GODFREY MIYANDA v MATTHEW CHAILA (JUDGE OF THE HIGH COURT)
(1985) Z.R. 193 (H.C.)

HIGH COURT
(E.L. SAKALA, J.)
31ST JULY, 1985

Flynote
Tort - Judge's delay in delivering judgment - Whether judge can be sued.
Constitutional Law - Independence of the judiciary - Necessity of for the better administration justice.

Headnote
The petitioner filed a civil suit on 10th September, 1981. The hearing of the suit commenced before the respondent on 22nd August, 1983. The hearing of the case was concluded on 7th September, 1983 but judgment was not delivered until 18th October, 1984. Dissatisfied with the length of time which it took the judge to prepare and deliver judgment the applicant brought this action. He contended that by failing to deliver judgment within reasonable time the judge was in breach of Art. 20(9) the Constitution of Zambia.

Held:
(i) A judge cannot be taken to court for delaying in adjudicating on the case;
(ii) The public have a right to have the independence of the judiciary preserved; the absolute freedom and independence of judges is imperative and necessary for the better administration of justice.

Cases cited:
(1) London Transport Board v Moscron [1942] A.C. 332.
(2) Sirros v Moore and Others [1975] Q.B. 118.
(3) Home Office v Dorset Yatch Co. (1970) A.C. 1004.
(4) Fray v Blackburn, 3B and S.576.
(5) Anderson v Gorrie and Others [1895] 1 Q.B. 668.
(6) re Mc C (A Minor) The Times, November 28, 1984 p.22.

For the applicant: In person
For the respondent: A.Kinariwala, Senior State Advocate.

Judgment
E.L, SAKALA.:

This is an application by way of a petition against the Hon. Mr Justice Chaila; a judge of the High Court. The petitioner appears in person.

The circumstances leading to the application are that the petitioner was a litigant in a civil suit commenced by writ of summons on 10th September, 1981 in the High Court for Zambia entitled 1981/HP/1244- *Godfrey Miyanda v The Attorney-General*. The hearing of the action commenced before the Hon. Mr Justice Chaila on 22nd August, 1983. On the same day the petitioner closed his case. The defendant who adduced no evidence, then made his final submissions. The plaintiff's final written submissions were filed on 7th September, 1983. According to the petitioner the respondent Mr. Justice Matthew Chaila, seized of the action has refused to adjudicate or to determine the action and to deliver judgment in reasonable time or at all. Paragraph 3(f) and (g) of the petition reads as follows:

> "3(f) Further, the respondent has not disposed of the action as a short cause action. In consequence the respondent is in breach of or has contravened Article 20(9) of the Constitution which it is his mandatory duty to uphold.
> (g) By virtue of the unwarranted and unreasonable delay in determining this action, the Petitioner has suffered and continues to suffer great emotional distress and anxiety and great inconvenience."

At the outset, I must mention that I have perused the record of Cause No. 1981/HP/1244. According to that record judgment was delivered on 18th October, 1984. The plaintiff's action was dismissed with costs. I must also say that I have not been able to ascertain whether the action was to be disposed of as a short cause action. The record, however, discloses that pleadings did take place. The record further discloses that the case record was allocated to the Hon. Mr Justice Chaila on 7th April, 1983, after it had been before two other High Court judges who excused themselves from hearing the matter for the reasons unnecessary to mention here. It is common cause that the petitioner appealed against the judgment of the Hon. Mr Justice Chaila to the Supreme Court. The Supreme Court allowed the petitioner's appeal.

The petitioner seeks the following remedies: (a) a declaration that the refusal by the Hon. Mr Justice Chaila to adjudicate or to determine the said action is wrongful and unconstitutional; (b) a declaration that the respondent's failure to perform his functions, namely refusing or failing to determine the said action is a denial of justice; and (c) a declaration that the delay in determining the said action is unreasonable and is in breach of a statutory duty. For the foregoing

remedies the petitioner is asking for an order directed to the Hon. Mr Justice Chaila to determine the said action and deliver judgment and damages.

To complete the history of this petition it must also be stated that the petition was set for hearing on April 17, 1985. Before the commencement of the hearing of the petition on that day, the petitioner raised an objection to the appearance of the Attorney-General on behalf of the Hon. Mr Justice Chaila. After hearing the arguments from both the petitioner and Mr. Kinariwala who appeared for the respondent the court over-ruled the objection and held that the Attorney-General could represent the respondent in these proceedings.

At the end of that ruling, I raised preliminary question with the parties as to whether judge of the

High Court can be sued in respect of anything done or omitted to be done while discharging or purporting to discharge any responsibilities which he has in connection with the execution of judicial process. The matter was adjourned for arguments on the issue to June 24th, 1985. Before the adjourned date, Mr Kinariwala, on behalf of the respondent, filed a notice of intention to raise a preliminary issue of whether this Hon. court has jurisdiction to try the cause herein. I ruled that the preliminary issue raised by the court should be heard first. It turned out but not deliberately, that both preliminary issues were argued at the same time. In my view the two preliminary issues boil to the same thing.

The petitioner's submissions on the preliminary issue can be summarised as follows:

(1) The court's preliminary issue due to the nature of the issues in the petition is the main triable issue both in fact and in law.
(2) The court's preliminary issue raises the discussion of the effect of bringing petition under Article 29 of the Constitution.
(3) The respondent, although High Court judge, is competent to be sued.
(4) The petition raises a question of general importance.
(5) The petition raises the question of costs.

At this stage I must further mention that the petitioner filed a long list of authorities for which I am greatly indebted to him. But in dealing with the preliminary issue I raised I am mindful that I should avoid delving into the merits of the petition. In the view that I have taken, I consider that the arguments on the first, second, fourth and fifth submissions on behalf of the petitioner centre on the very merits of the petition in that to discuss the triable issues in the petition is to discuss the merits of the petition while at the same time the procedure under Article 29 of the Constitution is not in dispute and whether a case raises a question of general importance, there is no rule of law that prohibits the raising of preliminary issues; while the question of costs is in the discretion of the court and invariably follows the event. For these reasons I am satisfied that a discussion of the third

submission would take care of the preliminary issue I raised. I therefore intend to confine my ruling on the preliminary issue only to the one submission.

The only submission for consideration which I have referred to resolves itself in my opinion into a single contention of whether a judge of the High Court can be sued in respect of anything done or omitted to been done while discharging or purporting to discharge any responsibilites of a Judicial nature vested in him. This question in my opinion also raises an issue of general importance and goes to the very root of the petition.

The arguments on the submission that the respondent, though a High Court judge, is competent to be sued were to the effect that the general rule is that all persons who appear to have a real interest in objecting to the grant of a relief being sought should be made defendants to the case. The petitioner submitted that the respondent's legal interests are severely affected by the petitioner's claim and could be affected by any judgment in favour of the petitioner. For this reasons, the petitioner contended that the respondent is competent to answer or defend the petition. The

petitioner further argued that the petition reveals a dispute rendering it necessary that the rights of both the petitioner and the respondent be ascertained and declared. The petitioner submitted that the interests of the respondent are at stake and hence he must be made a party to the petition. In support of this submission he cited several cases among them the case of *London Passenger Transport Board v Moscron* (1) where at page 345 Viscount Morgham said:

> "...but the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made."

The petitioner's argument on this submission continued by saying that the principle is that where judge acts wholly without any jurisdiction, there can be no immunity and the judge is liable. According to the petitioner, if I rule against him, that is to say, that a judge cannot be sued, this will amount to a denial of justice. The petitioner conceded that there has to be independence of the judges, but contended that this must not be at the expense or sacrifice of justice. The petitioner cited the case of *Sirros v Moore* (2) as a case decided against judge. (I will revert to this case later in this ruling). He further cited a passage in the case of *Home Office v Dorset Yatcht Co*. (3) where Lord Reid said at page 1031:

> "Where Parliament confers a discretion the position is not the same. Then there may, and almost certainly will be, errors of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to
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> sue in respect of such errors. But there must come a stage the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his power. Parliament cannot be supposed to have granted immunity to persons who do that."

Mr Kinariwala, in response to the petitioner's arguments on the preliminary issue submitted that in the light of the constitutional provisions in relation to the appointment and removal of a High Court judge and on the principle laid down in the Sirros case a judge is immune from legal action and protected from liability for damages when he is acting judicially. Mr Kinariwala also submitted that from the same principle it is absolutely clear that if a judge is acting not judicially then he can be sued for damages.

Mr Kinariwala pointed out that from the circumstances of the petition the complaint of the petitioner is against a High Court itself as he is complaining against the action or omission of High Court judge. Mr. Kinariwala submitted that this court cannot decide on a complaint against itself. Counsel further submitted that by nature of the redress sought, namely declaration, this court cannot make declaration against itself. Mr Kinariwala also submitted that the other relief claimed for, an

order directing the respondent to determine the action and deliver judgment is tantamount to asking this court to issue a writ of mandamus against itself. Counsel also contended that this court cannot issue damages against itself.

I have fully addressed my mind to the learned arguments and submissions by both parties on the preliminary issue. At this stage I would like to clarify few matters. I have no doubt that a petition is competent to be brought under Art. 29 of our Constitution. But as I said that was not the issue I raised in my preliminary issue. I agree that a party whose interest would be affected by a grant of a declaration must be made a party to a case. I am, however, in very serious doubt whether a High Court can make orders of mandamus and damages against itself.

My doubts on this are confirmed if not supported by the case of *Godfrey Miyanda v The High Court* SCZ Judgment No.5 of 1984 where the applicant dissatisfied with the alleged delay or failure in the disposal of his action by the High Court applied to the Supreme Court for leave to apply for an order of mandamus to compel the learned High Court judge (same judge as in present position) seized of the suit to determine the action and deliver judgment. That application failed on preliminary point of procedural law. But dealing with the substantive law in passing the learned Deputy Chief Justice at page 5 had this to say:

> "I further feel, in the circumstances, that no useful purpose will be served in discussing the applicant's additional obstacle posed by the substantive law which makes it clear that, it is the High Court which can issue mandamus against inferior courts and tribunals and that the order does not issue against the High Court

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> itself. The applicant asked what should happen if a High Court judge refuses or fails to perform his job within reasonable time (as enjoined by Article 20(9) of the Constitution) or at all. It is unnecessary for me to answer this question but I have no doubt in my mind that the remedy of mandamus is not available against the judges of the superior courts of this country In the event of an alleged failure to perform their judicial functions."

I entirely agree with the observations of the learned Deputy Chief Justice on the substantive law. But the crux of the preliminary point I raised is whether High Court judge can be subject of litigation for anything done or ommitted to be done in his capacity as such. I do not disagree with most of the procedural principles laid down in the cases cited by the petitioner but it must be observed that most of those cases did not involve a respondent judge and therefore have no bearing on the matter before me. I must, however, hasten to correct the petitioner when he submitted that the Sirros case was decided against respondent judge. This is not the correct position. I must also say that this is the first case in Zambia as far as I have been able to ascertain where a High Court judge is being taken to court for something done or said to have been ommitted in his judicial capacity and within his jurisdiction. On the facts as revealed by the petition itself some of which have by now been overtaken by events, I have no doubt in my mind that Cause No.1981/HP/1244 was heard before the Hon. Mr Justice Chaila in no other capacity than that of High Court judge. It is not the argument that he did not have jurisdiction to determine that case.

At this stage it becomes necessary to review some of the English cases in which the principle governing the immunity of judges has been debated and decided. In *Fray v Blackburn* 3B and S.576 (4) Crompton, J. stated the position in these words:

> "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though, it be alleged to have been done maliciously and corruptly... The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions."

In *Anderson v Gorrie and Others* (5), an action was brought by the plaintiff against several judges of the Supreme Court of a colony for damages for wrongful act done by them in committing him for contempt court and in holding him to excessive bail. It was accepted that the matters were matters with which they had jurisdiction to deal. After citing the principle laid down in *Fray* case Lord Esher M.R. at page 671 said:

> "To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or word spoken by a judge in the exercise of his judicial office, although

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> his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office."

The headnote in that case reads as follows:

> "No action lies against a judge of the Supreme Court of a colony in respect of any act done by him in his judicial capacity, even though he acted oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice. "

Winfield and Jolowicz on Tort 10th Edition at page 596 comments as follows:

> "If it were otherwise, the administration of justice would lack one of its essential -the independence of the judges. It is better to take the chance of judicial incompetence, irritability, or irrelevance, than to run the risk of getting a Bench warped by apprehension of the consequences of judgments which ought to be given without fear or favour."

The plaintiff cited the case of Sirros as a case in which a judge was held liable. As stated earlier this is not correct. The relevant very brief facts in that case are that the plaintiff began an action against the judge and the police claiming damages for assault and false imprisonment. Master Jacob refused an application by the defendants to strike out the writ and statement of claim and to dismiss the action on the ground they disclosed no reasonable cause of action but Michael Davies J. allowed their appeal. On appeal by the plaintiff to the court of appeal the appeal was dismissed with costs by a unanimous decision of the court. Lord Denning M.R.at page 132 had this to say:

> "Ever since the year 1613, if not before, it had been accepted in our law that no action is

> maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action.

Of course, if the judge has accepted bribes or been the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judges is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong .It is so that he should be able to do his duty with complete independence and free from fear."

In *re McC (Minor) The Times*, November 28, 1984 at p.22 Lord Bridge explained the principle as follows:

> "The principle underlying that rule was clear. If one Judge in 1,000 acted dishonestly within his jurisdiction to the detriment

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> of a party before him, it was less harmful to the health of the society to leave that party without a remedy than that 999 honest Judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction."

The foregoing English authorities in my opinion though not binding on this court are certainly good and sound law which I do not think this court can ignore. But it must be said and I have no doubt that where a judge exercises his jurisdiction from malicious motives and has been guilty of gross dereliction of duty then a different set of considerations would arise even if there is no civil remedy.

It may be argued that the immunity of a judge is confined to judicial acts only namely when a judge does an act or omits to do an act in his judicial capacity or in the exercise of his judicial office and within his jurisdiction. But in the instant case it must be noted that essentially the petitioner's complaint is that the judge has delayed the delivery of a judgment in an action in which he is a plaintiff. This complaint as I have already observed has been overtaken by events. But in fairness to the learned judge and without deciding the petition on its merits, it must be observed that the case No. 1981/HP/1244, the subject of the complaint was heard on the very day the learned judge fixed it for hearing. On that very day the trial was completed. At the request of the petitioner himself that case was adjourned for his submission and judgment thereafter. In adjourning the case for judgment the learned judge was performing his judicial function within his jurisdiction.

For my part I am unable to say that to adjourn a case is to refuse to adjudicate or to determine it. I am also unable to say that to adjourn a case is wrongful or unconstitutional. Further I cannot say that to adjourn a case for judgment is failure on the part of a judge to perform his functions and a denial of justice. Delivery of judgments may be delayed for a variety of reasons. But although the saying is that justice delayed is justice denied, it must also be borne in mind that rash justice can also be justice denied. In my considered opinion remedy for delayed judgment cannot and should

not be the taking of a judge to court. Zambia cherishes the independence of the judiciary. It will therefore be setting a very dangerous precedent and a serious threat to the independence of the judiciary if suing judge is established as remedy to a delayed judgment.

I must hasten by saying that I am not suggesting that there is no redress to judicial misconduct, but that there is no civil remedy. The public have right to have the independence of the judges preserved. It is therefore more than the privilege of the judges themselves. The absolute freedom and independence of the judges is imperative and necessary for the better administration of justice.

On the principle laid down by the English cases from the earliest times, which principle I accept in total I hold that in Zambia no civil

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action lies for acts done or words spoken by a judge in the exercise of his judicial office. It follows that this petition must be struck out and I so order. The petition is therefore dismissed.

I said earlier that this appears to be the first case where a judge has been sued in that capacity. The case has raised question procedural law of general importance. I therefore make no order as to costs.

Petition struck out
