

**Analysing the Legal Standard of Defamatory Conduct During National Elections in
Zambia**

By
NGABA CHAPATAMA
(29072280)

SPR
LLB
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A dissertation submitted to the University of Zambia in partial fulfilment of the requirements of
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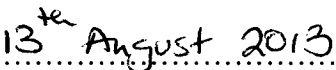
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ABSTRACT

Journalists generally face a number of challenges in their reporting during the period of national elections. This comes as a result of their duty to afford the public the best means of discovering and forming an opinion of the ideas and attitudes of Political Leaders vying for the various positions as well as their obligation to balance this amongst protecting the reputation of these candidates.

This research has undertaken the task of looking into how much leverage journalists should be given in their reporting of election candidates. Particular attention will be paid to the historical perspective, looking at how the courts have dealt with defamation cases during elections in all three republics and their consideration of press freedom. Looking at this will as well necessitate a critical analysis of our current defamation laws and whether they are in touch with the reality on the ground during election period. Suggestions such as amendments to the Defamation Act and/or the Electoral Code of Conduct in respect to the media as a way curb this problem

Furthermore, amongst the issues of great importance will be the amount of regulation that must be imposed on the media and just how far into the lives of candidates they should be allowed to explore. To achieve this, a comparative study with the United States, England and Australia has been made to see how much clout the courts have given the media. A questionnaire was also distributed among key informants so as to obtain their views around key topics concerning this research.

It is recommended that greater latitude needs to be extended towards these statements made during elections, than at any other time. This has not been the case in Zambia with the result that cases of defamation have been on the rise during election periods.

ACKNOWLEDGEMENT

Firstly, my special thanks go to the almighty God for making this piece of work a possibility. Secondly, to my Mother Cathrine C. Mpande who passed away in my third year at University of Zambia. Words can't express the profound gratitude I have for the endless sacrifice you exhibited in ensuring I had the best education. MYSRIP.

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To my elder brothers Mumba Mwaba and Bwalya Walice Ngaba, this piece of work would not have been a reality without your moral and financial support especially in my fourth year. To my young sister Sinduna Veronica Ngaba, you are a constant reminder of the hard work that is required of me so you too can have an education like mine.

Further, I wish to extend my gratitude to all my classmates and friends, but most notably Mazuba Moonga and John Kawana for the help and support rendered during this work. Further acknowledgement goes to Mwenda, Suzyo, Isaiah, Given, Benjamin, Larry and Gunstone for all the times you eased my mood when I was under pressure with this work. I thank you.

Last but most certainly not the least, Simbo Musokotwane, my friend and partner you have been with me throughout this work and it would have certainly been impossible to write it without you. Thank you is an understatement. Now it's finally done, you can stop complaining.

DEDICATION

I dedicate this work to the memory of my parents Henry Chilufya Ngaba (1962-2004) and Catharine Changala Mpande Ngaba (1964-2012). I hope I have made you both proud. May Your Souls Rest In Eternal Peace.

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CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

Zambia is a democratic state by virtue of its legal system. As such it holds regular elections which allow for citizens to play a vital role in the selection of their leaders of public offices. This important task of choosing their various public leaders requires the citizenry to know and analyze each candidate in order to make an effective choice. This can only be possible where a candidate is granted the platform on which they can present themselves to the public. The media is an essential means of doing so. It is at this point that freedom of the press becomes vital, particularly during preparations for elections as the media have to disseminate as much information as possible about the candidates. This is necessary to ensure that people make wise and informed decisions of each candidate after having had an opportunity to scrutinize them. Such scrutiny may tend to lower certain candidates in society. The rights of free speech and free press may thus clash with the interests served by defamation law, which is to protect the reputation of individuals.

1.2 BACKGROUND

The press exists in large part to report on issues of public concern while individuals possess a right not to be subjected to falsehoods that impugn their character. The clash between the two rights can lead to expensive litigation, and negative public views of the press.

In as much as press freedom is always a critical issue in governance, it usually becomes a major topic of discussion during the election period in Zambia, as is the case in many countries. This is because press freedom brings into question the duty of journalists and media houses to afford the public the best means of discovering and forming an opinion of the ideas and attitudes of political leaders vying for the various positions. This coincides with their obligation to balance

this amongst protecting the reputation of these candidates. The two important concepts of freedom of expression and freedom of the press and defamation will need to be explained to contextualize the discussion of the standard of defamation during national elections.

As regards the press, the first and basic function is the dissemination of information and news. Ancillary to this function is the right of an individual and human desire to know what is happening in the society in which they live.¹ The press gives access to knowledge and events far beyond the boundaries of an individual's own observation and for this to be achieved there is need for a certain degree of press freedom.

Press Freedom can therefore be defined as the freedom of communication and expression which is usually achieved through electronic and published media. In principle, it implies the absence of interference from an overreaching state and in Zambia it is preserved through indirectly through constitutional protections under the freedom of expression.² In addition it can be seen as the right to publish newspapers, magazines, and other printed matter without governmental restriction and subject only to the laws of libel, obscenity, sedition, etc.³ As such even though the definition of press freedom suggests there should be a lack of restrictions to journalists in the execution of their duties it does recognize that the laws on defamation should be respected.

Professor Kasoma has noted that during the election period, with this freedom, African journalists in particular face a big ethical problem of playing to the gallery of political parties as they engage in one political character assassination after another in their reporting.⁴ They tend to make serious allegations, many of them based on unnamed and dubious sources. The lack of

¹ Francis P. Kasoma, *The Press and Multiparty Politics in Africa* (Tampere: University of Tampere, 2000), 23.

² Article 20 Constitution of Zambia.

³ "Freedom of the Press." Accessed 23rd October 2012 at 16:22. <http://dictionary.reference.com/browse/freedom-of-the-press>.

⁴ Kasoma, *Press and Multi-Party Politics*, 72.

unprofessionalism is highly evident as these articles are published without the journalists who write them making concerted efforts to establish the truth of the allegations. Consequently, the people defamed are left permanently injured with little or no meaningful redress.⁵ He goes on to note that the harm that unfounded accusations can do to society and the individuals who constitute it can be devastating as even Africa's dirty politicians, and most of them really are, deserve justice and fair-play from the media and should not be accused, tried and sentenced by the press of wrongs they have not committed.

It is at this point that defamatory laws take effect to protect people from injury to their reputation. To do so, societies create laws to settle issues of truth or falsehood and reputational harm that result from defamatory statements. In a two-way function, the defamation laws act as deterrent to imputations either by publication or broadcast against individuals' reputation and also give remedy to any such damaged reputations.⁶

The law of defamation contemplates the clash of two fundamental rights; the right to freedom of expression, including freedom of the media and the right to reputation and so defamation law is designed to mediate between these two rights. The *Defamation v Freedom of Speech* debate basically articulates that fundamental rules and procedures of defamation law need to be reformed to take into account the dual importance of public interest speech, on the one hand, and the right to human dignity on the other.⁷

⁵ Francis P. Kasoma, *The Foundations of African Ethics (Afriethics) and the Professional Practice of Journalism: The Case for Society-Centered Media Morality* (Tampere: University of Tampere, 2003), 60.

⁶ Faustina N. P. Amponsah, *Libel Law, Political Criticism, and Defamation of Public Figures in the United States, Europe and Australia* (New York: LFB Scholarly Publishing LLC, 2004), 2.

⁷ Dario Milo, *Defamation and Freedom of Speech* (Oxford: Oxford University Press, 2008), 8.

It should be noted that a vast array of complications accompany the law of defamation as was noted by Lord Atkin in the case of *Sim v Stretch*⁸, where he categorically stated that Judges and textbook writer alike have found difficulty in defining with precision the word defamatory as the conventional phrase “exposing the plaintiff to hatred, contempt and ridicule” is too narrow.

The question of defamation is complicated further as consideration has to be had of the person or class of persons whose reaction to the publication is the test of wrongful character of the words used. It must be remembered from this view point that unprivileged falsehood need not entail universal hatred to constitute a cause of action as such conduct cannot be hated by all for it to be defamatory.

Therefore, it is an accepted view of most writers and judges that there is no comprehensive definition of defamation but one of the most encompassing descriptions was delivered by Slesser LJ. in the case of *Youssouppoff V MGM Pictures Ltd*⁹ where he construed it 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.” It can also be said to be any intentional false communication, either written or spoken, that harms a person's reputation, decreases the respect, regard, or confidence in which a person is held or induces disparaging, hostile, or disagreeable opinions or feelings against a person.

In relation to this work, the definition given by Gately in his leading monograph “*Libel and Slander*”¹⁰ gives a further illustration of what defamation would entail if it were narrowed down to the period of election preparations. He explains a defamatory imputation as those to “a man’s discredit or which tends to lower him in the estimation of others or to expose him to hatred,

⁸ (1936) 2 All. E. R 1237

⁹ (1934) 50 TLR 581 D

¹⁰ Patrick Milmo, *Gately on Libel and Slander*: 11th Edition (London: Sweet & Maxwell, 2008), 65.

contempt ridicule or to injure his reputation, office trade, profession or injure his financial credit.” Furthermore, in *Lewis v Daily Telegraph Ltd*¹¹ the court added another dimension in the determination of defamatory words where it stated that words are defamatory if the allegation was calculated to stir up adverse feelings amongst substantial and respectable group of the community without them being shared by the entire community.

1.3 STATEMENT OF THE PROBLEM

The problem is that in the recent past, a large number of cases of defamation have been brought to court during elections and preparation of elections. Additionally, there is no change in the standard of defamation that is applied to the cases that are brought during the election period. As such there is need to have a clear cut position on how far the courts can apply defamatory laws without infringing on the freedom of expression during the election period. There is also need to see how both the interests of the public and the interests of the individual candidates should be served proportionately during this period.

Furthermore, the role that the media plays in the entire process needs to be revisited to ensure that they are aware of their duties and responsibilities and adequately informed on the laws applicable in such a situation. It is also vital look to into how far in the merits of the case should courts investigate at the interlocutory stage in defamation cases i.e. is it desirable for them to look into the merits of the case in order to make determinations on the two conflicting interests. This is of vital importance as precedence has shown that the time for these cases to be decided creates a major hindrance on freedom of expression during the election period.

¹¹ [1964] 2 QB 601

1.4 PURPOSE OF THE STUDY

The purpose of the study is to investigate the application of defamatory laws during the election period and their effect on freedom of expression. Special emphasis will be placed on how the courts approach cases to deal with public figures and whether leverage should be given to the journalists during this period in their coverage of candidates in the interest of the public.

Of particular importance during an election year is the conflict between freedom of expression and the desire to protect the victim of a maligning tongue.¹² This is worsened by the fact that the law on defamation is inherently problematic to understand due to the fact that many of the rules are notoriously uncertain in their application and the interests represented by both parties are important yet contrary.

It is accepted that Election candidates during the election period put themselves out as public figures. It is therefore prudent to investigate whether a different criteria should be applied in determining whether or not words or imputations used against them amount to defamation. In the case of *Sata v Chimba And Others*¹³, the plaintiff was a candidate for election of President in the elections to be held on 20th September, 2011 and in the run up to the election the first defendant through the medium of the second, third and fourth defendants and other media houses not party to the proceedings produced a number of publications under the name *Stand Up Zambia* that the plaintiff claimed were aimed at defaming him.

A preliminary examination into various jurisdictions, brings out an interesting point of note in that the United States the Supreme Court held that public officials cannot claim damages for a defamatory falsehood about their official duties unless they prove with convincing clarity that

¹² M. W. Prosser, *The Law of Torts: 3rd Edition* (Minnesota: West Publishing, 1964), 754

¹³ (2010/HP/1282) / [2011] ZMHC 74 (2 September 2011)

the statement was made with knowledge of its falsity or with reckless disregard of whether it was false or not.

Similarly, the Supreme Court of India held that public officials cannot recover damages for defamation in matters concerning their official duties unless they prove that the statement was made with reckless disregard of the truth or out of personal spite.¹⁴ In India, it is sufficient for the defendant to show that he or she took reasonable care in verifying the facts to defeat an allegation of malice.

It therefore prudent to investigate the possibility of the application of these rules, especially during the election period, with due regard of the fact that the media should be allowed to expose more than the knowledge of candidates that is easily accessible.

1.5 RATIONALE AND JUSTIFICATION OF THE STUDY

The justification for such a study is that the laws on defamation are too complex and technical for journalists let alone the public to understand. These complexities of the law are heightened during the election period as journalists want to go an extra mile in the reporting of candidates which in most cases lead them into defaming these candidates. It is, as such, justifiable to carry out this study as there is need for journalists to understand these laws. This is in their best interest to enable them be knowledgeable of where to draw a line between reasonable journalism and journalism that leads to defamation. Furthermore, justification for this study is based on whether the law on prior restraint is necessary during the election period, and if it is how the courts should apply it in relation to publications that involve public figures. It is important to note that this study is narrowed down to the election period because time and again the issue

¹⁴ RAJAGOPAL v STATE OF TAMIL NADU (1994) 6 SCC 632

injunctions in defamation cases are seen as being used as a tool to hinder freedom of expression has been raised.

Additional justification for the study is found in one of the issues raised in the case of *Sata v Chimba & 3 Others*¹⁵ which was whether the plaintiff was at the time of the publications and the granting of the injunction a public figure. This is of critical importance in that it opens up various questions that the court can look into when making their judgments.

Prime amongst these issues is the burden that has to be satisfied in order to prove that a plaintiff that is a public figure was actually defamed. It has been argued that public figures by virtue of putting themselves in such a position are susceptible to criticism. Flowing from this is another pertinent issue as to whether the law on defamation should account for such, given the fact that the public has a right to criticize the people who govern or wish to govern them, which would entail that the least protection from defamation is given to public figures.

Another aspect that requires analysis is the law on prior restraint. In this regard, analysis will be focused on whether prior restraint of future publications is justifiable during the election period in light of its infringement on freedom of expression. The rationale behind this is based on the point view that when judges restrain the future publications, they do not know what will be contained therein and as such are not aware of whether those publications will or will not be defamatory. They also do not know the time it would take for the case to be fully determined thereby hindering the freedom of expression of during this period.

¹⁵ 2010/HP/1282/ [2011] ZMHC 74 (2nd September 2011)

1.7METHODOLOGY

This dissertation is not be restricted to merely to desk research but will also undertake field research with relevant research questions to be formulated. The scope of sources of information to be used will include among others law reports, law journals, texts books, the internet, articles both within and outside the *Zambian* jurisdiction, dissertations under obligatory essays and those awarded to master's and doctorate program. Additionally, a questioner will be formulated that will be distributed amongst journalists, legislators and law firms engaged in defamatory matter for the purpose of obtaining their opinion on the law of defamation and its effects on the freedom expression during the election period. This will be necessary so as to compare the opinion of the study with that of the persons that are actually affected by the law in question.

1.6 CONCLUSION

This chapter has basically given a broad outline and framework of what will be discussed in the following chapters by way of introduction. The next chapter will discuss the law on prior restraint, public figures in terms of defamation and its applicability in Zambia with reference to the case in point. To give a broader understanding, a comparative study with other jurisdictions will also be carried out.

CHAPTER 2: LAW ON PRIOR RESTRAINT AND INTERIM INJUNCTIONS

2.1 INTRODUCTION

This Chapter will mainly focus on the law of prior restraint.¹⁶ It will also consider the issues of election candidates, public officials and whether election candidates should be considered as public officials for the purposes of defamation cases. Finally it will discuss interlocutory injunctions and the considerations that have to be applied before one can be granted taking into account special cases of defamation. This will be necessary in contextualizing the analysis that will be carried out in the following chapter. This chapter will therefore give a broader understanding of how the law is applied in Zambia and other jurisdictions

2.2 PRIOR RESTRAINT

In the case of *Near v Minnesota*¹⁷ the Chief Justice of the United States Supreme Court broadly laid down the doctrine of prior restraint in the following terms;

“The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.”

Prior restraint is thus distinguished from ‘subsequent punishment’, which is a penalty imposed after the communication has been made as a punishment for having made it. Generally, a system of prior restraint would prevent communication from occurring at all while a system of ‘subsequent punishment’ allows the communication but imposes a penalty after the publication.

¹⁶ The concept of prior restraint deals with official restrictions imposed upon speech or other forms of expression in advance of actual publication.

¹⁷283 U.S. 697 (1931).

Despite being ancient and a celebrated history, the doctrine of prior restraint remains today curiously confused and unformed. It is not clear, simple, and easy to apply mostly because it is subject to a vast array of exceptions.¹⁸ The various problems it raises are those that are more inclined to judicial solution as the courts are better placed to deal with the issues it raises. The basic point of concern should be whether a particular action amounts to an effective censorship which is prohibited by Constitutional principles.

In the 1931 landmark opinion, *Nebraska Press Association v Stuart*¹⁹, the U. S. Supreme Court described prior restraint as “the most serious and least tolerable infringement on First Amendment rights”. As such it may seem that the United States Supreme Court has been from time in immemorial been consistent in its rulings in cases that touched on the issue of prior restraint and have been reluctant to make orders that may amount to restrictions on the rights of the press. The Zambian Courts on the other hand have moved away from the principles set in the American courts. This can be evidenced from one of the earlier cases which dealt with the issue; *Michael Sata v The Post Newspapers and Another*²⁰.

In the aforementioned case, the Court noted that despite the similarity between the provision in our Constitution and that of the USA, we are at different stages of development and democratization and the courts in each country must have regard to the social values applicable in their own milieu. Ngulube CJ further opined that the *Sullivan*²¹ case introduced modifications which have not found universal acceptance when it restricted a public official’s right to redress in libel action by finding a conditional privilege. The courts did so by changing the burden and

¹⁸ M. Prosser, *The Law of Torts*, 53

¹⁹ 472 U.S. 539 (1976)

²⁰ HCZ Judgment No. 1 of 1995

²¹ *NEW YORK TIMES CO. V SULLIVAN* 376 U.S. 254 (1964)

standard of proof, by narrowing the common law ambits of express or actual malice available to a public official.

The holding by the court cannot be justified in this day and age with the development of media and the need for freedom of expression and speech to be exercised more freely. As regards Zambia and with particular reference to the period of elections, it is time to modify the common law principles of the law of defamation in their application to plaintiffs who are public officials. In this vein, so to give a certain amount of as latitude to the press to subject public officials to criticism and scrutiny within a wider boarder than they are currently given.

2.3 MODES OF PRIOR RESTRAINT

It is necessary to define more precisely what forms of official restriction contain elements of prior restraint so as to explore the characteristics of that mode of restriction and its impact upon freedom of expression.

The clearest form of prior restraint arises in those situations where the government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official.²² Such limitations are normally enforced by criminal prosecution for having published without the required approval, the prosecution being based upon mere failure to obtain approval and not on any issue concerning the content or manner of the publication.

A second situation involves legislative restraints, which make unlawful, publication or other communication unless there has been previous compliance with specific conditions imposed by a legislative statute. In this situation, no approval of an executive or judicial official is involved.

²² Dario Milo, *Defamation and Freedom of Speech* (Oxford: Oxford University Press, 2008), 63

Enforcement of the control is normally by criminal prosecution or other legal proceeding for failure to meet the condition.

A third type of situation which contains elements of prior restraint upon communication, but in which the restraint appears more indirect or secondary to some other immediate objective. This occurs, for example, where political views or other forms of expression are used as a test for holding an office or position of influence.

Finally, the fourth type of prior restraint involves judicial officials and is based upon the injunction or similar judicial process, enforced through a contempt proceeding. The injunction may be directed only against specific aspects of a particular kind of communication, as the injunction against publishing a "malicious, scandalous and defamatory newspaper" in *Near v Minnesota*²³. A further example of this form of prior restraint is in the case of *Michael Chilufya Sata v Chanda Chimba III & 3 Others*²⁴. This form may also attempt to prevent all communication entirely, as an injunction preventing publication of any further issues of a newspaper.

2.4 PRIOR RESTRAINT BY JUDICIAL OFFICERS

The "heavy burden" placed on one seeking to restrain speech or press in advance of publication has been propounded by decisions of the United States Supreme Court such as in the case of *Carroll v Princess Anne*²⁵ where it held that "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity". The court in this case basically recognised the fundamental principle of freedom of expression and stressed the well-

²³283 U.S. 697 (1931).

²⁴(2010/HP/1282) / [2011] ZMHC 74 (2 September 2011)

²⁵393 U.S. 175, 181 (1968)

known principle that before a constitutional right can be infringed upon, a highly convincing reason needs to be adduced before the court.

Amongst the most prominent cases dealing with prior restraint, and in particular those dealing with public officials, is that of *New York Times Co. v United States*²⁶ also known as the “Pentagon Papers” case. Therein, the Supreme Court held that the government had failed to meet the heavy burden required to restrain the publication of a classified document entitled “History of U.S. Decision-Making Process on Viet Nam Policy.” The decision of the court was *per curiam*, but with each justice writing separately. Notwithstanding the separate opinions, even a dissenting Justice wrote later that each member of the court acknowledged that a prior restraint was presumptively unconstitutional.

The Zambian Courts have not necessarily followed this criterion and have failed to take into account the chilling effect or the tendency to inhibit free discussion induced by litigation or threats of litigation. This more so when the matter concerns public institutions and public officials as well as the public interest.

In delivering ruling in the case where, then opposition, Patriotic Front leader Michael Sata sought an injunction to restrain Chanda Chimba III from broadcasting Stand Up Zambia documentaries on Zambia National Broadcasting Cooperation, Muvi TV Limited and Mobi TV International, Judge Matibini restrained the first defendant and his agents, servants or whosoever from producing, distributing, or in any other form of transmission of the said Stand Up for Zambia programme until after the trial.²⁷

Of importance in his ruling was where he stated that public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false

²⁶ 403 U.S. 713 (1971)

²⁷ SATA v CHIMBA AND OTHERS (2010/HP/1282) / [2011] ZMHC 74 (2 September 2011)

accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. As such, despite granting the injunction, the Court actually realised its negative effects

“An official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery.”²⁸ The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried.

To submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. The public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy the Court of his good faith.

This being the case, the answer must be found in a balance between the evils inevitable in either alternative. As such in light of the foregoing, the courts have the important task of determining this distinction. In line with this, the rationale to affording public figures a different standard to that of private individuals has been explained thoroughly by the American courts.

They are of the opinion that public figures are those who, by reason of the notoriety of their achievements seek the public's attention and therefore, "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."²⁹ As a result of this, the American courts have reviewed public figures' allegations of defamation with greater scrutiny

²⁸ As per Ngulube CJ in *SATA v POST NEWSPAPER HCZ Judgment No. 1 of 1995*

²⁹ *GERTZ v ROBERT WELCH, INC.*, 418 U.S. 323, 342 (1974).

than they have the claims of private individuals and the courts have consistently given greater protection to the right of free speech than they have given to the opposing interest of defending the reputations of public figures.

2.5 CASE FOR THE CLASSIFICATION OF ELECTION CANDIDATES AS PUBLIC FIGURES

Despite The First Amendment of the American Constitution not being as elaborate as Article 20 of the Zambian Constitution, the Supreme Court of the United States, has had no difficulty in distinguishing among defamation plaintiffs and categorized them as plaintiffs who are public officials on the one hand and those who are private individuals on the other. They held that the constitutional guarantee of freedom of speech and press prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he (the plaintiff) proves that the statement was made with 'actual malice', that is with knowledge that it was false or with reckless disregard of whether it was false or not.

A journalist may go to whatever lengths the ordinary citizen may go and, except where the statute law otherwise provides, the range of his assertions, his criticism, or his comments, is as wide as, and no wider, than that of everyone else.³⁰ With this in mind, it is a necessary evil that the limits of comment on a matter of public interest are very wide indeed, especially in the case of public persons. When under attack, those who fill public positions must not be too thin-skinned. They are also taken to have offered themselves to public attack and criticism and the public interest requires that public conduct shall be open to the most searching criticism.

Even the defence of fair comment which is based on the availability of a sufficient substratum of true facts and which is generally defeasible if grounded on misstatements was heavily adjusted

³⁰ Francis P. Kasoma, *The Press and Multiparty Politics in Africa* (Tampere: University of Tampere, 2000), 90.

against the public official is in favor of free speech and press. Thus we find that the court in the Sullivan case held that the Fourteenth Amendment required recognition of a conditional privilege for honest misstatements of fact so that fair comment should be available for honest expression of opinion based on the privileged but false facts, to the same extent as comment on true facts, unless the plaintiff public official proves actual malice and this to the higher standard of proof of 'convicting clarity' found to be required by the Constitution. In the case of Curtis Publishing Co and Butts Associated Press v Walker³¹, the Court extended the Sullivan principle to public figures who are not public officials. In doing so, Harlan J pointed out very carefully that the decision was not meant to give the impression that the press was to be given a blank cheque to embark upon a course of destruction of the reputations of public officials or public figures.

The rationale to affording public figures a different standard to that of private individuals has been explained thoroughly by the courts. They are of the opinion, that public figures are those who, by reason of the notoriety of their achievements seek the public's attention and therefore, "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."³² As a result of this, courts have reviewed public figures' allegations of defamation with greater scrutiny than they have the claims of private individuals and the courts have consistently given greater protection to the right of free speech than they have given to the opposing interest of defending the reputations of public figures.

³¹ (1967) 388 US 130, 18 L Ed 2d 1094

³² GERTZ v ROBERT WELCH, INC., 418 U.S. 323, 342 (1974).

2.6 IMPORTANCE OF THE DISTINCTION BETWEEN PUBLIC FIGURES AND PRIVATES INDIVIDUALS

It can be seen that the United States Supreme Court and the House of Lords in the United Kingdom have made considerable efforts in attempting to make the distinction between the public and private divide as regards defamatory legal actions. It is prudent therefore for the Zambian courts to make this distinction clear as not only does it speak to the remedies being sought by a plaintiff in such an action but it also gives the guide as to what standard can be applied when dealing with said plaintiff. This is not to say that an Election candidate once categorized as public officials will be bared to bringing an action for defamation as the English Courts restricted for Governmental bodies but it will necessary as to the burden of proof that will have to be satisfied in proving defamation.

In addition, the distinction can help in the determination of whether the rationale and principles relating to impersonal criticism be extended to public officials in the wholesale manner. In the opinion of the court in Sullivan, which was delivered by Brennan J, stress was laid on the fact that the alleged libelous publication caused injury to official reputation. The court weighed the public interest of the public's receiving information against possible injury to the official reputation of public figures and took the view that the chances of injury to the private or personal characters were usually very small when the discussion was on official conduct. The judges were ever so careful to draw the distinction between injury to official reputation arising from official conduct and injury to the personal character of an official.

The protection of Constitution in Zambia does extended to injury to private character or the private conduct of a public official as such it is a matter of adjudication left to the determination of the court thus the need for this important distinction.

2.7 INJUNCTIONS

An injunction is a judicial process whereby a party is ordered to refrain from doing a particular act of thing and it is an equitable. A plaintiff may secure an injunction against a defendant, an order that the defendant shall not do certain acts. If such an injunction is not obeyed, the defendant is said to be in contempt of court and may be punished by fine or imprisonment.

The kind of injunction that is dealt with in this study is an interlocutory injunction which is one granted before the trial for the purpose of preventing any change in the status quo from taking place until the final determination of the merits of the case. Interlocutory injunctions may be prohibitory or mandatory. In exercising its jurisdiction by way of interlocutory injunction, the Court acts upon the principle of preventing irreparable damage. As such it is the first principle of injunction law that prima facie the Court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. In the case of *Plimpton v Spiller*³³ the court propounded the object of an interlocutory injunction or interim injunction and stated its purpose as to preserve matters in *status quo* until the case can be tried and the party applying for an interlocutory injunction must always give an undertaking in damage, in case it should turn out at the hearing that he is in the wrong.

It follows therefore that such an injunction usually so framed as to continue in force only until the hearing of the cause, or until further order. It does not assume finally to dispose of 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.

³³ (1876), 4Ch. D. 286

It was held in the case of Turnkey Properties v Lusaka West Development Company LTD., B.S.K. Chiti (sued as receiver), and Zambia State Insurance Corporation LTD³⁴ that;

“(i) an interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial.

(ii) it is improper for a court hearing an interlocutory application to make comments which may have the effect of pre-empting the decision of the issues which are to be decided on the merits to the trial.

(iii) in interlocutory injunction should not be regarded as a device by which an applicant can attain or create new conditions favourable only to himself.

(iv) in applications for Interlocutory injunctions the possibility of damages being an adequate remedy should always be considered.”

Of importance in the aforementioned judgement is the insistence of the court not to make comments that would have an effect on the determination at the final hearing. Therein, Honourable Ngulube stated “we do not believe that it would be proper for us, at this stage, to make any comments which may have the effect of pre-empting the issues which are to be decided on the merits at the trial.”

³⁴ (1984) Z.R. 85 (S.C.)

Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds, first, that the injury is irreparable and second that it is continuous.

As regards defamatory matters, the learned authors of Halsbury's Laws of England³⁵ have stated that the Court has the jurisdiction to restrain the publication of defamatory statements, if necessary on an interlocutory application, and even where no damage has actually accrued, provided it is imminent.³⁶ Having noted this, it should further be stated that where the plaintiff is asserting a right, they should show a strong prima facie case, at least, in support of the right which he asserts. The general application of the rules that relate to interlocutory injunctions cannot be applied *mutatis mutandis* so as to allow for necessary changes considering the wide range of considerations that have to be taken into account in these particular cases.

In the case of Edward Jack Shamwana v Levy Patrick Mwanawasa³⁷ Ngulube CJ gave guidance as to the ordering of interim injunctions, particularly in defamation cases as the one at hand.

He noted that he had the discretion to grant an interim injunction in order to restrain libel but could not restrain the publication of libel where the defences of justification, fair comment, or privilege were raised. The rationale for this rule being the importance in the public interest that the truth should come out. He went on to state that "the right to free speech must be measured or weighed against the right to reputation and must be respected. It must not be assailed without lawful justification. Once besmirched by unfounded allegations, the damages can be irreparable and everlasting, especially if there is no opportunity given to vindicate one's reputation."

³⁵ Viscount Simonds, Halsbury's Laws of England 3rd Edition: Volume 21 (London: Butterworth's & Co. (Publishers) Ltd 1957. 379

³⁶ QUARTZ HILL CONSOLIDATED GOLD MINNING V. BEALL (1882) 20 CH D 501

³⁷ (1993 -1994) ZR 149 (HC)

The need and importance of interim injunctions cannot be overstated in defamatory actions. It is wrong for any person before or during elections to publish false statements in relation to any candidate's personal character or conduct for the sole or dominant purpose of adversely affecting the return of such candidate, unless of course he clearly show or adduce reasonable evidence on grounds for believing in fact that the defamatory material is true, is fair comment on matter of public concern, or is protected by privilege as is posited above. This cannot be proved until the conclusion of trial and by allowing one to continue to publish such statements would lead the reputation of the candidate being brought into disrepute and the only way to avoid this is by the grant of an interim injunction.

2.8 CONCLUSION

In conclusion, this chapter has discussed the law on prior restraint and it is clear that the time has come for the Zambia Courts to place a “heavy burden” on one seeking to restrain speech or the press in advance of publication as has been the case in the United States of America. This will go a long way in upholding the well-known principle that before a constitutional right can be infringed upon, a highly convincing reason needs to be adduced before the court. The latter part discussed injunctions and their general effect. The next chapter will discuss the law on Freedom of Expression. It will also give a comparative study on how other jurisdictions have applied this law in relation to defamation.

CHAPTER 3: THE LAW ON FREEDOM OF EXPRESSION, FREEDOM OF THE PRESS AND DEFAMATION DURING ELECTIONS IN ZAMBIA

3.1 INTRODUCTION

This chapter has two main aspects. The first component deals with Freedom of Expression in Zambia. The second part gives discusses the application defamatory laws, in relation to public figures, in various jurisdictions in the world. The various jurisdiction used in this Section have where selected based either on the similarity or specific difference with Zambia in their legal regimes. In line with this, it should be pointed out that certain jurisdictions in the world, in addition to civil sanctions imposed on those found liable in defamatory action, impose criminal sanctions. This being the case and in line with of the nature of this research, only the civil aspect of their legal regimes will be the focus.

3.2 FREEDOM OF EXPRESSION AND THE PRESS IN ZAMBIA

Freedom of expression is only a human idea and is incapable of exact expression. It is an innate, instinctive desire of man for the right of self-expression and for the right to commune freely with his fellow men. It entails to some extent that any person is entitled to hold whatever view or opinion that he or she wishes.³⁸ Also described as the life blood of a democracy,³⁹ it is necessary in a democratic society especially during the period of elections.

The free flow of information and ideas lies at the very notion of democracy and is crucial to the effective respect of Human Rights. In the absence of respect for the freedom of expression, which includes the right to seek, receive and impart information, and ideas, it is not possible to exercise the right to vote, expose human rights abuses and corrupt, inefficient governments. To

³⁸ Thomas Jones, *Human Rights: Group Defamation, Freedom of Expression, and the Law of Nations* (London: Martinus Publishers, 1998), 31.

³⁹ Alfred W. Chanda. 1998. "Freedom of Expression and the Law in Zambia." *Zambia Law Journal* 30:63.

this end, the public has the right to criticize the action of their leaders and engage the government in full, open, uninhibited and, if need be robust debate about their actions, policies and programmes.

3.3 CONSTITUTIONAL GUARANTEE OF FREEDOM OF EXPRESSION AND THE PRESS IN ZAMBIA

The constitutional provisions relating to Freedom of Expression and Press Freedom in Zambia are dealt with by Article 20 of the Constitution which is states;

“20 (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.

(2) Subject to the provisions of this Constitution, a law shall not make any provision that derogates from freedom of the press.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision-

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and

independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating, the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public officers; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.”

It should be noted as a matter of importance that freedom of expression is not absolute or limitless and its exercise may be subject to restrictions as are necessary in a democratic society.

The right to free speech is one which is of public interest and individuals in a democratic society should be allowed to possess and exercise this right. With this in mind, a number of things should be put into consideration in making a judgment in a defamation case. These include the underlying rationale for the protection of free speech and its importance to good governance and democracy, the question of the public conduct of public officials, the liability of public persons to greater scrutiny, considerations of what matters can properly be regarded as matters of public interest and the protection for private reputation and character.⁴⁰

The Media Institute of Southern Africa in its 2007 report noted that in Zambia, as elsewhere in Africa, it is not so much the absence of explicit Constitutional provisions on Press Freedom which is worrying, as the fact that whatever legal provisions exist are rendered useless by a host of subordinate legislation.⁴¹

⁴⁰ Dario Milo, *Defamation and Freedom of Speech* (Oxford: Oxford University Press, 2008),

⁴¹ Media Institute of Southern Africa, “*So this is Democracy?*”: *Report on the state of Media Freedom and Freedom of Expression in Southern Africa* (Windhoek: The Media Institute of Southern Africa (MISA), 2007)

They further noted that in as much as Article 20(1) and (2) provide for freedom of expression and press freedom respectively, the legal protection they purport to provide is non-existent as they are numerous other statutes the state can invoke to circumvent these constitutional provisions. One of the functions of these Constitutional provisions is to ensure ample opportunity for the people to determine and resolve public issues. As such where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it. It becomes of paramount importance that the courts take this into consideration when passing judgments.

3.4 JUDICIAL INTERPRETATION OF FREEDOM OF EXPRESSION AND PRESS FREEDOM IN ZAMBIA

The courts have an important role to play in protecting journalists and the people against prosecution for merely exercising the human right of freedom of expression.⁴² Press Freedom and Freedom of expression are Human Rights and not guaranteed in absolute terms. Derogation are permitted under Article 20 (3) and the said derogation clause is couched in very wide terms. Broadly construed, it completely emasculates the protection of Freedom of Expression contained in clauses 1 and 2 of Article 20. The phraseology of derogation clauses implies that almost any restriction can be justified. It therefore becomes imperative on the Judiciary to insure that the clause is not abused especially during the election period where citizens are required to have knowledge of the candidates.

Trends in judicial decisions show that the courts have over the past years had a tendency to broadly construe derogations which has resulted in negative effect on the protection that Article 20 seeks to provide. A prime illustration of this is the case of *The People v Fred M'membe*,

⁴² Alfred W. Chanda, "*Freedom of Expression and the Law in Zambia*", 145

Masautso Phiri and Bright Mwape⁴³ which dealt with inter alia the Constitutionality of S. 69 of the Penal Code which relates to defamation of the President. The question before the court was whether S. 69 of the Penal Code conflicted and offended Article 20 thereby infringing upon Freedom of Expression. The Supreme Court, on this issue, held that there was nothing in Article 20 which immunized defamation law. The test required being if it had its aim in at least one of the interests or purposes listed in Article 20(3).

Additionally, in the case of Michael Chilufya Sata v Post Newspaper Ltd⁴⁴ former Chief Justice Matthew Ngulube said:

I do not consider that there can be any who would seriously dispute that side by side with the freedom of speech is equally very important public interest in the maintenance of the public character of public men for the proper conduct of public affairs which requires that they be protected from destructive attacks upon their honour and character.

From this opinion, interest is drawn to the equal status placed on public interest and freedom of speech. The equation of freedom of speech to the maintenance of public character for the proper conduct of public affairs, reveals a very broad construction of the derogations to the freedom of expression.

As such as was confirmed by the court in the aforementioned case, Freedom of Expression and Press Freedom are qualified by exception, in some cases more heavily than in others. It therefore

⁴³ (1995-1997) ZR 118 (S.C)

⁴⁴HCZ Judgment No. 1 of 1995

becomes the role of the Court to balance the public interest against the rights of individuals. The above mentioned cases show that the Supreme Court has sided with the individual's right to protection rather than see to it that freedom of expression is exercised freely.

3.5 JURISDICTIONAL COMPARISON OF DEFAMATORY LAWS

Taking into account the vast number of cases that have arisen in prior years as regards defamation of election candidates, perhaps, it is now time to modify the common law principles of the law of defamation in their application to election candidates as to their right of action, the burden and standard of proof, and the latitude the press should be permitted to subject them to criticism and scrutiny. In attempting to find a solution to this problem it is prudent that legislation and court decisions in a vast array of jurisdictions be taken into consideration so as to find a suitable manner in which to deal with such cases.

3.5.1 INTERNATIONAL INSTRUMENTS

Before looking into defamation regimes of various jurisdictions, it is important to note that they are salient provisions in various International Instruments that provide for the protection against defamation. These are of particular importance in determining the rights of a Plaintiff particularly with the growing movement towards acceptance of the domestic application of international human rights norms that assist to resolve any doubtful issues in the interpretation of domestic law in domestic litigation.

Furthermore, it will be noted from some of the judicial opinions hereinafter that some courts in the various jurisdictions, dealing with a similar problem, have used these provisions in arriving at judgments on the same issue. Notwithstanding, it does not follow that merely because of the

existence of similar provisions in international instruments or domestic laws, that the courts in the various jurisdictions can have or have had a uniform approach.

The value of these instruments and decisions is merely to help us to formulate a preferred direction which, given the context of our own situation and the state of our own laws, may be different to a lesser or greater extent.

The United Nations International Covenant on Civil and Political Rights, in Article 19 of provides that;

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, or in the form of art, or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary; (a) for respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals.

In the case of Zambia and other African countries, reference can also be made to the provisions of Article 9 of the African Charter on Human and Peoples' Rights which declare the right of

every individual to receive information and to express and disseminate his opinions ‘within the law’.

3.5.2 UNITED STATES OF AMERICA

Similarities exist in the provisions of the First and Fourteenth Amendment of the American Constitution and Article 20 of the Zambia Constitution as articulated above. The First Amendment to the United States Constitution reads, omitting the irrelevant: ‘Congress shall make no law... abridging the freedom of speech, or of the press.’ The Fourteenth Amendment reads: ‘No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.’

An analysis of the wording of the above provisions shows similarities in Constitution of Zambia and that of the United States. Despite these similarities, it can also be observed that the United States Constitution is not as elaborate as that of Zambia in the Protection of Freedom of Speech and Press Freedom. Notwithstanding this disproportion, the Supreme Court of the United States was able to imply some requirements in order to promote the freedom guaranteed by the Constitution. They said they had no difficulty in distinguishing among defamation plaintiffs and categorized them as plaintiffs who are public officials on the one hand and those who are private individuals on the other in the case of *New York Times Co. v Sullivan*.⁴⁵

They held that the constitutional guarantee of freedom of speech and press prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he (the plaintiff) proves that the statement was made with ‘actual malice’. Further, they must show that it is with knowledge that the information was false or with reckless disregard of whether it was false or not that it was published. The Court went on to observe that qualified

⁴⁵ 376 U.S. 254 (1964)

privilege of honest mistake of fact is required by the First and Fourteenth Amendments in order to give citizens and newspapers a 'conditional privilege' immunizing non-malicious defamatory misstatements of fact regarding the official conduct of public figures.

The United States Supreme Court has from time immemorial, especially in matter of public interest, supported Freedom of Expression over the right of an individual who is a public figure. In so doing, they have realized that one of the main functions of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues.

The Free Press Clauses in the United States Constitution protect publication of information and opinions, and applies to a wide variety of media. In *Near v Minnesota*⁴⁶ and *The New York Times v United States*⁴⁷, the Supreme Court ruled that the First Amendment protected against prior restraint, pre-publication censorship in almost all cases. While the petition clause therein protects the right to petition all branches and agencies of government for action.⁴⁸

In light of this the Court has found that where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.⁴⁹ This proposition can further be evidenced by the ruling in *Whitney v California*⁵⁰ where the court opined that:

it is imperative to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of a constitutional government. This is not to say

⁴⁶ 283 U.S. 697 (1931)

⁴⁷ 403 U.S. 713 (1971)

⁴⁸ Edward Mannino, *Shaping America: The Supreme Court and American Society* (Carolina: University of South Carolina Press; 2000), 149

⁴⁹ *DE JONG v OREGON*, 299 US 353, 365, 81 L ED 278, 284.

⁵⁰ 274 US 357, 375, 71 L Ed 1095, 1106

that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment. This, of course, cannot be said public matters are involved.

3.5.3 ENGLAND

Modern libel and slander laws, as implemented in many Commonwealth nations as well as in the United States are originally descended from English defamation law. The law in England has mainly developed through common law. With the last Acts by Parliament being passed in 1952 and 1996 prior to the enactment of the Defamation Act of 2013. This act was passed to reform English defamation law to ensure that a fair balance is struck between the right to freedom of expression and the protection of reputation.

The Act has made a number of substantive changes to the law of defamation which include a requirement for claimants to show that they have suffered serious harm before suing for defamation and the introduction a defence of "responsible publication on matters of public interest". The Act has also introduced new statutory defences of truth and honest opinion to replace the common law defences of justification and fair comment

Section 4 of the new Act has provides for publication on a matter of public interest. In so doing, the Reynolds privilege under common law has been abolished by the Act. Instead, it will be "a defence to an action for defamation for the defendant to show that the statement complained of

was, or formed part of, a statement on a matter of public interest; and the defendant reasonably believed that publishing the statement complained of was in the public interest.”⁵¹

In the new defence, there is no express requirement for the publisher to prove that it:

- a) has met a standard of responsible journalism;
- b) satisfied any or all of the *Reynolds* factors; or
- c) acted both fairly and responsibly in gathering and publishing information.

Instead, assuming that the statement was on a matter of public interest, the only issue will be the defendant’s reasonable belief. In deciding this, “the court must make such allowance for editorial judgement as it considers appropriate”, as well as “all the circumstances of the case”. The defence seems to be more flexible and more in favour of free speech than *Reynolds*.

Admittedly, in previous cases before the enactment of the 2013 Act, the English Courts have always encouraged a wider scope of comment on public matters. For instance the House of Lords in *Derbyshire Cc v Times Newspapers Ltd*⁵² held that, since it was of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism, and since the threat of civil actions for defamation would place an undesirable fetter on the freedom to express such criticism, it would be contrary to the public interest for institutions of central or local government to have any right at common law to maintain an action for damages for defamation; and that, accordingly, the plaintiff council was not entitled to bring an action for libel against the defendants.

⁵¹ Taylor Wessing, *Defamation Act 2013: Taylor Wessing Analysis* (London, 2013), 4
⁵² [1993] 2 LRC 617, [1993] AC 534

This being the case, the courts have also not shunned away from placing safe guards to ensure this privilege is not abused by journalists. Amponsah discusses whether the press has any special rights not shared with everyone else to make a comment upon a public persons or person occupying a public situation and concludes that they do not.⁵³ She states that, a journalists in England may go to whatever lengths the ordinary citizen may go and, except where the statute law otherwise provides, the range of his assertions, his criticism, or his comments, is as wide as, and no wider than, that of everyone else. Additionally, when under attack, those who fill public positions must not be too thin-skinned. They are taken to have offered themselves to public attack and criticism and the public interest requires that public conduct shall be open to the most searching criticism.

3.5.4 AUSTRALIA

Australian defamation law derives from English common law, but has been substantially modified by statute. Until 2006, jurisdictional differences abounded between the eight Australian states and territories, due to the differing extents to which the common law had been modified by legislation in each law area.⁵⁴ The jurisdictional differences have now been overcome by the enactment, by each Australian state and territory, of uniform defamation legislation in substantially identical form. In each state, the relevant statute is the Defamation Act of 2005.

The uniform legislation does not affect the operation of common law principles except to the extent that it provides otherwise, whether expressly or by necessary implication. The objects of the uniform legislation are to promote uniform laws of defamation in Australia to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in

⁵³ Faustina N. P. Amponsah, *Libel Law, Political Criticism, and Defamation of Public Figures in the United States, Europe and Australia* (New York: LFB Scholarly Publishing LLC, 2004), 78.

⁵⁴ D Butler and S Rodrick, *Australian Media Law. Second Edition* (Sydney: Pyrmont NSW Lawbook Co., 2004), 64

particular, on the publication and discussion of matters of public interest and importance; to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter and to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.

As regards case law, the Australian courts rejected the Sullivan approach in the case of *Theophanous v Herald and Weekly Times Ltd.*⁵⁵ Therein, the High Court of Australia said:

Once it is acknowledged, as it must be, that the existing law seriously inhibits freedom of communication on political matters, especially in relation to the views, conduct and suitability for office of an elected representative of the people, then, as it seems to us, that law is inconsistent with the requirements of the implied freedom of free communication. The law of defamation, whether common law or statute law, must conform to the implication of freedom, even if conformity means that plaintiffs experience greater difficulty in protecting their reputations. The interests of the individual must give way to the requirements of the Constitution. At the same time, the protection of free communication does not necessitate such a subordination of the protection of individual reputation as appears to have occurred in the United States. For that reason the defendant should be required to establish that the circumstances were such as to make it reasonable to publish the impugned material without ascertaining whether it was true or false.

The publisher should be required to show that, in the circumstances which prevailed, it acted reasonably, either by taking some steps to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps or steps which were adequate. To require more of those wishing to participate in

⁵⁵ [1994] 3 LRC 369, 124 ALR 1

political discussion would impose impractical and, sometimes, severe restraint on commentators and others who participate in discussion of public affairs. Such a restraint would severely cramp that freedom of political discussion which is so essential to the effective and open working of modern government.

At the same time, it cannot be said to be in the public interest or conducive to the working of democratic government if anyone were at liberty to publish false and damaging defamatory matter free from any responsibility at all in relation to the accuracy of what is published. In other words, if a defendant publishes false and defamatory matter about a plaintiff the defendant should be liable in damages unless it can establish that it was unaware of the falsity that it did not publish recklessly (i.e., not caring whether the matter was true or false) and that the publication was reasonable in the sense described. These requirements will redress the balance and give the publisher protection, consistently with the implied freedom, whether or not the material is accurate.

In one other respect the Sullivan concept of actual malice calls for some justification. As already noted, the common law connotation of malice embraces ill-will, spite and improper motive. There is an argument for saying that 'actual malice' should likewise extend to such motivating factors. However, it seems to us that, once it is accepted that it is necessary to show that the publication was reasonable in the sense to which we referred, there is no occasion to include malice according to its common law understanding as an element in the test to be applied. It will be noted from the preceding paragraphs that we do not consider that the plaintiff should bear the onus of proving that the publication is not protected. In our view, it is for the defendant to establish that the publication falls within the constitutional protection. That approach accords with the approach that the courts have taken in the past to proof

of matters of justification and excuse and we are not persuaded that the constitutional character of the justification should make any difference to the onus of proof. Whether the defendant has acted reasonably will involve consideration of any inquiry made by the defendant before publishing that is a matter peculiarly within the knowledge of the defendant.

In this case the Australian High court gave broad instructions on the way they proposed to protect the freedom to debate political issues and the fitness of a politician to hold office. In their analysis on the distinction between their provisions and those found in the United States Constitution, the Court realized that in both countries, they are distilling some principles by implication after finding that their Constitutions required such an exercise.

Given the provisions of Australian law, the court was been able to grant greater leverage to journalists in their reporting of matters that concern political issues and the fitness of a politician to hold office. With this in mind, the dilemma is that our Constitution attaches equal importance to freedom of the press and the right to reputation, without distinction whether such reputation belongs to a private or public individual.

3.6 CONCLUSION

In conclusion, this chapter has discussed the law on Freedom of Expression, Speech and Freedom of the Press in its first part. The latter part gave an outline of defamation laws in various jurisdictions and a in the international regime. The concluding chapter of this dissertation will give the findings recommendations and conclusion.

CHAPTER 4: FINDINGS, RECOMMENDATIONS AND CONCLUSION

4.1 FINDINGS

4.1.1 RESEARCH FINDINGS

The constitutional protection for the press embodied in the Zambian Constitution represents part of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

In the Zambia Courts, there has been a lack of careful consideration given to two competing propositions during elections. The competing propositions are, the interests of society that the public conduct of public men should be criticized without any limit and that the writer should have an honest belief that what he writes is true on one hand. On the other hand, the equally important public interest in the maintenance of the public character of public men for the proper conduct of public affairs which requires that they be protected from destructive attacks upon their honour and character if made without any foundation.

In analyzing these two prepositions, the Zambian courts have come to the conclusion that there is no need to formulate a new set of principles in defamatory matters that deal with public persons. In the alternative, they have chosen to maintain the ancient common law principles and dealt with all defamation cases in the same manner without regard to the circumstances of the case.

In an election campaign period, it is common for harsh and unflattering statements to often be made by political opponents and the media.⁵⁶ From the research carried out, it seems the courts

⁵⁶ <http://www.cyberlibel.com/repman.html> (Accessed 25th September 2012 at 18:55)

have neglected to recognize this fact and in line with this gone on to hold that election campaigns do not provide a license for defamation.

A general outlook of case precedent in Zambia shows that the courts have been reluctant or to apply a different criteria when determining cases that involve public figures. As such there is an important need to ascertain whether a two-fold criterion which would involve private individuals on one hand and public figures on the other can be applied in defamation cases in Zambia most importantly during the election period. This two fold criterion would be most important during the period for preparation of elections as it would allow persons who put themselves in such a position to be exposed there by granting the press some form of leverage.

Additionally, it can be noted that in matters to deal with defamation during the election period are not dealt with as a matter of urgency. This is despite the fact that prior restraint is imposed by judicial officers through the grant of injunctions to plaintiffs. This has been found to be a serious violation of freedom of speech expression and freedom of the press.

Finally, from the various jurisdictions analysed herein, it is clear that most countries in the world are amending their Defamation Laws so as to keep them in line with the developments in their democratic societies. For instance, England and Australia in 2103 and 2005 respectively amended their Defamation Acts. These amendments where both aimed at giving provisions that are more flexible and more in favour of free speech.

Where they have been no such amendments, the courts have over the years increasingly found in favour of defendants in their ruling. For instance, the United States of America, the Supreme Court has furnished the media with a valuable privilege by shielding journalists from liability for factual mistakes resulting from the journalists' reliance upon a credible source. As evidenced in

the case of Curtis Publishing Co. v. Butts, the Court extended the privilege to protect defamatory criticism of non-official public figures whose fame and notoriety necessarily subjects them to public scrutiny.

4.1.2 QUESTIONER FINDINGS

4.1.2.1 MEDIA

Mr. Shiekh S. Chifubwe, the General Manger of Staff Committees at the Post Newspaper and the Press Ombudsman for the Press Freedom Committee of the Post observed that in his over 21 years of practice, about 80% of the defamation cases brought against the Post have been thrown out of court for lack of merit.⁵⁷

He noted that Journalists are aware of the Provisions on the Law on Defamation but they are mainly influenced in their reporting by commercial considerations and appear to ignore the law in this regard. Furthermore, he advised that despite this knowledge of the laws, Journalists tend not to practice ethical journalism. In his opinion, Mr. Chiba in his reporting on Sata did not practice these ethics. He drew this conclusion from the fact that ethical journalism calls for journalists in their reporting to carry out balanced reporting and give all the parties a chance to be heard, a thing that Mr. Chimba neglected to do. In this vein, he noted that Mr. Sata was right in seeking an injunction and the court as in order when it granted one.

Statistically speaking, he has observed that the current defamation law as it stands is privy to a lot of abuse as Plaintiffs usually it to obtain injunctions that limit the free flow of information.

⁵⁷ Questioner answered on Monday 15th July, 2013 at 12:00hrs

Similar observations were noted from Mr. Mabvuto Sakala⁵⁸, the Operations Manager at Muvi Television in Lusaka. He noted that from his experience, injunctions are an unjustifiable hindrance on freedom of the press during elections. He cited an example of the 2011 polls where the then Attorney General obtained an injunction to restrain The Post Newspaper and two other private television stations; Muvi Television and Mobi Television from publishing election results before they are announced by the Electoral Commission of Zambia. He also however noted that Defamation Laws are a necessary evil in any society to the extent that they are not abused.

4.1.2.2 NATIONAL ASSEMBLY

Divergent views were received from Legal Counsel's at National Assembly. Mr. Chongo Musaonda, the Deputy Legal Counsel was of the opinion that the current legal framework governing defamatory conduct in Zambia is more than adequate to deal with any situation. He further states that in determining matters of defamation during elections, a different standard should not be applied but the courts should maintain consistency in the law. In light of this he suggests that nothing should be done in order to reduce the cases of defamation during elections as the Electoral Law and the Electoral Code of Conduct are sufficient. Furthermore, Mr. Musonda states that Injunctions are available to protect plaintiff from further injury to their reputation and that a lower criteria should not be applied towards journalists in their reporting of election candidates during elections.

On the other hand, Mrs. Banda, the Assistant Legal Counsel opined that the law is inadequate and needs revision to keep abreast with the developments in a democratic society like Zambia. She further noted that the laws do not adequately cover civil defamation in Zambia and that

⁵⁸ Questioner Answered Friday 12th July, 2013

injunctions in defamation cases are highly abused especially in the political spheres. She is of the opinion that a different standard should be applied in the protection of reputation in defamation cases during elections. To this end, she suggests that these matters should be determined expeditiously because they are usually frivolous and without merit. In expeditiously dealing with these matters, several frivolous claims will be thrown out at an early stage thereby saving the courts time.

The two were however in agreement on the importance of defamation in that they protect against injury to reputation and protect the goodwill of persons. They also pointed out that there is no need to apply a lower criteria toward journalists in defamation matters as they are aware of the laws on defamation. Despite this knowledge, Mrs. Banda pointed out that there is a serious lack of professionalism amongst journalists which has to be checked.

4.2 RECOMMENDATIONS

Based on the findings above, the following are recommended;

4.2.1 DISTINCTION

The Courts should draw a firm's distinction between an attack on the official public conduct of a public official and imputations that go beyond this and attack the private character of such an official which attack would be universally unsanctioned. The courts when considering the defence of fair comment on a matter of public interest arising from the conduct of a public official, should be more generous and expansive in its application.

Where an allegation complained of can properly be regarded as comment on the conduct of a public official in the performance of his official duties or on conduct reflecting upon his fitness and suitability to hold such office, freedom of speech and press can best be served in Zambia by

the courts insisting upon a higher breaking point, or a greater margin of tolerance than in the case of a private attack before an obvious comment based on facts which are substantially true can be regarded as unfair.

Furthermore, some recognition ought to be given to the constitutional provisions in art 20 and impersonal criticism of public conduct leading to injury to official reputation should generally not attract liability if there is no actual malice

4.2.2 PROVISION OF GREATER LATITUDE DURING ELECTION

PERIODS

As has been noted in the findings, it is common for harsh and unflattering statements to often be made by political opponents and the media during election period. For this reason, greater latitude needs to be extended towards these statements at that time, than at any other time. This has not been the case in Zambia with the result that cases of defamation have been on the rise during election periods. By provision of a certain level of leverage, journalists will be free to report on sensitive topics while Plaintiff's will be discouraged to bring trivial matters before the courts.

4.2.3 EXPEDIENT TRAIL OF DEFAMATION MATTERS DURING

ELECTIONS

The Courts must also deal with matters of defamation expeditiously during the election and election preparation period. It should be realized by Judicial officers dealing with such matters that the grant of an injunction during this period is seen and actually is a hindrance on freedom of speech and during the election period. As such, it would be prudent for judicial offices to deal with such cases as a matter of urgency as the public's right to know their election candidates remains vital throughout the period these matters stay in court.

4.2.4 AMENDMENT OF THE DEFAMATION ACT

The law on as it stands is antiquated, costly, unfair and time consuming, with result that it has a chilling effect on freedom of expression and the stifling of legitimate debate. The law needs to be brought in the 21st century and be formulated in way that it is balanced and fair by favouring freedom of expression and freedom of the press.

4.3 CONCLUSION

Therefore, whereas the *Zambian Courts* have stuck to principles inherited during the colonial era in coming up with Judgements on these matters, the rest of the world has moved forward. Realising that free speech and uninhibited public debate is necessary in a democratic society, most states have moved to amend their defamation laws and provide for this to be possible.

After the years of democracy and repeated trends in the judicial cycle of constantly receiving cases that deal with the same subject matter during the election period, the time is now to make a change. The Legislature and the Judiciary both have to play a role in ensuring that this pattern does not continue.

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APPENDIX I: KEY INFORMANT QUESTIONER



UNIVERSITY OF ZAMBIA
SCHOOL OF LAW
KEY INFORMANT INTERVIEW GUIDE

DEAR RESPONDENT,

You have been carefully selected to participate in a key informant interview. The two students who will be conducting this interview are Mazuba Moonga and Chapatama Ngaba. They are final year students in the School of Law at the University of Zambia. They are conducting research for their dissertations entitled *A Critique of the Legal Framework Governing Defamatory Conduct in Zambia* and *Analyzing the Legal Standard of Defamatory Conduct During National Elections in Zambia* respectively.

The interview will take approximately 45minutes and therefore we seek your indulgence in participating in the interview.

Thank you.

CHIPO MUSHOTA NKHATA
SUPERVISOR

INSTRUCTIONS TO INTERVIEWER:

- Introduce yourselves and give some background to your research.
- Inform the key informant why they were selected and what you seek to achieve from the interview.
- Explain how the interview is structured.
- Inquire if the key informant would like a copy of the final research paper.

PART A: ABOUT THE KEY INFORMANT

1. Name of Key Informant: _____
2. Name of Institution: _____
3. Position held by Key Informant: _____
4. Area of Employment:

- a) Media
- b) Legal Practice
- c) Judicial
- d) Other

Officer

Specify Position: _____

5. Years in Profession (of institution):

- a) One
- b) Two
- c) Three
- d) Four
- e) Five and Above

PART B: THE LEGAL FRAMEWORK FOR CIVIL DEFAMATION IN ZAMBIA

6. Are you aware of the law of defamation?

7. What are your views on the current legal framework governing defamatory conduct in Zambia?

8. Do you think the defamations laws adequately cover civil defamation in Zambia?

9. Have you or your institution been a party/ representative in a defamatory matter?

- a) Yes
- b) No

10. If your answer to (9) is Yes, what remedies were being sought in the defamation suit?

11. What do you know about injunctions as remedies in defamation suits?

12. Do you view interim injunctions as an unjustifiable hinderance on freedom of the press during elections?

- a) Yes
- b) No

13. Do you think defamation laws are important? Explain your response

14. Are you familiar with the case of **Sata v Chanda Chimba & Three Others**?

- a)Yes
- b)No

15. If yes to question (14) above, state your views about the case.

16. Do you think the legitimate interests of defamation laws were protected in the Sata Case?

17. Do you think journalists are fully aware of the laws of defamation?

a) Yes

b) No

18. Should a different standard of protecting reputation be applied in cases of defamation during elections?

a) Yes

b) No

19. Please explain your response to Question (18) above?

20. In your opinion, what needs to be done in order to reduce on cases of defamation during elections?

21. Do you think it is necessary to apply a lower criteria towards journalists in determining the outcome of defamation cases during elections? Kindly explain.

a) Yes

b) No

22. If your answer to (21) above is Yes, what safeguards should be put in place in order to avoid abuse by journalists?

23. Do you think the criminalisation of the defamation of the President in the Penal Code is justifiable in a democratic society like Zambia? Kindly explain.

24. Do you think there is need for any legislative reforms in the legal framework governing civil defamation? If so, what in particular?

THANK YOU FOR YOUR TIME AND PARTICIPATION.