

IN THE HIGH COURT FOR ZAMBIA

2017/HP/0054

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

GEORGE ANDREW LLOYD

PLAINTIFF

AND

SHELDON JOHN WOODS

DEFENDANT

BEFORE HONORABLE JUSTICE MR. MWILA CHITABO, SC

*For the Applicant : Mrs. N.N. Mbao of Nkusuwila Nachalwe and
Advocates.*

*For the Respondent : Mr. M.C. Kanga of Messrs Makebi Zulu
Advocates*

RULING

Cases Referred to:

- 1. American Cynamid Company v Ethicon Ltd. (1975) AC 396*
- 2. Communication Authority of Zambia v Vodacom Zambia Limited
(2009) ZR 196*

3. *Hondling Xing Xing Building Company Limited v ZamCapital Enterprise Limited*
4. *Ndove vs. National Educational Company Limited (1980) ZR 184*
5. *Shell BP Zambia Limited v Conidaris and Others (1975) Z.R. 174.*
6. *Turnkey Properties Limited v Lusaka West Development Limited and Others (1985) ZR 85.*

This is an application for an Injunction by the Plaintiff where he was requesting the Court to restrain the Defendant by himself or by his servants or agents from dealing with trailer Registration No. MNG 437 GP managing and/or using, selling or disposing of any part of the same until a further Order of the Court.

The application was supported by an affidavit that was deposed to by one George Andrew Lloyd, the Plaintiff herein. He swore that he was the legal owner of a white 12 meter trailer, Registration No. MNG 437 GP the said trailer had its origin in South Africa and was duly registered in Gauteng Province. He further swore that in the month of October, 2015 the trailer was sanctioned to be used for work in Zambia by himself.

The affidavit revealed that the trailer having served its purpose in Zambia was to be transported back to South Africa. It was deposed that whilst preparations for the trailer to be transported back to South Africa were underway, there was a necessity for the trailer to be parked in a secure place. He stated that he initially intended to

park the trailer at a Mr. Dudhia's premises for safe keeping whilst preparations for the transportation were still underway.

The Plaintiff averred that before he utilized Mr. Dudhia's premises the Defendant and his business partner suggested that, as a favour to him, they would allow him to park his trailer at his premises at Plot No. 14 Lilayi Road in Lilayi, Lusaka. He stated that this offer was gratuitous as the Defendant neither asked him to pay any parking fees nor asked him to enter into a contract pertaining to the parking of the Trailer at his premises.

He further averred that immediately following the parking of his trailer at the Defendant's Premises, it came to his attention that the Defendant was in fact using parts from of his trailer without his consent and knowledge. According to him, a month later in February 2016 he decided to come to Zambia in an attempt to retrieve the trailer from the Defendants premises and finally transport the same to South Africa.

He swore that when he arrived at the Defendant's premises he discovered that various parts including the axle had been removed from the trailer. He produced exhibit "**GAL1**" which were collectively the pictures of the trailer without the axel.

He further averred that despite discovering the various missing parts, he still attempted to move the trailer but later discover that this was impossible owing to the fact that a number of the parts were removed from the trailer which parts included axles, tyres and brake pads. He stated that the parts removed were vital to the

functioning of a trailer and as such movement of the trailer in question was frustrated rendering the transportation of the trailer to South Africa impossible and curtailed indefinitely. According to the Plaintiff, he reported the state of the truck to the Defendants who acknowledged the same and endeavoured to make sure that all the missing parts would be found and reattached to the trailer before he could make another attempt to retrieve it.

It was contended that he continued to complain about the same and reminded the Defendant on countless occasions about the reattachment of the detached parts to which nothing of consequence had been done to cure his predicament. He swore that he had travelled to Zambia three or more times to try and retrieve the said trailer but all efforts proved futile as the Defendant deliberately parked other immobile vehicles in front of it making it impossible for him to move it.

He further swore that after an outburst, the Defendant went on to demand that the Plaintiff pays a parking fee of One Hundred Kwacha (K100) per day for parking his trailer on his premises and the said fee would apply retrospectively. He stated that the trailer would have been long removed had the parts not been detached from it. It was further averred that the Defendant later informed him that the axle from the trailer had been taken by the Defendants business partner, a partner who had been unknown to him until this point.

The Plaintiff swore that upon receiving this information he contacted the Defendant's partner who undertook to send a replacement axel to be attached to his trailer. The said partner later informed him that the same had been sent and delivered to the Defendant's premises and the axle had been attached to the trailer. He averred that he had made attempts to have the Defendant send proof that his trailer had been rehabilitated back into a functional state before he made arrangements to come back to Zambia without wasting time and money. However, the Defendant had refused, failed or neglected to do the same.

He deposed that due to the Defendants actions and inactions with respect to the rehabilitation of the trailer, he had been unfairly denied use of his vehicle. He further learnt that the Defendant had taken out a Warrant of Distress against himself for purported accrued arrears of over thirty eight thousand kwacha (K38, 000). The said Warrant of Distress was exhibited and marked "**GAL 2**". He stated that the Bailiff had indeed purportedly executed the same Warrant of Distress and seized his trailer and was in its possession with the intention of selling it off to recover the purported rentals. A copy of the Bailiff's seizure Form executed on 11th January, 2017 was exhibited and marked "**GAL3**".

He further deposed that the seizure form informed him that he had five days in which to pay the supposed fees owe to the Defendant. According to him, he did not owe the Defendant any form of fee for parking his trailer on his premises as this was done as a gratuitous

gesture and as it turns out the Defendants orchestrated all this to prevent him from retrieving his trailer so he could use it for himself without his express consent. The Plaintiff stated that he believed that the Defendant had used his trailer on numerous occasions for his own business and to his detriment and wanted to unfairly enrich himself at his cost.

He contended that the Defendant neglected it to the point where parts were removed that frustrated efforts and attempts to move it so that in the end he could dispossess him of the same or purportedly sell it to defray his perceived rent and storage charges.

He said that he could not apply rent or storage retrospectively just because of a perceived difference between himself and the Defendant. He believed that this was a good case in which to Order and injunction so as to safeguard his proprietary interest in the trailer in question because if not restrained, the Defendant would dispose of the trailer causing him to suffer irreparable damage.

In opposing this application an affidavit in opposition was filed deposed to by one Sheldon John Wood, the Defendant herein. He swore that sometime in December 2015 a number of trucks under a company called AMS Transport Ltd came into Zambia to offload some cargo and after offloading AMS Transport directed that the trucks go and park at his premises at Plot No. 14A Lilayi Road in Lusaka because the place where the said trucks were supposed to load from had closed for industrial/Christmas break.

He deposed that all the trucks were branded AMS Transport Ltd. He later came to find out that one of the said trucks belonged to the Plaintiff. He stated that he had a business arrangement with AMS Transport Ltd. whereby he allowed them to park their trucks at his premises free of charge for the first seven days and thereafter, it would attract a storage charge of K100.

He averred that the Plaintiff's truck, both horse and trailer were parked at his place and the Plaintiff's driver whose name was Maxwell used to sleep in the said truck whilst it was parked in workshop. He stated that during the time this truck was parked at his premises, his workshop was closed and the only people who were at the premises were his security guard and the driver Maxwell.

Further, that sometime in December 2015 he received a call from AMS Transport Ltd informing him that they had been informed that the Plaintiff's truck had left his premises as they were monitoring all the trucks via GPS. That upon hearing that, he rushed to his premises and indeed found that the Plaintiff's truck was not in his yard and he quickly informed them that the truck was not on the premises and Maxwell was nowhere around.

He deposed that being in fear that the truck had been stolen, he called a police officer he knew whose name was Mr. Mulele and explained to him that according to the GPS reading the truck was en route to the Eastern Province of Zambia. He stated that this truck was later impounded at Katete and it was discovered that

Maxwell without authority from his boss loaded some cement and was set to transport and offload the same in Chipata.

He further deposed that the Plaintiff's brother in law Mr. James Donford and another person went to the truck as he was the closest person to Katete and that Mr. Donford first proceeded to Chipata to offload the cement consignment and on their way back to Lusaka they loaded some other cargo which was to be offloaded in Lusaka. He said he was in direct contact with Mr. Donford and he was informed that they had a breakdown on their way back to Lusaka but that they had somehow managed to reach Lusaka. After the truck offloaded the cargo, it was unable to start and had to be towed to the Defendant's premises in Lilayi.

He stated that Mr. Donford left the keys to the truck and parked it at his premises for a while and that he was in contact with the AMS Transport Ltd. regarding the storage fees. According to him, they informed him that that particular truck belonged to one of their contractors and that he had been informed of the charges and he agreed to pay the same but that could only pay when he next came to Zambia.

The Defendant further deposed that sometime in April 2016, the Plaintiff came to Zambia and he proceeded to his premises where he inspected his truck. That the Plaintiff explained and asked that he be allowed to take the horse of the truck only for purposes of repairing it and leave behind the trailer parked at his premises and

that the trailer was to be security for the storage fee which he agreed to settle at a later time,

He averred that sometime in August 2016 he received another phone call from AMS Transport Ltd who informed him that they had made arrangements with the Plaintiff that they be allowed to use the axle on his trailer parked at his premises. He stated that he had no objections because as far as he was concerned the two were business partners. He further averred that AMS Transport Ltd. picked the axle and he believed they managed to put the same on their truck and when the truck reached South Africa, the same was removed and taken to the Plaintiff's business premises in South Africa.

The Defendant swore that sometime in September 2016, the Plaintiff came back to his premises to inspect the truck and took some pictures and informed him that in about three weeks' time one of his drivers would be bringing back the axel which AMS Transport Ltd had borrowed. He stated that after some time the Plaintiff's drivers brought back the axle from South Africa and the same was placed at his premises contrary to what had been asserted in the Plaintiff's affidavit in support.

He deposed that he would occasionally call the Plaintiff informing him that the storage charges were accumulating and that he should make payment and pick up his trailer from his premises and the Plaintiff would promise that he would come and sort out everything which promise he never honoured. Further, that at one point the

Plaintiff even asked him to release the trailer to Mr. Donford and that he would at an appropriate time pay the charges but the Defendant could not accept that proposal and he decided to hold on to the trailer until payment.

He averred that after he failed to get his storage fee from him, he informed the Plaintiff that he would engage a debt collector who was going to help him recover the storage fees and a warrant of distress was issued in that regard. He stated that contrary to what the Plaintiff had asserted in his affidavit in support, he never at any point used or removed any parts from his truck and that the only instance of any parts being removed from his truck was the instance already alluded to which the Plaintiff was well aware of. It was his assertion that at no point did he agree to put back the alleged missing parts on his trailer as the Plaintiff had brought to Court nothing but fabrications and that he was simply trying to avoid paying his storage charges.

He stated that the Plaintiff was truly indebted to him in the same amount endorsed on the warrant of distress and that there was no way he would allow him to park his truck at his premises for such a long time for free.

He further deposed that the Plaintiff was seeking an equitable remedy with dirty hands as he brought total fabrications to Court and that he was the one in default and could not come to Court relying on his own wrong doing as he purposefully left out vital material evidence. He added that the Plaintiff had not adequately

shown and proven that he would suffer irreparable damages as any damages that maybe occasioned to him did not fall with the realm of irreparable damages as envisaged in this application.

Counsel for the Plaintiff filed in his skeleton arguments and list of authorities on 13th January 2017. It was Counsel's argument that this Court had the power to grant an injunction on the authority of Order 27 Rule 1 of the High Court Rules. He cited the case of ***Micheal Chilufya Sata V Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Limited, Mobi TV International Limited 2010/HP/1282*** which highlighted that an injunction was an equitable relief which was always discretionary.

Counsel further cited the case of ***American Cynamid V Eticon Ltd. (1975) AC 396*** outlining the Court's considerations when there was an application for injunction.

It was submitted that there must be a clear right to relief and there must be a serious issue to be tried. According to the plaintiff, they owed no debt to the Defendant and therefore the Defendant and its agents must be restrained from executing the warrant of distress on his property. He also argued that there was no agreement that the Defendant recovers money from the Plaintiff as rent for the storage of his trailer. In view of this the Plaintiff was of the view that he had a clear right to relief and cited the case of ***Mobil (Z) Ltd. v Msiska (1983) ZR 86*** where it was held that the Court will grant an injunction only if the right to relief is clear and the injunction was necessary to protect the Plaintiff from irreparable injury which

could not be atoned for by damages. He also cited the case of **Shell and BP Ltd v Conidaris and Others (1975) ZR 174** stressing the same point.

The Plaintiff's Counsel also submitted that the Court has to establish whether there was a serious question of law to be determined and that the Plaintiffs had a good arguable claim to the interest they sought to protect. It was submitted that the Defendant and his agents' execution of the warrant of distress was baseless and lacked merit because the Plaintiff did not incur rental liability towards the Defendants. Counsel cited authorities to support the argument that the Plaintiff had a good arguable claim.

It was further submitted that the Court should consider whether the Plaintiff would suffer irreparable harm or injury that could not be atoned for in damages. It was submitted that the execution of the warrant of distress would consequently result in injury that could not be atoned for in damages. He argued that it was paramount to preserve the status quo of the trailer in terms of ownership so as to prevent loss of ownership of the said trailer. Counsel cited the case of **Preston v Luck (1884) 27 Ch. D 497** on preserving the status quo and **Shell and BP (Z) Ltd. V Conidaris and Others** with respect to what irreparable injury means.

It was also the Plaintiff submission that the Plaintiff had demonstrated the balance of convenience lies with him as they desired to curb the disposal of the trailer to preserve its ownership

and use. He cited the cases of **Zimco Properties Ltd V LAPCO Ltd. (1988-1989) ZR 92** to support their submissions.

It was argued that the Plaintiff had succeeded in demonstrating that there was a serious issue to be tried and a serious question at law to be determined. Further, that the Plaintiff would suffer irreparable injury resulting from the execution of the warrant of distress. It was Counsel's submission that the relief of an injunction was appropriate in this case and urged the Court to grant the said application for injunction.

In opposition, Defence Counsel also filed its skeleton arguments and list of authorities on 9th June 2017. It was Counsel's submission that the case of **Shell and BP Zambia Ltd. v Conidaris and Others** established that the Court may not grant an interlocutory injunction unless the relief was clear and the injunction was necessary to protect the Plaintiff from irreparable injury and that mere inconvenience was not enough.

It was submitted that the affidavit evidence did not show that the injury that the Plaintiff would suffer would be irreparable should this Court discharge their interim Injunction Order. He argued further that the Plaintiff was seeking an equitable relief which demands that "*he who comes to equity must come with clean hands*". Counsel, citing the case of **Hina Furnishing Lusaka Ltd v Mwaiseni Properties Ltd. (1983) ZR 40**, argued that an injunction was an equitable remedy and the Court may not exercise its discretion to grant it where the Plaintiff was in breach of a contract.

It was submitted that the Plaintiff had not come to this Court with clean hands as he had not disclosed to this Court that he had unpaid arrears over storage charges which the Plaintiff was avoiding to pay and brought to this Court fabrications as the Defendant's possession was intended to be surety for storage.

It was submitted that the Plaintiff from the onset should have disclosed the material fact that they were in arrears. He cited the case of ***Mwendalema v Zambia Railways Board (1978) ZR 65*** to support the submission that non-disclosure of material facts by an applicant at the time of an ex parte application is a ground for discharging the Exparte Order. Counsel also cited Order 29 rule 1A of the White book in that regard.

Finally Counsel argued that the Plaintiff failed to disclose that his truck was in the possession of his driver at some point who was dishonest and removed the truck from the Defendant's premises. He also did not disclose the circumstances that led to the removal of the axle.

He submitted that on the forgoing principles relating to injunctions, this was not a proper case for the award of an interlocutory injunction as seeking the same would create conditions favourable only to the Plaintiff.

I have considered the affidavits and arguments on record. From the onset I must state that injunctions are an equitable remedy, whose grant is discretionary, and that discretion reposes in the Judge who should exercise it judiciously.

Similarly in the case of **Communications Authority v Vodacom Zambia Limited (2009) ZR 196**, the Supreme Court stated that as regards the right to relief, it is for the party seeking an injunction to establish clearly that he is entitled to the right which he seeks to protect by an injunction.

Further, another key issue of consideration in determining an application for injunction was well articulated in the case of *Hondling Xing Xing* where Justice Matibini stated that irreparable injury is said to be the first and primary element in injunctions.

Irreparable injury was defined in the case of **Shell BP Zambia Limited v Conidaris and Others** referred to by the Plaintiff. The Court in that case defined irreparable to mean

“injury which is substantial and can never be adequately remedied, or atoned for by damages. It is not injury which cannot be possibly be repaired”

Thus, an injunction will not generally be granted where damages would be an alternative adequate remedy to the injury complained of if the applicant succeeds in the main action.

Another important consideration is maintaining the status quo. Whilst it is generally accepted or acknowledged that an interim injunction is appropriate for the preservation or restoration of a particular situation pending trial, it cannot be regarded as a device by which the applicant can attain, or create new conditions favourable only to himself. Such conditions would 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 opponent's case, and strengthen his own. This was espoused by Ngulube D.C.J. as he was then, in the case of ***Turnkey Properties Limited v Lusaka West Development Limited and Others (1985) ZR 85.***

Having outlined the above and having taken the facts of this case I have noted that the Plaintiff and the Defendant in this matter have two completely different facts relating to this matter. The Plaintiff contends that his trailer was parked at the Defendant's premises pending arrangements being made to transport the trailer, which is the subject of this litigation, to South Africa.

He further contends that parking the trailer at the Defendant's premises was gratuitous and there was no agreement to pay for the said parking. According to him, essential parts of the said trailer were removed by the Defendant and his business partner that rendered the trailer immobile and as such could not be transported to South Africa. It was because of this that he was unable to remove the trailer from the Defendant's premises.

The Defendant on the other hand submitted that the evidence of the Plaintiff was a complete fabrication. According to him the trailer ended up at his premises after the Plaintiff's Truck broke down and the horse of the truck was first taken to be repaired leaving the trailer behind. His evidence is that he informed that Plaintiff that keeping the trailer at a fee of K100 per day and the Plaintiff was

Therefore in order maintain the status quo, I accordingly confirm my earlier Order for an interim injunction pending the determination of the main matter.

Costs follow the event.

Leave to appeal is granted.

Delivered under my hand and seal this the ... day of June, 2017



Mwila Chitabo, S.C
JUDGE