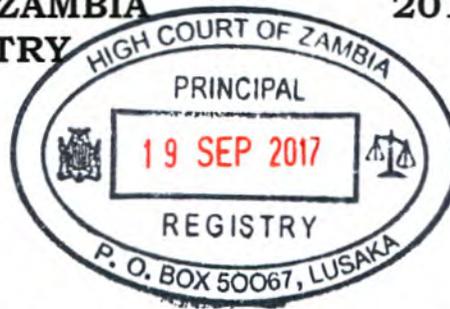


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

2017/HP/1144

**B E T W E E N:**

MIDLANDS BREWERIES (PVT) LTD

**PLAINTIFF****AND**

COMMISSIONER OF LANDS

**1<sup>st</sup> DEFENDANT**

MEHMUD SULEMAN MOHAMED

**2<sup>nd</sup> DEFENDANT**

SADIK PATEL MOHAMED SAKIL

**3<sup>RD</sup> DEFENDANT**

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 19<sup>th</sup> day of  
September, 2017**

*For the Plaintiff* : Mr. G. Lungu, Messrs Muleza Mwiimbu & Co.  
*For the 1<sup>st</sup> Defendant* : No Appearance  
*For the 2<sup>nd</sup> & 3<sup>rd</sup>  
Defendants* : Mr. P. Songolo, Messrs Philsong & Partners

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## **R U L I N G**

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**Cases Referred To:**

1. *Vodacom v Communication Authority, Appeal No. 98 of 2008*
2. *Shell and BP (Z) Limited v Conidaris and Others (1985) ZR, 174*
3. *American Cynamid Company v Ethicon (1975) A.C 396*
4. *Turnkey Properties v Lusaka West Development Company Ltd BSK Chiti (sued as receiver) & Zambia State Insurance Corporation Ltd (1984) ZR 85*
5. *Minister of Information and Broadcasting Services and Another v Chembo and Others (2007) ZR*

**Legislation Referred To:**

1. *High Court Act, Chapter 27*
2. *Lands and Deeds Registry Act, Chapter 185*
3. *Lands Act, Chapter 184*

By this application, the Plaintiff seeks an interim injunction pending determination of the matter pursuant to Order 27 of the High Court Rules. It is supported by an Affidavit.

The deponent **Bates Namuyamba**, Chairman and Chief Executive Officer of the Plaintiff Company states that on 15<sup>th</sup> March, 2014, he applied to the Town Clerk, Lusaka City Council, for the creation of a commercial plot on a disused road reserve in the light industrial area. This is shown in the exhibit marked **"BN1."** He states that the Lusaka City Council created two (2) commercial plots adjacent to each other through its Plans, Works, Development and Real Estates Committee on 19<sup>th</sup> November, 2014 as shown in the exhibit marked **"BN2."**

The deponent states that on 30<sup>th</sup> December, 2014, the Lusaka City Council adopted the minutes of the Plans, Works, Development and Real Estates Committee, which created the two plots under minute No. C/56/12/14 as shown in the exhibit marked **"BN3."** That consequently, on 24<sup>th</sup> February, 2015, the Lusaka City Council recommended to the 1<sup>st</sup> Defendant to allocate the

commercial plots to the Plaintiff as shown in the exhibit marked **"BN4."**

The deponent states that since then, the 1<sup>st</sup> Defendant has failed, neglected or simply refused to issue the Plaintiff an offer letter. Further, that there was no explanation provided for its failure. The affidavit discloses that a search conducted on 23<sup>rd</sup> June, 2016, at the 1<sup>st</sup> Defendant's Registry revealed that Plot No. Lusaka/LN-2804/1 was allocated to the 2<sup>nd</sup> Defendant on 28<sup>th</sup> April, 2015 and Certificate of Title No. CT-7022 issued to him on the same date as shown in the exhibit marked **"BN5."** The deponent also states that his further search at 1<sup>st</sup> Defendant's Registry conducted on 23<sup>rd</sup> June, 2016, revealed that Plot No. Lusaka/LN-2804/2 was allocated to the 3<sup>rd</sup> Defendant and Certificate of Title No. CT-28251 consequently issued to him as shown in the exhibit marked **"BN6."**

The deponent avers that a visit to the site showed that the Defendants had built boundary walls on the properties without the consent of the Plaintiff, who instated the creation of the commercial

properties. In his prayer, the deponent urged the Court to grant it an interim injunction until the matter is disposed of.

The 1<sup>st</sup> Defendant did not oppose the application.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants **Mehmud Suleman Mohamed** and **Sadik Patel Mohamed Sakil** filed a consolidated Affidavit in Opposition. The 2<sup>nd</sup> Defendant avows that he was approached by Mr. Kwaleyela Lubasi the agent of Mr. Simunji Silombwana (principal) who sold him Plot No. Lusaka/LN-2662/8 at ZMW350,000.00. The 2<sup>nd</sup> Defendant avers that prior to the sale, Mr. Lubasi showed him the property documents comprising an offer letter from the Commissioner of Lands and a receipt paid by the principal as shown in the exhibits marked "**MSMSPMS3**" and "**MSMSPMS4**" respectively.

The 2<sup>nd</sup> Defendant avows that he conducted a search at the Ministry of Lands where he satisfied himself that the documents were authentic. He states that he confirmed the documents and he went ahead to purchase the property. That a sale agreement was consequently executed on 19<sup>th</sup> February, 2015 as shown in the

exhibit marked **"MSMSPMS5."** It deposed that after paying for the property, the Commissioner of Lands informed him that it was encumbered and he was subsequently allocated Plot No. LN-2804/1 as a replacement and title was issued on 28<sup>th</sup> April, 2015. This is shown in the exhibit marked **"MSMSPMS6."** The 2<sup>nd</sup> Defendant states that he had no knowledge of the Plaintiff's claim and that it participated in the creation of his commercial plot.

The 2<sup>nd</sup> Defendant admits that after collecting the Certificate of Title, he moved on site and constructed a warehouse which is complete and about to be commissioned as shown in the exhibit marked **"MSMSPMS7."** The 2<sup>nd</sup> Defendant states that he has been in occupation of the property for over two years and the Plaintiff has come too late to Court to seek injunctive relief.

The 3<sup>rd</sup> Defendant who is similarly circumstanced as the 2<sup>nd</sup> Defendant states that sometime in September, 2010, he bought Stand No. LUS/12716 Lusaka from a Company called Sangalale Investments Limited at a purchase price of ZMW130,000.00. That he was duly issued a Certificate of Title on 6<sup>th</sup> October, 2010 as shown in the exhibit marked **"MSMSPMS8."** He states that he

delayed to develop his property and the Commissioner of Lands re-entered it on 20<sup>th</sup> June, 2013.

The 3<sup>rd</sup> Defendant avows that he challenged the re-entry because he did not receive a notice from the Commissioner of Lands who conceded his failure. He further states that he was subsequently offered Lusaka/LN-2804/2 and issued Certificate of Title No. 5798 on 23<sup>rd</sup> March, 2015 as shown in the exhibit marked **“MSMSPMS10.”**

The 3<sup>rd</sup> Defendant avers that after noticing a vacant piece of land in front of his property, he applied for an extension, which was approved and registered by way of Deed of Substitution of Survey Diagrams on 22<sup>nd</sup> December, 2016. This is shown in the exhibit marked **“MSMSPMS11.”** Further, that he obtained his first Certificate of Title No. 5798 for Stand No. LN-2804/2 on 23<sup>rd</sup> March, 2015 and the second Certificate of Title No. 28251 for the same property on 27<sup>th</sup> December, 2016 as shown in the exhibits marked **“MSMSPMS12”** and **“MSMSPMS13”** respectively.

In reply, the Plaintiff contends that the Commissioner of Lands wrongly joined itself in a matter which arose from a private transaction and in which the parties could have refunded each other over the non-existent properties. Further, that the Commissioner of Lands did describe the plots in issue as replacements and if he did, then there was an error on his part, which had to be corrected. The Affidavit in Reply also discloses that the Defendants illegally carried out construction works because their building plans were not approved and therefore subject to demolition by Lusaka City Council. It is deposed that the Plaintiff informed the Planning Authority of the development on 18<sup>th</sup> November, 2015, as shown in the exhibit marked "**BN1**" but no action was taken.

It is also deposed that the 1<sup>st</sup> Defendant wrongly extended the 3<sup>rd</sup> Defendant's property and as a result, denied the Plaintiff the property it legitimately expected. That the Plaintiff's expectation is based on the fact that it instated the creation of the plots. The Plaintiff concluded by reiterating its prayer to grant it an interim injunction.

The parties filed written submissions for which I am grateful.

Learned Counsel for the Plaintiff submitted that it had a legitimate expectation of acquiring the Defendants' plots after it initiated the process of their creation. He cited the case of **Vodacom v Communication Authority**<sup>1</sup>, where the Court stated that:

**“Legitimate expectation arises when a decision maker has led someone to believe that they will receive or retain a benefit or advantage....The protection of legitimate expectation, is at the root of the Constitutional Principle of the rule of Law, which requires regularity, predictability and continuity in government dealings with the public. The doctrine of Legitimate expectation derives from justification from the principle of allowing the individual to rely on assurances given, and to promote certainty and consistent Administration.”**

Counsel submitted that the Plaintiff was assured by the Lusaka City Council that once the property was created, it would be given the same. Thus, there was an obligation on the 1<sup>st</sup> Defendant to allocate the properties to the Plaintiff and this invoked a serious question to be determined by the Court.

Counsel further cited the case of **Shell and BP (Z) Limited v Conidaris and Others**<sup>2</sup>, which laid down the requirements of

injunctive relief and submitted that it supported the Plaintiff's application. He also called in aid the **American Cynamid<sup>3</sup>** case.

In response, Learned Counsel for the Defendants submitted that the boundary walls which the Plaintiff averred to be under construction were completed before it commenced the action. Further, the 2<sup>nd</sup> Defendant had fully constructed a warehouse on his property. Counsel submitted that in the circumstances, the Court had nothing to injunct. It was Counsel's contention that the Affidavit in Support did not reveal that the Plaintiff would be willing to compensate the Defendants' damages in the event that its action failed. It was Counsel's further submission that the balance of convenience tilted in the Defendants' favour and referred me to the **American Cynamid<sup>3</sup>** case, where Lord Diplock stated that:

**"It would be unwise even to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies let alone to suggest the relative weight to be attached to them. These vary from case to case,"**

Counsel went on to submit that the Plaintiff did not show what amounted to the status quo in its originating process or Affidavits in Support, which the Court was expected to maintain. He called in

aid the case of **Turnkey Properties Limited v Lusaka West Development Limited and Others**<sup>4</sup>, where it was held that:

**“While it is generally accepted 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 and 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 opponent’s case and strengthen his own.”**

It was Counsel’s submission that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were offered their respective properties by the Commissioner of Lands as replacements in April and March 2015, and that they commenced their building works simultaneously. By the time the Plaintiff’s action was filed on 14<sup>th</sup> July, 2017, the status quo was that the Defendants had already erected their boundary walls. Counsel prayed to the Court to dismiss the application.

I have anxiously considered the application and the affidavits and submissions filed herein. The central issue to be determined is whether this is a proper case where I can exercise my discretionary power to grant the Plaintiff an interim injunction. There are a plethora of authorities on the principles of injunctive relief and some of them have been cited by Counsel. In the case of **Shell &**

**BP v Conidaris**<sup>2</sup>, the Supreme Court stated that a person seeking injunctive relief must demonstrate the following:

- a) *A clear right to relief*
- b) *Irreparable damage and injury that cannot be atoned for by damages*
- c) *A tilt of the balance of convenience in the Plaintiff's favour.*

The first issue I must consider is whether on the available evidence, there is a serious question to be tried and if the Plaintiff has shown a clear right to relief. Upon consideration of the facts, there is a controversy on whether the Plaintiff who instated the creation of the commercial plots was entitled to the properties and had a legitimate expectation. This issue in my view, can only be determined at trial and not at this interlocutory stage.

The second issue to consider is whether the Plaintiff is likely to suffer irreparable damage, which cannot be atoned by an award of damages. The Affidavit in Opposition discloses that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants erected boundary walls on their properties in 2015 as shown in the exhibits marked "**MSMSPMS7**" and "**MSMSPMS15.**" The 2<sup>nd</sup> Defendant has built a warehouse which is about to be commissioned. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants obtained their title deeds

in April and March 2015 respectively. The Plaintiff only commenced this action on 14<sup>th</sup> July, 2017.

The Plaintiff has no title to the properties except for its claim for a legitimate expectation, which arises from the fact that it valiantly identified the properties in dispute and it was subsequently recommended for allocation by the Lusaka City Council to the 1<sup>st</sup> Defendant. It is undeniable that the Commissioner of Lands has wide discretion in allocating land. He is not bound to act on his agent's recommendations.

In the case of **Minister of Information and Broadcasting Services and Another v Chembo and Others**<sup>5</sup>, the Supreme Court settled the value of recommendations when it held *inter alia* that:

**“The word ‘recommendation’ in the context of the two sections, connotes or implies a discretion in the person to whom it is made to accept or reject the recommendation.”**

The fact that the Plaintiff identified the land does not therefore tie the Commissioner of Lands to any recommendation. The Defendants have exhibited title deeds for the properties, which serve as conclusive proof of ownership according to section 33 of

the Lands and Deeds Registry Act, particularly that there is no allegation of fraud. This being the case, I hold that injunctive relief cannot lie against them.

In view of the reasons stated above, it is otiose to consider the question of irreparable damage and the tilt of the balance of convenience.

Accordingly, I refuse to grant the Plaintiff an order of interim injunction and dismiss its application. Costs shall abide the event to be taxed in default of agreement.

Dated this 19<sup>th</sup> day of September, 2017.

  
M. Mapani-Kawimbe  
**HIGH COURT JUDGE**