SAIPAR Case Review

Volume 3
Issue 2 *November 2020*

Article 6

11-2020

Savenda Management Services Limited v Stanbic Bank Zambia Limited & Gregory Chifire (Alleged Contemnor) (Appeal No. 37/2017) [2018] ZMSC 11

Mwami Kabwabwa
University of Cape Town

Savenda Management Services Limited v Stanbic Bank Zambia Limited & Gregory Chifire (Alleged Contemnor) (Appeal No. 37/2017) [2018] ZMSC 11

Mwami Kabwabwa[1]

Facts

The Supreme court of Zambia on 23 November 2018 delivered its judgment in what has been termed the longest contempt of court sentence in the history of Zambia. This was the judgment in the case of *Savenda Management Services Limited v Stanbic Bank Zambia Limited & Gregory Chifire (Alleged Contemnor)*. The judgment came as result of public criticisms and attacks against the Judiciary following the Supreme Court judgment in *Savenda Management Services Limited v Stanbic Bank Zambia* (hereinafter referred to as the *Savenda* judgment). The *Savenda* judgment witnessed an assortment of attacks from the media and individuals targeted at the judiciary particularly the Supreme Court and the Court of Appeal. One prominent individual behind the criticisms was anti-corruption activist, Gregory Chifire (the alleged contemnor). The attacks and criticisms alleged that the judgment passed was defective and that the judges assigned to the case received bribes from the Respondent in order to pass judgment in its favour resulting in a judgment obtained by corruption. Letters written by the alleged contemnor were addressed and delivered to the Chief Justice in her capacity as head of the judiciary requesting her to set aside the decision because it exhibited incompetence on the judiciary particularly the judges that constituted the coram and that the decision was bad precedent.

Holding

The Court held that the alleged contemnor was guilty of contempt of court owing to actions attributed to him which the Court found were intended to bring the reputation of the judiciary into disrepute and to ridicule the Court that delivered the judgment. The Court further held that the actions of the alleged contemnor were calculated at obstructing the administration of justice. The Court sentenced the contemnor to six years' simple imprisonment.

Significance

Adjudicators have a social responsibility. When the Judiciary/judges carry out their constitutional mandate of dispensing justice it is critical to bear in mind that judges carry a

[1] LLB (University of Cape Town).

level of responsibility for the impact that their decisions have on society. For this reason, judges ought to be held responsible for every judgment they render either good or bad. Contempt is an exceedingly powerful instrument in the hands of the courts to tame the conduct and behaviour of lawyers and lay people who come into contact with judicial authority. Like any other power, the exercise of contempt power has to be checked. The use of contempt power by the courts if unchecked risks violating or infringing upon the right of freedom of speech and free press. This in return has a deterring effect on the public's freedom of speech and the vibrancy of advocacy for judicial accountability. The public and the press become fearful that any criticism altered against the judiciary or its judicial decisions coupled with any lapses in judicial decorum will result in personal liability for contempt of court. The lapses in judicial decorum flow from fervent advocacy for judicial accountability and also from the ordinary pursuit of freedom of expression. Consequently, the public and the press will have no choice but to either practice an indecisive brand of advocacy for judicial accountability or to operate under suppressed conditions of freedom of expression. Such a scenario is harmful to a democratic society. In writing this commentary, I take the position that any misplaced, uninformed, unjustified and personal attacks against judges or the judiciary's judicial integrity in a broader sense regardless of its source is unacceptable and must not be entertained.

Bearing in mind Article 118 of the Constitution which speaks to judicial authority and judicial independence it is important to acknowledge that authority and independence come with accountability. Therefore, judicial ways of attaining accountability ought to be balanced against their independence. The Court in this judgment provided a good and fair explanation of what the principles espoused in Article 118 of the Constitution entail. It rightfully acknowledged, though perhaps in a different way, that as part of accountability the judiciary and judges ought to be open to criticism that is constructive and that such criticism must be in good faith. If the judiciary is to remain independent and execute its constitutional mandate without undue influence it must shield itself from attacks and criticisms that are aimed at influencing the outcome of judgments. Unjustified criticisms and attacks devoid of evidence are unacceptable. The court stated that where there has been non-compliance with Article 118 the court system has appeal mechanisms. In the case of corruption allegations against judges or judicial officers this may be reported to the Judicial Complaints Commission, the Anti- Corruption Commission or other law enforcement agencies.

The court took the liberty to explain and justify its inherent jurisdiction over contempt power to ensure that the administration of justice is not obstructed. Regrettably however, the trend in contemporary Zambian courts has been to consider any public comment over a matter before the court as potential contempt of court. Muna Ndulo a professor of Law at Cornell University posits that such a practice is entrenched in ancient interpretation of contempt of court under common law and that other common law jurisdictions globally have since rejected such an approach to the power of contempt of court. He argues that the global change of approach towards contempt of court power has largely been influenced by the growing respect of the importance of freedom of speech in democratic dispensations. Ndulo asserted that courts need to understand that the option of being respected is better than being feared.[2] What can be gleaned from this in relation to contempt power as exercised by the Court in the *Chifire* contempt case is that the public or an individual's disagreement with a decision of the court is not the equivalent of disrespect for judicial decisions. Furthermore, disrespect cannot be equated to obstruction of the administration of justice. Once these cardinal distinctions are ignored the risk of potential abuse of contempt power by the courts becomes high and contempt power becomes a warrant to discourage disagreement. It becomes a license to command respect and decorum as desired by the judiciary. The former Chief Justice of India Gajendragadkar gave admonition against the indiscriminate and frequent exercise of contempt power by the courts. The following was his observation:

> We ought never to forget that the power to punish for contempt large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by restraint, dignity and decorum which they observe in their judicial conduct.[3]

The main question that ought to have been addressed is what needs to be done to preserve judicial integrity, judicial independence and the audacious pursuit of administration of justice within the confines of Article 118 of the Constitution. In the circumstances of this case, the judiciary having taken note that the matter attracted wide public attention, having received letters from the contemnor and prior to service of the process upon the contemnor, the

[2] *Under Article 143 v Unknown* AIR 1965 SC 745
[3] *Under Article 143 v Unknown* AIR 1965 SC 745

Honourable Chief Justice as the head of the Judiciary bore the responsibility of coming out and addressing the public, speaking out in defence of the judges and the Judiciary. To make it clear to the public and the contemnor that firstly, that the judiciary does not shy away from addressing public criticisms of its decisions, and secondly, that the judiciary does not shy away from openly investigating and pursuing either wrongful or correct allegations of misconduct or corruption by individual judges. I take the position that had the judiciary, through the Honourable Chief Justice, taken the approach espoused above, the present case would have taken a different trajectory that would have earned the judiciary the respect and decorum they deserve. In taking this position, I am aware of the fact that the nature of judicial office is such that judges cannot respond to criticisms levelled against them particularly when they are baleful, personal and irresponsible. Thus the key question is how and what can be done to safeguard judicial integrity and bold quest for constitutional governance. Not far from us the South African Judiciary receives enormous criticisms over its decisions and over the conduct of individual judges. The approach of the Chief Justice has been to address these allegations head on, to provide reasons and justifications for its decisions and to inform the public on the ways in which alleged misconduct of judges is being pursued within the judiciary, outlining the achievements that have been made.[4]

The court in this case touched on the need for a balance between the competing needs of the judiciary to ensure effective administration of justice and preventing unwarranted interference with judicial business and those of the public to freely exercise their right of freedom of expression. The court noted that in terms of the rules in the White Book, "the purpose of the power to punish for contempt is to prevent any attempt to interfere with the administration of justice".[5] The fundamental question here ought to have been what constitutes an interference or obstruction to the administration of justice. To do justice to this question one needs to scrutinize the nature of the judicial process at hand. The present case was dealing with outside court speech/comment. With outside court speech, the power to punish for contempt maybe justifiably exercised only in circumstances where there is no reasonable doubt that the threat to the administration of justice is imminent. On the other hand, when dealing with inside court speech or when faced with attempted interference with the outcome of a judgment before court,

[4] Mogoeng Mogoeng , General Gratuitous Criticism of Judiciary unacceptable (2015) available at https://www.politicsweb.co.za/politics/general-gratuitous-criticism-of-judiciary-unaccept accessed on 10 October 2020.
[5] Ibid

it is justifiable to punish for contempt, reason being, justice is being affected through avenues other than those established for the proper administration of justice.

In the American case of *Bridges v California*,[6] the Supreme Court dealt with the right of expression in relation to contempt of court for outside court statements that were condemnatory of the conduct of judges. The court applied the "clear and present danger test" and established that on constitutional grounds, outside court publications suspect of contempt of court ought to be treated in a similar manner as other kinds of utterances that justify punishment only in circumstances were "the substantive evil must be extremely serious and the degree of imminence must be extremely high before utterances can be punishable".[7] Although the *Bridges* case is only instructive, it can still be of assistance since our courts have not developed a test to be applied when dealing with contempt of court matters. Applying this test to the facts of the *Chifire* contempt case, I do not perceive that the actions attributed to the contemnor rise to the level of extreme seriousness and danger particularly to the administration of justice and impartial judicial process to justify the contempt convictions slapped on the alleged contemnor. In addition, if we apply the clear and present danger test broadly, the test may function as a constitutional limitation on the courts' contempt power to ensure that the exercise of the contempt power is not abused.

It is an acceptable position that institutions such as courts have high standards of decorum, are pedantic with their formalities and are particularly sensitive to any forms of court disruptions. However, it should never be acceptable that standards of contempt are dependent on the temperament of the judges presiding over the matter. Furthermore, courts should ever bear in mind that where disrespectful publications or conduct targeted at the court is at play, it should not be not be regarded as a blatant harm worthy of the punishment of contempt of court except if it is so acute or it takes place in conditions that are delicate as to threaten the administration of justice. In its assessment of the extent to which the alleged contemnors actions were likely to interfere with the administration of justice, the court should have measured the possible obstruction objectively rather than subjectively. An objective test would not only focus on the actual interference or obstruction derived from the act suspected of contempt but rather the "character of the act done and its direct tendency to prevent and obstruct the discharge of

[6] *Bridges v California* 314 U.S. 252 (1941).
[7] Ibid.

judicial duty".[8] Furthermore, whether an alleged contemnor's actions can be considered to be contemptuous and an attempt to obstruct the administration of justice is not necessarily based on the influence the act has on the subjective mind of a judge, but is the "reasonable tendency of the acts done to influence or bring about the baleful results, without reference to the consideration of how far they may have been without influence in a particular case".[9]

Adopting objective standards of assessing allegations of contempt alleviates the possibility of exaggerated perceptions of decorum, respect and civility expected of people who come into contact with judicial authority or individuals who are generally exercising their right to freedom of expression. Subjective attitudes towards contempt power may lead to authoritarian limitations not only on the freedom of expression but also on the public's ability to hold the judiciary accountable. The inescapable links between advocacy for judicial accountability, freedom of expression and contempt power cannot be ignored. It is therefore imperative that our courts develop a progressive jurisprudence that is appropriate for maintaining judicial integrity and respect while still faithful to constitutional values and principles. The Court noted in its judgment that individual rights to exercise freedoms such as freedom of speech and free press are superseded by the rights of the majority. While this statement is correct to some degree, it is important to think about this from a broader perspective which is that in different jurisdictions it is a widely accepted view that judicial business and its adjudicatory duties is a matter of public concern not just for the actual litigating parties. This explains why we have open court hearings. The purpose of this transparency is twofold: firstly, to ensure that the public knows what is happening, secondly, and most importantly, is so that the public is able to applaud, criticise and challenge the court's conduct. In the South African case of *State v Russel Mamabolo*[10] the Constitutional Court observed that "ultimately, such free and frank debate about judicial proceedings serves more than one vital public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the important aspirational attributes prescribed for the judiciary by the Constitutions".[11] When dealing with actions suspect of contempt our courts would do well to take head to the admonition of retired South African Constitutional Court Judge Albbie Sachs, who once stated that "indeed, bruising criticism could in many circumstances lead to

[8] Toledo Newspaper Company v United States 247 U.S. 371 (1918).
[9] Ibid
[10] *S v Mamabolo* 2001 (5) BCLR 449 (CC).
[11] Ibid.

improvement in the administration of justice. Conversely, the chilling effect of fear of prosecution for criticizing the courts might be conducive to its deterioration".[12]

[12] Ibid.