IN THE HIGH COURT FOR ZAMBIA **2017/HP/1135**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
LUSAKA
(Civil Jurisdiction)

BETWEEN

MEANWOOD PROPERTY DEVELOPMENT CORPORATION LIMITED **PLAINTIFF**

AND

HISTORY MAKERS ZAMBIA REGISTERED TRUSTEES **DEFENDANT**

Before the Honourable Mrs. Justice M.C. Kombe

For the Plaintiff : *Mr. C.M. Magubbwi - Messrs Tembo, Ngulube and Associates.*

For the Defendant : *Mrs. L.Ndovi - Mwansa -Messrs Thandwe Legal Practitioners.*

R U L I N G

Cases referred to:

1. **American Cyanamid v. Ethicon Limited (1975) A.C. 396.**
2. **Hilary Bernard Mukosa v. Michael Ronaldson (1993-1994) Z.R. 26.**
3. **Harton Ndove v. Zambia Educational Company (1980) Z.R. 184.**
4. **Turnkey Properties v. Lusaka West Development Company Limited (1984) Z.R. 85.**
5. **Siskina (Owners of Cargo Lately Laden On Board) and others v. Distos Compania Naviera (1979) A.C. 210 @ 256.**

Legislation and other material referred to:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia.**
2. **The Rules of the Supreme Court, 1999 Edition (White Book).**
3. **Iain S. Goldrein, K.H.P. Wilkinson and M. Kershaw - Commercial Litigation: Pre-emptive Remedies, London, Sweet & Maxwell 1997.**

This is a Ruling on the Plaintiff's application for an order of Prohibitory Injunction restraining the Defendant either by itself, its agents, servants or whosoever is connected to it from constructing or continuing to construct a church building and/or building used for church purposes and from using its property as a place of worship in any manner whatsoever.

The application is made pursuant to Order 27 rule 1 of the High Court Rules Chapter 27 of the Laws of Zambia and is supported by an affidavit deposed to by **JOEL LWANDO** the Projects Officer of the Defendant company. He deposed as follows:

That prior to the sell and purchase of individual plots within the Meanwood Ibex Hill Housing Project, the Plaintiff submitted an area plan to the Lusaka Province Planning Authority (LPPA) and which area plan was approved by the said Authority; that according to the approved area plan the Meanwood Ibex Hill Housing Project was zoned for Agricultural and Residential use only and in particular the Defendant's property being Subdivision No.4 of Farm 382(a) Meanwood Ibex Hill, Lusaka was zoned for Agricultural use.

He further deposed that contrary to the aforementioned land use, the Defendant applied to the LPPA for permission to erect a church office and Ablution block on its property; that by a letter dated 4th April, 2017 and addressed to the Defendant, LPPA refused to grant the Defendant permission to erect the said church office and Ablution block for the reason that the area was zoned for Agricultural and Residential use only and not as a place of worship. He added that the Defendant was further advised by LPPA that in order to carry out church activities on its property, the Defendant had to firstly

undertake the process of change of land use from Agricultural to place of worship. However, to the Plaintiff's utmost shock and disbelief and in total disregard of the LPPA's guidance, the Defendant had proceeded to construct a church building on its property without first attending to changing the use of the said property. Copies of pictures showing the church built were produced collectively and marked **'JL3.'**

The deponent explained that he believed that the Defendant's actions were not only in violation of the law but also went against the concept of the Plaintiff's housing project as the said actions had altered/changed the character of the concept of the housing project for which approval was granted by LPPA.

The deponent believed that it was imperative for this court to restrain the Defendant from constructing or continuing to construct a church building used for church purposes and from using its property as a place of worship until further order of court.

I did not hear the application *ex-parte* but directed that it be heard *inter-parte* 26th July, 2017.

The Defendant opposed the application and filed an Affidavit in Opposition on 31st July, 2017 which was deposed to by **MULENGA CHELLA**, the Trustee of History Makers Zambia Registered Trustees. He deposed as follows:

That the Defendant was a Christian Organisation and the Legal owner of Property No Sub division N4 of Farm 382a Meanwood Ibex Hill, Lusaka. He admitted that the whole of Meanwood Ibex Hill Housing Project had been zoned for Agricultural and Residential use only, but the area plan as approved by the LPPA included social amenities.

However, the deponent denied that the LPPA had denied the Defendant permission to use the plot as a place of worship. He explained that the LPPA's advice was to undertake the change of land use process of which the Defendant immediately pursued by way of application to the LPPA; that it was not that the

Defendant had continued to construct a church after the advice of the LPPA. He explained that the general housing structure seen in the copies of pictures produced were already there by the time the LPPA advised the Defendant to pursue the change of land use process. He added that the Defendant had not done any constructions but had been pursuing the change of land use process and officers from LPPA had been making regular inspections.

He further deposed that he believed that the application for an interim prohibitory injunction by the Plaintiff was premature as the Plaintiff had been given the opportunity to bring forward any objections to the LPPA concerning the application for change of land use through the official advertisement placed in the Times of Zambia.

The Plaintiff through its Project Officer filed an affidavit in reply on 10th August, 2017.

The deponent denied that the Meanwood Ibex Hill Housing Project provided for social amenities such as a place of worship; that if this was the case, the Defendant's application to LPPA for permission to erect a church office and ablution block on its property would not have been refused.

He further deposed that notwithstanding the advice rendered to the Defendant by the LPPA, the Defendant had already commenced and continued constructing structures used for church purposes and to use its property for worship and that it had abrogated the law.

At the hearing of the application on 15th August, 2017, learned counsel for the Plaintiff Mr. C.M. Magubbwi relied on the skeleton arguments filed into court as well as the affidavit in support and affidavit in reply. He urged the court to grant the order of prohibitory injunction sought.

Learned counsel for the Defendant equally relied on the affidavit in opposition and the skeleton arguments filed on 14th August, 2017. It was her prayer that the court dismisses the application for the injunction with costs to the

Defendant as the Plaintiff had not placed before court a valid cause of action to warrant the grant of an injunction.

I am indebted to counsel for their submissions. I shall not endeavor to enumerate what is contained in those submissions suffice it to mention that I have carefully considered the submissions and I shall be making reference to them in the ruling as and when it is necessary.

By this application, I have been called upon to determine whether the Plaintiff is entitled to an Order of prohibitory injunction.

The test to be applied when considering whether or not an injunction should be granted remains that laid down by the House of Lords in the seminal case of ***American Cyanamid Company v Ethicon***[1]. This case sets out a series of questions which should guide the court in making a determination. These are:

1. Is there a serious question to be tried?
2. Would damages be adequate?
3. Where does the balance of convenience lie?

In deciding whether or not an interim injunction should be granted, the first or primary issue therefore is that there must be a serious question to be tried. The Supreme Court in the case of ***Hilary Bernard Mukosa v Michael Ronaldson***[2] held that:

> ***"An injunction would only be granted to a plaintiff who established that he had a good and arguable claim to the right which he sought to protect."***

Further, in the case of ***Harton Ndove v. Zambia Educational Company***[3] Chirwa J held 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 prospect of succeeding at trial."

Iain S. Goldrein, K.H.P. Wilkinson and M. Kershaw, the learned authors of *Commercial Litigation: Pre-emptive Remedies* when considering this question whether there is a serious question to be tried at page 150, put it this way:

'It is implicit in the dicta of Lord Diplock that whether or not there is a defence must also be taken into account- for it is only against that anvil that the court can hammer out:

(a) Whether or not the issue raised by the Plaintiff is serious; or indeed
(b) Whether it is going to be tried.'

In sum, the primary issue to be considered is whether or not an applicant has raised a serious question to be determined at trial. If there is no serious question to be tried, the application fails and the injunction should be refused.

Conversely, if there is a serious question to be tried, the court must consider whether an applicant can fully be compensated with an award of damages. This question is based on the fundamental principle of injunction law that an interim injunction should not be granted to restrain actionable wrongs for which damages would be the proper or adequate remedy. The Supreme Court case of ***Turnkey Properties v. Lusaka West Development Company Limited*** [4] is instructive on this point as it held that:

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

In the event that there is a doubt as to the adequacy of damages and the ability of the defendant to pay them if the applicant were to succeed at trial, then the court should proceed to consider the balance of convenience.

In view of the above principles, for the application to succeed, the Plaintiff must first demonstrate that there is a serious question to be tried and that he has a good and arguable claim to the right he seeks to protect.

The Plaintiff's contention is that the Defendant has not been granted planning permission to change the use of its property from Agricultural to place of worship but that it has continued to construct church offices and to use its property for worship purposes. According to the Plaintiff, this contravenes section 49(1) of the Urban and Regional Planning Act No. 3 of 2015. Thus the actions are illegal. It is on this basis that the Plaintiff argues that it has a clear cause of action at law entitling it to relief.

The Defendant's contention on the other hand is that the Plaintiff is prematurely before court and therefore it has not established that its right to relief is clear.

In addressing the first question, I consider it pertinent to consider the Plaintiff's claims before this court.

Apart from the order of prohibitory injunction, the only other reliefs pleaded in the Writ of Summons and Statement of Claim are costs and any other relief the court may deem fit.

However, having examined the Statement of Claim and the affidavits filed by the Plaintiff, I have failed to appreciate the basis for this application for an order of prohibitory injunction. I say so because it is trite law that an application for an order of interlocutory injunction is not in itself a cause of action but is dependent on a pre-existing cause of action. Lord Diplock in case of ***Siskina (Owners of Cargo Lately Laden On Board) and others v Distos Compania Naviera*** [5] put it aptly when he held that:

> ***'A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being***

a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court.'

What this holding means which I fully subscribe to is that injunctions are only remedies and should only be granted if the applicant has a substantive cause of action. In other words, an injunction cannot exist in isolation but is incidental to and dependent on the enforcement of a substantive right.

Although the Plaintiff has argued that its right to relief is clear in the instant case, the substantive right which the Plaintiff seeks to enforce against the Defendant has not been defined before this court in the form of pleadings (that is the Writ of Summons and the Statement of claim). The Plaintiff has only averred that the Defendant's actions are in violation of the law and that it has suffered loss and damage as a result of the Defendant's action.

However, it is not clear what question the court will have to determine at the substantive hearing and what relief it seeks other than the order of prohibitory injunction. Therefore, I can safely state that the Plaintiff's application for an injunction exists in isolation.

In view of the foregoing and guided by the authorities referred to above, this court is not able to hammer out whether or not there is a serious question to be tried in the absence of any substantive cause of action against the Defendant.

I therefore find that in line with the principle adopted by the Supreme Court in the case of ***Shell and BP Zambia Limited*** that the right to relief is not clear. Thus there is no serious question to be determined at trial. In view of this finding, it is pointless to consider the other principles referred to above as the application fails at this stage.

For the reasons I have highlighted above, I decline to grant the order of prohibitory injunction sought by the Plaintiff against the Defendant. The application is accordingly dismissed as it lacks merit. Costs are awarded to the Defendant.

Leave to appeal is granted.

DELIVERED at Lusaka this 24th day August, 2017.

M. C. KOMBE
JUDGE