

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

2018/HP/0374



BETWEEN:

NYIOMBO INVESTMENTS LIMITED
KWAZI ADAM DLAMINI

1ST PLAINTIFF
2ND PLAINTIFF

AND

GULAM ADAM PATEL
JOMO MATULULU

1ST DEFENDANT
2ND DEFENDANT

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

*For the 1st Plaintiff: Mr. G. Phiri of Messrs PNP Advocates with
Mr. A. Kasolo of Messrs AKM Legal
Practitioners*

*For the 2nd Plaintiff: P. Muyatwa of Messrs Muyatwa Legal
Practitioners*

*For the 1st and 2nd: Mr. M. Chipanzya of Messrs ICN Legal
Defendants Practitioners*

RULING

Cases Referred to:

1. *Airtel Holdings Ltd and 3 Others v Patents and Companies Registration Agency and 2 Others* (2012) 3 ZR 494
2. *American Cynamid Company v Ethicon Limited* (1975) AC 369
3. *Harton Ndove v National Educational Company of Zambia Limited* (1980) ZR 184
4. *Hina furnishing Lusaka Limited v Mwaiseni Properties Limited* (1983) ZR 40
5. *Macfoy v United African Company* (1961) 3 ALL ER 1196
6. *Preston v Luck* (1887) 27 Ch D
7. *Royal Oak (Pvt) Limited v Lusaka City Council and Another* (2012)3 ZR 607
8. *Salomon v Salomon* (1897) AC 22
9. *Shamwana v Mwanawasa* (1993 - 1994) ZR 149

The 2nd Plaintiff made an application on behalf of the 1st Plaintiff for an Order of Interim Injunction restraining the Defendants and/or their agents and servants from holding themselves out as representatives of the 1st Plaintiff, interfering with the duties and/or operations of the Managing Director and management team and from violating the provisions of the Articles of Association of the Plaintiff Company and the Board Resolution passed on 1st August 2017. This application was supported by an affidavit deposed to by one Kwazi Adam Dlamini, the 2nd Plaintiff herein.

He swore that he was the Managing Director and shareholder in the employ of the 1st Plaintiff. That the Plaintiff Company had been

facing various operational challenges causing its indebtedness to its creditors to grow to such unmanageable levels that on 7th day of July, 2017 it had to write to some of its creditors like Standard Chartered Bank undertaking to put a Managing Director who would then oversee the Company management affairs. A copy this undertaking was exhibited and marked **“KAD1”**.

He deposed that acting on the undertaking; the Company’s board did meet and pass a resolution on 1st August, 2017 approving that:

- a) The 2nd Plaintiff be appointed Managing Director
- b) The 2nd Plaintiff recommended the new management team and commenced operations immediately.
- c) The 2nd Plaintiff be amongst the authorized signatories and empowered to sign and/or dispatch all documents and notices on behalf of the Applicant Company in connection with the new management structure.
- d) That Dr. Maurice Jangulo and Mr. Galum Patel who are also shareholders be removed from the signature mandate authorizing and empowering them to dispatch any documents and notices on behalf of the Applicant Company.

A copy of this document was exhibited and marked **“KAD2”**. He further deposed that after taking office he had been actively involved in the operations of the 1st Plaintiff Company doing such duties as spearheading debt collection and repaying company debts with a view of reducing the amount of its indebtedness and bringing its operations to sustainable levels.

That contrary to the provisions of the aforementioned resolutions, Mr. Galum Patel, the 1st Defendant, who was a shareholder in the company had been interfering with the activities of management by writing various letters to the 1st Plaintiff's debtors meant to divert company resources for assets without a board resolution or the approval of the management.

He deposed that in that regard on 1st February, 2018 the 1st Defendant did write to Sealand Commodities Limited, the 1st Plaintiff's debtor, citing his position as majority shareholder, directing them to deliver the Company's fertilizer to a warehouse unknown to the Plaintiff Company. A copy of this correspondence was exhibited and marked "**KAD3**".

That on 7th February, 2018 the 1st Defendant wrote to Export Trading Input (Z) Limited directing them on how he wished the balance of the debts owed to the 1st Plaintiff should be appropriated without the knowledge of the managing director, the Board or the Company management. A copy of this letter was exhibited and marked "**KAD4**".

The deponent further swore that on the 16th of February, 2018 the 1st Defendant wrote to ETG Inputs Zambia Limited, the 1st Plaintiff's debtor, instructing it to divert the Company's funds to a tune of US\$3,429,100.00 without the authority of the Company. That in the same correspondence the 1st Defendant used a forged company seal. A copy of this correspondence was exhibited and marked "**KAD5**".

He deposed that on 23rd February, 2018, the 2nd Defendant wrote to one of the Plaintiff's debtors demanding payment of US\$2,000,000 without following the company procedure.

That as a result of these actions by the Defendants, there had been apprehension by the 1st Plaintiff's creditors and debtors leading to delay in payments that were due to the 1st Plaintiff. A copy of a letter from one of the 1st Plaintiff's debtors was exhibited and marked "**KAD6**".

He swore that the 1st and 2nd Defendants had without the authority of the 1st Plaintiff issued press statements disparaging and defaming the 2nd Plaintiff which had caused a lot of anxiety and speculation among the 1st Plaintiff's clients, creditors and debtors. A copy of one of the press statements issues by the Defendants was exhibited and marked "**KAD7**".

He averred that Defendants conduct was deeply inconveniencing and costly to the Company and inconsistent with the smooth management of the Company and he was of the view that this a fit and proper case for an injunction to be obtained.

In opposing this application the Defendants filed an affidavit in opposition filed on 6th March 2016 and deposed to by one Galum Adam Patel. He swore that KAD1 referred to in the 2nd Plaintiff's affidavit was merely a settlement proposal which was subject to certain conditions that provided that he provide a personal guarantee in favour of Standard Chartered Bank Zambia as outlined in 1.2 and 2.1.

He deposed that he and the 1st Plaintiff's minority shareholder, Maurice Jangulo, appoint a management team acceptable to us and approved by Standard Chartered Banker Zambia. That according to clause 2.2 Redford Capital be engaged by the 1st plaintiff Company to ensure, among others that the management team remained impartial.

He deposed that "KAD2" was not duly executed by all the parties named and referred to therein, save by the deponent and the 1st plaintiff's minority shareholder. It was contended that because "KAD 2" was not duly executed by all the parties named and therefore the 2nd Plaintiff was not duly appointed as Managing Director of the 1st Plaintiff and in effect there was neither a new management team nor an oversight company appointed. That it was in the best interest of the 1st Plaintiff that the deponent assumed control and took all the decisions now complained of. He swore that the 2nd Plaintiff had not proceeded with utmost good faith and had deliberately failed to make full and frank disclosure of all the material facts as are outline above so as to warrant the Ex-parte Order.

The 1st Plaintiff through its' advocates on the other hand applied that the Exparte Order of Interim injunction granted to the 2nd Plaintiff be set aside citing that the 2nd Plaintiff had no authority to obtain an injunction on behalf of the 1st Plaintiff. When the hearing for the application to set aside came up on 5th March, 2018, I directed that the affidavit supporting this application to set aside be

deemed as an affidavit opposing the application for an order of interim injunction. Further that the matter would be heard at an interparte hearing for the injunction.

In the affidavit supporting the Application to Set Aside the Exparte Order for Interim Injunction deposed to by one Satosh Gaikwad, the Chief Accountant in the 1st Plaintiff Company, it was averred that the 2nd Plaintiff was dismissed from the employ of the 1st Plaintiff 24th February, 2018. That the letter of dismissal was served on him on the same day and a hard copy letter was also delivered to his residence on the same day but he refused to acknowledge it. A copy of the said letter was exhibited and marked **"SG1"**.

The deponent swore that further to the dismissal, newspaper advertisements were placed in all widely circulated daily newspapers to alert the general public that he was no longer acting on behalf of the 1st Plaintiff. A copy of the said newspaper advertisement was exhibited and marked **"SG2"**. That the 2nd Plaintiff was dismissed from the 1st Plaintiff for, among other, insubordination and failure to account for fertilizer stocks amounting to K27,500 metric tonnes valued at approximately US\$14,000,000.00 for which he repeatedly failed to account for. A copy of the letter asking the 2nd Plaintiff to give an account of the same was exhibited and marked **"SG3"**.

He averred that the missing fertilizer stock was part of the fertilizer that was availed to the 1st Plaintiff by the Zambian Government to distribute to peasant farmers but which the 2nd Plaintiff did not do.

That the said fertilizer was availed to the 1st Plaintiff as payment in kind by the Zambian Government for outstanding sums that were owed to the 1st Plaintiff by the Government.

He deposed that in order to procure fertilizer, the 1st Plaintiff borrowed from financial institutions but payments from the Zambian Government were not forthcoming on time hence the action to avail the fertilizer to the 1st Plaintiff. That the Government then executed Notices of Assignment with the Eastern and Southern African Trade and Development Bank as well as with Swiss Singapore Overseas Enterprises Pty Limited wherein the Zambian Government irrevocably and unconditionally undertook to pay into the Assignees' designated accounts the proceeds of the sale of fertilizer that had been availed to the 1st Plaintiff. Copies of the said Assignments was exhibited and marked **"SG4"**.

He deposed that that before his dismissal, the 2nd Plaintiff had been repeatedly reminded to account for the 27,500 metric tonnes of fertilizer that he had oversight over because the proceeds there from needed to be paid to the institutions mentioned above.

That upon the 2nd Plaintiff's failure to account for the said 27,500 metric tonnes of fertilizer, he was summarily dismissed by the 1st Defendant who is the Chairman of the Company and the majority shareholder. In his place the 2nd Defendant was placed to act in that position. A copy of the 2nd Defendant's letter of appointment was exhibited and marked **"SG5"**.

of the 1st Plaintiffs were fully settled and was a guarantor to the sum of US\$150,000,000 and it was in his interest that the 1st Plaintiff was run in a proper manner so that it was able to meet its obligations to its creditors. A copy of this guarantee was exhibited and marked “**SG8**”.

He deposed that the 2nd Plaintiff had no authority from the 1st plaintiff to approach this Court for an Order of interim injunction as he had no instructions to do so having been summarily dismissed from the company on 24th February, 2018 and the Advocates for the 2nd Plaintiff were advised to cease acting for the 1st Plaintiff.

He exhibited a copy of a letter as evidence to this and the same was marked “**SG9**”. It was his contention that the 2nd Plaintiff’s suit and his actions to impede payments meant to be paid to creditors imperils the Company and dims its prospects of continued existence and also further prejudiced the interests of the Government of the Republic of Zambia by virtue of the Notices of Assignment it entered into with the 1st Plaintiff’s creditors.

The 2nd Plaintiff filed in its skeleton arguments in support of the affidavit on 23rd March 2018. The gist of the arguments by Counsel for the 2nd Plaintiff was that the 2nd Plaintiff was duly appointed as Managing Director by the Board of Directors acting collectively and hence mandated him to represent the 1st Plaintiff and to sign any correspondence on its behalf.

He cited the case of **Salomon v Salomon (1897) AC 22** that a company has separate legal personality but that it acts through the

Board of Directors, Members or shareholders. Counsel argued that the Board of Directors did appoint the substantive Managing Director and delegated such powers as the company intended to. It was Counsel's argument that the 1st Defendant acting alone issued various letters to creditors and debtors and likewise purportedly terminated the appointment of the 2nd Plaintiff as Managing Director. He argued that the 1st Defendant as majority shareholder did not have locus standi to make any decision in that capacity and purport to have done so on behalf of Nyiombo Investments Limited.

He cited section 203(2) of the Companies Act that the same is couched in mandatory terms when it stipulates that's the decisions of the company shall be made by way of Board of Directors passing a resolution. It was submitted that the effect of this provision was that any decision not backed by a resolution could not be deemed to be a decision of the company. He stated that the dismissal of the 2nd Plaintiff by the 1st Defendant was therefore not only void but of no legal effect whatsoever.

He cited the case of ***Macfoy v United African Company (1961) 3 ALL ER 1196*** where it was held that:

"If an act is void, then it is a nullity. It is not only bad, it is incurably bad. There is no need for an order of Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient for the Court to declare it so. You cannot put something on nothing and expect it to stand, it will collapse"

It was Counsel's contention that the 1st Defendant had no authority and was not representing the company in any way in all his correspondences. He added that the Managing Director was an employee of the Company and not a single director and the 1st Defendant's act was in fact a nullity. He argued that in view of this the 2nd Plaintiff, as the 1st Plaintiff legal representative, was therefore legally able to instruct his advocates to seek an injunction on behalf of the 1st Plaintiff.

It was submitted that by virtue of the Ex parte Order of Interim Injunction granted by this Court, it meant that the 1st and 2nd Defendants could not appoint Counsel to represent the 1st Plaintiff. He also referred to another Order of injunction granted by Honourable Justice Mweemba on 27th February, 2018 which refrained the 1st and 2nd Defendants from representing the 1st Plaintiff. It was Counsel's further submission that where an order of the Court was issued, every party was bound to obey it, regardless of the fact that they contend it was irregularly procured.

It was argued that the continued appearance of Messrs PNP Advocates before this Court at the instruction of the Defendants who had been restrained by this Court to do so was not only contemptuous but also an attack on the integrity of the judicial system. He added that there was nothing stopping the Defendants from asking Counsel to act for them and then apply to set aside the injunction in their capacity as Defendants.

It was further submitted that one of the requirements for a court to grant an injunction was that there must be serious a serious question to be tried. He cited the case of ***American Cynamid Company v Ethicon Limited (1975) AC 369*** which sentiments were echoed in the case of ***Harton Ndove v National Educational Company of Zambia Limited (1980) ZR 184***. It was Counsel's argument there were serious questions to be tried that needed to be determined by this Court hence it was fit and proper to seek an injunction.

With regard to the adequacy of the damages it was submitted that in the *American Cynamid case* Lord Diplock held that if damages would be adequate remedy and the Defendant would be in a position to pay them, then no interim injunction should normally be granted. It was argued that in the case in casu the Defendants had been interfering with the management of the company in his capacity as majority shareholder on Company and writing letters letterhead directing several debtors colossal sums to bank accounts unknown to the management team. He argued that these sums of money were too huge that the Defendants would not afford to pay the 1st Plaintiff should they later be found liable.

It was counsel's further submission that in the case of ***Shell and BP Zambia v Conidaris and others (1975) ZR 174*** where it was held that injunctive relief should be given where the right to relief is clear and it is important to protect the Plaintiff from irreparable injury. He further referred to the *Harton Ndove case* and ***Preston v***

Luck (1887) 27 ChD that it was important to maintain the status quo. He argued that maintaining the status quo would entail that the company continued to run the way it was being run for the past six months without inference from the shareholders. He added that if the Court did not consider preserving the status quo and judgment was held in favour of the Plaintiffs it would be rendered as an academic exercise as the Plaintiffs would have lost huge sums of money, goodwill and also face possible legal actions from creditors and employees and also liquidation.

Counsel maintained that there was no suppression of facts as to the purported dismissal of the 2nd Plaintiff as he only learnt of it in the newspaper which he exhibited in his affidavit in support of this application. That he was and still is the duly appointed Managing Director of Nyiombo Investments Limited by virtue of the Board Resolution dated 1st August, 2017.

He stated that the dismissal letter was one of the many pieces of correspondence issued by the Defendants which formed the subject matter of this action.

The Defendants filed in their skeleton arguments on 22nd March, 2018. Defence Counsel submitted that a wealth of authorities had set the principles of law regarding when injunctive relief may be sought. Importantly counsel submitted that it must be shown that there is a clear right to relief and protect the Plaintiff from irreparable injury and that mere inconvenience was not enough.

Counsel cited the case of ***Airtel Holdings Ltd and 3 Others v Patents and Companies Registration Agency and 2 Others (2012) 3 ZR 494*** and ***Royal Oak (Pvt) Limited v Lusaka City Council and Another (2012)3 ZR 607*** where these principles were well enunciated. It was Counsel's submission that in the case in casu the right to relief is unclear and there was no evidence of irreparable damage or at all, more so that the 1st defendant was the Majority shareholder.

It was submitted that the 2nd Defendant did not seek this relief with utmost good faith and failed to make full and frank disclosure of all the facts. Particularly that exhibit "KAD1" was merely a settlement proposal which was subject to certain conditions as outlined in Clauses 1.2, 2.1, 2.2 and 4 thereof and none of the said conditions had been satisfied or at all and therefore that his appointment as the 1st Plaintiff's Managing Director was invalid.

Further that the 2nd Defendant had failed to make full and frank disclosure pertaining to exhibit "KAD2". That the same was not duly executed by all the parties named and as such was not legally binding and effective and as such the appointments were neither substantive nor effective.

In view of these arguments it was submitted that the Plaintiffs were not entitled to any injunctive relief.

Counsel for the 1st Plaintiff filed in its skeleton arguments which were in support of the Application to Set Aside the Interim Order of Injunction. The same were filed in on 6th March, 2018 and counsel

argued that “SG9” were letters terminating the employment of the 2nd Defendant and the legal services of Muyatwa Legal Practitioners. He submitted that the 2nd Plaintiff approached the Court to seek an injunction which he had no authority to do retaining the same legal firm whose services had been terminated. It was Counsel’s contention that the acts perpetrated by the duo procuring an ex parte order through suppression of facts was illegal.

Counsel argued that the net effect of the acts of the 2nd Defendant were that whatever resulted from this was void and of no legal effect. He cited the case of *Macfoy v United Africa Company Limited* which was cited by the 2nd Plaintiff’s Counsel. Counsel submitted that the entire action should be dismissed on this limb alone.

It was further argued it was clear that the 2nd Plaintiff did not proceed with utmost good faith on an ex-parte application. Counsel submitted that the fact that the Court was being asked to grant relief without the person whom the relief is sought against without having an opportunity to be heard made it imperative that the applicant should make full and frank disclosure of all material facts. He added that there was lamentable failure to disclose the material facts in the application including the want of authority to take out a writ on behalf of the 1st Plaintiff. He referred to the case of ***Shamwana v Mwanawasa (1993-1994) ZR 149*** where it was dispelled that ex-parte orders for injunctions are available as a matter of course and almost automatic. Further that the granting of an ex parte order of injunction was a very extraordinary jurisdiction

and therefore the time at which an applicant first had notice of the act complained of will be looked at very carefully in order to prevent an improper order being made.

He argued that for this reason an applicant who sought an *ex parte* order must not suppress material facts and aim to mislead the Court. Counsel referred to the maxim that 'he who comes to equity must come with clean hands' and in the present case the facts strongly suggested that this had not been the case.

He cited the case of ***Hina Furnishing Lusaka Limited v Mwaiseni Properties Limited (1983) ZR 40*** where it was held to the effect that in cases where an injunction is sought, the Court must consider the conduct of the parties. Further that a Plaintiff who complained of the Defendant's breach of contract would not obtain an injunction if he too was in breach. It was for the aforementioned reasons that Counsel for the 1st Plaintiff sought for this Court to set aside the *ex parte* order of interim injunction granted to the 2nd Plaintiff.

I have considered the evidence on record and the arguments by all the parties. A number of issues have been raised before me and it is imperative to remind myself that this application is to determine whether or not to discharge the *Ex parte* Order of Injunction I granted to the 1st and 2nd Plaintiffs.

The 2nd Plaintiff instituted this action and the main action on behalf of the 1st Plaintiff. According to the affidavit in support of the application, he as Managing Director instituted the action on behalf

of the 1st Plaintiff. The Defendants on the other hand opposed the 2nd Plaintiffs action citing that the 2nd Plaintiff had been dismissed from his position as Managing Director at the time he instituted these proceedings. The 1st Plaintiff through its advocates also applied to set aside the Exparte Order of Injunction that was granted to the 2nd Plaintiff on ground that he had no authority to obtain an injunction on behalf of the 1st Plaintiff following his dismissal from his position as Managing Director.

Produced before me by the Advocates of the 1st plaintiff and the Defendants were copies of the resolution appointing the 2nd Plaintiff as Managing director as well as a letter of his dismissal and a notice of his dismissal in the press. It was the Defendants argument that the resolution appointing the 2nd Defendant as Managing Director was not duly executed by all the board members.

I must state that while there appears to be a number of issues that have been raised in the conflicting affidavits before me, the issue before me is whether or not to discharge the Exparte Order of Injunction.

The main issues raised by both the advocates for the 1st Plaintiffs and the Defendants' advocates is that the 2nd Plaintiff had no authority to seek an injunctive relief on behalf of the 1st Plaintiff following his dismissal. The 1st Plaintiff's counsel in his arguments cited the case of Shamwana V Mwanawasa stating that the granting of an ex parte order is an extraordinary jurisdiction by the Court and should only be done where very good reason is shown. Counsel

argued that because the other party is not given an opportunity to be heard, then a party seeking the relief had to make full and frank disclosure of all material facts.

In the present case, the evidence before me is that the 2nd Plaintiff was dismissed by the 1st Defendant acting as Chairman. Whether it was done following procedures will be delving into the merits of the case which can only be determined at trial. On the face of it, it appears that the 2nd Plaintiff was in fact dismissed and following his dismissal the press was notified of this dismissal and a publication was made to that effect.

The 2nd Plaintiff in my view should have made mention or disclosed the circumstances under which he sought an injunction by stating that there was a dismissal letter made out to him. Whether he agreed with the dismissal or not was another issue. Failure to do so meant he failed to disclose material facts which are very important in this matter.

As has already been pointed out by Counsel for the 1st Plaintiff, the law of equity demands that he who comes to equity must come with clean hands. It is well known principle of law that an injunction is an equitable remedy and this Court must consider whether the 2nd Plaintiff sought this equitable relief with clean hands. From the non-disclosure of the material facts I find that he did not.

From the evidence before me I find that the 2nd Plaintiff had no authority to institute proceedings on behalf of the company let alone swear an affidavit in support of the application for injunction.

On this ground alone I will discharge the injunction without even delving into whether the principles of consideration in granting an injunction were met.

I accordingly discharge the injunction with costs to be borne by the 2nd Plaintiff.

Delivered under my hand and seal this 4th day of April, 2018



Mwila Chitabo, S.C.
JUDGE