

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)

2015/HP/0889



BETWEEN:

TWO THIRDS VOLTCON LIMITED

PLAINTIFF

AND

ZESCO LIMITED

DEFENDANT

Before the Honourable Mr. Justice C.F.R. Mchenga SC

For the Plaintiff: No appearance

For the Defendant: N. S. Sikazwe, Chief Legal Officer, ZESCO

RULING

The plaintiff, by writ of summons, seeks the following reliefs:

- (i) *Specific performance for the immediate payment of the outstanding balance of ZMK K1,200,180.39 for the contract dated December 2013, entered between them and the defendant herein*
- (ii) *An order for an interim injunction restraining the defendant whether by themselves, their servants or agents or any of them or otherwise from collecting or otherwise dealing with the 5 drums of cables situated at the plaintiff's warehouse in Northmead Lusaka or in any manner which is detrimental to the interests*

of the plaintiff in the said property, interfering with the plaintiff's quite enjoyment of peace

- (iii) Interest at the bank lending rate on all monies found due*
- (iv) Damages for inconveniences caused by the defendants actions*
- (v) Any other relief the court may deem fit*
- (vi) Costs*

The affidavit in support of the application for the interlocutory injunction was sworn by Kharen Mulenga, the plaintiff's managing director. He deposed that in December 2013, the defendant awarded the plaintiff a contract to supply 33KV cables and excavate and lay 11KV cables in Lusaka at a cost of K32,236,622.69. Between December 2014 and 4th June 2015, the plaintiff wrote the defendant, on three occasions, requesting for payments on the contract following some works they had performed. The defendant responded to their requests on 4th June 2015, querying the amounts they were asking for and the plaintiff replied the following day.

He also deposed that despite several attempts to have the defendant pay the plaintiff for works so far undertaken, the defendant has neglected to do so. As a result, the plaintiff has suffered financial loss and will suffer irreparable damage if the defendant is allowed to collect the 5 drums of cables from their premises.

The application is opposed. Christopher Phiri, a divisional manager with the defendant, deposed that the plaintiff and the defendant entered into two contracts; ZESCO/070/2013 valued at K7,070,277 and ZESCO/070/2013 valued at K42,795,778.36. He also deposed that clause PC 46 of both contracts provide for arbitration in accordance with the Zambia Arbitration Act, Act No. 29 of 2000, in the event of any dispute between the parties. He deposed that the plaintiff has made no effort to seek arbitration before coming to court and asking for the injunction.

He also deposed that the two contracts have since been terminated because of repeated breaches which the plaintiff was warned of but failed to attend to.

In his affidavit in reply, Kharen Mulenga deposed that K1,200,180 is still outstanding on the claims submitted to the defendant for materials delivered and works done. He deposed that the defendant's collection of materials has made it impossible for the plaintiff to fulfil their obligations under the contracts. He also deposed that he is not averse to attending arbitration over their disagreements but said lifting the injunction, pending such arbitration, will operate

unfairly against the plaintiff because the defendant will collect all the materials.

At the hearing, there was no appearance on behalf of the plaintiff's but I proceeded to hear the application because I am satisfied that they were of the hearing date. They applied for the interim injunction and notified the defendant of the hearing date.

Ms Sikazwe indicated that she was going to rely on the affidavit in opposition to the application for the injunction and skeleton arguments filed on 17th June 2015. She referred to **Section 10 (i) of the Arbitration Act** and submitted that since the contracts provide for arbitration where a dispute arises, the plaintiff should have invoked that option before coming to court.

Counsel referred to the cases of **American Cyanamid Company v Ethicon [1975] AC** and **Shell and BP (Z) Limited [1975] Z.R. 174** and submitted that since the plaintiff was in breach of their obligations under the contracts, they are not entitled to the injunction as they have not established a clear right to relief.

She also referred to the cases of *Redland Bricks v Morris and Another* [1970] AC 652, the *Shell and BP case*, *London and Blackwell RY v Cross* 31 ChD 345, *Aristogerasimos Vangelatos v Demetre Vangelatos Detective Constable Chishimba Vincent B. Malambo (Partner Malambo And Company)* (2005) Z.R. 132 and *Turnkey Properties v Lusaka West Development Company Limited* [1984] Z.R. 85 and submitted that plaintiff is not entitled to an injunction as the injury they are likely to suffer if it is not granted, can be atoned by damages. She argued that the claim against the defendant is one of breach of contract which can be atoned by damages.

Coming to where the balance of convenience lies, Ms Sikazwe referred to the case of *Zimco Properties v LAPCO* [1988] Z.R. 93 and submitted that the defendant will be greatly prejudiced if the injunction is granted as the works the plaintiff was carrying out are part of a national project that is behind schedule. The defendant will be denied the opportunity to complete the project and supply electricity to customers in Lusaka.

I am indebted to counsel for her submissions and I have taken them into account in arriving at my decision. I have also considered the

evidence in the affidavits filed in favour and against the grant of the injunction.

An assessment of the evidence so far before me clearly indicates that there is a dispute between the parties on whether the plaintiff has performed as was required under the contracts. The plaintiff's position is that they have and they seek payment for materials and works done while the defendant's position is that they have failed to perform. This being the case, the plaintiff should have taken or attempted to take the matter for arbitration as is provided for under the contract.

But more important, in the case of *Aristogerasimos Vangelatos v Demetre Vangelatos Detective Constable Chishimba Vincent B. Malambo (Partner Malambo and Company)*, it was held, *inter alia*, that:

"The very first principle of injunction law is that you do not obtain injunction to restrain actionable wrongs for which damages are a proper remedy."

In this case, the plaintiff, together with other remedies, seeks the immediate payment of the outstanding balance of ZMK K1,200,180.39 and damages for inconveniences caused by the defendant's failure to pay that amount. Since the plaintiff has claimed for a quantified amount

and damages for the defendant's breach of the contracts, I am satisfied that they are aware that the wrongs they have suffered and likely to continue suffering if the injunction is not granted, can be atoned by damages.

Consequently, I find that this is not an appropriate case for the court to exercise its discretion to grant an interlocutory injunction. It follows, that the interim injunction granted on 13th June 2015, is hereby discharged, with costs.

Delivered in chambers at Lusaka this 30th day of June, 2015


C. F. R. MCHENGA SC
JUDGE