

IN THE HIGH COURT FOR ZAMBIA
 AT THE PRINCIPAL REGISTRY
 HOLDEN AT LUSAKA
 (CIVIL JURISDICTION)

2019/HP/1207

BETWEEN:

GHASSAN KHALILI WIHA (Suing in his own Capacity as
 As done of Power of Attorney of HUSSEIN ZEITOUN)

1ST PLAINTIFF

MUHAMED ZEITOUN
 ADAM ZEITOUN



2ND PLAINTIFF

3RD PLAINTIFF

AND

ATLAS GLOBAL TRADING (Z) LTD

1ST DEFENDANT

NATHAN MVULA SICHILONGO

2ND DEFENDANT

CHITANKWA (MALE)

3RD DEFENDANT

MASAUO BANDA

4TH DEFENDANT

ANGELA KAFUMUKACHE SICHILONGO (Sued in
 Her capacity as Administratrix of the estate of
 The late DENNIS MENGO SICHILONGO)

5TH DEFENDANT

BEFORE JUSTICE ELITA PHIRI MWIKISA

FOR THE PLAINTIFF: MR. A. MUKANDA OF H. H. NDHLOVU & COMPANY

FOR THE DEFENDANTS: MR. V. LUNGWANGWA OF I.C.N. LEGAL
 PRACTITIONERS

RULING

Cases Referred To:

1. *Bank of Zambia v Chibote Meat Corporation Limited, SCZ*

Judgment No. 14 of 1999.

2. *National Airports Corporation v Regel Zimba and Saviour Koni*,
SCZ Judgment No. 34 of 2000.
3. *Shell & BP Zambia Limited v Connidaris and Others* (1975) ZR
174.
4. *American Cyanamid v Ethicon* [1975] AC 396.
5. *Preston v Luck* [1884] 27 Ch D 497.

This is the plaintiffs' application for an interim order of detention and preservation of property made pursuant to Order 3 rule 2 and Order 27 rule 3 of the High Court Rules of the High Court Act Chapter 27 of the Laws of Zambia as read together with Order 29 rule 2 of the Rules of the Supreme Court of England (White Book) 1999 Edition. The said application is supported by an affidavit dated 31st July, 2019, deposed to by Ghassan Khalili Wiha, the 1st plaintiff herein.

It was deposed that on or about 24th January, 2012, the donor, the 2nd and 3rd plaintiffs incorporated the 1st defendant company. The 1st plaintiff also deposed that on or about 8th May, 2014, he was employed as a Project Manager by the 1st defendant company and that by power of attorney dated 25th October, 2018, Mr Hussin Zeitoun (hereinafter referred to as the "donor") appointed him (the 1st plaintiff) as his attorney with respect to the management, administration, possession and any other dealings in respect of the donor's 25,000 shares in the 1st defendant company.

The 1st plaintiff deposed further that on or about 29th December, 2016, the 1st defendant sold the following vehicles to him: Reyland Truck, registration number BAC 2451; Daf Truck registration number BAA 7724; and Daf Truck registration number BAC 3245 as shown by the contract of sale exhibited and marked "GKW4". That the said trucks have however not handed over to the 1st plaintiff by the 2nd defendant who has had custody of them. The 1st plaintiff deposed that he has custody of the original White Books for the 3 motor vehicles as shown by exhibit marked "GKW5".

It was further deposed that the defendants have continued to use the motor vehicles in question to the detriment of the 1st plaintiff and that he (the 1st plaintiff) fears that the vehicles may completely depreciate or that the defendants may dispose of them before this matter is disposed of by the Court which may render the claim nugatory and a mere academic exercise.

The 1st plaintiff sought the indulgence of the Court to order the detention and preservation of the vehicles pending the determination of the matter.

On the other hand, the defendants filed an affidavit in opposition dated 27th August, 2019, deposed to by the 2nd defendant herein. He deposed that the 1st plaintiff herein was never an employee of the 1st

defendant but a donee of the purported power of attorney to oversee the interests of Mr Hussein Zeitoun who spent most of his time outside the country.

It was also deposed that there was no sale of the said motor vehicles to any of the plaintiffs herein and any sale alluded to was false and a mere attempt to deprive the company of its assets by the donee who is a minority shareholder in the company. Further, that any sale of motor vehicles or any assets of the company is by resolution of the board and approval by the Annual General Meeting which was never done.

The 2nd plaintiff also deposed that exhibit marked "GKW4" purporting to be a letter of sale is not valid as the same is an attempt to mislead this Court. That letters of sale are on company letter heads and they are signed by a representative of the company in the capacity of director and witnessed by the company secretary.

The 2nd plaintiff also stated that the purported letter of sale lacks legal effect as it lacks consideration. It was deposed further that the letter of sale is dated 29th December, 2016, when the 1st and 3rd plaintiffs were out of jurisdiction and that the signatory on the letter of sale, "Adam Zeytoun Housein," is not an official of the company or known to the company.

It was also deposed that when the 1st, 2nd and 3rd plaintiffs fled the country, they left with a number of company possessions which included the date stamp, documents relating to motor-vehicle ownership and other company possessions which the 1st defendant has been trying to retrieve.

It was also deposed that the 1st plaintiff has no claim to any company property and in particular, the vehicles in issue, as they cannot be safe with the 1st Plaintiff who is a foreign national with no fixed abode in Zambia. That the deponent in the affidavit in support has neither stated his residential address in Zambia nor stated his nationality when it is trite law to do so.

The 2nd defendant deposed that it is necessary for the interim order granted to be discharged and an order for preservation and detention to be rejected. That this application be dismissed with costs.

When the matter came up for hearing on 3rd December, 2019, Counsel on behalf of the plaintiffs, Mr Mukanda submitted that the matter was coming up for an inter parte hearing on an application for an order of preservation of property and for an order of injunction. He submitted that he would rely on the affidavit in support dated 31st July, 2019, particularly pages 2-23 as well as the list of authorities filed on 5th October, 2019.

Mr Mukanda further submitted that the gist of the application is that the 1st plaintiff alleges that he was sold 3 motor vehicles by one Hussin Zeitoun, the donor of his powers, and that at the time of the sale, the 1st plaintiff was given a contract of sale that was witnessed by two other people who included the 3rd plaintiff.

Mr Mukanda told the Court that the said donor of the powers was the Chairperson or Managing Director of the 1st defendant company and that when he sold the said vehicles, he handed over the white books to the 1st plaintiff but that the vehicles could not be handed over to him because they were in different places doing work for the 1st defendant.

Mr Mukanda submitted further that the application is made pursuant to Orders 3 rule 2 and 27 rule 3 of the HCR as well as Order 29 rule 2 (1) and Order 29 rule 8A paragraph 10 of the RSC which give this Court sufficient jurisdiction to make the order that it made and to confirm it based on the circumstances of the case. He contended that Order 29 rule 8A paragraph 10 does not give any exceptions with regard to any proprietary interests and that what this means is that it does not matter in whose custody the motor vehicles or property are in and what proprietary interests are being claimed. Counsel submitted further that a perusal of the affidavit in opposition filed by the defendants has impugned the contract of sale between the 1st

plaintiff and 1st defendant due to the fact that the said contract does not contain any price for the said vehicles. That Section 8(1) of the Sale of Goods Act 1893 provides that:

“The price in a contract of sale may be fixed by the contract or may be left to be fixed in a manner thereby agreed or may be determined by the course of dealing between the parties.”

Mr Mukanda submitted that that provision is not concluded in mandatory terms but leaves it discretionary. He went on to state that even if the price is not shown in the contract, the buyer must pay a reasonable price.

Counsel further submitted that the contract has been impugned as it is not a standard contract according to the company policy and that perhaps the donor did not have the authority to sell. It was submitted that outsiders are not to be concerned with the internal arrangements or concerns of the company. That the actions of a director cannot be invalidated by reason only that the act so done was contrary to the company's articles. Counsel cited the cases of **Bank of Zambia v Chibote Meat Corporation**¹ as well as **National Airports Corporation v Regel Zimba and Saviour Koni**² to substantiate his arguments.

Mr Mukanda submitted that the person who sold the vehicles was the person who incorporated the company using his personal money as

capital before any other person came on board. It was argued that for him to begin selling motor vehicles, it would be unconscionable how other third parties would know that he had no authority.

Mr Mukanda submitted that Section 23 of the Companies Act Chapter 388 of the laws of Zambia stated as follows:

“No act of a company including any transfer of property to or by the company shall be invalid by reason only that it is contrary to its articles of this Act.”

Mr Mukanda stated that on the totality of the submissions, it is clear that the balance of convenience lies with the plaintiff in whose custody the White Books for the vehicles are and in whose custody the contract of sale is. He submitted that this is a proper case for this Court to confirm the order that was made. Counsel submitted that the said vehicles must remain in the custody of the Court until final disposal of the matter.

On the other hand, Counsel on behalf of the defendants, Mr Lungwangwa submitted that an affidavit in opposition was filed on 27th August, 2019, which he would rely on. Mr Lungwangwa contended that the 1st plaintiff submits that he was sold the said motor vehicles by the 2nd plaintiff. He went on to contend that the purported contract of sale did not describe the capacity of the sellers so as to allow them to sell company vehicles. That the vehicles in

dispute were company vehicles and as such a company resolution had to be made before the sale.

It was submitted further that the company has standard forms in terms of how it executes its contract with third parties and that no such contract has been exhibited by the 1st plaintiff in this case. Counsel contended that in as much as internal affairs of a company are for a company and not third parties, there must be evidence of the proper transaction between a third party and a company. That in view of the aforesaid, the 1st plaintiff has not exhibited a strong case warranting an order of detention and preservation of the properties and that the Court should dismiss this application with costs.

In reply, Mr Mukanda submitted that Counsel for the defendants across bar alleges that the contract does not disclose the capacities of the sellers and that the vehicles were company vehicles and that therefore, there must have been a company resolution in order to sell. He contended that the sale agreement will show that the contract was between the 1st defendant and the 1st plaintiff and that the letter of sale has a date stamp of the 1st defendant and a director of the company who acted on behalf of the 1st defendant company. He stated that the fact that there was no resolution for the sale of the said vehicles is none of the business of the third party, who is the person buying, as per the authorities given earlier.

Mr Mukanda stated that the only question before Court is whether the individual who acted on behalf of the defendant company had the authority to do so. He submitted that the answer is in the affirmative. Counsel contended that the 1st plaintiff has established a sufficient nexus to the three vehicles by way of contract of sale that has been exhibited as well as the white books. Counsel submitted that the costs be for the plaintiff.

I have carefully considered the affidavit evidence as well as the submissions made by Counsel from both sides. I have to determine whether or not the plaintiffs are entitled to an Order of interim detention and preservation of the motor vehicles subject of this matter.

Order 27 rule 3 of the HCR provides as follows:

“It shall be lawful for the Court or a Judge, upon the application of any party to a suit, and upon such terms as may seem just, to make any order for the detention, preservation or inspection of any property being the subject of such suit, and, for all or any of the purposes aforesaid, to authorise any person or persons to enter upon or into any land or building in the possession of any party to such suit; and, for all or any of the purposes aforesaid, to authorise any samples to be taken, or any observations to be made or experiments to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.”

Order 29 rule 2 (1) of the RSC provides as follows:

“On the application of any party to a cause or matter, the Court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter or to which any question may arise therein or for the inspection of any such property in the possession of a party to the cause or matter.”

Order 29/8A/9 reads as follows:

“The protective measure extends to every case in which the Court sees that as between the plaintiff and defendant there is something which ought to be done for the security of the property.”

Pursuant to the above provisions, I am of the considered view that this Court has power to grant interim preservation orders in cases where the Court is of the view that something ought to be done for the security of the property in question.

In the case in casu, the plaintiffs’ deponent, in paragraph 22 of the affidavit in support stated that he fears that if the order is not granted, the vehicles in question may completely depreciate or be disposed of before the final determination of this matter which may then render this claim nugatory.

On the other hand, the defendants’ deponent deposed in paragraph 26 of the affidavit in opposition that the 1st plaintiff has no claim to any company property and that the said vehicles cannot be safe with the 1st plaintiff because he is a foreign national with no fixed abode in Zambia. The defendant’s deponent went on to depose in paragraph 27 that the 1st plaintiff need not fear as he does not own any of the

vehicles save that he is being used by the donor, 2nd and 3rd plaintiffs to further siphon company assets and resources to the detriment of the 1st defendant company.

A perusal of the documents exhibited in the affidavit in support show a letter of sale dated 29th December, 2016, signed by the 1st plaintiff and one Adam Zeytoun Housein in witness of Rabson Mwale and Ashraf Arzouni. The said letter of sale has the 1st defendant's stamp on it. The 1st plaintiff also exhibited white books for two of the motor vehicles in issue.

The defendants in their affidavit in opposition claimed, in paragraph 25, that the plaintiffs left with a number of company possessions which included a date stamp, documents relating to motor vehicle ownership and other company possessions which the 1st defendant has been struggling to retrieve from the plaintiffs.

Further, the contract of sale in the affidavit in support shows that it was signed by Adam Zeytoun Housein. The defendants' affidavit in opposition on the other hand shows at paragraph 24 that the signatory of the letter of sale "Adam Zeytoun Housein" is not an official of the company or known to them. What the defendant exhibited as "NMS1" is an employment contract showing the names "Adam Zeitoun" as Managing Director in 2015. Exhibit marked "GKW3" is a

copy of the certificate of incorporation and company incorporation form which also named an "Adam Zeitoun". Further "NMS3" is a copy of a print out from PACRA which also names an "Adam Zeitoun" as a shareholder or member.

When the matter came up for hearing, Counsel on behalf of the plaintiffs did rely on Order 27 rule 3 of the HCR which falls under the heading of injunctions. Therefore, I will apply the principles of injunctions in this case. I warn myself not to delve into the main matter.

In the matter in casu, it is clear, from the above, that there is a serious question to be tried at the main trial. In the case of **Shell & BP Zambia Limited v Connidaris and Others (1975) ZR 174³** the Supreme Court held, inter alia, that:

"(vi) A Court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the Plaintiff from irreparable injury; mere 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.

(vii) Where any doubt exists as to the Plaintiff's rights or if the violation of an admitted right is denied the Court takes into consideration the balance of convenience to the parties. The burden of showing the greater inconvenience is on the Plaintiff.

(viii) The rights of the parties in this case being in dispute, and the potential loss to the defendants being far greater than the inconvenience the Plaintiff would suffer if left to

rely on its remedy in damages, this was not a proper case for the Court for an interlocutory injunction.”

Pursuant to the case above, where any doubt exists as to the Plaintiff's rights or if the violation of an admitted right is denied the Court takes into consideration the balance of convenience to the parties. The burden of showing the greater inconvenience is on the Plaintiff. The 1st plaintiff argued that he fears that if the order is not granted, the vehicles in question may completely depreciate or be disposed of before the final determination of this matter which may then render this claim nugatory. Because of the nature of the subject being claimed; motor vehicles, I do agree that they depreciate and may render the entire matter an academic exercise if not preserved.

In the case of **Preston v Luck [1884] 27 Ch D 497⁵** Cotton LJ had this to say:

“The object of an interim injunction 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 way as to make that judgment ineffectual.”

In light of the above, I find that this is a proper case in which to exercise my discretion under Order 27 rule 3 of the High Court Rules, Order 29 rule 2 of the White Book as well as my inherent jurisdiction under Order 3 rule 2 of the HCR. I therefore order detention and preservation of the motor vehicles in issue at the Court premises so as to maintain the status quo. This is so as to ensure that if after the

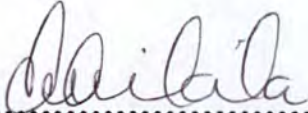
main trial, the plaintiffs obtain a judgment in their favour, the defendants would have been prevented from dealing with the property in such a way as to make that judgment ineffectual. For the avoidance of doubt, the vehicles to be detained and preserved are: Reyland Truck registration number BAC 2451; Daf Truck registration number BAA 7724; and Daf Truck registration number BAC 3245.

I accordingly confirm the ex parte order for an interim order of detention and preservation of property herein, earlier granted to the Plaintiffs on 14th August, 2019.

I award costs to the Plaintiffs to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka this 30th day of June 2020


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ELITA PHIRI MWIKISA
JUDGE