

IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 22/2014

BETWEEN:

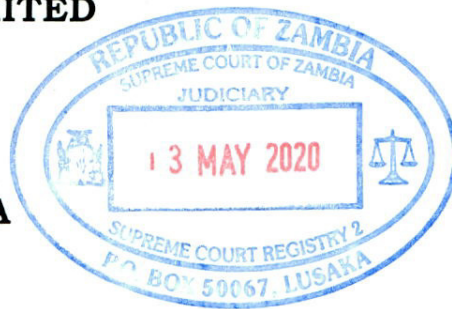
POST NEWSPAPER LIMITED

APPELLANT

AND

SONNY PAUL MULENGA

RESPONDENT



CORAM: Mambilima, CJ, Kabuka and Chinyama, JJS.
On the 12th of July, 2016 and 13th May, 2020.

FOR THE APPELLANT: Mr. N. Nchito, Messrs. Nchito and Nchito.

FOR THE RESPONDENT: Mr. M. J. Katolo, Messrs. Milner & Paul
Legal Practitioners.

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. Zambia Publishing Co Ltd v Eliya Mwanza (1979) ZR 76 (SC).
2. Galaunia Farms Ltd. v National Milling Corporation Ltd. (2004) ZR 1 (SC).

3. Bonaventure Bweupe v The Attorney General and Others (1984) ZR 21.
4. Silkin v Beaverbrook Newspapers 1958 1 WLR 743.
5. Shah & Another v Standard Chartered Bank [1998] 4 All ER 155.
6. Lewis v Daily Telegraph Ltd., Lewis v
7. Sim v Stretch [1936] 2 All ER 1237.
8. Benny Himainza, Wycliff Mwiinga v Times Newspaper (Z) Ltd. SCZ Judgment No. 11 of 1989.
9. Bevin Ndovi v Post Newspapers Ltd., Times Printpak Zambia Ltd. SCZ Judgment No. 8 of 2011.
10. "Truth" (NZ) Ltd. v Phillip North Holloway [1961] NZLR 22 (PC).
11. Reynolds v Times Newspaper Limited [1999]4 ALL ER 609
12. Fred Mmembe and Bright Mwape v The People (1996) ZR 118

Legislation and Other Works referred to:

1. The Defamation Act, Chapter 68 S.7.
2. Carter-Ruck, P.F., Carter-Ruck on Libel and Slander, 5th Edition, Lexis Nexis Butterworths, 1997, UK.
3. Gatley on Libel and Slander, 10th Edition, Sweet Maxwell, 2008.
4. The Defamation Act (UK)1952.

Introduction

1. By judgment dated 28th November, 2013 the High Court found the appellant newspaper liable to the respondent for a libelous article published of him and the respondent was awarded K35,000.00 in general damages. That judgment is what has brought the appellant on appeal to this Court.

Background

2. The background to the matter is that from the year 1991 to 2001 the respondent was a Member of Parliament and Deputy Minister in the Movement for Multi-Party Democracy (MMD) government, led by the late President Chiluba. The respondent was also the proprietor of *S.P. Mulenga and Associates*, a firm of property valuers and surveyors; and, *Chainama Hotels Limited*, which was a well-established hotel. He was therefore, a well-known public figure.
3. Nine years after the respondent had vacated his positions of Member of Parliament and Minister, the appellant published a newspaper article which appeared in its edition of 25th July, 2010 with the heading:

**“List of some of Chiluba’s right hand men and the
allegation of abuse of funds”**

In the body of the article, was a list of names of prominent persons who included the respondent and amounts of monies

each one, allegedly, stole. The allegation against the respondent, in particular, read as follows:

“Sonny Paul Mulenga: *Theft-U\$50 million- Deputy Minister*”

4. The import of the article was that the respondent, and some other named public figures, had stolen or embezzled various amounts of money. In the respondent's case, it was U\$50 million obtained during his tenure, as Deputy Minister. Shocked by the article, the respondent, by letter dated 28th July, 2010 demanded a retraction and an apology from the appellant to which the latter did not respond.

Proceedings in the High Court

5. Left with no other option, the respondent on 14th October, 2010 proceeded to commence an action for libel against the appellant. The respondent claimed that the appellant had caused to be printed and published of him, words which were untrue, disparaged him in his reputation, and lowered his character in the estimation of 'right thinking members' of

society. That the words complained of, further portrayed him as a thief, morally bankrupt, unworthy of public office, and a person who was corrupt.

6. The respondent also claimed that the publication had caused him stress and embarrassment as he had been shunned by business associates and other entities that had previously patronized his businesses. He further claimed to have suffered pecuniary loss, injury and damage to his business and reputation. The respondent claimed K1.2 million (rebased), exemplary damages for the alleged defamatory publication.
7. In its defence to the claim, the appellant did not deny publishing the article in question but pleaded, fair comment, on a matter of public interest; without any malice, intended, actual or implied.
8. At the trial of the matter in the High Court, the substance of the respondent's evidence was that the article in issue had caused him to lose out on various business transactions, such as an opportunity to tender for a contract to value the TAZARA

pipeline. There was also cancellation of workshops that were to be held at Chainama hotel.

9. The appellant on the other hand did not call any evidence, having opted to entirely rely on its written submissions. The gist of these submissions was that, for the respondent to succeed in his claim he must prove, the statement was defamatory by adducing evidence to support such claim, which he had failed to do. Relying on **section 7 of the Defamation Act, Cap. 68 of the Laws of Zambia** the appellant contended that, under that section, it did not have to prove the truth of all the allegations of fact but to only demonstrate that the comment made was fair, having regard to the facts proved. The appellant maintained that the publication was fair comment, on a matter of public interest, without any malice, actual or implied. That the respondent had not suffered any damage as a result of the published words and was not entitled to any of the claims he was seeking.

10. Upon considering the matter, the learned High Court judge, Sharpe-Phiri, J, framed the issues requiring her determination as being:
- (i) whether or not the article complained of was defamatory;**
 - (ii) if so, whether the words complained of were fair comment on a matter of public interest;**
 - (iii) whether the respondent was entitled to exemplary damages of K1.2 billion.**
11. On the first issue as identified above, the learned trial judge agreed with the respondent that upon examining excerpts of the article complained of, and the ordinary meaning of the words, they did convey to an ordinary person that the respondent had stolen U\$50 million. She found the words were *prima facie* defamatory and lowered the respondent's estimation in the eyes of 'right thinking members' of society.
12. On the second issue, the learned trial judge considered whether the defence of fair comment was available to the appellant, which defence she noted, is a complete defence when the comment is made in good faith and without malice on a matter of legitimate public interest.

13. The finding of the learned trial judge however, was that, although it was not disputed that the respondent had held public office and the issue related to a matter of public interest, the appellant did not set out the comments that it sought to defend as fair, without malice, actual or implied. Neither was viva voce evidence led to prove the facts upon which the comments complained of were anchored.
14. The learned trial judge observed that, the appellant merely relied on a table reproduced in a report titled: *'The abuse of public office for private gain: the state of corruption in Zambia,'* whose author was not named and the information appeared to have been gathered from other news sources. Her finding was that, the facts upon which the comments were based were unclear and could not be said to be truly stated in the matter. Hence, the defence of fair comment was found not available to the appellant.
15. On the third and final issue of entitlement to exemplary damages, the learned trial judge noted that, exemplary damages are punitive damages awarded in addition to actual damages,

when a defendant, such as the appellant in this appeal, acts with recklessness, malice or deceit. The learned trial judge found that, in order for the respondent to succeed with his claim for exemplary damages, the facts supporting the claim must be clearly and precisely set out as stated in the case of **Zambia Publishing Company Limited v Eliya Mwanza**.¹ The respondent in such event, must demonstrate that the appellant knew what it was doing was against the law or was a reckless disregard of the respondent's rights.

16. On the evidence led, the trial judge found the respondent had not proved the essential elements to justify an award for exemplary damages. The sum of K1, 200, 000. 00 claimed as exemplary damages, was declined for that reason. That conclusion notwithstanding, the trial judge still found that the evidence adduced had nonetheless, made out a case for general damages which were awarded to the respondent to compensate for his injured feelings and reputation. Taking into account the imputation of the article on him and his standing in society, the

trial judge found the sum of K35, 000, 000. 00 in general damages, as sufficient recompense for the libel.

Grounds of appeal to this Court and arguments of the parties

17. Dissatisfied with the above findings, the appellant appealed to this Court, on two grounds, stated as follows:

1. **That the court erred in law and fact when it found that the respondent had proved his claim when he had failed to adduce evidence to show how the words complained of had lowered his estimation in the eyes of right thinking members of society.**
2. **The court below erred in law and in fact when it found that, the defence of fair comment was not available to the appellant when the appellant had clearly demonstrated the factual basis of its comment.**

18. The appellant filed written submissions the gist of which on ground one, was that, it was incumbent upon the respondent to prove that his reputation was lowered in the eyes of right thinking members of society. The case of **Galaunia Farms Limited v National Milling Corporation Limited**² was cited as authority for the submission.

19. In relation to ground two, the appellant argued that, the learned trial judge should not have found that the respondent had

proved his claim that his reputation was lowered in the estimation of right thinking members of society, when he had not called any witnesses to attest to such claim. The submission was that, as he himself could not represent 'right thinking members' of society, he had failed to prove that his reputation was affected.

20. The appellant maintained its defence urging us to find that, the publication in issue was fair comment on a matter of public interest without any malice, actual or implied. The submission was that, the learned trial judge erred in law and fact by holding that the defence of fair comment could not succeed against the publication.
21. It was further argued that, the learned trial judge based her findings on a wrong premise of the law when she held that, for the appellant to succeed on a defence of fair comment, it must show that the opinion expressed was based on true facts. Appellant's counsel submitted that, under Zambian law, **section 7 of the Defamation Act**, a person pleading fair comment need not prove the truth of the statement. That the

said provision draws a distinction between the defence of justification and fair comment; and where fair comment is raised as a defence, it is enough to show that the comment was fair having regard to the facts proved.

22. It was submitted that, the right to comment fairly on matters of public interest is sacrosanct, which should be enjoyed by citizens and members of the press alike, as it is also a fundamental tenet of free speech. The cases of **Bonaventure Bweupe v The Attorney General and Others**³ and **Silkin v Beaverbrook Newspapers**⁴ were called in aid of the submission.
23. Learned counsel further argued that although the appellant did not call witnesses, it had sufficient material to meet the required conditions to sustain the defence of fair comment. His contention was that, the matter commented on affected the public at large, who had legitimate interest in what was going on. Counsel pointed out that the respondent himself in cross-examination conceded he was a public figure. He also conceded that newspapers have a right to report issues regarding the conduct of public figures.

24. Counsel proposed that the (entire) article from which the words complained of emanate, should be read in its entirety for it to be seen that the words were a fair comment on a matter of public interest. His submission was that the respondent had admitted, his colleagues listed in the statement, together with himself were accused of, 'allegedly, committing a number of offences upon leaving office.'
25. This Court was urged to look to the substance, rather than the form of the publication. The issue, according to counsel, was not the amount of money that the respondent purportedly abused, but rather, the fact that stories of abuse of resources on the part of the respondent were widespread; and, that this was a matter of public interest.
26. Learned counsel for the appellant in conclusion, submitted that, the article published was not defamatory but was a fair comment without any malice, actual or implied. That the use of the word 'alleged' was a qualifying word which according to the decision in **Shah & Another v Standard Chartered Bank**,⁵

rendered the words complained of, as being no more than a reasonable suspicion.

27. At the hearing of the appeal, Counsel for the respondent sought leave of the Court to file his heads of argument out of time, citing circumstances beyond his control. We declined to grant him leave for reasons that, he had ample time prior to the hearing, to file his heads of argument but had simply neglected to do so. Counsel thereafter opted to rely on viva voce arguments and submissions.
28. In his said oral arguments, learned counsel for the respondent on ground one, submitted that there is evidence on the record that alluded to his client having lost business opportunities due to the libelous article, and that this evidence was not challenged by the appellant in the court below.
29. On ground two, counsel for the respondent defended the learned trial court's finding that the appellant did not call for any evidence to demonstrate which portions of the alleged defamatory article constituted fair comment. His submission in that regard, was that, since the words complained of were

stated as a matter of fact but the source of the information remained undisclosed, the defence of fair comment could not be available to the appellant.

Consideration of the matter and decision of this Court

30. We have considered the heads of argument and the submissions both written and *viva voce*, made by learned counsel for the parties, as well as cases and statutory law to which we were referred and for which we are indebted.

31. Starting with ground one of the appeal, the appellant's argument here, was that, by failing to present evidence from a sample of 'right thinking members' of society the respondent did not prove how the words complained of had lowered his estimation, in the eyes of the said persons. That argument raises the question of what should be proved by a claimant in an action for defamation. Commenting on the same, learned author **Carter-Ruck on Libel and Slander**, at page 35 states that:

'In any action for defamation, whether it be libel or slander, the respondent must prove that the matter complained of:

1. is defamatory (defamation);
2. refers to the respondent (identification);
3. has been published to a third person (publication).'

32. For her part, the learned trial judge in considering whether or not the statement complained of was defamatory, referred to learned authors of **Halsbury's Laws of England, 4th Edition, Volume 28 at paragraph 43** where the test to be applied is set out in the following words:

'In deciding whether or not a statement is defamatory, the court must consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand it in a defamatory sense.'

33. The above quote is further, in line with the decision in **Lewis v Daily Telegraph Limited, Lewis v Associated Newspapers Limited⁶** in which the test is expressed in the following observations:

'There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs.'

34. In proceeding with the present appeal, the record shows that in arriving at her findings, the learned trial judge was alive to the legal requirements that must be met to establish a claim for defamation as set out in paragraphs 31-33 above, when she set out her task, as being:

‘..... to consider what the words in the article mean to an ordinary man. The publication indicates that some of former President Chiluba’s right hand men are alleged to have abused their offices. In relation to the respondent specifically, it states that in his capacity as Deputy Minister, the respondent is alleged to have stolen U\$50, million. I am of the considered view that the meaning these words convey to an ordinary man is that the respondent, whilst in public office, is said to have stolen U\$50 million dollars.’

35. We would have to agree with the learned judge in her conclusion, that the words complained of, in their ordinary sense, do impute to any ordinary right thinking person who read them that the respondent was a thief. It is further clear that in considering whether or not words complained of are defamatory, the test is objective, and the court determines this, based on its view and analysis of the evidence presented before it. The writer **Carter –Ruck on Libel and Slander**, on the proof required, at page 39 has this to say:

“The respondent need only show that the statement complained of tends to defame him, he does not have to prove that persons to whom it was published in fact think less of him; indeed a person may be defamed even though those to whom the statement was published know it to be untrue.”
(underling for emphasis supplied)

36. As to who constitutes a ‘right thinking person’ Lord Atkins who coined the phrase, had this to say, in the case of **Sim v Stretch**⁷:

“The question is complicated by having to consider the person or class of persons whose reaction to the publication is the test of the wrongful character of the words used.....I propose in the present case the test: would the words tend to lower the respondent in the estimation of right-thinking members of society generally? Assuming such to be the test of whether words are defamatory or not, there is no dispute as to the relative functions of judge and jury, of law and fact. It is well settled that the judge must decide whether the words are capable of a defamatory meaning. That is a question of law: is there evidence of a tort? If they are capable, then the jury is to decide whether they are in fact defamatory. (underlining for emphasis, supplied)

37. We are mindful that, in our jurisdiction where there is no jury, it is the judge who determines what an ‘ordinary man’ or ‘reasonable man’ or ‘right thinking person’ would likely think, based on the evidence adduced. In any event, the authority relied on by the appellant itself, in its heads of argument **Gatley**

on **Libel and Slander, 10th Edition, paragraph 32.47, page 938** in acknowledging those limitations states in part, that:

“The claimant can call evidence of the effect of the defamation on his reputation. It is unlikely that direct evidence from a witness in whose estimation the claimant’s reputation has been diminished will be available...”

38. The learned trial judge who, from the texts referred to in paragraphs 32-36 had the duty to determine whether the words published by the appellant newspaper were defamatory, found them *prima facie* defamatory of the respondent and based on unverified sources. As this finding is supported by the evidence on record, there can be no basis for faulting it. Ground one of the appeal fails for those reasons.
39. Coming to ground two, the contention of the appellant was that, the learned trial judge erred in law and fact when she found the defence of fair comment was not available to the appellant, when it had clearly demonstrated the factual basis of its comment.
40. In the case of **Benny Himainza and Wycliff Mwiinga v Times Newspaper (Z) Limited⁸** our holding was that, the defence of

fair comment failed as the defendants did not lead evidence to establish which words were comment and which ones were supporting facts and true. In our more recent decision of **Bevin Ndovi v Post Newspapers Limited, Times Printpak Zambia Limited**⁹, we had occasion to consider the defence of fair comment, in depth, and of relevance to the issue at hand are the following observations:

“Gatley.....defines comment as a statement of opinion on facts and observes that: ‘A libelous statement of fact is not a comment or criticism on anything.....

He adds that ‘the facts upon which the comment is based must be true. That a writer may, not suggest or invent facts, or adopt as true or untrue statements of facts made by others and then comment on them on the assumption that they are true. That if the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail.’ (underlining for emphasis, supplied)

41. The appellant seeks to rely on **section 7 of the Defamation Act**, for the defence of fair comment, arguing that in terms of that section, for the defence to be available one need not prove that the whole statement in issue is true; as it is sufficient to show that the facts relating to the comment were true. The relevant part of section 7 reads as follows:

'...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 words complained of as are proved.'

42. The above provision is premised on and is a verbatim replica of **section 6 of the (UK) Defamation Act, 1952** to which **Gatley on Libel and Slander at p. 354** has this to say:

"This section has not altered the law that fair comment is a defence to comment only; if there is any defamatory sting in any of the facts on which the comment is based and which are contained in the statement complained of, the appellant must plead and prove, if he can, a justification. The effect of the section in most cases will be that the appellant cannot succeed in a defence of fair comment unless he proves that the facts upon which the comment has been made are substantially true..... The court is only concerned with the comment in the statement complained of: if that is fair in relation to such of the facts on which it is based as are proved, the defence of fair comment is made out....." (underlining for emphasis, supplied).

43. In the case subject of the present appeal, the evidence on record shows the allegation made by the appellant that, *'the respondent stole U\$50 million'* was not proved as factual and true. The appellant had only sought to rely on a report that was not factually verified and whose author is unknown. In our view, that evidence, at the most, would only amount to a blind

reproduction of a defamatory statement. Accordingly, we agree with counsel for the respondent, that under the repetition rule an appellant who repeats a defamatory allegation made by another, is treated as if he made the allegation himself. In the case of **“Truth” (NZ) Limited v Phillip Holloway**¹⁰, Lord Denning stated, as quoted in **Gatley on Libel and Slander**, that:

“Every publication of a libel is a new libel, and each publisher is answerable for his act to the same extent as if the calumny originated with him.”

44. Further on the point, as the learned trial judge properly found, the appellant did not set out the specific comments that it sought to defend as fair comment. Our perusal of the record has disclosed that the appellant left it to the learned judge to decipher from the lengthy article what aspects were fact and which were comment. This in effect renders credence to the respondent’s proposition that, there was no truth in the words complained of and there was no comment on them, but a mere reproduction of a defamatory article without any investigation done, as to the veracity of the report on which it was anchored.

Gatley on Libel and Slander, at paragraph 12.1, page 336, again has this to say, on the defence of fair comment:

“To succeed in the defence the appellant must show that the words are comment and not a statement of fact..... He must also show that there is a basis for the comment, contained or referred to in the matter complained of.... Finally, he must show that the comment is on a matter of public interest....

...The fundamental rule is that..... the defence applies to comment but not to imputations of fact. If the imputation is one of fact the defence must be justification or privilege.

45. In the present appeal, the words which the respondent complained of as earlier reproduced at paragraph 3, read as follows:

“A list of some of Chiluba’s right hand men and the allegations of abuse of funds:

“Sonny Paul Mulenga: theft -U\$50 million- Deputy Minister”

46. In our view, there is clearly no comment in the above statement. It is rather, a factual assertion that presupposes the existence of supporting evidence. No such evidence was however, presented before the trial court. As the facts on which the allegation was made were not proved, ‘there was no material to sustain the defence of fair comment’. It also does not assist the

appellant, to now argue on appeal, that the factual basis of the allegations can be found further up in the article, when this was not part of its defence as deployed before the High Court. Our law is settled, that you cannot bring up issues on appeal that were not raised at the trial. Ground two also fails.

47. In concluding we wish to address other arguments advanced by learned counsel for the appellant that, focus should be placed on the substance of the publication and those relating to damages awarded. On the former, we were urged to look to the substance rather than the form of the publication. That it was not the amount of money that the respondent purportedly abused, but the fact that stories of abuse of resources on the part of the respondent were already widespread, making it a matter of public interest. Be that as it may, a line must still be drawn between fair comment and what can be considered to be on-going character assassination. Lord Nicholls in the cited case of **Reynolds v Times Newspaper Limited**¹¹ put it aptly, when he said:

“Reputation..... forms the basis of many decisions in a democratic society which are fundamental to its well-being; including whom...to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one’s reputation...it is in the public interest that the reputation of public figures should not be debased falsely.

48. It is thus clear, that there is a need to balance the promotion of the right to freedom of speech on the one hand and on the other, the right of an individual, including a public figure, not to be defamed. In **Fred Mmembe and Bright Mwape v The People**¹² we did say that, a balance had to be struck between freedom of speech and the right to reputation as freedom of speech and the press cannot be synonymous with the freedom to defame.
49. We note from the record, that although there was a criminal prosecution brought against the respondent by the State in the year, 2001; for allegations of obtaining pecuniary advantage by false pretense when he was Deputy Minister in 1997; he was acquitted of the same on 18th April, 2005. Yet, some 5 years after the respondent’s said acquittal, in 2010 the appellant

proceeded to publish its newspaper article in issue, thereby resurrecting a story that had already run its course and abated.

50. Regarding the damages awarded, we find that the trial court adequately interrogated the difference between exemplary damages as claimed by the respondent and the general damages that he was awarded. We find no reason to belabour the issue, save to add what we have said in a plethora of previous decisions, that the award of exemplary damages must only be made where the defendant has acted in contumelious disregard of the plaintiff's rights.
51. Having upheld the finding of the learned trial judge, that although no evidence was led by the respondent to justify the award of exemplary damages, the words complained of were indeed defamatory of him as to entitle him to the award of general damages, we confirm the sum of K35, 000.00 awarded. The amount will attract interest at average short term bank deposit rate from date of writ to date of judgment. Thereafter, interest will accrue at the current Bank of Zambia lending rate, to the date of payment.

52. Costs will follow the event and are to be taxed in default of agreement.

Appeal dismissed.



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I. C. Mambilima
CHIEF JUSTICE



.....
J. K. Kabuka
SUPREME COURT JUDGE



.....
J. Chinyama
SUPREME COURT JUDGE