untruth of the statement of which he complains. Malice is another essential ingredient....For present purposes, it is sufficient to note that if a plaintiff establishes that the defendant maliciously made a false statement which caused him financial damage, or in respect of which he is relieved from proving damage by the Defamation Act 1952, the law gives him a remedy. The false statement may also be defamatory, or it may not. As

already mentioned, it need not be defamatory. Conversely, the fact that the statement is defamatory does not exclude a cause of action for malicious falsehood, although the law will ensure that a plaintiff does not recover damages twice over the same loss”.

It is thus the plaintiff's argument that it has a cause of action for libel, which is properly before the court, and that it is equally not precluded from suing for malicious falsehood in the circumstances. On the question of whether a body corporate can sue for defamation or malicious falsehood on corruption allegations, the plaintiff's position is that it can, as the publication by the defendants was defamatory and was calculated at injuring the plaintiff in its business.

As authority, *Clerk and Lindsell on Torts, 19th Edition, Sweet and Maxwell 2006* at paragraph 23-40 at pages 1322-1323 is relied on. It provides as follows;

“A trading corporation may be defamed by a defamatory matter which relates to its business or the conduct of its affairs. A company has trading character which may be destroyed by libel. So, a trading corporation may sue in its corporate capacity for a defamatory statement disparaging its goods, or imputing insolvency, or any other matter calculated to injure it in the way of its business...”

The corporation and the person controlling it may of course each have an action. In the Derbyshire case, it was relevant that the Council leader Mr Bookbinder could bring an

action for defamation against the newspaper. A trade union is not a special register body within section 30 (1) (a) of the Trade Union and Labour Relations Act 1974, cannot sue for defamation because by virtue of S 2(1) of the Act, a trade union is not, and cannot be treated as if it were a body corporate. The tort of defamation requires the possession of a legal personality that can be defamed. The 1974 Act deprives trade unions of the necessary personality and reduces them to mere unincorporated associations”.

The plaintiff contends that it has a public character which was destroyed by the statements made by the defendant in the conduct of its affairs. Further in the arguments, the plaintiff states that it is in the business of generating income from the contributions that it receives from the public, in order to make profit for the contributors. Therefore, for that purpose, the plaintiff is a trading corporation as it aims to make profit, and it manages the money in its custody.

That pursuant to that purpose, the plaintiff issued a tender for the development of River View Park, so that it could generate profits once it was completed. It contends that the defendants issued the libelous and malicious statements for purposes of injuring the tender. Reference is made to the case of ***Transparency International Zambia v Chimba and another*** ⁽¹⁸⁾ stating that in that matter, the honourable Judge noted that the plaintiff had complained that the picture that had been painted by the defendants was that the plaintiff was involved in dishonourable and clandestine activities, and that one

of the plaintiff's primary objectives is to fight the scourge of corruption.

Therefore, the suggestion that the plaintiff was involved in activities that ran counter to its professed fight against corruption, was likely to lower the estimation of the plaintiff in the eyes of right thinking members of society. The plaintiff argues that the words published were false and were maliciously published, and were calculated and did in fact cause damage to the plaintiff's integrity.

The argument is further that to the extent that the malicious falsehood and libelous statements are attributable to the plaintiff, and not the agents or employees of the plaintiff, the plaintiff is the proper party to sue. That this is because the reputation of the plaintiff is what is being attacked by the defendants.

On 22nd June, 2020, the 2nd defendant filed an affidavit in reply, also deposed to by Funga Mukosha. She agrees with the plaintiff's assertions that its statutory functions are to implement the policy relating to the National Pension Scheme in line with the NAPSA Act, and to control and administer the Scheme. She deposes that the National Pension Scheme policy falls under the national social security policy set by the government through the Ministry of Labour and Social Security. This can be seen from the report for the Ministry for the year 2018, which is exhibited as 'MF1' to the affidavit.

The deponent avers that she has been advised by her advocates that pursuant to the NAPSA Act, the government exercises extensive control over the plaintiff through the Ministry of Labour and Social

Security and Parliament. Further, Sections 3, 6 and 53 of the Act and the first schedule of the Act highlight this.

It is also her contention that the averments relating to the plaintiff's corporate image as well as its legal personality in the affidavit in opposition are immaterial to the determination of the application, and the same goes for the number of articles and publications alleged to have been made by the defendants.

The 2nd defendant contends that the donation of K1, 000, 000.00 that the plaintiff made to the Ministry of Health to help with the mitigation and containment of the corona virus (covid 19) does not make the plaintiff independent of the government, and further, that the plaintiff is not the only government institution that made such donation. The 2nd defendant names the Zambia Revenue Authority (ZRA) as also having made a donation to the Ministry of Health, towards the fight of the corona virus (covid 19), as shown on the announcement exhibited as 'MF2', which was retrieved from the ZRA website, stating that this does not make it independent of the government.

In the skeleton arguments in reply filed on 25th June, 2020, the 2nd defendant states that it is not in contention that the plaintiff is a body corporate that is capable of suing and being sued. Therefore, that issue is common cause, and inconsequential in view of the application before court. Further, the arguments relating to the plaintiff's corporate personality which have been advanced by the plaintiff are in clear misapprehension of the application before the court.

It is stated that the 2nd defendant's application has raised two issues, the first being that the plaintiff is a public body and it performs public functions of the Government of the Republic of Zambia. That for that reason, the plaintiff has no right at common law to bring an action for defamation. The second issue relates to the plaintiff being a corporate and public body. In this regard, the 2nd defendant argues that corporate and public bodies are incapable of committing corruption under the Zambian law.

Consequently, the plaintiff cannot sue for defamation or malicious falsehood on facts relating to or arising from corruption allegations. As regards the first issue, it is stated that the plaintiff has in the skeleton arguments argued that it is separate and distinct from the government because is established under **Section 3 of the NAPSA Act**, as body corporate, and is capable of suing and being sued.

Further, that government institutions are those that are represented by the Attorney General in legal proceedings, pursuant to **Section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia**. However, the 2nd defendant's position is that this is erroneous and grossly misleading, as although the plaintiff is a body corporate, it is an institution of the government, whose responsibility is to implement the government's national pension scheme policy, as manifested in the NAPSA Act. The mere fact that is incorporated as a body corporate does not divorce it from the government.

Examples are given of other government institutions that have been clothed with capacity to sue and be sued in their names, such as the Minister of Finance, who under **Section 3 of Minister of Finance**

(Incorporation Act), Chapter 349 of the Laws of Zambia is established as a corporation sole with perpetual succession, and is capable of suing and being sued in that capacity. Further, **Section 6 of the Local Government Act, 2019**, establishes every local authority as a body corporate with perpetual succession, and a common seal, capable of being sued in its corporate name.

That this does not surely mean that the local authorities (councils) are not part of the government. The 2nd defendant argues that likening the plaintiff to ZCAS is misplaced, as the two institutions perform totally different functions, and they carry out totally different mandates. Further, the plaintiff enjoys monopoly in the provision of its services, being the only pension scheme where membership is mandatory for all persons under the retirement age, and employed by a contributing employer, in line with **Section 11 of the NAPSA Act**, which is not the case with ZCAS.

The case of ***Posts Telecommunications Corporation v Modus Publications*** ⁽¹⁴⁾ is reiterated with regard to the criteria used to determine whether an institution is a government institution. The 2nd defendant argues that the Supreme Court of Zimbabwe in that matter considered whether the Zimbabwean Postal Communications corporation was part of the State, for purposes of the law of defamation. That McNally J in that matter stated that;

“The question is not whether the public corporate entity (be it a rural district council, a municipality, a statutory corporation, a body corporate or a parastatal) is a separate legal persona. The question is whether it is a part of the

governance of the country. Or put it another way, whether it is a body such that the reasoning in the leading cases applies to it, so as to warrant the denial of the right to sue for defamation. The Postal and Telecommunications Corporation Act created the PTC as a body corporate capable of suing and be sued in its own right. It is really unnecessary to go further than that. Its individual legal personality is indisputable. But by no means does it follow because the PTC is a separate and distinct artificial legal person, it cannot become a government instrumentality.

One must be careful not to confuse distinctions made for one purpose with distinctions made for another. An entity such as the PTC may fall on one side of the line for one purpose, and on one side for another. If one asks, Is the PTC a legal persona separate and distinct from the state? The answer is yes. But if one asks, Given the policy considerations which require the law to deny the right to sue for defamation to instruments of governance (or instrumentalities of governance), is the PTC such an instrumentality? The answer may also be yes.

I conclude therefore that the phrases alter ego of the state and organ of the state are not terms which have a specific legal definition. They must be defined in their contexts”.

The 2nd defendant further argues that McNally J in that matter stated that the State, the alter ego of the State, an organ of the State, an instrumentality of the State, and an instrument of governance are

categories of artificial persons which should be denied the right to sue for defamation. That in that matter, the criteria for determining whether an entity is the State, as set out in the cases cited was stated as being;

1. Whether the body has any discretion of its' own; if it has, what is the degree of control by the executive over the exercise of that discretion?
2. Whether the property vested in the corporation is held by it, for and on behalf of the government?
3. Whether the corporation has any financial autonomy?
4. Whether the functions of the corporation are government functions?
5. Whether if the body is not a statutory trading corporation, it performs government functions either at local or national level.
6. Whether the body concerned as least largely of effectively a monopoly in providing what are generally regarded as essential services traditionally provided by the government, it would be contrary to public policy to muzzle criticism.

It is the 2nd defendant's argument that in light of the criteria highlighted above, their submission is that the plaintiff is part of the government, and that its autonomy and discretion in discharging its mandate if any, is limited because the government exercises extensive control over it. That this can be seen from the provisions of the NAPSA

Act, which in **Section 6** provides for the Director General whose appointing authority is the Minister of Labour and Social Security.

Secondly, the plaintiff is governed by the Authority, whose members and chairperson are appointed and removed by the Minister as provided in **Section 1 of the first schedule to the NAPSA Act**. Further, the employees of the plaintiff are appointed by the Authority, which is appointed by the Minister.

Thirdly, pursuant to **Section 53 of the Act**, the Minister makes regulations for the better carrying out of the provisions of the Act, by the plaintiff.

Fourthly, the plaintiff's activities are scrutinized by the government through the Minister and Parliament, as provided in **Section 14 of the first schedule of the Act**. Under that section, the plaintiff is required to submit its financial statements to parliament and answer to any queries from parliament every year.

Therefore, the plaintiff is an alter ego of the government, and even though it is a body corporate, its management, activities and decisions are not independent of the government. It is further argued that the plaintiff is clearly under the government's control, and that the reference to Section 5(2) of the Act by the plaintiff in arguing that it is independent of the government is misconstrued.

This is on account of the fact that the said section provides that the although the plaintiff in the performance of its functions, is not subject to the control or direction of any person or authority, it is subject to the provisions of the Act. Still on the plaintiff being part of

the government, the 2nd defendant states that one of the two functions of the plaintiff as provided under **Section 4 of the NAPSA Act** is to implement the policy relating to the National Pension Scheme in accordance with the Act.

That this policy is set by the government through the Ministry of Labour and Social Security, as part of the national security policy, as seen under item 2.5 of the Ministry's annual report for the year 2018, exhibited as 'MF1' to the affidavit in reply. This, the 2nd defendant argues, confirms that the plaintiff carries out government functions and that its actions are not independent of the government.

The 2nd defendant reiterates that is not in dispute that the plaintiff is the only pension scheme to which membership is mandatory, and in this regard, it enjoys monopoly to a very large extent. The argument is further that the nature of the services provided by the plaintiff are essential services traditionally provided by the government, and it would therefore be contrary to public policy to muzzle criticism, and to allow the plaintiff to use the money contributed by its members to sue the same members for questioning the propriety of its investments, and the manner in which it conducts its business.

The 2nd defendant with regard to the question of whether the plaintiff as trustee has the right to sue the contributors and beneficiaries of the trust, given the facts of this matter, agrees that as rightly submitted by the plaintiff, the Board of the plaintiff which is the Authority, in line with Section 8(1) of the Act are the trustees of the Scheme. That as trustees, the plaintiff is under a duty to act in the best interest of the beneficiaries, who are the members of the scheme.

Therefore, as a matter of public policy, the members should be granted the freedom to question how their trust is being managed by the trustees, without any fear of law suits arising therefrom. As authority, *Equity and Trusts (2009 Sweet & Maxwell, 2nd Edition* at page 401 is relied on. It states that;

“The beneficiary is entitled to receive explanations as to what the trustees have been doing with the trust property (eg concerning incomes, investments and distributions”.

It is argued that allowing the plaintiff to sue for criticizing its manner of awarding contracts, as it invests funds, would set a very bad precedent, with the effect of stifling criticism from employers as contributors and members as trustees. That even under the law of trusts, the plaintiff does not have the right to the bring this action.

The 2nd defendant also in reply reiterates that government institutions do not have the right to sue for defamation. In this regard, it argues that the tort of defamation is a common law tort, and is not a creature of any Zambian statute. The submission is that while the 2nd defendant is alive to the provisions of the *Defamation Act, Chapter 68 of the Laws of Zambia*, that statute does not create or define the tort of defamation. That what that Act does, is to consolidate and amend the law relating to defamation, which is the common law.

The decision in the case of *Derbyshire CC v Times Newspapers Ltd* (10) on the right of a government institution to sue for defamation is reiterated, noting that in that matter, the defendants had questioned the propriety of certain investments made by the Council in its

superannuation fund. That this is like the plaintiff in this matter, which is the administering authority of the national pension scheme, and it is under the control of the government, which is presided over by politicians, such as the minister.

The submission is that the plaintiff's decisions and actions will always be attributed to and associated with the supervising government ministry, just like in the **Derbyshire case** where the local authority was under the control of an elected government. Thus, the Derbyshire case applies.

It is further argued that even the **Die Spoorhoed v South African Railways** ⁽⁴⁾ case applies, contrary to the plaintiff's arguments. This is on account of the fact that the South African Railways was a statutory body performing government functions relating to railway transport, just like the plaintiff herein is a statutory body managing the national pension scheme on behalf of the government.

The 2nd defendant argues that the plaintiff's argument is that the Derbyshire case does not apply, because it interpreted **Article 10 of the European Convention**, which is not applicable in this jurisdiction. However, this is in fact not the position, as the Lord Keith in that matter stated that he had reached the conclusion in that matter upon the common law of England, without relying upon the European Convention.

The 2nd defendant further states that this position was echoed by Mc Nally J in the PTC case. Further, **Halsbury's Laws of England, 4th Edition, Vol 28** at page 14 in paragraph 15 states that;

“Institutions of central government such as local authorities have no right at common law to maintain an action for defamation”.

The 2nd defendant also argues that the common law is binding on the Zambian courts, as provided in **Article 7 of the Constitution, as amended by Act No 2 of 2016**, which states that;

“The laws of Zambia consist of-

(e) the laws and statutes which apply or extend to Zambia as prescribed”.

Article 266 of the Constitution is also referred to with regard to the term “*prescribed*”, stating that it means, provided for in an Act of Parliament. That in this regard, the **English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia**, in Section 2 prescribes the common law as one aspect of English law, which is in force in Zambia. Therefore, it accordingly follows that all common law doctrines and principles are applicable to this jurisdiction, and are binding on all the Zambian courts, unless under special circumstances, where such principle or doctrine is at variance with the Constitution or any other written law.

The argument is that there is no written law which gives government institutions powers or the right to sue for defamation, and the common law position applies. Reference is made to the case of **Ruth Kumbi v Robinson Kaleb Zulu** ⁽¹⁶⁾, which held that by virtue of Act No 14 of 2002, the Zambian Courts were bound to follow all the rules

which under **Section 3** provides that a public body cannot commit corruption, and the plaintiff is a public body. Rather, **Section 19 of that Act** provides that a public officer may commit corruption.

Further, under **Section 29 of the Anti Corruption Act**, only public officers can be involved in the corrupt award of tenders or contracts, which is deemed to be corruption. It is stated that the plaintiff's claim is based on the allegation it has been falsely and maliciously accused of corruptly awarding a tender to AVIC, which under **Section 29 of the Anti Corruption Act** it cannot do, and further under **Section 41 of the said Act**, corruption can only be committed by natural persons, as it provides for the penalties for persons convicted of the offence of corruption, which is imprisonment.

The argument is that a body corporate cannot be imprisoned, and that it is trite that when the law envisages the commission of an offence by a body corporate, it will prescribe a fine, as the penalty that is applicable to a body corporate. The 2nd defendant states that the Anti Corruption Act does not prescribe penalties for bodies corporate, as under that law, only natural persons can commit that offence.

On what amounts to defamation, the 2nd defendant reiterates the decision in the case of **Bryne v Deane** ⁽³⁾, stating that it held that for words to be defamatory, they must be those which right thinking members of society would understand to be defamatory. That the case of **Peter Cruddas v Jonathan Calvert, Heidi Blake and Times Newspaper Ltd** ⁽²¹⁾ made it clear that for there to be malicious falsehood, the words complained of must be capable of being understood against the plaintiff in a damaging way.

The 2nd defendant argues that as the plaintiff cannot commit corruption under the Zambian law, no right thinking member of society would see the plaintiff as corrupt. Therefore, the allegations of corruption against the plaintiff cannot be understood to be damaging against the plaintiff, and the people who would be seen as corrupt, and whose reputation would be damaged if any, would be the individual officers of the plaintiff, and not the plaintiff.

Thus, an action for malicious falsehood would be open to the plaintiff's individual officers, and not the plaintiff itself.

I have considered the application. It was brought pursuant to **Order 18 Rule 19 of the Rules of the Supreme Court of England, 1999 edition**. The said Order provides as follows;

“(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that -

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be”.

In making the application, the 2nd defendant contends that no cause of action has been revealed because;

1. The plaintiff being a public body and performing government functions has no right to bring an action for defamation.
2. The plaintiff being a body corporate cannot sue for defamation or malicious falsehood on corruption allegations because a body corporate cannot commit corruption.

The arguments in support of the first ground are that at common law, an elected government, a public body or indeed any body performing government functions is not entitled to sue for defamation. That the rationale for this was explained in the South African case of ***Die Spoorhoed v South African Railways*** ⁽⁴⁾ as it would be a serious interference with the free expression of opinion if the wealth of the State derived from the State's subjects could be used to launch actions for defamation against those subjects because they have falsely or unfairly criticized or condemned the management of the country.

The 2nd defendant argues that the plaintiff is a government body, as it is a public body that performs government functions. This argument is premised on the fact that the plaintiff is a creature of statute, and both its governing Board and the Chief Executive Officer are appointed by the government through the Minister of Labour and Social Security. The argument is also that the plaintiff's functions as seen in Section 4 of the NAPSA Act is to implement government policy relating

to the National Pension Scheme, in accordance with the Act, and to control and administer the scheme.

Further, by the very nature of the plaintiff's core business, the manner in which it carries out its functions, is an important subject of public interest as it manages the country's largest pension scheme, to which workers and employees are mandated to contribute. Thus, members, employers and the general public have the right to scrutinize, and if need be, to criticize the plaintiff's decisions without any fear of actions for defamation arising therefrom. Therefore, the plaintiff notwithstanding its corporate nature, is an organ of the government of the Republic of Zambia.

In opposing the application, the plaintiff has contended that as a body corporate, it has separate legal personality, and can sue and be sued in its own name. It has argued that the 2nd defendant has based the application upon the misconception that the plaintiff carries out government functions and implements government policy. However, the 2nd defendant has not cited any authority in support of that position.

The plaintiff is indeed a creature of statute, being the ***National Pension Scheme Act, Chapter 256 of the Laws of Zambia. Section 3 of that Act*** establishes the plaintiff. It provides as follows;

“3. (1) There is hereby established the National Pension Scheme Authority, which shall be a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name, and with power

subject to the provisions of this Act, to do all such acts and things as a body corporate may by law do or perform”.

The functions of the plaintiff are stipulated in **Section 4 of the Act** as;

“4. (1) The functions of the Authority shall be-

(a) implement the policy relating to the National Pension Scheme in accordance with this Act; and

(b) control and administer the Scheme”.

The 2nd defendant has placed reliance on the case of **Posts Telecommunications Corporation v Modus Publications** ⁽¹⁴⁾ stating that the said case laid down the criteria for determining whether a particular corporation is a government body or not. The said criteria include;

1. Whether the body has any discretion of its' own; if it has, what is the degree of control by the executive over the exercise of that discretion?
2. Whether the property vested in the corporation is held by it, for and on behalf of the government?
3. Whether the corporation has any financial autonomy?
4. Whether the functions of the corporation are government functions?
5. Whether if the body is not a statutory trading corporation, it performs government functions either at local or national level.

6. Whether the body concerned as least largely of effectively a monopoly in providing what are generally regarded as essential services traditionally provided by the government, it would be contrary to public policy to muzzle criticism.

The plaintiff does not dispute that it implements policy relating to the Scheme, and that it controls and administers the Scheme. Its' argument is that there is nowhere in the NAPSA Act where it states that the plaintiff has been established as an agent or an extension of the government. Particular reference has been made to **Section 5 (2) of the Act**, the argument being that the said Section confirms the independence of the plaintiff. The Section provides and I quote;

“(2) In the performance of its functions, the Authority shall, subject to the provisions of this Act, not be subject to the control or direction of any person or authority”.

However, the plaintiff has pointed out that the above Section provides that the plaintiff exercises its powers subject to the provisions of the Act, and under **Section 6 of the Act**, the Director General who heads the plaintiff is appointed by the Minister of Labour and Social Security. Further, pursuant to **Section 1 of the First Schedule of the Act**, the Authority of the plaintiff, being the members and chairperson are appointed and removed by the Minister of Labour and Social Security.

Then under **Section 53 of the Act**, the Minister has power to make regulations for the better carrying out of the Act, while **Section 14 to the first schedule of the Act** requires the plaintiff to submit financial

statements to Parliament, and to answer queries from Parliament every year.

From the provisions of the NAPSA Act, it can be seen that while the plaintiff is a body corporate, entailing that it has distinct legal personality with capacity to sue and to be sued in its own name, and it is independent, the Act that creates it makes it subject to government control, as seen from the highlighted sections of the Act. As rightly argued by the 2nd defendant, being a body corporate does not divorce the plaintiff from the government, and it has been noted that the government has power to incorporate institutions and offices for the better carrying out of its mandate.

The Minister of Finance is one such office, which is incorporated under Section 3 of The *Minister of Finance (Incorporation) Act, Chapter 349 of the Laws of Zambia*, which provides that;

“3. The Minister of Finance shall be a corporation sole by that name, with perpetual succession and an official seal, and with power to acquire and hold in that name lands, Government securities, shares in any company, securities for money, and real and personal property of every description, to sue and be sued, to execute deeds, to enter into agreements binding on himself and his successors in office, and to do all other acts necessary or expedient to be done in respect of the above matters or any of them”.

However, that institution remains accountable to the government, and therefore carries out government functions, or implements government

policy. While the plaintiff has argued that it is absurd to assert that it is a government institution because its functions fall within those general functions of the government, and has cited ZCAS which is a body corporate pursuant to **Section 4 of the ZCAS Act, Chapter 349 of the Laws of Zambia**, as seen from the **Post Telecommunications** case cited above, there are a number of factors that have been laid down as the criteria for determining whether an institution is a government body.

Performance of government functions is one such criteria, and it has been pointed out that the plaintiff has monopoly in providing the mandatory pension scheme in the country, which is a function for the government, as it must ensure that there is social security for its citizens. Further, the controlling arm of the government in the management of the plaintiff, as seen from the provisions of the NAPSA Act highlighted above, establishes that the plaintiff is part of the governance of the country.

Moreover, the annual report for the Ministry of Labour and Social Security for the year 2018, which is exhibited as 'MF1' to the affidavit in reply at page 15 under item 2.5, shows that the Ministry of Labour and Social Security has a mandate over national social security and the plaintiff implements this. Therefore, while the plaintiff is a body corporate, it is an institution that performs government functions.

The claims by the plaintiff as endorsed on the writ of summons are for damages for libel and for malicious falsehood. Libel is a written form of defamation. The basis of the rationale in the case of **Derbyshire CC v Times Newspapers Limited** ⁽¹⁰⁾, for not allowing the government or

its' institutions to sue for defamation, is that it would be contrary to the public interest for institutions of central or local government to have any right at common law to maintain an action for defamation, as being democratically elected, the government must be open to uninhibited criticism over how it governs the country.

Further, it is not in the public interest that the State should use the money that its' subjects contribute towards its wealth, to sue the said subjects for defamation because they have unfairly or wrongly criticized the management of the country.

The plaintiff has argued that the *Derbyshire* case does not apply, as the court in deciding that matter interpreted **Article 10 of the European Convention for the Protection of Human Rights and Fundamental Rights and Freedoms (1953)**, which is not applicable in Zambia. Further, that the court in that matter considered local authorities that were under the control of a political party, which is not the position for the plaintiff in this action. It has also been argued that the claim in that matter was for defamation, while in this matter, the plaintiff has sued both for defamation and malicious falsehood.

The plaintiff has also argued that the international decisions that the 2nd defendant has relied on in arguing that the government and any government institutions cannot sue for defamation, are only of persuasive value. Further, that international cases must be applied vis a vis our laws and our environment, as stated in the cases of **Sata v Post Newspapers Limited and another, Fred Mmembe, Bright Mwape v The People** ⁽¹²⁾ and **Fred Mmembe Masauso Phiri Goliath Mungonge v The People** ⁽¹³⁾ and **Michael Chilufya Sata v Chanda**

***Chiimba III, Zambia National Broadcasting Corporation, Muvi TV Limited, Mubi TV International Limited* (19).**

The 2nd defendant in countering that argument, in the skeleton arguments in reply acknowledges that the tort of defamation and malicious falsehood are separate, and that different elements constitute them.

However, that an action on both torts can only be founded on publications containing false information about the claimant. The 2nd defendant has further argued that in the ***Derbyshire*** case, the dispute concerned the publication of articles by the defendants, which questioned the propriety of certain investments made by the Council of monies in the superannuation fund under the Superannuation Act 1972, and the Local Government Superannuation Regulations 1996.

This they state, is like the plaintiff who is the administering authority of the National Pension Scheme. Further, that the council in the ***Derbyshire*** case was under the control of the government, just like the plaintiff in this matter. It has also been argued that like in the ***Die Spoorhoed v South Africa Railways*** (4) case, the South African Railways was a statutory body which was performing government functions relating to railway transport, so the case applies.

That what is cardinal, is that in the ***Derbyshire*** case, the decision was not based on the interpretation of **Article 10 of the European Convention**, but on the common law, as Lord Keith stated that he had reached the decision upon the common law of England, without having to rely on the European Convention.

The 2nd defendant's position is that argument by the plaintiff that the international cases that it has relied on are only of persuasive value is misplaced, as those cases were brought by individuals, and not bodies corporate, and in the case of ***Sata v Post Newspaper Ltd and another*** (12), Ngulube J drew a distinction between an attack on a public official in the conduct of his public or official duty, and an attack on a public official in his individual or private capacity. Further, that the ***Fred Mmembe*** case, involved the constitutionality of ***Section 69 of the Penal Code***.

While it is true that international decisions are only of persuasive value in our jurisdiction, it can be seen that the decision in the ***Derbyshire*** case was reached based on the common law, and not on ***Article 10 of the European Convention for the Protection of Human Rights and Fundamental Rights and Freedoms (1953)***. Therefore, the fact that ***Article 10 of the European Convention for the Protection of Human Rights and Fundamental Rights and Freedoms, 1953***, which does not apply in this jurisdiction was argued in that matter, it did not form the basis of the decision, and the case is applicable to this matter.

In terms of the application of the common law of England in Zambia, ***Section 2 of the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia*** provides that;

“Subject to the provisions of the Constitution and to any other written law --

(a) the common law;

(b) the doctrines of equity;

(c) the statutes which were in force in England on the 17th August, 1911, being the commencement of the Northern Rhodesia Order in Council 1911; and

(d) any statutes of a later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which shall apply to the Republic by an Act of Parliament, or otherwise;

shall be in force in the Republic.

(e) the Supreme Court Practice Rules of England in force until 1999:

Provided that the Civil Court Practice 1999 (The Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia except in matrimonial causes.

shall be in force in the Republic”.

Article 7 of the Constitution as amended by Act No 2 of 2016 states that;

“The Laws of Zambia consist of-

(f) the laws and statutes which apply or extend to Zambia as prescribed”.

Section 266 of the *Constitution of Zambia* defines “prescribed” as provided for in an Act of Parliament. As the *English Law (Extent of*

Application) Act, Chapter 11 of the Laws of Zambia prescribes that the common law is law in Zambia, the common law is binding in our jurisdiction.

That being the position, and the plaintiff being an institution that implements the government's social security policy, it is a government institution. It administers the Scheme to which employers and employees contribute, and the said monies are invested with a view to providing the members of the Scheme with income after they retire.

Being trustees of the said funds, the public and members who contribute thereto, should have the freedom to question the plaintiff how their monies are being invested, without fear of actions for defamation being instituted against them. It is against public policy that a democratically elected government or indeed a government body should not be open to uninhibited criticism.

I do agree that there is need to protect public officers in the performance of their duties, and the courts have recognized this. In the *Sata v Post Newspaper Ltd and another* ⁽¹²⁾ case, Ngulube J noted as follows;

“In contrast, our own Constitution is less vague, though I agree with the general principle of not simply allowing the existing law of defamation to operate without due regard to the need to lend greater meaning and effect to the art 20 provisions. The dilemma is that our Constitution attaches equal importance to freedom of the press and the right to reputation, without distinction whether such reputation

belongs to a private or public individual. I have agonised and given very careful consideration to the competing propositions that it is for the interests of society that the public conduct of public men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true; and the equally important public interest in the maintenance of the public character of public men for the proper conduct of public affairs which requires that they be protected from destructive attacks upon their honour and character if made without any foundation. I have come to the conclusion that there is no need to formulate a new set of principles to impose new fetters on the right of a public official to recover damages. However, in order to counter the inhibiting or chilling effect of litigation, I am prepared to draw a firm's distinction between an attack on the official public conduct of a public official and imputations that go beyond this and attack the private character of such an official which attack would be universally unsanctioned. I am also prepared, when considering the defence of fair comment on a matter of public interest arising from the conduct of a public official, to be more generous and expansive in its application....."

In that matter, the plaintiff sued as an individual, and not as a government institution. It will be noted that **Clerk on Lindsel on Torts, 19th Edition, Sweet and Maxwell, 2006 in paragraph 23-**

40 at page 1323 relied on by the plaintiff, in arguing that it can sue for defamation and malicious falsehood, states that a company has trading character which may be destroyed by libel. However, this provision does not relate to the government or its' institutions capacity to sue for defamation.

Therefore, in line with the **Derbyshire** case, the plaintiff, being an institution that implements government policy, and is therefore a government institution, it cannot maintain an action for defamation. The first ground of the application succeeds.

As regards, the second ground, it turns on the argument that the plaintiff being a corporate body, it cannot sue for defamation or malicious falsehood on allegations of corruption, as a body corporate cannot commit corruption. In arguing this ground, the contention by the 2nd defendant is that the plaintiff in paragraph 10 of the statement of claim alleges that words published by the 2nd defendant meant and were understood to mean that the plaintiff corruptly awarded the tender to develop River View Park to AVIC.

However, the 2nd defendant's position is that a body corporate cannot commit corruption, and to support this position, reliance has been placed on **Oxford Learner's Dictionary, 8th Edition** which defines corruption as "**dishonest or illegal behavior especially of people in authority**".

Also relied on, is **Section 3 of the Anti Corruption Act**, which defines corruption as;

“corrupt” means the soliciting, accepting, obtaining, giving, promising or offering of a gratification by way of a bribe or other personal temptation or inducement, or the misuse or abuse of a public office for advantage or benefit for oneself or another person, and “corruption” shall be construed accordingly;”

It has been further argued that from this definition, corruption cannot be committed by a legal or a fictitious person, such as a body corporate, but only by natural persons. The case of *Bryne v Deane* ⁽³⁾ has been relied on, stating that in that case, it was held that for words to be defamatory of a person, they must be those which right thinking members of society would understand to be defamatory.

Also relied on is the case of *Associated Chemicals Limited v Hill and Delamain Zambia Limited and another* ⁽¹⁵⁾ which held that while a body corporate is distinct from its members and shareholders, it is a metaphysical entity or a fiction at law, with legal but no physical existence.

The 2nd defendant relying on *Gatley on Libel and Slander, 6th edition, 1967 in paragraph 890 at page 409*, has argued that a corporation cannot maintain an action for libel and slander for any words which reflect not upon itself, but solely upon its individual officers or members.

Therefore, if the words published were defamatory or injurious in any way, they affected the individual officers of the plaintiff, and not the plaintiff itself. With specific reference to the allegations of corruption,

the 2nd defendant relies on the case of ***Metropolitan Omnibus Co Ltd v Hawkins*** ⁽¹⁾ which held that at common law, a corporation can maintain an action for libel, but that it cannot sue in respect of imputation of murder, incest or adultery, as it cannot commit those crimes.

Further, that it cannot sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may.

The plaintiff on the other hand has argued that it is not alien to the Zambian courts to sue the State for defamation, and reliance has been placed on the case of ***Bonaventure Bweupe v the Attorney General and the Zambia Publishing Company Limited and the Times Newspaper Zambia Limited*** ⁽⁷⁾ as an example, where an action for defamation was sustained.

The plaintiff has also relied on the case of ***New York Times Co v Sullivan*** ⁽⁵⁾ stating that in that case, it was held that public officials can sue for defamation and succeed if they can prove the existence of actual malice.

The argument in the alternative, is that if an action for defamation cannot succeed, the plaintiff can proceed on the action for malicious falsehood, as the torts of defamation and malicious falsehood are different, and different elements need to be established to prove the two torts, as explained in the cases of ***Spring v Guardian Insurance PLC and others*** ⁽¹¹⁾ and ***Joyce v Sengupta and another*** ⁽⁹⁾.

In reply to that argument, the 2nd defendant has reiterated that the basis of the plaintiff's claims in claiming damages for libel and malicious falsehood, is that the articles complained of alleged that the plaintiff corruptly awarded the contract to develop River View Park to AVIC, and the plaintiff being a body corporate cannot commit corruption.

It has already been stated that it is not in contention that the plaintiff is a body corporate. It can be seen from paragraphs 9-12 of the statement of claim, that the plaintiff alleges that the 2nd defendant published words which were defamatory of it, with regard to a tender that it awarded AVIC to develop the River View Park, and that the award of the tender was corruptly done.

From the authorities seen above, while a corporation may sue in defamation, it cannot do so where the claim relates to corruption as a body corporate cannot commit corruption, in line with the ***Anti Corruption Act No 3 of 2012***, as well as the authorities relied on.

Therefore, even if the torts of defamation and malicious falsehood are separate torts with different elements that need to be established to prove them, the fact that the claims relating to defamation and malicious falsehood in this matter are anchored on allegations of corruption by the plaintiff, a body corporate, the action cannot be sustained.

This is because a body corporate cannot commit the offence of corruption, although its officers can. That being the position, no cause

of action has been revealed to which the plaintiff can attach liability on the defendants.


In the case of *William David Carlisle Wise v E.F. Hervey Limited* (8) it was held that;

“A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other”.

In line with *Order 18/19/2 of the Rules of the Supreme Court of England, 1999*, which provides that if a statement of claim does not disclose a cause of action, an opportunity to amend may be given, unless there is reason to suppose that the case cannot be improved by amendment, and as the case cannot be improved by amendment, as a body corporate cannot commit corruption, the second ground of the application equally succeeds.

The action is accordingly dismissed for want of a cause of action with costs to the 2nd defendant, to be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THIS 17th DAY OF AUGUST, 2020



S. KAUNDA NEWA
HIGH COURT JUDGE