IN THE HIGH COURT FOR ZAMBIA **2015/HP/1237**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

RITA ILONA HOARE **PLAINTIFF**

AND

GENERAL NURSING COUNCIL OF ZAMBIA **1ST DEFENDANT**

ATTORNEY GENERAL **2ND DEFENDANT**

CHILIKWELA OSWELL, KAYEWA CYPRIAN and NCHIMUNYA ROSEMARY (sued as Partners T/a Agape Nursing College**)** **3RD DEFENDANT**

FOR THE PLAINTIFF: **Mr. M. J. Katolo, Messrs Milner Katolo and Associates, Lusaka**

FOR THE 1 ST DEFENDANT: **Mr. K. M. Simbao, Mulungushi Chambers, Lusaka**

FOR THE 2ND DEFENDANT: **N/A**

FOR THE 3RD DEFENDANT: **N/A**

Before the Hon. Mrs. Justice A.M. Banda-Bobo on the 13th day of November, 2015.

RULING

Cases referred to:

1. *American Cynamid Company vs. Ethicon Ltd [1975] AC 396*

2. *Jones vs. Pacaya Rubber and Produce Co Ltd [1911] 1K.B. 455*
3. *Harton Ndove vs. National Educational Company of Zambia Limited [1980] ZR 184.*
4. *Tau Capital Partners Incorporation, Corpus Globe Nominees Limited vs. Mumena Mushinge and 2 Others [2008] ZR 179*
5. *Turnkey Properties vs. Lusaka West Development Company Ltd., B.S.K Chiti (sued as receiver), and ZSIC ltd [1984] ZR 85*
6. *Shell and BP Zambia Limited vs. Conidaris and Others [1975] ZR 174*
7. *Luciano Mutale and Jackson Chomba vs. Newstead Zimba [1988-1989] ZR 64.*
8. *Moonda Jane Mungaila Mapiko (suing on behalf of Mungaila Royal Establishment), John Muchabi vs. Victor Makaba Chaande [2010] ZR416*
9. *Garden Cottage Foods Ltd vs. Milk Marketing Board [1984] A.C. 130*

Legislation and other authorities referred to:

- *High Court Rules Chapter 27 of the Laws of Zambia (HCR)*
- *Rules of The Supreme Court, (1965), RSC (1999) Edition, White Book (RSC)*
- *McGhee, J.A. (ED). Snell's Equity 31st edition. (Thomson Sweet and Maxwell London)*

This is an application for an Order of Interim Injunction made pursuant to **Order 27 of the High Court Rules Chapter 27 of the Laws of Zambia (HCR)** as read with **Order 29 Rules of The Supreme Court, (1965), RSC (1999) Edition, White Book (RSC)** to restrain the 1st and 3rd defendants and each one of them whether by themselves servants agents or whosoever described from interfering or in any way preventing the plaintiff from attending class or continuing with her training at Agape Nursing College until further Order of Court or until determination of the matter.

The same was supported by an affidavit sworn by the plaintiff herein. It was deposed that on or about 2013 she was enrolled and commenced training as a nurse at Kabwe School of Nursing and Midwifery in Kabwe.

That on 3rd July, 2014 the principal tutor without affording her an opportunity to be heard suspended her from training at Kabwe

School of Nursing and Midwifery for three weeks and deferred the same for one year on allegations of examination malpractice and informed her that she should resume her training on 12th January, 2015 as the same was in accordance with the General Nursing Council of Zambia Rules number 11.1.11.

Further, that she served the suspension which was slapped on her on 3rd July, 2014. On 9th December, 2014, according to the deponent, the Kabwe School of Nursing without giving her an opportunity to be heard again suspended the applicant and informed her that she could only be readmitted into the programme after two years and after submitting to the usual admission process.

It was further deposed that the 3rd defendant wrote to the deponent dismissing her from their programme after receiving a letter from the 1st defendant concerning the afore mentioned allegations of examination malpractice relating to her time at Kabwe School of Nursing. The deponent denied ever being involved in examination malpractice and that, that notwithstanding, she had already served her suspension and could not be punished twice for the same offence. It was said that the 1st defendant had no authority to direct the 3rd defendant to dismiss the deponent from their training program.

Additionally, that the defendants were determined to continue interfering and preventing her from attending class or continuing training at Agape Nursing College unless restrained by an order of

interim injunction. Also, that she trained for 6 months at Agape School of Nursing and had no disciplinary issues. Further, that she would suffer irreparable injury were the injunction not to be granted as she would be denied of an opportunity to secure her livelihood through a chosen career of nursing.

There was an affidavit in opposition to the application herein sworn by one Beatrice Matandiko Zulu who deposed as follows:

That on 3rd June, 2014, the plaintiff was found with illegal answers to end of year examination paper in Nutrition which was to be written on Friday 27th June, 2014. That based on what she termed Rule 11.11.11 of the General Nursing Council School Rules, cheating demands instant dismissal from the Nursing and Midwifery program.

That on or about 3rd July, 2014, sponsors of all the expelled student nurses wrote to the Medical Superintendent of Kabwe General Hospital requesting for an opportunity to be heard.

That on 5th August, 2015, an Adhoc meeting was held addressing the appeal of all the expelled students made to the Medical Superintendent's office. It also addressed matters relating to cheating during examinations and further guidance on how to handle the leakage of end of year examinations.

That the 1st defendant by a meeting held on 22nd and 23rd November, 2012, Clause 7.2 and by letter dated 28th November, 2014 decided to discipline the students facing expulsion for

cheating by expelling the said students for two years. Going on, it was deposed that the 1st defendant did indeed write to the 3rd defendant informing them that the plaintiff had not yet finished serving a two year expulsion period and as such could not be admitted to any Nursing institution until her expulsion period had elapsed.

It was further deposed that the plaintiff was entitled to enroll at any Nursing institution after serving her two year suspension. Additionally, that the 1st defendant was well within its rights to advise the 3rd defendant against enrolling the plaintiff in the nursing program.

In the affidavit in reply, the plaintiff deposed that she was never found with any illegal answers to the end of year examination paper in nutrition on 3rd June, 2014 as alleged in the affidavit in opposition. Further, that she did not cheat in the examination or at all. Additionally that she was not expelled from school but suspended and that at no time did her sponsor write a letter to the Medical Superintendent requesting for an opportunity to be heard and no such letter had been exhibited.

It was further deposed that the alleged Adhoc committee meeting of 5th August, 2015 did not affect her because as of that date, she was suspended and not expelled and only received the letter of expulsion on 12th January, 2014. That she wrote no letter of appeal.

Regarding the decision made in the month of November, 2012, the alleged offence, it was deposed, had not even taken place. Going on, that the letter of 28th November, 2014 did not affect her as it related to expelled students. The deponent said she was on suspension at the time.

It was further deposed that the 1st defendant as did the 3rd defendant fell in gross error and violated her right to attend an education institution of her choice when it influenced the 3rd defendant to expel her from training in the absence of any specific rule of law that forbids her from registering at any other Nursing school of her choice. She insisted that she had been punished twice.

Plaintiff's counsel augmented the affidavit evidence with skeleton arguments in which he cited the well known case of **American Cynamid Company vs. Ethicon Ltd**[1] and referred to the guiding principles in the granting of an injunction or the refusal thereof. I will return to these later. Counsel also drew the attention of the Court to other principles and related authorities. On the question of whether there was a serious issue to be tried reference was made to the cases of **Moonda Jane Mungaila Mapiko (suing on behalf of Mungaila Royal Establishment), John Muchabi vs. Victor Makaba Chaande**[2] and **Harton Ndove vs. National Educational Company of Zambia Limited**[3]. Counsel contended that the material placed before this Court in casu shows that a serious issue or dispute exists between the parties requiring the determination of

the Court. He cited as an example the dispute as to the initial dismissal of the plaintiff from the 1st defendant's Nursing School and that from the 3rd defendant's school.

As regards the principle of maintaining the *status quo* counsel asserted that it was important for the *status quo* to be maintained to enable the plaintiff continue with her tertiary education until this matter is determined. Counsel argued that this was one purpose of an injunction. He cited **Tau Capital Partners Incorporation, Corpus Globe Nominees Limited vs. Mumena Mushinge and 2 Others**[4] and the case of **Turnkey Properties vs. Lusaka West Development Company Ltd., B.S.K Chiti (sued as receiver), and ZSIC ltd**[5] to buttress his contention.

Counsel also drew the attention of the Court to the principle of *the right to relief being clear* and as he did, cited the celebrated case of **Shell and BP Zambia Limited vs. Conidaris and Others**[6] and the case of **Luciano Mutale and Jackson Chomba vs. Newstead Zimba**[7]. Counsel contended that where rules do exist on how a person may be suspended and these rules are not adhered to, the suspension is null and void and should be considered an illegality. Counsel argued at length that the 1st defendant had failed to bring before this Court the rule on which they relied to suspend the plaintiff and that the plaintiff was punished twice by being expelled as many times from two different colleges for an unproven allegation. Counsel further argued that the 1st defendant did not

implement guidelines as enshrined in the School Rules when suspending the plaintiff.

On the question of whether *damages would be an adequate remedy,* counsel cited the case of **Turnkey Properties (supra)** and argued that in the present case, damages will not be an adequate remedy as they would not return her to the position she would have been in had she not been suspended/ expelled.

Quoting the **American Cyanamid case (supra),** counsel contended that the *balance of convenience* lies in favour of the plaintiff. Further, that the undertaking by the plaintiff was sufficient to compensate the defendants should it later be established that the injunction ought not to have been obtained in the first place. Counsel concluded by praying for the application to be granted.

On behalf of the 1st defendant counsel in his skeleton arguments contended that the gist of the 1st defendant's case was that it was only involved in making sure that the punishment for cheating be considered with its policy of two years suspension. Further, that granting an injunction in this matter would not be appropriate as it would have the effect of deciding and concluding the whole case and there would be nothing to litigate upon.

When the matter came up plaintiff's counsel Mr. Milner Katolo sought to and indeed relied on the affidavit evidence and skeleton arguments on record. He however added in his oral arguments that the plaintiff's application was neither frivolous nor vexatious.

According to counsel, if the application was not granted, the injury that the plaintiff would suffer would not be atoned for in damages.

Mr. Katolo while admitting that the plaintiff stood expelled argued that based on the letter dated 4th June, 2016 appearing as exhibit "RIH3", this Court had jurisdiction to grant an injunction to maintain the *status quo ante*, as an injunction can be used to preserve or to restore a particular situation pending trial.

In response Mr. Simbao, counsel for the 1st defendant contended that no injunction can lie against the Attorney General. It was further submitted that it would not be appropriate to grant an injunction in the present case as the decision for which an injunction was sought had already been taken and acted upon. The appropriate action, counsel asserted would have been to apply for a mandatory injunction which is different from the present application. Better still, counsel added, the plaintiff should have taken out a Writ of Mandamus.

The second reason why, according to counsel, this was not an appropriate case for an injunction to be granted was that were this Court to order the 1st defendant to give the plaintiff an examination number, that order will have the effect of determining the actual issue before Court leaving the Court with nothing to try. To buttress, counsel submitted that the Writ of Summons was settled in July, 2015 and in counsel's view, the plaintiff has exhibited no urgency to settle pleadings but has instead waited on the outcome of this application to determine the main issue.

In reply, plaintiff's counsel Mr. Katolo explained that as regards the first limb of argument by Mr. Simbao, the endorsement on the writ of summons was very clear as it showed that the injunction sought was against the 1st and 3rd defendant over whom the Court has jurisdiction to grant the injunction.

Counsel further added that the plaintiff was, according to exhibit "RIH1", suspended for three weeks and that it was her resumption of training that was deferred for one year. The issue, as counsel saw it was that after serving the suspension and having her resumption of training deferred for one year, the plaintiff was then dismissed from training. He referred to exhibit "RIH2" on this point and argued that the plaintiff had been punished twice.

On the issue of settling pleadings, counsel drew the Court's attention to **Order 19 HCR** and submitted that either party can file an Order for Directions.

It was further argued that there were six reliefs sought and the injunction was but one of the six meaning even if it was granted there would still be five more reliefs for the Court to adjudicate on. He reiterated his prayer that the application be granted.

I have anxiously considered the affidavit evidence, skeleton arguments, oral arguments and authorities to which I was referred.

Applications for injunctive relief present any Court before which they are brought with a challenge. A decision has to be made whether or not to grant the relief sought without the applicant

having proved a right to the substantive remedies he seeks in his substantive case against the defendant. The fact that injunctive relief is grounded in equity and thus discretionary may present the temptation for those on the bench to do as they please but it must be remembered that discretionary power must be based on factual considerations that do justice and thus must be exercised judiciously. **J.A. McGhee** notes in **Snell's Equity 31st edition** at **page 404** that "the function of an interim in injunction has been said to be to maintain the *status quo*" **(see also: Jones vs. Pacaya Rubber and Produce Co Ltd[8])**. I will return to this point later. Further and more importantly, the same author notes as follows at page 405 para. 16-20:

> ***Interim injunctions are only available where there is a dispute as to the substantive rights of the parties. They may be granted with a number of objects in mind: to enforce substantive rights even before the dispute is resolved;... The different factual situations in which an injunction may be sought will give rise to different considerations: but in all cases the court will be aware that injunctive relief is being sought in circumstances where the claimant has not yet proven its right to any substantive relief. (emphasis added by Court)***

A discussion of injunctive relief would be incomplete it seems, without referring to the **Cyanamid case (supra)** and for good reason: prior to that case, it was incumbent upon the court before which an application such as the one before this Court was brought, to investigate the likelihood that a final injunction would be granted at trial. The House of Lords, as it was then, held in **Cyanamid (supra)** that in prohibitory injunctions all a plaintiff

needed to do was to prove the possibility and not the probability of success. The consequences of this decision were, as can be imagined, and has now been taken for granted, far reaching. As is observed in **Snell's Equity (supra)** at **page 406 para. 16-22,**

> **This meant that the balance of convenience, which had always been an important factor, became decisive in many more cases, since the initial hurdle in the claimant's path had been lowered....**

Relevant to the present case are a series of questions established in **Cyanamid (supra)** which any court must consider in determining whether an interim injunction such as is sought by the plaintiff in the present case should be granted. Among them is whether there is *a serious question to be tried; balance of convenience;* preserving the *status quo*; *Relative strength of cases* and *special factors.* I will consider the foregoing in turn within the context of the factual matrix in the present application.

The High Court had occasion to consider what the question "is *a serious question to be tried"* entailed in **Moonda Jane Mungaila Mapiko (supra)**. The Court held *inter alia*:

> **....The requirement that there must be a question to be tried therefore, comes down to the proposition that the claim must not be frivolous or vexatious and it must also have some prospects of succeeding.**

Plaintiff's counsel Mr. Katolo contended that there were serious issues to be tried in the present case. I agree. There is, the record will show, a dispute as to the initial dismissal of the plaintiff from

the 1st defendant's Nursing College and the 2nd dismissal from the 3rd defendant's Nursing School. These issues in my view form the core of the dispute between the parties herein and are ones which can only be delved into at trial. Be that as it may, this is but one of the many considerations the Court has to weigh and is of itself insufficient. It cannot be the sole criterion in determining whether an interim injunction should be granted.

It has been held in **Shell & BP Zambia Ltd vs. Conidaris and Others (supra)** that;

> **A court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means "injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired.** (emphasis added by Court)

To be reflected on too is the guidance by the Supreme Court in the **Turnkey case (supra)** that *"In applications for interlocutory injunctions the possibility of damages being an adequate remedy should always be considered."*

It was contended by plaintiff's counsel that giving the plaintiff damages for the injury she has suffered at the hands of the defendants will not be adequate compensation and the only adequate remedy would be to lift the suspension and allow the plaintiff to continue with her studies. A look at the Writ of Summons endorsement No. **"IV"** however indicates that one of the remedies that the plaintiff is seeking is:

Damages for mental distress and anguish against the defendants and an account of the unlawful termination of the plaintiff's training as a nurse. (emphasis added by Court)

Clearly, this runs counter to the plaintiff's claim that damages will not be able to atone for the injury that may result were she to succeed in her substantive case against the defendants. It has not been shown to this Court that the injunction sought is necessary to protect the plaintiff from irreparable injury. I do not consider that letting the plaintiff continue in her present state of expulsion would amount to irreparable damage that could not be atoned for in damages. In the view that I take what will result from a denial of injunctive relief to the plaintiff is mere inconvenience from not having to continue with her training. This to me is not injury that meets the test in **Shell & BP (supra).** It is not so considerable as to be deemed incapable of being adequately remedied or atoned for by damages.

In any case, and as Mr. Simbao had quite correctly argued in his oral submissions, it would not be appropriate to grant an injunction in the present case as the decision for which an injunction was sought had already been taken and acted upon. By plaintiff counsel's own admission the plaintiff was already serving her expulsion.

In view of what I have just said, it would be irrelevant to consider the *balance of convenience* in which the first port of call would be to consider whether the plaintiff would be adequately compensated by

damages. (I however, for the sake of clarity, dealt with the other considerations which ought to be considered in deciding whether to grant injunctive relief). This as I have already said is feasible under the circumstances and facts of the present case as is the question of whether the defendant would be adequately compensated by the plaintiff were the interim injunction to be granted but the defendant succeeded at trial. It has been held in **Shell& BP (supra)** that:

> **Where any doubt exists as to the plaintiff's rights or if the violation of an admitted right is denied the court takes into consideration the balance of convenience to the parties. The burden of showing the greater inconvenience is on the plaintiff.** (emphasis added by Court)

In my view, the plaintiff did not discharge her burden of showing the greater inconvenience in this respect which as I see it, lies with the defendants.

Were there to be a doubt with respect to the foregoing, it would become relevant to consider other issues among them *status quo*. As regards this, Lord Diplock opined in **Cyanamid (supra):** *"Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo".* What amounts to *status quo* seems to have steadily but worryingly become amorphous and subject to all manner of constructions if only to buttress the need for an injunction in any case by whatever name called however conceived and contrived. This Court adopts **Snell's Equity's (supra)** explanation at **page 408 16-22:**

The *status quo* refers to the period immediately preceding the commencement of proceedings (or application notice if substantially later), and not to the period before the conduct which led to the litigation (emphasis added by Court) **(see: Garden Cottage Foods Ltd vs. Milk Marketing Board[9])**

It has been held in the **Tau case (supra)** that maintaining a *status quo* is meant only to prevent rendering "the [final] judgment ineffectual".

Mr. Katolo, plaintiff's counsel was of the view that granting the relief sought would maintain the *status quo.* I have, in view of what I have said above, intractable difficulties in accepting this argument. To accede to Mr. Katolo's argument would not be to maintain the situation as it existed in *"the period immediately preceding the commencement of proceedings"* which is the correct implication of *status quo* but to return the parties to their relative positions before the impugned actions were taken that is to say *"to the period before the conduct which led to the litigation"*. In essence, it would entail creating conditions only favourable to the plaintiff (by undoing a decision which has already been taken) in which she would continue her training and potentially render the final decision academic were this Court to decide in favour of the defendants. This the Court cannot do.

Relative strength of cases entails that the Court should not venture into anything even remotely resembling a trial predicated on affidavit evidence which forms the basis for an application of injunctive relief before the main matter is heard on the merits. On

this score, the record will show, many issues were raised both in the affidavits skeleton arguments and oral arguments which issues can only be dealt with in the main matter. In arguing on the merits of the decision of the 1st and 2nd defendant, counsel wanted the Court to pronounce itself on matters that were only fit for trial. A delineation between matters fit for an interim injunction application and those that must be determined at trial must always be observed. This I say because the danger for both counsel and Court to stray into substantive matters at this stage were the foregoing dissimilarity is not observed is real and present.

As regards *special factors, e*ach case will, given its own set of circumstances and facts, present such special factors as would require a serious consideration by the Court hearing the application. It is worth noting though that such special factors only pertain to the question of *balance of convenience.*

Before I conclude I note that Mr. Simbao, 1st defendant's counsel sought, on behalf of his client to correct the apparent errors in the affidavit in opposition through the device of skeleton arguments. This shortcut method of doing things is deprecated. **Order V r.14** is clear on the procedure to take under circumstances were the affidavit is defective or erroneous. Counsel's attention is drawn to the said order which provides as follows:

> **14. A defective or erroneous affidavit may be amended and re-sworn, by leave of the Court or a Judge, on such terms as to time, costs or otherwise as seem reasonable.**(emphasis added by Court)

Having said that, in view of the foregoing reasons this Court is of the considered view that this is not a proper case in which to grant an interim injunction.

Costs follow the event to be taxed in default.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS ..... DAY OF NOVEMBER, 2015.

MRS. JUSTICE A. M. BANDA-BOBO
HIGH COURT JUDGE