SATA v POST NEWSPAPERS Ltd and ANOTHER

HIGH COURT
NGULUBE, C.J.
13TH FEBRUARY, 1995

Flynote

(1) Constitutional law – Fundamental rights – Freedom of the press – Right to reputation – Defamation – Fair comment – Public interest – Impersonal attack on governmental operations – Whether defamation of official responsible – Whether injury to official reputation – Extent of press freedom to express criticism – Whether current law of defamation requiring modification – Defamation at, s 7 – Constitutional of the Republic of Zambia 191, art 20.

(2) Tort – Defamation – 'Rolled-up plea' – Fair comment – Allegations patently injurious to personal, private and official, political character – Whether allegations based on inferences of fact – Whether inferences legitimately drawn from other facts stated orindicated in publication complained of – Whether protected as fair comment on matters of public interest.

(3) Tort – Defamation – Fair comment – Factual allegations proved in part or notorious in public domain – Some allegations unproved – Whether defence of fair comment available-Defamation Act, s 7.

(4) Remedies – Defamation – Injunction – Whether exemplary or punitive damages appropriate – Primary object of award – Whether perpetual injunction appropriate -Freedom of the press.

Headnote

The plaintiff, who was at all material times a politician and public official holding a ministerial appointment, brought three actions for libel against the defendant, contending that they had defamed him in their newspaper publications. In May 1992 the defendants published an editorial article in their newspaper stating that the plaintiff was a political survivor, and that in the second Republic 'he survived vetting on several occasions'. The article stated that in 1990 the plaintiff's 'political prostitution' prompted the former president's decision to fire him. The article listed the plaintiff's 'thoughtless' actions, including the razing of houses, his alleged order to fire striking workers, the alleged awarding of contracts to associate, riotous behaviour where some mourners from the ruling party were stoned at a funeral and outrageous or intolerant behaviour on television. The article referred to the Anti-Corruption Commission's investigations against the plaintiff and it concluded 'there is nothing "honourable" about this clearly dishonourable man'. The plaintiff issued proceedings in the first action against the defendant for the remarks published which he claimed were defamatory. The plaintiff's allegedly thoughtless actions had been reported in various other newspapers with a national circulation and on the electronic media. The plaintiff in a television programme took up the official defence of the razing of houses and criticised the media in general and the first defendants by name for their shortcomings when reporting on issues.

In the second action, which was consolidated with the first, the plaintiff complained about the

main story on the front page of the defendant's newspaper in July 1992, which reported that the plaintiff was beaten up by another minister in the National Assembly motel bar room when the plaintiff provoked others by his belligerence and abusive language. The plaintiff pleaded in his statement of claim that it was defamatory

(i) to impute that he was physically incapable of defending himself and

(ii) to assert that he could not even lose his good reputation, since he had none and that he was 'not only unruly, but…also greedy' as alleged in the accompanying editorial.

In the third action the plaintiff complained of two articles together with a cartoon which appeared in January 1993 in the defendants' newspaper. The first article concerned the plaintiff's diversion for his own benefit of a government grant of K1.6bn to local authorities which was meant for, inter alia, salary increases and arrears. A summary of a report on the matter was subsequently distributed at a State House press conference. In the second article the first defendant urged the president to remove the plaintiff from his ministerial office and, relying on previous publications, stated that the plaintiff was petty and unscrupulous. The cartoon depicted a large snake with a human head pinned down by a prong on which was inscribed '1.6 billion'. The plaintiff's nickname was 'King Cobra'. The statement of claim included a prayer for a perpetual injunction to restrain the defendants from repeating the alleged libels. The defendants did not dispute having published in their newspaper the articles and cartoon relating to the plaintiff which the plaintiff alleged were libellous. They asserted in a rolled-up plea that those allegations consisting of comments were fair comments on matters of public interest. Article 20(2) of the Constitution of the Republic of Zambia 1991 provided that subject to the Constitution's provisions no law should make any provision that derogated from the freedom of the press. The defendants submitted that s7 of the Defamation Act permitted a reasonable margin of misstatement of facts on the defence of fair comment. The defendant contended that the common law principles of the law of defamation in their application to plaintiffs who were public officials as to their right of action should be modified in relation to the burden and standard of proof and the latitude that the press should be permitted in order to subject public officials to criticism and scrutiny.

HELD: Judgement for the plaintiff in part.

(1) In order to give effect to art 20 of the Constitution, which guaranteed the freedom of the press, the law of defamation as currently applied was to be interpreted as precluding impersonal attacks on governmental operations from being treated as libels of an official responsible for those operations. It was of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism, and since the threat of civil actions for defamation induced the chilling effect or tendency to inhibit free discussion and placed an undesirable fetter on the freedom to express such criticism, it would be contrary to the public interest for governmental institutions to have any right at common law to maintain an action for damages for defamation. Since those in public positions were taken to have offered themselves to public attack, impersonal criticism of public conduct leading to injury to official reputation should not attract liability provided that criticism contained no actual malice and even if, pursuant to s 7 of the Defamation Act, the truth of all facts alleged was not established, the imputation complained of was competent on the remainder of the facts which were proved. Where an allegation of libel could properly be regarded as comment on the conduct of a public official in the performance of his official duties or on conduct reflecting upon his fitness and suitability to hold office, freedom of speech and the press could best be served by the courts' insisting upon greater tolerance than

in the case of a private attack before an obvious comment based on substantially true facts could be regarded as unfair. A balance had to be struck between freedom of the press and the right to reputation guaranteed by art 20, which was not possible by shifting the burden or standard of proof (see pp 73, post). *New York Times Co v Sullivan* (1964) 376 US 254 and *Theophanous v Herald and Weekly Times Ltd* [1994] 3 LRC 369 adopted.

(2)

(3) On established principles an allegation could be comment if it was an inference of fact which could legitimately be drawn from other facts stated or indicated in the publication complained of but where a bold allegation could not be distilled from other facts started or indicated, it could not even be called a comment. It followed that to call a politician and a minister a political prostitute was clearly defamatory. The plaintiff in the first action could not be called a political prostitute for joining a party of his own choice after the reintroduction of a new political dispensation allowing for the formation of other parties. The allegation was patently injurious to the plaintiff in his private and personal character and in his political and official character. In the second action the evidence given to support the allegation of greed did not reveal any personal benefit on the part of the plaintiff and constituted a personal attack upon him. Greed was a personal characteristic and could not have been a criticism of the plaintiff in any official capacity. Moreover, a fair-minded person could not reasonably infer greed from such facts and the opinion cold not represent the honest opinion of the writer. In the third action the allegations of corruption in the editorial wee not justifiable or warranted by the facts available and were indefensible as fair comment since there was little if any comment. It followed that the editorial amounted to a flagrant attack on the very core of the personal character and the private and public reputation of the plaintiff. Judgment would accordingly be entered for the plaintiff with regard to those allegations (see pp 76, 77, 78-79, 81-82, 83, 84, post). *Kemsley v Foot* [1952] 1 All ER 501 considered.

(4) Fair comment could not avail the defendant where the allegation made could not fairly and reasonably be inferred from the facts. Although on a consideration of the evidence the plaintiff in the first action was vetted on one occasion only, the error in the number of occasions could not be regarded as defamatory. Since the public and general readership of newspapers in the country had been conditioned by previous publications to attach official blame to the plaintiff with regard to his allegedly thoughtless actions, there was a sufficient substratum of fact on which to base the comments made on the razing of houses. In the second action in the context of the article as a whole it was clear that the allegation in the editorial, that the plaintiff had no reputation, was made as an inference of fact. Moreover, since bar-room brawls were dishonourable and those who participated were rightly said to be unruly, it followed that it was not defamatory to report that some one had been beaten, especially by a much bigger opponent. In the third action on the evidence the information concerning the diversion of the large sum of money was substantially the truth. The cartoon was a satirical comment to the effect that the plaintiff had been caught in some wrongdoing regarding the money referred to and could not be construed in isolation. The nature of the wrongdoing was fully discussed in the articles and it would be strange for any reasonable reader to ignore the articles and to read meanings into the cartoon independently of those articles. The inferences and comments on the true representation of the facts in the third action were neither defamatory nor actionable and it followed that the defence of fair comment applied to the otherwise defamatory caricature. Even though there was insufficient evidence to establish the truth of all of the allegations made by the

defendants, the imputations, except those relating to the personal character assassination, the political prostitution and greed of the plaintiff, were competent on the facts which were proved or notorious in the public domain and it followed that, in relation to those imputations, the defence of fair comment was available pursuant to s 7 of the Defamation Act (see pp 78, 79-80, 81, 82, 83-84, post).

(5) Where there was little actual loss suffered by a plaintiff exemplary or punitive damages were not appropriate, since the primary object of an award for defamation was to offer vindication and solatium rather than monetary compensation. On a consideration of all the circumstances, K500,000 would be awarded by way of solatium to the plaintiff in respect of the consolidated actions and an award of the same amount in respect of the third action. As the plaintiff was a political figure, a perpetual injunction would inhibit free debate on current and future, political matters and accordingly would not be granted to restrain the defendants from publishing their opinions (see pp 84-85, post). (Editor's note: Article 20 of the Constitution of the Republic of Zambia 1991 is set out at p 66, post.]

Cases referred to in judgment

(1) Afro-American Publishing co v Jaffe (1966) 125 US App Dc 70, 366 F 2d 649, US S.C.
(2) Barr v Matteo (1959) 360 US 564, 3 L Ed 2d 1434, US SC
(3) Buckley v New York Post Corp (1967) 372 F 2d 175, 2d Cir
(3) Cobbett-Tribe v Zambia Publishing Co Ltd [1973] ZR 9
(4) Curtis Publishing Co v Butts; Associated Press v Walker (1967) 388 US 130, (1967) 18 L Ed 2d 1094, US SC
(5) Chicago (City) v Tribune Co (1923) 307 111 595, 139 NE 86, US SC
(6) De jonge v Oregon (1937) 299 US 353, 81 L Ed 278, US SC
(7) Derbyshire CC v Times Newspapers Ltd [1993] 2 LRC 617, [1993] 1 All ER 1011, [1993] AC 534, [1993] 2 WLR 449, UK HL
(8) Hunt v Star Newspaper Co Ltd [1908]2 KB 309, [1908-10] All ER Rep 513, UK C.A.
(9) Kapwepwe v Zambia Publishing Co Ltd [1978] ZR 15 (S.C.)
(10) Kemsley v Foot [1952] 1 All ER 501, [1952] A.C. 345, UK HL
(11) New York Times Co v Sullivan (1964) 376 US 254, 11 L Ed 2d 686, US S.C.
(12) Theophanous v Herald and Weekly Times Ltd [1994] 3 LRC 369, (1994) 124 ALR 1, Aus H.C.
(13) Time, Inc, v Hill (1967) 385 US 374, 17 L Ed 2d 456, US S.C.
(14) Whitney v California(1927) 274 US 357, 71 L Ed 1095, US S.C.

Legislation referred to in judgment

Zambia

1. Constitution of the Republic of Zambia 1991, art 20
2. Corrupt Practices Act
3. Defamation Act (Cap 70), ss 6, 7, 9, 10

United Kingdom

Fatal Accidents Act 1846; Libel Act 1843 (Lord Campbell's Acts)

United States

Constitution (1787), First and Fourteenth Amendments

Other sources referred to in judgment

African Charter on Human and Peoples' Rights, art 9
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), art 10
Douglas The Right of the People (1958) p 41
Gatley on Libel and Slander (8th edn, 1981) paras 695, 696, 884
International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmnd 6702), art 19

Actions

Michael Chilufya Sata, the plaintiff, brought three actions for libel against Post Newspapers Ltd and Printpak Zambia Ltd, the defendants, which he contended published defamatory articles in their newspapers, The Post and formerly The Weekly Post, in the editions (i) dated 22 to 28 May 1992, (ii) dated 8 to 14 January 1993 and (iii) dated 31 July to 6 August 1992. The first two actions were consolidated and upon application the court ordered that the third action be tried with the consolidated actions. The defendants pleaded fair comment to all the allegations. The facts are set out in the judgment of Ngulube,C.J.

For the plaintiff: Mundia F. Sikatana
For the first defendant: S. Sikota and S Nkonde
For the second defendant: E. Lungu

Judgment

NGULUBE, C.J.: delivered the judgment of the Court

There are three actions for libel in this case to which the defendants have pleaded fair comment. Their rolled-up plea assets that those allegations consisting of fact are true and those consisting of comments are fair comments on matter of public interest. In respect of some of the matters complained of there is a denial that they could bear the defamatory imputations assigned to them by the plaintiff in his pleadings. The plaintiff was at all material times a politician and public official holding a ministerial appointment and it was not in dispute that the defendants published in their newspaper 'The Post' (and formerly 'The Weekly Post') the various articles and a cartoon complained of. The two actions commenced in 1992 were consolidated, while I had in the early stages of the trial allowed an application that the 1993 action be tried together with the consolidated action.

Before analysing the issues raised in the pleadings and the evidence it is necessary to give precedence to a proposition put forward by Mr Sikota and Mr Lungu which was to the following effect as I summarise it. Because art 20 of the Constitution of the Republic of Zambia 1991 specifically recognises, among others, the principle of the freedom of the press, it is now time to modify the common law principles of the law of defamation in their application to plaintiffs who are public officials as to their right of action, the burden and standard of proof, and the latitude the press should be permitted to subject public officials to criticism and scrutiny. It was argued that because of the similarity between the provision in our Constitution and that of the USA, we should choose to follow the line taken by the American courts rather than the one followed by the courts in England. In this regard, it was submitted that I should apply the landmark case of *New York Times Co v Sullivan* (1964) 376 US 254, 11 L Ed 2d 686 in which the Supreme Court of the United States laid down some principles grounded in the First and Fourteenth Amendments to fetter libel actions by public officials to

the benefit of free speech and press freedom. Our art 20 reads:

'(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom form interference with his correspondence.

(2) Subject to the provisions of this Constitution no law shall make any provision that derogates from freedom of the press.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question make provision-(a) that is reasonably required in the interest of defence, public safety, public order, public morality or public health; or (b) that it is reasonably required for the purpose of protecting the reputations rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts regulating educational institutions in the interest of persons receiving instruction therein, or the registration of, or regulating for technical administration or the technical operations of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television, or (c) that imposes restrictions upon public officers; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.'

The First Amendment to the United States Constitution reads, omitting the irrelevant: 'Congress shall make no law… abridging the freedom of speech, or of the press.' The Fourteenth Amendment reads: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' It should be noted that there are international human rights instruments with similar provisions. For instance, an English court would take heed of art 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the European Convention) which reads:

'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

Then there is the United Nations International Covenant on Civil and Political Rights, art 19 of which is couched in even more sweeping terms:

'(1)Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, or in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with. It special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary; (a) for respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

In the case of Zambia and other African countries, there are also the more modest provisions of art 9 of the African Charter on Human and Peoples' Rights which declare the right of every individual to receive information and to express and disseminate his opinions 'within the law'.

I make reference to the international instruments because I am aware of a growing movement towards acceptance of the domestic application of international human rights norms not only to assist to resolve any doubtful issues in the interpretation of domestic law in domestic litigation but also because the opinions of other senior courts in the various jurisdictions dealing with a similar problem tend to have a persuasive value. At the very least, consideration of such decisions may help us to formulate our own preferred direction which, given the context of our own situation and the state of our own laws, may be different to a lesser or greater extent. What is certain is that it does not follow that because there are these similar provisions in international instruments or domestic laws, the courts in the various jurisdictions can have or have had a uniform approach. For one thing, as the examples I have quoted show, the right to free expression and free speech is qualified by exceptions, in some cases more heavily than in others. For another, we are at different stages of development and democratisation and the courts in each country must surely have regard to the social values applicable in their own milieu. The question before me in these actions is whether the law of defamation as currently applied derogates from, among others, the freedom of the press guaranteed by art 20 and if so what modifications would reasonably be required to be imported or imposed in order to give effect to the intention of the Constitution.

Counsel for the defendants argued that Sullivan provides a suitable precedent of the attitude and direction the courts in Zambia ought to take. The First Amendment is not even as elaborate as our art 20 but the Supreme Court of the United States was able to imply some requirements in order to promote the freedom guaranteed by the Constitution. They said they had no difficulty in distinguishing among defamation plaintiffs and categorised them as plaintiffs who are public officials on the one hand and those who are private individuals on the other. They held that the constitutional guarantee of freedom of speech and press prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he (the plaintiff) proves that the statement was made with 'actual malice', that is with knowledge that it was false or with reckless disregard of whether it was false or not; finding that such a qualified privilege of honest mistake of fact is required by the First and Fourteenth Amendments in order to give citizens and newspapers a 'conditional privilege' immunising non-malicious defamatory misstatements of fact regarding the official conduct of a government officer.

Since the defendants rely quite heavily on Sullivan and other American cases, I intend to consider some of these cases in greater detail in a moment. However, I think it is important for me at this stage to dispel any suggestion that only the American courts or the common law as applied in that country have recognised the importance of the freedom of free speech and

the press in a democracy nor the banaful effects of libel litigation on the free press. The chilling effect or the tendency to inhibit free discussion induced by litigation or threats of litigation is universally recognised and no doubt taken into account particularly when the matter concerns public institutions and public officials as well as the public interest. There is in fact a lot more in common among the common law jurisdictions than there are differences. Thus the underlying rationale for protection free speech and its importance to good governance and democracy, the question of the public conduct of public officials, the liability of public persons to greater scrutiny, considerations of what matters can properly be regarded as matters of public interest, protection for private reputation and character, all these and many more generally find common expression and treatment. These seem to be differences when it comes to local variables in the limits afforded by the recognised defences, any local statute law on the subject and the factors entitling or disentitling the plaintiff to a remedy. Certainly Sullivan introduced modifications which have not found universal acceptance when it restricted a public official's right to redress in libel action by finding a conditional privilege, by changing the burden and standard of proof, by narrowing the common law ambits of express or actual malice available to a public official and by positively condoning defamatory falsehoods unless the plaintiff proves actual malice a narrowly defined by that august court. Even the defence of fair comment which is based on the availability of a sufficient substratum of true facts and which is generally defeasible if grounded on misstatements was heavily adjusted against the public official in favour of free speech and press. Thus we find that the court held that the Fourteenth Amendment required recognition of a conditional privilege for honest misstatements of fact so that fair comment should be available for honest expression of opinion based on the privileged but false facts, to the same extent as comment on true facts, unless the plaintiff public official proves actual malice and this to the higher standard of proof of 'convicting clarity' found to be required by the Constitution.

For completeness, I should refer to some aspects of Sullivan with which most courts would have no difficulty. The libel action was brought in a state court (circa 1960) by a public official against a newspaper and the authors for publication of an advertisement describing the maltreatment in an Alabama city of negro student protesting against segregation. There were references in the article to harassment of Dr Martin Luther King who was allegedly frequently arrested for trivial alleged infractions and whose residence had been physically attacked, the use of excessive force by the police to break up peaceful demonstrations by negro students and their sympathisers, and a reference to Constitution-violators in the south trying very hard to kill the movement for negro rights, including desegregation and the right to vote. The criticisms were aimed at officialdom and the police generally; the plaintiff was not personally identified nor targeted and the United States Supreme Court, quite properly in my view, criticised the attempt by the plaintiff to transmute the impersonal criticism of government into personal criticism of himself as the official heading the department in charge of the police. As headnote 38 of the report puts it:

> ''the constitutional guarantee of freedom of speech and press precludes an otherwise impersonal attack on governmental operations from being treated as a libel of an official responsible for those operations.''

I am myself nor surprised that the United States Supreme Court overturned the lower court's verdict, as it were, even on the merits. There was clearly no reference to the plaintiff so that the newspaper did not write of or concerning him. Even the few factual errors which were there (that Dr Martin Luther King had been arrested seven times instead of four, and that the police had 'ringed' a university campus when in fact they had been deployed there but without literally surrounding the campus) were properly accepted as inevitable in any free debate; they did not go to the root of the genuine grievance, the subject of the publication, which was

undoubtedly a matter of much current public interest. Section 7 of our Defamation Act – which I will be coming to late – would have applied to save the plea of fair comment if this case had been tried in our courts and there had been a proper reference to the plaintiff personally.Where there has been impersonal criticism, I would myself go along with the reasoning in Sullivan. It is this same type of reasoning which led the House of Lords in *Derbyshire CC v Times Newspapers Ltd* [1993] 2 LRC 617, [1993] AC 534 to hold that a local authority cannot bring an action for libel. Their Lordships held that, since it was of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism, and since the threat of civil actions for defamation would place an undesirable fetter on the 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; and that, accordingly, the plaintiff council was not entitled to bring an action for libel against the defendants. I entirely agree with this conclusion.

The question arises: should the rationale and principles relating to impersonal criticism be extended to public officials in the wholesale manner suggested by the submission in this case? In the opinion of the court in Sullivan, which was delivered by Brennan J, stress was laid on the fact that the alleged libellous publication caused injury to official reputation. The court weighed the public interest of the public's receiving information against possible injury to the official reputation of public figures and took the view that the chances of injury to the private or personal characters were usually very small when the discussion was on official conduct. The judges were ever so careful to draw the distinction between injury to official reputation arising from official conduct and injury to the personal character of an official. The protection of Constitution was not extended to injury to private character or the private conduct of a pubic official. I would like to quote perhaps usually extensively from the separate opinion of Goldberg J in Sullivan (1964) 376 US 254 at 301-303, 11 L Ed 2d 686 at 720-722:

> ''Our national experience teaches that reparations breed hate and 'that hate menaces stable government.' Whitney v. California, 274 US 357, 375, 71 L Ed 1095, 1106 (Brandies, J., concurring). We should be ever mindful of the wise counsel of Chief Justice Huges: '[I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.' *De Jong v. Oregon*, 299 Us 353, 365, 81 L Ed 278, 284. This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment. This, of course, cannot be said 'where public officials are concerned or where public matters are involved …[O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.' Douglas, The Right of the People (1958), p 41. In many jurisdictions, legislators, judges and executive officers are clothed with absolute immunity in the discharge of their public duties. See e.g., *Barr v. Matteo 360 US 564, 3 L Ed 2d 1434, City of Chicago v. Tribune Co.* 307 I11., 595 at 610, 139 N.E. at 91. Judge Learned Hand ably summarized the polices underlying the rule: It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his

spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honesty mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers that to subject those who try to do their duty to the constant dread of retaliation '.''

The foregoing is instructive. Another American case which was cited and which I have considered is *Curtis Publishing Co v Butts; Associated Press v Walker* (1967) 388 US 130, 18 L Ed 2d 1094, where the United States Supreme Court extended the Sullivan principle to public figures who are not public officials. The court was very careful not to give the impression that the press were to be given a blank cheque to embark upon a course of destruction of the reputations of public officials or public figures. As Harlan J pointed out (388 US 130 at 146-147, 18 L Ed 2d 1094 at 1106):

> ''We are told that '[t]he rule that permits satisfaction of the deep-seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes,' *Afro-American Publishing co. v. Jaffe* 125 U.S. App. D.C. 70, 81, 366 F. 2d 649, 660, and that: 'Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public… they must pay the freight; and injured persons should not be relegated [to remedies which] make collection of their claims difficult or impossible unless strong policy considerations demand.' *Buckley v. New York Post Corp*. 373 F. 2d 175, 182. We fully recognize the force of these competing considerations and the fact that an accommodation between them is necessary not only in these cases, but in all libel actions arising from a publication concerning public issues. In time, *Inc., v Hill* 385 U.S. 374, 388, 17 L Ed 2d 456, at 467 we held that '[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs…' and affirmed that freedom of discussion 'must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period'.''

The court went on to counsel against 'blind application of *New York Times Co v Sullivan.'* I would respectfully take heed of such counsel.

Before I can consider whether the Sullivan approach can be regarded as desirable or necessary in Zambia in order to lend greater meaning and effect to the intention of our are 20, I have to examine the framework of the law of defamation which is currently available to us. As Mr Sikatana correctly submitted, I have to bear in mind the exceptions under at 20, especially

that relating to reputation which has not been limited to private or official reputation but is a right necessarily guaranteed to everyone. I am also alive to the provisions of the Defamation Act which in s 7 (for fair comment) and s 6 (for justification) offer relief by permitting a reasonable margin of misstatement of facts, one of the matters that preoccupied the court in Sullivan. Section 9 of the Act offers relief by giving the newspapers qualified privilege in the circumstances set out in the section and the schedule, details of which I need not here recite save to observe that the qualified privilege covers a fairly wide range of subjects of public interest. Again s 10 offers relief for non-malicious libels published without actual malice and without gross negligence under the conditions described in the section to which reference should be made for its full term and effect. These were some of the obvious benefit and promotion of free speech and press. I have also considered the common law applicable, which is the same as that in England and, in this regard, I have had a quick look at a Gatley on Libel and Slander (8th edn, 1981) especially in the passages dealing with the public interest and comment on matters of public interest. Paragraph 695 discusses whether the press have any special rights not shared with everyone else to make a comment upon a public officer or person occupying a public situation and concludes that they do not. On the authorities therein cited, a journalist may go to whatever lengths the ordinary citizen may go and, except where the statute law otherwise provides, the range of his assertions, his criticism, or his comments, is as wide as, and no wider than, that of everyone else. Again the authorities discussed in para 884 show that the limits of comment on a matter of public interest are very wide indeed, especially in the case of public persons. When under attack, those who fill public positions must not be too thin-skinned. They are also taken to have offered themselves to public attack and criticism and the public interest requires that public conduct shall be open to the most searching criticism. In my considered opinion, the so-called public official doctrine urged by Mr Sikota already receives recognition though not exactly in the manner proposed by Sullivan. Even the so-called 'Fish Tank' theory whereby the public conduct of public persons is subjected to constant observation and scrutiny is already otherwise recognised. The chilling effect of libel actions on the freedom of the press so vital to democracy is universally accepted although the strategies to counter this may differ. The Americans came up with Sullivan. The English in the Derbyshire County Council case came up with disallowing local and central government organs. They have also encouraged a wider scope of comment on public matters. With regard to false material, the Defamation Act already mitigates in some way the common law principles which condemn misstatements and attach unfairness to any comment which is not well grounded. All these matters formed the basis of the discussion in Sullivan which sought to modify these shared principles in order to straighten free speech and press and impose fetters on public plaintiffs. The common law as developed through the cases and generally also has an established set of principles, though some still evolve as circumstances change or arise. Thus the matters to be proved by a plaintiff and those to be proved by the defendant are fairly well settled whether the defence is non-publication or non-reference, lack of defamatory meaning, consent of the plaintiff, justification, absolute or qualified privilege, fair comment, apology and payment into court under Lord Campbell's Acts, offer of amends under the Defamation Act, accord and satisfaction, and in the case of slander only, lack of special damage where required or remoteness of the same, mere vulgar abuse, and so on. The principal defence in the cases before me is that of fair comment on matters of public interest. The common law has evolved a number of considerations which would establish malice or render a comment unfair. The effect of Sullivan was to narrow quite considerably, in relation to a public official, the range of factors that would prove malice or render a comment unfair. It also extended quite considerably the relief available to the press whose injurious shortcomings were to be given a generous amnesty. It also established a novel type of qualified or conditional privilege available to all.

Our Constitution in art 20 recognised both the freedom of the press and the right to reputation. A balance has to be struck and I do not consider that a good balance can be

struck by shifting the burden or standard of proof, nor by straining to discover a new qualified privilege, nor by immunising falsehoods to any greater extent than the Defamation Act already provides.

Let me make it clear that I fully endorse the view that some recognition ought to be given to the constitutional provisions in art 20 and I accept that impersonal criticism of public conduct leading to injury to official reputation should generally not attract liability if there is no actual malice and even if, pursuant to s 7 of the Defamation Act the truth of all facts alleged is not established if the imputation complained of is competent on the remainder of the facts actually proved. However, I would reject the proposition in Sullivan to the extent that it sought to legalise character character assassination of public officials or to shift the burden of proof so that knowledge of falsity or recklessness should be proved by the plaintiff and to a degree of convincing clarity. In this regard and although I do not necessarily wish to follow the way they sought to give recognition to their own constitutional provisions, I find that the Australians properly rejected the Sullivan approach in Theophanous v Herald and Weekly times Ltd [1994] 3 LRC 369, 124 ALR 1. The High Court of Australia said ([1994] 3 LRC 369 at 391-392, 124 ALR 1 at 23-24):

> ''However, once it is acknowledged, as it must be, that the existing law seriously inhibits freedom of communication on political matters, especially in relation to the views, conduct and suitability for office of an elected representative of the people in the Australian Parliament, then, as it seems to us, that law is inconsistent with the requirements of the implied freedom of free communication. The law of defamation, whether common law or statute law, must conform to the implication of freedom, even if conformity means that plaintiffs experience greater difficulty in protecting their reputations. The interests of the individual must give way to the requirements of the Constitution. At the same time, the protection of free communication does not necessitate such a subordination of the protection of individual reputation as appears to have occurred in the United States. For that reason the defendant should be required to establish that the circumstances were such as to make it reasonable to publish the impugned material without ascertaining whether it was true or false. The publisher should be required to show that, in the circumstances which prevailed, it acted reasonably, either by taking some steps to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps or steps which were adequate. To require more of those wishing to participate in political discussion would impose impractical and, sometimes, severe restraint on commentators and others who participate in discussion of public affairs. Such a restraint would severely cramp that freedom of political discussion which is so essential to the effective and open working of modern government. At the same time, it cannot be said to be in the public interest or conducive to the working of democratic government if anyone were at liberty to publish false and damaging defamatory matter free from any responsibility at all in relation to the accuracy of what is published. In other words, if a defendant publishes false and defamatory matter about a plaintiff the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish recklessly (i.e., not caring whether the matter was true or false) and that the publication was reasonable in the sense described. These requirements will redress the balance and give the publisher protection, consistently with the implied freedom, whether or not the material is accurate. In one other respect the Sullivan concept of actual malice calls for some justification. As already noted, the common law connotation of malice embraces ill-will, spite and improper motive. There is an argument for saying that 'actual malice' should likewise extend to such motivating factors. However, it seems to us that, once it is accepted that it is necessary to show that the publication was reasonable in the sense to which we

> referred, there is no occasion to include malice according to its common law understanding as an element in the test to be applied. It will be noted from the preceding paragraphs that we do not consider that the plaintiff should bear the onus of proving that the publication is not protected. In our view, it is for the defendant to establish that the publication falls within the constitutional protection. That approach accords with the approach that the courts have taken in the past to proof of matters of justification and excuse and we are not persuaded that the constitutional character of the justification should make any difference to the onus of proof. Whether the defendant has acted reasonably will involve consideration of any inquiry made by the defendant before publishing that is a matter peculiarly within the knowledge of the defendant.''

If we were in the same boat with the Americans and the Australians, I would hide with the Australians and the way they have proposed to protect the freedom to debate political issues and the fitness of a politician to hold office. In both countries, they distilling some principles by implication after finding that their Constitutions required such an exercise. 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 firms 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. Of course, it would be unwise for me to attempt an exhausive description of what would be a generous application of the defence but it seems to me that where an allegation complained of can properly be regarded as comment on the conduct of a public official in the performance of his official duties or on conduct reflecting upon his fitness and suitability to hold such office, freedom of speech and press can best be served in Zambia by the courts insisting upon a higher breaking point, or a greater margin of tolerance than in the case of a private attack before an obvious comment based on facts which are substantially true can be regarded as unfair. Although considerably stretched at the seams, the existing defence would remain intact and the public official still able to recover damages for comment that is rendered unfair by any outrageous or aggravating features in the case.

In a sum, it is my considered opinion that the constitutional protection of reputation and free speech or press can best be balanced in Zambia, when the plaintiff is a public official who has been attached in that character, by a more generous application of the existing defences. The chilling effect of litigation would thereby be mitigated to some extent, just as it would be considerably eased by the courts constantly seeking to promote free speech and press by keeping a careful eye on the size of awards which perhaps are the true chilling factor especially if they involve any exemplary or punitive element. What is certain also is that, as Mr Sikatana suggested, since both the freedom of the press and the right to reputation are

recognised in art 20, no higher value can be placed on the one as against the other nor can one part of the Constitution be said to conflict with another part in any 'unconstitutional' way since the whole document legalises itself. The trick is to balance the competing rights and freedoms and on principles, as I hoe I have managed to explain, the resolution lies in the application of the existing law in a more imaginative and innovative way in order to meet the requirements of an open and democratic new Zambia. In this way, the press can be given some breathing space without the courts suggesting that freedom of the press will be freedom to defame. So much being premised, I now turn to the cases before me.

I heard evidence from 21 witnesses. The plaintiff testified on his own behalf and called one witness, while the defendants called 19 witnesses. In all the cases, there was no dispute that the articles complained of were published and that they explicitly referred to the plaintiff. The action 1992/HP/1395 was based on an article headed 'Michael Sata' in the newspaper dated 22 to 28 May 1992 and the article appeared on what loosely be termed the editorial page. The plaintiff relied on the natural and ordinary meaning and/or innuendo and attributed several defamatory imputations to the article. The defence put forward was one of fair comment. The article started by noting that the plaintiff was a political survivor, adding that in the second Republic 'he survived vetting on several occasions.' The evidence which I have accepted is that the plaintiff was vetted only on one occasion and not several as alleged. The vetting referred to the practice in the past when the leadership of the sole party then allowed used to screen candidates for election and bar those whose candidature was considered to be inimical to national interests. I do not regard the reference to vetting or the error in the number of occasions as defamatory. Next, the newspaper wrote that in 1990 the plaintiff's political prostitution prompted the former president's decision to fire him. To call a politician and a minister a political prostitute is clearly defamatory. The defendants' position was that this statement was a fair comment being a conclusion which could legitimately be made from the facts. Of course, I do not doubt the principle that an allegation can still be a comment if it is an inference of fact which could legitimately be drawn from other facts. However, where a bold allegation of this kind cannot be distilled from other facts stated or indicated in the publication complained of: See Kemsley v Foot [1952] 1 All ER 501, [1952] A.C. 345. I am prepared to stretch the requirement of indication to any facts shown to be notorious or at least known to the person or persons to whom the libellous allegation is published. If the facts are not so indicated or referred to, then it has long been accepted that the statement of opinion will stand in the same position as an allegation of fact: see Gatley para 696. In reference to this allegation, the editor of the defendant newspaper, Mr Phiri, testified that the conclusion was based on reports they had received and the fact that the plaintiff had accepted a post in the MMD government contrary to his earlier declaration at a political rally that he was not interested in a political position. Mr Phiri said that it was left up to the readers to figure out the political prostitution which had prompted President Kaunda to fire the plaintiff. Mmembe, the editor-in-chief and managing director of the paper, testified that the plaintiff was labelled a political prostitute for jumping from one party (the UNIP) to another (the MMD) and for having associated with the people in the MMD before he was fired. None of these explanations was available to the readers and they were neither offered nor was it indicated in the publication in order to afford the readers the opportunity to form their own judgment on the matter and to judge whether the defendants' conclusion was competent or not. The reader was left to speculate and think that the paper must have its own secret facts for making such a bold allegation, unsupported by anything available to the readers. In any event, even had the reasons revealed to the court been made available to the readers, I cannot imagine that anyone would consider a person to be a political prostitute for joining a party of his own choice after the reintroduction of a new political dispensation allowing for the formation of other parties. This allegation was patently injurious to the plaintiff in his private and personal character and in his political and official character and cannot conceivably be protected by the defence put forward, even on a more generous application of it as I have earlier proposed.

The article complained of went on to describe the plaintiff in other extravagantly uncomplimentary terms. These included a list actions described as 'thoughtless' such as the razing of houses in Kanyama, his alleged order to fire striking workers, the alleged awarding of contracts to associates, riotous behaviour in Chadiza and outrageous or intolerant behaviour on television. There was a reference to investigations against the plaintiff by the Anti-Corruption Commission and the plaintiff's misleading the nation about the presence of an arms cache at Sindamisale. After criticising the President for not dismissing the plaintiff, the defendants concluded by saying ''Our sincere conclusion is that there is nothing "honourable" about this clearly dishonourable man.''

I have given anxious consideration to the rest of this generally defamatory article. The examples of allegedly thoughtless actions are subjects that had been reported in various other newspapers with a national circulation and on the electronic media. The evidence that I heard from the witnesses, including General Chinkuli on the arms cache, together with the documentary exhibits, especially The Times of Zambia and Zambia Daily Mail newspapers, has satisfied me that there was a sufficient substratum of facts on which to base the comments made. The question is not whether I agree with the comments or the conclusions but whether an honest person, however prejudiced, might hold such opinions. Even the disputable conclusion that there was nothing honourable about the plaintiff was prefixed by a list of circumstances and the reader was free to form an independent opinion and to judge if the paper was right or wrong. I am, of course, alive to the contention on the part of the plaintiff that the defendants either did not substantiate the facts or made mistakes. For example, I am aware that the plaintiff has never accepted that he had personally ordered the razing of houses. However, other daily newspapers produced in evidence as exhibits showed that the plaintiff was in the forefront in defending this action by the local council. They also showed that the plaintiff was held accountable in his official capacity as the minister of local government at the time, rather than in his private capacity. That the plaintiff took up the official defence of the razing of houses was also manifest in the 'Face to Face' television programme which was played back to the court during these proceedings. I am satisfied that, by the time the defendants listed the razing of houses as one of the plaintiff's allegedly thoughtless actions, the public and general readership of newspapers in this country had already been conditioned by previous publications to attach official blame. The example that the plaintiff ordered the firing of striking workers was not supported by any evidence whether direct or indirect in these proceedings. However, it was just one example out of several given to support the comment about being thoughtless and the Defamation Act applies to the failure to establish the one example. The example regarding the award of contracts to associates was not borne out by the evidence concerning the contract awarded to Merzaf to build houses in Chilenje township. I find that the plaintiff was not guilty of any wrongdoing and this was borne out by the evidence of Mr Russell of the Anti-Corruption Commission. However, the evidence-including the 'Face to Face' programme – showed that the plaintiff has been reported on the subject and had stoutly defended the contract, once again leading to public attribution of the now costly project to him in his official capacity. Indeed, I accept the evidence that this contract ran into difficulties the minute the plaintiff left the Ministry of Local Government and Housing and the successors refused to give it the support which the plaintiff had given in his time. There were other contracts concerning the sale of council houses which the plaintiff had to facilitate or authorise. The plaintiff himself gave me a long list of names, including that of his wife, as being the people allowed to buy council houses. I am satisfied that the example about awarding contracts was supported by a sufficient amount of actual fact. Concerning the alleged riotous behaviour in Chadiza, there was indirect evidence given although no previous newspaper reports were produced to me. From the evidence of some defence witnesses, including Mr Nkolola of ZNBC, I accept that there was an incident in Chadiza where some mourners from the ruling party were stoned at a funeral and which was

even discussed on a television programme although the tape for this could not be found. There was nothing to show that the plaintiff provoked the incident. The television programme publicly seen by viewers was also one of the programmes relied on to support the allegation that the plaintiff behaved outrageously and intolerantly on television before the whole nation. The other was the 'Face to Face' programme shown to the court where the plaintiff was interviewed by Mrs Goretti Mapulanga, a well-known interviewer on our small screens. In that programme, the plaintiff criticised the media in general and the first defendants by name for their shortcomings when reporting on issues. He defended the award of the contract to Merzaf, the razing of houses by the council, early retirements for council workers and the handling of the funds meant for arrears of salaries and allowances which the government had inherited. The general impression gained by this court after watching the replay of the programme was that both the guest and the hostess were quite rumbustious, jovial and slightly disorderly. I am satisfied that the example and comment regarding the performance of the plaintiff on television was based on a sufficient substratum of fact. Again the article went on to refer to the plaintiff's denials that the Anti-Corruption Commission was investigating him. The evidence before me established the factual basis for the comments made. The global conclusion in the article about the plaintiff not being honourable was certainly harsh and probably an opinion not shared by anyone else but, as I have already stated, it was prefixed by the examples which were listed. The law protects even the minority opinion of a defendant who honestly comments on a public official and has facts to lean on.

Except for the allegation that the plaintiff was a political prostitute, on which I find for him, I find for the defendants on the rest of the article in cause 1992/HP/1395. On the evidence, and if necessary calling in aid the Defamation Act, the defence of fair comment is available on these other allegations or comments having regard to such of the facts as have been established or were already notorious in the public domain.

In cause number 1992/HP/1804, the complaint concerned the edition of 31 July to 6 August 1992. There were two articles, that is the main story on the front page headlined ''King Cobra meets his Waterloo-Lupunga clobbers Sata'' and an editorial under the heading ''Sata(nic) deeds''.

The gravamen of the main story was that the plaintiff was physically clobbered by another minister in the National Assembly motel bar room when the plaintiff provoked the other by his belligerence and abusive language. The first defendant described the incident in gloating terms showing that blows were exchanges and the plaintiff ended up lying helpless on the ground, hurt and humiliated, and had to be rescued by the security men from further damage. The plaintiff's account of the incident was characterised by excessive economy on the truth and only skilful and determined cross-examination prised an admission from him that any ill-tempered confrontation had taken place at all between himself f and Minster Lupunga. I have considered the evidence from the eye witness. There are four stages of drunkenness, namely jocose, bellicose, lachrymose and comatose. The evidence and the descriptions of the events left me in no doubt at all that the ministers, and probably some of the witnesses had passed the first stage. The eye witnesses called by the defence were basically agreed that a quarrel erupted and Lupunga violently charged towards the plaintiff, knocking down the witness Nganga who was in the way, and with, quite clearly, obvious intent. One witness said the plaintiff was actually violently pushed so that he fell against the back of a sofa chair while the other said that Lupunga was restrained before he could carry out his intentions so that the plaintiff was simply at the risk of being clobbered rather than that he was clobbered. Both eye witnesses denied that fists flew, or that the plaintiff ended up lying on the ground or that any security men intervened. I agree with the witness who said the defendant had

sensationalised the incident. I find they were gloating and full of glee over the supposed thrashing of the plaintiff. The bottom line, however, was that violent confrontation which disturbed the peace and was unsuitable for ministers to participate in did take place. This I find as a fact.

What was the sting of the libel complained of in this particular article? The plaintiff pleaded in his statement of claim that it was defamatory to impute that he was physically incapable of defending himself. I thought that the plaintiff did nor pursue this line of complaint with any conviction and I do not think that it would be defamatory to report that someone has been beaten. The plaintiff, I find, was not in fact beaten and the gloating style adopted by the paper grossly exaggerated the physical confrontation that did take place. The fracas itself was not something any minister could be proud of and it was not wrong to suggest that a bar-room brawl of this kind was dishonourable and that those who participated were unruly. The opinion was amply supported by the true facts once the overdramatisation is discounted. Indeed, the cause of action based on this particular article came very close to collapsing of its own inanition. I find for the defendants on this one. The next article in the particular edition was the editorial headed ''Sata(nic) deeds''. The article is worth reproducing and it reads:

> ''Not only is your edition of the Weekly Post this week a celebratory one, commemorating our first anniversary, but it is also rather 'Satamanian'. If newspaper printing costs were low, and newsprint cheap, Sata's exploits could quite easily provide copy to fill a tabloid newspaper every week. Two months ago, we said there was nothing honourable about this clearly dishonourable man, and we also lamented about his risky behaviour at a Chadiza funeral, when he endangered the lives of dignified men, among them, Home Affairs Minister Newstead Zimba. Soon after that, his foolish behaviour during a ZNBC panel discussion, under the guise of 'chimbuye', was quite objectionable. We are not surprised that his penchant for controversy led to his being beaten last Sunday. It was bound to happen. And were it not for the brave security guard on duty, you might have been reading an obituary of the once notorious King Cobra. This time, however, the motel fracas not only endangered Lupunga's reputation, but it could have also led to his imprisonment on charges of assault, or worse, manslaughter or murder, if things had gotten more out of hand. But as for Sata, he would have had nothing to lose, not even a loss of good reputation, since he has none. This man is not only unruly, but he is also greedy. Early this year, when Lusaka City Council had stopped the sale of its houses. Sata ordered that a house be sold to his father-in-law. And now when the entire Avondale area is all but dry for lack of water, he has directed the Lusaka Water and Sewerage Company to deliver a tanker of water every week to Sharry Hill house, one of his Avondale properties. Our ability to comment on his on going court case with the Zambia State Insurance Corporation concerning his activities at the Avondale Housing project is curtailed by legal sub judice restrictions. But early this year, Sata diverted K60 m earmarked for LCC workers' salaries, to pay for the Merzaf project in Chilenje. Now, after bashing ZULAWU and promising that by 30 June, its members' salary increments would be paid, he has diverted K1.6 bn to the Merzaf project and to a fixed deposit account at Standard Bank. While President Chiluba has the prerogative to hire and fire his ministers, keeping track of the misdeeds and unscrupulous behaviour of Michael Chilufya Sata is for us, becoming rather tiresome.''

Can be seen, the alleged Sata(nic) deeds have been tabulated. The article contains in the main comments based on facts stated or indicated in the article itself. Such facts have been sufficiently established by the evidence. I have been troubled though by the allegation that the plaintiff would have had nothing to lose out of the incident at the motel: ''not even a loss

of good reputation, since he has none.''

The law presumes that everyone has a good reputation and where this is shown not to be the case, a plaintiff with a bad reputation is equally entitled to have what is left of it protected from further damage. However, in the context of the article as a whole, it was clear that the defendants were making the allegation as an inference of fact which none the less remained a comment or opinion, on the basis of the events tabulated in the first half of the article.

The article then went on to allege that the plaintiff was 'not only unruly, but he is also greedy'. To support the latter allegation of greed, which was the sting of the libel, the article listed the sale of a council house to the plaintiff's father-in-law, the arrangement for the delivery of water to his Avondale residence, his court case which in the event he actually won against the developers of Avondale, diversion of K60 m, money intended for salaries and the deposing of K1.6 bn which was meant for workers' salaries. 'Greedy' in this context and in its ordinary sense denoted an insatiate appetite to acquire wealth or material benefits. It is a very personal characteristic and could not have been criticism of the plaintiff in any official capacity. The evidence which I heard did not support any suggestion of personal benefit in the derogatory or infamous sense suggested by the article. No evidence was led to support greed on the part of the plaintiff in connection with his court case mentioned in the article, nor was any evidence adduced to establish the fact of, let alone the greed in allegedly diverting K60 m for workers' salaries to the Merzaf contract. The evidence led did not reveal that there was any personal gain on the rest of the transactions listed, with the exception of the deliveries of water in a tanker from which service other Avondale residents also benefited. It is my considered opinion that this portion of the editorial article imputed a corrupt or dishonourable motive which was not warranted by the facts. Greed was not an inference which a fair-minded person might reasonably draw from such facts and cold not, I find, represent the honest opinion of the writer. On my expansive application of the defence of fair comment when it relates to the official conduct of a public official, the defence would have been available if the allegation had not been of so personal a trait as greed so that mere unfairness of the comment for imputing defamatory but impersonal motives would have not been fatal. However, since a description that a person is greedy and the imputation that the transactions cited were examples of and, by implication, motivated by greed as it is understood in its ordinary sense was a description attacking the personal and private character of the plaintiff, there is no occasion for departing from the general principle. This principle is that fair comment cannot avail the defendant where the allegation made cannot fairly and reasonably be inferred from the facts. The defamatory allegation then stands unsupported and is on the same footing as an allegation of fact: see Cobbet-Tribe v Zambia Publishing Co Ltd [1973] ZR 9. In the event the conclusion in the editorial under discussion that the plaintiff's behaviour was unscrupulous was equally insupportable in view of my finding on the question of greed although, for the purpose of my decision, the relevant sting was only in the allegation that the plaintiff was greedy. I find for the plaintiff to the extent indicated.

In the action 1993/HP/821 which was tried together with the consolidated actions, the edition of the paper was dated 8 to 14 January 1993, and there were two articles complained of together with a cartoon. The front page article was headed 'ACC hands over King Cobra docket to DPP over financial irregularities-Sata faces arrest'. The article concerned a sum of K1.6bn government grant to local authorities which was meant for, inter alia, salary increases and arrears as a result of negotiations between the unions and the representatives of the councils. The evidence which I heard established that it was entirely true and the ACC had investigated and handed over a docket to the DPP with a view to secure his consent to the prosecution of the plaintiff under the Corrupt Practices Act for failing to disclose interest in a contract and abuse of office in connection with the plaintiff's orders to his officials that they

must place the bulk of the grant money (K1.2 bn) in a deposit account with Standard Chartered Bank, a bank in which he had shares. It was also true that the plaintiff did not take the advice of Mr Mapala, his Permanent Secretary, about the choice of bank since another bank was offering a better rate of interest. The plaintiff explained why he had chosen the particular bank but that is beside the point. The point is that the article is that the article was so factually true that the witness from the ACC, Mr Russell, suspected there had been a leak and the first defendant had had access to the docket. A summary of the report of the ACC was subsequently distributed by the President through his aides at a State House press conference. Although there may be nothing commendable about the way the information was obtained, the report was substantially the truth and none of the imputations pleaded by the plaintiff can be entertained. The inferences and comments on such a true representations of the facts were neither defamatory nor actionable, and I so find.

The next article in the paper was an editorial headed 'Remove Sate.' In unmannerly and extravagant choice of diction, the first defendant urged the President to remove the plaintiff from his ministerial office. The first paragraph read:

> ''We have said it before and we will say it again that Michael Chilufya Sata is not fit to be a minister or hold any public office. Sata is not only a public nuisance but he is also a liar as well as a selfish, unfeeling and cantankerous character.''

The defendants relied on previous publications and incidents as well as the one about the imminent arrest. They warned of some harm to the presidency and referred to the plaintiff as one of the petty and unscrupulous politician. They suggested the President remove the plaintiff without waiting for the Paris Club, among others, to show contempt for corruption and said the plaintiff was beyond redemption. The paragraph I have quoted and the other aspects I have isolated cumulatively amounted to a flagrant attack on the very core of the personal character and the private and public reputation of the plaintiff. I see little if any comment in the allegations of fact and the imputations made. The first defendants were asserting that the plaintiff was this or that and I am myself unable to see that the allegations could fairly and reasonably be inferred from the facts so as to still be a comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which he unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that he injurious statements are base on adequate grounds known to the writer, though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses.'

I am aware that the Hunt case need to be qualified by more recent developments, namely the facts on which a comment is made do not always have to be set out in the publication complained of but can be implied from the terms of the publication if indicated with sufficient clarity. The only indication which was there in this case was that the first defendant was relying on previous publications by them and others and on the same edition's front page story. However, the number of independent and original allegations of positive fact in the passages I have quoted especially the suggestion of corruption are such that there was, in my considered view, no comment at all, not even one based on inference. If I am wrong in this conclusion, I would still find the passages indefensible as fair comment on the ground that the comment, if it was indeed comment, was not justifiable or warranted by the facts available. I find for the plaintiff on this.

Finally, there was next to the defamatory editorial a cartoon depicting a large snake with a human head and which was pinned down by a prong on which was inscribed '1.6 billion'. The evidence showed that the plaintiff has the nickname of King Cobra and the cartoon related to the front page story and the editorial comment. I agree entirely that the cartoon cannot be construed in isolation from the front page article and the editorial. Although it was not funny, the cartoon was none the less a satirical comment to the effect that the plaintiff had been caught in some wrongdoing regarding the money referred to in the other article. The nature of the wrongdoing concerning this money was fully discussed in the articles and it would be strange for any reasonable reader to ignore the articles and to read meanings into the cartoon independently of those articles. I am aware of the argument that even an illiterate might look at a cartoon and come to some unfavourable conclusions based on the fertility of the imagination. Illiteracy, as we all know, is a misfortune and not a privilege and the standard to be applied in a case arising out of the written word is that of the reasonable reader, that is, a literate reasonable person who can read the captions and relate pictures to their context. Any meanings assigned by an out-of-context illiterate imagination would not qualify as the reasonable understanding of the judicially acceptable reasonable average person who ordinarily reads newspapers. I am aware of the meanings contended for by the plaintiff both in the pleadings and in the evidence. In context, the cartoon added nothing much to the front page article and was therefore fair comment based on true facts the cartoon has the same flavour as the lead story and my considered view is that the defence of fair comment applies to this otherwise defamatory caricature.

In sum, the plaintiff succeeds in the consolidated action only in respect of the allegations that he was a political prostitute and that he was greedy. In the other action, the plaintiff succeeds only in respect of the flagrant attack in the 'Remove Sata' editorial where the various imputations I have already alluded to were made, especially the allegation of corruption; imputations which would stab through even the thicket skin of any public person. These were serious libels but I bear in mind the whole of the context and the circumstances, including any role contributed by the plaintiff himself in exposing himself to frequent attention of the press. He has had opportunities to take a retaliatory swipe at the defendants as the court saw when the video tape of the 'Face to Face' television programme was played. I am also alive to the facts that during these proceedings, the plaintiff was less than candid at times and even managed to spin an elaborate tale that he was in India when the President held a press conference and distributed a summary of the report by the ACC. The video tape produced by the witness Nkoloka showed the plaintiff was present and that was the day his transfer to the Ministry of Health was announced. I have taken into account the offer of the right to reply made by the first defendant which cancels quite substantially any failure to retract and apologise. The defendant has also, in a way, won on some aspects of the case; just as the plaintiff has also not suffered much actual damage.

Above all, however, I have taken into account the submissions by Mr Sikatana and Mr Sikota. I have considered the *Kapwepwe v Zambia Publishing co Ltd* [1978] Z.R. 15 and bear in mind that the primary object of awarding damages for defamation is to offer vindication and solatium; money cannot really be compensation in such cases. The principles of exemplary or punitive damages discussed in Kapwepwe and other cases apply only in an appropriate case where the general damages, incorporating any aggravating element, are insufficient to drive home to a defendant the error of his way. I am myself not in favour of encouraging the notion of punishment in a civil case, especially where there has been little actual loss suffered by the plaintiff. I did also say much earlier on that I considered the true chilling effect on the freedom of speech and press to emanate from the possibility of awards which are exorbitant and crippling. There was also a prayer for a perpetual injunction to restrain the defendants from repeating the libels complained of. With the vindication and consolation afforded by this judgment, I do not consider that it would be appropriate to restrain the defendants forever.

The plaintiff is a political public figure and a permanent injunction, like any excessive award, would be certain to inhibit free debate even on current and future subjects. Newspapers which cause damage while performing a vital public service should only be made to pay the freight but not be altogether stopped dead in their tracks.

Taking all the circumstances into account, I award in respect of the consolidated action the sum of K500,000 (five hundred thousand Kwacha) and for the 1993 action another sum K500,000 (five hundred thousand Kwacha) making a total of K1m compensatory damages by way of solatium. I enter judgment for the plaintiff in that amount with costs to be taxed in default of agreement.

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