

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA**

(Civil Jurisdiction)

2015/HP/2034



BETWEEN:

AUGUSTINE TEMBO

PLAINTIFF

AND

**FIRST QUANTUM MINING AND
OPERATIONS LIMITED**

1ST DEFENDANT

ANTI CORRUPTION COMMISSION

2ND DEFENDANT

*For the Plaintiff: Ms Natasha Hadunka of Messrs Keith
Mweemba Advocates*

For the Defendants: Ms. D.M Mwewa of Messrs KBF & Partner

R U L I N G

Cases referred:

1. *Sithole v. State Lotteries Board* (1975) ZR 105 (SC)
2. *Godfrey Miyanda v. The Attorney General*
3. *Katongo v. The Attorney General* (1975) ZR 185 (HC)
4. *Godfrey Miyanda v. The Attorney General* (1985) ZR 185 (SC)
5. *Lt. General Geojago Robert Chaswe Musengule v. Attorney General* (2009) ZR 359 (HC)
6. *Communications Authority v. Vidacom Zambia Limited* (2009) ZR 196 (SC)
7. *The Attorney General v. D.G Mpundu* (1984) ZR 6
8. *Zambia Publishing House v. Ella Mwanza* (1979) ZR 76 (SC)

9. *In Re Gospel of God Church, Isaac Matongo v. Shadreck Masedza and the Attorney General* (1977) ZR 292
10. *Radcliffe Urban District Council* [1922] 2 Ch 490 at page 507
11. *Kariba North Bank v. ZSC Limited* (1986) ZR 94
12. *Zambia Consolidated Copper Mines Investment Holding PLC v. Woodgate Holdings Limited* 2008/HK/01
13. *Access Bank Zambia Limited and Group Five/Zcon Business Park Ventures (suing as a firm) SCZ/8/52/2014*
14. *Tawela Akapelwa (sued as Induna Ineta) and 3 others v. Josiah Mubukwanu Litiya Nyumbu Appeal No. 004/2015*
15. *Damailes Mwansa v. Ndola Lime Company Limited* (2012) 3 ZR 268
16. *Twampane Mining Co-operative Limited v. A.M Storti Mining Limited* (2011) 3 ZR 67
17. *Henry M. Kapoko v. The People* (20160 CC/0023

Legislation referred to:

1. *Rules of the Supreme Court of England* (1999) edition White Book
2. *High Court Rules Act Chapter 27 of the Laws of Zambia*
3. *Anti Corruption Act No. 30 of 2012*
4. *Public Interest Disclosure (Protection of Whistle Blowers) Act No. 4 of 2010*

Other works

1. *Halsbury's Law of England, 4th Edition Vol.1 (1) page 272, paragraph 165*
2. *Bullen & Leak and Jacobs Precedents of pleadings 12th edition; Sweet and Maxwell at page 685*
3. *Atkins Court Forms 2nd edition vol. 32, (1996) Issues on Pleadings Probate & Public Health at page 29, paragraph 23*
4. *Clerk & Lindsell on torts 11th Edition, Sweet & Maxwell, the Common Law Library No. 3, 1982, page 643 paragraph 13 – 02*

5. *Odgers' Principles of Pleadings and Practice, Stevens and Sons London (1981) at page 123*
6. *Mac Gregor on Damages 17th Edition, Sweet and Maxwell pages 19 and 21*

This is an application to raise preliminary issue to dismiss case on points of law made pursuant to order 14A and 33 Rule 3 of the Rules of the Supreme Court¹, to determine the following points of law:-

- (1) Whether the reliefs under paragraph 1 of the plaintiffs statement of claim can be claimed as they are declaratory in nature and there are alternative remedies to the plaintiff.
- (2) Whether the relief under paragraph (ii) of the statement of claim can also be claimed when the particulars of the tort of negligence have not been specifically pleaded in line with order 18/12/29 of the Rules of the Supreme Court
- (3) Whether the plaintiff can claim the following special type of damages whose particulars he has not specifically pleaded in accordance with the requirements of Order 18/12/12 of the Rules of the Supreme Court Rules namely:
 - (i) *Damages for breach of confidence*
 - (ii) *Damages for breach of statutory duty*
 - (iii) *Damages for exposure and endangering his life as a whistle blower*
 - (iv) *Damages for mental distress, mental anguish, emotional distress, inconvenience and embarrassment*
 - (v) *Exemplary damages*

The application was supported by an affidavit deposed to by one **Lara Vermaak** the Defendants Support Services Manager. It was deposed that the Plaintiff claims for the following reliefs:-

- (i) A declaration that the Defendants are in breach of the provisions of inter alia, the Anti – Corruption Act no. 3 of 2012 and the Public Interest Disclosure (Protection of Whistle Blowers) Act of 2010 of the Laws of Zambia respectively;
- (ii) An order for compensation for negligence;
- (iii) Damages for breach of confidence;
- (iv) Damages for breach of statutory duty;
- (v) Damages for exposure and endangering his life as a whistle blower;
- (vi) Damages for mental distress, mental anguish, emotional distress, inconvenience and embarrassment;
- (vii) Exemplary damages;
- (viii) Interest thereon;
- (ix) Costs and any other relief the Court may deem fit and just.

That according to the advice rendered by the Attorneys for the Defendant the Anti-Corruption Commission Act does not provide for any civil claim therein.

It was her disposition that a claim under the said Act could have been made only against the Anti-Corruption Commission who were

no longer a party to the proceedings. It was her further disposition that, on the advice given, a plaintiff cannot claim declaratory remedies available to them.

It was deposed that the Plaintiff has not specifically pleaded any of all the damages that they have claimed. It was finally deposed that all in all, the Plaintiff has not pleaded any claim against the Defendant, if at all correctly. The deponent therefore sought that the matter be dismissed.

The application was supported by skeleton arguments.

(1) Whether the reliefs under paragraph "1" can be claimed as they are declaratory in nature and there being alternative remedies available to the plaintiff

Under this limb it was submitted that remedy for any alleged breach under the **Anti-Corruption Act and the Public Interest Disclosure (Protection of Whistle blowers) Act** cannot be sought by a declaratory order. And that a claim for declaratory order premised on these statutes is misplaced and incompetent.

In support of this proposition, reference was made to the Learned authors of Halsbury Laws of England¹ 4th Edition vol. 1 (1) page 272 paragraph 165.

Reliance was also placed on the cases of **Sithole v. State Lotteries Board¹**, **Katongo v. the Attorney General³**, **Godfrey Miyanda v. the Attorney Genral⁴**, **Lt. General Goejago Robert Chaswe**

***Musengule v. the Attorney General*⁵, and *Communications Authority v. Vidacom Zambia Limited*⁶.**

(2) Whether the relief under paragraph (ii) can be claimed as particulars for the tort of negligence which has not been specifically pleaded in line with **Order 18/12/29 of the Rules of the Supreme Court**

It was submitted that the Plaintiff claimed for compensation due to negligence. The law on the tort of negligence requires that one who seeks a relief as this must specifically plead particulars of negligence and the details of the damages allegedly sustained. It was further submitted that it was incompetent for the plaintiff to claim for the relief as the claim is clearly contrary to the law.

In support of the above submission, reliance was on the learned authors of *Bullen & Leak and Jacobs precedents of pleadings*², at page 685.

Counsel then turned to Order 18/12/(2) which directs that **“every pleadings must contain the necessary particulars of any claim, defence or other matter pleaded.**

Resort was then made to Order 18/12/29 which provides that in respect of negligence,

“Particulars must always be given in the pleadings showing in what respects the defendant was negligent. The statement of claim ought to state the facts upon which the supposed duty is founded and the duty to the plaintiff with the breach of which

the defendant is charged. Then should follow the allegation of the precise breach of that duty of which the plaintiff complains and lastly the particulars of the injury and damage sustained”

It was finally submitted under this limb that the Court had no jurisdiction to entertain any claim by the plaintiff as there are no particulars or pleas in the statement of claim and as such this claim must also collapse.

(3) Whether the plaintiff can claim the special types of damages whose particulars he has not specifically pleaded in accordance with Order 18/12/12 as specified in the writ of summons

It was submitted under this limb that special damages must be specifically pleaded. In support of this legal proposition reliance was placed on a passage from the Learned Authors of Atkins Court Forms 2nd Edition Volume 32, 1996 Issues on Pleadings, Probate and Public Health at page 29, paragraph 23.

Judicial precedence was also referred to in support of the above statement of law in the cases of ***The Attorney General v. D.G Mpundu, The Attorney General v. Martha Mwinde⁷, and Zambia Publishing Co. Ltd v. Eliya Mwanza⁸.***

It was submitted that the pleadings do not contain any particulars or at least general statements relating to the following:-

- (i) *How confidence in the defendant was affected and breached;*
- (ii) *How his life was exposed and his life endangered as an alleged whistle blower;*

- (iii) *How he was inconvenienced, embarrassed or suffered emotional, mental distress and anguish;*
- (iv) *What statutory duty existed if any and the purported breach as well as the genesis of the exemplary damages.*

It was submitted that even if there was any statutory breach, the claims were untenable. In support of this submission, Counsel called in aid the learned authors of Clerk & Lindsell on torts who are quoted as follows:-

“If a statute requires something to be done with a view to avoiding one particular form of harm, then no compliance with the statute results in another form of damage, no action will lie for such damage not contemplated by statute on the basis of breach of statutory duty”

The plaintiff opposed the application and filed in an affidavit in opposition deposed to by one **Natasha Hadunka**, the Plaintiffs' Advocate. The essence of which was that

- i) *That the Anti-Corruption Act and the The Public Interest Disclosure (Protection Act) do not preclude the bringing of civil actions relating to the same contrary to assertions by the plaintiff in paragraph 7 of the Supporting affidavit.*
- ii) *That there is nothing to stop the Plaintiff from bringing an action against the defendant as it is liable for the damage caused by the Defendant to the Plaintiff, contrary to paragraphs 8 of the supporting affidavit.*

- iii) *That this Court has jurisdiction to hear and determine this matter.*
- iv) *That contrary to averments in paragraph 10 of the supporting affidavit that the special damages have not been pleaded, in fact such damages have specifically been pleaded in paragraph 4 to 11 of the statement of claim.*
- v) *That negligence has also been set out in paragraphs 1, 2, 4, 5, 7, 8 and 9 of the statement of claim.*
- vi) *That the damages for mental anguish and distress do not need to be specifically pleaded, neither do damages for exposure and life endangerment.*
- vii) *That the defendants' option on their complaints is to apply for further and better particulars and not to dismiss the action at this stage.*

The Plaintiff filed skeleton arguments.

(1) **Question 1** In respect of the question as to the appropriateness of granting declaratory orders

It was submitted that the Court had discretion to grant such orders. It was pointed out that

- (a) Under Order 14A and 33 (3) of the rules of the Supreme Court the common feature of the above orders and also the cases cited by the Defendants Advocates is that a declaratory judgment is by

nature a discretionally one. Upon review of all the evidence before it, whether or not the matter at hand is one that a declaratory judgment may be awarded.

Reliance was placed on the cases of ***Re Gospel of God Church, Isaac Matongo v. Shadreck Masenda and the Attorney General***⁹, ***Handson v. Radcliffe Urban District Council***¹⁰, ***Sithole v. State Lotteries Board***¹¹.

(b) Judicious discretion and opportunity for court to pronounce itself on the identity of whistle blowers

It was pointed out that (i) the Court should seize this opportunity to pronounce itself on the critical and important requirement that whistle blowers' identities are protected by employers (ii) a declaration by the Court will make the position of the parties as regards their rights and liabilities clear in the issues in question.

(2) **Question 2** whether the tort of negligence was specifically pleaded

Learned Attorney made reference to Order 18/12/2 of the Supreme Court rules of England at page 327 which catalogued the functions of pleadings. Reference was also made to the Learned Authors of ***Odgers Principles of Pleadings and Practice***⁵ on the subject matter.

It was submitted that the Plaintiff had shown that under paragraph 9 of the statement of claim that the Defendant was negligent when it published and circulated statements provided to the Anti

Corruption Commission and in his capacity as a whistle blower on its letter head named "Group Security Investigations Report" and circulated the same on its internet.

It was pointed out that paragraphs 1, 2, 4, 5, 7, 8 and 9 the Defendant owed a duty to the Plaintiff anchored on the fact that at the material time the Defendant was his employer when the Plaintiff gave a statement to the Anti Corruption Commission and the later illegally and unlawfully and negligently published in breach of duty resulting in Plaintiff suffering damages particularized in the statement of claim.

Reference was then made to the case of **Zambia Consolidated Copper Mines Investment Holding Plc v. Woodgate Holdings Limited**¹², the High Court is recorded to have said:-

"The purpose of pleadings is not to play a game at the expense of the litigants but to enable the opposing party to know the case against him and there is a tendency to forget this purpose, and to seek particulars which are not necessary when in truth each party knows the others case"

It was Counsel's argument that under Order 15 Rule 1 of the High Court Act², which makes provision for delivery of further and better particulars. Order 18/12/3 of the Supreme Court Rules of England was also canvassed to support the above position.

Attention of the Court was brought to Order 18/12/6 of the Supreme Court Rules which provides that

“Where the applicant under this rule did not apply by letter for particulars he requires, the Court may refuse to make the order unless the Court is of the opinion that there were sufficient reasons for an application by letter not having been made”

(3) **Question 3** Whether the Plaintiff can claim damages specified in the writ of summons whose particulars allegedly have not been pleaded in accordance with Order 18/12/12 of the RSC

Reference was then made to the Learned authors of Mac Gregor on Damages⁶ which points out the danger of confusion in the use of the two distinct terms of damages or “general” damages and “special” damages and the wisdom to elucidate these terms at very start. “General Damages” are described as such the law will presume to be in direct natural or probable consequence of the action complained.

“Special Damages” on the other hand are such as the law will not enter from the nature of the act. They do not follow in ordinary course; they are exceptional in character and therefore must be claimed specifically and proved strictly”

Reference was then made to the case of ***The Attorney General v. G Mpundu***, which was equally cited by the Defendants Advocates in support of the above legal proposition. The case emphasised that unless the loss or damage are probable consequence of the Defendants act, or such a consequence as he in fact contemplated

or could reasonably have foreseen when he so acted. All other damage is held remote.

Recovery of damages for mental anguish and distress

It was pointed out that the Mpundu Case is authority for the proposition that damages for mental distress and inconvenience for example damages for frustration annoyance and disappointment could be recovered in an action for breach of contract and wrongful dismissal from employment.

On the foregoing it was submitted that the claims for damages for:-

- (i) Breach of confidence
- (ii) Breach of statutory duty
- (iii) Exposure and endangering the plaintiffs life; and
- (iv) Mental distress, mental anguish, emotional distress, inconvenience and distress are a natural and probable consequence of the defendants actions and as such are general damages and do not fall under the ambit of special damages.

She wrapped up his submissions by inviting the Court to dismiss the application with costs.

Learned Counsel for the Defendant countered the Plaintiffs submissions in the skeleton arguments in the skeleton arguments in reply. I will not replicate the same as they more or less restate and merely re-emphasise the issues expounded in the earlier submissions.

At the hearing, Learned Counsel Ms. Mwewa informed the Court that in support of the Defendants application they placed reliance on Order 14A and 33 rule of the Rules of the Supreme Court of England 1965 Edition and also on the supporting affidavit and skeleton arguments filed herein.

Learned Counsel Ms Hadunka augmented the Plaintiffs' affidavit in opposition and skeleton arguments with oral submissions. It was submitted that the case herein is not suitable without full trial. It was pointed out that the Defendant sought to distinguish the case of ***Re Gospel of God, Isaac Matongo, Shadreck Masedza***. In her view, that case lays down the principle when a Court can grant a declaratory Judgment. That even in the face of a preliminary application the Court is entitled to review the whole case if there are justifiable circumstances.

In the case in casu, she argued such justifiable circumstances do exist, one of which is public interest consideration being that the identities of whistle blowers ought to and should be protected by employers. According to her, a declaratory Judgment can be granted even where there is an alternative remedy. It was pointed out that this point has been conceded at page 2 of the Defendants heads of arguments. Alternative remedy, she went on, is not enough but it ought to be adequate.

In respect of the second question as relates to the tort of negligence as not having been specifically pleaded pursuant to Order 18/12/29 of the Supreme Court Rules, (1999), it was her

submission that contrary to the assertions that the particulars of negligence were not specified; paragraph 1 – 9 of the statement of claim reveals facts upon which negligence is anchored.

It was pointed out that it is irrelevant whether the Anti Corruption Commission was no longer a party to the proceedings. The important consideration was that the Plaintiff who was a whistle blower had to be protected by the employer who was the Defendant at the material time.

Referring to the case of ***Kariba North bank Limited v. Zambia, State Insurance Corporation Limited***¹¹, she observed that that case supports their case in that the Court said that in respect of particulars, there is no hard and fast rule. The critical consideration is merely to inform the other side what is being alleged against it for it to the case.

It was her argument that if the opponent feels that the particulars are not adequate they at liberty to apply for further and better particulars pursuant to Order 18/12/13 – 7 of the Supreme Court Rules.

In respect of the distinction between general and special damages, it was her submission that the claims made by the Plaintiff are indeed general damages which were suffered as a natural and probable consequence of the Defendants act and as such need not to have been specifically pleaded.

In reply, Learned Counsel for the Defendant in respect to the submission attacking the Defendant for not having applied for further and better particulars pursuant to the Rules of the Supreme Court of England alluded to, her quick answer was that the important issue is that the Plaintiff had not pleaded the special damages.

I am indebted on the industrious research of both Counsel. The submissions were helpful to the Court. I will now deal with the issues item by item as raised by the parties.

(1) **Whether the reliefs sought under paragraph “1” can be claimed as they are declaratory in nature and their being alternative remedies**

It is trite law that declaratory Judgment or orders are discretionary and ordinarily ought not to be where the litigant has alternative reliefs. The discretion is exercised in the particular context and facts of the case. The doctrine is not therefore cast in concrete that where there is an alternative relief the Court has no jurisdiction to grant a remedy.

The above legal position was correctly summed by Sakala, J (as he then was) in the case of **Re Gospel of God Church, Isaac Matongo v. Shadreck and the Attorney General**², he put it this way:-

“The first question that arises, for consideration in this application is whether or not an application for declaration is an appropriate remedy in this case. In my view although the

question appears to be a preliminary one, its determination is whether or not an application is appropriate remedy in this case. In my view, although the question appears to be a preliminary one, its determination, inevitably necessitates the review of the whole evidence and the consideration of the whole case.

His Lordship went on as follows:-

- “(i) the High Court has a discretionary power to grant a declaration.
- (ii) The power to grant a declaration should be exercised with proper sense of responsibility and with full realization that judicial pronouncement ought not to be issued unless there are circumstances that call for their making. The discretion should be exercised with care and caution and judicially.....”

Similar sentiments were expressed by Mwanamwambwa, J (as he then was) in the case of **Lt. Geojago Robert Chaswe Musengule v. The Attorney General**⁵,

1(a) Challenge pursuant to Order 14 A and 33 /3 of RSC – it is trite law that a litigant has a right at any stage of the proceedings, at, during trial and even after trial to raise preliminary applications on points of law or on both points of law and facts. The challenge launched by the Defendant therefore was properly anchored and this Court has jurisdiction to hear the application.

1 (b) **Judicial Discretion**

The Court of final resort had occasion to pronounce itself on the subject. Matibini, JS (as he then was) in the case of **Access Bank Zambia Limited and Group Five / Zcon Business Park Ventures (suing as firm)**¹³, put it this way:-

“As Counsel for the applicant has rightly submitted, this invariably implicates the exercise of judicial discretion. Since facts of two cases are never always the same, a court cannot be bound by a previous decision to exercise discretion in regimented way because that would be as it were putting an end to discretion (underlining mine for emphasis only)

Yet in another case, that is **Towela Akapelwa (suing as Induna Ineta) and 3 others v. Josiah Mubukwanu Litiya Nyumbu**¹⁴ His Lordship at page J20 had the following to say:-

“Judicial discretion is itself a power which inheres in a Judge. It is an armour which a Judge should employ judiciously to arrive at a just decision. The same should not be left out to the whims and caprices of a party to the action”

I can only add that addition to a myriad of combination of factors, the following factors may be factored in when exercising discretion namely:

- (i) *Whether there is an alternative and adequate remedy provided for under any law.*
- (ii) *If there is specific legislation providing for any relief.*
- (iii) *Whether the declaratory order or Judgment is capable of being complied with or not.*
- (iv) *Whether such a declaration is superfluous, academic and of no practical legal consequence.*

As alluded to the list is not exhaustive since the discretion is subject at all times to a rather armophous combination of facts which are perpetually different in every case.

The Defendant has complained that the plaintiff ought not to be permitted to proceed to have the declaratory remedies sought as he had an alternative remedy of suing for loss of employment provisions.

A careful scrutiny of both the writ and statement reveals that in addition to the declaration that the Defendant was in breach of the provisions of the Anti Corruption Act and the Public Interest (Protection of whistle blowers) Act under claim (i) and order compensation under claim (ii) order compensation for negligence, the Defendant has clearly under claim (iii) pleaded damages for breach of confidence, claim 9iv) damages for breach of statutory duty (v) damages for exposure and endangering his life as a whistle blower (vi) damages for mutual distress inter alia, (vii) exemplary damages.... and under (x) any other relief the Court may deem fit and just.

Paragraph 7 avers that the Plaintiff was summarily dismissed from employment by the 1st Defendant and in paragraph 12, the Plaintiff tabulates his particulars of loss and damage for (i) loss of employment; (ii) loss of future earnings; (iii) embarrassment and humiliation; (iv) endangering his own life and that of his family and other relatives.

It is trite law that pleadings include a statement of claim, a defence and counterclaim if any and a reply in addition with any proceedings which can properly be classified as a pleading.

I have no difficulty in discerning that the plaintiffs' pleadings clearly communicate to the Defendant that the cause of action originated from the parties relationship of employer and employee. That his employment was terminated following disclosure of certain information to the Anti Corruption Commission who are mandated to by law to receive and investigate such protected disclosure. That because of the termination of employment; he has suffered damage and injury and mental stress, fear and anguish.

In my view, the Defendant is in a very good position to counter the allegation or atleast to know what is being alleged against him.

Dr. Matibini, SCJ (as he then was) had occasion to pronounce himself on the subject. This was in the case of ***Damailes Mwnasa v. Ndola Lime Company Limited***¹⁵, held as follows:-

“Holding 1 *The functions of pleadings is very well known. It is to give fair notice of the case which has to*

be met, and to define the issues which the Court will have to adjudicate in Order to determine the matters in dispute between the parties.

Holding 2 Once pleadings have been closed, the parties are bound by them and the Court has to take them as such. The bounds of the action cannot be extended without leave of the Court and consequential amendment and pleadings.

Holding 3 It is one of the cardinal rules of pleadings for the party to tell his opponent what he is coming to court to prove, and to avoid taking the opponent by surprise. If he does not do that, the court may deal with him in one way of the two ways. It may say that it not open to him that he has not previously raised and will not be allowed to rely on it, or it may give him leave to amend by raising it, and protect the other party by letting the case stand down”

1 (c) Whether declaratory remedy can lie in proceedings under the Anti Corruption Act and the Public Interest Disclosure (protection of whistle blowers) Act

It was argued that declaratory reliefs could not be claimed pursuant to the above piece of legislation. The starting point is to have a

bird's eye view of certain provisions under the Public Interest Disclosure (Protection of whistle blowers) Act.

Section 2 of the above Act (the Interpretation clause) defines situations where the Act applies and the parties affected and the public interest so that members of the public at large, employees and employers inclusive do not indulge in any activity that could adversely affect either or indirectly the honest or impartial performance of official functions by the person, public officer or agency. This is captured under Section 3 of the Act.

“Section 6 (1) *This Act does not limit the protection given by any other law to a person who makes a public interest disclosure or prejudice any remedy available to the person under that law.*

Section 10 *An employer shall not subject an employee to any occupational detriment on account or partly on account of the employee having made a protected or public interest procedure.*

Section 11 *Provides for making of public interest disclosure*

Section 21 *Provides general protection of protected disclosure.*

Section 39 *Provides for protection of disclosure made to certain persons of bodies.*

Section 42 *Legislates for protection of against reprisals*

Section 42(2) *A civil proceeding in respect of a detrimental action under section may be instituted at any time within three months after the detrimental action is alleged to have been committed.*

42 (3) *In this section “detrimental action” means action causing compromising or involving any of the following:-*

(a) Injury damage or loss

(b) Intimidation or harassment

(c) Discrimination, disadvantage or adverse treatment in relation to employment

*(d) Dismissal from or prejudice in employment,
or*

(e) Disciplinary proceedings

Section 43(1) *A person is not subject to any liability for making a protected disclosure in good faith and no action or claim or demand shall be taken or made against the person for making the disclosure.*

Section 46 *Provides for prohibition of unlawful reprisals like conspiring to do so*

Section 49 (1) *Any employee who has been subjected; is subjected to any occupational detriment in breach of section then may*

- (a) apply to any Court having jurisdiction, including the Industrial and Labour Relations for appropriate relief, or
- (b) pursue any other process allowed or prescribed by any law.

Section 50 (1) *A person who engages in an unlawful reprisal is liable in damages to any person who suffers detriment as a result of the unlawful reprisal*

Section 50 (2) *The damages referred to under subsection (1) may be recovered in any court of competent jurisdiction.*

Section 56 *Makes provision of limitation of liability of persons making public interest disclosures.*

It is evident that the Public Interest Disclosure (Protection of Whistle Blowers) Act was enacted to protect person or institutions that make public interest disclosure from repercussions or reprisals from any person.

It provides for both criminal and civil sanctions against those persons and institutions that transgress against the Act. The mischief intended to be smashed is dishonest, corrupt, unfair and improper acts or omission on the part of person in public service and indeed in private, which are incompatible to good governance.

The act supercedes any Rule, Order or prescription under the high Court Rules and also under the foreign default Rules of the rules of the Supreme Court of England.

I can safely state that any order, rule, direction, prescription or practice in so far as it is complementary and not derogatory from the provisions of the Act is applicable. It follows law, that procedural rules are subordinate to specific pieces of legislation. The statutes have to be obeyed.

I cannot accept the proposition that mere non compliance with the procedural rules and orders cannot be a basis to defeat clear provisions of the Act. Such Rules and Orders are only of use in so far as they go to assist the expedient administration of justice. They should not be a hindrance in the administration of justice and enforcement of Laws as laid down by the legislature.

It is also obvious that this Court has unlimited jurisdiction to adjudicate on all legal issues as provided for by the law. That is, the jurisdiction of the Court is unlimited, though not limitless.

I therefore do not accept the Defendants submission that this Court has no jurisdiction on a mere assertion that there has been no compliance with one of two rules in respect of pleadings.

2. **Non compliance with procedural impositions (or order or rules of the court**

It is trite as alluded to earlier that rules and orders of the Court are to be complied with subject to surrounding factors to be considered

in each peculiar case. Some of the considerations may be (i) whether the rule is merely directory or mandatory (ii) whether the non compliance is curable or incurable (iii) whether the rule is in conflict or its strict adherence thereto may lead to the result of defeating a statute.

The Court of final resort had occasion to pronounce itself on the matter in the case of **Twampane Mining Co-operative Limited v. A.M Storti Mining Limited**¹⁶, where it was held as follows:-

“It is important to adhere to the rules of the Court in order to ensure that matters are heard in an orderly and expeditious manner and those who choose to ignore rules of the Court do so at their own peril”

The Court of final resort had occasion to pronounce themselves on the subject in the case of **Access Bank Zambia Limited and Group Five / Zcon Business Park Ventures (suing as a firm)**¹³ where Malila, JS (as he then was) put it this way:-

“In conclusion, we are mindful on the issue regarding Article 118 (2) (e) of the Constitution of Zambia.....we do not intend to engage in anything resembling interpretation of the Constitution in the Judgment. All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the Courts”

The Constitutional Court which is the Court of final resort in interpretation of Constitutional provisions put to rest and terminated all debate on the meaning and application of Article 118 (2) (e) which provides as follows:-

“In exercising judicial authority, the Courts shall be guided by the following principles:-

(a).....

(b) Justice shall not be delayed

(d)

(e) Justice shall be administered without undue regard to procedural technicalities.

Munalula, JC delivering the Judgment of the Court in the case of **Henry M. Kapoko v. The People** put it this way at page J38 – 39:-

“To be absolutely clear, we wish to point out that even if we had come to the conclusion that Sections 207 and 208 of the CPC are technicalities, the applicant still have had to convince the Court that the provisions are only technicalities that hinder due process to the extent that they ought to be disregarded in the interest of justice..... Article 118 (2) (e) does not direct courts to ignore technicalities. It enjoins courts not to pay undue regard to technicalities that obstruct the course of justice.....”

I have already found somewhere in one of the preceding paragraphs that the Defendant has not demonstrated that the Plaintiff has not sufficiently pleaded his case with particulars to enable it know what is being claimed from them for them to make a meaningful response. I have held that the Plaintiff has sufficiently pleaded his case as provided for under the Public Interest Disclosure (Protection of Whistle Blowers) Act as illustrated above.

In my view, the Court will be going too far to terminate an action by a whistle blower who alleges he lost employment in respect of a protected disclosure at a preliminary.

This Court has to obey and follow the law door. It will be against public interest to defeat the will of the legislature by terminating such an action on a preliminary point. The complaint under this limb is therefore destitute of any merit and I reject it.

3. Whether the tort of negligence was specifically pleaded

The Plaintiff has clearly pleaded the claim of negligence. The Defendant complains that particulars of negligence have not been pleaded. Order 15 rule 1 of the High Court Rules lays a path as to what steps a defendant should take if in its estimation the statement of claim is lacking, it provides as follows:-

“The Court or a Judge may, on application of the defendant, order further or better particulars”

Order 18/12 sub rule 3 of the Rules of the Supreme Court of England provides as follows:-

“The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading or statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just”

Order 18/12 sub rule 5 (RSC) provides:-

“An order under the rule shall not be made before service of the defence unless, in the opinion of the Court the Order is necessary or desirable to enable the defendant to plead or for some other special reason”

Therein lies the solution to the predicament the defendant claims it finds itself in. The defendant has elected not to comply with the rules of the Court that provides for a remedy to compel the defaulting party to deliver further and better particulars of the claims. The defendant is thus if the plaintiff is to have defaulted on his pleadings equally has defaulted and not complied with the rules of the Court.

The adage “he who goes to equity must do so with clean hands comes into play”; the defendant has come to Court with heavily soiled hands on the following grounds. Firstly, it did not disclose and admit that under the Public Interest Disclosure (protection of whistle Blowers) Act the Plaintiff was entitled to launch the claims he has made. I should make it abundantly clear at that at this stage the issue is that of pleadings and not determination of

liability. Those issues will be interrogated at trial where the burden and standard of proof will play a central role.

Secondly, the Defendant by not applying for better particulars has not complied with the rules of the court. It is no answer for a defaulting party to point at the default of the other litigant or party to justify its or his default. There is no merit in the second limb of the preliminary issue and I reject it.

4. **Whether the Plaintiff can claim damages specified in the writ of summons whose particulars have not been pleaded**

I have already pronounced myself on the matter and ruled that the claims by the Plaintiff were pleaded in the writ and statement of claim. The genesis of the grievances, according to the Plaintiff, is all traced to his having made a protected disclosure. He was then swiftly visited with dismissal, loss of employment and other specified attending claims. He had anchored his action on the enabling statute as aforementioned.

I have also observed in the immediate preceding paragraphs that if the defendant had any issue with the alleged lack of particulars in the pleadings, the remedy lies in making the necessary application for further and better particulars. The doctrine "equity assists the vigilant and not the indolent" aptly applies to this matter.

On the foregoing, I hold as I do that the entire application to raise preliminary issues is devoid and destitute of any merit. The same is dismissed. There is no justifiable cause to deprive the successful

litigant in this preliminary hearing, to justify the denial of the successful litigant to harvest the fruits of its Ruling.

The justice of the case therefore is that the costs of and incidental to this application are for the Plaintiff which costs are to be taxed in default of agreement and ought to be in compliance with Statutory Instrument No. 6 of 2017 of the Legal Practitioners scale of fees.

Leave to appeal to the Court of Appeal is denied.

Delivered under my hand and seal this Day of October, 2017



**Mwila Chitabo, SC
Judge**