

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

**2015/HP/358**



**BETWEEN:**

**MUTEMBO NCHITO**

**APPLICANT**

**AND**

**THE ATTORNEY GENERAL**

**RESPONDENT**

**CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC**

**For the Applicant: N/A**

**For the Respondent: N/A**

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**R U L I N G**

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**Legislation Referred to:**

(i) *Orders 53 (4) 45 Rule 7, 52 White Book 1999 (Edition) vol. 1*

**Cases Referred to:**

- 1. Zambian Breweries Plc v Maritime Freights and Forwarding Limited and another (2012) 3 ZR 21*
- 2. Monde Jane Mungaila Mapiko (suing on behalf of the traditional Council of Mungaila Royal Establishment) vs Victor Mukabe Chaande 2010 ZR 397*
- 3. Elia Kundiona v The People (1993/1994) ZR 59*

4. *Bonaventure Bweupe v Attorney General and another* (1984) ZR 21
5. *Attorney General v Nigel Kalonde Mutuna and 2 others appeal* No. 88/2012,/SCZ/185/2012 (dissenting Judgment)
6. *Deerick Chitalu v Attorney General* [1995/1997] ZR 91
7. *Musengule v Attorney General* [2009] ZR 359
8. *Christopher Kanema and 2 others v Attorney General* 2013/HP/0760 (unreported)
9. *Attorney General v Roy Clark* (2008) ZR 38
10. *Chimanga Changa Limited v Stephen Chipango Ngombe* (2010) ZR 208

The genesis of this case in so far as it relates to the exparte summons for leave to commence proceedings pursuant to Order 52 Rule 2 of the Supreme Court Rules<sup>1</sup> is that on 11<sup>th</sup> March, 2014 the Plaintiff launched proceedings by notice of application for leave to apply for Judicial Review Pursuant to Order 53 of the Rules of the Supreme Court.

The reliefs sought inter alia were

- (1) *An order of Certiorari to remove into the High Court for purpose of quashing the decision of the President of the Republic of Zambia for attempting to delve into issues which are sub judice and contravening the National Prosecution act No. 34 of 2016.*
- (2) *Leave to commence judicial review proceedings with a direction that such leave if granted was to operate as a stay of the decision by the President appointing a tribunal to inquire into conduct or alleged misconduct of the Director of Public Prosecution Mr. Mutembo Nchito, SC.*



The exparte notice for leave to apply for judicial review was supported by an affidavit verifying facts deposed to by Mutembo Nchito, SC.

After hearing the Learned Mr. Nchima Nchito, SC, exparte with the Learned Mr. Chisuwo Hamwela and upon perusal of the affidavit verifying the facts and upon sight of the certificate of urgency filed in by the Advocates for the Plaintiff, I formed a firm view that this was a fit and proper case on an emergent basis to be dealt with exparte.

After hearing counsel for the Applicant exparte on 11<sup>th</sup> March, 2015 and after considering the supporting affidavit in support of the application for leave to commence judicial review proceedings and upon sight of the certificate of urgency, I formed a firm view that the Applicant had demonstrated that there was reasonable apprehension that the appointment of the tribunal by the President of the Republic of Zambia touching on the conduct of the Director of Public Prosecution was likely to affect the proceedings which were active in the High Court and Supreme Court. A situation which may have the undesired effect of the Executive arm of the government interfering in the judiciary in matters pending before the courts.

It was principally for these reasons that I granted the sought relief for commencement of the judicial review proceedings aforesaid and further directed that leave to commence Judicial Review proceedings was to operate as a stay of the President's decision to

appoint the tribunal aforesaid. I then within the said written order ordered that the interparte hearing for leave for commencement of judicial review proceedings be heard interparte on 11<sup>th</sup> March, 2015 at 11:30 hours.

The said order prompted a sharp reaction from the PF Secretary General of the Party Mr. Davies Chama who called for a press conference and addressed the nation and broadcast a communiqué or bulletin which was televised on the Zambia National Broadcasting Services network.

Mr. Chama attacked my decision describing the same as illegal. He accused me as acting under coercion by some unknown persons and or collusion and that the decision was disrespectful to the President and contemptuous.

He then called upon the Judicial Complaints Commission to probe me for rendering a pronouncement in a matter where an aggrieved citizen had applied to court seeking for a remedy. He also called the Law Association of Zambia to probe me alleged misconduct.

He then attacked the His Lordship, Mr. Justice Chali, the Judge in charge for having assigned me cases touching on the suspended Director of Public Prosecutions and called for similar sanctions on him from the Judicial Services Commission and the Law Association of Zambia.

Mr. Chama then reminded me of the incidence where His Lordship the Hon. Chief Justice J.J Skinner (as he then was) was hounded



out of office arising out of a court's decision which displeased the incumbent Head of State then.

He then reminded me of the case where Mr. Justice Nyangulu (as he then was) had granted an injunction against the incumbent president Mr. Levy Patrick Mwanawasa, SC following certain appointments the President had made. Mr. Chama then directed the Acting Attorney General, the Learned Mr. Abraham Mwansa, SC to ensure that the tribunal was reinstated and I was censured.

On 12<sup>th</sup> March, 2015 late in the night I was faced with summons for an order to discharge the leave to apply for judicial review pursuant to order 53 Rule 4; the summons were supported by an affidavit, a certificate of urgency and arguments.

I heard the Learned Mr. Mwansa, SC and the Learned Mr. Joe Hantebe Simachela, Acting Chief State Advocate who brought to my attention certain useful judicial precedents.

On 13<sup>th</sup> March, 2015 I vacated my earlier Order of 11<sup>th</sup> march, 2015 as appears in the Ruling of the said date; not because of the threats of sanctions or intimidations as advocated by Mr. Chama but because by the doctrine of stare decisis courts are bound by judgments of superior courts.

On the same date the Appellant launched ex parte summons for leave to commence contempt proceedings pursuant to Order 52 Rule 2 of the Supreme Court Rules.<sup>1</sup> The summons was supported

by an affidavit together with a certificate of urgency and a statement in support of application.

It is regretted that this application could not be attended to earlier paramountly due to pressure of work. I was seized of the March 2015 Lusaka Criminal Sessions, Criminal matters take precedent over civil matters.

Having vacated the order of 11<sup>th</sup> March, 2015 grating leave for commencement of judicial review proceedings it means that I am functus officio in respect of any further proceedings.

I however note that the application is in respect of matters which occurred or allegedly occurred during the subsistence of the aforesaid order which is being said to have been disobeyed by the Applicant. I am also alive to the fact that the Tribunal appointed to inquire into the allegations of misconduct by the Applicant is actually sitting.

I am also further alive to the fact that the Applicant appears to have appealed against the Ruling of 13<sup>th</sup> March, 2015 vacating the order of 11<sup>th</sup> March, 2015 which is perfectly within his rights. It is therefore counsel of prudence that I take a precautionary approach in dealing with the application before me.

I have already observed that, the vacation of the order and resultant appeal effectively takes away the matter from my jurisdiction. But since the application relates to matters which took place or



allegedly took place during the subsistence of the order, I am duty bound to entertain and adjudicate on the Applicants application.

I will now deal with the substantive application.

The Applicant seeks leave to commence contempt proceedings against Mr. Davies Chama the Secretary General of the Patriotic Front and Stella Libongani the Inspector General of police for their committal to prison for contempt of court; for reasons set out in the Affidavit of the Applicant Mr. Mutembo Nchito, SC.

He deposed that the Respondent was served with dated 11<sup>th</sup> March, 2015 and the letter of service duly acknowledged vide exhibit "MN2". He deposed that police officers under the control of Ms. Libongani did on 12<sup>th</sup> March, 2015 stopped him from entering his office at the National Prosecutions.

He further deposed that Messrs Davies Chama and Sunday Chanda Patriotic Front Media Committee vice Chairperson on 12<sup>th</sup> March, 2015 issued statements which threatened, maligned and which generally contemptuous of the court vide exhibit "MN2".

The Applicant in his statement in support of the application stated that

*(1)The named contemnors conduct of ignoring, disregarding and or disobeying the order of stay of decision of the President is deliberate, willful and wanton effort to undermine the authority of the court.*

*(2) That the refusal by the said contemnors to comply with the courts order is intended to interfere with the course of Justice and to lower the integrity of the honourable court.*

*(3) That Mr. Chanda and Mr. Chama made despairing remarks towards the court intended at lowering its dignity.*

In dealing with the application before me, I will first deal with the issue of service of the order of 11<sup>th</sup> March, 2015.

*(i) Order of 14<sup>th</sup> March, 2015*

*The affidavit in support of exparte summons for leave to commence contempt proceedings exhibits a letter of service of 11<sup>th</sup> March, 2015 alluding to service of*

*(i) Affidavit verifying facts;*

*(ii) Notice of application for leave to apply for Judicial Review;  
and*

*(iii) Order granting leave for Judicial review.*

A scrutiny of that letter reveals that it was not acknowledged by the Respondent. It was neither stamped nor signed by the Respondent or an agent from the office of the Attorney General's Chambers. There is therefore no proof that the Order of 11<sup>th</sup> March, 2014 was served on the Acting Attorney General.

I also find no proof of service on the Inspector General of police Ms Libongani to justify the signaling of commencement of contempt proceedings. In respect of Mr. Davies Chama and Mr. Sunday



Chanda, I am satisfied that the said person were aware of the order of the court aforementioned as evidenced by the communiqué issued by Mr. Davies Chama vide exhibit “MN2” from the secretariat of the Patriotic Front. There was even a public coverage on National television of Zambia National Broadcasting Corporation to cover the story. I have taken judicial notice of that fact.

Order 45 Rule 7<sup>1</sup> gives discretion to the court to dispense with personal service of court process or orders if it thinks fit to do so. The above legal position was considered in the case of **Zambian Breweries Plc v Maritime Freight and Forwarding Limited**<sup>1</sup>.

In the case of **Chimanga Changa Limited v Stephen Chipango Ngombe**<sup>6</sup> their Lordships had occasion to consider the requirement to provide proof of service. They held as follows:

*(1) “There is no doubt that the rules of the court require that parties to a dispute must be served with the court process including a notice of hearing so that they can react to the process. The rationale behind this requirement is the common law principle of natural justice”.*

*(2) “There is no exclusively sacrosanct method of proving service of process while an affidavit of service will lay the issue of service to rest, service can be proved through an endorsement on a letter or other circumstance. A court is at liberty to infer from*

*circumstances in a case whether a litigant is aware of the hearing date”.*

In my view this instructive pronouncement also relate to service of court orders and stays as the one granted on 11<sup>th</sup> March, 2015. The Acting Attorney General, Mr. Mwansa, SC and his team reached my residence at 22:40 hours on 12<sup>th</sup> March, 2015 the day it is stated the Applicant was stopped to access his office. I am however unable to infer the date and time as to when precisely the Respondent was served with the order.

It was also held in the cited Chimanga Changa<sup>6</sup> case that

*“Order 52 gives discretion to grant or deny leave to issue contempt proceedings. The purpose is to consider whether there are reasonable grounds to warrant commencement of committal proceedings which are considered serious because of the Criminal nature”.*

It was alleged in the affidavit by the Applicant that he was denied entry to his office on 12<sup>th</sup> March, 2015 by some unnamed police officers who were under the instructions of the Inspector General of police Ms Stella Libongani.

I have taken judicial notice that the 12<sup>th</sup> March, 2015 was a public holiday; it was youth day, and without treading in the arena of conjecture, I would presume that the Applicant’s offices being government offices were closed on the public holiday. This is not to suggest that the Applicant had no access to the offices, that is



within the peculiar knowledge of the Applicant as well as dependent on administrative regulations in force regulating accessibility to the Applicants offices which are government offices.

The critical point of consideration is however that there was no proof of service of the order on Attorney General and Ms Stella Libongani the Inspector General of police.

**(iii) WAS THE CONDUCT AND UTTERENCES OF THE CITED CONTEMNORS CONTEMPTUOUS?**

Dr. Matibini, J SC (as he then was) in the case of **Monde Jane Mungaila Mapiko** (*suing on behalf of the traditional Council of Mungaila Royal Establishment*) **vs Victor Makabe Chaande**<sup>2</sup> His Lordship opined that

- (i) *“Proceedings for contempt are essentially punitive in character and the purpose is to secure compliance with court orders”.*
- (ii) *“The main form of punishment for contempt are imprisonment, fines and sequestrations. A court may also order taking of security; award damages or deliver strong reprimands”.*
- (iii) *“Contempt of court extends to conduct that tends to abuse the court proceedings generally and specifically putting forward any conduct that impedes the administration of justice”.*
- (iv) *“Abuse of court proceedings”.*

- (v) *“Need to protect the rule of law as the common factor underlying the contempt of court jurisdiction”.*

I respectfully agree and adopt the above pronouncements are correct statements of the law and I adopt them. Ngulube, DCJ (as he then was) instructively pronounced himself in the case of ***Elia Kundiona v the People***<sup>3</sup> as follows:

*“Contempt of this kind are punished not for purpose of protecting the court as a whole or the individual Judge of the court from a repetition of attack but or protecting the public and especially those who either voluntarily or by compulsion are subject to the Jurisdiction of the court, they will view if the authority of the tribunal was undermined or impuned.*

*It would not be a legitimate object of punishment for an aggrieved Judge to seek solely to vindicate his personal honor or sate his wrath. It is the public which must be protected against loss of confidence and respect of courts engendered by acts calculated to undermine authority as to expose the contempt..... A Judge should act of his own motion only when it is urgent or imperative to act immediately.*

*In all he should not take it upon himself to move. He should leave it to the Attorney General or to the other party aggrieved to make a motion in accordance with order 52 of the Supreme Court Rules<sup>1</sup>. The reason is so that he should*



*not appear to be both prosecutor and Judge for that is the role which does not become him well .....*”

These utterances are instructive. I should add that if the conduct and utterances of the contemnors is deemed to have amounted to proposing violence or threatening a Judge the office of the Director of Public Prosecution would be handy to deal with the mischief and not upon a Judge to start defending himself.

Silungwe, C.J as he then was in the case of ***Bonaventure Bweupe v Attorney General & Zambia Publishing Company Ltd of Zambia***<sup>4</sup>, descended and said

*“Although judges as such should generally not be exposed to criticism because of the nature of their work, a member of the public acting in good faith, may genuinely exercise a right of criticism within proper limits and without any way attempting to impute improper motives or to impair the administration of justice”.*

Lord Atkin put the matter succinctly in ***Andre Paul Terence Ambard v Attorney General of Trinidad and Tobago*** when he said:

*“But whether the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public act done in the seeking of justice. The path of criticism is a public way: the wrong headed are*

*permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune.*

*Justice is not a cloistered virtue, she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men”.*

In the case of **Attorney General v Roy Clarke**<sup>5</sup> the Supreme Court held that

*“Freedom of expression is one of the strong attributes of a democratic society and that to that extent permitted by the constitution itself. Freedom of expression must be protected at all costs and those who hold public office must be prepared to suffer and be tolerant to criticism”.*

In that case their Lordships went on to observe that the constitution limits or constricts freedom of expression. Freedom of expression is not limitless. Having visited the authorities on contempt and akin cases, I now apply the facts to the law.

As I narrated earlier, Mr. Chama issued and broadcast a very inflammatory communiqué wherein he made serious allegation of illegality and collusion to disrespect the President of the Republic of Zambia.



He also made reference to 2 incidences relating to the hounding of Skinner, CJ as he then was from the realm and the refusal by President L.P Mwanawasa, SC public defiance of the order of the court.

I should take opportunity to state that orders of the court are to be obeyed by all, irrespective of whether a given order is perceived to be wrong, oppressive, unwarranted or indeed bad in law. Court orders continue to be in force until reversed, vacated or terminated by legislative intervention.

I am constrained to comment on the communiqué published by Mr. Davies Chama because the matter is presently, I understand on appeal to the Supreme Court and I cannot defend myself against the attacks unless if I took the route taken by Bweupe, J (as he then was).

(i) **Allegations of illegality and disrespect to the office of the President**

To falsely allege that a Judge has committed an illegal act is definitely a serious affront on the integrity of the Judge and office of the Judge. It is contemptuous. One of the core functions of a Judge is to adjudicate.

Indeed courts have on previous occasions intervened in Presidential decisions. This was aptly demonstrated in the dissenting Judgment of Mwanamwambwa, JS in the case of **Attorney General and Nigel Kalonde Mutuna and 2 others Appeal No.**

**88/2012/SCZ/185/2012 (unreported)** His Lordship gave 3 examples where Presidential executive powers have in the past been challenged.

The first one is ***Kangombe v Attorney General [1972] ZR 177***. In that case Silungwe, J as he then was descended and declared that the Applicants dismissal by the President from Teaching Service a nullity for non compliance with the sections 115 B (1), (2) and 115 (10) of the constitution. On appeal by the Attorney General, the court of appeal upheld the decision of the High Court and dismissed the appeal.

The second case was ***Derrick Chitala v Attorney General, [1995 / 1997] ZR 91*** in that case the Applicant (in his capacity as secretary of the Zambia Democratic Congress) appealed against a decision of the High Court Judge, who had summarily refused to grant leave to commence judicial review proceedings.

The Appellant had sought an order for certiorari to remove into the High Court for purposes of quashing the decision by the 2<sup>nd</sup> Republican President and his cabinet, to have a new constitution enacted by the then National Assembly and an order of mandamus directed and compelling the President and cabinet to take such measure as may be necessary to ensure that the constitution was debated and finally determined by a constituent Assembly and subjected to a referendum.

The Supreme Court dismissed appeal.



The third case was ***Musengule v Attorney General [2009] ZR 359***. In that case the Petitioner was Army Commander holding the rank of Lt General. He had bought a house from the Government and the 3<sup>rd</sup> Republican President issued a directive that the Petitioner's house be re-entered and repossessed by the State. Mwanamwambwa, J as he then was declared in favour of the Petitioner as follows:

*(1) That decision of the government complained of was legally flawed, it deprived the Petitioner of article 16 (1) of the Constitution, section 3, 5, 6, 7 and 10 of the Lands acquisition Act and sections 35, 34 and 54 of the Lands and Registry Act.*

*(2) That the decision in question was null and void for contravention of Article 16(1) of the Constitution of the and for violating the Petitioners rights under the same Article.*

In the recent case of ***Christopher Kangwa and 2 others v Attorney General 2013/HP/0760 (unreported)*** Madam Justice A.M Banda – Bobo as she then was quashed the decision of His Excellency the President of the Republic of Zambia to retire the Applicants in the national interest or at all and order further that the Applicants succeeded in all the reliefs sought.

On the foregoing, there was therefore nothing illegal or disrespectful to the President for the court to pronounce and make an order on an application properly filed before court.

**(ii) Calling for the judicial complaints commission to establish the premise used to suspend decision made by President**

I find nothing objectionable for a citizen to call upon a legally constituted body like the Judicial Complaints Commission to make inquiries upon a complaint lodged by a member of the public in with the confines of the mandate. Of course taking due regard to powers of the High Court bestowed upon it by the Constitution, High Court Act and other legislation.

In my view, this publication though it might have been motivated by malice or ill will cannot be said to be contemptuous.

**(iii) Calling upon the Law Association to probe a Judge for Misconduct**

Suffice it to say that the law Association is not a supervisory body for Judges.

**(iv) Allocation of all matters relating to the suspension of the DPP to one Judge**

In the first place this statement is factually incorrect. Some matters touching on the DPP, Mutembo Nchito, SC are in the Supreme Court, others before Chawatama, J. In any event it is desirable that matters arising out of the same set of facts, in space and time, and having commonality of the applicable law are handled by one court to avoid multiplicity of actions and the danger



of contradictory Rulings or Judgments before different court of competent Jurisdiction.

**(v) *The cases of Skinner, CJ as he then was and Nyangulu, J (as he then was)***

I have already dealt with this matter somewhere in this Ruling in the preceding paragraphs. I have said that orders of the court are valid until discharged. To suggest that a Judge should flee the jurisdiction for discharging a function of adjudication is reprehensible. It is intimidatory and completely unwarranted.

I am old enough to recall that in one of the jurisdictions a Chief Justice was killed in mysterious circumstances in the course of his duties apparently for not heeding a directive from unnamed Head of State.

To that extent, advocating and proposing that a Zambian Judge should flee the realm is an affront on the personal safety and security of the Judge, an affront to the rule of law and against public policy.

These utterances and propositions are clearly contemptuous.

Taking into account the provisions of the constitution that guarantees the freedom of expression and taking into account the instructive judicial precedents about the striking of a balance between wanton outrageous attacks on the bench and the need to protect the integrity and dignity of the court, I do not think that this is a fit and proper case to signal the launching of contempt

proceedings against the alleged contemnors namely Mr. Davies Chama and Mr. Sunday Chama.

Each case has to be treated on its own merit. The clear message is that courts have inherent jurisdiction to deal with contemptuous behavior and punishment would be swift and prompt to those found wanting.

It is for the above reasons that leave to commence contempt proceedings has been denied.

The Applicant is informed of his right of appeal to the Supreme Court.

Dated this *14th* ..... day of April, 2015



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**Mwila Chitabo, SC**  
**Judge**