

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
[Civil Jurisdiction]

0626
2012/HP/0627

BETWEEN:

Michael Chilufya Sata



Plaintiff

v

Hakainde Hichilema

1st Defendant

Lloyd Himaambo (T/a Zambian Watchdog Newspapers)

2nd Defendant

Richard Sakala (T/a Daily Nation Newspapers)

3rd Defendant

CORAM:

Honorable Mr. Justice Mubanga Kondolo, SC

FOR THE PETITIONER:

Messrs Ellis & Company

FOR THE 1st RESPONDENT:

Messrs Central Chambers & Messrs Muleza & Company

FOR THE 2nd RESPONDENT:

Mr. M. Muchende – Dindi & Co.

R U L I N G

LIST OF AUTHORITIES

LEGISLATION & PUBLICATIONS

1. The Constitution, Chapter 1, Laws of Zambia.
2. The High Court Act, Chapter 27, Laws Of Zambia.
3. The Supreme Court Practice (White Book), 1999 Edition.
4. Protection of Fundamental Rights Rules, Statutory Instrument No. 156 of 1969.

CASES

1. **Attorney General v Law Association of Zambia (2008) ZR 21.**
2. **New Plast Industries v Commissioner of Lands.**
3. **Stanley Mwambazi v Morester Farms Limited (1977) ZR, 108 (S.C.).**
4. **Michael Chilufya Sata v Robert Amsterdam & Richard Sakala (T/a Daily Nation Newspapers) 2012/HP/0627 (Unreported).**

This is a matter in which the President of the Republic of Zambia has commenced legal proceedings against the Respondents and by an amended Writ of Summons he seeks the following relief;

1. ***General and exemplary damages for defamation of character.***
2. ***Interest thereon Interest thereon at current Commercial Bank lending rates.***
3. ***An injunctions restraining the Defendants and each of them, whether by themselves, their servants, or agents or otherwise, from further publishing or causing to be published the said or similar words defamatory of the Plaintiff.***
4. ***Such further or other relief as the the Court shall deem fit.***
5. ***Costs.***

This action was the subject of several interlocutory applications and several adjournments for various reasons. For the sake of clarity, this ruling is with respect to the following applications filed by the 1st Defendant;

1. ***"Summons To Stay Proceedings (Article 11 of The Constitution)" to stay proceedings "until further order or until the Plaintiff waived his immunity in***

respect of this action and any counter claim therein and that the costs of this application be borne by the Plaintiff."

2. *"Summons To Stay Proceedings Pending Application For Security For costs (Order 23 RSC and Article 11 of the Constitution of Zambia)" to stay proceedings, "until sufficient security for costs is provided by the Plaintiff in the sum of One Billion Kwacha (K1,000,000,000) or such other sum as the court may deem fit and that costs of this application be borne by the Plaintiff".*
3. *"Summons To Set Aside Writ of Summons and statement of Claim for Irregularity (Article 11 of The constitution of Zambia and Order 12 and 18 RSC)" for "the writ of summons and statement of claim herein to be set aside for irregularity and that costs of this application be borne by the Plaintiff"*

On account of the numerous adjournments in this matter, the court ordered that it would deliver its ruling on the basis of written arguments by the parties who both obliged accordingly. The Plaintiff filed its arguments in opposition to the applications before receiving the Defendants arguments in support.

In opposing the Defendants applications, learned counsel for the Plaintiff argued that the Applications in so far as they sought to enforce **Article 11 of the Constitution**¹ ought to have been brought by Petition and not by Summons as provided by **Article 28 of the Constitution**² as read together with **Rule 2 of the Protection of Fundamental Rights Rules**³. Reference was made to the Supreme Court decision in **Attorney General v Law Association of Zambia**⁴ where it was held as follows;

¹ Article 1, The Constitution, Chapter 1, Laws of Zambia

² Article 28(1), The Constitution, Chapter 1, Laws of Zambia

³ Rule 2 of the Protection of Fundamental Rights Rules, Statutory Instrument No. 156 of 1969

⁴ Attorney General v Law Association of Zambia (2008) ZR 21

“By virtue of Rule 2 of the Protection of Fundamental Right Rules, 1969, an application under Article 28(1) of the Constitution should be by way of petition.”

Counsel for the Plaintiff further argued that the notion that the president can use his immunity to frustrate the proceedings is without merit because he is the Plaintiff and he bears the burden of proof to succeed in his claim.

Learned counsel for the Plaintiff further submitted that **Article 43 of the Constitution**⁵ provides the president with blanket immunity against civil and criminal proceedings and a counter claim and/or purported waiver of the immunity conferred by **Article 43(1) and (3) of the Constitution**⁶ would be ultra vires and therefore null and void for illegality. It was argued that the language employed in **Article 43** is mandatory and prohibitive as follows;

“Civil proceedings shall not be instituted or continued against the person holding the office of President or performing the functions of that office in respect of which relief is claimed against him in respect of anything done or omitted to be done in his private capacity.”

With respect to the application to stay proceedings pending an application for costs, counsel for the Plaintiff submitted that **Order 23 RSC**⁷ employed by the 1st Defendant did not cover the circumstances in casu. They argued that the court could only consider such an application if the circumstances were captured within paragraphs **(a), (b), (c) and/or (d) of Order 23(1), RSC**⁸. It was further argued that the 1st Defendants affidavit in support of the application does not disclose any circumstance to justify the making of an order in his favor.

⁵ Article 4, The Constitution, Chapter 1, Laws of Zambia

⁶ Article 43(1) and (3), The Constitution, Chapter 1, Laws of Zambia

⁷ Order 23, The Supreme Court Practice (White Book), 1999 Edition

⁸ Order 23(1) (a), (b), (c) and/or (d), The Supreme Court Practice (White Book), 1999 Edition

It was further pointed out that the application was clearly one for the enforcement of Article 11 of the Constitution and was thereby incompetently before the court as it should have been brought by petition and not by summons as had been done.

Learned Counsel for the 1st Defendants likewise, filed written argument which opened by laying the foundation that the 1st Defendants applications were necessitated by the fact that the Plaintiff is the Republican President and thus protected from civil suits. In the 1st Defendants view, if the President sues a citizen and yet maintains his immunity, it provides the President with an unfair and illegal disadvantage over the citizen.

They argued that the immunity will prevent the citizen from filing a counter claim against the President thereby disadvantaging the citizen. Learned counsel for the 1st Defendant submitted that the law provides that both parties must present their arguments equally and they cited the courts role in ensuring this being as provided in **section 9 (2) of the High Court Act**⁹ (sic) which states as follows;

“Subject to any express statutory provision to the contrary, all the Judges shall have and may exercise, in all respects, equal power, authority and jurisdiction, and, subject as aforesaid, any Judge may exercise all or any part of the jurisdiction by this Act or otherwise vested in the Court, and, for such purpose, shall be and form a Court.”

They also argued that the 1st Defendants inability to file a counter claim would prevent all triable issues being brought before the court and thereby offend the holding in the case of **Stanley Mwambazi v Morester Farms Limited**¹⁰ in which it was held that, ***“It is the practice in dealing with bona fide interlocutory applications for courts to allow all triable issues to come to trial.”***

⁹ section 9 (2), High Court Act, Chapter 27, Laws Of Zambia

¹⁰ Stanley Mwambazi v Morester Farms Limited (1977) ZR, 108 (S.C.)

Counsel for the 1st Defendant pointed to **Order 3 Rule 2 HCR**¹¹ encouraging the court to exercise its inherent authority as provided by the order that the court or a judge can, in an interlocutory application, *“Make any order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”* It was argued that this court has the power to make an order to correct the imbalance caused by presidential immunity in this matter.

Learned counsel for the 1st Defendant conceded that the law was clear that actions which sought to protect or enforce the fundamental rights provided under **Part 3 of the constitution, from Article 11 to Article 26**¹², must be commenced by Petition.

Learned counsel for the 1st Defendant however submitted that the 1st Defendant was not arguing that his rights under the constitution had been violated but rather that, *“both him and the Plaintiff are protected under Article 11*¹³. *However, with the immunity offered to the Plaintiff under Article 43*¹⁴, *this removes the Plaintiff from being in the same league with the Defendant. As such, in order to feel protected by this Court it is only necessary that an appropriate order be made.”*

It was further argued that the requirement for a petition under **Article 28**¹⁵ was only in relation to commencement of an action. In casu, the 1st Defendant was not commencing a constitutional action but had merely made an interlocutory application necessitated by the imbalance in the protection of the law between the Plaintiff and the 1st Defendant.

With regards the application for security of costs learned counsel for the 1st Defendant submitted that **Order 23 RSC**¹⁶ is not exhaustive but merely demonstrative and the court has wide discretion to make an order for costs even with respect to parties residing within the jurisdiction and that **Order 23 RSC**¹⁷ did not prevent the court from exercising its power

¹¹ Order 3 Rule 2, High Court Rules, High Court Act, Chapter 27, Laws of Zambia

¹² Part III, Articles 11 to 26, The Constitution, Chapter 1, Laws of Zambia

¹³ The Constitution, Chapter 1, Laws of Zambia

¹⁴ Ibid

¹⁵ Article 28, The Constitution, Chapter 1, Laws of Zambia

¹⁶ Order 23, The Supreme Court Practice (White Book), 1999 Edition

¹⁷ Ibid

provided by **Order 3 HCR**¹⁸ to make orders for doing justice. It was also argued that in any event, **Order 40 Rules 7 and 8 HCR**¹⁹ provided for the payment of security for costs.

Under the heading, "**Setting Aside Writ for Irregularity**", learned counsel for the 1st Defendant repeated his argument on the inequality between the parties created by the Plaintiffs immunity.

Learned counsel for the 1st Defendant disagreed that it was ultra vires for the Plaintiff to waive his immunity arguing that **Article 43**²⁰ was silent on the matter but, in any event, the 1st Defendant was not contending that the Plaintiff should waive his immunity. He also submitted that the 1st Defendants application for a stay of proceedings was not only to allow him to raise a counterclaim against the Plaintiff but get an assurance that the parties would be placed on a level playing field.

Learned counsel for the Plaintiff filed additional arguments in response to the 1st Defendants submissions arguing, inter alia, that the 1st Defendant had not pointed out any irregularity with the writ of summons. It was further submitted that it was clear that the 1st Defendants court action was indeed anchored on **Article 11 of the Constitution**²¹ and his arguments constituted an allegation that the provisions of **Article 11 of the Constitution** have been or are likely to be contravened in relation to him.

I have considered the arguments of the parties and would wish to state that I quite recently delivered a judgment in a matter very similar to this particular case. The Plaintiff was the same and the 3rd Defendant herein was the 2nd Defendant in that matter; **Michael Chilufya Sata v Robert Amsterdam & Richard Sakala (T/a Daily Nation Newspapers)**²².

I shall begin by addressing the issue of the procedure employed in raising these interlocutory applications. Counsel for the 1st Defendant conceded that the procedure for enforcing

¹⁸ Order 3 Rule 2, The High court Rules, The High Court Act, Chapter 27, Laws Of Zambia

¹⁹ Order 40 Rules 7 and 8, The High court Rules, The High Court Act, Chapter 27, Laws Of Zambia

²⁰ Article 43, The Constitution, Chapter 1, Laws of Zambia

²¹ Article 11, The Constitution, Chapter 1, Laws of Zambia

²² Michael Chilufya Sata v Robert Amsterdam & Richard Sakala (T/a Daily Nation Newspapers) 2012/HP/0627 (Unreported)

constitutional rights is clear and that such matters must be commenced by petition. He however argued that, in casu, the 1st Defendant was not commencing an action but merely making an interlocutory application necessitated by the imbalance in the protection of the law between the Plaintiff and the 1st Defendant. He added that in any event the procedural requirement was limited to the commencement of an action whilst these applications were interlocutory.

It might be helpful to reproduce the exact words submitted by learned counsel for the 1st Defendant;

“My Lord, the 1st Defendant is not arguing that his rights under the constitution have been violated, but rather his argument before this court is that both him and the Plaintiff are protected under Article 11²³. However, with the immunity offered to the Plaintiff under Article 43²⁴, this removes the Plaintiff from being in the same league with the Defendant. As such, in order to feel protected by this Court it is only necessary that an appropriate order be made.

As rightly so argued by the Plaintiff in its skeleton arguments that the proper way of commencing an action when invoking the fundamental rights under the Constitution must be by way of petition under Article 28 of the Constitution. To the contrary, Article 28 provides for the mode of commencement of an action, whereas in this case before you it's merely an interlocutory application. Such an application My Lord is and can only be brought by way of summons plus affidavit in support, and not by way of petition as argued by the Plaintiff as the 1st Defendant is not commencing a fresh action at all.

In terms of Rules 2, of Statutory Instrument No. 156 of 1996, which provides to the effect that “any application to the High court for the enforcement of Article 11 – 26 for the Constitution ought to be made by petition.

²³ The Constitution, Chapter 1, Laws of Zambia

²⁴ *ibid*

..... *Article 11 is only referred to as a reminder of the right to protection under the Constitution; instead the application is premised on the Courts inherent jurisdiction to make the necessary order to do justice as provided under Order 3 rule 2 HCR.”*

Having considered learned counsel for the 1st Defendants submission, and bearing in mind that the headings of all three interlocutory applications clearly state that they are in relation to **Article 11 of the Constitution**, I find it hard to appreciate how else his client’s desire and intent can be interpreted, other than that the 1st Defendant seeks to protect and enforce his rights as provided by Article 11 of the Constitution.

The argument as I see it, is that the 1st Defendant feels that the immunity provided to the Plaintiff by **Article 43 of the Constitution**, as Republican President is infringing on his (the 1st Defendants) fundamental rights as provided by **Article 11** and he wants the court to exercise its inherent power as provided by **Order 3 rule 2 HCR²⁵** to make an appropriate order that will do justice. In this same vein, learned counsel for the 1st Defendant referred to **section 9 (2) of the High Court Act**, which as correctly observed by counsel for the Plaintiff must have been a slip because the reproduced text belongs to **section 4 HCR²⁶**.

The court has an obligation to preserve the established practice and procedure and in fact has little, if at all any latitude, to twist and/or massage procedural requirements. In exercising its inherent authority to make the necessary orders to do justice, the court, cannot not veer from prescribed procedure where the procedure does not prejudice any of the parties. I must also hasten to add that **section 4 HCR** has absolutely no relevance to this matter.

Interlocutory applications arising from a matter commenced by writ are normally by summons but as was said in the case of **New Plast Industries v Commissioner of Lands²⁷** procedural requirements are sometimes specified by statute. In this particular instance learned counsel for the Plaintiff has himself quoted the relevant legislation relating to this issue as *Rule 2, of*

²⁵ Order 3 rule 2, The High Court Rules, The High Court Act, Chapter 27, Laws Of Zambia

²⁶ section 4, The High Court Rules, The High Court Act, Chapter 27, Laws Of Zambia

²⁷ *New Plast Industries v Commissioner of Lands*

*Statutory Instrument No. 156 of 1969*²⁸ but he argues that it is restricted to the commencement of actions and not to interlocutory applications. He quoted the Statutory Instrument as follows;

“any application to the High court for the enforcement of Article 11 – 26 for the Constitution ought to be made by petition.”

There is no way of escaping the requirements of **Article 28(1)**²⁹ and **Statutory Instrument No. 156 of 1969**³⁰. It certainly does not mean that every time reference is made to **Part 3 of the Constitution** one has to file a petition but when one seeks to enforce those rights, there is no option but to file a petition for that purpose. There is no provision for seeking the enforcement of the rights contained in **Articles 11 to Article 26** by way of interlocutory summons.

The 1st Defendants interlocutory applications are borne of the process commenced by the Plaintiff and would normally have been made by Summons, as has been done. However, it is abundantly clear that the 1st Defendant seeks to enforce his rights under **Article 11**. This issues raised by the 1st Defendant are constitutional in nature and seek to address the impact of **Article 43** on his rights as guaranteed by **Article 11**. It is therefore quite clear that the 1st Defendant employed an incorrect procedure.

The constitution is silent on the question of the president commencing private litigation against citizens vis-à-vis the impact of his immunity on such citizens. This lacuna creates the potential for controversy and requires interpretation. In my judgment in the case of **Michael Chilufya Sata v Robert Amsterdam & Richard Sakala (T/a Daily Nation Newspapers)**³¹ I said as follows;

“Constitutional law is dynamic and without doubt influenced by changing perceptions of individuals and governments as they are impacted by changes to the cultural, economic, social and political environment. Constitutional interpretation is also influenced by international law as demonstrated by

²⁸ Rule 2, of Statutory Instrument No. 156 of 1996

²⁹ Article 28(1), The Constitution, Chapter 1, Laws of Zambia

³⁰ Protection of Fundamental Rights Rules, Statutory Instrument No. 156 of 1969

³¹ *Michael Chilufya Sata v Robert Amsterdam & Richard Sakala (T/a Daily Nation Newspapers) 2012/HP/0627 (Unreported)*

nations ratifying international instruments and conventions that impact on their domestic laws.”

In casu, all three interlocutory applications are borne of the constitutional issues raised by the 1st Defendant. The applications are therefore dismissed on account of the wrong procedure having been employed.

However, in my view the issues are cardinal and ought to be adjudicated and the 1st Defendant is granted leave to file a petition on the same facts.

Because serious constitutional issues have been raised, each party shall bear its own costs

Dated thisday of June, 2014.



**M.M KONDOLLO, SC
JUDGE**