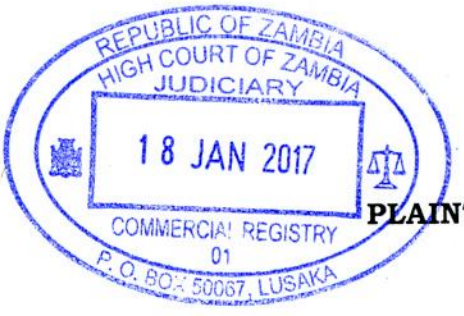
IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2015/HPC/0471



BETWEEN:

SPANCRETE ZAMBIA LIMITED **PLAINTIFF**

AND

ZESCO LIMITED **DEFENDANT**

Before the Honourable Mr Justice W.S Mweemba at Lusaka in Chambers.

For the Plaintiff : *Mr F. Besa – Messrs Besa Legal Practitioners.*

For the Defendant : *Mr Paul Mulenga- Pincipal Legal Officer- ZESCO Limited.*

RULING

LEGISLATION REFERRED TO:

1. ***RULES OF THE SUPREME COURT OF ENGLAND 1999 EDITION (WHITE BOOK)***

CASES REFERRED TO:

1. ***AMERICAN CYNAMID COMPANY V ETHICON LIMITED (1975) AC 396.***
2. ***SHEPHERD HOLMES LTD V SANDHAM (1970) 3 ALL ER 402.***
3. ***MEAD V HARINGEY LONDON BOROUGH COUNCIL (1979) 2 ALL ER 1016.***
4. ***NOTTINGHAM BUILDING SOCIETY V EURODYNAMICS SYSTEMS (1993) F.S.R. 468.***
5. ***SHELL AND BP (ZAMBIA) LTD V CONIDARIS & ORS (1975) ZR 174.***
6. ***MKUSHI CHRISTIAN FELLOWSHIP TRUST LIMITED (HOLD OUT AS CHENGELO SCHOOL) VS. HENRY MUSONDA APPEAL NO. 178 OF 2005 (UNREPORTED).***

This is a ruling on an application by the Plaintiff for a Mandatory Injunction. It is supported by an Affidavit sworn by Davies Kataya the Managing Director of the Plaintiff Company and Skeleton Arguments filed into Court on the 23rd March, 2016.

It is deposed by Mr Kataya that on 29th October 2015, the Plaintiff commenced these proceedings against the Defendant and that in this new application he was repeating the contents of the Affidavit he swore then dated 29th October, 2015 which was already part of this Court's record.

He also deposed that unfortunately at the time the Defendant was served the Order of Interim Injunction, it had already called on and collected the Advance Performance Guarantee from Cavmont Bank thereby occasioning him the same irreparable injury he sought to forestall.

Moreover, that among the orders this Court granted the Plaintiff was to prevent the Defendant from terminating the Contract. Further, that he believed that payment to the Plaintiff of the Advance Performance Guarantee was a fundamental term of the Contract and the Defendants withdrawing it had materially changed the status quo and amounted to the same thing as the Defendant terminating the Contract which was against the spirit of the order granted by this Court.

Further that one of the major irreparable injuries the Plaintiff and he stood to suffer was that Cavmont Bank had now also demanded that they comply with the terms of the Advance Performance Guarantee by refunding it the money it paid to the Defendant failure to which it would foreclose on the property the Plaintiff had pledged as security.

It is further deposed that the action of the Defendant had further rendered the Plaintiff incapable of performing its obligations in this Contract and had further affected the day to day running of the Plaintiff Company and its capacity to perform other equally important contractual obligations and the

fear of the Deponent was that this would set the Plaintiff on a spiral of other defaults with its clients.

That he verily believed that this was an unusually strong case for which an order of Mandatory Injunction ought to be granted compelling the Defendant to remit the funds withdrawn from Cavmont Bank to ensure that the status quo was restored.

It is also deposed that his request was that the status quo which the Plaintiff initially sought to preserve be brought into effect, which application would compel the Defendant to remit the sum of K7,787,436 to Cavmont Bank so that the Defendant was prevented from terminating the Contract as already ordered by this Court.

Further, that damages that will be suffered by the Plaintiff should its pledged security be foreclosed by Cavmont Bank and it being declared delinquent and losing all its contractual rights could not be adequately remedied by an award of damages.

That the Plaintiff was seeking an order of Mandatory Injunction compelling the Defendant to restore the Advance Performance Guarantee as the non-remittance of funds to Cavmont Bank would render the earlier order given by this Court restraining the Defendant from terminating the Contract academic, nugatory and of no legal effect which would in turn render these proceedings a waste of time and resources.

There is also an Affidavit in Opposition filed into Court on 21st April, 2016 sworn by Chiti Mulenga the Principal Procurement Officer in the Defendant Company.

He stated that the parties entered into a contract termed ZESCO/003/2/2014 dated 17th September, 2014 (**the Contract**) for the

supply and delivery of 120MW 4 Core aerial bundled conductors with insulated neutral and accessories under Lot 3 (**the Cable**).

Further that there appeared to be confusion in what the Plaintiff was referring to as there was no such thing as an Advance Performance Guarantee with Cavmont Bank, but a Performance Security with African Grey Insurance Limited, which they had since recalled on the guarantor as security for non- contract performance, following the failure by the Plaintiff to perform the Contract.

Moreover that any order for the termination of the contract was an academic exercise as it expired on 17th September, 2015. It was also stated that threatened foreclosure of a property not disclosed to this Court did not in itself amount to irreparable damage and that exhibit DK1 was in fact the Defendant's letter to Grey Insurance Limited and not to Cavmont Bank as erroneously stated by the Plaintiff.

That the obligations the Plaintiff claimed it could not perform was a redundant issue as the Contract had already expired and the claim for failure to perform other contractual obligations was baseless as it was not supported by any evidence whatsoever and was calculated to gain the sympathy of this Court.

It was also Mr Mulenga's deposition that this case was extremely weak, baseless and ill- conceived as the application for a mandatory injunction was primarily monetary in nature, was not exceptional in any way and could be atoned for by the payment of damages.

He further deposed that this application was an attempt to have a second bite at the cherry by seeking the remission of funds to Cavmont Bank despite the ruling of 19th February, 2016 in which the Plaintiff's application for a mandatory injunction was dismissed.

It is further deposed that the Plaintiff would only suffer a minor financial inconvenience occasioned by its own laxity in which damages would suffice.

Counsel for the Plaintiff filed Skeleton Arguments in support of the application. Counsel submitted that this Court had been called upon to consider three principles from the case of **AMERICAN CYNAMID V ETHICON (1).** Firstly if there was a clear right to relief, secondly where the balance of convenience would lie and thirdly whether the interlocutory relief was necessary to protect a party from irreparable injury which could not be atoned for by the award of damages.

According to Counsel, the Plaintiff had a clear right to relief as demonstrated by the facts in the Affidavit in Support of its application. Secondly, that the balance of convenience lay in granting the order to the Plaintiff.

He also stated that the Contract had been for the sum of K38,937,180.00 but that in its finalisation meeting its terms had been varied by the Defendant and it was agreed that the payment terms should be based on open account and that the Advance payment of 20% shall be paid to the Plaintiff within 30 days after presentation of the invoice and Advance Payment Guarantee equivalent to the amount being claimed.

Secondly, that upon shipment, 50% of the contract value was to be paid to the supplier upon presentation of shipping documentation in favour of the Defendant. Thirdly, that upon delivery and acceptance, 30% would be paid within 30 days on presentation of delivery note and acceptance of the goods by the Defendant at the final destination delivery stores.

In compliance with these terms, the Plaintiff presented a valid Advance Payment Guarantee to the Defendant from Cavmont Bank whereupon 20% deposit in the sum of K7, 787,436.00 was paid to the Plaintiff by the Defendant late in July and at this time, the Plaintiff through its contracted manufacturer of the Aerial Bundled Cables in China Zhengzhou Jin Hang

High Tech Com. Limited had already obtained a credit facility in China and had already manufactured 25% (250KM) and was ready for shipment to Zambia and was merely awaiting pre- shipment inspection by Engineers from the Defendant Company.

The parties further agreed at the proposal of the Plaintiff that prior to the commencement of production, a Factory Acceptance Test (FAT) be conducted by representatives from both parties so that the Defendant could satisfy itself that the Manufactured 120mm 4 core Aerial Bundled Conductor met the minimum specifications needed by the Defendant and also that it complied with international standards.

Moreover that after Factory Acceptance Testing was done by the Defendants engineers the Defendant recommended that the Plaintiff should go ahead with execution of the contract awarded and supply the 120mm 4 core Aerial Bundled Conductor manufactured by Zhengzhou Jin Hang High Tech Co. Limited as the same complied with contract specifications.

Further that in the said Factory Acceptance Testing report, it was further recommended that the Plaintiff, at its cost, should arrange a pre shipment factory acceptance test (FAT) prior to the shipment of the first consignment of the manufactured cable by mid- February, 2015 as per contract terms.

However, in or around mid- February 2015 when the first 250km cable (25% of the contract amount) was ready for Pre Shipment Factory acceptance testing, the Plaintiff in compliance with what was agreed asked representatives from the Defendant to go and conduct the FAT. The Defendant without justification changed the list of its representatives to travel and did not avail them on time, whereupon in China the consignment missed the ship on which it was to be transported to Africa and back to Zambia which made the Plaintiff to incur penalties with the airline in cancelling the old air tickets and having new ones issued.

It was also submitted that after cancellation of the first scheduled travel to China, a second travel date was arranged and the Defendant delayed travelling to go and perform the pre shipment FAT and that this failure was in clear breach of contract which occasioned the following losses to the Plaintiff.

First, the Plaintiff lost USD 176,000.00 which it had paid to shipping companies to transport the cables as the ship left without carrying them prior to inspection.

Second, the said 250KM of cable remained in storage in China for a long time and the Plaintiff incurred an additional USD 52,000.00 in storage charges.

Third, since the express terms of the contract were that 50% of the payment on the contract sum was to be paid upon shipping of the cables, the wilful delay by the Defendant prevented it from claiming this on the merchandise.

Further, that due to the Plaintiff's failure to claim this 50% aforesaid, it was prevented from meeting its payment obligations with the manufacturer of the said cables.

Moreover that the Plaintiff wrote to the Defendant explaining these dire circumstances that the Defendants delay had put the Plaintiff in and asked for payment to be made so that the manufacturer could be paid but the Plaintiff refused to pay.

Due to this failure to pay the manufacturer of the cables for the 250KM (25%) that was ready for shipment, the financier in China terminated the facility to fund the manufacture of 1000km of the cable.

It was also submitted that the default of the Plaintiff had always been orchestrated and induced by the Defendant and it was in view of all the foregoing that Counsel for the Plaintiff urged this Court to grant the Plaintiff an order of injunction restraining it from demanding and/ or collecting the performance security bond of K3, 893, 718.00 from African Grey Insurance Limited pending the hearing and determination of this matter.

The Defendant also filed Skeleton Arguments in Opposition to the application for an order of Mandatory Injunction on 21st April, 2016. It is pointed out that under Order 29/L/1 of the Editorial Notes of the White Book it is stated that:

> ***"The Court has jurisdiction upon an interlocutory application to grant a mandatory injunction directing that a positive act should be done to repair some omission or restore the prior position by undoing some wrongful act but it is a very exceptional form of relief".***

Counsel also cited the learned author Meggary J in **SHEPHERD HOLMES LTD V SANDHAM (2)** who stated similarly that:

> ***"...the Applicants case has to be 'unusually strong and clear' before a mandatory injunction will be granted... ".***

Premised on this, Counsel argued that a mandatory injunction would only be granted where the applicant demonstrated that their case was unusually strong and clear and that their case was beyond the prima facie case test of an injunction.

According to Counsel for the Defendant, the Plaintiff had failed to show that it had an unusually strong and clear case as shown in the Defendant's Affidavit in Opposition to the Plaintiffs application for a mandatory injunction. Further, that the Plaintiff clearly failed to deliver the cables even

after a pre- shipment test was conducted on 13th May, 2015 as shown in the Defendants Affidavit in Opposition of 7th December, 2015.

Further that the reasons advanced in the Plaintiff's current affidavit in support of this application had been shown to be misguided and lacking merit. Counsel then referred this Court to the case of **MEAD V HARINGEY LONDON BOROUGH COUNCIL (3)** where it was held that:

> ***"An interlocutory mandatory injunction should not be granted on affidavit evidence where the issue of facts are strongly contested and involve dispute which could only be determined on the trial of the action.".***

According to Counsel not only were the facts advanced by the Plaintiff strongly contested, its Statement of Claim revealed that the application for a mandatory injunction relating to the performance security was not pleaded and that the exhibit was not correspondence from Cavmont Bank as alleged but was correspondence from the Defendant to African Grey Insurance Ltd.

He also strongly condemned the averments in paragraph 11 of the affidavit as it appeared as an attempt to procure the initial remedy sought by the Plaintiff in their former application whose ruling was delivered on 29th February, 2016 not in their favour. He also added that this application amounted to an abuse of court process as it appeared to be a concealed solicitation for this Court to determine matters it had already decided on.

According to Counsel for the Defendant the Plaintiff had continued to abuse the Court process relentlessly yet knowing that the issue relating to the advance payment guarantee was decided upon in the earlier ruling.

Counsel also cited the case of **NOTTINGHAM BUILDING SOCIETY v EURODYNAMICS SYSTEMS (4)** where Chadwick J, explained the principles to be considered before the granting of a mandatory injunction.

> ***"First, the overriding consideration was: First which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense of granting an interlocutory injunction to a party who fails to establish his right at trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial...Secondly, the Court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate where a mandatory injunction is sought to consider whether the Court does feel a high degree of assurance that the Plaintiff will establish his right, there may be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage...".***

With regard to the first and second principles, Counsel submitted that the Defendant would suffer grave injustice because the granting of a mandatory injunction would effectively take away the right to make a call on the performance security under circumstances where it was so clear the Plaintiff neglected to perform the contract by its failure to deliver the cables to the Defendant which had disadvantaged the Defendant by delaying the project which could have delivered much needed revenue once completed.

Further Counsel contended that granting the mandatory injunction would be tantamount to rewarding the Plaintiff for its failure to perform the contract after the pre- factory acceptance test was duly conducted and signed for by all parties.

Counsel also added that this Court ought to decline the application because the relief of a mandatory injunction fell short of the standard set in the case of **SHELL AND BP (ZAMBIA) LTD V CONIDARIS & ORS (5)** where it was stated that:

> ***"A court will not generally grant an injunction unless the right to relief was clear and unless the injunction is necessary to protect the plaintiff from irreparable injury; mere inconvenience is not enough.".***

Moreover that no proof of irreparable injury was set out by the Plaintiff in form of details of the nature of the property it claimed to have pledged which made it difficult to determine whether the irreparable damage claimed if any was realistic.

During the hearing on 26th August, 2016, both Counsel for the Plaintiff as well as Counsel for the Defendant relied on their respective Affidavits and Skeleton Arguments.

I have considered the Affidavit evidence and the Skeleton Arguments filed by both parties.

The main issue for determination by this Court is whether or not to grant the Plaintiff's application for a mandatory injunction.

It is trite law that under Order 29/L/1 of the Rules of the Supreme Court of England 1999 Edition (White Book) the mandatory injunction is an exceptional form of relief that is granted in cases where the Applicant's case is **"unusually strong and clear."**

Moreover, the principles to be applied when granting one were expounded in the case of **NOTTINGHAM BUILDING SOCIETY v EURODYNAMICS SYSTEMS (4).** In that case, Chadwick J elucidated that:

"the overriding consideration was first which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense of granting an interlocutory injunction to a party who fails to establish his right at trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial.

Secondly, the Court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.

Thirdly, it is legitimate where a mandatory injunction is sought to consider whether the Court does feel a high degree of assurance that the Plaintiff will establish his right".

Moreover, in the case of ***MKUSHI CHRISTIAN FELLOWSHIP TRUST LIMITED (HOLD OUT AS CHENGELO SCHOOL) V HENRY MUSONDA (6),*** the Supreme Court observed that the learned trial Judge misdirected himself when he decided to grant an interlocutory mandatory injunction which had the effect of determining the substantive issue at interlocutory stage.

In the circumstances of this case I have noted that firstly the Plaintiffs made a similar application on 9th December, 2015 and a ruling was delivered on 29th February, 2016 dismissing the application for a mandatory injunction.

This current application in my view is also asking for the same mandatory injunction I declined to give for reasons which remain the same even now.

I have not found that the case of the Plaintiff is unusually strong and clear and due to this I do not feel a high degree of assurance that if I grant a

mandatory injunction at this stage, then at the trial, it will appear that I made the right decision.

In my view, the risk of injustice if this mandatory injunction is refused does not outweigh the risk of injustice if it is granted as set out in the case of **NOTTINGHAM BUILDING SOCIETY V EURODYNAMICS SYSTEMS (4)** above.

This is because the main claims of the Plaintiff have been overtaken by events, firstly the Contract executed between the parties expired on 17th September, 2015 and secondly the Advance Payment Guarantee was paid by Cavmont Bank on 30th October, 2015 before I made the initial Exparte Order for Interim Injunction on 3rd November, 2015. In any event the Plaintiff has failed to show this Court the wrongful act of the Defendant which must be undone in terms of Order 29/L/1 of the Editorial Notes of the White Book.

The Plaintiffs only remaining claim is for damages for breach of Contract. It is trite that if a claimant can be fully compensated by an award of damages, no injunction should be granted unless special circumstances would merit the grant of an injunction.

I am of the considered view that damages in the measure recoverable at common law would be an adequate remedy should the Plaintiff be successful at trial. Further I consider that the Defendant would be in a financial position to pay them.

The Plaintiff has also not advanced any special circumstances this time that would merit the grant of a mandatory injunction and making a similar application on a matter I had already decided on is something tantamount to an abuse of Court process. If I granted the Plaintiff an interlocutory mandatory injuction as prayed, this would have the effect of determining the

substantive issue at interlocutory stage. This would be a misdirection on my part and therefore undersired.

Based on the foregoing, I hereby dismiss the Plaintiffs application for a mandatory injunction. The Exparte Order for Interim Injunction dated 4th April, 2016 is hereby discharged.

The Plaintiff is to bear the costs of this application for abusing the court process. The same are to be taxed in default of agreement.

Leave to appeal is granted.

Delivered in Chamber at Lusaka this 18th day of January, 2017.

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WILLIAM S. MWEEMBA
HIGH COURT JUDGE.