

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA**

APPEAL No. 221/2019

(Civil Jurisdiction)

B E T W E E N:

SIMATAA SIMATAA

AND

ANDREW NDANGA KAMANGA



APPELLANT

RESPONDENT

**CORAM: Mchenga DJP, Majula and Siavwapa, JJA
On 19th February 2021 and 25th February 2021**

For the Appellant : No Appearance

For the Respondent : No Appearance

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Fraser vs Evans* (1969) 1 QB 349
2. *Shamwana vs Mwanawasa* (1993 – 1994) ZR 149.
3. *Micheal Chilufya Sata vs Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Ltd, Mobi TV International Ltd* (2011) 1 ZR 519
4. *American Cynamid Co vs. Ethicon* (1975) AC 396

1. BACKGROUND

- 1.1 The appellant has appealed to this court against an interlocutory ruling of the High Court by which the respondent was granted an injunction to restrain the appellant from uttering injurious statements until final determination of the matter.
- 1.2 The case for the respondent, who is the plaintiff in the court below, was that on 11th June, 2019 the appellant caused to be written and published in the Diggers Newspaper under the headline, “**KAMANGA TRIED TO BRIBE ME – SIMATAA.**” It was further alleged that the appellant, with his defamatory actions, proceeded to make several postings and publications on a social media WhatsApp group called “Bola Zambia” where he stated that a formal complainant had been lodged against the respondent for breach of certain provisions of the FIFA Code of Ethics.
- 1.3 The major grievance of the respondent was that the words uttered in their natural and ordinary meaning were understood to mean that he had committed acts of bribery that are criminal in nature. It was contended that if left unchecked, the appellant’s words would cause serious damage to the respondent’s personal and professional character and reputation.

- 1.4 It was in relation to the statements published by the appellant that led the respondent to seek for an order of interim injunction pending determination of the main matter to restrain him from continuing with his defamatory actions.
- 1.5 The appellant, who is the defendant in the court below did not file an affidavit in opposition but his advocate gave oral submissions in opposing the application. The thrust of counsel's submission in the court below was that there was a pending application before the Deputy Registrar for further and better particulars. He then sought an adjournment pending determination of the application. The request for adjournment was declined and the matter proceeded for hearing.
- 1.6 In opposing the application for an injunction, the gist of the appellant's arguments in the court below was that the statements complained of relate to fair comment in the running of football in the country and cannot, therefore, be considered to be defamatory. It was thus contended that if the injunction were to be granted, it would contravene the appellant's freedom of expression.

2. DECISION OF THE HIGH COURT

- 2.1 The lower court scrutinised the evidence and authorities that were presented before it in relation to the principles of law for the grant of interim injunction in defamation cases. The

learned Judge came to the conclusion that the respondent had demonstrated that there was injury to his reputation attributable to the statements issued by the appellant. She also observed that there was a danger of repeated publications of the injurious statements to which the appellant had no justifiable reason. The court, therefore, granted the interim injunction that the respondent sought.

3. GROUNDS OF APPEAL

3.1 Disconsolate with the decision, the appellant launched the present appeal mounting the following grounds of appeal:

- 1. The learned Judge erred in law and fact when she refused to adjourn the matter pending determination of preliminary issues raised by the Appellant which was filed in accordance with the law and therefore, the same ought to have taken precedence before the main matter.*
- 2. The learned Judge erred in law and fact when she proceeded to grant an order of interim injunction on the pretext that the appellant did not oppose the application when in fact it was the duty of the respondent to demonstrate irreparability as it is trite that the onus lies on the party alleging.*
- 3. The learned Judge erred in law and fact when she relied on assertions by the respondent to the effect that the words allegedly used by the appellant to the effect that the respondent wanted to bribe him by offering him a job in*

exchange of uplifting his ban is an offence under the Penal Code and the Anti-Corruption Act when in fact there is no such offence in the said two Acts.

4. The learned Judge in the court below erred when despite acknowledging the holding in the **Fraser vs Evans**¹ case wherein the following points were buttressed:

(i) Thus the court will only grant an interim injunction where:

(a) the statement is unarguably defamatory;

(b) there are no grounds for concluding the statement may be true;

(c) there is evidence of an intention to repeat or publish the defamatory statement; and

(d) there is no other defence that might succeed.

The respondent failed to prove the aforesaid points for the court to grant the interim injunction.

5. The learned Judge in the court below erred in law and fact when she granted an interim injunction by way of making a global order restraining the appellant from making any comments against the respondent despite acknowledging the holding in the **Shamwana vs Mwanawasa**² case where courts have been advised not to make global orders which would be oppressive to the other party.

5. APPELLANT'S ARGUMENTS

- 5.1 In relation to ground one, learned counsel for the appellant pointed out that the originating process by the respondent was filed concurrently with the summons for an interim injunction on 28th June, 2019. On 10th July 2014, the appellant entered a conditional memorandum of appearance and subsequently applied for further and better particulars. It was contended that the application for further and better particulars ought to have been disposed of first before hearing the application for an interim injunction.
- 5.2 Pertaining to ground two the learned counsel observed that there was no evidence to prove that the words complained of were indeed made by the appellant or that they were defamatory in nature. It is for this reason that counsel submitted that the lower court issued a global interim order that is oppressive to the appellant as espoused by the Supreme Court in the case of ***Shamwana vs Mwanawasa***¹
- 5.3 With respect to the third ground of appeal counsel for the appellant specifically criticized the lower court for holding that the offer for a bribe is an offence under the Penal Code and the Anti-Corruption Act Number 3 of 2012. According to counsel, the two pieces of legislation do not contain such an offence. We were accordingly implored to peruse through the cited Acts and allow this ground of appeal.

- 5.4 The major grievance in relation to ground four was that the evidence of the respondent fell short of the threshold set for one to be granted an interim injunction. To support his contention, counsel cited the case of ***Fraser vs Evans***.¹
- 5.6 The learned counsel concluded his submission on this ground by arguing that while the court acknowledged the holding in ***Fraser vs Evans***¹ case, it misdirected itself when applying the principles to the facts of this case.
- 5.7 Turning to ground five, counsel for the appellant complained that as a result of the interim injunction the appellant is proscribed from making any comments against the respondent. In his view, this is a misapplication of the guidance of the Supreme Court as stated in the case of ***Shamwana vs Mwanawasa***² where courts were advised not to make global orders which would be oppressive to the other party. On the basis of the foregoing argument, counsel urged us to allow the appeal with costs.

6. RESPONDENT'S ARGUMENTS

- 6.1 There were no heads of argument filed on behalf of the respondent and both parties were not in attendance at the hearing of the appeal when the matter came up on 19th February, 2021.

7. CONSIDERATION AND DECISION OF THE COURT

- 7.1 Having meticulously examined all the grounds of appeal, it is clear to us that in a nutshell, the appellant's grievance is the grant of the injunction against him by the lower court. According to him, the respondent did not merit the grant of an injunction.
- 7.2 Starting with the question as to whether the preliminary issues raised by the appellant for further and better particulars should have taken precedence over the main matter, we are of the view that there was nothing untoward by the Judge declining to wait for the decision of the Deputy Registrar. What was before her was an interlocutory application and it was within her discretion to consider whether what was on the writ merited an injunction. For that reason, we find no merit in the first ground of appeal.
- 7.3 In the second ground of appeal the appellant is attacking the grant of an interim injunction on the ground that the respondent did not demonstrate irreparability. He alleges that there is no evidence adduced by the respondent that seeks to defame him. According to the appellant, the court should not have granted an injunction as it made a global order that flies in the teeth of ***Shamwana vs Mwanawasa***.²
- 7.4 We note from the record that the trial Judge thoroughly examined the cases pertaining to the criteria to be satisfied in order to grant an injunction. She addressed her mind to the cases of ***Shamwana vs Mwanawasa***², ***Micheal Chilufya***

Sata vs Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Ltd, Mobi TV International Limited³, American Cynamid Co vs. Ethicon.⁴

- 7.5 In her decision, she applied the facts before her to the principles articulated in the foregoing cases and was satisfied that the respondent had demonstrated that there was a cause of action and danger of repeated publication of supposedly injurious statements by the appellant. The learned Judge proceeded to exercise her discretion in favour of the respondent and granted the injunction.
- 7.6 We must be quick to state that the question of whether one would suffer irreparable injury is one of the considerations a court ought to take into account when exercising its discretion. We do not fault the exercise of the Judge's discretion in this case, it was exercised judiciously. We thus find ground two to be bereft of merit and dismiss it accordingly.
- 7.7 Pertaining to the third ground the discontent is that the trial Judge in arriving at her decision allegedly relied on the offenses the appellant is alleged to have committed which do not exist in the Penal code or Anti-Corruption Act. That, therefore, her decision was wrong or misguided.

- 7.8 Our short reaction is that the trial Judge relied on the law of injunctions. She clearly explained her reasons and cited cases in support. The challenge on whether or not the offences exist will be dealt with at trial, suffice to say the trial Judge did not place her reliance on these.
- 7.9 In ground four, the appellant is again expressing the view that the trial Judge was wrong to have granted an injunction given the principles in *Fraser vs Evans*¹. The contention by the appellant is that the words he is alleged to have uttered in the publication do not constitute defamation.
- 7.10 Our view is that the question of whether or not words uttered constitute defamation can only be answered at trial. It is important to note that a trial Judge is entitled to preview prospects of success. In this case, as observed, there was no defence on the record. She found overwhelming grounds for her to grant the interim order that was sought. We see no merit in this ground and dismiss it.
- 7.11 The last ground is again faulting the grant of the injunction. The contention is that a global order was granted and the court relied on unsubstantiated information, in this regard purported publications.
- 7.12 We reiterate our views expressed in the second, third and fourth ground of appeal that the trial court interrogated the

law on the grant of injunctions. She did not delve into the substantive matter which will be dealt with at the main trial.

7.13 In her wisdom she found the respondent merited the grant of an injunction. The appellant's counsel submitted on points of law and argued that the documents exhibited by the plaintiff were fair comments. After an exhaustive analysis of the law, the Judge was of the view that the respondent needed protection by way of an injunction.

7.14 We hold the view that all the grounds of appeal are devoid of merit. Consequently, we uphold the decision of the court below. The appellant is condemned in costs to be taxed in default of agreement.


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C.F.R Mchenga
DEPUTY JUDGE PRESIDENT


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B.M. Majula
COURT OF APPEAL JUDGE


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M.J. Siavwapa
COURT OF APPEAL JUDGE