

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL/138/2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

JULIUS MUNYINDA

AND

ACKSON KASAPATU

PHINEAS MUTEMBU

OBIE NTENDA



APPELLANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

CORAM: KONDOLO SC, MAJULA AND BANDA-BOBO JJA

On 7th May, 2024 and on 21st June, 2024.

For the Applicant : Mr. H. Mulenga of Messrs Philsong & Partners

For the Respondents : Mr. A. Mbambara of Messrs A Mbambara, Legal Practitioners

J U D G M E N T

KONDOLO SC JA delivered the judgment of the Court.

CASES REFERRED TO:

- 1. Post Newspapers Limited v Rupiah Bwezani Banda
SCZ/25/2009**
- 2. Charles Ostenton & Co. v Johnston [1941] 2 All ER 245**

3. **Chimanga Changa Limited v Stephen Chipango 2010 ZR 208**
4. **Kuta chambers v Concilia Subilo (suing as admin of the estate of the late Francis Subilo) SCZ/36/2015**
5. **Indeni Petroleum Refinery Company Ltd v Kafco Oil Ltd & Others (Appeal 207 of 2014) [2017] ZMSC 220 (14 July 2017)**

LEGISLATION REFERRED TO:

1. **The Supreme Court Rules (Whitebook), 1999 Edition**
2. **Halsburys Laws of England 4th Edition, Vol 9**

1. INTRODUCTION

1.1. This is an appeal against the Ruling of Honourable Mr. Justice C. Kafunda dated 10th March, 2023 under cause No. 2017/HP/0463 in which he declined the Appellant's application to commence contempt proceedings against the Respondents.

2. BACKGROUND

2.1. The Appellant commenced proceedings in the High Court contending that he was rightfully selected and installed as Chief Chibwika. He applied for and was granted an injunction

restraining any person from interfering with running the affairs of the Chibwika Chiefdom.

- 2.2. However, his claim was dismissed in the final Judgment and the injunction was consequently discharged.
- 2.3. The Appellant then applied for and obtained a stay of execution against the High Court Judgment.
- 2.4. Whilst the stay of execution was still subsisting, the Respondents wrote a letter dated 11th January, 2022 (the letter) copied to various institutions informing them that the High Court had delivered a Ruling mandating the royal families to select and install a new Chief Chibwika at any time without interference by the President or government.
- 2.5. The letter made no mention of the Order staying execution of the High Court Judgment.

3. APPLICATION FOR LEAVE TO COMMENCE CONTEMPT PROCEEDINGS

- 3.1. Pursuant to **Order 52 Rule 2 of the Supreme Court Rules- Whitebook (RSC)**, the Appellant made an *ex parte* application for leave to commence contempt proceedings against the Respondents.

- 3.2. The affidavit supporting the application stated that the Respondents wrote the letter despite being aware of the Order staying execution of the Judgment.
- 3.3. That they were in contempt of deliberately disregarding the order of injunction and order of stay of execution and that the Appellant be granted leave to commence contempt proceedings.
- 3.4. **Respondents' Affidavit in Opposition**
- 3.5. The trial Judge ordered that the application be *heard inter partes* and the Respondents filed an affidavit in opposition.
- 3.6. The Respondents did not deny writing the letter but stated that they did not realise that they were covered by the injunction because they were only joined to the action after the injunction was granted.
- 3.7. That the letter was not intended to undermine the running of the affairs of the Chibwika Chiefdom and on 15th June, 2022 they wrote another letter advising all the addressees of the letter of 11th January, 2022 that the letter was withdrawn.
- 3.8. That their actions did not amount to disregard or disobedience of any Court Order.

3.9. Affidavit in Reply

3.10. The Appellant responded by stating that the Respondents were covered by the injunction.

3.11. That the letter was contemptuous as the ordinary meaning of the words used in the letter meant that the Appellant was no longer Chief Chibwika and that he was not carrying out his duties properly.

3.12. That the act of withdrawing the letter was only useful in mitigation and he prayed that leave be granted.

4. HIGH COURT DECISION

4.1. The trial Judge found as a fact that the Respondents authored and sent the alleged contemptuous letter to various government offices.

4.2. He further found that when the Respondents joined the action, the order of injunction was subsisting. That they were therefore covered by the injunction which was still in force because of the stay of execution granted to the Appellant.

4.3. The trial Judge further stated as follows; "*it is clear that the subject letter had the potential to undermine the running of Chief Chibwika's affairs*".

- 4.4. The trial Judge however stated that the Respondents being laymen may have failed to appreciate the implications of the order staying execution of the Judgment.
- 4.5. He further observed that the letter was withdrawn and that the Respondents had apologised for authoring the said letter.
- 4.6. The trial Judge stated that he was giving the Respondents the benefit of doubt and he declined to grant the Appellant leave to commence contempt proceedings and Ordered each party to bear their own costs.

5. APPEAL

- 5.1. The Appellant promptly appealed on the following three grounds;

- 1. That the Judge erred in law and fact when he held that in as much as their letter could have been, on the face of it contemptuous, the alleged contemnors may have been acting in want of the full understanding of the legal status of the Plaintiff as chief Chibwika, as laymen, could have failed to appreciate the import of the stay of execution contrary to evidence on record that the alleged contemnors were acting through an Advocate and there was no evidence on record to**

demonstrate the extent of the alleged contemnors lacking understanding and that in any case ignorance cannot help the alleged contemnors to escape justice.

2. The learned trial Judge erred in law and fact when he held that *'I have for the foregoing reasons given the alleged contemnors the benefit of the doubt'* contrary to the evidence on record and the law that the Court had no jurisdiction yet to forgive or give a benefit of doubt at the stage of leave to commence contempt of Court particularly having found that the letter authored by the alleged contemnors was contemptuous.

3. That the learned Judge erred in law and fact when he held that each Party bears its own costs contrary to the evidence on record that the alleged contemnors behaviour forced the Appellant to go to Court and that the judicious discretion ought to have been exercised in granting costs to the Appellant.

5.2. Appellant's Arguments

5.3. Grounds 1 and 2 are argued together and it was submitted that the learned trial Judge misdirected himself by essentially proceeding to hear and determine the entire contempt

proceedings and forgiving the Respondents at the stage where the Appellant had applied for leave for an Order for committal.

- 5.4. We were drawn to **Order 52/2 (1) and (2) RSC** which provides that a person wishing to file committal proceedings must first apply for leave and that the application must be made *ex parte*.
- 5.5. It was submitted that the learned trial Judge prematurely considered the merits of the Respondents' defence without first determining whether leave to commence committal proceedings should be granted. That, having not determined the question of leave, the learned trial Judge lacked jurisdiction to determine the committal proceedings on the merits. The case of **Post Newspapers Limited v Rupiah Bwezani Banda** ⁽¹⁾ was cited in support of this argument.
- 5.6. It was pointed out that the Respondents were represented by Counsel and there was no evidence to support the trial Court's finding that the Respondents may not have understood the import of the stay of execution.
- 5.7. That there was no proof that the letter purportedly withdrawing the offensive letter was actually sent as it was

not acknowledged as received by the addresses whilst the offensive letter was acknowledged. The Appellant prayed that the appeal be allowed.

5.8. In ground 3 on costs, the main argument was that the Respondents should have been condemned in costs as the legal proceedings and expenditure suffered by the Appellant was on account of the Respondents' contemptuous behaviour for which they had been forgiven.

5.9. It was submitted that even though awarding costs was discretionary, the said discretion must be exercised judiciously and this Court can interfere with the lower Court's exercise of discretion where it is improperly exercised. The case of **Charles Ostenton & Co. v Johnston** ⁽²⁾ was cited where Lord Wright stated as follows;

"This Court can and will interfere if it is satisfied that the Judge was wrong. Thus, it will interfere if it can see that the Judge has given no weight (or no sufficient weight) for those considerations which ought to have weighed with him conversely it will interfere if it can see that he has been influenced by other considerations

which ought not to have weighed with him, or not weighed so much”

5.10. It was prayed that the Order for costs be overturned and that costs be granted to the Appellant.

6. RESPONDENTS' ARGUMENTS

6.1. In ground 1, on the allegation that the learned trial Judge did not evaluate the evidence fairly, the Respondent submitted that the lower court exercised its inherent discretion by directing that the application be heard inter-partes and declining to grant leave to commence contempt proceedings. That no evidence was presented before Court as the matter was still in the area of the Court's discretion. That the Court has discretion as to whether or not to grant leave and in support cited the case of **Chimamga Changa Limited v Stephen Chipango** ⁽³⁾ and **Halsburys Laws of England 4th Edition, Vol 9** (*incomplete citation provided*).

6.2. The remainder of the Respondents' arguments in relation to grounds 1 and 2 addressed the merits of the arguments against committal. We shall not regurgitate these arguments as they are irrelevant to the appeal which is limited to

whether the trial Judge was on firm ground to render a final decision on the merits of the application for committal before considering and deciding the application for leave.

- 6.3. In ground 3, it was argued that the Appellant was not entitled to costs as the general principle is that costs follow the event. That this appeal was before this Court because the Appellant was unsuccessful in the lower Court and costs are normally awarded to the successful party. The case of **Kuta chambers v Concilia Subilo (suing as admin of the estate of the late Francis Subilo)** ⁽⁴⁾ was cited amongst other authorities on the issue of costs. That the lower Court could not be faulted for declining to award the Appellant costs.

7. HEARING

- 7.1. At the hearing both parties relied on the record of appeal and their filed heads of argument.

8. ANALYSIS AND DECISION

- 8.1. We have considered the record of appeal and in particular the arguments advanced by the parties in the High Court, the learned trial Court's Ruling, the grounds of appeal and the Appellant's heads of argument.

- 8.2. We shall begin with ground 2 because it raises a jurisdictional issue and thereafter, if need be, proceed to consider grounds 1 and 3 *seriatim*.
- 8.3. The Appellant's argument in ground 2 raises the question of whether a trial Judge has jurisdiction to proceed to hear an application where leave has not been obtained and where the rules require that leave be obtained before proceeding with that particular application.
- 8.4. The Appellant's application in the High Court was commenced pursuant to **Order 52 Rule 2 (1) RSC** 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 single 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

8.5. **Order 52 Rule 2 RSC** refers to a Divisional Court in England.

With regard to the Zambian equivalent of an English Divisional Court in the case of **Indeni Petroleum Refinery Company Ltd v Kafco Oil Ltd & Others** ⁽⁵⁾ the Supreme Court clarified as follows;

We, therefore, do not intend to go beyond what we said in the Leonard Banda case which is that a Divisional Court in England is equivalent to a High Court in Zambia. In that case we also made a determination as to whether leave is required prior to moving a motion for contempt before this court and held that, unlike in the court below, leave is not required in this court. What this means is that, when a party seeks to make an application for committal for contempt before the High Court the same must be commenced in accordance with Order 52 rule 2 of the White Book. This is not only in line with the case law referred to by the Learned High

Court Judge but also the practice and procedure that our High Court has adopted for a long time now.

- 8.6. It is quite clear that before the High Court's doors are opened for the commencement of committal proceedings under **Order 52 Rule 2 RSC** such as *in casu*, leave must be obtained by the party seeking to move the Court and the application for leave must be made *ex parte*. These requirements are couched in mandatory terms and cannot be escaped.
- 8.7. Page 15 of the record of appeal shows that the Appellant followed the procedure by filing an *ex parte* summons for leave to commence committal proceedings but the trial Court, contrary to **Order 52 Rule 2 (2) RSC** decided that he would hear the application for leave *inter partes*.
- 8.8. The learned trial Judge did not offer any explanation or point to any law permitting departure from the two mandatory provisions. Firstly, that leave had to be obtained before an application for committal could be heard and secondly that the application must be made *ex parte*. The provision does not provide for hearing the *ex parte* application *inter partes*.
- 8.9. The question as to whether the learned trial Judge had jurisdiction to determine the application for committal

without first granting leave is essential because as stated by Chibeskunda A/CJ in **JCN Holdings Limited v Development Bank of Zambia** *supra*; “It is clear from the *Chikuta and New Plast Industries* cases that if a Court has no jurisdiction to hear and determine a matter, it cannot make any lawful Orders or grant any remedies sought by a party to that matter.”

8.10. We were somewhat flabbergasted by the Respondents arguments which totally skirted the issue before Court and proceeded as though the learned trial Judge had in fact considered the application for leave and thereafter exercised his discretion to refuse the application for leave.

8.11. Applications for leave are independent, standalone applications whose merits must be considered and determined in their own right. There is no shortcut or work-around.

8.12. The requirement for leave is mandatory and where leave has not been obtained the Court has no jurisdiction to proceed with the substantive application. The Court is obliged to either grant or refuse the application for leave. Where the application is refused, the refusal opens the door to the

aggrieved party to either renew the application or appeal as provided.

- 8.13. *In casu*, the learned trial Judge should have begun by considering the *ex parte* application for leave to commence committal proceedings of which the only purpose was to consider whether or not there was a *prima facie* case upon which to grant the Appellant leave to file a motion for committal proceedings against the Respondents. The learned trial Judge consequently had no jurisdiction to consider the merits of the case and exonerate the Respondents at that stage.
- 8.14. If the trial Court was of the view that there were no grounds for granting leave, it should have denied the application for leave and paved the way for the Appellant to decide on the next course of action.
- 8.15. The learned trial Judge had no jurisdiction to operate outside the confines of **Order 52 RSC** and all the Orders that he made amount to nothing.
- 8.16. Having decided as we have, grounds 2 and 3 are rendered otiose.

8.17. We therefore allow the appeal and order that the application for leave to commence committal proceedings be remitted back to the High Court before a different Judge for hearing the application for leave to commit the Respondents for contempt of Court.

8.18. Costs for this application are awarded to the Appellant and the costs in the High Court shall abide the final decision of that Court.

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE

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A.M. BANDA-BOBO
COURT OF APPEAL JUDGE