

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**2022/HP/0559**



BETWEEN:

**ZAMASTONE MINING LIMITED  
SANITEX INVESTMENT LIMITED**

**1<sup>ST</sup> PLAINTIFF  
2<sup>ND</sup> PLAINTIFF**

AND

**ALBATROSS MINING LIMITED** (*First contemnor*)  
**AGGREGATES LIMITED**  
**TIAN CHUAO**  
**TIAN BAOQI**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT  
SECOND CONTEMNOR  
THIRD CONTEMNOR**

***Before:*** ***The Hon. Mr. Justice Charles Zulu***

*For the Plaintiffs:* *Mr. R. Mwala and Ms. S. Chatyoka, of Messrs Roy Mwala & Company Legal Practitioners.*

*For the Alleged Contemnors:* *Mr. S. Bwalya Jr., of Messrs of Messrs Solly Patel, Hamir & Lawrence Legal Practitioners.*

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## **R U L I N G**

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*Cases referred to:*

- 1. Hussein Versi and Another v Airsea Clearing & Forwarding Limited and Another (CAZ Appeal No. 24 of 2020).***
- 2. Flame Promotions & Procurement Limited v Joe's Earthworks & Mining Limited (2016/HPC/0164).***
- 3. Beatrice Nyambe v Barclays Bank Zambia PLC (2008) Z.R. Vol. 2 195.***
- 4. The Law Association of Zambia v The President of the Republic of Zambia & Others (Petition No. 13/CCZ/2019).***
- 5. Oscar Chinyanta and 31 Others v Alasia Building Construction Limited and Tap Zambia Limited (SCZ Appeal No. 158 of 2015).***

6. ***Mathias Zulu & Others v Inmobia Mobile Technology (2013/HP/829).***
7. ***M'Poyou and Another, In re (1979) Z.R. 280.***
8. ***Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (SCZ/8/52/2014).***

Legislation and other works referred to:

1. ***The Rules of the Supreme Court of England and Wales 1965 (White Book 1999 Edition).***
2. ***The High Court Rules (HCR) Chapter 27 of the Laws of Zambia.***
3. ***The High Court Act Chapter 27 of the Laws of Zambia.***
4. ***Halsbury's Laws of England, 4<sup>th</sup> Edition Re-issue, Vol. 9 (1) at paragraph 470.***

## **1.0 INTRODUCTION**

- 1.1 This ruling is in respect of an application at the instance of the alleged contemnors, Albatross Mining Limited (first Defendant), Tian Chuo and Tian Baoqi dated May 21, 2024; for an order to set aside an *ex parte* order for leave to commence committal proceedings against the trio, alleged contemnors.
- 1.2 The application was made pursuant to Order 2 rule 2 and Order 33 rule 3 of the **Rules of the Supreme Court (RSC) of England and Wales 1965 (White Book 1999 Edition)** read together with Order III rule 2 of the **High Court Rules (HCR) Chapter 27 of the Laws of Zambia**, and section 13 of the **High Court Act Chapter 27 of the Laws of Zambia**.

## **2.0 BACKGROUND**

- 2.1 The Plaintiffs, claiming proprietary land rights, took out a writ of summons and statement of claim, claiming damages for trespass against the Defendants.

2.2 A partial consent judgment was entered into by the Plaintiffs on the one part, and the first Defendant of the other part. The said consent judgment was perfected on February 17, 2023. And under clause 7 it was agreed by the parties and approved by the Court as follows:

2.2.1 **7. That the Defendant will subdivide Property No.19063/M and transfer a subdivision thereof to the 1<sup>st</sup> Plaintiff with the access road being on the portion to be transferred to the 1<sup>st</sup> Plaintiff as set out in the sketch plan annexed hereto.**

2.3 Further to the foregoing, a vesting order with a penal notice dated August 9, 2023 was granted to the first Plaintiff couched as follows:

2.3.1 **Upon the application by the Plaintiffs and upon hearing Counsel for the Plaintiffs and the 1<sup>st</sup> Defendant it is ordered and directed that the 1<sup>st</sup> Defendant shall immediately surrender the original certificate relating to Property No. 199063/M to the 1<sup>st</sup> Plaintiff for purposes of subdividing Property No. 199063/M and transferring a subdivision thereof to the 1<sup>st</sup> Plaintiff as acknowledged under clause 7 of the partial consent judgment herein.**

**And it is further ordered and directed that the Registrar of the High Court for Zambia shall execute all the documents required to complete the subdivision of Property No.199063/M and transfer of subdivision thereof to the 1<sup>st</sup> Plaintiff as adjudged under clause 7 of the partial consent judgment herein.**

2.4 It is alleged that the Defendant and the two other alleged contemnors being directors of the first Defendant Company disobeyed the consent judgment and the vesting order.

2.6 An application for leave to issue contempt proceedings was granted by an *ex parte* order dated September 12, 2023. And it is this order which has given rise to the present application.

2.7 The grounds advanced in the summons for setting aside the order granting leave to commence committal proceedings are as stated here-below:

2.7.1 **1. That the Partial Consent Judgment date 17<sup>th</sup> February, 2023 was not personally served on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> alleged contemnors or the person against whom committal proceedings for contempt of court herein is sought, contrary to the provisions of Order 45 rule 7 of the of White Book.**

**2. That the vesting order dated 28<sup>th</sup> July 2023 was not personally served on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> alleged contemnors or the persons against whom committal proceedings for contempt of court herein is sought, contrary to the provisions of Order 45 rule 7 of the White Book.**

**3. That the vesting order dated 28<sup>th</sup> July 2023 ordered and directed to the 1<sup>st</sup> alleged contemnor to surrender the original certificate of title relating to a wrong Property No. 199063/M and not Property No. 19063/M referred to in paragraph 7 of the Partial Consent Judgment.**

**4. The Partial Consent Judgment dated 17<sup>th</sup> February 2023 was not endorsed with a penal notice as required by Order 45 rule 7 (4) of the Rules of the Supreme Court 1965 (1999 Edition) RSC.**

**5. That paragraph 7 of the Partial Consent Judgment dated 17<sup>th</sup> February 2023 did not expressly specify the period or duration within which the 1<sup>st</sup> alleged contemnor was required to**

***subdivide and transfer a subdivision of Property No. 19063/M to the 1<sup>st</sup> Plaintiff.***

***6. That the “notice of motion for an order for committal proceedings for contempt of Court”, the statement in support of ex parte summons for leave to commence committal proceedings for contempt of court were not personally served on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> alleged contemnors contrary to the provisions of Order 52 rule 3 (3) of the White Book.***

***7. That the affidavit verifying facts of the statement in support of ex parte summons for leave to commence committal proceedings for contempt of court or the application for leave to commence committal proceedings for contempt of court do not show or reveal any “mens rea” or an “actus reus” on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> alleged contemnors relating to the alleged disobedience of the subject Partial Consent Judgment and vesting order.***

### **3.0 THE PARTIES’ AFFIDAVIT EVIDENCE**

3.1 An affidavit in support was deposed to by Steven Bwalya, the advocate for the alleged contemnors. He stated that the consent judgment did not contain a penal notice, and was not personally served on the alleged contemnors. However, he admitted that the consent judgment was served on the contemnors’ advocates.

3.2 And as regards the vesting order, he acknowledged that the first Defendant (Albatross Mining Limited) was ordered to surrender the certificate of title, but relating to a wrong property described as Property No. “199063/M” instead of Property No. “19063/M” indicated in the partial consent judgment.

- 3.3 He added that the vesting order was not personally served on the alleged contemnors except on their advocates. He also stated that the notice of motion for an order for committal proceedings for contempt of court was also not personally served on the alleged contemnors.
- 3.4 An affidavit in opposition was deposed to by Ali Ezzeddine, a Director in the Plaintiff Company. The affidavit in part contains what may be termed legal arguments which for now I will reserve for possible summary in the proceeding paragraphs dedicated to the parties' arguments.
- 3.6 He deposed that the partial consent judgment was served on the alleged contemnors' advocates as enjoined by law governing civil contempt proceedings. According to him, there was no requirement to effect personal service on the contemnors. He added that personal service was effected on one of the contemnors who at the material time was within the jurisdiction namely, Tian Baoqi. A letter of service was exhibited marked "AE1".
- 3.7 And in response to the misidentification of property in the vesting order, it was stated that the letter of service effected on the contemnors' advocates instead captured the correct property number.

#### **4.0 ARGUMENTS**

- 4.1 In respect of personal service of the partial consent judgment and /or the vesting order, it was argued that there was no personal service effected on the alleged contemnors. And that

as the result of the aforesaid failure, the Plaintiffs remised to meet the threshold stipulated by procedural law. Order 45 rule 7(2) (a) and (3) (a) of the RSC was cited, which provides:

4.1.1 **7. (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.**

**(3) Subject to the aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1) (b) (ii) or (iii) unless –**

**(a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of sequestration or against whom an order of committal is sought.**

4.2 Recourse was also had to the case of **Hussein Versi and Another v Airsea Clearing & Forwarding Limited and Another**<sup>1</sup> where our Court of Appeal had this to say:

4.2.1 **It is trite that the provisions of Order 45 rule (5) 1 RSC must be read together with rule 7. Enforcement cannot be obtained unless a copy of the order is served personally on the person in default. As regards an order requiring a body corporate to do an act, it shall not be enforced unless a copy of the order has been personally served on the officers against whom an order of committal is sought and served before.**

4.3 Further reference was made to **Halsbury's Laws of England, 4<sup>th</sup> Edition Re-issue, Vol 9 (1)** at paragraph 470, where the learned authors submit as follows:

- 4.3.1 ***Personal service of an order upon an officer of a company must be proved before he can be committed for disobedience to an order against the company.***
- 4.4 And in respect of service of process relating to contempt of court proceedings, it was argued that the same was not personally served on the alleged contemnors as required by Order 52 rule 3(3) of the RSC, which provides:
- 4.4.1 ***Subject to paragraph (4) of the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2 must be served personally on the person sought to be committed.***
- 4.6 It was contended that the failure by the Plaintiffs to abide by the provisions of Order 52 rule 3(3) RSC rendered the committal application irregular.
- 4.7 And in respect of the vesting order dated July 28, 2023 it was noted that, whereas the first Defendant was directed to surrender the original certificate of title relating to Property No. 199063/M, the actual and proper identity of the property in issue was Property No. 19063/M. It was thus argued that since the vesting order referred to a wrong property, the alleged contemnors herein cannot be held to disobey the said order.
- 4.8 It was further contended that, that the committal proceedings were defective because, the partial consent judgment sought to be enforced was not endorsed with a penal notice as required by Order 45 rule 7 (4) of the RSC. Order 45 rule 7(4) RSC provides:

4.8.1 ***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 contempt of court punishable by imprisonment (or in the case of an order requiring a body corporate to do or abstain from doing and punishable by sequestration of assets of a body corporate and punishable by imprisonment of any individual responsible.***

4.9 And the case of **Flame Promotions & Procurement Limited and Joe's Earthworks & Mining Limited**<sup>2</sup> was referred to, wherein I.Z. Mbewe J., had this to say:

4.9.1 ***It is my considered view that Order 45 rule 7(4) 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 his case, I am of the settled mind that the Consent Order does not comply with the provisions of Order 45 rule 7(4) of the Rules of the Supreme Court, 1999 Edition. This preliminary issue succeeds.***

4.10 It was observed that the partial consent judgment did not expressly specify the period or duration within which the first Defendant was required to subdivide and transfer a subdivision of Property No. 19063/M to the 1<sup>st</sup> Plaintiff. And that the lack of this direction renders the sanction for the alleged disobedience irregular. Once again, the case of **Flame Promotions & Procurement Limited** (supra) was relied on wherein Mbewe J., went on to say:

4.10.1 ***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 Defendants has no doubt in their minds whatsoever as to exactly what it is that is required of them by the Consent 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 the time are necessary where a failure may lead to penal consequences being imposed by the Court.... in the case in casu, the Consent Order indicates that 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 within which the actions shall be undertaken. It is my considered view that Order 45 of the Rules of the Supreme Court, 1999 Edition is couched in mandatory terms and the court has no power to make an Order to set or put matters right or straight.***

4.11 In concluding his arguments, counsel argued that, granted the rules governing committal proceedings for contempt of Court had draconian implications; rules governing the same must be strictly adhered to. The case of ***Beatrice Nyambe v Barclays Bank Zambia PLC***<sup>3</sup> was sought, wherein it was held:

4.11.1 ***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 consequence 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.***

4.12 In the light of the foregoing, I was urged to set aside the *ex parte* order for leave to commence committal proceedings for contempt of court and the notice of motion for irregularity.

4.13 The Plaintiffs' opposition was twofold, firstly relating to arguments stating that the application was procedurally incompetent. The desirability to take this approach was anchored on the holding in the case of **The Law Association of Zambia v The President of the Republic of Zambia & Others<sup>4</sup>**, where the Supreme held:

4.13.1 ***Our brief guidance to both parties is that this Court frowns upon the practice of raising preliminary issues which have a tendency of unnecessarily delaying proceedings...litigants are therefore encouraged to incorporate their preliminary issues in the opposing affidavit and skeleton arguments so as to minimize the possibility of multiple hearings.***

4.14 And citing Order 2 rule 2(1) RSC, relied on by the contemnors, it was alleged that the contemnors waived their rights to take out this application, because they took steps to defend the case on the merits, given the averments in paragraphs 16, 17 and 18 of the affidavit in support. For the avoidance of doubt, Order 2 rule 2(1) RSC provides:

4.14.1 ***An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh steps after becoming aware of the irregularity.***

4.15 The case of **Oscar Chinyanta and 31 Others v Alasia Building Construction Limited and tap Zambia Limited**<sup>5</sup> was vouched, where it was held:

4.15.1 ***We can safely say that the applicant waived their right to object when they took fresh steps in the action after becoming aware of the irregularities. It was argued that in casu, the respondent waived their rights to object on a procedural issue and cannot do so as at this stage in the proceedings.***

4.16 In terms of what constitutes “fresh steps” paragraph 2/2/4 of the **White Book** was relied on which provides:

4.16.1 ***A “fresh step” for the purpose of this rule is one sufficient to constitute a waiver of the irregularity... Thus steps taken, with the knowledge of an irregularity, either with a view to defending the case on the merits...will waive the irregularities in the institution...***

4.17 It was also argued that the supporting affidavit was irregular because, it was deposed to by the advocate to the alleged contemnors. In the case of **Mathias Zulu & Others v Inmobia Mobile Technology**<sup>6</sup>, was cited by the Plaintiffs, where it was held:

4.17.1 ***The Court did not ban the swearing of affidavits by Counsel; it however stated that Counsel should not swear affidavits in contentious matters.***

4.18 Reference was also had to the case of **M’Poyou and Another, In re**<sup>7</sup> where it was held:

4.18.1 ***It is inadvisable for an advocate to swear an affidavit deposing as to facts on behalf of a client in contentious matters, especially where***

***there is a risk that the facts deposed to by the advocate could be disputed by the other side.***

4.19 It was argued that the application was an abuse of the court process.

4.20 The second limb of the opposition was on the merits of the application. With reference to cited authorities in supposed support, the Plaintiffs' Counsel summarized the opposition as follows:

- 4.20.1
- (i) the duration within which the subdivisions were to be undertaken and the transfer thereof were clearly spelt out in the vesting order which is partly the subject of the contempt;***
  - (ii) the partial consent judgment is regular and need not to be endorsed with penal notice;***
  - (iii) the consent judgment was duly served on the Advocates of the alleged contemnors;***
  - (iv) the Plaintiffs perfected the consent judgment by way of vesting order which said vesting order references the correct property number in issue;***
  - (v) the notice of motion for an order for committal proceedings for contempt of court, the statement in support and affidavit verifying facts were duly served; and***
  - (vi) the alleged contemnors cannot interrogate the intention of the Plaintiffs as the purported ingredients alleged not to have been satisfied, are not relevant in civil contempt proceedings.***

4.21 I wish to pause here, and say, granted the approach I have taken in my determination, the above summary is sufficient.

4.22 In reply, the Defendant's Counsel argued that the right to raise the application was not waived, because the contemnors took

no fresh steps in terms of legal steps or making a formal application.

4.23 It was argued that there was no formal proscription preventing the contemnors' counsel from attesting to an affidavit in support. According to Counsel, the pronouncements made in the cases cited by the Plaintiffs' counsel were meant to discourage the conduct of counsel swearing to an affidavit on behalf of a client. It was argued that the "discouragement" is without sanctions.

## **5.0 DETERMINATION**

5.1 I have carefully considered the relevant facts and the arguments for and against the application. The Plaintiffs' opposition based on the application's want of propriety deserves primary determination, because the determination thereof has potential to summarily abate the application.

5.2 Firstly, I don't think the alleged contemnors waived the right to set in motion this application as envisaged by Order 2 rule 2(1) RSC or the commentaries thereof recorded under paragraph 2/2/4 of the **White Book**.

5.3 The alleged averments in the supporting affidavit seemingly going beyond the scope of the opposition, and touching on the merits of defending or disapproving the application do not constitute fresh steps within the tenor of fresh steps envisaged under Order 2 rule 2(1) RSC, but are superfluous responses. In fact, it is said: steps taken to assert an objection cannot amount to a waiver (see paragraph 2/2/4 of the White Book).

- 5.4 Second is the issue as regard the propriety or want thereof, of the affidavit deposed to by the alleged contemnors' advocate. It is obvious that the application is highly contentious, especially as regards whether service of the partial consent judgment and the contempt of court process was personally served on the contemnors. Whereas the contemnors through counsel purport to allege that there was no personal service, the Plaintiffs rejoined by stating that there was personal service, especially in the case of the alleged third contemnor, Tian Baoqi, believed to have been within jurisdiction at the material time.
- 5.5 Therefore, it was materially desirable under the circumstances of this case, that the affidavit in support of the application should not have been deposed to by the alleged contemnors' advocate. This requires strict enforcement, given the nature of the proceedings herein, touching on the liberties of individuals, who stand accused of contempt of court.
- 5.6 I think it is perilous for the Defendant's counsel to suggest that the disapproval consistently exude in our courts of counsel swearing to an affidavit in contentious matter is without sanction. The Court cannot *play possum* to such conduct, especially, if it is apparently unjustified or blatantly used to cover up unreachable clients, whereby counsel assumes the client's stead to cure the void.
- 5.7 Assuming the supporting affidavit was allowed to stand, and it turns out that one of the alleged contemnors was in fact personally served as claimed by the Plaintiffs, contrary to counsel's statement, the ramification on the independence of

the legal profession and the purity of the administration of justice may attract public mockery. And this forms the bedrock for the prohibition that counsel should not swear affidavits in contentious matters.

5.8 The argument of hearing matters on the merit cannot solely be used as a matter of right to persuade the Court to ignore the irregularity as regards the supporting affidavit deposed to by counsel instead of the contemnors. In **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture<sup>8</sup>** the Supreme Court was lucid in its guidance:

5.8.1 ***Matters should as much as possible be determined on their merits rather than be disposed of on technical or procedural points. Yet, justice also requires that this court, indeed all courts, must never provide succor 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 doing 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 seek to aid one side, it unfairly harms the innocent party who strives to abide by the rules. It is in the even-handed and dispassionate application of the rules that courts can give assurance that there is a clear method in which things should be done so that outcomes can be anticipated with a measure of confidence, certainty and clarity. This is regardless of the significance of the issues involved or questions to be tried.***

5.9 The affidavit in support of the application having been found wanting, this Court in the exercise of its inherent supervisory role over litigation and its officers (advocates); the supporting affidavit is incompetent to support the application. Therefore, the application is deemed to be without the supporting affidavit, and amenable to dismissal on that score. The application is thus at an end.

**6.0 CONCLUSION**

6.1 In the light of the foregoing, the application to set aside leave to issue committal proceedings is dismissed with costs for procedural impropriety.

6.3 Leave to appeal is granted.

**DATED THIS 16<sup>TH</sup> DAY OF APRIL, 2025**

  
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**THE HON. MR. JUSTICE CHARLES ZULU**