IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0453**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

AIRTEL NETWORKS PLC **PLAINTIFF**

AND

NATIONAL HOUSING AUTHORITY **1ST DEFENDANT**

GIDEON MITI **2NDDEFENDANT**

Before the Hon Lady Justice Irene Zeko Mbewe in Chambers

For the Plaintiff: *Mrs O Chirwa of Messrs Ranchod Chungu Advocates*

For the Defendants: *Ms W Ndhlovu Legal Counsel NHA*

RULING

Cases Referred to:

1. *Mutanika and Another v Chipungu SCZ/13/2014*
2. *Partizanski Put (Zambia) Limited v Willikit Limited [1977] ZR 357*
3. *Michael Chilufya Sata v Chanda Chimba and Others 2010/HP/1282*

4. *Barclays Bank Zambia v Nyangu and Others SCZ/8/080/2012*

5. *Linotype Hell Finance Limited v Baker [1993] 1 WLR 1165*

6. *Manal Investments Limited v Lamise Investments Limited SCZ No 1 of 2001*

7. *African Life Financial Services Limited v Faith Simbao and Others 2009/HK/307*

8. *Shell and BP Limited v Conidaris and Others [1975] ZR 174*

9. *Turnkey Properties v Lusaka West Development Company Limited [1984] ZR 85*

10. *Hina Furnishing Lusaka Limited v Mwaiseni Properties Limited [1983] ZR 40*

11. *Communications Authority v Vodacom Zambia Limited SCZ No 21 of 2009*

12. *Ndove v National Education Company Limited [1980] ZR 184*

13. *American Cynamid v Ethicon Limited[1975] AC 396*

14. *ZIMCO Properties v LAPCO Limited [1988-1989] ZR 92*

Legislation Referred to:

1. *High Court Rules, Cap 27 of the Laws of Zambia*

2. *Rules of the Supreme Court, 1999 Edition*

This Ruling is on three applications namely: a stay of execution, notice of motion to raise a preliminary issue and inter-parte interim injunction.

1. Notice of Motion to raise a preliminary issue on a point of law

I shall first deal with the notice of motion to raise a preliminary issue on a point of law raised by the Plaintiff pursuant to **Order 14/5 of Rules of the Supreme Court of England, 1999 Edition** and **Order 5 of the High Court Rules Cap 27 of the laws of Zambia.** The point of law raised is that:

> **"Paragraph 9, 11, 13, 14, 15, 20, 25, 28 and 29 of the 1st and 2nd Defendants' affidavit in opposition contains extraneous issues by way of legal argument, conclusion and objection and that these are not aversions of fact but submissions."**

At the hearing, Counsel for the Plaintiff placed reliance on the notice of motion to raise preliminary issue filed on 12th October 2016. The Plaintiff contends that the above mentioned paragraphs of the Defendants' affidavit in opposition advance legal arguments, conclusions, prayers, opinions and objections that are not aversions of fact and that the same ought to be expunged from the record.

The brief facts necessary to the applications are as follows. The Plaintiff and the 1st Defendant entered into a lease agreement dated 1st January 2013 for property known as the Roof Top a portion of

the Kulima Tower building situate at Stand No.6907 Lusaka for a period of three years. The monthly rental was K2,250.00 till the 1st Defendant issued a notice to increase rent to K7,440.00 per antenna effective 1st April 2016. The Plaintiff responded by stating that it would accept an increment of K3,500.00 payable yearly in advance. The 1st Defendant then issued a warrant of distress instructing the 2nd Defendant to levy distress in the sum of K80, 786.06 being the alleged arrears as at 9th September 2016. Subsequently on 12th September 2016 the 2nd Defendant entered the property and took walking possession. The Plaintiff then made an ex-parte application to stay execution of the warrant of distress, which this Court granted on 16th September 2016. Thereafter the Plaintiff made an application for ex-parte order for an interim injunction, which order was granted on 23rd September 2016. On 12th October 2016 the Plaintiff made an application for notice of motion to raise a preliminary issue on a point of law as regards the 1st and 2nd Defendants affidavit in opposition to summons for stay of execution.

In relation to the notice to raise a preliminary issue, Counsel for the Plaintiff submitted that **Order 5 Rules 15 and 16 of the High Court Rules** states that:

> **"15. An affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion.**

16. Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true."

Counsel further cited the case of **Mutanika and Another v. Chipungu (1)** in which the Supreme Court expunged contents of the affidavit after confirming that indeed the same contained legal arguments, rules of court and opinion evidence.

Further in support of the Plaintiff's argument, Counsel cited the provisions of **Order 41/5/2 of the Rules of the Supreme Court, 1999 Edition** which provides to the effect that:

> **"Save as in exceptional circumstances an affidavit must contain evidence of the deponent as to such facts only as he is able to speak to his own knowledge, and to this extent equating affidavit evidence to oral evidence given in court."**

With that, it was the Plaintiff's contention that Defendants' affidavit contained paragraphs that are not in tandem with the requirements of the provisions of the law, and that the said paragraphs should be expunged from the record.

The 1st and 2nd Defendants in opposing the application filed their skeleton arguments and list of authorities to the notice of motion to raise a preliminary issue dated 27th October 2016. Their argument is that the Plaintiff's application is not made pursuant to **Order 5**

Rule 5 High Court Rules hence it cannot rely on the said Order in its argument. Further that even if the Plaintiff were to rely on **Order 5 Rule 15 of the High Court Rules**, an application as this one is not made pursuant to this rule but to **Orders 33 Rule 3 and 14A of the Rules of the Supreme Court, 1999 Edition**. Also that **Order 41 Rule 5 of the Rules of the Supreme Court, 1999 Edition** on which the Plaintiff placed reliance in making this application, gives guidance to the effect that affidavits for use in interlocutory proceeding may contain statements of information and belief with the sources and grounds thereof, and added that the paragraphs in issue do not contain extraneous matters as they do not amount to unnecessary, unimportant or irrelevant matters, and as such do not in any way offend the provisions of the High Court Rules or the Rules of the Supreme Court as alleged.

The gist of their argument is that the paragraphs in question contain facts and general information which would be presented as such if the Defendants were giving oral evidence in court. Further that neither **Order 33 Rule 3** nor **Order 14A of the Rules of the Supreme Court, 1999 Edition** give specific guidance on the expunging of the paragraphs from an affidavit. In furtherance of their argument the case of **Partizanski Put (Z) Limited v Willi Kit Limited (2)** was cited in which it was held that:

> **"The plaintiff's right to have summary judgment entered under order XII is not absolute merely because the defendant's affidavit as to his defence are not completely**

satisfactory; the jurisdiction is to be exercised with great care so as not to preclude a party from raising any defence he may really have."

Based on the above submissions the Defendants prayed that the affidavit in opposition be maintained as it is on the record.

I have considered the arguments advanced by Counsel and the authorities cited. The preliminary issue raised by the Plaintiff hinges on whether paragraphs 9, 11- 29 of the Defendants' affidavit in opposition are compliant with **Order 5 Rule 15 and 16 of the High Court Rules** and **Order 41/5 of the Rules of the Supreme Court**. It has been argued by the Plaintiff that the said paragraphs contain extraneous matters. The Defendants on the other hand have argued that the matters in the paragraphs in question are not extraneous but are facts and general information which would be presented if the Defendants were giving oral evidence in Court. A perusal of the paragraphs shows that the Defendants were merely stating facts and not making conclusions, legal arguments or prayer as alleged.

I therefore dismiss the preliminary issue raised by the Plaintiffs.

I award costs to the Defendant on the Plaintiff's notice of motion to raise a preliminary issue to be taxed in default of agreement.

2. Application for a stay of execution of the warrant of distress

Having not expunged the said paragraphs from the Defendants affidavits, I shall now move on to deal with the Plaintiff's application for stay of execution of the warrant of distress, where the parties filed their respective affidavits and skeleton arguments which they relied on.

The Plaintiff's affidavit in support of the summons to stay execution was deposed by Sandra Malupande the Legal Counsel and Company Secretary of the Plaintiff company. The gist of which was that the 1st Defendant issued a warrant of distress instructing the 2nd Defendant to levy distress in the sum of K80,786.06 for alleged arrears, and the 2nd Defendant did as instructed and took walking possession of the property. It was also deposed that on 11thJune 2015 the Plaintiff paid to the 1st Defendant K28,188.00 being rentals for the months of June 2015 to May 2016, and further that on 2ndJune 2015 the Plaintiff paid to the 1st Defendant a sum of K28,188.00 being rentals for the months of June 2016 to May 2017. It was further deposed that the 1st Defendant acting through the 2nd Defendant wrongfully entered the property in issue and took possession of the property and distained on goods in excess of the rent allegedly owed.

The Plaintiff argued that if the warrant of distress is not stayed and the Plaintiff is not afforded access to its equipment, then its provision of cellular and other network services may be disrupted

and cause unquantifiable damage to the Plaintiff's business. In support of the Plaintiff's argument, Counsel cited the case of **Micheal Chilufya Sata v. Chanda Chimba and others (3)** in which it was stated that:

> **"The position of the law is that an applicant who shows that special circumstances exist to warrant a grant of a stay or that without a stay he stands to be ruined by suffering irreparable injury flourishes in attaining the indulgence of a stay."**

Counsel also argued that in any application for a stay of execution of any order, ruling or judgment, that good and arguable triable issues are always the primary considerations. In furtherance of this argument the case of **Barclays Bank Zambia v. Nyangu and Others (4)** was cited in which the Supreme Court stated that:

> **"It would be unfair for the Respondent to execute pending the hearing of an action."**

It was argued further that the equipment seized is an integral part of the Plaintiff's business which is required in order to provide its services. That the Plaintiff has disclosed good and convincing reasons to warrant a stay of execution of the seized goods.

In the skeleton arguments, the Plaintiff's cited the case of **Linotype-Hell Finance Limited v Baker (5)** in which Stanghton observed that:

"It seems to be that if a Defendant can say that without a stay he will be ruined, that is a legitimate ground for granting a stay of execution."

The Plaintiffs argued that the equipment seized by the 2nd Defendant is an integral part of the Plaintiff's business and is highly sophisticated and used in the provision of cellular and other network transmissions. That if the warrant of distress is not stayed, the Plaintiff provisions of service to third parties and subscribers shall be ruined and the Plaintiff will suffer irreparable loss which cannot adequately be compensated for in damages. The case of **Manal Investments Limited v Lamise Investment Limited (6)** was cited where it was observed that in a case of urgency where the High Court has refused to grant an interim remedy the aggrieved party may have no immediate remedy, and by the time the matter is heard, irreparable damages may already have been caused. The Plaintiffs further relied on the case of **Michael Chilufya Sata v Chanda Chimba and Others (3)** where the Court affirmed that in determining whether the other parties will be substantially prejudiced if a stay is granted, the Court is called upon to look at the two compelling interests.

In opposing the application, the Defendants filed an affidavit deposed by Mambwe Mukosha the Senior Estates Officer in the employ of the 1st Defendant. It was deposed that the premises is known as Stand No.4797 and not Stand No.6907 and that the Plaintiff has not at any time informed the 1st Defendant that it was

willing to pay a sum of K3500.00 per month. Further that the rent that was paid at the rate of K2, 550.00 did not apply beyond 1st April 2016, and that the new rate is K7,440.00 bringing the arrears to the sum of K80,786.06. It was deposed that the money paid by the Plaintiff has already been applied to the rent and that the sum claimed in the warrant is outstanding after the money paid by the Plaintiff was applied to the accrued rent.

Further, the Defendants stated that the distress levied on the Plaintiff was by shutting down the power supply which goes to the antenna and not taking possession of the equipment. It was also deposed that making the stay interlocutory may mean allowing the Plaintiff to continue operating without paying rent which will highly prejudice the 1st Defendant, and that the Plaintiff is using this process as a way of avoiding the adjusted rent.

In advancing their arguments further, the Defendants in their skeleton arguments submitted that the Plaintiff has not disputed the notice to increase rent and that the Plaintiff has no right under the lease agreement to determine or refuse to pay rent. Counsel cited the case of **African Life Financial Services Limited v. Faith Simbao and Others** in which the Court held that:

> **"1. The right of the landlord to distrain for rent arrears arises at common law and need not be expressly reserved.**
>
> **2. It enables the landlord to secure the payment of rent by seizing goods and chattels found upon the**

premises in respect of which the rent or obligations are due.

3. **The common law right of distress for rent in arrears is a right for the landlord to seize whatever movables he finds on the premises out of which the rent or service issues, and to hold them until the rent is paid or the service performed.**

4. **Under the common law, a landlord can prima facie seize and distrain for rent in arrear, all goods and chattels found on the premises out of which the rent issues; the goods and chattels may be the property of the tenant, or of a stranger, the landlord being entitled to have recourse to all chattels actually on his tenant's premises without reference to their ownership."**

In relation to the foregoing it was submitted that the argument by the Plaintiff that the execution is excessive should not be sustained as the above case gives the landlord the right to take the goods of the tenant in order to satisfy the payment of rent.

I have considered the arguments advanced by the Plaintiff and the Defendants herein. As a starting point, I am in agreement with the Plaintiff that for an order of stay of execution to be granted there must special circumstances shown by the applicant to the effect that if such an order is not made, the applicant will suffer grave inconvenience and that the Respondent will not be prejudiced. In

the present case the Plaintiff being the applicant has submitted that if the stay is not made interlocutory it will be inconvenienced in the sense that it will lose its equipment and will not be able to offer its services which will affect other interested parties who are its subscribers. The Plaintiff has also submitted that the loss it is likely to suffer is irreparable. The determination I have to make is whether the Plaintiff has adduced sufficient reasons to justify the grant of an interlocutory stay of execution.

A perusal of the record shows that the execution was already commenced by the 1st Defendant through the 2nd Defendant taking possession of the Plaintiff's equipment. The Plaintiff has also issued a Writ of Summons against the Defendants herein to which the Defendants have entered their defence. This goes to show that there are triable issues which should not be overshadowed by allowing further execution. To this effect I am of the view that not making the stay interlocutory will affect the Plaintiff's property or equipment which in essence forms the subject matter of the action before Court. I am of the considered view that not only will the Plaintiff suffer irreparable damages but it will also affect its subscribers.

In the interest of justice, I order that the ex-parte order to stay execution of the warrant of distress granted on 23rd September 2016, be and is hereby made interlocutory pending the determination of the main matter.

I award costs to the Plaintiff for the inter parte stay of execution of the warrant of distress, to be taxed in default of agreement.

3. Application for an interim injunction

The last application for determination is for an interim injunction stemming from the same set of facts given above. The Plaintiff by way of affidavit deposed by Sandra Malupande deposed that the equipment seized by the 2nd Defendant is an integral part of the Plaintiff's business and is highly sophisticated and used in the provision of cellular and other network transmissions. That the Plaintiff requires continuous and unfettered access to the same in order to provide the services. Further that following the grant of the ex-parte stay of execution the Plaintiff Company was denied access on to the premises and the team was informed that the keys were in the possession of the 1st Defendant, and this continued despite the Plaintiff having paid the bailiff fees as ordered by this Court.

It was further deposed that the Plaintiff continues to suffer damage that cannot adequately be compensated for in damages and as such seeks an order for interim injunction to restrain the Defendants by themselves, their servants or agents from obstructing the Plaintiff from accessing the property known as Roof Top a portion of the Kulima Tower building Stand No.6907 Lusaka.

In furtherance of the Plaintiff's argument skeleton arguments were filed into Court. The Plaintiff cited a number of cases amongst them

Shell and BP Limited v. Conidaris and Others (8) where the Supreme Court said:

> **"all the Court needs to do at the interlocutory stage is to be satisfied that there is a serious question to be tried at the hearing and that the court ought to interfere to preserve property without waiting for the right to be finally established at trial."**

Counsel also cited the case of **Turnkey Properties v. Lusaka West Development Co. Limited (9)** where it was held that:

> **"It is improper for a court hearing an interlocutory application to make comments which may have effect of pre-emptying the decision of the issues which are to be decided on the merits."**

It was also submitted that there is an imminent and clear danger that if the Defendants are not restrained by an injunction, the Plaintiff will be evicted and the subject matter of this action will be beyond the order of this Court. Further that the injury to be suffered by the Plaintiff is irreparable and cannot be atoned for in damages considering that the Plaintiff's operations will be halted as it will be denied access to its property.

The Defendants in opposing this application filed an affidavit deposed by Mambwe Mukosha the gist of which was that the Plaintiff was granted access to the premises immediately it paid the bailiff fees. It was further deposed that the Plaintiff is on the

premises without paying rent and that making the injunction interlocutory without compelling the Plaintiff to pay rent arrears will greatly prejudice the 1st Defendant.

In support of the Defendants arguments Counsel submitted that the Plaintiff is in breach of the lease agreement and cannot be entitled to equitable relief. The case of **Hina Furnishing Lusaka Limited v. Mwaiseni Properties Limited (10)** was cited in which it was held that:

> **"An injunction is an equitable remedy and the court may not exercise to grant it where the plaintiff is in breach of contract."**

Counsel further added that the above case promotes the precedent that he who comes to equity must come with clean hands. The case of **Communications Authority v. Vodacom Zambia Limited (11)** was also cited where it was held that:

> **"In an application for an interim injunction, there are two issues to be considered. There are irreparable injury, and the right to relief. Irreparable injury is the first and primary element. It is for the party seeking an injunction to establish clearly that he is entitled to the right which he seeks to protect by an injunction."**

It was submitted that the interlocutory injunction should not be granted as it will amount to letting the Plaintiff remain on the 1st Defendant's premises without paying rent.

I have addressed my mind to the arguments advanced by both Counsel in this application and the authorities cited, and the same will be considered in my Ruling.

The law regarding the grant of interlocutory injunctions of which the general grounds are well established in Zambian law and as correctly submitted by Counsel for the Defendants, is that, it is essential that the applicant shows that there is a serious question to be tried and must show that if the injunction is not granted the applicant will suffer irreparable injury or loss.

It has been argued by the Counsel for the Defendants that the Plaintiff has failed to meet these two requirements. However, I am of the view that the Plaintiff has established that there are serious questions to be tried in this matter and also that if the interlocutory injunction is not granted it shall suffer irreparable loss. The requirement that there must be a serious question to be tried therefore comes down to the proposition that the claim must not be frivolous or vexatious.

As observed by Chirwa J as he was then, in the case of **Ndove v National Educational Company Limited (12)**, that in an application for an interlocutory injunction, though the Court is not called upon to decide finally on the rights of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it, there is a probability that the applicant is entitled to relief. The issue to be considered, or assessed at the outset is whether there is

a serious question to be tried, and that it must have some prospect of succeeding. At this stage of the proceedings, it is not part of the Court's function to try to resolve conflicts of evidence on affidavits as to the facts on which the claims of either party may ultimately depend, or decide difficult questions of law which call for detailed argument, and mature considerations. (**See American Cynamid v Ethicon Limited (13**). The serious questions that have arisen which are a preserve for the main trial are to do with how much the Plaintiff owe the Defendants, and whether the 2nd Defendant lawfully entered the Plaintiff's premises.

On the issue of the Plaintiff showing that if the injunction is not granted it will suffer irreparable loss, I am of the considered view that the Plaintiff has equally established that if the injunction is not granted the Plaintiff will not have access to its equipment which will result in irreparable loss which cannot be atoned for in damages. This is notwithstanding the fact that the Defendants' are concerned that granting the interlocutory injunction will be tantamount to allowing the Plaintiff to remain in the 1st Defendant's premises without paying rent. I find that the balance of convenience weighs more in favor of the Plaintiff as the Defendants will in no way be prejudiced if the interlocutory injunction is granted pending the determination of the main matter.

In relation to the adequacy of damages, in the **American Cynamid v Ethicon Limited (13)**, the test was stated by Lord Diplock that if damages in the measure recoverable at common law would be

adequate remedy, and the Defendant would be in a financial position to pay them, no interim injunction should normally be granted. However, damages maybe inadequate where the wrong is irreparable, and the adequacy of damages is then determined on a question of balance of convenience.

I am guided by the case of **ZIMCO Properties v LAPCO Limited (14)** where Gardner J.S explained concisely that the balance of convenience arises if harm done would be irreparable, and damages would not suffice to compensate an applicant for any harm which may be suffered as a result of the actions of the Defendant. I find that any injury to the Defendants can be atoned for in damages. The burden of proof that the inconvenience which the Plaintiff will suffer by the refusal of the injunction is greater than that, which the Defendant will suffer, if it is granted.

I therefore make an order for an interim injunction restraining the Defendants, their servants or agents or whomsoever from obstructing the Plaintiff from accessing the premises or removing any equipment belonging to the Plaintiff in issue until the matter is determined at trial. The Plaintiff has undertaken to pay such damages as the Court may find the Defendants to have suffered by reason of this Order, the same is hereby granted subject thereto.

I award costs to the Plaintiff on the application for an interim

injunction, to be taxed in default of agreement.

Leave to appeal is hereby granted.

Delivered in Chambers this 23rd day of January, 2017

.....

HON IRENE ZEKO MBEWE

HIGH COURT JUDGE