

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA



2017/HP/0888

(Civil Jurisdiction)

IN THE MATTER OF: SECTION 123(1) OF THE CRIMINAL
PROCEDURE CODE, CHAPTER 88 OF THE
LAWS OF ZAMBIA

IN THE MATTER OF: ARTICLES 1, 11, 13 AND 18 OF THE
CONSTITUTION OF ZAMBIA

IN THE MATTER OF: RULE 20 OF THE PROTECTION OF THE
FUNDAMENTAL RIGHTS REGULATIONS, 1969

BETWEEN:

HAKAINDE HICHILEMA 1ST PETITIONER

HAMUSONDE HAMALEKA 2ND PETITIONER

MULEYA HACHINDA 3RD PETITIONER

MULILANDUBA LASTON 4TH PETITIONER

HALOBA PRESTORIUS 5TH PETITIONER

CHAKAWA WALLACE 6TH PETITIONER

VERSUS

GOVERNMENT OF THE REPUBLIC OF ZAMBIA RESPONDENT

*Before the Hon. Judge Betty M. Majula-Mung'omba on the 16th day of
June 2017.*

For the Petitioners : Mr. J. Sangwa, SC of Simeza Sangwa & Associates
: Mr. J. Mwiimbu of Muleza Mwiimbu & Company
Ms. M. Mushipe of Martha Mushipe & Company

For the Respondent

Mr. L. Kalaluka, SC - Attorney General

Mr. J. Simachela, Chief State Advocate

Mr. F. Mwale, Principal State Advocate

Mr. D. Kamfwa, Assistant Senior State Advocate

R U L I N G

Cases referred to:

- 1. Finsbury Investments Limited and Antonio Ventriglia, Manuel Ventriglia, Ital Terrazzo Limited (in receivership) (SCZ/8/95/2016):***
- 2. BP Zambia Plc v Interland Motors (2001) ZR 37.***
- 3. Development Bank of Zambia and Another v Sunvest Limited and Another (1995-1997) ZR 187.***

Legislation referred to:

- 1. Constitution of Zambia, Cap 1 of the Laws of Zambia.***
- 2. Criminal Procedure Code Cap 88 of the Laws Zambia.***
- 3. High Court Act Cap 27 of the Laws of Zambia.***

This is a Ruling on an application by the respondent on a Notice of Motion to stay proceedings pending determination of the application to set aside Constitutional Court proceedings for duplicity and abuse of Court process. The application has been brought pursuant to Order 3 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia. The application for substitution of the respondent was withdrawn by consent of the parties to allow the issue be determined by the Constitutional Court as the same application was also pending before that Court.

The brief facts as revealed by the petition and affidavit verifying facts are as follows: on 7th April 2017, the petitioners travelled by road to Limulunga of

Western Province to attend the Kuomboka Traditional ceremony using the Mongu/Limulunga road. It is alleged that along the way, they failed to give way to the Presidential Motorcade, which was carrying His Excellency, President Edgar Chagwa Lungu, despite being ordered to do so by police officers.

Following this turn of events, on 10th April 2017, a legion of heavily armed police officers clad in paramilitary uniforms broke into the 1st petitioner's residential house in New Kasama area of Lusaka, apprehended him and took him to woodlands police station where he was subsequently charged with the other petitioners for offences of treason, disobedience to lawful orders and use of insulting language contrary to sections 43, 127 and 179 of the Penal Code. The petitioners were however acquitted on the two minor offences by the Subordinate Court and what remains to be determined is the offence of treason by the High Court.

The petitioners contend that they have not sought to be released on bail pending trial from the police or the Courts on account of the proviso to section 123(1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia which bars any person charged with treason or other capital offences listed therein from being granted bail. They thus allege that the respondent has breached, *inter alia*, the provisions of Article 13 of the Constitution which guarantees personal liberty.

It is against the preceding background that the petitioners are seeking for the following reliefs from this Court as set out in paragraph 47 of their Petition:

“(47) Your Petitioners, therefore, pray that they be granted the following remedies:

(a) an order quashing their arrest and continued arrest on the grounds that:

- (i) *There are no facts or grounds and there were no facts or grounds on which reasonable suspicion could be or could have been formed of the Petitioners having committed, or about to commit the offence of treason as provided for in Section 43 of the Penal Code, Chapter 87 of the Laws of Zambia.*
- (ii) *Since their arrest the Petitioners have not been given the reasons for their arrest as required by Article 13(2) of the Constitution.*
- (iii) *Since their arrest, the Petitioners have not been informed in detail of the nature of the offence they are charged with as required by Article 18(2)(b) of the Constitution.*
- (iv) *Since their arrest, the Petitioners have never been given adequate time and facilities for the preparation of their respective defences as required by Article 18(2)(c) of the Constitution.*
- (b)** *A declaration that Section 123 (1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia, to the extent to which it denies any Police Officer, Subordinate Court, High Court or the Supreme Court the power to decide whether to grant bail or not to any person charged with murder, treason or any other offence carrying a possible or mandatory capital penalty; misprision of treason or treason felony; aggravated robbery; or theft of motor, if such a person has previously been convicted of theft of motor vehicle, is ultra-vires Articles 11 and 13 of the Constitution and hence null and void.*
- (c)** *An Order severing the proviso to section 123 (1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia on the premise that it is inconsistent with the provisions of Articles 11 and 13(3)(b) of the Constitution of Zambia.*

(d) Compensation (in monetary terms) for unlawful arrest pursuant to the provisions of Articles 13(4) of the Constitution of Zambia.

Before the petition could be heard, a Notice of Motion, which is the subject of this Ruling, was filed into Court by the respondent. The Motion as earlier stated is for an Order to stay proceedings pending determination of the application to set aside Constitutional Court proceedings for duplicity and abuse of Court process. The application is supported by an affidavit sworn by one Joe Simachela in which he deposed that besides these proceedings, the petitioners have also petitioned the Constitutional Court under cause number 2017/CCZ/0006 based on the same facts and also seeking substantially the same reliefs. The said petition in the Constitutional Court appears as exhibit "JS1" to the affidavit in support of the Notice of Motion. For completeness sake the reliefs, as endorsed in the petition before the Constitutional Court, are as follows:

"BREACH OF CONSTITUTION

(49) By virtue of what is stated in paragraphs 1 to 48:

- (a) Section 123(1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia to the extent to which it bars the High Court from entertaining an application for bail and where necessary granting bail to any person charged with murder, treason or any other offence carrying a possible or mandatory capital penalty; misprision of treason or treason felony; aggravated robbery; or theft of motor, if such a person has previously been convicted of theft of motor vehicle is inconsistent with Article 134(a) of the Constitution and hence null and void.*
- (b) Section 123(1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia to the extent to which it bars the Supreme Court from entertaining an application for bail and where necessary*

granting bail to any person charged with murder, treason or any other offence carrying a possible or mandatory capital penalty; misprision of treason or treason felony; aggravated robbery; or theft of motor, if such a person has previously been convicted of theft of motor vehicle is inconsistent with Article 125 of the Constitution and hence null and void.

SUBSTANTIVE RELIEF SOUGHT BY THE PETITIONERS

[50] Your Petitioners, therefore, pray that they be granted the following remedies,

(a) An order severing the proviso to section 123(1) of the Criminal Procedure Code, which reads:

Provided that any person charged with:-

- (i) Murder, treason or any other offence carrying a possible or mandatory capital penalty;*
- (ii) Misprision of treason or treason-felony;*
- (iii) Aggravated robbery; or*
- (iv) Theft of motor, if such a person has previously been convicted of theft of motor vehicle; shall not be granted bail by either the High Court or Supreme Court or be released by any Police Officer.*

(b) An order that the petitioners be at liberty to apply before the High Court for bail pending trial and that the High Court be at liberty to grant such bail if need be."

The hearing of the motion to stay proceedings was held on 12th June 2017 at which Mr. Kalaluka, SC, the learned Attorney General submitted that in a nutshell the respondent's application has been brought pursuant to Order 3 Rule 2 of the High Court Rules Cap 27 of the Laws of the Zambia.

The learned Attorney-General spiritedly argued that the reliefs being sought in the Petition before this court were substantially the same reliefs being sought in the Constitutional Court in the sense that both courts were being asked to pronounce themselves on the same issue of severing section 123 of the Criminal Procedure Code. That this amounts to duplicity and forum shopping and an abuse of court process. He urged it upon the court to demonstrate firmness in order to avoid the court being put in an embarrassing position where there would be potentially two conflicting decisions referring to the High Court and Constitutional Court.

The learned Attorney-General went on to crave the court to stay the proceedings pending the decision of the Constitutional Court.

He argued that the respondent had demonstrated that the facts and reliefs being sought were exactly the same and hence this application to stay the proceedings.

Mr. John Sangwa SC, in reply, vociferously argued that the application by the respondent was bereft of merit. The reasons advanced for this bold assertion were as follows:

1. That the petition before the High Court was pursuant to the provisions of Article 28 of the Constitution whereas the petition before the Constitutional Court was made pursuant to Article 128 of the Constitution. He averred that in light of the above these were two separate jurisdictions. He went to explain the implication of this, that is to the effect that the High Court is mandated to deal with the enforcement of the Bill of Rights and can pronounce itself on whether or not the Bill of Rights has been violated whereas the Constitutional Court cannot. Mr. Sangwa SC, went on to elaborate further that the jurisdiction of the Constitutional Court is very clear that it covers all matters except the Bill of Rights and it is in this vein that he submitted

that the conflict suggested by the learned Attorney-General was a mere fiction.

2. The second limb of Mr. Sangwa's SC, submission was that the respondent did not cite the authority upon which the application was premised save for citing Order 3 Rule 2. According to State Counsel Sangwa it is good practice to state the authority being relied upon when making an application. He went on to argue that the fact that one has moved the High Court under Article 18 is not a bar to commencing another action on the same facts. He conceded that the facts were the same but persisted in the assertion that facts before the High Court do not prejudice the petitioners to go to another court as it is their constitutional right. He emphasized that Article 28 of the Constitution is exclusively for the enforcement of Bill of Rights as a court of first instance.
3. Thirdly, Mr. Sangwa SC, strongly refuted the averment that the remedies sought in the two actions were the same. He stated categorically that the remedies were different. The long and short of his argument on this point was that in the Constitutional Court they sought section 123 of the Criminal Procedure Code to be severed because it violates Articles 125 and 134(a) of the Constitution which was beyond the jurisdiction of the High Court. He opined that in the High Court however, section 123 is sought to be severed because it violates the Bill of Rights in particular Articles 13 and 11. That only the High Court could rule on that issue. He forcefully contended that the issue or question on the issue of rights was not raised before the Constitutional Court and he therefore did not see how the conflicting decisions would come about. He went on to state that the right for a petitioner to seek other remedies on the same facts is a constitutional right and can only be curtailed by the Constitution. He stoutly argued that if there had to be a stay it must be prescribed by the Constitution and the court cannot impose a stay without a legal basis. In addition Order 3 Rule 2 cannot be relied upon as a basis to stay

proceedings. The distinction State Counsel sought to draw was that the High Court was being called upon to determine whether the Bill of Rights has been violated. That pursuant to Article 28, the Bill of Rights was the preserve of the High Court. In concluding the foregoing arguments, State Counsel Sangwa implored the court to dismiss the application.

The learned Attorney-General in reacting to Mr. Sangwa SC arguments begun by reading out the reliefs sought in the High Court Petition and the reliefs sought in the Constitutional Court Petition, paragraphs 47(c) and paragraphs 50 respectively.

He went on to expound on the absurdity the courts would find themselves in if one court found that the proviso to section 123 of the CPC should be severed from the statute and the other court namely the Constitutional Court declines to sever the proviso. He submitted that two matters seeking the same reliefs would cause embarrassment to the court.

His argument was predicated on the fact that once the proviso is removed by this Court, it would no longer be part of the statute book and therefore he urged the court not to be swayed by the flowery arguments but should instead rise to the occasion to abate the likelihood of embarrassment.

Pertaining to the argument advanced that the High Court and Constitutional Court had two separate jurisdictions, the learned Attorney-General determinedly argued that, that notwithstanding, there was a clear possibility of having two conflicting decisions because the reliefs sought were exactly the same. He submitted further that Article 28 does not open flood gates of having different courts being requested to grant the same reliefs. He contended that the relief sought in the High Court and Constitutional Court was the same which was to sever the proviso under Section 123 of the Criminal Penal Code.

Regarding the contention that the application lacked legal basis the learned Attorney-General maintained that they were fortified in relying on Order 3 Rule 2 and that besides it being couched in general terms, it makes provision for this court to grant any order in the interest of justice. In doing so he again urged the court to stay proceedings pending the determination of proceedings in the Constitutional Court on the grounds already articulated and the ground that the court has inherent jurisdiction to avoid duplicity and abuse of court process.

I have carefully taken into consideration all the arguments by both parties as well as the various provisions of the law in arriving at my decision.

I will begin by addressing the issue pertaining to the use of Order 3 Rule 2 by the Attorney-General as the basis for the application before me.

I am in total agreement with State Counsel Sangwa, that it is good practice to state the authority being relied on. The State has sought to rely on Order 3 Rule 2 which provides as follows:

"Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."

Whilst I agree that Order 3 rule 2 does not come to the aid of the Attorney-General in that it does not address the issue of commencement on an application before this court but rather the remedy that this court can grant, I find the application is properly before me because I have inherent jurisdiction to entertain such application. My finding is based on the interpretation given by the Supreme Court of the High Court Rules in the case of **Finsbury Investments Limited and Antonio Ventriglia, Manuel Ventriglia, Ital Terrazzo Limited** ⁽¹⁾ when it stated thus:

*“The High Court Rules are couched in a manner that all actions before court are Judge driven. Which entails that a Judge of that court has the responsibility of ensuring that all actions before it are stirred to their logical conclusion promptly. In doing so, the High Court has a responsibility of ensuring that it adopts the quickest method of disposing of a matter before it, justly and having afforded the parties an opportunity to be heard. To achieve this, there is built in the practice and procedure of the High Court and indeed the appellate courts, a system whereby, an obviously hopeless, frivolous or vexatious matter may be dealt with at interlocutory stage without having to await a full hearing. This ensures that there is a saving on the already overstretched resources of the court and indeed that matters are disposed of at least cost to the parties. In its unlimited jurisdiction, the High Court is also vested with “... the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto, may appear to be entitled... (see section 13 of the **High Court Act**)”*

This portion of the decision clothes me with jurisdiction to entertain the application before me notwithstanding that there is no reference to any Order cited in the application. The interpretation given of the High Court Rules by the Supreme Court urges this court to be robust in situations similar to this where a matter can be determined at interlocutory stage as long as the parties have been given an opportunity to be heard.

Although it is desirable that a party cites the rule pursuant to which he is making the application the omission of itself is not fatal thereby rendering the application incompetent. Neither does it close the doors to a Judge on his or her own motion to entertain the application.

Having found that the application is properly before me I now proceed to determine the application and I shall commence by determining the separate jurisdictions of the two courts.

The law as provided for in Article 28 and Articles 128 and 134 is very clear. For ease of reference it is reproduced hereunder:

"28. (1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall-

- (a) hear and determine any such application;*
- (b) determine any question arising in the case of any person which is referred to it in pursuance of clause(2);*

and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.

(2) (a) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of Articles 11 to 26 inclusive, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion the raising of the question is merely frivolous or vexatious.

(b) Any person aggrieved by any determination of the High Court under this Article may appeal therefrom to the Supreme Court:

Provided that an appeal shall not lie from a determination of the High Court dismissing an application on the ground that it is frivolous and vexatious.

(3) An application shall not be brought under clause (1) on the grounds that the provisions of Articles 11 to 26 (inclusive) are likely to be contravened by reason of proposals contained in any bill which, at the date of the application, has not become a law.

(4) Parliament may confer upon the Supreme Court or High Court such jurisdiction or powers in addition to those conferred by this Article as may appear to be necessary or desirable for the purpose of enabling that Court more effectively to exercise the jurisdiction conferred upon it by this Article or of enabling any application for redress to be more speedily determined.

128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear— (a) a matter relating to the interpretation of this Constitution; (b) a matter relating to a violation or contravention of this Constitution; (c) a matter relating to the President, Vice-President or an election of a President; (d) appeals relating to election of Members of Parliament and councillors; and (e) whether or not a matter falls within the jurisdiction of the Constitutional Court.

(2) Subject to Article 28 (2), where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court.

(3) Subject to Article 28, a person who alleges that - (a) an Act of Parliament or statutory instrument; (b) an action, measure or decision taken under law; or

(c) an act, omission, measure or decision by a person or an authority; contravenes this Constitution, may petition the Constitutional Court for

redress. (4) A decision of the Constitutional Court is not appealable to the Supreme Court.

134. The High Court has, subject to Article 128 - (a) unlimited and original jurisdiction in civil and criminal matters; (b) appellate and supervisory jurisdiction, as prescribed; and (c) jurisdiction to review decisions, as prescribed."

Arising from the preceding paragraphs it is an undisputed fact that matters concerning the Bill of Rights which are located in Part III of the Constitution are the preserve of the High Court.

The Constitutional Court jurisdiction covers all matters except for those contained in the Bill of Rights.

I now move on to determine the issue whether or not there is a multiplicity of actions. The starting point is considering what the Zambian Courts have described as amounting to a multiplicity of actions. This can be discerned from the Supreme Court decision of **BP Zambia Plc vs Interland Motors** ⁽²⁾, where it stated as follows:

"for our part we are satisfied that, as a general rule, it will be regarded as an abuse of the process if the same parties re-litigate the same subject matter from one action to another or from judge to judge... In conformity with the Courts inherent power to prevent abuse of its process, a party in dispute with another over a particular subject should not be allowed to deploy his grievance piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various Courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions, or decisions which undermine each other from two or more judges over the same subject matter." (underlining mine for emphasis)

It is abundantly clear that there are three features that emanate from this decision that is in order to constitute a multiplicity of actions there should be:

1. the same parties;
2. the same subject matter;
3. a litigant hopping from court to court.

Applying the foregoing to this matter it is clear from the exhibit "JS1" that the parties before me are the same parties before the Constitutional Court.

Secondly the subject matter before me and the Constitutional Court is the same.

The gist of the matter is that a decision by either of the courts would have the capacity to resolve the issues brought to the court for determination. It is my very firm view that it would absolutely be inappropriate to have a situation where two parallel cases are running to pronounce on the same provision in the Criminal Procedure Code. This would create disharmony in the judicial system because not only does it have the potential but also poses the real danger of having conflicting and contradictory decisions over the same matter which will have the effect of bringing the judicial system into disrepute, and contrary to public interest.

Thirdly the litigants in this case are hopping from this court to the Constitutional Court. Clearly and in line with **BP Zambia Plc vs Interland Motors** ⁽²⁾ case the litigants in this case have deployed their grievance piecemeal and scattered it in the two courts. Naturally, this court is bound to frown upon such conduct as was stated by the Supreme Court in the case of **Development Bank of Zambia and Another vs Sunvest Limited and Another** ⁽³⁾, when it expressed itself in the following words:

"we also disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter. The objection raised by the borrowers in this action to the Bank pursuing the remedy of self-redress in this action, that an action was pending, applies with equal force to the whole idea of the borrowers commencing a fresh action when there is already another one pending in the Court with the result that

the various Courts may end up making various conflicting and contradictory decisions because the parties have started another action in the Courts." (underlining mine for emphasis).

I therefore find and hold that this action amounts to a multiplicity of action which is undesirable.

This now brings me to the question of what is the fate of this matter before me? The learned Attorney-General has urged me to stay the proceedings pending the outcome of the proceedings in the Constitutional Court. I am disinclined to stay proceedings because I see no reason why I should stay them as the petitioners will have their day in court in the Constitutional Court. I am of the firm view that the matter before me must be dismissed to avoid relitigating on the same issues.

I am on *terra firma* in the foregoing interlocutory Order of dismissal because Order 3 rule 2 clothes me with such jurisdiction of making orders which:

"... [I MAY] consider necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not"

For avoidance of doubt the matter before me stands dismissed with costs.

Leave to appeal is granted.

Dated at Lusaka this 16th day of June, 2017.


Judge Betty Majula-Mung'omba
HIGH COURT