

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

2016/HPC/0164



BETWEEN:

FLAME PROMOTIONS & PROCUREMENT PLAINTIFF
LIMITED

AND

JOE'S EARTHWORKS & MINING LIMITED DEFENDANT

RICCARDO RAIMO 1ST ALLEGED CONTEMNOR
LUCA RAIMO 2ND ALLEGED CONTEMNOR

Before the Hon. Lady Justice Irene Zeko Mbewe

For the Plaintiff : *Mr. Keith Kaunda of Messrs Ellis & Co.*
For the Defendant: *Mr. Robert Simeza SC of Messrs Simeza Sangwa & Co.*

RULING

Cases Referred To:

1. *In Mind Enterprises Ltd, Afro American Fibre Industry Limited Alreef Ltd Stripes Zambia Ltd and Hassen Sasso (2013) Vol. 3 ZR 73*

2. *NFC Africa Mining Plc v Techro Zambia Limited* (2009) ZR 236
3. *Access Bank (Zambia) Limited v Group Five/ZCON Business Joint Venture* SCZ/8/52/2014
4. *Sitima Tembo v National Council for Scientific Research* (1988-1989) ZR 4
5. *Beatrice Nyambe v Barclays Bank* (2008) ZR 195
6. *Zambia Breweries v Maritime Freight and Forwarding Limited, Misheck Chatora* (2012) ZR 529 Volume 3
7. *Simpamba v Kamalamba and Another* (2012) Vol 2 ZR 103
8. *Charles Kabwita and Others v NFC Africa Mining Plc* 920120 ZR 103
9. *Ethel Vivian Musamba Nyalugwe v Kalumba Crispin Nyalugwe* (1977) ZR 243
10. *Benabo v William Jay & Partners* (1940) 4 ALL ER
11. *Post Newspaper Limited v Rupiah Bwezani Banda* (2009) ZR 254
12. *Attorney-General v Leverler Magazine* (1979) AC
13. *Josia Tembo, Henry Jawa v Peter Chitambala ((Sued as Administrator of estate of Late Frank M. Chitambala* (2009) ZR 326
14. *Heelmore v Smith* (2) (1886) LR 35 CD 455
15. *Gordon v Gordon* (1946) 1 ALL E R 247
16. *Siebe Gorman and Company Limited v Priepac Limited* (1979) 2 Lloyds Rep 142
17. *Balkenbank v Tahar and Others* (1995) 2 ALL E R 904
18. *Cornhill Insurance Plc v Barclays* (1992) CA Transcript 948
19. *Zambia Revenue Authority v Nasandi Isikando and 3525 Others* SCZ Judgment 8/340/2012

Legislation Referred to:

1. *Rules of the Supreme Court. 1999 Edition*

Other Works:

1. *Halsbury's Laws of England, Volume 8, 3rd Edition*
2. *Black's Law Dictionary, 9th Edition, Thomson and Reuters*
3. *Arlidge and Smith on Contempt 3rd Edition, Sweet and Maxwell 2005*

This is a Ruling on the alleged Contemnors preliminary objections to the Notice of Motion for an Order of Committal made pursuant to *Order 33 Rule 3 and 7 Rules of the Supreme Court, 1999 Edition*.

The following issues have been raised:

1. That the Consent Order dated 30th May 2016 is not enforceable by way of committal as it does not specify what act the alleged Contemnors ought to do or to abstain from doing nor does it specify the time within which the said acts ought to have been done.
2. The Consent Order is not enforceable by way of committal as it is not endorsed with a Penal Notice.
3. The Consent Order is not an Order of the Court and that therefore not capable of enforcement by way of committal; and
4. That there was no personal service of the said Consent Order dated 30th May 2016.

The application is supported by skeleton arguments dated 26th May 2017. The alleged Contemnor relied on *Order 45 Rules of the Supreme Court 1999 Edition* which constitutes a code of procedure on what it terms “execution”. The cases of **In Mind Enterprises Limited, Afro American Fibre Industry Limited and Alreef Enterprises Ltd v Stripes Zambia Limited and Hassan Sasso**¹ were cited in support of the proposition that *Orders 45 and 52 Rules of the Supreme Court, 1999 Edition* deal with the methods a party can employ in enforcing a Judgment or Order of the Court. The alleged Contemnor contends that the Plaintiff’s application for committal can only be successful if the said application adheres to the requirements of both *Order 45 and Order 52 Rules of the Supreme Court, 1999 Edition*.

The alleged Contemnors submit that acts to be done and the time within which the said acts are done are not specified in the Consent Order dated 30th May 2016. The cases of **NFC African Mining Plc v Techro Zambia Limited**² and **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture**³ were cited in aid of the position at law that rules of the Court are to be strictly

complied with. That since the Consent Order dated 30th May 2016 does not fulfil the requirements under *Order 45 Rules of the Supreme Court, 1999 Edition*, the Court cannot grant the Plaintiff an Order of committal as doing so would be tantamount to endorsing non-compliance with rules of the Court. The alleged Contemnors submit that there is no directive referred to which the alleged Contemnors are required to perform or abstain from doing and what they have breached to warrant committal proceedings. The alleged Contemnors argue that they are not parties to the said Consent Order as neither their names nor the office they occupy as directors in the Defendant Company is mentioned in the Consent Order. That there is no positive or negative act directed at the alleged Contemnors in the Consent Order. The alleged Contemnors contend that that for a Director to be held liable for contempt, the Order must specifically state that the Director will be held liable for contempt if he fails to comply with the Order.

The alleged Contemnors further submit that the Consent Order is not endorsed with a Penal Notice contrary to *Order 45 Rule 7 (4) of the Rules of the Supreme Court* and cited the case of **In Mind**

Enterprises Limited, Afro American Fibre Industry Limited, Alreef Enterprises Ltd v Stripes Zambia Limited and Hassan Sasso¹, Sitima Tembo v National Council for Scientific Research⁴, Beatrice Nyambe v Barclays Bank⁵, Zambia Breweries v Maritime Freight and Forwarding Limited, Misheck Chatora⁵ which dealt with the issue of the Penal Notice.

Further that a Consent Order is not an Order of Court as envisaged by *Order 45 and 52 rules of the Supreme Court*. Therefore this Court can only enforce Judgments or Orders made by the Court. The case of **Simpamba v Kamalamba and Another⁷ and Charles Kabwita and Others v NFC African Mining Plc⁸** were cited in support of the argument that Consent Orders are prepared by the parties setting out their terms and brought to Court for approval.

The alleged Contemnors contend that there was no personal service of the Consent Order on the alleged Contemnors contrary to *Order 45 Rule 7 (7) (2) (a) Rules of the Supreme Court, 1999 Edition*. In support of the proposition on the necessity for personal service in contempt proceedings, the cases of **Zambia Breweries Plc v Maritime Freight and Forwarding Limited⁶, Misheck Chatora**

and Ethel Vivian Musamba Nyalugwe v Kalumba Crispin Nyalugwe⁹ and Benabo William Jay and Partners Limited¹⁰ were referred. It was submitted that the failure to effect personal service of the Consent Order is irregular which renders the leave obtained liable to be set aside.

The alleged Contemnors pray that the Order for leave to institute committal proceedings granted in favour of the Plaintiffs ought to be set aside with costs in favour of the alleged Contemnors.

The Plaintiff filed skeleton argument in opposition to the alleged Contemnors Notice to raise preliminary objections to the motion for an Order of committal. It is submitted that the motion by the Alleged Contemnors amounts to forum shopping, is irregular and incompetent and an abuse of Court process. Counsel for the Plaintiff, in terms of the irregularity and incompetency, argues that the application falls under *Order 2 Rules (1) and (2) Rules of the Supreme Court, 1999 Edition*. It submits that the Alleged Contemnors should have made the objections under *Order 2 Rules of the Supreme Court, 1999 Edition*. Counsel argues that this Court has no jurisdiction to set aside the committal proceedings for the

sole reason that the Order of 31st March 2017 is a final Order and can only be appealed against. In support of this proposition, the case of **Post Newspaper Limited v Rupiah Bwezani Banda**¹¹ was cited.

Counsel for the Plaintiff submits that the alleged Contemnors are aware of the existence and contents of the Consent Order as it was executed with their full instructions. Thus the argument that the alleged Contemnors are not parties to the Consent Order is untenable as the Defendant operates through agents and the alleged Contemnors are its principal agents. Counsel for the Plaintiff cited the case of **Attorney-General v Leverler Magazine**¹². The argument that the Consent Order had no Penal Notice is a lame one as all Judgments and Orders are generally binding on the Republic and are to be obeyed by the affected persons and their agents. Counsel submits that the arguments that contempt proceedings can only be instituted where a Judgment or Order has a Penal Notice is dangerous and prejudicial to the integrity and authority of the Courts. Counsel submits that any deliberate or willful interference or obstruction of the due administration of

justice may attract criminal sanctions as the Courts have inherent jurisdiction to ensure that its Orders are complied with or effected without any interference or hindrance by any person. Reliance was placed on **Halsbury's Laws of England, 3rd Edition Volume 8** where a superior Court having an inherent jurisdiction to punish criminal contempt by the summary process of attachment or committal in cases where an indictment or information is not on the Queen's Bench is not calculated to serve the ends of justice. That the contempt mainly arises from the alleged Contemnors outright refusal to have the measurements of works undertaken on Makoli Apartment by Messrs City Worx Consult.

Counsel for the Plaintiff submits that Messrs City Worx Consult having been appointed by the Court, any obstruction of an officer of the Court in the administration of justice is one instance of criminal contempt and does not require a penal notice. Counsel submits that justice in this case dictates that the extent of the works undertaken by the Plaintiff on Makoli Apartments are ascertained so that amounts owing to the parties herein are known and paid by the party found owing. That the alleged Contemnors have

frustrated the process by their refusal to permit Messrs City Worx Consult to the site. The reasons for not complying with the Consent Order is that they had instructed their Advocates to set aside the Consent Order notwithstanding this Court's Ruling of 12th December 2016 dismissing the Plaintiff's application to stay proceedings pending arbitration.

Counsel for the Plaintiff argues that personal service of process on the 2nd alleged Contemnor was effected as confirmed in an affidavit of service dated 13th April 2017. Counsel concedes failure to effect personal service on the 1st alleged Contemnor is not fatal and does not nullify the contempt proceedings and relied on *Order 2 Rule 1 Rules of the Supreme Court, 1999 Edition*. Counsel in conclusion submits that the Notice of Motion to raise preliminary objection should be dismissed with costs.

Counsel for the alleged Contemnors filed skeleton arguments in reply to the Plaintiff's arguments. Counsel argues that the Supreme Court in the **Post Newspaper Ltd v Rupiah Bwezani Banda**¹¹ did not say that a motion to set aside an Order for leave cannot be made before the same Judge who granted the Order nor did the

Court say that moving such a motion before the same Court would amount to forum shopping. That the **Post Newspaper Ltd Rupiah Banda**¹¹ case is distinguishable as the alleged Contemnors made their application under *Order 32 Rule 6 Rules of the Supreme Court 1999 Edition*. That the issues being canvassed before this Court are totally different from the **Post Newspaper Ltd v Rupiah Bwezani Banda**¹¹ and not founded on *Order 32 Rule 6 Rules of the Supreme Court 1999 Edition*.

Counsel for the alleged Contemnors argues that preliminary objections can be raised before the Court that granted leave to commence committal proceedings and where it is found that the proceedings did not comply with the provisions of the law, the Court has power to dismiss the committal proceedings and the motion altogether. That the Plaintiff's argument that the alleged Contemnors are forum shopping and that an ex parte order can only be set aside on appeal is misconceived as the Supreme Court in the **Post Newspaper Ltd v Rupiah Bwezani Banda**¹¹ case did not hold that as a rule, leave to apply for committal once granted

cannot be set aside except on appeal as this would fly in the face of *Order 32 Rule 6 Rules of the Supreme Court*.

In respect to *Order 2 Rule 2 Rules of the Supreme Court 1999 Edition* the gist is that this Order is inapplicable as the Notice of Motion filed does not raise irregularity as a ground for seeking to set aside the motion for committal proceedings. The case of **Josia Tembo, Henry Java v Peter Chitambala (sued as Administrator of estate of the Late Frank Macharious Chitambala)**¹³ was cited in aid of *Order 2 Rule 2 (1) Rules of the Supreme Court, 1999 Edition* and its non-applicability to applications to raise preliminary issues.

On the Penal Notice, Counsel for the alleged Contemnors relied on *Order 52 Rules of the Supreme Court* where committal proceedings can only proceed if there is compliance with the provisions of *Order 45 Rules of the Supreme Court, 1999 Edition*.

On personal service, Counsel for the alleged Contemnors submits that the Plaintiff concedes that no service was effected on the 1st alleged Contemnor but argues that the same is not fatal and does not nullify the contempt proceedings. Counsel argues that the Plaintiff has not demonstrated any exceptional circumstances for

the Court to dispense with the requirement for personal service as provided in the Editorial Notes *Order 52/3/1 Rules of the Supreme Court, 1999 Edition*. It is submitted that dispensing with personal service would be prejudicial to the interests of the alleged Contemnors. In conclusion Counsel submits that the Order for leave granted to the Plaintiff ought to be set aside and that the Court dismisses the Plaintiff's application in which they seek an Order of committal, with costs to the alleged Contemnors.

At the hearing, the parties relied on the skeleton arguments, list of authorities and oral submissions which I shall not restate as they are similar to the skeleton arguments.

I have considered the preliminary issues raised, skeleton arguments, authorities cited and oral arguments by both parties.

The Plaintiff on 31st March 2017 obtained an ex parte Order for leave to move the Court for an Order of committal returnable on 25th May 2017. The alleged Contemnors raised preliminary issues contending that the Order for leave be set aside.

I will first dispense with the issue raised by the Plaintiff that according to the alleged Contemnors, it is an irregularity to enforce

by way of committal proceedings a Consent Order that has inter alia no penal notice. The Plaintiff argues that the alleged Contemnors application should have therefore have been brought pursuant to *Order 2 Rule (1) and (2) Rules of the Supreme Court, 1999 Edition*. Conversely, the alleged Contemnors argue that the said *Order 2 Rule 1 and 2* is inapplicable herein as the notice of motion does not raise irregularity as the ground for seeking to set aside the motion for committal proceedings. *Order 2 Rule 1 and 2 Rules of the Supreme Court, 1999 Edition* states as follows:

"(1) Where in beginning or purporting to begin any proceedings or at any stage or in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3) the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, and any step taken in the proceedings or any documents, judgment or order therein or exercise its powers under these rules to allow such amendments if any dealing with the proceedings generally as it thinks fit."

In my considered view, I find that there is a distinction between *Order 2 Rule 1 and 2 on irregularity* and *Order 52 Rules of the Supreme Court, 1999 Edition on committal*, in that a party cited for contempt loses his entitlement to take any steps in the proceedings until the contempt is purged. Counsel for the alleged Contemnors cited the case of **Josia Tembo, Henry Jawa v Peter Mukuka Chitambala (Sued as administrator of the estate of the late Frank Macharious Chitambala)**¹³ where it was held that *Order 2 Rule 2 (1) Rules of the Supreme Court, 1999 Edition* relates to setting aside a matter and does not apply to applications to raise

preliminary issues. I find that there is force in the principles in the cited case and I adopt the stated principles.

The alleged Contemnors application is predicated on *Order 33 Rule 3 Rules of the Supreme Court 1999 Edition* which empowers this Court to determine any issue arising at any time during the proceedings. The procedure for instituting committal proceedings is set out in *Order 52 Rules of the Supreme Court, 1999 Edition* and *Order 45 Rules of the Supreme Court, 1999 Edition* which provides for enforcement of Judgments in various ways and for committal respectively. *Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition* empowers the Court to order any question or issue arising in a cause or matter, whether of fact or law or partly of fact or law to be tried before, at or after the trial of a cause. The Court therefore has the jurisdiction to determine the preliminary issue at hand.

The alleged Contemnors have raised four (4) preliminary issues and seek to set aside the Order for leave to commence committal proceedings on the basis that it does not comply with *Order 45 Rule*

7 (7) *Rules of the Supreme Court, 1999 Edition* which provides as follows:

"(1) In this rule references to an order shall be construed as including references to a judgment.

(2) Subject to order 24, rule 16 (3), Order 26 rule (6) (3) and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless -

(a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question, and

(b) In the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

(c) Subject as aforesaid, an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act.

There must be prominently displayed on the front of the copy of an order served under this rule a warning to the person on whom the copy is served that disobedience to the order would be a contempt of court punishable by imprisonment, or (in the case of an order requiring a corporate body to do or abstain from doing an act) punishable by sequestration of the assets of the body corporate and by imprisonment of any individual responsible.

(5) With the copy of an order required to be served under this rule, being an order requiring a person to do an act, there must also be served a copy of any Order made under Order 3, rule 5 extending or abridging the time for doing an act, where the first-mentioned order was made under rule 5 (3) or 6 of this Order, a copy of the previous order requiring the act to be done.

(6) An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in

accordance with this rule if the Court is satisfied that pending such service, the person against whom or against whose property is sought to enforce the order has had notice thereof either -

- (a) by being present when the order was made, or
- (b) by being notified of the terms of the order, whether by telephone, telegram or otherwise.

(7) Without prejudice to its powers under Order 65 rule 4 the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so.

The power to punish for contempt is an important and necessary one for protecting the cause of justice and the rule of law, and for protecting the authority of the Court and supremacy of the law. This is aptly stated by Lord Bower LJ in the case of **Heelmore v Smith (2) (1886) LR 35 C.D 455**¹⁴ where he stated the rationale for punishing contempt as follows:

"The object of the discipline enforced by the court in case of contempt of court is not to vindicate the

dignity of the court or the person of the Judge, but to prevent undue interference with the administration of justice."

Black's Law Dictionary, 9th Edition, Thomson Reuters defines contempt as:

"conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by a fine or imprisonment."

In aid the case of **Gordon v Gordon**¹⁵ at page 250, Du Parcq L.J held that:

"I fully realise that no Court must forget the importance of the liberty of the subject and the importance of the principle that in this country people are not to be imprisoned without good cause, cause shown according to law. Liberty would never be preserved of the Court were to have one measure for people whom they think to be deserving and another measure for people whom they

think undeserving. The law must be applied strictly so far as the liberty of the subject is concerned."

In **Halsbury's Laws of England, 3rd Edition, Volume 8** cited by Counsel for the Plaintiff, it states as follows:

"The superior courts have an inherent jurisdiction to punish criminal contempt by the summary process of attachment or committal in cases where an indictment, or information is not in the Queen's Bench is not calculated to serve the ends of justice. The power to attach and commit, being arbitrary and unlimited, is to be exercised with the greatest caution... it is only to be resorted to where the administration of justice would be hampered by the delay involved in pursuing the ordinary criminal process."

The Court adopts these principles in determining the preliminary issues herein.

In order to put the issues into perspective, I have reproduced the Consent Order dated 30th May 2016 which reads as follows:

BY CONSENT OF THE PARTIES

IT IS HEREBY ORDERED as follows:

- (i) That Messrs City Worx Consult as appointed by the parties shall undertake measurements of works undertaken by the Plaintiff on Makoli Apartments in Ndola.**
- (ii) That the Defendant's Project Manager Mr. Vijay Kumar, shall have no role to play during the measurements exercise as he is not registered with the Engineering Institute of Zambia.**
- (iii) That the parties shall bear equally the fees and incidental costs for Messrs City Worx Consult.**
- (iv) That the Plaintiff shall be at liberty to demobilize and remove verified materials from Makoli Apartments immediately after the measurements of works is undertaken by Messrs City Worx Consult.**
- (v) That the Defendant shall permit a new contractor to work on Makoli Apartments after the measurements have been undertaken.**

- (vi) That after the measurements are taken, which party will be found owing the other shall promptly pay the money to the party found to be owed.**
- (vii) That each party shall bear its own legal costs.**

The first preliminary issue raised is that the Consent Order dated 30th May 2016 is not enforceable by way of committal as it does not specify what act the alleged Contemnors ought to do or to abstain from doing nor does it specify the time within which the said acts ought to have been done. It goes without saying that the actual manner in which the Consent Order is framed is of primary importance. This is in order to ensure that the alleged Contemnors or Defendant has no doubt in their minds whatsoever as to exactly what it is that is required of them by the Consent Order to do and when it is to be done. An Order must specify that the person shall do an act or specify the time or date when the person is to do the act. The details as to time are necessary where a failure may lead to penal consequences being imposed by the Court.

I have examined the Consent Order dated 30th May 2016. Paragraph (i) and (v) of the Consent Order state as follows:

- (i) That Messrs City Worx Consult as appointed by the parties shall undertake measurements of works undertaken by the Plaintiff on Makoli Apartments in Ndola.**
- (v) That the Defendant shall permit a new contractor to work on Makoli Apartments after the measurements have been undertaken.**
- (vi) That after the measurements are taken, which party will be found owing the other shall promptly pay the money to the party found to be owed.**

Is the Consent Order framed in accordance with *Order 45 Rule 7 (6) Rules of the Supreme Court, 1999 Edition* as to be able to result in the Court committing the alleged Contemnors arising from the non compliance? In the case in *casu*, the Consent Order indicates the acts to be done which is to permit the measurements to be undertaken and thereafter allow a new contractor to complete the works at Makoli Apartments. However, the Consent Order fails to indicate the precise time frame or date frame within which the

actions shall be undertaken. It is my considered view that *Order 45 Rules of the Supreme Court, 1999 Edition* is couched in mandatory terms and the Court has no powers to make an Order to "*set or put matters right or straight*". This preliminary issue therefore succeeds.

The next preliminary issue raised is that the Consent Order is not enforceable by way of committal as it is not endorsed with a penal notice. *Order 45 Rule 7 (4) Rules of the Supreme Court, 1999 Edition* provides as follows:

"(4) there must be prominently displayed on the front of the copy of an order served under this rule a warning to the person on whom the copy is served that disobedience to the order would be a contempt of court punishable by imprisonment, (or in the case of an order requiring a body corporate to do or abstain from doing any act) punishable by sequestration of the assets of the body corporate and by imprisonment of any individual responsible."

From a reading of the Consent Order dated 30th May, 2016 it is apparent that it does not contain a penal notice. It is trite that there

must be a penal notice on the front page warning of the consequences of disobedience. In the cited case of **Beatrice Nyambe v Barclays Bank Zambia Plc**⁵, Judge Wood held that:

"There must be prominently displayed on the front of the copy of an Order to initiate committal proceedings, a penal notice warning the person to whom the copy is served that disobedience to the Order would be contempt of Court or in the case of an Order requiring a body corporate do or abstain from doing an act punishable by sequestration of assets of the body corporate and by imprisonment of an individual responsible."

I adopt this dicta and agree that it is a requirement to prominently display the penal notice on the front page of an Order. Counsel for the Plaintiff argues that all Judgments and Orders are binding on the Republic and generally are to be obeyed by all the affected persons. It is my considered view that *Order 45 Rule 7 (4) Rules of the Supreme Court, 1999 Edition* is couched in mandatory terms and the Court has no discretion to dispense with the requirement for a penal notice where the Judgment or order requires a person to

do an act. In this case, I am of the settled mind that the Consent Order does not comply with the provisions of *Order 45 Rule 7 (4) Rules of the Supreme Court, 1999 Edition*. This preliminary issue succeeds.

The next issue preliminary issue raised is that the Consent Order is not an Order of Court and therefore not capable of enforcement by way of committal. Counsel for the alleged Contemnors cited the case of **Simpamba v Kamalamba and Another**⁷ where it was stated that a Consent Order or Judgment is a substitute for a reasoned judgment or order of the Court and decides the action between the parties for all intents and purposes. The case of **Charles Kabwita and Others v NFC Africa Mining Plc**⁸ was further relied on where it states that Consent Orders are only brought to Court for approval or acknowledgment. That under *Order 45 and Order 52 Rules of the Supreme Court, 1999 Edition*, the only orders which are capable of enforcement by way of committal are orders of the court or Judgments of the Court. Conversely, Counsel for the Plaintiff argues that a Consent Order has the force of law. It is settled that the Court has on countless occasions pronounced itself on the

nature and extent of a Consent Order. In the case of **Siebe Gorman and Company Limited v Priepac Limited**¹⁶, Lord Denning MR (as he was then) said at page 379 and Lord Justice Staughton in **Balkenbank v Tahar and Others**⁷ at page 912 where he quotes Beldan LJ in **Cornhill Insurance Plc v Barclays**¹⁸:

"When a Judge approves a consent order, it takes effect as if made by him after argument."

The above position is reaffirmed by the Supreme Court in the case of **Zambia Revenue Authority v Nasandi Isikando and 3525 Others**¹⁹ where it stated as follows:

"essentially although a consent order arises out of an agreement and terms arrived at by the parties themselves, and may even evidence a contract, with or without obligation, it is a Judgment or Order made by or in the name of the Court and has all the consequences of a Court Judgment or Order. See Order 42/5A/4 Rules of the Supreme Court, 1999 Edition. The parties must therefore accept all its implications."

The upshot of the above exposition is that Counsel for the alleged Contemnors assertion that a Consent Order is not enforceable is untenable.

The next preliminary issue is that there was no personal service of the said Consent Order dated 30th May 2016. It is on record that personal service was effected on the 2nd alleged Contemnor on 13th April 2017 and there is proof by way of an affidavit of service. Counsel for the Plaintiff graciously conceded that it did not personally serve the 1st alleged Contemnor but argues that the parties herein agreed to the terms of the Consent Order therefore the 1st alleged Contemnor cannot claim that he was not served with his own Order. Did the 1st alleged Contemnor have notice of the Consent Order? According to **Black's Law Dictionary, 9th Edition** Thomson Reuters, "notice" is defined as follows:

"A person has notice of a fact or condition if that person has actual knowledge of it has received information about it. Has reason to know it, knows about a related fact; is considered as having been able to ascertain if by checking an official filing or recording."

Counsel for the Plaintiff contends that the Court should dispense with the requirement for personal service. The question is, can a Court dispense with personal service? There is growing jurisprudence in the commonwealth jurisdictions that knowledge of a Court Order suffices to prove service, and dispenses with personal service for the purpose of contempt proceedings. In so doing, it is incumbent upon the Court to first satisfy itself from the facts on record that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the Court Order requiring the doing or abstaining from doing an act.

Counsel for the alleged Contemnors relied on the case of **In Mind Enterprises Limited, Afro American Fibre Industry Limited and Alreef Enterprises Limited v Stripes Zambia Limited and Hassan Sasso**¹, where the Judge found that the Plaintiff did not comply with the procedural rules on service of process and content and form of such process as per the requirement of *Order 45 and Order 52 Rules of the Supreme Court, 1999 Edition*. I endorse the principles as outlined in the cited case.

A perusal of the Consent Order reveals that it is addressed to the Defendant who according to the pleadings is a body corporate. In *Arlidge and Smith on Contempt 3rd Edition, Sweet and Maxwell 2005* at page 927 paragraph 12-102, the learned authors observe that:

"As has already been pointed out, no one can be held for breach of an order without knowledge that such an order has been made. Service of the order itself is also required, unless an order has been made to dispense with service. Therefore it would appear that in order to fix a corporation with liability for contempt, it will be necessary to show that it has been properly served or that service has been dispensed with on the basis that an appropriate officer of the company had knowledge of the order or for some other reason"

Given that the Defendant is a company, the question that arises is how service of an order is to be effected upon a company if the directors of such a company are to be committed for disobedience of an order. In my mind, in order to hold a company with liability for contempt, it is necessary to show that the company was properly

served or that service has been dispensed with on the basis that the appropriate officer of the company had knowledge of the order. Counsel for the Plaintiff submits that the two alleged Contemnors are directors in the Defendant company and this was not disputed by the alleged Contemnors except to state that they are not party to the proceedings.

Counsel for the Plaintiff further relies on *Order 2 Rule 1 Rules of the Supreme Court, 1999 Edition* which provides that any irregularity shall not amount to a nullity. In terms of the non fatality of failure to effect personal service, I concur that the rules of the Court are meant to be obeyed for the proper administration of justice. This has been reiterated by the Supreme Court in a plethora of cases cited by Counsel for the alleged Contemnor which I shall not restate but concur with the principles therein. I am of the settled view that the effects of non compliance may have different consequences depending on whether the breach is mandatory or directory. However, in the case of *Order 45 Rule 7 (2) (a) and Order 52 Rule 3 (3) Rules of the Supreme Court, 1999 Edition* it is a requirement that documents are to be served personally on the person required to do

the act except where the Court satisfies itself that personal service can be dispensed with under *Order 45 Rule 7 (7) Rules of the Supreme Court, 1999 Edition*. I find that the Plaintiff has not demonstrated any special circumstances to warrant the dispensing of personal service under *Order 45 Rule 7 (2)(a)* and *Order 52 Rule 3 (3) Rules of the Supreme Court, 1999 Edition*.

I draw the parties attention to *Order 45 Rule 7 (2) (a), Rules of the Supreme Court, 1999 Edition* where it stipulates that Orders must be served personally on the person required to do the act. Arising from my earlier finding that the 1st alleged Contemnor was not personally served with the Consent Order and no special circumstances exist to warrant the dispensing of personal service, the preliminary issue partially succeeds in respect to the 1st alleged Contemnor.

Counsel for the Plaintiff contends that the application to set aside an order for committal proceedings amounts to forum shopping and relied on the case of **Post Newspaper v Rupiah Bwezani Banda**¹¹ where it was held that an ex parte order under *Order 52 Rules of the Supreme Court, 1999 Edition* is a final order and can only be

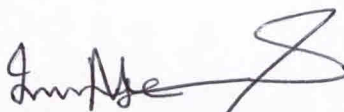
appealed against. Conversely, Counsel for the alleged Contemnor argues that the Post Newspaper case related to *Order 32 Rule 6 Rules of the Supreme Court, 1999 Edition*, and that the issues canvassed in the present application are totally different. I shall not delve into this aspect as the facts of the **Post Newspaper Limited v Rupiah Bwezani Banda**¹¹ are distinguishable to the present case as the thrust of the preliminary issue relates to the non compliance by the Plaintiff of *Order 45 Rule 7 (3) (4) and Order 52 Rule 4 (2) Rules of the Supreme Court, 1999 Edition*.

In view of the aforesaid, it is my considered view that the Order for Leave to apply for an Order for Committal of the alleged Contemnors does not meet the requirements of *Order 45 Rule 7 (3) and (4) and Order 52 Rule 4 (2) Rules of the Supreme Court, 1999 Edition*. Accordingly, I hereby set aside the Order for Leave to commence contempt proceedings and the Notice of Motion herein.

In the circumstances of the case, I Order that each party shall bear its own cost.

Leave to appeal granted.

Dated the 14th day of November 2017.



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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE