

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

**2020/HP/005**

BETWEEN:

**CHANSA CHITEBA**

**PLAINTIFF**

AND

**MANGANI BANDA**



**DEFENDANT**

**BEFORE THE HON. JUSTICE G. MILIMO - SALASINI IN  
CHAMBERS ON THE 20<sup>TH</sup> DAY OF JULY, 2020**

*For the Plaintiff: Mr. B. Zulu – Messrs Kalokoni & Company*

*For the Defendant: Mr. Z. Sinkala – Muleza Mwiimbu and Company*

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**RULING**

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**CASES REFERRED TO:**

- 1. Xing Xing Building Company Limited v Zam Capital Enterprises Limited 2010 vol. 1 Z.R 30 at page 49*
- 2. American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504*
- 3. Shell & B.P. Zambia Limited v. Conidaris and Others (1975) Z.R. 174*
- 4. Landiden Hartog Nv v Seabird. C. Clean A (1975) F.S. R.*
- 5. Kalusha Bwalya v Chardore Properties Limited and Ian Chamunora Nyalungwe Haruperi (2009/HPC/ 0294*
- 6. Turnkey Properties v. Lusaka West Development Company Ltd., B.S.K. Chiti (sued as Receiver), and Zambia State Insurance Corporation Ltd (1984) Z.R. 85*
- 7. Gideon Mundanda v. Timothy Mulwani and The Agricultural Finance Co. Ltd and S.S.S. Mwiinga (1987) Z.R. 29*

**LEGISLATION REFERRED TO:**

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *The Supreme Court Practice (White Book), 1999*
3. *The Companies Act, Chapter 388 of the Laws of Zambia*

This is a matter in which Chansa Chiteba, the Plaintiff herein commenced these proceedings against Mangani Banda, the Defendant, on the 6<sup>th</sup> day of January, 2020 by way of Writ of Summons accompanied by a Statement of Claim seeking the following reliefs:

- i. *A declaration that the Plaintiff is and was at all material times, the rightful owner of Motor Vehicles Registration Numbers Toyota ABK 5046 2007 Model and Isuzu ALT 6711 2014 Model;*
- ii. *An order of injunction restraining the Defendant either by himself. His servants or agents from interfering with the Plaintiff's vehicles indicated above;*
- iii. *Damages for breach of contract*
- iv. *Interest*
- v. *Further and other reliefs the Court may deem fit*
- vi. *Costs*

In the second relief of the Writ of Summons the Plaintiff filed an ex parte summons for an order of Interim Injunction pursuant to **Order 27, Rule 1 of the High Court Rules** as read together with **Order 29 of the Rules of the Supreme Court of England, 1965 (1999) edition** on 6<sup>th</sup> January, 2020. The summons is supported by an affidavit and skeleton arguments which were filed into court on 20<sup>th</sup> January, 2020.

In his affidavit the deponent, **Chansa Chiteba**, an Accountant by profession asserts that on the 18<sup>th</sup> day of November, 2019 the Plaintiff entered into a Pawn Agreement with Defendant where he

initially agreed to pawn his Toyota Hilux Registration Number ABK 5046 in exchange for a loan of K50, 000.00. A copy of the said agreement has been produced and marked “**CC1**” to evidence the foregoing.

According to the deponent, it is his assertion that he further agreed with the Defendant to pawn another car, an Isuzu KB 300 Registration Number ABK 5046 as security for a further advance of K100, 000. 00 at 30% interest payable on or before the 25<sup>th</sup> day of December, 2019. The deponent further asserts that to ensure uniformity and order to this transaction, a new Pawn Agreement was executed by the parties which Agreement incorporated the terms of the first Agreement on the 18<sup>th</sup> day of December, 2019. A copy of the said agreement has been exhibited as “**CC2**” (hereafter called “the new agreement”).

According to the deponent, clause 2.1 of the new Agreement stipulates that the payment was to be made on or before the 25<sup>th</sup> day of December, 2019 and that the plaintiff attempted to liquidate the loan debt on 24<sup>th</sup> December, 2019 so that he could have his vehicles back but was shocked to discover that the Defendant had already found a buyer for the cars.

Consequently, according to the deponent, he tried to reason with the Defendant in view of the fact that he had at least a day before the expiry date but all in vain. He adds that he then reported the matter to the police who then impounded both vehicles which vehicles are currently in the custody of the police at the police headquarters, in Lusaka.

The deponent further asserts that he will be seriously prejudiced if the Defendant was allowed to remove the said motor vehicles from the custody of the police. That unless restrained by the Honourable Court, the Defendant will continue with the same acts complained of.

That the Plaintiff failed to respect the oral and written agreement regarding the debt and interest.

The deponent added that on 23<sup>rd</sup> December, 2019 the Defendant exercising his power of sale which was granted to him by the plaintiff under the agreement which was made partially oral and partially in writing and sold the Hilux to Brown Chama Kasanda in order to liquidate the loan in the sum of K50,000.00 together with interest.

The Defendant further filed into Court a Defence and Counter-Claim on 4<sup>th</sup> day of February, 2020.

At the *inter parte* hearing of this application on the 21<sup>th</sup> day of January 2020, Counsel for the parties relied on the affidavit evidence which were filed by the respective parties.

Counsel for plaintiff argued that there is a cause of action as posed the question whether Defendant had the right to confiscate and use the motor vehicle before expiration of the agreed time. Counsel submitted in his skeleton arguments that they wished to draw the attention of this court to the case of **Xing Xing Building Company limited v Zam capital Enterprises Limited**<sup>1</sup> where the court, citing the principles outlined in the case of **American Cyanamid Co v. Ethicon Ltd**<sup>2</sup>, as espoused by the learned authors of the **Rules of the Supreme Court** under **Order 27/L/2** which states *that:-*

***“the Court must respectively consider the seriousness of the question to be tried, the adequacy of the remedy of damages for the injured party and where the balance of convenience lies before granting an Interlocutory Injunction.”***

In trying to further show that there are serious triable issues, Counsel posed the following questions;

1. *Whether the Defendant had the right to confiscated and use the vehicles before the expiration of the time indicated in the pawn agreement dated 18<sup>th</sup> December, 2019*
2. *Where title to the two vehicles had passed to the Defendant before the expiration of the Loan period.*
3. *Whether the Defendant breached the terms of the pawn agreement when he decided to sell one motor vehicle.*

Counsel submitted that the foregoing questions demonstrate that the plaintiff herein has an arguable case.

On the adequacy of damages, Counsel cited the case of ***Shell and BP Zambia Limited v Conidaris and other***<sup>3</sup>

It was further argued by Counsel that the balance of convenience lies in the Plaintiff's favour as they had demonstrated that the plaintiff is likely to suffer irreparable damage if the injunction was not granted.

In his response, Counsel for the Respondent argued that an injunction is a serious matter that should be considered in an appropriate case and restricted as to where there is cogent evidence that the Defendant's alleged wrong doing will cause irreparable damage from the time of issuing of the writ and statement of claim to the time of trial. Counsel submitted that in the case in casu, the Defendant is owed money in the sum of K150, 000.00 which amount the plaintiff has lamentably failed to settle. Counsel referred the court to the works of Dr. P. Matibini at page 760 and the case of ***Landiden Hartog Nv v Seabird. C. Clean***<sup>4</sup> where Judge Whitfield stated that: - ***"injunction is never lightly granted; the court must be satisfied that there is a real threat."***

Counsel further submitted that from the Plaintiff's statement of claim, other reliefs sought are damages for breach of contract. Counsel submitted that an injunction can only be granted where

I have carefully considered and fully addressed my mind to the application by the Plaintiff, the affidavit evidence adduced by the parties to this cause, the Plaintiff's skeleton arguments and the oral submissions by both Counsel and I am indebted to both Counsel for their spirited arguments.

Before I venture to discuss the merits of the application, I note that to a large extent, the parties laboured at this interlocutory stage to deal with substantive issues on the merits of the matter which, if the matter proceeds to trial, ought to be left for that purpose. The Court is however precluded from pronouncing itself on such issues when determining an interlocutory application as the same may have the effect of pre-empting the decision on the issues which are to be decided on the merits at the trial. Among other cases, the case of ***Turnkey Properties v. Lusaka West Development Company Ltd., B.S.K. Chiti (sued as Receiver), and Zambia State Insurance Corporation Ltd***<sup>6</sup> is instructive in that respect. I therefore decline to dig into the substantive issues which touch on the merits of the main matter for the current purposes.

Having said that, I will now address the application before me. As earlier alluded to, the Plaintiff's application is for confirmation of the ***ex parte*** order for an Interim Injunction which was granted on the 14<sup>th</sup> day of January 2020 in its favour. The Injunction in its current enjoins the Defendants by himself, servants, agents from interfering with the Plaintiff's vehicles, *Registration Numbers Toyota ABK 5046 2007 Model and Isuzu ALT 6711 2014 Model*.

In an application of this nature, as was argued by Counsel for the Plaintiff, the Court has a duty to first satisfy itself that the applicant's claim is not frivolous or vexatious, that is to say, that there is a serious question which remains to be tried. However, it must be emphasized that it is not part of the Court's duty at this stage of litigation to try to resolve conflicts of evidence on affidavits

as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations as such matters are to be dealt with at trial. This is so because, as **Lord Diplock** aptly put in the case of *American Cyanamid Co v. Ethicon Ltd*<sup>1</sup>, “***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 on 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 the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action***”.

The question to be determined at this stage therefore is only whether or not the material currently available to the Court discloses that the Plaintiff has any real prospect of succeeding in its claim for a permanent injunction at the conclusion of trial. If and only if, the answer to this question is in the affirmative is the Injunction tentatively sustainable.

In the case in *casu*, I agree with Counsel for the Plaintiff that on the facts before Court, the Plaintiff has demonstrated reasonable prospect of succeeding in its claim for a permanent injunction at trial if no evidence is issued to rebut the questions asked by Plaintiff. In my view, the right to relief is clear in that if indeed, as asserted by the Plaintiff that the Vehicles in issue was meant to be security for repayment of the sum owed, the said assertion is an issue which can only be properly determined at the trial.

As regards the assertion to the effect that the Plaintiff has defaulted on the Pawn agreement and as such is disentitled to an equitable relief in form of an interlocutory injunction, I take the view that this issue raises yet another uncertainty which can only be properly determined after a full trial. At this point the Plaintiff’s evidence appears to show that the Plaintiff had not defaulted and

was ready to pay before the due date. In light of the foregoing, the material available to the Court at the hearing of an application of this nature discloses that the Plaintiff has real prospect of succeeding in his claim at trial.

The next issue the Court should go on to consider is whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. In the case of **Shell & B.P. Zambia Limited v. Conidaris and Others**<sup>3</sup> the determination of this issue is especially indispensable where there is doubt as to the plaintiff's rights or if the violation of an admitted right is denied and the burden of showing the greater inconvenience is on the plaintiff.

From the evidence before Court as set out above, I have no doubt in my mind that this is a contested matter and as such that the rights of the parties concerned and the uncertainties and their answers are far from clear. With respect to the balance of convenience, I take the view that if this Injunction were not to be sustained and the Plaintiff were the successful party at the conclusion of trial, the loss to the Plaintiff would be much more severe than the inconvenience which would be occasioned to the Defendants if left to rely on their right to claim damages from the Plaintiff.

It must be noted, as **Lord Diplock** stated in the case of **American Cyanamid Co v. Ethicon Ltd**<sup>1</sup>, that the object of an 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 in issue were resolved in his favour at the trial. Therefore, having weighed the foregoing herein against the corresponding need for the Defendants to be protected against possible injury resulting from their being prevented from exercising their own legal rights if the uncertainty is resolved in their favour at



trial, I am satisfied that the balance of convenience lies in favour of sustaining the Interlocutory Injunction which was granted ex parte.

For the reasons I have given, the Interim Injunction which was granted *ex parte* on the 14<sup>th</sup> day of February, 2020 herein is hereby confirmed and shall remain in force during the pendency of these proceedings until any order to the contrary is made by the Court.

Leave to Appeal is granted.

**Delivered at Lusaka this 20<sup>th</sup> day of July, 2020**

*G. Milimo J*

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**HON. JUSTICE G. MILIMO- SALASINI  
HIGH COURT JUDGE**