IN THE HIGH COURT FOR ZAMBIA **2015/HP/2173**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: SECTION 11(2) (C) OF THE ARBITRATION ACT No. 19 OF 2000

AND

IN THE MATTER OF: THE LEASE AGREEMENT DATED THE 30TH DAY OF JULY 2014

BETWEEN:

METL MULUNGUSHI TEXTILES LIMITED 1ST APPLICANT

MOHAMMED ENTERPRISES (TANZANIA) LIMITED 2ND APPLICANT

AND

ZAMBIA CHINA MULUNGUSHI TEXTILES (JOINT VENTURE) LIMITED RESPONDENT

Before The Honourable Mrs. Justice P.C.M. Ngulube in Chambers.

For the Applicants: Mr. B. Mosha, Messrs Mosha and Company

For the Respondents: Mr. B.C. Mutale, State Counsel, Messrs Ellis And Company

---

R U L I N G

CASES REFERRED TO:

1. ***Shell and BP vs. Conidaris and Others (1975) ZR. 174***
2. ***Saudi vs. Ravalia 5 NRLR (1949-1954)***
3. ***Tembo vs. Azalwani (SCZ Judgment Number 6 of 1996)***
4. ***American Cyanamid vs. Ethicon Limited (1975) 1 ALLER 504***
5. ***Turnkey Properties vs. Lusaka West Development Company Limited BSK Chiti and Zambia State Insurance Corporation (1984) ZR 85***
6. ***Preston vs. Luck (1884) 27 Ch D 497***

On the 13th November, 2015, the Applicants were granted an Ex-parte order of Interim Injunction restraining the Respondents from evicting the Applicants who occupy Plot Number 2419 and 2420, Kabwe to allow the Applicants to remain in occupation of the properties pending the hearing and determination of the arbitral tribunal herein. On the 15th of February , 2016, the matter was heard inter partes.

Mr. Mosha, on behalf of the Applicants submitted that he would rely on the affidavit in support of the application and further submitted that the Applicant had met the threshold for the grant of an injunction. He stated that he would rely on the case of ***Shell and BP vs. Conidaris and Others[1] (1975) ZR 174*** and further submitted that the Applicant has a good and arguable case. He further stated that without injunctive relief, the Plaintiffs would suffer irreparable injury and substantive loss.

Mr. Mosha submitted that he had read the Defendant's affidavit in opposition and was alive to the fact that the Lease Agreement between the parties was not registered. He asked the court to take judicial notice of the fact that leases come in different forms. He submitted that at the very least, the Lease Agreement herein

falls in the category of an oral agreement and there is evidence that there was a fair amount of discourse, disagreement and discussions between the parties.

Mr. Mosha submitted that if the court were to find that the Lease is void for want of registration, the court will be in a position to decipher the terms that the parties contracted on. The fact that the Respondent allowed the Applicants to occupy and spend colossal sums of money in itself prevents the Respondent from denying that there was a landlord and tenant relationship. Mr. Mosha submitted that it is a matter of public policy to allow the Respondent to first of all neglect to register a lease and then use it against an investor. He contended that this was unjust, un equitable and an act of bad faith. He stated that the relationship between the parties cannot be reduced to that of a mere licensee.

Mr. Mosha submitted that the issues highlighted demonstrate that the Applicants have a good and arguable case and have made it clear that the issue is not about money. The same has been paid into court in excess of K1.2 million and that the Applicants would like to resolve the issue that has arisen by way of arbitration. Mr. Mosha stated that it would be unjust to allow the Respondent to unilaterally terminate an investment of this magnitude and prayed that the court confirms the injunction.

Mr. Mutale, SC, on behalf of the Respondent opposed the application for interlocutory injunction. He submitted that the Respondent's Advocates filed two affidavits in opposition as well as skeleton arguments. State Counsel stated that he would rely on the two affidavits as well as the skeleton arguments. In the

affidavit in support, it is stated that the Lease was intended to grant the Applicant a tenure of twelve years.

Mr. Mutale, SC, submitted that Sections 4, 5 and 6 of the Lands and Deeds Registry Act clearly indicate that leases of more than twelve months ought to be registered. He submitted that failure do so is fatal and renders the agreement null and void and unenforceable. Mr. Mutale, SC, submitted that Section 6 of the Act is couched in mandatory terms as it states that any document not registered within the time specified shall be null and void. State Counsel stated that the obligation to register a lease rests on both parties who have rights under the lease agreement.

Mr. Mutale, SC, submitted that injunctions are granted upon laid down principles and cited the case of **Shell and BP Zambia Limited vs. Conidaris**. He stated that an Applicant needs to satisfy the court that he has the right to relief and that he has an arguable case. He further submitted that the affidavit in support seeks to enforce an un registered lease and on that score, the application should fail.

Mr. Mutale, SC submitted that another threshold is required to show that the Applicant will suffer irreparable injury if the injunction is not granted. He submitted that the Applicant had failed to meet the threshold and that the affidavit in support is totally silent on the issue and that the Applicant's Advocates relied on the Lease Agreement which was to last for twelve years. Mr. Mutale wondered how a twelve year oral lease can be enforced. He submitted that the relationship between the parties

was merely that of licensor and a licensee, and that it was terminated when the licence to continue was withdrawn. Regardless of payment of monies into court and whatever other commitments that the Applicants may have made, they have not shown any enforceable rights. Mr. Mutale, SC, submitted that an injunction is not one of the remedies that the Applicants are entitled to. The threshold referred to in the skeleton arguments has not been met. He prayed that the application be dismissed for lack of merit.

In reply, Mr. Mosha on behalf of the Applicants submitted that they would rely on equity and submitted that the Applicants presence on the property was not in a vacuum. Even in the absence of a registered lease, there was still a relationship between the parties and that the intention of the parties was for a long term relationship. He submitted that the court must determine the relationship and the rights of the parties. Mr. Mosha prayed that the injunction be confirmed.

I have considered the affidavits that were filed in support as well as those that were filed in opposition to the application for injunction.

The affidavit in support was sworn by one Cosmas Mtesigwa, the country manager of the 1st Applicant and the local representative of the 2nd Applicant. He averred that the Applicant and the Respondent executed a Lease Agreement for the letting of the Respondent's factory and buildings on the 30th of July, 2014. The said Lease was for a period of twelve years with an option to

renew for a further period of eighteen years at a fixed fee of K220,000=00 per month.

Mr. Mtesigwa averred that the Lease Agreement provided for good faith, negotiation and discussion before formal arbitration as the method of settlement of disputes, differences or questions arising from the agreement. Mr. Mtesigwa averred that on the 10th of November, 2015, the Applicants, through their Advocates gave notice to the Respondent for the declaration of a dispute and called for formal negotiations prior to arbitration as provided for in the Lease Agreement. Mr. Mtesigwa averred that the Applicants received a letter from the Respondent dated 28th August, 2015, in which the said Respondent gave the Applicants notice to terminate the Lease.

This was the genesis of the declaration of the dispute. Mr. Mtesigwa stated that on the 10th of November, 2015, the Respondent wrote a letter instructing and ordering the factory manager to vacate the premises by 1000 hours on the 11th of November, 2015. He prayed that the Respondent be compelled to allow the Applicants to remain in occupation of the premises until the final determination of the dispute in the manner provided for the law.

The Human Resource Manager for the Respondent, Mr. Friday Philip Ngulube filed an affidavit in opposition in which he averred that contrary to clause 3.1.1 of the Lease, the Lease Fee of K220,000 per month which was supposed to be paid twelve months in advance remained unpaid as at 17th November, 2015. Further, Mr. Ngulube averred that the Applicants had not

commenced any textile operations on the plant despite under taking to do so within three months of signing the Lease Agreement on 30th July, 2014.

Mr. Ngulube averred that a road map was drawn on the 20th of November, 2014 but the Applicants have still failed to fulfil their side of the obligations of paying the Lease fee and commencing textile operations as provided. He averred than a meeting was held on the 18th of April, 2015 at which it was resolved that the Lease fees would be paid immediately and that the Applicants would commence production within three months. Mr Ngulube averred that the Respondent tried to reach an amicable settlement with the Applicants but failed. It then resolved to terminate the Lease Agreement. He averred that an injunction to await arbitration would worsen the condition of the plant, machinery and equipment which has not been in use for over seven years and has not been serviced for over three years. Mr. Ngulube prayed for the Honourable Court to discharge the ex-parte injunction to enable the Respondent to attend to the servicing of the plant and machinery.

On the 4th of December, 2015,Mr. Mtesigwa, on behalf of the Applicant filed an affidavit in reply to the affidavit in opposition. He averred that the Applicants did upon execution of the Lease bring in a team of experts from India and Tanzania for the purposes of rehabilitating the plant. However, the Respondent was reluctant to hand over the spare parts section of the plant which is central to the rehabilitation works. He further averred that the Respondent has not handed over the houses on the

premises which were supposed to be occupied by the Applicants' staff. He averred that the Applicants have always been ready to settle the Lease Fees but the Respondent has not complied with the road map and refused to sign the minutes of the April, 2015 meeting. As an act of good faith, Mr. Mtesigwa stated that the Applicants have paid the Lease Fees into court pending the resolution of the matter at arbitration.

He prayed that the court grants the Applicants an injunction as prayed.

The Board Secretary for the Respondent, Mr. Sinkende averred that the Lease Agreement marked "CMI" in the affidavit of Cosmas Mtesigwa was executed on 30th July, 2014 and that since then, the said Lease has not been registered with the Lands and Deeds Registry as per requirement of the law. Mr. Sinkende stated that by virtue of non-registration of the Lease, the Applicants were given mere permission to occupy the premises as licensees. The same was terminated by the Respondent through letters that gave the Applicants notice of termination. Mr. Sinkende averred that the Applicants owe the Respondent mesne profits for the use and occupation of the said premises from 30th July, 2014 to date.

Mr. Mutale, SC, filed skeleton arguments in opposition to the ex-parte application for an interim injunction pending the appointment of an arbitral tribunal. In the skeleton arguments, he submitted that the ex-parte order of injunction that was obtained by the Applicants ought to be set aside in the grounds that the purported Lease Agreement relied on by the Applicants is

null and void. Mr. Mutale SC, submitted that the Applicants' claim is founded on a Lease Agreement that has not yet been registered with the Lands and Deeds Registry and that it was a fact not denied by the Defendants. The Learned State Counsel referred to Section 4(1) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia which provides that –

"Every document purporting to grant, convey or transfer land or an interest in land, or to be a lease or agreement for lease or permit of occupation of land for term longer than one year....must be registered within the time hereinafter specified in the Registry or at District Registry if eligible for registration in such District Registry..."

Section 6 of the Act provides that any document required to be registered as aforesaid and not registered within the time specified...shall be null and void. Mr. Mutale, SC, cited the case of ***Sundi vs. Ravalia 5 NRLR[2] (1949 – 1954),*** followed by the Supreme Court in the case of ***Tembo vs. Azilwani[3] (SCZ Judgment Number 6 of 1996)*** where it was held that a document not registered in accordance with the provisions of Section 4 and 5 of the Lands and Deeds Registry Act is null and void for all intents and purposes. He submitted that since the Lease Agreement was not registered, the same is null and void for all intents and purposes, and that there is no wrongful act on the part of the Respondent that the Applicants seek to prevent.

Mr. Mutale, SC, submitted that Order 29 Rule 1A(2) of the Rules of the Supreme Court states that an injunction is an order of the

court restraining the commission or continuance of some wrongful act or the continuance of some omission. He submitted that there is nothing unlawful in the withdrawal with notice of the permission granted to the Applicants by the Respondent to use the subject property for business purposes. State Counsel submitted that it cannot reasonably be argued that the Applicants are entitled to remain in occupation of the property even in the face of the Respondent's notice to vacate. He cited the case *of* ***American Cyanamid vs. Ethicon Limited[4] (1975) 1 ALL ER 504*** where it was stated that-

"In order to obtain an injunction, the Plaintiff must establish that he has a good and arguable claim to the right he seeks to protect."

State Counsel went on to cite the case of Preston vs. Luck (1884) 2 Ch P 497 where it was held that –

"of course to entitle the Plaintiff to an interlocutory injunction, through the court is not called upon to decide finally on the right of parties, it is necessary that the court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it, there is a probability that the Plaintiffs are entitled to relief."

Mr. Mutale, SC, submitted that there can be no estoppel against a statute and that a licensee is not entitled to remain in occupation of land in respect whereof the other has furnished notice to vacate. Further, the Lease Agreement that the Applicants place reliance on was not registered and as such is null and void. He submitted that no prima facie right to relief

has been demonstrated and as such, the ex-parte interim injunction should not be allowed to stand.

State Counsel referred to the case of **American Cyanamid vs. Ethicon** on the issue of damages. He stated that damages may not be sufficient if the wrong is irreparable or outside the scope of pecuniary compensation or if damages would be difficult to assess. He further submitted that the Applicants can be adequately compensated if the arbitral proceedings were resolved in their favour and this therefore defeats the need for an interim injunction. Mr. Mutale, SC submitted that the Applicant has not shown the court that damages would not be an adequate means of compensation or that they will suffer irreparable injury.

Citing the case of **Turnkey Properties vs. Lusaka West Development Company Limited BSK Chiti and Zambia State Insurance Corporation[5] (1984) ZR 85,** State Counsel submitted that the Applicants are trying to use the Injunction to create a situation favourable only to themselves, which is frowned on by the Supreme Court. He urged the court to discharge the Ex-parte Order of Injunction as it lacks merit, with costs to the Respondents.

I have considered the submissions by Mr Mutale, State Counsel and the Learned Counsel for the Applicants. I have also considered the affidavits in support as well as in opposition to the application. The leading case on the grant of an injunction is the case of **American Cyanamid vs. Ethicon**, in which four principles were laid down on the granting of injunctions.

These are –

(1)Whether there is a serious question to be tried;

(2)Whether damages would be an adequate remedy;

(3)Balance of convenience;

(4)Status quo.

In the case of **Shell and BP vs. Conidaris and Others** the court stated that -

"***A court will not generally grant an injunction unless the right to relief is clear and the injunction is necessary to protect the Plaintiff from irreparable injury; mere inconvenience is not enough."***

On the balance of convenience, the American Cyanamid vs. Ethicon case states that –

"The object of an interlocutory injunction is to protect the Plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The Plaintiff's need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiff's undertaking in damages if the uncertainty were resolved in the Defendant's favour at the trial."

The court must weigh one need against another and determine where the balance of convenience lies.

Mr. Mtesigwa averred in the affidavit in support that the Applicants and the Respondent executed a Lease Agreement on the 30th of July, 2014. However, there is evidence on record that the Lease was not registered as provided for under the Lands and Deeds Registry Act. The Applicants seek an order of interim injunction restraining the Respondents from evicting the from the premises until the full determination of the dispute between the parties.

Being careful not to delve into the merits of the matter, I do not find that the Plaintiff has a clear right to relief. The Lease Agreement that was entered into by the parties was not registered and is therefore unenforceable. The affidavit evidence further reveals that that the Applicants did not pay the Lease Fee and I note that money was only paid into Court after notice to terminate the Lease was served on the Applicants by the Respondent. The Applicants entered the Respondent's premises sometime after signing the purported lease in 2014 but to date, there has been no activity as provided for in the road map.

In the case of ***Turnkey Properties vs. Lusaka West Development Company Limited and Another,*** it was stated that –

"the court in deciding whether to grant an injunction or not should not in any way pre-empt the decision of the issues which are to be decided on the merits and the evidence at the trial of the action."

The injury that the Applicants stand to suffer relates to monetary loss which can be adequately atoned for in damages should the matter be decided in their favour.

Due to the fact that damages are an adequate remedy to the injury which the Applicants may suffer, I find that this is not an appropriate matter in which this Court can grant an interim injunction. I accordingly discharge the ex-parte injunction that was granted to the Applicants on the 13th of November, 2015 for lack of merit.

Leave to appeal to the Supreme Court is granted.

Delivered this 1st day of March, 2016.

P.C.M. NGULUBE
HIGH COURT JUDGE