

**IN THE HIGH COURT FOR ZAMBIA**

**2019/HP/1220**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

**JCJ AFRICA INVESTMENTS LIMITED      PLAINTIFF**

**AND**

**ABC GLOBAL WORKS LIMITED      DEFENDANT**

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,  
IN CHAMBERS, ON THE 10<sup>TH</sup> DAY OF SEPTEMBER, 2020.**

*For the Plaintiff:*                      N/A

*For the Defendant:*                    N/A

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## **RULING**

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**CASES REFERRED TO:**

1. *Attorney General v Times Newspapers Limited* (1974) A.C. 273 at 302;
2. *Zulu v The People* (1990 – 1992) Z.R. 62;
3. *Balogh v Crown Court at St Albans* (1974) 3 ALL E.R. 238;
4. *Sitima Tembo v National Council for Scientific Research* (1988 - 1989) Z. R. 4 (S.C.);  
and
5. *Beatrice Nyambe v Barclays Bank Zambia Plc* (2008) Z. R. Vol. 2 195

**LEGISLATION AND OTHER WORKS REFERRED TO:**

1. *The Rules of the Supreme Court*, 1999 Edition, London Sweet & Maxwell;
2. *Black's Law Dictionary*, Bryan A. Garner, 9<sup>th</sup> Edition, West;
3. *Arlidge, Eady and Smith on Contempt*, D. Eady and A. T. H. Smith, 3<sup>rd</sup> Edition,  
(London, Sweet and Maxwell 2005); and
4. *A Practical Approach to Civil Procedure*, Stuart Sime, Oxford University Press, 2005, at  
page 487.

### **1      INTRODUCTION**

- 1.1 This is a Ruling on an application made *Ex Parte* by the Defendant for leave to issue contempt of Court proceedings.
- 1.2 The application is made pursuant to **Order 52, Rule 2** of ***The Rules of the Supreme Court***<sup>1</sup> and is against the Plaintiff on the ground that it disobeyed an Order of this Court.

## **2 BACKGROUND**

- 2.1 Following the endorsement of the *Ex Parte* Order staying the Judgment on Assessment on 8<sup>th</sup> June, 2020, the Defendant's Advocates informed the Plaintiff's Advocates, who agreed in writing that they had received the said Order. However, the Plaintiffs caused to file an application for liquidation of the Defendant claiming that it was a Judgment creditor. It is on this basis that the Defendant now applies before this Court for leave to issue committal proceedings.
- 2.2 Upon being satisfied that the application can be disposed of on the basis of the documents before me, I have dispensed with hearing submissions *viva voce* and will determine the matter without the attendance of the Defendant's Advocates.

## **3 AFFIDAVIT EVIDENCE**

- 3.1 The application is supported by an Affidavit dated 17<sup>th</sup> August, 2020, deposed to by Evans Muchona, a Director in the Defendant company, wherein it is averred *inter alia*, that following the endorsement of

the *Ex Parte* Order staying execution of Judgment, the Defendant informed the Plaintiff of the said Order, but the Plaintiff caused to be filed an application for liquidation of the Defendant company in the High Court Commercial Division claiming that it was a Judgment Creditor, when not. It is further averred that by filing the said liquidation application, the Plaintiff is disregarding the *Ex Parte* Order staying execution of Judgment on Assessment, thus the Court must grant leave to apply for committal proceedings.

#### **4 THE LAW**

4.1 I have seriously considered the application, together with the Affidavit and the Statement of Facts. The application for leave to commence committal proceedings has been brought pursuant to **Order 52, Rule 2** of **The Rules of the Supreme Court**<sup>1</sup>, which reads as follows: -

***"(1) No application to a Divisional Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.***

***(2) An application for such leave must be made ex parte to a Divisional Court, except in vacation when it may be made to a judge in chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an***

**affidavit, to be filed before the application is made, verifying the facts relied on.**

**(3) The applicant must give notice of the application for leave not later than the preceding day to the Crown Office and must at the same time lodge in that office copies of the statement and affidavit." (Court's emphasis)**

- 4.2 Contempt has been said to consist of words or acts obstructing or tending to obstruct or interfere with the administration of justice and can be committed outside the Court. It is said that in general, words or acts done outside Court which are intended or likely to interfere with or obstruct the fair administrations of justice are punishable by Contempt of Court.
- 4.3 According to ***Black's Law Dictionary***<sup>2</sup>, contempt is conduct that defies the authority or dignity of a Court or legislature. Such conduct is punishable by fine or imprisonment because it interferes with the administration of justice. In order to establish Contempt, it must be shown that the contemnor was personally served with the Order that he ought to comply with. Further, the act or failure to act complained of must be within the contemnor's power to perform and the contempt order must state how the contempt may be purged.
- 4.4 The learned authors of ***Arlidge, Eady and Smith on Contempt***<sup>3</sup>, state that the Courts have assumed the power to coerce those who obstruct the administration of justice. Thus in essence, as stated above, contempt

of Court consists of interfering with the administration of justice. The learned author of ***A Practical Approach to Civil Procedure***<sup>4</sup>, states that contempt of Court can take many forms. However, the most common are: -

1. Disobedience by the contemnor of an order requiring him or her to take or refrain from taking specified action;
2. Assisting another to breach such an order; and
3. Taking action which impedes or interferes with the course of justice.

4.5 The learned author of ***A Practical Approach to Civil Procedure***<sup>4</sup> at **page 487**, further states that proceedings for contempt are essentially punitive in character, although they also have the purpose of securing the compliance with Court orders. The main forms of punishment for contempt are imprisonment, fines, and sequestration. However, the Court can also order the taking of security, award damages, or deliver a strong reprimand.

4.6 Given the nature of the punishments for contempt, the Courts have insisted on the establishment of *mens rea*, and proof beyond reasonable doubt. The rationale underlying Contempt jurisdiction was explained in the following terms by Lord Morris in the case of ***Attorney General vs. Times Newspapers Limited***<sup>1</sup>: -

***"In an ordered community, Courts are established for the pacific settlement of disputes, and for the maintenance of law and order. In the general***

*interest of the community, it is imperative that the authority of the Court should not be imperilled, and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed, it is not because those charged with the responsibilities of administering justice are concerned for their dignity; it is because the very structure of ordered life is at risk if the recognised Courts of the land are so flouted, and the authority wanes and is supplanted."*

- 4.7 In the decided case of **Zulu vs. The People**<sup>2</sup>, the Supreme Court approved a passage by Lord Denning in the case of **Balogh vs. Crown Court at St Albans**<sup>3</sup>, at **page 288**, as follows: -

*"This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity, and authority of the judge, and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent, and imperative to act immediately – so as to maintain the authority of the Court – to prevent disorder – to enable witnesses to be free from fear – and jurors from being improperly influenced and the like. It is of course to be exercised with scrupulous care, and only, when the case is clear and beyond reasonable doubt." (Court's emphasis)*

- 4.8 As can be seen from above, it is clear that contempt jurisdiction includes conduct which tends to disobey an order requiring a person to take or refrain from taking specified action, assisting another to breach such an order, and generally any conduct which

impedes the administration of justice. However, the ambit of the contempt jurisdiction is not limited to the matters stated above. It extends to conduct that tends to abuse the Court procedures generally and specifically to putting forward false cases.

## **5 ANALYSIS AND FINDINGS**

- 5.1 Coming to the case at hand, I am mindful of the fact that this is an application for leave to issue committal proceedings and that the substantive issues relating to actual contempt are not relevant. However, in considering the application for leave to issue Committal Proceedings it is pertinent to glance at the act complained of.
- 5.2 The history precipitating the application is as deposed in the Affidavit on record and needs no repetition as the same is not in issue.
- 5.3 First and foremost, I have perused the Affidavit in Support and exhibits attached thereto. The Defendant avers that the Plaintiff's Advocates were informed of the *Ex Parte* Order staying execution of Judgment on Assessment, who then agreed in writing that they had received the Order as shown in exhibit marked "EM 2". A careful reading of the exhibit "EM 2" which is dated 1<sup>st</sup> July, 2020, reveals that the Plaintiff does not, in any way, acknowledge receipt of the Order as alleged by the Defendant, nor refer to the said Order, at all. The rules are clear that in order to establish Contempt, it must be shown that the contemnor was personally

served with the Order that he ought to comply with. Clearly, in *casu*, there is no proof on record that the Order was served on the Plaintiff.

5.4 Further, a perusal of the record shows that the *Ex Parte* Order endorsed by the Court on 8<sup>th</sup> June, 2020, is not indorsed with a Penal Notice. **Order 45, Rule 7** of **The Rules of the Supreme Court**<sup>1</sup> makes it mandatory for an Applicant to indorse a penal notice on an Order. This requirement is couched in mandatory terms.

5.5 The supplemental notes under **Order 45, Rule 7 (7)** of **The Rules of the Supreme Court**<sup>1</sup> provide the following: -

***"It is a necessary condition for the enforcement of a judgment or order under r.5 by way of sequestration or committal, that the copy of the judgment or order served under this rule should have the requisite penal notice prominently indorsed thereon..." (Court's emphasis)***

5.6 In *casu*, the *Ex Parte* Order in question stays the execution of the Judgment on Assessment pending the Defendant's Appeal to the Court of Appeal or *Inter Parte* hearing that was scheduled for 30<sup>th</sup> June, 2020, at 09:00 hours. The application for stay of execution of Judgment on Assessment is yet to be heard *inter parte*. The said Order is not indorsed with a Penal Notice.

5.7 Although it refers to a Penal Notice relating to an injunction, the Supreme Court Judgment of **Sitima**



***Tembo v National Council for Scientific Research***<sup>4</sup>

held as follows: -

***"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."***

5.8 Notwithstanding that the above authority refers to an injunction, the provisions of **Order 45, Rule 7** of **The Rules of the Supreme Court**<sup>1</sup> refer to an "Order", thereby implying that it applies to all forms of Orders irrespective of the applications from which they stem. It is therefore applicable to the *Ex Parte* Order made herein.

5.9 Furthermore, the supplemental notes under **Order 45 Rule 7 (7)** of **The Rules of the Supreme Court**<sup>1</sup> provide the following on the indorsement of a Penal Notice: -

***"This must be indorsed on the copy for service of all orders which are required to be served, whether personally or not, e.g. an order for discovery (of which service on the solicitor is sufficient) and this rule applies, even where the "defendant" is a limited liability company."***

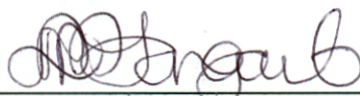
5.10 In the case of **Beatrice Nyambe v Barclays Bank Zambia Plc**<sup>5</sup>, it was held as follows: -

*"Contempt of Court quite apart from being concerned with the authority and dignity of the Court, also ultimately deals with the liberty of the individual. The consequences of disobeying Court Orders whether properly or improperly obtained are very serious. It is for this reason that the Court must exercise great care when dealing with applications relating to contempt of Court. It is therefore imperative that the rules are strictly followed." (Court's emphasis)*

## **6 CONCLUSION**

- 6.1 In conclusion, it is the considered view of this Court that the failure to serve on the Plaintiff and to indorse the Penal Notice on the *Ex Parte* Order is fatal and therefore renders the committal proceedings null.
- 6.2 Accordingly, the Defendant's application for leave to issue Committal Proceedings is hereby dismissed.
- 6.3 I make no order as to costs.
- 6.4 Leave to Appeal is granted.

**Delivered on 10<sup>th</sup> day of September, 2020.**



**P. K. YANGAILO  
HIGH COURT JUDGE**