

**IN THE HIGH COURT FOR ZAMBIA**  
**2013/HP/0196**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**BETWEEN:**

**ENOCK KAVINDELE**  
**DOROTHY KAVINDELE**  
PLANTIFF

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

and

**BOLOGNA PROPERTIES LIMITED**

1<sup>ST</sup> DEFENDANT

**DIEGO CASILLI**

2<sup>ND</sup> DEFENDANT

**Before the Hon. Mr. Justice Justin Chashi in Open Court on the 15<sup>th</sup> day of May , 2013.**

For the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs: SN Kwendeni (Ms) Messrs KBF Partners

For the 1<sup>st</sup> & 2<sup>nd</sup> Defendants: (1) JP Sangwa & C Kazimbe of Messrs Simeza Sangwa &

Dudhia Associates,  
(2) AA Dudhia and M Banda (Ms) of Messrs Musa  
& Company

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**R U L I N G**

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**Cases referred to:**

1. Beatrice Nyambe v Barclays Bank Zambia Plc (2008) ZR Vol. 2 page 195
2. Sitima Tembo v National Council for Scientific Research (1988-1989) ZR 4
3. Elias Kundiona v The People (1993-4) ZR 59

4. *Bellamano v Ligure Lombard Limited (1976) ZR 267*
5. *Benabo v William Jay and Partners Limited (1941) CH 52*
6. *Senator Noel Sloley Sr v Noel Sloeley Jr and Others (2011) MCA Civ 28*
7. *PA Thomas & Co and Others v Mould and others (1968) 1 All ER 963*
8. *Chiltern District Council v Keane (1985) 2 All ER 118*
  
9. *Mander v Falcke (1891) 3 CH 488*
10. *Cartwright v Wexler, Wexler & Heller Limited, 369 NE 2 D 185, 187 (ILL. APP .CT)1977*
11. *The People v Kambarange Mpundu Kaunda (1991) SJ (HC)*
12. *New Plast Industries v The Commoissioner of Lands and the Attorney General (SCZ Judgment No. 8 of 2001)*
13. *Ethel Vitian Musamba Nyalungwe v Katumba Crispin Misheck Nyalungwe (1977) ZR 243*
14. *Ronson Products Limited v Ronson Furniture Limited (1966) ALL ER*
15. *Redwing Limited v Redwing Forest Products Limited (1947) 177 LT 387*
16. *R v Seager (2009) EWCA CRIM 1303*
17. *The Republic of Botswana, Ministry of Works Transport and Communications, Rinceau Design Consultants (sued as a firm previously t/a KZ Architects v Mitre Limited (1995) SJ*

**Legislation referred to:**

18. The High Court Act, Chapter 27 of the Laws of Zambia
19. The Supreme Court Practice (White Book) Volume. 1, 1999 edition
20. The Supreme Court Practice (White Book) Volume 1, 1976 edition
21. The Supreme Court Practice (White Book) Volume 2, 1999 edition

**Other Works referred to:**

22. Halsbury's Laws of England, Volume 9, 4<sup>th</sup> edition

The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs namely **Enock Kavindele** and **Dorothy Kavindele** respectively, commenced an action against **Bologna Properties Limited and Diego Casilli**, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively by way of a Writ of Summons filed on the 14<sup>th</sup> day of February 2013 claiming the following reliefs:

1. *A declaration that the 2<sup>nd</sup> Plaintiff is the bonafide Owner of half of Plot No. 2152/M Leopards Hill Road, Lusaka having equitable ownership of the same from the 1<sup>st</sup> Plaintiff who is the registered legal owner of the said property.*
2. *A declaration that the entrance of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the said property amounts to an intrusion as it is illegal.*
3. *A declaration that the Defendants be reimbursed by the 1<sup>st</sup> Plaintiff the amount of \$450,000 (Four Hundred and fifty United States Dollars) as full and final settlement for half of the land which the 1<sup>st</sup> Plaintiff is not entitled to sell.*
4. *An Injunction against the Defendants preventing them from entering or continuing to enter onto the said half which equitably belongs to the 2<sup>nd</sup> Plaintiff pending the determination of the matter.*
5. *Any other reliefs that the Court may deem fit.*
6. *Damages*
7. *Any other relief*
8. *Interest .*

Attendant to the Writ of Summons and the accompanying Statement of Claim was an ex parte Summons for an Injunction pursuant to Order 27 Rule 1 of **The High Court Rules**<sup>18</sup>.

On the 22<sup>nd</sup> day of February 2013, I granted an ex parte Order of an Interim Injunction against the Defendants, their agents, servants or anyone acting under their authority from interfering with or obstructing the 2<sup>nd</sup> Plaintiff from enjoying and maintaining her business on half of **Plot 2152/M** pending inter parte hearing of the application.

The inter parte hearing took place on the 15<sup>th</sup> day of March 2013 and the ruling was to be delivered on the 28<sup>th</sup> day of March 2013.

However, the delivery of the ruling was clipped by an application by the Plaintiffs for commencement of contempt proceedings. It is to that effect that I gave an Order granting leave to apply for an Order of Committal for contempt of Court on the 28<sup>th</sup> day of March 2013.

At the hearing of the contempt proceedings, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Co-Advocates Messrs Musa Dudhia and Company raised preliminary issues which are contained in the Notice of Intention which was filed into Court on the 5<sup>th</sup> day of April 2013 and urged the Court to set aside leave which was granted to the Plaintiffs. The following were the issues raised pursuant to **Order 33 (3) and 33(7) of The Rules of The Supreme Court**<sup>19</sup>:

- 1. That leave for an Order for contempt of Court against the Defendants should be set aside as the Order of Interim Injunction upon which the application for leave is premised does not comply with the requirements of Order 45 Rule 7 (4) of the Rules of the Supreme Court in that there was no notice prominently displayed on the front of the copy of the Order for an Injunction containing a warning to the persons intended to be served with the said Order and concerning the consequences of disobedience of the Order of Interim Injunction and,*

2. Leave to apply for committal should be set aside as the Plaintiffs failed to satisfy an essential condition precedent to the enforcement of Order of Interim Injunction by way of an Order for committal for Contempt of Court as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants when the Plaintiffs did not personally serve the Order of Interim Injunction on the Defendants contrary to Order 45 Rule 7 (2) (a) and (b).

Messrs Musa Dudhia and Company relied on the Skeleton arguments filed into Court on the 9<sup>th</sup> day of April 2013 in which they submitted that the failure by the Plaintiffs are fatal as such the Order for leave should be set aside. They submitted that the Plaintiffs did not comply with **Order 45 Rule 7 (4)** since the penal notice is not prominently displayed on the front of the copy of the Order for Interim Injunction which they now seek to enforce and that the penal notice also failed to warn a named Officer of the 1<sup>st</sup> Defendant of the consequences of disobeying the Order. In that respect, the Court was referred to **Halsbury's Laws of England**, paragraph 62 and the case of **Beatrice Nyambe v Barclays Bank Zambia Plc**<sup>1</sup> in which the Court recognized the importance of the requirement of a penal notice being endorsed on the front of the copy of an Order.

It was further submitted that according to **Order 45, Rule 7 (7)** which gives guidance on the form of penal notice, the Order also clarifies the fetter on the Courts discretion when it comes to enforcing an Order which has not complied with the requirements concerning a penal notice. It states:

***“The Court has no discretion to dispense with the requirement for the display on the front of the copy of the Order in a prominent manner warning that disobedience would be a Contempt of Court punishable by imprisonment.”***

The case of **Sitima Tembo v National Council for Scientific Research**<sup>2</sup> was also cited where the Court recognized that failure to adhere to **Order 45 Rules 7 (4)** dealing with the requirement for a penal notice is fatal, when

the Court refused to grant the applicants application for an Order for committal.

On the second issue, it was submitted that **Order 45 Rule 7** stipulates that it is an essential condition precedent to the enforcement of an Order by means of committal of Contempt of Court for personal service of an Order which the applicant seeks to enforce to have been effected on the person liable to imprisonment for Contempt of Court for disobeying the Order.

The Courts attention was drawn to **Order 45 Rule 7 (2)(a)** and **(3)** and also **Halsbury's Laws of England**<sup>22</sup>, paragraph 61 where it is stated that:

***“As a general rule, no Order of the Court requiring a person to do or abstain from doing any act may be enforced unless a copy of the Order has been served personally on the person required to do or abstain from the act in question.....”***

***Where the Order is made against a Company, the Order may only be enforced against an Officer of the Company if the Officer has been served personally with a copy of the Order.....”***

That there is no proof that the Order was served on a named Officer of the 1<sup>st</sup> Respondent nor the 2<sup>nd</sup> Respondent. It was further submitted that the position of the law regarding service of documents on a Company as stated in **Order 45 Rule 7 (3)** requires service to be effected on an Officer of the Company intended to be served with the Order and against whom committal proceedings for Contempt of Court would be instituted.

Simeza Sangwa and Associates, the Other Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Notice of Motion to dismiss Contempt proceedings on the

12<sup>th</sup> day of April 2013 pursuant to **Order 3 Rule 2 of The High Court Rules<sup>18</sup>** on the following ground:

1. *That it is impossible to commit the first Defendant to prison as prayed by the Plaintiffs.*
2. *That the Statement and the affidavit filed in support of the application for leave to commence Contempt proceedings do not comply with the provisions of Order 52 of The Rules of the Supreme Court.*
3. *That the mandatory requirements of Order 45 Rule 7 of the Rules of the Supreme Court have not been met in relation to these Contempt proceedings.*

The Advocates filed submissions on the 23<sup>rd</sup> day of April 2013 in accordance with the direction of the Court. They started the submissions by drawing the attention of the Court to its jurisdiction to entertain the application and its inherent jurisdiction to prevent abuse of Court process and in that respect cited the case of **Elias Kundiona v The People<sup>3</sup>**.

On the first ground, they submitted that the application for contempt against the 1<sup>st</sup> Defendant is not tenable at law and that the Court has an obligation to prevent applications that are frivolous and an abuse of the Court process. That the parties before Court have an obligation to follow the rules in making their application and where there is non compliance the Court has an inherent power and can exercise its powers under Order 3 Rule 2 of The High Court Rules to dismiss such an application. To that effect, they relied on the case of **Bellamano v Ligure Lombard Limited<sup>4</sup>** where Gardner J observed that:

*“The application in this case was made by way of Summons applying for dismissal of the action and other relief. It is not indicated on the summons under what Order and rule the application is made and I would point out in passing that it is always necessary on making of an*

*application, for the summons or notice of application to contain a reference to the Order or rule number or other authority under which relief is sought.”*

According to the Advocates, the import of that statement is that it is not enough to merely quote a particular provision of the rules of Court. That for the rules quoted, they must have meaning and value and relevance to the nature of the application before Court. That the rationale is to ensure that the Court is satisfied that it has power or authority to do what it is being asked to do and that it will do so within the rules of the Court.

They submitted that the 2<sup>nd</sup> Plaintiff seeks to have the Defendants committed to prison for Contempt and in that respect have relied on **Order 52 Rule 2 of the Rules of The Supreme Court**. That the said Rules do not provide for a Company as a legal entity to be committed to prison.

According to the Advocates, that is not possible at law and even as a matter of logic. To that effect, they drew the attention of the court to the provisions of **Order 52 Rule 2** as read with the provisions of **Order 45 of The Rules of The Supreme Court**.

They contended that the proceedings herein do not comply with the provisions of Order 45 which stipulates situations in which one can be committed to prison for failure to comply with the Judgement or Order of the Court. They then went on to reproduce the provisions of **Order 45 rule 5** which outlines the means to be employed in dealing with committal proceedings and submitted that the means to be employed is dependent on whether the party alleged to be in breach of the Order of the Court is a human being or a body corporate. That if it is a body as the case is with the 1<sup>st</sup> Defendant, the rules requires that with the leave of the Court, a Writ of Sequestration will issue against the property of any director or other officer of the body.



The Advocates submitted that there are also other pre requisites to enforcement under **Order 45 Rule 7(5)** which requires personal service to be effected and what is considered appropriate service on a body corporate. The case of **Benabo v William Jay and Partners Limited**<sup>5</sup> was cited.

The Advocates also submitted on the same strength as their Co- Advocates Musa Dudhia and Company regarding the endorsement on the Order of the Injunction in respect of the need to prominently display on the front of the copy of an Order served under these rules the penal notice in the appropriate form and format and also referred to the case of **Sitima Tembo v National Council for Scientific Research**<sup>2</sup> and further the case of the Court of Appeal of Jamaica in Senator **Noel Sloley Sr v Noel Sloley Jr and Others**<sup>6</sup>. It was contended by the Advocates that the rule which was subject of consideration in that Court is the same as **Order 45 Rule 7 of the Rules of the Supreme Court**. Morrison J A had this to say:

*“Section 1 of Part 53 deals with the power of the Court to commit a person to prison or make an Order confiscating his assets for failure to comply with (a) an Order requiring that person or (b) an undertaking by that person to do an act within a specified time or by a specific date, or not to do an act within a specified time or by a specific date or not to do an act. It is clear that Section 1 is reference to the punishment by committal or confiscation of assets of persons who have themselves been enjoined by an Order of the Court to do or refrain from doing something. Where that person is an individual, then rule 53.3 provides that the Court cannot make an Order for committal or confiscation against him or her unless (a) the Order has been served personally on him or her and (b) at the time of service of the Order, it was endorsed with a penal notice in the prescribed form, that is to say, that **“if you fail to comply with the terms of this Order you will be in contempt of Court and may be liable to imprisonment or to have your assets confiscated.”**”*

*Where an Order for confiscation of assets for contempt is sought against a body corporate, the Order served on that body must also have been endorsed with a penal notice in the prescribed form, that is to say that, **"If you fail to comply with the terms of this Order you will be in contempt of Court and may be liable to have your assets confiscated"**(Rule 53.3 (b) ).*

*Where a Committal Order or confiscation of assets Order is sought against an Officer of the body corporate, rule 53.4 provides that (a) a copy of the Order requiring the body corporate to do or refrain from doing something must have been served personally on the Officer against who the Order is sought and (b) at the time when it was served it must have been endorsed with a penal notice in the prescribed form, that is to say "if (name of body corporate) fails to comply with the terms of this Order it will be in contempt of the Court and you (name the Officer) may be liable to be imprisonment or have your assets confiscated."*

The Advocates contended that the penal notice on the Order in this case as regards the 1<sup>st</sup> Defendant is not in compliance with **Order 45 Rule 7** and the **Sitima case** and that non compliance has fatal consequences. On the second ground, the Advocates submitted that the Plaintiffs have not complied with **Order 52 of the Rules of the Supreme Court** in that:

- (a) The Statement does not contain the grounds for committal and,*
- (b) The Notice of Motion was not personally served on the Defendants.*

The Advocates drew the attention of the Court to **Order 52 Rule 2 of the Supreme Court Rules**. That the Statement filed in this case does not contain anything close to what is required to be contained in the Statement. That apart from the names it contains nothing in form of description and

addresses of the Defendants whom the Plaintiffs want to have committed to prison, which requirements according to the Advocates are mandatory. They further submitted that the grounds on which committal is sought must be clear so that the Defendants know exactly what is alleged against them.

That there is need for clarity in both the terms of the Injunction and the Statement filed in support of the application for Contempt. That this was emphasized in the case of **PA Thomas and Company and Others v Mould and Others**<sup>7</sup> and also the case of **Chiltern District Council v Keane**<sup>8</sup>.

It is the Advocates contention that both the notice of the application for leave to commence contempt proceedings and the Statement lack sufficient clarity.

According to the Advocates, where there are two parties sought to be committed to prison, then the conduct of each party said to be in breach of the Injunction needs to be particularized, that as such it would be in appropriate to proceed with the hearing of the contempt proceedings.

On the service of the Notice of Motion, the Advocates drew the attention of the Court to **Order 52 Rule 3** which required the motion to be served personally on the persons to be committed to prison. That there is no evidence before Court that there was personal service on the Defendants of the Notice of Motion. Reliance in that respect was placed on the case of **Mander v Jalcke**<sup>9</sup>, which dealt with the issue of service of the Notice of Motion for Contempt.

It was submitted that it is a Mandatory requirement that there be personal service of the notice of motion, since the liberty of a person is at stake. That the appearance of a person concerned is not a waiver of failure to serve the

documents personally on him. Where personal service is not possible then an Order for substituted service ought to be obtained.

The third ground was more of a recap of the first and second ground for dismissal of the Contempt proceedings and I shall not go further on the same, to avoid being repetitive. The Advocates in concluding the submissions ended up with a summary of the same and prayed for the dismissal of the contempt proceedings and that costs of and occasioned by the application be borne by the 1<sup>st</sup> Plaintiff.

In response to the Defendants' Advocates submissions, the Plaintiffs Advocates filed written submissions on the 30<sup>th</sup> day of April 2013. They started with a preamble on the alleged abuse of Court process and in that respect cited the cases of **Cartwright v Wexler Wenler and Heller Limited**<sup>10</sup> and the case of **The People v Kambarange Mpundu Kaunda**<sup>11</sup> and submitted that the Plaintiffs have demonstrated a clear case of disobedience of this Court's Injunction Order and that the only way to deal with the matter was by commencing an action under **Order 52 of the Rules of the Supreme Court** for Committal and that the Plaintiffs have done nothing to constitute an abuse of the Court process, but are before Court to ensure that justice prevails and to bring finality to an action.

On the location of the penal notice, the Advocates drew the attention of the Court to the Learned authors of **Gerlis, S. Stephen M; houghlin, Paula (2001) (1999) Civil Procedure**. Practice and Procedures series on pages 367, 498 and 524 where a penal notice is defined as:

**“A penal notice is a warning endorsed on a Court Order, notifying the recipient of liability to committal to prison or to pay a fine for breach of the Order.”**

According to the Plaintiffs Advocates, there is a clear penal notice on the second page of the Order filed on the 14<sup>th</sup> day of February 2013. They

questioned the Defendants Advocates reliance on Order 45 the **Rules of the Supreme Court (White book) 1999 edition**, when the Plaintiffs reliance was on **Order 2 rule 1 of the High Court Rules** and that there is no lacuna which Order 45 envisages to cure. In that respect, they relied on the case of **New Plast Industries v The Commissioner of Lands and The Attorney General**<sup>12</sup> where it was held that the English white book could only be resorted to if the act was silent or not fully comprehensive.

It was the Advocates submission that even if they were to lean on the Defendants assertion that the penal notice must be as elaborated in **Order 47 Rule 7 Subrule 7 of the Supreme Court Practice**, that the penal notice was prominently endorsed in the Order in the current case and that the Defendants ground on the penal notice must fail as it lacks merit. They further went on to say that it is the duty of the Lawyer representing a client to read the entire document, especially a Court Order and advise their client not to disobey it.

And in reference to the **Sitima** case aforestated, they submitted that there is no comment in that case on the positioning of the penal notice to mandatorily be on the front and that equally our law in **Order 27 Rule 1 of the High Court Rules** has no such provision.

On the service of the Interim Injunction, the Advocates contend that the allegation by the Defendants is a complete afterthought. That the Injunction was served on their Lawyers on the 26<sup>th</sup> day of February 2013 and that according to the affidavit filed into Court on the 2<sup>nd</sup> day of April 2013 the same was relayed to the Defendants who had sight of the same, and that the Defendants failure to convey the Order of the Court to its agents or servants or any one acting under their authority is clearly on the Defendants' shoulders.

According to the Plaintiffs Advocates, the Defendants have throughout the aforestated affidavit displayed full knowledge of the existence of the Injunction.

The Advocates drew the attention of the Court to **Order 10 Rule 4 of the High Court Rules** and also cited the case of **Ethel Vitian Musamba Nyalungwe v Katumba Crispin Misheck Nyalungwe**<sup>13</sup>.

Further attention of the Court was drawn to Order 45 Rule 7 (ii) which empowers the Court to dispense with service if satisfied that the Respondent had notice of the Order either by being present when it was made or by being notified of its terms.

The Advocates further relied on the cases of **Ronson Products Limited v Ronson Furniture Limited**<sup>14</sup> and the case of **Redwing Limited v Redwing Forest Products Limited**<sup>15</sup> and submitted that the Defendants are trying to base their application for dismissal on technicalities which a plethora of authorities does not agree with. That the Defendants were notified of the Injunction by their Advocates and the Defendants do not at all claim to have been un aware of the same.

On the issue of the 1<sup>st</sup> Defendant being committed to prison for Contempt, their Advocates submitted that they are aware that the 1<sup>st</sup> Defendant is a Company but based on the learned author **Brenda Hanninghan, Oxford University Press** and the case of **R V Seager**<sup>16</sup> that they are on firm grounds for citing the Company because it is not the Company which will be committed to prison but its agents hiding behind its corporate veil if the Court rules that the Defendants were indeed contemptuous.

On the issue of non compliance with **Order 52 Rule 2 of The Supreme Court Rules**, the Advocates drew the attention of the **Court to Orders 52 Rule 1 Subrule 5 and Order 59 Rule 10** which gives the Court power to rectify procedural defects both in the procedure leading to and after the

making of an Order. The Advocates in that respect relied on the case of **The Republic of Botswana, Ministry of Works Transport and Communications, Rinceau Design Consultants (sued as a firm previously t/a K2 Architects) v Mitre Limited**<sup>17</sup> where it was held that the High Court rules of procedure were therefore regulatory and any breach should be treated as a mere irregularity which was curable.

On that basis, the Advocates contended that this Court has a duty to order rectification where there is a real matter in controversy which the Court must hear and determine. That the Defendants must not have these proceedings dismissed on a mere technicality.

The Plaintiffs' Advocates urged this Court to dismiss the Defendants application with costs and ensure that justice prevails by ensuring that the triable issues are heard.

I have carefully considered the issues raised by the Advocates for the Defendants and the response from the Plaintiffs Advocates, together with the authorities cited and I am indebted to all Counsel for their spirited submissions.

From the outset I have taken note of the Plaintiffs' Advocates condemnation of the Defendants Advocates for heavily relying on the provisions of the Rules of the Supreme Court (White Book) although the Plaintiffs Advocates gradually in their submissions ended up relying on the same rules.

The Order of Interim Injunction made by this Court on the 14<sup>th</sup> day of February 2013 was granted pursuant to **Order 27 Rule 1 of the High Court Rules**. It is evident from the High Court Act that it neither provides for the procedure to be undertaken nor the format of the Injunction, hence the fall back on the Supreme Court Rules and in particular Order 45 which provides for enforcement of Judgement and Orders, which procedures are non existent under our rules.

It is also evident that the Contempt proceedings before this Court have been brought by the Plaintiffs Advocates under **Order 52 of the Supreme Court Rules**. I therefore find the Plaintiffs Advocates proscription of the Defendants Advocates on that aspect totally unfair and uncalled for. I do take recognizance of The High Court (Amendment) Act No. 7 of 2011 which came into effect on the 15<sup>th</sup> day of April 2011, which empowers this Court to resort to The Supreme Court Rules where our law is deficient in practice and procedure in order to fill in the gaps that may exist in our law.

There is indeed a lacuna in our procedural law and practice and the Defendants Advocates cannot be faulted for relying on **The Supreme Court Rules** in that respect.

The issues raised by the Defendants' Advocates revolve around **Order 45 and 52 of the Supreme Court Rules**. In circumventing the issues it is therefore necessary to highlight the relevant provisions of the two Orders.

To begin with the editorial introduction to **Order 45 which is Order 45 Rule 0 Subrule 2** States as follows:

*“The series of Orders comprising Orders 45-52 inclusive under the heading **“Enforcement of Judgements and Orders”** groups together the methods for the enforcement of the Judgements and Orders of the Court. Together, they constitute a code of procedure on the subject of what is called **“execution”** in the former rules. They should be read together as they deal with the various ways in which the successful party can employ the machinery of the High Court towards obtaining satisfaction of his Judgement or Order or compelling compliance therewith or obedience thereto.”*

From the aforesaid editorial introduction, it can be deduced that Orders 45-52 deal with methods open to a party in enforcing a Judgement or Order



of the Court and also that the two Orders should be read together. Of relevance under **Order 45 is Order 45 Rule 7** which states as follows:

*“(1) In this rule reference to an Order shall be construed as including references to a Judgement,*

*(2) Subject to Order 24, rule 16(3), Order 26 rule 6(3) and paragraphs (6) and (7) of this rule, an Order shall not be enforced under rule 5 unless*

*(a) a copy of the Order has been served personally on the person required to do or abstain from doing the act in question and*

*(b) In the case of an Order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.*

**(3) Subject as aforestated an Order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5 (1)(b)(ii) or (iii) unless -**

*(a) a copy of the Order has also been served personally on the Officer against whose property leave is sought to issue a Writ of sequestration or against whom an Order of committal is sought and*

*(b) In the case of an Order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body corporate was required to do an act.*

(4) There must be prominently displayed on the front of the copy of an Order served under this rule a warning to the person on whom the copy is served that disobedience to the Order would be a contempt of Court punishable by imprisonment, or (in the case of an Order requiring a body corporate to do or abstain from doing an act)

punishable by sequestration of the assets of the body corporate and by imprisonment of any individual responsible.

- (5) With the copy of an Order required to be served under this rule, being an Order requiring a person to do an act, there must also be served a copy of any Order made under Order 3 rule 5 extending or abridging the time for doing the act and where the first mentioned Order was made under rule 5 (3) or 6 of this Order, a copy of the previous Order requiring the act to be done.
- (6) An Order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the Order has not been effected in accordance with this rule if the Court is satisfied that pending such service, the person against whom or against whose property is sought to enforce the Order has had notice thereof either-
  - (a) by being present when the Order was made or**
  - (b) by being notified of terms of the Order, whether by telephone, telegram or otherwise.**
- (7) Without prejudice to its powers under Order 65 Rule 4 the Court may dispense with service of a copy of an Order under this rule if it thinks it just to do so.”

The effect and extent of the aforesaid Order has been aptly recapped under Order 45 Rule 7 Subrule 2 as follows:

*“Effect of rule - The rule makes explicit the conditions precedent to the enforcement of a Judgement or Order by Writ of Sequestration or by*

*Order of committal under the rule by specifying (1) the requisite document(s) to be served (2) the time within which such documents must be served. (3) the person on whom such document (s) must be served and (4) the terms of the penal notice served to be endorsed. The rule also recognizes the present practice under which the Court may dispense with service of the requisite document(s)."*

In order for me to sustain and entertain the proceedings before me, I must satisfy myself that the Plaintiffs have complied with the requisites as contained in Order 45. Alternatively the Plaintiffs must demonstrate to my satisfaction that there is need for me to exercise my discretion and dispense with service.

I now turn to the relevant provisions of Order 52.

**Order 52 Rule 1 Subrule 1 states that:**

*"The power of the High Court or court of Appeal to punish for Contempt of Court may be exercised by an Order of Committal."*

**Order 52 Rule 1 Subrule 14 states as follows:**

*"Disobedience to a Judgement or Order to abstain from doing an act (Order 45 rule 5 (1)(b). Where the Judgement or Order is against a body corporate, a director or other Officer may be committed (Order 45 rule 5 (1)(iii)."*

**Order 52 Rule 1 Subrule 5 states that:**

*".....the Court has the power to rectify the procedural defects both in the procedure leading up to the making of an Order and after it has been made. That discretion must be exercised so as to best reflect the requirements of justice. The Court must not only take into account the interest of the Contemnor but also the interests of the other parties and the interests of upholding the reputation of civil justice in general."*

*It is no longer appropriate to regard an Order for committal as being no more than a form of execution available to another party. The Court itself has a very substantial interest in seeing that its Orders are upheld. If Orders are set aside on purely technical grounds this will undermine the system of justice and the credibility of Court Orders. As long as the Order made by the Judge is valid the approach of the Court will be to uphold the Order in the absence of any prejudice or injustice to the Contempt.”*

Let me now turn to consider the issues raised, though not in the same sequence:

**1. That it is impossible to commit the 1<sup>st</sup> Defendant to prison as prayed by the Plaintiffs.**

It is not in dispute that the 1<sup>st</sup> Defendant is a body corporate and is also amenable to contempt proceedings. The contention by the Defendants Advocates is that it is not logical and possible to seize and imprison the 1<sup>st</sup> Defendant. Whilst the Plaintiffs' Advocates agree with that contention, they are of the view that going by the provisions of **Order 53 Rule 1 Subrule 13**, it gives guidance that although the wording is directed at the Company, it is the directors or other Officers of the Company who would instead be imprisoned if a body corporate is found to be in contempt.

I think, the Plaintiffs Advocates have missed the all point and it all has its genesis in the manner the Interim Order for the Injunction was presented and in particular the wording of the penal notice. The penal notice in the Order suffices in respect of the 2<sup>nd</sup> Defendant, who is an individual human being. It is however in applicable to a body corporate such as the 1<sup>st</sup> Defendant and falls far short of the required practice.

**Order 45 rule 7 (4)** requires that in the case of an Order requiring a body corporate to do or abstain from doing an act there must be a warning that if

it is found to be in contempt it would be punished by sequestration of the assets of the body corporate and/or by imprisonment of any individual responsible.

In agreeing with the Defendants, it is my view that there should apart from the warning to the 2<sup>nd</sup> Defendant have been a further warning to the 1<sup>st</sup> Defendant as a body corporate which should have more or less been in the following manner:

*“That if you Bologna Properties Limited, the 1<sup>st</sup> Defendant herein disobey this Order, you may be held in contempt of Court and liable to sequestration and (if any of your Directors, Officers, employees, agents or Servants) disobey this Order they may be held in Contempt of Court and liable to imprisonment and if any person or whosoever with the knowledge of this Order procures or encourages or assists in the breach of this Order, that person will also be guilty of contempt of Court and liable to imprisonment (this is not a standard format but purely my own which one can work around)*

## **2. Personal service of the Order for Interim Injunction.**

The law and rules of process which includes Orders and Judgements i.e **Order 10 Rule 6 of the High Court Rules** state that service must be personal. That the document to be served shall be delivered to the person to be served himself. **Order 47 Rule 7 (2) (a)** requires that the Order be served personally. This is as it is applicable to the 2<sup>nd</sup> Defendant.

As regards the 1<sup>st</sup> Defendant, a body corporate **Section 200 (1)(a) and (b) and (2) of the Companies Act** provides that a document may be served on a company by leaving it at the registered office of the company or personal service on a Director or Secretary or sending it by post to the Companies registered office.

There is no evidence at all of any personal service having been effected on either the 1<sup>st</sup> nor the 2<sup>nd</sup> Defendant as required by law. If anything, the Plaintiffs Advocates admits that there was no such service as envisaged by law as service was effected on the Defendants Advocates.

There is however, no doubt as contended by the Plaintiffs Advocates that the Defendants Advocates did bring the contents of the Order to the attention of both Defendants. This is evident from the affidavit in opposition to the ex parte summons for an Interim Injunction filed into Court and deposed to by the 2<sup>nd</sup> Defendant who is the Managing Director of the 1<sup>st</sup> Defendant.

In that respect, the Plaintiffs have not complied with the Order as regards the process of service.

However, this is a matter in which I need to exercise my discretion and dispense with service because the circumstances as highlighted in Order 47 Rule 7 Subrule 6 (b) exist in that the Defendants were and are aware of the Order as they were notified by their Advocates.

**3. Non compliance with Order 52 in relation to personal service of documentation relating to contempt proceedings.**

**Order 52 Rule 3 and 3 (4) of The Supreme Court Rules**, requires that after leave to apply for committal proceedings has been granted that the following documents be personally served on the person sought to be committed.

**(1) The Notice of Motion**

**(2) The Statement and the Affidavit in support of the application.**

However, it should be noted that under **Order 52 Rule 3 (4)** and **Order 53 Rules 3 Subrule 1** the Court has the discretion to dispense with service or indeed personal service where the Defendant is evading service and also

where there is no other course available to uphold the authority of the Court and protect the Applicant.

Again here there is no proof of personal service on the Defendants. It is admitted that service was effected on their Advocates. My understanding of the requirement for personal service under this Order is that committal proceedings by their very nature are a very serious matter and that in that respect the Courts must proceed very carefully and ensure that the rules and procedures are observed and the alleged contemnor is given an opportunity to know clearly what is being alleged against him and has every opportunity to meet the allegation.

It is in that respect that Wood J in the case of **Beatrice Nyambe v Barclays Bank Zambia Plc**<sup>1</sup> had this to say:

*“Contempt of Court quite apart from being concerned with the authority and dignity of the Court, also ultimately deals with the liberty of the individual. The consequences of disobeying Court Orders whether properly or improperly obtained are very serious. It is for this reason that the Court must exercise great care when dealing with applications relating to contempt of court. It is therefore imperative that the rules are strictly followed.”*

However, the failure to effect personal service under this Order is a defect which can be cured before proceeding with the contempt proceedings. In other words, it can only be fatal if the Court proceeds with the contempt proceedings before and without ensuring that the alleged contemnor is given an opportunity to know and understand what is being alleged against him.

In that respect, the Court has the right to adjourn the proceedings and Order that all the requisite documentation be served on the Defendant or alleged contemnor, so that by the time of the return date, they are able to know and

understand what is being alleged against them in Order for them to meet the allegations.

I am in that respect fortified by the provisions of Order 52 Rule 3 Subrule 1 in the second paragraph which states as follows:

*“Failure to comply with a proper procedure, such as personal service is not necessarily fatal to the lawfulness of a contempt Order. The Court has complete discretion..... to perfect an invalid committal Order in a contempt case, but that power should only be used in exceptional cases and should be dictated by the need to do justice having regard to the interest of the contemnor, the victim of the contempt and other Court users. Where a contemnor has not suffered any injustice by the failure to follow the proper procedure (such as service) the committal Order could stand subject to variation to take account of any technical or procedural defects.”*

**(4) The clarity of the Statement in Support of the application for leave.**

I have had occasion to revisit the Statement. The allegation by the Defendants is that it does not contain the grounds for committal and to that effect lacks clarity.

**Order 52 Rule 2 (2) reads:**

*“(2) An application for such leave must be made ex parte to a divisional Court except in vacation when it may be made to a Judge in Chambers and must be supported by a Statement setting out the name and description of the Applicant, the name, description and address of the person sought to be committed and the grounds on which the committal is sought and by an affidavit to be filed before the application is made, verifying the facts relied on.”*



I do note from the Statement filed on the 21<sup>st</sup> day of March 2013 that it has provided the grounds on which the committal is sought.

However, apart from mentioning the names of the Defendants, it does not name, describe and provide the addresses of the persons sought to be committed. To that extent, the Plaintiffs have not complied with **Order 52 Rule 2 of the Supreme Court Rules.**

**5. Failure to comply with Order 45 Rule 7 (4) of The Supreme Court Rules**

Order 45 Rule 7 (4) which I earlier reproduced in this Ruling, was also reproduced in the case of **Beatrice Nyambe v Barclays Bank Zambia Plc.** At the expense of being repetitive, I will for the sake of clarity restate the holding:

***“There must be prominently displayed on the front of the copy of an Order to initiate committal proceedings, a penal notice warning the person to whom the copy is served that disobedience to the Order would be contempt of Court or (in the case of an Order requiring a body corporate to do or abstain from doing an act) punishable by sequestration of the assets of the body corporate and by imprisonment of an Individual responsible.”***

The foregoing clearly demonstrates that it is mandatory for the penal notice to be displayed on the front of the Order. Front in this sense means the very first page. Further, that such warning should be directed to the person on whom the copy of the Order is served and it must state the consequences of the disobedience. The very essence of the penal notice is to proclaim the eventual punishment in the event of disobedience.

The case of **Sitima Tembo v National Council for Scientific Research**<sup>2</sup> which has been cited by both parties made it very clear that an Injunction

must be endorsed with a penal notice in accordance with **Order 45 Rule 7 (4) of The Supreme Court Rules**. In that case this is what Gardner JS in refusing the Order for committal had to say:

*“Once a written notice has been prepared, it must contain a penal notice in accordance with Rule 7 (4) in order to make a breach of the Injunction the subject of an Order for committal. To hold otherwise would be to render the provision requiring a penal notice valueless, in that all Injunctions by their very nature are matters of urgency and parties wishing to enforce Injunctions would in all cases be able to avoid the necessity for a penal notice by relying on verbal notice.”*

Although that case was based on the Supreme Court Practice (White Book) 1976 edition, the provisions of **Order 45 Rule 7 (4)** have remained the same as in the 1999 edition. Despite that, we have continued to ignore the same procedural rule which is mandatory and whose non compliance is fatal to contempt proceedings.

The penal notice in the case in **CASU** appears on the second page of the Order and is only directed towards the 2<sup>nd</sup> Defendant and not the 1<sup>st</sup> Defendant and therefore does not comply with **Order 45 Rule 7 (4)**.

As earlier alluded to the penal notice must be on the front page immediately after the heading and citation of the provisions of the law under which the Order is made as opposed to the continued practice of the same appearing after the Judges signature.

This is more in line with the forms as provided for under Sections **2C-47, 2C-68, 2C-83, 2C-99** and **2C-109** of **The Queen’s Bench Practice Directions Vol. 2 of the Supreme Court Practice 1999 edition** and I urge the Advocates to adopt the same in Order for us to move away from the past practice and make Injunction Orders effective.

The Defendants Advocates having succeeded on all issues relating to Order 47 Rule 7 (4), the motion for Contempt proceedings is not properly before this Court and are **therefore dismissed**. The Order for leave to commence Contempt proceedings is set aside with costs to the Defendants. The said costs are to be borne by the 2<sup>nd</sup> Plaintiff.

The Ruling on the Injunction which was heard Inter Parte will be delivered on the 31<sup>st</sup> day of May, 2013

**Delivered at Lusaka this 15<sup>th</sup> day of May 2013.**

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JUSTIN CHASHI  
**HIGH COURT JUDGE**