

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2014/HP/1180

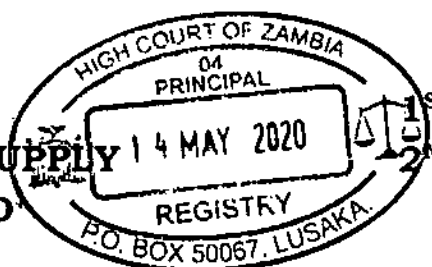
BETWEEN:

ASTRO HOLDINGS LIMITED

PLAINTIFF

AND

LUSAKA CITY COUNCIL
ZAMBIA ELECTRICAL SUPPLY
CORPORATION LIMITED



1ST DEFENDANT
2ND DEFENDANT

CHIKUTANO NKHOMA

3RD DEFENDANT

VICTOR MWAPE

4TH DEFENDANT

Before Hon. Mrs. Justice S.M. Wanjelani in Chambers on the
14th day of May, 2020.

For the Plaintiff: Mr. M. Ndhlovu, Messers MRN Legal
Practitioners

For the Defendants: Ms. S. Kalima, Messers J & M
Advocates

RULING ON 1ST DEFENDANT'S PRELIMINARY ISSUE

Cases referred to:

1. *Mopani-Copper Mines PLC v Monlow Investments*, Appeal No. 36 of 2011,
2. *JNC Holdings v Development Bank of Zambia*, SCJ No. 22 of 2012
3. *Winnie Zalomis v Felix Mutati*, SCZ/28/2016
4. *Grafton Isaac v Emery Robertson* (1985) AC, 97
5. *Hadkinson v Hadkinson* (1952) 2 ALLER 567

6. *Sitima Tembo V National Council for Scientific Research (1988 - 1989) Z.R. 4 (S.C.)*
7. *Gideon Mundanda V Timothy Mulwani and The Agricultural Finance Co. Ltd and S.S.S. Mwiinga (1987) Z.R. 29 (S.C.)*

Legislation referred to:

1. *Rules of the High Court, Cp 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England 1999 Edition*

This is a Ruling on the 1st Defendant's application to raise Preliminary Issue in relation to contempt proceedings against its Town Clerk. The application has been made pursuant to **Order 14A** as read with **Order 33 Rule 3 of the Rules of the Supreme Court** and was couched as follows:

1. *That this Court assumed a jurisdiction that it does not possess at law by re-couching a Ruling that it delivered on 27th September, 2018 into an Ex-Parte Order of 7th February, 2019. The Court was functus officio on the issue of the injunction and could not entertain Ex-Parte proceedings and grant Ex-parte Orders on exactly the same issue;*
2. *That the Order of Interim Injunction dated 7th February, 2019, was irregularly obtained as the Court lacked jurisdiction to grant the same and the procedure for granting Ex-Parte orders or any orders in the absence of opposing Counsel was abused and does not accord with the guidance given by the Supreme Court in Selected Judgment No. 28 of 2016;*
3. *That the Order for Leave to Commence Committal Proceedings for alleged breach of the Order of Interim dated 7th February, 2019 is tainted by the nullity of the Order dated 7th February,*

- 2019 and was therefore irregularly granted and must be discharged;
4. That the Notice of Motion for committal for contempt and its accompanying documents are irregular in material particulars as follows;
 - i. The process does not cite or join any alleged contemnor as required at law;
 - ii. The process is taken out in pursuance of an order that was irregularly obtained; and
 - iii. There was no personal service of the injunction order of 7th February, 2019 or of the committal proceedings.
 5. That in any event, the Plaintiff, having on the 13th of December, 2018, discontinued the Contempt proceedings it filed into Court on the 17th of September, 2018, cannot commence contempt proceeding again without first paying costs of discontinuance to the Defendants that the Defendants are entitled to by law;
 6. That consequent to the foregoing, the process for contempt of Court commenced before this Court is defective and incompetent and the Order for Leave to issue committal proceedings granted by this Court on the 11th day of September, 2018, should be discharged; and
 7. The Defendants are represented by Counsel whose particulars are on record and any proceedings and order that were granted in the absence of notifying and serving Counsel with the requisite process are irregular and an abuse of the Court process.

The Application was supported by an Affidavit in Support sworn by **Alex Mwansa**, the Town Clerk in the 1st Defendant institution, whose averment mirror the contents of the Notice of Motion save to add that he was not personally served the Ex-Parte Order of Interim Injunction nor the Notice of Motion setting the hearing of the Committal proceedings on 5th October, 2018.

During the hearing of the application, Counsel for the 1st Defendant relied on the Notice of Motion and the Affidavit in Support, reiterating that the Court was *functus officio* at the time the Order of injunction dated 7th February 2019 was granted. Reference was made to the case of **Mopani Copper Mines PLC v Monlow Investments⁽¹⁾**, **JNC Holdings v Development Bank of Zambia⁽²⁾** and **Winnie Zalomis v Felix Mutati⁽³⁾**, in support of the assertion that the Order was irregularly obtained.

Counsel stated that the Plaintiff, having discontinued the Contempt proceedings on 13th December 2018, cannot commence Contempt proceedings again without first paying costs to the 1st Defendant. It was submitted that the process of contempt was defective and should be discharged.

In response, Counsel for the Plaintiff filed submissions on 11th March 2020, stating that the intended Contemnor, **Alex Mwansa** was served on 11th February, 2019, but he referred the Order to his Lawyers who said the Order was invalid and advised him to ignore it.

It was submitted that the Order dated 7th February 2019 was an extract of the Ruling delivered on 27th September, 2018, and should have been obeyed, failing which consequences of

disobedience follow as alluded to in the case of **Grafton Isaac v Emery Robertson**⁽⁴⁾ to the effect that an Order of Court has to be obeyed unless it has been set aside by the Court. In addition, the case of **Hadkinson v Hardkinson**⁽⁵⁾ was cited for the same position on obeying the order of the Court.

It was argued that the 1st Defendant and Mr. Mwansa, having been served the Order of the Court on 11th February 2019, had every opportunity to apply to set aside the Order and Stay the hearing but instead chose the perilous and disrespectful path of ignoring the Court Order until the Contempt proceedings were initiated.

In relation to costs for the discontinued committal proceedings, it was submitted that the 1st Defendants were not granted costs by the Court on the application that was made viva voce and discontinued immediately. It was further submitted that costs are only due when an appropriate order for costs is made.

In the alternative, it was prayed that the 1st Defendant should first be made to comply with the Order of Injunction before the Court can entertain any preliminary issues regarding the Order of injunction.

I have considered the application, pleadings on record and the submissions by respective Counsel. The issues raised are interrelated, but basically two issues come to the fore, which are that the Court was *functus officio* when it issued the Order dated 7th February 2019, and that the 1st Plaintiff ought to have paid costs for the discontinued proceedings before launching fresh proceedings. I will first deal with the aspect of this Court being

functus officio and thus having no jurisdiction to issue the Order of Injunction dated 7th February 2019.

It is not in dispute that the Plaintiff had been granted an *Ex-Parte* Order of injunction on 22nd August 2018 and an *Inter-Parte* hearing was subsequently held which culminated into a Ruling dated 27th September, 2018. This Ruling confined the *Ex-parte* Order of Injunction.

On 5th February 2019, the Plaintiffs' Counsel filed an Interim Order of Injunction for the Court's execution, which order reduced the Ruling of 27th September, 2018 into an Interim Order of Injunction, with requisite Penal Notice.

The *Ex Parte* Order of 21st August, 2018, as drafted was indeed defective as pointed out by the 1st Defendant, in that it lacked the Penal Notice on the first page. This Order therefore could not be enforced in that format as alluded to in various authorities including in the case of **Sitima Tembo V National Council For Scientific Research**⁽⁶⁾, where it was held that:

"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."

According to the 1st Defendant's argument, the defective Order of 22nd August, 2018 should still have been the only Order relating to the injunction in this matter despite this Court having confirmed the injunction after the *Inter-partes* hearing as reflected in the Ruling dated 27th September, 2018. In essence, this would have meant that while there was a valid injunction in place, it could not be enforced due to the earlier defective *Ex-parte* Order on record.

This is certainly not the purpose of Court orders. There can be no enforcement of a Court's determination without it being incorporated into a formal document capable of enforcement, and in this case, the enforcement requires the Order to be in a particular format.

Thus, it is my considered opinion that reducing the Ruling dated 27th September, 2018, into the Interim Injunction Order dated 7th February, 2019 did not amount to the Court hearing a fresh *Ex-parte* injunction application in this matter and granting the Order *Ex-Parte*, as it was merely putting the Order of injunction in the format required by the Rules in order for it to be enforceable. I am further fortified in this view by the holding of the Supreme Court in the case of **Gideon Mundanda V Timothy Mulwani And The Agricultural Finance Co. Ltd And S.S.S. Mwiinga**⁽⁷⁾ where it was stated, *inter alia* that:

"...the court will not make orders which it cannot enforce..."

I therefore hold the view that this Court was not *functus officio* in that regard and the Order dated 7th February 2019 was properly

executed as it specifically made reference to the fact that it was pursuant to the Ruling dated 27thSeptember, 2018.

The Defendant has alleged that the Notice of Motion for commencement of contempt and its accompanying documents were irregular in material particulars as the process did not cite or join any alleged contemnor as required at law. However, the Defendant has not stated which law has been breached. Notably, **Order 52(2)(2)** states in part:

“An application for such leave must be made Ex-parte... and must be supported by a statement setting out the name and description of the Applicant, the name and description of the person sought to be committed and the grounds on which his committal is sought and by an Affidavit ...”

The record shows that the Plaintiff did file the Statement containing these requirements on 1st April,2019.

The 1st Defendant further alleges that there was no personal service of the injunction Order dated 7th February 2019. However, the *“Affidavit in Support of the Statement of facts and leave to issue committal proceedings”* exhibits a letter dated 11th February 2019 marked **“AK1”** which shows acknowledgment of receipt of the letter and enclosed injunction by **Alex Mwansa** on 12th February 2019.

The 1st Defendant has not disputed the authenticity of Alex Mwansa’s signature acknowledging receipt of that letter. I thus find that the alleged contemnor was personally served with that Order of injunction.

The 1st Defendant has also alleged that the Plaintiff cannot commence these committal proceedings without first paying costs for the discontinued proceedings on 13thDecember, 2018. **Order 17 of the High Court Rules** provides for discontinuation of suits or parts of a claim. It is not in dispute that the Plaintiff discontinued the contempt proceedings on 13thDecember, 2018, upon the Defendant raising a preliminary issue in relation to the said proceedings.

I note that during the hearing when the Plaintiff's Counsel withdrew the application, the Defendant had prayed for costs. However, this Court had inadvertently stated that costs were in the cause, when in actual fact the correct position is that the 1st Defendant is entitled to costs from the discontinued claim as per **Order 17 of the High Court Rules**.

In the premise, it is my considered view that the 1st Defendant should have, nonetheless, applied for an Order for costs for the discontinued claim as provided under **order 17 of the High Court Rules**. The next step then would have been an application to Stay of these subsequent proceedings pending payment of costs as stated under **order 17 (2) of the High Court Rules**.

As pointed out by the Plaintiff' Counsel, there is no such Order for costs before this Court nor is there an application to Stay proceedings pending payment of costs.

In the sum total, I find no merit in the 1st Defendant's preliminary issue and it is hereby dismissed.

I take note of the fact that I have already delivered the substantive Judgment in this matter, and in my view any further

proceedings in relation to contempt will be merely an academic exercise and of no value.

Costs are for the Plaintiff to be taxed in default of agreement.

Delivered at Lusaka this 14th day of May, 2020.



.....
S.M. WANJELANI
JUDGE