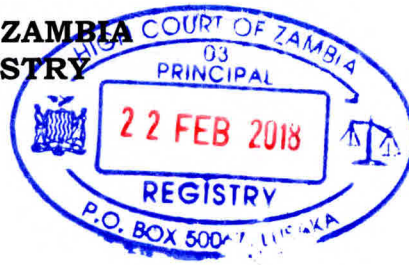


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2018/HP/0128

BETWEEN:

MUGAIRANEZZ JEAN PIERRE

PLAINTIFF

AND

BERNADETTE KAYIMBI

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 22nd DAY OF
FEBRUARY, 2018**

For the Plaintiff : Mr M. Mukupa, Isaac and Partners

For the Defendant : In person

R U L I N G

CASES REFERRED TO:

1. ***American Cynamid CO V Ethicon CO LTD 1976 AC 396***
2. ***Shell and BP V Connidaris 1974 ZR 281***

LEGISLATION REFERRED TO:

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

This is a ruling on an application made by the Plaintiff for an order of interim injunction and stay of sale of the goods seized in execution, pursuant to Order XXVII Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia as read with Order 29 Rule 1 of the Rules of the Supreme Court, 1999 Edition and Order III Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.

Counsel relied on the affidavit filed in support of the application as well as the list of authorities and skeleton arguments filed on 23rd January, 2018. It was stated that the gist of the application as shown in paragraphs 6 to 8 of the affidavit in support of the application, was that the Plaintiff had been paying his rentals in advance up to 1st February, 2018, but the Defendant who is the landlord had been interfering with the Plaintiff's right to quiet possession of the premises.

Further, that the Defendant had gone as far as levying distress for rentals in the amount of K208, 000.00 when the same was not due and owing. Therefore the Plaintiff sought the court's protection, by firstly staying sale of the goods seized in execution pursuant to the warrant of distress, and secondly by setting aside the said warrant of distress. Counsel further submitted that they also asked that the Plaintiff be granted an order of injunction restraining the Defendant from interfering with the Plaintiff's quiet possession of the properties.

The Defendant in response to the application stated that she opposed the application, and relied on the affidavit in opposition filed on 26th January, 2018. Her contention was that the Plaintiff had not been paying rent, and had forged documents to show that he had. That that is what had prompted her to engage bailiffs.

In reply, Counsel for the Plaintiff submitted that the Plaintiff had exhibited an acknowledgement of receipt of monies by the Defendant, which was exhibited as 'MJP3' to the affidavit in support of the application. That the said document shows that the Defendant had deposed in an affidavit before the Subordinate Court that the rentals payable were K1, 500.00 a month, contrary to her assertions before this court that they were K4, 000.00 a month.

Further, that the Defendant had exhibited a letter from her advocates KBF and Partners in which the Defendant acknowledged to a certain extent that monies were paid by the Plaintiff to the Defendant, and therefore the claim that the rentals were increased to K4, 000.00 as shown in exhibit 'BK4' were merely an afterthought. The court was invited to note that the defence and counterclaim in paragraph 4 alleges that the lease commenced on 2nd January, 2013, which is the date of the letter that increased the rentals after the renovations were done. That none of these letters were acknowledged by the Plaintiff, and Counsel reiterated the earlier prayers.

I have considered the application. Order XXVII Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia provides that;

“In any suit for restraining the defendant from the committal of any breach of contract or other injury, and whether the same be accompanied by any claim for damages or not, it shall be lawful for the plaintiff, at any time after the commencement of the suit, and whether before or after judgment, to apply to the Court or a Judge for an injunction to restrain the defendant from the repetition or the continuance of the breach of contract or wrongful act complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right, and such injunction may be granted by the Court or a Judge on such terms as to the duration of the injunction, keeping an account, giving security or otherwise, as to the Court or a Judge shall seem reasonable and just:

Provided that any order for an injunction may be discharged, varied or set aside by the Court or a Judge, on application made thereto by any party dissatisfied with such order.”

Order 29 Rule 1 of the Rules of the Supreme Court, 1999 edition on the other hand, states that;

“(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.”

Order III Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia empowers the Court to make any interlocutory orders that are necessary in the interests of justice, subject to any rules of the court.

The Plaintiff in the affidavit in support of the application states that he entered into a tenancy agreement with the Defendant to rent Shop No 269B Vubu Road, in Emmasdale at K1, 500.00 per month as shown on the lease exhibited as 'MJP1' to the said affidavit. That the parties agreed that the Plaintiff would renovate the said shop and recover the cost from the Defendant. Further that he advanced the Defendant the sum of K63, 565.50 on diverse dates, which amount was supposed to be recovered from the monthly rentals of K1, 500.00, as shown on exhibit 'MJP2' to the affidavit.

That thereafter the Defendant commenced actions in the Subordinate Court and the Local Court which the Plaintiff challenged, but surprisingly she issued a warrant of distress for rentals owing of K208, 000.00, which was executed and all the goods in the shop were seized, and the shop was closed. That exhibit 'MJP3' is the Bailiff's seizure form.

It is deposed that the Defendant acted contrary to the law by forcibly evicting the Plaintiff without notice to quit or terminate the tenancy, and without a court order.

The Plaintiff also avers that he will suffer irreparable loss and damage as a result of the Defendant's illegal eviction, trespass and unlawful seizure and detention of his goods and chattels, which cannot be atoned for by damages. In the skeleton arguments in support of the application, the Plaintiff argued the case of **AMERICAN CYNAMID CO V ETHICON CO LTD 1976 AC 396** illustrated the objectives of granting injunctions by stating that interlocutory injunctions are granted to protect the Plaintiff against injury by violation of his rights which could not adequately be compensated in damages, and that the Plaintiff's need for such protection must be weighed against the corresponding need for the Defendant to be protected against injury from his having been prevented from exercising his rights for which he could not adequately be compensated by the Plaintiff's undertaking in damages, if the uncertainty is resolved in the Defendant's favour at trial.

Further, that in the case of **SHELL AND BP V CONNIDARIS 1974 ZR 281**, the Supreme Court stated that the court will generally not grant an interlocutory injunction unless the right to relief is clear, and the injunction is necessary to protect the Plaintiff from irreparable injury.

The Defendant in the affidavit in opposition to the application deposed that the Plaintiff had been her tenant for five years, and was paying rent at K1, 500.00 a month, which was increased to K4, 000.00 a month on 2nd January, 2013, as shown on exhibit 'BK1'. However the Plaintiff had not been paying the rent as agreed. She also deposed that prior to issuing the warrant of distress, she had written to the Plaintiff giving him

notice to vacate the shop on 3rd October, 2017, as shown on exhibit 'BK2'. It was also her averment that on 19th September, 2017, she had given the Plaintiff one month's notice as shown on exhibit 'BK3'.

Her response to the assertions that the Plaintiff renovated the shop was that the same were done at the Plaintiff's plea, and that no terms were agreed on with regard to the said renovations in that there were two shops which became one, and that is why the rent was increased to K4, 000.00. That the Plaintiff had refused to vacate the shop as seen on exhibits 'BK4' and 'BK5' prompting her to issue the warrant of distress on 9th January, 2018 to recover rentals from the period January 2013 to date.

Her averments with regard to the assertion that the Plaintiff paid her in excess of K63, 000.00 was that the same is subject of criminal charges as the signatures on the two documents were not hers, and hence a forgery. She admits having commenced proceedings before the Subordinate Court and discontinuing them, and her explanation for this was that it was because the parties had agreed to settle the matter excuria. On that basis she prayed that the application be dismissed for want of merit.

It is trite that in order for an interim injunction to be granted, certain principles are considered. The first is that the court must establish there is a serious issue to be tried, and that the right to relief is clear. In this case, it is clear that there is a dispute over whether the Plaintiff is in rental arrears, and so the first requirement has been met, as there is an issue to be tried. The next question is whether damages would be an adequate remedy if the Plaintiff were to succeed at trial.

The Plaintiff in the affidavit in support of the application deposed that the act of the Defendant having distrained the goods for the payment of rentals owing, and locking up the said shop will cause him irreparable loss which cannot be atoned for in damages. However the Plaintiff did not demonstrate how any loss that he would suffer would not be atoned for by damages, as the goods seized are quantifiable.

However, from the affidavit in opposition that was filed, it was not indicated whether the Defendant would be able to pay the damages if the Plaintiff were to succeed at trial. Therefore while damages may be an adequate remedy, it has not been demonstrated that the Defendant would be able to pay them, if the Plaintiff were to succeed at the trial. On that basis I find that this is a proper case in which an injunction restraining the Defendant from interfering with the Plaintiff's possession of the demised premises should be granted. I accordingly direct that the Defendant shall open shop number 269B, Vubu Road, Emmasdale forthwith, and the Plaintiff shall enjoy quiet possession of the same until the matter is determined.

The order staying sale of the goods seized in pursuance of the warrant of distress is hereby confirmed, as whether the Defendant had a right to levy distress and seize the same is a matter that can only be determined after trial of the matter.

As the Defendant has entered appearance and filed a defence, the following shall be the orders for directions;

1. That the Plaintiff shall file a reply if any within fourteen days from today.
2. That there shall be discovery by list within fourteen days of the reply.

3. That there shall be inspection of documents within fourteen days of the discovery.
4. That the parties shall file their respective bundle of documents and pleadings within fourteen days of the inspection.
5. That there shall be liberty to apply by either party.
6. That the matter shall come up for status conference on 15th May, 2018 at 08:30 hours.

Costs shall be in the cause, and leave to appeal is granted.

DATED THE 22nd DAY OF FEBRUARY, 2018

kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE