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MULENGA, JC..... ✓ 04/09/18.....

MULEMBE, JC..... ✓ 3/09/18.....

MULONDA, JC..... ✓ 3/09/2018.....

MUNALULA, JC..... ✓ 3/9/18.....

MUSALUKE, JC..... ✓ 04/09/2018.....

IN THE CONSTITUTIONAL COURT OF ZAMBIA **2016/CC/0029**
AT THE CONSTITUTIONAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

IN THE MATTER OF:	**THE CONSTITUTION OF THE REPUBLIC OF ZAMBIA (AS AMENDED BY ACT NUMBER 2 OF 2016) CHAPTER 1 OF THE LAWS OF ZAMBIA**
AND	
IN THE MATTER OF:	**AN APPLICATION UNDER ARTICLES 182 (3), 143 AND 144 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA**

BETWEEN:

MUTEMBO NCHITO **PETITIONER**

AND

ATTORNEY GENERAL **RESPONDENT**

Coram: Mulenga, Mulembe, Mulonda, Munalula and Musaluke, JJC on 9th August, 2018 and 7th September, 2018

For the Petitioner:	**Mr. M. Nchito (SC) in person, assisted by Mr. C. Hamwela of Messrs Nchito & Nchito**
For the Respondent:	**Mr. A. Mwansa (SC), Solicitor General Mrs. K. Mundia and Mr. F. Mwale of Attorney General's Chambers**

RULING

Mulonda, JC, delivered the Ruling of the Court

AUTHORITIES REFERRED TO:

1. **Chikuta v Chipata Rural Council (1974) Z.R. 241**
2. **New Plast Industries v Commissioner of Lands and Attorney General [2001] Z.R. 51**
3. **Access Bank (Z) Limited v Group Five/Zcon Business Park Joint Venture (sued as a firm) SCZ/8/52/2014**
4. **Raymond v Tapson [1882] 22 Ch.D 430 CA**
5. **Harmony Shipping v Saudi Europe Line [1979] 1 W.L.R. 1380**
6. **Boeing Co. v PPG Industries Inc. [1988] 3 ALL E.R. 839**
7. **London & Leeds Estates v Paribas (No. 2) [1995] 1 E.G.L.R 102**
8. **Secretary of State v Mask and Company A.I.R 1940 P.C. 105**
9. **Panayiotou v Sony Music Limited [1994] CH. 142**
10. **Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu and Attorney General Selected Ruling No. 29 of 2018**

LEGISLATION REFERRED TO:

1. **The Constitutional Court Act No. 8 of 2016**
2. **The Constitutional Court Rules Act, S.I. No. 37 of 2016**
3. **The High Court Act, Chapter 27 of the Laws of Zambia**
4. **The Rules of the Supreme Court of England 1999 Edition**

OTHER MATERIALS REFERRED TO:

1. **Halsbury's Laws of England, 4th Edition, Volume 37**
2. **Bryan A. Garner, 'Garner's Dictionary of Legal Usage', 3rd Edition**
3. **Christopher Style and Charles Hollander, 'Documentary Evidence', 6th Edition**
4. **Phipson on Evidence, Sweet & Maxwell, 18th Edition**
5. **Phipson on Evidence, Sweet & Maxwell, 14th Edition**

This is the respondent's application to set aside the subpoenas issued in this matter for irregularity. The application was made pursuant to sections 9 and 13 (1) and (2) of the Constitutional Court Act, Order 1 Rule 1(1) and (2) of the Constitutional Court Rules as read together with the provisions of Order 38 Rule 19 (3) and (25) of the Rules of the Supreme Court Practice of England, 1999 Edition (RSC). The applicant's affidavit in support states that the said subpoenas were irregular as they were issued without leave of this Court as required under Order 38 Rule 19 (3) of the RSC.

In support of the application, the respondent relied on written submissions filed into Court dated 7th December, 2017. It was submitted that the petitioner caused to be issued out of the Constitutional Court registry subpoenas directed at the former Chief Justice of Zambia, Mr Justice Annel Silungwe (retired) in his capacity as former Chairperson of the now defunct Mutembo Nchito Tribunal; Mr Justice Mathew Zulu and Mr Justice Charles Zulu, Judges of the High Court in their capacities as former Secretary and Deputy Secretary respectively of the said Tribunal.

The provisions of sections 9 and 13(1) and (2) of the Constitutional Court Act were cited which provide for the summoning and attendance of witnesses at the Court's own instance or by an application of a litigant before this Court. It was submitted however, that neither the Act nor the Rules of this Court gave guidance on the procedure to subpoena a witness and that under the circumstances Order 1 Rule 1(1) and (2) of the Constitutional Court Rules provides that in the absence of any particular point of practice or procedure, the practice and procedure of the Court shall be, among other sources, that of the Court of Appeal in England as provided for in the Supreme Court Practice, 1999 edition (**White Book**) of England (RSC). In particular, Order 38 Rule 19 (3) of the RSC provides that:

> **"Before a subpoena may be issued, a praecipe duly completed must first be filed in the office from which it is to issue. Any party may issue a subpoena for the examination of witnesses or for the production of documents by him, at any stage, without the leave of the Court...On the other hand, subpoenas may not issue to compel the attendance of a witness for the purpose of proceedings in chambers, except with leave...Similarly, before a subpoena can issue for attendance in the Court of Appeal, leave must first be obtained from that Court by motion or notice, after which the subpoena will issue out of the central office." (Emphasis theirs)**

Order 38 Rule 19 (3) of the RSC requires that leave of court be obtained before the issuance of a subpoena in matters before chambers or in the Court of Appeal. It was argued that the petitioner therefore ought to have sought leave of this Court before causing the subpoenas to be issued out of the Constitutional Court registry.

Counsel proceeded to submit that where a statute provided for the procedure of issuing a subpoena, litigants had no choice but to follow that procedure. For this submission, counsel referred to the cases of **Chikuta v Chipata Rural Council**[1] and **New Plast Industries v Commissioner of Lands and Attorney General**[2] where the Supreme Court gave similar guidance on the need for litigants to follow the prescribed modes of commencement in statutes. Emphasis was placed on the reasoning of the Supreme Court in the **New Plast case**[2] where it was held that:

> **"Where any matter is brought to the High Court by means of an originating summons when it should have been commenced by a writ, the court has no jurisdiction to make any declarations."**

The learned Solicitor General contended that a party was restricted to the provisions of a statute and had no choice on the procedure to follow when issuing a subpoena other than to do so with leave of the Court either by way of motion or notice. It was further submitted that despite the Constitutional provision relating to the administration of justice without undue regard to procedural technicalities, procedure ought to be followed as expounded by the Supreme Court in the case of **Access Bank (Z) Limited v Group Five/Zcon Business Park Joint Venture (sued as a firm)**[3] where it was stated that:

> **"All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts."**

It was submitted that the Supreme Court in addressing the issue of breach in procedure in the **Access Bank**[3] case, went on to state that:

> **"We have in many cases consistently held the view that it is desirable for matters to be determined on their merits and in finality rather than on technicalities and piece meal. The cases of Stanley Mwambazi v Morester Farms Limited and Water Wells Limited v Jackson are authority**

for this position. We affirm this position. Matters should, as much as possible, be determined on their merits rather than be disposed of on technical or procedural points. This, in our opinion, is what the ends of justice demand. Yet justice also requires that this court, indeed all courts, must never provide succour to litigants and their counsel who exhibit scant respect for rules of procedure. Rules of procedure and timelines serve to make the process of adjudication fair, just, certain and even-handed. Under the guise of justice through hearing matters on their merit, courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. A fairly well established and consistent corpus juris on the effects of failure to comply with rules of court exists in this jurisdiction..." (Emphasis theirs)

It was submitted that the petitioner had wrongly caused to be issued the subpoenas as leave of this Court was not sought. We were therefore urged to set aside the subpoenas for irregularity.

Augmenting the submissions, the learned Solicitor General stated that the subpoenas were improperly before this Court and that a perusal of the record would show that the petitioner did not mention the documents which the witnesses were required to produce as part of their evidence. Counsel argued that a subpoena ought to be set aside if it was considered to be oppressive, that is where the court in the matter denied its discovery. That in the case

at hand, this Court denied the discovery of the Report of the Tribunal in its Ruling dated 19th October, 2016. It was therefore prayed that the subpoenas be set aside for irregularity.

In opposing the application, the petitioner relied on submissions filed into Court dated 24th July, 2018. The gist of the response being that the petitioner was at liberty to call any witnesses that were necessary to prosecute his claim in light of the fact that he was denied access to the Report of the Tribunal that recommended his removal from office of Director of Public Prosecutions. The petitioner posed what he termed as a rhetorical question which read as follows:

> **"If the petitioner does not have access to the Report of the Investigative Tribunal that recommended his removal and if he is not allowed to call the investigators, then what is the purpose of these proceedings? How is the petitioner going to challenge the tribunal whose report he does not have and whose members he cannot call to testify?"**

In responding to the submission on the provisions of Order 38 Rule 19(3) of the RSC regarding leave of court to issue subpoenas for attendance of witnesses in chambers or in the Court of Appeal, it

was argued that the Court of Appeal did not hear witnesses as a matter of course and that it was unusual to hear witnesses in chambers, therefore in those instances, it was necessary to seek leave of court as the same were a departure from established practice.

The petitioner emphasised that this Court was exercising its original jurisdiction as a trial court whose procedure to subpoena a witness was provided for by the same Order 38 Rule 19 (3) of the RSC as follows:

> **"Before a subpoena may be issued, a praecipe duly completed must first be filled in the office from which it is to issue. Any party may issue a subpoena for the examination of a witness or for the production of documents by him, at any stage, without leave of the Court..."**

It was argued that the subpoenas in question were issued after a duly filed praecipe was dealt with by this Court. It was also submitted that the respondent would not suffer any prejudice regarding the subpoenas that were issued to aid the petitioner's case. It was prayed that this Court dismiss the application by the respondent and allow the matter to proceed.

In augmenting his submissions, the petitioner stated that the argument by the respondent that the subpoenas were a means of requesting for the Report of the Tribunal was misconceived. He argued that the said subpoenas were not meant to obtain the Report as the same was denied by the single Judge of this Court as being an issue for the Courts' determination or interpretation in exercising its jurisdiction. In responding to the requirements under Order 38 of the RSC to strictly follow the rules of Court, Mr Nchito, SC argued that the affidavit in support of the application before Court was erroneously sworn by the respondent contrary to Order 38 Rule 19 (25) of the RSC as the respondent had no right to swear an affidavit on behalf of a witness.

In responding to the issue of a formal application for leave to issue subpoenas, Mr Nchito, SC argued that this requirement raised a challenge of determining who would respond to the application between the witness and the litigant. That to allow such a situation would lead to an absurdity as a party would be objecting to a witness being called in aid of the other party's case, thus creating an injustice.

Mr Nchito, SC cited the provisions of section 27 of the High Court Act for illustrative purposes and stated that the provision was similar to section 13 of the Constitutional Court Act and it referred to the practice of a court sitting in its original jurisdiction. He reiterated that under such circumstances where the court was constituted as a trial court, there was no need for leave to issue subpoenas. He further contended that the question of calling witnesses was at the Court's discretion for purposes of justice. In concluding, Mr Nchito, SC in the alternative made an oral application for leave to issue the subpoenas before Court.

In his brief reply, Mr Mwansa, SC argued that he swore his affidavit in his capacity as counsel for the respondent where he merely stated that the petitioner ought to have sought leave to issue the subpoenas. With regard to the provisions of section 27 of the High Court Act and section 13 of the Constitutional Court Act, it was submitted that the procedure obtaining before this Court was the same as the procedure in the Court of Appeal in England which required a party to seek leave to issue a subpoena.

Counsel emphasised that the provisions of Order 38 Rule 19 (3) of the RSC were couched in mandatory terms requiring a party to seek leave by way of motion or notice and not in the oral manner that the petitioner had done. It was submitted that the petitioner's application was late and irregular and ought not to be entertained by this Court. It was lastly prayed that the subpoenas be set aside for irregularity.

Having considered both written and oral arguments from both parties in this application, we intend to begin by examining the subpoenas before us to establish whether they are irregular. We took time to consider the law, practice and procedure pertaining to the issuance of subpoenas. Section 9 of the Constitutional Court Act provides that:

> **"The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Rules."**

Further, section 13 (1) and (2) of the same Act provides that:

"(1) The Court may, in any suit or matter in which the Court is exercising original jurisdiction –

(a) Summon a person to give evidence or produce a document in that person's possession or power; and

(b) Examine a person as a witness and require the person to produce any document in that person's possession or power.

(2) The Court may, at any stage of a suit or matter, exercise the power in subsection (1) on its own motion <u>or on the application of a party to the suit or matter.</u>" (Emphasis ours)

A reading of the above provisions shows that the summoning of witnesses when the court is exercising its original jurisdiction is either on the court's own motion or on the application of a party to the suit. However, the specific procedure to be employed at the instance of a party's application is not provided for in our Act. Therefore guidance must be sought from the provisions of Order 1 Rule 1 (1) and (2) of the Constitutional Court Rules which provides that:

> **"(1) The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by the Act and these Rules, the Criminal Procedure Code or any other written law, or by such rules, orders or directions of the Court as may be made under the Act, the Criminal Procedure Code or such written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England and the law and practice applicable in England in the Court of Appeal up to 31st December, 1999.**

(2) Where the Act and these Rules do not make provision for any particular point of practice or procedure, the practice and procedure of the Court shall be as nearly as may be in accordance with the law and practice for the time being observed in the Court of Appeal in England."

From the above Order, making use of the default position, the Supreme Court Practice 1999 Edition of England becomes the source of practice and procedure for the issuance of subpoenas and particularly Order 38 Rule 19 (3) and (25) of the RSC which provide that:

"(3) Before a subpoena may be issued, a praecipe duly completed must first be filed in the office from which it is to issue. Any party may issue a subpoena for the examination of witnesses or for the production of documents by him, at any stage, without the leave of the Court, i.e. subpoenas issue as of course without order, for attendance for trial before a Judge...Similarly, before a subpoena can issue for attendance in the Court of Appeal, leave must first be obtained from that Court by motion or notice, after which the subpoena will issue out of the Central Office. (Emphasis ours)

(25) ...The Court will also set aside a subpoena in a case where a statute excludes the power to issue it and it will set aside a subpoena duces tecum which is oppressive, e.g. which relates to documents discovery of which has been refused by the Court."

As we stated in our ruling in the case of **Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu and Attorney General**[10], notes accompanying rules such as those in sub-rule 25 above, are not in themselves rules but give meaning and import of the rule in question. In this regard, notes accompanying Order 38 Rule 19 (25) of the RSC are in our view helpful in as far as understanding the circumstances when subpoenas may be set aside.

In the circumstances of this case where the rules are that the practice and procedure should be that obtaining in the Court of Appeal in England, the rule as stated above requires that leave must be obtained from the court by motion or notice after which the subpoenas will issue out of the court registry. We are therefore of the firm view that the application by a party to issue subpoenas referred to in Section 13 (2) of the Constitutional Court Act is an application for leave to issue the same.

We note that the petitioner did, in the alternative, make an oral application for leave to issue the subpoenas. We refuse to grant the same as the application is irregular in that it ought to have been by

way of motion or notice as provided for under Order 9 Rule 20 (1) of the Constitutional Court Rules or Order 38 Rule 19 (3) of the RSC.

It is important to note that the purpose of seeking leave to issue a subpoena under such circumstances is to ensure that the summoning party has not abused their privilege of summoning witnesses. This was laid down in the case of **Raymond v Tapson**[4] at page 435. Also, for orderliness, an application for leave to issue subpoenas is important as it accords the court with an opportunity to investigate whether the subpoenas have met all the requirements relating to form as laid down by law.

It therefore becomes obvious that in this particular case as in the Court of Appeal in England, leave ought to be obtained before subpoenas can issue. This we note was not done by the petitioner.

Another issue that we feel is important in the issuance of subpoenas in this matter is a consideration of the correct form that a subpoena ought to take. By way of definition, **Garner's Dictionary of Legal Usage, 3rd edition,** defines a subpoena as follows:

> **"A subpoena *ad testificandum* is a subpoena to testify; usually, when subpoena is used alone, the word refers to this type. A subpoena *duces tecum* commands the witness not only to appear but also to bring specified books, papers, or records."**

From the above authority, it is clear that a subpoena *duces tecum* ought to specify the documents that one is required to produce at trial. The documents sought must be identified with specificity by means of a particular description and not a general description. The documents must either be individually identified by reference to a class of documents or things by which criterion the recipient can know what obligation the court places on them.

The learned authors of **Documentary Evidence, 6th Edition** at page 352 in addressing how specific a subpoena must be, state that if the documents are not specified with the necessary particularity the subpoena will be set aside. They go on to cite the case of **Panayiotou v Sony Music Ltd**[9] where it was held that there must be specific documents identified in a subpoena which are known or believed to exist. This requirement is important as the recipient should be able to determine from the description of the documents required precisely what documents are covered. It is on this basis

that either the witness or the other litigant to an action is able to raise an objection as we guided earlier.

We note that two out of the three subpoenas before this Court require the witnesses to produce documents; these are directed to Justice Mathew Zulu and Justice Charles Zulu, in their capacities as former Secretary and Deputy Secretary of the now defunct Mutembo Nchito Tribunal. The two subpoenas alluded to do not specify the documents that the petitioner desires the witnesses to produce at trial. In that respect, they are irregular.

The learned authors of **Phipson on Evidence, 14th Edition** at page 138 note as follows:

> **"Litigation does not always produce perfect justice, but it is in our view unjust and unnecessary to restrict a party to putting forward only half his case, when the rules of evidence do not compel any such restriction. There may be a residual discretion in the court to disallow subpoenas on discretionary grounds, but it is respectfully submitted that such a power is vestigial only, and should be exercised only very rarely, if at all...To say this is not to deny that the courts have an inherent jurisdiction to prevent their machinery being used as an instrument of oppression. Indeed, a litigant may be prevented from calling an undue multiplicity of witnesses."**

In this particular case, it is our considered view that the procedure of seeking leave to issue subpoena by way of notice or motion was not followed by the petitioner thereby rendering them irregular. We are also of the view that the two subpoenas *duces tecum* issued by the petitioner are equally irregular in form as they do not specify the documents required to be produced at trial.

Before we conclude, the petitioner in his arguments questioned the capacity under which the respondent swore the affidavit on behalf of the witnesses as he did not have a power of attorney to do so. He argued that such conduct flew in the teeth of Order 38 Rule 19 (25) of the RSC which the respondent sought to rely on. The petitioner further submitted that the respondent's application was an attempt at undermining the petitioner's right to be heard which included calling witnesses that one deemed fit.

In his response, the Solicitor General stated that his affidavit was clearly sworn in his capacity as counsel appearing for the respondent and that he was merely stating at paragraph 4 that the petitioner ought to have sought leave of court before issuing the subpoenas.

In addressing the question of who can apply to set aside a subpoena in this instance, reference is made to the learned authors of **Documentary Evidence, 6th Edition**, at page 354 who state that the correct person to challenge a subpoena is obviously the party to whom the subpoena is directed. The learned authors go on to cite the case of **Harmony Shipping v Saudi Europe Line**[5] where it was suggested that the other party to litigation would not normally be entitled to set aside the subpoena as it would not seem attractive for one party to the litigation to be seen to be trying to object to the admission of relevant evidence.

Further, the learned authors cite the case of **Boeing Co. v PPG Industries Inc.**[6] at page 842, a case on whether there was a right to object to the production of documents, O'Connor LJ suggested that the appropriate course would have been for the other party to object not to the subpoena but to the production and admissibility of the documents when the subpoena is complied with in court. In considering this issue in detail, Mance J in the case of **London & Leeds Estates v Paribas**[7], also cited by the learned authors, recognised that in the usual case, the other party would have no

locus to object. It was noted however, that there were cases in which another person or the other party to litigation would be able to object.

In support of the above position, the learned authors of **Phipson on Evidence, 18th Edition,** note at page 240 that not only may the person to whom the witness summons is directed apply to set aside the witness summons, but the owner of the documents requested in the subpoena may object and where the confidential or private documents are required, a person who is owed a duty of confidentiality by the holder of the documents may also object. It is not necessarily the case that the other party to the litigation has a right to set aside a witness summons, although in specific instances, the litigant may object as highlighted above. The learned authors go on to state that if a general right were recognised in an opposite party to raise objections to the witness summons, this may encourage ancillary litigation.

Having established the above position, we feel it is critical at this point to highlight the grounds for setting aside a witness summons at the instance of a litigant being the other party. According to the

learned authors of **Documentary Evidence, 6th Edition**, the most common grounds for setting aside a witness summons by the other party are as follows; lack of specificity in the subpoena duces tecum; oppression, that is, requesting for a document whose discovery was denied by the court; confidentiality, that is, a third party should not be required to divulge confidential documents in a litigation that he is not a party to; if the request is irrelevant, fishing or speculative and if the documents are privileged.

In concluding, under the circumstances of this case, we find all three subpoenas irregular and therefore set them aside for irregularity.

M.S. Mulenga
Judge
Constitutional Court

E. Mulembe
Judge
Constitutional Court

P. Mulonda
Judge
Constitutional Court

M. M. Munalula
Judge
Constitutional Court

M. Musaluke
Judge
Constitutional Court