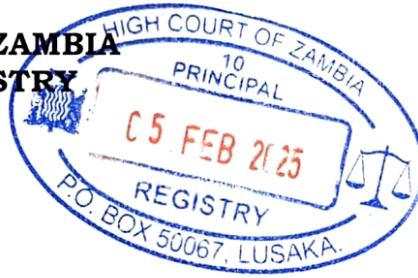


**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

2024/HP/0659



BETWEEN:

**MUNGULASU GOBAH** (*Suing as Attorney for Kenneth Gobah*) **PLAINTIFF**

AND

**WEZI NGUNI** (*Sued as Administrator of the estate of the late William Nguni*) **DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 5<sup>th</sup> DAY OF FEBRUARY, 2025**

*For the Plaintiff* : Mr B. Zulu, Messrs G.M Legal Practitioners

*For the Defendant* : Mr A. Chuni, Messrs Equitas Legal Practitioners

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## R U L I N G

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CASES REFERRED TO:

1. *R v Kensington Income Tax Commissioners, Ex-parte Princess Edmond de Polignac* 1917 1 KB 509
2. *Shell & BP Zambia Limited v Conidaris and others* 1975 ZR 174
3. *American Cynamid v Ethicon Limited* 1975 AC 396
4. *Khalid Mohammed v the Attorney General* 1982 ZR 49
5. *ZIMCO Properties Limited v LAPCO Limited* 1988-1989 ZR 92
6. *Attorney General v Times Newspaper Limited* 1992 1 AC
7. *Knarf v British Gypsum Limited* 2002 2 ALL ER 525
8. *Mututwila Farms Limited v John Nortjie* SCZ No 28 of 2010
9. *Stripes Zambia Limited v Cinderella Investments Limited and Sana Industries Limited* Appeal No 200 of 2012
10. *Ubuchinga Investment Limited v Teklemichael Menstab and Semhar Transport and Mechanical Limited* SCZ/25/2014
11. *Akapelwa (Sued as Induna Inete) & others v Nyumbu (sued as Chief Chiyengele)* Appeal No 4 of 2015
12. *Arcades Development Plc v Elajics Limited (T/A Rhapsody's Café and Bar)*

LEGISLATION REFERRED TO:

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***
2. ***The Rules of the Supreme Court, 1965, 1999 Edition***

## **1. INTRODUCTION**

- 1.1 This Ruling is on an application which was filed by Wezi Nguni, the Defendant herein, for an Order to discharge the Order of injunction, which was granted on 12<sup>th</sup> June, 2024. The application was made pursuant to ***Order 27 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia*** as read with ***Order 29/1A/33 of the Rules of the Supreme Court of England, 1965, 1999 Edition***, and was supported by an affidavit and a List of Authorities and Skeleton Arguments.
- 1.2 In opposition, the Plaintiff, Mungulasu Gobah filed an affidavit in opposition, and a List of Authorities and Skeleton Arguments in opposition on 9<sup>th</sup> August, 2024.

## **2. BACKGROUND**

- 2.1 As Attorney for Kenneth Gobah, Mungulasu Gobah commenced these proceedings on 13<sup>th</sup> May, 2024, by Writ of Summons which was accompanied by a statement of claim and the other documents, claiming:
- i. *A declaration that Kenneth Gobah is the rightful owner of Stand No S/D 143 of Stand No 11321, Libala Stage 4B Lusaka;*
  - ii. *An Order that Wezi Nguni yields vacant possession of Stand No S/D 143 of Stand No 11321, Libala Stage 4B Lusaka;*
  - iii. *An Order for the payment of rentals collected by Wezi Nguni relating to No S/D 143 of Stand No 11321, Libala*

- Stage 4B Lusaka from 1<sup>st</sup> January, 2000 until the date of possession at the rate of ZMW3, 500.00 per month;*
- iv. Damages for trespass;*
- v. Mense profits at the rate of ZMW3, 500.00 per month from the date of the Writ of Summons herein until possession is given;*
- vi. Exemplary damages as pleaded;*
- vii. An Order of interim injunction restraining Wezi Nguni, whether by himself, his servants or agents from interfering with Kenneth Gobah's quiet possession and enjoyment of Stand No S/D 143 of Stand No 11321, Libala Stage 4B Lusaka;*
- viii. As well as trespassing, encroaching or carrying out any illegal activities on the said land;*
- ix. Any other relief that the Court may deem fit;*
- x. Interest;*
- xi. Costs.*

2.2 The Order of injunction which is sought to be discharged was granted on 12<sup>th</sup> June, 2024. Wezi Nguni entered appearance and filed his defence and the other documents on 18<sup>th</sup> July, 2024. On the same day, he applied to discharge the Order of injunction.

2.3 Wezi Nguni also filed a Notice of Motion to raise preliminary issues on 18<sup>th</sup> July, 2024, alleging that the matter was statute barred. Opposition to that application was filed on 9<sup>th</sup> August, 2024, and the application was determined in a Ruling dated 25<sup>th</sup> October, 2024.

### **3. SUBMISSIONS AT THE HEARING**

#### **SUBMISSIONS BY COUNSEL FOR WEZI NGUNI**

- 3.1 Counsel for Wezi Nguni, in making the application, relied on the affidavit which was filed in support of the application, together with the List of Authorities and Skeleton Arguments in support.
- 3.2 In augmenting, his submission was that the crux of the application, was that the conduct of Mungulasu Gobah leading up to the granting of the Order of injunction was not deserving of such a sacred and equitable remedy. Counsel also stated that it is trite, that a party who seeks an equitable remedy must do so with clean hands.
- 3.3 The Court was asked to note that the affidavit which was filed in support of the application, showed that Wezi Nguni was only served the application on the date that it was coming up for hearing. Additional submission was made, that Mungulasu Gobah omitted to serve the Writ of Summons and statement of claim, which Counsel believed was the anchor of the application for an Order of injunction.
- 3.4 Note was made, that Mungulasu Gobah in the affidavit in opposition, had deposed that he had obtained the leave of the Court to serve the originating process on Wezi Nguni by substituted service, yet in the same affidavit, he had averred that he had continued with efforts to personally serve the Court process on Wezi Nguni.
- 3.5 It was Counsel's submission that if indeed, an Order for substituted service was obtained, then in the absence of an

affidavit stating such, the submission had been watered down. Based on the foregoing, the prayer was that the application be granted.

**RESPONSE BY COUNSEL FOR MUNGULASU GOBAH**

- 3.6 Counsel in response, stated that they had filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition on 9<sup>th</sup> August, 2024. It was submitted that Counsel for Wezi Nguni had stressed that the conduct of Mungulasu Gobah in this matter was bad, and therefore, he did not deserve to be granted the Order of injunction.
- 3.7 However, the view that Counsel took, was that the failure to serve the Writ of Summons and Statement of Claim was an omission, and was not deliberate. He asked this Court to note that from the inception of the proceedings, Wezi Nguni had never attended Court either in person or through Counsel to answer to the application for an Order of injunction.
- 3.8 It was also stated that on all the affidavits that Wezi Nguni had filed, they did not indicate his residential address, thereby making it difficult to locate him and serve him the Court process. Further submission was made, that the date of 12<sup>th</sup> June, 2024, was for hearing of the injunction application, and Wezi Nguni was served the notice a day before that date, on 11<sup>th</sup> June, 2024.
- 3.9 Counsel still in submission, stated that the honourable thing that Wezi Nguni could have done, was to appear at the

hearing, and apply for an adjournment as certain documents were missing. He stated that the second exhibit to the affidavit in opposition, was a letter from Wezi Nguni's advocates, in which they enclosed a Notice of Appointment as Advocates, and they requested for a copy of the Writ of Summons and Statement of Claim, eight (8) days after the Order of injunction was granted.

3.10 Therefore, even assuming that Wezi Nguni was served with the said documents on time, he would not have filed documents in response, as he only appointed advocates Eight (8) days later.

3.11 Continuing in submission, Counsel stated that they had perused the defence, and observed that Wezi Nguni disputed the claims that Mungulasu Gobah had made. Thus, he had demonstrated that there are contentious issues in this matter, which turned on whether the Order of injunction should have been granted.

3.12 Counsel also submitted that Orders of injunction are granted in the Court's discretion, with regard being had to the circumstances of the case. Further in submission, Counsel stated that Wezi Nguni had bemoaned the late service of the application, but the position that was taken by Counsel, was that they were served the application, which was the subject of this Ruling, was on the very day that it was coming up for hearing.

3.13 However, Mungulasu Gobah had not complained, and he had applied for time to respond to the application. It was

stated that Counsel had highlighted the explanatory notes in ***Order 29 of the Rules of the Supreme Court of England***, which provide that the best option for Wezi Nguni, was to have appealed against the Order of injunction.

3.14 Therefore, this was not a proper case to apply for an Order to discharge the Order of injunction, after the Court had applied its' mind to the issues. The submission was also that speaking of clean hands, there was no evidence to show that the Order of injunction had been complied with, as the rentals had not been paid into Court, as Ordered by the Court.

3.15 The prayer was that the application be dismissed with costs to Mungulasu Gobah.

**REPLY BY COUNSEL FOR WEZI NGUNI**

3.16 The submission in reply, was that the Court was invited to look at the record, and note that on 1<sup>st</sup> October, 2024, a Notice of Payment into Court was made for K9, 000.00. It was also his submission, that Wezi Nguni was yet to pay the next instalment into Court, as payments were made bimonthly.

3.17 Counsel submitted that it was not enough to argue that contentious issues had been raised in this matter, and that they had demonstrated in their arguments, that Mungulasu Gobah had not demonstrated what irreparable injury would be suffered in the absence of an Order of injunction.

3.18 It was added that this was manifest from the fact that the Order of injunction was directed towards the payment of

rentals, which could easily be accounted for, assuming that this Court found in favour of Mungulasu Gobah at trial.

#### **4. DECISION OF THIS COURT**

4.1 I have considered the application. It was made pursuant to ***Order 27 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia*** as read with ***Order 29/1A/33 of the Rules of the Supreme Court of England, 1965, 1999 Edition.***

4.2 ***Order 27 Rule 4 of the High Court Rules*** states as follows:

***“4. In any suit for restraining the defendant from the committal of any breach of contract or other injury, and whether the same be accompanied by any claim for damages or not, it shall be lawful for the plaintiff, at any time after the commencement of the suit, and whether before or after judgment, to apply to the Court or a Judge for an injunction to restrain the defendant from the repetition or the continuance of the breach of contract or wrongful act complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right, and such injunction may be granted by the Court or a Judge on such terms as to the duration of the injunction, keeping an account, giving security or otherwise, as to the Court or a Judge shall seem reasonable and just:***

***Provided that any order for an injunction may be discharged, varied or set aside by the Court or a Judge, on application made thereto by any party dissatisfied with such order.”***

4.3 The explanatory notes in ***Order 29/1A/33 of the Rules of the Supreme Court of England*** provide that:

***“An injunction granted ex parte may on sufficiently cogent grounds be discharged or waived on an application itself made ex parte.”***

4.4 The affidavit which was filed in support of the application, and which was deposed to by Wezi Nguni, stated that while Mungulasu Gobah commenced these proceedings in May, 2024, he only served Wezi Nguni a segment of the Court process on 11<sup>th</sup> June, 2024, in the afternoon, on the day before that which this Court had set, for the hearing of the application for an Order of injunction.

4.5 He also deposed, that as even submitted by Counsel at the hearing of the application, the Writ of Summons and statement of claim were not served on him. Wezi Nguni exhibited as ‘WN1’, the letter of service dated 11<sup>th</sup> June, 2024.

4.6 It was his averment, that he then engaged Counsel on 12<sup>th</sup> June, 2024, who filed the Notice of Appointment as Advocates, which was exhibited as ‘WN2’ on 13<sup>th</sup> June, 2024. Wezi Nguni deposed that as advised by his advocates, every summons shall be served on the other party Four (4) clear days before the hearing date.

- 4.7 It was deposed that Wezi Nguni had been advised by his advocates, that an application for an Order of interim injunction is anchored on a pre-existing cause of action. However, at the time that the application for an Order of injunction was served, the Writ of Summons and statement of claim were not served. Thus, it was impractical for Wezi Nguni to prepare an affidavit in opposition or a defence to the claims.
- 4.8 Then as shown by exhibit 'WN3', his advocates wrote to the advocates for Mungulasu Gobah, requesting for copies of the Writ of Summons and statement of claim. He deposed that the response enclosing the said documents was only received on 16<sup>th</sup> July, 2024, as shown by the letter of service which was exhibited as 'WN4'.
- 4.9 Wezi Nguni stated that as advised by his advocates, an application for an Order of injunction may be discharged where an applicant has not come to Court with clean hands.
- 4.10 In the List of Authorities and Skeleton Arguments in support of the application, reliance was placed on the case of ***Attorney General v Times Newspaper Limited*** <sup>(6)</sup>, stating that *Lord Oliver* in that matter, stated that the legal fabric upon which interim injunctions were designed, was to ensure the efficient administration of justice, so that the rights which it is the duty of the Court to protect, can be fairly administered and be efficiently protected by the Courts.

- 4.11 It was also stated that in Order for an interim injunction to be granted, there must be a serious question to be tried, and that the Order of injunction will be granted to prevent irreparable injury being caused to the Plaintiff. In that regard, the case of ***American Cynamid v Ethicon Limited*** <sup>(3)</sup> was cited as authority.
- 4.12 The law in ***Order 27 of the High Court Rules, Chapter 27 of the Laws of Zambia***, was cited, and further reliance was placed on the explanatory notes in ***Order 29/1A/33 of the Rules of the Supreme Court of England*** as providing that where an Order of injunction is obtained irregularly by the suppression of facts, it may be discharged.
- 4.13 The case of ***Knarf v British Gypsum Limited*** <sup>(7)</sup> was relied on, as where the Court stated that there is a golden rule that an applicant for relief without notice, must disclose to the Court all matters relevant to the exercise of the Court's discretion, and that failure to observe the same, entitles the Court to discharge the Order even if the circumstances would otherwise justify the grant of such relief.
- 4.14 The cases of ***R v Kensington Income Tax Commissioners, Ex-parte Princess Edmond de Polignac*** <sup>(1)</sup> and ***Stripes Zambia Limited v Cinderella Investments Limited and Sana Industries Limited*** <sup>(9)</sup> were further relied on, as authority in that regard.
- 4.15 Reiteration was made that ***Order XXX Rule 3 of the High Court Rules***, requires that every summons must be served Four (4) clear days before the hearing.

- 4.16 Argument was also made, that in this matter, the failure to comply with the Rule, was meant to mislead the Court on facts which had not been disclosed, and that this was evident from the fact that Wezi Nguni had not entered his defence, and yet the Court issued the Order.
- 4.17 Citing the cases of ***Akapelwa (Sued as Induna Inete) & others v Nyumbu (sued as Chief Chiyengele)*** <sup>(11)</sup> and ***Mututwila Farms Limited v John Nortjie*** <sup>(8)</sup>, it was argued that the principles as espoused in the case of ***American Cyanamid v Ethicon Limited*** <sup>(3)</sup> on the granting of Orders of injunction should be considered.
- 4.18 The argument was that the said case, held that in Order for an Order of injunction to be granted, the applicant has to demonstrate that they have a good and arguable case. It was further stated that in the case of ***Shell & BP Zambia Limited v Conidaris and others*** <sup>(2)</sup>, it was held that the right to relief must be clear, in Order for an Order of injunction to be granted, and that an Order of injunction will only be granted where an applicant will suffer irreparable injury, which cannot be atoned in damages.
- 4.19 Argument was made, that Mungulusu Gobah had not demonstrated that he would suffer irreparable injury if the Order of injunction was not granted. Thus, citing the case of ***ZIMCO Properties Limited v LAPCO Limited*** <sup>(5)</sup>, it was stated that the balance of convenience would only have arisen, had Munugulusu Gobah shown that damages would not suffice.

- 4.20 Accordingly, the Order of injunction should be discharged.
- 4.21 In opposition, Mungulasu Gobah deposed in the affidavit in opposition, that after he filed the Writ of Summons and statement of claim on 13<sup>th</sup> May, 2024, he had also filed an ex-parte application for an Order of injunction. However, this Court had endorsed that the application be heard interpartes.
- 4.22 He also averred that Wezi Nguni could not be found, and his advocates applied viva voce when the application came up for hearing to serve the documents on Wezi Nguni by way of substituted service, which application was granted.
- 4.23 It was further deposed that a hearing date of 12<sup>th</sup> June, 2024 was given. However, Wezi Nguni could not be found, and he had stopped picking up Mungulasu Gobah's phone calls and he was not replying to messages which were sent to him on the phone. Mungulasu Gobah further averred that Wezi Nguni's offices were only located at Urban Hotel in Kabulonga on 11<sup>th</sup> June, 2024.
- 4.24 Then at the time that he was able to speak with Wezi Nguni, the Writ of Summons and statement of claim had been misplaced, owing to the fact that he was trying to locate Wezi Nguni, thus their omission from being served with the application for an Order of injunction.
- 4.25 Mungulasu Gobah also in deposing, stated that Wezi Nguni did not appear in Court on the date of hearing of the application for an Order of injunction, and the Court granted

leave for him to proceed with the application on 12<sup>th</sup> June, 2024, having explained the circumstances.

- 4.26 He stated that after the Order of injunction was granted, following an ex-tempore Ruling, which was exhibited as 'MG1, his advocates were only served the Notice of Appointment for Wezi Nguni's advocates on 20<sup>th</sup> June, 2024, which was exhibited as 'MG2'.
- 4.27 Then accordingly, on 16<sup>th</sup> July, 2024, the Writ of Summons and statement of claim which were omitted to be served, were served. Mungulasu Gobah denied having concealed any facts, in making the application for an Order of injunction.
- 4.28 He stated that he had been advised by his advocates, that the proper thing to have been done, was to appeal the Order of the Court. It was also his averment, that he had never met Wezi Nguni in person, as he had consistently refused to reveal his whereabouts.
- 4.29 Note was made that the defence raised serious questions to be tried.
- 4.30 The arguments in the List of Authorities and Skeleton Arguments in opposition were that as held in the case of ***Khalid Mohammed v the Attorney General*** <sup>(4)</sup>, it is an unqualified proposition that a Plaintiff should not succeed automatically whenever a defence has failed. Further, that a Plaintiff must prove his case, and the mere failure of a Defendant's defence does not entitle him to Judgment.
- 4.31 It was also stated that as seen from paragraphs 4, 6, 7 and 8 of the defence, Wezi Nguni had raised contention over

Kenneth Gobah's ownership of the property. Therefore, this demonstrated that there is a serious question to be tried.

- 4.32 Relying on the case of ***Arcades Development Plc v Elajics Limited (T/A Rhapsody's Café and Bar*** <sup>(12)</sup>, the argument was that the Court when granting Orders of injunction, should address its' mind to whether damages would be an adequate remedy, and that the balance of convenience will only be considered thereafter. The case of ***Ubuchinga Investment Limited v Teklemichael Menstab and Semhar Transport and Mechanical Limited*** <sup>(10)</sup> was cited as authority in that regard.
- 4.33 It was argued that even if Wezi Nguni was served the Writ of Summons and statement of claim, he would not have said anything different, from what he had stated in his defence, which established that there is a serious question to be tried. Reiteration was made, that Wezi Nguni had not pleaded that he has a certificate of title for the property, and that Mungulasu Gobah did not conceal any material facts from him.
- 4.34 Arguing that Orders of injunction are granted in the Court's discretion, the case of ***Tawela Akapelwa (sued as Induna Inete) & others v Josiah Mubukwanu Litiya Nyumbu (Suing as Chief Chiyengele)*** <sup>(11)</sup> was relied on.
- 4.35 As regards the argument that Wezi Nguni should have appealed this Court's granting of the Order of injunction, the explanatory notes in ***Order 29/1A/33 of the Rules of the Supreme Court of England*** were reiterated. This it was

argued, was because the issues that Wezi Nguni had raised, were not material, as he had the opportunity of requesting for them before the hearing.

4.36 However, he sat on that right, and he only asked for the documents, Eight (8) days after the Order of injunction was granted.

4.37 Reiteration was made that Mungulasu Gobah had satisfied the requirements in Order for the Order of injunction to be granted.

### **DECISION**

4.38 The application before me is to discharge the Order of injunction on the basis that Mungulasu Gobah in making the application, had conducted himself in manner which was not befitting of the grant of the Order. In that regard, assertion was made, that Mungulasu Gobah only served the application for the Order of injunction, a day before the date which was scheduled for the hearing of the application, being 12<sup>th</sup> June, 2024.

4.39 Further argument was made, that only the application for an Order of injunction was served, without the Writ of Summons and statement of claim, which documents were the anchor of the application.

4.40 In response, Mungulasu Gobah contended that service of the Court documents on Wezi Nguni was impossible, as his whereabouts could not be established, and he had stopped picking up his phone or responding to the messages which were sent to him.

- 4.41 Mungulasu Gobah also stated he only managed to locate Wezi Nguni's offices at Urban Hotel in Kabulonga on 11<sup>th</sup> June, 2024, a day before the hearing date of the application. He explained that as he had been making efforts to locate Wezi Nguni he had in that process, misplaced the Writ of Summons and statement of claim. Therefore, he omitted to serve them together with the application for an Order of injunction.
- 4.42 **Order 27 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia**, empowers this Court to discharge an Order of injunction which is obtained ex-parte, on an application being made by any party that is dissatisfied with the Order.
- 4.43 The explanatory notes in **Order 29/1A/33 of the Rules of the Supreme Court of England**, provide that an Order of injunction, which is obtained ex-parte may be discharged where it was obtained irregularly, on suppression of material facts. From what I can gather from the affidavit which was filed by Wezi Nguni, is that the failure to serve the Writ of Summons and the statement of claim, together with the application for an Order of injunction was meant to mislead the Court.
- 4.44 Therefore, Mungulasu Gobah did not come to Court with clean hands, and the Order of injunction should be discharged.
- 4.45 The record shows that when Mungulasu Gobah commenced these proceedings, on 13<sup>th</sup> May, 2024, he also applied ex-

parte for an Order of interim injunction. I directed that the said application be heard interpartes on 30<sup>th</sup> May, 2024. When the application came up for hearing on that date, Counsel for Mungulasu Gobah informed the Court that they had been unable to serve the Court documents on Wezi Nguni, as his whereabouts were unknown.

- 4.46 I adjourned the matter to 12<sup>th</sup> June, 2024, for hearing of the application, and I also granted Counsel a viva voce Order to serve the application on Wezi Nguni via substituted service on the said date.
- 4.47 The record shows that there is no affidavit of service which was filed, to indicate that the application for an Order of injunction was served on Wezi Nguni via substituted service. What is on record, is an affidavit of service dated 12<sup>th</sup> June, 2024, which shows that Wezi Nguni was served the documents on 11<sup>th</sup> June, 2024.
- 4.48 On 12<sup>th</sup> June, 2024, when the application came up for hearing, Counsel for Mungulasu Gobah informed the Court that they had difficulties serving Wezi Nguni the documents, and that they only managed to do so on 11<sup>th</sup> June, 2024 after he had informed them to leave the documents at his registered office.
- 4.49 Premised on that explanation, I allowed Counsel to proceed with the application, and on hearing Counsel, I granted the Order as prayed.
- 4.50 Wezi Nguni in making the application, did not deny that Mungulasu Gobah had encountered difficulties in serving

him the Court documents. As argued by Mungulasu Gobah, the affidavits which are on record that Wezi Nguni filed, do not state his address as required by **Order 5 of the High Court Rules**.

- 4.51 Mungulasu Gobah admitted that when he served the application for an Order of injunction, there was a lapse in also serving Wezi Nguni the Writ of Summons and statement of claim. He attributed this to having misplaced the documents, as he was trying to locate Wezi Nguni.
- 4.52 It is clear that Mungulasu Gobah had difficulties in locating Wezi Nguni so that he could serve him the Writ of Summons and statement of claim as well as the application for an Order of injunction.
- 4.53 Therefore, it cannot be said that Mungulasu Gobah in his conduct in this matter, he intended to mislead the Court when it granted the application. The authorities which were cited in support of the contention that where a party to an application for an Order of injunction suppresses material facts, the Order of injunction may be discharged, do not apply as a result.
- 4.54 Further argument was made, on the principles that govern the granting of Orders of injunction. These were laid down in the case of **American Cyanamid v Ethicon Limited** <sup>(3)</sup> and they can be summarised as follows:
- i. *Is there a serious question to be tried?*
  - ii. *If yes, would damages be an adequate remedy?*
  - iii. *If yes, the Order of injunction should not be granted.*

*iv. If no, where does the balance of convenience lie?*

4.55 From the Writ of Summons and statement of claim, as well as the defence which was filed, a dispute over ownership of the property has been revealed. However, Kenneth Gobah was issued with a certificate of title for the property. Wezi Nguni however contended that while there is a serious question to be tried, Mungulasu Gobah seeks to restrain the collection of rentals for the property.

4.56 Thus, the collection of rentals being what was restrained, damages would be an adequate remedy. Therefore, the Order of injunction should be discharged.

4.57 Indeed, it is a trite principle of law, that where damages would be an adequate remedy, an Order of injunction should not be granted. However, a consideration of the facts in this matter, show that Kenneth Gobah contends that Wezi Nguni has been collecting the rentals since January, 2000. That is a very long period of time, and Wezi Nguni has not stated that he has capacity to pay the said rentals, should an Order be made against him at trial.

4.58 The explanatory notes in **Order 29/1A/33 of the Rules of the Supreme Court of England** state that:

***“Where an interlocutory injunction has been granted following a full inter partes hearing, there is no jurisdictional bar to the Court hearing an application by the enjoined party to discharge it. Such application may be made where there is liberty to apply, or where the sole or main basis of***

*the application for discharge is that there has been a material change of circumstances since the injunction was first granted (i.e. a crucial new factual development), or where it has become apparent that it is founded on an erroneous view of the law; aliter if the defendant voluntarily gives an undertaking. But generally, the Court will not hear an application to discharge an injunction made after full inter partes hearing where it appears that justice between the parties can as readily be achieved by his pursuing the right to appeal.*

*Where an injunction was obtained ex parte without notice, an aggrieved enjoined party in the first instance should apply to the judge to discharge it and not apply for leave to appeal to the Court of Appeal.*

*Where an injunction was obtained ex parte with notice, and was opposed by the enjoined party but no evidence was filed on his behalf, it is unsatisfactory for that party to pursue an appeal at that stage. Instead, the plaintiff's original motion should be stood over to a subsequent inter partes hearing when the evidence of both sides will be before the court of first instance."*

4.59 In this matter, the Order of injunction was granted after only Mungulasu Gobah was heard on the application. Therefore,

it was not granted following a full interpartes hearing, within the meaning stated in the explanatory notes which have been seen above. The hearing can be said to have been ex-parte hearing for all intents and purposes.

## 5. CONCLUSION

- 5.1 While that is the position, however, there was no suppression of material facts, and the matter does not fall within the ambit of an Order which the Court can discharge.
- 5.2 Wezi Nguni not having made an undertaking that he is capable of paying the rentals ordered, should Mungulusu Gobah succeed at trial, then damages would not suffice, and the balance tilts in favour of the Order of injunction being maintained. I accordingly maintain the Order of injunction as granted on 12<sup>th</sup> June, 2024.
- 5.3 The matter shall come up for Orders for Directions on 19<sup>th</sup> February, 2025 at 08:20 hours. Costs shall be in the cause, and leave to appeal is granted.

**DATED AT LUSAKA THE 5<sup>th</sup> DAY OF FEBRUARY, 2025**

*S. Kaunda*  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**

