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REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

CIVIL CAUSE NO. 55 OF 2017

(Before the Honorable Mr. Justice D. Madise)

BETWEEN

HON. DR. GEORGE CHAPONDA .....CLAIMANT

AND

BLANTYRE PRINT AND PACKING LIMITED.....1ST DEFENDANT

BLANTYRE NEWSPAPERS.....2ND DEFENDANT

GEORGE KASAKULA (THE EDITOR IN CHIEF MALAWI NEWSPAPERS) .....3RD DEFENDANT

INNOCENT CHITOSI (THE EDITOR, DAILY TIMES NEWSPAPERS) ..... 4TH DEFENDANT

CHAKACHA MUNTHALI (THE EDITOR, SUNDAY TIMES NEWSPAPERS) .....5TH DEFENDANT

ALICK PONJE.....6TH DEFENDANT

MADALITSO MUSSA.....7TH DEFENDANT

CORAM: HONORABLE JUSTICE D. MADISE

Mr. Chokotho, of Counsel for the Claimant

Mr. Mmeta, of Counsel for the Claimant

Mr. Mwantisi, of Counsel for the Defendant

Mr. Mbabungulu, of Counsel for the Defendant

Mr. Mathanda, Official Interpreter

Madise J,

JUDGMENT

Introduction

1. The Claimant took out a Writ of Summons against the Defendants claiming damages for defamation (libel) and extra judicial finding of guilt of theft and corruption. The Defendant have denied the claim and have called the Claimant to strict proof on the basis that the words complained of were not defamatory, as the words were true in substance based on fair comment. That the alleged defamatory statements were published for the national interest and in pursuit of media freedom on public information of public interest. The Defendants denied that the articles were meant to damage, injure and discredit the character and reputation of the Claimant.

The Facts

2. The Claimant himself testified and stated as follows:

   I, Honorable Dr. George Chaponda, of P.O. Box 48, Mulanje in the Republic of Malawi **MAKE OATH** and **STATE** as follows:

3. I am a lawyer by training, a former international civil servant having worked with, among others, the United Nations, and a Member of Parliament for Mulanje South West, Vice President for the Democratic Progressive Party (southern Region) and former Minister of the Republic of Malawi having held different portfolios.
4. I was enjoying my tranquility when the 1st and 2nd Defendants being publisher and printer of Malawi News Newspaper, The Daily times Newspaper and The Sunday Times Newspaper

Launched a Coordinated defamatory, libelous and injurious barrage of publications effective December, 2016 (hereafter 'Injurious Publications').

5. The coordinated Injurious Publications were effectuated by 3rd Defendant as the Editor-in-Chief of Malawi News Newspaper, the 4th Defendant as the Editor of The Daily Times Newspaper and the 5th Defendant as the Editor of The Sunday Times Newspaper.
6. In pursuit of the coordinated Injurious Publications, the 6th and 7th Defendants were reporters and authors of some of the Injurious Publications.

The calculated defamatory imagery of the Defendants

7. On the 28th day of January 2017, the 1st, 2nd, 3rd and 6th Defendant falsely and maliciously wrote and printed and published, or caused to be written, printed and published, on pages 1 and 2 of the 28th January to 3rd February 2017 issue of "Malawi News" newspaper defamatory words of, and concerning me as follows:
8. At page 1 the words "THE DEFIANT CHAPONDA"
9. At page 2 the Words

> *"However, despite his secretary having reportedly confirmed to the committee that the invitation had been received, Chaponda failed to show up even though he supposedly made no effort to provide reasons for his non-appearance……*
>
> *Our efforts to speak to Chaponda proved futile as he first answered our call but gave the phone to another person even before we introduced the subject……*
>
> *As we went to press, it was reported that Chaponda had later claimed that he had failed to appear before the committee because he had just received the invitation a*

few moments before. (Who reported this? We are confusing the readers. We said he did not pick our phone)"

Exhibited hereto and marked **"GC1"** is a copy of the said publication

10. The words complained of in in exhibit **"GC1"** in their material and ordinary meaning meant and were understood to mean:

    I am a defiant and self-willed person who is not willing to cooperate with other member of the society;

    I am not willing to be subservient and eager to disdain lawful and reasonable demands.

11. The stay Words "*who reported this? We are confusing the readers. We said he did not pick our phone*" amplify a coordinated and premeditated storyline designed to champion a fabricated imagery of defiance.

12. The words complained of in exhibit **"GC1"** had the effect of:

    Portraying an appalling image at face value to the public without even reading for further details.

    Attacking my character as an individual in the eyes of right-thinking people of the society.

13. The 1st, 2nd, 3rd and 6th Defendant published the said words in exhibit **"GC1"** out of malevolence or spite towards me with the aim of tarnishing my image as amplified by the stray words "*Who reported this? We are confusing the readers. We said he did not pick our phone"*:

14. The 1st, 2nd, 3rd, and 6th Defendants either retorted, or 'closed their eyes', or were repugnant, to any perceived rationale for my failure to attend the parliamentary committee alluded to in the newspaper article;

15. The 1st, 2nd, 3nd and 6th Defendants were adamant to concretize and emblazon the imagery of the title of the article **'THE DEFIANT CHAPONDA'** at all costs irrespective of the available and illuminating information to the contrary; and
16. The 1st, 2nd, 3rd and 6th Defendants purposefully disregarded the truth to fulfill their ill motives and conclusions to embrace the editorial comment titled **'Chaponda can't keep playing dishonorable'** on page 2 of the same publication.
17. By reason of the premises set out above, my image and reputation as a public official and individual has been severely scandalized and tarnished.

Coordinated and calculated characterization of decadence and rot

18. On the 29th January 2017 the 1st, 2nd, 5th, and 7th falsely and maliciously wrote and printed and published, or caused to be written, printed and published, on pages 6 of the issue of "The Sunday Time" newspaper defamatory words of, and concerning me as follows:
19. My portrait was hovering over a bolded headline "*Epitome of Decadence*".

Exhibited hereto and marked **"GC 2"** is a copy of the said publication.

20. The publication in exhibit **"GC2"** of my picture/photograph against this portrayal of "Epitome of decadence" is more harmful to my character and this has been circulated and kept for reference for generations to come who are being, and will be, made to believe that I was a morally rotten character.
21. The 1st, 2nd, 5th and 7th Defendants construed an opinion that Malawi is in a state of moral rottenness and that I am the very "epitome of decadence".

22. The manner in which my photograph/picture is positioned and published against the headline **"Epitome of Decadence"** is intentionally calculated to portray me as a morally rotten person, and worse, that I am the very epitome of that moral rottenness in our society. My image and reputation as a public official and individual has been lowered and brought into public scandal, odium and contempt.

23. The 1st, 2nd and 3rd Defendant falsely and maliciously wrote and printed at page 2 of the 21st January to 27th of January 2017 issue of "Malawi News" newspaper the words in the editorial comment of, and concerning, me as follows:

> "***No one is above the law, including Chaponda*** – *It isn't that Minister George Chaponda does not know how the law works. It is just that he thinks that he is above the law and that he can therefore do whatever he wants and in defiance of court decisions ...*"

Exhibited hereto and marked **"GC3"** is a copy of the publication.

24. The 1st, 2nd and 4th Defendants falsely and maliciously wrote and printed at page 2 of the 23rd January 2017 issue of "The Daily Times" newspaper the defamatory words in the editorial comment of, and concerning, me as follows

> "***Govt is setting bad precedent*** – *Even the most brutal savage knows that disobeying the court order is a crime in itself. This means even an undergraduate law student still struggling with LAW 101 knows what contempt of court is all about. So it is nothing but an act of sheer uppity for a Yale-trained lawyer to disregard a court order that clearly restrains one from performing any other*

duty as minister. We are talking about the supposedly suspended Minister of Agriculture, George Chaponda, who despite a court order stopping him, he proceeded to Germany where he is representing Malawi as Minister of Agriculture."

Exhibited hereto and marked **"GC4"** is a copy of the publication.

25. The 1st, 2nd, 3rd, and 6th Defendants falsely and maliciously wrote and printed in exhibit **"GC1"** the defamatory words of, and concerning, me under the title 'The Defiant Chaponda' as follows:

"Chaponda's failure comes hot on the heels of his jumping a court injunction last week which effectively suspended him from discharging ministerial duties until the probe in the maize saga is completed. He flew out to Germany on official duty"

26. The 1st, 2nd, and 3rd Defendant falsely and maliciously wrote and printed in exhibit **"GC1"** the defamatory words of, and concerning me in the editorial comment as follows:

"***Chaponda can't keep playing the dishonorable man*** *– Last week, this comment was about George Chaponda ignoring a court injunction when he travelled to Germany on official duties.*

You would have given him a benefit of doubt and consider his action last week an accident. Now we know it wasn't! And that is very strange, strange because

Chaponda is supposed to be Knowledgeable of his obligation as a public official. In that capacity, he is expected to be an example to every citizen but he is strangely opting to play the dishonorable man..."

27. My image and reputation as a public official and individual has been brought into public scandal, odium and contempt.

Extrajudicial finding of guilt of theft, corruption and criminalization

28. The Defendant maliciously acted as a 'bush court' and thereby accused, charged, tried and found me guilty and prayed for my punishment outside the norms of justice.
29. For the 1st, 2nd, and 4th Defendants at page 2 of the 23rd December 2016 issue of "The Daily Times" newspaper the defamatory words in the editorial comment headed "***Malawi cannot stand this rot*** -…. *Come to think of it that by purchasing this maize from a private company, the government spent close to K9.5 billion more than it could have, had the deal been between Lilongwe and Lusaka. And this K9.5 billion is believed to have gone into pockets of a few corrupt people who care less about this country....Clearly, all this blatant corruption had the blessing of the top management of this country because it all started from...Then Minister of Agriculture, George Chaponda blatantly said the government was happy with the maize hike."*

Exhibited and marked hereto **"GC5"** is a copy of the publication.

30. In the immediate aftermath of these publications, I would occasionally get mobbed with people baying for the worst against me.

31. For the 1st, 2nd, and 4th Defendant, at page 2 of the 16th January 2017 issue of the "The Daily Times" newspaper the defamatory words in the editorial comment headed "***Kapito's stand defies reason*** – *The voice of reason does not*

> *Come from everyone and everyone who has tried to justify or conceal wrong-doing in the much-publicized maize scandal is doing Malawi great injustice. Unfortunately, Consumer Association of Malawi (CAMA) Executive Director, John Kapito, has decided to abandon ordinary Malawians by attempting to trivialize the magnitude of the maize scandal. It is obvious that Kapito no longer represents the interests of the consumer that he claims to defend. It is unthinkable that Kapito has leapt to the defence of Minister of Agriculture George Chaponda.... When there is evidence that every effort was made to silence those who vowed to support the truth"*

Exhibited hereto and marked **"GC6"** is a copy of the publication.

32. For the 1st, 2nd, 5th and 7th Defendant, at page 6 of the 22nd January 2017 issue of "The Sunday Time" newspaper the defamatory words in the article of Madalitso Musa headed:

> "***In the Book of John*** - *...While people are waiting for the Commission of inquiry and joint committee of Agriculture and Public Accounts to probe into the dubious maize deal between Malawi and Zambia, somehow, John Kapito wants to impress upon us that he is the quickest investigator on the land. According to him, he has already done his investigation and has found Minister*

of Agriculture George Chaponda... not guilty of any wrongdoing in the questionable purchase of the grain from Zambia."

What I find laughable is that Kapito really thinks he still represents the timid Consumer of 1993. Twenty-four years of posing as a Consumer rights activist, Kapito should have been smart enough to know that people have now woken up and can easily tell when someone is playing games with them."

Exhibited hereto and marked **"GC7"** is a copy of the publication,

33. By reason of the premises set out above, the Defendants have criminalized and demonized me with coordinated articles, editorials and commentaries. That very act of coordination vindicates the existence of ulterior and malicious motives against me.

Calculated malice

34. The Defendants published the complained words calculating thereby to increase the circulation of the said newspapers and with a view to making profit from the sale of the said newspapers and of advertising space therein. The Defendants had persistently been covering me in a defamatory tone.
35. The Defendants covered me in their publications mostly on the cover pages, editorial columns and other prime pages.
36. The Defendants struck a scandalous thread of story-telling to ridicule, belittle and alienate me.

37. Although the Defendants knew the allegations were untrue, they calculated that the profits from publication would be enormous, outweighing the risk of a claim of damages.

38. The Defendants knew that the allegation were untrue but defied any notion to the contrary as is clear from the article title '**In the book of John**': The Defendants belittled and admonished and findings that were against their much touted finding of perceived wrong doing against the Claimant as is clear from the editorial comment headed **'Kapito's stand defies reason'**.

39. The Defendants have, over a given period of time set out above herein, published news stories, columns and editorials including photographs of the Claimant based on their view that the Claimant had stolen money and that he is a liar in whatever he says in relation to the procurement of maize and thereby scandalizing the Claimant both in Malawi and outside Malawi.

40. Subsequent to the in injurious publications, I received calls from my colleagues and members of the society both on the national and international scene asking me about my well-being and if I had indeed stolen funds from the government.

41. Due to the unfair and unbalanced reporting, the family has suffered irreparable reputational damage due to the unsubstantiated media accounts portrayed in the Daily Times, including:

- The family received a large volume of queries from South Africa where many Malawians have viewed the reports on the Times online reports. A number of South Africans also picked up on the same report including journalists at the South African Broadcasting Corporation (SABC).

- In the United Kingdom, several charities had expressed interest in working with the family on social and community projects in Malawi but pulled out after the negative media coverage from the Times media group.
- The stories have proliferated widely due to the Times media coverage and were circulated throughout the United Nations system where Dr George Chaponda was formally a respected member of staff at UNHCR. His reputation at the UN has been badly damaged after a long and distinguished career of public service.

42. Moreover, since the publication of the aforementioned injurious publications, I have been stunned by different people. I was removed as the Leader of the House as my fellow Members of Parliament refused to be associated with me as their Leader. I was removed as the Minister of Agriculture, Irrigation and Water Development as the President was compelled to do so from the nature of reporting that was being generated by the Defendants.

43. I state the above verily believing the same to be true to the best of my knowledge, information and belief.

The Defence

44. GEORGE KASAKULA of Blantyre Printing and Publishing Company Limited. Private Bag 39 Blantyre hereby make oath and state as follows: -

45. I am of full age. I am the Managing Editor for the 1st and 2nd Defendant who at all material times are the employers for the 3rd- 7th Defendant within group of companies called the Times Group.

46. This statement, unless otherwise stated is based on information known to me in that capacity and I hereby verify the truth of the facts presented to court herein in terms of Oaths, Affirmations and Declarations Act.

47. The Times Group is a group of media companies. It is, among others, involved in the publication of newspapers for public consumption since 1995.

48. By these proceedings the Plaintiff sues all the Defendants herein in respect of 7 news articles that appeared in the .Times Group's various daily and weekly newspaper in the period between **23rd December 2016** and **28th January 2017** in the exercise of the Defendants' media freedoms and practice.

49. At all material times prior to and during the said publications, the Plaintiff was the Minster of the Malawi Government Responsible for Agriculture, Irrigation and Water Development, a Member of Malawi Parliament for Mulanje South West constituency, a Leader of House in Malawi Parliament on the Government side and a Vice President for the Southern Region for the governing political party within the Republic of Malawi.

50. In the exercise of their media freedom of the press, of expression and of opinion on the matters and where appropriate after verifying such information with the plaintiff or other responsible officer, the Defendants made the publications complained of in this matter within a wider context concerning allegations of fraud, corruption and mismanagement of public funds in the procurement of maize by the Malawi Government through ADMARC in the period between April and October 2016. I exhibit hereto together marked as **"GK1"** copies of all publications we made in that period as media house. I observe that the Plaintiff does not sue the Defendants in respect of all the newspaper articles that appeared in our papers in that period although the subject of the publication is the same.

51. The said subject matter was and remains a matter of high public interest. As such and thanks to the media freedom and constitutional guarantees thereof under which the articles were published:

    On or around **1st January 2017**, the President of the Republic of Malawi who is the Head of State and Government appointed a Commission of Inquiry under statute "*to investigate the procurement of maize by Admarc*". Exhibited hereto and marked as **"GK 2"** is a true copy of the reprint of the full Report by the Commission on Inquiry on the subject matter.

52. On or around **9th January 2017**, the Speaker of the National Assembly who is the Head of the Legislative arm of Government sanctioned a Joint Parliamentary Committee on Agriculture and Public Accounts under Standing Order 151 to inquire into allegations of fraud in the procurement of maize from Zambia by the Malawi Government through the ADMARC. Exhibited hereto marked as **"GK 3"** is a copy of the Report of the Joint Parliamentary Committee on the subject matter.

53. On or around **20th July 2017**, the Anti-Corruption Bureau instituted criminal proceedings against the plaintiff and one Rashid Tayub under the Corrupt Practices Act concerning the same subject matter. Exhibited hereto marked as **"GK 4"** is true copy of the charge sheet issued against the Plaintiff in Criminal Case No. 932 of 2017.

54. Meanwhile, several media outlets had been reporting and writing about the Plaintiff. I exhibit hereto marked as **"GK 5"** a random sample of such publications.

55. I ask the Court to have regard to the findings of and position taken by the statutory bodies in GK2-5 above and observe that in the circumstances, the Defendants, at all times, reported on or expressed opinions concerning the Plaintiff on a subject of public interest

concerning a public figure on matters that cannot be regarded as unfounded or qualify as irresponsible journalism.

56. In the circumstance, it was at all material times incumbent upon the Defendants as public watchdogs to impart information, other criticism and ideas on the issues and assist in the formulation of public opinion concerning the way in which the Plaintiff as a public official, among many others involved, may have managed or dealt with the relevant aspects of a subject of public concern. I verily believe that the Plaintiff cannot then sustain an action in defamation against the Defendants In those circumstances.

57. I therefore maintain all the defenses raised against the defamation claim and ask that it may please this Court to dismiss this action with costs to the Defendants.

58. AND I hereby verify the truth of the facts presented to court herein in terms of Oaths, Affirmations and Declarations Act.

The Issues

1. Whether the articles published by the Defendant were defamatory?
2. Whether where was fair comment and privilege?
3. Whether, damages are payable where defamation is found?

The Law

The burden and standards of proof in civil matter.

59. The burden and standard of proof in civil matter is this. He who alleges the existence of given facts must be the first to prove as a positive is earlier to prove than a negative. He who alleges must prove. The burden of proof rests on the party (the plaintiff) who substantially asserts the

affirmative. It is fixed at the beginning of the trial by the state of pleading and remaining uncharged through the trial. See ***Joseph Constantine Steamship Line vs. Tamperial Smelting Corporation Limited*** **[1942] AC 154,174.**

60. In *Joseph Jonathan Zinga vs. Airtel Malawi Limited*, Civil Cause No. 74 of 2014 (Mzuzu District Registry) (unreported), the court said

> *"In civil matters there are two principles to be followed. Who is duty bound to adduce evidence on a particular point and what is the quantum of evidence that must be adduced to satisfy the court on that point? The law is that he who alleges must prove. The standard required by the civil law is on a balance of probabilities. Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty. Whichever story is more probable than the other carry the day".* [Emphasis added]

61. The standard required is on a balance of probabilities. If the evidence is such that the tribunal can say; we think it more probable that not the burden is discharged but if the probabilities are equal it is not. Denning J in ***Miller vs. Minister of Pension*** **[1947] All E.R 572.** Our own local case of ***Commercial Bank of Malawi v Mhango*** [2002-2003] MLR 43 (SCA), the court stated as follows:

> *"The burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless sufficient evidence is adduced to rebut the presumption. The court makes its*

decision on the 'balance of probabilities', and this is the standard of proof required in civil cases."

Defamation

62. A defendant is liable for defamation if he publishes to some person other than the plaintiff some false and defamatory story which injures the plaintiff's reputation. Three elements must be present for a defendant to be liable for defamation. False story, Publication to third party other than the claimant, Injury to reputation.

63. It is the intentional false communication published or publicly spoken that injures another's reputation or good name. It holds a person to ridicule, scorn or contempt in a respectable and considerable part of the community. (Black Law Dictionary 6th Ed. 1990). The two major distinctions of defamation are libel and slander. Libel is actionable per se, whereas in most cases of slander, special damages must be shown. In cases of libel, for instance, the claimant can recover general damages for the injury to his reputation without adducing any evidence that it has in fact been harmed, for the law presumes that some damage will arise in the ordinary course of things **(See W.V.H. Rogers, Winfield and Jolowicz on Torts (Sweet & Maxwell, Thomas Reuters 2010**

In ***Uren vs. John Fairfax & Sons Ltd*** [1967] 11 CLR 118, 150 Windeyer, J. *It seems to me that properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was publicly defamed. For this reason, compensation by damages operates in two ways: - as vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.*

Claimants Submissions.

In submission the Claimant argued that

64. The two major distinctions of defamation are libel and slander. Libel is actionable per se, whereas in most cases of slander, special damages must be shown. In cases of libel, for instance, the claimant can recover general damages for the injury to his reputation without adducing any evidence that it has in fact been harmed, for the law presumes that some damage will arise in the ordinary course of things **(See W.V.H. Rogers, Winfield and Jolowicz on Torts (Sweet & Maxwell, Thomas Reuters 2010), pg. 572).** **Gatley 'On Libel And Slander'** 10th Edition Para 3.6 States that:

> *"Libel is committed when defamatory matter is published in a "permanent" form or in a form which is deemed to be permanent. Defamation published by spoken word or in some other transitory form is slander. In English law libel is always actionable per se, that is to say the claimant is not required to show any actual damage, and substantial rather than merely nominal damages may be awarded even in the absence of such proof..."*

65. The Claimant stated that in view of the fact that Libel is actionable *per se,* the Defendant's argument that the Claimant needed to bring evidence that he was shunned due to the newspapers articles in question is incorrect. In this sense, the judgement in the case of ***Joseph Mapwesera v The Editor, Malawi News & Blantyre Newspapers Limited*** Civil Cause Number 2456 of 2005 was erroneous as it dealt with a case of libel and not slander and the court should therefore not have insisted on the evidence of a witness who would allege that because of the

article he held the claimant in low esteem and shunned him. After all, it is absurd to expect a person who is shunning the Claimant to come and testify for him.

66. That a defamatory statement is one which has the tendency to injure the reputation of the person to whom it refers. Thus, the essential feature of such statement is its tendency to damage the reputation of the plaintiff in any given case **(See *Phiri vs Toyota Malawi* [2004] MLR 269).** It is, therefore, not what the plaintiff feels about him or herself upon the defamatory matter ***(Chidongo vs Cremer and Others* [2002-2003] MLR 17).** That further, the form of the words used is immaterial as per **Kumitsonyo J** in ***Mpasu vs The Democrat & others* [1997] 1 MLR 323 at pg. 337** as follows:

> *In the law of defamation, the form of the defamatory words is immaterial. It is immaterial whether the imputation is conveyed by words of assertion or suggestion or by words used in the declarative or interrogative manner. A Defendant is liable for insinuations, as well as for explicit statements, for an insinuation may be as defamatory as a direct assertion and even more mischievous. It is, therefore, the tendency and effect of the language which the criterion and not its form. The libeller cannot defame and escape the consequences by dexterity of style.*

67. That regarding defamatory statements, there are two questions that have to be settled by the court, one a question of fact and the other one a question of law as per **Tembo J** in ***Patel vs Star Publications* [1999] MLR 334 at pg. 339** as follows:

To determine whether a published matter is capable of bearing any defamatory meaning alleged by the plaintiff is, and involves, a question of law to be determined by a judge.

Upon the determination of that question in the affirmative, the question whether the defamatory matter is in fact defamatory of the plaintiff is a question of fact which the judge should then determine before the court can decide and declare that the Defendant is liable for libel complained of ....

68. According to the case of ***Capital and Counties Bank v Henry*** **[1882] 7 App Cas No. 741** as cited in the case of ***Banda vs Blantyre Print and Publishing Company*** **[1999] MLR 36 at pg. 43** that the test applicable is whether under the circumstances in which the writing was published, reasonable men to whom publication was made, would be likely to understand it in a libelous sense. **Msosa J** in ***Banda vs Blantyre Print and Publishing Company*** went on to quote **Margeret Brazier in Street on Torts (9 ed) at pg. 427** the 'right thinking test' which goes as follows: If most citizens would shun a man in consequence of the statement, thus defamatory; 2. If a substantial and respectable proportion of society would think less well of a person, provided that this reaction is not plainly anti-social or irrational, then a statement is defamatory. Further, in determining the question of whether the words complained of are defamatory or not, the judge must ask himself whether it would be wholly unreasonable to ascribe a defamatory meaning to such words **(See *Maluza vs David Whitehead and Sons (Mal) Ltd* [1993] 16(2) MLR 564 at pg. 569).**

69. That another essential requirement is that there must be publication of the defamatory matter complained of to some other person than to the plaintiff. **Tembo J** in ***Patel vs Star Publications*** **[1999] MLR 334 at pg. 338** stated as follows:

> *Turning to the law, this case raises issues which concern the tort of libel. Libel is a publication by a Defendant by means of printing, writing, pictures or the like, of matter defamatory of a plaintiff .... It is actionable without proof of special damages. A plaintiff will succeed in an action for libel if it is proved that the Defendant has published to some person other than the plaintiff false and defamatory matter in reference to the plaintiff .... The plaintiff will not succeed unless it can be proved that the defamatory matter complained of must be understood to be published of and concerning the plaintiff.*

70. That it is clear from the evidence that the defamatory imputations were published and that the publication was in reference to the Claimant herein. It should be noted that the Defendant mistakenly thinks that the Claimant's complaints have only to do with the 'maize saga'. This is not true. In the article, **"The Defiant Chaponda"**, the Defendants deliberately lied that the Claimant's call went unanswered instead of reporting the truth that the Claimant had answered the call and advised the reporter that he was informed of his need to appear before Parliament late when he was away from Lilongwe in Blantyre.

71. That this was calculated to disparage the Claimant and to present him as a defiant and arrogant person who holds himself above the law. Fortunately for the Claimant, the editorial notes got published and the conspiracy to write the misleading article was exposed. However, the

Defendants still went ahead and published the editorial **"Chaponda can't keep playing dishonorable"** as a continuation of their earlier false publication that portrayed the Claimant as a defiant character.

72. That the Editorial commenting on facts that were not true were purely an attack on the Claimant's character and were not raising facts. The Defendants employed the fallacy *argumentum ad hominem* in this regard. In the Article **"Epitome of Decadence"**, the claimant's picture was displayed against the bold title and the Defendant's witness admitted that such juxtaposition of the photograph against such title could be interpreted as meaning that the Claimant is the epitome of decadence.

73. That the article itself by innuendo alleges that Satan or Diablo resides in the Claimant. The article even proceeds to suggest that the Claimant deserved to be arrested and if he were in other countries, he would have been arrested on his return from Germany. Similarly, in the articles **"Noone is above the law, including Chaponda", Government is setting a bad precedent"; "Malawi cannot stand this rot"; "Kapito's stand defies reason" and "In the Book of John."** The Defendant's either simply and unjustifiably attack the character of the Claimant or the employ force in their arguments portraying any person that follows the Claimant as an idiot and lacking sense.

74. That they attacked any person whose opinion was that the Claimant did not do wrong to be foolish and unpatriotic. They go as far as portraying the Claimant as worse than a most brutal savage. Surely, the court cannot condone the use of such language in the media. Such language cannot be what the Constitution seeks to protect with the freedoms of speech, expression and opinion.

75. That in their defence, the Defendants pleaded truth. In the case of ***Mpasu vs The Democrat and others*** **[1997] 1 MLR 323 Kumitsonyo J** states that it is not part of the plaintiff's duty in an action for defamation to prove that the defamatory words were false, since the law presumes this in the favor of the plaintiff. Thus, in the instant case, the burden of adducing the evidence of truth is on the Defendant and the plaintiff has no duty whatsoever to adduce evidence that the statements were false as the same have been presumed in his favor. We must however, mention that among the matters that the Defendant is relying on the defence of justification, is the fact of an injunction. The Defendants did not bring the injunction to court and have no proof that the Claimant was ever served with the injunction at the time that he had traveled to Germany.

76. That the Defendant instead relies on the Judgment in the case of ***The State v George Chaponda, Ex Parte Charles Kajoloweka*** **et al** MSCA Civil Appeal No 5 of 2017. There are a couple of things to be noted about that matter. Firstly, the judgment is not the injunction order itself and as such we have no way of verifying if the injunction order was served on the Claimant and if so, when was it served? Furthermore, the coram on the judgment shows that the Claimant was not represented at all. This was an appeal taken out by the Office of the Attorney General who was represented by Counsel Apoche Itimu.

77. That the judgment actually does seem to confirm the fact that the Claimant was not served with the injunction in question. The Supreme Court, though having mentioned the injunction does not provide the full purport of the order itself. Considering that in the judgement, at some point the Claimant is referred to as the Appellant when in fact he was not, relying on the Supreme Court Judgement by way of Judicial Notice may not be a safe thing to do.

78. The Defendants also raised the defence of qualified privilege. The case of ***Banda vs Blantyre Printing and Publishing Co. Ltd*** **[1999] MLR 36** held the defence of special privilege does not apply to a newspaper that publishes defamatory imputations. **At pg. 44, Msosa J** adopted the views of the learned authors of **Salmond on Torts (14 ed) at pg. 244** as follows:

> *Newspaper in no special position.*
>
> *This question often arises in relation to charges made in newspapers against public men, if such a charge is solely an assertion of fact, so that defence of fair comment is not open, a Defendant newspaper which is not able to justify its allegations sometimes pleads privilege. The privilege is said to be created by interest which the public at large have in hearing the details of such a charge against such a person. Now the common law does not recognize any special privilege as attaching to the profession of journalism. A journalist who obtains information reflecting on a public man has no more right than any other private citizen to publish his assertions to the public at large; such assertions are not privileged merely because the general topic developed in the article is of public interest.*
>
> **Msosa J** continued:
>
> *This means that a newspaper that writes a story that tends to damage the character or reputation of a person holding public office must, just like any other ordinary person, justify it or successfully establish a defence of fair comment. Failure to do so will attract liability.*

79. That further, the court in ***Mpasu vs The Democrat and others*** **[1997] 1 MLR 323 at pg. 338,** **Kumitsonyo J** opined that "It is of no consequence that the Defendants in this case wanted to inform and educate the public as they alleged in their defence. The point is that they did in fact defame the plaintiff."

80. The court should not entertain the defence of qualified privilege since neither a newspaper nor journalists enjoy such privilege. The other defence raised by the Defendants is that of fair comment. The defence is available where the publication is on an issue of public interest and where the author expresses **his honest opinion on the issue**. The court in ***Patel vs. Star Publications*** **[1999] MLR 334** stated as follows on **pp. 342-343:**

> *What is said about letters issue by authors not being publishers of newspapers also passes for newspaper articles by authors writing on issues of public interest. The article watchmen facilitate prostitution and the publication of the plaintiff's photograph on the mode of dressing; constitute writing on an issue of public interest. By that publication, the author had expressed his honest opinion on the flourishing trade of prostitution along Hannover Street and on the role played by watchmen in its promotion. The author bemoaned lack of government intervention to curb that trade, especially in the light of statistics which had indicated that Malawi and Zimbabwe then had led the rest in SADC region on the occurrences of HIV/AIDS. The author pointed out that long trousers were not much of a bother but short dresses, thus in connection with the growth of both the trade of prostitution and the high incidence of HIV/AIDS in the country. The court views the publication of the article and the plaintiff's photograph, in that respect, as containing fair comment on a subject of public interest. Use of trousers by women was given a higher approval rating than the use of short*

dresses in that behalf. In the circumstances, the court considers the defence of fair comment as being successful indeed.

81. That, this case raises high the standard for fair comment. It is not enough just to say one was commenting on a matter of public interest. Commenting on issues of public interest does not involve injuring the integrity of other people. When commenting on issues of public interest, one should not injure the reputation of other people under the guise of fair comment.
82. It is strange that the Defendant wishes to rely on the same case authority to support a premise that *"no matter that the words thereof conveyed derogatory imputations, were wrong, exaggerated, badly expressed, or outright untrue, the Defendants are nevertheless protected by the defence of fair comment."* – See paragraph 6.12 of the Defendant's submission. This cannot be correct as it directly conflicts with what the Defendants state in paragraph 6.13 that the fair comment must be honest.
83. That it would be an oxymoron or paradox for derogatory imputations, wrong statements, exaggerated or badly expressed words, outright untrue words to be termed fair comments. That would go against good sense and conscious and would entitle journalists to conduct their business with impunity. The Defendant's witness clearly stated at the commencement of his cross-examination that journalists are guided by ethical principles and if they breach their ethical standards, they would be liable. He further unequivocally stated that a fallacy such as *argumentum ad hominem* or *argumentum ad buculum* cannot qualify as fair comment.
84. That the defence of fair comment together with the defence of privilege cannot be sustained where there is proof of malice. The case of ***Banda vs. Pitman*** **[1990] 13 MLR 34** is an authority on this point. The court stated the following on pg. 48:

Mr. Chizumila then submitted that if the occasion was privileged, then the Defendant destroyed the occasion because he had abused the occasion and was actuated with malice. ***It is true that a Defendant who is actuated by malice destroys the privileged occasion.*** *In the case of Angel vs. HH Bushell & Co. Ltd [1967] 1 All ER 1018, it was held that the Defendant had published a libelous letter in circumstances which were privileged but nonetheless he was liable because he had destroyed the occasion as he had written the letter under malice." (Emphasis supplied)*

And further at pg. 49:

Since I have found that the Defendant was actuated by malice, he cannot avail himself of the defence of qualified privilege. Under paragraph 13 of his defence the Defendant is pleading fair comment. Having found that he was motivated by malice, there is no point in considering this defence for a person who is acting under malice or ill will cannot make a fair comment – see the case of Thomas V Bardbury, Agnew & Co Ltd and another [1906] 2 KB 627.

85. That in ***Mpasu vs The Democrat and others*** **[1997] 1 MLR 323** it was stated that from the mere publication of a defamatory matter, malice is implied, unless the publication was on what is termed a privileged occasion. The court in ***Munthali vs. Mwakasungula*** **[1991] 14 MLR 298 at pg. 315** made the following comments:

As for malice, it is true that the Defendant did not make any reply giving particulars of express malice, but this is a slander which was published without

lawful excuse, and, accordingly, the law conclusively presumes that the publisher was activated by malice; it having been pleaded that the publications was done falsely and maliciously. This submission must fail.

86. That during trial, the Claimant showed that the publications were motivated by malicious intent and that the allegations were not supported and as such were false. As such, the defence of fair comment, should not be allowed to stand.

87. The Claimant submitted that the last defence raised by the Defendants was that of media freedom. As much as the Defendants may claim to be enjoying media freedom, the same should not be abused by being used as a tool to defame other people. The view was expressed in the case of ***Mtambo vs National Publications Ltd*** **[1999] MLR 256.** In that case, the plaintiff was a High Court judge who took out the action against the National Publications Limited for damages based on a cartoon published in the respondents *Nation* newspaper. It was the plaintiff's case that, the cartoon in question, when read with accompanying articles, was defamatory of him in his position both as a judge and as a professional man in that the publication wrongly subjected him to ridicule and contempt.

88. The Defendant denied the allegation. The court held that the exercise of fundamental human rights gives no licence, whether directly or indirectly to people to say or publish anything without their work being censored. If they embark on publications that violate the characters of others, the civil law remedies have to be invoked to crack down on them. The court went to hold that if a cartoon or caricature is found to be tinted with an impression conveying some defamatory sense, the defence of freedom of expression must literally collapse. This false impression should give rise to liability. **Kumange J** said the following on pg. 266:

In this country, like many democratic countries, human rights have been enshrined in our 1994 Constitution. Chapter IV (Sections 15-46) of the Constitution guarantees the protection of human rights and these are not to be easily or arbitrary limited or derogated. Under the same Chapter (sections 35 and 36) freedoms of expression and the press are enacted. But this does not mean that we can express contumelious opinions, or use the press for contumelious views and expressions about other persons.

89. That in the case of ***The State vs. Director of the Anti-Corruption Bureau Ex-Parte Salim Tayub and others*** Judicial review Cause No. 29 of 2017, the Claimant was not a party to the Judicial Review. However, the issue in that matter was whether the Applicants in the matter could be tried for the suspected offences. The court chose not to interfere with the criminal process. This judgement of Honorable Justice Potani has no relevance in respect of the defamatory statements published by the Defendants.

90. That the judgement in ***Republic v George Thapatula Chaponda and Rashid Tayub*** Criminal Cause No 932 of 2017 shows that no wrongdoing was found on the part of the Claimant after full trial. In the Case of ***Rashid Tayub and Transglobe Produce Export Limited v Attorney General and The Director of the Anti-Corruption Bureau*** Civil Cause No 209 of 2018, the court was dealing with the question on whether the Director of Public Prosecutions can properly be joined as party to a suit for malicious prosecution in a suit against the Director of the Anti-Corruption Bureau having merely consented to the prosecution of the matter. The court found that the Director of Public Prosecutions may be complicit in a malicious prosecution and ought to be answerable for the damage caused by the prosecution. We fail to appreciate the relevance of this case to the present matter.

91. In the case of ***Rashid Tayub and Transglobe Produce Export Limited v Attorney General, Director of Public Prosecutions and Anti-Corruption Bureau*** Civil Cause No. 326 of 2018 the Claimants in that matter sued the prosecutorial authorities claiming damages for loss and damage on the 1st Claimant's liberty and injury to reputation and loss of business following the failed prosecution where he had been jointly charged with the Claimant in this matter. The Court found that the arrest and prosecution of the Claimants in that matter was justified.

92. The Claimant submitted that the finding in that matter had no bearing on this matter. The Defendants in the present matter are not prosecutors. The maize saga did not give the Defendants a license to defame the Claimant. The Defendants' witness agreed that the newspapers must comply with the rule of law and that journalists are aware that any person is to be presumed innocent unless proven guilty by a court of law.

93. The Claimant argued that the Defendants were therefore not justified in defaming the Claimant. The Defendants' witness evaded the question whether the language used by the commission of enquiry and the Parliamentary Committee looking into the matter was inflammatory and defamatory as the Defendants had employed. However, there is a clear distinction as all other publications were based on alleged facts honestly held. On the other hand, the Defendants did not hold an honest view of their publications as was detected from the fluke that happened when an editorial comment in the newsroom got published in the newspaper.

94. That at no point did any other publication refer to the Claimant or any other accused person as the seat of Satan's residence, the epitome of decadence, rotten, worse than a brutal savage, such a person that if followed his followers are idiots. The simple question we are grappling with in this matter is whether a person charged with an offence can be defamed by a newspaper

and the answer is in the affirmative. In conclusion the Claimant prayed to the Honorable court for Judgement to be entered in favor of the Claimant herein with costs.

The Defendant's Submission

95. The Defendant argued in submission that it is a requirement in defamation cases that the claimant must bring a witness to testify that as a result of the article he held the claimant in low esteem and shunned him. In ***Joseph Mapwesera v The Editor, Malawi News & Blantyre Newspapers Ltd***, Civil Cause No. 2456 of 2005 (HC) (unreported), Kamwambe J opined thus:

> *"Finally let me mention that this being a case of defamation I expected the plaintiff to bring a witness to testify that as a result of the article he held the plaintiff in low esteem and shunned him. This is significant to defamation since if the alleged defamation does not put you into ridicule and you are not shunned then it would not qualify as defamation. Proof of the same must be brought to court. The plaintiff failed to bring such proof. He cannot succeed on this claim of defamation."*

96. That the claimant in proving that the publication is defamatory must bring witnesses which will prove that the publication tended to lower him in the estimation of right-thinking men or cause him to be shunned or avoided or expose him to hatred, contempt or ridicule. It is however insufficient if the claimant only refers or brings his friends, relatives and colleagues to show that he was shunned or infer a defamatory meaning. ***Chiume and Chiume v Blantyre Print and Packaging Limited & Blantyre Periodicals Limited*** [1981-83] 10 MLR 9. That the **Constitution of the Republic of Malawi** provides as follows in section 35:-

"Every person shall have the right to freedom of expression."

97. And section 36 of the said **Constitution of the Republic of Malawi** provides for freedom of the press:-

"The press shall have the right to report and publish freely within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information."

98. That in ***Joseph Mapwesera v The Editor, Malawi News & Blantyre Newspapers Ltd***, Civil Cause No. 2456 of 2005 (HC) (unreported), Kamwambe J had this to say on section 35 and 36 of the Constitution:-

"It is trite that the fact that the other person's words have caused hurt to your feelings that in itself does not amount to defamation. We should keep alive Constitutional provisions such as section 35 so that real meaning is applied in everyday life. Thus the right to freedom of expression must be kept burning. So is the right of the press under section 36 of the Constitution to report and to publish freely so that people have unfettered access to public information. There must be good reason to trifle this right so that publication is defamatory and the publisher is left defenseless. The publication must not be merely malicious and untruthful. The publication must not luck in truth. It must be true or substantially true for it to qualify as non defamatory."

99. In ***Mr. D A Bello v Nation Publications Ltd*** Civil Cause Number 420 of 2011 (HC) (unreported), Honorable Ntaba had this to say about the constitutional provisions and the law of defamation:

> *"It can be argued that the law of defamation must strike a balance between the freedom of speech or press against the protection of a person's reputation. The Malawian Constitution does protect freedom of the press as provided under section 36. Notably, the Defendant has not claimed this right but it is worth noting that its existence as a newspaper is to report news as guaranteed by the above provision. Therefore, where it has been sued for publishing news, it has rights to invoke the said provisions as well as other applicable defences as was the case herein."*

Defence of Justification

100. That it is a complete defence to an action of libel that the defamatory imputation is true. ***M' Pherson v Daniels*** (1829) 10 B&C at p. 272. ***Wyatt v Gore*** (1816) Holt N.P. 299 at 30. The Defendant may justify what he has said by proving specific facts that show that what he said is substantially true. It is not necessary to prove the truth of every word of the libel. If the Defendant proves that "the main charge, or gist", of the libel is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable. ***Edwards v Bell*** (1824) I Bing 403. ***Clarke v Taylor*** (1836) 3 Scott 95.

101. That in ***Joseph Mapwesera v The Editor, Malawi News & Blantyre Newspapers Ltd***, Civil Cause No. 2456 of 2005, Kamwambe J had this to say on the defence of justification.

102. "*...it does not help to explain this at trial when we are questioning whether the Defendants were justified to publish the article that they published about the plaintiff. It is a defence to an action for libel that the defamatory importation is true – **M'pherson vs Daniels** (1829) 10 B& C at p. 272 and **Watts vs Gore** (1816) Halt N.P. 299 at 308.* Since in this case the Defendants article was substantially true, they must avail themselves with the defence of justification. In ***Moore vs News of the World*** [1972] 1ALLER 915 at 919 Lord Denning summarised the law thus:

> '...a Defendant is not to fail simply because he cannot prove every single thing in the libel to be true. If he proves the greater part of it to be true, then even though there is a smaller part not proved, nevertheless the Defendant will win as long as the part not proved does not do the plaintiff much harm'".

103. If the Defendant can prove that the main charge or gist of the libel is true, a slight inaccuracy in one or more of its details will not prevent him from succeeding in a defence of justification ***Alexander v N.E. Railway*** (1865) 6B & S 340. In ***Katunga v Auction Holdings Ltd*** [2000-2001] MLR 226 at 231 Tambala J (as he then was) put the position thus:

> *"The position of the law is that to establish the defence of justification it is not necessary to show that the disputed story is literally true. It is sufficient if it is true in substance: **Alexander v N.E. Railway** (1865) 6B and section 340. I come to the conclusion that the Defendants have successfully raised the defence of justification."*

Burden of Proof in Defence of Justification

104. The Defendants submitted that libel must be understood with reference to the subject matter and a justification which covers the libel considered in reference to the subject matter is sufficient. ***Tighe vs. Cooper*** (1857) 7 E&B 639. The burden is on the Defendant of satisfying the jury that the statement which is justified or so much, if it be divisible, as is separately justified, is true in substance and in fact. The Defendant must satisfy the jury that the statement justified is substantially true, though the proof does not establish every little detail. ***Cory v Bond*** (1860) 2 F&F 241. In ***Zierenberg v Labouchere*** (1893) 2 QB 183, the modern practice was stated thus by Lord Esher M.R. at p. 186:

> *"Strictly speaking, the Defendant having pleaded generally justification of the whole libel, would be bound to prove the whole to be true, and if he failed in doing so, it might be said that his plea of justification failed altogether. That would have been the old practice; but that seems to be too strict a view of the rights of the parties to take at the present time, and I think we ought to treat the case as if the statements in the claim were statements of separate libels and the general plea of justification as if it applied to each part of the claim".*

105. That in ***Alexander vs. N.E. Ry*** (1865) 6 B&S 340, the Plaintiff had been convicted in the manner stated in the plea containing the libel, except that the period of imprisonment in default of sufficient distress was **fourteen days** and not **three weeks**. It was held that the inaccuracy as to the length of the alternative imprisonment did not necessarily make the publication to be libelous. The Plaintiff action had thus to fail. In ***Cory v. Bond*** (1860) 2 F&F 24, a libel against the Plaintiff was not entirely true in that "it related to the putting of fees into the Plaintiffs'

pocket which was not the case". It was held that the Defendant was nevertheless entitled to succeed since the libel was substantially true.

Fair Comment

106. The **Constitution of the Republic of Malawi** provides for the freedom of opinion in section 34 as follows:

> "Every person shall have the right to freedom of opinion, including the right to hold, receive and impart opinions without interference."

107. That it is a defence to an action for libel or slander, that the words complained of are fair comment on a matter of public interest. In ***Lyon v Daily Telegraph*** [1943] 1 KB at p.753 Scott L.J had this to say:

> *"The right to fair comment is one of the fundamental rights of free speech and writing which are so dear to the British Nation, and it is of vital importance to the rule of law on which we depend for our personal freedom".*

108. The scope of the defence of fair comment was analysed in ***Broadway Approvals v Odhams Press*** [1965] 2ALLER 523 at 535 by Sellers L.J:

> *"The comments, as well as the facts and the inferences from both fact and comment, in defamatory statements have to be proved to be true for the defence of justification to succeed, but if the facts are established and the comment is fair, the defence of fair comment can succeed. An honest and fair expression of*

opinion on a matter of public interest is not actionable even though it be untrue and fail of justification".

See also: ***Joseph Mapwesera v The Editor, Malawi News & Blantyre Newspapers Ltd*** (op cit).

109. That the defence of fair comment was discussed at length in the Malawian case of ***Patel v Star Publications Ltd*** [1999] MLR 334 at 342 by Tembo J (as he then was):

> *"Finally, let me consider the defence of fair comment on a matter of public interest. In a lawsuit for libel concerning publication of letters in a newspaper and on a defence of fair comment on a matter of public interest, Lord Denning, among other things, said this:*
>
> *'I think the correct approach is simply this: Were these letters fair comment on a matter of public interest? These comments are capable of various meanings.... But in considering a plea of fair comment, it is not correct to canvas all the various imputations which different readers may put upon the words. The important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations: no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendos into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express*

his view. So long as he does this, he has nothing to fear, even though other people may read more into it,

See per Lord Porter in ***Turner v M.G.M. Pictures Ltd*** *and per Lord* Diplock J. In ***Silkin v Beaverbrook Newspaper Ltd*** I stress this because the right of fair comment is one of the essential elements which go to make up our freedom of speech. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to write to the newspaper: and the newspaper should be free to publish his letter. It is often the only way to get things put right. The matter must, of course, be one of public interest. The writer must get his facts right: and he must honestly state his real opinion. But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions: ***Slim v Daily Telegraph Ltd*** [1968] 2 QB 169-179, Per Lord Denning.' "

Qualified Privilege

110. The Defendants argued that there are occasions upon which, on grounds of public policy and convenience a person may, without incurring liability make statements about another that are defamatory and in fact untrue. On such occasions a man, stating what he believes to be the truth about another, is protected in so doing provided he makes the statement honestly and without any indirect or improper motives. ***Watt v Longdsdon*** [1930] 1K.B. 130. see also: per willes J in ***Huntley v Ward*** (1859) 6 C.B. (N.S) P 517.

111. That the defence of qualified privilege is available to publications on matters of public interest in Malawi. In ***Mr. D A Bello v Nation Publications Ltd*** Civil Cause Number 420 of 2011 (HC) (unreported), Honorable Ntaba emphatically stated the law as follows:

> "Consequently when the defence of absolute privilege fails, a defence of qualified privilege can be allowed. In ***Adam v Ward*** [1917] AC 309, the court stated that a privilege occasion is, in reference to qualified privilege, an occasion where the person who makes it has an interest or a duty to make it to the person to whom it is made and the person to whom it is made has a corresponding duty to receive it. This entails that the person making the statement had a legal, social, moral or public right to do so. Previously, qualified privilege did not apply to the media, for instance in the case of ***Davis and Sons v Shepstone*** (1886) 11AC 187 held that the privilege of reports of proceedings in Parliament does not extend to reports of statements by newspapers.

112. That in the case herein, this court is basically being called to answer the duty and interest test that is whether the media had a duty to publish the information and whether the public had an interest in receiving it. As argued by the Defendant, it merely printed the proceedings of the PAC meeting held on 4th October, 2011. It did as a matter of public interest. Nations Publications Limited published as indicated by DW 1 what it reasonably believed in its role a public informer and that publishing the statement complained of was in the public interest. It also strongly believed in the correctness of the information as it came from an Auditor General Report and tabled at a PAC meeting.

113. That accordingly, this court agrees with the Defendant it terms that it had no malice when it published the 5th October, 2011 article as all it reported was what had transpired at Parliament.....In conclusion, the publication of made by Nation Newspaper was not covered by absolute privilege as such refers to official publications of Parliament and this does not extend to publications made by newspaper (my emphasis). However, the publication can be covered by qualified privilege because, newspapers have a duty of informing the public and the public has a corresponding duty to receive such information of issues of national interest"

114. In ***Dick Chagwamnjira t/a Chagwamnjira & Company v Nation Publications Limited & Secucom International*** Civil Cause No. 2438 of 2000 (HC) (unreported) Kapanda J stated thus:

> *"It is a settled principle, at common law, that qualified privilege as a defence to defamation is available for dissemination to the general public of information which the public should know".*

115. That Lord Nichols of Birkenhead in ***Reynolds v Times Newspaper Ltd*** [1999] 3 WLR 1010 explained the principle of qualified privilege vis a vis newspaper reports as follows:-

> *"The common law has long recognized the chilling effect of this rigorous, reputation - protective principle. There must be exceptions. A times people must be able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed, in the wider public interest, protection of reputation must then give way to a higher priority. Public interest has never been defined but in* ***London Artists Ltd v Littler*** *[1969] 2 ALLER 193, Lord Denning stated:-*

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

116. That the defence of qualified privilege as developed in Reynolds case is a common law defence accorded to newspaper reportage. The defence is a "different jurisprudential creature" from the law of privilege. See ***Jameel and others v Wall street Journal Europe Sprl*** [2006] UKHL 44 at paragraph 146

117. Where the court has doubts whether a particular scenario is one of public interest, the doubt should always be resolved in favour of the publication. In ***Loutchansky v Times Newspapers Limited*** [2001] 4 ALLER 115 at p. 123 Brooke, L.J. cited the following passage from Reynolds's case p.626 with approval:-

"Further, it should always be remembered that journalists act without the benefit of clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the Court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watch dog. The court should be slow to conclude that a publication was not in the public interest and therefore the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication".

118. In ***Dick Chagwamnjira t/a Chagwamnjira & Company v Nation Publications Limited & Secucom International*** (op cit) Kapanda J. opined thus as regards applicability of the principle of qualified privilege in Malawi:

> *"It is of prime importance to take into account that the defence of qualified privilege serves to protect and foster freedom of the press. Sections 35 and 36 of the constitution of the Republic of Malawi are instructive in this regard. I would tend to think that that is the reason why the defence is qualified for the freedoms of expression and the press are being curtailed for other compelling countervailing reasons".*

Public Officials and the Law of Defamation

119. That the courts have made a special recognition of the discussion of public officials and government as constituting qualified privilege. The press has thus a qualified privilege to report on Ministers and Government covered under the fundamental right of freedom of speech. In ***City of Chicago vs. Tribune Co.*** (1923) 139 N.E. 86 Thompson C.J. had this to say at P. 90.

> *"The fundamental right of freedom of speech is involved in this litigation, and not merely the right to liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticize the ministers who are temporarily conducting the affairs of his government.....it follows, therefore, that every citizen has a right to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it*

is advantageous for the public interest that the citizen should not be in any way be fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely."

120. That the European court of Human Rights in the case of ***Handyside v The United Kingdom*** 5493 /72 (1976) ECHR at page 32, it was stated thus:-

"The courts supervisory functions oblige it to pay the utmost attention to the principles characterizing a democratic society. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of everyman. Subject to paragraph 2 of the article 10, it is applicable not only to "information " or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also those that offend shock or disturb the state or any sector of the population such are the demands of that pluralism, tolerance and broad mindedness without which there is no " democratic society."

121. That a comprehensive discussion of the defence of qualified privilege vis - a - vis public officials can be obtained from the case of ***New York Times Co. v Sullivan*** 376 US 254 (1964). In that case Justice Brennan had this to say:-

"While our court has held that some kinds of speech and writings are not expression within the protection of the First Amendment, freedom to discuss public affairs and public affairs is un questionably, as the court today holds, the kind of speech the First Amendment was primarily designed to keep within the

area of free discussion. To punish the exercise of this right to discuss public affairs or to penalise it through libel judgements is to a bridge or shut off discussion of the very kind most needed. This nation, I suspect can live in peace without suits based on public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically of financially for criticizing their government, its actions of its officials. For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it. An unconditional right to say what one pleases about public affairs is what (consider to be the minimum guarantee of the First Amendment."

Malice in Qualified Privilege and Fair Comment

122. That when qualified privilege has been invoked by the Defendants and the claimant pleads malice. The duty and the burden of proof to establish and prove malice whether express or actual malice shifts to the claimant. In ***National Bank of Malawi v Donnie Nkhoma*** [2008] MLR 224 at 235 Tambala JA put the law thus:

"It is probably the wrong position taken by the learned judge which, influenced him to deny the appellant the defence of qualified privilege which, on the facts of the case, the appellant deserved. The duty rested on the respondent to prove express or

actual malice on the part of the appellant. The latter had no duty to establish absence of malice. The law is clear:

'Once there is proof that the Defendant published the defamatory matter on a privileged occasion, it will be assumed he did so honestly believing his statement to be true, unless there is some evidence, the onus of giving which lies on the plaintiff, from which a contrary inference may be drawn. See GATLEY ON LIBEL AND SLANDER Eighth Edition par 790."

123. The Defendant submitted that a discussion as regards malice and a newspaper article was had in the case of ***Mr. D A Bello v Nation Publications Ltd*** Civil Cause Number 420 of 2011 (HC) (unreported) as follows:

"The courts in determining a defamation especially where a defence is proferred, must still examine the circumstances, for instance in ***Blackshaw v Lord*** *[1983] 2 ALL ER 311, the court pointed out that where damaging allegations or charges have been made and are still under investigation, or have been authoritatively refuted, there can be no duty to report them to the public. Further, courts must rule whether the alleged defamatory material was done with intention like improper motives or malice. According to the case of* ***Hollocks v Lowe*** *[1975] AC 135 which held that if the Defendant did not believe the publication to be true, it is usually conclusive evidence of malice and it rebuts the defence of qualified privilege. Incidentally one cannot argued that the motive for publication is irrelevant however if the meaning which can be derived from material is determined to be truth, then the court may rule against defamation....Notably, the plaintiff and Defendant have both indicated that the*

leading case of ***Reynolds*** *has set the test especially for establishing malice. Like* ***Halpin v Oxford Brookes University*** *[1995] QBENF 94/0863/C 227 stated that malice can be proved if shown that the writer knew that what he was publishing was untrue or was reckless to whether it was accurate or not. Notably, when it comes to the media, the same principles on whether the material they publish is defamatory has to be subjected to the same standards. However courts have tended to examine media cases carefully, For instance the Malawian case of* ***Mpasu v The Democrat****, Civil Cause Number 124 of 1995 (HC) (PR) (Unrep) stated that newspapers have a duty to inform the public and that the public has a corresponding duty to receive the information."*

The Finding

124. It is not in dispute that the Claimant is a well-respected man in society who was a cabinet minister and Member of Parliament in Mulanje, at the time the articles were published. He had previously worked for the United Nations. It is not in dispute that the Claimant is a highly educated man with a PhD. The Claimant has produced various articles which the Defendants wrote which he alleged were defamatory in nature. The Defendants have stated that the story involving the Claimant was of national interest and the general public was entitled to be informed about what was happening in respect of the maize sage. Suffice to say that the Clamant was eventually exonerated by the courts.

125. The Defendants claim the articles were based on fair comment and qualified privilege on matter of national interest involving a public servant. The Defendants further claim that they were expressing the right to freedom of the press as enshrined in the Constitution. That they

were simply exercising their freedom of the press, of expression and of opinion on the matters and where appropriate after verifying such information with the plaintiff or other responsible officer. That the Defendants made the publications complained of in this matter within a wider context concerning allegations of fraud, corruption and mismanagement of public funds in the procurement of maize by the Malawi Government through ADMARC in the period between April and October 2016. The Defendant exhibited **"GK1"** being copies of all publications made in that period as a media house. I will now look at the specific articles as alleged by the Claimant.

126. The Defiant Chaponda published on 28th January, 2017 by the 1st, 2nd, 3rd, and 6th Defendants.

"However despite his secretary having reportedly confirmed to the committee that the invitation had been received, Chaponda failed to show up even though he supposedly made no effort to provide reasons for his nonappearance."

127. Our efforts to speak to Chaponda proved futile, as he first answered our call but gave the phone to another person even before we introduced the subject. As we went to press, it was reported that Chaponda had later claimed that he had failed to appear before the committee because he had just received the invitation a few moments before (who reported this we are confusing the readers. We said he did not pick our phone.

128. The Claimant stated that these words indicated that he was a defiant person, self-willed and not willing to cooperate with others in society. That the words ***"who reported this? We are confusing the readers we said he did not pick our phone"***, clearly show that there was a coordinated effort to injure the character of the Claimant. That in this regard the defence of fair

comment together with the defence of privilege cannot be sustained where there is clear proof of malice. I agree with the Claimant that when qualified privilege has been invoked by the Defendants and the claimant pleads malice, the duty and the burden of proof to establish and prove malice whether express or actual malice shifts to the Claimant. Fair comment and qualified privilege only applies where there is honesty. The comment in the editorial which accidently found its out to publication speak for the Claimant in the simplest of words. I need not go any further. I find that there was malice.

129. It is settled that the law of defamation must strike a balance between the freedom of speech and freedom of the press against the protection of a person's reputation. The Malawian Constitution does protect freedom of the press as provided under section 36. It is worth noting that that the Defendants' existence as a newspaper is to report news as guaranteed by the above provision. Therefore, where it has been sued for publishing news but not fake, it has rights to invoke the said provisions as well as other applicable defences provided the facts leads to such a conclusion.

130. It is not part of the Claimant's duty in an action for defamation to prove that the defamatory words were false, since the law on the face of it presumes this in the favor of the Claimant. Thus, in the instant case, the burden of adducing the evidence of truth is on the Defendants and the Claimant has no duty whatsoever to adduce evidence that the statements were false as the same have been presumed in his favor.

131. In this must be noted that a court must always strike a balance between these two competing claims. Once again o the comment which was accidentally published in the editorial, I totally agree with the Claimant. There was a coordinated plan to show to the public that the Claimant was a defiant man, who was not fit for the various positions he held in society. I therefore find

that the Claimant was not defiant as alleged by the Defendants and since this was falsehood I find that the Claimant was defamed.

Epitome of decadence

132. This was published by the 1st, 2nd, 5th and 7th Defendant on 29th January, 2017 with a picture of the Claimant. The Claimant alleged the story was aimed to show to the public, that the Malawi nation was in a state of moral rottenness and that the Claimant was the epitome of decadence.

133. Again the Defendants have failed to show how rotten the Claimant was in view of the maize saga. The article stated that contrary to the common belief that Satan lures in other unpleasant places actually ***Satan*** lives among us. This article clearly shows that the Claimant was being equated to satan himself. Surely this is not true as the Claimant is not satan as it been presented in various religious writings. In my view this is false information and defamatory in nature which was aimed at tarnishing the Claimants image. This was not supposed to be published in the first place. The public had no interest in this kind of falsehood. The Defendants had a duty to balance the right to media freedom and the right of the Claimant to be protected from falsehood and other malicious attacks on his credibility. I find that the Defendants were careless and unprofessional when they published the article.

134. The Defendants owed the Claimant a duty of care by informing the general public fairly on matters of national interest without injuring the Claimant's reputation. The way this article was written cannot be based on fair comment. This was an abuse of press freedom since the Claimant had no forum to respond to the accusations.

135. *No one is above the law including Chaponda.* This was published by the 1st, 2nd, and 3rd Defendant on 21st January, to 27th January, 2017 issue of Malawi news,

"It isn't that Minister George Chaponda does not know how the law works it is just that he thinks, that he is above the law and that he can therefore do whatever he wants and in defiance of court decisions".

136. Government is settling bad precedent. The Claimant was ordered by the court not to perform ministerial duties until a further order of the court.

137. I do not know whether the court had jurisdiction to suspend a cabinet minister who was under the direct superintendence of the president who is the head of the executive branch. Judicial discretion and privilege on one hand and judicial over reach are two sides of the same coin. It takes a simple flip of the coin. But this is for another day.

138. However a court order once issued and no matter how irregular it is must still be obeyed until otherwise vacated by a competent court. The Claimant claims he was not served with the order. The Defendants have not lead evidence that he was served with the order. Since there is doubt as to what real happened in terms of service, the Defendants made a fair commend since the injunction as issued by the court was still in force. I therefore give the Defendants a benefit of doubt and I will not condemn them for this article. The defence of fair comment is available to the Defendants in this matter since the publication was on an issue of public interest and the author expressed his honest opinion on the issue.

139. In conclusion having looked at the evidence for and against I find that the Defendants went overboard in their quest to inform the public. Their freedom as a media house notwithstanding, the Defendants injured the Claimant's name in the eyes of right thinking members of society.

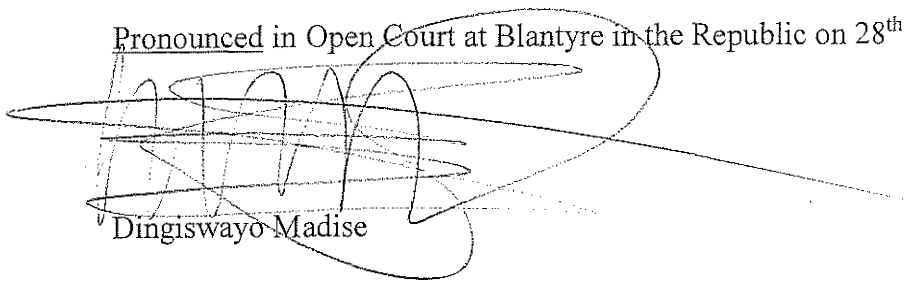
However they embarked on publications that violated the character of the Claimant and the civil law must remedy this assault. Commenting on issues of public interest does not involve injuring the integrity of other people.

140. When commenting on issues of public interest *vis a vis* public officials the defence of qualified privilege or fair comment can only be invoked where is some truth in the story. However that notwithstanding the Defendants herein had a duty to balance the interests of the public to receive information and the rights of the Claimant not to be unjustly ridiculed. No one should not injure the reputation of other people under the guise of fair comment and media freedom. I therefore find that the reference to the Claimant as the seat of Satan's residence, the epitome of decadence, rotten, worse than a brutal savage, such a person that if followed his followers are idiots to be defamatory on the face of it.

141. I therefore order the Defendants who authored those articles if still in employment to withdraw the articles so cited and apologise sincerely to the Claimant on the front pages of all the papers involved in this case within 10 days. The front page must not carry any other article apart from the apology as ordered.

142. The Claimant is entitled to monetary damages and I order the Registrar to access damages taking into account the apology that the Defendant will make. It is not in the interest of this court to order huge damages which will end up bankrupting the Defendants. Responsible media freedom is necessary in a democracy as it calls on public servants to account and the media must be protected by the law and the courts. The Defendants must pay the cost of this action.

Pronounced in Open Court at Blantyre in the Republic on 28th February 2022



Dingiswayo Madise

Judge