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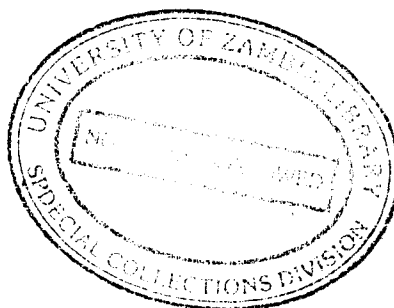
**SCANDALISING THE COURT IN ZAMBIA: THE CASE OF MASIYE
MOTEL LTD v RESCUE SHOULDERS ESTATE AGENCY LTD**

BY

JOSHUA KABWE

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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.

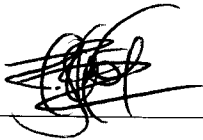


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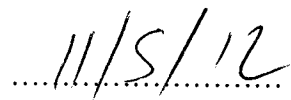
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ABSTRACT

The species of the offence of contempt of court termed as “scandalising the court”, is an archaic common law contempt, that although often regarded as having fallen into desuetude in certain jurisdictions, has continued to be imposed in most parts of the Commonwealth. In particular, it remains very much alive in Zambia. Considering the archaic nature of the offence, this paper has set out to investigate the effectiveness of the offence in Zambia and to examine the practice and the judicial approaches in this branch of contempt, with special focus on the case of *Masiye Motel v Rescue Shoulders Estate Agency Ltd*.

The study has set out to determine what constitutes the offence in Zambia and whether there are there any defences available to an alleged contemnor in cases involving scandalising the court, whether the statutory provisions dealing with offence in Zambia are effective in ensuring the rationale of the offence is achieved, the issues arising from the case under study and the possible implications on future cases dealing with the offence.

This research embraces both desk research and occasional field investigations, of which the latter entails the conducting of interviews with eminent advocates and scholars on the subject matter. This research reveals that the uncertainties in the law dealing with the offence in Zambia are largely due to lacunas in the law and the wide discretion given to judges to punish for contempt. The paper has further revealed that the offence of scandalising the court is very much alive in Zambia as compared to other jurisdictions where it is either obsolete or seldom applied. The paper has proposed that the offence should not be completely abolished, but that significant alterations, substantive and procedural, should be made to the present law. In particular, the paper recommends the enactment of a comprehensive statute defining what amounts to “scandalising”, setting out the procedure and limiting the maximum sentence possible for the offence.

DEDICATION

To my beloved mother and cherished sister, the two most important women in my life, for their never ending love and support throughout the duration of my studies.

ACKNOWLEDGEMENTS

I would like to thank the Lord Almighty, for all the blessings and guidance in realising my goals during the course of my studies.

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I should also like to sincerely thank Professor Mvunga and Mr. Malila, for answering all the questions I had on the topic-and who've taught me so much during these years. I've been lucky to learn from you!

During the course of this work, many parties have been involved directly or indirectly in giving assistance, support and encouragement. I hope they forgive me if I don't attempt to mention them by name; they include friends, family and classmates generally. I must, however, mention by name those whose help still went further. Kaumbi Ndulo for her inability to say no to my numerous requests, Likando Makala for her bounteousness, Joshua Mwamulima, John Ngisi, Arnold Kaluba and Crispin Tembo for their friendship and willingness to help. I want to thank my fellow-travellers on this road, the students in law school, who've shared opinions, knowledge, books, and fun with me. I have been lucky to be in a wonderful cohort – Lillian, Chocious, Chewie and Angelica (including the people already mentioned). You're the true 'grund norms'!

To all the friends I could not mention, thank you for making my stay in law school gratifying. Your contribution is forever remembered. I hope to acknowledge you in future works!

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CHAPTER ONE

GENERAL INTRODUCTION

1.0 INTRODUCTION

Contempt of court is a topic that usually comes up for comment and discussion. Contempt of court can be classified as consisting of words or acts which impede or interfere with the administration of justice, or which create a substantial risk that the course of justice will be seriously impeded or prejudiced, or disobedience to the judgments, orders or other process of the court.¹ Contempt of court is thus conduct that tends to undermine the authority of legal proceedings, or causes the public to lose confidence in the courts in resolving disputes.

One form of contempt is the offence of scandalising the court. Although scandalising the court is an offence in many Common Law jurisdictions, there is no simple, universally accepted definition of the offence. A loose working definition might define it as involving any illegitimate act that seriously undermines public confidence in the administration of justice.² This happens when a person behaves in a manner, or publishes a statement that brings a court or a judge of a court into contempt, or lowers his authority.

The view about the contempt power was first stated in England by Wilmot J. in 1765 in a judgment which was in fact never delivered in *R. v Almon*³. In that opinion, Wilmot J. observed that this power in the courts was for vindicating their authority, and it was coeval with their foundation and institution, and was a necessary incident to a Court of Justice. The above dictum was thereafter followed by successive courts not only in England, but also in other countries.

¹ Lord Mackay, ed., *Halsbury's Laws of England*, 4th ed. (London: LexisNexis Butterworths, 2001), 402.

² Justice Markandey Katju, "Contempt of Court: The Need for a Fresh Look." www.districtcourtallabad.up.inc.in (accessed 30th October, 2011).

³ (1765) Wilmot's Opinion 243.

Thus the power of Contempt was said to be required for maintaining the dignity and vindicating the authority of the Court.

Zambia inherited the concept of scandalising the court from English law during the colonial period. Today many other former British colonies recognise the offence, albeit in differing forms, such as Australia, Canada, the Republic of Ireland, Singapore, South Africa and Zimbabwe. The notion of scandalising the court – or at least notions analogous to it - are also recognised in some Civil Law jurisdictions, but differs in several respects.⁴

The case of *Masiye Motel Ltd v Rescue Shoulders and Estate Agency Ltd*⁵ is the latest (at the time of this paper) in a line of cases involving scandalising the court that have come before the courts, the Supreme Court in particular, in the last few years. The contemnors in this case (Nsunka Nsambo and Victor Chilekwa) were advocate and client respectively who appealed against a decision of the High Court in a civil suit to the Supreme Court. Having been unsuccessful in their appeal, the second contemnor went on to utter words through written correspondence to the presiding Supreme Court justices initially requesting them to reverse the judgment stating that their judgment “lacked merit” and was “unreasonable”.

He further alleged nepotism on the part of the bench in their ruling and stated that he had been advised by his lawyer that the decision of the court was a “stupid judgment by stupid judges”. The two were cited for contempt arising from the said letters and accordingly convicted and sentenced to two years in prison respectively.

This case, which forms the basis of discussion in a later chapter, is important in that it presented the Supreme Court the opportunity to clarify and restate the law as to the appropriate test for

⁴ M. Chesterman, “Contempt: In the Common Law, but not the Civil Law.” (1997) 46 *ICLQ* 521.

⁵ SCZ Judgment No. 34 of 2010.

liability, and also allowed an opportunity for the clarification of the offence of scandalising the court in Zambia. This study thus analyses the various principles relating to the offence in Zambia and how the courts in Zambia have decided such cases, with special focus on the aforementioned case. The approaches taken by the courts to the issue of scandalising the court receive a lot of concerns, both from members of the public and the legal profession in general. An understanding of the exact nature of this offence becomes vital in addressing the various issues raised as regards the offence.

1.1 STATEMENT OF PROBLEM

The offence of scandalising the court deals with that part of the law of contempt which prohibits verbal or written attacks upon judges or the courts. It is clear that under the existing law, contempt may be committed through publication of material, such as an accusation of bias, prejudice or corruption, which is calculated to bring a judge or a court into contempt or to lower his authority.⁶ The law confers wide powers on the courts to deal with contempt and the courts in Zambia have exercised this power in differing degrees.

The question then arises as to the courts response against criticism and attacks against it and its officers. Additionally, it must always be remembered that contempt jurisdiction is discretionary jurisdiction. A judge is not bound to take action for contempt even if contempt has in fact been committed.⁷ It becomes important to assess when a judge may exercise this wide discretion vested in him in dealing with the offence of scandalising the court.

⁶ Chesterman, 24.
⁷ Katju, 8 (accessed 30th October, 2011).

The courts in Zambia have decided various cases that deal with scandalising the court or attacks on the integrity of the court. The case of *Masiye Motel Ltd v Rescue Shoulders Estates Agency Ltd* is the most recent of these and from a legal perspective, the litigation prompted various questions relating to the way the court handled the case in general, considering its powers to decide contempt cases and summary trial, the right to a hearing, sentencing principles and possible defences among others.

The case may be seen as yet another twist in the already existing law of contempt of court, and yet the ratio of the case suggests that the decision may be more in line with the case law on contempt of court and the power of the courts to deal with such cases. This study in the ensuing chapters therefore considers the offence in more detail, and the case as a whole, and the possible repercussions the case may have on later cases with similar facts or scandalising the court as a form of contempt in general.

1.2 OBJECTIVES

The Zambian courts have decided a number of cases involving the offence of scandalising the court. These cases have been handled differently and various principles have emanated from such cases. The general objective of this paper is therefore to consider the offence of scandalising the court in Zambia and how the court applied the principles related to the offence in the case under study.

1.2.1 SPECIFIC OBJECTIVES

1. To consider the offence of scandalising the court and to examine the practice and the judicial approaches in this branch of contempt.

2. To examine the law relating to contempt of court, with emphasis on scandalising the court, and the procedure for the punishment thereof.
3. To undertake a partial comparative study of the position in the Zambian cases as relates to scandalising the court and how other jurisdictions, in particular Britain and the U.S.A, deal with similar cases. Seminal cases in other jurisdictions are also considered.
4. State the implication of the judgment in the case of *Masiye Motel v Rescue Shoulders and Estate Agency Ltd*⁸ on future contempt cases, more so in respect of the offence of scandalising the court and the general procedure adopted in dealing with such cases.
5. Following from the above, consider if there is need for a change in legislation and the way courts deal with such cases and recommend accordingly.

1.3 RATIONALE AND JUSTIFICATION

It is important that the administration of justice be protected and public confidence in the judicial system be preserved. However, it is also of importance to note that the significance of reasoned criticism made in good faith should not be undermined; without it the legal system cannot be expected to develop satisfactorily.

The justification of this paper is premised on the basis that following the Supreme Court decision in *Masiye Motel v Rescue Shoulders and Estate Agency Ltd*, it has become necessary to consider the offence of scandalising the court in more detail to understand the outcome of the case, especially considering the special nature of the facts provided which involved lawyer and client respectively. Following this decision, various scholars, legal and non-legal, expressed different opinions on how the case was handled generally and the position of the judiciary when it comes

⁸ SCZ Judgment No. 34 of 2010.

to comments made by the public in relation to judges and officers of the court.⁹ This is especially so in relation to the recent past where there has been incessant attacks on the judiciary and its officers by the media and the public in general. The question is therefore: when do such comments constitute contempt and how does the judiciary and the judges in particular handle such cases considering they are the ones being attacked?

Further, the offence of scandalising the court is largely based on the common law and the courts in Zambia refer to various common law decisions in determining matters before it. Therefore, it is important to get a clear definition of some of the constituents of the offense, such as what amounts to ‘scandalous’ comments as different courts have defined this differently. This paper therefore analyses such matters as the definition(s) adopted by courts in Zambia and considers the effectiveness of such definition in light of how the law on the matter has evolved in other jurisdictions.

1.4 RESEARCH QUESTIONS

1. What constitutes the offence of scandalising the court?
2. Are there any defences available to an alleged contemnor in cases involving scandalising the court and criticism of judges?
3. Are the statutory provisions dealing with offence in Zambia effective in ensuring the rationale of the offence is achieved?
4. What are the issues that arise in the case of Masiye Motel v Rescue Shoulders?
5. What are the ramifications of the said judgment on future contempt cases?

⁹ *Zambian Economist*, “Stupid judgment by stupid judges.” <http://www.zambian-economist.com/stupid-judgements-by-stupid-judges.html> (accessed 20th October, 2011).

1.5 **METHODOLOGY**

The research primarily relies on desk research and field research of which the latter entails the conducting of interviews with eminent advocates and scholars on the subject matter of this research paper. Secondary data in the form of books, journals, scholarly articles as well as the use of the internet is also referred to in order to attain the most recent information on the subject matter. The secondary information includes analysing cases, student obligatory essays and reports where necessary, by mandated bodies.

1.6 **BRIEF HISTORY OF THE OFFENCE OF SCANDALISING THE COURT**

The power of contempt is a power once exercised only by kings and queens. Most judges and legislators today who can issue citations for contempt recognise that it is an authoritarian practice out of step with modern democratic concepts and contemporary due process of the law.¹⁰ Yet judges especially argue that they must retain this power in order to enforce their orders.

The origin of the offense of contempt in England can be traced to the time when all the courts were divisions of the great Curia Regia, that is, the supreme court of the sovereign.¹¹ In that country, scandalising of the sovereign, or his ministers, or the law making power, as well as scandalising the courts, has been punished as contempt.¹² This power has been modified in the United States, particularly with respect to the executive department and ministers of the state.¹³

In 1631 in England, a British subject was convicted of a felony, which was common place. This particular subject was angered at being found guilty, and after the sentence was read he threw a

¹⁰ Don R. Pember, *Mass Media Law*. (New York: McGraw Hill Companies, 2000), 386.
¹¹ George S. Gulick and Robert T. Kimbrough, *American Jurisprudence - A Modern Text Comprehensive Statement on American Law*. Volume 17: 2nd Ed. (New York: Lawyers Co-operative Publishing Company, 1964), 6.
¹² Gulick & Kimbrough, 6.
¹³ Gulick & Kimbrough, 6.

piece of broken brick at the judge. The brickbat missed the judge but the subject was quickly apprehended, his right hand cut off and nailed to the gallows and he was immediately hanged in the presence of the court.¹⁴

While such judicial retribution is an uncommon exercise of the contempt power, it nevertheless is a representative example of the power of judges to control what goes on in the court rooms. Even today, at the beginning of the 21st century, disobedience or disrespect for the court is normally put down swiftly by exercise of the power of contempt. Any act that interferes with the orderly processes of justice is usually promptly stopped and the offender is quickly punished.¹⁵ While other governmental bodies (legislative bodies, for example) can use the contempt power, its use by judges, which is the subject of this paper, is far more common today.

As representative democracy developed in England and royal influence of the government diminished, judges retained the contempt power, and it became institutionalised in common law courts in Great Britain, the United States and Zambia itself. Courts today rarely justify the exercise of the contempt power on the grounds that it protects the integrity of the judge. Instead, protection of the authority, order and decorum of the court is the usual reason given for the use of the contempt power.¹⁶

1.7 ORGANISATION OF THE RESEARCH

The present research is composed of five chapters. The first is the introductory chapter which contains the background of the research and the general introduction. Chapter two focuses on the definition of contempt of court and scandalising the court in particular. The latter part of this

¹⁴ Goldfab Ronald, *The Contempt Power*. (New York: Columbia University Press, 1963), 50.
¹⁵ Pember, 386.
¹⁶ Gulick & Kimbrough, 7.

chapter briefly discusses the purpose and justification of the offence, in addition to the limits placed on such exercise of power.

Chapter 3 examines the law and practice of contempt of court in Zambia by considering the legal framework governing the offence of scandalising the court in Zambia. In particular, the relevant sections of the law are considered in light of the judicial pronouncements made in line with them. The powers of the court and the procedures adopted are considered, and this chapter also examines in brief the status of the law on scandalising the court in Britain and the U.S.A.

Chapter 4 focuses on the main concerns or anomalies found in the current law and practice of contempt of court, and scandalising the court in particular, in Zambia through a case analysis. The principles and provisions discussed in chapters preceding this chapter are discussed in line with the *Masiye Motel* case. The latter part of this chapter considers the implications of the judgment on later cases on the same subject matter.

Lastly in Chapter 5, some concluding remarks in which the findings of the research are highlighted and suggestions are proposed to improve the existing law and practice in dealing with offences of scandalising the court in Zambia.

2.0 CONCLUSION

This chapter has briefly outlined the direction of the paper as a whole and provided a brief history of the power of contempt. It can clearly be seen that the history of the power by the courts to punish for contempt are largely rooted in the English system from which most common law countries, Zambia included, adopted and inherited this inherent power. The successive chapters will build upon this and give a more detailed account of contempt, especially as it relates to Zambia. In particular, the next chapter explains the offence in more detail.

CHAPTER TWO

CONTEMPT OF COURT- SCANDALISING THE COURT IN GENERAL

2.0 INTRODUCTION

In the last decade, in many countries of the common law, the general deference formerly paid to judges, has been eroded.¹ Attacks on judges have now become commonplace. These attacks have been made by the media, public commentators, academics and members of the legal profession, the last omitting to dress up their words in the respect for the judicial office which were formerly obtained.² The same is true for Zambia, and it is often suggested that one of the ways the court can protect itself from these attacks and maintain its integrity and authority is through its inherent power to punish for contempt of court. The aim of this chapter is therefore to provide an explanation on the notion of contempt with particular interest in the offence of scandalising the court. The definition and purpose of the offence will be given after which the rationale/justification of the offence will be explained.

2.1 DEFINITION OF CONTEMPT OF COURT

Contempt of court has various and wide definitions. Properly speaking, contempt of court is a common law offence which was held to consist in scandalising the court by uttering in court disparaging or offensive words to the judge in court, or by uttering such disparaging remarks out of court concerning judges of superior courts, in relation to their office or otherwise.³ The term

¹ Kirby, (accessed 21st December, 2011).

² Kirby, (accessed 21st December, 2011).

³ J. C. Smith & B. Hogan, *Criminal Law*. (New York: Oxford University Press, 2000), 770.

is, however, widely used in a broader sense to cover any representation intended or calculated to interfere with the fair trial of a legal proceeding pending in any court of justice.⁴

Generally speaking, he whose conduct tends to bring the authority and administration of the law into disrepute or disregard, interferes with or prejudices parties or their witnesses during a litigation, or otherwise tends to impede, embarrass, or obstruct the court in discharge of its duties, is guilty of contempt.⁵

Contempt of court is said to have its origins in the medieval devolution of royal powers to the courts from a monarch who was believed to be divinely appointed and accountable only to God.⁶ Be that as it may, it is clear from the earliest legal history that common law courts have assumed the power to coerce those who obstruct the administration of justice.⁷ At least with respect to the courts having common law jurisdiction in matters of contempt, it is not essential in the existence of the contempt for the conduct to actually obstruct justice; it is sufficient if the conduct tends to obstruct the administration of justice.⁸

2.1.1 PURPOSE OF THE OFFENCE

The purpose of the offence of contempt of court was clearly stated by Salmon L.J in *Morris and others v The Crown Office*⁹ where he stated:

The sole purpose of proceeding for contempt is to give our courts power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented. This power to commit for what is inappropriately called 'contempt of court' is sui generis and has from time immemorial reposed in a judge for the protection of the public.

⁴ Smith & Hogan, 770.

⁵ Gulick & Kimbrough, 6.

⁶ Attorney General v Times Newspaper Ltd [1974] AC 273, 322, per Lord Cross of Chelsea.

⁷ Australian Law Reform Commission, "Contempt". Report No 35 (1987), 20.

⁸ Gulick & Kimbrough, 6.

⁹ [1970] 1 All ER 1.

In view of the salutary objects which punishment for contempt is designed to sub serve, the general rule applies in contempt proceedings that ignorance of the law is no defence, although it may, under certain circumstances, be considered in mitigation.¹⁰ The law of defamation is not to be confused with contempt. For example, it is said that that the truth or falsity of statements made in an attempt to obstruct or impair the administration of justice is irrelevant on the issue of whether the statements constitute contempt.¹¹

2.1.2 CIVIL AND CRIMINAL CONTEMPTS DISTINGUISHED

Contempt may be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice, or which create a substantial risk that the course of justice will be seriously impeded or prejudiced; or contempt in procedure, otherwise known as civil contempt, consisting of disobedience of the judgments, orders or other process of the court, and involving a private injury.¹²

The classification of contempt as either criminal or civil has been progressively less important and has been described as ‘unhelpful and almost meaningless’ in the present day.¹³ There remain, nevertheless, significant points of distinction between the two types of contempt and the traditional classification is maintained in this paper. The basis of the distinction is similar to that between crimes and torts generally, that is, in its character and purpose. For civil contempt, the punishment is remedial and for the benefit of the complainant, whereas for criminal contempt,

¹⁰ Gulick & Kimbrough, 4.

¹¹ Gulick & Kimbrough, 4.

¹² Lord Mackay, 402.

¹³ Jennison v Baker [1972] 2 QB 52.

the act is one which so threatens the administration of justice that it requires punishment from a public point of view, which is punitive in nature.¹⁴

Criminal contempt has taken the form of many types of offences which can be broadly categorised into four main areas:

- (i) Contempt in the face of the court;
- (ii) Scandalising the court;
- (iii) Prejudicing or impeding court proceedings;
- (iv) Interfering with the course of justice.

For the purpose of this study, the paper will restrict itself to the second type under the classification above, which is scandalising the court.

2.3 SCANDALISING THE COURT

The species of the offence of contempt of court termed scandalising the court, often regarded as having fallen into desuetude in the United Kingdom, has continued to be imposed in other parts of the Commonwealth. In particular, it remains very much alive in Zambia. It has been applied in many cases over the past few years, one the most recent being *Masiye Motel v Rescue Shoulders*¹⁵, a decision of the Supreme Court of Zambia.

This offence, broadly speaking, seeks to prevent scurrilous abuse or attacks upon the authority and impartiality of the judiciary as a whole or of a judge as a judge or of a court, and to protect the public confidence in the administration of justice.¹⁶ As with other forms of common law

¹⁴ Jerald Gomez, "Contempt of Court-Freedom of Expression and the Rights of the Accused," *The Malayan Law Journal* (September 2002):1.

¹⁵ SCZ Judgment No. 34 of 2010 (unreported).

¹⁶ Gomez, 1.

contempt of court, the doctrine of scandalising the court is rooted in English common law. The primary rationale for this form of contempt law is the maintenance of public confidence in the administration of justice.

The Supreme Court of Zambia in *Sebastian Zulu v The People*¹⁷ defined contempt of court as including “any word spoken or act done calculated to bring a court into contempt or to lower its dignity and authority. Further, contempt of court may be shown either by language or manner.” This definition provided by the Supreme Court specially refers or covers the type of contempt of court specifically known as scandalising the court.

In *Chokolingo v AG of Trinidad and Tobago*¹⁸, the Privy Council explained the offence of scandalising the court in the following way:

Scandalising the court is a convenient way of describing a publication which, although it does not relate to any specific judge, is a scurrilous attack on the judiciary as whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice.

Accordingly, slanderous abuse of a judge or court or attacks on the personal character of a judge, are punishable contempts. The punishment is inflicted, not for the purpose of either protecting the court or the individual judge from the repetition of the attack, but of protecting the public, especially those who voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief they will incur if the authority of the tribunal is undermined or impaired.¹⁹ As stated by Lord Salmon in *Morris v The Crown Office*²⁰:

¹⁷ (1990-92) Z.R. 62.

¹⁸ [1981] 1 All ER 244.

¹⁹ Lord Mackay, 405.

²⁰ [1970] 1 All ER 1079, at 1087.

The archaic description of these proceedings as 'contempt of court' is in my view unfortunate and misleading. It suggests that they are designed to buttress the dignity of the judges and to protect them from insults. Nothing is further from the truth. No such protection is needed.

The purpose of having the said form of contempt is therefore for the public interest of maintaining the respect, independence, confidence and impartiality of the judiciary by not belittling their reputation and authority as such remarks may have a detrimental effect on the carrying out of their judicial responsibilities.²¹ The Phillimore Committee in England²², after a thorough study of the law of contempt, also concluded that the law in fact exists to protect the administration of justice and the fundamental supremacy of the law and not the dignity of the judges.

In the early case of *R. v Almon*,²³ Wilmot J. stated:

Criticism of judges excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiances to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever.

From the above, it can be observed that personal attacks on the character of judges and the court in general is what constitutes the offence of scandalising the court. However, no wrong is committed by any member of the public who exercises his ordinary right of criticising in good faith any words said or any act done in the seat of justice. As stated by Lord Atkin in *Amard v A.G. for Trinidad and Tobago*²⁴, "justice is not a cloistered virtue. She must be allowed to suffer the scrutiny and respectful, even though outspoken, comment of ordinary men." Further, Lord

²¹ E. Shorts & C. de Than, *Civil Liberties Legal Principles of Individual Freedom*. (London: Sweet & Maxwell, 1998), 321.

²² Appointed by the Lord Chancellor on 8 June 1971 and chaired by Phillimore LJ.

²³ [1765] Wilm 243.

²⁴ [1936] 1 All ER 704.

Russell, C.J in *R. v Gray*²⁵ stated that: "Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court."

Thus, criticism of a judge's conduct or of the conduct of the court, even if strongly worded, is not contempt provided the criticisms is fair, temperate and made in good faith, and is not directed to the personal character of the judge or the impartiality of a judge or court.²⁶ The power of committal "is not to be used for the vindication of the judge as person. He must resort to action for libel or criminal defamation."²⁷ Accordingly where a letter was published containing sarcastic allusions to the Chief Justice of Bahamas of a gift of pineapples, the Privy Council held that while the letter may have been the subject of an action for libel, it was not contempt because it was not calculated to obstruct or interfere with the course of justice or the due administration of the law.²⁸

It has been held that once it is proved that there has been an intentional publication of material calculated to undermine the authority of the court, and that the defence of fair criticism in good faith is inapplicable, the offence is established.²⁹ Additionally, no additional mens rea is required; no intent to interfere with or impede the course of justice needs to be proved. Proceedings for scandalising the court are rare in certain jurisdictions; no such proceedings have been brought successfully in England for more than 60 years.³⁰ However, in the Zambian context, the offence continues to subsist as shown by the cases discussed in subsequent chapters.

²⁵ [1900] 2 QB 3.

²⁶ Lord Mackay, 403.

²⁷ *Metropolis Police Commissioner, ex parte Blackburn* (No2) [1968] 2QB 150 at 155.

²⁸ *McLeod v St Aubyn* [1899] AC 549 at 561, per Lord Morris.

²⁹ Richard Card, *Card, Cross and Jones Criminal Law*. 17th Ed. (New York: Oxford University Press, 2006), 523.

³⁰ *Ahmee v DPP* [1999] 2 AC 294.

2.3.1 JUSTIFICATION/RATIONALE OF OFFENCE

Several questions arise regarding maintaining the offence of scandalising the court in this day and age of constitutional democracy. Is the offence of scandalising the court consistent with values of a democratic and open society in which every organ of the State including the judiciary is accountable for its actions? It is said that the judiciary as a democratic institution can be made accountable only if there is complete freedom to criticise courts and judges without the effect of a potential proceeding for contempt of the court.³¹ The question then becomes: if the legislature and the executive can be criticised freely and brought into disrepute without fear of punishment, why not the judiciary?

The classic response to the above query is provided by the South African Constitutional Court in *R v Mamabolo*,³² where the court gave a lucid and exhaustive exposition of the law on the topic of contempt and scandalising the court in particular. The court stated thus:

It is, simply, because the constitutional position of the judiciary is fundamentally different. In our constitutional order the judiciary is an independent pillar of state...under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential.

The justification for the offence suggests that judges are especially vulnerable to criticism, and thus the offence of scandalising is necessary to ensure that such criticism does not get out of hand and undermine the rule of law. It is acknowledged that judges must refrain from making public comment, in order to maintain an image of impartiality, and thus, judgments speak for

³¹ *R v Mamabolo* [2001] Case CCT 44/00.

³² [2001] Case CCT 44/00.

themselves.³³ Further, it is submitted that alternative legal actions available to judges may not be sufficient to protect judges from illegitimate criticism, as several law reform bodies have concluded.³⁴ For example, the defamation law available to the ordinary citizens may therefore be inadequate for dealing with attacks on judges, given the unusual vulnerability of judges to respond to criticism, and the special role that judges play in society.³⁵

From the justification above, it can be clearly seen that the special position assumed by the judiciary in relation to the other organs of government necessitates having the offence to ensure the smooth administration of justice. This is especially true considering the court and judges in particular do not have the normal avenues available to ordinary members of the public, like responding in the press, to defend themselves.

2.4 LIMITATIONS ON CONTEMPT POWER

The early years of the 21st century must be regarded as high water mark for the contempt power, because since this time the opponents of this power have succeeded in placing rather severe limitations in its use.³⁶ However, this is not to suggest that the power is done away with. Judges can and still do use their contempt power, and the case under study is an example of this. One important limitation on the power of the court to use contempt comes from the legislature. Various Acts are passed to govern the offence of contempt and the offence of scandalising the court. Similarly, the bench itself imposes limits on the use of this summary power through the various decisions it renders. The various Acts of Parliament governing contempt of court in

³³ D. Snyder & J. Narayan, "Report on the Offence of Scandalising the Court in India." <http://www.fdrindia.org/publications/OffenceOfScandalising.pdf> (accessed 20th November, 2011).

³⁴ The Law Reform Commission of Ireland, "Consultation Paper on Contempt of Court" (1991), 271.

³⁵ In *Bonaventure Bweupe v The Attorney-General & Two Others* (1984) Z.R. 21, the plaintiff who was High Court Judge successfully sued for defamation for comments made by the defendants relating to a judgment he delivered.

³⁶ Pember, 386.

Zambia and the case law on the subject matter are the subject of the next chapter and will be considered in more detail there.

Under modern conditions, the jurisdiction of the court to deal with contempt which consists of scandalising the court will be exercised only in exceptional cases because ordinarily the good sense of the community is a sufficient safeguard in curbing undue and improper criticisms of judges.³⁷ An exceptional case might be where a letter is published against a judge alleging that his judgment in a case contained a malicious attack upon the character of one of the parties and that there was an ulterior motive behind such attack.³⁸

2.5 CONCLUSION

This chapter has explained the offence of contempt of court and the offence of scandalising the court in particular. It has shown that the most fundamental rationale for the offence of scandalising the court is that an effective judiciary is necessary for a proper rule of law. Thus, the power of a court to punish for contempt is exercised to vindicate its dignity for disrespect shown to its orders. Scandalising the court as an offence attempts not to protect the personal feeling of the judge; but the public from the mischief which would occur if such authority is undermined. The next chapter examines the legal framework governing contempt in Zambia and considers some decisions on the offence determined by the Zambian courts.

³⁷ Judicial Commission of South Wales, “Consultation Paper on Contempt of Court” (July 1991).

³⁸ Attorney-General Ex p; Re Goodwin [1969] 2 NSW 360.

CHAPTER THREE

LEGAL FRAMEWORK GOVERNING SCANDALISING THE COURT IN ZAMBIA

3.0 INTRODUCTION

This chapter aims to give the legal basis for the offence of scandalising the court in Zambia by considering the various statutory provisions relating to the offence. Further, the chapter considers the case law relating to scandalising the court in Zambia to understand how the statutory provisions and the principles discussed in the previous chapter have been applied by the Zambian courts. This includes a brief consideration of the *Masiye Motel v Rescue Shoulders* case, which is the subject of this paper. The chapter further considers the offence of scandalising in other jurisdictions, particularly Britain and U.S.A to determine the position of the law there as compared to Zambia.

3.1 JURISDICTION

The power to punish for contempt of court may be regarded as an essential element of judicial authority. It is possessed as part of the judicial authority granted to courts and is a power said to be inherent in all courts of general jurisdiction.¹ In many instances, the right of certain courts to punish for contempt is expressly bestowed by the statute, but such statutory authorisation has been held to be unnecessary so far as the courts of general jurisdiction are concerned, and in general adds nothing to their power.²

Much of the law on contempt of court and scandalising the court in particular in Zambia is an inheritance from former British rule. As is seen from the case law, the notion of contempt of

¹ Gulick & Kimbrough, 6.

² State v Shumaker (1927) 200 Ind. 623.

court in Zambia is largely an application of principles espoused in British cases on the topic. However, this does mean there are no statutory provisions in Zambia which deal with contempt of court. The history of the offence shows that the courts exercised this power even before statutory provisions recognising this power were passed.

The Zambian law of contempt in its present form is derived from two sources: first, from provisions contained in statutes and Rules of Court, and second, from common law – in particular English common law rules – which are still in force. This power to punish for contempt is recognised in a host of statutes which include the following: The Contempt of Court Act³, the Penal Code⁴ and Order 52 of the Rules of the Supreme Court (herein after referred to as Order 52).⁵ The relevant statutory provisions are discussed below.

3.1.1 Analysis of the Contempt of Court (Miscellaneous Provisions) Act⁶

The purpose of this Act as stated in the preamble is to amend the law relating to contempt of court and to restrict the publication of the details of certain proceedings and for purposes connected therewith. Therefore, as the name suggests, the Act does not provide comprehensive provisions on the law relating to contempt. The Act only has 5 sections that mainly deal with innocent publication and publication in matrimonial causes. Section 2 of the Act decriminalises innocent publication and distribution of any matter calculated to interfere with the course of justice. Thus where there is no intention to interfere with the course of justice, one cannot be guilty of contempt of court under the Act.

³ Chapter 38 of the Laws of Zambia.

⁴ Chapter 87 of the Laws of Zambia.

⁵ Rules of the Supreme Court, 1999 edition.

⁶ Chapter 38 of the Laws of Zambia.

It is also worth noting that neither the Contempt of Court (Miscellaneous Provisions) Act nor section 116 of the Penal Code (discussed below) define the term ‘scandalise’. As such, it is necessary to refer to case law to determine the meaning of the term, including, where necessary, English case law. In addition, the Act does stipulate that certain acts are not contempt or amount to scandalising, leaving wide room for uncertainty as to what scandalising is exactly. In relation to scandalising the court, the substantive provisions of the Act do not directly address this form of contempt, apart from the defence in section two relating to innocent publication.

An analysis of the Act reveals that it was meant to cover only certain matters as they relate to other forms of contempt. For example sections 3 and 4 relate to publication of information relating to court proceedings in private and restrictions on publication of matrimonial proceedings respectively. Conclusively, the Act is inadequate to address the issues arising in relation to the offence of scandalising the court.

3.1.2 Analysis of section 116 of the Penal Code⁷

The Penal Code is the Act that principally establishes the code of criminal law in Zambia. As scandalising the court is a criminal offence, the Penal Code becomes the principle Act of reference as regards the offence. The High Court for Zambia stated in *Rupiah Bwezani Banda v The Post Newspapers Limited*⁸ that; “Criminal Contempt may be invoked against a person who is alleged to have committed any of the offences provided in section 116 of the Penal Code; or it may be dealt with under Order 52 of the RSC.”

The categories of criminal contempt of court in Zambia are set out under section 116 (1) of the Penal Code. Therein are a number of matters which are dealt with as being contempt of court,

⁷ Cap 87 of the Laws of Zambia.

⁸ 2008/HP/0984 (unreported).

and the operative words of the section say that anyone who does any of those things is guilty of a misdemeanour. It should also be noted that subsection (3) provides that these categories should be deemed to be in addition to and not in derogation from the power of a court to punish for contempt of court. An example of this is the power to punish for contempt granted by Order 52 which is discussed in more detail below.

ANALYSIS

A cardinal point to note from the above section is subsection 2 of section 116 which provides that “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....”(emphasis added). This means that were one is cited for contempt under this section, the matter should be expedited and the matter dealt with summarily.

A proper illustration of the application of this rule is seen the case of *The People v David Masupa*⁹ in which Moody J (as he then was) quashed the proceedings for scandalising the court and held that if the contempt was committed in view of the court then it could be dealt with summarily under section 116. If, however, it was committed outside the court and even if it is separated by distance of time or space from the actual judicial happening, the proceedings for contempt should be instituted by the State or the aggrieved party.

Similarly, in *Reverend Tegerepayi Gusto and Another v The People*¹⁰ it was held that since the offence the accused were charged with was under section 116, it was not within the power of the learned trial judge to deal with the matter at a later date. The Supreme Court stated that where the contempt is criminal or quasi-criminal, such as the use of insulting words or behaviour,

⁹ (1977) Z.R. 226.

¹⁰ (1988-89) Z.R.78.

unless it occurs in the face of the court it is not proper to deal with the offence in any manner other than the institution of proceedings under Section 116 of the Penal Code.

On the strength of the authorities cited above, it is submitted that if an offence under section 116 (1) of the Penal Code is not committed in view of the court, then such an offence should not be dealt with summarily. The alternative course in such circumstances is to rely on the power to punish for contempt of court under Order 52 discussed below. As relates to the inherent power of the court to punish summarily for scandalising the court, that power should be exercised on the court's own motion in exceptional circumstances such as those referred to by Lord Denning, M.R (as he then was) in *Balough v The Crown Court*¹¹ namely:

Only when it is 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 a reasonable doubt. In all other cases he should not take it on himself to move. He should leave it to the Attorney General or to the party aggrieved to make a motion in accordance with the Rules in RSC Order 52. The reason is so that he should not appear to be both prosecutor and judge; for that is a role which does not become him well.

From this, a clear distinction is seen between the procedure under section 116 (which provides for summary proceedings) and under Order 52 (which has no specific procedure) and this is illustrated further when Order 52 is considered below. In terms of Order 52, it is not illegal to dispose of the contempt on an adjourned date, but the practice in most cases is that Order 52 is read together with section 116 (3) of the Penal Code which recognises other powers of court to punish for contempt.

¹¹ [1974] 3 All E.R. 283.

3.1.3 Analysis of Order 52 of the RSC

Order 52 also gives the court the power to punish for contempt. The position of the Rules of the Supreme Court is that they are on equal standing with other laws passed by Parliament. This position was established in *Ruth Kumbi v Robinson Kaleb Zulu*¹² where the Supreme Court held 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, meaning it is as good as and is on equal footing with the rules of the Zambian courts.

The power from Order 52 empowers the High Court and the Supreme Court to punish for contempt of court. The Courts' powers under Order 52 are wider than those provided for under section 116 (1) (a) and (2) of the Penal Code in the sense that there is no limitation on the court to dispose of a contempt of court on the same day that it arises. Order 52 generally confers wide powers on the court to punish for contempt, and the Zambian courts, as will be seen below from the cases discussed, usually rely on these powers conferred where it is established that the power being exercised by the court is not that conferred by section 116 of the Penal Code, which requires the court to deal with the case summarily.

ANALYSIS

As stated above, the Courts' powers under Order 52 are wider than those provided for under section 116 and there is no limitation on the court to dispose of a contempt of court on the same day that it arises. A proper analysis of the power granted is seen in the seminal Supreme Court of Zambia decision in *Sebastian Zulu v The People*,¹³ where the appellant was acting for the defence in a murder case. Before judgment could be delivered, the appellant handed to the learned trial

¹² SCZ Judgment No. 19 of 2009 (unreported).

¹³ (1990-92) Z.R. 62.

judge an affidavit and made an application for the learned trial judge to recuse himself from that case on the ground that the learned trial judge had, in a letter signed by three other judges, promised to “fix” Kambarange Kaunda by sentencing him to death. The learned trial judge found the action of the appellant to be contempt of court and consequently found him guilty of contempt and sentenced him to twelve months' imprisonment with hard labour. On appeal, the court held that it is generally improper for a judge to deal summarily with contempt, as it is undesirable for him to appear to be both prosecutor and judge. Despite stating this, however, the court stated 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.

From the foregoing, it can clearly be seen that the powers of the court under Order 52 are wider than those conferred under section 116, and depending on the circumstances of the case, the court can invoke powers to deal with contempt, in this particular case scandalising the court. Depending on the powers being exercised, the procedure adopted will differ, though as the court stated in the above case, there is no particular procedure stated in Order 52 and thus an enquiry can be held. Further, unlike under section 116 of the Penal Code which deems contempt under the section as a misdemeanour and punished accordingly, there is no limit to the sentencing powers of a judge and no particular punishments have been prescribed by Order 52, and this confers wide powers on the court to punish for contempt, which can lead to abuse as will be discussed in successive chapters.

Subsequent to the *Zulu* case, a number of decisions have been made on scandalising the court as a form of contempt. An example of this is the case of *Elias Kundiona v The People*¹⁴ which arose on the same facts as the *Zulu* case, only in this instance one of the deponents to the affidavit was charged with the offence. The appellant in this case appealed against both conviction of sentence arguing that the matter should have been heard by a different court. The appellant was proceeded against under Order 52 RSC as read with section 116 of the Penal.

In dismissing three of the four grounds of appeal, the court held that no specific procedure is provided for summary contempt provided basic principles of fairness such as the right to be heard are observed. It stated that it is an unavoidable corollary of summary contempt that the tribunal is not completely impartial or independent. The court took cognisance of the inherent power to summarily punish for contempt and noted that neither the status nor the rules have provided how the summary trial for contempt should proceed and it will therefore depend on what actually did take place in each case whether there was a fair hearing or not.

From the foregoing, it can be noted that despite the powers of the court as relates to contempt of court being founded in statute, the courts in Zambia still rely on their inherent power to punish for contempt. The two Supreme Court cases of *Zulu* and *Kundiona* show the attitude of the court in Zambia as relates to the offence of scandalising the court. It is the position of this study that were the power to punish for contempt being relied upon is Order 52, there is wide room for abuse as no particular procedure or punishment is prescribed therein. This leads to uncertainty as a litigant should know beforehand the punishment a particular offense carries and the procedure likely to be adopted by the court. Thus were it is left to the discretion of the court to either

¹⁴ (1993 - 1994) Z.R. 59.

summarily deal with the case or conduct and enquiry, room for abuse and uncertainty is left, which only serves as a disadvantage to both the litigant and the development of the law.

3.2 THE PRESENT STATE OF THE LAW: THE MASIYE MOTEL CASE

The case of *Masiye Motel Ltd v Rescue Shoulders and Estate Agency Ltd*¹⁵ (which is the focus of the next chapter) is the latest (at the time of this paper) in a line of contempt of court cases that have come before the courts, the Supreme Court in particular, in the last few years. Although the case is discussed in more detail in the next chapter, it is important to note here that unlike the cases considered above, special issues arise out of the case because of the peculiar facts of the case. For example, all the cases above involved an appeal from a lower court to the High Court or Supreme Court. In the instant case, the alleged contempt or scandalous words used were before or against the Bench in the Supreme Court and the case was handled by the same Supreme Court judges against whom the allegations were made. The two contemnors were sentenced to three years in prison each, suspended for a year each.

As the latest decision of the Supreme Court, it establishes the latest principles and attitude of the court as relates to the offence of scandalising the court, and it is suffice to say at this point, without prejudice to the issues to be discussed in the next chapter, that the current position of the law as stated in this case is that contempt of court (and scandalising the court) includes any word spoken or act done calculated to bring a court into contempt or to lower its dignity and authority, and the court will summarily punish such conduct using its inherent power and the wide discretionary powers conferred under Order 52.

¹⁵ SCZ Judgment No. 34 of 2010 (unreported).

3.3 SCANDALISING THE COURT IN OTHER JURISDICTIONS

It must be noted from the onset that the law of scandalising in Zambia may differ from that in other jurisdictions. Nevertheless, there are certain features that can be identified, and it is useful, if only by way of comparison, to consider the offence of scandalising the court in other jurisdictions.

3.3.1 ENGLAND

The law of scandalising the court has established its roots in England since time immemorial. The law on contempt is partly set out in case law, and partly specified in the Contempt of Court Act 1981. The offence of scandalising and other forms of contempt not covered under the Act are still under the common law regime as substantial parts of criminal contempt fall outside its scope.¹⁶ Apart from the Act and the common law, the exercise of contempt power is to some extent affected by the European Convention on Human Rights (ECHR).

In England the last time a publication was held to be in contempt for scandalising the court was in 1931.¹⁷ In 1899 in *McLeod v St. Aubyn*¹⁸ Lord Morris delivering the judgment of the Privy Council stated: "Committals for contempt of court by itself have become obsolete in this country even though in small colonies consisting principally of coloured population, committals might be necessary in proper cases." In a later decision in *R v Metropolitan Police Commissioner, ex parte Blackburn*¹⁹, the Court of Appeal declined an application for an order that the writer of a critical journal article be held in contempt.

¹⁶ Mohd-Sheriff Shukriah, "The Contempt Power: A Sword or a Shield? A Study of the Law and Practice of Contempt of Court in Malaysia." (Doctoral thesis: Durham University, 2010), 165.

¹⁷ Colin Munro, "Case Comment, More Heat than Light from Anwar." (2009) 13 *Edin L Rev* 104: 107.

¹⁸ [1899] AC 549.

¹⁹ [1968] 2 QB 150.

Conclusively, it can be stated that unlike Zambia, the offence of scandalising the court is rarely invoked in England, with the courts taking a similar attitude as that adopted by Lord Denning in *Balogh v Crown Court at St. Albans*²⁰ where he stated that insults are best treated with disdain, and took no further action.

3.1.2 UNITED STATES OF AMERICA

The English law of contempt had far-reaching influence on the law of contempt in the USA. Historically, the American courts punished contempt in facie and out of court contempt summarily.²¹ Despite this, in the United States, unlike England and Zambia, there is no such offence as scandalising the court at present.²² To constitute contempt (other than scandalising the court) in the US the conduct complained of must relate to pending proceedings and even then there must be a clear and imminent danger of prejudicing the proceedings.²³

In *Bridges v California*²⁴ Justice Black dismissed the argument that the evil of endangering disrespect for the judiciary could justify convictions for contempt of court in these words:

The assumption that respect for the judiciary can be won by shielding Judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however, limited, solely in the name of preserving the dignity of the Bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Justice Frankfurter in the same case in tracing the history of the contempt power said:

²⁰ [1975] QB 373.

²¹ Shukriah, 165.

²² D. Weisenhaus, *Hong Kong Media Law- A Guide for Journalists and Media Professionals*. (Hong Kong: HK University Press, 2007), 74-75.

²³ T.R. Andhyarujina, "Scandalising the Court; Is It Obsolete?" (2003) 4 SCC (Jour) 12

²⁴ (1941) 314 U.S. 252.

As in the exercise of all power, it was abused. Some English Judges extended their authority for checking interferences with judicial business actually in hand, to 'lay by the heel' those responsible for 'scandalising the court', that is, bringing it into general disrepute. Such foolishness has long since been disavowed in England and has never found lodgement here.²⁵

However, it must be remembered that freedom of speech in the US Constitution guaranteed by the First Amendment is absolute, subject only to judicially evolved limited and necessary restraints on free speech. From the above, it is clear that unlike Zambia, the offence of scandalising is obsolete in England and non-existent in the USA. The difference in the legal systems largely accounts for this difference in application of the offence.

3.4 CONCLUSION

This chapter has considered and analysed the various statutory provisions dealing with contempt of court, and scandalising the court in particular, in Zambia. In so doing, the various cases which have interpreted the said sections have been analysed to show how the court exercises the summary power to punish for contempt of court. Scandalising the court in other jurisdictions has also been considered to determine how the offence is interpreted in other jurisdictions. The next chapter examines the Masiye Motel case in light of the principles set out in the preceding chapters.

²⁵ (1941) 314 U.S. 252.

CHAPTER FOUR

CASE ANALYSIS: MASIYE MOTEL LTD V RESCUE SHOULDERS & ESTATE

AGENCY LIMITED

4.0 INTRODUCTION

This chapter examines the important decision of the Supreme Court of Zambia in *Masiye Motels Limited v Rescue Shoulders and Estate Agency Limited*¹, in the matter of contempt proceedings against Nsunka Sambo and Victor Chilekwa, who were lawyer and client respectively. This case is crucial, not only for the wide publicity it generated from legal scholars and members of the public alike, but also for its restatement of the powers of the court to punish for conduct which tends to scandalise the court, an offence elaborately explained in previous chapters.

Drawing upon scholarly articles and various cases, both Zambian and from other jurisdictions, the chapter explains the legal and factual background to this litigation and examines the Court's decision. Additionally, the chapter reflects upon the potential significance of this judgment for the wider legal community and the public in general, in terms of how criticism of judges and judgments and scandalising the court are reconciled, and how to confront and analyse the legal challenges the offence of scandalising presents within our legal system.

4.1 BACKGROUND TO THE LITIGATION

To fully appreciate the legal issues that arise from the case under discussion, a more detailed recital of the facts is essential for a comprehensive analysis. The facts giving rise to the contempt proceedings were that Chilekwa, an executive director of Rescue Shoulders Ltd and his lawyer,

¹ SCZ Judgment No. 34 of 2010 (unreported).

Nsunka Sambo, were facing charges of contempt of court after they allegedly insulted the court following their loss of an appeal between Masiye Motels Ltd and Rescue Shoulders & Estate Agency Ltd. Chilekwa was facing three charges arising from three contemptuous letters he wrote addressed to Chief Justice Ernest Sakala after losing his appeal in the Supreme Court.

In his first letter, Chilekwa alleged nepotism by the Supreme Court bench in reaching its decision, and alleged that the Supreme Court had ‘sunk lower than the High Court on simple contract matters’.² After the court received the first letter, it instructed his lawyer, Sambo, to advise his client but instead of ceasing, they received a second letter from him that was worse than the first. The second letter received from Chilekwa described the judgment as ‘shameful’, ‘embarrassing’ and ‘unreasonable’ and stated that there was a cartel of conspiracy in the matter.³ At this point, the Supreme Court decided to cite Chilekwa for contempt to show cause why he should not be punished. Before the summons were finalised, they received a third letter which was more caustic.

In his third letter dubbed: 'Pay us our money, maintain integrity and root out nepotism from the Supreme Court' he alleged that: "In fact, when handing us the judgment, your own officer of the court, respondent counsel with more than 15 years of legal practice who you interviewed for a High Court judge position said, '*it is a stupid judgment by stupid judges*'.⁴ (Emphasis added) Consequently, Sambo was summoned for contempt for allegedly uttering these words together with Chilekwa and a Moses Zulu (who was not present but a bench warrant was issued against him) to answer to contempt charges pursuant to Order 52/1/23 of the Rules of the Supreme Court 1999.

² Page 4 of judgment.

³ Page 6 of judgment.

⁴ Page 7 of judgment.

In his evidence (before the Supreme Court justices the letters referred to as being corrupt) when he was summoned to show cause why he should not be cited, Sambo said he uttered the words, "stupid judgment by stupid judges" in order to convince his client that the situation was not going to change. Sambo apologised to the court for having failed it as an officer of the court after being directed to deal with his client. As for Chilekwa, instead of purging his alleged contempt, he continued castigating the court accusing the judges of only delivering judgments in favour of their relatives while other judges were corrupt. Chilekwa said there was a clique of judges who came from the same village and that they ruled in favour of their relatives while those outside the circle did not stand a chance.

4.2 DECISION AND RATIO

In passing judgment, the Supreme Court sentenced the two to three years in prison each after finding them guilty of grave contempt of court. The terms were suspended for a year meaning the two would only serve two years. The Court found that there was no doubt, through Chilekwa's insolent letters, that he and his lawyer were attacking the integrity of the court, and held that to make wild and unsubstantiated allegations of corruption against the bench could not be condoned as it was only intended to scandalise the court and thus found it highly contemptuous.

The court further held that courts are public institutions performing a public duty and as such, they are amenable to criticism in the way they perform their duties and even in the decisions they pass. It held that a line had to be drawn between bonafide criticism, outright insults and insolent language. In this regard, it was held that Sambo's statement, "stupid judgment by stupid judges", could not by any stretch of imagination qualify to be criticism made in good faith as it was an

outright insult. It thus found him liable and convicted him of grave contempt. It is worth noting however, that the two were later released on presidential pardon on 7th December 2010.⁵

4.3 ANALYSIS

4.3.1 What exactly amounts to scandalising the court?

Scandalising may loosely be thought of as any act that seriously undermines public confidence in the administration of justice.⁶ None of the Acts dealing with contempt of court in Zambia define what exactly ‘scandalising’ the court is. The various Acts leave it to case law to define the term. In the case at hand, the Supreme Court relied on its earlier decision in *Sebastian Zulu v The People*⁷ where it defined contempt as including any word spoken or act done calculated to bring a court into contempt or to lower its dignity and authority. From various cases, scandalising the court has been to mean scurrilous abuse of the court⁸ and allegations or imputations of corruption among others.

In the instant case, the Supreme Court had an opportunity to define the exact meaning of what conduct amounts to ‘scandalising’, but the court relied on the rather too broad definition given for scandalising the court in previous cases. It is worth noting that the meanings of words, and people’s notions, change with the passage of time.⁹ Thus, what may be regarded as ‘scandalising’ at an earlier time, may not be regarded so by another court today. In the instant case, the lawyer, Nsambo, referred to the decision by the Court as ‘*a stupid judgment by stupid judges*’. Clearly, this is an example of conduct that falls within the meaning of ‘scandalising’ as

⁵ Lusaka Times, “President Banda remits sentence of Lusaka lawyer Sambo and his client” <http://www.lusakatimes.com/2010/12/08/president-banda-remits-sentence-lusaka-lawyer-sambo/> (accessed 10th October, 2011).

⁶ Smith & Hogan, 770.

⁷ (1990-92) Z.R. 62.

⁸ R v Gray [1900] 2 QB 3.

⁹ Katju, 6.

it lowers the dignity and authority of the court and may be classified as a scurrilous attack on the court.

However, a contrast can be drawn with the decision in *Attorney General v Guardian Newspaper*¹⁰ where the House of Lords granted an injunction to restrain publication of the ‘Spycatcher’ book on the ground that the material in the book was confidential and was prejudicial to national security. A newspaper ran a banner headline next day accompanied by upside down photographs of the majority Judges and the caption ‘YOU FOOLS’. One of the three Judges in the majority decision, Lord Templeman, was asked why contempt proceeding was not initiated against the newspapers. He was quoted as saying: “Judges in England do not take notice of personal insults.” Though he believed he was not a fool, others were entitled to their opinion.

Similarly, in *Balogh v Crown Court at St. Albans*¹¹ the defendant told the Judge in Court: “You are a humourless automaton. Why don’t you self-destruct?” Lord Denning said that such insults are best treated with disdain, and took no action. It is therefore submitted that a clear definition of what amounts to scandalising the court must be given to promote certainty in the law of contempt. Clearly, in the case at hand referring to a judgment as being ‘*a stupid judgment by stupid judges*’ is scandalous, but considering the power to punish for contempt is discretionary, in other cases of scandalising not as grave as the one at hand, it is submitted that such attacks should be treated with disdain and no action taken.

¹⁰ [1987] All.E.R 316 (H.L.).

¹¹ [1975] QB 373.

4.3.2 Procedural issues in the hearing of scandalising cases

The offence of scandalising the court raises several specific procedural issues. First, is how prosecutions for scandalising are to be instigated and investigated: who should be able to lay charges and how are trials for scandalising to be conducted? Linked to this is the issue of who should be able to decide scandalising cases, particularly given the personal interest that a presiding judge may have in a case being heard before him. There is also an issue of balancing one's freedom of expression as guaranteed by the constitution and the offence of scandalising the court. Lastly, there is the issue of the appropriate punishment for the offence, and whether there should be any limits to such punishment. These issues are considered in more detail below.

4.3.3 Who may initiate contempt of court proceedings?

The Penal Code¹² in section 116 and the cases discussed thereunder distinguish between acts of contempt that occur in the face of the court, and acts that occur outside of the court. For acts of contempt in the face of the court, it has been held that the court may bring charges.¹³ In the case at hand, the Supreme Court invoked the power under Order 52 to punish for contempt of court, and further, from the facts, the words by Mr Nsambo were not uttered in the face of court. It was stated in *The People v David Masupa*¹⁴ that if the contempt is committed outside the court and even if it is separated by distance of time or space from the actual judicial happening, the proceedings for contempt should be instituted by the State or the aggrieved party.

It is therefore submitted in the instant case that despite the recognition of the power of the Supreme Court to take cognizance of the contempt on its own motion and punish accordingly, it

¹² Cap 87 of the Laws of Zambia.

¹³ *The People v David Masupa* (1977) Z.R. 226.

¹⁴ (1977) Z.R. 226.

would be more appropriate given the circumstances of the case to refer the case to the state or allow other aggrieved parties (counsel for the other party) to initiate proceedings. Despite this statement, it must be said that it is not particularly rare for courts to move on their own motion to punish for scandalising the court, and this has been the trend in almost all the Zambian cases where scandalising the court has arisen. It is submitted that in cases like the one at hand, the matter can be referred to the Attorney General or the DPP for necessary action to be taken. This is usually to avoid having the judge acting as judge and prosecutor, a notion considered briefly below.

4.3.4 Which judges are entitled to hear scandalising cases?

One of the most criticised aspects of the law of contempt of court is the process by which such cases are often judged, which raises serious conflict of interest and other fair trial issues. Where a judge is insulted, summarily tries and summarily convicts and imprisons, he may be legally within his rights. However, it raises concerns, especially considering the rules of natural justice which state that no man shall be a judge in his own cause. In the instant case, the three Supreme Court justices took the role of complainant, investigator, prosecutor and judge in establishing the guilt of an advocate and his client for acts deemed contemptuous.

It is submitted that the principles of natural justice apply to contempt cases, regardless of whether the court is acting within its inherent powers or under the powers conferred by the Acts dealing with contempt of court.¹⁵ In *Elias Kundiona v The People*¹⁶ the Supreme Court held that no specific procedure is provided for summary contempt provided basic principles of fairness

¹⁵ Snyder & Narayan, 63 (accessed 20th November, 2011).

¹⁶ (1993 - 1994) Z.R. 59.

such as the right to be heard are observed. It further held that it is an unavoidable corollary of summary contempt that the tribunal is not completely impartial or independent.

Applied to the case at hand, it is submitted that despite their being no specific procedure provided, the rules of natural justice can be applied and in as much as there is no complete impartiality, an attempt can be made to refer the case to other judges to hear the matter. In *R. v High Sierra Broadcasting Ltd*¹⁷ when faced with defamatory statements made before him and directed at him, as well as radio broadcasts of similar allegations, a judge ruled that the hearing which he was to conduct could not proceed before him as scheduled and transferred the matter to another judge. He also declined to deal with the alleged contempt and the Attorney General, at the judge's request, took over conduct of the case, which was heard before a different judge.

It is submitted that since no particular procedure is provided for under Order 52, a similar procedure to the one adopted in the above case can be adopted by the Supreme Court to avoid conflicts as to who may initiate the action and which judges can hear scandalising the court cases.

It must be noted however that there can be no rule that a judge should not preside or continue to preside at a trial or hearing when contempt has been alleged just because he or she has been attacked or criticised, for if there were such a rule a judge could easily be driven out of a case.¹⁸ Similarly, other scholars argue that the judges of the Court when hearing the matter are not acting in their personal capacity in trying the applicant.¹⁹ Moreover, if contempt proceedings were to be tried before a different bench, undesirable consequences would occur; the judges

¹⁷ [1990] Vernon, B.C.

¹⁸ Snyder & Narayan, 54 (accessed 20th November, 2011).

¹⁹ Achilles Emilianides. "A Re-Evaluation of the Law of Contempt by Advocates in Light of Recent Cypriot Jurisprudence." (Paper presented at the ECBA Autumn Conference, Nicosia, Cyprus, 23 and 24 September 2011), 4.

would have to testify and their credibility would have to be scrutinized by their peers.²⁰ Consequently, the very integrity of justice will be at stake. Despite this, it is the position of this paper that it is possible to follow a similar procedure as in the case cited and not have the concerns raised above, as the case cited itself shows.

4.3.5 Scandalising vis-à-vis freedom of expression and criticism of the Judiciary

The offence of scandalising is controversial, because it potentially suppresses public criticism of the judiciary or judicial system. For instance, suggestions that a judge has been corrupt, or swayed by political considerations, are potentially punishable as contempt of court.²¹ In Zambia, the offence can be said to be compliant to rights of freedom of speech or expression guaranteed in Article 20 of the Constitution which establishes the basic human right to freedom of expression. Moreover, Article 20(3) (b) of the Constitution permits legislation to place reasonable restrictions on this right to freedom of speech in relation to contempt of court.

In most jurisdictions, Zambia included, courts have held that the offence of scandalising the court is a reasonable restriction on freedom of speech.²² While this offence is not overruled by freedom of speech, courts have emphasized that it should not be used to suppress legitimate criticism of the Judiciary. Indeed the Supreme Court in the case under analysis acknowledged that courts are public institutions performing a public duty and as such, they are amenable to criticism in the way they perform their duties and even the decisions they pass. The court

²⁰ Emilianides, 3.

²¹ Snyder & Narayan, 6 (accessed 20th November, 2011).

²² Snyder & Narayan, 6 (accessed 20th November, 2011).

adopted the words of Lord Atkin in *Ambard v Attorney-General of Trinidad and Tobago*²³ were he famously stated:

But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice.... Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.

Related to the facts at hand, it can be noted that the above position of the law begs the question as to what is legitimate and what is not, and who decides whether it is legitimate or not. Determining whether a publication was made “in good faith” and without “malice” is highly subjective.²⁴ Admittedly, the offence needs to be narrowly defined to avoid potential abuse.

4.3.6 Punishment for contempt

Punishment for the offence of scandalising the court in Zambia may take two forms. First, a person who commits any of the Acts listed under section 116 of the Penal Code is guilty of a misdemeanour and is liable to imprisonment for six months or to a fine not exceeding seven hundred and fifty penalty units. Further, when the offence is under certain paragraphs of subsection 1, the court may cause the offender to be detained in custody 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. Second, were one is found guilty under Order 52 of the RSC, no particular procedure or punishment prescribed.

²³ [1936] AC 322, 335.

²⁴ Snyder & Narayan, 7 (accessed 20th November, 2011).

Various *Zambian* cases have dealt with punishment for scandalising the court. In *Sebastian Zulu v The People*²⁵ the appellant was sentenced to twelve months' imprisonment with hard labour for submitting a contemptuous affidavit requesting a judge to recuse himself from a murder case. On appeal, the Supreme Court reduced the sentence and imposed a suspended sentence of three months simple imprisonment having considered the mitigating factors that the appellant did not did not make its contents known in open court and also that he had tendered an apology. Similarly, in *Elias Kundiona v The People*²⁶, which arose out of the same facts as the Zulu case, the Supreme Court upheld the sentence of six months imprisonment with due regard being had to the two months already served in prison by the appellant.

Compared to the case at hand, the Supreme Court imposed a two year sentence on the two contemnors. It is submitted that though there is no limit to the sentencing powers of a judge under Order 52, the sentence imposed on the two was unnecessarily harsh considering its previous sentences on similar matters. The fact that the letters were unpublished and the apology tendered by counsel should have led to a less stiff sentence, or a combination of a fine and a sentence. Further, considering the matter involved legal counsel, the sentence could have been reduced and the matter, as it rightly was, referred to the Disciplinary Committee of the Law Association for further action.

Despite this, it must also be noted that the conduct involved in the cases cited differs in terms of seriousness. As Professor Mvunga notes, the case cannot be compared to the *Zulu* or the *Kundiona* cases above because stating '*a stupid judgment by stupid judges*' cannot be equated to

²⁵ (1990-92) Z.R. 62.

²⁶ (1993 - 1994) Z.R. 59.

submitting an affidavit requesting a judge to recuse himself.²⁷ Thus, he states that the punishment is the case at hand was acceptable considering the gravity of the offence and the words used.²⁸

4.3.7 Potential of abuse of the offence

Having reviewed the current substantive and procedural law of scandalising the court, it is fair to conclude that the scandalising offence has the potential to be abused, for several reasons. First, the definition of the offence is both wide and vague – any act that undermines public confidence in the administration of justice is potentially punishable.²⁹ Second, judges are relatively free to try contempt cases as they see fit, even potentially in circumstances where the judge has a personal interest in the case.

4.4 Implications of the judgment on future scandalising offences

From the above discussion, it emerges clearly that the case under study is a seminal case on scandalising the court in Zambia. One of the implications of this case upon subsequent cases on scandalising the court is that it is a clear indication that Zambian courts do not take lightly comments that are deemed to be scurrilous attacks on their integrity. This can be seen from the two year jail sentences the two received for their conduct in these proceedings. Thus, in future, owing to the principle of stare decisis, a lower court would not hesitate to impose a similar punishment for scandalising, and it is submitted that this might stifle legitimate criticism by the public for fear of sanctions. Further, no fixed definition of what conduct amounts to scandalising is given, leaving wide room for the court to exercise its powers to punish for contempt. However,

²⁷ Professor P. Mvunga, interview by author, UNZA, Lusaka, 12th April 2012.

²⁸ Professor P. Mvunga, interview by author, UNZA, Lusaka, 12th April 2012.

²⁹ Snyder & Narayan, 6 (accessed 20th November, 2011).

this may be seen as an advantage in itself in that it leaves room to decide what is scandalous or not based on time and all the circumstances of the case.

It is noted that possibly, the sentence serves as a warning to would be contemnors, especially in recent years when general attacks on the judiciary and the judgments of the courts have increased. Thus, it further serves as a warning to lawyers to carefully choose their words in criticising decisions of the court. Further, the court stated clearly that for the second contemnor, Victor Chilekwa, by repeating the words used by his lawyer to the court, he was adopting them as his own and therefore risked being charged for a fourth count of contempt. This shows that even while one has been summoned to show cause why he/she should not be cited for contempt, further contempt can still be committed in the face of court leading to sanctions.

Finally, going by the trend in cases dealing with scandalising, the case under analysis shows that the courts will not hesitate to invoke their inherent power to punish for scandalising and punish summarily even at the risk of the rules of natural justice not being observed. Thus, the case does not reflect any shift as to the possibility of a judge recusing himself, and it further gives an indication that judges will continue hearing matters involving scandalising the court, even were they are the subject of criticism. Thus the judgment comes highly recommended by those advocating for the maintaining of the courts authority through the power of contempt, and the reverse to those who think the judiciary should be more open to criticism.

4.5 CONCLUSION

This chapter has examined the decision in *Masiye Motel v Rescue Shoulders Estate Agency Ltd* in line with the offence of scandalising the court and the principles governing the offence. The Supreme Court decision clearly gives a position on the state of the law on scandalising the court

in Zambia, which is that words spoken or written tending to lower the dignity of the court will lead to punishment. Several substantive and procedural issues as regards the offence and the case in particular have been highlighted, which show that there is much to glean from this judgment, not least because it is the latest Supreme Court judgment dealing with scandalising the court by advocate and client. Its implications on later cases on the topic have also been advanced. Arising from the issues discovered in the preceding chapters, the next chapter generally concludes and advances various recommendations in light of the findings.

CHAPTER FIVE

CONCLUSION AND GENERAL RECOMMENDATIONS

5.0 GENERAL CONCLUSION

The recent practice of contempt of court in Zambia demonstrates the wide scope of powers of the court to punish for scandalising the court due to the unrestricted jurisdiction of the courts in punishing of this form of contempt. Chapter one of this study has shown that the offence of scandalising the court as form of contempt is very wide and very much alive in the Zambian legal system. The research has outlined the history of scandalising the court from the common law to the current position, tracing its necessity in ensuring the dignity and authority of the court is maintained. From this, it has been shown in chapter two that much of the law in Zambia on scandalising the court is an inheritance of the law from the English concept of the offence and the courts in Zambia usually rely on justifications for the offence as propounded in the various British cases.

An analysis of the main legislative provisions dealing with scandalising the court in Zambia i.e. section 116 of the Penal Code¹ and Order 52 of the Rules of the Supreme Court in chapter three reveals that Zambian courts have wide discretion in deciding cases dealing with the offence. As a result of this wide discretion, inconsistencies can be seen in determining what conduct amounts to contempt, the mode of trial and the penalty that can be imposed among others. Taking the case of *Masiye Motel* as the case under study of this research, chapter four has highlighted the procedural issues that arise in scandalising proceedings and the need for safeguards in the law to protect litigants, the dignity of the court and the public at large. The decision in this case clearly

¹ Cap 87 of the Laws of Zambia.

gives a position on the state of the law on scandalising the court in Zambia, which is that words spoken or written tending to lower the dignity of the court may amount to contempt of court and lead to punishment. Despite the many issues related to the nature and proceedings of the offence, its relevance in ensuring the operation of the legal system and the maintenance of law and order in society still makes it a much needed mechanism of achieving these ends. This observation is highlighted in Chapter 3 and is supported by the *Masiye Motel* case examined in chapter four.

Conclusively, it is noted that because of its broad and vague nature, the offence has the potential to suppress legitimate criticism of the Judiciary. Thus, procedural safeguards are vital in such cases, particularly given the potential conflict of interest that judges may face in hearing scandalising cases. In addition, the offence of scandalising the court has been the subject of extensive review and reform throughout the world, as shown in chapter three and Zambia should not be left behind in ensuring that its laws as relates to the offence is in tune with the modern tenets of democracy, freedom of speech and legitimate criticism of the judiciary as a public body. Reform therefore is inevitable. The precise nature of the reforms needed is considered in the next section.

5.1 RECOMMENDATIONS

Having demonstrated the need for reform owing to the various issues raised throughout the paper as regards the offence of scandalising the court, this part of the paper makes several recommendations to remedy the issues identified and make the offence more relevant so that its initial aim of maintaining the integrity and authority of the court is upheld. These reforms take various forms, and include, but not limited to recommendations on both the substantive and

procedural issues identified as regards the offence and the legislation which gives it legal backing.

5.1.1 Revision of the Legislative Framework

It is proposed that the law of contempt of court in Zambia should be codified and the procedures for prosecution and punishment made uniform. In particular, the Contempt of Court (Miscellaneous Provisions) Act² and the Penal Code Act³ as well as the provisions of Order 52 of the RSC should be codified into a single Act dealing with contempt of court in whatever form. Further, such Act should clearly stipulate the conduct amounting to scandalising the court, the procedure to be followed and a maximum limit of punishment possible. This will help in limiting the current wide discretion of judges in terms of the procedure and punishment where the contempt is under Order 52 of the current law.

While it is admitted that legal reform is a demanding task in which it is unrealistic to expect a revision of a law to bring about the desired changes overnight, it is also suggested that the change should first come from the judicial personnel. As noted in this study, the power to punish for scandalising the court is discretionary. Thus before this codification can occur, it is proposed that the judges should shift their paradigm and attitudes when dealing with contempt to a more liberal approach encompassing freedom of expression.

5.1.2 The need for a clear definition of what amounts to ‘scandalising’

It is proposed that the offence should be constituted by the making of a statement which is likely to bring the administration of justice into disrepute. In deciding whether a particular statement is

² Chapter 38 of the Laws of Zambia.

³ Section 116 of Chapter 87 of the Laws of Zambia.

likely to bring the administration of justice into disrepute, regard should be had to a number of factors. These could include the likelihood of repetition of the statement; the nature and reputation of the maker of the statement and the circumstances in which it is made; and whether the statement has a significant bearing on the administration of justice as a whole.

5.1.3 Extension of Defences

It is proposed that there should be a public interest defence for charges of scandalising the court. This defence should be made out if the statements in question were on a matter of public interest and the defendant acted in good faith. Further, the defences of innocent publication or distribution, fair and accurate report of proceedings in the current Contempt of Court (Miscellaneous Provisions) Act⁴ should be expanded to provide that a publication made as part of a legitimate discussion of matters of public affairs or public interest is not to be treated as contempt if it incidentally resulted in a serious interference to particular legal proceedings.

5.1.4 The need to strike a balance

The balancing of the various interests at stake in contempt law should continue to be undertaken by the courts, but in accordance with legislation rather than the common law.⁵ One such interest is the right to have a fair trial which includes being heard by an impartial tribunal. This study subscribes to the basic principle that a judge who has been personally attacked should not pass judgment on the individual attacking him. It is therefore proposed that the law should allow a litigant to apply for another judge to hear the case to ensure fairness.

⁴ Chapter 38 of the Laws of Zambia.

⁵ Law Reform Commission of Western Australia, "Report on Review of the Law of Contempt". Project No. 93. (June 2003), 25.

5.1.5 Expansion of offence

It is proposed that that the protection afforded by the offence should not be restricted to members of the judiciary but should extend to the conduct of those concerned with the administration of justice while engaged in judicial proceedings. A false allegation of impropriety in the conduct of counsel in a case could bring into disrepute the administration of justice.⁶

5.1.6 Necessity for retention of offence

It is recommended that despite the myriad of issues identified relating to the offence of scandalising the court, it is nevertheless important to maintain the courts' power of punishing for the most obvious and gross case of bringing it into disrepute. Public trust and confidence in the judiciary is vital. If that is undermined by unjustified attacks on it or the judges, the rule of law suffers. Thus, the fact that scandalising the court has become obsolete in some countries should not be an argument for scrapping it elsewhere where conditions of growing democratic institutions require confidence and respect for the judiciary to be securely established.⁷

5.2 CONCLUSION

This chapter has highlighted the areas of reform as identified by Chapter 2, 3 and 4 and proposed recommendations where need be. From the foregoing, it can be seen that the offence of scandalising the court is a necessary offence for the upholding of the courts dignity and authority. However, the wide discretion granted to the courts and the lack of proper procedures and punishment among other procedural defects calls for the need for the recommendations advanced above, which are aimed at ensuring the rationale for the offence is upheld and at the same time the citizens' right to legitimately criticise the judiciary are not stifled.

⁶ The Law Reform Commission of Hong Kong, Report on Contempt of Court. (December 1986), 34.

⁷ Andhyarujina, 12.

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