

IN THE HIGH COURT FOR ZAMBIA

2017/HPC/0011

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



NGOSA ALBUES MAKALU

PLAINTIFF

AND

DOUGLAS CHILOMBO SILUMBWE

1ST DEFENDANT

(T/A D.C BUILDMANN SUPPLY)

RURAL ELECTRIFICATION AUTHORITY

2ND DEFENDANT

FIRST NATIONAL BANK ZAMBIA LTD

3RD DEFENDANT

Before the Hon Lady Justice Irene Zeko Mbewe

For the Plaintiff:

Mr. S. Mbewe of Messrs Keith Mweemba

For the 1st Defendant:

Ms C. K. Mulenga of Mesdames CKM Associates

For the 3rd Defendant:

Mr. Moonga In House Counsel First National Bank

R U L I N G

Cases Referred To:

1. *Finsbury Investment Limited and Others v Ventriglia and Others [2013] Vol 2 Z.R 412*

2. *Leopold Walford (Z) Limited v Unifreight [1985] ZR 203*
3. *Tam Capital Partners Incorporation, Corpus Globe Nominees Limited v Mumena Mushinge, Zambort Limited, Terra Gold Barbados Inc [2008] ZR 179 Vol 2*

Legislation referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*

This is the 1st and 3rd Defendant's application to discharge an interlocutory injunction obtained irregularly and is made pursuant to **Order 27 Rules 1, 2, 3 and 4 High Court Rules** as read with **Order 3 Rule 2, High Court Rules, Cap 27 of the Laws of Zambia.**

It is supported by an affidavit deposed to by Douglas Chilombo Silumbwe the 1st Defendant herein. The deponent asserts that on the 13th January 2017 he was served with a Statement of Claim and Writ of Summons (**Exhibit DCS 1**) and entered a conditional appearance and made an application to set aside the originating process.

That the Plaintiff obtained an injunction from the Court on 12th January 2017 (**DCS 2-5**). That the inter parte hearing was held on

31st January 2017 and Ruling delivered on 28th February 2017 confirming the ex parte injunction where costs were awarded to the Plaintiff. That the 1st Defendant was not aware of the *inter parte* hearing as the Plaintiff only served the 2nd Defendant (Exhibit "**DCS 2-5**").

The gist of the 1st Defendant's evidence is that he only learnt of the injunction on 22nd March 2017 when his Advocates availed him a copy and that the obtaining of the injunction was by stratagem and fraud and should not stand. According to the 1st Defendant, that the Plaintiff deliberately failed to serve the injunction on him and on that basis prayed that the injunction be set aside on account of fraud. According to the deponent, he fully funded the procurement of the said goods from India (**Exhibit DCS 6-14**).

The 1st Defendant relied on **Order 35 Rule 5 of the High Court Rules** which provides that:

"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as it may seem fit."

The 1st Defendant urged this Court to set aside the interlocutory injunction for reason that he was not given an opportunity to be heard due to the non-service of court process on him and that this caused an injustice to be done thereby making the interlocutory injunction irregular.

The 1st Defendant filed list of authorities and skeleton arguments dated 31st March 2017 and in support of their application relied on **Order 35 Rule 5 High Court Rules, Cap 27 of the Laws of Zambia** and **Order 45 Rule 7 (2) (a) of the Halsbury's Laws of England** even though the correct citation is Rules of the Supreme Court, 1999 Edition.

In the 1st Defendant's affidavit in reply, the prayer is for the interlocutory injunction to be set aside for want of procedural service and or fraud.

The 3rd Defendant filed an affidavit in support on 30th March 2017 deposed to by Milimo Moonga the Legal Manager in the employ of the 3rd Defendant. The gist of the evidence is that on 11th January, 2017, the Plaintiff served the 3rd Defendant with a certificate of urgency, affidavit in support of an ex parte injunction application,

writ of summons, statement of claim and list of authorities but did not serve the ex parte Order of interim injunction obtained from the Court wherein the return date was endorsed for the inter parte hearing of the injunction. It is deposed that the 3rd Defendant only heard about the interim injunction from the 2nd Defendant when it made a follow up on the payment from the contract it financed on behalf of the 1st Defendant and that it was then that copies of the ex parte Order and interlocutory Ruling were availed to it. It is deposed that the deponent conducted a search on the 28th March 2017 which revealed that only the 2nd Defendant had been served with the ex-parte Order of interim injunction endorsed with the return date. That the Plaintiff misled the Court resulting in a grave miscarriage of justice as it is on that basis that the Court proceeded to hear the Plaintiff in the absence of the Defendants herein.

It is the deponent's evidence that this is a proper case for the Court to exercise its power to discharge the interlocutory injunction as it was obtained in an irregular manner by the Plaintiff as they did not effect service of the ex parte interim order for an interim injunction.

Counsel for the 3rd Defendant further relied on **Order 45 Rule 7 (2) of the Rules of the Supreme Court, 1999 Edition** though they cited it as Halsbury Laws of England which states as follows:

"An Order shall not be enforced under Rule 5 unless -

(a) a copy of the Order has been served personally on the person required to do or abstain from doing the act in question."

The 3rd Defendant filed list of authorities and skeleton arguments on 30th March 2017 and relied on **Order 27 Rule 1-4 High Court Rules, Cap 27 of the Laws of Zambia** with particular emphasis to the proviso of Rule 4 which grants this Court power to discharge any injunction granted under that Order upon application by a dissatisfied party. Counsel for the 3rd Defendant submits that it is a grave miscarriage of justice and an injustice that an Order affecting it was made without it being accorded an opportunity to be heard at the inter parte hearing.

The Plaintiff filed an affidavit in opposition deposed to by Mr. Mbewe Counsel seized with conduct of the matter. A number of

issues raised in the affidavit are not related to the application at hand and for that reason I shall not delve into them. The deponent averred that he proceeded with the application under the honest and reasonable belief that all the Defendants herein were served with court process including the requisite Order for the inter parte hearing. That the non service was not deliberate or intentional and that he has been advised by Counsel that any breach of Court Rules is treated as a mere irregularity which is curable and may be waived by the conduct of the parties to an application to discharge an injunction. According to the deponent, no prejudice will be occasioned to the 1st and 3rd Defendant by maintaining the status quo in this matter.

In the Plaintiff's list of authorities and skeleton arguments, the Plaintiff submits that an injunction may be discharged as envisaged in **Order 35 Rule 5 High Court Rules, Cap 27 of the Laws of Zambia**. Reliance was placed on the case of **Finsbury Investment Limited and Others v Ventriglia and Others**¹ in which the Supreme Court discharged an interim injunction on grounds that the changes in circumstances had occurred after the Court had

granted the interim injunction as such the injunction was no longer serving the purpose for which it was granted as the perceived threat was no longer existing. The deponent avers that in the current case, he obtained an ex parte Order on the basis of full and frank affidavit evidence placed before the Court and disclosing the right to relief he seeks to protect. That it is justifiable to restrain the 2nd Defendant from doing the very act that would defeat the usual purpose of an interlocutory injunction. That notification of the application for an inter parte hearing of an application for an interlocutory injunction is a regulatory or procedural rule and breach of the same should be treated as a mere irregularity and cited the case of **Leopold Walford (Z) Limited v Unifreight²**.

At the hearing Ms. Mulenga, Counsel for the 1st Defendant relied on the affidavit and skeleton arguments filed herein and submitted that it was the 1st Defendant's contention that the application of the injunction was not served hence their absence at the inter parte hearing and was subsequently informed by the 2nd Defendant when making a follow up on payments. Counsel prayed that the

injunction be discharged as there was no service and the 1st Defendant was not given an opportunity to be heard.

Counsel for the 3rd Defendant Mr. Moonga submitted that he was relying on the affidavit and skeleton arguments in support of this application filed on 30th March 2017. Counsel informed the Court that the gist of the 3rd Defendant's application is that the Plaintiff did not serve the interim Order of the injunction endorsed with a return date and as such the 3rd Defendant was deprived an opportunity to be heard at the inter-parte hearing. Counsel relied on the proviso under **Order 27 Rule 4 of the High Court Rules** and stated that it empowers the Court to discharge an injunction such as one granted to the Plaintiff. Further that a perusal of the injunction shows that the Plaintiff misled the Court that the Defendants were notified and an injustice has been occasioned to the 3rd Defendant and prayed that the injunction be discharged.

Counsel for the Plaintiff, Mr. Mbewe relied on the affidavit and skeleton arguments dated 19th April 2017. Counsel submits that the basis of the irregularity is not sufficient to discharge the injunction because an irregularity is curable as is the practice in our

jurisdiction. Counsel argues that the Order that is being challenged was granted to maintain the status the quo until the determination of the main matter, and that it does not create any favourable conditions for the Plaintiff and is granted to ensure that these proceedings do not become an academic exercise.

In response Ms. Mulenga submitted that the Plaintiff having admitted that there was no service, this Court should dismiss the injunction and that it is not a mere irregularity as it borders on inequity.

I have carefully considered the affidavit evidence, list of authorities and skeleton arguments supported by list of authorities in support of the parties' respective rival arguments.

The issue for determination is whether or not to discharge the interlocutory injunction of the 20th January 2017 granted in the absence of the 1st and 3rd Defendant.

The 1st and 3rd Defendants application is predicated on **Order 27 Rule 1-4 High Court Rules, Cap 27 of the Laws of Zambia.**

Order 3 Rule 2 High Court Rules, Cap 27 of the Laws of Zambia empowers this Court to make an order that is necessary for the administration of justice and **Order 35 Rule 5 Rules of the Supreme Court, 1999 Edition** empowers this Court to hear the Plaintiff in the absence of the Defendant provided that there is proof of service of the notice of hearing.

The Plaintiff concede that the notice of hearing for the inter parte application for an interlocutory injunction was not served on the 1st and 3rd Defendant. A cursory perusal of the record shows that the injunction is directed at the 2nd Defendant and this can be discerned from the wording of the injunction itself which states as follows:

" IT IS HEREBY ORDERED AND DIRECTED that the 2nd Defendant whether by itself or its servants or agents whomsoever acting under its authority BE and IS HEREBY restrained from effecting or making payment to the 1st and 3rd Defendant's account of 70% on shipment or 20% on acceptance of remaining 14 distribution transformers.....".

The Penal Notice is addressed to the 2nd Defendant herein.

The question which begs for an answer in this application is what then is the fate of the interlocutory injunction granted in the absence of the 1st and 3rd Defendant? An inter parte proceeding requires both parties to be present to canvass their respective positions before Court. I opine that in this case, the Plaintiff applied for the interlocutory injunction, and the party against whom the injunction was sought was duly served with the requisite court process. Much as it is not disputed that the application was not served on the 1st and 3rd Defendant and that the interlocutory injunction is directed at the 2nd Defendant, I bear in mind that the interlocutory injunction affects the substantive rights of all the parties herein as alluded to in this Court's Ruling of 20th January 2017.

The Plaintiff sought an injunction to preserve the subject matter of the suit. The Plaintiff argues that if the injunction is discharged or set aside, the Plaintiff stands to be greatly prejudiced and prayed that the status quo be maintained pending hearing of the substantive matter. Counsel for the 3rd Defendant relied on the case

of Finsbury **Investment Limited and Others v Ventriglia and Others**¹ where the Supreme Court held inter alia that the Judge who grants an ex parte injunction retains the discretion to dissolve it after hearing the opposite side and if it becomes obvious that it should have never been granted.

In the circumstances of this case, I have perused the writ of summons and statement of claim and find that should the interlocutory injunction granted on the 20th January 2017 be set aside, it will affect the substantive rights of the parties to this action. I adopt the dicta of Wood J as he was then in the case of **Tam Capital Partners Incorporation, Corpus Globe Nominees Limited v Mumena Mushingi, Zambort Limited, Terra Gold Barbados Inc**³ which is persuasive, and where it was held as follows:

"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 the judgment ineffectual."

I opine that if the status quo is not maintained in this matter, it entails creating conditions only favourable to the Defendants. In a status quo, it is the duty of this Court to ensure that no conflict is generated by the Order for maintenance of the status quo. It should create no prejudice to one party nor hardship to another party. There should be an equality in the prejudice which in essence creates some sort of rigid yet false equality. Both or all the parties should have a feel that neither is disadvantaged by the Order.

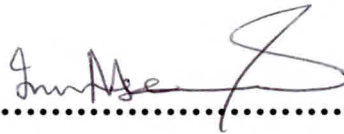
The primary objective in this case is the doing of justice to the parties. I opine that the interlocutory injunction be maintained so as to preserve the status quo until the rights of the parties are determined.

The net result is that the interlocutory injunction granted on 20th January 2017 is maintained pending determination of the substantive matter.

Costs in the cause.

Leave to appeal granted.

Dated at Lusaka this 31st day of July, 2017.

A handwritten signature in black ink, appearing to read 'Irene Zeko Mbeve', is written above a horizontal dotted line.

HON IRENE ZEKO MBEWE
HIGH COURT JUDGE