

RORAIMA DATA SERVICES LIMITED
v
ZAMBIA POSTAL SERVICES CORPORATION

HIGH COURT
CHISANGA, J.
17th JUNE, 2011.
2011/HN/ARB/01

[1] Civil Procedure - Interim Injunction - Whether award of damages would suffice.

The plaintiff applied for interim protection measures pending arbitration pursuant to Rule 9, of statutory instrument number 75 of 2001. The order sought to restrain the defendant from conducting any commercial transactions on any platform other than "Cash 4 Africa Technology" contracted under the management services agreement between the parties dated 11th August, 2006, or from applying any other platform of technology which in practical effect would conflict with or diminish, or dilute the contractual performance of the said "Cash 4 Africa Technology" in the defendant's electronic cash transfer portfolio.

Held:

1. There is a serious question to be determined by an umpire and there was a probability that the plaintiff is entitled to relief.
2. It is trite law that where damages would suffice, and the defendant is able to pay them, then an injunction should not be granted.
3. In this case, the plaintiff did not quantify the damage it would suffer, and the defendant did not indicate that it would be able to pay whatever damages would be occasioned to the plaintiff.
4. If an injunction were refused, and the plaintiff succeeded, it would get the usual damages for breach of contract.
5. It would be unjust to confine the plaintiff to damages for the breach complained of, if the decision of the arbitration were to go in the plaintiff's favour.
6. If the defendant succeeded, and it were found that the injunction ought not be have been granted, would be adequately compensated in damages on the plaintiff's undertaking to make good any damage.
7. As between the defendant and the plaintiff, the former was likely to suffer more inconvenience if an injunction to restrain them was granted, where the plaintiff was likely to suffer utter

ruin. The balance of convenience tipped in favour of the plaintiff.

Cases referred to:

1. Preston v Luck [1884] 27 Ch D 497.
2. Evans Marshall and Company v Bertola SA [1973] 1 W.L.R. 349.
3. Mobil Zambia Limited v Msiska (1983) Z.R. 86.
4. ZIMCO Properties Limited v LAPCO Limited (1988-1989) Z.R. 92.
5. Vangelatos v Vangelatos and Others Appeal Number 7 of 2006 (unreported)

Legislation referred to:

1. Arbitration Act Number 19 of 2000.
2. Statutory Instrument Number 75 of 2001, Rule 9.

J. Kabuka of Messrs J. Kabuka and Company for the plaintiff.

N. Mukaya Legal Counsel, Zambia Postal Services Corporation for the defendant.

CHISANGA, J.: The plaintiff has applied for interim protection measures pending arbitration pursuant to Rule 9, of statutory instrument number 75 of 2001. The order sought to restrain the defendant from conducting any commercial transactions on any platform other than "Cash 4 Africa Technology" contracted under the management services agreement between the parties dated 11th August, 2006, or from applying any other platform of technology which in practical effect would conflict with or diminish, or dilute the contractual performance of the said "Cash 4 Africa Technology" in the defendant's electronic cash transfer portfolio.

The application is supported by an affidavit sworn by one Mcherson Chanda who has alluded to an agreement for the provision by the plaintiff to the defendant of a web based financial services platform known as 'Cash 4 Africa Technology' for the purpose of facilitating the defendant's electronic cash transfer business which was launched under the domestic brand name of 'Swift Cash'.

The agreement is to subsist for a period of 10 years from 2006, but while it is still running, the deponent has gone to state, the defendant has acquired a replica platform to 'Cash 4 Africa Technology' known as 'Post Global' it has done this without offering the plaintiff the right of first refusal as agreed, and this according to the plaintiff, is a breach of agreement. As a result of the above, the plaintiff has pursuant to the agreement invited the defendant to concur in the appointment of an arbitrator, and awaits the defendant's response.

It is the plaintiff's position that pending the formal commencement of the arbitration, it is urgently necessary that there are interim protection measures as sought in the originating summons.

The defendant has opposed the application by an affidavit sworn by Cathryn Nakamba Chellah. She has not disputed the existence of the agreement, but has drawn the Court's attention to the two tier system of negotiation before an arbitration is contemplated. No comment has been made in paragraph

5 of the plaintiff's affidavit in support, and it has been emphasized that the 'post global' system is not a replica system of the 'Cash 4 Africa Technology,' but a computer software that automates all processes in the post office and fundamentally different from the Cash 4 Africa Technology.

The plaintiff filed an affidavit in reply in which the contents of the affidavit in support were reiterated by pointing to the defendant's evasiveness about the true purport in its acquisition of the 'post global' software, and its intention to migrate the electronic money transfer transactions onto that system in the face of its continuing obligations with the plaintiff on the contract.

At the hearing, learned counsel for the plaintiff Mr. Kabuka submitted that the defendant was in grave breach of the contract, and if left unchecked, the plaintiff's heavy investment in the system would be brought to utter utter ruin, and the plaintiff feels they need interim protection of the Court restraining the defendant from migrating its contractual obligations under the services agreed to the other system the defendant has recently acquired. Counsel further submitted that the defendant had failed to counter the statements in the affidavit in support, and to comment on the exhibits.

Counsel humbly submitted that there was an arbitrable dispute between the parties, and the plaintiff had laid a valid claim for interim protection measures on the usual undertaking to pay damages should it turn out that the interim measures were wrongly granted.

In opposing the application, learned counsel for the defendant, Mr. N. Mukaya submitted that the plaintiff had not qualified the colossal financial loss, but nevertheless should the plaintiff's be successful in the main matter, an order for damages would suffice to atone for any benefits the plaintiff would have lost. Reliance was placed on the case of *Vangelatos vVangelatos*, and *Others* (5).

Counsel further submitted that mere inconvenience on the part of the plaintiff is not enough, and drew the Court's attention to the case of *ZIMCO Properties v LAPCO Limited* (4).

Counsel further submitted that in purporting to accept proposals to amend the clauses, an applicable law, and jurisdiction in a letter of demand three years after the proposed amendment in contemplation of these proceedings, the plaintiff did not act in good faith, and did not come to equity with clean hands.

In reply, learned counsel for the plaintiff Mr. J. Kabuka submitted that the principles on which the application had been launched were set out in section 11 of the Arbitration Act Number 19 of 2000, and they were similar to the ones acknowledged in the authorities referred to by his learned colleague in ordinary civil litigation.

Learned counsel further argued that the right to relief was clear, and that it was imperative that the integrity of the contract be protected by restraining the defendant from migrating the electronic money transfer business to the Post Global from Cash 4 Africa, and in the absence of restraining order, the whole contract would be rendered inoperable, ineffectual, and irredeemable damages on the

plaintiff's heavy investment in the project would be occasioned. Counsel submitted that the scenario was not simplistic, and could not be compensated simply in damages. There were very serious commercial obligations that the parties are bound, and expected to honour. If the interim protection was not granted, the plaintiff stood to suffer irredeemable injury or utter ruin. Counsel went on to argue that the balance of convenience lay with the plaintiff in that from 2006, the defendant had used Cash for Africa Technology platform, and that it was convenient to continue using the platform while the parties try to resolve the dispute, and that the defendant would continue to get the same business it had been getting from its customers under the Cash 4 Africa Technology platform. Legal counsel went on to further submit that the defendant's complaint on the acceptance of the amendment was strange as it had suffered no prejudice, but instead had its financial burden lessened by not having to settle the dispute in London.

I have considered the affidavit evidence filed herein as well as the submissions. It is not disputed that an agreement subsists between the parties where under the plaintiff is to provide management services to the defendant through the Cash for Africa Technology. It is as well undisputed that the defendant had launched a software under which it is to electronically transfer funds on behalf of customers, among other functions. Exhibit "MC5" annexed to the affidavit in support is a request to the defendant to concur in the appointment of an arbitrator, the defendant having failed to give an undertaking not to implement the Post Global. Clause 14 of the agreement makes mention of reference of a dispute to arbitration by either party. Section 9 (1) of the Arbitration Act No. 19 of 2000 provides that:

"an arbitration agreement may be in the form of an arbitration clause in a contract, or in the form of a separate agreement."

Section 11(1) of the said Act further provides that:

"a party may, before or during arbitral proceedings request from a Court an interim measure of protection and, subject to subsections (2) (3) and (4) the Court may grant such measure."

From the affidavit evidence before me, it is clear that there is an arbitration agreement between the parties, and a dispute between them has arisen. The plaintiff has requested the defendant to concur in the appointment of an Arbitral Tribunal pursuant to the arbitration agreement, and the application for interim protection measures is made pending arbitration. Quite clearly then the plaintiff's right to relief is clear. There is a serious question to be determined by an umpire and there is a probability that the plaintiff is entitled to relief. See *Preston Luck (1)* at p. 506.

It is the contention of learned counsel for the plaintiff that if an injunction is not granted, the plaintiff will be ruined. Learned counsel for the defendant has on the other hand argued that damages would suffice. It is trite law that where damages would suffice, and the defendant able to pay, an injunction should not be granted. See the case of *Mobil Zambia Limited v Msiska (3)*.

In this case, the plaintiff has not quantified the damage it would suffer but has referred to the plaintiff's heavy investment. The defendant has not through its advocates indicated that it would be able

to pay whatever damages would be occasioned to the plaintiff.

In considering this issue, I am mindful that the agreement is for a period of 10 years. There is no usual termination clause in the agreement, and it is not conjecture to surmise that the plaintiff's heavy investment is as a result of the long-term contract. If an injunction were refused, and the plaintiff succeeded, it would get the usual damages for breach of contract. These damages would not ordinarily take into account the heavy investment made by the plaintiff. It is my considered view that it would be unjust to confine the plaintiff to damages for the breach complained of if the decision of the arbitrator were to go into the plaintiff's favour.

In the case of *Evans Marshall & Company v Bertola S. A* (2) Sachs L.J. had this to say at page 379 H 380 A A:

"I.S.I, by Mr. Butler's affidavit chose to emphasize the damage to their goodwill and trade reputation that they would suffer if the agency at will which they had held for three weeks was unjustifiably disrupted; he emphasized the difficulty of assessing the resulting damage.

These assertions appear a little naïve when one looks in comparison at the loss of goodwill, the disruption of the trade and litigation with sub agents which would be inflicted on the plaintiffs by an unjustified abrupt termination of an agreement with 14 years to run terminated with the aid of allegations of their having failed to carry out their obligations and having made undue profits.

In my judgment damages would not be an adequate remedy in this case..... The Courts have repeatedly recognized that there can be claims under contracts which, as here, it is unjust to confine a plaintiff to his damages for their breach.

Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary account in a common law action for breach of contract."

I concur with his Lordship's reasoning and am persuaded by it. The agreement between the parties herein has five years to run. Unjustifiable (assuming it is) breach thereof would disrupt trade and lead the plaintiff to ruin. I do not think that the usual damages awarded in breach of contract would relieve the plaintiff. Damages would be totally inadequate, and it would be manifestly unjust to confine the plaintiff to its damages for breach should it succeed in its claim before the arbitrator.

I consider that the defendant, should it succeed and it be found that the injunction ought not to have been granted, would be adequately compensated in damages on the plaintiff's undertaking to make good any damage. As between the defendant and the plaintiff, the former is likely to suffer mere inconvenience if an injunction to restrain them is granted while the plaintiff is likely to suffer utter ruin. The balance of convenience tips in favour of the plaintiff. The case of *ZIMCO Properties Ltd vs LAPCO Limited*(4), aforesaid is in point.

The factors I have pointed out incline me to exercise my discretion in favour of the plaintiff as I agree with counsel for the plaintiff that a simplistic approach to an award of damages is inappropriate in this particular case. It is also pertinent to note, although I am not construing the agreement, that the

parties agreed in clause 14.5 that either party could seek interim relief from a Court of competent jurisdiction to protect their respective interest.

I propose therefore to grant the plaintiff the interim protection measures sought by restraining the defendant from migrating electronic money transfers from the plaintiff's portfolio known as 'Cash 4 Africa Technology' to 'Post Global' portfolio pending arbitration. For the avoidance of doubt, the defendant will be at liberty to use the post global system for all other processes in the post office except for electronic money transfer, and in areas where the Cash 4 Africa Technology is not available.

Plaintiff's claim allowed.