

CONTEMPT OF COURT IN ZAMBIA: A CRITICAL ANALYSIS OF THE STATUTORY
PROVISIONS AND JUDICIAL PRECEDENTS GOVERNING THE LAW OF
CONTEMPT OF COURT IN ZAMBIA IN LINE WITH THE NEED TO OBSERVE THE
RULES OF NATURAL JUSTICE AND SENTENCING PRINCIPLES.

By

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Being a Directed Research essay submitted to the University of Zambia Law Faculty in
Partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.

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ABSTRACT

The legal instrument of Contempt of Court is one which has brought a magnitude of controversy in the Zambian legal jurisdiction. As this notion is not a new occurrence, its genesis can be traced as far back as the eighteenth century and has carefully evolved for the proper administration of justice. The intended purpose of this academic paper is to provide a full analysis of the statutory provisions and judicial precedents (past and recent) governing the law of Contempt of Court in Zambia as a means of ascertaining whether the same take into consideration the Principles of Natural Justice.

These include especially the notion that “no man ought to be a judge in his own case” and “every man has the right to be heard” in circumstances especially of Contempt in the face of the court. The paper attempts in the same vein to give a detailed account of how Contempt Proceedings can be commenced in civil litigation, those of a criminal nature as per the provisions of the Zambian Penal Code Cap 87 of the Laws of Zambia and proceedings whose genesis emanate from a court of law moving on its own motion to commence the same.

This paper seeks to primarily establish whether or not the Courts of law have given efficacy to the existing governing statutory law on Contempt of Court with due regard for the need to adhere to the aforesaid Rules of Natural Justice. Consequentially, an analysis of the need to observe Sentencing Principles as against a Contemnor in Contempt of Court matters is imperative to this paper.

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I am eternally grateful to my father and mother, my ten siblings, uncountable beloved nieces, nephews and cousins for their support and confidence during my academic life and family moments. Sometimes the journey has been rough, our climb has been steep. Yet in all our experiences we have stayed together, growing and learning to love each other in new and intimate ways. Dad, I face the greatest challenge a young man can take on in trying to emulate you. But I know if I can live up to become half the lawyer and man you are, greatness I would have achieved. Mum, your strength and faith continue to amaze me each day that goes by. You remain the best mother in the world.

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Finally, I thank the Lord God Almighty for calling me to be a Lawyer for the pursuance of justice for and on behalf of all in society as I embark on this journey of public service.

DEDICATION

“This is dedicated to my beloved late elder brother, Mwewa ‘Guy’ Kabwe. Loosing you was the most painful thing that ever happened to me. How I miss u so much and how I have spent so many nights crying myself to sleep is only testament of how much we all loved you. The greatest comfort I hold on to each day is the thought that I will one day see you my best friend. This one is for you.”

TABLE OF STATUTES CONSTRUED

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The Contempt of Court (Miscellaneous Provisions) Act Chapter 38 of the Laws of Zambia

The High Court Act Chapter 27 of the Laws of Zambia

The Penal Code Act Chapter 87 of the Laws of Zambia

The Rules of the Supreme Court of England (White Book) 1999 Edition

CASES CITED

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Miyanda v the Attorney General [1985] Z.R 185

Nsokolo [1940] 2 NRLR 85

R v Almon

R v The Commissioner of Police [1968] 2 Q.B 150

R v The University of Cambridge [1723] 1 Stra 557

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Ruth Kumbi v Robinson Kaleb Zulu SCZ No. 19 of 2009

Zambia National Provident Fund v Chirwa[1986] ZR 70

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CHAPTER ONE: GENERAL INTRODUCTION AND DEFINITION OF CONCEPTS

1.1 INTRODUCTION

The adjudicative branch of any civilized government in the world today is known to preside over cases in an impartial and dignified manner. In adjudicating over such matters, be them criminal or civil in their nature, parties to such proceedings as well as individuals with and without an interest in such matters sometimes come into direct confrontation with the courts of law during such adjudication. Contempt of Court is a court order which, in the context of a court trial or hearing, declares a person or organization to have disobeyed or been disrespectful of the court's authority. Often simply referred to as 'contempt', it is the judge's strongest power to impose sanctions for acts which disrupt the court's normal process.

This may arise out of three main instances. These include the disobedience of orders of court, of matters before court which tend to prejudice the administration of justice as well as conduct which is 'facie curiae' by any person or conduct obstructing or calculated to prejudice the due administration of justice¹. To this effect, the law pertaining to Contempt of Court has its sole purpose in the maintenance of the authority and dignity of the courts of law which adjudicate over matters on an everyday basis.

Historically, the notion of Contempt of Court was first discussed in the commonwealth jurisdiction in a judgment that was never delivered in the 1765 case of *R v Almon*². In this particular case, the alleged contemnor was cited for Contempt of Court having published a pamphlet accusing the then Chief Justice Mansfield of having 'acted officiously, arbitrary and illegally'. However, jurisprudence now seems to suggest that the legal tool of Contempt of Court should ideally not be used to maintain a court's dignity and integrity but should be used purely to advance the administration of justice.

This view was in recent times advanced in the case of *AG v BBB*³ where the Salmond.J stated;

"The description 'Contempt of Court' no doubt has a historically basis, but is nonetheless misleading. Its object is to protect the dignity of the courts but to protect the administration of justice".

¹ Order 52 rule 1 sub-rule 3 of the Rules of the Supreme Court, 1999 edition

² www.Legalserviceindia.com [Accessed on the 3rd of January, 2011]

³ 1980 3 ALL ER 161

1.2 STATEMENT OF PROBLEM

The law pertaining to Contempt of Court can strictly be summed up to be enacted in the following pieces of legislation. These include, the Contempt of Court (Miscellaneous Provisions) Act⁴, the High Court Act⁵, the Penal Code Act⁶ as well as the provisions of Order 52 of the Rules of the Supreme Court (White Book) 1999 edition. Generally speaking however, the law pertaining to contempt has its genesis in the common law of England. The importance of the notion of Contempt of Court cannot be over emphasized for any legal jurisdiction. This is because the 'legal tool' of contempt is not based on the exaggerated notion of the dignity of individuals be they judges, witnesses or others but on the duty of preventing any attempt to interfere with the administration of justice⁷.

In doing so however, it follows that that the two fundamental principles pertaining to the Rules of Natural Justice are scarcely adhered to in the Zambia jurisdiction. These rules in question include the notion that 'no man ought to be a judge in his own case' as well as 'the right to be heard'. This inevitably is as a result of the fact that the law as it stands today entails that judges presiding over cases of a contempt nature act as the complainant, investigator as well the adjudicator.

Sequentially, it also follows that parties to proceedings of contempt are never in reality ever given the full benefit of the right to be heard in a manner as to rebut allegations through cross examination as the same would entail judges being subjected to the rigors of full examination. This is particularly so in instances where the courts of law move on their own motion to initiate proceedings for contempt. In this vein, while it is materially evident as case law will illustrate, there exists an inherent problem of 'interest' and 'bias' usually arising out courts initiating such proceedings.

In addition, it is cardinal to note that while courts are inherently endowed with the authority to administer appropriate sanctions in cases of contempt, it follows that Zambia still does not have a set standard as to what principles of sentencing are to be adhered to. Despite a plethora of authorities pertaining to Principles of Sentencing, it follows that the Zambian legal

⁴ Chapter 38 of the Laws of Zambia

⁵ Chapter 27 of the Laws of Zambia

⁶ Section 116 of Chapter 87 of the Laws of Zambia

⁷ Attorney General v Times Newspapers Ltd [1991] 2 W.L.R 994,HL

jurisdiction has shown an appalling inconsistency in adherence to the Principles of Sentencing which in effect can be equated to arbitrariness.

There is therefore urgent need to consider new legislation to effectively give credence to the notion of contempt in adhering to the Principles of Natural Justice as well as sentencing principles.

1.3 GENERAL OBJECTIVE

This paper intends to show the need for the courts of law in Zambia to adhere to the Principles of Natural Justice and Sentencing Principles in their attempt to prevent any interference with the administration of justice through the use of ‘Contempt of Court’.

1.3.1 SPECIFIC OBJECTIVES

1. To clearly illustrate the effects of the non-adherence to the rules of natural justice in the adjudication of Contempt of Court cases.
2. To bring to the fore the need to observe the Principles of Sentencing as against contemnors to avoid arbitrariness in the dispensation of justice.
3. To advocate for a radical change to the law pertaining to Contempt of Court in Zambia so as to encapsulate the above mentioned notions to their full extent.

1.4 RATIONALE AND JUSTIFICATION OF RESEARCH

This study is being advanced at the time when misgivings and a general lack of understanding of the notion of Contempt of Court are at their peak. This has been exacerbated by the notion that this noble ‘legal tool’ has recently been employed to silence individuals especially those critical of the executive and judicial arms of the government in Zambia. This has been fueled by recent judicial pronouncements where there has been a blatant disregard for the observance of the rules of natural justice as witnessed in the recent case of Masiye Motels Limited v Rescue Shoulders⁸ where the Supreme Court took the role of complainant, investigator, prosecutor and judge in establishing the guilt of an advocate and his client for acts deemed contemptuous.

Further, this study comes at a critical moment in time when the Zambian courts of law have exhibited a general trend of inconsistency in administering sentences for offences of a contempt nature which are of similar fact giving rise to the notion of arbitrariness. In this regard, this paper will suggest a radical change in the law to embody the two Rules of Natural Justice as well as the adherence to Sentencing Principles.

⁸ SCZ Appeal No.187 of 2007

1.5 RESEARCH QUESTIONS

1. Are the Rules of Natural Justice to be adhered to in every adjudicative matter?
2. Does an obligation exist for the courts of law to adhere to the Rules of Natural Justice when dealing with matters which entail the likely hood of deprivation of one's freedom by penal sanction such as those of a contemptuous nature?
3. Does substantial and procedural legislation pertaining to contempt in Zambia encompass adherence to the Rules of Natural Justice?
4. Do the Zambian courts of law take into regard the principles of sentencing when administering sanctions as against contemnors?
5. In what instances should the courts of law ideally impose custodial sentences in cases involving Contempt of Court?

1.6 LITERATURE REVIEW

Upon carrying out a search in the University of Zambia main Library as well as a host of other libraries and scholarly institutions it was discovered that there exists a host of other scholarly research similar to one being undertaken. However, with regard to the University of Zambia, it was discovered that only two individuals have written on similar topics to the one currently being undertaken and as such will form the genesis of this literature review. The following essays were located;

Kuku⁹ in his study of the law of contempt primarily concentrated on case law to establish the notion of the use and especially the misuse of the legal tool of Contempt of Court. In his study, he gives a clear account of the genesis of the notion of contempt of court. He further goes on to 'attempt' to address the deficiencies in existing legislation pertaining to contempt of court. Consequentially, he goes on to give an account of the effectiveness of the penal code in dealing with contempt of court. He additionally attempts to address the notion of interference by the state in judicial pronouncements pertaining to Contempt of Court.

On the other hand, Sinkala¹⁰ undertook a case study that focused on the application of The Rules of Natural Justice specifically in relation to the laws governing deportation in Zambia. He additionally addresses the application of the rules of natural justice in labour matters in

⁹James Kuku. **Contempt of Court; A case study of its Judicial use and abuse in Zambia**: Obligatory Essay submitted to the School of Law in partial fulfillment of the award of the Bachelor of Laws Degree 2006.

¹⁰ Charles Sinkala. **The Rules of Natural Justice within the Zambian Legal System**: Obligatory Essay submitted to the School of Law in partial fulfillment of the award of the Bachelor of Laws Degree 2008.

Zambia. Further, it must be noted that Sinkala gives a detailed account of the historical development of the Rules of Natural Justice.

From the numerous searches conducted at the University of Zambia main Library, it becomes evident to one that while the above scholars have each conducted a study similar to the one to be undertaken, none of the aforementioned scholars took a holistic study to encompass the notion of the application of the Rules of Natural Justice as well as the adherence to the Principles of Sentencing when dealing with contemnors. Furthermore, this study departs from the study advanced by Kuku¹¹ in particular as he does not specifically address the notions of the applicability of the two (2) Rules of Natural Justice and the need for the courts in Zambia to adhere to the principles governing sentencing.

Sequentially, Card¹² on the contrary, has simply undertaken a study restricted to the aspect of Criminal Contempt as he essentially deals with the criminal aspect of the law in his celebrated legal writings. By no account does he endeavor to address the notion of the need to adhere to the Rules of Natural Justice in contempt matters or Sentencing Principles established at law.

Unlike the case with Card, Kuloba¹³ has instead endeavored to discuss the notion of Civil Contempt of Court. This has been advanced by him on account of the need to cite individuals who disobey court injunctions granted by a competent court of law. As the case with the three (3) other scholars aforementioned, Kuloba does not address the notion of the need to adhere to the Rules of Natural Justice in contempt matters or Sentencing Principles which in effect is the point of departure of this paper from other studies undertaken under the subject of Contempt of Court.

1.7 METHODOLOGY

This research will rely mainly on Secondary data in the form of books, journals, scholarly articles as well as the use of the internet will be consulted in order to attain the most recent information on the subject matter which continues to be addressed globally by scholars.

¹¹ James Kuku. **Contempt of Court; A case study of its Judicial use and abuse in Zambia**: Obligatory Essay submitted to the School of Law in partial fulfillment of the award of the Bachelor of Laws Degree 2006.

¹² Richard Card, **Introduction to Criminal Law**, 9th Ed, London Butterworths, 1980. Page. 276 to 286

¹³ Richard Kuloba, **Principles of Injunctions**, Oxford University Press, 1987. Page 17

1.8 DEFINITION AND ANALYSIS OF CONCEPTS

1.8.1 CONTEMPT OF COURT

As stated above, the notion of Contempt of Court is an order of court which in the context of a court trial or hearing, declares a person or organization to have disobeyed or been disrespectful of the court's authority. However, one is inclined to opine to the effect that the said legal notion exists fundamentally to enable the proper administration of justice. Therefore contempt power in a democracy only exists to enable a court to function, and not to vindicate and maintain its authority and dignity¹⁴.

1.8.2 TYPES OF CONTEMPT OF COURT

Essentially, there exist two types of Contempt of Court. These include what is referred to as Criminal Contempt of Court and Civil Contempt of Court. While one is inclined to opine to the effect that there essentially exists no difference in legal consequences arising out of the two, the only distinction that fundamentally exists is the notion of the instance where such alleged contempt of court is committed. In one vein, contempt can be committed in the face of court while in another vein may be committed outside the face or precinct of the court.

1.8.3 CRIMINAL CONTEMPT

Criminal Contempt of Court is that type of contempt which consists of words or acts obstructing, or tending to obstruct, the administration of justice¹⁵. Essentially, there exist eight principal categories of criminal contempt of court. These include; (1) contempt in the face of court, (2) scandalizing the court (this will be subject of further clarity and discussion in the due course of this paper), (3) reprisals against jurors and witnesses, (4) obstructing officers of the court in their duties, (5) conduct liable to prejudice the fair trial or conduct of pending or eminent proceedings, (6) publications which prejudice issues in pending civil proceedings, (7) publication of information relating to proceedings in private and (8) publishing the identity of anonymous witnesses as per court order as to anonymity¹⁶. These variant categories will be subject of discussion throughout the course of this paper.

¹⁴ www.legalserviceindia.com [Accessed on the 3rd of January, 2011]

¹⁵ John Saunders, **Words and Phrases Legally Defined**, 2nd Ed, Volume 1, London Butterworths, 1969, Page.329

¹⁶ Richard Card, **Introduction to Criminal Law**, 9th Ed, London Butterworths, 1980. Page.276

1.8.4 CIVIL CONTEMPT

Civil contempt of court essentially embraces the legal notion where a litigant or party to which a court order has been directed disobeys such a court order. While one is of the opinion that all forms of contempt of court fundamentally interfere with the administration of justice, the principles of common law as well as jurisprudence in Zambia as well as the commonwealth jurisdiction seem to buttress the position that a distinction, though fine, still exist. For instance in the case of *Rupiah Bwezani Banda v The Post Newspapers Limited*¹⁷, the High Court for Zambia was of the view that the provisions of Article 18 of the Constitution¹⁸ as to fair trial in criminal offences could not apply to the contempt proceedings subject of the said matter as the notion of alleged disobedience of a court order such as an injunction was a question of Civil Contempt as opposed to Criminal Contempt of Court.

1.9 THE RULES OF NATURAL JUSTICE

The notion of the rules of natural justice is an aspect of the law that has developed throughout the existence of mankind. For instance, in the case of *R v The University of Cambridge*¹⁹, the court was of the view that all 'men' were entitled to be heard in all judicial matters where a defence existed. To this effect the Fortescue.J stated as follows;

"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Has thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

To this effect, one is inclined to concur with his lordship in this matter that one ought to be given an opportunity to be heard by advancing a defence in all instances before judgment is advanced in any matter where such defence exists.

1.9.1 'Audi Alteram Partem'

This Latin maxim literally translates to the effect that, 'hear the other side'. No accused, or a person directly affected by a decision, shall be condemned unless given full chance to prepare and submit his or her case and rebuttal to the opposing party's arguments²⁰. To this effect, it follows that because the legal notion of Contempt of Court is so grave, to the extent that the same may lead to the deprivation of one's freedom if found to have committed the said

¹⁷ 2008/HP/0984, Ruling Delivered on the 9th of July, 2010

¹⁸ Chapter 1 of the Laws of Zambia

¹⁹ [1723] 1 Stra 557, 567

²⁰ Available at <http://www.Business Dictionary.com> [accessed on the 29th of December, 2010]

Contempt in question. This paper is of the view that one ought to be heard in all instances of contempt to their full extent.

To this effect, it is only proper that an alleged contemnor should be accorded the right to cross examine individuals that adduce evidence of such an alleged contemnor's acts that purportedly constitute Contempt of Court. However, this paper will highlight during due course how jurisprudence in Zambia does not always accord this opportunity to an alleged contemnor.

1.9.2 'Nemo judex in parte sua'

This Latin maxim literally translates to the effect that, 'no man a judge in his own case'. No decision is valid if it was influenced by any financial consideration or other interest or bias of the decision maker²¹. This rule is sometimes referred to as the rule against bias. To this effect, any person that makes a judicial decision must not have any personal interest in the outcome of the decision. If such interest is present, the decision maker must be disqualified even if no actual bias can be shown that is to say; it is not demonstrated that the interest has influenced the decision. It must be noted that the test as to whether a decision should be set aside is whether there is a "real possibility of bias"²². This position as to the rule against bias was well illustrated in the case of *Gough v Chief Constable of the Derbyshire Constabulary*²³.

1.9.3 CONCLUSION

This chapter has endeavored to introduce the contents of this research paper. To this effect, this chapter has given a brief introduction to the notion of Contempt of Court. In addition, this chapter has introduced the aspect of the need to adhere to the rules of natural justice whenever a judicial officer is tasked to deal with aspects of Contempt of Court as the same has grave consequences if one is found liable or guilty of the same. Further, this paper has also introduced the aspect of the need for judicial officers presiding over contempt proceedings to adhere to the principles of sentencing whenever faced with the need to sentence contemnors.

In the proceeding Chapter of this paper (chapter 2), this paper will endeavor to categorically establish whether or not there exists the need to adhere to the rules of natural justice and the principles of sentencing whenever a judicial officer presides over a contempt matter. This

²¹ Available at [_ Business Dictionary.com](http://www.Business Dictionary.com) [accessed on the 29th of December, 2010]

²² Available at <http://www.Business Dictionary.com> [accessed on the 29th of December, 2010]

²³ [2001] 4 ALL ER 289

paper will take a critical analytical view at the celebrated case of *Zulu v The People*²⁴ which has been an authority on contempt proceedings in the past in Zambia.

This will be coupled by a further analysis of various judicial pronouncements that have been advanced in contempt matters. This chapter will also illustrate the inconsistencies that have engulfed the Zambian legal jurisdiction when sentencing contemnors in disregard of precedent established as to the same while making a comparative analysis with other commonwealth jurisdictions.

Further, in Chapter 3, this paper will endeavor to deal with various pieces of legislation which encompass the notion of Contempt of Court in Zambia. This will be done in line with a discussion as to whether the same provisions of the law adhere to the rules of natural justice. To achieve this, this paper will heavily rely on Zambian jurisprudence as well as scholarly articles.

This research paper will conclude in its chapter four (4) by advancing a number of recommendations as to radical amendments to the law and conduct of presiding judicial officials (judges and magistrates) in matters that deal with the legal notion of Contempt of Court. The Chapter will also make recommendations as to the instances when the courts of law should invoke this legal tool for the proper administration of justice and not in a quest to preserve a court's dignity or 'face'.

²⁴ [1990-1992] ZR 62

CHAPTER TWO: ZAMBIAN JUDICIAL PRONOUNCEMENTS; DO THEY ADHERE TO THE RULES OF NATURAL JUSTICE AND SENTENCING PRINCIPLES IN CONTEMPT PROCEEDINGS?

2.1 INTRODUCTION

Judges and legal practitioners have frequently found themselves dealing with the notion of the consequences of the breach of the Principles of Natural Justice. In addition, the consequences of disregarding well established sentencing principles in ordinary adjudicative matters not of a contemptuous nature has raised great challenges to the legal profession in Zambia.

Firstly, much legal debate to date still exists as to what the true consequence of the breach of the Rules of Natural Justice really entails. In one vein, jurists and scholars argue that the breach of these principles entails a total prejudice to the rights of an individual who is entitled to the enjoyment of the principles of Natural Justice in matters of an adjudicative and quasi-adjudicative nature. On the other hand, another school of thought seems to suggest that it is not in all adjudicative and quasi-adjudicative matters that the rules of Natural justice have to be adhered to or followed.

One can safely note from the very genesis of this Chapter that the application of the Rules of Natural justice seem to differ on a case by case basis, depending upon the legal jurisdiction in which a matter is to be decided. Therefore, a matter decided in the English legal jurisdiction may not enjoy to the same extent the application of the Rules of Natural Justice as would a matter decided in the Zambian legal jurisdiction for instance. Emphasis must however be placed that the extent of the application of these rules is not easily defined. In the case of *Abbott v Sullivan*²⁵, it was clearly stated that;

“The Principles of Natural Justice are easy to proclaim, but their precise extent is far less easy to define”.

This position of the law is well buttressed by further jurisprudence in the case of *Lloyd v MacMahon*²⁶ where Lord Steyn clearly put it that what was deemed as fair, differed from case to case when he stated that;

“The rules of Natural Justice are not engraved on tablets stone.”

This was simply meant to connote that the application of the Rules of Natural Justice are in fact variant as opposed to static.

²⁵ [1952] 1 K.B, 189

²⁶ [1987] A.C. 625

It has been stated that there exists no single definition of the Rules of Natural Justice and it is only possible to enumerate with some certainty the main principles. Historically, the term Natural Law was often used alternately with the expression natural law. However in modern times, a restricted meaning has been accorded to describe certain rules of judicial procedure²⁷. To this effect, two basic elements of Natural Justice exist to date. These include the notion that, 'No man shall be a judge in his own cause' often summed up in the latin maxim of *nemo judex in sua causa* and secondly that 'Both sides shall be heard', the latter often directly summed up in the latin maxim of *audi alteram partem*²⁸.

In order to obtain the true meaning of what is meant by the Rules of Natural Justice, their veracity and origin, one is inclined to take cognizance of the pronouncement in the celebrated case of *Maclean v. The Workers Union*²⁹, where it was crudely but correctly stated that;

"The phrase is, of course, used only in a popular sense and must not be taken to mean that there is any justice natural among men. Among most savages there is no such thing as justice in the modern sense. In ancient days a person wronged executed his own justice. Amongst our own ancestors, down to the thirteenth century, manifest felony, such as that of a manslayer taken with his own weapon, or a thief with the stolen goods, might be punished by summary execution without any form of trial. Again, every student has heard of compurgation and of ordeal; and it is hardly necessary to observe that (for example) a system of ordeal by water in which sinking was the sign of innocence and floating the sign of guilt, a system which lasted in this country for hundreds of years, has little to do with modern ideas of justice. It is unnecessary to give further illustrations. The truth is that justice is a very elaborate conception, the growth of many centuries of civilization; and even now the conception differs widely in countries usually described as civilized."

Secondly, purely from a Zambian jurisdictional point of view, courts have generally been accorded a wide range of sentence options available to them as such giving courts in Zambia the freedom to determine the kind of sentence and level of penalties especially at the lowest level and for the most minor of offences³⁰. However, instances have always arisen where the attitudes and beliefs of presiding judicial officers influence the decision of such a sentencer when delivering judgment.

To avoid any clashes between the beliefs and attitude of a presiding judicial officer and the set forth parameters of sentencing accorded by statutory law, jurisprudence has developed over the years to establish five principles of sentencing which were first espoused by Chief Justice

²⁷ Sivagnanam, **Principles of Natural Justice**, Lecture Delivered at Tamil Nadu State Judicial Academy, 1st July, 2009, Page, 2

²⁸ www.bclrl.com [accessed on the 3rd of January, 2011]

²⁹ [1929] 1 Ch. 602, 624

³⁰ Simon Kulusika, **Criminal Law**, Page. 813

Law (as he then was) in the celebrated case of *Nsokolo*³¹. These five principles were further given credence in the case of *Chipata*³² which principles will be the subject of this paper.

2.2 THE RULES OF NATURAL JUSTICE

As alluded to above, the Rules of Natural Justice have essentially been summed into two basic principles. For purposes of this paper, these will be discussed individually so as to obtain an exhaustive view as to their meaning.

2.2.1 'AUDI ALTERAM PARTEM'

Translated directly as 'hear the other side'³³, the principle is all encompassing as its interpretation has been extended. To this effect, the principle does not only apply to the very aspect of an individual appearing before an adjudicative body being accorded a chance to tell his 'side of the story'. It now also includes the following aspects as such according a broader approach classification. These include the legal aspect that; (i) a party to an action is *prima facie* entitled to be heard in person, (ii) he is entitled to dispute his opponent's case, cross examine his opponent's witnesses and to call his own witnesses and give his own evidence before a court presiding over the said matter he is party to, (iii) he is entitled to know the reasons for the decision rendered by a court or a tribunal which he or she has been party to at the close of proceedings³⁴.

As highlighted above, the notion of *audi alteram partem* clearly entails that a party must not only be heard in terms of his defense in adjudicative matters, but must also be accorded reasons for decisions passed in such matters while being accorded an opportunity during the going concern of such proceedings to cross examine such witnesses as may be availed to such a party. However, scholars have gone as far as to describe this cardinal principle of law as having its genesis at the very instance when a party to proceedings before an adjudicative body is informed of a hearing date and time during which proceedings will commence or resume as the case may be³⁵.

³¹ [1940] 2 NRLR 85

³² [1970] SJZ 189

³³ www.Business Dictionary.com [Accessed on the 3rd of January, 2011]

³⁴ Sivagnanam, **Principles of Natural Justice**, Lecture Delivered at Tamil Nadu State Judicial Academy, 1st July, 2009, Page.4

³⁵ Sivagnanam, **Principles of Natural Justice**, Lecture Delivered at Tamil Nadu State Judicial Academy, 1st July, 2009, Page.2

The learned authors Wade and Forsyth³⁶ in their celebrated literature continue to take cognizance of the fact that the principle of the 'right to be heard' in adjudicative and quasi adjudicative matters is one which is ancient and impeded in history. They contend that the said principle is of wide application with the very first accorded right to be heard advanced in the case of Adam and Eve in the Garden of Eden³⁷.

2.2.2 'NEMO JUDEX IN PARTE SUA'

As aforementioned, the second hinge of the Rules of Natural Justice is embodied in the latin maxim of *nemo judex in parte sua* which literally translates that, 'no man a judge in his own cause'. As the case is with the first hinge of the Rules of Natural Justice, it follows that this hinge of the Rules of Natural Justice connotes and dictates a broad interpretation which encompassing the following legal aspects that; (i) the adjudicator must be dis-interested, (ii) and that the adjudicator must be unbiased in a matter³⁸.

It must be emphasized when dealing with the 'rule against bias', that any person who presides over and makes a judicial decision must not have any interest in the outcome of the matter he so presides over. Further, it must also be emphasized that where such an interest exists, such a presiding officer must be disqualified from proceedings even if no actual bias can be proved or where only the possibility of bias exists³⁹. As the position of the law exists today, the test as to whether or not a decision should be set aside on account of the 'rule against bias' is whether there exists a real possibility of bias as advanced in the case of *Gough v Chief Constable of Derbyshire Constabulary*⁴⁰. Therefore, one is inclined to opine to the effect that, where a party successfully proves on appeal in any matter, the notion that there existed a real possibility of bias during the course of proceedings that one is appealing against, such an individual ought to succeed on such an account.

2.3 SENTENCING PRINCIPLES IN THE ZAMBIAN JURISDICTION

As alluded to above, the notion of the governing principles of adherence to the Principles of Sentencing has been developed on the hinge of jurisprudence as opposed to statutory law.

³⁶ William Wade and Christopher Forsyth, Administrative Law, 9th ed, Oxford University Press, London, 2004, Page.447

³⁷ *R v The University of Cambridge* [1723] 1 Stra 557, 567

³⁸ www.KalyanCityLife.com, Principles of Natural Justice-Consequences if not Followed [Accessed on 28th of October, 2010]

³⁹ www.wapedia.mobi [Accessed on the 3rd of January, 2011]

⁴⁰ [2001] 4 All ER .289

In the celebrated case of *Nsokolo*⁴¹, Chief Justice Law (as he then was) propounded the five basic principles of sentencing which the courts in Zambia have 'all along followed' in the determination of appropriate sentences to be imposed. According to Justice Law, in determining the appropriate sentence to be minted out, recourse has to be had to the nature and intrinsic value of the matter involved in the offence.

Secondly, Justice Law, was of the view that a sentencer ought to also take into consideration the history, character and previous record of the accused. It must be noted that this principle has been subject of litigation in the Zambian legal jurisdiction with conflicting application in different cases as will be shown in the due course of this paper⁴².

Thirdly, Justice Law was of the view that the age of the offender had to be taken into consideration. This was mainly on account that to exclude a young offender from society for great lengths of time where an option not to was available would deprive such an offender any chance of further participation in the affairs of society to which he or she would immensely contribute.

Fourthly, Justice Law was of the view that the character of the accused had to be taken into account at the time of sentencing⁴³. To this effect, if 'X' at his trial confined himself to proper behavior and by all account did not waste the courts time especially by pleading guilty to an offence at his own volition, then 'X' deserved a lighter sentence to 'Z' who acted to the contrary.

Finally and fifthly, Justice Law was of the view that at the time of sentence, courts had to take into account the prevalence of the offence in society with which an accused who had just been found guilty was being committed. One is of the opinion that the underlining notion behind this principle was to enable the courts of law to send out a clear message to would-be offenders as a means of deterrence by imposing stiffer punishment by way of custodial sentence within the ambit of the law. This in effect accounts for the governing principles of sentencing that exist in Zambia to which adjudicators are to abide by whenever faced with the need to sentence an accused upon delivery of a guilty verdict.

⁴¹ [1940] 2 NRLR 85

⁴² Simon Kulusika, ***Criminal Law***, Page.813

⁴³ Simon Kulusika, ***Criminal Law***, Page.813

2.4 ADHERENCE TO THE RULES OF NATURAL JUSTICE AND SENTENCING PRINCIPLES IN CONTEMPT MATTERS; THE ZAMBIAN LEGAL PERSPECTIVE

While it is generally accepted that the Zambian courts of law take cognizance of the existence of the Rules of Natural Justice, one is also alive to the fact that the same are not always adhered to on all accounts. Similarly, the notion of the adherence to the principles of sentencing have similarly not always been adhered to even after firm approval of the same principles by subsequent case law in variant cases such as the cases of Chipata⁴⁴ and Kabongo⁴⁵.

These inconsistencies in the application of the immediate aforementioned principles of natural justice and sentencing principles now seem to have the due legal backing of the Supreme Court of Zambia⁴⁶ by way of judicial precedent. For instance, in the case of Zambia National Provident Fund v Chirwa⁴⁷, the court was of the view that where it was not in dispute that an employee had committed an offence, for which appropriate punishment was dismissal, and such an employee was in fact dismissed, no injustice could be attached to an employer on account of failure to adhere to the procedure of an employee being accorded a chance to be heard. This according to the Supreme Court was correct in law even if the same was provided for in such an individual's contract of employment.

Similarly, the High Court for Zambia⁴⁸ in the case of Davison v The National Agricultural Market Board⁴⁹ was of the view that where there existed a pure master and servant relationship, failure to observe the Rules of Natural Justice did not result in injustice or wrongful dismissal (which is void) when a question of dismissal arose. The Supreme Court sought to clarify this position of the law in the case of Miyanda v the Attorney General⁵⁰ when it was held that the appellant in the case had to succeed as he fell in the class of 'statutory employment' which provided for such a procedure of adhering to principle of *audi alteram partem*.

⁴⁴ [1970] SJZ 189

⁴⁵ [1974] Z.R 83

⁴⁶ Article 92 of The Constitution of the Republic of Zambia Chapter 1 of the Laws

⁴⁷ [1986] ZR 70

⁴⁸ Article 94 of The Constitution of the Republic of Zambia Chapter 1 of the Laws

⁴⁹ [1975] 1 A.L.R Comm.1

⁵⁰ [1985] Z.R 185

While one is alive to the fact that the Supreme Court arrived at the right decision in the case of *Miyanda v the Attorney General*⁵¹, one inclined to opine that the same was erroneously arrived at. This is because of the fact that while the Rules of Natural Justice can be accorded statutory recognition, their genesis is traceable only at common law and equity. Therefore, their application must and should never be purely on account of statutory law but simply based on the principles of common law, equity and common fairness⁵².

This position as to the application of the principles of Natural Justice being availed at all times to an individual irrespective of statutory recognition as in the case of *Miyanda v The Attorney General*⁵³ can however be evidenced in the case of *Zambia Sugar Company Plc v Gumboh*⁵⁴ where the same Supreme Court without a trace of distinction from the former case was of the view that a purported termination of the respondent's contract of employment was a nullity on account that the Rules of Natural Justice were not followed by not furnishing the Respondent with reasons for such termination. This decision was passed in light of previous decisions and while the said employment in question was never a 'statutory form of employment' as the case was in *Miyanda v The Attorney General*⁵⁵.

The above sequence of decided cases leaves much to be desired as it clearly illustrates a pattern of inconsistency in the application of the Rules of Natural Justice as well as illustrates a blatant disregard for precedent which the Supreme Court of Zambia has set forth for itself. If the courts of law in Zambia, especially the Supreme Court are to depart from their own decisions, it follows that the same ought to be done by clear distinction from past decisions while being courteous enough to advance reasons for the same.

Similarly, the notion that the principles of sentencing have always been adhered to in the Zambian legal perspective can only be described as a legal facade. To this effect, three cases highlight this position. Firstly, the case of *Anderson Kambela Mazoka v Levy Patrick Mwanawasa and 2 others*⁵⁶ gives credence to above assertion while read in line with the another ruling delivered by the Supreme Court of Zambia in the same case of *Anderson Kambela Mazoka v Levy Patrick Mwanawasa and 2 others*⁵⁷ and the case of *Communications*

⁵¹ [1985] Z.R 185

⁵² *Regina v Secretary of State For Home Affairs Ex Parte Hosenball* [1977] 1 WLR 766

⁵³ [1985] Z.R 185

⁵⁴ Supreme Court Appeal No. 69 of 1996

⁵⁵ [1985] Z.R 185

⁵⁶ SCZ/EP/01/2002, Ruling Delivered on the 15th of May, 2003

⁵⁷ SCZ/EP/01/2002, Ruling Delivered on the 27th of May, 2003

Authority of Zambia v Vodacom Zambia Limited⁵⁸ which will be subject of further reference during the due course of this paper.

In the first cited ruling delivered in the case of Anderson Kambela Mazoka v Levy Patrick Mwanawasa and 2 others⁵⁹, it was held that the petitioner having been found guilty of Contempt of Court was to be fined the sum of Three Million Kwacha within a period of seven days in default of which he was to serve a period of three months simple imprisonment. It must be accordingly noted that the petitioner in this matter pleaded not guilty to the said charge and was accorded a defense with witnesses fully cross examined.

However, in the same matter, the then Republican Vice President of Zambia Enoch Kavindele was also found guilty of Contempt of Court on account of the same offence committed by the petitioner by publicly commenting on the said matter while the matter was a going concern hence was guilty of *sub judice* Contempt of Court. Having pleaded guilty to the said offence and apologized to the court unreservedly, the contemnor was fined a sum of One Million Kwacha to be paid in seven days, default of which was to attract a custodial sentence of three months imprisonment.

In delivering their judgment, the court stated as follows; “we accept that apology but only to the extent that it will mitigate on the punishment which we are going to mete on him, because he has not wasted our time”. This was stated clearly in line with fourth principle of the principles of sentencing as advanced in the Nsokolo case⁶⁰. However, it is the opinion of the author of this paper that the Supreme Court clearly contradicted itself. In one vein the court was of the view that because a contemnor did not waste its time, it imposed a poultry sum of One Million Kwacha while it imposed a fine of Three Million Kwacha for the same offence where the petitioner (contemnor) pleaded not guilty. While this may *prima facie* seem correct in law, it must be clearly noted that each of the contemnors were accorded a period of seven days within which to pay the said fines failure to which they would serve a period of three months simple imprisonment. This was irrespective of the respective stations in life.

Gravely so, it must be noted with the utmost emphasis that Section 4 (2) of the Contempt of Court (Miscellaneous Provisions) Act⁶¹ provides a threshold of six months imprisonment for the offence in question committed by both contemnors yet the court decided to accorded the

⁵⁸ Supreme Court Appeal No. 98 of 2008

⁵⁹ SCZ/EP/01/2002, Ruling Delivered on the 15th of May, 2003

⁶⁰ [1940] 2 NRLR 85

⁶¹ Chapter 38 of the Laws of Zambia

same time frame of imprisonment in default of fines imposed. Therefore, the question that begs to be answered is; would it be in line with the principles of sentencing had the contemnor who had pleaded guilty been in a state of impecuniosity so as to fail to pay the fine in question and thus save an equivalent custodial sentence as an equally impecunious contemnor who had wasted the Supreme Court's time? The answer can clearly never be in the affirmative.

Consequently, the case of Communications Authority of Zambia v Vodacom Zambia Limited⁶² gives further credence to the notion that Principles of Sentencing have been a subject of disregard especially in Contempt of Court cases. To this effect, it must be noted that the notion of Contempt of Court arose in this matter as *sub judice* Contempt which was meant to scandalize the Supreme Court of Zambia by impugning the undue influence of the executive in the delivery of a judgment against the Respondent Company. In this particular case, the Chairman of the Respondent company and former Republican Vice President Enoch Kavindele was quoted in one of the daily tabloids as having stated that;

"I am particularly upset that the President himself could direct the Supreme Court to rule against me over Vodacom."⁶³

Having been charged with Contempt of Court, the said contemnor gave evidence in mitigation while pleading guilty to the offence so charged with.

In delivering the judgment of the Deputy Chief Justice Ireen Mambilima had the following to say when she stated that;

"be as it may, having taken into account the background to the utterances and the remorse shown by the contemnor over his remarks and the fact that he readily admitted the charge, we hereby fine the Contemnor Five Million Kwacha. The fine shall be paid within seven days from today. In default, he shall serve a term of six months simple imprisonment. We wish to emphasis that had it not been for the plea of guilty, apology and mitigation, we would have imposed a custodial sentence."

As illustrated in the case Kambela Mazoka v Levy Patrick Mwanawasa and 2 others⁶⁴, the Supreme Court once again showed error, self contradiction and inconsistency in their application of the well founded Principles of Sentencing. In one vein, the Supreme Court clearly stated that they were imposing a weaker sentence on the Contemnor on account that he had not wasted the court's time by pleading guilty and mitigating.

⁶² Supreme Court Appeal No. 98 of 2008

⁶³ Communications Authority of Zambia v Vodacom Zambia Limited

⁶⁴ SCZ/EP/01/2002, Ruling Delivered on the 15th of May, 2003

In another vein, the Supreme Court cast a blind eye to the very fact that the Contemnor in this matter was not a first offender as he simply adopted the same litigation strategy under the circumstances as he did in the case of Kambela Mazoka v Levy Patrick Mwanawasa and 2 others⁶⁵ to avoid a custodial sentence and as such disregarded the very principles of sentencing which the court sought to apply. While one is alive to the fact that courts generally have the discretion to impose weaker sentences on offenders where such option exists, it is cardinal that the same be done in accordance with well established principles of law. Consequentially, general practice demands that second offenders ought to be accorded stiffer punishments by the courts of law especially in instances that involve the same offence being repeated. It is therefore the opinion of this paper that a custodial sentence would have been more appropriate.

2.5 THE CASE OF SEBASTIAN SAIZI ZULU v THE PEOPLE

The facts of Sebastian Saizi Zulu v The People⁶⁶, a celebrated and highly relied upon judicial precedent, are an example of Contempt of Court in the face of the Court. In this case, the Appellant acted as defense counsel in a murder case involving one Kambarange Kaunda. Before judgment could be delivered, that is, after final submissions on behalf of the accused had been made, the Appellant handed to the learned trial judge an affidavit and made an application for the learned trial judge to recuse himself from that case.

According to contents of the affidavit filed, the judge was to do so on the ground set out in the affidavit to the effect that the learned trial judge had in a letter signed by three other judges, promised to “fix” the then murder accused who was the son of the former Republican President Kenneth Kaunda, by sentencing him to death. The learned trial judge found the conduct of the Appellant to have been highly contemptuous and therefore found the Appellant guilty of Contempt of Court and sentenced him to twelve months imprisonment with hard labour. Sequentially, counsel for the accused murder suspect appealed against judgment entered against him to the Supreme Court of Zambia, setting the scene for this landmark judgment.

During the course of this appeal, five grounds of appeal were advanced on behalf of the Appellant. However, only one ground is relevant and cardinal for purposes of this paper. To this effect, it was put to the Supreme Court as to whether or not it was proper for the presiding

⁶⁵ SCZ/EP/01/2002, Ruling Delivered on the 27th of May, 2003

⁶⁶ SCZ No.7 of 1991

judge to have acted in manner that espoused bias and impartiality as the trial judge had acted as an adjudicator and prosecutor in contravention of the Rules of Natural Justice, in particular the rule that, 'no man can be a judge in his own case'. It was argued by counsel for the Appellant while citing Lord Denning in the case of *Balough v The Crown*⁶⁷ that the power to summarily deal with matters of Contempt of Court by courts had to be restricted to instances of an exceptional nature when it was;

"urgent and imperative to act immediately so as to maintain the authority of the court to prevent disorder.....and with scrupulous care and only when the case is clear and beyond any reasonable doubt".

2.5.1 RATIO DECIDENDI IN THE CASE OF ZULU V THE PEOPLE

The court was of the view in disregarding arguments advanced by counsel in support of the ground that the Rules of Natural Justice had been breached by stating that "where a contempt is committed in the face of the court there is nothing illegal (or even unfair) in the holding (under Order 52) of an enquiry by a judge before whom the contempt is committed". What in effect the Supreme Court was clarifying in this particular instance was the notion that where Contempt of Court had been committed in the face of the court, it was proper for the court to summarily deal with such a matter irrespective of a breach of the Rules of Natural Justice for the furtherance and maintenance of the administration of justice.

It must be noted that this approach presupposes that one has no possible defense whatsoever so as the warrant the disposal of a matter summarily once purported to be contemptuous if such a purported contempt occurs in the face of court. This approach resonates well with the approach adopted by the Supreme Court of Zambia in certain matters of an employment nature of a master and servant nature as espoused in the cases of *Zambia National Provident Fund v Chirwa*⁶⁸ and *Davison v The National Agricultural Market Board*⁶⁹ as aforementioned.

Consequently, while one is conscious of the need for the court to summarily deal with certain instances of Contempt of Court summarily, such as the need to stop physical injury to witnesses within court premises, the same should only be exercised diligently and in very exceptional circumstances. Quite clearly, and in the opinion of this paper, the circumstances of this case do not lend themselves to one of those very exceptional circumstances where the Court acts summarily as it did. As espoused in the case of *Gough v Chief Constable of*

⁶⁷ [1974] 3 ALL E.R. 283

⁶⁸ [1986] ZR 70

⁶⁹ [1975] 1 A.L.R Comm.1

Derbyshire Constabulary⁷⁰, the principle that ‘no man ought to be a judge in his own case’ encompasses the ‘rule against bias’.

The rule as advanced in the Gough Case clearly entails that where there exists a real possibility of ‘bias’ in the adjudication of matters, the same acts as a sufficient ground to set aside a decision so passed on appeal. One is therefore inclined to opine to the effect that the Supreme Court hence erred in law when it upheld a blatant breach of the Rules of Natural Justice by erroneously finding that the facts of this case did lend themselves to the exceptional instances where the Rules of Natural justice could be breached in order to preserve the due administration of justice.

Secondly, the notion advanced by the Court that the breach of a pertinent Rule of Natural Justice was justified under the circumstances can not be supported at law on account that the contemnor in this case did not adduce ‘reliable evidence’. According to the Supreme Court, the judge in this case could not be called upon to recuse himself from this case because of the unavailability of reliable evidence of bias adduced by the contemnor, which they defined as being, “evidence which can be tested in cross-examination and found to be cogent.”⁷¹ One is inclined to the effect that such an assertion lacks any semblance of logic. This is because the very essence of the rule against bias entails that one is not required to produce actual evidence as to bias alleged but has to simply illustrate a possibility of bias. On all accounts therefore, it is the opinion of this paper that a breach of the Rules of Natural Justice can not be supported by the law or as a matter of fact.

2.6 SUBSEQUENT ZAMBIAN JUDICIAL PRONOUNCEMENTS; DO THEY DISREGARD SENTENCING PRINCIPLES ESTABLISHED BY PRECEDENT

Following the case of Zulu v The People⁷², a number of judicial pronouncements have been passed in the Zambian that deal with Contempt of Court. It must be noted at this juncture that the same have neither adhered to the rules of natural justice nor have they adhered to the principles that govern sentencing as will be illustrated in the following cases.

⁷⁰ [2001] 4 All ER .289

⁷¹ Zulu v The People SCZ No.7 of 1991,Page.8

⁷² SCZ No.7 of 1991

2.6.1 Elias Kundiona v The People⁷³

This particular case arose out of the facts alluded to in the case of *Zulu v The people*⁷⁴ in so far as the contemnor in this case failed to appear before court having been the deponent of the affidavit which was deemed as contemptuous in the case of *Zulu v The People*⁷⁵. The contemnor in this case appealed against his conviction having been convicted on both counts of Contempt of Court so charged with.

In the second argument of the first ground of appeal, it was contended that the Appellant was the victim of an unfair trial because the learned trial judge was not impartial and independent. Ironically, and in a sudden departure from what the court stated in *Zulu v The People*, the court stated as follows;

“admittedly a judge reacting to an attack upon himself necessarily assumes many roles in the proceedings against a contemnor.....we have already made the observation that no specific procedure is prescribed for summary contempt and the important point will be the observance of the basic principles of fairness, such as affording the accused the right to be heard in his own behalf.”

It must be noted that the Supreme Court of Zambia in one breath clearly recognised the position that the judge in the present case and in all cases of summary contempt acted as judge, prosecutor and witness by assuming many roles in the proceedings. However, what the court fell short of taking cognizance of; was the inherent danger that such a blatant disregard for the Rules of Natural Justice entails.

Moreover, the court clearly departed from the precedent and guidelines it set for itself in the case of *Zulu v The People*⁷⁶ where it stated that Contempt of Court could be summarily dealt with and that the breach of the Principles of Natural Justice was justified if the same was done when an immediate need for the furtherance of the administration of justice arose. Clearly, the judge in the High Court still went on to summarily deal with the matter of Contempt of Court even after determination of the matter of murder in the case that gave rise to proceedings of Contempt of Court hence leaving no grounds for summarily determination of the aspect of Contempt of Court.

As in the case of *Zulu v The People*⁷⁷, the Court once again failed to apply the rule against bias to its full effect taking into regard that a judge attacked as to his credibility naturally

⁷³ [1993] S.J .49

⁷⁴ SCZ No.7 of 1991

⁷⁵ SCZ No.7 of 1991

⁷⁶ SCZ No.7 of 1991

⁷⁷ SCZ No.7 of 1991

assumes biased interest in such a matter. Moreover, one can only add that the assumption of many roles in contempt proceedings has an inherent danger of a judge giving evidence at the bench, an act which in all fairness of litigation should enable an alleged contemnor the opportunity to subject all witnesses to the rigors of cross examination, a fact which would prove unfavorable and undesirable to presiding judges.

2.6.2 MASIYE MOTELS LTD V RESCUE SHOULDERS⁷⁸

The facts of this case lend themselves to a peculiarity. In this particular case, the contemnors in this case where at all times advocate and client who had appealed against a decision in a civil suit to the Supreme Court from the High Court of Zambia. Having been unsuccessful in their appeal, the second contemnor went on to utter words through written correspondence to the presiding Supreme Court justices to the effect that he had been advised by his lawyer that the decision of the court was a “stupid judgment by stupid judges”.

Using their inherent powers under order 52/1/23 of the Rules of the Supreme Court⁷⁹, the court cited both individuals for Contempt of Court. When called upon to defend their assertions, the first contemnor who was counsel for the second contemnor in the civil suit did not deny the said assertions attributed to him and his client.

In this particular case, as the case with the above cases discussed, the Court assumed the role of complainant, investigator, prosecutor and judge in establishing the guilt of both contemnors for acts deemed contemptuous. This was clearly in violation of the Principles of Natural Justice legally inexcusable even under the threshold of the immediate administration of justice standard that the court set in the *Zulu v The People*⁸⁰.

The court in this particular case further imposed a custodial sentence without the option of a fine irrespective of the fact that the contemnors in question were first offenders, a consideration the Supreme Court should have taken into account. This is especially so in light of the fact that the court has previously stated that even though a Contempt of court is serious, the fact that mitigating factors exist, in this case the notion of being first offenders, a fine as opposed to a custodial sentence remains appropriate in default of which imprisonment would

⁷⁸ SCZ Appeal No.187 of 2007

⁷⁹ Order 52 rule 1 sub-rule 23 of the Rules of the Supreme Court, 1999 edition

⁸⁰ SCZ No.7 of 1991

suffice⁸¹. Clearly, this represents a departure from the very principles of sentencing that the Supreme Court of Zambia has previously adopted and prescribed.

2.7 JUDICIAL PRONOUNCEMENTS ON CONTEMPT MATTERS IN THE COMMONWEALTH JURISDICTION

As compared to the Zambian legal jurisdiction, courts in the commonwealth have favorably handled matters of contempt of Court in terms of the adherence to the Rules of Natural Justice and Sentencing Principles. This can be entirely attributed to the fact that courts in the rest of the commonwealth have adopted the legal position that the legal aspect of Contempt of Court is one that is to be utilized purely as a means of preserving the administration of justice and not as a means of coercing litigants and advocates to be respectful to the courts of law or shield themselves from criticism. Moreover, it must be emphasized that statutory law in the United Kingdom has been amended on the recommendation of the Phillimore Committee to include the defence of truth against Contempt of Court by way of scandalizing a presiding court justice⁸². In order to obtain a holistic view as to use of the legal aspect of Contempt of Court, recourse has to be had to jurisprudence to this effect.

2.7.1 AMBARD V THE ATTORNEY GENERAL FOR TRINIDAD AND TOBAGO

In this particular case, the courts took cognizance of the all important aspect that courts should inevitably be subject to the very rigors of public criticism. The court was of the view that as long as such criticism was done in good faith; the same could never amount to Contempt of Court. To this effect, lord Atkin stated;

“Justice is not a cloistered virtue; she must be allowed to suffer the respectful, even though outspoken comments of ordinary men.”

Clearly, what Lord Atkin was taking cognizance of was the fact that the courts custodians of the law could not especially be immune to criticism even though harsh or outspoken from ordinary members of society for as long as the same was done in good faith.

2.7.2 DUDA’S CASE

The case of Duda⁸³ in the Indian legal jurisdiction does not only give credence to the assertion that proper criticism of judicial officers is not contemptuous. It also extends this to the very

⁸¹ Zulu v The People SCZ No.7 of 1991,Page.9

⁸² www.AIrc.com. **A note on the Law of Contempt, The Case of Micheal Anthony Fernando**[Accessed on the 3rd of January,2011]

⁸³ AIR 1988 SC 1208

aspect that words though harsh, directed at judges in courts of law are not contemptuous if the same do not bring into disrepute or impair the administration of justice.

In this case, an Indian cabinet minister stated in reference to judges that the highest Court had their “unconcealed sympathy for the haves” (as opposed to the have nots) when they had interpreted the expression “compensation” in the manner they did, clearly attributing motives. It was held by a quorum of two judges that the same could not amount to contempt of court. In discharging the said minister, the court noted that;

“the speech of the Minister has to be read in its proper perspective, and when so read it did not bring the administration of justice into disrepute or impair the administration of justice. The Minister is not guilty of contempt of the Court.”

This position adopted by the Indian courts highlights the need to only utilize the legal notion of Contempt of Court when a need arises to preserve the due administration of justice.

2.7.3 R V THE COMMISSIONER OF POLICE

The case of *R v The Commissioner of Police*⁸⁴ as the cases of *Duda and Ambard v The Attorney General of Trinidad and Tobago* clearly highlights the only instance in which the legal notion of Contempt of Court should be invoked by the courts of law. This can be noted from the words of Lord Denning when he states that;

“Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.”

Further, the learned author and retired Indian Justice, H Suresh is of the view that the notion of contempt of court must be utilized in the most liberal manner. He cites the approach adopted by in the United States of America where Contempt of Court proceedings are only invoked *proprio moto* where there exists a ‘clear and present danger’ to the administration of justice⁸⁵.

⁸⁴ [1968] 2 Q.B 150

⁸⁵ www.Alcrc.com. **A note on the Law of Contempt, The Case of Micheal Anthony Fernando**[Accessed on the 3rd of January,2011]

2.8 CONCLUSION

From the foregoing, it becomes clear that the proper standard and instance where courts should invoke the legal notion of Contempt of Court is when the administration of justice is clearly and without a doubt at risk of not being administered owing to the conduct of a contemnor. The position that the administration of justice supersedes the need to the adherence to the Rules of Natural Justice is one that still attracts great legal debate. However, one is inclined to opine to the effect that the very observance of these rules should never be disregarded unless such hindrance to the administration of justice is clear and immediate. Conclusively, it must be noted based purely on authority derived from Zambian jurisprudence the trend to disregard principles of sentencing especially in the highest Court in the land, the Supreme Court for Zambia, which accords no opportunity for appeal. It is for this reason that it is even more undesirable that contempt matters be handled summarily before it.

CHAPTER THREE: THE GOVERNING LEGAL FRAME WORK ON CONTEMPT OF COURT IN ZAMBIA

3.1 INTRODUCTION

As the case with any notion of the law, Contempt of Court is governed by a host of pieces of legislation in the Zambian legal jurisdiction. In this respect, this aspect of the law which is to be utilized for the due administration of justice as highlighted in the Second Chapter of this paper is governed by four pieces of legislation in the Zambian legal jurisdiction. These include, Contempt of Court (Miscellaneous Provisions) Act⁸⁶, the High Court Act⁸⁷, the Penal Code Act⁸⁸ as well as the provisions of Order 52 of the Rules of the Supreme Court (White Book) 1999 edition⁸⁹.

This Chapter attempts to analyze the provisions of statutory legislation that governs Contempt of Court in Zambia with a bias as to whether the same adhere to the Rules of Natural Justice. For purposes of this Chapter, one is inclined to undertake an analysis of the statutory law governing Contempt of Court in the following order, beginning with the Contempt of Court (Miscellaneous Provisions) Act⁹⁰. This will be followed by an analysis of the law as enacted in the High Court Act⁹¹, followed by the law as espoused in the Penal Code Act⁹² and will finally end with an analysis of the law as espoused in the Rules of the Supreme Court, 1999 edition⁹³.

3.2 THE CONTEMPT OF COURT (Miscellaneous Provisions) ACT

This Act came into effect in the year of 1965 and was amended in 1967 and in 1994, amendments which will also be subject of analysis under this heading but not on account of being amendments to this Act. It must be noted from the very genesis of this paper that the aforementioned Act under analysis primarily has five sections, of which all will be subject of analysis not only as a result of their inherent relevance to this research paper, but also owing to their short length. The Act as all Zambian statutory legislation has an introductory Section under Section 1.

⁸⁶ Chapter 38 of the Laws of Zambia

⁸⁷ Chapter 27 of the Laws of Zambia

⁸⁸ Section 116 of Chapter 87 of the Laws of Zambia

⁸⁹ Order 52 of the Rules of the Supreme Court, 1999 edition

⁹⁰ Chapter 38 of the Laws of Zambia

⁹¹ Chapter 27 of the laws of Zambia

⁹² Section 116 of chapter 87 of the Laws of Zambia

⁹³ Order 52 of the Rules of the Supreme Court, 1999 edition

However, and cardinally to this paper, the Act under Section 2 establishes the instances when an alleged contemnor will not be deemed to have actually been contemptuous of court owing to innocent publication which has potential to interfere with the due administration of justice.

To this respect, the Act enacts under section 2 (1) that;

“A person shall not be guilty of contempt of court on the ground that he has published any matter calculated to interfere with the course of justice in connection with any proceedings pending or imminent at the time of publication if at that time (having taken all reasonable care) he did not know and had no reason to suspect that the proceedings were pending, or that such proceedings were imminent, as the case may be.”

Under the above highlighted Section, the law seems to take the unprecedented approach that ignorance will be a defence. It is the opinion of this paper, that the above Section accords an alleged Contemnor an easy option when advancing a defence to the charge of Contempt of Court by way of publication as the same entails a situation where one simply brings to the attention of the court that the publication in question was published innocently. One is further of the view that this will also include the aspect that one has to prove to the court that such publication was by no means published in an attempt to stifle the due administration of justice.

In addition, the Act in Sub-Sections 2 and 3 of Section 2 enacts to the effect that;

“(2) A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing such matter as is mentioned in subsection (1) if at the time of distribution (having taken all reasonable care) he did not know that it contained any such matter as aforesaid and had no reason to suspect that it was likely to do so.”

“(3) The proof of any fact tending to establish a defence afforded by this section to any person in proceedings for contempt of court shall lie upon that person”.

In this accord, Sub Section 2 of Section 2 of the Act again fortifies the position that it will be sufficient to show as a way of defence that one did not believe or know at the time the publication in question was caused to be distributed by such an individual; that the same contained material that would lead to interference with the due administration of justice. However, it must be emphasized that the said Sub Section aforementioned establishes an objective standard of determining whether or not an alleged contemnor took reasonable care to establish the contents of the publication before such an individual undertook to distribute the publication in question.

Under Sub Section 3 of Section 2 of the Act, the Act simply confers the burden of proving facts incidental to the establishment of one's defence under Contempt of Court solely on the

alleged Contemnor. This is entirely customary as in most similar instances where one has to make a defence to an allegation before the courts of law.

Further, the Act under Section 3 clearly highlights the cardinal aspect and point that publication of information relating to proceedings before courts of law are as a general rule not contemptuous. However, as with any general rule, there exist exceptions to such a particular rule. In this regard, the Act under Section 3 (1) (a) to (f) sets out to list the instances when publication of information will in fact amount to Contempt of Court.

“3. (1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say:

(a) Where the proceedings relate to the ward ship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant;

(b) Where the proceedings are brought under the law for the time being in force in Zambia with respect to the control, care or detention of, or to the estates and property of, mentally disordered or defective persons;

(c) Where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;

(d) Where the information relates to a secret process, discovery or invention which is in issue in the proceedings;

(e) Where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published;

(f) Where the proceedings are an appeal under the law with respect to income tax.”

Further, the Act under Sub Section 2 clearly also highlights that the publication of orders of Court either wholly or partially will as a general rule not amount to Contempt of Court. However, as the case is in Sub Section 1, Sub Section 2 clarifies the instances when publication will in turn be deemed as Contemptuous, in this respect; publications as to orders of the court, where the court having such jurisdiction prohibits publication as to the same. In this respect, the Act under Sub Section 2 of Section 3 enacts that;

“(2) Without prejudice to subsection (1), the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.”

In terms of Sub Section 3 of Section 3, the Act sets out to clarify what the term court means in terms of the provisions of Section 3 of the Act. The Act therefore dictates that;

“(3) In this section, references to a court include references to a Judge or magistrate and to a tribunal and to any person exercising the functions of a court, a Judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.”

In terms of the provisions of Section 4 of the Act, the Act lists the instances which are not contemptuous of court as they clearly do not stifle the due administration of justice. However, the Act still recognizes the said in-listed acts as being unlawful. These acts as highlighted in Section 4 Sub Section 2 equally carry penal sanctions with them with a custodial sentence not exceeding six months.

In this view, the said Section 4 of the Act enacts that;

“(4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be punishable apart from this section.

(1) It shall not be lawful to print or publish or cause or procure to be printed or published-

(a) in relation to any judicial proceedings, any indecent matter or indecent medical, surgical or physiological details being matter or details the publication of which would be calculated to injure public morals;

(b) in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, or for restitution of conjugal rights, any particulars other than the following, that is to say:

(i) the names, addresses and occupations of the parties and witnesses;

(ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given;

(iii) submissions on any point of law arising in the course of the proceedings, and the decisions of the court thereon;

(iv) the judgment of the court and observations made by the Judge or magistrate in giving judgment:

Provided that nothing in this paragraph shall be held to permit the publication of anything contrary to the provisions of paragraph (a).

(2) If any person contravenes any provision of subsection (1), he shall be guilty of an offence and shall be liable on conviction to imprisonment for six months, or to a fine not exceeding fifteen thousand penalty units, or to both:

Provided that no person, other than a proprietor, editor, master printer or publisher, shall be liable to be convicted under this section.

(3) No prosecution for an offence under this section shall be commenced by any person without the written consent of the Director of Public Prosecutions.

(4) Nothing in this section shall apply to the printing of any pleading, transcript of evidence or other document for use in connection with any judicial proceedings or the communication thereof to persons concerned in the proceedings, or to the printing or publishing of any notice or report in pursuance of the directions of the court, or to the printing or publishing of any matter in any separate volume or part of any bona fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law, or in any publication of a technical character bona fide intended for circulation among members of the legal or medical profession.”

Sequentially, it must be noted under the provisions of Section 5 of the Act that the provisions under analysis provide for the legal option of an appeal to an appellate court in terms of hierarchy as per the Zambian judicial court system against decisions convicting one of Contempt of Court. However, and as highlighted in the previous Chapter of this paper, it follows that once an individual is convicted of the offence of Contempt of Court by the Supreme Court of Zambia, such as individual has no forum to appeal to. This was as clearly discussed in the cases of *Masiye Motels Limited v Rescue Shoulders*⁹⁴ and that of *Communications Authority of Zambia v Vodacom Zambia Limited*⁹⁵ as advanced in the second Chapter of this paper.

In this respect, Section 5 of the Act enacts to the effect that;

“5. (1) Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt); and in relation to any such order or decision, the provisions of this section shall have effect in substitution for any other written law relating to appeals in civil or criminal proceedings.

(2) An appeal under this section shall lie in any case at the instance of the person against whom the order or decision has been made and, in the case of an applicant for committal or attachment, at the instance of the applicant; and the appeal shall lie-

(a) from the order or decision of any subordinate court, to the High Court;

(b) from an order or decision of the High Court, to the Supreme Court.

(3) The court to which an appeal is brought under this section may exercise any of the powers conferred upon it in relation to the hearing and determining of appeals generally by the Criminal Procedure Code or Supreme Court of Zambia Act, and without prejudice to the inherent powers of any court referred to in subsection (2), provision may be made by rules of court for authorising the release on bail of an appellant under this section.

(4) Without prejudice to the provisions of this Act, an appeal under this section shall be lodged and prosecuted in compliance with the provisions of the Criminal Procedure Code or the Supreme Court of Zambia Act, as appropriate.”

In terms of Sub Section 5 of Section 5 of the Act, the Act as the case in Section 3 (3) endeavors to highlight what the term court means as per the specific provisions of Section 5 of the Act. In this respect, the Act enacts that;

“(5) In this section, "court" includes any tribunal or person having power to punish for contempt; and references in this section to an order or decision of a court in the exercise of jurisdiction to punish for contempt of court includes references to an order or decision of the High Court or a subordinate court under any enactment enabling that court to deal with an offence as if it were contempt of court.

(6) This section shall not apply to a conviction or sentence in respect of which an appeal lies under the Criminal Procedure Code.”

⁹⁴ SCZ Appeal No. 187 of 2007

⁹⁵ Supreme Court Appeal No. 98 of 2008

3.3 THE HIGH COURT ACT

This Act⁹⁶ was promulgated in the year 1960 and was subject of extensive amendments in the year 1964. However, and for purposes of this research paper, it is cardinal to analyze the contents of the subsidiary legislation that manifests in the form of Orders of the High Court for Zambia often used for purposes of procedure in the High Court. One particular Order is however cardinal to this paper in terms of the High Court Act; this being Order 5 Rule 25 of the High Court Rules⁹⁷.

The provision in question raises the notion that a deponent to an affidavit can be allowed to advance evidence in contempt proceedings through an affidavit that he deposes to. However, what the Order in question also clearly highlights is that a deponent to such an affidavit can escape the rigors of cross examination as to the veracity of his allegations or evidence as advanced by way of affidavit. While this is entirely within the confines of the law and based on an adjudicator's discretion as will be noted from the actual wording of the Order, it follows that the same represents an avenue for the abrogation of the Rules of Natural Justice.

This is because the procedural law enacted in Order 5 rule 25 of the High Court Rules essentially tends to leave the notion of one's right to be heard in the 'hands' of an adjudicator. It is trite law that an accused person has the inherent right to face his accusers and represents a fundamental aspect of the notion that one ought to be heard before judgment can be passed on them. This includes subjecting individuals that tender evidence of an accused's guilt to the rigors of cross examination⁹⁸.

To leave the notion of cross examination of deponents to affidavits containing evidence with the potential to cause one to be imprisoned for a substantial period of time without subjecting the deponent of such an affidavit to the rigors of cross examination is in the opinion of this paper a breach of the Rules of Natural Justice. It is further the opinion of this paper that the law seems to make 'light weight' of the consequences of Contempt of Court under Order 5 rule 25 by providing that there can arise certain instances when an individual who presents evidence in court by means of affidavit can do so without 'proper' challenge as to the veracity of such evidence through cross examination. How the same can be advanced in the name of preserving the 'interest of justice' when such evidence has the potential to deprive one of his

⁹⁶ Subsidiary Provisions of Chapter 27 of the Laws of Zambia

⁹⁷ Chapter 27 of the Laws of Zambia

⁹⁸ Sivagnanam, **Principles of Natural Justice**, Lecture Delivered at Tamil Nadu State Judicial Academy, 1st July, 2009, Page.4

liberty on account of imprisonment as evidenced by case law in the previous Chapter of this paper remains a legal myth to this author.

To this effect, the said Order enacts to the effect that;

“In any suit, the Court may, in its discretion, if the interests of justice appear absolutely so to require (for reasons to be recorded in the minutes of the proceedings), admit an affidavit in evidence, although it is shown that the party against whom the affidavit is offered in evidence has had no opportunity of cross-examining the person making the affidavit.”⁹⁹

⁹⁹ Chapter 27 of the Laws of Zambia

adopt the instances as advanced by the learned Card¹⁰³ which amount to Criminal Contempt when he states that;

“There are eight principle categories of criminal contempt. These include; (1) contempt in the face of court, (2) scandalizing the court (this will be subject of further clarity and discussion in the due course of this paper), (3) reprisals against jurors and witnesses, (4) obstructing officers of the court in their duties, (5) conduct liable to prejudice the fair trial or conduct of pending or eminent proceedings, (6) publications which prejudice issues in pending civil proceedings, (7) publication of information relating to proceedings in private and (8) publishing the identity of anonymous witnesses as per court order as to anonymity.”

However, the provisions of Sub Section 2 of Section 116 of the Penal Code Act raises particular concern for purposes of this paper. To this effect, the said Sub Section enacts that;

“(2) When any offence against paragraph (a), (b), (c), (d) or (i) of subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding six hundred penalty units or, in default of payment, to imprisonment without hard labour for one month”.

As the case with the provisions of Order 5 rule 25 of the rules of the High Court¹⁰⁴, it is the opinion of this paper that the provisions of Sub Section 2 represent a clear violation of the Rules of Natural Justice. This is because the said provision provides for a summary of determination of matters deemed as contemptuous at the very next seating of a court before which alleged acts of contempt occurred.

In this particular instance therefore, such a presiding judicial officer before whom such a matter tasked assumes the office of judge, jury and witness to the said contemptuous acts. Moreover, this particular Sub Section does not detail whether or not an alleged contemnor will be allowed in such circumstances to adduce evidence in his defence, call witnesses or subject his accuser to the rigors of cross examination, an act which would be most certainly undesirable by presiding judicial officers under the circumstances.

It must be noted that the provisions of Sub Section 3 of the Act in question give credence to the aforementioned decision in the case of Rupiah Bwezani Banda v The Post Newspapers Limited¹⁰⁵ where the court acknowledged the fact that Criminal Contempt can be advanced by way of Order 52 of the Rules of the Supreme Court. This is because the provisions of Section

¹⁰³ Richard Card, Introduction to Criminal Law, 9th Ed, London Butterworths, 1980. Page.267

¹⁰⁴ Chapter 27 of the Laws of Zambia

¹⁰⁵ 2008/HP/0984, Ruling Delivered on the 9th of July, 2010

116 of the Penal Code Act¹⁰⁶ by virtue of the provisions of Sub Section 3 are an addition to existing law that enables courts to punish for Contempt of Court.

To this effect, the said Sub Section enacts that;

“(3) The provisions of this section shall be deemed to be in addition to and not in derogation from the power of a court to punish for contempt of court”.

¹⁰⁶ Chapter 87 of the Laws of Zambia

3.5 THE RULES OF THE SUPREME COURT

The Rules of the Supreme Court of England of 1999 edition today stand on equal footing with the rest of the statutory laws of Zambia. This position of the law has since been recognised by the Supreme Court of Zambia in the case of *Ruth Kumbi v Robinson Kaleb Zulu*¹⁰⁷. It is important to note from the onset that the effect of this judgement is that the whole of the 1999 edition of the Rules of the Supreme Court of England (White Book) is now law in Zambia by statute, that is to say, it is as good as and on equal footing with the rules of the Zambian courts.

The White Book no longer fills in gaps in the Zambian rules and procedure when there is a lacuna as it were, as intimated in section 10 of the High Court Act which provides thus in part:

“in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice”¹⁰⁸.

This is the same position provided for by Section 8 of the Supreme Court Act which provides thus in part:

“if this Act or rules of court do not make provision for any particular point of practice and procedure, then the practice and procedure of the Court shall be- (ii) in relation to civil matters, as nearly as may be in accordance with the law and practice for the time being observed in the Court of Appeal in England”¹⁰⁹.

This has far reaching effects. For lack of a better term, this judgment encourages forum shopping as it were in respects of modes of commencement of matters and at large any application of Zambian rules of Court and those of the ‘White book’. This inadvertently leads to unpredictability of the law as it would be difficult to set positive precedent in terms of application of the Zambian rules of court and those of the White book. This goes against the tenets of a good legal system.

However, it is not the intention of this paper to delve into the ramifications of the case at hand. In this regard, it follows that the provisions of the ‘White Book’ are part and parcel of

¹⁰⁷ SCZ No. 19 of 2009

¹⁰⁸ Chapter 27 of the Laws of Zambia

¹⁰⁹ Chapter 25 of the Laws of Zambia

the laws of Zambia. In terms of the subject matter of this paper, Contempt of Court, the following Orders of the White Book remain cardinal to this paper. These include;

3.5.1 ORDER 38 rule 2 (6)

The provisions of the aforementioned Order¹¹⁰ lend themselves to particular scrutiny as they are equally enacted in a manner that stifles the Rules of Natural Justice.

To this effect, the said Order enacts that;

“In contempt proceedings, where a deponent has made an affidavit, he may be cross-examined upon that affidavit. Only very exceptionally should a Judge refuse an application to cross-examine, e.g., where cross-examination would be for a collateral purpose (*Comet Products U.K. Ltd v. Hawkex Plastics Ltd* [1971] 2 Q.B. 67; [1971] 1 All E.R. 1141).”

This is because the said provision in question accords a judge the discretion to admit affidavit evidence in certain instances with the deponent of such an affidavit not being subjected to the rigors of cross examination. As the case is with Order 5 rule 25 of the High Court Rules¹¹¹, the said Order creates an inherent danger of an alleged contemnor being deprived of his liberty by way of custodial sentence without actually facing his accusers by way of cross examining¹¹² a deponent to an affidavit which contains evidence of alleged contemptuous acts.

3.5.2 ORDER 52 rule 4 (3)

As the case is with the immediate aforementioned Order, Order 52 rule 4 (3) of the Rules of the Supreme Court¹¹³ also stands as an Order that is inherently contrary to the Rules of Natural Justice. While one concedes that hear say evidence has been and is admitted in instances where one's liberty is at stake (an accused), it is still the opinion of his paper that the same should not apply to Contempt of Court proceedings before the Supreme Court of Zambia; in this particular instance acting as a court of first and last instance if it moves to cite an individual for Contempt of Court, *pro prior moto*.

In this respect, the said Order enacts that;

“Proceedings for committal for contempt of court for breach of an undertaking given in a civil action are themselves civil proceedings, and, where their purpose is to further the proper conduct of the main action and the final resolution of the issues between the parties, they are interlocutory proceedings within the meaning of O.41, r.5(2), and, accordingly, hearsay affidavit evidence is admissible in the contempt

¹¹⁰ Order 38 of the Rules of the Supreme Court, 1999 edition

¹¹¹ Chapter 27 of the Laws of Zambia

¹¹² Sivagnanam, **Principles of Natural Justice**, Lecture Delivered at Tamil Nadu State Judicial Academy, 1st July, 2009, Page.4

¹¹³ Order 52 of the Rules of the Rules of the Supreme Court, 1999 edition

proceedings unless the Court exercises its power under O.32, r.2(3) to rule otherwise (*Savings & Investment Bank Ltd v. Gasco Investments (Netherlands) B.V.* [1988] Ch. 422; [1988] 1 All E.R. 975, C.A.). The appropriate standard of proof to be applied in committal proceedings, however, is the criminal standard of proof (*Dean v. Dean* [1987] F.L.R. 517, C.A.).”

In addition, the explanatory notes under the provisions of Order 52 rule (4) 3 also state that;

“An alleged contemnor is not a compellable witness, even in proceedings for civil contempt, but he may be cross-examined upon an affidavit.....”

This gives further credence to the notion that the said Order 52 rule (4) 3 stifles the Rules of Natural Justice as it is clear from its explanatory notes that a witness under the said Order is neither a compellable witness nor can he or she be subjected to the rigors of cross examination. The need to constantly subject witnesses who give *viva voce* and affidavit evidence to the rigors of cross examination and as such uphold the principles of Natural Justice have since been recognised by the Supreme Court of Zambia when it was stated by the court in the case of *The Post Newspapers Limited v Rupiah Bwezani Banda*¹¹⁴that;

“This is as it should be as the Respondent is required to state exactly, in the affidavit in support of the notice of motion and the motion itself, what the alleged contemnor has done or omitted to do that constitutes a contempt of court with sufficient particular to enable the contemnor meet the charge. It cannot be over emphasized that the matters alleged in the motion are normally contentious, requiring the Respondent to testify and be cross examined in person, hence the need to swear the affidavit personally.”

From the above decision of the court, it is clear that the Supreme Court took cognizance of the vital need to subject deponents to affidavits containing evidence or allegations of Contempt of Court to the rigors of cross examination. This decision was taken irrespective of the fact that the deponent of the affidavit in question is the current Republican President. Clearly, the Supreme Court took into regard the inherent danger that exists in allowing witnesses and deponents of affidavits containing allegations and evidence to acts in question deemed as contemptuous without being cross examined to the veracity of the same.

3.6 CONCLUSION

In conclusion, it must be noted that the current statutory law governing Contempt of Court in the Zambian jurisdiction is of a nature that is enacted in a fashion as to breach the Rules of Natural Justice. While the Zambian legal jurisdiction has now adopted the provisions of the Rules of the Supreme Court of England, 1999 Edition as being part and parcel of Zambian statutory law, inherent short comings in the law still exist in adhering to the Rules of Natural Justice when dealing with matters pertaining to Contempt of Court. It is the opinion of this

¹¹⁴ SCZ Judgment No. 25 of 2009

paper that this can only be attributed to very nature of the legal instrument of Contempt of Court.

During the last Chapter of this paper, this paper will conclude by advancing a number of recommendations as to radical amendments to the law and conduct of presiding judicial officials (judges and magistrates) in matters that deal with the legal notion of Contempt of Court. The Chapter will also make recommendations as to the instances when the courts of law should invoke this tool for the proper administration of justice and not in a quest to preserve a court's dignity or 'face'.

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.0 GENERAL CONCLUSION

The notion of the legal instrument of Contempt of Court is one that ought to be sparingly utilized. This legal instrument for all intents and purposes should only ever be utilized for the due administration of justice. It is an instrument that should never be utilized by the adjudicative arm of the government in its quest to protect its integrity or save face in light of criticism that can sometimes be scathing as noted in the previous Chapters of this paper.

While one takes cognizance of the fact that there exists the need for the adjudicative arm of government to maintain a certain amount of authority over matters before them, it follows that the best option to attain this authority is by way of proper conduct of adjudicators themselves firstly. This will in turn inadvertently result in litigants and individual members of society who appear before courts or within court jurisdictional premises conducting themselves in a manner that does not give rise to the aspect of Contempt of Court.

However, certain instances have arisen and will always arise where there is an immediate risk to the due administration of justice. These inevitably require that the courts of law remedy such situations immediately. It is only in these exceptional instances that the legal instrument of Contempt of Court ought to be utilized fully by the courts of law.

While this paper recommends that the notion of Contempt of Court be sparingly used by the courts of law; it is the opinion of this paper that the same should be advanced with no element of 'bias' whatsoever that usually arises when dealing with matters of Contempt of Court as seen in this paper's previous Chapters. This as highlighted stems from the fact that individuals by their human nature and the circumstances under which Contempt of Court arises; usually conduct which is offensive towards an adjudicator, will more often than not give rise to such an adjudicator being biased.

This in itself connotes that such an adjudicator assumes an interest in such a matter as such an adjudicator sets out to punish such an individual contemnor in question. It is this very human nature to take offence by others' conduct especially before the courts of law that makes the notion of Contempt of Court a peculiar topic in light of the need to adhere to the Rules of Natural Justice in adjudicative matters.

It is therefore highly undesirable for an adjudicator to preside over a Contempt of Court matter where the said contemptuous conduct in question has occurred in the presence of such an adjudicator. The inherent dangers that arise and come with a breach of the Principles of Natural Justice entail that where there is need to cite an individual for an act deemed as contemptuous, legitimacy and the feeling that justice has been attained can only be advanced if such an adjudicator recuses himself from such a matter. This in itself will in turn confer with the notion that is often summed up in the latin maxim of “*Nemo judex in parte sua*” which literally translates as “no man a judge in his own case”; therefore observing the Rules of Natural Justice.

The very fact that the notion of Contempt of Court gives rise to a court decision further raises the aspect of what appropriate sentence should be advanced in Contempt of Court matters. This is especially so when dealing with instances where the courts of law within their jurisdiction are faced with the need to adhere to the Principles of Sentencing long established by jurisprudence. As highlighted throughout the course of this paper especially in the second Chapter, there exists an urgent need for courts to always adhere to the Principles of Sentencing taking into regard that the aspect of Contempt of Court occasionally results in deprivation of a contemnor’s freedom by way of imprisonment.

Therefore, as maintained throughout the course of this paper, the aspect of the observance of the principles that govern sentencing have to be adhered to in all instances concerning the aspect of Contempt of Court. While Zambian jurisprudence has been reluctant in its application of the said fundamental principles in Contempt of Court of matters, there exists an inherent need to re-approach this aspect of the law to ensure that adjudicators are constrained to adhering to these principles, within the due ambit of the law.

4.1 RECOMMENDATIONS

This Chapter in part seeks to advance a host of recommendations to remedy the appalling levels at which the Zambia judicial system and governing statutory laws have neglected or blatantly breached the Rules of Natural Justice and Sentencing Principles whenever faced with matters pertaining to Contempt of Court. In this regard, as the aforementioned vice continues to remain an immediate travesty of the basic tenets of justice, as justice must not only be said to be done but be seen to be done, this paper therefore advances short term and long term recommendations to remedy the continuous breach of the Rules of Natural Justice and Sentencing Principles in these matters of a contempt nature.

4.1.1 SHORT TERM RECOMMENDATIONS

It is the recommendation of this paper that the notion of Contempt of Court be immediately dealt with at all levels by a body established for the sole purpose of handling such matters. While this may seem to be an expensive and time consuming venture, it ought to be taken as a form of priority enactment by the legislature in order to preserve the sanctity of the Rules of Natural Justice. It is clear that the Zambian adjudicative branch of government has lamentably failed in its quest to ensure the due administration of justice in matters dealing with Contempt of Court.

The said body in question is preferably a tribunal mandated to deal with all matters of Contempt of Court referred to it by adjudicators in the Zambia court hierarchy. Consequentially, it is cardinal that such immediate legislation should make it mandatory for a judge or magistrate to refer matters of contempt to such a tribunal for immediate action. While this may seem as a radical coercive action aimed at judges and magistrates, the said recommendation would be necessary to enable an alleged contemnor fully enjoy the benefits of the Rules of Natural Justice such as subjecting witnesses to the rigors of cross examination. While this may seem as being an already existing remedy, the same can not be fully utilized even in the most liberal instances as such witnesses especially in summary determination would have been called upon to testify by a judge or magistrate dealing with such a matter.

Further, it would be imperative that such an adjudicative body be accorded specific statutory guidelines as to sentencing. This would in effect be a codification of the principles as espoused in the case of *Nsokolo*¹¹⁵ and *Chipata*¹¹⁶. While this may also seem as a radical manner of handling the notion of Sentencing Principles in relation to Contempt of Court cases, this remains a necessary step to be undertaken.

This is because while ordinary cases of a criminal nature are essentially codified, thereby rendering a determination of one's guilt easier on account of having to satisfy certain elements that constitute a particular crime in question, the same can not be said when determining an aspect of Contempt of Court. This is because the determination of whether or not an act is contemptuous is left to the discretion of a presiding judicial officer who in turn must decide what appropriate sentence to mint out on a contemnor. This is more often than not subject to abuse or emotional determination as witnessed in the cases of *Zulu v The*

¹¹⁵ [1940] 2 NRLR 85

¹¹⁶ [1970] SJZ 189

People¹¹⁷ before the High Court for Zambia and that of Masiye Motels Limited v Rescue Shoulders¹¹⁸ before the Supreme Court of Zambia where the courts clearly decided harshly against the contemnors in question owing to the fact that the contemptuous acts in each individual case where an attack on the integrity of the presiding judges in both cases.

4.1.2 LONG TERM RECOMMENDATIONS

It is the opinion of this paper that it is crucial in the ongoing long term development of the proper determination of Contempt of Court matters that the current four pieces of legislation discussed in the third Chapter of this paper be codified into one single Act. These include, the Contempt of Court (Miscellaneous Provisions) Act¹¹⁹, the High Court Act¹²⁰, the Penal Code Act¹²¹ as well as the provisions of Order 52 of the Rules of the Supreme Court (White Book) 1999 edition. This is because of the inherent blatant flows that exist in the current governing statutory law which is utilized by the courts of law individually.

For instance, under the provisions of Order 52 of the white book, certain provisions exist which give one litigant an unfair advantage over another in cases of contempt by the courts refusal to subject one litigant who deposes to an affidavit to the rigors of cross examination. This is as highlighted in the third Chapter of this paper in the High Court for Zambia case of Rupiah Bwezani Banda v The Post Newspapers Limited¹²². While the current four pieces of legislation remain inadequate especially when called upon to observe the rules of natural justice, it is cardinal that the notion of contempt of court ought to continue to be employed where necessary.

With the current legislation in place, adjudicators must thus show maximum restraint when dealing with contemnors especially when scandalized by the same. It therefore the long term recommendation of this paper that a new Act of parliament taking into regard all factors discussed in the course of this paper be enacted to curtail any further travesty of justice that has often been advanced in contempt matters.

¹¹⁷ [1990-1992] ZR 62

¹¹⁸ SCZ Appeal No.187 of 2007

¹¹⁹ Chapter 38 of the Laws of Zambia

¹²⁰ Chapter 27 of the Laws of Zambia

¹²¹ Section 116 of Chapter 87 of the Laws of Zambia

¹²² 2008/HP/0984, Ruling Delivered on the 9th of July, 2010

4.2 CONCLUSION

In conclusion, one is inclined to make due reference to the variant objectives set forth in the first chapter of this paper so as to determine on face value whether this paper has attempted to achieve the same. These include; To clearly illustrate the effects of the non-adherence to the rules of natural justice in the adjudication of contempt of court cases; To bring to the fore the need to observe the principles of sentencing as against contemnors to avoid arbitrariness in the dispensation of justice and to; advocate for a radical change to the law pertaining to contempt of court in Zambia so as to encapsulate the above mentioned notions to their full extent.

From the foregoing arguments based on judicial decisions, statutory law and scholarly articles, it becomes evident that there exists a need to constantly adhere to the Rules of Natural Justice when dealing with matters of Contempt of Court. This is even more crucial at the sentencing stage in Contempt of Court matters when the courts are faced with the notion of what appropriate sentence to be meted out to a Contemnor. In this regard, the need to adhere to sentencing principles developed by means of judicial precedents over the years in Zambia can not be over emphasized.

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