

IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO. 2 OF 2018

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

GIVEN LUBINDA

AND

EDMOND LIFWEKELO

DAILY NATION NEWSPAPER LIMITED

CORAM : Wood, Malila and Mutuna, JJS

On 5th June 2020 and 23rd June 2020

For the Appellant : Mr. K. Kaunda and Mr. A. L. Mwila of Messrs
Kaunda Kaunda Legal Practitioners and Mr.
M. Sitali of Messrs Ellis and Company

For the Respondents : N/A



APPELLANT

FIRST RESPONDENT

SECOND RESPONDENT

J U D G M E N T

MUTUNA JS, delivered the judgment of the Court.

Cases referred to:

- 1) **Branson v Bower** (2002) QB 735
- 2) **Lingens v Austria** (1986) 8 E CHN 425
- 3) **New York Times Co. v Sullivan** 376 vs 254
- 4) **Parmiter v Coupland** (1840) 6 M and W 105
- 5) **Michael Chilufya Sata v the Post Newspapers Limited and Another** 1995
- 6) **Sim v Stretch** TLR (1935 to 1936) volume 52
- 7) **Holdsworth LTD v Associated Newspapers LTD** (1937) 3 ALL ER 872
- 8) **Tolley v J.S. Fry and Sons LTD** (1931) AC 333

9) Attorney General v Roy Clark (2008) 1 ZR 38

Works referred to:

- 1) **Gatley on Libel and Slander 12 edition, by Richard Parkes, QC; Professor Alastair Mullis; Godwin Busuttill; Adam Speker; Andrew Scott and Chloe Strong, Sweet and Maxwell, London**
- 2) **Halsbury's Laws of England, by Lord Halisham of St. Marylebone, 3rd edition, volume 24**
- 3) **Clerk and Lindsell on Torts, 21st edition, by Michael A. Jones, Anthony Dugdale and Mark Simpson, Sweet and Maxwell, London**

Legislation referred to:

- 1) **Defamation Act, Cap 68**
- 2) **Constitution, Cap 1**

Introduction

- 1) This appeal arises from the decision of a High Court Judge, Siavwapa J, (as he then was) in terms of which, he dismissed the Appellant's claim for damages in libel against the Respondents.
- 2) The appeal questions a number of findings of fact made by the Learned High Court Judge, including but not restricted to, what amounts to a defamatory statement.

Background

- 3) The Appellant is a member of Parliament for Kabwata constituency under the ruling Patriotic Front Party (PF

Party). He is also a Cabinet Minister and was at the material time relieved of his position as Minister on account of certain differences of opinion he had with some members of the PF Party. He was previously a member of the opposition party, United Party for National Development, UPND.

- 4) Sometime in 2014, the Appellant made a public statement on the political landscape in Zambia in which he alleged, among other things, that the political opposition to the ruling PF Party in Zambia was weak. This prompted the Second Respondent to publish an article in its Sunday edition of 18th May 2014, quoting the First Respondent's reaction to the Appellant's public statement.
- 5) The response publication alleged, among other things, that the Appellant was motivated by a desire to be reappointed Minister in the government of the ruling PF Party. It also alleged that the ruling party and indeed the Appellant was no longer popular with the masses. In addition, it contended that the Appellant was attempting

to rejoin the opposition UPND party because he was sure that the ruling PF Party would lose the next election.

- 6) After the publication, the Appellant complained to the Second Respondent which published an article by him in which he replied to the allegations made in the publication and clarified his earlier statement. The Appellant then took out an action against the Respondents in the High Court.

Appellant's claim and Respondent's defence in the High Court

- 7) The Appellant's action was by a writ of summons and statement of claim in which he claimed the following reliefs:

- 7.1 Damages for libel contained in an article entitled "*UPND WRITES OFF LUBINDA*" attributed to the [First Respondent] which appeared at page 4 of the Sunday Nation Edition of 18th March 2014, vol.3, issue 747, a publication of the [Second Respondent];
- 7.2 An order of interim and permanent injunction restraining the [First and Second Respondents] from

uttering or and publishing similar and other defamatory statements of the [Appellant];

- 7.3 punitive damages;
- 7.4 Any other relief the Court deems fit;
- 7.5 Interest on the said damages at the current bank lending rate from 18th March 2014 until date of full payment;
- 7.6 Costs.

8) The Appellant contended that he is a Member of Parliament and member of the ruling PF Party. He also contended that the publication lowered his standing in the estimation of right thinking members of society and that it brought him into scandal, ridicule, odium, hatred and contempt.

9) He contended further that the ordinary and natural meaning of the words in the publication, which was how they were understood to mean by right thinking members of society was that:

- 9.1 The Appellant cannot survive without a government job;
- 9.2 The Appellant's participation in politics is for personal gain;

- 9.3 The Appellant practices politics of the "*belly*" and will say anything to please the powers that be;
- 9.4 The Appellant has no morals;
- 9.5 The Appellant is a propagandist bent on misleading the public;
- 9.6 The Appellant is a double dealer.

10) In addition, the Appellant contended that the publication was false, malicious and injurious to his reputation on the grounds that:

- 10.1 Prior to joining and after he left the executive arm of government he has been a business man;
- 10.2 The Second Respondent did not attempt to verify the story with him prior to publishing it.

11) At the trial the Appellant testified as PW1 and called one other witness. His evidence explained his understanding of the content of the publication and the effect it had on him.

12) PW2 was Nathan Nhlame a businessman who had known the Appellant since 1995. He described the Appellant as an honest and focused man and testified that when he saw the publication he bought the newspaper and went

to discuss it with the Appellant. He told him that it portrayed him, the Appellant, as a traitor and double dealer.

13) The First Respondent did not file a defence to the Appellant's claim and did not attend trial in the Court below. The Second Respondent filed a defence in which it contended that the publication was fair comment on a matter of public interest which enhanced free political debate arising from a statement attributed to the Appellant, alleging that there was no strong political opposition in the country.

14) Further, the publication was made without malice and, insofar as it would be necessary, the Second Respondent would rely on Section 9 of the **Defamation Act**. It particularized its defence in this regard, as follows:

14.1 The First Respondent, who issued the statement contained in the publication, is and was the Publicity and Information Secretary for a lawfully recognized opposition political party in the country by the name of UPND;

- 14.2 The Appellant is a politician, public figure and Member of Parliament for Kabwata Constituency under the PF Party;
- 14.3 The publication complained of was preceded by a statement issued by the Appellant to the effect that there was no strong political opposition in the country;
- 14.4 The opposition UPND did issue a response to the statement by the Appellant through the First Respondent;
- 14.5 The statement by the First Respondent was, insofar as the Second Respondent is concerned, an honest expression of a genuine opinion in furtherance of free inclusion in vehement, caustic and unpleasantly sharp attacks against the Appellant who is a public official and vocal politician;
- 14.6 The Appellant entered political and public life voluntarily, as such, he knew or ought to have known that he would be subject to political attacks in retaliation to attacks made by him against his opponents;
- 14.7 The content of the publication are true because they recount the harassment the Appellant suffered under the hands of his colleagues in the PF who were determined to hound him out of the PF Party.

His actions of condemning the opposition appeared to be calculated at appeasing the PF Party.

- 15) The Second Respondent's pleadings concluded by denying the Appellant's claim in its entirety.
- 16) Testifying on behalf of the Second Respondent was a lone witness, Richard Lazarous Sakala, the Managing Director. He testified that the publication was an accurate representation of the statement by the First Respondent who was reacting to the statement by the Appellant which he considered disparaging of the opposition, UPND Party.
- 17) According to the witness, the publication was in no way injurious to the Appellant's political career which is evident from the fact that, following the publication, he was appointed Minister. It was in no way intended to demean the reputation of the Appellant but rather enhanced it given his trials and tribulation occasioned by the other members of the PF Party.
- 18) The witness went on to say that the Appellant is an active politician who frequently makes political statements

which will inevitably attract robust response from certain sections of society. The Second Respondent, as an independent newspaper, encourages debate as is required in a democratic society, and accurate reporting so that the reader can form his/her own opinion on the matter. For that reason, it invited the First Respondent to respond to the publication and later invited the Appellant to reply to the First Respondent's response but he declined to do so.

- 19) The witness concluded by stating the need for politicians to be "*thick skinned*" because they are open to public scrutiny.

Consideration and decision by the Learned High Court Judge

- 20) In his consideration of the matter, the Learned High Court Judge identified one issue for determination as being, did the article complained of contain words that are defamatory of the Appellant? He proceeded to state that if the answer to the question posed is in the

affirmative then the Respondents are liable to the Appellant in damages.

21) The Learned High Court Judge then turned to consider what constitutes the tort of defamation. He said that clarity is lacking in the definition of the term "*defamation*". Nonetheless he reminded himself that the main objective of the tort of defamation is to protect one's reputation based on the assumption that every individual is entitled to a good reputation. He was of the view that mere insults are not injurious to one's reputation.

22) He identified three instances which amount to injury of one's reputation as follows:

22.1 Words that tend to lower a plaintiff in the estimation of right thinking members of society generally;

22.2 Words that tend to cause others to shun or avoid the plaintiff; and

22.3 Words that tend to expose the plaintiff to hatred, contempt or ridicule.

23) The Learned High Court Judge reviewed the background to and content of the publication in light of the three

tests set out in the preceding paragraph. He summarized the offensive publication as follows: a reaction to an earlier public statement made by the Appellant alleging that the opposition parties in Zambia are weak; couched in a language which portrays the Appellant as seeking to appease the leadership in the ruling PF Party so that he could receive favourable treatment and reappointment to a cabinet position; and, portrays the Appellant as being out of touch with reality because the converse is what was applicable being that, it was the ruling PF Party which had weakened due to loss of support from the masses on account of its poor performance in the governance of the country.

- 24) The Judge reiterated that the publication was an angry reaction to the public statement issued by the Appellant from a representative of UPND which is an opposition party and, as such, affected by the public statement. In addition, he reviewed the content of the article, the evidence of PW2 and the fact that the Appellant is engaged in active politics, in light of English authorities

on the matter. He concluded that in determining whether or not the words complained of are defamatory the Court looks at the context in which the words are made and the circumstances of each case.

- 25) Applying the test in the preceding paragraph to the case, the Judge referred to the learned authors of the text ***Gately on Libel and Slander*** and quoted a passage to the effect that once a person opts for public office he opens himself up to attack and criticism because the law recognizes that such criticism is in the interest of the public. He also quoted passages from the cases of ***Branson v Bower***¹ ***Lingens v Austria***² and ***New York Times Co. v Sullivan***³. The Judge also made reference to Article 20 of the ***Constitution*** on the freedom of expression and the press.
- 26) Explaining the provisions of the ***Constitution***, the Judge found that the interests of the larger majority i.e. public interests, supersede individual rights. He then explained the circumstances which the Appellant was in at the time of the publication and concluded that members of the

public and indeed the press were interested in any news generated by him. This, he found, was reinforced by the fact that the Appellant's statement was "*pregnant*" with contempt of the opposition political parties and it received an equally contemptuous response on his person. Further, as a politician he ought to have known he would receive such a response.

- 27) The Judge justified his findings in the preceding paragraph by reviewing the political landscape in Zambia and said the reintroduction of multiparty democracy in Zambia had brought about the use of venomous language by politicians against each other. This language, he said, does not necessarily lower the standing of the attacked politician in the eyes of right thinking members of society or lead them to being shunned. He examined the evidence led by the Appellant which revealed that his feelings were hurt by the publication and found that the law of defamation is not concerned with the personal hurt suffered by a plaintiff.

- 28) According to the Judge, a plaintiff must show that as a consequence of the words complained of, he suffered ridicule, shunning and resentment from people who previously held him in high esteem. The words, he stated, must be interpreted to have such an effect in their natural and ordinary meaning. His finding was that although the Appellant contended that the publication complained of had that effect, the evidence led did not prove the contention, especially that he did not produce the full text of the publication and merely quoted extracts of it in the statement of claim.
- 29) In addition, the Judge found that what appeared to have riled the Appellant was the suggestion in the publication that he was seeking refuge in the opposition UPND Party following his fall out with the PF Party. Such allegations, according to the Judge, did not have the effect of lowering the reputation of the Appellant in the estimation of right thinking members of society. This, the Judge surmised, was as a consequence of precedent set in the political arena in Zambia of frequent defections from parties by a

number of politicians. He gave examples of this from different eras of the political history of the country.

- 30) The Judge concluded by reiterating the need for healthy political debate in a democratic country and expressed the view that the Appellant provoked the situation and received an appropriate response.
- 31) He accordingly dismissed the Appellant's claim with costs.

Grounds of appeal to this Court and the arguments by the Appellant

- 32) The Appellant is dissatisfied with the decision of the Learned High Court Judge and has launched this appeal advancing four grounds of appeal as follows:

32.1 The Court below erred both in law and fact by holding that Zambians have accepted that politicians can cross over to another political party at will without suffering any serious disapproval from many Zambians, thereby disregarding the law and decisions of this Court on the defamation of politicians;

32.2 The Court below erred both in law and fact when it held that if one or two people hold such a politician in contempt, hatred and ridicule, it cannot amount to a reflection of society generally, when there is no evidence before Court to support the Court's position;

32.3 The Court below erred both in law and fact when it concluded that the offensive statement herein was provoked by the Appellant when the said statement attacked the Appellant in his private and personal character and also in his political character. The person to whom the statement is attributed to did not defend the veracity, if any, of the statement; and

32.4 The Court below erred both in law and fact by awarding costs to the Respondents.

33) Counsel for the Appellant filed heads of argument before the hearing which they relied upon. They also made *viva voce* arguments. The First and Second Respondents did not file heads of argument and were not represented by counsel at the hearing.

34) In the case of the Second Respondent, present at the hearing was its Executive Director, a Ms Chibiliti, who sought an adjournment for purposes of enabling the

Second Respondent engage substitute counsel to represent it. We declined to grant the adjournment because the record did not reveal withdrawal from conduct by counsel for the Second Respondent appearing in the record of appeal. Further, we were of the view that the Second Respondent had ample time, before the hearing, to engage another firm of lawyers.

- 35) In the opening part of the Appellant's heads of argument, counsel for the Appellant, Mr. K. Kaunda, contended that the people of Zambia have not accepted that politicians, in particular, members of Parliament, have the freedom of changing parties without suffering public disapproval. Further, the law on defamation applies to all persons without exception.
- 36) Counsel then argued grounds 1 and 2 of the appeal together, then 3 and 4 separately, in that order.
- 37) In opening the substance of the Appellant's arguments under grounds 1 and 2 of the appeal, Mr. Kaunda, set out the findings by the Learned High Court Judge which he disagreed with. The passages were the ones where the

Judge explained the effect which words complained of should have if they are to be found to be defamatory and his opinion of the public attitude generally on the frequency with which Zambian politicians change parties.

38) The argument by counsel here, was that it was a misdirection on the part of the Learned High Court Judge to find that the words complained of were not injurious to the character of the Appellant. Further, the finding departed from precedent set by this Court specifically the decision in the case of ***Michael Chilufya Sata v The Post Newspapers Limited***⁵ where Ngulube CJ (as he then was), sitting as a High Court Judge stated, among other things, that to call a politician a political prostitute is clearly defamatory.

39) According to counsel, the ***Sata***⁵ case demonstrates that Zambians in general frown upon politicians who cross over from one party to another. As such, it was a misdirection on the part of the Learned High Court Judge to have found to the contrary.

- 40) Counsel also urged us, in our consideration of the **Sata**⁵ case, to take cognizance of the character of the Plaintiff in that case as opposed to the Appellant in this case. The suggestion here was that the Plaintiff in the **Sata** case was theatrical while the converse is true of the Appellant.
- 41) Taking his argument further, counsel submitted that it is for this reason, that the **Constitution** (as amended) under Article 71(2) (c) provides for vacating of office by a Member of Parliament where, he or she, changes from the party under which he was elected to another. This, he argued, is in line with the will of the people as expressed in the preamble to the **Constitution**.
- 42) Concluding his argument under these two grounds of appeal, counsel submitted from two fronts. The first was that the evidence of PW2 and the Second Respondent's only witness confirm that the publication complained of was defamatory. PW2's testimony revealed that the article portrayed the Appellant as a traitor or double dealer, while DW1 confirmed that the words in the publication were unpleasant.

- 43) The second front related to damages. Here, counsel argued that for a Court to hold that an article is libelous, a party need not prove that he suffered actual damages. Reliance was placed on *Halsbury's Laws of England*, 3rd edition, volume 24, paragraph 18.
- 44) Turning to ground 3 of the appeal, the arguments by counsel focused on attacking the finding by the Judge that the Appellant provoked the opposition, UPND, hence the response he received. This finding, he argued confirmed that the publication complained of were injurious and attacked the Appellant's personal and political character. That the initial statement made by the Appellant was not contemptuous and did not warrant the response it received. Counsel concluded that his arguments were reinforced by the fact that the First Respondent did not defend the veracity of the words complained of. In other words, counsel took the view that the claim for defamation was proven because the First Respondent did not defend the action.

- 45) Last of all, in ground 4 of the appeal, counsel contended that in view of the arguments advanced in the first three grounds of appeal, which according to him proved the misdirection on the part of the Learned High Court Judge, the Appellant ought not to have been condemned to costs.
- 46) In response to questions posed by the Court, Mr. Kaunda contended that the publication as a whole was defamatory of the Appellant's character. When pressed by the Court to point out which portion or portions of the publication were defamatory, he said paragraph 4 of the publication portrays the Appellant as a political prostitute and likened the effect of that portion of the publication to the one in the **Sata⁵** case. He said it portrays the Appellant as a person who has no morals and will do anything to get a government job.
- 47) Mr. Kaunda also said that paragraphs 8 and the penultimate paragraph of the publication are defamatory. As regards paragraph 8, because it refers to the Appellant as "*... trying to blind his masters that PF is still*

popular ..." and the latter, the reference to the Appellant as courting the opposition UPND Party.

48) Mr. Mwila and Mr. Sitali did not add to Mr. Kaunda's arguments when invited to do so. They merely confirmed their support for the arguments advanced.

49) We were urged to allow the appeal.

Consideration and decision by this Court

50) In our consideration of this appeal, we have looked at the record of appeal and arguments by counsel. Our perusal of the four grounds of appeal have led us to conclude that the sole issue for determination in this appeal is whether or not the Court below erred when it found that the publication complained of was not defamatory.

51) Before we consider the issue we must start by commenting on an issue that continues to haunt our Courts in Zambia, namely, flawed pleadings presented by counsel. The endorsement in the originating process filed in the Court below on behalf of the Appellant is bereft of particulars of the specific words or paragraphs in the

publication which the Appellant considered defamatory. The Appellant's position, as confirmed by counsel, was that the publication as a whole is defamatory.

52) Order 18 rule 12 sub-rule 24 of the **Supreme Court Practice 1999 (White Book)** under the heading "*libel*" states that "*... in the statement of claim, the precise words complained of must be set out ...*" in a libel action arising out of a long article or "feature" in a newspaper, the Plaintiff must set forth in his statement of claim the particular passages referring to him of which he complains and he must set out the respects in which such passages are alleged to be defamatory, otherwise the pleading will be struck out."

53) Based on the authority we have cited in the preceding paragraph, the Appellant's action should not have progressed to trial because the originating process was wanting in particulars. The pleadings should have been struck out. Unfortunately it proceeded to trial in that form and finally on appeal, leaving the High Court Judge and us having to squint our eyes in reading the article

against the pleadings in search of the particular defamatory words or paragraphs. It is for this reason that we pressed counsel for the Appellant at the hearing to specifically point out to us which paragraphs were defamatory. We have commented on his response later in this judgment because our task here was to merely to point out the flaw in the originating process.

- 54) We also wish to state that we have not considered the Appellant's arguments in relation to the constitutional provision relating to vacating office where a Member of Parliament changes political parties. The reason for this is that the arguments or issue was not presented in the Court below.
- 55) Having made these two clarifications we now proceed to consider the issue that engages this appeal. The Judge's finding that the publication complained of was not defamatory was preceded by defining what amounts to injury to one's reputation. He held that an article will be held to be injurious to one's reputation and, therefore, defamatory where the words contained in it:

- 55.1 Tend to lower the plaintiff's reputation in the estimation of right thinking members of society generally;
- 55.2 Tend to cause others to shun or avoid the plaintiff; and
- 55.3 Tend to expose the plaintiff to hatred, contempt or ridicule.

56) The Learned authors of **Clerk and Lindsell on Torts**, 11th edition, state the test at pages 1315 to 1316 as to whether a statement is defamatory or not as being "*...whether the matter complained of was calculated to hold the Claimant up to hatred, contempt or ridicule. This ancient formula was, however, insufficient in all cases ... Lord Atkin in Sim v Stretch applied the test, "would the words tend to lower the, Claimant in the estimation of right thinking members of society generally". Or ...[Would the words] likely to affect a person adversely in the estimation of reasonable people generally". The alternative" or which would cause him to be shunned or avoided" must be added ..."*

- 57) The passage we have quoted in the preceding paragraph shows that an article or publication will be defamatory if its effect is to expose a claimant: to hatred contempt or ridicule; or lower the claimant's reputation in the estimation of right thinking members of society; or, to be shunned or avoided. A claimant must, therefore, lead evidence to prove that the publication complained of had this effect, not on him, but right thinking members of society, generally. **Clerk and Linsell** drew their inspiration to the foregoing definition from the English cases of **Sim v Stretch**⁶, **Holdsworth Ltd v Associated Newspapers Ltd**⁷ and **Tolley v JS Fry and Sons Ltd**⁸.
- 58) The learned authors go further at page 1316 of the text to explain that in determining whether or not a statement is defamatory , "... the Court should give the material in question its natural and ordinary meaning."
- 59) Coming back to our case and applying the tests we have set out in the three preceding paragraphs. The Appellant explained in the originating process what he perceived the ordinary and natural meaning of the statement as a

whole to be. He said it suggested that he cannot survive without a government job; he is in politics for personal gain; practices politics of the belly and will say anything to please the powers that be; suggested that he has no morals; he is a propagandist bent on misleading the public; and, is a double dealer. He concluded by contending that the publication lowered him in the estimation of right thinking members of society and brought him into scandal, ridicule, odium, hatred and contempt.

- 60) As for the evidence led in support of the contentions, it reveals firstly ,that he was extremely depressed and was injured because "... [he] is not one who trades attacks] with other] individuals". Further, it also revealed that immediately after reading the article, PW2 went to his side to offer his sympathies and told him that the publication portrayed him "...as a traitor or double dealer".
- 61) We have difficulty holding the publication as being defamatory on the evidence led by the Appellant, because

it shows that it is the emotions of the Appellant and not his reputation which was harmed. He categorically stated that it depressed him as is evident from his testimony at page 142 of the record of appeal. This is an emotional feeling. Damage to reputation is felt by how right thinking members of society generally perceive you after the publication and not how you feel about the publication or the emotions it draws out of you. The public either, shun and hold you in contempt, or hate, avoid and ridicule you, thereby lowering your standing in society generally. For this reason it is incumbent upon a plaintiff to lead evidence, through his witnesses, the right thinking members of society, to show that the publication complained of had such an effect on them especially that he specifically pleaded that this was the effect it had as we have said in paragraph 8 of this judgment.

- 62) The evidence of PW2 does not reveal that the publication had such an effect on him in relation to the Appellant. To the contrary, he did not shun, avoid, ridicule, or even hold the Appellant in low esteem. He rather, went to his

side immediately after the publication to commiserate with him. This demonstrates that PW2 still held the Appellant in high esteem and or the same esteem in which he had before the publication. We can only conclude that this is because PW2 knew the Appellant not to be one.

- 63) Secondly, we also have difficulty reading into the article the interpretation ascribed to it by PW2. He testified that the article portrayed the Appellant as a traitor and double dealer. He does not specifically point to any words, paragraph or paragraphs in the publication which attest to such portrayal nor was this pleaded in the originating process.
- 64) The natural and ordinary meaning we have given to the publication is that it was, first and foremost, a reaction from a member of the opposition UPND party to an allegation by the Appellant that the opposition was weak. It labeled the Appellant as being detached from the political landscape which revealed that the ruling PF Party's popularity was waning. It also attributed the

criticism of the opposition by the Appellant as an attempt at impressing the leadership in the PF ruling party in an effort to gain back their trust and his political appointment as a cabinet minister. These allegations, true or false, looked at in their ordinary and natural meaning, along with their effect on right thinking members of society, can in no way be said to be injurious to the Appellant's character.

- 65) The Appellant also said that the publication suggested that he was desperate to be re-employed as a cabinet minister for what he termed economic gain. He contended that this was defamatory because he was a businessman before and during his tenure as a cabinet minister and was thus not desperate for the financial perks that came with the position of cabinet minister.
- 66) What is clear from the contention by the Appellant in the preceding paragraph is that his ego was thoroughly bruised and he sought to repair it through the action in the Court below.

- 67) We do not consider these allegations, made if at all that is what right thinking members of society would have said they mean, to be in any way defamatory because, along with seeking to advance their political careers, politicians enter politics for financial gain. The post of cabinet minister is a position of employment from which the holder earns a living through the salary, perks and other fringe benefits that come with the position. We take judicial notice of this notorious fact. To state this notorious and obvious fact is by no means defamatory and the law of defamation is not about repairing dented egos.
- 68) The facts of this case should be distinguished from the facts in the **Sata**⁵ case relied upon by the Appellant. In that case the Defendant referred to the Plaintiff (now late), a politician, as a "*political prostitute*" for joining a party of his own choice after the reintroduction of a new political dispensation which abolished the one party system of government. Ngulube CJ, (as he then was) sitting as a High Court Judge, found that it was

defamatory to refer to a politician as a political prostitute as we have said earlier. We agree with the findings by Ngulube CJ and are persuaded by them.

- 69) The Respondents in this action did not use the phrase used by the Defendant in the **Sata**⁵ case and neither does paragraph 4 of the publication suggest that. For completeness we are compelled to reproduce the paragraph. It states as follows:

"Mr. Lifwekelo said Mr. Lubinda had been blinded by his desire to get back a government job and that the Kabwata Parliamentarian had become political myopic and disoriented following a surge of anti-Lubinda campaign that were meant to hound him out of the ruling party."

We have already stated our views on the allegation that the Appellant was prompted to make his statement due to his desire to be re employed as a cabinet minister. The statement, as we see it, cannot in any way be equated, as Mr. Kaunda, wishes us to do, to the statement in the **Sata**⁵ case. In that case the words "*political prostitute*" were actually used and they are indeed defamatory of a person. In the paragraph in issue no such words or

suggestion of prostitution was made nor was evidence led to that effect.

70) As regards paragraph 8 and the penultimate paragraph of the publication they merely alleged that the Appellant had been trying to blind his masters and courting the members of the UPND Party because he was sure the PF Party would not win elections. These allegations, are in no way defamatory if one gives the words complained of their ordinary and natural meaning. They do not also portray to society the meaning counsel ascribed to them. This is quite apart from the fact that the pleadings do not explain the paragraphs to have such meaning.

71) The Appellant also complained about the holdings by the Learned High Court Judge which he said suggests that the practice of crossing over from one party to another by politicians is generally accepted in Zambia. That, the fact that one or two politicians hold such a politician in contempt, hatred and ridicule is not a reflection of the view of society in general. And that the Appellant provoked the situation by issuance of the statement. In

case of the latter holding, in any event, the First Respondent to whom the publication was attributed never defended its veracity.

- 72) We will begin our consideration of the three contentions made by the Appellant with the third one. This contention relates to the finding by the Learned High Court Judge as follows:

"The statement issued by the Plaintiff, viz, "there is no strong opposition in Zambia; was pregnant with contempt on opposition political parties and he got a response that smacks of contempt on his person. As a seasoned politician, he should have seen it coming."

The contention by counsel for the Appellant is that the use of the word contempt is a confirmation by the Learned High Court Judge that the publication was defamatory.

- 73) We have already set out the consideration made by the Judge in deciding whether or not the publication was defamatory and the conclusion he reached. The use of the phrase "*smacks of contempt on his person*" is in no way an acknowledgment by the Judge that the

publication was defamatory. The Judge was merely confirming a notorious fact that the PF and UPND are poles apart and to allege that one faction is weak is bound to result in a backlash. The statement issued by the Appellant was on a very sensitive issue which is debated upon publicly in the country very often. This fact is not lost to the Appellant, he, therefore, ought to have expected a harsh response from the First Respondent as a representative of UPND.

74) Further, we do not accept the suggestion by counsel for the Appellant that the fact that the First Respondent did not defend the veracity of the contents of the publication means that the claim was proved. It is a well known principle of law, and precedent abound, that a Plaintiff needs to prove his case if he is to get judgment in his favour notwithstanding that a defence may have collapsed.

75) Perhaps this is an opportune point at which to comment on the Appellant's rights arising from the fact that he has entered politics and press freedom. Ngulube CJ, in the

Sata⁵ case observed that persons in public positions are taken to have offered themselves to public attack and impersonal criticism. Such criticism should not attract liability for as long as it is not personal and defamatory.

76) We also wish to reiterate what we said in the case of **Attorney General v Roy Clarke**⁹ that freedom of expression is one of the strong attributes of a democratic society, and that, to the extent permitted by the **Constitution**, it must be protected at all costs. As a consequence, those who hold public office must be prepared to suffer criticism, and be tolerant. In other words, they should be thick skinned.

77) Although the **Roy Clarke** case was not a case involving defamation, it is relevant because it restates the need for promotion of healthy public debate in pursuance of the advancement of democratic values. If such debate involves a person holding a political position, he or she must be tolerant of acceptable criticism. That is, criticism which is not personal and casts aspersions on a person's

reputation, as he or she has offered himself to such criticism or attack.

78) The Appellant, in his position of politician, has not only offered himself to public attacks but enhanced this by making public a pronouncement on a very sensitive and debate provoking issue. The nature of the issue brings into play Article 20(2) of the **Constitution** on freedom of the press whose main purpose is to promote public awareness and debate. The Second Respondent was thus, duty bound to disseminate, in a responsible manner, the contents of the publication on account of the public interest it stirred.

79) The Appellant also complained of two other passages in the findings by the Learned High Court Judge. He has raised these grievances under grounds 1 and 2 of the appeal and the passages are as follows:

79.1 "It is for that reason that the Plaintiff must show that as a result of the words complained of he has suffered ridicule, shunning and resentment from people that previously held him in high esteem."

79.2 "It is therefore something that Zambians have lived with and accepted that politicians can cross over

to another political party at will without suffering any serious disapproval from many Zambian:

"If one or two people hold such a politician in contempt hatred and ridicule, it cannot amount to a reflection of society generally."

- 80) The argument by the Appellant here is that, although the Learned High Court Judge found the publication defamatory, it erroneously exonerated the Respondents. In addition, the finding by the Learned High Court Judge was legally flawed because Zambians in general have not accepted the practice of politicians frequently changing parties.
- 81) We must state from the outset that we do not agree with the interpretation which counsel has ascribed to the passages. Our understanding of the reasoning by the Judge, as reflected in the passages, is that he was restating the test which the Appellant had to surmount in order to prove that the publication was defamatory. That is to say, as a consequence of the publication, the Appellant has been shunned, resented and ridiculed. Further the Appellant's reputation has suffered in the

estimation of right thinking members of society generally and not just a small section of society.

82) We are reluctant to deal with this argument beyond this because, although the judge did make a finding of fact which the Appellant has complained about public reaction to politicians changing parties, it was not an issue raised in the pleadings or the evidence in the Court below. The grievance which the Appellant deployed was for damages arising out of a publication he alleged was defamatory. He did not call on the judge to pronounce himself on whether or not the prevalent act or practice of politicians changing parties is perceived by right thinking members of society as a practice to be frowned upon. The judge misdirected himself in this regard. However, and to the Judge's credit, in dealing with the matter and arriving at his decision he addressed the question which the Appellant's claim posed, of whether or not the publication was defamatory.

83) As a consequence of our holdings in the preceding paragraphs we are compelled to answer the question

posed by this appeal in the negative. The Judge did not err when he found that the publication was not defamatory. Ground 1, 2 and 3 have no merit.

- 84) The net result of our determination in the preceding paragraphs, is that there is no merit in ground 4 of the appeal because it was predicated on the success of the other three grounds of appeal. The award of costs is governed by the principle that they follow the event, except where it can be shown that the winning party is not deserving of costs on account of his conduct during the proceedings. In this case the appropriate award is that the Second Respondent only, will have the costs of the proceedings in the Court below. This is on account of the expense it incurred in defending the matter. These will be taxed in default of agreement. We, accordingly, vary the decision of the Learned High Court Judge to the extent that we set aside the award of costs in that Court to the First Respondent. He is not entitled to costs because he did not take any steps in the direction of defending the action in that Court.

- 85) In regard to the costs in this Court, these will lie where they fall because, although the event is in favour of the two Respondents, they did not take any steps in defending the appeal. They, therefore, incurred no costs whatsoever.

Conclusion

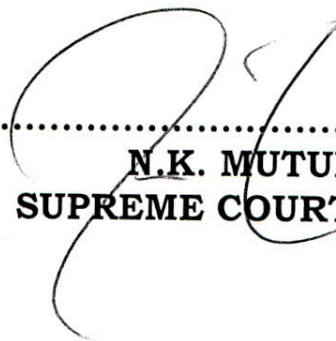
- 86) Since all four grounds of appeal are bereft of merit, the appeal is doomed to fail and we so hold and dismiss it.



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A.M. WOOD
SUPREME COURT JUDGE



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M. MALILA
SUPREME COURT JUDGE



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N.K. MUTUNA
SUPREME COURT JUDGE