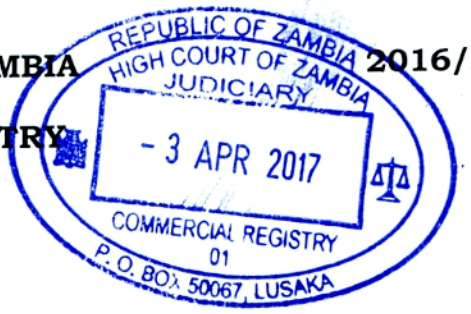
IN THE HIGH COURT FOR ZAMBIA **2016/HPC/ARB0278**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



IN THE MATTER OF: A Joint Venture Agreement Between Zamastone Limited and Saving Wealth Enterprise Limited dated the 12th September 2016

AND

IN THE MATTER OF: An Addendum to the Joint Venture Agreement between Zamastone Limited and Saving Wealth Enterprise Limited Dated 12th September 2016

AND

IN THE MATTER OF: Section 11 Rule (1) and Section Rule (2) (c) and (d) and Section 11 Rule (4) of the Arbitration Act, No 19 of 2000

AND

IN THE MATTER OF: Rule 9 of S.I No 75 of the Arbitration (Court Proceedings) Rules of 2001

BETWEEN:

ZAMASTONE LIMITED **Claimant**

And

SAVING WEALTH ENTERPRISE LIMITED **Respondent**

Before the Hon Lady Justice Irene Zeko Mbewe

For the Claimant : *Ms O Zyambo of Messrs Ranchod Chungu*

For the Respondent : *N/A*

RULING

Cases Referred To:

1. *Shell and BP v Conidaris & Others [1975] Z.R 174*
2. *Zambia State Insurance Corporation v Dennis Mulikelela [1990-1992] Z.R 18*
3. *Zambia Revenue Authority v Makeni Gardens Limited SCZ Judgment No 69 of 1995*
4. *Turnkey Properties Lusaka West Development Co Limited [1984] Z.R 85*
5. *American Cyanamid Company v Ethicon Limited [1975] A.C 396*
6. *Harton Ndove v National Educational Company Zambia Limited [1980] Z.R 184 (SC)*
7. *G.F. Construction Limited and Rudnap Zambia Limited vs. Unitechna Limited [1999] Z.R 134*
8. *Preston v Luck [1884] 27 Ch.D 497*
9. *Mobil Zambia v Msiska [1983] Z.R 86 (SC)*
10. *Zimco Properties Limited v LAPCO Limited [1988-1989] Z.R 92*
11. *Cambridge Nutrition Limited v BBC [1990] 2 All E R 533*

Legislation Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Arbitration Act No 19 of 2000*
3. *Arbitration (Court Proceedings) Rules Statutory Instrument No 75 of 2001*

This is a Ruling on the Applicant's application for an order of interim measure of protection pursuant to Section 9 of the **Arbitration (Court Proceedings) Rules** as read with **Order 29** of the **Rules of the Supreme Court, 1999 Edition** filed into Court on 17th October, 2016. The application is supported by an affidavit filed on 6 June 2016. It is deposed by Francesca Gondwe the Business Development Manager and shareholder in the Applicant Company. It is averred that the Claimant is a holder of a small scale mining licence (No 17950-HQ-SML) relating to mining of limestone and the licence is valid for a period of ten years (**Exhibit "FG2"**). That on the 9th September, 2014, the Claimant entered into a Joint Venture Agreement with the Respondent for the purpose of mining, processing and crushing limestone, (**Exhibit "FG3-14"**). That the Joint Agreement was premised on the understanding that the Claimant held the mining licence for the extraction and processing of limestone and the Business Permit to sell the product while the Respondent had the financial resources to inject into the operation to enhance productivity and the quality of the end product. That the parties executed an Addendum (**Exhibit "FG16-20"**). That during

the subsistence of the Joint Venture, a number of issues arose relating to compliance. According to the Claimant, there were illegal sales conducted by the Respondent. breakdown of equipment and delay in fixing it resulting in a substantial loss of business, failure to meet production targets (**Exhibit "FG28-29**"), illegal interference in sales (**Exhibit FG"30-32**"), production of low grade stones and quarry dust below production levels (**Exhibit "FG33-34**") unsafe mining, excess dust, (**Exhibit "FG40-41**"), non compliance with safety and health regulations (**Exhibit "FG46**"), failure to meet agreed qualities of materials (**Exhibit "FG48-49**"), unilateral increase of pricing of products (**Exhibit "FG53-54**"). It is averred that production went down due to the Respondent's non adherence to mining practices. It is averred that an accident occurred resulting in one of the Respondent's employee losing a limb following which an inspection was conducted by Mine Safety Department (**Exhibit "FG66-67**"). In conclusion it is averred that the Respondent's conduct in its mining operations is jeopardising the whole operation which may result in the cancellation of the mining licence for non compliance.

The application is opposed by way of affidavit deposed by Xie Jian Liang a Director in the Respondent Company. It is deposed that the parties entered into a Joint Venture Agreement and the Respondent provided financial assistance (**Exhibit "XJL1"**). According to the deponent, the Claimant has not discharged its responsibilities well as there has been non-payment or delayed payments of monies realised from the sale of quarry and this has caused operational challenges. It is averred that despite the Respondent producing good quality finished products, the Claimant owes the Respondent a substantial amount of money from unpaid portions of the Respondents profit share despite the Claimant selling the finished products and collecting monies from the purchases. It is averred that as at March 2016, the amount due of the profit share is K4,892,500 which amount continues to accumulate and remains unpaid by the Claimant (**Exhibit "XJL2"**). It is averred that due to the financial challenges, a number of trucks were seized by the supplier due to non payment. It is averred that in respect to the sale of quarry to Baode Cement Limited, this was done with the express authority of the Claimant and monies were shared between

the parties. That when the equipment broke down, the Respondent did not have sufficient funds to fix the broken down equipment at the site as payments of their profit share had been delayed by the Claimant. It is averred that the Claimant bought the wrong size of mesh screens to produce the 5mm tonnes. That the slow loading at the plant was caused by the Claimant who could not control the flow of tipper trucks entering the loading area thus causing congestion (**Exhibit "XJL3"**). It is averred that the production of low grade stones and quarry dust is beyond the control of the Respondent as they cannot change the geographical formation at the site (**Exhibit "XJL4"**). It is further averred that safe blasting operations are conducted by both parties' representatives and that the damaging blasting came from a nearby quarry and not from the Respondent. It is averred that the Respondent rectified the excessive dust issue and that Zambia Environmental Management Agency (ZEMA) has never re-visited the issue. (**Exhibit "XLJ5"**).

In its skeleton arguments, the Claimant relied on the case of **Shell and BP v Conidaris (1), Zambia State Insurance Corporation v Dennis Mulikelela (2), Zambia Revenue Authority v Makeni**

Gardens Limited (3) and Turnkey Properties Lusaka West Development Co Limited (4) which all sets out the guiding principles on interlocutory injunction.

The issue for my determination is whether or not to grant an interim measure of protection in the form of an interim injunction.

It is trite law that an injunction is an equitable remedy. It is not disputed that the parties entered into a joint venture and responsibilities were apportioned between the parties wherein the Claimant was responsible for the marketing and sales, distribution of monthly production commissions and net profits, whilst the Respondent was in charge of procuring and installing at their own cost, all necessary machinery and equipment required for the mining processing and crushing of limestone, mining, processing and crushing of limestone, production in a timely and environmentally compliant manner and day to day management of the quarry including general operations. (**Exhibit FG3**"). It is common cause that Clause 18 of the Joint Venture Agreement specifies that disputes shall be settled by arbitration in accordance with the **Arbitration Act, No 19 of 2000**.

When the matter came up for hearing, there was no explanation for the non attendance of the Respondent. I proceeded to hear the Claimant's application since Counsel for the Respondent was present when the date of hearing was given.

I have taken into consideration the affidavit evidence, skeleton arguments and list of authorities filed by both parties, and oral submissions of Counsel for the Claimant.

The Claimant's application is predicated on Section 11 of the **Arbitration Act No 19 of 2000** which is couched as follows:

"Section 11(1) of the said Act further provides that:

> *"a party may, before or during arbitral proceedings request from a Court an interim measure of protection and, subject to subsections (2) (3) and (4) the Court may grant such measure.*
>
> *(2) Upon a request in terms of subsection (1), the Court may grant -*
>
> *(a) an order for the preservation, interim custody, sale or inspection of any goods which are the subject matter of the dispute;*

(b) an order securing the amount in dispute or the costs and expenses of the arbitral proceedings;

(c) an interim injunction or other interim order; or

(d) any other order to ensure that an award which may be made in the arbitral proceedings is not rendered ineffectual"

An injunction is an equitable remedy meaning the court has the discretion in making a decision on whether or not to grant the application. It is common ground that the application for an interlocutory injunction must succeed or fail on the test of the guidelines enunciated in the celebrated case of **American Cyanamid v Ethicon Limited (5)** by Lord Diplock. In that case the following was considered:

(a) Is there a serious question to be tried;

(b) Would damages be adequate compensation to the Plaintiff for his interim loss pending trial and if so is the Defendant in a position to pay them?

(c) **The court must consider whether the Plaintiff is able to give an undertaking to compensate the Defendant for any interim loss suffered pending trial should the injunction be granted, or at the eventual trial if the Court finds that the Plaintiff was entitled to an injunction.**

(d) **Where the balance of convenience lies should an injunction be granted.**

In our own Courts, these guidelines have been followed in a plethora of cases such as **Shell and BP v Conidaris and Others (1).** At this juncture, it is important to bear in mind the caution of Kers L.J in the case of **Cambridge Nutrition v BBC (11)** where in respect to the guidelines in the case of **American Cynamid v Ethicon Limited (5)** held that:

> ***" It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the Court to grant injunctions when it is just,***

and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases, It must never be used as a rule of thumb, let alone a straight jacket. The American Cyanamid case provides an authoritative, and most helpful approach to cases where the function of the Court in relation to the grant, or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by trial."

Turning to the facts of this case, and applying the above guidelines laid down in **American Cyanamid v Ethicon Limited (5)** in granting injunctions, the Applicant must show to the satisfaction of the Court that there is a serious question to be tried and has a right of claim. (**See Harton Ndove v National Educational Company Limited (6).**

In the case of **Zambia State Insurance Corporation Limited vs. Dennis Mulikelela (2)** it was held that:

"of course to entitle the Plaintiffs to an interlocutory injunction, though the court is not called upon to decide finally on the right of the 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."

In addition the case of **G.F. Construction Limited and Rudnap Zambia Limited vs. Unitechna Limited (7)** Muzyamba, JS (as he then was) observed that:

"An injunction will be granted only to a Plaintiff who establishes that he has a good arguable claim to the right he seeks to protect."

I adopt and apply the above stated words to this case. My role at this stage is to determine whether the Claimant has raised triable issues. From the affidavit evidence before me, it is clear that there is an arbitration agreement between the parties, and a dispute between them has arisen. The Claimant has requested the

Respondent to concur in the appointment of an Arbitral Tribunal pursuant to the arbitration agreement, and this application for interim protection measures is made pending arbitration. Quite clearly, the Claimant's right to relief is clear and that there is a serious question to be determined by an umpire and there is a probability that the Claimant is entitled to relief. (See **Preston v Luck (8)**. Notwithstanding, I am alive to the fact that at this stage of the proceedings, it must be noted that the Court is not called upon to decide with finality on the facts or the law and more particularly so on the basis of conflicting evidence as to the facts on which the claims of either party may ultimately depend, or even decide complex questions of law which call for detailed argument and mature considerations.

The next issue is whether or not the Claimant will suffer irreparable injury or damage by the refusal to grant the injunction. In this respect, I am guided by the case of **Mobil (Z) Limited v Msiska (9)**, where the Court held that an injunction is to be granted if it is necessary to protect the Plaintiff from irreparable injury. The injury or damages must be substantial or material that cannot adequately

be atoned for in damages. Where a claimant can be compensated by an award of damages, no injunction should be granted. As aptly put by Lord Diplock in the **American Cyanamid v Ethicon Limited (5),** if damages is the measure recoverable at common law would be an adequate remedy, and the Defendant would be in a financial position to pay them, no interim injunction should be then granted. If the Court is in doubt on the above two principles elucidated aforesaid, it will decide the application on a balance of convenience.

The balance of convenience was expounded by Lord Diplock who observed that the extent to which the disadvantages to each party would be incapable of being compensated is always a significant factor in assessing where the balance of convenience lies. To summarise the question of balance of convenience -

(i) the governing principle is that if the claimant would be adequately compensated by an award of damages if he succeeds at the trial, and the defendant would be able to pay them, no injunction should be granted however strong the claimant's case.

(ii) **Whether if an interim injunction is granted the defendant succeeds at trial the defendant would be adequately compensated in damages, which then would have to be paid by the claimant, and whether the claimant would be able to pay those damages, If such damages would be an adequate remedy, and the claimant would be in a position to pay them, the defendant's prospects of success at the trial would be no bar to the grant of the injunction.**

(iii) **That there is doubt as the adequacy of the respective remedies in damages available to either party or to both, the Court must consider where the balance of convenience lies.**

I am fortified by the case of **ZIMCO Properties Limited v LAPCO Limited (10)** where Gardner J.S explained concisely that the balance of convenience arises if harm done would be irreparable, and damages would not suffice to compensate an applicant for any harm which may be suffered as a result of the actions of the Respondent. The burden of proof that the inconvenience which the Claimant will suffer by the refusal of the injunction is greater than

that which the Respondent will suffer, if it is granted, lies on the Claimant. Thus the Court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If the Claimant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. Lord Diplock further acknowledged that there may be many other special factors to consider in the particular circumstances of each case to be considered by the Court on whether or not to grant an injunction.

Each party claims that the other is in breach of the terms of the joint venture and both presented arguments in support of their respective positions. The Claimant states that due to the Respondent's conduct, the Claimant is apprehensive that the mining licence for the quarry shall be cancelled for non-compliance with the law in its operations leading to a cessation of quarrying activities altogether. The Respondent's argued that it is likely to suffer irreparable damage if the injunction is granted as the disruption of production will result in the failure by the Respondent to honour its financial obligation under its financial facility.

I find that as between the Claimant and Respondent, the Claimant is likely to suffer mere inconvenience if an injunction to restrain the Respondent from operating the quarry is granted whilst the Respondent is likely to suffer substantial loss or utter ruin if the injunction is granted. The balance of convenience tips in favour of the Respondent.

I further rely on the case of **Turnkey Properties Limited v Lusaka West Development Limited And Others (4)** where Ngulube D.C.J as he then was, observed that an interlocutory injunction is appropriate for the preservation, or restoration of a particular situation pending trial; but 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 the 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.

On the peculiar facts of this case, I find that this is not an appropriate case to grant an interim measure of protection by way of interim injunction.

The upshot is that the Claimant's application for an interim measure of protection in the form of an interim injunction fails.

I make no order as to costs.

Leave to appeal granted.

Delivered in Chambers this 3rd day of April, 2017.

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HON IRENE ZEKO MBEWE
HIGH COURT JUDGE