IN THE HIGH COURT FOR ZAMBIA **2015/HP/0626**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

HIGH COURT OF ZAMBIA
PRINCIPAL
18 DEC 2017
REGISTRY
P. O. BOX 50067, LUSAKA

BETWEEN:

MECKIE MWAMUCHENA SHISHOLEKA **PLAINTIFF**

AND

LAFARGE ZAMBIA LIMITED **1ST DEFENDANT**

THE COMMISSIONER OF LANDS **2ND DEFENDANT**

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff: *Mr. G. Musonda of Messrs Dzekdzeke and Co.*

For the 1st Respondent: Mrs. C. Ngulube Litigation Manager Lafarge.

RULING

Cases Referred to:

1. *Ahmed Abad v Turning and Metals Limited (1987) Z.R. 86 (S.C.)*
2. *American Cynamid Co. v Ethicon Ltd (1975) 1 ALL ER 504.*
3. *Edward Jack Shamwana v Levy Mwanawasa (1994) S.J 93*
4. *Shell BP Zambia Limited v Conidaris and Others (1975) Z.R. 174.*
5. *Tan Capital Partners Incorporation and Another v Mushinge and Other (2008) 2 ZR 179*

6. *Turnkey Properties Limited v Lusaka West Development Limited and Others (1985) ZR 85.*

Legislation Referred to:

1. *White Book Rules of the Supreme Court of England (1999 Edition)*

This was the 1st Defendant's application for an Order to Discharge an Exparte Order of Injunction granted to the Plaintiff on 1st April, 2016.

The genesis of the matter is that this matter was commenced on 1st April 2016 by way of writ of summons and Statement of Claim. The Plaintiff also applied for an Exparte Order for an Interim Injunction which was also granted on 1st April, 2016.

The Court initially gave a return date for the inter-parte hearing of 10th May, 2016. However, on the return date an application to set aside the writ for abuse of Court process was made by the Defendants. The parties also informed the Court that they required a month long adjournment as they were engaging in ex curia discussions.

When the matter came up a month later the parties proceeded with the application to set aside the writ for abuse of Court process. This application was however dismissed and the Court proceeded to give Order for Directions.

The Ex-parte Order remained in force but no interparte hearing was not held and has prompted this application. The application was

supported by an affidavit in support deposed to by one Mrs. Harriet Kapekele-Katongo and filed into Court on 10th October, 2017. She swore that upon perusal of the file it was apparent that the Plaintiff was granted an Ex-parte Order but that the 1st defendant had not been given an opportunity to be heard Inter-parte which was in breach of the normal requirement of justice.

She further swore that the 1st Defendant was the legal, rightful and bonafide owner of farm No. 1880 and No. 1881 (appearing on the same title) which covers the Chilanga Estate which form part of the land wherein the Plaintiff was issued the Certificates of Title in the year 2015, thereby making the Plaintiff an encroacher. A copy of the title was exhibited and marked **"HK1"**.

It was contended that the fact the 1st Defendant has title over the land in dispute gave consent to the Ministry of Lands to transfer portions of Farm 1881/1880 to the Plaintiff. Consequently, the 1stDefendant engaged Pet born Surveying Services to carry out a land audit on Farm 1881 which the land and it was found that Ministry of Lands had erroneously subdivided a portion of the 1st Defendants' land into 25 subdivisions which included the three pieces of land the Plaintiff continued to occupy. A copy of the land report dated 1st September, 2016 was marked **"HK2"**.

She averred that the 1st Defendant then engaged the Ministry of Lands and the 2nd Defendant as regards the encroachment on farm 1881 and the Ministry of Lands communicated its error to all the parties involved and advised that it would offer alternative land to

the aggrieved parties after acknowledge that the portion of land in dispute fell under the 1st Defendant Land. A copy of the letter from the Ministry was exhibited and marked **"HK3"**. She deposed that following the Ministry's involvement, all the other encroachers gave up possession of the land in question and the Ministry of Lands cancelled all certificates of title issued in error. The Plaintiff however refuse and neglected to give up possession of the land and obtained the injunction dated 1st April, 2016 without disclosing material facts and/or having clean hands.

She swore that approximately three weeks previously it came to the 1st Defendant's attention that the Plaintiff had begun mining stones on the land in question and sold them to third parties unknown to the 1st Defendant. Further, that the land in issue was in the middle of residential houses and the Plaintiff had been using explosives to blast stones and was disturbing the balance of the hill upon which Chilanga Estate housing complex lies and could lead to future landslides and was causing a nuisance to the area. A copy of the aero view showing the Mining activities being undertaken by the Plaintiff in the area and pictures of the same were produced and collectively marked **"HK4"**.

She contended that she believed that the Plaintiff had no mining licence to mine on the land. She averred that 1st Defendant was equally seeking justice and it would suffer loss that could not be atoned for in damages and the same would render the main matter an academic exercise. It was her contention that because the

interim injunction was granted Ex-parte, the 1st Defendant was not given an opportunity to be heard and as such it would be in the interest of justice that the injunction granted to the Plaintiff is not upheld.

She further stated that the Plaintiff was using the Ex-parte Order of injunction as a device to attain or create new conditions favourable only to himself to the detriment of the 1st Defendant who was the rightful owner. It was therefore in the interest of justice that the land in issue be preserved until final determination of this Court.

In opposing this application the Plaintiff filed an affidavit in opposition filed into Court on 20th October, 2017 where he deposed that he purchased Stand No 2601/9 from Mr. Kennedy Malama, Stand No. LN 2601/10 from a Ms. Onny Kayumba and Stand No. LN 2601/12 and the certificates for the same properties were issued in his name in about 2015. Copies of the certificates of title marked **"MMS/1"** to **"MMS/3"**.

He stated that he was the rightful an bonafide owner of the properties having been duly and legally issued with the Certificate of Titles by the Commissioner of Lands under the Ministry of Lands and a copy of the print out from the Ministry of Lands was produced and marked **"MMS/4"**.

He deposed that he had been conducting gravel excavation properties on the said properties and which project was legally authorized and approved by the Zambia Environmental Management Agency (ZEMA). Copies of the approved Environmental

brief and the conditions governing the approval were produced and marked **"MMS/5"** to **"MM/6"**.

He contended that Clause 2.0 of the ZEMA decision letter allowed him to excavate the gravel using the excavator and load the gravel into Tipper trucks for delivery. He denied there being explosives being used in blasting the stone and explained that the excavator had a jack hammer attached to it used in the excavation of gravel.

He further deposed that the gravel excavation project was registered with Chilanga District Council and he had been paying K1, 500 per month to the Council and the Council had representatives on site and collected a levy of K20 per Tipper of grave load. He stated that he was advised by his advocates that the Ex-parte injunction granted on 1st April by this Court was given to a Plaintiff who had established that he had a good arguable claim to the right he seeks to protect. That the same remained in force until this Court set it aside.

It was his contention that because of the length of the process in getting the licence from ZEMA and registering the gravel excavation project with Chilanga District Council, he would suffer irreparable damage if the injunction was discharged.

In Reply on behalf of the 1st Defendant it was deposed that it was untrue that the Plaintiff was legally issued with a certificate of title relating to the properties in question as the Plaintiff was fully aware that the said issuance was wrongfully executed and the 2nd Defendant recalled all certificates issued wrongfully over the

demised land which included the Plaintiffs alleged certificates of title. The deponent further swore that the Plaintiff wrongfully obtained title as Kennedy Malama, Onny Kayumba and Titus Songwe could not sale and/or transfer title to that which they did not have.

She deposed that the Plaintiff had sufficient notice of the 1st Defendant's title which the 1st Defendant has had for 67 years and had often remarked that that he was a son of a Chieftainess thus he could have any land but wished to possess the particular land dispute.

It was also sworn that on one occasion the Plaintiff was approached by the 1st Defendant to attempt an amicable settlement he brandished a fire arm and threatened the 1st Defendants' representative which led to his apprehension. It was averred that the letters of approval from ZEMA exhibited as **MMS5** and **MMS 6** were obtained by mispresentation of the Plaintiff who knew very well that he had no ownership in the land in question. Further, that the said excavation project was granted for a period ranging from four to six months from 24th December 2016 which was the date of consideration by ZEMA as is clearly outlined in the last sentence of clause 2.0 of exhibit MM6.

She averred that the Mines and Minerals Act, 2015 required the Plaintiff to possess a mining licence issued accordingly. That to the best of her knowledge and understanding, a perusal of the Mining Cadastre Unit website which shows all the mining and prospecting

licences in Zambia, this has never been issued to the Plaintiff. She stated that it would be in the interest of justice that the land which was the subject matter of the dispute be preserved until final determination of this Court and that if this were to granted by this Court suffer injustice.

When the matter came up for hearing on 25th October, 2017 the learned Counsel for the 1st Defendant Mrs. Ngulube argued that according to the rules of natural justice the 1st Defendant was not given an opportunity to be heard after the Plaintiff was granted an Ex-parte order of injunction. She referred the Court to Order 32 of the White Book which gives the Court discretion to set aside an Ex part order. It was Counsel's contention that the Plaintiff would not suffer any damages or prejudices if the aid order was discharged.

She cited the case of ***Tan Capital Partners Incorporation and Another v Mushinge and Other (2008) 2 ZR 179*** on the object of an injunction. She argued that the digging that the Plaintiff was conducting on the land as holders of the land is given to the 1st Defendant would render such judgment ineffectual.

She argued that allowing the application for an injunction would result in allowing the Plaintiff to waste the land.

In opposing the application Learned Counsel for the Plaintiff Mr. Musonda argued that Order 27 rule 4 of the High Court Rules does not make it mandatory for the Court to discharge an injunction but states that the Court may discharge, vary or set aside an injunction on an application by any party dissatisfied with that order.

He cited the case of ***Shell and BP (Z) Limited v Conidaris (1975) ZR 174*** where it was held that the Court would not grant an interlocutory injunction unless the right to relief was clear. It was his contention that the Plaintiff would suffer irreparable damage if the injunction was discharged.

He further contended that the Plaintiff started excavating the land way back in 2015 and in the course of the trade bought an excavator which investment was about K3million and therefore appealed to the Court to uphold the injunction because as business of the Plaintiff would suffer.

He submitted that discharging this injunction would create new conditions which would prejudice the Plaintiff and prevent in getting a return on his investment.

In reply the learned Mrs. Ngulube submitted that there was no evidence to support the assertion that the Plaintiff had purchased machinery and invested in the business. She referred to MMS/5 under 2.0 which said that there would be no blasting and that the excavation would be for a period of four to six months and only 83,000 tons of gravel.

She argued that the loss suffered by the Plaintiff would be quantified and added that the 1st Defendants had title to the premises in question for 67 years and had enjoyed quit possession prior to the coming of the Plaintiff. It was her prayer that the 1st Defendant's application be granted.

I have considered the evidence on record and the arguments by both parties. It is not in dispute that this Court granted an Ex-parte Order for Interim injunction on 1st April, 2016. It is further not disputed that interparte hearing in this application was not held as was indicated in the Order.

The Supreme Court in the case of ***Ahmed Abad v Turning and Metals Limited (1987) Z.R. 86 (S.C.)*** referred to Order 29 of the white book and guided

> *"that an ex parte interim injunction should generally be until a certain day. This is so as to enable the other party to be served with the summons and the affidavit in order to be heard. An ex parte interim injunction, therefore, runs for a limited time generally followed by an interlocutory injunction where the applicant establishes his case. On the other hand the purpose of the grant of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action."*

In the present case it is conceded that there was no inter-parte hearing held as the same was overtaken by events. That notwithstanding, an injunction is an equitable relief and the laws of equity must apply. The 1st Defendant should have been afforded an opportunity to be heard because the rules of natural justice require both parties to be heard before the Court can determine a matter. The Court in the case of ***Edward Jack Shamwana v Levy***

Mwanawasa (1994) S.J 93 the Chief Justice delivering the High Court judgment held that

> *"it is an elementary requirement of fairness and justice that as a general rule both sides be afforded the opportunity to be heard and where it is sought to depart from this norm, as in an ex parte application for an injunction, strong grounds must be shown to justify the application being made ex parte."*

I am fortified by this holding and agree that the 1st Defendant in the present case was not given an opportunity to be heard. Having conceded this, I have carefully considered the affidavits in support and in opposition of this application. I am satisfied that the facts in support and in opposition of the application suffice as facts for and against the granting of an interlocutory injunction.

Having carefully analysed the arguments from both parties I have noted that the main issue is that the Plaintiff has continued to excavate on the land and thereby using the injunction he was granted only to be more favourable to him while disadvantaging the 1st Defendant. The Plaintiff's main argument is that the excavation business is his main business in which he has invested a substantial amount of money.

The rules on granting an injunction are very clear in the case of ***American Cynamid Co. v Ethicon Ltd (1975) 1 ALL ER 504***. In that case one of the main principles was that the Court would not generally grant an interlocutory injunction unless the right to relief was clear and the same was necessary to protect the Plaintiff from

irreparable injury. Irreparable injury was well defined in the case of ***Shell BP Zambia Limited v Conidaris and Others (1975) Z.R. 174*** where the Court defined irreparable to mean *injury which is substantial and can never be adequately remedied, or atoned for by damages. It is not injury which cannot be possibly be repaired.*

Another important consideration is where the balance of convenience lies. Whilst it is generally accepted or acknowledged that an interim injunction is appropriate for the preservation or restoration of a particular situation pending trial, it cannot be regarded as a device by which the applicant can attain, or create new conditions favourable only to himself. These sentiments were echoed by Ngulube D.C.J. as he was then, in ***Turnkey Properties Limited v Lusaka West Development Limited and Others (1985) ZR 85.***

Having outlined the plethora of authorities on the considerations that should be given before granting or confirming an interlocutory injunction, I will now consider the arguments in favour of the injunction. The Plaintiff argued that he spent K3m to invest in an excavator and further obtained a licence from ZEMA and authority from the council to conduct his business.

It is my firm view that all the arguments clearly indicate that the Plaintiff's damages can adequately be atoned in damages as they are all monetary. It therefore goes without saying that an injunction Order cannot be sustained where there is no irreparable injury proven.

Further, I must also mention that granting this injunction would still put the Plaintiff in a position where he obtains conditions that are favourable only to himself because he argues that if he stops excavating by vacating this injunction then his business will suffer. The law is clear as is stated in the White book that *the usual purpose of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action.*

This is not what the Plaintiff is asking for going by his arguments as he is actually asking the Court to continue excavating on the land even while the action is still before this Court. In view of this, I accordingly discharge the Exparte Order for Interim Injunction.

I order that costs follow the event.

Leave to Appeal is granted

Delivered under my hand and seal this 18th day of December, 2017

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Mwila Chitabo SC

Judge