CRIMINAL CONTEMPT OF COURT AND THE RIGHT TO A FAIR TRIAL

A CASE FOR ZAMBIA

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CERTIFICATION

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I Andrew Chisala, Computer Number 25142003, do hereby declare that I am the author of this Directed Research Paper Entitled: "Criminal Contempt of Court and the Right to a Fair Trial – A Case for Zambia." I further declare that it is the work of my own ingenuity and that due acknowledgment has been made where other people's work has been used. I truly believe that this research has not been previously presented in the School of Law at the University of Zambia or any other related institution for academic work.

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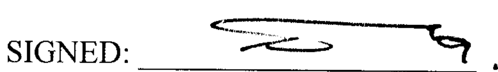
SIGNED: . DATE: 08/04/11

ABREVIATIONS AND ACRONYMS

1.	Forum for Democracy and Development	(FDD)
2.	Movement for Multiparty Democracy	(MMD)
3.	South African National Editors' Forum	(Sanef)
4.	United Party for National Development	(UPND)

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Young v United States ex rel. Vuitton et Fils S.A (1987) 481 U.S. 787, 795-801

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Andrew Chisala

March, 2011

ABSTRACT

The upsurge in criminal contempt cases being resorted to by the Courts of Law in Zambia prompted the researcher to undertake the study. Contempt of Court may either be civil or criminal. This essay has only examined the question regarding the law of criminal contempt of Court in Zambia as it affects the right to a fair trial without covering the aspect of civil contempt.

This essay examines the purpose and use of contempt of Court powers as they relate to the right to a fair trial. It also makes a critical analysis of case law on criminal contempt of court in Zambia as it relates to the summary procedure used in contempt proceedings. The essay has revealed that contempt powers are now very sparingly exercised in Western countries and many commonwealth countries. It has also observed that the purpose of the contempt of Court power is not to vindicate or uphold the majesty and dignity of the court but only to enable the court to function.

In conclusion, the essay acknowledges that the offence of contempt of court still has a valid place in Zambia in order to curb general interference in the administration of justice. The essay also observes the abuses to which contempt powers have been put and recommends reforms in the law and procedural rules used in contempt of Court proceedings.

It is my sincere hope that this essay will contribute to the understanding of criminal contempt of court and the purpose and use of the contempt powers.

Andrew Chisala

UNZA

March 2011

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CHAPTER ONE

1.0 BACKGROUND INFORMATION ON THE CONCEPT OF CRIMINAL CONTEMPT OF COURT

This study will address the question of criminal contempt of court and the right to a fair trial in Zambia. The study will examine the purpose and use of the power of contempt of court in ensuring fair trial.

Contempt of Court may either be civil or criminal. The study will only examine the question regarding the law of criminal contempt of Court in Zambia without covering the aspect of civil contempt. The study will also argue and analyse the extent to which the contempt of court powers have been used to either vindicate or uphold the dignity of the Court. It is also anticipated that the study will come up with a position as to whether the offence of criminal contempt of Court has a valid place in its current form in the law of modern day Zambia.

The upsurge in criminal contempt cases being resorted to by the Courts of Law in Zambia prompted the researcher to undertake the study. The research will seek to consider the mischief which the enactment of the contempt of court legislation sought to solve and relate it to the use to which the law has been put. There are genuine concerns regarding the administration of justice in relation to the manner in which criminal contempt of court is prosecuted.

The study will primarily concern itself with criminal contempt of court as it affects the right to a fair trial and laws which restrict comments on pending judicial proceedings and criticism of judges and courts. The study objectives will be:

i. To understand criminal contempt law and its application in Zambia;

ii. To discuss the law of criminal contempt of Court in relation to the right to a fair trial as interpreted by the Zambian Courts;

iii. To establish the purpose of contempt of Court powers in Zambia.

The purpose of the contempt of Court power is not to vindicate or uphold the majesty and dignity of the court but only to enable the court to function. The study reveals that contempt power is now very sparingly exercised in Western countries and many commonwealth countries.

It is the opinion of the researcher that a fresh and modern democratic approach is required in Zambia to do away with the old anachronistic view. In a democracy there is no need for Judges to vindicate their authority or display majesty or pomp. Their authority will come from the public confidence, and this in turn will be an outcome of their own conduct, their integrity, impartiality, learning and simplicity. No other vindication is required in a democracy by Judges, and there is no need for them to display majesty and authority.

This is precisely the thesis which is sought to be propounded in this study. The contempt power in a democracy is only to enable the Court to function, and not to vindicate and maintain it authority and dignity. The study reveals the uses and abuses of the contempt of court powers and court decisions that have been made in the past to cure the problem. Furthermore, the study gives insights into the tested approaches in establishing the purpose for which contempt of court powers should be used.

In Zambia contempt of Court is one of the offences relating to administration of justice found in the Penal Code.[1] The offences are found in Chapter xi under Sections 104 to 117 of the Penal Code. The offence of contempt of Court in Zambia is provided in section 116 of the Penal Code. In English Law (Common Law Jurisprudence) the law on contempt of Court is partly set out in case law and partly in the Contempt of Court Act 1981.

A finding of criminal contempt occurs when there is interference with or disruption of criminal or civil court proceedings. This may take the form of yelling in the court room, publishing matters which may prejudice the right to a fair trial (trial by media) or criticisms of courts or

[1] Chapter 87 of the Laws of Zambia

Judges which may undermine public confidence in the judicial system (scandalizing the court). Contempt of court includes any word spoken or act done calculated to bring a court into contempt or to lower its dignity and authority.

Assaulting or manhandling and throwing objects at a Judge is criminal contempt. Persistence in being noisy in court, or to keep interrupting the proceedings or refusing to answer questions which have been properly put is another form of criminal contempt. The most common form of contempt is the common law jurisdiction of scandalizing the court.

Lord Atkin's often quoted dicta that:

> justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respectful even though outspoken comments of ordinary men,[2]

often sound like a contradiction when one considers the lack of restraint or due process in contemptuous conduct and punishment for contempt even when criticism is reasonable. The dangers also lie in crossing the appropriate boundaries of the law of contempt based upon competing constitutional individual rights to justice in the administration of justice.

Under common law, there is no requirement that a prosecutor or the injured party should initiate the proceedings in criminal contempt. The Judge, on his/her own motion is entitled to proceed without any summons or indictment. Furthermore, there is no mandatory requirement for any written account of the accusation made against the accused to be furnished to the contemnor.

The Contempt of Court powers give the Judge the right to enquire into the circumstances so far as they are within his/her personal knowledge. The Judge identifies the grounds of complaint, makes a selection of witnesses, proceeds to investigate what they have to say and decides on the guilt and pronounces the sentence. All the safeguards to which an accused is entitled are omitted under this summary procedure which is used due to the nature of the offence and opens the use of contempt powers to abuse.

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[2] Ambard v. General fo Trinidada and Tobago (1993) AC 322, 335 (PC)

The summary procedure used in contempt proceedings has resulted into many legal commentators[3] to repeatedly call upon the legislator to revisit the law on contempt and the Judges to sparingly use these powers. The statement of the problems in this paper was meant to make a critical analysis of the criminal contempt of court in relation to fair trial in Zambia. The researcher believes that the knowledge to be generated in this research will persuade the legislator and interpreter of the law that the contempt of court powers are not meant to vindicate the authority of the courts but only to enable the smooth functioning of the courts of law.

In the subsequent chapters, the study will examine the purpose of the contempt of Court power in a democratic environment and how Contempt affects the right to a fair trial. This is with the understanding that the essence of contempt of court is that the misconduct can and impairs the fair and efficient administration of justice. In addition, the paper will examine case law on criminal contempt of court in Zambia.

The literature reveals the uses and abuses of the contempt of court powers and how court decisions that have been made in the past to cure the problem. Furthermore, the literature gives insights into the tested approaches in establishing the purpose for which contempt of court powers should be used.

The Researcher uses qualitative method throughout the research. The qualitative method is more appropriate for this type research as it will be able to bring out a great measure of objectivity. Data was collected using the following instruments and methods:

i. Desk Bound and Library Research - Documentation review of various learned authors and court decisions was used by the researcher to collect data.

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[3] Archibold 1999, p. 2263; Att.-General v. Times Newspapers Ltd, [1974] AC 273

ii. Interviews – The researcher interviewed a selected sample of legal practitioners. Legal practitioners were interviewed to answer the questions regarding the adequacy and relevance of the law of contempt of court in a democratic Zambia.

As this research is largely descriptive the researcher only used simple statistical measures, that is, measures of central tendency and dispersion in the analysis of data collected from the collection tools outlined in the data collection section. There was no need, therefore, for a statistical package to be used. Data consistence and stability was tested to check how well the items would positively correlate to one another. Finally, the researcher tested his hypothesis using the data available. In all these, the researcher has illustrated the findings using decided cases.

It is expected that this study will provoke the media groups to lobby, journalists to partake in fair, well-reasoned criticism of the administration of justice and the Press Associations to press for greater clarity in the law of criminal contempt of Court. Beneficiaries from this study will include defense Lawyers, the Bench, accused persons for criminal contempt of Court and the press.

The study ends by outlining the major findings and recommendations or way forward. The focus of the recommendations takes the form of suggestions to reform the institutional and legal systems so that the contempt powers of the courts are not abused and do not violate the fundamental human rights of citizens.

1.1 Conclusion

While Judges have the discretion to determine what is contemptuous and can decide how to punish it, there are arguments that the contempt of court authority is too much as it commingles the roles of a victim, prosecutor and Judge. It can be argued that the Judge, who is the principal offended party, is likely to be too harsh. It is also argued that the misconduct in a contempt case must be clear and present danger which clearly threatens the administration of justice and violates the right to a fair trial. The study advocates for reforms in both legislation and procedure in the prosecution of criminal contempt cases.

The Researcher anticipates that the this study will not only bring a new understanding to the purpose of the contempt powers of Court, but will also bring a new approach in the use of these powers. In the next chapter, the study considers and discusses the purpose and use of Contempt of Court Powers.

CHAPTER TWO

2.0 THE PURPOSE AND USE OF CONTEMPT OF COURT POWERS

This study has established in Chapter One that any behavior or conduct that opposes or defiles or impairs the authority, justice, dignity of the Court and the fair and efficient administration of justice amounts to contempt of Court. In Zambia, contempt of court is one of the offences relating to administration of justice found in the Penal Code.

2.1 The Court's Power to cite for Criminal Contempt

Lord Denning wrote in the case of Morris v Crown Office,[4]

> Of all the places where law and order must be maintained, it is here in these courts. The courts of justice must not be deflected or interfered with. Those who strike at it strike at the very foundation of justice. To maintain law and order, the Judges have, and must have, power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without a trial – but it is a necessary power.

The view about the contempt power was first stated in England by Wilmot J. in the case of R v Almon[5] even though this judgment which was in fact never delivered. 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.

Thus, the Power of Contempt was said to be required for maintaining the dignity and vindicating the authority of the Court and the above dictum was followed by successive courts not only in England but also in other countries.

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[4] [1970] 2 QB 114

[5] (1765)

However, there was a complete departure from the above dictum by Wilmot when Lord Denning in R v Commissioner of Police[6] observed and stated the following:

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

It is apparent from Lord Denning's observation that the best shield and armour of a Judge is his reputation of integrity, impartiality, and learning. The Researcher concedes that an upright Judge will hardly ever need to use the contempt power in his judicial career. It is only in a very rare and extreme case that this power will need to be exercised, and that, too only to enable the Judge to function, not to maintain his dignity or majesty.

While it is acknowledged that the contempt power enables the Courts to rightly protect themselves against anything which will undermine their dignity or interfere with their independence, this does not mean that they cannot be criticized. Bad decisions can and should be criticized even though great care must always be taken in the way in which courts' decisions are criticized.

Wilmot's opinion was expressed in 1765 but this cannot be said to be the law of Contempt of Court in England today. Lord Atkin stated that:

> Justice is not a cloistered virtue and must suffer the scrutiny and outspoken comments of ordinary men. In fact exposure to criticism only strengthens the judiciary, far from weakening it.

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[6] (1968) 2 QB 150

2.2 Purpose of Contempt of Court Powers

While contempt power is said to be essential to the very existence of and inherent in a court, noncommon-law country courts do without it. This is partly because contempt power is seen to be a camouflage for the violation of litigant's rights of due process which are summarily and unconstitutionally denied.

The case of Radio Avon[7] discussed very interesting issues both on facts and the law. In 1976, a privately owned Christianchurch radio station, broadcast a news item saying that a Judge of the then Supreme Court was at the centre of "another" closed court controversy, and that he had dismissed a criminal charge in a closed court. In fact the Judge had sat in chambers, a matter which was later agreed to be non-controversial.

A few months later, the Judge's son had been convicted of drink drug charges in the magistrate's court in a closed court. There had been allegation of preferential treatment. The radio station after a police investigation, broadcast an apology. Nevertheless, the Solicitor-General moved the Supreme Court for contempt of court. The Supreme Court (per Wild CJ and Casey J) found the radio station and one of its officers, guilty of contempt and fined both of them. On appeal, the conviction in respect of the officer was allowed. In the course of argument, it was submitted that the offence of scandalizing the court became obsolete. The court of Appeal made the following finding about the law of contempt:

1. The law of contempt exists to protect the administration of justice, not the dignity of the Judges;
2. Because of the wide powers given to the courts to punish for contempt, these powers should be used only from a sense of duty and in cases where there is a clear case of contempt beyond reasonable doubt;

[7] (1976) 165 CLR 346

3. One class of contempt is an act done to bring a Court or a Judge into contempt, or to lower his/her authority. The second class is to do something calculated to interfere with the due process of justice;

The researcher clearly notes that the offence of criminal contempt of court should only be exercised for the advancement of justice and the good of the public. In other words, the contempt jurisdiction of the court should be exercised sparingly and with wisdom. Truth or fair comment and honest and forthright criticism of the court system is not contempt unless it falsely imputes improper motives on a Judge's conduct. Where the contempt is in the form of scandalizing the court, it is preferable that the Judge, who is the victim, should not hear the matter.

In a modern democratic society, the purpose of the Contempt of Court power can only be to enable the Court to function. The power is not to prevent the public from criticizing the courts if the courts do not function properly or commit misconduct. It is the opinion of the researcher that the test to determine whether an act amounts to Contempt of Court or not is this: 'does it make the functioning of the Judges impossible or extremely difficult?' If it does not, then it does not amount to Contempt of Court even if it is harsh criticism.

The decision of the House of Lords in the *Spycatcher* case, vide Attorney General v Guardian Newspaper[8] illustrates the above position. The facts of the case were that a former spy, Peter Wright, wrote a book entitled 'Spycatcher' about his days in the British Intelligence Agency M15. The British Government filed an injunction suit to retrain publication of the book on the ground that the material in the book was confidential and was prejudicial to national security. By a 3-2 majority the House of Lords granted the injunction.

The press was outraged. The Daily Mirror, for example, ran a banner headline next day accompanied by upside down photographs of the majority Judges and a caption 'YOU FOOLS'.

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[8] (1987) 3 All E.R. 316 H.L.

Mr. Nariman, who was in England at that time, asked Lord Templeman (the Senior Judge in the majority) why no contempt proceedings were initiated. Lord Templeman smiled, and said that Judges in England did not take notice of personal insults. Though he believed he was not a fool, others were entitled to their opinion.

Thus the concept of scandalizing the court has changed. In earlier times, a person who called a Judge a fool in England would certainly be hauled up for contempt; today he would not. And the reasons for this change is, as Lord Salmon has pointed out, that today, the contempt power is not used for vindicating the authority of the Judge but only for enabling him to function.

In Balogh v. Crown Court at St. Albans[9] 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.

The questions which remain to be answered through this research are:

1. Is the purpose of contempt jurisdiction to uphold the majesty and dignity of law Courts and their image in the minds of the public?

2. Isn't the essence of the law of contempt to act as protector of the seat of justice more than the person sitting or the Judge sitting in that seat?

2.3 Use of Contempt of Court Powers

The discretion permitted to Judges in determining what contempt is and how to punish it has led to some legal scholars to argue that the contempt power gives too much authority to Judges. Earl C. Dudley, University of Virginia Law Professor, wrote that in the contempt power, "the roles of victim, prosecutor and Judge are dangerously commingles"

[9] (1975) Q.B. 373

Much of the criticism of the contempt of court power focuses on the lack of restraint or due process in determining punishments for contempt. In an excellent analysis of the history of contempt of court, Townsley J in Sayed Muktar Shah v Elizabeth Rice and Others,[10] explained why contempt jurisdiction should be exercised only in exceptional circumstances. A similar decision was made in the case of Elias Kundiona v The People,[11] when the Supreme Court held that an aggrieved Judge in summary contempt should show restraint and maintain equanimity; a Judge subjected to contempt should not be prosecutor and Judge in his own case. There are possible abuses of judicial power in contempt proceedings and one would come to a conclusion that Judges handling contempt cases tend to be biased and vindictive.

In the case of Green v United States,[12] Justice Hugo Black, in a famous dissent that was later vindicated by the Court's holding in Bloom v Illinois[13] put it carefully:

> When the responsibilities of lawmaker, prosecutor, Judge, jury and disciplinarian are thrust upon a Judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the Judge of his own cause.

The potential for abuse in exercising contempt powers has long been recognized by the court. It was stated in Ex party Terry,[14] "it is an arbitrary power which is liable to abuse".

2.4 Criminal Contempt of Court and the Right to a Fair Trial

The Zambian Constitution,[15] provides in article 18 (1) that every person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. Various rights associated with a fair trial are explicitly proclaimed in

[10] Criminal Appeal No. HAA002 of 1997

[11] (1993) S.J. 49 (S.C)

[12] 356 U.S. 165, 188, 199 (1958)

[13] 391 U.S. 194, 202 (1968)

[14] 128 U.S. 289, 313 (1888)

[15] Chapter 1 of the Laws of Zambia

Article 10 of the Universal Declaration of Human Rights, the Sixth Amendment to the United States Constitution and Article 6 of the European Convention of Human Rights as well as numerous other constitutions and declarations throughout the world.

In Worm v Austria,[16] the Court considered the case of a journalist in Austria who had been convicted under Section 23 of the Media Act, which prohibited the publication of matters considered capable of influencing the outcome of criminal proceedings. The journalist had published an article which strongly suggested that a government minister who was on trial for tax evasion was guilty. In this case the court held that there was no violation of the right to freedom of expression.

The court reasoned further that the interference with freedom of expression was necessary in a democratic society in order to protect the right to a fair trial and to maintain public confidence in the administration of justice Public figures are entitled to the enjoyment of the guarantees of a fair trial set out in Article 6, which in criminal proceedings include the right to an impartial tribunal on the same basis as every other person.

However, a contrary view was expressed in a Canadian leading case of Dagenais v Canadian Broadcasting Corporation,[17] where a provincial Court had issued a publication ban on a fictional television programme dealing with the sexual and physical abuse of children in a Catholic orphanage while the trials of four members of a Catholic order charged with similar crimes was in progress or pending. The Supreme Court of Canada held that the ban could not be upheld. The Court began by rejecting the traditional common law rule, which tipped the balance in favour of a fair trial.

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[16] (1997) Application 22714/93, 25 EHRR 454

[17] (1995) 120 DLR (4th) 12.

2.5 Conclusion

The Courts power to deal with those who offend against it at once is a great power but it is a necessary power for purposes of enabling the Court to function. The Power of Contempt is not, however, required for maintaining the dignity and vindicating the authority of the Court. The law of contempt exists to protect the administration of justice, not the dignity of the Judges.

The danger lies in the fact that Judges in the name of contempt powers make the laws (i.e. orders or judgments), prosecute the violations of their own laws and also sit in judgment of such prosecutions. It was observed by the U.S. Supreme Court in Young v United States ex rel. Vuitton et Fils S.A.,[18] that Judges wielding this vast unlimited power of contempt suffer from obvious and ineradicable conflict of interest. Vindicating the court's authority and enforcing litigant's rights are so closely entwined, that is, the Judge being victim, prosecutor and Judge are dangerously commingled causing the potential for abuse to which the court's conflict role gives rise.

Similar observation was made by the U.S. Supreme Court in the case of Bloom v Illinois[19] when the Court recognized the "potential for abuse" in summary contempt proceedings because "men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir".

In Chapter Three, the paper discusses and analyses criminal contempt of Court and the right to a fair trial as interpreted by the Zambian Courts.

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[18] 481 U.S. 787, 795-801 (1987)

[19] 391 U.S. 194 (1968)

CHAPTER THREE

3.0 CRIMINAL CONTEMPT OF COURT AND THE RIGHT TO A FAIR TRIAL AS INTERPRETED BY THE ZAMBIAN COURTS

3.1 Introduction

The Zambia Judiciary has delivered a number of judgments which assert the Court's power to punish for criminal contempt of court either as a way of protecting themselves against anything which will undermine their dignity or interfere with their independence or to ensure fair trial.

3.2 Cases Involving Criminal Contempt of Court in Zambia

While there are a number of contempt cases decided by the Zambia Courts, the focus in this Chapter will be limited to the following cases

a) Sebastian Saizi Zulu v. The People (1990-1992) ZR 62 (S.C.);

b) Elias Kundiona v. The People (1993-94) ZR 59 (S.C.);

c) David Masupa v. The People (1977) Z.R. 226 (H.C.);

d) Anderson Kambela Mazoka and Others v. Levy Patricl Mwanawasa and Others (Ex-parte Anderson Kambela Mazoka);

e) George Lipimile Zambia Competition Commission v Mpulungu Harbour Management Limited; and

f) Masiye Motels v. Rescure Shoulders and Estate Agency (Unreported)

3.2.1 Sebastian Saizi Zulu v. The People[20]

This was an appeal against conviction and sentence for contempt of court under Order 52 of the Rules of the Supreme Court of England, as read with s116 (3) of the Penal Code, Cap 146 of the Laws of Zambia.

The appellant was in this case acting for the defence in a murder case. Before judgment could be delivered, that is, after final submissions for the defence had been made, the appellant handed to the learned trial Judge an affidavit and made an application for the learned trail Judge to recuse himself from that case on the ground set out in the affidavit the gist of which was that the learned Judge had, in a letter signed by three other Judges, promised to "fix" *Kambarange Kaunda*, son of former President *Kenneth Kaunda*, by sentencing him to death. The learned trail Judge found the action of the appellant to be a contempt of Court and consequently found the appellant guilty of contempt and sentenced him to twelve months' imprisonment with hard labour.

On appeal, it was contended that:

i. The trial Judge was under obligation in terms of s116 of the Penal Code to either deal with the matter summarily or to refer it to the Director of Public Prosecutions;

ii. The appellant had not received a fair trial as the trail Judge had not been impartial and independent;

iii. The appellant's conduct did not amount to contempt of Court.

The Appeal Court held that:

i. Contempt of Court includes any word spoken or act done calculated to bring a Court into contempt or to lower its dignity and authority;

[20] (1990-1992) Z.R. 62 (S.C.)

ii. The enquiry that the trail Judge instituted was unnecessary because he had made his finding of contempt of court as soon as it arose;

iii. It was generally improper for a trial Judge to deal summarily with contempt as it is undesirable for him to appear to be both prosecutor and Judge. An aggrieved Judge in summary contempt should show restraint and maintain equanimity; a Judge subject to contempt should not be prosecutor and Judge in his own case;

iv. The appellant's conduct was reckless in the extreme and constituted contempt of Court.

The contempt of Court in this case consisted of the allegation that the trial Judge was not impartial and independent and unless the application for recuse was substantiated by reliable evidence, it amounted to contempt of Court.

The appeal Court accordingly held that the appeal against conviction was dismissed. The Court added that although the trial Court was not limited in the sentencing, it could be imposed and that there were mitigating factors which justified a suspended sentence being imposed and the appeal on sentence was, therefore, allowed.

3.2.2 Elias Kundiona v. The People[21]

In this case, the appellant was convicted on two counts of contempt and sentenced to two terms of six months' imprisonment to run concurrently. He appealed against both conviction of sentence arguing that the matter should have been heard by a different court. As a result of his absence from the country, it was not heard until a year after the alleged contempt took place. He also alleged bias on the part of the Court and raised the defence of compulsion.

[21] (1993-94) Z.R. 59 (S.C.)

The appeal Court held as follows:

i. Lapse of time has no impact on the continuance of proceedings which were initiated promptly and were only delayed by the accused's own actions;

ii. No specific procedure is provided for summary contempt provided basic principles of fairness such as the right to be heard are observed. It is an unavoidable corollary of summary contempt that the tribunal is completely impartial or independent ;

iii. It is misdirection for the trial Court to deal with the defence of compulsion under the Penal Code without taking into account the 1990 amendment which includes future threats;

iv. It is wrong in principle for a lower court to criticize the sentence of the higher Court.

3.2.3 The People v. David Masupa[22]

The accused was arrested on a bench warrant issued by a magistrate, who thereupon charged the accused with contempt of court contrary to section 116 (1) (i) of the Penal Code and dealt with the matter summarily; the allegation was that the accused had implied, after the conclusion of the case and not in the presence of the court, that he had been unfairly dealt with in a case of overcharging when another man charged a similar offence was found not guilty.

The Court held that:

i. Contempt of court under section 116 (1) of the Penal Code, Cap. 146, if not committed in view of the court, should not be dealt with summarily. The proper course is for the State or for the aggrieved party to institute criminal proceedings, even where it is separated by distance of time or space from the actual judicial happening;

[22] (1977) Z.R. 226 (H.C.)

ii. Mere criticism of a judicial decision does not amount to contempt; where the criticism becomes an attack or abuse on the partiality of a judge or magistrate in relation to his conduct in a judicial proceeding or when there is an express or implied allegation of bias on the part of a judicial officer then such conduct could amount to contempt.

This was a review of proceedings for contempt of court instituted against one David *Masupa* by a magistrate of the first class at *Chingola*. The case record was called for in terms of section 337 of the Criminal Procedure Code, Cap. 160. On the 10th August, 1977, the learned magistrate had caused a warrant to be issued for the arrest of David *Masupa* for contempt of court. The warrant was duly executed on the same day and on the 11th August, 1977, the accused was produced before the learned magistrate. Thereupon the learned magistrate purported to charge the accused for contempt of court under the provisions of section 116 (1) (i) of the Penal Code, Cap. 146.

The particulars of the offence alleged that the accused had shown some intentional disrespect to judicial proceedings, to which he implied that he was unfairly dealt with in a case of overcharging when one *J.M.Tembo* was also charged with the same offence and was not found guilty of that offence.

The learned magistrate then explained the nature of the offence to the accused who said: "It is not true that I had shown some disrespect to judicial proceedings as I talked to nobody. I know that all the people here in *Chingola* are against me. They say anything because of the elections which are due at anytime. I realise that there could have been malicious reports against me. I could not go round and tell people that your judgment was wrong; any such reports were malicious. In future when any such reports are made I would request that such persons be arrested. Because of provocation I always retire to bed earlier than usual. With those few words I would thank you very much for calling me to appear before you to clear the air."

The court's finding reads as follows: "I have listened to what you said; it may or it may not be that the reports so received are baseless. It seems that there could be something in what you said.

For that reason I do not find it necessary to hold you guilty for contempt of court, and excuse you."

Section 116 (1) of the Penal Code, inter alia, provides as follows:

> Any person who . . (i) commits any other act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken; is guilty of a misdemeanour and is liable to imprisonment for six: months or to a fine not exceeding fifty Kwacha.

Section 116 (2) reads:

> When any offence against paragraph (a), (b), (c), 20 (d), or (i) of sub-section 1 is committed in view of the court, the court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding forty Kwacha or in default of payment, to imprisonment without hard labour for one month.

The High Court stated 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 Court went on to say that the proper course in such circumstances is for the State to institute criminal proceedings against the offender for committing an offence under section 116 (1) of the Penal Code. A conviction for an offence under section 116 (1) is a misdemeanor. However, sub-section (2) provides that if certain offences, namely, those in paragraph (a), (b), (c), (d) or (i) of sub-section (i) are committed in view of the court then the court is empowered to deal with the offenders summarily.

The High Court established that the learned magistrate had purported to act under the provisions of section 116 (1) (i) of the Penal Code which makes it a contempt for any person to commit any other act of intentional disrespect to any judicial proceeding or to any person before whom such proceeding is being had or taken. It should be observed that an act of "intentional disrespect" must be committed.

The Court also observed that an examination of the case record showed that although the accused was formally charged, no plea was taken. The learned magistrate merely explained the nature of

the offence to the accused who gave an explanation which was accepted by the court and thereafter the learned magistrate held that it was not necessary to find the accused guilty of contempt of court. The particulars of the offence did not indicate the date and place where the alleged contempt had taken place and the nature of the contempt was not precisely particularised. The Court categorically stated that the particulars of offence were vague and in the Court's view did not disclose an offence.

Lord Donovan in Attorney-General v Butterworth[23] states "The question to be decided here, as in all cases of alleged contempt of court, is whether the action complained of is calculated to interfere with the proper administration of justice. There is more than one way of interfering. The authority of a Court may be lowered by scurrilous abuse." McCleod v. Aubyn[24] was a case of publication of a scurrilous attack on a judge as a judge, particularly with reference to his conduct in cases he had tried. This was held to be contemptuous as scandalising the court. The judgment inferred that mere criticism of a judge or jury in respect of a case while it is still pending may amount to contempt but once a trial had taken place and the case was over then legitimate criticism is permissible though not scandalisation.

R v. Gray[25] was also a case of scurrilous attack on a judge which was held to be a contempt. Ambard v Attorney-General for Trinidad and Tobago[26] was a case of the publication of a virulent attack on a judge. Reference was made in that case to the judgment in the Gray case and the following passage was cited from the judgment in that case: "Any act done or writing published calculated to bring a court or judge of the court into contempt or to lower his authority is a contempt of court."

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[23] [1963]1QB 696

[24] [1899] AC 549, 561

[25] [1890] 2QB 36

[26] [1936] AC 322, 325 (PC)

The Appeals Court made reference to the case of Balogh v. Crown Court[27]. In considering the powers of summary punishment for contempt of court, Lord Denning, MR, at p. 288 states as follows: "This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity of an authority of the judge and to ensure a fair trial. It is to be exercised by a judge on his own motion only when it is urgent and imperative to act immediately-so as to maintain the authority of the court-to prevent disorder-to enable witnesses to be free from fear-and Jurors from being improperly influenced-and the like. It is, of course, to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt as was held in the Gray case by Lord Russell of Killowen, CJ But properly exercised, it is a pourer of the utmost value and importance which should not be curtailed.

The Appeals Court also cited the Erie, C.J., who in the case of Ex parte Fernandez[28] said that these powers, 'as far as my experience goes, have always been exercised for the advancement of justice and the good of the public. The same could be said today. From time to time anxieties have been expressed lest these powers might be abused. But these have been set at rest by s. 13 of the Administration of Justice Act, 1960, which gives a right of appeal to a higher court.
A judge should act of his own motion only when it is urgent and imperative to act immediately. 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 R.S.C. Order 52. The reason is so that there should not appear to be both prosecutor and Judge; for that is a role which does not become him well.

Stephenson, L.J., in the same case at p. 293 says "The power which the judge exercised is both salutary and dangerous: salutary because it gives those who administer justice the protection necessary to secure justice for the public, dangerous because it deprives a citizen of the protection of safeguards considered generally necessary to secure justice for him.
The appeal in this case gave an opportunity to make clear that it is a power to be used reluctantly but fearlessly when, and only when, it is necessary to prevent justice being obstructed or

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[27] [1975] QB 73

[28] [1861], 142 E.R. 349, 10 C.B.

undermined-even by a practical joker. That is not because judges, juries, witnesses and officers of the court take themselves seriously; it is because justice, whose servants they are, must be taken seriously in a civilised society if the rule of law is to be maintained."

Finally Lawton, L J , at p. 295 in the same case states:

> In my judgment this summary and draconian jurisdiction should only be used for the purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance and witty a fair chance of a just verdict or judgment. Contempts which are not likely to disturb the trial or affect the verdict or judgment can be dealt with by a motion to commit under Order 52 of the Rules of the Supreme Court or even by indictment.

The High Court held that the proceedings in this case were irregular since the learned magistrate had acted in excess of his jurisdiction. I should add that no actual injustice has resulted in this case since there has been no finding of guilt or conviction for contempt against the accused. In the result I would merely quash the proceedings for contempt of court in this case.

3.2.4 Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others (Ex-parte Anderson Kambela Mazoka)[29]

In 2001, Zambia held presidential and general elections and Levy *Mwanawasa* was declared winner. Anderson *Mazoka,* the UPND runner-up in the 2001 presidential election, Christon *Tembo* of the FDD, and Godfrey *Miyanda* of the Heritage Party challenged the election results under Article 41 (2) of the Constitution.

In July 2002, the court banned public comments on this matter after the three petitioners claimed that they were intimidated by President *Mwanawasa's* warning in a media interview that his accusers should "be prepared to accept as a reward for their evidence that they should be prosecuted and possibly convicted of theft or corrupt practices."
The hearing in the case of *Ex Parte Anderson Kambela Mazoka* commenced in January 2002 and *Mazoka* was the 1st petitioner while Mwanawasa was the 1st respondent. It was alleged through a

[29] SCZ/EP/010203/2002

report in one local newspaper[30] that the 1st petitioner during a campaign rally in a by-election made remarks impeaching the moral character of the 1st respondent and others, alleging that the 1st respondent was a thief who used stolen resources to corruptly get elected as President. It was on the basis of the report in the local newspaper that the Supreme Court *ex proprio motu* issued a *subpoena* against the 1st petitioner to show cause why he should not be cited for contempt of Court because the petition was still before the Supreme Court which had not even started evaluating the evidence received. The 1st petitioner admitted in Court that he had uttered some of the things attributed to him but not the content of the whole article.

The Court dismissed any suggestion by the 1st petitioner's counsel that a citation for contempt not in the face of the Court is premised on a fundamental understanding that the authority of the Court could be undermined on a matter pending before the Court, whereas in the this case the alleged statements were made at a campaign rally which was held very far away from the Court and that there was no evidence to show that the 1st petitioner made any reference to the pending petition and the preferred conclusion.

The Court referred to the well known House of Lords decision in the Attorney General v Times Newspaper[31] and quoted in detail the dicta of Diplock, LJ that:

> The due administration of justice requires first of all that all citizens should have unlimited access to the constitutionally established courts of criminal or civil jurisdiction for determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in the courts of law.; and thirdly, that once the dispute has been submitted to a court of law, they should be able to rely upon there being no asurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence, that will be observed as contempt of court… similarly 'trial by newspaper' i.e., public discussion or comment on the merits of a dispute which has been submitted to a court of of law or on the alleged facts of the dispute before they have been found by the court upon evidence adduced before it, is calculated to prejudice the third requirement; that parties to litigation should be able to rely upon their being no asurpation by any other person of the functions of that court to decide their dispute according to law. If to have recourse to civil litigation were to expose a

[30] The Post February 3 2003

[31] [1974] AC 273

> litigant to the risk of public obloquy or public prejudicial discussion of the facts or merits of the case, potential suitors would be inhibited from availing themselves of the courts of law for the purpose for which they were established.

Similar circumstances existed in the case of Ex Parte Kavindele. The contemnor was then Republican Vice President. During a campaign rally for his party, *Kavindele* was reported by the media[32] to have said that he had formally written to the Chief Justice to allow him to clarify matters which had been raised in testimony by certain witness in the ongoing Presidential election petition. The report stated that *Kavindele* said that some of the witnesses were liars.

On May 16, the Supreme Court found *Mazoka* and Vice-President Enoch *Kavindele* in contempt for having discussed the presidential election petition in the media. The court ordered *Mazoka* and *Kavindele* to pay a fine of $600 (3 million kwacha) and $200 (1 million kwacha), respectively; the election petition was still pending before the Court at year's end.

The Learned author Mumba Malila[33]argues that in both the *mazoka* and the *Kavindele* contempt cases, the Supreme Court clearly premised its judgment on Lord Diplock's reasoning in the case of Attorney-General v Times Newspapers.[34] What the Court did do was to state that the decision in Attorney-General v Times Newspapers was subsequently held by the European Court of Human Rights in the case of Sunday Times United Kingdom[35] to be a breach of article 10 of the European Convention on Human Rights, and that as a result, British contempt law was amended.[36] What is even more surprising is that the Supreme Court did not consider whether there was really anything to justify the House of Lords decision in Attorney-General v Times Newspapers in the first place.

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[32] Zambia Daily Mail, February 4 2003

[33] Zambia Law Journal Vol. 38, 2006 at p. 118

[34] [1973] 3 All E.R. 54, 72

[35] [1979] 2 EHRR 245

[36] English Contempt of Court Act, 1981

From the judgment of Diplock, LJ, so much relied upon by the Supreme Court, critical reasons for the court to hold a party who comments on pending litigation would be summarized in the following three propositions:

a) All citizens should have unlimited access to the constitutionally established courts for the determination of their disputes;

b) People should expect and should receive from the courts decisions which are free from bias based on facts proved in evidence in court;

c) Once a dispute has been submitted to a court of law, the parties should be able to rely upon there being no asurpation by any other person of the function of the court to decide the dispute.

Taking the last point first, Malila explains that the argument is that the press or other commentators would asurp the functions of the courts, if they were allowed to comment on issues pending determination in court. He further argues that the first point of difference between the *Mazoka* case and the case of Attorney-General v. Times Newspapers is that in the Times case the newspaper, rather than the party to the proceeding was cited. In *Mazoka,* it was the party to the proceedings that was cited.

Secondly, in *Mazoka,* the contemnor's statements were made in a political context. Regardless of all other considerations, however, the argument that the function of the court would be asurped appears very difficult to sustain, even assuming that in this case it were *The Post Newspaper* and not *Mazoka* himself that was facing contempt proceedings.

The second argument that public discussion of matter pending in court may create a possible prejudice, or that public discussion may lead to prejudgment of a pending matter, is only relevant to the extent that it can be shown that indeed the statement or discussion posed a risk of influencing the court. In Attorney-General v Times Newspapers some members of the House of Lords admitted that there was no real risk of articles influencing the tribunal or the witnesses.

This was the question the Supreme Court should have asked itself, in both the *Mazoka* and the *Kavindele* contempt cases.

According to Malila in his article, the only argument that deserves further consideration is that based on protection of the judiciary. In the Attorney-General v Times Newspapers, case this is the argument which constituted Lord Reid's reasoning. By this argument, it was contended that public confidence in the administration of justice may decline if people believe that they would use the media rather than the legal process to resolve their disputes.

3.2.6 George Lipimile Zambia Competition Commission v. Mpulungu Harbour Management Limited.[37]

This was an appeal against a ruling of a High Court Judge who held that the High Court of judicature for Zambia enjoys extra-territorial jurisdiction to try a Zambia citizen resident in Zambia for an act of contempt of Court allegedly committed in a foreign jurisdiction, namely France.

The fact which were common cause, are that this matter initially came up for defence on 1st September, 2005. On application by appellants advocate, the matter was adjourned to 14th September, 2005 to enable them obtain further instructions on the e-mail contained in the Notice of intention to produce documents filed by the Respondent's Advocates on 1st September, 2005.

When the matter came up on 14th September, 2005 the Appellants' Advocates raised a preliminary point of law as to:

> Whether the High Court of Judicature for Zambia enjoys extra-territorial jurisdiction to try a Zambia citizen resident in Zambia for an act in contempt of Court allegedly committed in a foreign jurisdiction, namely; Peris, France.

[37] (2008) (S.C.Z. Judgment No. 22 of 2008)

After listening and considering the submissions by Counsel on either side, the learned trial Judge answered the preliminary issue in the affirmative.

The learned trial Judge pointed out that whether contempt proceedings are based on section 116 (1) of the Penal Code or Order 52 of the Rules of the Supreme Court, the end result is the same. According to the learned trials Judge, it was immaterial that the contempt proceedings before him were commenced under Order 52 of the Rules of the Supreme Court and not under section 116 of the Penal Code. He found solace in the Supreme Court decision in *Sebastian Zulu* case where the Court said that:

> It is clear, therefore, that in reality the learned trial Judge derived his power from Order 52 which ... empowers the High Court and Supreme Court to punish for contempt of Court. The Court's 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 contempt on the same day that it arises.

3.2.7 Masiye Motels v. Rescure Shoulders and Estate Agency[38]

This was an appeal case against the judgment of the High Court. Upon hearing the appeal, the Supreme Court rendered a judgment in favour of the appellant and set aside the award made by the trial Judge. In other words, the appeal was allowed.

Dissatisfied with the judgment of the Supreme Court, the alleged contemnor wrote three letters addressed to the Honourable Chief Justice, Deputy Chief Justice and High Court Registrar. The Supreme Court issued summons to the alleged contemnors to show cause why they should not be cited and punished for contempt of Court for insulting and demeaning the Court in three letters.

It is apparent that the 2nd Alleged Contemnor had to be cited to show cause why he should not be punished for contempt. Before the summons in this respect could be finalized, a third letter was written, this time containing outright insults in the description of the Court. In the 3rd letter of

[38] Appeal No. 187/2007 (Ureported)

10th February 2010, the 2nd Alleged Contemnor alleged that the lawyer had described the decision of the Supreme Court as follows:- "it is a stupid judgment by stupid Judges"

Summons were subsequently issued and served on *Mr. Sambo,* to show cause why he should not be cited and punished for contempt for his alleged outright insult and affront to this Court."

The charge of contempt against *Mr. Sambo* arose from the letter written by his client to the Court stating that he had described the judgment in this case as a 'stupid judgment by stupid Judges.' The Court found as a fact that *Mr. Sambo* uttered the words attributed to him. The Court stated that it was their view that *Mr. Chilekwa* from the outset purposed to write the letters and make his wild allegations under the mistaken impression that he could intimidate and force the Court to change the verdict in his favour.

He Court observed that through the insolent letters written by *Mr. Chilekwa,* both him and lawyer were attacking the integrity of the Court. Citing their decision, in the case of Zulu contempt of Court was defined to include "any word spoken or act done calculated to bring a Court into contempt or to lower its dignity and authority."

Additionally, the Court emphasised that the power to punish for contempt is inherent in the Court. This power should be exercised with caution, in the delicate balancing act, between ordinary *bonafide* criticism and contempt. 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 that they pass.

The Court retaliated that *Mr. Sambo's* words that a Court decision is a 'stupid judgment by stupid Judges' cannot by any stretch of imagination qualify to be criticism made in good faith. It is an outright insult. It is preposterous that *Mr. Sambo* can even argue that by these words, he did not mean to demean and insult this Court. We have no hesitation in concluding that he is liable and we accordingly find him guilty of grave contempt.

The Court also stated that there was no doubt that in *Mr. Chilekwa's* letters and testimony in Court, he used insolent language and made serious allegations of improper conduct and corruption which he tried to justify on the ground of tribal origin of some members of the Bench with Professor *Mvunga*... It was the Court's finding that *Mr. Chilekwa* was guilty on all three counts of contempt that he was charged with and the Court convicted him accordingly.

On sentence of Counsel, *Mr. Sambo,* the Court relied on the decision made in *Mr. Sebastian Zulu* case stating that his breach was to hand the trail Judge an affidavit on the basis of which he asked the Judge to recuse himself and his action was found to be contemptuous. The Court found *Mr. Sambo's* action to be grave contempt which, in the Court's view called for a stiffer penalty. The Court imposed a custodial sentence of 36 months simple imprisonment out of which twelve months were suspended for 3 years.

The Court took serious view of the 'insults' and unsubstantiated allegations that *Mr. Chilekwa* leveled against the Court. The Court stated that *Mr. Chilekwa* purposed to deliberately insult, demean and ridicule the Court. The Court imposed a custodial sentence of 36 months simple imprisonment for each count 12 out of which were suspended for a period of three years.

CHAPTER FOUR

4.0 USES OF CONTEMPT POWERS IN ZAMBIA

4.1 Introduction

The previous chapter cited a number of cases involving criminal contempt of Court in Zambia. This chapter proceeds to critically analyse the extent to which the Zambian Courts have used the power to punish for criminal contempt as a way of maintaining their authority and integrity or curbing conduct or acts intended or likely to prejudice a fair trial. This analysis has resulted into establishing how the purpose and use to which contempt powers have been put by the Zambian Courts.

The decisions involving criminal contempt of Court in Zambia will be analysed under the basic principle that Zambia is a democratic state and the people are supreme and a consequence, all authorities, whether Court Judges, Legislators, Ministers etc are servants of the people.

The preamble o the Constitution of Zambia assets:

> WE, THE PEOPLE OF ZAMBIA by our representatives, assembled in our Parliament, having solemnly resolved to maintain Zambia as a Sovereign Democratic Republic;
>
> DETERMINED to uphold and exercise our inherent and inviolable right as a people to decide, appoint and proclaim the means and style to govern ourselves;
>
> RECOGNISE the equal worth of men and women in their rights to participate, and freely determine and build a political, economic and social system of their own free choice;
>
> PLEDGE to ourselves that we shall ensure that the State shall respect the rights and dignity of the human family, uphold the laws of the State and conduct the affairs of the State in such manner as to preserve, deserve and utilize its resources for this and future generations;
>
> RESOLVE to uphold the values of democracy, transparency, accountability and good governance; AND FURTHER RESOLVE that Zambia shall forever remain a unitary, indivisible, multi-party and democratic sovereign state;
>
> DO HEREBY ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

The words in the preamble of the Constitution of Zambia give emphasise to the republican and democratic character of our Constitution, and clearly state that all power ultimately stems from the people. The people create the Constitution which in turn creates institutions which include the judiciary.

The implication of the concept of popular sovereignty is that the people of Zambia are the masters and, therefore, all authorities in Zambia remain the people's servants. With this in mind, the master, (the people of Zambia) must have the right to discuss and criticize the servant if the servant acts, fails to act or behaves in an improper manner and this includes people's right to criticize the judges.

Considering the Contempt of Court Power in the light of democracy immediately makes one to realize that the sole purpose of this power should only be to enable the Court to function. This power should not be used to prevent the people 9the master) from discussion and criticizing their servant (the Judges) if they fail to act or function properly or commit misconduct.

It is also interesting to note and it can further be argued that Article 20 (1) of the Constitution protects the freedom of expression of all citizens but it does not grant any power of contempt to the Courts. In other words the Constitution neither provides for the law of contempt nor define what constitutes the offence of scandalizing the Court. With this in mind, the study will proceed to analyse the cases involving contempt of Court to see how the Zambia Courts have struck a balance between ensuring the proper and smooth functioning of the Courts to ensure fair trail and protecting their own dignity and authority.

4.2 Analysis of Cases Involving Criminal Contempt of Court in Zambia

The Courts in Zambia have categorically stated that the law does not provide any specific procedure for summary contempt. This was the holding in Zulu v. The People and Kundiona v. The People where the Court went on to state that only basic principles of fairness such as the right to be heard should be observed.

4.2.1 Sebastian Saizi Zulu v. The People

The Supreme Court, in the case of Zulu vs. The People defined contempt of Court to mean "any word spoken or act done calculated to bring a Court into contempt or to lower its dignity and authority." With due respect to the Supreme Court, this definition is obviously wide off the mark in a democratic society such as Zambia and it does not fit in well with the observation made by Lord Salmon in Attorney-General v. BBB[39] when he observed that:

> The description 'Contempt of Court' no doubt has a historical basis, but it is nonetheless misleading. Its object is not to protect the dignity of the Courts but to protect the administration of justice.

This is exactly the thesis which this study is propounding in line with Lord Atkin's statement that justice is not a 'cloistered virtue' and must suffer the scrutiny and outspoken comments of ordinary men.

The Court also stated that the enquiry that the trail Judge instituted was unnecessary because he had made his finding of contempt of court as soon as it arose. There is a serious flaw in this decision because the procedure adopted by the trial Judge was said to be improper as he did not need to deal summarily with contempt as it is undesirable for him to appear to be both prosecutor and Judge.

Unfortunately, the Court proceeded to justify the trial Judges adoption of an improper procedure by saying that he had derived his power to punish for contempt of Court from the Rules of the Supreme Court of England (Order 52) and that these powers were wider than the provisions in s116 because they set no limitation on the Court to dispose of a contempt of Court on the same day as it arose. Finally, the Court held that the appellant's conduct was reckless in the extreme and constituted contempt of Court.

[39] [1981] AC 303 = [1980] 3 All ER 161 (170)

The observations made by the Supreme Court clearly indicate that one can actually infer that there is a possibility of abusing the contempt of Court powers in the administration of justice in Zambia in the name of wider powers conferred by Order 52 of the Rules of the Supreme Court. The danger lies in the fact that the trial Judge may pass a harsh sentence (because the trail Court is not limited in the sentence it could impose) due to provocation by the plaintiff and this tends to contradict the provisions of s116 (2) of the Penal Code.

Another danger lies in the fact that the Court may overreact. This was observed by the Supreme Court in the case of David Masupa vs. The People where the Appeal Judge said the following:

> The learned trial Magistrate appears to have reacted in a somewhat over sensitive manner when he… In the result, I would quash the proceedings for contempt of Court in this case.

Commentators have stated a number of reasons why the law of contempt should be amended. According to James Young,[40] the law of contempt has attracted criticism on three grounds:

i. It is distinguished from general criminal law by its curious procedure which deprives an accused of the safeguards normally vouchsafed by the British Law;

ii. It is also uncertain in its application and so runs counter to that aspect of the rule of law according to which no man should be 'punished'… except for a distinct breach of the law;

iii. It is argued that the law of contempt has a broader scope than is strictly justified for its purpose, and that this leads to unjustified infringement of liberty, most importantly freedom of expression and in particular, freedom of the press.

[40] British Journal of Law and Society Vol. 8, No. 2, 1981, p. 243

The enactment of the Contempt of Court Act 1981 was in response to these criticisms even though it still has a number of limitations in that it deals primarily with criminal contempt and only provides a series of piecemeal reforms.

The criticisms as observed by James Young are relevant and apply in the case of Zambia in that Courts tend to derive their powers to punish for contempt of Court from the Rules of the Supreme Court of England (White Book) as was the case in Zulu vs. The People. This application of the White Book purports that the powers to punish for contempt are inherent in the Court itself and, therefore, shows no regard for the rules of natural justice.

After establishing and defining what contempt of court means in this case, the Court did show how the conduct by the contemnor which the Court described as 'reckless in the extreme' could affect public confidence and impair the fair and efficient administration of justice. One can only see apart from protecting themselves against what they believed would undermine their dignity and interfere with their independence.

4.2.2 Kundiona v. The People

The holding in this case that no specific procedure is provided for summary contempt provided basic principles of fairness such as the rights to be heard are observed poses more dangers to the justice. It is clear from the cases cited in this study that Judges don't get transformed into super humans upon appointment and, therefore, continue to possess frailties and fallibilities.

It is, therefore, dangerous to expect the Judge whose human feelings and emotions have been hurt to adhere to the basic principles of fairness towards the person who has offended him. It is expecting too much from the man who is in a position to wield the powers and authority to remain impartial and independent against his offender.

The Court cited and used the decisions in the Australian cases of Fraser v. R and Meredith v. R[41]but did consider the counsel in Balogh v. Crown Court at St Albans where the Court warned that summary power should be 'exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt'.

4.2.3 The People v. David Masupa

The learned magistrate in this case when he caused the warrant of arrest to be issued purported to act on reports, the source of which was not stated. The record revealed that these reports were not substantiated by concrete evidence. It was clear that the whole purpose of the exercise was to cause the accused to be brought before the court in order for him to show why he could not be found guilty of contempt of court. The accused having given an explanation satisfactory to the court was let off.

Like in the case of Zulu v. The People, the issue again was about the procedure adopted in these proceedings which was irregular. Had the contempt been committed in the sight of the court then no problem would have arisen since the learned magistrate could have dealt with the matter summarily under the provisions of section 116 (2) of the Penal Code. But where the learned magistrate had received reports of conduct amounting to an alleged contempt of court committed not in the view of the court and subsequent to the completion of judicial proceedings, then, he was not justified in dealing with the alleged contempt summarily.

The learned magistrate appeared to have acted on reports that the accused had criticised or complained of a decision by the court against him in a case when another person charged with a similar offence was acquitted. As already stated, mere criticism of a judicial decision does not of itself amount to a contempt. Even if it was established that the accused had criticized the decision, it would still not amount to contempt because there was no attack on the learned magistrate as regards his conduct or impartiality.

However, if the criticism by the accused gave over to an attack or abuse on the partiality of the magistrate in relation to his conduct of judicial proceedings or if there was an express or implied allegation of bias on the part of the learned magistrate, then such conduct could have amounted to contempt because it tended to scandalise the court by seriously lowering the authority of the magistrate.

Thus a review of the authorities would show that acts done or expressions used by an individual which would appear to be to a scurriculous attack or abuse of a judge (or a magistrate) with reference to the manner in which he has discharged his judicial function or reflected on his partiality as a judge in any case he has tried then such acts or expressions tended to scandalise the court by bringing it into disrepute in the public eye and this would constitute a gross and improper interference with the administration of justice. In such circumstances the acts done or expressions used would amount to a contempt of court.

If the contempt was committed in view of the court then it could be dealt with summarily. 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.

The learned magistrate in this case appeared to have reacted in a somewhat over sensitive manner when he received what now appear to be unsubstantiated reports of an alleged contempt by the accused. The proper course would have been for the learned magistrate to have referred the reports to the police for investigations and if there was substance in those reports then the matter could have been left to the police to prosecute the accused under the provisions of section 116 (1) of the Penal Code.

This is not a case where the learned magistrate should have dealt with the matter summarily since the alleged contempt was not committed in view of the court. The learned magistrate acted in good faith in order to resist what he thought was an improper interference with the

administration of justice. Unfortunately, the action he took was based on a mistaken notion of the law.

4.2.4 Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others (Ex-parte Anderson Kambela Mazoka)

In both *Mazoka* and *Kavindele* cases, the contemnors did not comment on issues that were pending in Court. It is, therefore, difficult to appreciate the basis for the Court to treat as contempt the statements made at political campaign rallies. One would draw a conclusion that the Court would only be justified to resort to this process where there is a calculated and deliberate campaign to undermine the authority of the Court.

In agreement with the learned author Mumba Malila's[42] comments on this case, it is curious that the Supreme Court in both the *Mazoka* and *Kavindele* contempt cases did not critically scrutinize the judgment of the House of Lords in the Times Newspapers on the basis of which they found the contemnors guilty. The learned judges did not even attempt to consider the decision of the European Court on Human Rights which criticized the judgment of the House of Lords. The European Court judgment showed a strong appreciation of the value attached to public discussion of issues relating to the administration of justice, which was a dimension ignored by the House of Lords in Attorney-General v. Times Newspapers and by the Supreme Court of Zambia in the *Mazoka* and the *Kavindele* contempt cases.

In the *Mazoka* contempt case, the Supreme Court stated that:

> As we have stated above, not only does the 1st petitioner comment on the evidence adduced before this Court, upon which this Court has not decided, but he also casts aspersions on the integrity and character of one of the parties to the petition, as well as two witnesses, who were in fact by called by the petitioners. This in our view amounts to contempt of court and we so find.[43]

[42] Zambia Law Journal, Vol. 38, 2006 at p. 122

[43] Page 11 of the judgment

In Halsbury's Law of England,[44] it is clearly stated that for a publication to amount to contempt, it is not necessary that it should be shown actually to prejudice a fair trial or the likely conduct of the proceedings. The true test appears to be whether the publication is likely or tends to prejudice the trial or conduct of the action. This in fact, is what the Supreme Court quoted with approval in the *Kavindele* case.

After quoting from Halsbury's Law of England the Court then stated that:

> What is attributed to Mr. *Kavindele* in the publication is a clear comment on the weight and credibility of the evidence given by PW45, *Xavier Chungu* in the ongoing election petition now before this Court. In the said publication, Mr. *Kavindele* is commenting on the evidence given by PW45 alleging *inter alia;* that the evidence given by PW45 on the source of funding for the vehicles procured by MMD was not correct; that the testimony given by some witnesses is driven by hate; and that former leaders who were testifying against President *Mwanawasa* had been incarcerated by the President and cannot, therefore, tell the truth. These comments go to the roots of the issues that this Court is being upon to decide at the end of the day.

After quoting Lord Diplock's statement in Attorney-General v. Times Newspapers Limited on trial by newspapers and the argument of asurpation by any other person of the functions of the court, the Supreme Court then concluded that the comments by *Kavindele* could interfere with potential witnesses yet to give evidence before the Court, and that he had asurped the function of the Court which was eventually to decide on the credibility of PW45's testimony. This, in the Court's view, amounted to contempt.

Malila[45] argues that in both instances the Supreme Court seems to have primarily premised its finding that a contempt has been committed on the fact that comments which cast aspersions on either the parties to the petition or the witness had been made. He further argues that in the *Kavindele* case, the Court even advanced the asurpation of court function but made no attempts in neither case, to show that there was indeed a substantial risk of the Supreme Court itself prejudging the issues because the Court completely ignored the question as to whether a contempt law can be justified in terms of preserving the impartiality of the judges.

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[44] Halsbury's Law of England (4th ed.), Vol. 9 paragraph 9.

[45] At page 124

4.2.5 George Lipimile Zambia Competition Commission v. Mpulungu Harbour Management Limited

The fears which are continually expressed concerning the use and abuse of contempt powers can be confirmed by the holding in this case. The holding by the learned trial Judge that whether contempt proceedings are based on section 116 (1) of the Penal Code or Order 52 of the Rules of the Supreme Court, the end result is the same poses great risk to the rights of the alleged contemnor because there are no safeguards with the accused. The lack of limitation on the part of the Court to proceed and punish as it pleases without any regard to rights of the alleged contemnor in disposing of contempt is a great source of abuse of these powers.

As stated before, Judges as humans and posses all the tendencies of humanity and can sometimes be driven by emotion, anger, jealousy and temptation to overprotect their person in place of the seat they occupy.

4.2.6 Masiye v. Rescue Shoulders and Estate Agency

This study has established that under common law, there is no requirement that a prosecutor or the injured party should initiate the proceedings in criminal contempt. As a consequence of this, the Court in the Judges in *Masiye* Motels proceeded to issue summons, determined what was contemptuous and imposed custodial sentences upon the alleged contemnors. The same Judge identified the grounds of complaint, decided on the guilt and pronounced the sentences on *Mr. Sambo* and *Mr. Chilekwa.* All the safeguards to which the alleged contemnors could be entitled were omitted under this summary procedure.

However, the High Court in the case of Masupa v The People stated 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 Court went on to say that the proper course in such circumstances is for the State to institute criminal proceedings against the offender for committing an offence under section 116 (1) of the Penal Code. A conviction for an offence under section 116 (1) is a misdemeanor. However, sub-section (2) provides that if certain

offences, namely, those in paragraph (a), (b), (c), (d) or (i) of sub-section (i) are committed in view of the court then the court is empowered to deal with the offenders summarily.

The imposition of custodial sentences of 36 months by the Court, somehow, appears to have been a reaction in a somewhat over sensitive manner. Even after Counsel, *Mr. Sambo* tendered his apology as an officer of the Court by virtue of Section 85 of the Legal Practitioners Act, Cap 30 of the Laws of Zambia, the Court could not consider the apology but proceeded to impose a similar custodial sentence.

The Court retaliated that *Mr. Sambo's* words that a Court decision is a 'stupid judgment by stupid Judges' cannot by any stretch of imagination qualify to be criticism made in good faith. It is an outright insult. The Court did not hesitate in concluding that he was liable and he was accordingly found guilty of grave contempt.

This decision is a complete departure from the decision in Attorney General v. Guardian Newspaper[46] where Lord Templeman (the Senior Judge in the majority) justified why no contempt proceedings were initiated against the Daily Mirror which ran a banner headline accompanied by upside photographs of the majority Judges and the caption 'YOU FOOLS'. Lord Templeman simply said that Judges in England did not take notice of personal insults. Though he believed he was not a fool, other were entitled to their opinion.

Similarly, in *Balogh* case, 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. The Zambian Judges should take leaf from their counterparts to grow shoulders broad enough to shrug off such comments and baseless criticism

It is not deniable that bruised feelings, excessive zeal and pettiness took hold of the Bench robbing them of the high order and conducted expected of them. What happened in this case was a total disregard for section 116 (2) of the Penal Code where the Lawyer allegedly committed the

[46] Note 7 at p. 10

offence while trying to counsel his client but was subjected to summary proceedings as though the offence was committed in view of the Court.

In the *Zulu* case, the same Court took into account the appellant's apology and imposed a suspended sentence of three months simple imprisonment only. The Supreme Court in this case based its decision on the fact that the bench felt insulted, demeaned and that the language was insolent. This is in direct contradiction with Lord Denning's observation in R v Commissioner of Police[47] observed and stated the following:

> Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on sure foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself... We must rely on our conduct itself to be its own vindication.

It is apparent from Lord Denning's observation that the best shield and armour of a Judge is his reputation of integrity, impartiality, and learning. The Researcher concedes that an upright Judge will hardly ever need to use the contempt power in his judicial career. It is only in a very rare and extreme case that this power will need to be exercised, and that, too only to enable the Judge to function, not to maintain his dignity or majesty.

The imposition of custodial sentences of 36 months by the Court has sent a wave of fear not only among lawyers but also the general public. It is clear from the provisions in the White book that the contempt powers are inherent in the Court itself. This makes the Court to ignore or subordinate the rules of natural justice in the exercise of these powers.

The Supreme Court did not seem to prove in this case whether there was any intention on the part of *Sambo* to willfully obstruct justice especially that the proceedings had come to a dignified conclusion. One would think that the Court would adopt an advisory role where *Sambo* could be

[47] (1968) 2 QB 150

allowed to make responses to all the allegations of contempt by the Judges and should have been given chance to bring in legal representation.

The researcher believes that judges do not transform into super humans once they get appointed. They remain persons and the courts are institutions and both should not be entitled to greater immunity from criticism than other persons or institutions. They should never forget their human frailties and fallibilities. The decision in this case clearly shows that the large powers and considerable level of immunity were at play as judges turned noxious and culpable. Strange as it may sound, the decision was full of arrogance, pride and vanity elements which are incompatible with the 'sacred seat' and 'divinity' of the Bench.

It is now common knowledge that the Courts have tended to abuse the power of contempt. In 2010, there were national and regional condemnations against the Zambian Court's decision to jail a journalist. In convicting *M'membe* the magistrate David *Simusamba* confirmed that he was imposing a punitive sentence. He said, in order to ``reform the convict and deter others from engaging into such kind of behaviour", it was his considered view that a fine was not appropriate in the case. He added that the offence on which *M'membe* had been convicted posed a real risk of interfering with the fair administration of justice.

The charge arose from an article published by The Post about an earlier trial of The Post news editor *Chansa Kabwela* who tried to draw attention to the effects of a strike by hospital staff by sending to the Health minister and other health agencies copies of a picture of a woman rejected by a hospital giving birth in the street. Though she did not publish the material in the paper, she was charged with obscenity. However, she was freed by the magistrate, saying she had no case to answer.

The South African National Editors' Forum[48] (Sanef) condemned the imposition of an extremely severe four months' jail sentence -- with hard labour -- on legendary Zambian Editor Fred *M'membe* of The Post, Zambia's most popular newspaper, for contempt of court. Sanef's position

[48] South African National Editors' Forum 7 June 2010

was that a prison sentence for *M'membe's* alleged offence was unduly severe -- in the context of the charge, lawyers expected a fine would be imposed.

4.3 Conclusion

While it is not in dispute that the offence of contempt of Court is necessary to maintain the dignity of the Courts, the Courts in Zambia have exercised the contempt of Court Powers not only for the advancement of justice and the good of the public, but much more to maintain the Courts' dignity or majesty. In Zambia and in the name of the wide powers under Order 52 of the Rules of the Supreme Court, those who may wish to criticize Court decisions are threatened with contempt charges.

It is, therefore, submitted that the law of contempt of Court can only be made certain in Zambia if it is accepted that the purpose of contempt power should not be to vindicate or uphold the majesty and dignity of the Court but only to enable to enable the Court to function smoothly and properly. This power should only be sued in a rare and very exceptional situation where it is deemed that if it is invoked, it would be impossible or extremely difficult for the Court to function with an option of mere threat where this could suffice.

Regardless of how bad a Court decision may be, it has become extremely difficult to criticize for fear of being cited for contempt and because of this threat; Judges are being perceived to be acting less judiciously.

It has also been observed that s116 of the Penal Code is not sufficient to deal with cases of the administration of justice. This is why at High Court level, Judges often use Order 52 of the Rules of the Supreme Court. Contempt which is not likely to disturb the trial or affect the verdict of judgment can be dealt with by a motion to commit under Rules of the Supreme Court, or even by indictment.

CHAPTER FIVE

5.0 WAY FORWARD

5.1 CONCLUSION

It is not in dispute that the offence of contempt of Court is necessary to maintain the dignity of the Courts. However, it has been established that it should only be exercised for advancement of justice and the good of the public. Many of the people who were interviewed confirmed that the offence of contempt still has a valid place in Zambia in order to curb general interference in the administration of justice. Indications are that summary procedures in particular, which are adopted in contempt of Court cases should only be used to ensure that Court proceedings are not frustrated or intruded into rather than for punitive purposes. This is because the more a Judge on his own motion holds people in contempt, the more he is perceived to act less judiciously.

The study has revealed the flaws in the decisions made by the Zambia Courts especially in the failure to adhere to procedure in contempt proceedings. It is has been observed that there has been contempt powers have been wielded by some on the bench to either silence the public or to only protect their dignity without regard to fair trial.

It has also been established that the categories of criminal contempt of Court in Zambia as contained in section 116 (1) of the Penal Code is insufficient. This is the more reason why there has been more reliance on the White Book. This situation has created difficulties in having a standard procedure in contempt proceedings.

People who were interviewed indicated that the contempt legislation is inadequate and there has been too much reliance on Order 52 of the Rules of the Supreme Court. The interviewees also responded that there has been abuse of contempt powers as many of these allegations are never verified and the result has been that the alleged contemnor has always been at a disadvantage as

far as justice is concerned. Some respondents indicated that contempt powers have been used to fix those deemed to be opponents of the judiciary.

5.2 RECOMMENDATIONS

5.2.1 Legal Framework

The study has established that the provisions under section 104 to 117 of the Penal Code are not effective in dealing with the offences relating to the administration of justice. In view of this, it recommended that sections 104 to 117 of the Penal Code should be amended to encompass the wider provisions of Order 52. The rationale behind this recommendation is the fact that provisions under Order 52 are much wider than s116 and as such it allows the contemnor to be afforded a right to be heard and also to legal representation which are Constitutional rights under the Zambian Constitution.

It has also been observed that s116 of the Penal Code is not sufficient to deal with cases of the administration of justice. This is why at High Court level, Judges often use Order 52 of the Rules of the Supreme Court. Contempt which is not likely to disturb the trial or affect the verdict of judgment can be dealt with by a motion to commit under Rules of the Supreme Court, or even by indictment.

In view of this, it is recommended that s104 to s117 of the Penal Code should be amended to encompass the provisions under Order 52 of the Rules of the Supreme Court.

5.2.2 Use of Contempt Powers

This study has established that any willful disobedience to, or any misconduct in the presence of a court or action that interferes with a judge's ability to administer justice or that insults the dignity of the court is contempt.

However, the manner in which the contempt powers have been used in the recent past has raised more question than answers. In the case of a Judge who reacts to an attack upon himself, combing section 116 and Order 52 of the Rules of the Supreme Court would definitely allow the Judge to enough time to reflect on the extent and nature of the attack and as such he may not overreact and pass an unfair sentence. This approach would curtail the danger posed by the fact that the Judge assumes many roles (i.e. being both Judge and a prosecutor) in the proceedings against a contemnor in summary proceedings.

Judges like other public officer must realize that they also have human flaws, shortcomings and violations and public criticism may be one of the ways to correct them. They have a public responsibility and, therefore, should not take every criticism as lowering their dignity because as humans, they can commit mistake and blunders.

As a consequence of the above, it is recommended that Judges learn to avoid using summary trial except in very extenuating circumstances for the purposes of ensuring that a trial in progress or about to commence can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or judgment. Unlike the upsurge in criminal contempt cases being resorted to by the Zambian Courts in the recent past, it is recommended that the offence of contempt of court should be used sparingly coupled with adherence to provisions of section 116 (1) and (2) of the Penal Code cap 146 as the recent happenings are seemingly meant to curtail debate and discussion of Court judgments.

It is also recommended that the men and women of the Bench should resort to using their reputation of integrity, impartiality and their learning as the only best shield and armor without resorting to contempt powers.

5.2.3 Procedural Rules

The research has established that different procedures and most cases improper procedures have been adopted by the Courts of Law in Zambia in Contempt of Court proceedings. The Courts

have dealt with matters summarily when contempt has not been committed in the view of the Court and as a consequence, Judges have appeared to be both prosecutor and Judge.

It is recommended that standard procedures for the means by which cases are brought before Court, parties are informed, evidence is presented, and facts are determined should be established in order to maximize the fairness of the proceedings.

It is further recommended that it should be a mandatory requirement for written account of the accusation made against the contemnor to be furnished to him. This will ensure that all the safeguards to which the alleged contemnor is entitled to are availed to him and reduce the abuse of contempt powers.

5.2.4 Supremacy of the People under the Constitution

The words in the preamble of the Constitution of Zambia give emphasise to the republican and democratic character of our Constitution, and clearly state that all power ultimately stems from the people. The people create the Constitution which in turn creates institutions which include the judiciary.

The implication of the concept of popular sovereignty is that the people of Zambia are the masters and, therefore, all authorities in Zambia remain the people's servants. With this in mind, the master, (the people of Zambia) must have the right to discuss and criticize the servant if the servant acts, fails to act or behaves in an improper manner and this includes people's right to criticize the judges.

The law on contempt should, therefore, be amended to bring in line with Article 20 (1) of the Constitution which protects the freedom of expression of all citizens so that debate and discussion of the conduct of judges is not curtailed under the contempt law.

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