

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA

2014/HP/0637

(Civil Jurisdiction)

BETWEEN:

MARTIN SIMUMBA

PLAINTIFF

AND

ANTI-CORRUPTION COMMISSION

DEFENDANT

Before the Hon. Mrs. Justice A. M. Sitali on the 18th day of June, 2014

For the Plaintiff : ***Mr. M. Lisimba of
Messrs Mambwe, Siwila and
Lisimba Advocates***

For the Defendant : ***Mr. M. Kamanga, Legal and Prosecutions
Officer, Anti-Corruption Commission***

J U D G M E N T

Legislation referred to:

The Anti-Corruption Commission Act No. 42 of 1996, section 24 (1) and (3).

Other works referred to:

Winfield and Jolowicz *Tort*, seventeenth edition, (London: Sweet & Maxwell, 2006)

The Applicant commenced this action by originating summons issued out of the principal registry on 29th April, 2014, seeking an order that the restriction notice dated 19th December, 2008 is no longer applicable and is null and void; an order that the restriction notice dated 19th December, 2008 cannot be renewed; an order to reverse the restriction notice issued; damages for misfeasance in public office and an order for costs.

The originating summons is supported by an affidavit sworn by Martin Simumba, the Applicant. The facts of the case as stated by the applicant in the affidavit in support are that on 19th November, 2008, the Acting Director General of the defendant Commission issued a restriction notice on several of his motor vehicles under the guise of investigations and that on 9th June, 2009 his lawyers wrote a letter to the defendant demanding that the restriction notice be removed. On 15th June, 2009 the Acting Director General of the defendant responded stating that the restriction would remain in force. The applicant exhibited a copy of the restriction notice marked "MS1", a copy of the letter written by the his lawyers to the Director General dated 9th June, 2009 marked "MS2" and a copy of the Acting Director General's letter in response dated 15th June, 2009 marked "MS3".

The applicant went on to state that although he made several representations to the defendant complaining about the continued harassment and intimidation he was experiencing, the restriction notice has remained in force to date and he has been unable to do a lot of transactions and his travel was restricted as evidenced by the letters marked "MS4" and "MS5". The applicant stated that no charge has been preferred against him over the last six years after the restriction notice was issued and that he has been advised by his lawyer and believes that the continued restriction notices are an abuse of authority and are abusive of his person and his property.

The applicant contended that there is no justification for the continued notices and that the defendant has no defence to his claim. The applicant entreated this court to order the defendant to withdrawal all the restriction notices on his properties.

The defendant filed an affidavit in opposition to the originating summons on 16th May, 2014. It was deposed to by Boniface Mwamba who described himself as Investigations Officer and case officer in this matter. He stated that the defendant received complaints of various corrupt activities and abuse of authority of office against the plaintiff regarding the manner in which he, as Unit Manager of the Bank of Zambia, and others unknown were managing and disbursing the Enterprises Development Project funds provided to the Government of the Republic of Zambia by the World Bank through International Development Agency. He went on to state that the Defendant instituted investigations to verify the allegations levelled against the plaintiff and on 19th December, 2008 placed a restriction notice on the properties that were connected to the various offences that the plaintiff was being investigated for. The defendant stated that the restriction notice was effective for a period of twelve months. A copy of the restriction notice is exhibited marked "BM1".

The defendant confirmed that on 15th June. 2009 the defendant responded to the plaintiff's letter informing him that the restriction notice would remain in force for the permitted period of twelve months from the date of issue. A copy of the acting Director General's letter is exhibited marked "BM2". The defendant contended that there is no need to invite this Court to reverse the said restriction notice in the circumstances. The defendant denied that the plaintiff was harassed as he claimed in paragraphs 4 and 8 of the affidavit in support, and stated that he was merely investigated for the various offences he was alleged to have committed. The deponent went on to state that he

believes as advised by his counsel that the plaintiff's application is an abuse of court process, that it is actuated by malice and that it is an attempt to stifle the impending criminal prosecution the plaintiff is due to face before the courts of law. The defendant further stated that during the course of the investigations, the plaintiff was summoned by the defendant and he gave a warn-and-caution statement in respect of the allegations and that the investigations have since been concluded and the plaintiff will soon be appearing in Court on the charges established against him.

At the hearing of the application, Mr. Lisimba, counsel for the plaintiff, relied on the affidavit in support of the originating summons filed on 29th April, 2014 and submitted that the defendant does not dispute in its affidavit in opposition that the restriction notice which was issued by the Acting Director General of the defendant on 19th December, 2008 against the plaintiff's properties has never been revoked. He submitted that his client has suffered as a result and urged me to grant the orders as prayed in the originating summons.

In opposing the application, Mr. Kamanga counsel for the defendant relied on the affidavit in opposition to the originating summons dated 16th May, 2014. He stated that the gist of the defendant's opposition to the plaintiff's application is that the plaintiff was being investigated by the defendant for various crimes relating to the properties and that it was, thus necessary for the properties to be placed under notice to pave way for investigations. Counsel submitted that the restriction notice was issued on 19th December, 2008 pursuant to the provisions of section 24 (1) of the Anti-Corruption Commission Act No. 42 of 1996 and that it came to an end by operation of law upon the expiration of twelve months in accordance with subsection (3) of that section of the Act. Counsel stated that there was no mandatory requirement, under that provision, for the Director General to notify the suspect that the restriction notice had come to an end. For that reason,

Counsel submitted that the plaintiff's contention in paragraph 9 of the affidavit in support is not correct as the restriction notice expired on 20th December, 2009.

Regarding the letters exhibited by the plaintiff, counsel submitted that the Director-General was in order to respond as she did in her letter dated 15th June, 2009 marked "MS3" as the letter was written within the period of twelve months and the restriction notice was still in force at that time. In conclusion, counsel submitted that this Court is being asked to reverse a restriction notice that does not exist as it expired more than six years ago and that it is on that premise that the defendant contends that for the plaintiff to have commenced this action is an abuse of court process. He prayed for costs on that basis.

In reply Mr. Lisimba submitted that the plaintiff contends that the restriction notice has remained in force because he has failed to deal with the restricted properties in the manner he wants to as there are still notices registered at the Ministry of Lands, at the Road Transport and Safety Agency and at the Patents and Companies Registration Agency, because the notice has not been reversed. Counsel prayed that this court orders that the restriction notice be vacated and that the plaintiff be awarded the costs of this action.

I have carefully considered the affidavit evidence and the submissions by counsel for the respective parties. The plaintiff's first claim is for an order that the restriction notice dated 19th December 2008 is no longer applicable and is null and void. The plaintiff states in his affidavit evidence that the Acting Director-General of the defendant issued a restriction notice on his motor vehicles on 19th November 2008 (although the restriction notice marked "MS1" is dated 19th December, 2008) and contends that the restriction notice has not been discharged and has remained in force to date

despite his having made representations to the Director-General of the defendant Commission for the notice to be vacated.

On the other hand, the defendant asserts that the restriction notice against the plaintiff's specified properties was issued by the Acting Director-General of the defendant pursuant to section 24 (1) of the Anti-Corruption Commission Act No 42 of 1996 which was in operation in 2008 (hereinafter referred to as the 1996 Act) on 19th December, 2008 to facilitate investigations of corrupt activities levelled against the plaintiff in relation to his office. The defendant, however, denies that the restriction notice is still in force as alleged by the plaintiff and states that according to subsection (3) of section 24 of the 1996 Act, the restriction notice was in force only for a period of twelve months from the date it was issued and that it ceased to have effect on 20th December, 2009 by operation of law.

Section 24 (1) of the 1996 Act under which the restriction notice was issued provided as follows:

"24. (1) The Director-General may, by written notice to a person who is subject to an investigation in respect of an offence alleged or suspected to have been committed under this Act, or against whom a prosecution for such offence has been instituted, direct that such person shall not dispose of or otherwise deal with any property specified in such notice without the consent of the Director-General.

Section 24 (3) of the said 1996 Act further provided that:

(3) A notice issued under subsection (1) shall have effect from the time of service and shall continue in force for a period of twelve months or until cancelled by the Director-General, whichever is earlier.

From the provisions of section 24 (1) of the 1996 Act, it is clear that the Director-General had the power to issue a notice restricting the plaintiff from disposing of or dealing in any way with his properties which were specified in the notice whilst he was being investigated for an alleged or suspected offence under the Act. However, in terms of subsection (3) of section 24 of the 1996 Act, a notice issued under subsection (1) of section 24 of the 1996 Act could only be in force for a maximum period of twelve months unless it was cancelled before the expiration of the twelve months by the Director-General.

The restriction notice dated 19th December 2008 marked “MS1” issued by the defendant against the plaintiff read in part as follows:

“This Commission is conducting investigations into offences alleged or suspected to have been committed by yourself under Part IV of the Anti-Corruption Commission Act No. 42 of 1996.

In exercise of the powers conferred on me by section 24 of the ACC Act No. 42 of 1996, I hereby direct that you shall not dispose of or otherwise deal with motor vehicles with registration numbers: AAR 8702, AAT 3188, AAX 7710, AAZ 611, AAZ 612, AAZ 5271, AAZ 5272, AAZ 5275, ABC 303, ABC 304, ABC 305, ABE 4902, ABE 4903, ABE 4904, ABE 4905, ABE 5005, ABE 5666, ABJ 4275, ABJ 4922, ABJ 5092; properties numbered: L/36650/M on Title No. 69104, F/669/27 on Title No. 30219, F/687/A/2/C on Title No. 27676, F/687/A/1/A/2/B, L8353, F/687/A/1/A/2 on Title No. 27675; and 4,000,000 shares in Fresh Direct Zambia Limited without my consent.”

The restriction notice was copied to the Chief Executive Officer of the Road Transport and Safety Agency (RTSA) which is responsible, inter alia, for the registration of motor vehicles and licensing of motor vehicles for use on roads in Zambia; the Commissioner of Lands in the Ministry of Lands who is responsible for land administration in Zambia and the Registrar of the Patents and Companies Registration Office (PACRO) as it was called at that time who is responsible, inter alia, for registration of companies and related matters.

By that restriction notice, the Acting Director General directed the plaintiff not to dispose of or otherwise deal with the specified motor vehicles, real properties and shares named in the notice without the consent of the Director General. In terms of subsection (3) of section 24 of the 1996 Act the restriction notice which was issued by the Acting Director-General against the plaintiff on 19th December, 2008 expired twelve months later on 19th December, 2009. In paragraph 7 of the affidavit in opposition, the defendant acknowledges that the restriction notice expired twelve months from the date of issue.

In opposing the application, Counsel for the defendant contended that there was no mandatory requirement under section 24 (3) of the 1996 Act for the Director-General to notify the suspect that the restriction notice had expired. However, the Acting Director-General in paragraph 2 of the letter dated 15th June, 2009 marked "MS3" undertook to advise the plaintiff in due course of any changes relating to the restriction notice. In that paragraph the Acting Director-General stated the following:

"I wish to advise that the restriction notices on your client's properties shall remain in force as the properties are still subject of investigations

this Commission is carrying out. You will be advised in due course of any changes over the same". Emphasis mine.

This undertaking was made following an enquiry made by letter dated 9th June, 2009 marked "SM2" written by counsel for the plaintiff to the defendant as to whether the defendant would remove the restriction on the plaintiff's property as, according to counsel, the defendant had made significant head way in its investigations. In view of the undertaking, the Acting Director-General was expected to notify the plaintiff that the restriction notice had expired by operation of law. The defendant cannot say, contrary to its own undertaking, that it had no legal obligation to notify the plaintiff that the restriction notice had indeed expired.

Furthermore, as I observed earlier in this judgment, the restriction notice marked "MS1" was copied to the chief executive officer of the Road Transport and Safety Agency, the Commissioner of Lands and the Registrar of the Patents and Companies Registration Agency. The purpose of copying the restriction notice to these respective offices was clearly to put the said officers on notice and to oblige them to ensure that no document relating to any dealings by the plaintiff with any of the specified motor vehicles, real properties or shares was registered without the consent of the Director-General as long as the restriction notice was in operation. The restriction notice was issued on the ground that the plaintiff was being investigated for alleged or suspected corrupt activities and its effect was to prevent the plaintiff from dealing with his properties as he would wish to do. Although the defendant claims that section 24 (3) of the 1996 Act did not place any mandatory requirement on the defendant to inform the plaintiff that the restriction notice had expired by operation of law, the defendant cannot claim that it was similarly not obliged to notify the three organisations to

which the restriction notice was copied that the restriction notice had expired.

Therefore, although the law clearly stated that the restriction notice would remain in force for only twelve months from the date of issue unless it was sooner cancelled by the Director-General, it was incumbent upon the Director-General to notify the chief executive officer of the Road Transport and Safety Agency, the Commissioner of Lands and the Registrar of Patents and Companies Registration Office who were obliged to ensure that no dealings in the restricted properties were permitted when the notice period expired by operation of law. This is because as long as the said officers were not notified of the expiry of the restriction notice, they would continue to prevent the registration of any dealings relating to the properties in issue given the serious nature of the allegations of corruption levelled against the plaintiff. I should clearly state here that it was not the responsibility of these officers to keep track of when the restriction notice expired and it was certainly not their duty to interpret the provisions of the Anti-Corruption Commission Act No. 42 of 1996 relating to restriction notices or anything else which they did not administer.

The three institutions needed specific notification by the Director-General that the restriction notice issued against the plaintiff pending criminal investigations on allegations of corruption had expired before they would permit the plaintiff to deal with the subject properties. In my view the reason parliament put a limit to the duration of a restriction notice was to ensure that restriction notices are not issued indefinitely to the detriment of property owners. The limitation is also clearly intended to protect property owners against the misuse of the power by those in whom the power is vested. In the present case, since the Director-General did not notify the three institutions that the restriction notice has expired, the restriction notice

issued against the plaintiff's properties is still registered with the three institutions to this day notwithstanding that it expired well over five and a half years ago. The defendant has not adduced any evidence to rebut the plaintiff's evidence that this is still the position.

In view of this, the plaintiff's contention that the restriction notice placed on his motor vehicles, his real properties and his shares in Fresh Direct Zambia Limited remains in force is valid as its continued registration at the three institutions has had the effect of preventing him from dealing with his properties as he wished to as already observed.

That being the case, I do not agree with Mr Kamanga's submission that this action is an abuse of court process because the Director-General having failed or neglected to notify the three institutions that the restriction notice of 19th December 2008 had expired, the only other option the plaintiff had to free his properties from the restriction placed on them was to seek a court order that the restriction notice dated 19th December, 2009 has expired and is no longer applicable and should be vacated. I accordingly grant him the order as prayed. I further order that the restriction notice which is registered at the Road Transport and Safety Agency, the Lands and Deeds Registry of the Ministry of Lands and the Patents and Companies Registration Agency against the plaintiff's motor vehicles, properties and shares in Fresh Direct Zambia Limited specified in the restriction notice dated 19th December, 2008 be discharged forthwith.

The plaintiff also seeks an order that the restriction notice dated 19th December, 2008 cannot be renewed and a further order to reverse the restriction notice issued. The notice complained of was placed on the plaintiff's properties in December, 2008. The Act in operation at the time was the Anti-Corruption Commission Act No. 42 of 1996 which was repealed

and replaced by the Anti-Corruption Act No. 38 of 2010. The Anti-Corruption Act No. 38 of 2010 was further repealed and replaced by the Anti-Corruption Act No. 3 of 2012. Although the defendant retains the power to issue restriction notices under the current Anti-Corruption Act No 3 of 2012, the restriction notice placed on the plaintiff's motor vehicles, real properties and shares in Fresh Direct Zambia Limited has long expired and is not in effect. As the notice expired over five years ago there is no possibility that it can be renewed at this late hour. Further, I cannot order that the said notice should be reversed because in the first place it was properly issued by the Acting Director in accordance with section 24 (1) of the 1996 Act to pave way for investigations against the plaintiff for alleged or suspected crimes under the Act and in the second place, the notice has since expired and is not in effect although it has remained registered with the three institutions to which it was copied due to the defendant's failure to notify them of its expiry. I will therefore not grant the two orders as prayed.

The plaintiff further seeks damages for misfeasance in public office. The learned authors of *Winfield and Jolowicz Tort*, seventeenth edition, (London: Sweet & Maxwell, 2006) state in paragraph 7-20 on pages 358 to 360 that:

"The purpose of the tort of misfeasance in public office is to give compensation to those who have suffered loss as a result of improper abuse of public power, it being based on the principle that such power may be exercised only for the public good and not for ulterior and improper purposes. It applies to an unlawful (that is to say, unauthorised) act by a person holding a public office (which includes a public body such as a local authority, a government department or the Bank of England) provided it is done with the requisite mental element. ... The mental element relates both to the validity of the act and its effects upon the claimant. As to the first, the officer must act in bad

faith, that is to say he must either be aware that his act is unlawful or be consciously indifferent as to its lawfulness - negligence is not enough. As to the effect on the claimant, there are two situations. The first is what is called "targeted malice", that is to say, the case where the defendant acts with the purpose of causing harm to the claimant... Alternatively, the defendant will be liable if he is aware that his act will probably (or in the ordinary course of things) cause damage of the type in fact suffered by the claimant or he is consciously indifferent to that risk."

For the plaintiff to succeed under this claim, he must demonstrate that he has suffered loss as a result of the improper abuse of public power by the Director General or any other officer of the defendant. He must also show that the Director-General exercised the power to issue the restriction notice for ulterior and improper purposes and that the Director-General acted maliciously in issuing the said restriction notice or in the conduct of investigations against the plaintiff for offences he allegedly committed under the Anti-Corruption Commission Act No. 42 of 1996.

The evidence on record is to the effect that the defendant issued a restriction notice against the plaintiff's properties to pave way for investigations into offences alleged to have been committed by the plaintiff under the Anti-Corruption Commission Act No. 42 of 1996. The notice was issued pursuant to section 24 (1) of the said Act which empowered the defendant to issue such a notice. The plaintiff has not adduced any evidence to show that the Director-General acted with malice when exercising the power to issue the restriction notice under section 24 (1) of the 1996 Act. He has also not shown that the exercise of the power was done in bad faith. Further, the plaintiff has not demonstrated that the decision to issue the restriction notice in order to facilitate investigations against the plaintiff for

crimes allegedly or suspected to have been committed under the Act of 1996 was not exercised for the public good. On the evidence before me I find that the plaintiff has not proved on a balance of probabilities that the tort of misfeasance in public office was committed by the Director-General or any other officer of the defendant. The claim, therefore, fails and is dismissed.

I award costs to the plaintiff which are to be agreed and taxed in default of agreement. Leave to appeal is hereby granted.

Dated the 18th day of June, 2014.

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A. M. SITALI
JUDGE