

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2009/HPC/0322

BETWEEN:

DEVELOPMENT BANK OF ZAMBIA

PLIANTIFF

AND

**JCN HOLDINGS LIMITED
POST NEWSPAPERS LIMITED
MUTEMBO NCHITO**

**1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT**

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 19th DAY OF APRIL, 2012

For the Plaintiff	:	Mr. V.B. Malambo SC and Ms Kalyabantu of Messrs Malambo & Company
For the First & Second Defendants	:	Mrs. S. Kateka of Nchito & Nchicto
For the Third Defendant	:	N/A

RULING

Authorities referred to:

- 1. *The Supreme Court Practice, 1999 Volume 1***
- 2. *High Court Act, Chapter 27 of the Laws of Zambia.***
- 3. *Constitution, Chapter 1 of the Laws of Zambia.***
- 4. *Inquiries Act Chapter 41 of the Laws of Zambia.***

On the 11th day of April, 2012 I adjourned this matter for judgment. Subsequently, an interlocutory application was made by the First and Second Defendants to stay proceedings.

After hearing the parties on the application to stay proceedings, I reserved the ruling for delivery today. Meanwhile, on 18th April 2012, the Plaintiff purported to discontinue the action by filing a notice of discontinuance. The said notice was not preceded by an application to arrest ruling and judgment and neither has this Court issued an order to that effect. It is also in contravention of Order 21 (2) of ***The Supreme Court Practice (whitebook)*** which by implication requires any discontinuance made after 14 days of service of defense to be by leave of Court. The order states as follows:

“ Subject to paragraph (2A), the plaintiff in an action begun by writ may, without the leave of the Court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 14 days after service of the defense on him or, if there are two or more defendants, of the defense last served, by serving a notice to that effect on the defendant concerned.”

The explanatory notes to the said order at Order 21 rule 5 Sub rule 9, in clarifying this position state as follows:

“Leave of the Court is required for the discontinuance of an action or counterclaim or the withdrawal of any particular claim or question in the following cases:

(1) •••

(2) where a notice of discontinuance or withdrawal has not been served or not effectively served in due time•••”

It is therefore a requirement of the law that leave of court should be sought by

a party seeking to discontinue an action or claim on expiry of 14 days after service of defence on him. This matter is at judgment stage, as such it was

mandatory for the Plaintiff to seek leave of this Court to discontinue the action.

I have therefore ignored the notice of discontinuance because it is not properly filed before this Court nor does it render the Court *functus officio*.

This application by the First and Second Defendants is for a stay of proceedings in this matter made pursuant to Order 3 rule 2 of the **High Court Act**. The proceeding in issue sought to be stayed is delivery of judgment, pending the out come of investigations or inquiry by the Minister of Justice into the manner in which this record was reallocated to this Court from Wood, J. The application is supported by an affidavit sworn by one Fred M'membe and skeleton arguments. The Plaintiff opposed the application by way of an affidavit sworn by one Caiaphas Mwanakwale Habosonda and skeleton arguments.

The brief facts of this case, leading up to this application, are as follows. On 26th March, 2012, the matter came up for continued trial. Prior to the commencement of trial, counsel for the First and Second Defendants requested the Court for audience in chambers. The Court declined the application and requested the Defendants to proceed with cross examination of PW1. The Third Defendant rose and applied that the matter be adjourned pending investigations by the Minister of Justice regarding the manner in which the case record was reallocated to this Court from Wood, J. This Court declined the application where upon the First and Second Defendants' counsel and the Third Defendant stormed out of the Court room. The Court proceeded with the trial and after the hearing, it reserved judgment. It is delivery of the said judgment that the First and Second Defendants seek to stay by this application.

The evidence as it is revealed in the affidavit in support is that the record of this matter was initially allocated to Wood, J. who adjudicated upon several

applications and also heard a substantial part of the Plaintiff's case. Prior to conclusion of the matter, however, the record was allegedly withdrawn from Wood, J. and reallocated to this Court. Arising from the foregoing facts, a complaint had been lodged with His Lordship the Chief Justice and subsequently with the Minister of Justice. It is in this respect argued that, investigations have not yet been concluded and as such, if this Court proceeds to deliver judgment, the Defendants will be prejudiced.

The deponent also highlighted how, the Third Defendant and himself and Mr. N. Nchito, as counsel for the First and Second Defendants walked out of the Court room prior to commencement of the continued trial of the matter on 26th March, 2012, on the ground that they would not be afforded a fair trial.

The affidavit in opposition revealed the following evidence that is to say; at the hearing of the 25th August, 2011, upon enquiry from the Court, the Defendants indicated that they had no reason to believe that this Court would not grant them a fair hearing; the record reveals that at the hearing of 26th March, 2012 the Defendants and their Advocates in an unprecedented manner walked out of the proceedings of the Court, thereby abandoning their opportunity to present their case; there is no judicial ground revealed in the affidavit in support upon which this Court can stay these proceedings; and the Plaintiff has not been privy to the Defendants' various complaints and meetings suggested to have been held by the Defendants in respect of and surrounding these proceedings.

The application came up for hearing on 11th April, 2012. Counsel for the First and Second Defendants, Mrs. S. Kateka in her arguments focused on highlighting the background to this matter. In so doing she cited the provisions of the **High Court Act** that cater for transfer of matters and the procedure to be adopted by a judge in recusing himself. Counsel argued that, this procedure was not followed in this matter when the record was

reallocated to this Court from Wood, J. In the light of this and the complaint lodged with the Minister of Justice, these proceedings should be stayed pending conclusion of the investigations.

Counsel went on to highlight instances where the Executive can properly and legally review the exercise of judicial functions thus; by way of an inquiry under Section 2 of the ***Inquiries Act***; and by virtue of the provisions of the ***Constitution*** that provide for removal of judges from office.

She closed her submissions by arguing that the application is anchored on Order 3 rule 2 of the ***High Court Act***. The said order, it was argued, empowers this Court to entertain an application such as this one.

In response counsel for the Plaintiff Mr. V.B. Malambo SC argued thus; it is improper and illegal for a party to ongoing litigation to seek to invoke Executive interference as the basis to stay or halt judicial proceedings; the Second Defendant has presented no material upon which this Court can exercise its discretion to grant the order sought; and the Court had already dealt with the issues raised in the application and the ruling on record renders the Court *factus officio*. Counsel proceeded to elaborate that, pursuant to Article 91(2) of the ***Constitution***, this Court is granted independence and as such to request the Court to stay proceedings pending inquiry violates the spirit of the ***Constitution***. Further that, the application as it is couched also amounts to contempt of the Court process because the Minister of Justice has no Constitutional mandate to play in any Court proceedings.

As regards the reference to Order 3 rule 2 of the ***High Court Act***, counsel argued that the provision is invoked by the Court for purposes of doing justice. The pursuit of justice under this order must however be sought within the law and this is not the case in this matter as the reasons

advanced for seeking the stay are without precedent. Counsel ended arguments by highlighting the effect of failure by a party to attend trial with reference to Order 35 rule 2 of the **Supreme Court Practice (whitebook)**.

I have considered the affidavit evidence and arguments advanced by counsel for the parties. Put simply, the First and Second Defendants' application is for stay of this Court's proceedings pending inquiry into the complaint lodged by the Defendants to the Minister of Justice. The question or issue before me is therefore, whether a party can request a stay of proceedings in a matter pending determination by a Court properly constituted by referring any dispute arising therefrom to the executive for investigation?

Before I determine this application I feel compelled to inform the parties that in this ruling I will not address the effect of the Defendants' and their counsel's departure from the Court room during trial on 26th March, 2012. I will address that issue at an appropriate stage. My duty in this ruling is merely to address the question or issue I have stated in the preceding paragraph.

The starting point is a perusal of the provisions of the law that constitute or establish this Court. These provisions are Articles 91 and 94 of the **Constitution** and they state as follows;

Article 91

“(1) The Judicature of the Republic shall consist of:

- (a) the Supreme Court of Zambia;**
- (b) the High Court for Zambia;**
- (c) the Industrial Relations Court;**
- (d) the Subordinate Courts;**
- (e) the Local Courts; and**
- (f) such lower Courts as may be prescribed by an Act of Parliament**

(2) The Judges, members, magistrates and justices, as the case may be, of the Courts mentioned in clause (1) shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with code of conduct promulgated by Parliament.

(3) The Judicature shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament.”

Article 94

“(1) There shall be a High Court for the Republic which shall have, except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act, unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.”

(The underlining is the Court's for emphasis only).

This is the foundation upon which this Court is constituted and it is evidence that this Court is not subject to review or inquiry by the Executive in the performance of its judicial functions. It is only subject to the **Constitution** pursuant to which it is created and enjoys original jurisdiction in all matters in the exercise of judicial functions. Therefore, this application is an attempt at eroding and abrogating the very foundation upon which the Court is constituted and subordinating it to the dictates of the Minister of Justice. This is not only unacceptable but also contemptuous of the Court process because as counsel for the Plaintiff has argued the Minister of Justice has no

constitutionally mandated role to play in any Court proceedings. I would venture to state further that, the Minister of Justice has no mandate whatsoever to orchestrate or direct the conduct of any Court proceedings.

In arriving at the foregoing conclusion I have considered the arguments by counsel for the First and Second Defendants to the effect that under Section 2 of the **Inquires Act** and Article 98 of the **Constitution** the Executive is empowered to review the exercise of judicial functions. I have found the said arguments not only to be untenable but a gross misapprehension of the two provisions of the law. Section 2 (1) of the **Inquiries Act** states as follows;

“The President may issue a commission appointing one or more commissioners to inquire into any matter in which an inquiry would, in the opinion of the President, be for the public welfare.”

While Article 98 of the constitution states as follows;

“(2) A Judge of the Supreme Court, High Court, Chairman or Deputy Chairman of the Industrial Relations Court may be removed from office only for inability to perform the functions of office, whether arising from infirmity of body or mind, incompetence or misbehavior and shall not be so removed except in accordance with the provision of this Article.

(3) If the President considers that the question of removing a judge of the Supreme Court or of the High Court under this Article ought to be investigated, then-

(a) he shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office;

on (b) *the tribunal shall inquire into the matter and report*

the facts thereof to the President and advise the President whether the judge ought to be removed from office under this Article for inability as aforesaid or for misbehaviour.

(4) *Where a tribunal appointed under clause (3) advises the President that a judge of the Supreme Court or of the High Court ought to be removed from office for inability, or incompetence or for misbehaviour, the President shall remove such judge from office.*

(5) *If the question of removing a judge of the Supreme Court or of the High Court from office has been referred to a tribunal under clause (3), the President may suspend the judge from performing the functions of this office, and any such suspension may at any time be revoked by the President and shall in any case cease to have effect if the tribunal advises the President that the judge ought to be removed from office.*

(6) *The provisions of this Article shall be without prejudice to the provisions of Article 96.”*

It is clear from these two provisions of the law that they respectively empower the President to set up a commission of enquiry and the constitution of a tribunal for the removal of a Judge from office. They do not however, make provisions for such inquiry or tribunal to review the exercise of a Judge's judicial functions.

Further, I have considered the arguments by counsel for the First and Second Defendants that the rendering of judgment will prejudice her clients and I am of the firm view that they will in no way be prejudiced. The reason for this is that the issues before this Court which will be the subject of the judgment are totally unrelated to the issues that have been laid before the Minister of Justice which will be the subject of investigations. To demonstrate this point, the issues for determination before this Court are; whether or not the Defendants are indebted to the Plaintiff in the sum of K14 billion; and in the alternative whether or not the Third Defendant should be compelled to execute the deed of guarantee and pay the sum of USD 3 million. On the other hand, the Minister of Justice has been called upon to investigate the circumstances that led to the case record in this matter being reallocated to this Court from Wood, J. These two issues, as I have stated are not in any way related and neither do they have a bearing on each other. This point is emphasized by the fact that should the investigations reveal any impropriety in the manner the record was reallocated to this Court, neither the Minister of Justice nor the investigators can direct this Court to surrender the record back to Wood, J. This arises from the independence that the High Court Judges enjoys as per Article 91(2) of the **Constitution** as demonstrated in the earlier part of this ruling. Which is that once, allocated a case for determination only the Judge himself or herself can refer it back for reallocation to the Judge-in-Charge on the grounds provided by law. Therefore, Wood, J. was not obliged to surrender the case record for undisclosed obscure reasons or reasons outside the requirements of the law.

Arising from my findings in the preceding paragraphs it is clear that the First and Second Defendants' application is not only misconceived but bereft of any merit. Their predicament is compounded by the fact that the issues they are raising now in relation to the reallocation of the record to this Court, transfer of matters between Courts and procedure for recusal were dealt with on 25th August, 2011. On that day a motion was raised by the Third

Defendant which addressed the issues being raised now. This Court did deliver a ruling dismissing the Third Defendant's motion and the proper steps for the Third Defendant and indeed other Defendants to take, if they are dissatisfied with that ruling, is to appeal against the ruling to the Supreme Court. A feable attempt was made in that respect, by way of an application for leave to appeal which this Court refused on account of the application being unmeritorious. This however, as counsel for the Plaintiff, argued did not shut the doors to justice to the Defendants because they are at liberty to make a similar application in the Supreme Court.

In the ruling of the 25th August, 2011 I did also highlight the circumstances that led to the record on this matter being reallocated to this Court and procedure followed in allocating files in the High Court. I feel compelled to restate this procedure for purposes of putting the issue beyond doubt and to rest. The procedure is as follows. At Lusaka there is a Judge-in-Charge and Deputy Judge-in-Charge. The former is charged with the responsibility of allocating records of all actions filed in the High Court to Judges. In the absence of the Judge-in-Charge the Deputy Judge-in-Charge acts in that position. However, since we have a general list and commercial list at the principal registry, the roles of the two have been divided between the two list. That is to say, the Judge-in-Charge allocates records for actions filed on the general list to Judges on the general list, while the Deputy Judge-in-Charge allocates records for actions filed on the commercial list to Judges on the commercial list. From time to time however, and entirely in the discretion of the Judge-in-Charge, actions filed on the general list are allocated to Judges on the commercial list, and similarly, pursuant to application by a party and in appropriate circumstances, commercial list cases are transferred to the general list for hearing.

Following allocation of a record as aforestated to a Judge, he or she takes charge of the said record and adjudicates upon it independent of either the

Judge-in-Charge, Deputy Judge-in-Charge or indeed any other Judge. Further, a record once allocated to a Judge can not be withdrawn from him by either the Judge-in-Charge, Deputy Judge-in-Charge or another Judge. He or she can only cease to act on such a record if he recuses himself, by reason of transfer or retires, ceases for any reason to be a Judge or dies.

All Judges are alive to the exclusive right a Judge has over a record arises from the independence that Judges and other judicial officers enjoy pursuant to Article 91(2) of the **Constitution**. It is therefore preposterous, in my considered view, to assume, or even assuming such attempt is made for reasons outside the parameters of the provisions for recusal, that a Judge or indeed other judicial officer can be compelled to surrender a record allocated to him to the Judge-in-Charge or Deputy Judge-in-Charge.

To answer the question or issue raised, there can be no stay of proceedings before this Court or any other Court for purpose of facilitating investigations by the Minister of Justice or indeed the Executive as a whole. Neither can a judicial decision be the subject of investigation by the Minister of Justice or the Executive because any grievance against a judicial decision by a dissatisfied party lies in appeal. Having so found, this application is accordingly dismissed with costs.

Leave to appeal is granted.

Delivered on the 19th day of April, 2012.

Nigel K. Mutuna
HIGH COURT JUDGE

