

MIFIBOSHE WALULYA AND ATTORNEY- GENERAL AND HON. F. M.
CHOMBA (1980) Z.R. 327 (H.C.)

HIGH COURT
E.L. SAKALA, J.
25TH NOVEMBER, 1981
(1981/HP/1531)

Flynote

Civil procedure - Injunction - Whether issuable against the State - State Proceedings Act, Cap. 92, s. 16.

Civil procedure - State - Proceedings against the State - Power of court to make orders against the State - Whether exists - State Proceedings Act Cap. 92, s.16.

Civil procedure - Party to suit - Removal of party from jurisdiction while proceedings pending - Undesirability.

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Immigration and Deportation - Deportation of prohibited Immigrant- Whether can be made against applicant whose application for relief is Pending before court of law.

Headnote

The plaintiff applied for an interim injunction to refrain the Minister of Home Affairs from deporting him from Zambia pending the trial of his claim against the State. In the alternative to order the Minister of Home Affairs to make an undertaking that he should not deport the plaintiff until the matters were settled by court. His counsel submitted that the plaintiff's case was that if he was deported, he would not be able to prove his legal rights which he was entitled to.

Counsel for the defendant submitted that the application was misconceived in that by virtue of s.16 of the State Proceedings Act an applicant cannot obtain an injunction against the State and cannot also obtain a declaration.

Held:

- (i) This court according to s. 16 of the State Proceedings Act, Cap. 92, subject to certain provisions has power in any civil proceedings by or against the State to make any orders as it has power to make such orders in proceedings between subjects and grant any appropriate relief as the case may require.
- (ii) But where the relief being sought as between subjects is for an injunction or specific performance, this Court has no power to grant an injunction or make an order for specific performance against the State. But in lieu thereof this Court has power to make an order declaratory of the rights of the parties.
- (iii) This court has no power to make an order declaring that the plaintiff is entitled as against the State to the land or property to the possession thereof. The court, in any civil

- proceedings, has no power to grant any injunction or make any order against public officer of granting the injunction or making such order would be to give any relief against the State which would not have been obtained in proceedings against the State.
- (iv) The plaintiff is entitled to prosecute his claim against the State but this does not call for declaration of rights by an interim order. However, to make such an order against the Minister of Home Affairs would be tantamount to giving the plaintiff relief against the State which by law could not be obtained in proceedings against the State.
 - (v) It is most undesirable to remove a party to a suit from the jurisdiction of the court when the proceedings are still pending.

Cases referred:

- (1) Underhill and Another v Minister of Food, [1951] 1 All E.R. 591.
- (2) International General Electricity Company of New York Ltd and Another v The Commissioner of Customs and Excise, [1962] 2 All E.R. 398.

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- (3) Shipanga v Attorney-General' (1978) Z.R. 71.

Legislation referred to:

State Proceedings Act, Cap. 92 ss. 12, 16 (2).
Crown Proceedings Act, 1947 s. 21.

For the plaintiff: P. P.C. Zulu Esq., Zulu and Company.
For the defendant: A.M. Kasonde Esq., Principal State Advocate.

Judgment

SAKALA, J.:

This is an application by the plaintiff for an interim injunction to refrain the Minister of Home Affairs from deporting him from Zambia pending trial of his claim against the State. The application is supported by an affidavit sworn by the plaintiff himself. There is no affidavit in opposition.

Mr Kasonde, the Principal State Advocate, appearing for the defendant stated in his submissions that he did not find it necessary to make an affidavit in opposition because the point involved is one of law only. He also informed the court that he had not entered an appearance to the writ because at the time of receipt of the summons he had enough time to do so. This being the position this court is therefore entitled to accept all that is stated in the plaintiff's affidavit as being not in dispute.

The facts relevant to this application as revealed by the affidavit are these. The plaintiff is a Ugandan. He has lawfully resided in Zambia since 1962. In January, 1970, he obtained a certificate as an established resident. He is married to a Zambian and has six children born in Zambia. He is the owner of Overlands Car Breakers situated at Stand No. 7a of Farm 873 Mungwi Road, Lusaka West. Before his arrest and detention on the 13th August, 1978, on charges of being in possession

of motor vehicles believed to be stolen he operated the business as Overlands Car Breakers which included motor vehicle repairs, panel beating and spray painting, purchase of second hand motor vehicles and motor vehicle parts. Between 13th August, 1978, and 23rd July, 1980, he was charged with various offences of being in possession of motor vehicles believed to be stolen or unlawfully obtained before six subordinate courts in Lusaka. He has been acquitted on all the charges except on one count of being in possession of a motor vehicle on which he was convicted on the 23rd July, 1980, and sentenced to nine months imprisonment with hard labour with effect from 6th April, 1979. On the 25th July, 1980, he appealed to the High Court against conviction and sentence. This appeal has not yet been determined. According to the plaintiff in August, 1978, armed Zambian police officers seized his property at Overlands Car Breakers garage. These officers are still guarding the garage and he is not allowed to enter therein. The plaintiff also states in his affidavit that he has various items at the garage valued at K504,360. The police took several of the motor vehicles. They are kept at Lilayi Training School. The police are also keeping motor vehicle registration books in respect of the motor vehicles and engines. On the 22nd January, 1981, the plaintiff was apprehended by Immigration Officers who informed

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him that the Honourable Minister of Home Affairs had signed a deportation order. He was detained at Lusaka Central Prison on the ground that his presence in Zambia is inimical to the public interest. In February, 1981, he applied in the High Court for release from detention. On the 30th March, 1981, he was released from detention by order of the High Court. By a Government Gazette Notice No. 1471 of 23rd October, 1981, the Minister of Home Affairs on the 17th June, 1981, declared the plaintiff to be a danger to peace and good order. He demanded the release of his property or its value through his solicitors but without success. According to the plaintiff, he has been declared a prohibited immigrant owing to the embarrassment the police have suffered on account of his acquittals by the six different subordinate courts during the period of two years. He also states in his affidavit that most of the property seized has since disappeared and the State finds it embarrassing to admit that the property has been stolen by public officers. Hence according to the plaintiff the deportation order from Zambia is an attempt to sweep the matter under the carpet. He craves this court to grant the order as prayed on account that his deportation from Zambia before his claim against the State is settled is tantamount to extinguishing his legal right of an action against the State as he would be unable to prove his claim at the trial owing to his inevitable absence from Zambia.

On behalf of the plaintiff, Mr. Zulu submitted that the plaintiff's case is that if he is deported he will not be able to prove his legal rights which on the facts of the case, he is entitled to. Counsel further submitted that the plaintiff is being deported not because he is a danger to the peace and good order but because the State is embarrassed. Mr Zulu conceded that while an injunction under the State Proceedings Act cannot lie against the State, it can lie against a public officer. In this case he pointed out that the Minister of Home Affairs is a public officer against whom an injunction may be granted. Mr Zulu also contended that if for any reason the court finds that it cannot grant an injunction then the court can make alternative order declaring the applicant's legal rights. In this case, he submitted that the court can declare that the plaintiff is entitled to seek legal redress against wrongful seizure of his property by the State. He submitted that if the defended is willing to make an undertaking not to deport the plaintiff then an order is unnecessary.

On behalf of the State, Mr Kasonde invited the court to consider whether it is proper to include the Minister of Home Affairs as a defendant in the matter. He pointed out that under section 12 of the State Proceedings Act, Cap. 92 all claims in civil proceedings by or against the State have to be instituted by or against the Attorney-General. Mr Kasonde however stated that under Order 14, rule 5 of Cap. 50 misjoinder of parties does not defeat a suit. But Mr Kasonde submitted that the application is misconceived in that by virtue of section 16 of Cap. 92 an applicant cannot obtain an injunction against the State and cannot also obtain a declaration. For this submission, Mr Kasonde cited the cases of *Underhill and Another v Minister of Food*, (1) and the case of *International General Electricity Company of New York and Another*

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v The Commissioner of Customs and Excise (2). Mr. Kasonde submitted that these two authorities are on all fours against the present application and they are on all fours in support of section 16 of Cap. 92. He submitted that it is unheard of that an interim declaratory order can be made against the State. He thus submitted that the application for an interim injunction is improperly before this Court.

In reply, Mr Zulu pointed out that the plaintiff is not saying that the Minister has no powers to deport him but that he would wish to be present at his trial.

I have fully addressed my mind to the facts presented by this application as well as to the arguments and submissions by both learned counsel. Basically the plaintiff's case in this application is that he issued a writ of summons against the State and the Minister of Home Affairs. On the writ, he has made various claims against the Attorney-General. He has also made a claim for an order that the declaration as a prohibited immigrant by the Minister of Home Affairs as per Government Gazette Notice No. 1471 of 23rd October, 1981, is null and void. This application is based on paragraph 4 and 5 of the writ of summons which read as follows:

- "(4) An interlocutory injunction prohibiting the Minister of Home Affairs to deport the plaintiff from Zambia until these matters are determined by this Honourable Court in lieu thereof an order declaring the plaintiff's legal rights to protection of his property and to be present in Zambia during the trial in order to prosecute his claim against the State;
- (5) or in lieu thereof an undertaking by the Hon. Minister

of Home Affairs to refrain from deporting the plaintiff from Zambia until these matters are finally settled by the courts."

Mr Kasonde's first ground of argument is on misjoinder of parties but concedes that that alone would not defeat the case of the plaintiff. I agree with him. In the light of the issues involved and on account of the view I take of this application, I do not propose to make any ruling on the question of joinder or misjoinder of parties. In any event, even if I were to, as properly conceded to by the learned Principal State Advocate, that would not go to the root of this application.

Mr Kasonde's main argument centres on section 16 of State Proceedings Act, Cap. 92. The section reads as follows:

"(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: 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

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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

(ii) in any proceedings against the State for the recovery of land or other property, the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the State to the land or property or to the possession thereof.

2. The court shall not in any civil proceedings grant any injunction or make any order against a public officer if the effect of granting the injunction or making the order would be to give any relief against the State which could not have been obtained in proceedings against the State."

This court according to the section subject to certain provisions has power in any civil proceedings by or against the State to make any orders as it has power to make such orders -in proceedings between subjects and grant any appropriate relief as the case may require. But where the relief being sought as between subjects is for an injunction or specific performance this court has no power to grant an injunction or make an order for specific performance against the State. But in lieu thereof this court has power to make an order declaratory of the rights of the parties. Also this Court has no power to make an order declaring that the plaintiff is entitled as against the State to the land or property to the possession thereof. This court has also, in any civil proceedings no power to grant any injunction or make any order against a public officer if the effect of granting the injunction or making such order would be to give any relief against the State which would not have been obtained in proceedings against the State.

Mr Zulu submitted that the Minister of Home Affairs is a public officer and an order for an injunction can lie against him. In my opinion, the language of section 16 (2) of Cap. 92 is very clear. I am satisfied that the plaintiff is entitled to prosecute his claim against the State. But I do not think that this calls for a declaration of rights by an interim order. In any event, to make such an order against the Minister of Home Affairs would in my view be tantamount to giving the plaintiff relief against the State which by law could not be obtained in proceedings against the State. Mr Zulu properly concedes that this court cannot grant an injunction against the State. His main argument appears to be that on the facts of this case a declaration can be made against the Minister of Home Affairs. I am in great difficulty to accept this contention. Section 16 of Cap. 92 is

word for word taken from section 21 of the Crown Proceedings Act of 1947. The proviso of that section which is also word for word as the proviso in our section was considered in the two cases cited by Mr Kasonde. At pages 400/401 Up John, L.J., in *the International General & Electricity Company of New York Ltd and Another (2)* case had this say:

"As between subjects, it cannot be doubted that some form o,

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interlocutory relief can properly be sought and might be granted, but I say no more about that. It is, between perfectly plain that the court, in proceedings between subjects, could not grant some form of interlocutory relief in the sense of some interim declaration. When one reads on in the proviso to s. 21 (1), one finds, however, that, as against the Crown, an injunction cannot be granted but an order may be made declaratory of the rights of the parties. But, as Romer, J., pointed out in the passage which I have read, an order declaring what the rights of the parties are, and such an order must necessarily then be res judicata and bind the parties for ever, subject only, of course, to a right of appeal. It may be - and this is the only reservation that I make on the observations of Romer, J., - that, in certain cases, it is proper on a motion or on a summons under R.S.C. Ord. 25, r. 2, to make some declaration of rights on some interlocutory proceeding. That, however, is infrequent and should only sparingly be exercised, but the point is that, if it is determined on some interlocutory proceedings, it finally determines and declares the rights of the parties, and it is not open to further review except on appeal. In this case, as in the case before Romer, J., that is not sought. It is said that some form of interim declaration should be made merely to preserve the status quo and, therefore, this order which we are being asked to make today ex parte, without hearing the defendants is not apparently to be finally binding on the parties; it is something which can later be re-examined and some other form of declaration substituted if it is found to be appropriate after a full hearing when the matter comes on for trial. Speaking for my part, I simply do not understand how there can be such an animal, as I ventured to call in argument, as an interim declaratory order which does not finally declare the rights of the parties. It seems to me quite clear that, in proceedings against the Crown, it is impossible to get anything which corresponds to an interim injunction. When one comes to the question of a final injunction, no doubt a declaratory order may be made in lieu thereof, for that finally determines the rights of the parties; but it seems to me quite impossible to invent some form of declaration which does not determine the rights of the parties, but is only meant to preserve the status quo."

As I have said the plaintiff's claim by this application is for an injunction to prohibit the Minister of Home Affairs from deporting him from Zambia. In the alternative to order the Minister of Home Affairs to make an undertaking that he should not deport the plaintiff until the matters claimed are settled by court I certainly appreciate the plaintiff's predicament in this matter. But this court has no power to make such orders against the Minister of Home Affairs. I am thus satisfied that on the point of law this application must fail. Accordingly I hold that the application is misconceived. The matter however does not rest there. On the 11th November the plaintiff filed a writ of summons against the State. From the Government Gazette Notice No. 1471 of 23rd October,

an order of deportation by the Minister of Home Affairs was made on the 17th June, 1981. The order has not been effected yet. If effected it means the plaintiff will be arrested and deported from Zambia. But there are now proceedings in court in which the plaintiff is making a claim against the State which proceedings are within the jurisdiction of this court. The plaintiff is above all challenging the very order declaring him a prohibited immigrant. While this court has no power to make an order asking the Minister of Home Affairs to make an undertaking that he will not deport the plaintiff from Zambia until his case has been heard, this court would like to observe that it is most undesirable to remove a party to a suit from the jurisdiction of the court when the proceedings are still pending. I am fortified in making this observation by the Supreme Court's decision in the case *Shipanga v The Attorney-General* (3). This was a case of writ of habeas corpus. The applicant was arrested and detained. While the Supreme Court was hearing his appeal against the decision of the High Court dismissing his application the applicant was removed from the jurisdiction of the court. The circumstances of his removal were not clear. At page 72 Silungwe, C.J., had this to say:

"But the matter does not rest there for we would like to express ourselves on the subject of removing the appellant out of the court's jurisdiction whilst the hearing of the application for habeas corpus was pending before the court. The respondent says the departure was at the appellant's request; it is said on behalf of the appellant that the departure was unwilling. An issue of this kind cannot be resolved on affidavit and in the absence of the appellant there is little prospect of it being resolved at all. If, as is alleged on behalf of the appellant, his departure was unwilling, there has been a contempt of this court. The learned former Attorney-General assured us that the actions of the executive were taken in good faith and with no intention to show disrespect to this court. But we must point out that even if the appellant's departure was at his request, it was unfortunate for the executive to provide facilities for or to have anything to do with that departure from Zambia whilst habeas corpus proceedings were in progress without the knowledge of his legal advisers."

In the instant case as per endorsement on the writ of summons the plaintiff challenges the very order making him a prohibited immigrant. I am aware that the order making the plaintiff a prohibited immigrant was earlier than the writ of summons. But certainly the plaintiff could not challenge an order that did not exist. Now that the order has been challenged it would be most unfortunate for the State to remove the plaintiff out of the jurisdiction of the court. I appreciate the reasons given by the State for declaring the plaintiff a prohibited immigrant. But I am certain that the State can take other measures in effecting their order if the situation so warrants without removing the plaintiff out of the jurisdiction of this Court pending the hearing of the plaintiff's case now before the court. As I have said these are merely observations which I have no doubt the authorities concerned would consider very

seriously before taking any step which may prejudice the trial and perhaps which may lead to unnecessary costs. The order of this Court however is that the application is dismissed.

Application dismissed
