

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

2017/HP/1057



BETWEEN:

BOZY SIMUTANDA
(Homerights UCI Agency)

PLAINTIFF

AND

DAVIES MWILA
(Secretary General- Patriotic Front)

1st DEFENDANT

ATTORNEY GENERAL

2nd DEFENDANT

DIRECTOR OF PUBLIC PROSECUTIONS

3rd DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 11th DAY OF
AUGUST, 2017**

For the Plaintiff : In person
For the 1st Defendant : No appearance
For the 2nd Defendant : No appearance
For the 3rd Defendant : No appearance

R U L I N G

LEGISLATION REFERRED TO:

The Constitution of Zambia Act No 2 of 2016
The High Court Rules, Chapter 27 of the Laws of Zambia
The Rules of the Supreme Court, 1999 edition
The State Proceedings Act, Chapter 71 of the Laws of Zambia

The Plaintiff commenced this action by way of writ of summons on 30th June, 2017 claiming;

- i. *An order that Mr Hakainde Hichilema and five others be discharged as the particular treason charge evidence and final criminology report as it stands shows that there is insufficient grounds for committing them for trial.*
- ii. *An order for a warrant of arrest to issue against the Inspector General of Police and other police officers for attempted murder for the false treason charge against Mr Hakainde Hichilema and five others.*
- iii. *An order of injunction restraining the Zambia Police from unlawful arrests, police brutalities, shootings, perjuries and furthermore to stop them from complying with unlawful orders or any form of intimidation and interference of the public rights.*
- iv. *Costs*
- v. *Any other relief that the court may deem fit*

On 19th July, 2017 the Plaintiff filed an ex-parte application for an order of interim injunction pursuant to Order 29 Rule 4 of the High Court Act, Chapter 27 of the Laws of Zambia. I directed that the application be heard inter-partes and gave it a return date of 4th August, 2017. On that date only the Plaintiff was before court, and as he had filed an affidavit of service on 3rd August, 2017 indicating that the Defendants had been served the application on 21st July, 2017, I allowed him to proceed with the application.

In the submissions the Plaintiff stated that he applied for an order of injunction against all three Defendants. That the 1st Defendant be restrained from giving unlawful orders in the false treason charge against Mr Hakainde Hichilema and five others to the 2nd and 3rd Defendants. The Plaintiff further submitted that the 2nd Defendant should be restrained from disobeying court orders and from disrespecting the court, and that the 1st and 2nd Defendants should be restrained from committing perjury in the false treason charges against Mr Hakainde Hichilema and five others.

He also stated that the 3rd Defendant should be restrained from continuing the false treason charge against Mr Hakainde Hichilema and five others. The Plaintiff's further submission was that he had made the application pursuant to Article 28 Clause 1 of the republican constitution, which allows a person to seek redress from the High Court when articles 11-26 are violated or are likely to be so violated.

He stated that every person is entitled to fundamental rights and freedoms, and that he had done a report proving that the police had not investigated the matter but had proceeded to arrest the six based on unlawful orders from the 1st Defendant, and without consideration of the law. That in the interests of maintaining law and order, the injunction should be granted, pending the determination of the matter. He prayed that the application be granted with costs.

No affidavits in opposition to the application were filed. I have considered the application. According to the caption of summons, the application was taken out pursuant to Order 29 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia. The said order provides that;

“4. (1) Money may be paid into Court under rule 1 by one or more of several defendants sued jointly or in the alternative, upon notice to the other defendant or defendants.

(2) If the plaintiff elects within twenty-one days after receipt of notice of payment into Court to accept the sum or sums paid into Court, he shall give notice to that effect to each defendant.

(3) Thereupon all further proceedings in the action or in respect of the specified cause or causes of action, as the case may be, shall be stayed, and the money shall not be paid out except in pursuance of an order of the Court or a Judge dealing with the whole costs of the action or cause or causes of action, as the case may be”.

This order does not deal with injunctions, but payments made into court. The order that deals with injunctions is Order 27. The Plaintiff has therefore moved

me in this application, pursuant to a wrong provision of the law, which provision does not confer me with jurisdiction to grant orders of injunctions, and I cannot therefore grant the relief sought on that basis.

Furthermore the Plaintiff wishes to obtain an injunction against the Attorney General, who represents the government as the Chief Legal Advisor. Section 16 of the State Proceedings Act, Chapter 71 of the Laws of Zambia provides that;

“16. (1) In any civil proceedings by or against the State the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require: Nature of relief

Provided that-

(i) where in any proceedings against the State any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and”

Based on this provision an injunction cannot issue against both the 2nd and 3rd Defendants in this matter. The application for the injunction therefore fails. The 3rd Defendant is an office established by Article 180 of the Constitution of Zambia Act No 2 of 2016. Article 180 (3) of the said constitution provides that the Director of Public Prosecutions (DPP) is the chief prosecutor for the government, and head of the National Prosecutions Authority.

This office is empowered to institute, undertake, take over, continue and discontinue any criminal proceedings, other than those before a court martial. Article 180 (7) of the constitution states that the DPP is not subject to the direction or control of any person in the performance of the office, except that the DPP shall have regard to public interest, administration of justice, the

integrity of the judicial system, and the need to prevent and avoid abuse of the legal process.

The powers conferred on the DPP are exercised after the police service which is mandated to preserve the peace, prevent and detect crime, apprehend offenders against the peace exercises its powers. From these provisions of the law, it is clear that both the police service and the office of the DPP are empowered to arrest and prosecute offenders respectively. These powers are exercised independently of any person's directions, and stemming from this, the action before me seeks to usurp those powers, looking at the reliefs claimed.

The treason charge involving Mr Hakainde Hichilema comes up next week before the High Court sitting at Lusaka. By instituting this action, the Plaintiff seeks to interfere with the course of justice, which in my view is not in the public interest. The DPP exercised the power to institute the said criminal proceedings, and has not exercised the power to discontinue those proceedings. Therefore no one has the power to curtail the exercise of that power. If indeed the accused persons are innocent, the law is there to vindicate them.

It would be anarchy to allow private persons with no locus standi like the Plaintiff in this matter, as he is personally not affected by the treason case, to commence judicial proceedings challenging the powers of the police and the DPP, in the name of private investigations. If the Plaintiff has evidence relating to the treason trial that he thinks is beneficial to the accused persons, he can avail it to them, so that they can use it in their defence of the matter.

It is therefore my considered view that allowing this action to continue would go against good order, and would be tantamount to interfering with the prosecution of the treason case against Mr Hakainde Hichilema and five others.

Furthermore Section 4 (5) of the State Proceedings Act, Chapter 71 of the Laws of Zambia provides that;

“(5) No proceedings shall lie against the State by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any

responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process”.

On that basis I find that the action is scandalous, frivolous and vexatious, and in line with Order 18 Rule 19 (b) of the Rules of the Supreme Court of England, 1999 edition I dismiss it, with no order as to costs. Leave to appeal is granted.

DATED THE 11th DAY OF AUGUST, 2017.

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**