

Freedom of Expression v Defamation: The law on the defences

By

ANTHONY M. CHIBUYE

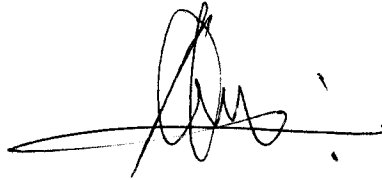
(28046919)

SPR  
LLB  
CHI  
2013  
C-1

Being a Directed Research Essay submitted to the University of Zambia Law Faculty in partial fulfilment of the requirements for the award of the Bachelor of Laws(LLB) Degree

## DECLARATION

I ANTHONY M. CHIBUYE do hereby declare that this Directed Research Essay is my own original work and to the best of my knowledge and belief, no similar piece of work has previously been produced at the University of Zambia or any other institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorisation in writing of the author.

A handwritten signature in black ink, consisting of a large, stylized capital 'A' followed by several loops and a long horizontal stroke extending to the left.

.....

ANTHONY M CHIBUYE

I recommend that the Directed Research Essay prepared under my supervision by:

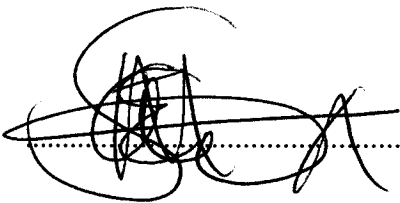
**ANTHONY M. CHIBUYE**

(Computer No.28046919)

Entitled:

**FREEDOM OF EXPRESSION VS DEFAMATION IN ZAMBIA: THE LAW ON THE  
DEFENCES**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements pertaining to the format as laid down in the regulations governing Directed Research Essays.

A handwritten signature in black ink, appearing to be 'E. Siangundu', written over a horizontal dotted line.

MS. E, SIANGUNDU.

12/08/2013

DATE

## ABSTRACT

Freedom of expression and the right to reputation are said to be important hallmarks of a democratic society. Freedom of expression in particular is viewed as the blood-life of a democratic state. The ability of citizens to access and share wide range of information is said to be critical in national development. Equally, reputation is said to be an integral and important part of the dignity of an individual and forms the basis of the main decision in a democratic state which are fundamental for its well been. As a result, courts more often than not, find themselves in situation where a balance has to be drawn between the competing interests of free speech and defamation, the tort that protects reputation. Thus, regard to the law that govern the defences in defamation is one of the best aspect from which the competing interests of free speech and defamation can be considered. The purpose of this research was to consider the conflict between freedom of expression and defamation through considering the law on defences to see how effective the law is in promoting a balance between these competing rights. The research basically involved desk research. This research introduced the ideas behind freedom of expression and reputation and put into context the conflict that exists between these interests. It considered case law on the defences as well as statute and noted that bias as been toward free speech.

In this way, the research outlined recommendations which can help in drawing a good balance in cases where free speech conflict with reputation. These recommendations included; changing the current position of standard of proof especially in criminal libel, change the current impediments on granting injunctions, amending the defamation Act to allow the purported final decision of the High Court to be appealed against in cases involving the defence of offer of amends, and amending the Act to provide for specific occasions of qualified privilege.

## **DEDICATION**

This is dedicated to the following:



My late Auntie Dailina Mwika

My late Brother Eden Chibuye

My late Brother William Musonda

My late father Mr Anthony Chibuye

My late Sister Mary Nyuma Gondwe

My late Brother Robert Tingana Gondwe

My late Uncles Peter Lawrence and Buster Lawrence

My late Grandparents Mr John Chata and Sanbisaya Sadaka

My late Nieces Daifa Lungu, Bonnie Musonda and Kalenga Musonda

**AND**

**MY BELOVED MUM MS DAIFA CHATA**

**MY BELOVED DAUGHTER ABISHENIA CHIBUYE**

## ACKNOWLEDGEMENTS

First and foremost, I would like to thank the Lord Almighty for the gift of life and opportunity and grace to learn especially this law career. His love has been enduring and covered me in the shadow of his wings and shield me from my enemies.

I would like to thank Ms E. Siangandu, my learned supervisor for her understanding and open minded approach with all the patience who gracefully took the meticulous task of reading, correcting and offering valuable critic and suggestions on the content of this research. I hope her excellence has reflected on every page of this paper though I remain liable for any errors.

I am eternally grateful to all my family, nuclear and extended. My life has been a combination of all of you. I value all the support regardless of how small it might have looked. Special thanks go to my Mother who has been nothing but a great pillar. Her advice, correction and prayers have been vital. You are the best mother on earth. I would like specially thank my auntie and uncle Mr and Mrs Wright for been there for me. Your investment in me cannot be valued but is what has made all this possible. I also would like to thank Florence my sister for all the support. I also thank Mrs Pauline Chibuye for been there for me. I also thank my sister Stella Muyambango and the husband for been there for me. I also would like to thank all the lecturers and entire staff of school of law.

I thank my great friends who have come to be part of my family; Libuku Muwanei my all season friend who I have shared many things with, Chabamba Johnstone, Raymond Musumali my benevolent colleague, Walumwewa Siyumbano. Mulape Kampakasa, Mwansa Chisala, Nsapato Mapange, Choonga Simulyamana, Diana Majokwe, Jeremiah Phiri, Noel Tembo, Sinvula Mbuyuwana and Ireen Mbewe.

I would like to thank Reverend Ken Chileshe and Pastor Evelyn Chileshe for the spiritual guidance during the long period we have been together. And Special thanks go to my best friend Betty Chileshe. I would also like to extend my gratitude to all those I have not mentioned who have helped me in making this dissertation a reality and through the pursuance of my Bachelor of Laws Degree, I am extremely grateful.

## **TABLE OF STATUTES**

The Constitution of Zambia Chapter 1 of the Laws of Zambia



The Defamation Act Chapter 68 of the Laws of Zambia

The Penal Code Chapter 87 of the Laws of Zambia



## TABLE OF CASES

Al-Fagih Case (2000) AC 67

Banda v Zambia Publishing Company (1982) Z.R. 4 (H.C)

Beach v Freeson, (1971) C.A 118

Bweupe v Attorney General and others (1984) Z.R. 21

Benny Hamaiza Mwinga v Times Newspapers ltd ( 1989) Z.R. 177 S.C.Z

Branson v Bower (2002) Q.B.D. 737.

Byrne v Dean (1937) Ch 27

Cassidy v Daily Mirrors (1929) Court of Appeal 13 A.C

Castells v Spain (1992) 14 EHRR 445

Cobbett-Tribe v The Zambia Publishing Company Limited, (1973) Z.R 9.

Cookson v Harewood (1932) A.C 118

Edginton v Fitzmaurice (1885)29 Ch. D. 459

GKR Karate (UK) Ltd v Yorkshire Post Ltd (2000) 1 WLR 2571

Hubbard v Piti (1975) 3 A11 ER1

Hulton v Jones (1908) 2 Ch 317

Jackson v Adam (1835) 2 Bing. N.C 402

Kapondeni v Mapulanga (1984) ZR 51

Lewis v Daily Telegraph (1963) A.C 22

Lingens v. Austria (1986) 8 EHRR 407

London Artists v Littler (1969) O.B.D 103

Merivale v Carson (1887) Q.B.D 275

McPherson v Daniel (1829) 10 B and C 263

Monson v Tussauds Ltd (1894) 2 Macq 221

Michael Sata v Chanda Chimba and Others [2011] /H.C

Ndovi v the Post Newspaper (2011) SCZ No. 11

New York Times Co. v. Sullivan (1964) 376 U.S

Newstead v London Express (1939) A.C 27

Osborn v Boulter (1930) Q.B.D 47

Paul Shakabwali v Chief Mono (2010) HP/357

Phiri v The Programme Manager Radio Maria-Zambia 21/HJ/31 (Unreported )

Polly Peck (holdings) plc v Trelford (1986)

Resident Doctors Association of Zambia V Attorney-General (1997) S.C.Z Judgment Number 25

Reynolds v. Times Newspaper (2001) 2 A.C 127

Sata v The Post Newspaper and Another, (1993) HP/1395

Shamwana v Mwanawasa (1994) ZR 27

Speidel v Plato Films (1961) ALL ER 103

Sutherland v Stapes (1925) LKJB 166

The Orphanus v The Herald and Weekly Limited FC/94/041, 12th October, 1994

Wenhak v Morgan (1888) 20 Q.B.D 635.

Wensleydale in Parmiter v Coupland [1840] 6 M.& W.105

Woomington v DPP (1935) AC 2 64

Yousoupoff v Metro-Goldwyn-Mayer Pictures Ltd (1934) 50 T.L.R 581

**CONTENT**

Research Topic..... i

Declaration.....ii

Supervisor’s Approval.....iii

Abstract.....iv

Dedication .....v

Acknowledgement.....vi

Table of Statutes.....viii

Table of Cases.....ix

**CHAPTER ONE**

1.1 Introduction.....1

1.2 Statement of Problem.....5

1.3 Purpose and Objectives of the Study.....6.

1.4 Significance of the Study.....7

1.5 Operational Definition of Terms .....9

1.6 Methodology.....9

1.7 Conclusion.....10.

## **CHAPTER TWO**

2.1 Introduction.....	11
2.2 Meaning of Defamation.....	13
2.3 Constituents of Defamation.....	14
2.3.1 Ingredients of Defamation.....	15
2.3.2 Nature of a Defamatory Statement.....	16
2.4 Remedies in Defamation.....	21
2.5 Defences.....	23
2.6 Conclusion.....	23

## **CHAPTER THREE**

3.0 Introduction.....	24
3.1 Justification.....	24
3.2 Fair Comment.....	30
3.3.1 Composition of Fair Comment.....	31
3.4 Efficacy of the Defences in light of Freedom of Expression and Defamation.....	33
3.5 Conclusion.....	35

**CHAPTER FOUR**

4.0 Introduction.....36

4.2 Privilege.....36

4.3 Offer of Amend or Unintentional Defamation.....40

4.4 Efficacy of the Defences in light of Freedom of Expression and Defamation.....41

4.5 Conclusion.....42

**CHAPTER FIVE**

5.1 General Introduction .....43

5.2 Recommendation.....47

5.3 Conclusion.....48

## **CHAPTER ONE**

### **GENERAL INTRODUCTION**



#### **1.1 INTRODUCTION**

This chapter covers the basic aspect of this research namely; the introduction, statement of the problem, definition of concepts, research objectives, scope of study, purpose of the study, significance of study, and methodology.

The conflict between freedom of expression and the tort of defamation always involve achieving a convenient balance between the rights of free speech and press, and that of reputation. While achieving this balance has been the focus in the virtually all the precedents, the aspect of this focus has been taking a general look at the entire law of defamation. Past research and precedents have not taken advantage of specifically focusing on the law on the defenses in defamation which ultimately can be regarded as the art of the entire law of defamation and is especially vital to both the plaintiff and defendant. Once the law on the defenses is clear, people will be accessing and sharing information without having to be afraid. This is so because, as has been noted here, defenses are crucial to both the plaintiff and the defendant. The requirements attached for one to succeed in any of the available defenses ensure that freedom of expression is not used to indiscriminately injure other people's rights particularly the right to have a reputation. This makes it necessary to achieve a convenient balance between the need for free speech and the right to reputation. Therefore, this research mainly focuses on the efficacy of the law governing the defenses.

Freedom of the press including people's ability to access and share information has been held to be the hallmarks of a democratic state and as a critical variable to national success in the information age and is widely acknowledged in most civilized society.<sup>1</sup> There is increased desire in present modern democratic state for ease access to information in particular that which borders on public interest.<sup>2</sup> In this way freedom of expression is said to be the life blood of any democracy.<sup>3</sup> Values of an open society such as transparency, accountability and good governance can only flourish where there is freedom of expression and the right of others to know is respected.<sup>4</sup> In this way article 20(1) provides:

“Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information 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 from interference with his correspondence”.

In the case of *Resident Doctors Association of Zambia V Attorney-General*<sup>5</sup> the then Judge Mambilima ably noted that, “The right of free speech is not only fundamental but central to the concept and ideal of democracy”.

On the hand, the law has recognized the right of an individual to possess a reputation and a good name during a lifetime.<sup>6</sup> This right is recognized both statutory and at common law.<sup>7</sup> In Reynolds

---

<sup>1</sup> [www.humanegoty.gov/Freedom of expression](http://www.humanegoty.gov/Freedom%20of%20expression) accessed 3rd March 2013

<sup>2</sup> [www.humanegoty.gov/Freedom of expression](http://www.humanegoty.gov/Freedom%20of%20expression)

<sup>3</sup> Chanda, F. Freedom of Expression, A Paper Presented to a LAZ Meeting

<sup>4</sup> Chanda, F, Freedom of Expression. Zambia Law Journal Vol 6 (1999)

<sup>5</sup> [1997] S.C.Z Judgment Number 25

<sup>6</sup> Frederic John Clerk. Clerk & Lindsell on Torts. 18<sup>th</sup> Edition, London: Sweet & Maxwell, 2000), 1093

<sup>7</sup> Winfield and Jolowitz. Tort. 17<sup>th</sup> Edition, (London: Sweet & Maxwell Limited, 2006), 514

v. Times Newspaper<sup>8</sup> the House of Lords Common Law to be consistency with the provisions of Article 10 of the European Convention of Human Rights. A man's reputation is his property and possibly more valuable than any other property<sup>9</sup>. The tort of defamation aims at securing the interest of an individual in his reputation. Thus, defamation is regarded by the Courts as the only appropriate action for the vindication of reputation.<sup>10</sup>

An individual whose reputation as been injured may seek recourse to the law to make good via such remedies as an injunction, damages or such relief as the court may deem. On the other hand, the law as also provided defenses for those who may be sued for defaming other individuals. In this way, judges have allowed such defenses as justification on the strength that one cannot make good for what he does not own. In *McPherson v Daniel*<sup>11</sup> Littledale said that, "the law will not permit a man to recover damages in respect of injury to a character which he either does not, or ought not to possess."<sup>12</sup>

Therefore, the civil wrong of defamation is complex in that there are competing interests. To this end, "There is tension between this wrong and freedom of speech, particularly the freedom of the press and broadcast media."<sup>13</sup> As earlier noted, a man's reputation is his property and possibly more valuable than any other property hence it must be safeguard it just like any other property. Thus, the courts more often than not find themselves having to draw a balance between

---

<sup>8</sup> [2001] 2 A.C 127

<sup>9</sup> Vernas, Mitter. The Law of Defamation and Malicious Prosecution :Civil and Criminal. (Allahabad: At Sardar Patel, 1965), 453

<sup>10</sup> Frederic, John. Clerk. Clerk & Lindsell on Torts. 18<sup>th</sup> Edition. 1094

<sup>11</sup> [1829] 10 B and C 263

<sup>12</sup> Frederic, John. Clerk. Clerk & Lindsell on Torts. 18<sup>th</sup> Edition. 1094

<sup>13</sup> Winfield and Jolowitz. Tort. 17<sup>th</sup> Edition. 514



the need to protect the right of the individual's reputation and the need of others to the right of free speech.<sup>14</sup> This balancing is vital such that no one right supersedes the other.

In *New York Times Co. v. Sullivan*<sup>15</sup> the need for free speech and press freedom was found to outweigh the need to protect the public official. In this case the United States Supreme Court evoked the constitutional provision embodied in the First and Fourteenth Amendment which safeguarded public interest in cases where a public officer brought a libel action against his critics in his official capacity.

Also in *Lingens v. Austria*<sup>16</sup> Lingens was fined for publishing in a Vienna magazine comments about the behavior of the Austrian Chancellor such as 'basest opportunism', 'immoral' and 'undignified'. Under the Austrian criminal code the only defense was proof of the truth of these statements. Lingens could not prove the truth of this value judgment. On appeal to the European Court of Human Rights, the Austrian criminal code was found to put a restriction on freedom of the press. The Court evoked article 10 of the European Convention on Human Rights.

Yet, these decisions do not suggest any blanket immunity to defame others. They only demonstrate how free speech needs to co-exist with the right to reputation. Thus, in *Sata v The Postnewspaper and Another*,<sup>17</sup> the erstwhile Chief Justice Ngulube went on to observe that:

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 pursuant to section 7 (b) of the Defamation Act, cap 70 (now cap 68) the truth of the facts alleged is not established if the reputation complained of is competent on the remainder of the facts actually proved. However, I would reject the proposition in Sullivan case to the extent that it sought to legalise character assassination of public

---

<sup>14</sup> Patrick Mvunga and Sangwani Ng'ambi. *The Law of Tort*. (Lusaka: UNZA Press, 2011), 256

<sup>15</sup> [1964] 376 U.S

<sup>16</sup> [1986] 8 EHRR 407

<sup>17</sup> [1993] HP/1395

officials, or to shift the burden of proof so that knowledge, or falsity or recklessness should be proved by the plaintiff to a degree of convincing clarity.”

And further the proviso to article 11 provides:

and the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this Part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest<sup>18</sup>

And as it had been shown already, a person who is sued has the opportunity to plead the defenses as provided under sections 6, 7, 8,9,10 and 11 such as the defenses of Justification, Fair Comment, Qualified Privilege and Offer of Amends in the Defamation Act.<sup>19</sup> To this end, the manner in which the defendant relies on the defenses open to him, as either taken on minor modifications or totally changed the way particular defenses are pleaded and how effective such defenses are. To this end, the manner in which the defendant relies on the defenses open to him, as either taken on minor modifications or totally changed the way particular defenses are pleaded and how effective such defenses are.

## 1.2 STATEMENT OF PROBLEM

The current law on the defenses in defamation as provided under the Act<sup>20</sup> does not reflect the intended purpose of the entire law of defamation. As already alluded to, defenses can be said to form a core or art of the entire law of defamation. Suffice to say that the ultimate need for the law on defamation is for protection of personal reputation.<sup>21</sup> Yet, the law on the defenses such as fair comment and justification do not adequately promote protection of reputation. The current

---

<sup>18</sup> The Constitution Cap 1 of the Laws of Zambia

<sup>19</sup> Chapter 68 of the Laws of Zambia

<sup>20</sup> Chapter 68 of the Laws of Zambia

<sup>21</sup> Patrick Mvunga and Sangwani Ng'ambi. The Law of Tort. 257

position that any defense will not fall by reason that all the strings of the defamatory statement are not entirely proved but just substantial,<sup>22</sup> is one such element that does not favor the plaintiff as far as defamation is concerned. Further, the standard of proof in criminal libel of balance of preponderance is not adequate as far as defamation is concerned. Hence, the need to have clear and unambiguous legal rules on the defenses in the legal regime governing defamation a modern day democratic state.<sup>23</sup> A person who is sued needs to be certain about the law of the defenses of defamation and the procedure for pleading such defenses. Individuals who are sued in defamation need not speculate on the efficacy of a defense they can rely on. When an individual files a defense, they need to be sure of the efficacy of the defense which they choose to rely on. The plethora of cases in defamation in which defenses are highlighted can provide a clue to come up with a clear and satisfactory law on defenses.

### **1.3 PURPOSE AND OBJECTIVES OF THE STUDY**

- a. To define defamation and its constituents as well as incidental issues.
- b. To consider situations in which individual right to free speech and free press conflicts with the right to reputation and the attitude of the court in resolving such conflicts.
- c. To criticize the burden of proof as required in civil defamation particularly between libel and slander.
- d. To determine the efficacy of the defenses namely justification, fair comment, privilege and others and show the shortcomings of these defenses.

---

<sup>22</sup> Sections 6 and 7 of Cap 68.

<sup>23</sup> Alfred Chanda. Freedom of Expression. Zambia Law Journal Vol 6

- e. endeavor to give a summary of the general law on defenses and offer criticism in view of the current political, social and economic landscape.



#### **1.4 SIGNIFICANCE OF THE STUDY**

This research is been undertaken at the time when the court cases on defamation have steadily increased largely due to the wider recognition of the right to free press and access to valuable information.<sup>24</sup> This has resulted mainly from the steady growth of democracy which has been taking hold over two decades since the reintroduction of multi-party system and democracy in general.<sup>25</sup> Since, the early 1990s, the number of media houses, both print and visual, have dramatically increased. Over the years, such media institutions as ZNBC TWO, MUVI TV, MOBI TV, RADIO ICHENGELO, RADIO PHOENIX, newspapers such as the MIRROR, DAILY NATION, MONITOR have been set up all of which have expanded the horizon of communication, and the public as now a wider platform on which it can air the public and individual views. Further, concerns in human rights reports have been raised. For instance, the Zambia 2012 Human Rights Report<sup>26</sup> under the subheading Respect for Civil Liberties noted that despite the recognition of the rights to freedom of speech and press, the law still contains measures which the government uses to restrict these freedoms. On freedom of speech the report noted that “there was close censorship and sensitivity by the government to opposing views and other criticism. As such, there was an increase in prosecution of those views which were

---

<sup>24</sup> Alfred Chanda. Freedom of Expression. Zambia Law Journal Vol 6

<sup>25</sup> Alfred Chanda. Freedom of Expression. Zambia Law Journal Vol 6

<sup>26</sup> An excerpt from the Post Newspaper May 19<sup>th</sup> 2013.

regarded as dangerous to public order and national security".<sup>27</sup> While on freedom of press it noted that;

The two most widely circulated newspapers and the only television station with national coverage were government run. The third most widely circulated private newspaper was owned by a presidential ally....the government remained sensitive to media criticism. On August 12, Clayson Hamasaka, head of media studies at a government journalism school was fired because he allowed the interview of an opposition party leader at the school radio station. On September 4, the government threatened to close the University of Zambia's radio station after it broadcasted a programme featuring Richard Kapita, opposition UPND vice president<sup>28</sup>

On national security and libel laws, the report noted that these laws were abused to suppress free speech and the press in the duty to inform the public. The report noted that there was arbitrary detention of opposition political party leader including their members who were opposed to government. It cited the defamation action by the republican President Mr Sata against United Party for National Development leader Hakainde Hichilema and the private newspaper Daily Nation as one such example.<sup>29</sup>

Therefore, with the foregoing, individual and media houses will also need to be cautious of the dangers of irresponsible reporting as it would lead to huge implications. The defenses in defamation suit need to be clear so as to discourage indiscriminate abuse of the right to a free press and speech which could impact negatively on the need to protect individual right to a reputation. Hence, it is important that this research investigates the law governing the defenses in defamation and establish from the current legal environment obtaining and come up with standard suggestion to improve the obtaining situation.

---

<sup>27</sup> Post newspaper dated 19<sup>th</sup> May 2013.

<sup>28</sup> Post newspaper dated 19<sup>th</sup> May 2013

<sup>29</sup> 2012 Human Rights Report Courtesy of US

## 1.5 OPERATIONAL DEFINITION OF TERMS.

Throughout this essay, unless otherwise defined, use of the following terms means the following.

**Defamation:** The publication of an untrue statement about a person that tends to lower his reputation in the opinion of right-thinking members of the community or to make them shun or avoid him<sup>30</sup>.

**Freedom of Expression:** The freedom of speech, press, assembly, or religion as guaranteed by the First Amendment;<sup>31</sup>

**Freedom of Speech:** The right to express one's thoughts and opinions without governmental limitations.<sup>32</sup>

**Freedom of the Press:** The right to print and publish materials without governmental intervention,<sup>33</sup> as guaranteed by the First Amendment.<sup>1</sup>

**Fair Comment:** A statement based on the writer's or speakers honest opinion about a matter of public concern.<sup>34</sup>

## 1.6 METHODOLOGY

This research essay will concern itself with desk research and will be devoid of field investigations. In this regard, the desk research will be via the gathering of primary and

---

<sup>30</sup> Elizabeth Martin. Oxford Dictionary of Law (Oxford: Oxford University Press, 2006),154

<sup>31</sup> Bryan Garner. Black's Law Dictionary (8th ed. 2004),1960

<sup>32</sup> Bryan Garner. Black's Law Dictionary (8th ed. 2004), 1960

<sup>33</sup> Bryan Garner. Black's Law Dictionary (8th ed. 2004),1960

<sup>34</sup> Bryan Garner. Black's Law Dictionary (8th ed. 2004),1792

secondary data in the form of Law Reports within the Zambian context and international jurisdictions, text books, journals, classroom lectures as well as the internet. Lastly, it should be borne in mind that this research will mostly investigate cases from different jurisdiction.

## **1.7 CONCLUSION.**

Freedom of expression and the right to reputation are vital in the democratic state. This chapter as demonstrated and highlighted the basic aspects of this research namely the statement of the problem, definition of concepts, research objectives, purpose of the study, Significance of study, and methodology. The following chapter looks at the defenses of Justification and Fair Comment.

## **CHAPTER TWO**

### **Freedom of Expression and Defamation in General**

#### **2.1 INTRODUCTION**

This chapter focuses on freedom of expression and defamation in general. It defines freedom of expression and its importance in a democratic state. It addresses the current law on freedom of expression and what impedes its enjoyment. It also gives the meaning of defamation including its constituents and incidental matters thereof. And it gives situations in which conflict ensues between freedom of expression and the right to reputation and the attitude of the courts in resolving the conflict.

#### **2.2 Importance of Freedom of Expression**

The right of citizen to freely express themselves is one of the rights that are so highly held.<sup>35</sup> This right to freedom of expression has been described as the life-blood of any democracy.<sup>36</sup> The Constitution makes provision that a person, save by their own consent, shall not be impeded in the enjoyment of receiving, giving opinion, sharing as well as to impart it on others. At the same time press freedom is recognized.<sup>37</sup> Freedom of expression is said to play a big role in a democratic society such ensuring transparency and good governance. A democratic society is

---

<sup>35</sup>New York Times v Sullivan [1964] 376 US

<sup>36</sup> Chanda, Alfred. Freedom of Expression. A Paper Presented at a LAZ Meeting.

<sup>37</sup> The Constitution Article 20(1) and (2)



seen as one in which tolerance, pluralism and open-mindedness are intrinsic as well as evolutionary and anchored on freedom of expression.<sup>38</sup>

In *Resident Doctors Association v Attorney General*<sup>39</sup> the then Judge Mambilima ably noted that; “the right of free speech is not only fundamental but also central to the concept and ideals of democracy”. However this recognition of freedom of expression and its enjoyment is not absolute. There are permitted derogation under the law. Situation under the law that permit derogations include where there is need to protect public good and morality, where there is need to protect the reputation and rights and freedoms of others, and where restrictions are placed on public officers provided all this is done under any law in force in Zambia.<sup>40</sup>

Hence, from the above, it is clear that other laws such as those that protect the rights of others such as reputation are well qualified to restrict freedom of expression in cases where it can be shown that such derogation are necessary. The law that seeks to protect reputation of others is defamation.<sup>41</sup> The law of defamation is addressed in statute and at Common Law.<sup>42</sup> In Zambia, besides Common Law, the laws which deal with defamation are the Defamation Act<sup>43</sup> and the Penal Code.<sup>44</sup>

---

<sup>38</sup> Chanda, Alfred. Freedom of Expression. A Paper Presented at a LAZ Meeting

<sup>39</sup> [1997] S.C.Z Judgment No. 25

<sup>40</sup> The Constitution Article 20(3) a, b and c.

<sup>41</sup> Frederic, John. Clerk. Clerk & Lindsell on Torts. 18<sup>th</sup> Edition. 1093

<sup>42</sup> Rodgers. Winfield & Jolowicz on Tort, 521

<sup>43</sup> Chapter 68 of the Laws of Zambia

<sup>44</sup> Chapter 87 of the Laws of Zambia

Yet, rigorous implementation of the law of defamation is said to have a chilling effect on the enjoyment of freedom of expression.<sup>45</sup> The press may become afraid of publishing certain information for fear of legal action and this can hinder good governance, transparency and accountability.<sup>46</sup> In this way, the challenge in a democracy is, therefore, to strike an optimum balance between the legitimate interests of individuals not to have their reputations besmirched and the interest of the public to have access to relevant information and to have unhindered debate of public issues.<sup>47</sup>

This result in the obvious conflict between freedom of expression and defamation and the attitude of the court in resolving this conflict has been biased towards freedom of expression more especially if the issue involves public interest. In *New York Times v Sullivan*<sup>48</sup> the U.S Supreme Court evoked the provisions embodied in the First and Fourteenth Amendments which safeguards public interest in cases where a public official sought an action in libel for been criticized in is official capacity. In this way the defense of fair comment on a matter of public interest succeeded. Therefore this paper is aimed at looking at the law on the defenses to defamation and efficacy of this law to the parties particularly the party who wishes to rely on these defenses.

## 2.2 MEANING OF DEFAMATION

A defamatory statement is defined by the learned authors of Halsbury as a statement “that tends to lower a person in the estimation of right thinking members of society generally or to cause

---

<sup>45</sup> Chanda, Alfred. Freedom of Expression. A Paper Presented at a LAZ Meeting 7

<sup>46</sup> Chanda, Alfred. Freedom of Expression. A Paper Presented at a LAZ Meeting 7

<sup>47</sup> Chanda, Alfred. Freedom of Expression. A Paper Presented at a LAZ Meeting 8

<sup>48</sup> [1964] 376 U.S

him to be shunned or avoided or to expose him to hatred, contempt, or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling or trade or business.<sup>49</sup> The civil wrong of defamation deals with damage to one's reputation which every individual has the right to possess during a lifetime and must not be fettered. The tort is referred to as the most appropriate action for the vindication of reputation.<sup>50</sup> Hence, like other torts, the civil wrong of defamation also requires the balancing between competing interests namely, the right to possess a reputation without any fetters and the constitutional right of others to freedom of expression.<sup>51</sup> To this end, individuals have the right to freely but fairly comment on matters of public interest or where such matters are privileged.

## 2.3 CONSTITUENTS OF DEFAMATION

The tort of defamation is composed of two distinct torts namely slander and libel.<sup>52</sup> Slander is a defamatory statement which is in form of spoken words or gesture.<sup>53</sup> It is in a temporal form and not action per se, which means that proof of damage, must be shown for the plaintiff to succeed.<sup>54</sup> Nevertheless, there are exceptions to this rule. The first exception is where the defamatory statement imputes a crime which is punishable by imprisonment, in which case there will be no need of proving special damages. In *Jackson v Adam*<sup>55</sup> defendant put this defamatory statement to the plaintiff, "who stole the parish bellropes, you scamping rascal?". It

---

<sup>49</sup> Halsbury Laws of England, 4th Edition, Volumes 24, and 28 (London: Butterworths, 1997)

<sup>50</sup> Fredric, John Clerk. Clerk & Lindsell on Torts. 18<sup>th</sup> Edition. 1094

<sup>51</sup> Article 20 of the Constitution of Zambia

<sup>52</sup> Patrick Mvunga and Sangwani Ng'ambi. The Law of Tort. 278

<sup>53</sup> Rodgers. Winfield & Jolowicz on Tort, 516

<sup>54</sup> Owen, R. Essential Tort Law. 3<sup>rd</sup> Edition. (London: Cavendish Publishers, 2000), 128

<sup>55</sup> [1835] 2 Bing. N.C 402

was impossible at a time for a churchwarden to still the bellropes. Had this not been the case the action would have succeeded.

Second, imputation of a contagious or infectious disease such as telling somebody that they have AIDS or Leprosy which results in them being shunned, is actionable without proof of any damages. Third, imputation of unchastity on a female is actionable per se. The Slander of Women Act 1891, made it actionable to impute any adultery or unchastity on any female or girl. And fourth, imputation of incompetence, such as saying a judge could not stay awake on the bench is actionable per se as opposed to when the same words were used on an ordinary person<sup>56</sup>

Libel on the other hand is defamation that is in a permanent form such as written words or objects.<sup>57</sup> Unlike slander libel is action per se<sup>58</sup> this means that the plaintiff does not have to show or prove special damage. This is because; libel is a tort as well as a crime.<sup>59</sup>

### **2.3.1 Ingredients of Defamation**

In order for the plaintiff to maintain an action in the civil wrong of defamation, he or she must be able to show or satisfy three basic ingredients namely; that the words complained of are defamatory, that the words refer to the plaintiff and that there was publication. These ingredients must be proved for an action to succeed. The plaintiff must be able to show that the words are defamatory in their ordinary meaning. For instance, if X tells Y that you had your house searched by the anti drugs squad, Y must show that these words are defamatory or at least capable of being

---

<sup>56</sup> Rodgers. Winfield & Jolowicz on Tort 520, 521

<sup>57</sup> Rodgers. Winfield & Jolowicz on Tort 517

<sup>58</sup> Patrick Mvunga and Sangwani Ng'ambi. The Law of Tort. 240

<sup>59</sup> Patrick Mvunga and Sangwani Ng'ambi. The Law of Tort. 246

defamatory. If Y succeeds in qualifying that the words are defamatory, Y must then show that the defamatory words referred to him either directly or by way of an innuendo. Then after this, Y must show that the said words were published to at least another person other than himself.

The question whether a statement is defamatory is a legal one and is not for the defendant or plaintiff to prove but is left for the trial judge in the case of Zambia and for the jury in the case of England.<sup>60</sup> This is echoed by the prior sentiments of Lord Wensleydale in *Parminter v Coupland*<sup>61</sup> that it was up to the judge to give a legal meaning to the offence. The test which the court employs in dealing with this legal question is that of a reasonable person that is to say what conclusion a reasonable person in a society generally will make of the alleged defamatory statement. In *Byrne v Dean*<sup>62</sup> it was alleged that a lampoon was defamatory because the defendant accused the plaintiff of 'sneaking' to the police about unlawful gambling in his club. The action of the club committee in allowing the lampoon to remain on the notice board did not constitute defamation, since members of society would not be right thinking if they thought it defamatory to say that a man had discharged his public duty to help suppress crime.<sup>63</sup>

### 2.3.2 Nature of a Defamatory Statement

A defamatory statement may take a direct reflection on the plaintiff's reputation or merely a physical relationship of things.<sup>64</sup> In *Yousoupoff v Metro-Goldwyn-Meyer Pictures Ltd*<sup>65</sup> the

---

<sup>60</sup> Per Ngulube C.J in *Shamwana v. Mwanawasa* [1994] Z.R. 149.

<sup>61</sup> [1840] 6 M.& W.105

<sup>62</sup> [1937] Ch 27

<sup>63</sup> Owen, R. Essential Tort Law. 3<sup>rd</sup> Edition.127

<sup>64</sup> Owen, Essential Tort Law. 3<sup>rd</sup> Edition,127

<sup>65</sup> [1934] 50 T.L.R 581 at 584, per Scrutton L.J

implication in the film about Princess Youssoupoff been raped by Rasputin was held by court to be libel on ground that to suggest that a woman had been raped would tend to cause her been avoided and shunned despite that she is morally upright. Further, in *Monson v Tussauds Ltd*<sup>66</sup> the action by the defendant to place an effigy depicting the plaintiff who was not proved of the charge of murder near the effigy of convicted murderers was held to be libel despite the failure of the relief of the remedy of an injunction.

But it is not only a direct reflection on the plaintiff's reputation or the mere physical relationship of objects that are defamatory. An indirect imputation on the plaintiff is also defamatory.<sup>67</sup> An inference from the fact and circumstances of a publication may be enough to qualify as an innuendo.<sup>68</sup> In *Cassidy v Daily Mirrors*<sup>69</sup> the defendant newspaper published a photo of the plaintiff's husband and a certain Miss X whose engagement had been announced. At the time of publication, the plaintiff was not living with the husband and advanced that the innuendo carried in the photograph was understood to mean that she was not married to him.

Therefore, any statement that makes an imputation on the reputation of the plaintiff either directly or by way of an innuendo may be deemed defamatory upon establishing that the words or object are defamatory in their meaning. In establishing whether a statement carries a defamatory meaning, the court employs the natural or ordinary meaning of the words. The natural and ordinary meaning is one which is conveyed to the ordinary, reasonable and fair

---

<sup>66</sup> [1894] 2 Macq 221

<sup>67</sup> Owen, *Essential Tort Law*. 3<sup>rd</sup> Edition

<sup>68</sup> Owen, *Essential Tort Law*. 3<sup>rd</sup> Edition

<sup>69</sup> [1929] Court of Appeal 13 A.C

minded reader.<sup>70</sup> And this is also a question for the judge to determine. In *Lewis v Daily Telegraph*<sup>71</sup> the defendants produced an article stating that the plaintiff's affairs were being inquired into by the Fraud Squad. These words were held to be defamatory in the ordinary and natural meaning. During trial, a judge had put the meaning of defamatory statement to the jury. This was reversed on appeal on ground that the judge wrongly put the question before the jury instead of determining it himself.

Further, where word fails the test of having a defamatory meaning, then the burden will be on the plaintiff.<sup>72</sup> In this way, where an inference of defamatory meaning cannot be inferred from the natural and ordinary meaning of words, the plaintiff must show that the words are capable of conveying a defamatory meaning in the eyes of a reasonable person.<sup>73</sup> The second ingredient that the statement must refer to the plaintiff is also critical. Here also, the test is that of a reasonable person whether the alleged defamatory statement is identifiable with the plaintiff. And the burden is on the plaintiff to prove that the statement refers to him or her. In *Benny Hamaiza Mwinga v Times Newspapers Ltd*<sup>74</sup> Ngulube DCJ stated that:

In this jurisdiction, the question whether certain words are defamatory or not is determined by the judge. This must be supplemented by the plaintiff who too must show that the words complained of referred to the plaintiff and that their publication which acts has put the plaintiff's reputation in question<sup>75</sup>

---

<sup>70</sup> Owen, *Essential Tort Law*. 3<sup>rd</sup> Edition, 132

<sup>71</sup> [1963] A.C 22

<sup>72</sup> Owen, *Essential Tort Law*. 3<sup>rd</sup> Edition, 133

<sup>73</sup> Owen, *Essential Tort Law*. 3<sup>rd</sup> Edition, 135

<sup>74</sup> [1989] Z.R. 177 S.C.Z

<sup>75</sup> *Benny Hamaiza Mwinga v Times Newspapers Ltd* [1989] ZR 177 SCZ

Where a defamatory statement directly identifies the plaintiff as in the case under analysis<sup>76</sup> there is no problem because the plaintiff does not need to prove that the words actually refer to the plaintiff. However if the plaintiff is not named, then there is a problem because, as already alluded to, this will shift the burden on the plaintiff who must prove that the word are defamatory or capable of being defamatory. It is not necessary that the plaintiff is mentioned because the issue is whether the statement may be understood by reasonable people as referring to the plaintiff<sup>77</sup>. In *Hulton v Jones*<sup>78</sup> the plaintiffs were owners of newspaper who had published in their newspaper a humorous account of a motor festival in Dieppe in which imputation was cast on the morals of Artemus Jones, a church warden at Peckham. The writers believed this person to be fictitious. But there was in fact a barrister named Artemus Jones who was not a church warden but lived in Peckham and had taken no part in the Dieppe festival. He commenced an action in libel and succeeded. It was immaterial that the defendant did not intend to defame him. In the classical ruling it was stated that, the question is not who it is aimed at but who it hit”

However, the Court of Appeal in *Newstead v London Express*<sup>79</sup> extended this in two directions namely that the principle applies where the statement truly relates to the real person A, and is mistakenly but reasonably thought to refer to another real person B; and that absences of negligence on the defendant’s part is valid only in the establishing whether reasonable persons may regard the statement as defamatory.<sup>80</sup> In *Newstead v London Express* the plaintiff brought an action against the statement in the defendant’s newspaper which read ‘Harold Newstead, 30

---

<sup>76</sup> *Ndovi v the Post Newspaper* SCZ No. 11 of 2011

<sup>77</sup> *Rodgers. Winfield & Jolowicz on Tort*, 534

<sup>78</sup> (1908) 2 Ch 317

<sup>79</sup> (1939) A.C 27

<sup>80</sup> *Owen, R. Essential Tort Law. 3<sup>rd</sup> Edition*, 135



years Camberwell man has been convicted of Bigamy. This was true of a Camberwell barman and not true of the plaintiff who helped his father to run a hairdressing business in Camberwell. Judgment was entered for the defendant.

Sometime the defamatory statement may be vague and could refer to a group or class of person in general. Where the statement refers to a limited class of persons, it is not difficult for that class to sue and all members will be entitled to sue. Yet difficulties may arise where the class referred to is vast. In the case of the *Cobbett-Tribe v The Zambia Publishing Company Limited*,<sup>81</sup> the defendant newspaper wrote a defamatory article about the Council of the law society of which the plaintiff was a member. DOYLE CJ stated that:

I do not consider that there is anything in the facts which show that the defamatory article was directed at the plaintiff in any more particularity than at any other member of the council.....I am, however, satisfied that this is a case where the words used would be taken by a reasonable person to refer to each member of the limited class of seven persons who comprise the Council of the law Society of Zambia. I am satisfied therefore that the words referred to the plaintiff.

Hence, for an action to be maintained, the plaintiff must show that defamatory statement identify or refer to him or her. And if it is a group or class of person that the defamatory statement refers to the specific group to which the plaintiff belongs he or she can sue. And the test is always whether a reasonable reader identifies the statement with the plaintiff.

The third and last ingredient is publication. Publication means the communication of words to at least one other person, other than the person defamed.<sup>82</sup> Publication in the commercial sense, as in a book or news paper or broadcast is not necessary but it can attract larger damages<sup>83</sup>. Publication underlie the all tort of defamation particularly libel. The plaintiff must show that the

---

<sup>81</sup>(1973) Z.R 9.

<sup>82</sup> Owen, R. Essential Tort Law. 3<sup>rd</sup> Edition,137

<sup>83</sup> Rodgers. Winfield & Jolowicz on Tort,539

defamation was published. But there are instances where publication may not suffice. This include communication of a defamatory material by the husband to the wife or vice versa<sup>84</sup> but if someone writes to the husband about the wife or vice versa, it will be defamatory<sup>85</sup> the rationale is to cement social relationships.

Also, if the plaintiff consents to a publication, then there is no defamation in the contextual sense of defamation and there can be no liability.<sup>86</sup> In *Cookson v Harewood*<sup>87</sup> the plaintiff consented to the rules of a Pony Turf Club which the defendant controlled. One of the rules was that the stewards of the club in his absolute discretion could warn off any person. Scrutton LJ state:

“No liability can result. The statement was true and there was authority to publish the statement and what meaning people gave it did not matter. The publication itself must be with cause and not malicious. Liability is not limited only to those responsible of publishing the defamatory material. Distributors of defamatory material are liable at common law.”<sup>88</sup>

## 2.4 Remedies in Defamation

The tort of defamation like other torts such as nuisance, negligence, trespass and malicious falsehood are aimed at balancing competing interest.<sup>89</sup> In other words the law of tort is about protection of rights.<sup>90</sup> And in relation to assault to ones reputation, the injured party will be seeking such reliefs such an injunction or damages.<sup>91</sup>

---

<sup>84</sup>Owen, R. Essential Tort Law. 3<sup>rd</sup> Edition,137

<sup>85</sup> *Wenhak v Morgan* [1888] 20 Q.B.D 635.

<sup>86</sup> Rodgers. Winfield & Jolowicz on Tort,538

<sup>87</sup> (1932) A.C 118

<sup>88</sup> Rodgers. Winfield & Jolowicz on Tort,541

<sup>89</sup> Owen, Essential Tort Law. 3<sup>rd</sup> Edition

<sup>90</sup> Owen, Essential Tort Law. 3<sup>rd</sup> Edition

<sup>91</sup> Owen, Essential Tort Law 3<sup>rd</sup> Edition, 152

Damages may be nominal, exemplary, contemptuous or excessive.<sup>92</sup> Nominal damages are awarded where the case has been proved but the plaintiff suffered very little damage.<sup>93</sup>

Contemptuous damages are awarded where the plaintiff has been technically successful but the claim is without merit.<sup>94</sup> Exemplary damages are awarded where the defendant has calculated that even after paying out damages and costs he or she will still make a profit by repeating the defamation.<sup>95</sup> While excessive damages, are awarded where damage is excessive.<sup>96</sup>

Injunctions on the other hand are awarded where the plaintiff reputation cannot be compensated by any form of damages. Injunction may be granted even before the reputation of someone is damaged.<sup>97</sup> Like damages, injunction can be mandatory, perpetual or interlocutory. Mandatory injunction serves to deter the defendant from doing or repeating acts which may be prejudicial to the plaintiff.<sup>98</sup> Perpetual injunctions are granted to permanently prevent the right of the plaintiff been violated hence they are rarely awarded.<sup>99</sup> Interlocutory injunction on the other hand, is aimed at maintaining the status quo until matters are fully determined at a full inter party hearing.<sup>100</sup> But this may not be tenable once the defendant advances a defense. In this way the effectiveness of the defense will depend on whether in the considered view of the court the defense is likely to succeed at the full hearing.

---

<sup>92</sup> Owen, Essential Tort Law. 3<sup>rd</sup> Edition

<sup>93</sup> Owen, Essential Tort Law. 3<sup>rd</sup> Edition

<sup>94</sup> Owen, Essential Tort Law. 3<sup>rd</sup> Edition

<sup>95</sup> Owen, Essential Tort Law. 3<sup>rd</sup> Edition

<sup>96</sup> Owen, Essential Tort Law. 3<sup>rd</sup> Edition, 152

<sup>97</sup> David Bean, Injunctions (London: Longman Group Limited, 1994), 3

<sup>98</sup> David Bean, Injunctions, 4

<sup>99</sup> Halsburys Laws of England, volume 21 (London: Butterworths, 1997) Para 715.

<sup>100</sup> Halsburys Laws of England, volume 21 (London: Butterworths, 1997) Para 716

## **2.5 Defenses**

The defendant can rely on a number of defenses which are provided by the Act such as Justification, Fair Comment, Privilege or Offer of Amends. But for the defendant to succeed, the defendant must be sure of the efficacy of each of these defenses and the requirements which are needed for a successful plea of each of these defenses.

## **2.6 Conclusion**

This chapter has demonstrated that freedom of expression is a vital component of a democratic society and ensures transparency and accountability as well as good governance. It is held to be the blood-life and an anchor of a democratic society. Hence, the chapter as endeavored to state the general law that governs the tort of defamation especially in view of the need to protect reputation of other persons. The chapter as also brought to bear the need to strike a balance between freedom of expression and reputation. The next chapter will focus on the defenses of Justification and Fair Comment

## CHAPTER THREE

### 3.0 INTRODUCTION

This chapter focuses on the defenses of justification and fair comment. It considers justification and fair comment by means of reference to cases. The chapter considers the current law on these two defenses as encapsulated in the Act.<sup>101</sup> It scrutinizes the burden and standard of proof prove as required by the law in both criminal libel and slander. The chapter further considers whether the current law on these defenses is adequate to promote freedom of expression and safeguard the right of reputation particularly in Zambia's current democratic environment.

### 3.1 Justification

Justification is truth.<sup>102</sup> It is a defense to an action in defamation. Instead of thinking whether what someone said is defamatory or not, one need only to ask oneself whether they had a right to say what they said and if this right exist, then he or she has a defense.<sup>103</sup> Justification is said to be a dangerous defense because if it is not sustained, heavier damages are imposed.<sup>104</sup> Yet, if it succeeds, it has no bearing whether the defendant believed the defamatory statement was true or had malice when he makes it.<sup>105</sup> But it has traditionally been regarded as the main defense to a defamation claim.<sup>106</sup>

---

<sup>101</sup> Defamation Act Chapter 68 of the Laws of Zambia.

<sup>102</sup> Rodgers. Winfield & Jolowicz on Tort, 544

<sup>103</sup> Martins, B Defamation Law and Free Speech. [www.http://www.uow.edu.au/arts/sts/bmartin](http://www.uow.edu.au/arts/sts/bmartin) . Accessed 9th January 2013.

<sup>104</sup> Rodgers. Winfield & Jolowicz on Tort, 545

<sup>105</sup> Owen, R. Essential Tort Law. 3<sup>rd</sup> Edition. 141

<sup>106</sup> Per Matibini, P in Michael Sata v Chanda Chimba and Others (2011) H.C

The tort of defamation is aimed at protection of reputation and is regarded as the most appropriate cause of action for the vindication of reputation.<sup>107</sup> Littledale LJ in *M'Pherson v Daniels*<sup>108</sup> stated that “the law will not allow a man to recover damages in respect of injury to a character which he either does not, or must not have.

But does it therefore mean that those who do not have character must under the guise of freedom of expression be indiscriminately defamed? From what we know through prior cases as well statutory position, this question appears to depend on circumstances. In *Shamwana v Mwanawasa*<sup>109</sup> the court held that a construction of the words is critical. In this case, the plaintiff sought remedies in form of an injunction against the defendant reference to the plaintiff as an ex-convict. Ngulube CJ distinguished the authority in *Leyman v Latimer*<sup>110</sup> the effect of a pardon was said to restore an individual's reputation so that the individual can maintain an action in defamation. Ngulube observed that; like in *Leyman*, the action largely depends on construction of the words such as the case was between the words “convicted felon” and “editor felon”. In construing these words, the first statement was qualified for the defense of justification while the latter was not. This is quite important because whenever one advances a defense either justification or fair comment or any other, construction of words is key to ensuring a successful plea of the defense.

---

<sup>107</sup> Fredric John Clerk. *Clerk & Lindsell on Torts*. 18<sup>th</sup> Edition. 1094

<sup>108</sup> *M'Pherson v Daniel* (1829) 10 B and C 263 at 272.

<sup>109</sup> [1994] ZR 27

<sup>110</sup> [1878] 3 EXD 352

The burden and the standard of proof under justification are on the defendant.<sup>111</sup> The standard of proof like in other civil action is on balance of probability. The defendant must show that the statement is untrue.<sup>112</sup> And it is clear that libel as opposed to slander is in permanent form hence actionable per se<sup>113</sup> Sakala J in *Banda v Zambia Publishing Company*<sup>114</sup> observed that a plea of justification is a complete defense to an action for libel but to establish this defense the defendant must establish and prove that the defamatory imputation is true in substance and fact.

Further, with regard to the relief of injunction, if the defendant makes the intention to advance any defence such as justification, the court is called upon to exercise caution in the exercise of its jurisdiction.<sup>115</sup> Hence, the law require that the plaintiff must show to the satisfaction of the court that the defence of justification will fail upon which the relief of interim injunction will be awarded. In *Hubbard v Piti*<sup>116</sup> Lord Denning stated that:

It is well settled that no injunction will be granted if the defendant states his intention of pleading a recognised defence, unless the plaintiff can satisfy the court that the defence will fail. This principle applies not only to the defence of justification but also to the defences of privilege, fair comment, consent, and probably any other defence.<sup>117</sup>

And the statutory position currently on justification as a defence is encapsulated in section 6 of the Act<sup>118</sup>. The law provides that; the defence of justification will not fail on ground that, in a

---

<sup>111</sup> Rodgers. Winfield & Jolowicz on Tort, 551

<sup>112</sup> Owen, R. Essential Tort Law. 3<sup>rd</sup> Edition, 141

<sup>113</sup> Patrick Mvunga and Sangwani Ng'ambi. The Law of Tort, 240

<sup>114</sup> [1982] Z.R. 4 (H.C)

<sup>115</sup> Owen, R. Essential Tort Law. 3<sup>rd</sup> Edition, 143

<sup>116</sup> [1975] 3 All ER 1

<sup>117</sup> Owen, R. Essential Tort Law. 3<sup>rd</sup> Edition, 144

<sup>118</sup> Defamation Act Cap 68 of the Laws of Zambia

case where two or more allegations are made and the plaintiff substantially justifies two or more allegations but fail to prove others, then if this other or others has or have no effect on the plaintiff's reputation, it then has no bearing. This is a loophole in the law and it means that the defendant may even make false allegations knowingly or unknowingly as long as it does not substantially affect the other allegations. Further, it also means that the burden of proof on balance of probability suffices. But this is not effective especially in criminal libel which is a crime.

### **Implication of the above on Justification**

From the observations it is clear that while the law of defamation is aimed at protection of individual's reputation which is assumed to be the most important valuable property during one's lifetime, these requirements which the law imposes on the parties particularly the plaintiff may have a chilling impact on the entire law of defamation. Proponents of human rights are already clear in their intention of what they would like to achieve. In this way, Chanda advanced that a rigorous implementation of defamation law may have a chilling effect on freedom of expression.<sup>119</sup> This is because it can undermine good governance, transparency and accountability.<sup>120</sup> The press may fear to publish certain key information for fear of legal suits. Similarly, members of the public may be reluctant to provide information to the press or the authorities for the same reason. Public debate of national issues may thus be hindered by defamation law.<sup>121</sup>

---

<sup>119</sup> Alfred Chanda. Freedom of Expression. Zambia Law Journal Vol 6

<sup>120</sup> Alfred Chanda. Freedom of Expression. Zambia Law Journal Vol

<sup>121</sup> Chanda, Alfred. Freedom of Expression. A Paper Presented at a LAZ Meeting



But from the defense of justification point of view, the law still appears to imply that the court still exalts freedom of expression as opposed to defamation and the all proposition that the law of defamation, if rigorously implemented will affect freedom of expression is misplaced. This is because, first, the position of section 6 is lacks clarity and does not correctly reflect the objective which the law seeks to achieve. The provision of section 6 is problematic in its interpretation because the plaintiff has no clue as to what strings of the allegations the defendant will rely on. In *Speidel v Plato Films*<sup>122</sup> the plaintiff was the subject of a film made by the defendants, in which several allegations were made against plaintiff. The plaintiff only complained about two specific allegations, which the defendant was unable to prove, although they were able to prove equally discreditable allegations. Hence justification failed because the defendant did not widely plead this defense. This means that whereas previously where specific allegation are pleaded and fails to be sustained, truth of the other allegations cannot suffice. But the current law as per section 6 already makes an assumption that the defendant makes a plea based on the entire allegations.

Hence, in a latter case of *Polly Peck (holdings) plc v Trelford*<sup>123</sup> the defense of justification was upheld against the claim of damage for the entire article because the defendant widely pleaded the defense to cover the all article. In this way *Speidel v Plato Films* was distinguished on ground that it was not specially pleaded. This coincides very well with the current position that failure of proof of the other allegations in defamation does not affect the truth of the other allegations that have been proved.

---

<sup>122</sup> [1961] ALL ER 103

<sup>123</sup> (1986) WLR 147

Section 6 is identical to section 5 of the Defamation Act 1952 of England which the Faulk Committee recommended to amend to allow for the defendant to rely on the entire article.<sup>124</sup> This position however did not change anything because, just as the current section 6 provide, the requirement that a defense of justification must not fail if the defendant substantially prove most of the allegations in the case where a defamatory statement consist of several allegations as been followed by the courts to the latter. In *Sutherland v Stapes*<sup>125</sup> Shaw LJ stated that:

I view with great satisfaction the charge of the Lord Chief Justice when he made this point perfectly clear to the jury, that all that was required to affirm that plea was that the jury should be satisfied that the sting of the libel or, if there were more than one, the stings of the libel should be made out. To which I may add that there may be mistakes here and there in what has been said which would make no substantial difference to the quality of the alleged libel or in the justification pleaded for it<sup>126</sup>

This position places a plaintiff on a vulnerable position. The defendant once allowed to rely on the entire sting of the statement, might even abuse the right of freedom of expression to indiscriminately defame the plaintiff. In the most extreme cases, the defendant would even be actuated by malice knowing well that by merely substantially proving parts of the defamatory allegations will be enough and it will be difficult to prove malice. No person can tell the mind of another at a given time. In *Edginton v Fitzmaurice*<sup>127</sup> Bowen LJ stated: The state of a man's mind is much a fact as the state of his digestion."

The standard of proof on the balance of probability is problematic especially on libel. This standard is opposed to the normal standard of beyond reasonable doubt as in standard criminal

---

<sup>124</sup> Owen, R. *Essential Tort Law*. 3<sup>rd</sup> Edition, 142

<sup>125</sup> (1925) LKJB 166

<sup>126</sup> Per Shaw L.J in *Sutherland v Stapes* [1925] LKJB 166

<sup>127</sup> 1885] 29 Ch. D. 459.

cases such as *Woomington v Director of Public Prosecution*.<sup>128</sup> Libel is said to be a crime and actionable per se.<sup>129</sup> This is important because, if the defendant is left to prove the defamatory allegations on balance of probability, the aim of the law of defamation to protect people's reputations from unfair attack will be defeated.<sup>130</sup> In Zambia defamation of a president is enshrined in the penal law and a person found liable is entitled to a prison sentence of three years<sup>131</sup> in this way, the disparities as given in case law on the standard of proof is detrimental to the aim of the law of defamation and it might have a negative impact on the efficacy of the defense.

### 3.3 Fair Comment

Another defense that is recognized in most civilized legal system and held to be indispensable to the proper functioning of public office, institutions and the work of all private persons who make their work the object of public interest is fair comment.<sup>132</sup> Like justification, section 7 of the Act<sup>133</sup> provides for fair comment as a complete defense and that it is not hinder even when the allegation is a mixture of facts and opinion as long as the allegation is based on opinion. In this way, whereas justification deals with allegations which are based on facts, fair comment deals with allegations that are based on opinion based on honest criticism.<sup>134</sup> The defense only applies

---

<sup>128</sup> [1935] AC2 64

<sup>129</sup> [www.lawteacher.uk.com](http://www.lawteacher.uk.com) accessed on 28 June 2013.

<sup>130</sup> [www.http://www.uow.edu.arts/bmartin](http://www.uow.edu.arts/bmartin)

<sup>131</sup> Section 69 of Chapter 87 of the Laws of Zambia

<sup>132</sup> Rodgers. Winfield & Jolowicz on Tort, 552

<sup>133</sup> Defamation Act Cap 68

<sup>134</sup> [www.lawteacher.uk.com](http://www.lawteacher.uk.com) accessed on 29<sup>th</sup> June 2013

to matter of public interest such as comment on works of literature, art, play, radio and television, and also the activities of public figure.<sup>135</sup>

The significance of this defense cannot be overemphasized. The development of this defense as made it more attractive especially to the press whose works involve a public duty to inform.<sup>136</sup> It largely protects freedom of expression and press freedom.<sup>137</sup> In justifying this defense, Silungwe CJ stated in *Bweupe v Attorney General and others*<sup>138</sup> that:

Fair comment has been recognized since the Victorian times. The defense is in the nature of a general right, and enables any member of the public to comment fairly on matters of public interest. It is based on facts and inferences which are proved to be true

In this way, fair comment is such an important defense which the defendant can rely on in as far as suit in defamation is concerned. Its strict plea as would be shown in its composition ensures that a defendant wishing to rely on this defense does not just advance it but must be knowledgeable on what the requirements for a successful plea of this defense are.

### **3.3.1 Composition of Fair Comment**

Therefore it can be deduced that for a defense of fair comment to hold, two things must be proved. These are that; first the matter commented on is of public interest, and second that the opinion is based on facts as opposed to assertion of facts.<sup>139</sup>

#### **(a) Public Interest**

---

<sup>135</sup> [www.lawteacher.uk.com](http://www.lawteacher.uk.com)

<sup>136</sup> Per Matibini J in *Michael Sata v Chanda Chimba and Others* SCZ No 11 of 2011

<sup>137</sup> Per Matibini J in *Michael Sata v Chanda Chimba and Others*

<sup>138</sup> [1984] Z.R. 21

<sup>139</sup> Halsburys Laws of England, 4<sup>th</sup> Edition.488

This requirement that the comment be on matters of public interest is quite vague as what is a matter of public interest is left to whether an honest person could express the comment on the basis of facts before them.<sup>140</sup> It is of no effect how prejudiced someone may be. Hence, the question is would any man with the most prejudice or exaggerated view regard the comment on the subject matter as fair?<sup>141</sup> But what constitutes public interest is quite subjective and could be perceived differently by people of such extreme exaggeration or obstinate views.<sup>142</sup> What could be of public interest to one person may not be such to the other. For instance, how would a fair person perceive a matter of a woman giving birth in a bush after what appears to be professional negligence at a government clinic.<sup>143</sup> Would a reasonable person consider this to be a matter of public interest? This could throw the whole question into speculation. However guidance as to what constitutes public interest is given in *London Artists v Little*<sup>144</sup> Lord Denning stated:

Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make a fair comment.

But even this guidance by Lord Denning may not be sufficient going by the changing landscape in the set up of the society in view of the growing and complexities of private as well as public functionaries. No wonder in modern litigation as in previous one the most involving task by the court is always to strike a balance between these issues.

#### (b) Opinion on Facts

---

<sup>140</sup> Eady J in *Branson v Bower* [2002] Q.B.D. 737.

<sup>141</sup> Lord Esher in *Merivale v Carson* [1887] Q.B.D 275

<sup>142</sup> Lord Esher in *Merivale v Carson*

<sup>143</sup> *Phiri v The Programme Manager Radio Maria-Zambia Chipata*, 21/HJ/31(Unreported )

<sup>144</sup> [1969] O.B.D 103

It is very difficult to separate comment from facts. It is not necessary to lay out all the facts that a comment is based on. Mere reference in passing is enough. The wording of section 7 implies that as long as the comment is on facts the plea of fair comment must not fail. Hence, the line between comment and facts is thin and one must properly direct his or her mind as to whether it is a comment been made or actually a repeat of the facts.

### **3.4 Efficacy of the Defenses in light of Freedom of Expression and Defamation**

Just as freedom of expression is regarded as the blood life of an open society and that ensures transparency and good governance,<sup>145</sup> defenses likewise can be said to be the main anchor of the law of defamation.<sup>146</sup> The effectiveness of the law of defamation can be looked at from the defenses point of view. Thus from the foregoing analysis and observation, justification and fair comment are statutory defenses open to the defendant. However whichever of the two a defendants choose to rely on, the mechanism designed for a successful plea of the defenses, does or does not support either freedom of expression and defamation or vice versa.

The provision of both sections 6 and 7 of the Defamation Act are clear that a plea justification and fair comment will not fail if the defamatory allegations are substantially proved or that comment contain both a mixture of both truth and comment. This position renders the law on these defenses less effective because the rules of pleading such as the standard of proof on balance of probability don't favor the plaintiff. Further, the requirement that the plaintiff must show that a plea of any defense cannot be sustained by the defendant in cases where a plaintiff seeks an injunction, is very difficult for the plaintiff to prove. Although malice is held to be something that vitiates this defenses particularly fair comment, the observation of Bowen LJ in

---

<sup>145</sup> Chanda, Alfred. Freedom of Expression. A Paper Presented at a LAZ Meeting

<sup>146</sup> [www.humanegoty.gov/Freedom of expression](http://www.humanegoty.gov/Freedom%20of%20expression)

Edgington v Fitzmaurice that it is impossible to tell the thoughts of the mind at a given time just as it is difficult to tell that digestion is taking place when fact it is true that it is taking place.<sup>147</sup>

Further, the ruling in cases such as *Lingens v Austria* and *New York Times v Sullivan* all exalted fair comment both failing to take into consideration of the desirous need for reputation which once besmirched can take time to rebuild. To this effect a brave decision was made in *The Orphanus v The Herald and Weekly Limited*<sup>148</sup> in this case the Australian High Court held that law must be in line with the implication of freedom despite the effect this may have on reputation. Individual interest must give interest to the provisions of the constitution. But at the same time free communication is not a passport to subordinate the right to reputation as appeared in the Sullivan case.

In *Sata v the Post Newspaper and Another*,<sup>149</sup> the erstwhile Chief Justice Ngulube consider the question whether or not the law of defamation derogates from, inter alia, press freedom as guaranteed by the Constitution. The Chief Justice recognized that both freedom of expression and the right to reputation are recognized by the constitution and no one between this two should be held to be more than the other. To this extent, there is need to strike a balance between these two interest. Yet, noted that this was not easy to achieve. It was said "in sum, it is my considered opinion that constitutional protection of reputation and free speech can be best balanced in Zambia when the plaintiff is a public official who has been attacked in that character by more generous application of the existing defenses.

From the above observation, the effectiveness of the law on defamation particularly defenses is rendered less effective by suggestion such as the right to reputation must pave way for the

---

<sup>147</sup> Per LJ Bowen in *Edgington v Fitzmaurice*

<sup>148</sup> FC/94/041, 12<sup>th</sup> October, 1994.

<sup>149</sup> *Sata v Post Newspapers Limited and Another* 1993/HP/1395 (unreported).

constitutional right of freedom of expression and that a good balance between freedom of expression and the right to reputation is to apply the defenses generously.

### **3.5 Conclusion**

This chapter has considered the law on the defenses of justification and fair comment. It has reflected on the lapse and strength in the law especially defamation. It has in the process looked at instances via case law on which the court has to deal with the balancing of the competing interest between freedom of expression and defamation and the attitude which it adopt. And it in effect as considered the efficacy of the defenses. The next chapter will focus on the defenses of Privilege and Offer of Amend.



## CHAPTER FOUR

### 4.0 INTRODUCTION

In the previous chapter, the defenses of justification and fair comment were considered. This chapter is concerned with yet two other defenses which the defendant may rely on in defamation. These are privilege, which may be either qualified or absolute,<sup>150</sup> and offer of amends. The defense of privilege will be defined including instances which the law regards as privilege. The chapter will further seek to establish whether it is necessary in a democratic environment and the impact which it has on both freedom of expression and defamation. The notion of offer of amend is also considered particularly the implication it has on the right to sue in defamation. Finally, the efficacy of these defenses in as far as freedom of expression and defamation are concerned will be considered.

### 4.2 PRIVILEGE

There is no precise definition of what is privilege both at common law as well as statute. However, it is recognized that the law considers certain occasions in which freedom of communication without fear of litigation is more important than the protection of one's reputation.<sup>151</sup> Examples of such occasions are parliamentary debates and courts proceedings. The rationale behind this is the law's recognition of the importance of allowing free communication among people which must take precedent over protection of individual reputation. The issue of public policy is pertinent in treating certain occasions as privilege. In *Phiri v The Programme*

---

<sup>150</sup> Rodgers. Winfield & Jolowicz on Tort, 561

<sup>151</sup> Rodgers. Winfield & Jolowicz on Tort, 560

*Manager Radio Maria-Zambia*<sup>152</sup> in which a defense of qualified privilege was raised, Mwanamwabwa J stated that:

On grounds of public policy the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person which is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. It is not possible to set out all the occasions at Common Law which will be held, to be privileged, but as a general rule, there must be a common and corresponding duty or interest between the person who makes the communication and the person who receives it<sup>153</sup>

The defense of privilege has two stings namely absolute privilege and qualified privilege.<sup>154</sup> Under absolute privilege freedom of speech is held to be so important that the defense of absolute privilege can never be defeated no matter how false or malicious the statement.<sup>155</sup> As earlier alluded to, occasions such as parliamentary statements and judicial proceedings are absolutely privileged. Under qualified privilege, occasions such as fair and accurate report of parliament debates and fair and accurate report of judicial proceedings. Statements made in protection of oneself or one's property is also privileged.<sup>156</sup> In *Osborn v Boulter*<sup>157</sup> a publican complained to the brewer who supplied him with beer that it was of poor quality. They retorted that had heard rumours that the poor quality of the beer was due to the watering of it by the publican and they published this statement to a third party. It was held to be privileged.

---

<sup>152</sup> 21/HJ/31(Unreported )

<sup>153</sup> *Phiri v The Programme Manager Radio Maria-Zambia Chipata*, 21/HJ/31(Unreported )

<sup>154</sup> Rodgers. Winfield & Jolowicz on Tort 561

<sup>155</sup> [www.lawteacher.uk.com](http://www.lawteacher.uk.com)

<sup>156</sup> Owen, R. Essential Tort Law. 3<sup>rd</sup> Edition,

<sup>157</sup> [1930] Q.B.D 47

Yet, for a statement to be held on qualified privilege, it must fulfill two conditions. These conditions are that they must be a duty recognized in law to make such a statement and an interest to receive such statements. These conditions are applicable in all cases of qualified privilege.<sup>158</sup> In *Beach v Frieson*,<sup>159</sup> a letter by a Member of Parliament to the Law Society and the Lord Chancellor in which he set out complaints from one of his constituents concerning the conduct of a firm of solicitors was held to be protected by qualified privilege.

It is also important to note that while the law recognize certain occasions as qualified privileged, it does not leave open or warrant attack on other people's reputation.<sup>160</sup> In *Reynolds v Times Newspaper Ltd*<sup>161</sup> ruled that while those who engage in public life must expect and accept that their conduct will be the subject of close scrutiny and robust criticism, they should not be defamed or subject to false statements save in circumstances in which the publication occurs qualifies it, in the interest of the public, to afford the publisher qualified privilege.<sup>162</sup>

However, like other defenses, the question of malice is critical in as far as the defense of privilege is concerned. In this regard malice can vitiate this defense. For the purpose of the defense privilege, malice is taken to mean; lack of truth in the statement and using the privileged occasion for an improper purpose. This calls for responsible reporting by the press. To this end Simon Brown LJ sitting in the Court of Appeal in the *Al-Fagih*<sup>163</sup> case, while considering the question of duty and interest, stated that:

---

<sup>158</sup> Owen, R. Essential Tort Law. 3<sup>rd</sup> Edition 138

<sup>159</sup> [1971] C.A 118

<sup>160</sup> Rodgers. Winfield & Jolowicz on Tort 547

<sup>161</sup> [2001] 2 AC 127 H.L

<sup>162</sup> Patrick Mvunga and Sangwani Ng'ambi. The Law of Tort. 298

<sup>163</sup> [2000] AC 67

That seemed properly to reflect on the hand the importance of keeping the public informed and on the other, the need for responsible journalism to guard against needless misinformation. A publisher could not properly consider that he was under a public duty to communicate the information to the public unless in deciding to do so, he reasonably<sup>164</sup> believed that he was acting responsibly

In Zambia there are currently caveat in the law that ensure that the law is not abused in the guise of fulfilling what might not even fall within the ambit of either absolute and qualified privilege.<sup>164</sup> While fair and accurate reporting in newspapers is accepted, blasphemous and related matters is not permitted. Further, matters made outside what are regarded as absolute privileged occasions such as personal statement of politicians either in their own capacity or via agent are exempted. Matters which are prohibited at law and lack public interest are also exempted.<sup>165</sup>

But, these caveats are not adequate in the sense that, like in fair comment, what is regarded as public interest may differ from individual to individual and judges alike. Despite the guidance Lord Denning provided in *London Artists v Little*,<sup>166</sup> it is not easy. For instances, if the judge decides that the occasion was not privilege, the issue of malice does not arise. But if he finds otherwise, having regard to all circumstances, the interest of the public entitlement to know the information is vital.<sup>167</sup>

These caveat again, bows down to the issue of duty and interest. Hence in matters of privilege reciprocity is always vital and has it been shown, public interest as generated by public entitlement to information is only to be shown or weighed with the responsibility of

---

<sup>164</sup> Sections 8, 9 and 14 of Cap 68 of the Laws of Zambia

<sup>165</sup> Patrick Mvunga and Sangwani Ng'ambi. *The Law of Tort*. 263

<sup>166</sup> [1969] O.B.D 103

<sup>167</sup> Per Lord May in *GKR Karate (UK) Ltd v Yorkshire Post Ltd* (2000) 1 WLR 2571

disseminating the information makes it available. In *Kapondeni v Mapulanga*<sup>168</sup> in this case, the plaintiff owned a service which acted as an agent of Shell BP. It often broke down resulting in erratic supply which in effect raised concern among the district authorities who wrote letters to both the plaintiff and Shell BP as the principal. The publication to shells was contended by the plaintiff as not privileged and was defamatory. It was found by the High Court on evidence that the district authorities had a duty to ensure that there were enough fuel stock in the district and that Shell BP being the principal of the plaintiff had an interest to know how the filling station was being run. As a result, reciprocity was present and the appeal was found without merit.

#### **4.3 Offer of Amend or Unintentional Defamation**

This defense covers instances where the defendant did not have the intention to defame the plaintiff or innocently published the defamatory matter.<sup>169</sup> For the defendant to raise this defense, the defendant needs to offer amends (apology) to the plaintiff.<sup>170</sup> If the amends are accepted, the plaintiff cannot commence any libel action against the defendant. However, in an event that the offer of amends is refused or rejected by the plaintiff, the defendant can then raise the defense. Section 11 of the Act<sup>171</sup> is elaborative of both the substance and procedure for relying on this defense.

Thus, under this defense innocent publication is treated as that one in which the publisher lacked the intention and was ignorant of the circumstances giving rise to the defamatory mean in the context of the person so aggrieved. If an offer is accepted and an agreement reached by the

---

<sup>168</sup> [1984] ZR 51

<sup>169</sup> Rodgers. Winfield & Jolowicz on Tort 594

<sup>170</sup> Rodgers. Winfield & Jolowicz on Tort 595

<sup>171</sup> Defamation Act Cap 68 of the Laws of Zambia

parties, where the defendant breaches the agreement the matter is referred to the High Court which makes a decision that is regarded as final. But where an offer is not accepted, the defendant must file the offer together with the affidavit specifying the facts of the publication that will be relied upon. And for the purpose of this defense, extrinsic evidence which is not included in the affidavit is not accepted.<sup>172</sup>

#### **4.4 Efficacy of the Defenses in light of Freedom of Expression and Defamation**

In chapter three it was shown that the aim of the all law of defamation is to ensure that individual reputation and that the best way to look at this law is to look at the law on the defenses. It was also stated that the major task which the court is engaged in is to balance the competing interest. In this way, the role of those charged with the duty of disseminating information is held to be critical as it ensure that those with a reciprocal right to receive it actually receive it. In *Castells v Spain*<sup>173</sup> the European Court of Human Rights observed that:

The pre-eminent role of the press in a state governed by the rule of law must not be forgotten. Although it must not overstep various bound set, inter alia, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest<sup>174</sup>

In this regard the defense of privilege recognizes the crucial role that the press plays but at the same time recognizes the need to ensure that other interests are protected. In this way section 9 qualifies newspaper report made without malice as privileged while at the same time recognizes that such privilege should not be interpreted as protecting the publication of any matters prohibited by law. There has to be balance between freedom of expression and defamation which

---

<sup>172</sup> Section 11(2) and (4)(a) and (5)(a) of Cap 68

<sup>173</sup> [1992] 14 EHRR 445

<sup>174</sup> Patrick Mvunga and Sangwani Ng'ambi. *The Law of Tort*.298

is meant for protection reputation. In terms of Section 14 of the Act, all publications made outside traditional privileged occasions such as parliamentary debate to personal or agent publication statements made on occasions such as political rallies during an election excluded.

Further, section 11 as established a requirement that for anyone to rely on the defense of offer of amend; they must state clearly in the affidavit what facts they will rely on. This is important especially for the plaintiff because if a defendant is allowed to widely speculate, it has the potential of reducing the chances of success for the plaintiff whose reputation could be serious jeopardy. In addition, the inadmissibility of the extrinsic evidence does a little more disadvantage to the defendant because, especially under offer of amends, the defendant may not possess the immediate facts on the available circumstances which facts can only be sourced later on during the litigation process. Also the reference of the issues in an event that the offer of amend agreement is breached to the High Court whose decision is said to be final is arbitrary from the freedom of expression point of view. But the doctrine of Estoppel which aims to bar people from back tracking the on their earlier promises is quite appropriate for the defense of offer of amend.

#### **4.5 Conclusion**

This chapter has looked at the defense of privilege, both absolute and qualified, and the defense of offer of amends. The law on the two defenses as provided under statute and case law has been examined. The essential elements such as public interest and malice have been referred to in the course of looking at these defenses particularly via cases. The efficacy of these defenses in relation to freedom of expression and defamation has also been considered. It has also considered the doctrine of estoppels. The next chapter is the conclusion and puts forward recommendation on the law governing defenses in defamation.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 GENERAL CONCLUSION

In chapter one of this research freedom of expression and defamation were introduced as some of the critical elements of a democratic society. It was discovered that freedom of expression in particular was the anchor of a democratic society in as far as good governance, transparency and accountability were concerned. While at the same time the need to allow others enjoy reputation was also heightened. Hence, the difficulty that is involved in the co-existence of freedom of expression and the right to reputation were looked at via instances in which the courts often have to resolve the conflict which arises between these two competing interests. In this way, cases such as *Lingens v Austria* and *Resident Doctors Association v. The Attorney General* were considered as examples of such instances. And the chapter concluded by stating the need to have clear law on the defenses by looking at the significance and objective of the research.

Chapter two gave an overview of the freedom of expression and defamation. It looked at the importance of freedom of expression as a blood-life of a democratic society. The meaning, ingredient and constituents of defamation were looked at and considered. Further, the chilling effect that defamation may have on freedom of expression was mentioned. And the remedies and defenses open to the plaintiff and the defendant were considered. The chapter concluded portraying an emphasis on the need to balance between freedom of expression and defamation.

Chapter three introduced the basic defenses of justification and fair comment. It suggested in the outset that the best way to look at the conflict between freedom of expression and defamation was to look at the law on the defenses. It considered the adequacy of the current law on



## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 GENERAL CONCLUSION

In chapter one of this research freedom of expression and defamation were introduced as some of the critical elements of a democratic society. It was discovered that freedom of expression in particular was the anchor of a democratic society in as far as good governance, transparency and accountability were concerned. While at the same time the need to allow others enjoy reputation was also heightened. Hence, the difficulty that is involved in the co-existence of freedom of expression and the right to reputation were looked at via instances in which the courts often have to resolve the conflict which arises between these two competing interests. In this way, cases such as *Lingens v Austria* and *Resident Doctors Association v. The Attorney General* were considered as examples of such instances. And the chapter concluded by stating the need to have clear law on the defenses by looking at the significance and objective of the research.

Chapter two gave an overview of the freedom of expression and defamation. It looked at the importance of freedom of expression as a blood-life of a democratic society. The meaning, ingredient and constituents of defamation were looked at and considered. Further, the chilling effect that defamation may have on freedom of expression was mentioned. And the remedies and defenses open to the plaintiff and the defendant were considered. The chapter concluded portraying an emphasis on the need to balance between freedom of expression and defamation.

Chapter three introduced the basic defenses of justification and fair comment. It suggested in the outset that the best way to look at the conflict between freedom of expression and defamation was to look at the law on the defenses. It considered the adequacy of the current law on

justification and fair comment as defenses. It looked at the efficacy of these two defenses. It considered and attacked the lapse in the standard of proof, particularly on criminal libel. It concluded by showing that while defamation is suppose to protect reputation, the suggestion such as it rigorous implementation as a chilling effect on freedom of expression are misplaced and that the opposite is true.

In chapter four, two other defenses namely privilege and offer of amends (unintentional defamation where considered. Instances that are absolutely privileged by law such as judicial proceedings as well as those qualified by law such as matter bordering public interest such as was discussed in the case of Phiri v. The Programme Manager of Radio Maria was considered. The concern to treat certain situations as privileged was raised. The efficacy of these defenses as far as freedom of expression and defamation were concerned was considered. And the chapter concluded by making reference to the English doctrine of estoppels.

The ultimate objective of this research has been to look at the law on the defenses to defamation as far as the conflict between freedom of expression and defamation is concerned. Just as freedom of expression is blood life of a democratic society,<sup>175</sup> the defenses too can best be regarded as the blood life of the entire law of defamation. And it is the best litmus test in all instances involving the competing interests of and balancing between freedom of expression and the right to reputation. With the steady growth of democracy, the importance of free speech as even acquired such prominence that sometimes the right to reputation is almost relegated to a lower position than freedom of expression as was implied in *Castells v. Spain*. However, such implications are misplaced as they fall short of sight to protect other rights such as reputation.

---

<sup>175</sup> Chanda, Alfred. Freedom of Expression. A Paper Presented at a LAZ Meeting

In *Reynolds v Times Newspaper*, the right to reputation was said to be integral and significant aspect of the dignity of an individual. It is the basis of important decision in a democratic society and its health. If besmirched by false allegations, reputation can be seriously damaged especially if the opportunity to vindicate oneself is absent. Hence such should be discouraged for public good as protection of reputation is in public interest. To this end, in democratic state such as Zambia, where the constitution recognizes both freedoms of expression and the right to reputation, the huge task court has is to strike a balance between these interests. As such in *Sata v The Post Newspaper and Another*, Chief Justice Ngulube opined that the constitution protection of reputation and free speech can be best balanced in Zambia when the plaintiff is a public official who had been attacked in that character by more generous application of existing defenses.

Thus, defenses are crucial in the exercise by the court of striking a balance between free speech and the right to unpaired reputation. What can be deemed as a generous application of the defenses, can only be solicited via considering the current law on the defenses and see the extent to which the current law protect the right of reputation and avoids impeding the right to free speech and see whether it is well balances between them.

The defamation Act under section 6 provides the defense of justification. Truth is regarded as an absolute defense. Instead of having to struggle when threatened with a law suit in defamation, one can simply say that what they said is true. Moreover, case law such the *Mc'Pherson v Daniel* reputation is only considered when it is really deserved. The wording of section 6 is wide in the sense that it in a way defeats the all purpose of the aim of the law of defamation which is to protect reputation of the plaintiff. The provision that a defense of justification cannot fall on account of minor effect a defamatory statement has on the all defamatory statement, just gives

the defendant a more flexible way of justifying even an apparent defamatory statement. In situations like the *Shamwana v Mwanawasa* case, difficulties are quiet inevitable and resolution is left at the hand of a judge. Further, in cases where plaintiff seeks an interim injunction, the plaintiff will not normally be give this remedy if the defendant indicates that he wishes to plead justification or any defense and will only be given in the clearest circumstances.<sup>176</sup> In this way, the law on the defense of justification is more biased to ensure free speech and puts reputation to be a bit trivial. The need for the plaintiff to show that the defense of justification is likely to fall in order for a relief of interim injunction to be given is a serious caveat for the plaintiff in pursuit of fairness in the vindication of character.

The same can be said of fair comment. Under fair comment also the requirement such as proving malice by the plaintiff is another serious caveat. As Bowen LJ noted in *Edington v Fitzmaurice* that the state of a man's mind is much a fact as the state of his digestion, it is difficult to expect the plaintiff to prove malice. Though same pointer can be used to infer malice, it is nevertheless difficult. The aspect of public interest is open to wide interpretation and may be held to be quiet diverse and may in the guise of public interest abused.

Further the treatment of certain occasion as privileged, both absolute and qualified, thought necessary in a democratic state for proper functioning of institutions is also an impediment on the right to reputation. And in cases of the defense of offer of amends (unintentional defamation), such requirements that once an offer has been accepted and an agreement is made but latter on breached, the current position that the High Court decision becomes final once it matters are referred to it, is very restrictive and in a sense that it takes away especially from the

---

<sup>176</sup> Per Matibini in *Paul Shakabwali v Chief Mono* (2010) HP/357

plaintiffs point of view the full course of justice. This is identical to Court Annexed Mediation in which participation is an hot issue.<sup>177</sup> And since the defense is pretty much identical with the English doctrine of estoppels, the contractual rules applicable in a normal contract agreement may be helpful as far as the process of litigation is concerned.

To an extent the current law on defenses is quiet biased towards free speech than reputation. In this way propositions in the law may be necessary.

## **5.2 RECOMMENDATION**

In the course of this research, issues such as what circumstances are regarded as privileged and their necessity in democratic state, the burden of proof especially in criminal libel, the need for the plaintiff to prove malice in cases where the defendant advance such defenses such as fair comment, unintentional defamation and privilege, as well as the position that if the defendant indicate that they will plead any of the defenses, such relief as interim injunction is not necessarily given as a matter of law but rather equity, have been raised. To rectify some of these concerns, the under listed are the recommendations.

### **(1) Standard of Proof in Criminal Libel**

While the current law as differentiated between libel and slander, in that slander is not actionable per se and need proof of damage for it to succeed and libel as actionable per se because it is crime, and its inclusion in the penal law such as section 69 of Penal Code, the standard of prove on the on the balance of probability is quiet inadequate. The law must be changed to elevate and distinguish between standard of proof required between criminal libel

---

<sup>177</sup> Matibini, P. Mediation: An Alternative Dispute Resolution Process. Law Association of Zambia Journal Vol 2(2000), 46

and slander. The standard for libel should be the normal standard of beyond reasonable doubt as in all criminal matters.



(2) Change the Requirement on Injunction

Relief such as the relief of Interim Injunction must not be hindered by the mere fact that the defendant is to advance a defense at the full hearing of the case. The requirement that the plaintiff must show to the satisfaction of the judge must not be entertained. But caution must be exercised as not to allow immunity from criticism.

(3) Change the Defamation Act to Capture Privilege Occasions

The current Act must be changed to capture particular instances which are privileged instead of the current position where the test of duty-interest has to be relied on by the judge. This will ensure that there is clarity in the law.

(4) Amend the Defamation Act to Change the Current Position on Offer of Amends.

And in the defense of offer of amend, the law must be changed so that the High Court decisions do not become final in cases where such matters as arising from breach of the agreement of offer of amends. The normal law of contract must apply.

### 5.3 CONCLUSION

This research has demonstrated that the ever present conflict between freedom of expression and defamation can be best looked at from the defenses of defamation perspective. Both free speech and said to be important in a democratic society. And that the task of the courts has always been to achieve a balance between these competing interests. The authorities espoused in prior case law though recognizing the right to reputation have been biased towards free speech. Hence the law governing defenses provides a better clue in striking a balance between free speech and

reputation. Unfortunately the current law on defenses has some flaws in it and instead of the traditional view of defamation having a chilling effect on free speech, the opposite is true. To this end, recommendations have been put forward which are hoped could change the all topic of free speech and defamation and help to achieve a good balance.

## **BIBLIOGRAPHY**

Bean, David. Injunctions. (London: Longman Group Limited, 1994)

Clerk, J. Frederic. Clerk & Lindsell on Torts. 18<sup>th</sup> Edition, (London: Sweet & Maxwell, 2000)

Garner, Bryan. Black's Law Dictionary 8th edition,( New York: Sweet & Maxwell, 2004)

Halsburys Laws of England, Volume 21(London: Sweet & Maxwell, 1969)

Halsbury Laws of England, 4th Edition, Volumes 24, and 28 (London: Butterworths, 1997)

Martin, Elizabeth and Law, John.Oxford Dictionary of Law (Oxford: Oxford University Press, 2006)

Mvunga, Patrick and Ng'ambi, Sangwani. The Law of Tort. (Lusaka: UNZA Press, 2011)

Owen, R. Essential Tort Law. 3<sup>rd</sup> Edition (London: Cavendish Publishers, 2000)

Vernas, Mitter. The Law of Defamation and Malicious Prosecution: Civil and Criminal. (Allahabad: At Sardar Patel, 1965)

Winfield and Jolowitz. Tort. 17<sup>th</sup> Edition, (London: Sweet & Maxwell Limited, 2006)

Post newspaper dated 19<sup>th</sup> May 2013

[www.http://www.uow.edu.au/arts/sts/bmartin](http://www.uow.edu.au/arts/sts/bmartin) . Accessed 9th January 2013

[www.lawteacher.uk.com](http://www.lawteacher.uk.com) Accessed on 19<sup>th</sup> May 2013

## **JOURNAL, SCHOLARY ARTICLE AND REPORTS**

Chanda, Alfred. Freedom of Expression, A Paper Presented to a LAZ Meeting

Chanda, Alfred, Freedom of Expression. Zambia Law Journal, Special Edition (1998)

Matibini, P. Mediation: An Alternative Dispute Resolution Process. Law Association of Zambia Journal Vol 2(2000)