

THE REMEDY OF INJUNCTION IN CIVIL DEFAMATION
-THE ZAMBIAN PERSPECTIVE

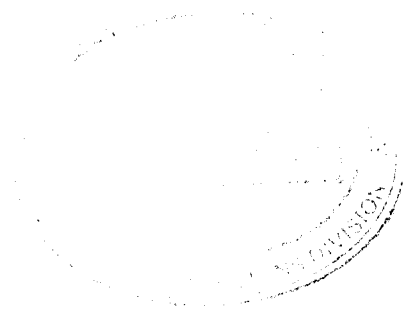
BY

MWEENDALUBI KAPUKUTULA BILLIARD TINTA II

A paper presented in partial fulfillment of the requirements for the Award of the Degree of Bachelor of Laws of the University of Zambia.

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I recommend that the obligatory essay prepared under my supervision by

MWEENDALUBI KAPUKUTULA BILLIARD TINTA II
(27005801)

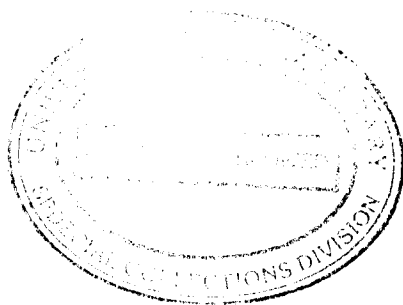
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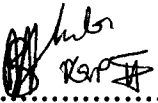


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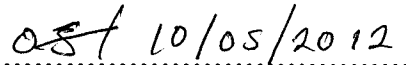
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ABSTRACT

This dissertation considered the remedy of injunction in civil defamation from the Zambian perspective. With this end in mind, the research begins by looking at the legal regime governing the tort of defamation in general. The dissertation thereafter traces the origin of injunctive relief. The research also examined the unique position of the injunctive relief in defamation cases before doing a comparative analysis between Zambia and two common law jurisdictions namely; Canada and United States of America.

The dissertation, through research primarily comprising secondary data especially case law, statute analysis and books, found that the Defamation Act, Chapter 68, of the Laws of Zambia, the principal Act governing civil defamation is silent on the definition of defamation and does not provide guidelines on the granting of injunctions in defamation cases. The other finding was that the courts rely on common law guidelines on the grant of injunctions under which the remedy is discretionary. This has led to uncertainty in the law as common law is not fixed. Further, the availability of the remedy on discretionary terms makes it susceptible to abuse by the judges. Furthermore, an analysis of Zambian case law on defamation showed that injunctions are granted on a narrow basis as opposed to a broad basis. This disadvantages the majority poor as defamation litigation is convoluted and expensive. The inability of Legal Aid Board to give Legal Aid in civil defamation has augmented this problem. Unless these problems are ironed out or remedied there is no hope of injunctive relief in civil relief in civil defamation to be responsive to the needs of the Zambian society.

Some of the important recommendations to improve the legal regime governing the grant of injunctions in defamation causes as drawn from the American, Canadian and indeed the Zambian experience include; the need to reform the Defamation Act so that it can expressly provide for the remedy of injunction and provide guidelines on how this remedy is to be granted. This will make the remedy statutory thereby remove the discretion vested in judges on its grant and turn the remedy to be a right and not a privilege; the remedy of injunction should be granted on a broad basis in light of the realities in Zambia. Further, the Legal Aid board should provide legal services for civil defamation causes. In essence, the Zambian system should adopt the Canadian and American approach in the grant of injunctions.

DEDICATION

This dissertation is dedicated to all my family members and all who have been instrumental to the consummation of my academic and potentialities abilities as well as all those in the annals of my kindred that sparkled the desire for excellence.

Special mention is made of My Late Uncle, Sunday Nyirenda, for spinning the wheels of my primary education,

My sisters Prisca, Margarita, Mwaka, Mabuku and Betty and also my brothers Bornfree and Buyst for shaping my demeanor and being always there for me. I don't know how it would have been without you no *bamakwesu*.

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To my family, thanks for believing in me even when I did not believe in myself. Lwiiyo Lwangu aalusunpushe mukuwa

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Last but not the least, special curdles go to the School of law Class of 2012, you guys were a great company in this journey. Aluta continua!

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Youssoupoff v Metro-Goldwyn-Meyer Pictures Ltd [1934]50 T.L.R 581

CONTENTS

Research Topic.....i

Declaration.....i

Supervisor’s Approval.....ii

Abstractiii

Acknowledgements.....v

Dedication.....vi

Table of statutes.....vii

Table of cases.....viii

Table of contents.....x

CHAPTER 1

1.1 General Introduction.....1

1.2 Introduction.....1

1.3 Problem of the statement.....2

1.4Hypothesis.....3

1.5Objectives3

1.6 Research Questions.....4

1.7 Justification and Rationale of the Study.....5

1.8 Operational definition of terms.....6

1.9 Methodology.....7

1.10 Conclusion7

CHAPTER TWO

CIVIL DEFAMATION IN GENERAL

2.1 Introduction.....8

2.2 What is defamation?.....8

2.3 Essentials of Defamation.....11

2.4 Types of Defamation.....15

2.5 Defences.....17

2.7 Conclusion.....22

CHAPTER THREE

CIVIL DEFAMATION IN GENERAL

3.1 Introduction.....	23
3.2 History of injunctive relief.....	23
3.3 Why Injunctions are Granted in Defamation cases.....	24
3.4 Types of Injunctions.....	27
3.5 General Principles Governing the Grant of Injunctions.....	27
3.6 Critique of the Cynamid Case Principles.....	32
3.7 Injunctions in Defamation Cases.....	34
3.8 Grounds for Granting Injunctions in Defamation Cases.....	34
3.9An Appraisal of Injunctive Relief in Defamation Cases in Zambia	38
3.10 Conclusion.....	39

CHAPTER FOUR

COMPARATIVE ANALYSIS OF THE GRANT OF INJUNCTIONS BETWEEN CANADA, UNITED STATES AND ZAMBIA

4.1 Introduction.....	41
4.2 Canadian Position.....	41

4.3 American Position.....43

4.4 Conclusion.....45

CHAPTER FIVE

5.1 General Conclusion..... 45

5.2 Findings.....44

5.3 Recommendations.....47

5.4 Conclusion.....49

CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION.

This chapter covers the basic aspects of the research. These being the introduction, statement of the problem, definition of concepts, research objectives, Scope of study, purpose of the study, hypothesis, Significance of study, and methodology.

As a principle of equity, every man is enabled to have his reputation preserved intact. A man's reputation is his property and possibly more valuable than any other property¹. The tort of defamation seeks to protect the interest of an individual in his reputation. This cause of action for defamation has been recognized from the very beginning of our civilization, and people have been resorting to available dispute resolving mechanisms to smoothen out the wrong done to their reputation.

The courts here are required to balance the interest of the individual in the protection of the individual and freedom of expression of others as guaranteed by article 20(3) (b) of the Zambian constitution. In *Resident Doctors Association of Zambia V Attorney-General*² Judge Mambilima Stated;

“The right of free speech is not only fundamental but central to the concept and ideal of democracy”.

¹ Vernas, Mitter. *The Law of Defamation and Malicious Prosecution :Civil and Criminal*. (Allahabad: At Sardar Patel, 1965), 453

² (1997) Supreme Court Judgment Number 25.

Consequently, one can clearly see that the courts have a huge task of protecting the reputations of individuals in light of the constitutional freedom of expression. This necessitates the striking of a balance between freedom of expression and protection of reputation. To this effect parliament has enacted a law – The Defamation Act³ to govern Civil Defamation. With Damages and Injunctions as the only remedies for defamation, the courts have to ensure that remedies are adequate. This dissertation looks at the remedy of injunction in the law of defamation from the Zambian perspective.

1.2 STATEMENT OF THE PROBLEM.

It is an empirical fact that the current law on defamation as encapsulated in the defamation Act is not adequate as it does not meet the social economic and political realities in Zambia. Particular defects can be seen in the remedies given in defamation; damages and injunctions. It is sad to note that in Zambia as a democracy, the law is rather archaic and does not conform to the challenges that are incidental to democracy-the requirement that every citizen be accorded justice. The granting of damages and injunctions is still based on the English common law and Equity principles which do not address the realities in Zambia as is evident in the inadequacy of injunctions as a relief today. It is egregious that the Defamation Act is silent on these two remedies in the tort of defamation. Therefore, recourse is had by the courts to the common law rules guiding the granting of the aforesaid relief. It is further observed that the law on defamation in Zambia especially on remedies needs swift and urgent revision because the law is silent on this and practice has shown that the common law rules on the granting of injunctions and their implementation is not adequate enough to meet the challenges of a third world country like

³ Chapter 68 of the laws of Zambia. The preamble of this Act provides; An Act to consolidate and amend the law relating to libel, other than criminal libel, and slander; and to provide for matters incidental thereto.

Zambia. This is so because injunctions as currently granted by the courts are individual specific, meaning if X has filed an injunction against Y that injunction will have no effect on Z who allegedly defames X by uttering the same statement and X will have to commence an action against Z again to obtain an injunctive relief before the courts of law. This is costly in Zambia as consequence justice is unavailable to the poor Zambia. Simply put, the law on defamation especially the granting of injunctions is not reflective of the social and economic situation. This is augmented by the fact that there is no legal aid for defamation cases (this position is appreciated even in England), and thus turns defamation into a rich man's tort because the costs involved in defamation litigation are so great. From this perspective, the remedy of injunction as currently granted by the courts is not economically sensitive in that the poor can not sustain it. Furthermore, it is economically unfriendly because the costs involved are huge and beyond the scope of the ordinary Zambia who could be interested in defending his reputation. It is therefore suggested that just as the Constitution guarantees the right to have one's reputation protected, the Defamation Act should be revised so as to codify the common law rules on injunctions and make them abreast with the social, economic and political environment prevailing in Zambia by making injunctions general so that whoever makes a statement against a person on a matter subject to a defamation suit is held to be in contempt for violating a court order.

1.3 HYPOTHESIS.

The law on defamation in Zambia as provided and as applied in particular the rules governing the granting of injunctive relief do not reflect the prevailing social, economic and political realities. This is augmented by the fact that injunctions are granted in a specific manner relating to a

particular defendant or defendants but if another person utters or publishes the same words that make a plaintiff to go to court, he or she will not be covered by the injunction. Instead, the plaintiff will have to institute a legal proceeding against the other person and seek injunctive relief. Further, the remedy is discretionary therefore it is open to abuse by judges. Making the remedy statutory will help alleviate its abuse as it will now be of right and not a privilege.

1.4 OBJECTIVES.

The ultimate objective of this study is to analyse the grant of injunctions in civil defamation cases from the Zambian perspective. The specific objectives are;

- (a) To show the legal framework governing the grant of injunctions in civil defamation in Zambia
- (b) To show the attitude of the Zambian courts towards the grant of injunctions in civil defamation.
- (c) To show whether the manner in which injunctions in Zambia are granted is responsive to the needs of the poor in society.
- (d) To show what Zambia can learn from other jurisdictions in the grant of injunctions.
- (e) To show whether there is need for the Defamation Act to be brought in conformity with developments in society.

1.5 RATIONALE AND JUSTIFICATION FOR THE STUDY.

The essence of this dissertation is to show need for the law on defamation in particular the defamation Act to be in tune with social, economic and political realities in Zambia. Any legal system achieves efficacy by encapsulating the political and social realities⁴. The Defamation Act is silent on the granting of damages and injunctions. In particular the statute does not provide for the manner in which the court should proceed in granting of these reliefs. Reliance is therefore had to common law principles which reflect Zambian realities especially in the area of injunctive relief. This law must be responsive to the needs of society and not be static. In this regard, this dissertation will suggest change or rather reform in the law in order to encapsulate a legal framework where remedies in defamation especially injunctions are granted in general manner as opposed to being individual specific and thereby make the relief economically and socially sensitive.

1.6 Operational definition of terms

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 him⁵.

Slander: A defamatory statement made by such means as spoken words or gestures, not in a permanent form.⁶

Libel: A defamatory statement made in a permanent form⁷.

⁴ Margaret Munalula, *Legal Process: Cases and materials* (Lusaka: UNZA Press, 2004), 14

⁵ Elizabeth Martin. *Oxford Dictionary of Law* (Oxford: Oxford University Press, 2006), 154

⁶ Martin. *Oxford Dictionary of Law*, 499

⁷ Martin. *Oxford Dictionary of Law*, 314

Remedy: Any of the methods available at law for the enforcement, protection, or recovery of rights or for obtaining redress for obtaining redress for their infringement⁸.

Injunction: A remedy in the form of a court order addressed to a particular person that either prohibits him from doing or continuing to do a certain act or orders him to carry out a certain act⁹.

1.7 RESEARCH QUESTIONS.

- (1) Is Injunctive relief as currently granted in the law of defamation in Zambia adequate?
- (2) What are some of the changes that need to be addressed in order to bring the remedy of injunction within the scope of prevailing conditions in Zambia?
- (3) What has been the attitude of the courts when it comes to granting injunctive relief in defamation cases?
- (3) What can Zambia learn from foreign jurisdictions in the area of granting injunctive relief?

1.8 RESEARCH METHODOLOGY.

This research was qualitative; therefore, it was characterized by desk research and perusal of the black letter law. Secondary data in the form of books, journals and scholarly articles were also consulted with a view to analyzing the current legal framework on the grant of injunctions in civil defamation.

⁸ Martin. *Oxford Dictionary of Law*,154

⁹ Martin. *Oxford Dictionary of Law*,274

1.9 CONCLUSION.

This chapter covered the basic aspects of the research. These being the introduction, statement of the problem, definition of concepts, research objectives, Scope of study, purpose of the study, hypothesis, Significance of study, and methodology. The next chapter looks at the tort defamation in general.

CHAPTER TWO

DEFAMATION IN GENERAL

2.1 INTRODUCTION.

This chapter looks at defamation in general. It looks at the types of defamation and the elements of defamation before giving a conclusion.

2.2 WHAT IS DEFAMATION?

The term defamation is aptly defined as “the publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society generally, or tends to make them shun or avoid him.”¹ This tort therefore deals with injury to one’s reputation which is a priceless commodity and ought to be protected by the law. It therefore requires the court to strike a balance between the one’s right not to have their reputation infringed and the defendant’s constitutional right to freedom of expression².

2.3 ESSENTIALS OF DEFAMATION.

In order for a claimant to sustain an action for defamation, there are three elements that need to be satisfied and these are;

- (a) Words must be defamatory.
- (b) Reference to the plaintiff.
- (c) Publication

¹ Per Mwanamwambwa J, in *Phiri v The Programme Manager Radio Maria-Zambia Chipata*, 21/HJ/31(Unreported)

² Article 20 of the Constitution of Zambia .

These elements shall be looked at in greater detail in turn.

2.3.1 WORDS MUST BE DEFAMATORY.

The definition of what amounts to defamatory words in the comprehensive sense has eluded the courts and commentators³. In *Parmiter v Coupland*⁴ Lord Wensleydale stated that it was up to the judge to give legal meaning to the offence which he defined as being a publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule. This definition was held to be too narrow⁵, for a statement may be defamatory even when it excites in reasonable people feelings less strong than that. In *Sim v Stretch*⁶ it was stated that the words must tend to lower the claimant in the estimation of right-thinking members of society generally. In *Youssouf v Metro-Goldwyn-Meyer Pictures Ltd*⁷ it was stated that a defamatory statement is one that makes the claimant is shunned and avoided and that without that without any moral discredit on her/his part. Yet in *Mount Cook Group v Johnstone Motors Ltd*⁸ it was held that any statement which disparages a person in his reputation in relation to his office, profession, calling trade or business may be defamatory. Examples of this include the imputation of some quality which would be detrimental or the absence of some quality which is essential to the successful carrying on the office and matters related thereto such as a want of ability, incompetence, conduct which breaches widely recognized canons of business ethics and of course, fraudulent or dishonest conduct.⁹ An untrue injurious statement which does not reflect

³Winfield Rodgers. *Winfield & Jolowicz on Tort*. Seventeenth Edition. (London; Sweet and Maxwell, 2006.) 514.

⁴ [1840] 6 M. & W. 105

⁵ Rodgers. *Winfield & Jolowicz on Tort*, 522.

⁶ [1956] 52 T.L.R 669, per Lord Atkin.

⁷ [1934] 50 T.L.R 581 at 584, per Scrutton L.J

⁸ [1990] 2 N.Z.L.R 488

⁹ Rogers. *Winfield & Jolowicz on Tort*, 522

on reputation in this broad sense is not defamatory, though it will be actionable if made maliciously.

From the foregoing, it is clear that the best approach to the definition of what is defamatory is to consider it from the view of the reputation which the defamatory statement is alleged to infringe. Every person has a right to the enjoyment of his reputation and whoever violates this right unless for good cause or excuse stands to be charged before the law¹⁰. The enjoyment of one's reputation includes all the moral and material advantages to which it may entitle him in his relationship of society as a whole or as Slessor, L.J calls it the opportunities of receiving respectful consideration from the world¹¹. Any imputation that infringes on or tends to infringe this right would be termed as defamatory. It is however, important to underscore the point that it is not always necessary to show that this right to reputation has been infringed, but it may even be established that it has a tendency to do so. It is in this vein that an innuendo is defamatory. An innuendo comprises words of which the claimant complains may either be defamatory in their (a) natural and ordinary meaning or (b) defamatory only; or in addition to or in light of facts and circumstances known to persons to whom the words were published. The natural and ordinary meaning includes implications so that it is as defamatory of A to say that justice miscarried when he was acquitted of murdering X, as it is to say outright that he did murder X.

The simplest and best definition of defamatory matter is as Justice Cave stated in *Scot v Sampson*¹²

“A false statement or publication about a man to his discredit”.

¹⁰ Reputations protected are not only for human beings but also for artificial persons like corporations.

¹¹ *Youssouf v Metro-Goldwyn-Meyer Pictures Ltd* [1934] 50 T.L.R 581

¹² [1882] 8 Q.B.D 491

In determination of what amounts to a defamatory statement the courts apply a reasonable man's test, that is, the estimation that a reasonable member of society would have. It for this reason that mere vulgar spoken abuse is not actionable if it is clear that they were (words) uttered as mere vituperation and were so understood by those who heard them.

2.3.2 REFERENCE TO THE PLAINTIFF.

This element delves on the identity of the claimant and the reasonable association the members of society may have in linking the defamatory material to him/her. If the claimant is mentioned by name there is usually no difficulty, but he need not be named, for the issue is whether the statement may be understood by reasonable people as referring to him¹³. Reference to a person may for instance be made by invoking a person's nickname or his or her initials or job description or by reference to some allegorical or historical character or by a word picture. In *I 'Anson v Stuart*¹⁴ a news paper paragraph stated

This diabolical character, like Polyphemus the man-eater, has but one eye, and is well-known to all persons acquainted with the name of a certain noble circumnavigator.

It was clear that the claimant was the person referred to on his giving proof that he had one eye and bore a name similar to that of Anson, the famous admiral. The court held in his favour because reference could be by implication. In *Benny Mwiinga v Times Newspapers Limited*¹⁵ where the appellant, a Zambian resident in Britain, brought an action for defamation. The action arose out of articles published by the respondent based on reports derived from their London correspondent concerning criminal proceedings against some Zambian charged with smuggling drugs. The articles, which the trial judge found to be defamatory in their natural and ordinary

¹³ Rodgers. *Winfield & Jolowicz on Tort*, 534

¹⁴ [1787]1 T.R 748.

¹⁵ (1988-1989) Z.R 177

meaning, imputed that the appellant was one of the Zambians involved in smuggling drugs. The Trial judge found that the appellant had not proven the element of reference. In finding for the plaintiff, NGULUBE DCJ (as he then was) stated the following;

In this country, it is for the trial judge as trier of both fact and law to determine whether, as a matter of law, the words complained of were capable of being understood to refer to the plaintiff and if so whether, as a matter of fact, the words were reasonably understood to refer to the plaintiff. It is, of course, for the plaintiff to prove the reference to him and this is so whether his identity has been put in issue by the pleading or not, for unless he can prove that the defamatory imputation was published of and concerning him, he has no cause of action.

In cases where a class of people has been defamed, only identifiable individuals can bring an action. If however the statement makes reference to a limited group of people, for example the tenants of a specific building then the whole group will be allowed to sue under the tort of defamation¹⁶. A Zambian case in point is that *Cobbett-Tribe v The Zambia Publishing Company Limited*¹⁷ where the defendants wrote a defamatory article about the Council of the law society of which the plaintiff was a member. In finding for the plaintiff Chief Justice DOYLE (as he then was) 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.

In essence for the element of reference to suffice there must be a clear and unequivocal relation between the defamatory statement and the plaintiff's identity. This can be express or implied but should not be vague.

¹⁶ Browne v DC Thomson [1912] SC 359

¹⁷ (1973) Z.R 9

2.3.3 PUBLICATION.

The plaintiff must prove that the defamatory words were published. Publication, according to Mwanamwambwa J means communication to at least one person other than the plaintiff¹⁸. There is no actionable wrong of defamation unless the words complained are communicated to at least one person other than the claimant. Publication in the commercial sense, as in a book or news paper or broadcast is not necessary but it can attract larger damages¹⁹.

Publication is the essence of libel and slander because the wrong is injury to reputation, not insult, and reputation is what other people think of one, and not one's own opinion of self. The publication must be malicious or without just cause. It is for this cause that even the *Zambian* courts are strict on this element. In *Chinkuli and Masheke v Times Printpak Zambia and Kazembe*²⁰ where a newspaper article authored by the Mr. Kazembe and published by the Times Newspaper which article was defamatory of the plaintiffs who had served in the Zambia Army to the ranks of General. In holding for the plaintiffs the Honorable Judge Phiri stated the following:

The last question to resolve is whether the publication was malicious. Here again, I have no doubt in resolving this question in favour of the joint plaintiffs because the allegation contained in the publication was not based on the truth and evidence was given on record to show that the defendants did not attempt to verify the truth of their allegations with the Ministry of Defence or at all and further there is evidence that when the defendants were requested, in writing, to retract the publication, they refused or neglected to do so and instead preferred this litigation by referring the matter to their lawyers.

The common law spreads the net of liability very wide to include distributors of defamatory material²¹. In the case of a newspaper article, for example, not only is the author treated as a publisher, but so is the editor, the printer, the proprietor of the news paper or indeed anyone who

¹⁸Phiri v The Programme Manager Radio Maria-Zambia Chipata, 21/HJ/31(Unreported)

¹⁹ Rodgers. *Winfield & Jolowicz on Tort*,539

²⁰ 1996/HP/4833(Unreported)

²¹ Rodgers. *Winfield & Jolowicz on Tort*,541

participated in the Publication. However, those concerned with the mere mechanical distribution of material such as News agents, libraries, booksellers and the like could escape liability if they prove;²²

- (a) They were innocent of any knowledge of the libel contained in the work;
- (b) That there was nothing in the work or in the circumstances in which it came to them or was disseminated by them which ought to have led them to suppose that it contained a libel; and
- (c) That when the work was disseminated by them, it was not by any negligence on their part that they did not know it contained the libel.

The second instance is that of Repetition of Defamatory material. Where the defendant's defamatory words are voluntarily repeated or republished by the person to whom he published them (and for whom he is not vicariously liable), the question arises as whether he is liable for that publication or repetition²³.

It is however, not all publication that is actionable. This happens in two instances. First, Communication of defamatory matter between husband and wife is not actionable. This is so because what passes between them is protected on the ground that any other rule might lead to disastrous results to social life²⁴. Conversely, communication of defamatory matter to one spouse is a publication. This is so even when husband and wife could fairly be said to be one person for legal purposes. The justification lies in what was stated in *Wenman v Ash*²⁵ as

²² *Vizetelly v Mundie's Select Library Limited* (1990) 2 Q.B 170

²³ *Rodgers. Winfield & Jolowicz on Tort*, 544

²⁴ *Wenhak v Morgan* [1888] 20 Q.B.D 635.

²⁵ [1853] 13 C.B 836 at 844

“For the purpose of having the honour and feelings of the husband assailed and injured by acts done or communications made to his wife”.

Finally, if the claimant has consented to the publication then technically there has been no publication for the purposes of defamation²⁶. By consent is meant both express and implied so that the defendant can plead *volenti non fit injuria*.

In the foregoing discourse on publication, it must be appreciated that the statement must be intelligible to the recipient of it as there can only be publication if the opinion of others has been made to change towards someone in the adverse sense. There can only be publication if the third party understands the communication and not otherwise.

2.4 TYPES OF DEFAMATION.

Defamation occurs in two forms; libel and slander. Understanding the difference between these two forms of defamation is central to the appreciation of this tort. Libel is the publication of defamatory matter in a permanent form. It is actionable *per se*²⁷ meaning one does not have to prove special damages for them to get relief from the courts of law. It is both a tort and a crime. Examples of libel include; writing, printed material, wax work, statue, picture or effigy. broadcasting and theatrical performances.

Slander is a defamatory statement in a more evanescent form. This may occur where two friends or even a group of friends are gossiping for example. It is always a civil action. In slander cases special damages must be proved. There are however, four exceptions to this rule. The first exception may arise where there is an allegation that the claimant has committed an imprisonable offence. A second exception is where the defendant alleges that the plaintiff suffers from a

²⁶ Patrick Mvunga and Sangwani Ng'ambi. *The Law of Tort*. (Lusaka: UNZA Press, 2011), 240

²⁷ Mvunga and. Ng'ambi. *The Law of Tort*, 240

disease. An imputation of a contagious or infectious disease likely to prevent people from associating the plaintiff is actionable per se. There is some uncertainty about the scope of this head. It has always included venereal disease and plague and leprosy. A contentious issue is whether it covers an imputation of HIV/AIDS on the plaintiff. It is clear in Zambia that there is still, regrettably, some social stigma attached to people living with HIV/AIDS in the republic of Zambia. Such an accusation like adultery, a criminal act or an inability to carry on one's profession does follow the plaintiff for the rest of their lives and could lead to the plaintiff being shunned or socially ostracized whether or not it is proven to be untrue²⁸. As such, it would be unnecessary to prove special damage when there is an imputation of HIV/AIDS because as a matter of policy it fits comfortably within the scope of this exception.

The other exception is where there is an imputation of unchastity to a woman. It is covered by section 4 of the Defamation Act which provides that in an action for slander in respect of words imputing unchastity or adultery to any woman or girl, it shall not be necessary to allege or prove special damage.

The other exception is one found in section 3 of the Defamation Act termed Imputation of unfitness or incompetence. The section provides that any words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, is actionable per se.

The justification in making slander in the above circumstances actionable per se stems from the common law and also in the idea that the nature and severity of the allegation makes damage so likely that it should be presumed.

²⁸ Mvunga and .Ng'ambi. *The Law of Tort*, 241

2.5 DEFENCES.

There are a number of specialized defences to defamation. These are discussed below;

(a) UNINTENTIONAL DEFAMATION.

This defence is provided for by section 11 of the Defamation Act. It covers instances where the defendant did not have the intention to defame the plaintiff or he innocently published the defamatory matter. For this defence to be effective the defendant has to offer amends to the plaintiff. If the amends are accepted, no libel action can be sustained. In an instance where the offer of amends is refused or rejected by the plaintiff, the defendant can then raise the defence of unintentional publication.

(b) JUSTIFICATION.

Justification means truth. It is an absolute defence in a civil defamation claim that the statement in question is true, or substantially true.²⁹ It is irrelevant for the purposes of defamation that its publication constitutes a gross breach of privacy or confidence or that it is contrary to public interest. The purpose of civil law is to compensate a claimant, not to punish a defendant.³⁰ A claimant is not entitled to be compensated for a reputation that he does not deserve. As Littledale said in *McPherson v Daniels*:³¹

“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.”

²⁹ David Price, Korieh Duodu, and Nicola Cain. *Defamation Law, Procedure, and Practice*. Fifth Edition, (London: Sweet, and Maxwell, 2010), 57.

³⁰ David Price, Korieh Duodu, and Nicola Cain. *Defamation Law, Procedure, and Practice*, 58

³¹ [1829] 10 B and C 263

In the case of *Banda v Zambia Publishing Company*³² Sakala J (as he then was) held that a plea of justification is a complete defence to an action for libel but to establish this defence the defendant must establish and prove that the defamatory imputation is true in substance and fact. To buttress, the common law position, the Defamation Act has in section 6 made recognizance of this defence. However, it has to be born in mind that this defence will not hold in instances where there is conspiracy to defame someone or the defendant merely held an opinion in that regard in relation to the plaintiff.

(c) FAIR COMMENT ON A MATTER OF PUBLIC INTEREST.

This defence covers such things as honest criticism, which is, recognized in any civilized system of law as indispensable to the efficient working of any public institution or office, and as a salutary for private persons who make themselves or their work the object of public interest. It is encapsulated by section 7 of the Defamation Act which provides makes it a complete defence even when the assertion is a mixture of fact and opinion by stating that such a mixture shall not affect the defence provided there is an honest opinion. This defence differs from justification in that justification deals with factual issues where as fair comment deals with matters of opinion. Therefore, the only caveat in this defence is that the statement must held honestly otherwise this defence is vitiated by any malice. In the case of *Bweupe v Attorney-General and others*³³, this defence was discussed .The facts of the case that the plaintiff was a High Court judge who delivered a ruling in a case heard in open court to the effect that UNIP special constables did not exist in law. The plaintiff was the then Minister of Home Affairs. Reacting to that ruling, the then Minister of Home Affairs, Aaron Milner, under whose auspices the special constables fell,

³² (1982) Z.R. 4 (H.C)

³³ (1984)Z.R. 21

made certain statements, which were published by the second and third respondents. SILUNGWE CJ (as he then was) in holding for the plaintiff, stated thus;

“The defence of fair comment has been recognised since the Victorian times. The defence 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,”

From the above statement we see that this defence is anchored on two factors; first the matter must be one of public interest and second the observation made must be on facts and not assertion of fact. The defence of fair comment on a matter of public interest is available to everyone. However, this defence is of particular importance to the media. Freedom of expression, and press freedom is largely protected by this defence.

(d) PRIVILEGE.

In addition to cases covered by the defence of fair comment, the law recognises that there are other occasions in which freedom of communication without fear of litigation is more important than the protection of one's reputation³⁴. The law of defamation always seeks to balance the competing interests of freedom of speech and the protection of reputation. There is no difficulty where the publication in question is true. Freedom to disseminate the truth must outweigh the protection of underserved reputation³⁵. However, in certain circumstances, the law recognises that it is better that individuals, are free to speak their mind (and others to report what they say) without fear of being sued even if they get it wrong, and the claimant's reputation is damaged. This is the rationale behind the defence of privilege.

This defence is divided into two; absolute and qualified. This has been reflected in the Defamation Act by sections 8, 9 and 14 respectively. Absolute privilege covers cases in which

³⁴Rodgers. *Winfield & Jolowicz on Tort*, 560

³⁵ *Reynolds v Times Newspapers Limited and Others* [2001] 2 A.C. 127.

complete freedom of communication is regarded as of absolute paramount importance that actions of defamation cannot be entertained at all. A person defamed on an occasion of absolute privilege, like statements made in parliament or report of judicial proceedings, has no legal redress via the law of defamation, however outrageous the untrue statement may be and however malicious the motive of the maker³⁶.

Qualified privilege, on the other hand though it protects the maker of an untrue defamatory statement, does so only if the maker of the statement acted honestly and without malice. If the claimant can prove malice the privilege is displaced. In *Phiri v The Programme Manager Radio Maria-Zambia*³⁷ where a woman in labour had been turned away from a clinic by a nurse because the clinic had run out of surgical gloves. The pregnant woman gave birth to her baby under a tree. This incident was broadcast on Radio Maria, attributing it to the plaintiff Mr. Phiri Clinical officer in charge who had been away on that day. The issue in contention was inter alia the defence of qualified privilege. MWANAMWAMBWA J (as he then was) stated thus;

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.

From the foregoing we see that both qualified and absolute privilege have been encapsulated by the Defamation Act, which has gone beyond the common law position include even this privilege at election times. This would seem to be anchored on the need to avoid mudslinging among candidates which notorious holds sway in election campaigns.

³⁶ Rodgers. *Winfield & Jolowicz on Tort*.561

³⁷ 21/HJ/31(Unreported)

The importance of defences in defamation like any other tort is that they justify the wrong done by the defendant. In the case of defamation, a successful defence vitiates any application of interim injunctions on the part of the plaintiff. This directly helps in striking a balance between the protection of one's reputation and freedom of expression. This is so because if one has a defence for infringing one's reputation it could mean that the other person has no reputation therefore it such a one should not be given protection by the courts.

2.6 CONCLUSION.

This chapter has, in a general way, shown that the publication of a false statement which tends to injure the reputation of another may constitute the tort of defamation. The elements of the tort being; reference, publication and defamatory statement. It has further shown that defamation in a permanent form, such as writing, is libel where as in a temporal form such as speech, is slander. It also underscored the fact libel is actionable per se whereas slander is not except in special circumstances. The defences of Privilege, Justification, Apology, fair comment and unintentional publication have been shown to exist in the tort and progressively captured by the defamation Act.

The next chapter will look at remedy of Injunctions in defamation cases.

CHAPTER THREE

INJUNCTIVE RELIEF AS A REMEDY IN DEFAMATION CASES IN ZAMBIA

3.1 INTRODUCTION.

This chapter focuses on the remedy of injunction under the law of defamation in Zambia. It looks at the origin of the remedy, the development of the principles governing it and the special case of defamation causes before giving a critique of the relief from the Zambian perspective.

3.2 HISTORY OF INJUNCTIVE RELIEF.

The history of injunctive relief does not begin with the common law courts. It is rooted in equity. By the end of the 14th century the Court of Chancery in England had begun to grant injunctions as a remedy for the inadequacy of decisions in the common-law courts. Often an award of damages did not fully protect the plaintiff.¹ For instance, if the defendant intended to continue a trespass or a breach of covenant despite the payment of damages or in the case of defamation if the defendant intended to continue slandering or libelling the plaintiff. When England's courts of common law and equity were merged in the 19th century into one system, the new system was empowered to grant injunctions as well as damages.

¹ *Halsbury Laws of England, 4th Edition, Volumes 21, (London: Butterworth's, 1997) Para 724*

When Zambia became independent in 1964 it adopted the common law system² and incorporated principles of common law and equity side by side including the remedy of injunction.

Injunctions, from the time of their introduction, have been accepted and used by various legal systems. Injunctions are granted to restrain a wide range of acts: a breach of contract, such as a contract against engaging in a competing business; the commission of a tort (such as a nuisance, slander or libel); an injury to property - wrongful expulsion - or wrongful disclosure of confidential information³.

3.3 WHY INJUNCTIONS ARE GRANTED IN DEFAMATION.

The principal remedy in tort is an award of damages to compensate the injured party for the loss he or she has suffered. The aim is to put the plaintiff back in his original position so far as money is able to do this⁴. This can frequently be done satisfactorily where property has been damaged by assessing the value of the things destroyed or the cost of repairs.

In the case of damage to one's reputation, it is different. The court has discretion and jurisdiction to award damages either in addition to or in substitution for an injunction, and even where the injury is only threatened⁵. This is because the injury to one's reputation may not be sufficiently addressed by an award of damages as this cannot prevent someone from inflicting the same harm on one's reputation again. Therefore, an injunction serves to restrain the defendant from

² As per section 2 of English Law Extent of application Act, Cap 11, Laws of Zambia, all English Acts and doctrines of equity in application in England up to 17th August, 1911 were extended to Zambia as applicable law.

³ David Price, Korieh Duodu, and Nicola Cain. *Defamation Law, Procedure, and Practice*, 120.

⁴ Smith Marsh. *Business Law*. Fifth edition (London : Stanley Thornes Publishers Limited, 1992) 108.

⁵ *Halsbury's laws of England*. Volume 46. (London: Butterworth's, 1997) Paragraph 1246.

infringing on the plaintiff's reputation where otherwise the plaintiff will, or continue to suffer wrongful injury for which an award of damages will not adequately compensate them.

The *raison d'être* for granting injunctions is to maintain the status quo which is an essential concept of equity in facilitating justice. An injunction may be granted even though the plaintiff's legal rights have not as yet been violated.⁶ It is in such instances the relief becomes eminent in defamation as one would always want to retain confidence in his or her reputation. In such a case, the relief one might be seeking before the courts will be called a *quia timet* injunction. Once an injunction is granted or duty given, it becomes an obligation on the defendant and must be obeyed until it is discharged by the court, however stale the litigation and even if the order should not have been made in the first place.⁷ If an injunction is violated, the violator can be held in contempt of court and will be punished accordingly.

3.4 TYPES OF INJUNCTIONS.

There are several types of injunctions and these are named after the situations under which they are given or the purpose they serve. The main categories of injunctions are as set out below.

3.4.1 MANDATORY INJUNCTIONS.

Injunctions are usually granted to prevent the defendant from doing certain acts which may be prejudicial to the interests of the plaintiff. True, this serves the ends of justice but there are instances where harm is occasioned on the plaintiff such that a mere prohibition of the future harms may not cure the harm already done. In order to serve the ends of justice, the courts grant Mandatory injunctions in such instances so as to compel the defendant to do a certain act.

⁶ David Bean, *Injunctions* (London: Longman Group Limited, 1994) 3.

⁷ David Bean, *Injunctions*, 4.

3.4.2 PERPETUAL INJUNCTIONS.

A perpetual injunction is based on a final determination of the rights of the parties, and is intended permanently to prevent infringement of those rights and obviate the necessity of bringing action after action in respect of every such an infringement.⁸ This type of injunction is not granted by the courts unless it is clear that the facts before it do show that there is an irreparable injury that has been occasioned on the plaintiff and that such injury is continuous. This was enunciated in the case of *Soltau v De Held*⁹. By irreparable injury is meant injury which is substantial and cannot be addressed or cushioned by damages. This clearly clarifies the layman's misconception that the injury must be one that should not be reparable. This type of injunction is restrictive and is not necessarily obviated by the existence or possibility of the plaintiff's right to damages in the action. Though this type of injunctive relief is not exclusive to defamation suits, the said suits pose great relevance for the relief because of the need to protect an individual's reputation at all costs.

3.4.3 INTERLOCUTORY INJUNCTIONS.

The word interlocutory means interim which entails something temporal. Therefore, an interlocutory injunction is one that is granted by the courts whilst trial is pending. The object of an interlocutory or interim injunction is to preserve matters *in statu quo* until the case is substantively heard¹⁰. For this reason, the party applying for it has to make an undertaking in damages so that if it should turn out at hearing that he or she is in the wrong he or she pays the defendant for the inconvenience. It is framed in terms which clearly show that it is to continue in

⁸ *Halsburys Laws of England*, volume 21(London;Butterworths, 1997) Para 715.

⁹ [1951] 2 Sim.N.S.133, at p.159

¹⁰ *Halsburys Laws of England*, volume 21, Para 716..

force only until the hearing of cause, or until further order. It does not affect the ultimate decision of the court. The features and modus operandi of this type of injunction is well captured by the case of *Blakemore v Glamorganshire Canal Navigation*¹¹ where it was stated that;

It is clearly explained that an interlocutory injunction does not assume finally to dispose off the right, and will only impose such restraint as may suffice to stop the mischief complained of, or, where the object is to stay further injury, to keep things as they are at the moment. Such an injunction is in effect a substitute for the damages which might be assessed for the period between the issuance the writ and the trial.

This form of injunction is common in defamation suits especially libel actions. This is because in defamation cases injunctions are rarely available as an ultimate remedy.

3.5 PRINCIPLES GOVERNING THE GRANT OF INJUNCTIONS.

Like every other court application, the grant of injunctive relief is not automatic. It is granted by the courts under certain circumstances. The remedy is an offspring of equity and is therefore granted on equitable grounds, that is to say, the grant of this remedy is not as of right but it is a privilege as it depends on the courts' discretion. Therefore the courts require that certain elements be satisfied before this relief is granted. However, the mere satisfaction of the elements does not mean the courts will grant the right rather, it still reserves the right not to do so as it uses discretion.

The principles governing the grant of injunctions shall be looked in three phases; the early times, the *Cynamid* case¹² principles and the post *Cynamid* case principles and subsequently the principles for granting injunctions in defamation causes.

¹¹ [1832] 1 My. & K 154, at p.185

¹² By *Cynamid* case principles is meant the principles on the granting of injunctions as set out in *American Cyanamid Company v Ethicon* by Lord Diplock.

3.5.1 EARLY TIMES.

Prior to the *American Cyanamid case*¹³, it was necessary for the Court to investigate the likelihood that a final injunction would be granted at trial. Over the years, a rule had evolved that the claimant would be granted an interim injunction only if on the material before the Court, he could show a *prima facie* case that he was entitled to the right which he claimed and also that his allegation(s) that his right had been infringed was reasonably capable of succeeding.¹⁴ In time, this test had been rejected on the ground that the remedy of an interim injunction must be kept flexible and discretionary.¹⁵ And it was held that a case must be considered on the basis of fairness, justice, and common sense.¹⁶ The realisation of this factual impasse led to the formulation of new principles of determining the granting of injunctions as especially influenced by individual cases in light of their peculiarity.

3.5.2 THE PRINCIPLES ENUNCIATED IN THE AMERICAN CYNAMID CASE.

Lord Diplock in the *American Cyanamid case* laid down principles upon which injunctions could be granted. The guidelines laid down by Lord Diplock have since become the leading source of the law on the subject of injunction.¹⁷ The underlying principles for granting injunctions were mainly three in number and these are; Serious Question, Inadequacy of Damages, Balance of Convenience (Status Quo, Relative Strength of Cases and Special Factors)

3.5.1 SERIOUS QUESTION.

When the plaintiff applies for an interim injunction, he or she must raise a serious question to be settled at trial. This invariably means that the claim by the plaintiff must be one of merit

¹³ *American Cyanamid Company v Ethicon Limited* [1975] A.C. 396.

¹⁴ Michael A. Jones, *Clerk and Lindsell on Torts*, Twentieth Edition, (Thomson Reuters Legal Limited 2010).67

¹⁵ *Duport Steels Limited and Others v Sirs* [1980] W.L.R. 142 at 179.

¹⁶ Jones, *Clerk and Lindsell on torts*,82

¹⁷ Bean, *Injunctions*, 32.

translating into it not being vexatious or frivolous. It further requires that the claim should have a likelihood of success at trial. Anything devoid of the foregoing will render an application for interim injunction unmeritorious. In *Ndove v National Educational Company Limited*¹⁸ where an employee sought an injunction to restrain his employer from doing certain acts, it was held by the High Court that before granting an interlocutory injunction it must be shown that there is a serious dispute between the parties and the plaintiff must show on the material before court, that he has any real prospect of succeeding at the trial.

3.5.2.2 ADEQUACY OF DAMAGES.

Once the court has satisfied itself that there is a serious question to be determined, it then considers whether on the success of the case the claimant will be adequately catered for by damages. It is trite law that an injunction cannot be granted in an instance where the injury suffered by the plaintiff can be atoned for in damages. In the words of Lord Diplock this principle was stated as follows;

If damages in the measure recoverable at common law would be adequate remedy, and the defendant would be in a financial position to pay them, no interim injunction should normally be granted. It is important to note however, that there are instances when a case may have nothing to do with monetary compensation. In those instances, the question of adequacy of damages becomes an irrelevant consideration, and the case may fall outside the purview of the general principles upon which injunctions are granted¹⁹.

This principle was affirmed recently by the Supreme Court in the case of *Communications Authority v Vodacom Zambia Limited*²⁰ where Mwanamwaba J in delivering judgment of the Court observed that an injunction will not be granted where damages will be an alternative adequate remedy to the injury complained, if the applicant succeeds in the main action.

¹⁸ (1980) Z.R 184

¹⁹ *American Cyanamid v Ethicon Ltd*, [1975] 2 W.L.R. 316. Per Lord Diplock

²⁰ Supreme Court Judgment No 21 of 2009

3.5.2.3 BALANCE OF CONVENIENCE.

This principle applies in instances where there is suspense or doubt as to the adequacy of damages and the ability of the defendant to pay them if the plaintiff or applicant were to succeed at trial, then the Court should proceed to consider the balance of convenience. Thus once the investigation has reached this stage, the decision of the Court whether in favour of or against an injunction will inevitably involve some advantage to one or the other side which damages cannot compensate. Therefore, the extent of this uncompensatable disadvantage, (to use Lord Diplock’s phrase in the *American Cyanamid* case), either way is a significant factor in determining the balance of convenience. In many cases, it has been the decisive factor. Simply stated, the balance of convenience arises if the harm would be irreparable, and damages would not be sufficient to compensate for any harm which may be suffered as a result of the actions of the defendant²¹. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer if it is granted lies on the plaintiff²². To summarise, the question of balance of convenience is dealt with in three stages;²³

- (i) The governing principle is that if the claimant would be adequately compensated by an award of damages if he succeeds at the trial, and the defendant would be able to pay them, no injunction should be granted, however strong the claimant’s case.
- (ii) If the claim survives the previous head, the Court must consider whether, if an interim injunction is granted, but the defendant succeeds at the trial, the defendant would be adequately compensated in damages, which then would have to be paid by the claimant, and whether the claimant would be able to pay those damages. If such damages would be an adequate remedy and the claimant would be in a position to pay them, then the defendant’s prospects of success at

²¹ Per Gardner JS in *ZIMCO Properties v LAPCO Limited* (1988-1989) Z.R. 92 at p 93.
²² *Shell B.P. Zambia Limited v Conidaris and Others* (1975) Z.R. 174 at p 182.
²³ John McGhee. *Snell’s Equity*, Thirty First Edition, (London: Sweet and Maxwell, 2008), 406.

the trial would be no bar to the grant of the injunction.

(iii) If there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, the Court must consider the wide range of matters which go to make up the general balance of convenience. These will vary from case to case.

In assessment of the balance of convenience, three sub principles are also considered. These are status quo, relevance of the case and special factors. By status quo is meant that an interim injunction is granted to maintain the status of things and not to grant to the plaintiff an advantage relative to the defendant. This was laboured upon by the Deputy Chief Justice Matthew Ngulube (as he then was) in *Turnkey Properties Limited v Lusaka West Development Limited and Others*²⁴ when he held inter alia that an interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial and that an interlocutory intimation should not be regarded as a device by which an applicant can attain or create new conditions favourable only to himself.

The status quo is only maintained if two or more factors appear evenly balanced in the three stage analysis under the balance of convenience stage.

By the relative strength of cases and special factors is meant the propensity of the case to succeed or the merit therein. Special factors entail anything from the factual situation which takes the case outside the purview of commonality to warrant special consideration or treatment.

3.6 CRITIQUE OF THE CYNAMID CASE PRINCIPLES.

The cynamid case principles are not flawless. It must be born in mind that principles enunciated by Lord Diplock are only of guidance and not of statutory authority to warrant strict adherence

²⁴ (1984) Z.R. 85

thereto. They can be departed from in light of the demands of justice in a particular case. This position was shared by Kerr L.J in *Cambridge Nutrition Limited v BBC*²⁵; as follows

It is important to bear in mind that the American Cynamid case contains no principle of universal application. The only such principle is the statutory power of the Court to grant injunctions when it is just and convenient to do so. The American cynamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone, as a straight jacket. The American cynamid case provides an authoritative, most helpful approach to cases where the function of the Court in relation to the grant or refusal of interim injunction is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial.

These principles are not of universal application as they are primarily aimed at addressing applications of interim injunctions in cases where facts are in dispute. Therefore, it is possible like Judge Matibini (as he then was) stated in *Sata v Chanda Chimba and three others*²⁶, to grant or refuse to grant an injunction without applying the American Cynamid guidelines, if the action is concerned with say, a simple question of construction of a statute, a document or point of law. In essence the Cynamid Case principles cannot be used to address instances in which there is a dispute on matters of law.

From the foregoing it is clear that the grant of injunctions is or should be based on the nature and circumstances of the case in which the interim injunction is sought. Defamation cases present a unique example as the later study will show.

3.7 INJUNCTIONS IN DEFAMATION CASES.

The jurisdiction to grant interim injunction in the field of defamation, and malicious falsehood arises where there has been, or there is a threatened publication of a defamatory statement, or a

²⁵ [1990] 3 ALLE.R. 523 at 534.

²⁶ 2010/HP/1282

false statement which would give rise to a claim for malicious falsehood²⁷. In Zambia, the power to grant injunctions, though widely couched, is governed by order XXVII of the High Court Rules. In defamation, injunctions serve to restrain the threatened publication or repeated publication of the defamatory statement against the plaintiff. Therefore, injunctions sought in defamation causes are Prohibitive in nature. For the said cause, the jurisdiction to grant injunctions is said to be of a delicate nature as the courts have to balance two interests; the freedom of expression on the part of the defendant, and the right to have one's reputation protected as stipulated under Article 20 of the *Zambian Constitution*. Therefore it is exercised only in the clearest case. Lord Esher M.R. in *Coulson v Coulson*²⁸ stated, in affirmation of this position, that:

It could not be denied that the Court had jurisdiction to grant an interim injunction before trial. To justify the Court in granting an interim injunction, it must come to a decision upon the question of libel or no libel before the jury decided whether it was libel or not. Therefore, the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find, the Court would set aside the verdict as unreasonable. The Court must be satisfied in all probability then alleged libel was untrue and if written on a privileged occasion that there was malice on the part of the defendant. It followed from those three rules that the Court could only on the rarest occasion exercise the jurisdiction.

Due to the delicate nature of injunctions and indeed the need not to stifle people's freedom of expression, the courts have guidelines on the granting of or refusal to grant injunctions in defamation cases.

3.8 GROUNDS FOR GRANTING INJUNCTIONS IN DEFAMATION CASES.

Order XXVII of the High Court Rules sets out the jurisdiction to grant injunctions. However, the section is couched in wide terms without setting grounds upon which injunctions can be granted.

²⁷ Patrick Milmo and M.V.R. Rogers, *Gatley on Libel, and Slander*, Eleventh Edition, (London: Thomson Reuters Limited, 2008.), 931

²⁸ [1887] 3 T.L.R. 846.

Furthermore, the Defamation Act²⁹ is silent on injunctions. Therefore, the courts look to common law for guidance. Instructive on this, are the learned authors of *Gatley on Libel and Slander*, Eleventh edition [Thomson Reuters Limited, 2008]. According to these, there are four elements to be met before an injunction is granted in a defamation suit. These are³⁰

- (1) The statement is unarguably defamatory;
- (2) There are no grounds for concluding the statement may be true;
- (3) There is evidence of an intention to repeat or publish the defamatory statement; and
- (4) There is no other defence which might succeed.

All the four elements must be proven before an interim injunction may be granted by the courts. However, it is vital to understand the connotative meaning of the above elements so as to have an appreciation of the elementary regime governing the grant of injunctions in defamation suits.

3.8.1 UNARGUABLY DEFAMATORY.

Under this head the plaintiff must not only prove as was spelt out in *Coulson v Coulson* (already cited) that the words are capable of being defamatory but the Court must be satisfied that it would inevitably come to the conclusion that they are defamatory. If this element is not met an injunction is declined. Instructive of this is the case of *Paul Shakabwali v Mungule, Chief Moono and others (unreported)*³¹. The facts of this case were that the plaintiff by an ex parte summons, applied for an interim injunction to restrain the chief Moono by himself, or servants or agents whatsoever name, from in any way defaming the plaintiff until the final determination of the matter by the court. The application was heard inter partes on the direction of the trial judge. The

²⁹ Chapter 68 of the laws of Zambia.
³⁰ Milmo and Rogers, *Gatley on Libel, and Slander*, 936
³¹ 2010/HP/357

plaintiff deposed that if the 5th defendant (Chief Moono) was allowed to continue defaming the plaintiff, he would suffer irreparable injury that cannot be atoned for by damages, since the plaintiff was a well known figure in the community. The trial judge declined to grant the interim injunction because the plaintiff had not demonstrated and adduced cogent evidence of the 5th defendant's intention to propagate palpable falsehoods that would be legally objectionable and actionable. From this case we see that this element is crucial to the sustenance of an application for injunction.

3.8.2 NO GROUNDS FOR CONCLUDING THE STATEMENT IS TRUE.

There must, invariably, be evidence that the materials or statement complained of is untrue. This can be done even through assertions of the claimant as to the falsity of the allegations. In the absence of such evidence the court may in the exercise of its discretion and having regard to the delicate nature of the jurisdiction refuse to grant an injunction³². The proof of this makes the grant of injunctive relief more likely than not. In *Michael Chilufya Sata v Times of Zambia*³³ where the plaintiff sued the defendant for publishing a story that the plaintiff as president received funding from Taiwan and Afghanistan and that the Patriotic Front had resolved to send unemployed youths to Afghanistan, Sudan or any war torn country. The defendants denied authorship of the story. The trial judge, Wood, granted the interim injunction to the plaintiff for proof inter alia, that there were no grounds for concluding that the statement or story was true.

3.8.3 INTENTION TO REPEAT OR PUBLICATION OF THE DEFAMATORY STATEMENT.

The Court will not grant an interim injunction unless there is some evidence or there are grounds to infer that the defendant threatens and intends to continue the publication of the words. However, where there has not yet been any publication of defamatory words, but there is threat

³² Milmo and Rogers, *Gatley on Libel*, and Slander, 936

³³ 2011/HP/225

of publication, the claimant need not wait for the publication to take place; he may seek to restrain publication, by means of *quia timet* order before it has taken place.

As Lord Dunedin put it in *Attorney General for Canada v Ritchie Contracting*:³⁴

“But no one can obtain a *quia timet* order by merely saying “Timeo,” he must aver and prove that what is going on is calculated to infringe his rights.”

The afore cited obiter aptly sums up the nature of this element.

3.8.4 THERE SHOULD BE NO OTHER DEFENCE THAT SHOULD SUCCEED.

It is trite law that interim injunctions are not issued in a libel action where the defendant raises a defence whether justification, privilege, fair comment on a matter of public interest unless the defence would obviously fail. The court will not grant an injunction even though the statement is unarguably defamatory or the defendant threatens or intends to publish the defamatory words or similar words unless the defendant is clearly acting out of malice or in bad faith³⁵. This element is embedded in the rationale for the law of defamation: - which is to protect individuals’ reputations. If somebody has a defence to defaming someone it certainly means someone has no reputation to be protected under defamation law.

In terms of jurisprudence, the locus classicus on the operation of the aforesaid rules is the case of *Sata v Chanda Chimba (iii) and three others*³⁶. Facts of this case are that the plaintiff, a politician and president of the then leading opposition political party known as the patriotic front (now the ruling party) sued the defendants for defamation of character and applied for an interim injunction restraining the defendants publishing defamatory words against the plaintiff. The first defendant was a free lance journalist and the other three were media bodies namely; Zambia National Broadcasting corporation, Muvi TV and Mobi TV international Limited. The plaintiff avers in the main that the defendants have collectively caused to be broadcast and published

³⁴ [1919] A.C. 999 at 1005.
³⁵ Milmo and Rogers, *Gatley on Libel, and Slander*, 936
³⁶ 2011/HP/1282(unreported)

weekly series of programmes complained of. The plaintiff contends that programmes complained of include words and images which are defamatory of the plaintiff. The words and images complained of having been particularised in a Stand up for zambia 'venom of the cobra' and Stand up for zambia unholy alliance which programmes were literally culpable of meaning that the plaintiff, among others, That the plaintiff was a schemer, and has been engaged in dirty politics for a long time. The defendants did not furnish a justifiable defence and malice was eminent. The trial judge, Matibini SC (as he then was) granted the injunction to the plaintiff on the fact that the allegations were unjustified.

It is eminent from the foregoing discourse that defamation presents a different case when it comes to granting of interlocutory injunctive relief, which is governed by general rules subject to special rules applying to defamation cases. The question that begs attention is whether the grant of injunctive relief in Zambia is adequate given the levels of poverty and access to legal services. The proceeding arch of this paper addresses this.

3.9 AN APPRAISSAL OF INJUNCTIVE RELIEF IN ZAMBIA.

The remedy of injunction seeks to restrain a defendant from publishing defamatory material. In so doing it serves the ends of justice by protecting the reputation of the plaintiff. However, it is not flawless. Firstly, the grant of injunctive relief is governed by equitable principles and is discretionary on the part of the judge. This is so because the Defamation Act does not provide any guidelines on the grant of this relief and it does not even mention it. Therefore, leaving the remedy subject to judges' discretion is not safe as discretion can be abused. It is therefore, arguable that the relief should be governed by statute so that it becomes a right and not a privilege as is the case now.

Finally, injunctions in Zambia, as practice has shown, are granted on specific basis instead of on a broad basis. This practice is not supported by any social and economic factors. In effect, the two factors buttress the converse. Given the fact that most Zambians are poor and that Legal Aid³⁷ is not available in defamation suits³⁸, the practice only succeeds in making defamation a rich man's tort because of the costs involved in defamation litigation. The case would have been different if the remedy was granted in broad terms so as to capture culpable infringers on one's reputation without having the need to institute legal process against many individuals. There is therefore need to change and become sensitive of the fact that there are many people who would rather suffer than come to court because, as Matibini puts it, they are not confident that the court will give them an adequate remedy³⁹. At the least, the courts should adopt the American approach in the Californian case of *Tory v Cochran*⁴⁰ where the Superior Court of Californian issued a broad injunction.

3.10. CONCLUSION.

It has been shown in this chapter that injunctions are crucial in the protection of the reputation of individuals. The Zambian courts are strict on the grant of injunctions as this is only done in the clearest of cases so as not to stifle people's freedom of speech. Though the power to grant interim injunctions is couched in wide terms, by order XXVII of the High Court Rules, it is firmly circumscribed by decided cases. Subject to the special considerations which apply to defamation cases, the usual considerations which apply to other application for interlocutory injunctions generally apply to defamation cases. However, two problems peculiar to Zambia are

³⁷ Chapter 34, of the laws of Zambia creates the Legal Aid Board.

³⁸ It is a notorious fact that the legal Aid Board has numerous challenges from financial to human resource; the Board tends to limit the grant of Legal Aid to accused persons facing serious criminal cases mostly in the High Court. The Board therefore handles a very limited number of civil cases which do not include defamation.

³⁹ Dr. Patrick Matibini. *Access to Justice and the Rule of Law*. An Issue paper presented to the Commission on the Legal Empowerment of Women.

⁴⁰ 544 US 734(2005)

eminent. First, the silence of the Defamation Act on this remedy has led to this remedy being subject to Judge's discretion which like any exercise of power is susceptible to abuse. Secondly, though the grounds for granting injunctions are well formulated, the fact that the remedy is granted is given on a specific basis is not in touch with reality in that it encourages multiplicity of defendants over the same cause and it discourages the poor from litigating owing to the cost of litigation hence the proposal for injunctions being granted on broad basis.

The next chapter looks at judicial pronouncements on the grant of injunctive relief in other common law jurisdictions.

CHAPTER FOUR

COMPARATIVE ANALYSIS OF THE GRANT OF INJUNCTIONS IN SELECTED JURISDICTIONS AND ZAMBIA

4.1 INTRODUCTION.

This chapter is exclusively designed to do a comparison between Zambia and selected jurisdictions on the legal regime governing the grant of injunctions in defamation cases.

The selected jurisdictions are Canada and the United States of America

4.2 CANADIAN POSITION.

Canada has both common law and civil law jurisdictions. Therefore, Canadian defamation Law refers to defamation law as it stands in both common law and civil law jurisdictions in Canada⁴¹. However, for the present purposes, only the law as applied in common law jurisdictions will be explored.

As with other commonwealth countries, Canada follows the English law of defamation. It is equally trite law in Canada that Defamation as a tort does not infringe the freedom of expression guarantee under the Canadian Charter of Rights and Freedoms, according to the *Nova Scotia Supreme Court in Coates v. The Citizen*⁴². Therefore, the Canadian courts strike a balance between the protection of the reputation of the plaintiff and the freedom of expression of the defendant.

⁴¹ Brown, Thomas. *The Law of Defamation in Canada*. 2nd edition (Scarborough : Ontario ; Carswell, 1994), 201 [1988] 44 C.C.L.T. 286 (N.S.S.C.).

4.2.1 GRANT OF INJUNCTIONS UNDER THE CANADIAN COMMON LAW REGIME.

The law of defamation in Canada is based on the English common law and is, therefore more plaintiff oriented. Injunctions are granted based on equitable and statutory basis. The case of *Canadian Human Rights Commission v Tomasz Winnicki*⁴³ shows that injunctive relief is available in Canada under statute. In that case, the plaintiff sought an interlocutory injunction to restrain the respondent from communicating by means of internet messages likely to expose the person to hatred or contempt by reason of race, national ethnic origin, colour or religion contrary to Canadian Human Rights Act, section 13(1). Though the Act governs human rights issues it has an impact on the law of defamation as could be gleaned from the use of words likely to expose the persons to hatred or contempt.

In Canada, it is difficult to obtain an interlocutory injunction in defamation cases. In *Compass Group Canada (Health Services) Ltd. v. Hospital Employees Union*⁴⁴, the Court set aside an *ex parte* injunction prohibiting a union from picketing with placards containing information allegedly defamatory of the plaintiff company. The Court agreed that the traditional balance of convenience test should not apply when a party seeks an interlocutory injunction restraining the publication of allegedly defamatory statements. The Court upheld the general approach that injunctive relief to restrain alleged defamation is an exceptional remedy which should be granted in only the rarest and clearest of cases. The Court should only issue such relief when the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal. In addition, there must be evidence of an intention, or grounds to infer, that the alleged defamation will be repeated or published.

This decision is in marked contrast to another decision in *55971 BC Ltd. v. Hospital Employees Union*⁴⁵, where the Court granted an interlocutory injunction prohibiting the union from broadcasting a television ad which referred obliquely to the plaintiff company as an abortion foes

⁴³ 2005 CHRT 25

⁴⁴ 2004 BCSC 51

⁴⁵ 2002 BCSC 962

firm. The Court held that because the defendants did not seek to justify the alleged defamatory statements, an interlocutory injunction was justified.

It can be seen that both Zambia and Canada grant injunctions on equitable principles. The remedy is only granted in clear cases. However, the difference lies in the fact that Canada has an Act which regulate the grant of injunctions in certain instances as could be seen from the aforementioned Canadian Human Rights Act Section 13(2), while Zambia does not.

4.3 THE AMERICAN POSITION.

In the United States the injunction retains its essentially equitable character and, as in England, covers a wide spectrum of types of injurious or potentially injurious conduct. The most significant developments in the United States have been in connection with labour disputes, governmental regulation, and the protection of constitutional rights⁴⁶. The broadest extension of the injunction remedy has occurred in the field of governmental regulation. Many federal and state statutes specifically authorise the use of the injunction as an alternative to seeking criminal conviction for regulatory violations. In the enforcement of federal and state statutes, injunctions are sought with far greater frequency than are criminal penalties as a means of obtaining effective compliance. Injunctions have also been used increasingly in the protection of rights guaranteed by the United States Constitution, particularly to prevent violations of the rights of free assembly and speech, violations of religious freedom, and denial of equal rights and opportunity on racial grounds.

The locus classicus on the grant of injunction in America is the case of *Tory v Cochran*⁴⁷. This was a Supreme Court case involving libel. The case began in California with Johnnie Cochran, the famed attorney who represented O.J Simpson, suing his former client Ulysses Tory for libel

⁴⁶ Alexander v United States, 509 U.S 544 550

⁴⁷ 544 U.S. 734 (2005)

and invasion of privacy. Cochran had withdrawn as Tory's lawyer in a civil rights suit nearly twenty years earlier, and in the late 1990's Tory began picketing Cochran's office, carrying signs that accused him of being a thief and of accepting bribes. A trial judge ruled that Tory had made false and defamatory statements about Cochran, and issued a broad injunction ordering Tory to never again display a sign or speak about Cochran. The order was couched in this manner;

Unless until this court, after notice to Johnnie L. Cochran, Jr. (COCHRAN) and opportunity for him to be heard, modifies or vacates this order, it is ordered that TORY, and his employees, agents, representatives, and all persons acting in concert, cooperation or participation with him, including, but not limited to, Ruth Craft and any other co-conspirator, are permanently enjoined in picketing COCHRAN and or his law firm, displaying signs and the like.

Tory appealed to the Californian court of appeal alleging that the injunction chilled his freedom of expression but the court upheld the injunction as being constitutional. On appeal to the US Supreme Court just lifted the injunction owing to its inability to make a ruling as Cochran died seven days after the appeal was lodged.

Though some American jurists critique this case, it is instructive to the Zambian scene in two ways. First, it poses a good example on the grant of injunctions. The Californian court showed that in broad injunctions are the best option in order to avoid multiplicity of actions and indeed, incurring the consequential legal costs.

Secondly, the decision shows that injunctions granted for the protection of an individual's reputation are constitutional as the law cannot be used as a permit to defame others through freedom of expression.

4.4 CONCLUSION.

This chapter has shown the practice in the grant of injunctions in selected common law jurisdictions namely Canada and United States. Two lessons are to be learnt from these. From Canada can be learnt the idea to encapsulate injunctive relief for Defamation, while from California America can be learnt the need to make injunctive relief statutory and to grant injunctions on a broad basis. The encapsulation of these two principles can make injunctive relief a safe haven in the Zambian legal framework.

The next chapter sums up the findings of this research and gives reasoned recommendations for the consideration of the powers that be in formulation of a legal framework on injunctions which is reflective of the prevailing conditions in Zambia.

CHAPTER FIVE

CONCLUSION: FINDINGS AND RECCOMENDATIONS

5.1 Introduction.

Having researched the remedy of injunction in civil defamation from Zambian perspective, this chapter will analyse the findings before making recommendations. This will be done in a two thronged approach by looking at findings before making recommendations. The findings will be explained in light of the objectives of the study. Recommendations shall suggest remedies to the identified imperfections in the law.

5.2 FINDINGS.

This is best tackled by reference to the research objectives;

(a) LEGAL FRAMEWORK GOVERNING THE GRANT OF INJUNCTIONS IN ZAMBIAN CIVIL DEFAMATION.

It has been shown in this paper, in particular chapter three, that the grant of injunctions in civil defamation is not governed by any Act of parliament. The Defamation Act is silent on the remedy of injunction just as it is silent on assessment of damages. Jurisdiction of the high court is therefore gleaned from Order XXVII⁴⁸ of the High Court Rules which authorises the High

⁴⁸ The said provision which is rather couched in general terms provides; In any suit in which it shall be shown, to the satisfaction of the Court or a Judge, that any property which is in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit, it shall be lawful for the Court or a Judge to issue an injunction to such party, commanding him to refrain from doing the particular act complained of, or to give such order, for the purpose of staying and preventing him from wasting, damaging or alienating the property, as to the Court or a Judge may seem meet, and, in all cases in which it may appear to the Court or a Judge to be necessary for the preservation of the better management or custody of any property which is in dispute in a suit, it shall be lawful for the Court or a Judge to appoint a receiver or manager of such property, and, if need be, to remove the person in whose possession or custody the property may be from the possession or custody thereof, and to commit the same to the custody of such receiver or manager, and to grant to such receiver or manager all such powers for the management or the

enunciated in the Cyanamid case with reference to special rules applicable to injunctions. These special principles were well outlined by Judge Matibini (as he then was) in *Sata v Chanda Chimba and three others* as; proof of defamatory matter, absence of any defence, and unavailability of damages. The absence of statutory guidelines especially in the defamation Act on the grant of injunctions has cast the law in a sea of uncertainty as common law is not static.

(b) THE ATTITUDE OF THE COURTS TOWARDS THE GRANT OF INJUNCTIONS IN CIVIL DEFAMATION.

The attitude of the Zambian courts to the grant of injunctions is that courts lean towards striking a balance between protecting the reputation of one individual on the one hand, and protecting the freedom of speech on the other. This is in line with article 20(3) of the republican Constitution which guarantees both the right to reputation and freedom of expression. Therefore, the courts only grant injunctions in the clearest of cases and it is cautiously done and they regard the jurisdiction to grant injunctions to be of a delicate nature. Judge Matibini in *Paul Shakabwali v Chief Moono*⁴⁹ and others clearly stated that;

“the jurisdiction to grant interim injunctions to restrain the publication of defamatory matter statements is of a delicate nature and ought to be exercised only in the clearest case.”

From the above citation as well as many others, this paper has shown that the attitude of the Zambian courts on the grant of injunctions is progressive as they grant them only in clear instances so as not to stifle freedom of expression.

⁴⁹ 2010/HP/357

(c) THE UNDER PRIVILEGED VS. THE GRANT OF INJUNCTIONS IN ZAMBIA.

Defamation causes are very costly in Zambia and elsewhere. But the research has shown a connection between this and the poor. It is trite that in Zambia injunctions are granted on a narrow basis that is they are granted in such a way that they refer to the defendant and his or her agents. This is the case in all Zambian cases that have been cited. The net effect of this is that for every similar defamatory statement, the plaintiff will have to institute fresh legal proceedings against such a person to obtain an injunction. This is not reflective of the social and economic situations that Zambians live in that many poor people though interested in having their reputations protected cannot institute legal proceeding in defamation and even if they were to do so the narrow manner of granting injunctions may chill their interest. The case would have been different if injunctions were granted on a broader basis so as to capture not only the defendant and his or her agents but also others person who may make the same defamatory statement.

This problem is intertwined with the fact that there is no legal aid for civil defamation cases. Therefore, many poor people do not use the legal system because they believe often correctly - that the legal system will not provide them with an effective remedy for their problems .It is beyond dispute that many poor people who might otherwise avail themselves of the legal system to resolve disputes and advance their interests do not do so because they lack the time, resources and expertise necessary to navigate the legal system on their own, and there are not able to source the assistance of a legal services provider who could help them. In general, court fees do not hinder access. What is prohibitive is the cost of legal representation. Given the serious limitations and constraints that the Legal Aid Board faces, most poor are unable to instruct legal practitioners to represent them in courts.

(d) LESSONS FROM OTHER JURISDICTIONS.

This has been shown by chapter four in a rather succinct way. The research drew lessons from two jurisdictions namely the State of California from the United States of America and Canada. The necessary lessons are the need to grant injunctions on a broad basis as was shown in the American case of *Tory v Cachran* where a Californian court made a broad injunction which covered not only the makers of the imputed defamatory matter, but also

persons that were likely to do so. This fits in the Zambian system where most people live below the poverty datum line and there is no legal aid for defamation cases therefore, this could be cost effective as it would avoid the need to sue many people on the same defamatory matter.

(e) NEED TO REFORM THE DEFAMATION ACT.

The research has shown that for a statute of great significance and one covering matters that are critical to the democratic dispensation – protection of freedom of expression and balancing it with freedom of speech, the defamation Act is too silent on matters that it should expressly provide for. For instance, the research shows that the Defamation Act does not provide any guidelines on what amounts to defamation, it does not give guidelines on how interim injunctions or otherwise should be granted in a defamation cause, and it also does not give guidelines on how damages should be quantified. The silence of the Act on these matters has led to uncertainty in the law in that the common law relied on could be changed at any time without the litigants knowing beforehand.

Having outlined the findings, it is now pertinent to look at the consequential recommendations of the research.

5.3 RECOMMENDATIONS

The research has identified three suggestions as a means of remedying the defects in our current legal regime. These are outlined below.

(1) REFORM OF THE DEFAMATION ACT TO EXPRESSLY PROVIDE FOR INJUNCTIONS IN CIVIL DEFAMATION.

The essence of having statutes is to have certainty and order in the application of legal principles. From the research point of view, the Defamation Act needs to be up to date with the demands of justice. It should provide for the remedy of injunctions in civil defamation causes it should provide guidelines on what circumstances could necessitate the grant of injunctive relief. This should be done by incorporating the equitable and common law principles as currently applicable and reconcile them with the peculiar needs of the Zambian

society. This will in effect entail that the remedy will be available as a matter of right and not a privilege as currently is where the courts use their discretion.

(2) INJUNCTIONS SHOULD BE GRANTED ON A BROAD AND NOT ON NARROW BASIS.

Given the cost of defamation cases in terms of procedures and indeed the social and economic plight of the Zambian people, it is hereby submitted that injunctions be granted on a broad basis so as to cover all persons that make the same defamatory statement as a defendant but are not his or her agents. This would help many people have recourse to injunctive relief in defamation causes so as to defend their reputation. This has been done in California, America as has been shown in the celebrated case of *Tory v Cochran*.

(3) THE LEGAL AID BOARD SHOULD PROVIDE LEGAL SERVICES FOR DEFAMATION CAUSES.

Legal Aid is not available in defamation causes in Zambia. The law on Defamation seeks to protect an individual's reputation against unwarranted attacks from others under the guise of freedom of expression. This right to reputation is guaranteed in article 20(3) of the Constitution which equally guarantees the right to protection of freedom of expression. Since a right is property, the state through the Legal Aid Board should help citizens defend their esteemed property-reputation. This is so because defamation litigation is expensive and convoluted thereby not capable of being utilised by the poor in society. Currently, defamation is like a rich man's tort.

5.4 CONCLUSION.

The research has shown that an injunction at interim stage or otherwise in a defamation suit serves the ends of justice by ensuring that a defendant is restrained from publishing or making defamatory statement. It has further being shown that the courts exercise the power to grant injunctions in a rather delicate and cautious manner so as to strike a balance between the protection of peoples reputation and the freedom of expression of other people. Bottlenecks have been identified to exist in the legal regime on the grant of injunctions and

the recommended actions herein if acted upon by the powers that be can surely remedy the current situation in Zambia.

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