

BENNIE R. W. MWINGA v HONOURABLE GREY ZULU AND HONOURABLE CLEMENT MWANASHIKU AND HONOURABLE FELIX LUPUTA AND DANNIEL MAPIKI SIMOLOKA AND THE ATTORNEY GENERAL (1990) S.J. (S.C.)

HIGH COURT
MR. COMMISSIONER M.E MWABA
(1990/HP/1690)

Flynote

Constitution of Zambia - Sections 66, 68 and 77 of - Applicant's membership to UNIP - Disciplinary rules of UNIP.

Injunction - Pursuant to Order 30 rule 11(b) and (c) of the High Court Act

Headnote

The applicant was a Member of Parliament and of the ruling United National Independence Party under one-party rule. He became a target for harassment and threats by his fellow UNIP members after he publicly debated the advantages of a multi-party over a single-party system. He sought an injunction preventing further harassment from his party counterparts. One of the issues raised was whether the plaintiff was entitled to relief at all.

Held:

- (i) The Plaintiff had a right to relief.
- (ii) The plaintiff would not be adequately compensated for his loss as a member of UNIP and parliament if he were denied an injunction.

Cases referred to:

1. Hollywood Silver Fox Farm Limited v Emmett 1936 2 K.B. 468
2. Turnkey Properties v Lusaka West Development Company Limited and Zambia State Insurance Corporation Limited 1984 Z.R. 85
3. Harton Ndove v National Education Company of Zambia Limited 1980 Z.R. 185
4. Shell and B.P. Zambia Limited v Conidaris and Others 1975 Z.R. 174
5. Doctor J W Billingsley v A Mundi 1982 Z.R 11

Legislation referred to:

1. Constitution of Zambia Cap1 of the Laws of Zambia
2. UNIP Constitution
3. High Court Rules Cap 50 of the Laws of Zambia
4. Referendum Act and Regulations Cap 20 of the Laws of Zambia
5. Halsbury's Statutes of England 3rd Ed. Vol. 17 pages 809 - 811 at page 810 paragraph 3

For Plaintiff: Mr. K.Bwalya of Messrs Chifumu Banda and Associates

For the 1st, 2nd and 3rd Defendants: Mrs. M. G. B. Chigaga, Senior Legal Officer, United National Independence Party (UNIP)

Judgment

M.E MWABA,C.:

The Plaintiff 's application is for an interim injunction pending the determination of the substantive issues by the court.

The 1st, 2nd, 3rd and 4th Defendants being the Secretary-General , the Chairman of Appointments and Disciplinary Committee, the Member of Central Committee for Southern Province and Chairman of the Provincial Disciplinary Committee of UNIP And Governor for Mazabuka District respectively, who are

sued on behalf of themselves as members and on behalf of all other members of the United National Independence Party (UNIP)
.E MWABA,C.:

The application is supported by an affidavit sworn by the Plaintiff and dated 25th October, 1990. The affidavit reads in part as follows:

4. That I am the current duly elected Member of Parliament for the Mazabuka Constituency of the Republic of Zambia and I am a fully paid up member of UNIP which is the sole ruling Political Party in the country.
5. That by virtue of the Referendum Act Cap 20 of the Laws of Zambia the President put the following question to the Nation:-

"DO YOU SUPPORT THE RE-INTRODUCTION OF THE MULTI-PARTY SYSTEM OF POLITICS IN ZAMBIA?"
6. That by virtue of the Referendum Regulations of 1990 under Statutory Instrument No. 97 of 1990 I, as a Zambian Citizen, was allowed and required to answer the above question by debating the same in privacy and in public.
7. That the Referendum Act or the Regulations made thereunder did not make it a matter of national or partisan duty for members of UNIP to support the retention of the One Party Political system that Zambia has been operating for the last seventeen years.
8. That no sooner I appeared in public to debate the advantage and disadvantages of Zambia's political system vis-à-vis multi-party system of politics was I made by the Defendants and their agents and servants subject to threats of expulsion from membership of UNIP and Parliament, and have since been continuously prevented from attending any of the UNIP meetings at National Council and Provincial and Constituency levels contrary to then existing Regulations 63 (3) (4) (5) and (6) of the Referendum Regulations.

THE PARTICULARS OF INCIDENTS were as follows:

- (a) On 25th September, 1990 I was forcibly thrown out of the 25th UNIP National Council Meeting
- (b) On 8th October, 1990 I was again forcibly thrown out of the Southern Province Provincial Council Meeting upon the instructions of the 3rd Defendant herein
- (c) On 11th October 1990 I was once again forcibly thrown out of the Mazabuka District Council Meeting on the instructions of the 4th Defendant.

In addition to the said Affidavit Mr. K. F. Bwalya an advocate for the Plaintiff also made submissions supporting the contents of the Affidavit and referred the court to the case of Hollywood Silver Farm Limited vs Emmett (1) in which a Plaintiff Company carried on the business of breeding silver foxes on their land. During the breeding season the vixens are very nervous, and liable if disturbed either to refuse to breed, to miscarry, or to kill the young. The defendant, as adjoining landowner maliciously caused his son to discharge guns on his own land as near as possible to the breeding pens for the purpose of injuring the Plaintiffs by interfering with the breeding of foxes.

The court found that the Plaintiffs were entitled to an injunction and damages, although the firing took place on the Defendant's own land over which he was entitled to shoot.

Relying on the decision stated above, Mr. Bwalya urged this court to grant an injunction in order to refrain the defendants from harassing the Plaintiff by preventing him from attending Party meetings and that if the court does not grant an injunction the Plaintiff will eventually be stopped from participating in Parliamentary sessions which are currently taking place because if his client ceases to be a Member of UNIP, he would automatically lose his seat in Parliament according to the provision of UNIP Constitution and if that happens no amount of damages would adequately compensate the Plaintiff for such a loss.

On the other hand, Mrs. M.G. B. Chigaga, Senior Legal Officer, United National Independence Party submitted three affidavits in opposition. The first affidavit in opposition dated 5th November, 1990 sworn by Mr. Austin Silas Mweemba, Permanent Secretary, Southern Province and Secretary of the Southern Province Disciplinary Committee reads in part as

follows:

6. That on 4th October, 1990 the Provincial Disciplinary Committee considered allegations against the Plaintiff and Honourable Lumina who were alleged to have publicly denounced and disowned the Party and campaigned against it during the Multi-Party debates in contravention of Article 18 (1) and (e) of UNIP Constitution.
7. That after consideration of the said allegations the Provincial Disciplinary Committee resolved that the Plaintiff and Honourable Lumina be charged for violating the said provisions of the UNIP Constitution referred to in paragraph 5 of my said Affidavit.

The second affidavit in opposition dated 2nd November 1990 was sworn by Honourable Daniel Mapiki Simoloka, District Governor for Mazabuka and Chairman of Mazabuka District Council. The affidavits reads:

9. That on the 11th October, 1990, there was a full Council Meeting held in the Council Chamber Mazabuka. While the said Council Meeting was in progress Councillor Webby Chiyaba raised a point of order asking the Chairman whether or not it was an order for the Plaintiff to be present at the Council Meeting in view of his contemptuous behaviour towards the Party.
10. That there was a near commotion in the Council Chamber as many other Councillors objected to the presence of Mr. Mwiinga. A motion was moved by Councillor H. M. Chiputa and seconded by Councillor D. Chindindindi that the meeting adjourns to resolve, the issue of the Plaintiff's present at the meeting."

The 3rd affidavit in opposition dated 5th November, 1990 was sworn by Honourable Clement Mwamba Mananshiku, Chairman of the Appointments and Disciplinary Committee of the Central Committee of the United National Independence Party.

The affidavit says:

- "6. That the 5th Extra-Ordinary National Council Meeting of the United National Independence Party accepted the recommendations by the Central Committee that a Referendum be held to decide the question whether or not the Multi-Party system of Government should be re-introduced. It was resolved that a Referendum should be held to decide this issue.
7. That it was resolved by the 5th Extra-Ordinary National Council Meeting that UNIP as a Party should campaign for the retention of the One Party System of Government.
8. That the Plaintiff is a member of the said United National Independence Party and is also a member of the National Council by virtue of Article 55 (1) (6) of the UNIP Constitution.
9. That under Article 54 (1) the National Council is the highest Policy making organ of the Party in between Party Congresses. The Plaintiff by virtue of being a member of UNIP is obliged by Article 18 (1) (b) (d) and (e) of the Party Constitution to abide by support and implement all decisions and projects proposed or adopted by the Party.
10. That the Party UNIP is entitled to discipline its own members who are in breach of the Party Constitution. That in fact disciplinary proceedings have been instituted against the Plaintiff's misconduct by the Southern Province Independence Disciplinary Committee as provided by the Party Constitution and therefore the Plaintiff as a member of UNIP is subject to the Party's Disciplinary code and procedures.
11. That if the Plaintiff did not agree or was not happy with the Party's decision and therefore felt that he could no longer identify himself with the Party, he had and continues to have the right to resign from UNIP. Having joined UNIP voluntarily he is at liberty to resign from UNIP if he finds himself at variance with the Party. Article 14 (1) (a) of the Party Constitution gives the applicant the right to resign if he so wishes."

In addition to the affidavits aforesaid, Mrs Chigaga, the advocate for the Defendants has made comprehensive submissions which the court will consider later.

I have fully addressed my mind to documents, affidavits as well as submissions by both advocates and upon consideration of the totality of the evidence before me I find following facts common cause and proved. That the Plaintiff is still a UNIP member and that on 25th September, 1990 he was forced to leave the 25th UNIP National Council Meeting, again on

8th October 1990 he was prevented from attending the Provincial Council Meeting in the Southern Province and on 11th October, 1990 he was removed from the District Council Meeting.

The position now is that there are various crucial issues raised by the learned advocate for the Defendants pertaining to the question as to whether this a proper case where an interlocutory interim injunction could be ordered or that the *ex parte* injunction which this court issued on 25th October, 1990 pending the hearing of this application be dissolved.

Firstly, the advocate for the defendants has raised a preliminary issue to the effect that the application which is before this court is misconceived and that the *ex parte* interim injunction granted to the Plaintiff should be discharged on the ground that there is no action concerned by a Writ, originating summons, counter-claim or third party notice, as the case may be. She referred the court to Order 29.1 (3) of the Supreme Court rules and Order 27 (1) of the High Court rules CAP 50 of the Laws of Zambia as well as to the case of *Turnkey Properties v Lusaka West Development Company Limited*, and *Zambia State Insurance Corporation Limited*, () in which the court held that an interlocutory injunction is appropriate for preservation or restoration of a particular situation pending trial. The case of *Harton Ndove v National Education Company of Zambia Limited* (3) was also quoted to support the argument that before an application for a interim injunction can be entertained, there must be an action pending before the courts.

I must state that the learned defence Counsel's submissions are perfectly correct except to mention that in the instant case there is an action pending before this court, the action was commenced by way of an originating summons seeking declaratory Orders of the Court regarding the provisions of the Referendum Act Cap 20 and Referendum Regulations made thereto as well as provisions of the UNIP Constitution and the Constitution of Zambia, respectively. However, the learned defence Counsel is not aware of this aspect because the documents may not have been served on their clients since the main application will be heard by another court. After the determination of this application the matter will be passed to such a Court to fix a date of hearing and once that is done the originating process will be served on the defendants accordingly.

I am reminded also that it is improper for a court hearing an interlocutory application to make comments which may have the effect of pre-empting the decision of the issues which are to be decided on the merits at the trial; this was pointed out in the case of *Doctor J W Billingsley v J A Mundi* (5). I take note of this. However, before concluding this matter I wish to deal with the last submissions by Mrs Chigaga relating to Halsbury's statutes of England (10) where the learned authors said:

"An interlocutory injunction will normally be granted only where the Party seeking it can show a strong *prima facie* case in support of his right and that he is likely to suffer substantial (i.e), "irreparable (") injury if an injunction is not granted and the court takes into consideration both the balance of convenience and the desirability of preserving the Status quo."

Mrs Chigaga has maintained that the Plaintiff has no right to relief and that he would not suffer irreparable damage if the court refuses to grant an injunction. She relies further on the case of *Shell and BP Zambia Limited v Conidaris and others* (4) where the court said:

"Irreparable injury means injury which is substantial and can never be equately remedied or atoned for damages."

I have carefully considered these submissions and I have, without commenting on the prospects of the substantive matters at the trial, arrived to the conclusion that the acts complained against the Plaintiff were induced by the coming into force of Referendum Act Cap. 20 of the Laws of Zambia and the Regulations made hereunder as well as the relevant provisions of UNIP Constitution of Zambia, respectively. The Plaintiff has shown that he had and still have a strong belief that the acts complained of are intravires the provisions of the said Laws and therefore he has a right to the relief sought before this court by way of an interim injunction until such time that his belief is reversed by the trial court. His belief is therefore in accordance with the saying:

"Qui jure suo utitur neminem i.e. he who exercises his rights injures no one."

I accordingly find that the Plaintiff has a right to relief. On the question of "irreparable damage" I hold the view that if the Plaintiff is denied an injunction he would not adequately be compensated for his loss as a member of UNIP and Parliament; as this would mean denial of fundamental rights and privileges accorded to him by UNIP Constitution as well as the

Zambian Constitution which is the highest law of the land, and no amount of damages would adequately compensate him for such a loss. For this reason, I rely on the case of Hollywood Silver Fox Company Limited v Emmett (1) already referred to in which the court held that the Plaintiffs are entitled to an injunction and damages.

In the circumstances, I am of the view that it will be in the interest of justice to grant the application as prayed and I so order until the final determination of the trial by the court or until further order. Costs to follow the event.

NOTICE OF UNDERTAKING AS TO DAMAGES

AND the Plaintiff hereby undertakes that should his claim be found to be frivolous or vexatious giving him no cause of action he will bear the costs incurred by the Defendants as consequence of this order.

PENAL NOTICE

AND the Defendants are hereby notified that committal proceedings may be instituted should they disobey the order.

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