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

2020/HP/0710

IN THE MATTER OF: **AN APPLICATION FOR AN INTERIM MEASURE OF PROTECTION PURSUANT TO SECTIONS 11(1) & 11(1) (c) OF THE ARBITRATION ACT, ACT NO. 19 OF 2000 AS READ WITH RULE 9 OF THE ARBITRATION (COURT PROCEEDINGS RULES) STATUTORY INSTRUMENT NO. 75 OF 2001**

BETWEEN:

TITO NG'ANDWE (Suing under Power of Attorney from Stephen Ng'andwe trading as FASTVIEW ENTERPRISE) **APPLICANT**

AND

LAZY CAT INVESTMENT LIMITED **RESPONDENT**

Before the Hon. Lady Justice C. Lombe Phiri in Chambers

For the Applicant: *Mr. S. Botha – Mosha & Company*

For the Respondent: *Mr. M. Kabesha – Kabesha & Company*

RULING

CASES REFERRED TO:

1. **American Cynamid Co v Ethicon [1975] AC 396** and **Shell and BP Zambia Limited v Condaris (1975) ZR 75**
2. **Shell & B.P. Zambia Limited v Conidaris and Others (1975) Z.R. 174 (S.C.)**
3. **Hondling Xing Xing Building Company Limited v Zamcapital Enterprises Limited (2010/HP/439)**

LEGISLATION AND OTHER WORKS REFERRED TO:

1. **Arbitration Act No 19 of 2000**

This was the Applicant's application for interim measures of protection pursuant to Section 11 (1) and 11(1) (c) of the Arbitration Act, No 19 of 2000 as read with Rule 9 of the Arbitration (Court Proceedings Rules) Statutory Instrument No. 75 of 2001. The interim relief sought is an injunction to restrain the Respondent by itself, servants, agents or otherwise from using a manganese ore crusher as provided for in an agreement between the Applicant and Respondent pending the determination of the dispute in Arbitration or until further Order of the Court. In support of the application the Applicant deposed an affidavit stating that he entered into an Agreement with the Defendant. The said Contract was exhibited with the Affidavit. It was stated in the affidavit that the agreement was for the Applicant to provide a crusher and the Defendant to crush its manganese ore at a rate of US$5 per ton of manganese crushed. It was further averred that the arrangement between the parties commenced in 2019 and the Agreement merely formalized the arrangement. It was also averred that to date the Defendant had paid the

Plaintiff K92,500.00 which was an amount less than the quantity of manganese crushed to date. It was further stated that the Defendant had to date withheld payments and adjusted the rate of payment to US$1 per ton. It was also deposed that the Defendant had refused to allow the Applicant's representative on site to monitor the quantities of manganese being crushed and that they had refused to release the crusher. It was further stated that the Agreement between the parties provides for Arbitration in the event of a dispute between the parties. It was stated that a dispute had now arisen regarding the pricing, monitoring and performance for crushing of the manganese ore. That in view of the foregoing facts the Applicant now seeks the intervention of the Court to restrain the Defendant from further using or possessing the crusher.

Further in support of the Application the Applicant filed into Court skeleton arguments and list of authorities. It was submitted that the jurisdiction of the Court is drawn from Section 11 of the Arbitration Act as read with Rule 9 of the Arbitration (Court Proceedings) Rules, 2001. The relevant provisions of the law were reproduced. In arguing the justification for grant of injunction the cases of **American Cynamid Co v Ethicon [1975] AC 396** and **Shell and BP Zambia Limited v Condaris (1975) ZR 174**[1] and others were cited as authorities. It was submitted that the Applicant had demonstrated their right to relief as provided for in Paragraphs 6 to 13 of their Affidavit in support. It was further submitted that the balance of convenience lies with the Applicant as they are a smaller enterprise and the effects of allowing the Respondent to continue using the manganese ore crusher will bring the Applicant's business to a close and their financial credibility will be tainted. The Applicant undertook to pay any damages that would be occasioned should the Court

decide to discharge the injunction or the Court order payment of damages. The Applicant therefore prayed for grant of the interim measure of protection.

In response the Respondent opposed the application by filing into an affidavit and skeleton arguments.

In the affidavit deposed to by Hong Wei Qu paragraphs 1 to 6 of the Applicants affidavit were admitted. It was, however, deposed to that in relation to the K97,750 claimed by the Applicant, it was in fact the Applicant who owed the Respondent. That the sum was to be deducted from the sum due to the Applicant after the manganese ore crushing. It was further deposed to that the rate of US$1 per ton was agreed to between the parties when the Respondent started paying for crushing, sieving and washing of the ore. It was further deposed to that the Applicant owed the Respondent due to advance crushing of 500 tonnes of ore. Further, that the Applicant had been advanced US$2500 before the works commenced. It was averred that at the time of the dispute the Applicant owed the Respondent K97,750. It was also averred that the Respondent had not refused to allow the Applicant's Representative to monitor the quality being crushed but that the Representative feared being harassed by their unpaid workers. It was stated that the Applicant had not demonstrated any irreparable injury likely to be suffered which cannot be recompensed by damages for any harm which may be suffered.

In the skeleton arguments the Respondent submitted that the legal requirement to be complied with prior to the grant of an interlocutory injunction is well settled. It was further submitted that the Court was not privy to what the Applicant intends to place before Arbitration. Further, that this Court does not have the full detail of the dispute as to determine whether the Applicant

entitled to relief. It was also submitted that by the Respondent that by the Applicant stating the contractual sum in its Contract with the Respondent it has demonstrated that any injury it may suffer can be atoned for by damages.

The law granting this Court jurisdiction to entertain this Application is contained in *Section 11 of the* **Arbitration Act** which states as follows:

> *11. (1) **A party may, before or during arbitral proceedings, request from a court an interim measure of protection and, subject to subsections (2), (3) and (4), the court may grant such measure.***
>
> *(2) Upon a request in terms of subsection (1), **the court may grant-***
>
> *(a) an order for the preservation, interim custody, sale or inspection of any goods, which are the subject matter of the dispute.*
>
> *(b) an order securing the amount in dispute or the costs and expenses of the arbitral proceedings;*
>
> *(c) **an interim injunction** or other interim order; or*
>
> *(d) any other order to ensure that an award which may be made in the arbitral proceedings is not rendered ineffectual.*
>
> *(3) Where the court intends to grant an order or an injunction requested under subsection (2), and an arbitral tribunal has already rules or made a finding of fact on a matter relevant to the request, the court shall treat the ruling or finding made in the course of the arbitral proceedings as conclusive for the purpose of the request.*
>
> *(4) **The court shall not grant an order or injunction under this section***

unless-

(a) ***the arbitral tribunal has not yet been appointed and the matter is urgent;***

(b) the arbitral tribunal is not competent to grant the order or injunction; or

c) the urgency of the matter makes it impracticable to seek such order or injunction from the arbitral tribunal; and the court shall not grant any order or injunction where the arbitral tribunal, being competent to grant the order or injunction, has already determined an application therefor.

Clearly, from the highlighted portions of the law, it is clear that this Court has powers to grant an injunction, whether or not an Arbitral Tribunal has been constituted. However, the party seeking the Court's intervention ought to demonstrate that the matter is one which is urgent in nature and cannot wait the constituting of an arbitral tribunal. There is no dispute as regards the existence of and Arbitral Clause in the agreement between the parties. However, the Applicant has not demonstrated to the satisfaction of the Court the urgency in this Court proceeding before the Arbitral Tribunal is constituted. While averments have been made that if the injunction is not granted the Applicant's business may close there is no evidence to support this exhibited before Court. Just on this score alone this application would fail.

Now considering the application on its merits, as has been submitted by both parties the requirements for an interim injunction to be granted are common ground. Basically, in **American Cyanamid Co v Ethicom Ltd [1975] AC 396,**

the court developed a set of guidelines to establish whether an applicant's case merited the granting of an interlocutory injunction.

The main **American Cyanamid guidelines,** as they have come to be known, are:

a) Whether there is a serious question to be tried.

b) What would be the balance of convenience of each party should the order be granted (in other words, where does that balance lie?)

c) Whether there are any special factors.

And, what Lord Diplock referred to as the "governing principle:"

d) Whether an award of damages would be an adequate remedy, the basis for which he explained as follows:

"... the governing principle is that the court should first consider whether, if the Plaintiff were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable would be [an] adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

In the Zambian case of **Shell & B.P. Zambia Limited v Conidaris and Others (1975) Z.R. 174 (S.C.)**[2] it was 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.***

Further in the case of **Hondling Xing Xing Building Company Limited v Zamcapital Enterprises Limited (2010/HP/439)**[3] it was held *inter alia* regarding the requirements to be proved that:

> *1.* ***It is a settled fundamental principle of injunction law that interlocutory injunctions should only be granted where the right to relief is clear, and where it is necessary to protect a plaintiff against irreparable injury; mere inconvenience is not enough.***
>
> ***2. An injunction will not be granted were damages would be an alternative and adequate remedy to the injury complained of if the applicant succeeded in the main action.***
>
> ***3. In an application for an injunction, the overriding requirement is that the applicant must have a cause of action in law entitling him to relief.***

4. In deciding whether or not an interim injunction should be granted, the first, or primary issue is that there must be a serious question to be tried.

5. An injunction will be refused to a claimant who has no real prospect of succeeding in his claim for a permanent injunction at the trial.

6. The question of balance of convenience is considered in three stages. First, the governing principle is that if the claimant would be adequately compensated by an award succeeding at the trial, and the defendant would be able to pay for them, no injunction should be granted, however, strong the claimant's case.

7. If the claim survives the previous head, the Court must consider whether if an interim injunction is granted, but the defendant succeeds at the trial, the defendant would be adequately compensated in damages which then would have to be paid by the claimant, and whether the claimant would be able to pay those damages if such damages would be adequate remedy, and the claimant would be in a position to pay them, the defendant's prospects of success as the trial would be no bar to grant the injunction.

8. If there is doubt as to the adequacy of the respective remedies in damages available to either party, or to both, the Court must consider the wide range of matters which go to make up general balance of convenience. These include the status quo, relative strength of cases, and special factors.

9. As regards the status quo, where other factors appear to be evenly balanced, it is counsel of prudence to take such measures as are calculated to preserve the status quo.

10. In relation to the relative strength of cases, it is laid down that the Court should not embark on anything resembling a trial of the action on conflicting affidavit evidence.

11. The principles established in the Cynamid case are of general application, and must not be treated as a statutory definition.

Clearly from the affidavits and arguments it can be seen that there is a dispute between the parties regarding liability of either party in relation to the Agreement that requires resolution. I find that the initial threshold of serious issues to be tried has been met.

The second crucial issue to consider is whether or not the injury that the Applicant is likely to suffer cannot be atoned for in damages. A critical look at the facts before the Court demonstrate that the dispute between the parties is one that involves dispute regarding amounts that can be easily calculated and quantified. Therefore, it cannot be said that the Applicant would suffer irreparable injury. Irreparable injury would arise in a situation where the damage to be suffered cannot be quantified in monetary terms or in an instance where the Defendant would be incapable of paying for them in the event that they are calculated. The Applicant in his own submissions has stated that the Defendant is an international enterprise that has resources which cannot be said of the Applicant. I find that the circumstances do not exist for the Court to change the situation as this would be more likely to be injurious to the Defendant than the Applicant. Actually, granting an injunction in the circumstances would be creating a situation that is more favourable to the Applicant than the Defendant.

In view of the foregoing, I find that the Applicant has not demonstrated to the satisfaction of this Court that circumstances exist for the grant of an injunction pending the referral of the matter to Arbitration.

The Application is dismissed.

Costs are ordered for the Respondent.

Delivered at Lusaka this 5th day of August, 2020.

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C. LOMBE PHIRI

JUDGE