

IN THE HIGH COURT FOR ZAMBIA

2019/HPC/0121

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

SECURIWRAP ZAMBIA LIMITED

PLAINTIFF

AND

ZAMBIA AIRPORTS CORPORATION

DEFENDANT

LIMITED

Before the Honourable Mrs. Justice Irene Zeko Mbewe.

*For the Plaintiff : Mr M Musapato of Messrs Chibesakunda & Company*

*For the Defendant : Ms S Chatora In House Counsel, National Airports Corporation*

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## RULING

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### Cases referred to:

- 1. Shell and BP Zambia Limited v Conidaris and Others [1975] ZR 174*
- 2. Turnkey Properties v Lusaka West Development Corporation and ZSIC [1984] ZR 85*
- 3. Reckitt and Coleman Products Limited v Burden Inc. (1990) 1 WLR 491 at page 499*



4. *American Cyanamid Co v Ethicon Limited (1975) AC 396*
5. *Mobil Zambia Limited v Msiska [1983] ZR 86*
6. *Kent Community Health NHS Foundation Trust v NHS Swale CCG and NHS, Dartford, Gravesham and Swanley CCG [2016] EWHC 1393*
7. *Evans Marshall and Company v Bertola SA [1973] 1 WLR 349*
8. *Lauritzencool Ab v Lady Navigation Inc [2004] EWHC 2607*
9. *Garden Cottage Foods Limited v Milk Marketing Board (1984) AC 130*

**Legislation referred to:**

1. *High Court Rules, Cap 27 of the laws of Zambia*

This is the Plaintiff's application for an interlocutory injunction made pursuant to *Order 27 (1) High Court Rules, Chapter 27 of the Laws of Zambia*.

In the supporting affidavit deposed to by Mibela A J Chileshe a director and CEO in the Plaintiff company, he disclosed that in 2003 the parties entered into a lease agreement for a period of 5 years. The Plaintiff was provided with 9 square metres for purposes of providing baggage wrapping services at the now Kenneth Kaunda International Airport (Exhibit "MC1").

According to the deponent, the lease agreement was renewed three times and the present term expires on 1<sup>st</sup> April 2023. The rental fee is 4% gross takings paid quarterly in arrears and the next payment is due in March 2020. It is disclosed that the lease agreement includes a covenant for quiet enjoyment, and a notice period of 6 months for non-renewal (Exhibit "MC2"). It is the deponent's position that the Defendant embarked on a campaign to harass the Plaintiff with the intention of forcing the Plaintiff to give up possession of the premises.

According to the deponent, on 8<sup>th</sup> February 2020 the Defendant entered the demised premises and locked it demanding the Plaintiff to leave. On 10<sup>th</sup> February 2020 the Defendant purported to terminate the lease agreement with immediate effect and locked out the Plaintiff (Exhibit "MC3"). It is the deponent's belief

that the purported termination by the Defendant is contrary to the lease agreement and statute and is therefore null and void. That unless compelled and restrained by a Court Order, the Defendant will continue to refuse the Plaintiff possession and quiet enjoyment of the premises.

The Defendant opposed the application by way of affidavit deposed to by Brian Chintu the Director Commercial Services in the Defendant institution.

According to the deponent, the lease with the Plaintiff expired on 1<sup>st</sup> October 2008 (Exhibit "BC1-2"). Following its expiry, there was a periodical lease and there is presently no executed lease agreement between the parties as the Plaintiff neglected to execute various lease agreements sent to the Plaintiff (Exhibit "BC3"). The deponent disputed that the Plaintiff was up to date with rental payments. Further, that the rental during the tenancy was subject to review by the Defendant as landlord every year on 1<sup>st</sup> April. On 23<sup>rd</sup> December 2016, the Defendant gave reasonable notice of an upward revision of rent of the contractual charges from 4% to 20% (Exhibit "BC4").

According to the deponent, despite bringing it to the attention of the Plaintiff, the Plaintiff has continued to pay the unrevised contractual charges in total disregard of the Defendant's right to revision of charges (Exhibit "BC5"). It is the Defendant's belief that a landlord can re-enter the premises in exceptional circumstances under the *Landlord and Tenant (Business Premises) Act* and therefore it is within its rights to recover possession of the demised premises (Exhibit "BC7"). The Defendant denied harassing the Plaintiff.

It is stated that the Plaintiff is not entitled to the relief of an injunction as the Plaintiff is in breach of the agreed terms of the landlord and tenant relationship, and the Plaintiff has not demonstrated it will suffer irreparable damage if the injunction is not confirmed.

I have considered the affidavit evidence and arguments presented by the parties herein including the skeleton arguments and list of authorities.

The issue for determination is whether to grant an Order for an interlocutory injunction. *Order 27 Rule 1 High Courts Rules* provides that:

“(1) *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 Judge may seem, and in all cases in which it may appear to the Court or Judge to be necessary for the preservation or the better management or custody of any property which is in dispute in a suit, it shall be lawful for the Court or a Judge to appoint a receiver or manager of such property, and, if need be, to remove the person in whose possession or custody the property may be from the possession or custody thereof, and to commit the same to the custody of such receiver or manager all such powers for the management or the preservation or improvement of the property, and the collection of the rents and profits thereof, and the application and disposal of such rents and profits, as to the Court or a Judge may seem proper.*” ...

The law on injunctions is well settled and articulated in a plethora of legal authorities such as *Shell and BP Zambia Limited v Conidaris and Others* [1975] ZR 174<sup>(1)</sup>, *Turnkey Properties v Lusaka West Development Corporation and ZSIC* [1984] ZR 85<sup>(2)</sup> referred to by both Counsel for the Plaintiff and Defendant. In

*Reckitt and Coleman Products Limited v Burden Inc. (1990) 1 WLR 491* at page 499 <sup>(3)</sup> it was suggested by Lord Ohoer that:

*“My Lords when an application for an interlocutory injunction to restrain a Defendant from doing acts alleged to be in violation of the Plaintiff’s legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesis the existence of the right or violation of or both, is uncertain, and will remain uncertain until final Judgment is given in the action. It was to mitigate the risk of the injustice to the Plaintiff during the period before that uncertainty could be resolved that the practice arose granting him relief by way of interlocutory injunction. The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial”.*

In considering whether to grant an interlocutory injunction, the case of *American Cyanamid Co v Ethicon Limited (1975) AC 396*<sup>(4)</sup> is instructive and gives general guidelines. The Plaintiff must show there is a probability it is entitled to relief and there is a serious question to be determined. The issues herein revolve around a purported periodical lease agreement and whether the rentals have been adjusted and if so, if the Plaintiff is in arrears or in breach thereof. Secondly whether the Defendant is entitled to take possession of the demised premises in light of the alleged breach by the Plaintiff to pay rentals at the revised rates. Counsel for the Defendant went into the merits of the case which at the stage of the proceedings, I shall not delve into. Having perused the affidavit evidence, it is my considered view that there is a serious question to be determined.

The second issue is whether the Plaintiff can be adequately remedied or atoned for by damages. The Supreme Court in the case of *Shell BP Zambia Limited v Conidaris and Others* (1975) ZR 174<sup>(1)</sup> stated that:

*“A court will not generally grant an injunction unless the injunction is necessary to protect the Plaintiff from an irreparable injury; mere inconvenience is not enough. Irreparable damage means injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired”.*

In the case of *Mobil Zambia Limited v Msiska* [1983] ZR 86<sup>(5)</sup> the Supreme Court observed at page 93 that:

*“..the Court will grant an injunction only if the right to relief is clear, and the injunction is necessary to protect the plaintiff from irreparable injury which cannot be atoned for by damages.”*

Counsel for the Plaintiff submits that damages are not an adequate remedy as the Plaintiff stands to lose goodwill which cannot be adequately quantified, and the Plaintiff's business is rare and cannot easily be substituted. Counsel for the Defendant argues that if the Court grants the Plaintiff an interlocutory injunction, damages would not be adequate to atone for the loss the Defendant will incur.

I am persuaded by the case of *Kent Community Health NHS Foundation Trust v NHS Swale CCG and NHS, Dartford, Gravesham and Swanley CCG* [2016] EWHC 1393<sup>(6)</sup> where the Court accepted that in some cases damages might not be an adequate remedy on grounds of it not being possible to calculate the loss incurred. In *Evans Marshall and Company v Bertola SA* [1973] 1 WLR 349 at page 379H<sup>(7)</sup>, Sachs LJ in considering whether damages were an adequate remedy for the refusal of an injunction observed that:

*“The standard question on relation to the grant of injunction. Are damages an adequate remedy? Might perhaps, in the light of the authority of recent*

*years be re-written: Is it fit, just in all the circumstances, that a plaintiff should be confined to his remedy in damages.”*

Similar observations were made by Justice Cooke in the case of *Lauritzencool Ab v Lady Navigation Inc* [2004] EWHC 2607<sup>(8)</sup>

*“the purpose of an interlocutory injunction is protection not just against loss which would sound in damages but against violation of any right where damages would not be adequate compensation. Loss of goodwill, loss of reputation and loss of competitiveness or marketability are all matters which can be taken into account.”*

In *casu*, I adopt the approach exposed above and in the circumstances find it unjust to confine the Plaintiff to damages for any breach as certain areas of damages cannot be taken into monetary account such as where one takes the loss of goodwill, loss of trade reputation and loss of marketability considering that the Plaintiff's business of baggage wrapping is almost exclusively in places such as airports. On that basis, I find the Plaintiff would suffer irreparable damages that cannot be atoned for by damages.

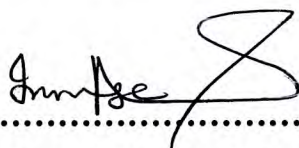
Counsel for the Defendant argued in the event that the Defendant's succeeds on its defence, it would appear unlikely the Plaintiff would be able to settle the damages arising therefrom as the Plaintiff's is purportedly in default in paying the rental arrears. The Defendant further argued that granting the Plaintiff an injunction would cause economic harm to the Defendant. Not only has the Defendant not demonstrated this sufficiently, but at this stage of the proceedings this Court shall not venture into definitive findings of fact or law based on affidavit evidence as it is only at a trial that these issues can be resolved through viva voce evidence.

For the foregoing, I find that the balance of convenience tilts in favour of the continuation of the injunction in terms of the Plaintiff's continued possession and

enjoyment of quiet possession of the demised premises pending the determination of the substantive matter.

A scheduling conference shall be held on 9<sup>th</sup> September 2020 at 8.45 hours.

Delivered and dated at Lusaka this 28<sup>th</sup> day of August 2020.

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

**IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**