

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

2015/HP/2279

*(Civil Jurisdiction)*



**BETWEEN:**

**VITALINE TEMBO**

**1<sup>ST</sup> PLAINTIFF**

**JAMES BANDA**

**2<sup>ND</sup> PLAINTIFF**

**AND**

**PATRICK PHIRI** (Sued in his Capacity as President  
of the Zambia Banana Traders Association)

**DEFENDANT**

Before Mrs. Justice A. M. Banda-Bobo on the 8<sup>th</sup> day of April,  
2016

**FOR THE PLAINTIFFS: Mr. W. Phiri of Messrs Keith  
Mweemba Advocates**

**FOR THE DEFENDANT: Mrs. Kapita of Kangwa Kapita  
Advocates**

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**R U L I N G**

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**Cases referred to:**

1. Shell and BP Zambia Limited vs. Condaris (1975) ZR 174
2. Communications Authority vs. Vodacom Zambia Limited (2009) ZR 169
3. Hondling Xing Building Company Limited Vs. Zamcapital Enterprises Limited (2010) ZR
4. Hilary Bernard Mukosa vs. Michael Ronaldson (1993 – 94) ZR 26
5. Zambia State Insurance Corporation Limited vs. Muliokela (1990 – 1992) ZR 18
6. Kapema vs. Tewelde (2012/HP/0904) (unreported)
7. Ndovi vs. National Education Company Limited (1980) ZR 184
8. Msanzya Paul Zulu, Wedson White Phiri vs. Anna Mwape and Lusaka City Council (App No. 25 of 2007)
9. London and Blackwell Railway vs. Cross (1836) Vol. 13, Ch D 345

10. Turnkey Properties Limited vs. Lusaka West Development Company Limited (1984) ZR 85
11. American Cynamid Company vs. Ethicon Limited (1975) AC 396
12. Moonda Jane Mungaila Mapiko vs. Victor Makaba Chaande (2010) ZR 416
13. Garden Cottage Foods Limited vs. Milk Marketing Board (1984) AC 130
14. Tau Capital Partners Incorporation, Corpus Globe Nominees Limited vs. Mumena Mushingi, Zambort Limited, Terra Gold (Barbados) Inc.

**Legislation and other authorities used:**

- Markets and Bus Stations Act No. 7 of 2007
- Constitution and Rules of Zambia Association of Banana Traders

The delay in delivering this Ruling is deeply regretted. It was due to circumstances beyond the Court's control.

This is a Ruling on an application for an Order of Injunction filed by the plaintiff as part of their reliefs in a suit filed against the defendants herein. The summons were accompanied by an affidavit in support thereof. The affidavit was deposed to by one Vitaline Tembo, who deposed that the plaintiffs had been suppliers of bananas in bulk the last twelve years and had been members of the defendant organisation for three years; and had been importing bananas in the last two years. Further that they held a permit to import bananas from Tanzania carrying a consignment of 16 tonnes of bananas from Tanzania for resale in Zambia.

It was her deposition that she fell foul of the Zambia Association of Banana Traders (ZABATA) when this was brought to their attention and she was threatened with expulsion; confiscation of the 16 tonnes of bananas and that she would be stopped from trading at the Lusaka City Council run market in respect of the



16 tonnes of bananas. It was her deposition that that market was the only place for sale of bananas, which business the plaintiffs engaged in to sustain their families. The Court was asked to restrain the defendant from confiscating the bananas or interfering with the plaintiff's banana trade at the Lusaka City Council Market or elsewhere or indeed expelling them from ZABATA.

An ex-parte order of injunction was granted with a date for inter-partes hearing. As expected, the application was opposed; on grounds that having become members of the ZABATA voluntarily, the applicants were amenable to the Association's Disciplinary Code of Conduct as they were familiar with its Rules.

Further, that the Association members had been allotted specific selling times in order to regulate and maintain orderly trade.

That infact the plaintiffs who imported the bananas on 7<sup>th</sup> November, 2015 had since sold those bananas; in abrogation of the membership rules as laid down and to which they were expected to abide. It was further said that contrary to their assertions, the plaintiffs can infact trade from anywhere else like other banana traders and could sell at the City Market between 09:00 hours up to 15:30 hours when the ZABATA members left.

In reply, there was a lengthy affidavit covering 22 paragraphs and three pages of A4 paper, whose contents I shall not reproduce

herein but I have duly noted and will refer to if need should arise in the course of the Ruling herein.

Besides the reply, there was filed a list of authorities and skeleton arguments in support of the application. Counsel began by setting out the case for the plaintiff, as appear at paragraph

1 to 1.4. He then went on to deal with the powers vested in this Court regarding matters of this nature. Paragraph 2.2 dealt with the principles upon which the Court can grant or refuse to grant an injunction.

In arguing the case for his client, counsel anchored it firstly on **irreparable damages** that would be occasioned to his client in the event that the Court refused to confirm the injunction. He opined that the injunction was necessary to protect the plaintiff from this irreparable injury. My attention was drawn to the case of **Shell and BP Zambia Limited vs. Conidaris<sup>1</sup>**, on the meaning of irreparable injury or damage. In arguing this point, he contended that since the plaintiffs take care of their families through the banana trade, their families would suffer if the defendant was not restrained from interfering with the plaintiffs' business. Further, that they would become destitute, and the injury would be incapable of repair by monetary damages.

Counsel contended that the plaintiff had a clear right to relief, namely the right to import bananas from anywhere, including Tanzania. To buttress on this issue, my attention was drawn to



the case of **Communications Authority vs. Vodacom Zambia Limited**<sup>2</sup>, where the Court held *inter alia* that:-

**“the modern tendency is only to grant an interlocutory injunction where the right to relief is clear”.**

It was argued that the plaintiffs had shown that they are entitled to import bananas and also to trade from the place designated for trade in bananas at the Lusaka City Market as they had done for the past twelve years.

Counsel went to deal with **Section 5 of the Markets and Bus Stations Act No. 7 of 2007**, and contended that under that Act, the defendant had no authority to restrain the use of the market or any part thereof as suggested and has no right to manage any part of the market.

Counsel then went on to deal with the question of a good and arguable claim or a serious issue to be tried. I was referred to the case of **Hondling Xing Building Company Limited vs. Zamcapital Enterprises Limited**<sup>3</sup>, in which the Supreme Court’s decision in the case of **Hilary Bernard Mukosa vs. Michael Ronaldson**<sup>4</sup> was cited with approval, vis:-

**an injunction will only be granted to a plaintiff who establishes that he has a good arguable claim to the right to which he seeks to protect.**

It was counsel’s arguments on this point that his client had a valid permit to import bananas, which the defendants were opposed to because according to the defendants, the plaintiffs

joined the Association voluntarily. Counsel argued that despite that, the defendant had not shown which Rule the plaintiffs had abrogated for them to be ejected from the ZABATA. Counsel said it was this abrogation of the rules which this Court would be called upon to determine. He went on to state that nevertheless, the plaintiffs' argument was that there is no rule prohibiting them from importing bananas; and if there was, the only authority to promulgate such a rule would be the Government.

On the plaintiff having good prospects to succeed, counsel cited the case of **Zambia State Insurance Corporation Limited vs. Muliokel<sup>5</sup>** and **Kapema vs. Tewelde<sup>6</sup>** where this Court cited with approval the case of **Ndovi vs. National Education Company Limited<sup>7</sup>**—for the proposition that:-

**before granting an interlocutory injunction, it must be shown that there is a serious dispute between the parties, and the plaintiff must show on the material before Court that he has any real prospects at succeeding at trial** (underline supplied).

Counsel found himself submitting that the defendants had in paragraphs 5 of their affidavit in opposition admitted that the plaintiff had been importing bananas for the past twelve years and had never been stopped. Further, that the defendant had not shown any specific or express rule prohibiting the plaintiff from importing bananas. Counsel went on to contend that based on the above, the plaintiff had shown that they have strong prospects of succeeding in the main trial.



There was submission on the status Quo and counsel adverted to the case of **Kapema vs. Tewelde** (supra) with reference to the case of **Msanzya Paul Zulu, Wedson White Phiri vs. Anna Mwape and Lusaka City Council**<sup>8</sup> for the proposition that:-

**“an injunction is intended to maintain the status quo and not to change it.”**

Counsel then drew my attention back to paragraph 5 of the defendant's affidavit in opposition and went on to state that:-

**“it is this status (their trading in bananas) that must be preserved as it is”.**

He repeated that his clients would suffer irreparable injury which would not be adequately atoned for in damages if the status quo is not maintained.

In conclusion, counsel argued that the defendants wanted to violate the plaintiffs' rights which if allowed, would lead to the plaintiffs suffering irreparable injury if the uncertainty was resolved in their favour at trial. The converse, so he submitted, was that the defendant would not suffer any prejudice if the injunction is confirmed. The Court was urged to confirm the ex-parte order of injunction.

At the hearing, plaintiffs' counsel relied on the various affidavits and authorities to which I have already referred. He went on to argument the written submissions as the record will show, and merely rehashed the written submissions.

In response, defendant's counsel relied on the affidavit in opposition and augmented them with viva voce submissions. Her first port of call was the question of sufficiency of damages; and that where the same would suffice, the Court would not grant an injunction. To buttress, she cited the cases of **London and Blackwell Railway vs. Cross**<sup>9</sup>, **Shell and BP (Z) Limited vs. Conidaris** (supra) where it was stated that a Court will not generally grant an interlocutory injunction unless the right to relief is clear and that an injunction is necessary to protect the plaintiff from irreparable damage. Reverting to the matter in casu, it was her contention that the injury to be suffered is not irreparable and can be atoned for by damages.

She then referred me to the case of **Turnkey Properties Limited vs. Lusaka West Development Company Limited (1984) ZR 85**<sup>10</sup> for the holding that an interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial, further that:-

**It is also improper for the Court hearing an interlocutory application to make comments which may have the effect of pre-empting the issues to be decided on the merits of the trial**

Further, that the interlocutory injunction should not be regarded as a device by which a party can attain new conditions favourable only to oneself.

It was counsel's submission that the plaintiff made herself amenable to the provisions of the Constitution and Rules of



ZABATA which were made from time to time and as appear at “pp3”, specifically to Rule 2 therein and that a trader is given a specific daily quota for bringing bananas to the market. Counsel went on to state that the plaintiffs have admitted that they are members of the association and that they were coerced to join the association but that she has not adduced any evidence to show how she was coerced to join a voluntary association whose rules she now seeks to abrogate with the help of an injunction from Court.

It was counsel’s submission that the defendant had, in paragraph 6 of their affidavit in opposition indicated why members can trade at a specific time and within specified locations. In exhibit “pp2”, so counsel stated, the same confirms that position by the market manager who derive their authority from a higher authority and whose duty it is to maintain order, sanity and fairness in trade. Counsel argued that if the injunction is confirmed, it will be used to undermine the authority of the Association, and will allow the plaintiff to create new conditions favourable only to herself and the Association will suffer irreparable damage. Counsel asked that the status quo that existed before the plaintiffs purported to change the Rules which have been in existence regulating the trade in bananas for the last twelve years and to which she had willingly subscribed be maintained. The Court was urged not to confirm the injunction on the grounds that it would destroy the very reason for which the Rules were created by the Association and the Association itself.

In reply, learned plaintiffs' counsel disparaged the reference by the defendant's learned counsel to Rule 2 of the Rules of the Association and said he saw no relevance of the Rule.

On the plaintiff not showing that she was coerced to join the Association, it was learned counsel's submission that Rule 4 of "pp3" restricts trading at the market to only members of the Association and therefore, the plaintiffs' joining of the Association cannot be said to be voluntary in the circumstances.

It was also his assertion that there was no restriction on importation of bananas.

On abrogation of authority of the Association Rules, counsel replied that the defendant has no authority to control who can and cannot trade at the market. On the status quo, being that before the change of the Rules, he was of the view that the status to be maintained is the status of allowing the plaintiffs to continue importing the bananas before the ex-parte order of injunction.

On irreparable damage, the reply was that the plaintiffs sustain their families from the sale of bananas, and they would suffer irreparable damage if the injunction was not sustained. The Court was urged to sustain and confirm the ex-parte order of injunction.



I have carefully considered the affidavit evidence, skeleton arguments, oral submissions by counsel for both parties and have fully applied my mind to the authorities to which my attention was drawn.

It is settled that interim injunctions are only granted where the right to relief is clear, where it is necessary to protect a plaintiff from irreparable injury, mere inconvenience not being enough, as per **Shell and BP (Z) Limited** (supra)

It is also settled that applications for interim injunctions are usually made when the legal validity of the claim, or when the factual basis for the claim may be uncertain, as emphasised by Lord Diplock in the case of **American Cyanamid Company vs. Ethicon Limited**<sup>11</sup>. This case also laid down a number of tests to apply when considering an application for an injunction. Our courts have followed the principles laid down in that case in a plethora of authorities, most of which have been cited by counsel herein, on which a court can base its decision whether or not to grant an application for an injunction.

Just to briefly restate, that case set out the following tests to be applied, vis:-

- (i) Whether there is a serious question to be determined at trial
- (ii) Whether damages would suffice or would be an adequate remedy to atone for the injury that the claimant would suffer

- (iii) Balance of convenience, and
- (iv) Maintenance of the status quo

The High Court in the case of **Moonda Jane Mungaila Mapiko vs. Victor Makaba Chaanda**<sup>12</sup>, had occasion to consider the question “**what a serious question to be tried entailed**” and it was held inter alia that:-

**... 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 contends that there are serious issues to be tried in this case, namely that the plaintiff has the necessary permit to import bananas into the country, and that even though the defendants contend that the plaintiffs should not import bananas because they voluntarily joined the defendant's association, the defendants have not shown the express rules which the plaintiffs violated for which they must be ejected from ZABATA. He contends that the plaintiffs' violation of the alleged rules is one which begs serious determination by this Court. I agree. There is the issue on record as to whether the association has powers to regulate the market as it is the role of Government to do so as per the **Market and Bus Stations Act**. Further, it remains to be determined whether the plaintiffs herein were coerced into joining the association just so that they could have an opportunity to trade failure to which they would not be able to sell their bananas. Be that as it may, this is but one of the many considerations that the Court has to weigh and is of itself not



sufficient. It cannot be the sole consideration in determining whether an interim injunction should be granted.

Both counsel cited the case of **Shell and BP Limited vs. Conidaris & Others** (supra) where it was held 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.**

The Supreme Court provided further guidance when it said in the **Turnkey Case** (supra) that:-

**In applications for interlocutory injunctions, the possibility of damages being an adequate remedy should always be considered**

Counsel argued that the plaintiffs herein will suffer irreparable damage if they are stopped from bringing in bananas as they use the banana trade to look after their families. The defendants have argued that the plaintiffs can trade anywhere else like other banana traders; and that in any case they can sell at the place from 09:00 hours to 15:30 hours when the banana traders leave.

From the facts on record, it has not been disputed that the plaintiffs have or had permits allowing them to import certain tonnage of bananas which in my view will have values attached to them. Even in their trade, it is easy to estimate the monetary value attached thereto. They did not rebut the assertion that as

members of the association, they had a designated place and time to sell, and that even if they were to be expelled, they would still have a place from which to sell their bananas.

They could still sell between 09:00 hours and 15:30 hours. Based on the facts before me I am not inclined to believe that the injury they would suffer by being prevented from selling from the designated places would cause them irreparable injury that could not be atoned for by the payment of damages. It is not true that the only place for sale of bananas is the Lusaka City Market. They would probably suffer mere inconvenience by finding another selling place for their merchandise, but certainly not irreparable damages. In the view that I take, what the plaintiffs would suffer would be mere inconvenience and any injury caused in the circumstances of this case is not injury that meets the test laid down in the **Shell and BP** (supra) case. In any case and as regards the tonnage the subject of these proceedings the same had already been sold and this was not disputed.

Moving on, one of the tests laid down for the grant of an injunction is the issue of the balance of convenience. The case of **Shell and BP** (supra) dealt with this issue where the Court held that:-

**where any doubt exists as to the plaintiffs 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 this burden of showing the greater inconvenience in this respect, which I believe in the circumstances of this case lies with the defendants. The defendants have shown the purpose for which the association, to which the plaintiffs are privy, although they claim they were coerced to join, namely, that it is to maintain law and order in the sale of bananas. I believe the scales of justice tilts in their favour as the plaintiffs have not shown good cause to me why this law and order should be disturbed to merely accommodate them against the good of the other banana traders who in my view would find it difficult to trade if law and order was not maintained.

Also of great importance, is the guidance gleaned from the Supreme Court in the case of **Turnkey Properties** (supra) wherein the court observed, regarding the grant of an injunction as follows:-

**... it cannot be regarded as a device by which the applicant can attain or create new conditions, favourable only to himself, which tip the balance of contending interests in such a way that he is able or more likely to influence the final outcome by bringing about an alteration to the prevailing situation which may weaken the opponents case and strengthen his own**

The facts of this case show that the plaintiffs who are members of the association and conversant with its rules would like to create new and favourable conditions for themselves by way of an order of injunction thereby disregarding the interests of the association and that of the other members of the association.

Moving on, it has been stated that where there is a doubt regarding the tests discussed above, it would be relevant to discuss other issues, among them the maintenance of the status quo. Regarding this, it is helpful to advert to Lord Diplock's opinion in the case of **Cynamid** (supra) where he said:-

**where other factors appear to be evenly balanced, it is counsel of prudence to take such measures as are calculated to preserve the status quo**

What amounts to status quo has been explained by **Mc Ghee J. A. (Ed) Snells Equity 31<sup>st</sup> Edition (Thomson, Sweet and Maxwell London) at page 408, paragraphs 16 - 22** thus:-

**“The status quo refers to the period immediately preceding the commencement of the proceedings (or application notice if substantially later) not to the period before the conduct which led to the litigation (emphasis by Court).**

See also **Garden Cottage Foods Limited Vs. Milk Marketing Board**<sup>13</sup>

In the case of **Tau Capital Partners Incorporation, Corpus Globe Nominees Limited vs. Mumena Mushinge, Zambort Limited, Terra Gold (Barbados) Inc.**<sup>14</sup>, my brother Wood J, as he was then held that:-

**the object of an injunction is to maintain the status quo. That is to help matters in a status quo, so that if at the hearing, a plaintiff obtains a judgment in their favour, a defendant will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual.**



Mr. Phiri was of the view that the plaintiffs having been importing and trading in bananas for the past twelve years, the status of their importing bananas must be maintained.

This fact is not in dispute. What is in dispute is the fact that while the plaintiffs are members of the Association and amenable to the rules and regulations for importing and selling bananas, they now want to abrogate these rules and start operating outside the set guidelines of the Association to whose rules they are amenable. This state of affairs occurred on 27<sup>th</sup> November, 2015 when they imported the subject tonnage of bananas. To maintain the status that existed in the period immediately preceding the commencement of proceedings would effectively be to allow them to continue abrogating their own Association's rules to the detriment of the defendant. In essence, it would entail creating conditions only favourable to the plaintiffs, in which they would continue to import and trade in bananas outside the Rules of the organisation. This I am unable to do.

Relative strength of the cases entails that the Court should not go on to consider anything resembling a trial predicated on affidavit evidence, which forms the basis for an application of injunctive relief before the main matter is heard on its merits. I was asked to pronounce myself on the issue **of Section 5 of the Market and Bus Stations Act No. 7 of 2007**, on the powers to control trade in the market. I am of the view that that is a matter that has to be substantially dealt with during the main trial.


On the basis of the evidence before me, I deem that the plaintiffs have not shown that damages are not sufficient to atone for the injury they would suffer were this injunction not to be confirmed. I am convinced that the same does not go beyond the confines of mere inconvenience. I am of the considered view that if one were for a moment to consider the balance of convenience in the matter, the same would tilt in the defendant's favour.

In view of the fore going, I deem that this is not a proper case in which to confirm the ex-parte order of injunction earlier granted. For avoidance of doubt, the ex-parte order of interim injunction granted to the plaintiffs on 30<sup>th</sup> November, 2015 is hereby discharged.

Costs follow the cause to be taxed in default.

Leave to appeal is granted

**Delivered at Lusaka on 8<sup>th</sup> day of April, 2016**

  
**Mrs. Justice A. M. Banda-Bobo**  
**High Court Judge**