

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

2019/HPC/0562



**BETWEEN:**

**AVANTECH LIMITED**

**PLAINTIFF**

**AND**

**LUMWANA MINING COMPANY LIMITED**

**ALLEGED 1<sup>st</sup> CONTEMNOR  
DEFENDANT**

**PAUL GILLOT  
ANTHONY MALENGA**

**ALLEGED 2<sup>nd</sup> CONTEMNOR  
ALLEGED 3<sup>rd</sup> CONTEMNOR**

*Before Lady Justice B.G. Shonga this 13<sup>th</sup> day of October 2020*

*For the Plaintiff, Mr. M. Mwenya SC and Mr. E. Mwitwa, Messrs. Mwenya & Mwitwa Adv.*

*For the Defendant, Mr. S. Chisenga & Ms. M. Nanchinga, Messrs. Corpus Legal Practitioners*

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## **RULING**

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**Cases Referred to:**

- 1. Zulu V. The People (1990 - 1992) Z.R. 62 (S.C.).**
- 2. Savenda Management Services Limited v. Stanbic Bank Zambia and Gregory Chifire, Selected Judgment No. 47 of 2018.**
- 3. Iberian Trust Ltd v Founders Trust and Investment Co Ltd [1932] 2 KB 87 at 95**

**Legislation and Other Material Referred To:**

- 1. Order 52, Rules of the Supreme Court, 1965, The Supreme Court Practice 1999 edition (White Book).**
- 2. Atkin's Court Forms, 2<sup>nd</sup> Edition, 2000, Vol. 12 (1) at 187.**
- 3. Halsbury's Laws of England, Vol, 9,4<sup>th</sup> Edition, paragraph 59, page 36**

**1.0 INTRODUCTION**

This is an application by way of notice of motion dated the 10<sup>th</sup> February, requesting the court to order that the defendant be fined for contempt of court and that Paul Gillot and Anthony Malenga be committed to prison for contempt of court on the allegation that they are interfering with the plaintiff's performance of contract LMC0925 by: (i) permitting a company called KASSCO to deliver its equipment and machinery at the defendant's premises over which the plaintiff has an existing contract and (ii) conducting activities that violate the order of injunction obtained by the plaintiff.

**2.0 BACKGROUND**

By dint of writ of summons filed on 16<sup>th</sup> December, 2019, the plaintiff, Avantech Ltd, issued process against the defendant, Lumwana Mining Company Limited.

A summary of the principal claims, as endorsed on the writ, include: (i) a declaration that the contract entered between the parties on 4<sup>th</sup> august 2016 was varied by the Variation Agreement of 21<sup>st</sup> January 2019 by invoking a guaranteed 3 years extension ending on the 30<sup>th</sup> of June 2022, in consideration of the plaintiff rate per Bank Cubic Meter (BCM) reduction of 5%; (ii) a declaration that by the Variation Agreement, the defendant undertook not to terminate the contract without cause before the 1<sup>st</sup> of July 2022; and (iii) an injunction to prevent the defendant from interfering with the plaintiff's due performance of the contract or from terminating the contract before 1<sup>st</sup> July 2022.

On the date that it filed the writ, the plaintiff obtained an order of injunction, granted *ex parte*, restraining the defendant, whether by itself, its officers, servants, agents or whosoever, from interfering with or canceling contract LMC0925 entered between the plaintiff and the defendant on 4<sup>th</sup> August, 2016 or re-tendering the works under the said contract, pending determination of the main matter.

### **3.0 SUPPORTING DOCUMENTS**

The plaintiff relies on the affidavit in support of the *ex parte* summons for leave to commence these contempt proceedings dated 6<sup>th</sup> February, 2020; skeleton arguments and list of authorities of even date; affidavit in reply filed on 5<sup>th</sup> June, 2020

and submissions filed on 16<sup>th</sup> June, 2020. Both the affidavit in support and in reply were deposed to by Joseph Kapira, the General Manager in the plaintiff company.

The evidence in opposition is presented through the medium of an affidavit in opposition of 11<sup>th</sup> March, 2020, deposed to by Anthony Malenga, together with list of authorities and skeleton arguments filed into court on 11<sup>th</sup> March 2020 and submissions filed on 16<sup>th</sup> June, 2020.

#### **4.0 POWER TO PUNISH FOR CONTEMPT**

These committal proceedings were stated to have been taken out pursuant to ***Order 52 of the Rules of the Supreme Court, 1965, Supreme Court Practice, 1999 Edition (the "White Book")***. Order 52, rule 1 empowers the High Court exercise its power to punish for contempt of court by an order of committal where contempt of court is committed, *inter alia*, in connection with any proceedings before a Divisional Court of the Queen's Bench Division.

I note that in ***Zulu V. The People (1990 - 1992) Z.R. 62 (S.C.)***<sup>1</sup> the Supreme Court stated that Order 52 of the White Book applies in Zambia and empowers the High Court to punish for contempt of court. Counsel for the plaintiff also highlighted the case of ***Savenda Management Services Limited v. Stanbic Bank Zambia and***

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*Gregory Chifire, Selected Judgment No. 47 of 2018*<sup>2</sup> where the Supreme Court identified Order 52 of the White Book as a source of power for the Courts in Zambia to punish for civil contempt of Court.

On the strength of the cited authorities, I opine that I have the jurisdiction to hear and determine whether the alleged contemnors ought to be punished for contempt of court.

## **5.0 PROCEDURE FOR HEARING**

With respect to the procedure governing contempt proceedings, Order 52, rule 6 provides as follows:

*“If on the hearing of the application the person sought to be committed expresses a wish to give oral evidence on his own behalf, he shall be entitled to do so”*

The record reflects that as at the date of hearing of these proceedings on 3<sup>rd</sup> June, 2020, none of the alleged contemnors expressed a wish to give oral evidence. That being the case, it was agreed by the parties that the court could determine the application on the affidavit evidence before court, skeleton arguments, and submissions.

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## 6.0 ANALYSIS

I have carefully examined all the affidavit evidence before court. I have also seriously considered all the legal arguments presented by the parties.

I do not propose to rehearse all the legal arguments presented by the parties because I have whittled down the issue to determining whether the terms of the *ex parte* order of injunction that was made by the Court on 16<sup>th</sup> December, 2016 were clear, unambiguous.

My visit into the submissions of the parties revealed that each party accepts that in proceedings for civil contempt, the plaintiff bears the burden of establishing that the terms of the order of injunction are clear and unambiguous. Counsel for the plaintiff referred me to *Atkin's Court Forms, 2<sup>nd</sup> Edition, 2000, Vol. 12 (1) at 187* which was quoted, in part, as follows:

*"the court will punish as a contempt, breach of an injunction when the terms of the injunction are clear and unambiguous..."*

Counsel for the alleged contemnors concurred and referred me to the case of *Iberian Trust Ltd v Founders Trust and Investment Co Ltd [1932] 2 KB 87 at 95<sup>3</sup>* where Luxmoore J, in delivering the Judgment of the court stated as follows:

*"If the Court is to punish anyone for not carrying out its Order, the order must in unambiguous terms direct what is to be done"*

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I am also alive to the erudition of **Halsbury's Laws of England, Vol, 9,4<sup>th</sup> Edition, paragraph 59, page 36**, wherein it is stated that contempt proceedings cannot be commenced as a means of enforcing an unambiguous order.

In view of the foregoing, I opine that the existence of a clear unambiguous order of injunction is essential to these proceeding. Absent such an order, the Court cannot punish the alleged contemnors for non-compliance. According, I move to examine the order, after which I will consider submissions made by the parties on the clarity of the order.

The order reads, in part, as follows:

*"**IT IS HEREBY ORDERED and DIRECTED** that the defendant, whether by itself, its officers, servants, agents or whosoever **BE and IS HEREBY** ordered not to interfere with or cancel contract LMC0925 entered between the plaintiff and the defendant on 4<sup>th</sup> August, 2016 or re-tendering the works under the said contract, pending determination of this matter by this honorable Court."*

The plaintiff submitted that the order of injunction was extremely clear and unambiguous in that it directed the defendant, whether by itself, its officers, servants or whosoever, not to interfere with contract LMC0925. The alleged contemnors acquiesce that the order clearly restrained the defendant from, inter alia, interfering with contract LMC0925.

The position taken by the parties plays into the notion that the order is clear and unambiguous. However, stepping out of that notion, I question whether the unqualified use of the term "*interference*" in the injunction, without listing what constitutes interference with the contract breeds an element of ambiguity. I say this because, according to ***Black's Law Dictionary, 3<sup>rd</sup> edition, Bryan A. Garner, Thomson Reuters at p. 1718***, interference with contract is akin to tortious interference with contractual relations. The definition ascribed to interference with contractual relations is:

*"A third party's intentional inducement of a contracting party to break a contract, causing damage to the relationship between the contracting parties."*

From the foregoing meaning, I perceive that an order restraining interference with a contract is intended to be directed to a third party to refrain the third party from inducing a party to the contract to terminate, cancel or in any other way break the contract.

Where the order purports to be directed to a party to the contract, it becomes difficult to ascertain what the contracting party is being restrained from doing. This is more so in a case such as this where the aspect of canceling or retendering is dealt with in the order, which expressly restrained the defendant from cancelling the contract or retendering the works under the contract. An analysis of the affidavit evidence reveals



that the plaintiff accepts that the defendant has neither cancelled nor retendered contract LMC0925.

Given the dearth of discernable elements as to the nature of interference of contract being prohibited and considering the definition of contract interference, I opine that the order of injunction of 16<sup>th</sup> December, 2020 that was drafted by the plaintiff and granted by this Court is ambiguous and unclear.

#### **6.0 DETERMINATION**

On the strength of the cited authorities, namely, *Atkin's Court Forms*, the *Iberian Trust Ltd case* and *Halsbury's Laws of England*, I do not consider this to be an appropriate case to punish the alleged contemnors for not carrying out the order because the order falls short of the required level of clarity and unambiguity. Accordingly, the application is dismissed, with costs.

Costs are awarded to the defendant, to be taxed in default of agreement. Leave to appeal is granted.

Dated this 13 day of October, 2020

  
**B.G. SHONGA**  
**JUDGE**