

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2008/HPC/0366

BETWEEN:

FINSBURY INVESTMENTS LIMITED



PLAINTIFF

AND

ANTONIO VENTRIGLIA
MANUELA VENTRIGLIA

FIRST DEFENDANT
SECOND DEFENDANT

(By Original Action)

ANTONIO VENTRIGLIA
MANUELA VENTRIGLIA

FIRST PLAINTIFF
SECOND PLAINTIFF

AND

FINSBURY INVESTMENTS LIMITED

DEFENDANT

(By Counterclaim)

DR. RAJAN MAHTANI

ALLEGED CONTEMNOR

Delivered in Chambers before the Hon. Mr. Justice Sunday B. Nkonde, SC at Lusaka this 14th day of March, 2017.

For the Plaintiff by Original Action, The Defendant by Counterclaim and the alleged Contemnor : Mr. M. M. Mundashi, SC & Mr. C. Salati of Messrs Mulenga Mundashi Kasonde Legal Practitioners
: Mr. John Sangwa, SC of Simeza Sangwa & Associates

For the Defendants by Original Action and Plaintiffs by Counterclaim : Mr. S. Sikota, SC & Mr. K. Khanda of Messrs Central Chambers
: Mr. A. Siwila & Mr. S. Mambwe of Messrs Mambwe Siwila & Lisimba Advocates

RULING

CASES REFERRED TO:

- 1) *In Re W and Others (Wards) Publication of Information (1989) F.L.R 246*
- 2) *Comet Products UK Limited v Hawkex Plastics Limited (1971)2 Q.B 67*
- 3) *In Re B (Contempt of Court: Affidavit Evidence (1996) 1 F.L.R 239*
- 4) *Bhimiji v Chatwani (1991) 1 W.L.R 989*
- 5) *Kapildeo Prasad Sah & Others v State of Bihar & Others (1999) 7 SCC 569*
- 6) *Shoppe v Nathan and Company (1892) 1 Q.B 245*

LEGISTRATION REFERRED TO:

- 1) *Supreme Court Practice Rules, UK 1999 Edition (White Book)*

OTHER WORKS REFERRED TO:

- 1) *Garner, Black's Law Dictionary, Volume II, 8th Edition*

This is a Ruling on an application made on behalf of the alleged Contemnor, Dr. Rajan Mahtani, Executive Chairman of Finsbury Investments Limited, the Plaintiff by Original Action and Defendant by Counterclaim (Finsbury Investments Limited to be referred to in this Ruling as "the Defendant") for "no case to answer" to contempt proceedings at the close of the Complainants' case on 23rd February, 2017.

The background to the application is that on 25th January, 2017, the First and Second Defendants by the Original Action and the First and Second Plaintiffs by Counterclaim (the Complainants) filed a Motion of committal of Dr. Rajan Mahtani for Contempt of the Court on the ground that he disobeyed the Court Order of 9th December, 2016 which restrained all parties, whether by themselves, their agents or servants or whosoever under their control from issuing any advertisement on the proceedings in whatever manner in any media by causing an advertisement to be published in the Zambia Daily Mail Edition Volume 20 Number 294 dated 10th December, 2016.

According to the Affidavit in Support of the Notice of Motion sworn by Antonio Ventriglia, who is the 2nd Plaintiff by Counterclaim, the Complainants had pre-paid for the advertisements that the Court Order of 9th December, 2016 was restraining which the Complainants immediately caused to be withdrawn after the Order was made. Yet, on its part, the Defendant Company caused to be published an advertisement in the Zambia Dairy Mail of 10th December, 2016. The deponent further stated that for as he was aware, the Court Order of 9th December, 2016 had not been set aside. A copy of the advertisement referred to was exhibited to the supporting affidavit.

On 3rd February, 2017, the alleged Contemnor filed a Statement and Bundle of Documents. In the Statement, the alleged Contemnor stated that neither the Defendant nor him had anything to do with the publication of the advertisement in issue. He further stated that the Order of the Court referred to was never served on him and he only came to know of it when he had a telephone conversation with the Defendant's Advocates on Saturday, 10th December, 2016.

The alleged Contemnor went on to state that the Order was also neither directed to him nor was he a party to the proceedings.

At the hearing, the Complainants brought two witnesses, Gomery Howard Litana (PW1) and Antonio Ventriglia (PW2) to show or prove that the Order with a Penal Notice was served, that the alleged Contemnor breached the Order and also that the Motion was duly served.

Under cross-examination by Learned State Counsel Mr. Michael Mundashi, PW1 stated that before 9th December, 2016, Zambezi Portland Cement and the Defendant had been running advertisements in three National Newspapers but on 10th December, 2016, he only saw one advertisement (by the Defendant) in the Zambia Daily Mail.

PW1 also agreed with the suggestion by the Learned State Counsel that what was appearing on the 10th December, 2016 was based on an earlier order to run the advertisements for a period of time.

Under cross-examination by Learned State Counsel Mr. Sangwa, PW1 denied that the Defendant's advertisement were placed to counter those of Zambezi Portland Cement. PW1 was also referred to various documents in the Defendant's Bundle of Documents including the e-mail dated 13th December, 2016 and marked RM5 from the Zambia Daily Mail to Professional Insurance Corporation in which Zambia Daily Mail was apologizing for publishing the 10th December, 2016 advertisement and PW1 stated that in none of these documents was there any reference to the alleged Contemnor.

PW2 was also cross-examined. Under cross-examination by Learned State Counsel Mr. Mundashi, PW2 stated that he gave the instructions for contempt proceedings earlier before he saw the Court Order of 9th December, 2016 as he had been sick in Italy at the time.

Under cross-examination by Learned State Counsel Mr. Sangwa, PW2 stated that he did not know what transpired on 9th December, 2016 or the time the Court Order was finalized and when the alleged Contemnor became aware of the Court Order. PW2 also stated that although the statement accompanying the application for committal referred to the Defendant as the person that disobeyed the Court Order, the alleged Contemnor as its Chairman controlled the Defendant. PW2, however, conceded that he did not speak to the Zambia Daily Mail on how the 10th December, 2016 advertisement came about.

At the close of the Complainant's case, Learned Counsel for the contesting parties made substantial written submissions in addition to the Skeleton Arguments earlier filed with the Motion. The Skeleton Arguments and Submissions centred on essentially two questions; namely, first, whether the Court can terminate these contempt proceedings on the basis of "no case to answer" and secondly, whether there has been failure by the Complainants to make out a *prima facie* case against the alleged Contemnor.

I feel compelled to record my gratitude to all the Learned Counsel for the Complainants and the alleged Contemnor for the industry shown in addressing the law in the Skeleton Arguments and the Submissions and which I have fully

taken into account in considering the Motion. I will make reference to the pertinent portions of the Submissions in the course of the Ruling.

In my view, the Motion at this stage principally raises the following issues for determination:

1. ***Whether disobedience of a Court Order directing a person to abstain from doing anything committed off the face of the Court is Civil or Criminal Contempt.***
2. ***Whether a non party to the proceedings can be liable to committal for Contempt of Court.***
3. ***Whether Civil Contempt proceedings can terminate with “no case to answer” without the alleged Contemnor being asked to elect whether he wished to call evidence or not.***
4. ***Whether disobedience of a Court Order per- se constitutes Contempt of Court punishable by committal***

1. Whether disobedience of a Court Order directing a person to abstain from doing anything committed off the face of the Court is Civil or Criminal Contempt

The answer is that it is Civil Contempt.

2. On whether a non party to the action can be liable for committal for Contempt

The answer is that it is possible depending on the facts and circumstances.

For instance, it is settled law that a Director of a Company who is a non party can be liable for Committal for Contempt on the basis that although he is not bound by the Order, he is bound to obey the Order and the Court can punish

the disobedient person in the public interest.

3. On whether Civil proceedings for Contempt of Court can terminate on the basis of "no case to answer" without the alleged Contemnor being asked to elect whether he wished to call evidence or not.

The law is not totally settled on this. However, because Civil contempt is to be proved on the same standard as Criminal Contempt, that is beyond all reasonable doubt, the favoured view is that Civil Contempt can also terminate on the basis of "no case to answer" without the alleged Contemnor being asked to elect whether he wished to call evidence or not.

Both Learned Counsel for the alleged Contemnor submitted *in extensio* to underscore this point as the favoured view by citing various English cases, among them, In **Re W and Others (Wards) Publication of Information**¹, **Comet Products UK Limited v Hawkex Plastics Limited**², In **Re B (Contempt of Court: Affidavit Evidence**³ and **Bhimiji v Chatwani**⁴ in which the view was held or favoured.

Learned Counsel for the Complainants, however, firmly contended that the English Cases cited are only persuasive and not binding on this Court and further that the position in Zambia is unsettled with **Order 52 Rule 6** of the **Supreme Court Practice Rules** which is relevant to these proceedings being silent on the aspect. The Complainants' Learned Counsel, thus, urged the Court to reject the alleged Contemnor's arguments on the aspect of termination of the Contempt proceedings on "no case to answer" in the manner contended on behalf of the alleged Contemnor.

4. Whether disobedience of a Court Order per se Constitutes Contempt of Court punishable by Committal

The Law is that for disobedience to be punished, it must be willful or deliberate. It is not enough that such disobedience be merely casual or accidental. Thus, in **Kapildeo Prasad Sah & Others v State of Bihar & Others**⁵, it was held by the Supreme Court of India that for holding a person to have committed contempt, it must be shown that there was willful disobedience of the Judgment or Order of the Court, even though negligence and carelessness can also amount to contempt. It was also observed that the power to punish for Contempt of Court having far reaching consequences, the power ought to be exercised where a clear and willful disobedience of the Court's Order is made out. Therefore, a person that complains of a breach of a Court's Order must allege deliberate or contumacious disobedience of the Court's Order and if such allegation is proved, contempt can be said to have been made, not otherwise.

In the case of **Shoppe v Nathan and Company**⁶, it was also held that where a disobedience was not willful but unintended, it was not punishable by committal.

Black's Law Dictionary, Volume II, 8th Edition defines "willful" as

" Voluntary and intentional but not necessarily malicious."

At the same time, it also remains the position of the law and beyond controversy that Court Orders require to be observed as not doing so is a

recipe for bringing to an end the Rule of Law. Thus, even disobedience by mistake or negligence can constitute contempt depending on the circumstances.

Coming to the Motion before me, I find that Dr. Mahtani as Executive Chairman of the Defendant and as the alleged Contemnor can be liable for Contempt of Court for disobedience of the Court Order. I also find that there was indeed disobedience of the Court Order of 9th December, 2016 when the advertisement came out on 10th December, 2016 in the Zambia Daily Mail. However, on the evidence before me, I am not satisfied beyond all reasonable doubt that the alleged Contemnor willfully or deliberately or intentionally violated the Court Order made on 9th December, 2016 for contempt and committal to attach. There is clear evidence before me in the form of RM5 in the Bundle of Documents dated 13th December, 2016 which is an e-mail from the Zambia Daily Mail, that the Newspaper erroneously placed the advertisement on 10th December, 2016 and apologized for doing so.

On the facts and circumstances of this case, I find that no *prima facie* case has been made out against the alleged Contemnor, Dr. Rajah Mahtani, and the Contempt proceedings accordingly terminate on "no case to answer".

I make no Order as to costs.

Dated at Lusaka this 14th day of March, 2017.



HON. MR. JUSTICE SUNDAY B. NKONDE, SC
HIGH COURT JUDGE