

IN THE HIGH COURT FOR ZAMBIA
2014/HK/143
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(Civil Jurisdiction)

BETWEEN:

ASTOR INVESTMENTS LIMITED

PLAINTIFF

AND

**ZAMBIA ELECTRICITY SUPPLY CORPORATION
LIMITED**

DEFENDANT

Before the Honourable Madam Justice C.K. Makungu

For the Plaintiff: Mr. T.M. Chabu of Freddie & Co.

For the Defendant: Mr. J. Ilunga - Legal Counsel - Zesco Ltd

R U L I N G

Book referred to:

1. 29/L/1 & 2 - Rules of Supreme Court 1999 (White Book)

Cases referred to:

1. Shepherd Homes Ltd v Sandham (1971) Ch. 340; (1970)3 All E.R. 402
2. Locabail International Finance Ltd v Agroexport (1986) 1 W.L.R.. 657;
(1986) 1 All E.R. 901, CA
3. Leisure Data vs Bell (1988) F.S.R 367, CA

4. Nottingham Building Society vs Eurodynamics Systems (1993) F.S.R 468 at 475
5. American Cyanamid Co. v Ethicon Ltd (1975) A.C. 396
6. Shell B.P Zambia Limited v Conidaris and Others (1975) Z.R. 174
7. Tommy Mwendalema v Zambia Railways Board (1978) Z.R. 65
8. Harton Ndove v National Educational Company of Zambia Ltd (1980) Z.R.
9. Zimco properties Limited v Lapco Limited (1988-1989) Z.R. 92
10. Lombe Chibesakunda v Rajan Lekhraj Mahtani (1998) S.J 39
11. Bennie R.W. Mwiinga v Honourable Grey Zulu and others (1990) S.J
12. Manal Investment Limited v Lamise Investment Ltd SCZ No. 1/2001
13. Aristogerasimos Vangelastos v Demetre Vangelatos (2005) Z.R. 132
14. Communications Authority vs Vodacom Zambia Ltd SCZ J No. 21
15. Turnkey Properties v Lusaka West Development Ltd BSK Chiti (sued as receiver) and ZSIC Ltd (15) (1984) Z.R. 85.

Legislation referred to:

1. Electricity (Supply) Regulations Act-Chapter 433 of the Laws of Zambia - sections 9, 12(2)

On 25th March, 2014 the plaintiff applied for a mandatory injunction to direct the defendant company to forthwith reconnect electricity at its business premises situated at Plot 273, Thorite Avenue, Garneton, Kitwe and an order of injunction to restrain the defendant company by its servants, or agents or whosoever from continuing to breach the contract for the supply of power to the aforementioned premises.

The affidavit in support was sworn by Wang Xin and I will quote some of the paragraphs therein:

- “2. That I am the Chairman in the plaintiff herein by reason whereof I am competent to depose hereto facts from within my personal knowledge.**
- 3. That in or about August, 2013, the plaintiff applied for Installation of a transformer of 200KVA capacity for purposes of supplying power for the use of the plaintiff’s welding business at plot 273, Thorite Avenue, Garneton, Kitwe.**
- 4. That on or about the 26th November, 2013, the plaintiff paid the sum of K72,226.83 charged for the intended installation and the defendant undertook to carry out the installation exercise within 3 months. There is now produced and shown to me marked “WX1” a copy of the receipt for the said payment.**

5. **That on or about the 28th February, 2014 the defendant company disconnected power supply to the said premises without notice and without any documentation stating the reasons for disconnection.**

6. **That the plaintiff does not owe the defendant company any money on its account number 4312399 to warrant any disconnection. There is now produced and shown to me marked "WX2" a copy of the receipt for the prepaid meter number 01321323428 showing the said information.**

7. **That despite all reminders to the defendant company, the defendant company has failed and/or neglected to reconnect power to the premises named herein thereby occasioning the plaintiff consequential losses and expenses of K200 per day or diesel and loss of business profit."**

On 27th March, 2014 the defendant filed an Affidavit in Opposition sworn by Lawrence Sinzala, the gist of which is as follows:

- “4. That I am employed as Regional Manager-Kitwe in the defendant company by virtue of which I have authority to swear this my affidavit from facts within my personal knowledge.**
- 5. That I have read the affidavit in support of ex-parte summons for an interim order of mandatory injunction sworn by one Wang Xin and wish to respond to the contents herein.**
- 6. That while it is true that the plaintiff did apply and subsequently paid for an upgrade to three phase supply at Plot 273, Thorite Avenue, Garneton, Kitwe on 26th November 2013 the defendant did not at any time undertake to carry out the works within three (3) months after the payment.**
- 7. That the quotation for electricity supply No. P40112013082939 issued to the plaintiff for the works quoted therein did clearly stipulate that “Due to other outstanding commitments of paid up customer jobs, installation works may commence twelve (12) weeks after**

payment to facilitate material acquisitions and other preparations.” There is now produced and shown to me marked ‘LS1” a true copy of the said quotation.

- 8. That the plaintiff has withheld information from this Honourable Court regarding the real reason why supply to its premises was disconnected on 28th February, 2014.**
- 9. That the defendant disconnected supply from the plaintiff’s premises because the former was found to have hooked conductors to overhead lines passing across the premises for purposes of using electricity without charge. There is now produced and shown to me collectively marked “LS2” true copies of photographs depicting the plaintiff’s interference with the defendant’s overhead lines.**
- 10. That the electricity supply consumed by the plaintiff through the method referred to in paragraph 9 above was**

not captured through the installed meter at the premises.

- 11. That the defendant has lost substantial amounts of electricity units through the plaintiff's activities.**
- 12. That I am advised by the defendant's advocate and verily believe that an injunction is granted if the loss suffered cannot be atoned for by damages.**
- 13. That in paragraph 7 of the affidavit in support of the application herein the plaintiff is able to quantify in monetary terms what it purports to be the consequential loss and expenses as a result of the alleged breach of contract.**
- 14. That this is not a proper case where the relief of injunction, in whatsoever form, can be granted."**

On 1st April, 2014 an Affidavit in Reply sworn by the same person namely Wang Xin was filed. The salient parts of it are as follows:

- "3. That it is not true that the plaintiff had hooked conductors to overhead lines**

passing across the premises for purposes of using electricity without charge.

- 4. That the alleged hooking, if any, has no connection whatsoever to the defendant's account number 4312399 and prepaid meter number 013223428 to warrant any disconnection.**
- 5. That the defendant never left any disconnection document stating reasons for disconnecting power supply to the above mentioned account.**
- 6. That as regards paragraphs 12-13 of the Affidavit in Opposition, I am advised and verily believe that the principles relating to grant of mandatory injunctions are different from the restraining/prohibitory injunction.**
- 7. That the quotation exhibited as "LS1" was fabricated by the defendant as it shows quotation of 26th March, 2014 when I was given a different quotation in August, 2013 and paid for the same on 26th November, 2013.**

- 8. That the said fabricated quotation is a draft and not valid as it was not even signed by the defendant's agent.**
- 9. That I am advised and verily believe that fabrication of evidence amounts to an offence under section 108(a)(b) of the Penal Code Cap. 87 of the Laws of Zambia for which Mr. Lawrence Sinzala should be prosecuted."**

The plaintiff's advocate relied on the affidavit in support and "skeleton arguments" filed herein on 1st April, 2014. They are in my view not skeleton arguments because they are detailed and ten pages long, so he should have just labeled them submissions. I will only pick out the points which I consider to be necessary for my decision;

He submitted that the principles of mandatory injunction are quite distinct from the principles prohibitory injunctions. To fortify this, he relied on editorial notes **29/L/1 and 29/L/2 of the 1999 White Book** (1). He therefore based his arguments in support of the application for a mandatory injunction on the principles laid down in the White Book under 29/L/1 that:

"The Court has jurisdiction upon an interlocutory application to grant a

mandatory injunction directing that a positive act should be done to repair some omission or to restore the prior position by undoing some wrongful act but it is a very exceptional form of relief.....”

Further that;

“In *Shepherd Homes Ltd v Sandham (1)*, Meggry J. stated general guidelines for the determination of an application for a mandatory interlocutory injunction. His Lordship said (at P. 349); the applicant’s case has to be “unusually strong and clear” before a mandatory injunction will be granted and added (P. 35) that; “ in a normal case,” the Court must, *inter alia* feel a “high degree of assurance” that at the trial, it will appear that the injunction was rightly granted. His Lordship stressed that the requisite degree of assurance was a higher standard than was required for a prohibitory injunction at that time, that is, higher than the “prima facie case” test which applied before the *American Cyanamid Co.* was decided by the House of Lords in

1975..... The American Cyanamid Co. guidelines should not be regarded as relevant to the determination of such applications and the general guidelines stated by Megarry J. in the *Shepherd Homes Ltd* case were approved by the Court of Appeal in *Locabail International Finance Ltd vs Agroexport* (2).

In the case of *Leisure Data vs Bell* (3), it was said that circumstances can arise (e.g. where there is “a salvage element” involved) where it is necessary that some form of mandatory order should be made to deal with a situation which cannot on the practical realities be left to wait until the trial. Under the same note 29/L/1 it is stated that the concise summary of the law can be found in *Nottingham Building Society vs Eurodynamics Systems* (4), where Chadwick J. said: the principles to be applied are these: First, the overriding consideration is, which course is likely to involve the least risk of injustice if it turns out to be “wrong” in the sense of granting an interlocutory injunction to a party who fails to establish

his right at trial (or would fail if there was a trial) or, alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. Secondly, in considering whether to grant a mandatory injunction, the Court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby persevering the *status quo*. Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the Court does feel a high degree of assurance that the plaintiff will be able to establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused, sufficiently outweigh the risk of injustice if it is granted.”

In the light of the foregoing, Mr. Chabu submitted that the plaintiff has shown that it deserves a mandatory injunction at an interlocutory stage because granting the injunction is likely to

involve the least risk of injustice to the defendant if it turns out to be “wrong” If the plaintiff failed to establish his right at trial, the plaintiff would pay the defendant for the consumption of power. On the other hand, the risk of injustice the plaintiff would suffer if the mandatory injunction is refused, sufficiently outweighs the risk of injustice if it is granted as the plaintiff would go for months without electricity whilst awaiting Judgment after trial. He further submitted that the plaintiff has established a high degree of assurance that it will be able to establish its right at trial because the disconnection was done illegally and in breach of section 9 of the Electricity Act Chapter 433 of the Laws of Zambia which requires the defendant to only disconnect if the consumer has failed to pay charges lawfully due in terms of the conditions of supply or the agreement as the case may be or if the consumer has failed to comply with conditions of supply or the regulations and failed to remedy the default within seven days of receiving from the operator of the undertaking, a notice served on the consumer in accordance with section twenty nine calling upon the consumer to do so.

He said the plaintiff at whose premises a pre-paid meter has been installed by the defendant, did not owe the defendant any money for the services that were provided before disconnection. He prayed that for these reasons a mandatory injunction be granted as prayed.

Mr. Chabu went on to make submissions in support of a prohibitory injunction and he relied on the following cases:

- 1. *American Cyanamid Co. v Ethicon Ltd* (5)**
- 2. *Shell B.P Zambia Limited v Conidaris and Others* (6)**
- 3. *Tommy Mwendalema v Zambia Railways Board* (7)**
- 4. *Harton Ndove v National Educational Company of Zambia Ltd* (8)**
- 5. *Zimco properties Limited v Lapco Limited* (9)**
- 6. *Lombe Chibesakunda v Rajan Lekhraj Mahtani* (10)**
- 7. *Bennie R.W. Mwiinga v Honourable Grey Zulu and others* (11)**
- 8. *Manal Investment Limited v Lamise Investment Ltd* (12)**
- 9. *Aristogerasimos Vangelastos v Demetre Vangelatos* (13)**

Mr. Chabu submitted further that the main case herein is a unique subject matter namely “electricity” and the plaintiff is not only claiming damages. The loss of electricity to premises in perpetuity cannot be adequately atoned for by damages. He said from the affidavit in support and exhibits “WX1” and “WX2”, it is quite clear that the plaintiff has a clear right to the reliefs sought as it is not in dispute that the plaintiff is the holder of pre-paid meter number 01321323428 whose account number is 4312399. So it is the plaintiff’s alternative prayer that the defendant be restrained from discontinuing the power supply.

In response, learned counsel for the defendant submitted that an injunction cannot be granted where damages would be an adequate alternative remedy. To fortify this, he relied on the case

of ***Communications Authority vs Vodacom Zambia Ltd*** (14) where the Supreme Court said *inter alia* that in injunction cases, irreparable injury is the first and primary factor to consider. He pointed out that in paragraph 2 of the endorsement on the Writ, the plaintiff claims: “Alternatively, to installation of transformer, an order for refund of K72,226.83 the same being the money paid for the installation of a transformer and in paragraph 3, the claim is for “Special damages for diesel expenses of K200.00 per day for the use of the generator and loss of business profits from date of disconnection.”

He therefore submitted that damages would be an adequate alternative remedy should the plaintiff succeed in this action and urged me not to grant an injunction.

He further submitted that the plaintiff has not shown a clear right to the relief sought. The defendant however, has shown in the affidavit in opposition that the plaintiff interfered with the overhead lines. In terms of Regulation **12(2) of the Electricity (Supply) Regulations, Chapter 433** (1) of the Laws of Zambia , the defendant is empowered under such circumstances to forthwith discontinue the supply of electricity without prior notice. Regulation 12(2) provides:

“Where the undertaker is satisfied that immediate action is justified in the

customer's interest or in the public interest as a result of any of the circumstances set out in paragraphs (a),(b),(c) and (d) of sub regulation (1), he may forthwith discontinue the supply of electricity without prior notice."

He said paragraphs (c) and (d) of sub-regulation (1) referred to in the provision relate to installations operated in such a way as to endanger any person and installations interfering with the efficient supply of electricity to any other consumer, respectively. In addition, he said it is clear from exhibit "LS2" of the defendant's affidavit in opposition that the plaintiff's activities on the defendant's overhead lines were a safety hazard likely to interfere with the efficient supply of electricity to other consumers. He argued further that granting the plaintiff an injunction would entail that the plaintiff benefits from its own wrongs. The discontinuance of supply was as a result of the plaintiff's own misconduct, therefore the plaintiff has come to Court with dirty hands and its application should be dismissed with costs.

From the affidavit evidence my findings of fact are as follows:

It is not in dispute that the plaintiff is involved in the business of welding at Plot 273, Thorite Avenue, Garneton Kitwe. That the

defendant used to supply the plaintiff with electricity through a pre-paid meter number 01321323428 for a period of time which has not been disclosed in the affidavits, until 28th February, 2014 when the defendant decided to disconnect the power supply without giving the plaintiff notice of disconnection. The defendant's decision to disconnect was based on the facts that the plaintiff had hooked some conductors to the overhead lines belonging to the defendant which pass across the plaintiff's business premises and the defendant asserts that the said conductors were used to evade paying charges for electricity that was being consumed at those premises.

It is also not in dispute that on 26th November, 2013 the plaintiff paid the sum of K72,226.83 to the defendant for the installation of a transformer of 200 KVA capacity for the purpose of supplying power for use at the plaintiff's business premises. At the time that this case was instituted on 25th March, 2014 the transformer had not yet been installed. Since the power supply was disconnected, the plaintiff has been able to carry on with its business using its own generator.

Having considered the submissions made by both advocates and the endorsement on the Writ, I am of the view that it was improper for the plaintiff to fail to disclose the reason why power was disconnected. I further find that the circumstances of this case do not warrant the grant of any injunction, be it mandatory

or prohibitory. I will avoid making comments which may have the effect of pre-empting the decision of the issues which ought to be decided on the merits at trial as that is the proper way of dealing with interlocutory injunction applications. (See ***Turnkey Properties v Lusaka West Development Ltd BSK Chiti (sued as receiver) and ZSIC Ltd*** (15).

I refuse to grant a mandatory injunction because the plaintiff's case is generally not unusually strong and clear. I do not feel a high degree of assurance that if I grant a mandatory injunction, at the trial, it will appear that it was rightly granted. The risk of injustice if this injunction is refused does not outweigh the risk of injustice if it is granted.

The claim for a prohibitory order lacks merit because the defendant has already stopped supplying power to the plaintiff. The defendant cannot be restrained from doing what it has already done and all the requirements for the grant of an interlocutory injunction have not been satisfied.

For the foregoing reasons, the application is refused. Costs shall be in the cause. Lastly, I urge the parties to consider mediation as an alternative way of resolving the dispute.

Dated at Kitwe this 25TH day of June, 2014.

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C.K. Makungu
JUDGE