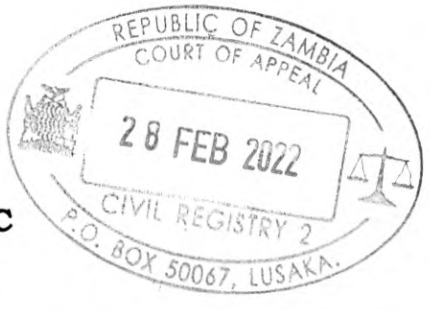
IN THE COURT OF APPEAL OF ZAMBIA **CAZ APPEAL No. 028/2018**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

ARCADES DEVELOPMENTS PLC **APPELLANT**

AND

ELAJICS LIMITED (T/A RHAPSODY'S CAFÉ & BAR) **RESPONDENT**

CORAM: CHISANGA JP, MAKUNGU AND KONDOLO SC, JJA

24TH APRIL, 2018 AND 28TH FEBRUARY, 2022

For the Appellant : *Mr. S. Bwalya & Mr. M. Desai of Messrs Solly Patel, Hamir & Lawrence*

For the Respondent : *Mr. A Mumba of Messrs Mwenye, Mwitwa & Associates*

J U D G M E N T

KONDOLO SC JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. **ZIMCO Properties Ltd v LAPCO Ltd (1988-90) ZR93 (SC)**
2. **Turnkey Properties v Lusaka West Development Company Ltd & Others (1984) ZR 85.**

3. **Elias Mumeno & 43 Others & Essau Phiri, Jacob Phiri & 845 Unknown Others CAZ/63/2917**
4. **Eller v Grovecrest Investments Limited [1994] 4 ALL ER**
5. **Connaught Restaurants Ltd v Indoor Leisure Ltd [1994] 1**
6. **Townrow v Benson (1818) 3 MADD 203 at 487**
7. **American Cynamid Co. v Ethicon Ltd [1975] 1 ALL ER 504**
8. **Minister of Information & Broadcasting Services, The Attorney General v Fanwell Chembo & Others (2007) ZR 207**
9. **Ahmed Abad v Turning and Metals Ltd (1978) ZR 86**
10. **Gideon Mundanda v Mulwani & Others (1987) ZR 30**
11. **Tawela Akapelwa (sued as Induna Inete) & Others v Josiah Mubukwanu Litiya Nyumbu (Suing as Chief Chiyengele) SCZ/004/2015.**
12. **Ubuchinga Investments Limited v Teklemical Menstab Semhar Transport & Mechanica Limited SC/25/2014**
13. **Nevers Sekwila Mumba v Muhabi Lungu (suing in his capacity as National Secretary of the MMD) SCZ/55/2014**
14. **Bernard Kutalika v Dainess Kalunga SCZ/73/2013**

LEGISLATION REFERRED TO:

15. **Southern African Institute for Policy and Research (25/01/2016 https://saipar.org › judgment-commentary-unit)**

1. INTRODUCTION

1.1. When this appeal was heard, Chisanga JP, as she then was, was on the panel but she has since ascended to the Supreme Court. This Judgment is therefore a decision of the majority.

1.2. The delay in delivering this judgment, which was caused in part by the record being misplaced, is regretted.

1.3. The Appeal relates to an injunction granted to the Respondent by the High Court restraining the Appellant from entering upon or levying any distress whatsoever on shop number 41 Arcades Shopping Mall which the Respondents were renting from the Appellants.

1.4. The judgment addresses in detail, the question of whether an injunction can be granted where damages are claimed as one of the reliefs, and/or where the applicant has not established that he will suffer irreparable injury if the injunction is not granted.

2. BACKGROUND

2.1. The Respondent filed a statement of claim and affidavit in support of the application for an interim injunction stating that the Respondent was the Appellant's tenant at shop number 41 Arcades Shopping Mall where the Respondent operated a restaurant and lounge.

2.2. Before the tenancy expired, the Respondent informed the Appellant that it wished to renew the lease but wished to negotiate a few issues before executing the new lease. This included allocation of a dedicated parking space for the Respondent's customers and agreement on how to address the impact of the currency fluctuations on the rent denominated in US$ but payable in Zambian Kwacha.

2.3. According to the Respondent, the Appellant embarked on major re-development works at the mall which were expected to go on for about 10 months and the Respondent was only given two days' notice that the works would commence.

2.4. The Respondent stated that it had suffered a reduced flow of customers as a result of the civil works thus impacting on their income. The Respondent claimed that the development works

resulted in a breach of its implied right to enjoy quiet possession of the leased property.

2.5. The Respondent further averred that the Appellant reduced the rental by 50% for three months. The Respondent informed the Appellant that the reduction for three months was insufficient to cover the losses it had suffered as well as anticipated losses over the 10-month duration of the works which were caused inter alia by the Appellant's failure to provide the Respondent with a dedicated parking space for its customers.

2.6. On 1st June, 2017 the Respondent gave the Appellant notice of its intention to cease trading at the mall with effect from 31st August, 2017.

2.7. The Appellant reacted by issuing a Notice of distress for rentals in the sum of US$64,355.57 for rent arrears as at 30th June 2017.

2.8. According to the Respondent its records showed that the arrears were in the sum of US$46,096.50 and its failure to pay on time was a direct result of the development works embarked on by the Appellant. The Respondent sought various reliefs including;

"An interim injunction to restrain the Defendant whether by itself or its servants or agents from entering on or levying any distress by whatsoever mode on all that retail premises known as shop number 41 measuring approximately 800m^2 at the Arcades Shopping Mall in the Lusaka Province of the Republic of Zambia for the rentals allegedly in arrears pending the determination of this matter."

2.9. The Respondent indicated that it was willing to pay the Appellant the amount that the Court would find due and owing to the Appellant after determination of its claim as set out in the writ of summons.

2.10. The Appellant filed an affidavit in opposition attesting that the Respondent's affidavit in support of the application was irregular and erroneous because the deponent, Nick Lostrom, was not a director of the Respondent company and had no capacity to swear an affidavit on behalf of the Respondent.

2.11. That the parties had a valid lease agreement duly registered at the Lands and Deeds Registry and all its terms were binding on the parties and it did not contain any provision granting the

Plaintiff exclusive parking space for its clients and provided for no reduction in rentals on account of developmental works.

2.12. That the 50% reduction in rent for three months was a mere gesture of goodwill on the part of the Appellant with no legal obligation to do so. That despite the reduction translating into a benefit of US$21,000, the Respondent had still remained heavily indebted to the Appellant.

2.13. After the new lease was signed, the Appellant agreed to freeze the exchange rate and this was done for all its tenants at the Mall.

2.14. That the Respondent had consistently defaulted and the rent accumulated to US$64,355.57. The Respondent and also owed the sums of K26,001.57 and K15,000 in utility and service charges.

2.15. It was attested that the Respondent was aware of the Appellant's refurbishment plans as shown in its own correspondence to the Appellant two years earlier.

2.16. That there was no proof that the refurbishment works had affected the Respondent's income and it was possible that it had lost customers to two new competitors who had recently

opened at Eastpark Mall, about 400 meters from the Respondent.

2.17. That the reduction in income could have been on account of other factors such as increases in costs of goods and a reduction in consumer spending power.

2.18. That the Respondent's Notice to cease trading was ineffectual because it only gave 3 months' notice when the lease provided for 6 months' notice.

2.19. That the Respondent had not come with clean hands because it was heavily indebted to the Appellant and granting an injunction would prevent the Appellant from exercising its legal rights and remedies.

2.20. That the Respondent could not suffer irreparable injury from the Appellant exercising its statutory right to distress for rent arrears.

2.21. The Respondents affidavit in reply attested that, the name Nick was an alias and his actual name is Nicholas as appearing on the print-out from PACRA and on his national registration card.

2.22. That the lease agreement exhibited by the Respondent as "SMM2" was registered on 27th June, 2017, about 1 year and 8 months after it was signed, sealed and delivered to the Respondent's offices and the deponent's first sight of it was in the affidavit in opposition. On account of that, the lease was invalid and not binding in relation to claims that arose prior to its registration.

2.23. That the issue of parking space and the issue of the fluctuation of the exchange rate resulting in escalated kwacha rentals, had been raised on numerous occasions.

2.24. That the decline in the Respondent's income started way before the competing businesses at Eastpark Mall started operating and the sum claimed by the Appellant erroneously included withholding tax even though the Respondent had presented it with the withholding tax certificate.

2.25. That the re-development activity of the Appellant had affected the Respondent's business and was in breach of the lease agreement thereby entitling the Respondent to a claim for loss of business.

2.26. That a tenant who has an arguable claim against the landlord in damages, for breach of the lease agreement, is entitled to apply for an injunction restraining the landlord from levying distress on the principles of fair dealing until the determination of the matter, and to have the damages that may be found due to him set off from the rent owing.

3. HIGH COURT DECISION

3.1. The learned High Court Judge's reasoning was as follows;

"From the affidavit evidence and the submissions made by counsel, I am convinced that there are serious questions to be tried. I have to consider whether an interim injunction is necessary to protect the Plaintiff from irreparable injury. There is evidence from the affidavits that the Plaintiff has raised triable issues against the Defendant in respect of which the right to relief could be ascertained and on the basis of which the relief of an injunction could be granted to the Plaintiff as set out in the Shell and BP and Ndove cases.

From the factors pointed out above, I find that a simplistic approach to an award for damages is inappropriate in this particular case.

All circumstances considered, I am of the view that on the evidence before me, the Plaintiff has made out a strong case to warrant the court exercising its discretion and order an interim injunction. I therefore confirm the ex parte order of interim injunction granted on the 5th day of July, 2017."

3.2. The above comprised the entire reasoning of the lower court.

4. THE APPEAL

4.1. Disgruntled by the High Court decision, the Appellant launched its appeal on nine grounds as follows:

1.The learned trial Judge erred both in law and in fact when in granting the interim injunction, she held at page R11 of the said Ruling that "....*a simplistic approach to an award for damages is inappropriate in this particular case.....*", despite the overwhelming evidence and arguments

presented before the honourable Court demonstrating that damages would have been an alternative and adequate remedy;

2. Further or in the alternative, that the honourable Court below erred in law and fact when it granted the Respondent an interim injunction, despite damages being an alternative and adequate remedy to the alleged injury or expected injury complained of;

3. The honourable trial Court misdirected itself in law and in fact by granting the interim injunction to the Respondent in spite of the Respondent having admitted in its pleadings and evidence before the Court that it was a tenant in default of rental payments and was in fact in arrear of rental, ad [sic] consequently had not abided by the equitable maxim and principle that *"he who comes to equity must come with clean hands"*;

4. The honourable trial Judge erred in law and in fact by granting the Respondent the interim injunction

despite the Respondent not having shown that it had a clear right to relief; contrary to the well-established principles governing the grant of the equitable remedy of an interim injunction;

5. The honourable trial Court misdirected itself in law and in fact when it granted the Respondent an interim injunction, despite the resultant effect of the said injunction conferring upon the Respondent a benefit favorable only to itself and thereby altering the status quo, contrary to the well-established principles governing the grant of the equitable remedy of an interim injunction;

6. The honourable trial Judge erred in law and in fact by granting the Respondent the equitable remedy of interim injunction, thereby restraining the Appellant from exercising its statutory right to levy distress pursuant the Law of Distress (Amendment) Act, 1888 of the United Kingdom, which statutory right takes precedence over the

equitable remedy of an interim injunction, in line with the legal maxim that *"equity follows the law";*

7. The honourable trial Court misdirected itself in law and fact when it found at page R9 of the said Ruling that only two primary issues are to be considered in the granting of an injunction, namely: (i) The right to relief must be clear, and (ii) whether irreparable damage will be occasioned to the claimant if the injunction was not granted, when the legal principles surrounding the granting of an injunction mandate the cumulative fulfillment of the following five legal conditions precedent, namely:

a. That damages would not be an alternative and adequate remedy to the injury complained of; and

b. That the right to relief must be clear and that the applicant party has a real prospect of succeeding at trial; and

c. That the party seeking relief must have come to Court with 'clean hands'; and

d. That the grant of the injunction would preserve the status quo and not create new conditions favorable to the applicant party; and

e. That the balance of convenience in favour of the grant of the injunction must weigh in favour of the applicant party.

That as the Respondent did not meet all of these legal conditions precedent cumulatively, it ought not to have been granted an interim injunction;

8. Further or in the alternative, the honourable trial Court erred in law and fact by granting the Respondent an interim injunction, which had the effect of unjustly enriching the Respondent to the extent that the Respondent was effectively no longer obliged to make payment of rent due, thereby conferring on the Respondent the dual and unjust benefits of continued use of the demised premises, as well as having the use of funds that

would ordinarily have been paid over to the Appellant as rentals;

9. Further or in the alternative, the honourable trial Judge erred in law and in fact by delivering a Ruling that does not fully satisfy the principles relating to the content and form of a Judgment, in that the honourable trial Judge did not comprehensively reveal her reasoning and conclusion of all the legal issues that arose for determination, and further how such reasoning was arrived at, based on the facts and authorities before the honourable Court.

5. APPELLANT'S ARGUMENTS

5.1. The Appellant's contention under ground 1 was that the Respondent had not shown that it would suffer irreparable injury if the injunction was not granted. That the court did not address the issue and further that the balance of convenience between the parties only arises where the harm done would be

irreparable and damages would not suffice to recompense the harm done.

5.2. In support of the foregoing submissions, Counsel cited the cases of **ZIMCO Properties Ltd v LAPCO Ltd** [1] and **Turnkey Properties v Lusaka West Development Company Ltd & Others** [2]. Also referred to was the decision of this Court in the case of **Elias Mumeno & 43 Others & Essau Phiri, Jacob Phiri & Unknown Others** [3] in which Sichinga JA rehashed the stated principles.

5.3. It was submitted that the principle of *stare decisis* demanded that the High Court be bound by the cited Supreme Court and Court of Appeal authorities.

5.4. The Appellant stated that the lower court made a finding of fact when it stated that, *"a simplistic approach to an award for damages is inappropriate in this particular case"* and submitted that the finding was perverse because it went against the weight of the evidence and submissions offered by the Appellant. That the learned trial judge's ruling revealed no consideration of the said evidence and submissions thus

suggesting that the lower court preferred the Respondent's evidence without giving reasons.

5.5. The argument in ground 2 was similar to parts of ground one as it attacked the trial judge's failure to consider that an injunction should not be granted where damages are an adequate or alternative remedy.

5.6. It was further argued under this ground that the case of **Eller v Grovecrest Investments Limited** [4] cited by the Respondent is only of persuasive force because it is an English authority. That allowing the English decision to override well settled Zambian law would be a departure of the highest magnitude, especially considering that there was nothing unique or peculiar in this matter to warrant applying the English authority.

5.7. Under ground three, it was argued that the Respondent had admitted being in rent arrears of US$46,096.50 and had thus not approached equity with clean hands. This being an equitable relief, the lower Court erred to grant an injunction in such circumstances and the fact that the Respondent had

blamed the Appellant for causing the default was a matter which should be resolved at trial.

5.8. That the Respondent's application for an injunction was a reaction to the notice of distress issued by the Appellant. Several cases including the case of **Elias Mumeno & 43 Others & Essau Phiri, Jacob Phiri & Unknown Others (supra)** were cited on the requirement to come to equity with clean hands.

5.9. In ground four, it was argued that the trial court had granted the injunction without establishing that the Respondent had a clear right to relief. It was pointed out that the Respondent's claim based on set-off was flawed from the onset because the lease agreement at clause 5.1 indicated that the Respondent would "*pay rentals in advance without deduction*". That the lease agreement at clause 26.1 provided very limited scope for the Respondent to seek remission of rent on account of works such as those being undertaken by the Appellant.

5.10. According to the Appellant, clauses 5.1 and 26.1 of the lease agreement exclude the Tenant's right to set-off and therefore the Respondent has no clear right of relief in this matter. The

case of **Connaught Restaurants Ltd v Indoor Leisure Ltd** [5] was cited in support of the argument that in the circumstances, the claim for set-off was baseless.

5.11. Under ground 5 it was submitted that by granting the injunction, the trial judge altered the status quo and created a condition favorable only to the Respondent. That this was against the guidance of the Supreme Court in the case of **Turnkey Properties v Lusaka West Development Company Ltd & Others (Supra).**

5.12. It was postulated that the injunction was obtained purely for the purpose of preventing the Respondent from being evicted despite its failure to pay rentals. That the injunction will enable the Appellant to pay no rent at all, until the matter is concluded, a situation which only favors the Respondent.

5.13. Ground 6 was based on the argument that the grant of an injunction was an equitable remedy which cannot oust the exercise by the Appellant, of its statutory right to levy distress under the Distress for Rent Act, 1737 and the Law of Distress (Amendment) Act 1988 (UK). That *"equity follows the law"* and

the equitable right to injunctive relief cannot supersede the Appellant's statutory right to levy distress.

5.14. The case of **Townrow v Benson** [6] was relied upon in which it was held as follows;

> *"The tenant here claims to set off a legal demand against the distress of his landlord for rent. The policy of the law does not permit a set-off against a distress for rent; and a Court of Equity must follow the law, and cannot relieve against the rule of law, where the claim to set-off is founded on a legal demand. It is not necessary to consider how the case might be if the tenant had a counter demand, not in law, but in equity. Demurrer allowed."*

5.15. Ground 7 essentially attacked the trial judge's ruling for stating that the only two primary elements that required to be considered for the grant of an injunction were; that the applicant had a clear right to relief and that he would suffer irreparable damage if it was not granted.

5.16. Counsel submitted that the injunction should not have been granted because the other conditions precedent as set out in

the case of **American Cynamid Co. v Ethicon Ltd** [7] for the grant of an injunction had not been established. These were that the applicant must come with clean hands, the injunction must preserve the status quo and not create new conditions favorable to the applicant and that the balance of convenience must weigh in favor of the applicant.

5.17. Ground 9 impugned the content and form of the ruling, alleging that it did not reveal how it was reasoned and failed to meet the requirements of a good judgment as established by case law. The Appellant relied on the case of **Minister of Information & Broadcasting Services, The Attorney General v Fanwell Chembo & Others** [8].

5.18. It was submitted that the lower court did not explain which triable issues had been established or why "*a simplistic approach to an award for damages is inappropriate in this particular case*". That in fact, the lower court did not explain how it arrived at any of its conclusions.

5.19. It was further submitted that this Court addressed these elements in the **Elias Mumeno** Case and we were requested to follow our own reasoning in that case.

5.20. Under ground 8 it was contended that the grant of an injunction had unjustly enriched the Respondent because it would now get to keep and use the money it was meant to pay for rent whilst depriving the Appellant. That the court had made no order compelling the Respondent to pay rent into Court pending determination of the dispute.

6. RESPONDENT'S ARGUMENTS

6.1. The Respondent argued grounds 1 and 2 together, in relation to the Appellant's submission that the trial judge glossed over the issue of adequacy of damages.

The Appellant submitted that the trial judge did not ignore this principle at all and referred to pages R10 to R11 where, according to the Appellant, the trial judge addressed her mind to the principle of adequacy of damages when she referred to the case of **Ahmed Abad v Turning and Metals Ltd** [9] where the court held that *"Where damages would be an adequate remedy, the award of an injunction is inappropriate"*.

6.2. The case of **Gideon Mundanda v Mulwani & Others** [10] was cited where it was held that the High Court has power to award

damages in addition to or in substitution for specific performance or an injunction.

6.3. That the lower court therefore did not err when it held that a simplistic approach to an award of damages is not appropriate under injunction law in the circumstances of this case. Further, the Court noted that it had to preview the facts and had indicated that it had made its decision after considering the Respondent's affidavit evidence.

6.4. It was further argued on the above basis that there was, no valid reason for this Court to interfere with the lower Court's finding that the Respondent would have suffered irreparable harm if the injunction was not granted.

6.5. The Respondent's next attack was against grounds 3 and 4 in relation to the argument that the Respondent's hands were soiled because it was in rent arrears and thus had no clear right to relief. It was argued that, as stated in the writ of summons, the Respondent's claim was that its default was actually caused by the Appellant's breach of its covenants under the lease agreement. It was pointed out that even the precise sums being claimed for unpaid rent had been disputed.

It was opined that since the Appellant had denied the claim, the two issues raised under these grounds could only be settled at trial. In support of the assertion that disputed facts must be resolved at trial, the Respondent cited the **Turnkey Properties Case** and **Tawela Akapelwa (sued as Induna Inete) & Others v Josiah Mubukwanu Litiya Nyumbu (Suing as Chief Chiyengele)** [11].

6.6. It was submitted that it was necessary for the lower court to grant the injunction because the Supreme Court guided in the Turnkey Case that it is improper for a court hearing an interlocutory application for an injunction to make comments which may have the effect of pre-empting the decision of the issues which are to be decided on the merits at the trial.

6.7. In response to grounds 5 and 8 on the interim injunction having created conditions only favorable to the Respondent resulting in unjust enrichment of the Respondent, it was argued that the appellant reacted by issuing the notice of distress only after it received the Respondent's notice to quit.

6.8. That the lower court was on firm ground because refusing the injunction would have resulted in the Respondents restaurant

being shut down despite having raised triable issues. That the injunction did not allow the Respondent to stop paying rent as it preserved the status and positions of both parties thus preventing either of them from creating new conditions only favorable to itself.

6.9. In reply to ground 6, on the argument that an injunction cannot be granted to prevent the exercise of a statutory right, the Respondent stated that the argument was a non-issue because the legality of the Appellant's exercise of the said statutory right was itself in question and yet to be determined by the court.

6.10. Further on this ground, the Respondent cited the **Eller Case Supra** which it described as being on all fours with the case before us and submitted that in the **Eller Case** the Court of Appeal of England and Whales held that, as a matter of fair dealing between the parties, a tenant was entitled to invoke the right of set-off, for example, by way of an arguable claim for damages for breach of a covenant against a claim by the landlord to levy distress. It followed that the appeal would be

allowed and that the Plaintiff was entitled to an injunction to restrain the landlord from proceeding with the distraint.

6.11. In summing up on this ground, the Respondent argued that the **Eller Case** demonstrated that *equity and law run concurrently and under the principle of fair dealing, a tenant with an arguable claim for a set-off of damages against the landlord was entitled to the grant of an injunction.* That *in casu* the claim for set-off was on account of the landlords breach of the lease agreement by failing to provide the tenant with quiet possession of the leased premises.

6.12. Under ground 7 it as argued that quite contrary to the Appellant's submissions, the criteria for the grant of an injunction set out in the **American Cynanid Case** were only guidelines. In support of this, the cases of **Ubuchinga Invsetments Limited v Teklemical Menstab and Semhar Transport & Mechanica Limited** [12] and the **Elias Mumeno Case (supra)** were cited as were a few other High Court authorities for persuasive value.

6.13. The Respondent submitted that the **Ubuchinga Case** made it clear that that the most important issue for consideration was

to establish whether the right the applicant seeks to protect actually exists.

6.14. Further that in the case of **Nevers Sekwila Mumba v Muhabi Lungu (suing in his capacity and National Secretary of the MMD)** [13], Malila JS, as he then was, stated that *"the essential requirements for the grant of an injunction logically flow into each other. They are mutually inclusive. When irreparable injury is alleged, it is ineluctable to consider the adequacy or inadequacy of damages. And when the right to relief and irreparable injury are established, the balance of convenience is the next logical consideration ....."*

6.15. Flowing from the preceding quote, the Respondent opined that when one is considering the adequacy of damages, they are undoubtedly considering the balance of convenience because the **American Cyanamid** principles are so mutually inclusive and intertwined that they can be categorized into two main issues namely, clear right to relief and irreparable damage.

6.16. That the trial judge could not be faulted for her findings on this point and ground 6 should be dismissed.

6.17. Under ground 9 on the form and content of the ruling, it was argued that the ruling comports with the principles of good judgment writing as it met the minimum standards as the trial judge reviewed the evidence; summarized the arguments and submissions; made findings of fact; gave her reasoning on the facts; applied the law and gave a conclusion.

6.18. The Respondent concluded its arguments on the appeal by imploring this Court to uphold the injunction by judiciously exercising its power as guided in the **Tawela Akapelwa Case (Supra).**

7. APELLANT'S ARGUMENTS IN REPLY

7.1. The arguments in reply were mostly an expansion of the points advanced earlier but with an emphasis on the form and content of the ruling delivered by the trial judge.

8. ARGUMENTS AT THE HEARING

8.1 At the hearing, both parties relied on their filed arguments and briefly augmented by merely emphasizing the arguments they had already advanced.

9. DECISION

9.1. We thank the Parties for their spirited arguments which we have duly noted and considered. We shall begin with grounds 1, 2, 3, 4, 5, 6 and 8 which we shall consider as one because they all relate to the elements a court should consider when granting an injunction. Grounds 7 and 9 shall be addressed individually.

9.2. The Respondent does not dispute that its rent payments were in arrears and thus in default of the contractual requirement to timeously pay the same.

9.3. An injunction is an equitable relief and the age-old principle that he who approaches equity must come with clean hands continues to ring true. On the face of it, the Respondent's hands appear soiled because it is in rent arrears but has offered an explanation as to why that is the case and essentially blames the Appellant for the status quo.

9.4. This decision shall consider the following questions;

1. Can an injunction be granted where a claim for damages has been made and/or where, on the face of it, the applicant

has not established that he will suffer irreparable damage if an injunction is not granted.

2. If the answer to the above is in the affirmative, in the circumstances of this case, does the Respondent's claim of set-off against the Appellant fall into the category of instances where an injunction can be awarded even where it has not been established that the applicant will suffer irreparable injury if it is not granted.

9.5. Under ground 3, the Appellant asserted that the Respondent's main action had no prospects of success because the lease agreement specifically precluded the Respondent from claiming set-off against the rent.

9.6. A set-off can be described as the right of someone who owes money to subtract, from the debt, any money owed in the other direction.

9.7. The basis of the Respondent's application for an injunction was that it had commenced an action against the Appellant seeking various reliefs which included damages for breach of the implied right of the Respondent to enjoy quiet possession of Stand No. 41 at the Arcades Shopping Mall, damages for loss

of business and a set-off against all monies found due to the Respondent against any rent due to the Appellant.

9.8. Claims for set-off are not alien to our jurisdiction and over the years various courts have adjudicated divers matters where parties sought set-off either as a main action, a counter-claim or where it was raised as a defence.

9.9. Without delving too far into the merits of the Respondent's claim, it appears to us that the claim for set-off was not based on the Respondent deducting its perceived losses from the rent but rather a situation where there was simply an inability to pay the rent as a result of the Appellant's alleged breach of the tenancy agreement on account of the re-development works being conducted on the premises. The Respondent further claimed that it was entitled to damages on account of the breach.

9.10. Whether or not the Respondent would be at liberty to set-off any sums it might be awarded by the court from the rent found due and owing is a matter to be determined at trial. A snapshot of the statement of claim shows that there is a serious question

to be tried and on the face of it, the action has reasonable prospects of success.

9.11. The parties argued at length on the elements a court must consider when deciding whether or not to grant an injunction. The Appellant insists that the elements set out in the American Cyanamid case are mandatory and cumulative pre-conditions to the grant of an injunction. That an injunction can only be granted where it is established that the applicant will suffer irreparable damage or injury if it is not granted.

9.12. The Respondent argued that depending on the subject matter and the nature of the case, the possibility of irreparable injury need not always be established and that an injunction can be granted even where the applicant has in its main claim sought compensation in the form of damages. They cited the **Eller Case (supra)** a British case where the Court of Appeal granted an injunction on the basis of an arguable claim for damages for breach of a covenant against a claim by the landlord to levy distress. The injunction was granted on the principle of fair dealing between parties even though the tenant's claim for damages was liquidated.

9.13. The Appellant submitted that the principle of set-off applied by the British Court of Appeal is alien to our jurisdiction where the law on injunction is derived from the principles espoused in the **American Cyanamid Case.** It was pointed out that the entire case for the Respondent is built around convincing this Court that there is no reason to not apply the principle of fair dealing between parties espoused in the **Eller Case**.

9.14. Both parties cited the **Tawela Akapelwa Case** in which the Supreme Court addressed the elements a court should consider when determining an application for an injunction.

9.15. We came across an interesting commentary on the **Tawela Akapelwa Case (supra)** by Mapange Nsapato in an on-line article posted by the **Southern African Institute for Policy and Research** [15].

9.16. He opined that in its previous decisions, the Supreme Court indicated that the principles established in the **American Cyanamid Case** (Cyanamid principles) were mere guidelines and not binding on the courts, but in the **Tawela Akapelwa Case** it itemized the Cyanamid principles and said as follows:

"these considerations should be foremost in the mind of any judge considering whether or not to grant an injunction'

9.17. He went further and pointed out that the Supreme Court had the opportunity to rule on whether the consideration for damages as an adequate remedy was mandatory in all cases but it did not. That the Court however proceeded to set out the principles a court must consider when hearing an application for an interim injunction. The author concluded that the **Tawela Akapelwa Case** has confirmed that consideration of the adequacy of damages is mandatory when granting an interim injunction.

9.18. The position taken by the author represents the stance assumed by the Appellant that the elements to be considered for the grant of an injunction, as set out in the American Cyanamid Case, are forged in steel and inflexible.

9.19. In the **Tawela Akapelwa Case** the Supreme Court said a number of things which on the face of it support the Appellant's argument on damages. The court said at page J20 of its judgement that when considering the grant of an

injunction, a court must be "*guided*" by the principles which were so clearly set out in the American Cyanamid Case namely:

1. *Whether there is a serious question to be tried;*
2. *Whether damages would be adequate to compensate the Plaintiff;*
3. *Whether the balance of convenience tilts in favor of granting the injunction to the plaintiff; and*
4. *Whether the plaintiff has come to court with clean hands*

9.20. The Supreme Court said at page J21 that *"these considerations should be foremost in the mind of any judge considering whether or not to grant injunction".*

At page J23 the Court said *"Even where the right to relief is clear, an interlocutory injunction should only be granted where it is necessary to protect the applicant from irreparable injury, not mere inconvenience."*

9.21. In the Tawela Akapelwa Case, counsel for the Respondent reminded the Supreme Court that it had in several *post* Cynamid *dicta*, indicated that an injunction could be granted

even where an applicant has not established that he would suffer irreparable injury if it is not granted.

In response, the court said as follows;

> *"Seductive as Mr. Katolo's invitation is for us to apply post American Cynamid dicta on the grant of injunctions in the absence of proof of irreparable injury, we resist that temptation principally because the law still appears to us, to be evolving and is evidently still in a state of flux. In any case, given what we have already stated, those authorities are inapplicable.*

9.22. In our understanding, the post American Cyanamid dicta were not applicable to the particular case before the Court. The apex Court did not say that the Cyanamid principles are inflexible and cast in stone; it said courts should be *"guided"* by the principles and they should be *"foremost in the mind of any court"*. Its conclusion was that the authorities in which it had earlier stated that irreparable damage need not always be established were not applicable to the case before it.

9.23. The Supreme Court went on to say as follows;

"Before we conclude, we wish to comment on the law relating to injunctions generally. The law with regard to interlocutory injunctions in this country constitutes one of the most difficult sections of the law.

Difficult, not because it is abstruse, but because the ascertained principles for granting injunctions must be subject at all times to a rather amorphous combination of facts which are perpetually different in every case.

A good deal of judicial discretion is required and we think no one now imagines that an order of injunction would be granted as a matter of course. Judicial discretion itself is a power which inheres in a judge. It is an amour which a judge should employ judiciously to arrive at a decision."

9.24. The above quotation perfectly describes the landscape that a judge is required to navigate when deciding whether or not to grant an injunction. It can sometimes be opaque, obscure and complicated, but no matter how complicated the expedition, the main requirement is the judicious exercise of discretion.

9.25. In the case of **Bernard Kutalika v Dainess Kalunga** [14] delivered on 9th September, 2015 a few months after the **Tawela Akapelwa Case** which was delivered earlier on 21st May the same year, Malila JS, as he then was, delivered the judgment on behalf of the Supreme Court and he reproduced the quotation from the **Tawela Akapelwa Case** (as per paragraph 8.17 above) and further said as follows at page J18;

> *"It is well settled that the grant or refusal of an order of interlocutory injunction is in the absolute discretion of the court, which discretion, however, like all other judicial discretions, must be exercised judiciously, having regard to all the facts and circumstances of each and every case. (emphasis ours)*
>
> *And as Lord Denning put it in Hubbard v. Vospers, the remedy of interlocutory injunction is so useful that it should be kept flexible and discretionary and must not be made the subject of strict rules".*

9.26. It is notable that in the **Bernard Kutalika case** cited above, the Supreme Court did not even refer to the issue of irreparable injury and, in the circumstances of the case, it took the

unusual but necessary action of restraining both parties to that action from developing the land at the center of the dispute.

9.27. It thus is clear to us that the Supreme Court has not departed from its post Cyanamid *dicta* that in certain circumstances an injunction can be granted where an applicant has not established that if it is not granted, he would suffer irreparable injury.

9.28. The next element to be considered is the question of damages. In keeping with the principles espoused in the **Bernard Kutalika Case**, the exercise of the discretionary remedy to grant an injunction must be *exercised judiciously, having regard to all the facts and circumstances of each and every case and should be kept flexible and must not be made the subject of strict rules.*

In applying the said principles, we see no reason why, depending on the circumstances, an injunction cannot be granted under the principle of fair dealing between parties, on the basis of a claim for set-off.

9.29. We have scrutinized the Respondents main action and as earlier indicated, there is indeed a serious question to be tried. This must however be considered in the context of the fact that the Respondent issued the Appellant with a notice to quit after the expiration of 3 months.

9.30. In view of the fact that the Respondent intended to leave the premises within three months it is hard to justify granting an injunction without considering the question of irreparable injury.

9.31. Any amount awarded under the claim for set-off would be capable of being assessed, meaning that, the injury would not be irreparable. Where there is still a long period of occupancy remaining on the lease, depending on the circumstances, the question of fair dealing between the parties would be a valid consideration where there is a claim for set-off similar to or even different from those in the **Eller Case**.

9.32. In our view, the circumstances of the case before us do not warrant the grant of an injunction without the applicant establishing that it would suffer irreparable injury if an injunction is not granted.

9.33. The Respondent has not proved irreparable injury and for that reason, the questions of the balance of convenience and the that of the Respondent coming to equity with unclean hands do not arise.

9.34. In the circumstances, grounds 1, 2, 3, 4, 5, and 7 succeed.

9.35. The net result of our decision in the preceding grounds is that the *ex parte* injunction is discharged and the appeal substantially succeeds.

9.36. In view of our decision, considering grounds 6, 8 and 9 will serve no purpose.

9.37. Costs are awarded to the Appellant.

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F.M. CHISANGA
JUDGE PRESIDENT

.....
C.K. MAKUNGU
COURT OF APPEAL JUDGE

.....
M.M. KONDOLO, SC
COURT OF APPEAL JUDGE