

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



(Civil Jurisdiction)

IN THE MATTER OF: PLOT NUMBER 5290 MZILIKAZI ROAD
INDUSTRIAL AREA LUSAKA

IN THE MATTER OF: AN APPLICATION FOR AN ORDER TO STAY
AND SET ASIDE DISTRESS AND CLOSURE
OF THE AFOREMENTIONED PROPERTY

IN THE MATTER OF: AN APPLICATION FOR AN INJUNCTION
RESTRAINING THE RESPONDENT BY
THEMSELVES THEIR SERVANTS OR AGENTS
FROM EVICTING AND/OR PREVENTING THE
APPLICANT FROM ENTERING AND
CONDUCTING BUSINESS ON THE
AFOREMENTIONED PROPERTY

IN THE MATTER OF: RULE 3 OF THE LANDLORD AND TENANT
(BUSINESS PROMISES) CHAPTER 193
OF THE LAWS OF ZAMBIA

BETWEEN:

BEJA ENTERPRISES LIMITED

APPLICANT

AND

F.M. BHAI ENTERPRISES

RESPONDENT

Before The Honourable Mrs Justice P.C.M. Ngulube in Chambers

For the Applicant: Ms Chilekwa, Messrs A.B. and David.

For the Respondent: Mr Kasote, Messrs Chifumu Banda and Associates.

RULING

Cases referred to:

- 1. *Shell and BP Zambia Limited vs. Conidaris and others*(1975)ZR 174**
- 2. *Turnkey Properties vs. Lusaka West Development Company Limited B.S.K. Chiti (Sued as Receiver) and Zambia State Insurance Corporation. (1984) ZR 86***
- 3. *Zambia State Insurance Corporation Limited vs. Mulikelela (1990-1992) ZR 18***
- 4. *Fourie vs. Le Roux (2007) 1 W.L.R 320***
- 5. *American Cyanamid Company vs. Ethicon Limited*(1975) AC 396**

This is the Applicant's application for an interlocutory injunction pursuant to Order 27 Rule 4 of the High Court Rules and Order 29 Rule 1 of the Rules of the Supreme Court, 1999 Edition. The Learned Counsel for the Applicant, Ms Chilekwa submitted that she would rely on the affidavit in support and the skeleton arguments that were filed on the 19th of May, and the 9th of June 2016, respectively. She submitted that the Applicant also filed an affidavit in reply on the 11th of July, 2016 and that the application is to prevent the Respondent from closing, evicting or preventing the Applicant from entering Plot Number 5290, Mzilikazi Road, Industrial Area, Lusaka.

Ms Chilekwa submitted that the closure would be in breach of the Tenancy Agreement which provides for Arbitration in the case of a dispute. She submitted that the Applicant had satisfied the criteria for the grant of an injunction and accordingly prayed for the grant of the said injunction.

The Learned Counsel for the Respondent Mr Kasote submitted that he would rely on the affidavit in opposition that was filed on the 29th of June, 2016. He submitted that the parties entered into an agreement to lease the property in issue and the Applicant was to pay monthly rentals. Mr Kasote submitted that the Applicant has failed to pay the rentals and is in arrears for two years. He submitted that on the 29th of June, 2016, the Applicant owed the landlord K71,000=00. Mr Kasote stated that that arbitration can be resorted to where something is not understood or a dispute arises but not one such as the one is occasioned by the Defendant. Mr Kasote prayed that the tenant settles the outstanding rentals so that and he can then continue operating his business at the premises.

The Learned Counsel for the Respondent submitted that the Applicant paid in cheque form but the same were dishonoured by the bank. He prayed that the injunction be dismissed so that the Applicant be evicted and the landlord recovers his dues.

In reply, Ms Chilekwa submitted that the court documents will show that there is a dispute between the parties on the actual amount owed. She submitted that her client has been making payments in liquidating the owed amount and that the tenancy agreement provides for arbitration where the parties fail to reconcile the figures. She prayed that the matter be referred to arbitration as opposed to the Respondent closing the premises and evicting the Applicant as such an act would be in breach of the tenancy agreement.

I have considered the affidavits in support and in opposition of the application for injunction and have also considered the skeleton arguments that were filed in support of the application. In the affidavit in support that was dated 19th May, 2016, the Applicant's managing director averred that on the 1st of January 2014, he signed a lease agreement with the Respondent to lease property number 5290, Mzilikazi Road, Industrial Area Lusaka, renewable every two years. The Applicant paid monthly rentals as agreed and the managing director averred that the Respondent increased rentals in an inconsistent way. The Respondent stated that there were outstanding rentals and gave the Applicant a notice of eviction which he exhibited marked "BK3".

The Applicant's managing director averred that he paid K3,000 on the 23rd of March, 2016, which the Respondent acknowledged. The Respondent however proceeded to evict the Applicant on the 26th of April, 2016 without giving adequate notice. The Applicant's managing director acknowledges being in rental arrears 'and expressed willingness to settle the same once business stabilises and upon the parties reconciling the figures and agreeing on the outstanding rentals. He averred that when a dispute arose, the Respondent did not seek arbitration but decided to block the Applicant from operating at the premises and contended that the Respondent was supposed to give the Applicant six months notice prior to terminating the tenancy.

The Applicant's managing director averred that it would suffer irreparable damages which shall not be atoned for in damages.

and submitted that the Respondent would not be prejudiced and that the interests of justice will be served.

The Applicant's Advocates filed skeleton arguments on the 9th of June, 2016 and stated that the granting of an injunction is the best possible way to ensure that the Respondent does not continue to violate the provisions of the tenancy agreement which contains an arbitration clause. The Learned Advocates submitted that the Applicant has suffered loss of business, income and loss of customers due to the closure of the business.

The Learned Advocates for the Applicant referred to the case of ***Shell and BP Zambia Limited vs. Conidaris and others***¹ where the court stated that to obtain an injunction the Plaintiff must also be able to show that an injunction until the hearing is necessary to protect him against irreparable injury, mere inconvenience is not enough. The Learned Counsel for the Applicant also referred to the case of ***Turnkey Properties vs. Lusaka West Development Company Limited B.S.K Chiti***² (sued as Receiver) **and Zambia State Insurance Corporation (1984) ZR 85 (S.C)**. where the court stated that –

“an interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial.”

The Learned Counsel for the Applicant submitted that the right to relief is clear and that there are triable matters. She submitted that the injunction will protect the Applicant from irreparable injury and prayed for the grant of the interlocutory injunction until the final determination of the matter.

The Manager for the Respondent Mohamed, Bhai filed an affidavit in opposition in which he averred that the rental balance that was due to the Respondent as at 30th June 2016 was K71.050=00 and that this compelled the Respondent to lock up the premises. The Applicant informed the Respondent that they would deposit two cheques towards the settlement of the outstanding rentals. However, they proceeded to instruct their bankers not to pay the Respondent without any reasonable justification. The Respondent's manager averred that there is nothing to arbitrate as the rental amounts due to the Respondent are known. Further, he averred that the six months notice is not applicable to a tenant in rental arrears as such a lease can be subject to cancellation. The Respondents Manager averred that the Respondent has been prejudiced and put out of funds by the Applicant.

The Managing Director of the Applicant filed an affidavit in reply on the 11th of July, 2016. He averred that since there is a dispute on the amount owed, the matter ought to be referred to arbitration. The Applicant's Managing Director disputed the amount of K71,050=00, and stated that he gave the bank instructions not to pay the cheques to the Respondent as there were disputed figures. He prayed that the court maintains and preserves the injunction until the final determination of the matter.

I have considered the affidavit evidence as well as the submissions by Counsel in this matter.

In the case of ***Zambia State Insurance Corporation Limited vs. Mulikelela***³, the court stated that –

“a court will not grant an interlocutory injunction unless the court is satisfied that on the facts before it, the Plaintiff is likely to succeed in the relief sought.”

It is a settled fundamental principle of injunction law that interlocutory injunction should only be granted when the right to relief is clear and where it is necessary to protect a Plaintiff against irreparable injury, mere inconvenience is not enough. In the case of ***Fourie vs. Le Roux***⁴, the court stated that in an application for an injunction, the overriding requirement is that the applicant must have a cause of action entitling him to relief.

The classical test to be applied when considering whether a interim injunction should be granted remains that laid down by the House of Lords in the case of ***American Cyanamid Company vs. Ethicon Limited***⁵. Before applying the injunction law set out above to the facts of this case, it is necessary to consider the nature of the legal relationship between the parties. It is that of landlord and tenant. It is clear from the affidavit evidence that the Applicant has outstanding rentals although he states that there is a dispute on the quantum. In the case of ***Moorock***⁶ the court stated that –

“in business transactions such as this, what the law desires to effect by implication is to give business efficacy to the transaction as must have been intended by both parties who are also businessman....”

In the present case, without going into the merits of the case, the Applicant admits owing in rentals. I do not see how he can seek the protection of the agreement and pray that the matter be referred to arbitration. I do not find the Applicant's right to relief clear in this matter. I accordingly refuse to confirm the injunction that was granted ex-parte on the 18th of June, 2016. It is accordingly discharged with costs to the Respondent.

Leave to appeal is granted.

Delivered this 5th day of September, 2016.



HONOURABLE MRS JUSTICE P.C.M. NGULUBE
HIGH COURT JUDGE

