REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
JUDICIARY
- 4 FEB 2020
REGISTRY
BOX 50067, LUSAKA.

IN THE HIGH COURT FOR ZAMBIA 2018/HPC/0108
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

In the matter of: A-Plus Urban Technics Limited

and

In the matter of: *Inter alia*, Sections 16, 184, 189, 193, 206, 210, 211, 217, 224 and 226 of the Companies Act, Cap. 388 of the Laws of Zambia

BETWEEN:

MARTIN CHIZEZE KABWIRI	**APPLICANT**
AND	
A-PLUS URBAN TECHNICS LIMITED	**1ST RESPONDENT**
GERARD CHUNGU	**2ND RESPONDENT**
ALBERT MALAMA	**3RD RESPONDENT**

CORAM: Hon. Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka this 4th day of February, 2020.

For the Applicant	:	*Mr. A. Kearns of Willa Mutofwe and Associates*
For the 1st Respondent	:	*Mr. S. Mambwe of Mambwe, Siwila and Lisimba Advocates*
For the 2nd and 3rd Respondents	:	*Mr. K.N. Sakala of Messrs. Ventus Legal Practitioners*

RULING

Cases cited:

1) *American Cyanamid Company v. Ethicon Limited (1975) A.C. 396.*

2) *The Seventh Day Adventist Association in Zambia Registered Trustees of Avondale S.D.A. Church in Lusaka v. Amock Phiri, SCZ Appeal No. 15 of 2010.*
3) *Shell & B.P. Zambia Limited v. Conidaris and Others (1975) Z.R. 174.*
4) *Communications Authority v. Vodacom Zambia Limited, SCZ Judgment No. 21 of 2009.*

Legislation cited:

1. *Order 27, rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
2. *Order 29, rule 1 (1) of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book).*

This is the Applicant's application for an order of interim injunction made pursuant to Order 27, rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia as read in conjunction with Order 29, rule 1 (1) of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book). The Summons for an Order for Interim Injunction was filed into Court on 19th March, 2018 and was supported by an Affidavit in Support of Order for Interim Injunction of even date (hereinafter referred to as "the Affidavit in Support") sworn by Martin Chizeze Kabwiri, the Applicant herein.

It was the deponent's testimony that upon incorporation of the 1st Respondent he was a promoter and later became a shareholder and first director in the company and thus, was competent to depose to the Affidavit from facts within his personal knowledge and from records availed to him. He asserted that the Company was incorporated under the Companies Act, Chapter 388 of the Laws of Zambia on or about 26th January, 2009 and the Company's ordinary business is architectural and engineering services and other technical consultancy

and professional, scientific and technical activities related to the construction of buildings.

The deponent averred that the current shareholding of the Company is as follows:

a) Martin Chizeze Kabwiri – 5,000
b) Gerard Chungu - 5,000
c) Albert Malama - 5,000

It was the deponent's further testimony that upon incorporating the Company, it was agreed that the 2nd and 3rd Respondents and himself would receive a monthly payment of K25,000.00 representing a dividend payment and/or directors' fees, but for no explained reason, from October, 2017 to the date of filing the application, the Company under the control of the 2nd and 3rd Respondents, had failed, refused or neglected to pay him the fee. That, due to the deterioration of the working relationship in the Company, he made a decision to make an offer in writing to the remaining shareholders, a pre-emptive right to purchase his shares on a fair market value to be ascertained by an independent valuation of the value of the Company on or about 20th November, 2017. That, to the date of filing the application, the 2nd and 3rd Respondents had made little or no effort to take up the deponent's offer despite intimating their intent to so act. That, consequently, he engaged with the 2nd and 3rd Respondents in an attempt to resolve the impasse.

The deponent further asserted that in or about 20th November, 2017, he instructed his advocates to proceed to serve a notice of an offer to

the 2nd and 3rd Respondents of pre-emptive rights of purchase of his shares in the Company. As evidence of this averment, a copy of the said letter was produced as exhibit "MCK2". That, he was advised by his advocates and verily believed the same to be true, that under the circumstances, the relationship between the Company directors and/shareholders had for all intents and purposes, deteriorated to such an extent as to curtail the Company's abilities to manage its business affairs in compliance with the Regulatory and Statutory guidelines governing the operations of a private company limited by shares. That, in the circumstances, he had instructed his advocates to seek the granting of an order by the Court for the following relief:

i. *The sum of K25,000.00 for monthly allowance as shareholder's dividend and/or director's fee from October, 2017 to date;*
ii. *The Court to determine whether A-Plus Urban Technics Limited is in fact in deadlock due to the relationship between the Company Directors/Shareholders which for all intents and purposes has curtailed the Company's abilities to manage its business affairs in compliance with the Regulatory and Statutory guidelines governing the operations of a private company limited by shares at law;*
iii. *That the Shares of the Applicant should be independently valued and offered for sale to the 2nd and 3rd Respondents as the remaining shareholders of the Company in accordance with the relevant provisions of the relevant statutory authorities and/or Articles of Association of the Company by way of an option under a pre-emptive right of purchase;*
iv. *That the Court appoint an independent valuator to determine a fair market value of the shares of the shareholders and the total assets of the Company on such terms as this honourable Court deems fit;*
v. *That the 2nd and 3rd Respondents should be prevented and/or restrained from interfering with the property or affairs of the 1st*

Respondent Company which may adversely affect the value of the shares in the same;

vi. *Any other order and/or direction as this honourable Court may deem fit in the circumstances of this matter;*

vii. *That costs of these proceedings be borne by the 2nd and 3rd Respondents.*

The deponent asserted that pending the determination of the aforementioned application, he verily believes that the property of the Company and the shares that he holds in the Company herein, are at risk of being wasted, damaged, sold and/or dissipated by the 2nd and 3rd Respondents. That, he was advised and verily believes the same to be true, that the shares of a company form part of the property of the company. That, he was further advised by his advocates and verily believes the same to be true, that where a party is concerned or apprehends a fear that the property being the subject matter of a cause of action is at risk of being depreciated, dissipated or in any other way wasted, they may apply to the Court to seek the granting of an order for an interlocutory injunction. That, in the circumstances, he has instructed his advocates to seek the granting of an order for an interim injunction to restrain the 2nd and 3rd Respondents from disposing of, dissipating and/or interfering with any of the property belonging to the Company and/or interfering in any other way in the affairs of the Company until the final determination of this matter or until such further order of the Court.

The application is opposed and to that end, the 2nd and 3rd Respondents filed a combined Affidavit in Opposition to Summons for interim Injunction on 18th July, 2018, deposed to by Albert Malama, the 3rd

Respondent herein and Chief Executive Officer of the 1st Respondent Company wherein he averred that apart from being a shareholder in the Company, the Applicant was also the Chief Operating Officer. That, the Applicant, the 2nd Respondent and the 3rd Respondent (collectively called "the Members"), resolved in June, 2013, to offer to each respective member of staff of the Company, 5% of the shares in the Company. That, the Company's register, however, remained unchanged to the date of the application and only reflected the Members' shareholding. The deponent averred that contrary to the Applicant's allegations in the Affidavit in Support, the K25,000.00 was not a dividend payment but rather, a monthly allowance paid to the Members in their capacity as executive directors of the Company. That, the allowance was paid out of the monthly operational budget and not the declared profits of the Company. Further, that the Applicant resigned as a director of the Company on 4th October, 2017 and therefore, was no longer entitled to payment of the allowance. As evidence of these assertions, copies of a WhatsApp conversation showing the Applicant' intention to resign, notice to resign and a letter from the Respondents to the Applicant confirming resignation, were produced as exhibit "AM2".

It was the deponent's further testimony that there was no deterioration of the working environment as alleged by the Applicant. That, sometime before October, 2017, the Applicant conducted himself in bad faith and contrary to his fiduciary duties and role as a director of the Company when he, without consultation or authorisation from the Respondents, made unauthorised payments, therefore, obtaining

pecuniary advantage in the sum of K300,000.00. that, upon being approached about his breach of duty and Company policies and financial guidelines, he opted to resign and cease acting as Chief Operating officer.

The deponent further stated that as a result of his resignation, the Applicant decided to sell his shares and offered the 2nd and 3rd Respondents the right of first refusal. That, the Respondents were initially willing purchase the shares held by the Applicant, but as no agreement could be reached on the valuation of the shares held by the Applicant meant to ascertain their market price, the 2nd and 3rd Respondents by letter dated 1st June, 2018, addressed to the Applicant, resolved not to purchase the shares and suggested that the same be offered to the members of staff instead. A copy of the letter to the Applicant was produced as exhibit "AM3".

It was further averred that any perceived shareholding differences that existed between the parties had not in any way affected the Company's operations and the 2nd and 3rd Respondent's ability to manage the business affairs of the Company, contrary to the assertions of the Applicant. That, the company continued to be a going concern following the resignation of the Applicant. Further, that contrary to the Applicant's allegations, his shares in the Company were not in any danger of being disposed of as shares are the Applicant's personal assets which cannot be sold or disposed of by the 2nd and 3rd Respondents. Further, that there was no likelihood of property being disposed of as any property of the Company was being used for the day

to day running of the company business and disposing of the same would have been detrimental of the Company. That, he was advised by his advocates on record and which advice he verily believed to be true, that an injunction to restrain the 2nd and 3rd Respondents from interfering with any of the property of the Company would cause prejudice and serious inconvenience to the Respondents who are the directors of the Company and responsible for the day to day operations of the Company.

The Applicant filed an Affidavit in Reply to 2nd and 3rd Respondent's Affidavit in Opposition on 20th November, 2018 which attested to the fact that the parties hereto did agree to numerous adjournments in these proceedings to attempt to resolve this dispute by way of *ex-curia* settlement and that at the last Status Conference on 12th November, 2018, the 2nd and 3rd Respondents stated that they no longer wished to resolve this matter amicably and set 29th November, 2018, for the *inter-partes* hearing for an order of interim injunction. Further, that he had not seen any minutes or resolutions executed by the members of the 1st Respondent Company regarding the 1st Respondent Company approving the appointment of Associate Directors. That, it was a matter of record that the 2nd and 3rd Respondents as directors of the Company had in the past absented themselves from participating in the business of the 1st Respondent Company. He averred further, that he was not aware that during the periods of disassociation by the 2nd and 3rd Respondents, these parties as directors and members of the 1st Respondent Company received any correspondence from the 1st Respondent company stating that they were no longer directors of the

company. That, he had not seen any documents in the 2nd and 3rd Respondents' Affidavit to demonstrate that a document was filed at Patents and Companies Registration Agency (PACRA) to remove him or showing that he resigned or was replaced as a director of the 1st Respondent Company Further, that it was a matter of record that the parties hereto and their advocates attended a meeting on or about 23rd July, 2018, at the offices of the 1st Respondent Company's advocates to discuss *inter-alia,* the valuation of the 1st Respondent Company. That, at this meeting it was agreed that a Sale and Purchase Agreement should be drawn to facilitate any sale of the deponent's shares and that the valuation of the Company should proceed. That, to the date of the Affidavit, he was not aware if any valuation has been conducted, despite his written approval of such a valuation being issued by his advocates to the Respondents' advocates.

The matter came up for hearing on 1st October, 2019. Counsel for the Applicant and the 1st Respondent were not in attendance. The matter having been adjourned several times for one reason or the other, but mostly to allow the parties to try and conclude an *ex-curia* settlement they were attempting, I decided to proceed to render my ruling on the application for interim injunction based on the documents on record filed by the parties.

The parties hereto filed Skeleton Arguments and Lists of Authorities in support of their respective positions. I am indebted to both Counsel for the same. Counsel for the Applicant has relied on the provisions of Order 27, rule 1 of the High Court Rules, Chapter 27 of the Laws of

Zambia for the application for an order of interim injunction. The said Order provides as follows:

> *"In any suit in which it shall be shown, to the satisfaction of the Court or a Judge, that any property which is in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit, it shall be lawful for the Court or a Judge to issue an injunction to such party, commanding him to refrain from doing the particular act complained of, or to give such order, for the purpose of staying and preventing him from wasting, damaging or alienating the property, as to the Court or a Judge may seem fit..."*

From the above provision, it is evident that this Court is empowered to grant an order of interim or interlocutory injunction, if satisfied that the property in dispute in the suit is in danger of being wasted, damaged or alienated by any party to a suit, for the purpose of staying and preventing the party from wasting, damaging or alienating the property in issue. The requirements for the grant of an injunction were well articulated by the House of Lords in the celebrated case of *American Cyanamid Company v. Ethicon Limited*[1], and adopted with approval in our jurisdiction. One of the cases where the principles were applied is *The Seventh Day Adventist Association in Zambia Registered Trustees of Avondale S.D.A. Church in Lusaka v. Amock Phiri*[2], cited by the Applicant in his Skeleton Arguments. In that case, the Supreme Court laid down the questions to be considered by the Court when exercising its discretion to grant an interlocutory injunction, namely:

a. Is there a serious question to be tried;

b. If the answer to (a) is yes, then the next question would be, whether damages would be an adequate remedy for the party injured by the grant or refusal to grant the injunction;
c. If damages would not be an adequate remedy, then the court is to determine where the balance of convenience lies in granting or refusing to grant an injunction.

What the above means is that if the finding by the Court is that there is a serious question to be tried, it will proceed to determine whether or not damages will be an adequate remedy. If damages will be an adequate remedy, then the injunction will not be granted, notwithstanding that there is a serious issue to be determined. If on the other hand, damages will not be an adequate remedy, then the Court will proceed to determine where the balance of convenience lies in granting or refusing to grant an injunction and will either grant or refuse to grant the injunction depending on where the balance of convenience lies.

It was argued on the Applicant's behalf that in line with the above principles, the Applicant has raised serious issues and has demonstrated a clear right to the relief sought in that having offered the 2nd and 3rd Respondent's his shares in the 1st Respondent Company, subject to the parties agreeing on a purchase price, the Applicant cannot sell his shares in the Company on the market overt until the exercise is deemed to be complete or has lapsed.

On the requirements needed to be satisfied in order for a party to be entitled to the grant of an interlocutory injunction, the 2nd and 3rd

Respondents submitted that there are two key elements that must be satisfied, namely, a clear right to relief and that the injunction is necessary to protect the plaintiff from irreparable injury, which is, injury that can never be adequately remedied or atoned for by damages. As authority for this submission, they cited the cases of *Shell & B.P. Zambia Limited v. Conidaris and Others*[3], and *Communications Authority v. Vodacom Zambia Limited*[4]. They contended that the Applicant does not have a clear right to relief as he has not satisfied the test laid down in the Australian case of *Australian Broadcasting Corporation v. O'Neill*[5], where the Court reportedly held the test to be as follows:

> *"Whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief."*

It was further submitted on behalf of the 2nd and 3rd Respondents that the guidance of our own Supreme Court in the case of *Turnkey Properties v. Lusaka West Development Company Limited*[6], further substantiates the principle enunciated in the Australian Broadcasting Corporation v. O'Neill case. In the Trunkey Properties case, the Supreme Court observed that it is improper for a court hearing an interlocutory application to make comments which may have the effect of pre-empting the decision of the issues to be decided on the merits at trial. It was argued on behalf of the 2nd and 3rd Respondents that in accordance with the direction given in the Australian Broadcasting Corporation v. O'Neill case, if the evidence remains at it stands at trial, the Applicant will not, *prima facie,* be entitled to any relief. That, the

Court must not delve into the merits of the case and a face value of the evidence before the Court suffices to determine whether the Applicant has a clear right to relief. That, in this regard, it is the 2nd and 3rd Respondents' contention that the Applicant does not have a clear right to relief.

I have carefully examined the endorsement on the Originating Summons and without going into the merits of the matter, a state of affairs which the Supreme Court advised against in the Turnkey Properties v. Lusaka West Development Limited and Others case, I am of the view that the claims on the originating process reveal serious questions to be tried, namely, whether the K25,000.00 monthly allowance being claimed by the Applicant constituted a shareholder's dividend and whether he was entitled to it; whether the shares held by the Applicant in the 1st Respondent should be subjected to independent valuation and whether the Court should appoint an independent valuator to determine a fair market value for the same. Having determined that there are serious questions to be determined, I am of the view that the Applicant has established a clear right to relief.

From the guidelines above, the next question to be determined is, whether damages would be an adequate remedy to compensate the Applicant herein. It is the Applicant's contention that damages would not be an adequate remedy because his claim involves shares in a company and shares are property. In this regard, the Applicant cited the case of *Finsbury Investments Limited v. Antonio Ventriglia, Manuela Ventriglia*[7], where the Supreme Court adopted the reasoning of Wood

J., (as he was then), that shares are essentially property and if no injunction was granted to maintain the status quo, the plaintiff would have suffered irreparable damage if they had been transferred to a third party pending determination of the matter. That, the Plaintiff would also have lost his interest in the company which would have amounted to irreparable damage. That hence, the Applicant herein will suffer irreparable injury which will not be adequately atoned for in damages and/or monetary terms if this Court does not grant an injunction to maintain the status quo.

On the other hand, the Respondents have argued that the Applicant will not suffer from irreparable damage if the *ex-parte* injunction granted herein is not confirmed and that the Applicant has totally failed or neglected to show on the facts, that irreparable injury that cannot be atoned by an award of damages will be caused if the injunction is not confirmed. That, any envisaged injury that may be sustained by the Applicant, if the injunction is confirmed, can be atoned for by an award of damages and further, that the granting of an injunction in this case would be merely for the convenience of the Applicant as there is no actual injury that the injunction is sought to protect. That, consequently, the Applicant has not discharged the burden imposed by law to show that an interlocutory injunction is necessary to protect him against irreparable injury as mere inconvenience will not suffice.

I have considered the arguments for and against the contention that irreparable damage will be occasioned to the Applicant if the interlocutory injunction is not confirmed. I am of the view that in the

circumstances of this case, no irreparable damage would be occasioned to the Applicant if the *ex-parte* injunction was not confirmed because any injury caused by the refusal to confirm the injunction can be adequately atoned for by an award of damages. In my opinion, the circumstances in the present case are different from those in the case of Finsbury Investments Limited v. Antonio Ventriglia, because in the latter case the injunction sought was to prevent the defendant from transferring the plaintiff's shares to a third party pending determination of the matter, while in the case before this Court, it is the Applicant's desire to have his shares valued by an independent valuator and offered to the 2nd and 3rd Respondents as remaining shareholders. While in the Finsbury Investments case the Plaintiff was trying to ensure that its shares were not transferred to a third party, in this case the Applicant wants his shares to be sold to the other shareholders after their value is determined by an independent valuator. Therefore, the Applicant is not in any danger of losing his interest in the company which would result in irreparable injury.

Pursuant to my finding that no irreparable injury would be occasioned if this court decided not to confirm the *ex-parte* Order of Interim Injunction herein, the issue of determining where the balance of convenience lies in granting or refusing to grant an injunction falls off.

In view of my findings above, the application for an interim order of injunction has failed and is dismissed with costs to the 2nd and 3rd Respondents. The costs shall be agreed by the parties or taxed in

default thereof. The *Ex-parte* Order of Interim Injunction granted to the Applicant on 29th June, 2018 is discharged forthwith.

Leave to appeal is denied.

Delivered at Lusaka the 4th day of February, 2020.

DR. W.S. MWENDA
JUDGE