

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2017/HP/1828

(Civil Jurisdiction)



B E T W E E N :

AFRICAN BROTHERS CORPORATION LIMITED
(trading as PHI Shopping Mall)

PLAINTIFF

AND

DAILY NATION NEWSPAPER LIMITED
RICHARD SAKALA

**1ST DEFENDANT
2ND DEFENDANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the
21st day of March, 2018**

For the Plaintiff : Ms. I. K. Chabe, Dove Chambers
*For the 1st and
2nd Defendants* : Mr. N. C. Kanga, Makebi Zulu Advocates

R U L I N G

Cases Referred To:

1. *Harton Ndove v National Educational Company of Zambia Limited (1980) ZR 184 (H.C)*
2. *Turnkey Properties v Lusaka West Development Company Ltd, B.S.K Chiti (sued as Receiver) and Zambia State Insurance Corporation (1984) Z.R 85 (S.C)*
3. *Shell & BP (Z) Limited v Coniridas & Others (1975) ZR 174*
4. *American Cynamid Company v Ethicon Limited (1975) AC 396*
5. *Bonnard v Perryman (1891) 2 Ch 269*
6. *Edward Jack Shamwana v Levy Mwanawasa (1994) S.J 93 (HC)*

Legislation Referred To:

1. *High Court Act, Chapter 27*

Other Works Referred To:

1. *Halsbury's Laws of England 4th Edition*
2. *Gatley on Libel and Slander, Sweet and Maxwell, 11th Edition, 2008*

This is the Plaintiff's application for an interim injunction made pursuant to Order 27 Rule 4 of the High Court rules. It is supported by an Affidavit.

The deponent **Zhou Wei**, Director in the Plaintiff Company avers that the 1st Defendant Newspaper and its proprietor publish a Newspaper which enjoys a wide and substantial circulation in Zambia both in print and electronic form on the World Wide Web.

He also avers that on 26th September, 2017, the Defendants caused to be published an article entitled "PHI MALL NOT SAFE ANYMORE" at page 21 of the Daily Nation Newspaper and the article contained unverified and utterly false defamatory words against the Plaintiff. This is shown in the exhibit marked "**ZW1**." Further, that despite the Plaintiff asking the Defendant through its Advocates to retract the publication with an apology, the Defendants totally disregarded the request.

The deponent states that it has become necessary to restrain the Defendant either by himself, his agents, servants or howsoever otherwise from publishing or causing to be published in any form, the defamatory or related statements concerning the Plaintiff, its management, servants or agents. The deponent contends that the Plaintiff stands to suffer irreparable damages and loss if the Defendants are not restrained from further publishing or causing to be published the same or related statements against it, its management, servants or agents.

In response, **Richard Sakala** deposed an Affidavit in Opposition on behalf of the Defendants. He states that the article complained of by the Plaintiff was not uttered falsely and defamatory. That it is not necessary to restrain the Defendants from further publishing stories, which relates to this matter. Further, that the Plaintiff will not suffer any irreparable injury if the *ex parte* order of interim injunction granted on 20th October, 2017 is vacated. That if the Plaintiff succeeds at trial an award for damages will be adequate.

Learned Counsels filed Skeleton Arguments for which I am indebted. Learned Counsel for the Plaintiff submitted that while the action was in Court, the Defendants published another article in the Daily Nation Newspaper titled 'MYSTERY OF LAND SALE TO CHINESE DEVELOPER IN PHI PERSISTS" in total disregard of the *ex parte* Order on interim injunction granted. Counsel further submitted that the article was premised on unverified information regarding the Plaintiff. It was reckless and aimed at injuring the Plaintiff's rights and reputation as an investor in Zambia as shown in the exhibit marked "**IKC2.**"

It was Counsel's submission that the Plaintiff filed an Amended Writ of Summons and Statement of Claim to include the contents of the said article. Counsel cited the case of **Harton Ndove v National Educational Company of Zambia Limited**¹, where it was stated that:

"The object of an interlocutory injunction is to maintain status quo. This has been the principle upon which an interlocutory injunction is granted for a long time, certainly as recognized by Cotton L.J in the case of Preston v Luck (1884) 27Ch.D 497 at P505 where he says:

"This is an application only for an interlocutory injunction, the object of which is to keep things in status quo so that, if at the hearing the Plaintiffs obtain a Judgment in their favour, the Defendants will have been prevented from dealing in the meantime

with the property in such a way as to make that judgment ineffectual.”

Counsel added that if the injunction was not granted, there was a high risk of the Defendant would further publishing articles that were injurious to the Plaintiff. Counsel next adverted to the case of **Turnkey Properties v Lusaka West Development Company Limited and Others²**, where it was held inter alia that:

“An interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial.”

She prayed to Court for an order of interim injunction pending determination of the substantive matter.

In response, Learned Counsel for the Defendants submitted that in defamation cases, damages were a key remedy and if the Plaintiff was to succeed at trial an award of damages would atone the Plaintiff's loss.

Counsel further submitted that a careful perusal of the Plaintiff's application revealed that it had not established how

damages could not be adequate compensation. Thus, the Plaintiff was not entitled to injunctive relief.

Counsel referred me to the case of **Shell and BP Zambia Limited v Conidaris and Others**³ to support his assertion. He also referred me to the case of **American Cynamid Company v Ethicon Limited**⁴ on injunctive relief. He contended that there were no threats that the articles complained of were injurious to the Plaintiff. They were written on two very distinct subjects and could not be construed as validating each other.

Counsel adverted to the argument that the law of defamation could conflict with the right of freedom of expression. However, the Court was duty bound to balance the interest of freedom of expression and the reputation of an individual. Counsel cited the cases of **Bonnard v Perryman**⁵ and **Edward Jack Shamwana v Levy Mwanawasa**⁶ as authorities.

Counsel stated that the Court could exercise its discretion when there was actual or threatened publication of a defamatory

statement calculated to ruin one's good reputation as articulated by the **Learned Authors of Gatley on Libel and Slander, Sweet and Maxwell, 11th Edition, 2008 at page 299**. However, the Plaintiff had a duty to establish that there was a threat of a further publication of similar statements, which were injurious to it.

Counsel went on to submit that the Defendant intended to rely on the defence of fair comment and the injunction could not be granted. He prayed to Court to dismiss the *ex parte* order of injunctive relief.

I have seriously considered the affidavits and Skeleton Arguments filed herein. The application raises the question whether I can exercise my discretionary power to grant the Plaintiff injunctive relief? The learned Authors of **Halsbury's Laws of England 4th Edition** at page 448 at paragraph 853 state that:

".....on an application for interlocutory injunction, the Court must be satisfied that there is a serious question to be tried. The material available to the Court at the hearing of the application must disclose that the Plaintiff has real prospects for succeeding in his claim."

In the case of **Shell & BP (Zambia) Limited v Conidaris**¹, the Supreme Court held that:

“...all the Courts need to do at the interlocutory stage is to be satisfied that there is a serious question to be tried at the hearing and that the Court has to interfere to preserve property without waiting for the right to be finally established at the trial...”

Further, in the **Shell** case, the Supreme Court held 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 Plaintiffs are entitled to relief. In the Statement of Claim the Plaintiff alleges that on diverse dates, the Defendants published in their Newspapers, malicious, unjustified and defamatory statements about the PHI Mall owned by the Plaintiff. I cannot delve into the substance of these allegations at an interlocutory stage because they can only be determined at a trial.

The gist of the Plaintiff's contention is that the articles in the 1st Defendant Newspaper have a disadvantage on the Plaintiff's business. In the eyes of a reasonable man who finds himself in the Plaintiff's circumstances, it is possible to draw the same reaction.

The second issue to consider is whether the Plaintiffs would be adequately compensated in damages if they were not granted an injunction and were to succeed at trial. In the **Shell** case, the Supreme Court further held that:

"A Court will not generally grant an interlocutory injunction unless a right to relief is clear and unless the injunction is necessary to protect the Plaintiff from irreparable injury; where inconvenience is not enough, irreparable injury means injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired."

The Plaintiff is seeking an injunction to restrain the Defendants from continuing the publication of statements about it, which it considers injurious to its business and integrity. In my view, it is not possible to quantify in monetary terms, the damage the Plaintiff is likely to suffer, assuming that such loss were to arise from the Defendant's publications. Thus, damages will not be able to atone the Plaintiff's loss. As regards the plea of justification and

fair comment on matters of public interest, it must be obvious at an interlocutory stage that the plea is available to a party pleading it. This is not obvious from the affidavit evidence filed herein and in consequence, I find that the balance of convenience rests with the Plaintiff.

I hold that this is a proper case in which I can exercise my discretionary power to grant an interim injunction pending final determination of the main matter. Accordingly, the ex parte order of interim injunction granted to the Plaintiff on 20th October, 2017 is confirmed. Costs are for the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 21st day of March, 2018.


M. Mapani-Kawimbe
HIGH COURT JUDGE