

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
AT LUSAKA**

2011/HPC/726

(Civil Jurisdiction)

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF COMMITTAL

AND

**IN THE MATTER OF ORDER 52 OF THE RULES OF THE SUPREME
COURT 1999**

BETWEEN:

IN MIND ENTERPRISES LIMITED

FIRST APPLICANT

AFRO AMERICA FIBRE INDUSTRY LIMITED

SECOND APPLICANT

ALREEF ENTERPRISES LIMITED

THIRD APPLICANT

AND

STRIPES ZAMBIA LIMITED

FIRST RESPONDENT

**HASSAN SASSO
RESPONDENT**

SECOND

**BEFORE HON. JUSTICE NIGEL K. MUTUNA THIS 4TH DAY OF
FEBRUARY, 2013**

FOR THE APPLICANT: Mr. A. Wright of Wright Chambers

**FOR THE RESPONDENTS: Mr. J. P. Sangwa and Mr. S. Chikuba of
Simeza**

Sangwa & Associates

R U L I N G

Cases referred to:

- 1) Mander-Vs-Falcke (1891) 3 Ch d 488**
- 2) Nyambe-Vs-Barclays Bank (Z) Limited Plc (2008) ZR page 195**
- 3) The Republic-Vs-The High Court, Commercial Division, Accra, Exparte Millicom Ghana Limited, Regis Romero, Tismark Inja, Percy Grundy and Superphone Company Limited JS/43/2008**
- 4) Bellamano-Vs-Ligure Lombard Limited (1976) ZR page 267**
- 5) Sitima Tembo-Vs-National Council for Scientific Research (1988 - 1989) ZR page 4**
- 6) Senator Noel Sloley Sr-Vs-Noel Sloley Jr and Others (2011) MCA Civ 28**
- 7) Ethel vitian Musamba Nyalugwe-Vs-Katumba Crispin Misheck Nyalugwe (1977) ZR page 243**

Other authorities referred to:

- 1) Supreme Court Practice, 1999, Volume 1**
- 2) Vienna Convention on Diplomatic Relations**
- 3) Diplomatic Immunities and Privileges Act, Cap 20**
- 4) Constitution, Cap 1**
- 5) High Court act, Cap 27**
- 6) Halsbury's Laws of England, by Lord Halisham of St. Marylebone, Volume 7(1), London, Butterworths, 1988**

On 16th December, 2011 the Plaintiffs filed an application for leave to commence contempt of court proceedings against the Defendant and its director, one Hassan Sasso. The two have been referred to as the First and

Second Respondents, respectively whilst the Plaintiffs are referred to as the Applicants. I will refer to the Plaintiffs as Plaintiffs whilst the Defendant and Hassan Sasso as First and Second Respondents, respectively. The leave of this Court was granted pursuant to which the Plaintiffs filed a motion for the hearing of the contempt of court proceedings.

When the motion was set down for hearing, the Respondents filed a notice of motion to raise preliminary issues. The notice of motion was amended and the amended notice of motion was filed on 3rd August, 2012. This is the notice of motion to raise preliminary issues the Respondents relied upon and it seeks the determination of four issues, namely:

- “1. The First Respondent enjoys immunity and therefore cannot be a subject of contempt proceedings;*
- 2. The contempt proceedings be set aside for irregularity in that they have not complied with the provisions of order 45 of the Rules of the Supreme Court;*
- 3. The application for contempt be set aside on the ground that the service of process was irregular on the premise that the said process was not served on the Respondent;*
- 4. That Mr. Andy Jonathan Wright of Messrs Andy Wright chambers should forthwith cease to act in this matter on the basis that there is a strong likelihood of conflict of interest, breach of confidentiality and prejudice to the justice systems as he had once acted for the Respondents pertaining to registration of certain Trade marks and other matters.”*

These are the questions that have been tabled before this Court in this application.

The facts of this case as they are relevant to this application are as follows. On 8th December, 2011, the Plaintiffs took out this action against the Defendant, Stripes Zambia Limited (the First Respondent). The action is by way of writ of summons and statement of claim and it is for the following reliefs:

“a) A declaration that the 1st Plaintiff is the registered owner and/or proprietor of Trade Mark NO-: 113/2005.

b) And/ or a further declaration that the Copyright and performance rights Act Cap 406 of the Laws of Zambia do not apply to infringement of Trade Marks under the Trade Marks Act Cap 401 of the Laws of Zambia

c) And/ or a further declaration that the registration of the Trade Mark ‘Ebony collection’ is fraudulent, and meant to cause confusion.

d) A further declaration that even assuming the, ‘Ebony Collection’ was properly registered: registration of the same does not give right of exclusive use to the Defendant.

e) The 1st Plaintiff claim the sum of K950,000,000,000 for loss of profit caused by the cancellation of confirm orders of its products.

f) And the 2nd Plaintiff claims the sum of K350,000,000 for loss of profit of manufacturing orders.

g) And the 3rd Plaintiff claims the sum of K1,250,000,000 for loss retail and distribution profit.

h) And the Plaintiffs claim a further sum of K5,000,000,000 for disruption of their respective businesses

i) And the 1st Plaintiff claim K2,000,000,000 for infringement and Passing off of its trade mark by the Defendant.

j) And the Plaintiffs claim the total sum of K9,5550,000,000 against the Defendant.

k) And an injunction

l) And/ or any other amount and/or relief the Court shall deem fit

m) Interests and costs.”

(The typographical errors in the foregoing are as they appear in the endorsement in the pleading).

After the writ was issued, the Plaintiffs applied for an injunction, ex-parte, to restrain the First Respondent from: interfering with the First Plaintiff's registered Trade Mark No. 113/2005, Ebony and the pictorial representation; selling and or dealing in any products bearing the First Plaintiff's Trade Mark Number 113/2005 "Ebony" together with its pictorial representation; and interfering with and/or disrupting the Plaintiffs' businesses in any manner whatsoever. An ex-parte order was granted which made provision for inter partes hearing on 16th December, 2011. The said hearing was rescheduled to 20th December, 2012.

On 16th December, 2012 the Plaintiffs applied for leave to commence committal proceedings against the Respondents. The allegation being that they had breached the ex parte injunction order granted by this Court. I granted leave to commence contempt proceedings on 16th December, 2011. Subsequently, on 20th December, 2011, when the matter came up for hearing of the injunction, inter parties, the application was struck-off for non attendance by counsel for the Plaintiffs and consequently, the ex parte injunction order was discharged. However, following an application to restore the application which was granted, and hearing of the injunction

application, inter partes, the order of an injunction was granted on 3rd January, 2012. The terms of the order were similar to those of the one granted earlier and it is that earlier order that the Plaintiffs allege the Respondents have breached.

The foregoing is the background to this application.

The hearing of the application for the motion to raise preliminary issues was held on 14th November, 2012. Counsel for the Respondents, Mr. J. P. Sangwa and Mr. S. Chikuba indicated to the Court that in advancing arguments in support of the motion they relied upon the following documents: the amended notice of motion filed on 3rd August, 2012; list of authorities and skeleton arguments filed on 22nd March, 2012; and skeleton arguments filed on 28th August, 2012. Counsel also indicated that they had withdrawn preliminary issue 4 and would therefore not argue it.

In response, counsel for the Plaintiffs, Mr. A. Wright indicated to the Court that he relied upon the following documents: affidavit in opposition filed on 28th March, 2012; list of authorities filed on 27th March, 2012; affidavit of service filed on 3rd April, 2012; and the list of authorities filed on 16th March, 2012. It was also argued that even if an order is irregular a party is obliged to obey it. Further that, the Respondents have not denied being in breach of the order of the Court.

The evidence led in the application is contained in the affidavits. The one in support of the motion was sworn by one Hassan Sasso, the Second Respondent who began by revealing that he is a Sierra Leone national and managing director of the Defendant. He revealed further that he is also Honorary Consul of the Republic of Sierra Leone to Zambia and as such enjoys diplomatic immunity. As a consequence of this, he is not supposed to be a party to these proceedings because he is a diplomat.

The evidence went on to reveal that the Second Respondent only heard about the application for contempt of court through his advocates and that neither he nor the First Respondent were personally served with process in respect of the said application. That he had been advised by his advocates and he verily believes that it is a fundamental procedural requirement that service of process should be affected not only on his advocates but also on himself and the First Respondent. He therefore stated that the application should be set aside for being incompetent.

The affidavit opposing the motion was sworn by James Onwuka, a director in the first Plaintiff. It revealed the following facts as they are relevant to the three preliminary issues raised. That the Second Respondent has been acting on behalf of the First Respondent as a director in his individual capacity and appeared as such before this Court and sworn affidavits in that capacity and has not at any time raised the issue of his alleged diplomatic status. That the attempt to raise the alleged diplomatic immunity or status in this manner is the Second Respondent's calculated move to continue disobeying and disregarding this Court's order and to lower and insult the integrity and honour of the Court. Further that the Second Respondent has never raised the issue of the alleged diplomatic status from the time he and the First Respondent were sued and as such he cannot raise it at this late hour for purposes of perpetrating injustice against the deponent of the affidavit in opposition and the other Plaintiffs.

The affidavit also revealed that the order of injunction was personally served upon the Second Respondent on 12th January, 2012 but he refused to acknowledge receipt. Further, and notwithstanding the foregoing, an affidavit of service was sworn and is produced as exhibit "JO1" which proves service of the order of injunction. It went on to reveal that the advocate for the Respondents were in attendance at the time the injunction order was granted by this Court and therefore, the Respondents ought to know of its

existence. It also revealed that several letters have been written to the Respondents' advocates in which the Respondents have been advised on divers occasions about the existence of the injunction order and the need for the Respondents to desist from disrespecting the court with impunity. The said letters were produced and marked "JO2."

The arguments advanced by counsel for the parties as I have stated in the earlier part of this ruling are in the list of authorities and skeleton arguments filed. The relevant parts of the list of authorities and skeleton arguments in support of the motion, filed by the Respondents' advocates on 22nd March, 2012, addressed two limbs of the motion. These are diplomatic immunity and the service of the motion under Order 52 rule 4 sub rule 2 of the **Supreme Court Practice (white book)**.

With respect to diplomatic immunity counsel for the Respondents Mr. Sangwa and Mr. Chikuba highlighted the provisions of Article 29 of the **Vienna Convention on Diplomatic Relations** which it was argued provides for the inviolability of the person of a diplomat and makes him immune from any form of arrest or detention. The Convention it was argued is applicable to Zambia by virtue of section 3 of the **Diplomatic Immunities and Privileges Act**. It was therefore, argued that, the Second Respondent being the Consul General of the Republic of Sierra Leone to Zambia cannot be subject to contempt proceedings due to the fact that they come with the penalty of imprisonment and or any other order the Court may issue. The Second Respondent, it was argued further, should be misjoined from this application.

As regards service of the motion under Order 52 rule 4 subrule 2 of the **white book**, it was argued that the motion must be served personally on the person sought to be cited for contempt unless the Court dispenses with personal service. The rationale for this, it was argued, is that such a person

is entitled to know what he is accused of and the evidence against him before the trial. Further that, the personal attendance of the person sought to be cited for contempt at the hearing does not, in and of itself, waive the necessity for personal service. In articulating this latter point counsel drew the Court's attention to the case of ***Mander-Vs-Falcke (1)***. Counsel also drew my attention to the cases of ***Nyambe-Vs-Barclays Bank (Z) Limited Plc (2)*** and ***The Republic-Vs-The High Court, Commercial Division, Accra, Ex Parte Millicon Ghana Limited, Regis Romero, Tismark Inja. Percy Grundy, and Superphere Company Limited (3)***. The said cases it was argued demonstrate the need for care to be taken before punishing someone for disobeying a Court order in view of the fact that the liberty of an individual is at stake and the need for personal service of process to be effected. The latter case which is a decision of the Supreme Court of Ghana, Counsel argued, goes further and states the need for service of the motion to be effected on the directors of a company.

Counsel argued further that the Respondents can not be committed because the proceedings are in contravention of Order 45 of the ***white book*** which stipulates procedure to be adopted in enforcing judgments and orders of the Court. It was argued that by virtue of article 94 of the ***Constitution***, this court has unlimited jurisdiction to hear and determine any civil or criminal matter. The exercise of the said jurisdiction, it was argued, is subject to the practice and procedure as stipulated in section 10 of the ***High Court Act*** which provides that whenever one makes an application to Court, he must state the provision of the law pursuant to which the application is made. This, counsel argued was made clear by Gardner, JS. In the case of ***Bellamano-Vs-Ligure Lombard Limited (4)***.

Counsel proceeded to argue that an application for committal must comply not only with Order 52 of the ***white book*** but also Order 45. The said Orders must be read together because the latter provides for how various

orders or judgments of the Court can be enforced whilst the former deals specifically with committal. Further that, according to Order 45, it is the nature of the enforcement mechanism sought which determines the procedure to be followed. In this case, counsel argued, the Plaintiffs seek the committal of the Second Respondent for failing to obey an order of the Court, being an injunction. They argued that breach of an injunction is punishable by an order of committal but one has to comply with the provisions of order 45 rule 5 (1)(b) which deals with the means of enforcing an order or judgment to abstain from doing an act. Under the said Order, counsel argued, an order of committal is not available against a corporate body such as the First Respondent. This, it was argued, is because the First Respondent is an artificial person and therefore has no body to be seized and taken to prison. Counsel therefore submitted that the application for committal as it relates to the first Respondent has no foundation.

As regards the committal of Second Respondent, counsel argued that, he was not and is not a party to the substantive matter before Court, hence the injunction order was not directed at him. Further, there was no application to join him to the proceedings to make him a Second Respondent or Defendant in the matter.

Counsel argued that, according to Order 45 rule 5 there are different ways of securing compliance with an order of the court depending on whether the party in breach is a human being or a corporate body. If the order breached is against a human being, his property can be sequestered or he can be committed to prison. In the case of a corporate body, with leave of the Court its property can be sequestered or any of its directors or officers can be committed for contempt. The Plaintiffs, counsel argued, are not seeking the sequestration of the Defendant's assets.

It was argued further that even assuming this Court can be moved for committal, certain preconditions must be met which have not been met in

this matter. These conditioning are as follows: personal service - there is no evidence before Court to show that personal service of the order of injunction was effected upon the Second Respondent; penal notice - there is no notice on the face of the order of injunction warning the Second Respondent of the consequence of his failure to comply with the order. The requirement of a penal notice, is mandatory, counsel argued, and non-compliance is fatal as per the ***Sitima Tembo-Vs-National Council for Scientific Research (5)*** case; and the format of the penal notice or warning must be in accordance with Order 45 rule 7(4) in order to make the breach of the injunction the subject of an order of committal. Reference was also made to the case of ***Senator Noel Sloley Sr-Vs-Noel Sloley Jr & Others (6)***. The penal notice on the injunction order, it was argued, does not comply with the provisions of Order 45 rule 7(4).

Counsel prayed that the contempt proceedings be set aside.

In the skeleton arguments and list of authorities dated 16th march, 2012 counsel for the Plaintiffs Mr. A. Wright listed and quoted from the following authorities: Order 52 rule 1 and Order 45 rule 5 (1) and (3) of the ***white book; Nyambe-Vs-Barclays Bank (Z) Plc (7)***; Order 45 rule 7 subrule 9; and ***Ethel Vitian Musamba Nyalugwe-Vs-Katumba Crispin Misheck Nyalugwe (8)***. It was argued that these authorities were on all fours with this matter because the order of injunction issued in this matter is duly endorsed with a penal notice and the Respondents' advocates were in court when the order was granted. It was argued further that subsequent to perfecting the order of injunction, it was served upon the First Respondent and its advocates. The Respondents, it was argued, therefore had due notice of the order and have deliberately been disobeying the order of the Court.

In the relevant portion of the list of authorities and skeleton arguments filed on 27th March, 2012 counsel for the Plaintiffs argued from two limbs. The

first limb addressed the issue of diplomatic immunity. It was argued that there is no proof or authority produced by the Respondents to the effect that someone with diplomatic status is not amenable to the Court's jurisdiction in circumstances where such an individual has on a number of occasions opted to discard his diplomatic status. The behaviour of the Second Respondent of wishing to hide behind diplomatic status in conducting his business is an abuse of the said status.

The second limb addressed the issue of service of process. Counsel argued that the conduct of the First and Second Respondents calls for the Court to invoke the provisions of Order 52 rule 4 subrule 3 of the **white book** and dispense with the requirement of service of the notice of motion. This, it was argued, is on account of the fact that they have been aware of the contempt proceedings and as the affidavit of service shows they were aware from the date of service. Their refusal to acknowledge service of process is another illustration of their disregard and disrespect of this Court.

Counsel prayed that the motion on the objection be dismissed.

I have considered the pleading, affidavit evidence and arguments. In determining this application I will consider the three preliminary issues raised in the order that they were presenting.

The first preliminary issue raised seeks to remove the Second Respondent from the motion on contempt of court on the ground that he enjoys diplomatic immunity. It has been argued that the Second Respondent as Consul General or Honorary Consul of Sierra Leone to Zambia, is not amenable to any Court action especially one that may result in his arrest such as this application. Reliance was made on ***The Diplomatic Immunities and Privileges Act.***

The Plaintiffs on the other hand have argued that at all material times in their dealings with the First Respondent in this matter, the Second Respondent acted in his personal capacity. Further that, when giving evidence before this Court in the form of affidavit evidence, the Second Respondent acted in his personal capacity.

The fact that the Second Respondent is the Sierra Leone Consul General or Honorary Consul to Zambia is not in dispute. He therefore is a diplomat and enjoys certain immunities and privileges. Section 7 of ***The Diplomatic Immunities and Privileges Act*** confirms this when it states as follows:

“Subject to the provisions of this act, a consular officer and consular

employee (other than persons on whom immunities and privileges are conferred by virtue of section three) shall be entitled to immunity from suit and legal process in respect of things done or omitted to be done in the course of the performance of his official duties as such, and to such inviolability of official archives and official correspondence as is necessary to comply with the terms of any treaty or other international agreement applicable to Zambia or as is recognized by the principles of customary international law and usage.”

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

By the said section a diplomat as defined therein is immune from any suit or legal action in the Zambian Courts arising from any acts he does in his official capacity. His official archives and correspondence are also inviolable. Therefore, the said immunity only extends to the diplomat for those acts that he performs in his capacity as such diplomat. They do not extend to any acts that he does in his private capacity. My finding is fortified by the

provisions of ***The Vienna Convention*** which is applicable in part to Zambia by virtue of section 3(1) of ***The Diplomatic Immunities and Privileges Act*** which states as follows:

“Subject to the provisions of section twelve, the Articles of the Vienna Convention set one in the First schedule shall have the force of law in Zambia ...”

One such article that is set out in the First Schedule to the Act which therefore has the force of law in Zambia, is article 31 which states as follows:

“A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) ...

(b) ...

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”

From the foregoing article of ***The Vienna Convention***, it is clear that diplomatic immunity is not absolute. This is because it does not extend, as I have stated in the earlier part of this ruling, to activities conducted by the diplomat outside his official duties.

Relating to the foregoing to this matter, the issue is, was the Second Respondent acting in his official capacity as Consul General or Honorary Consul when he conducted the affairs of the First Respondent as its managing director? The Second Respondent has not alleged that the First Respondent is an institution that enjoys diplomatic immunity under the Act

nor has he claimed that it is an institution of the Sierra Leone government enjoying such immunity. He has also not claimed diplomatic immunity arising out of his calling as managing director of the First Respondent. He has claimed it through his appointment as Consul General or Honorary Consul of Sierra Leone to Zambia, which in my considered view, is totally independent of his appointment as managing director of the First Respondent. Further, he has not alleged that when he conducted the functions of managing director he did so as a diplomat. Therefore, I find that in the capacity of managing director and his dealings in this action, the Second Respondent was conducting actions of a commercial activity outside his official functions. The diplomatic privileges and immunities envisaged under the Act and Convention do not therefore extend to him in that capacity. As such I find that preliminary issue (1) lacks merit.

I now turn to determine the second preliminary issue which alleges that the contempt proceedings are irregular for failure to comply with Order 45 of the **white book**. In determining this issue I will also determine preliminary issue 3 because the arguments advanced and the issues to be determined are similar. It has been alleged by the Respondents that in contempt proceedings, Order 52 must be read with Order 45 of the **white book**. Further that, in advancing the motion for contempt, the Plaintiff has not complied with the provisions of Order 45 rule 7 as to service of process, the requirement of a warning of the consequences in the event breach of the injunction order, and compliance of the said warning in terms of its format. The Plaintiff has argued that service of process was effected upon the Respondents and that the penal notice on the injunction order complies with the rules.

Before I set out the contents of the relevant portions of Orders 45 and 52 it is important that I quote from the Editorial Introduction to Order 45 which is

Order 45 rule 0 subrule 2 and is at page 780 of the **white book**. It 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 judgments and orders of the court. Together they constitute a code of procedure on the subject of what was 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 judgment or order or compelling compliance therewith or obedience thereto.”

The foregoing portion of the editorial introduction makes it clear, firstly that Orders 45 to 52 deal with methods a party can employ in enforcing a judgment or order of the Court. Secondly, that they must be read together. To this extent I agree with the Respondents that the two Orders must be read together.

I now move on to highlight the relevant provisions of Order 45 and 52. As counsel for the Respondents has argued, the relevant provisions of Order 45 is rule 7 which states as follows:

“(1) In this rule reference to an order shall be construed as including references to a judgment.

(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 aforesaid, 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 the 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 the 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's just to do so."

The effect and extent of this Order has been aptly summoned up in the editorial notes to the Order under Order 45 rule 7 subrule 2 as follows:

"Effect of rule - The rule makes explicit the conditions precedent to

the enforcement of a judgment 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 persons 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)."

For purposes of this application which alleges disobedience of an injunction order, the relevant points are (1), (3) and (4). Therefore in order for me to entertain the motion for contempt of court brought by the Plaintiff, I must be satisfied that the Plaintiff has complied with the three conditions I have set out in the preceding sentence. Alternatively, the Plaintiff must demonstrate to my satisfaction that there is need for me to exercise my discretion to dispense with service because the circumstances highlighted in Order 47 rule 7 subrule 6(a) or (b) exist.

Having explained the effect of Order 45 rule 7 I now turn to consider Order 52. The relevant portions of Order 52, for purposes of determining this application, are Order 52 rule 1 subrule 1 and Order 52 rule 1 subrule 14. The former states as follows:

"The power of the High Court or Court of Appeal to punish for contempt of court may be exercised by an order of committal."

Whilst the latter states as follows:

"Disobedience to a judgment or order to abstain from doing an act

(O.45, r.5 (1) (b). Where the judgment or order is against a body corporate, a director or other officer may be committed (Order 45, r.5 (1) (iii))."

The former order spells out the power of the court to punish for contempt of court which power may be exercised by an order of committal. The latter on the other hand indicates that where such power is to be exercised against a body corporate, the same is directed to a director or officer of the body corporate. To this extent the argument by counsel for the Respondents that the Second Respondent must be removed from the committal proceedings because he is not a Defendant in the main action, is untenable. The action taken by the Plaintiffs against the Second Respondent is in his capacity as managing director, therefore, representative of the First Respondent and as such the person responsible for receiving process on its behalf. Further, the said Order also demonstrates that a body corporate is amenable to contempt proceedings despite the fact that it can not be seized and imprisoned. The arguments by counsel for the Respondents to the contrary are therefore untenable.

Having explained the effect of Orders 45 and 52 I now proceed to consider the first issue to be determined which is whether or not service of process was effected upon the two Respondents. If whether or not this is a case warranting the Court imputing that the Respondents had notice of the order of injunction and therefore, dispense with the requirement of personal service.

The Respondents have alleged that service was not effected upon them. The Plaintiffs on the other hand have alleged that service was effected and have relied on the affidavit of service to prove such service. Further it has been contended that the circumstances of this case warrant the Court exercising its discretion to dispense with service.

As a starting point it is important that I first list the documents that the Plaintiffs were obliged to serve upon the Respondents. These documents are, the ex-parte order of an injunction, the order granting leave for committal, statement in support of application for leave to file committal proceedings, the affidavit in support and motion for committal. As regards the ex-parte order of injunction, the affidavit of service filed in Court on 15th December, 2011 indicates that, one Gideon Phiri effected service upon the Defendant (i.e. First Respondent), the originating process and order of injunction. He states further that the First Respondent refused to sign acknowledging receipt. It is important to reproduce the exact paragraph which alleges the effecting of the said service being paragraph 3 of Gideon Phiri's affidavit. It states as follows:

*"That on 9th December, 2011, I personally served upon the defendant herein
at their place of business with a true copy of the "Order of Injunction,"
"Writ
of Summons" and "Statement of Claim," "Affidavit in Support,"
"Skeleton
Arguments and Ex-parte Application."*

The law and rules of service of process which includes orders and judgments state that service must be personal i.e. directly on the person to be served. It is for this reason that the deponent of the affidavit of service is alleging that he personally served upon the First Respondent. However, the First Respondent is a limited liability company and lacks flesh and human presence. He could not therefore have walked up to it and served process on it as is suggested in paragraph 3. Service of process on a limited liability company must take a particular form to be sufficient service. **Halsbury's Laws of England, 4th edition, volume 7 (1)** states in this respect as follows at page 724:

“Notice to a company. A document may be served on a company by leaving it at, or sending it by post to, the company’s registered office.”

The explanatory notes to the foregoing passage on the word “document” at the same page state that, “document” as used in the foregoing quote includes summons, notice, order and any other legal process. Therefore, the foregoing passage is relevant to the circumstances of this case because what is at hand is service of an injunction order. Further, when the passage I have cited is read in isolation from the subsequent passage, one would form the erroneous conclusion that the service on the First Respondent effected by Gideon Phiri was sufficient because he alleges that he effected service at the First Respondent place of business. However, the subsequent passage at page 725 proves the contrary when it states as follows:

“Notice to officers. In order that notice to a company may be effectual it should either be given to the company through its proper officers or received by it in the course of its business. Notice to a director or other officer of the company in that character is sufficient ...”

The circumstances in which service was allegedly made upon the First Respondent as revealed by the affidavit of one Gideon Phiri does not indicate that it was effected in accordance with the authority I have cited in the preceding paragraph. As I have stated in the earlier part of this ruling, Gideon Phiri merely states that he effected personal service upon the First Respondent. He does not state whom in particular he served the order of injunction upon as representative of the First Respondent. To this extent I find that the Plaintiff did not comply with Order 45 rule 7 (3) (a) on service. This however, is subject to the finding I shall make in my consideration of

whether or not the order of injunction was served upon the Second Respondent in the next paragraph.

The evidence on the record does not reveal that service of the injunction order was effected upon the Second Respondent. However, he deposed to the affidavit in opposition to the injunction application which was filed on 15th December, 2011. The evidence in the said affidavit reveals that he was aware of the injunction order. This is clear from paragraph 27 by which he makes a prayer that the injunction be discharged. He states as follows:

“That therefore, I humbly pray for this Honourable Court to discharge the ex-parte injunction granted on 8th December, 2011.”

The fact that he prayed that the injunction be discharged clearly demonstrates that he knew of its existence and as such was bound to obey it. Further, he swears the affidavit in his capacity as managing director of the First Respondent. As such his knowledge of the existence of the injunction is in that capacity which is the capacity of a proper officer of the First Respondent and or director authorized to receive process on its behalf. Having so found, I find that this is a proper case to invoke the provision of Order 45 rule 7 (b) because the Second Respondent has confirmed his knowledge of the existence of the injunction as such he is taken to have been notified of its terms. The knowledge of the existence of the order of injunction by the Second Respondent in his capacity as managing director implies that the First Respondent also knew of the order. I am therefore satisfied that the two Respondents were aware of the injunction order and as such this is a proper case for me to dispense with the requirement of personal service.

I now turn to determine the issue of whether or not the other process was served upon the Respondents. This process is the order granting leave to

proceed with contempt proceedings, the motion for contempt, affidavit in support of the application for leave to file contempt proceedings and the statement in support of the application. The latter two documents namely, the affidavit in support and statement are important because it is in those documents that the person or entity sought to be cited for contempt is identified and the nature of his offence set out. This of course is to afford the Respondent an opportunity to know the charges against him so that he can adequately respond. This is clear from Order 52 rule 2 (2) of the **white book** which states as follows:

“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 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 application is made, verifying the facts relied upon.”

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

Further, Order 52 rule 3 (3) confirms the requirement of service of these two documents along with the motion. It states as follows:

“Subject to paragraph 4 the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.”

I have already stated in the earlier part of this ruling that the Plaintiff has relied upon the affidavit of service filed on 3rd April, 2012 to prove that service of the relevant process was effected. To the said affidavit's is attached exhibit "JN1" which was the letter of service accompanying the process. By the said letter, the Plaintiffs' advocates notify the Second Respondent of the rescheduled date of hearing of the motion and enclose the order granting leave to apply for committal proceedings and the notice of motion. The Second Respondent acknowledges receipt of the said documents by signing on the copy of the letter of service. There is however no statement and affidavit in support enclosed therewith. Clearly the said service does not comply with the provisions of Order 52 rule 3 (3) for want of service of the statement and affidavit. I therefore find that service of the other documents did not comply with the rules.

I now turn to consider the issue of the penal notice. The Respondents have argued that the penal notice on the injunction order does not conform to order 45 rule 7 (4) in that there is no warning to the Second Respondent and as such the format is wrong.

Order 45 rule 7 (1) of the **white book** which I have quoted in the earlier part of this ruling states as follows:

"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 the 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.”

The foregoing order clearly demonstrates the need for the warning to be displayed prominently on the front of the order. Further that, such warning should be directed to the person on whom the copy of the order is served and it must state that the consequence of disobedience is a contempt of court.

Further, as counsel for the Respondents has quite rightly argued, Zambian case law indicates that it is a necessity for a penal notice to be endorsed on an injunction order in accordance with the provisions of Order 45 rule 7 (4). The case of ***Sitima Tembo-Vs-National Council for Scientific Research (5)*** which counsel for the Respondents referred to states as follows at page 4:

“Order 45, Rule 7 (4) of the Supreme Court Practice provides that it is necessary for a written notice of an injunction to be endorsed with a penal notice. The exceptions referred to in the note to the rule apply only when there has been insufficient time to prepare a written notice of injunction. Once a written notice has been prepared it must contain a penal notice in order to make the breach of injunction the subject of an order of committal.”

By implication the format of the notice must comply with Order 45 rule 7 (1) I have quoted in the earlier part of this ruling. Applying the foregoing principles to our case, the order of injunction has a penal notice which states as follows:

“If you, Stripes (Zambia) Limited whether by yourself, your servant or agent or whomsoever fail to obey this order, you shall be liable to process of contempt.”

The said penal notice is at page 2 of the injunction order. I find that it does not comply with the provisions of Order 47 rule (1) for the following reasons. Firstly, it is not addressed to the Second Respondent being the person it was intended to be served upon and who it is sought to be commit for contempt. Secondly, it is not prominently displayed on the front of the injunction order but is tucked away at page 2 of the order and appears as the last item. Thirdly, it does not state or inform the recipient of the order that disobedience of the order would be a contempt of court punishable by imprisonment. To the contrary, it merely states that disobedience to the order would render the offender amenable to the process of contempt. This, in my considered view, falls far short of the requirement of Order 45 rule 7 (1).

In view of my findings on preliminary issues (2) and (3) it is clear that the Plaintiffs did not comply with the procedural rules on service of process and content and form of such process as per the requirement of Orders 45 and 52. Further, the said provisions make it abundantly clear that for a motion for committal for contempt to be heard and sustained it must strictly comply with the provisions of those two Orders. This is for the obvious reason that the liberty of an individual is at stake and as such I am obliged to take great care before I deny an individual such liberty. For this reason I am persuaded and endorse the holding of my brother Wood, J. in the case of ***Nyambe-Vs-Barclays Bank (Z) Limited Plc (2)*** at page 195 as follows:

“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.”

Further, I am also alive to the fact that service of process was effected upon counsel for the Respondents. However, in view of the provisions of Order 45, the said service is not sufficient service. Order 45 as I have demonstrated requires personal service and not service on counsel. This is in line with the case of ***Mander-Vs-Falcke (1)*** referred to me by counsel for the Respondents whose facts are similar to the facts of this case and are as follows. On the 6th of July, 1801, the Plaintiffs’ solicitor served the defendant’s solicitor with the copies of the notice of motion and affidavits. Subsequently, attempts were made to serve the Defendant personally, but without success, until the 9th of July – that is, the day before that on which the motion was to be heard – when the Plaintiffs’ solicitor succeeded in effecting personal service.

The Plaintiffs charged the defendant with having adopted various means to evade service.

The holding of the case at page 488 is as follows:

“Notice of motion to commit a defendant must be served upon him

personally, if practicable, service upon his solicitor being insufficient; and the Court will not make an order for substituted service until it is satisfied that every endeavor has been made to effect personal service. Mere knowledge on the part of the defendant of the plaintiff’s intention to move to commit does not dispense with the necessity of endeavouring

to effect personal service; and the appearance of the defendant upon the motion is not a waiver of any objection on his part on the ground either of want of personal service or of any irregularity.”

This clearly demonstrates that service of process on the Respondents' advocates is not sufficient service neither does attendance at Court by the Respondent waive the requirement of personal service.

By way of conclusion preliminary issue (1) raised by the Respondents fails for the reasons I have given in the earlier part of this ruling. I accordingly dismiss it. Preliminary issues (2) and (3) succeed to the extent I have stated in the earlier part of this ruling. The consequence of success of preliminary issues (2) and (3) is that the motion for contempt is not properly before me. As such it is dismissed with costs to the Respondents.

I further order that the matter came up for a scheduling conference on 20th February, 2012 at 08:20 hours.

Leave to appeal is granted.

Delivered in chambers this 4th day of February, 2013.

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NIGEL K. MUTUNA
HIGH COURT JUDGE

