

**IN THE HIGH COURT OF ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**

**2010/HP/690**

*(Civil Jurisdiction)*

BETWEEN:

**MOONDA JANE MUGAILA-MAPIKO**  
**JOHN MUCHABI** *(Suing on behalf of the*  
*Traditional Council of Mungaila Royal Establishment*

**1<sup>ST</sup> PLAINTIFF**  
**2<sup>ND</sup> PLAINTIFF**

**AND**

**VICTOR MAKABA CHAANDE**  
**DEFENDANT**

*Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 25<sup>th</sup> day of November, 2010.*

*For the Plaintiffs: Mr. S. W. Sabi of Messrs Kaunda Sabi and Company.*

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**R U L I N G**

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**Cases referred to:**

1. *Weisz Ex Parte Hector MacDolnald Limited* [1951] 2 K.B. 611.
2. *Eckman v Midland Bank Limited* [1973] Q.B. 519.
3. *Balogh v Crown Court at St Albans* [1974] 3 ALL E.R 238.
4. *Attorney General v Times Newspaper Limited* [1974] A.C. 273.
5. *Enfield London Borough Council v Mahoney* [1983] 1 W.L.R. 749.
6. *Zulu v The People* [1990-1992] Z.R. 62.
7. *Kundiona v The People* [1993- 1994] Z.R. 59.

**Legislation referred to:**

1. *Rules of the Supreme Court (White Book) Orders: 45, rule 5, and 52.*

**Works referred to:**

1. *D. Eady and A.T.H. Smith, Arlidge, Eady and Smith on Contempt, Third Edition, (London, Sweet and Maxwell 2005).*
2. *Stuart Sime, A. Practical Approach to Civil Procedure (Oxford University Press, 2005).*
3. *J. R. Lewis, Civil and Criminal Procedure, (London, Sweet and Maxwell 1968).*

I was approached in this matter through a Notice of Motion for an order of committal. The terms of the Notice are as follows:

1. That Victor Makaba Chaande the contemnor herein, be committed to prison for his contempt of Court in deliberately lying on oath in the affidavit in opposition to the plaintiff's application for an order of interim injunction, dated 13<sup>th</sup> July, 2010, which action was calculated to deliberately mislead this honourable Court, whether or not to grant the order of injunction as requested by the 1<sup>st</sup> Plaintiff;
2. That the contemnor, namely, Victor Makaba Chaande, do pay the applicant herein her costs of, and incidental to this application, and order to be made thereon.

3. That such further, or other order be made as the Court shall deem proper.

The Notice of Motion for an order of committal was accompanied by an affidavit in support. The affidavit in support was sworn by Moonda Jane Mungaila-Mapiko, the 1<sup>st</sup> plaintiff in this action. Ms. Mapiko deposed that she is a Royal princess in the Mungaila chieftdom, and swore the affidavit in that capacity.

Ms. Mapika set out the background to the application as follows. On 29<sup>th</sup> June, 2010, by a writ of summons, and statement of claim, she commenced the present action. Simultaneously, she applied for an order of interim injunction. The application for an interim injunction was opposed by Victor Makaba Chaande, the defendant in this action. In opposing the application, Ms. Mapika contends that Mr. Chaande falsely stated in paragraph 16 of the affidavit in opposition dated 13<sup>th</sup> July, 2010 as follows:

*“The instruments of power and authority were eventually given to me after all the relevant procedures were followed with the guidance of the local Authority (“the Council”).*

Ms. Mapika contends that the preceding assertion is not true because the Chief’s (Recognition) (No. 11) Order, 2010, was only signed by the President on 6<sup>th</sup> August, 2010. And thereafter, the instruments of power were handed over to the defendant on 22<sup>nd</sup> August, 2010. In support of this contention, Ms. Mapika showed me a copy of the order of Recognition confirming that it was

issued on 6<sup>th</sup> August, 2010. The order, Ms. Mapika contends, is proof that Mr. Chaande lied on oath.

Ms. Mapika states in the affidavit in support of the present application that upon discovery of Mr. Chaande's misrepresentations, she instructed her advocates to enquire from the Provincial (Southern Province) Permanent Secretary, about the succession dispute in Mungaila chiefdom. The letter under even reference is dated 20<sup>th</sup> August, 2010. In fact, the letter in question is not an enquiry. It is a complaint to the effect that the Permanent Secretary should have not recommended the recognition of Mr. Chaande, in view of the fact that there is pending action before me. Thus Ms. Mapika's advocates, in the letter of even reference, threatened to cite the Permanent Secretary - Southern Province-for contempt of Court.

To continue with the narration, in a letter dated 23<sup>rd</sup> August, 2010, a Mr. A Chingi; Acting Deputy Permanent Secretary - Southern Province, replied to the letter written by Ms. Mapika's advocates. In the reply, Mr. Chingi, (writing on behalf of the Permanent Secretary), expressed ignorance about the existence of the succession dispute in Mungaila chiefdom. Mr. Chingi intimated that the recommendation for recognition made in favour of Mr. Chaande, was based on the recommendation from the Provincial Local Government officer, and the Council Secretary; Namwala District Council.

Following receipt of the reply, Ms Mapika deposed in the affidavit in support, that she instructed her advocates to write to the Republican President, stating that the Recognition Order was issued as a result of misrepresentations by Mr. Chaande; working in concert with the Council Secretary of Namwala District Council, and the Provincial Local Government Officer. Thus in a letter dated 8<sup>th</sup> September, 2010, Ms. Mapika's advocates wrote to the Republican President setting out the background to the dispute, and complained that the Recognition Order was issued following concealment of material facts surrounding the succession dispute. Ms. Mapika's advocates urged the Republican President to investigate the matter, and to revoke statutory instrument number 68 of 2010; which recognised Mr. Chaande as chief Mungaila of the Ila people of Namwala District.

Ms. Mapika further contends that Mr. Chaande lied on oath in his affidavit in opposition to the interim injunction, when he stated in paragraph 19 that: *"the Mungaila Traditional Council does not exist."* This averment, Ms. Mapika contends, was calculated to mislead me in my consideration, and evaluation of the application for the order of interim injunction. Ms. Mapika contends that Mr. Chaande knew as a matter of fact that the Mungaila Traditional Council has been in existence, and to a large extent administers the affairs of the chieftdom. Further, Ms. Mapika contends that the existence of the Mungaila Traditional Council is evidenced by Mr. Chaande's own action, when he issued an eviction order to a

subject by the name Boyd Makando, through the Mungaila Traditional Council. Ms. Mapika showed me a copy of the “*Eviction Order*”, dated 10<sup>th</sup> September, 2010, issued by the chairman of the Mungaila Traditional Council; headman Mwanamufwenga. In the circumstances, Ms. Mapika contends that Mr. Chaande by his acts of lying on oath, and or contemptuous conduct, has been, and is guilty of contempt of Court. Ms. Mapika has urged me to commit Mr. Chaande to prison for the alleged contempt.

In addition to the pleadings referred to above, Mr. Sabi on behalf of Ms. Mapika filed Skeleton Arguments to support the application for leave to issue committal proceedings. In the Skeleton Arguments, Mr. Sabi submitted that the application is made pursuant to Order 52, rule 2 (1), and (2) of the Rules of the Supreme Court. Order 52 rule 2 (9i) is in the following terms:

*“No application to a Divisional Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.”*

Order 52 rule 2 (2) goes on to provide that:

*“An application for such leave must be made ex parte to a Divisional Court, except in a vacation when it may be made to a judge in chambers, and must be supported by a statement setting out the name, and description, and address of the person sought to be committed, and the grounds on which his committal is sought, and by an affidavit to be filed before the applications is made verifying the facts relied on.”*

Mr. Sabi argued that according to the affidavit in opposition dated 13<sup>th</sup> July, 2010, Mr. Chaande stated in paragraph 16, that the instruments of power, and authority were handed over to him, after all the relevant procedures were followed with the guidance of Namwala District Council. Yet, the Recognition Order shown to me reveals that the Order is dated 6<sup>th</sup> August, 2010. Mr. Sabi argued that the instruments of power, and authority could not have been given to Mr. Chaande by 13<sup>th</sup> July, 2010, as stated in his affidavit of even reference. Mr. Sabi therefore contends that Mr. Chaande lied on oath. The lie, Mr. Sabi contends, was calculated to mislead me in the consideration of the application for an interim injunction. Mr. Sabi contends that as a matter of fact, the instruments of power were only given to Mr. Chaande on 22<sup>nd</sup> August, 2010, whilst this matter was still pending before me. Furthermore, Mr. Sabi contends that Mr. Chaande lied on oath when he stated in paragraph 19 of his affidavit in opposition that the Mungaila Traditional Council, does not exist. The lie, Mr. Sabi argued, is vindicated by fact that the Mungaila Traditional Council on 10<sup>th</sup> September, 2010, issued an eviction order to one of the subjects on behalf of Mr. Chaande. In view of the foregoing, Mr Sabi urged to grant an order for leave to issue committal proceedings against Mr. Chaande. And also to show cause why he should not be committed to prison for contemptuous conduct by lying on oath deliberately.

I am indebted to Mr. Sabi for his arguments, and submissions. I will begin by examining the notion of contempt of Court itself. According to *D. Eady, and A. T. H. Smith, Arlidge, Eady and Smith on Contempt, Third Edition, (London, Sweet and Maxwell 2005)*, at P1, from the earliest legal history, the Courts have assumed the power to coerce those who obstruct the administration of justice. Thus in essence contempt of Court consists of interfering with the administration of justice. Further, according to *Stuart Sime, A Practical Approach to Civil Procedure, (Oxford University Press, 2005)* at page 487), contempt of Court can take many forms. However, the most common are:

- (a) Disobedience by the contemnor of an order requiring him or her to take or refrain from taking specified action;
- (b) Assisting another to breach such an order; and
- (c) Taking action which impedes or interferes with the course of justice.

Sime (supra page 487), states that proceedings for contempt are essentially punitive in character, although they also have the purpose of securing the compliance with Court orders. The main forms of punishment for contempt are imprisonment, fines, and sequestration. However, the Court can also order the taking of security, award damages, or deliver a strong reprimand. (See S Sime, *A Practical Approach to Civil Procedure*, (supra) at page 487).



Given the nature of the punishments for contempt, the Courts have insisted on the establishment of *mens rea*, and proof beyond reasonable doubt. (See *S Sime A Practical Approach to Civil Procedure, (Supra) at page 487*).

What then is the rationale behind contempt jurisdiction. The rationale underlying Contempt jurisdiction was explained in the following terms by Lord Morris in *Attorney General v Times Newspapers Limited [1974] A.C. 273 at 302*:

*“In an ordered community, Courts are established for the pacific settlement of disputes, and for the maintenance of law and order. In the general interest of the community, it is imperative that the authority of the Court should not be imperiled, and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed, it is not because those charged with the responsibilities of administering justice are concerned for their dignity; it is because the very structure of ordered life is at risk if the recognized Courts of the land are so flouted, and the authority wanes and is supplanted.”*

To continue with the discussion of the rationale for contempt jurisdiction, in the decided case of *Zulu v The People (1990 - 1992) Z.R. 62*, the Supreme Court approved a passage by Lord Denning in the case of *Balogh v Crown Court at St Albans [1974] 3 ALL E.R. 238*, at page 288, at paragraph e - f as follows:

*“This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity, and authority of the judge, and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent, and imperative to act immediately - so as to maintain the authority of the Court - to prevent disorder - to enable witnesses to be free from fear - and jurors from being improperly influenced*

*and the like. It is of course to be exercised with scrupulous care, and only, when the case is clear and beyond reasonable doubt."*

In the case of *Kundiona v The People [1993 - 1994] Z.R 59*, the erstwhile Chief Justice Ngulube explained contempt of Court at page 61, in the following terms:

*".... contempt of this kind are punished not for the purpose of protecting either the Court as a whole, or the individual judges of the Court from a repetition of the attack, but of protecting the public especially those who either voluntarily or by compulsion are subject to the jurisdiction of the Court from mischief they will incur if the authority of the tribunal is undermined or impaired."*

In short, it is the need to protect the rule of law that is the common factor underlying the contempt of Court jurisdiction generally.

Applications for contempt of Court are normally made in the context of enforcing injunctive orders, or judgments generally. Accordingly, when a defendant disobeys a prohibitory injunction, or neglects to comply with a mandatory injunction within the time specified in the order, the judgment of the Court may be enforced by a writ of sequestration, or an order of committal against him. (See Order 45 rule 5(1) of the Rules of the Supreme Court).

According to J.R. Lewis, Civil and Criminal Procedure, (London Sweet and Maxwell 1968) at page 97, where a judgment or order directs a person to pay money into Court, or to do any other act within a limited time, if that person fails to do so, his obedience may be enforced by writ of sequestration. Leave to issue a writ of

sequestration can only be obtained by motion to a judge. The effect of the issue of a writ of sequestration is that all property is placed in the control of sequestrators, who will usually be four in number. They will have authority to enter upon his property, and receive into their hands and profits from his real estate, and all his goods and chattels to detain them until he has purged his contempt (See *Eckman v Midland Bank Limited* [1973] Q.B. 519.)

It is worth noting that a contemnor does not necessarily serve the entire term of the imprisonment imposed by a judge. An application for its discharge may be made on the grounds that the contempt has been purged, or that the contemnor has been sufficiently punished for the contempt, and has shown suitable remorse. However, the Court will also be concerned with whether the contemnor is likely to obey the Court's order in the future. (See *Enfield London Borough Council v Mahoney* [1983] 1 W.L.R. 74 (CA)).

In the instant case the application for leave to issue committal proceedings is premised on two grounds. The first ground is that the defendant stated in paragraph 16 of the affidavit in opposition to the *ex parte* summons for an order of interim injunction as follows:

*“That the instruments of power and authority were eventually given to me after the relevant procedures were followed with the guidance of the Local Authority (Council).”*

The contention of the plaintiff here is that the Recognition Order, recognizing the defendant as chief Mungaila of the Ila people, was only signed by the President on 6<sup>th</sup> August, 2010. Thus the instrument(s) of power and authority could not have been given to the defendant prior to that date. The 1<sup>st</sup> plaintiff therefore contends that this constitutes evidence that the defendant lied on oath.

Secondly, in paragraph 19 of the same affidavit, the defendant stated as follows:

*“That according to our culture and tradition, there has never been a time when the Royal Establishment Council [Mungaila Traditional Council] was tasked to oversee the affairs of the Chieftom because the said Royal Establishment Council does not exist.”*

The 1<sup>st</sup> plaintiff contends that the preceding assertion is a lie because the same Mungaila Traditional Council, which the defendant claimed does not exist, issued an eviction order to one of the subjects under the authority of the defendant. The 1<sup>st</sup> plaintiff therefore contends that this is proof that the defendant was lying on oath. It is against this backdrop that leave is sought to issue committal proceedings.

The question that falls to be determined is therefore whether or not the matters complained of constitute contempt of Court. From the discussion had regarding contempt jurisdiction, it is clear that contempt jurisdiction includes conduct which tends to disobey an order requiring a person to take or refrain from taking specified action, assisting another to breach such an order, and generally any conduct which impedes the administration of justice. However, the ambit of the contempt jurisdiction is not limited to the matters stated above. It extends to conduct that tends to abuse the Court procedures generally, and specifically to putting forward false cases.

A leading case on this aspect of contempt of Court, is the case of *Weisz Ex parte Hector MacDonald Limited [1951] 2 K.B. 611*. The facts of the case were that a gambler wished to recover certain gaming debts from a firm of bookmakers. Although he was aware that the action was not maintainable at law, he instructed his solicitor, who in turn instructed counsel to commence an action for their recovery. Counsel endorsed the writ as an account stated though in fact there never had been an account stated. Subsequently, counsel settled further particulars which made the nature of the claim clear, but advised that these were in fact fatal to the claim. After some delay the action was discontinued. The bookmakers sought to have both the gambler and his solicitor committed for contempt.

In the course of the judgment Lord Goddard pointed out that it was an example of putting forward what the old cases called a

*“feigned issue”*; that is to say a fictitious cause of action. Lord Goddard emphasized the importance and necessity of being frank with the Court. Ultimately, the Court held the solicitor in contempt, but regarded it as a mitigating factor that the form of endorsement had often been used in the past without it having been held to be in contempt. For that reason no penalty was imposed. The gambler was acquitted of contempt on the basis that he was abroad when the writ was actually issued, and did not know of its terms. It was clear though that he insisted on an action which was an abuse of process, but it had never been held previously that merely to bring an action which was an abuse of Court amounted in itself to contempt.

Lord Goddard in the *Weisz* case observed as follows at page 614:

*“Abuse of the process of the Court, and contempt are not the same thing; the latter can be committed at any rate by a layman only where there is a deliberate and contumacious act on his part. It is conceded that the contents of the endorsement were an abuse of the process of the Court, but there must be something more than that to constitute a contempt. There is no authority to show explicitly what that thing is, but all the cases of contempt involved some definitely fraudulent, or wrong intent”.*

Lord Goddard went on to observe at page 615 that:

*“An abuse of the process of the Court should only be held to be contempt where there is an element of wickedness e.g where two persons fraudulently conspire to claim something to which they know they are not entitled, and deceive the Court”.*

Lord Goddard concluded at page 617 that:

*“To attempt to deceive the Court by disguising the true nature of the claim is contempt. It is in our opinion beyond question that to disguise a cause of action so as to conceal its true nature when in truth is one prohibited by a statute is a contempt.”*

The learned authors of *Arlidge, Eady, and Smith on Contempt*, (London Sweet and Maxwell 2005), observe in paragraph 11-51 at page 781 as follows: *“It is not the case merely because an action could be struck out as an abuse of the process of the Court that those responsible for its formulation are to be regarded as thereby in contempt. An attempt to deceive however, by disguising the nature of the claim would be contempt. For example, if facts are pleaded which are known to be false this would be classified as contempt.”*

The distinction between abuse of the process of the Court, and contempt of Court, is a nice one. Be that as it may, Courts of law should in my opinion deprecate any attempt by a litigant, or his Counsel to deceive the Court by disguising or distorting the true nature of a claim, or to plead matters, which are known to be false. It is obviously in the general interest of the administration of justice, that litigants, and counsel are candid with Courts of law.

In the instant case, the gist of the complaint is twofold. First, that the defendant lied on oath when he stated that the instruments and authority were handed over to him after the relevant procedures were followed with the guidance of the Council; Namwala District Council. Secondly, that the defendant lied when stated that there has never been a time when the Traditional Council was tasked to oversee the affairs of the chiefdom, because such a Council does not in fact exist. I am particularly concerned with the latter assertion, because it has been controverted by the allegation, (in paragraph 12 of the affidavit in support of Notice of Motion for an order of committal), that such a Council exists. And further that the defendant issued an eviction order to a subject through such Council. It is therefore imperative in my opinion to establish whether or not the defendant pleaded a falsity in his affidavit in opposition, dated 13<sup>th</sup> July, 2010. Consequently, I hereby grant the 1<sup>st</sup> plaintiff leave to issue committal proceedings against the defendant.

Leave to appeal is hereby granted.

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**DR. P. MATIBINI, SC.**  
**HIGH COURT JUDGE**