

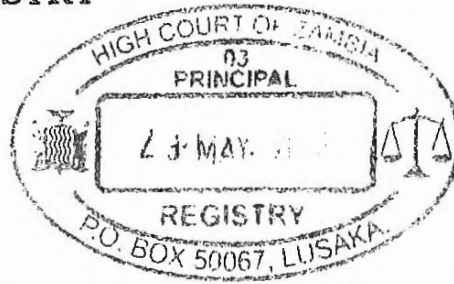
IN THE HIGH COURT FOR ZAMBIA

2020/HP/375

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



BETWEEN:

**LEO LUTHOMBI LIAMBELA (Suing as Secretary of the
Outdoor Advertising Association of Zambia**

PLAINTIFF

AND

ZAMBIA AIRPORTS CORPORATION LIMITED

DEFENDANT

Before the Honourable Mrs Justice Ruth Chibbabbuka on the 27th day of
April, 2020

For the Applicants:

Mrs N. S. Mabushi, Messrs Mambwe, Siwila &
Lisimba Advocates

For the Respondent:

Ms R. Chansa, In-house Counsel

RULING

Cases referred to:

1. *Shell BP Zambia Limited vs Conidaris & Others* (1975) Z.R 174 (SC)
2. *Zambia Revenue Authority vs Makeni Gardens SCZ Appeal No. 69 1995*
3. *Communications Authority vs Vodacom Zambia Limited SCZ No. 21 2009*
4. *Tawela Akapelwa and others vs Josiah Mubukwanu Litiya Nyumbu Appeal Case No. 004 2015 SCZ*
5. *American Cynamid Co Vs. Ethicon Ltd 1975 AC 396 HL*

Legislation referred to:

Arbitration Act No. 14 of 2000

The Public Procurement Act, No. 12 of 2008

Rules of the Supreme Court, White Book, 1999 Edition

This is an application by the plaintiff, firstly, for a mandatory injunction for an Order directing the defendant to formulate a fresh Tender that will ensure fair and equal participation and secondly for an interim injunction restraining the defendant from awarding a contract for Tender No.ZACL/ONB/AS/03/2020. The application is made pursuant to *Order 29 Rule 1 of the Rules of the Supreme Court, 1999 Edition*.

The affidavit in support of this application is sworn and deposed to by Leo Luthombi Liambela and he avers as follows: In or around March, the defendant advertised a Tender No.ZACL/ONB/AS/03/202 for the provision of advertising space at the new terminal building at the Kenneth Kaunda International Airport. The said tender has material anomalies; harshly discriminates against members of the plaintiff's association and on the face of it promotes corruption and fraud. The plaintiff wrote to the defendant to withdraw the tender as it was discriminatory and illegal on the face of it but the defendant has continued with the tender process. In light of the aforesaid the plaintiff's members would suffer irreparable damage if the defendant is not restrained from continuing with the tender process and subsequently award a contract.

In opposing the application, the defendant swore an affidavit, deposed to by Alendo Mbewe, whose averments are as follows: The tender was advertised on the 14th February, 2020. The plaintiff's members were given an opportunity to present any anomalies to the defendant under clause 10 of Section 1 in the Instruction to Bidders in the said Tender and they were also given an opportunity to attend a mandatory pre-bid meeting on the 21st February, 2020 where all identified anomalies could be addressed. The plaintiff's members did not take advantage of these avenues provided to inform the defendant of any anomalies. The tender does not discriminate against members of the plaintiff's association and on the contrary the tender provides under clause 5.5 (b) that participation by local nationals as per the *Citizen Economic Empowerment Act* will be an added advantage. The defendant is not an institution which

promotes corruption and fraud in its Procurement process and will show that the plaintiff has just misinterpreted the relevant provision in the Tender document. The contents of paragraph 6 of the plaintiff's affidavit are in contention as following receipt of the said letter, the defendant responded on 6th April, 2020 addressing the concerns raised by the plaintiff. The due process as provided by the *Zambia Public Procurement Act* and other laws of Zambia were followed by the defendant and the plaintiff like all other bidders to the Tender under contention was given the opportunity to seek clarifications. As such, the plaintiffs were not disadvantaged in any way. The plaintiff will not suffer irreparable damages if the defendant is not restrained from continuing with the Tender process and subsequently award the contract to a successful bidder. The proper procurement process was followed and the defendant courteously addressed the plaintiff's concern via letter dated 6th April, 2020, even when the communication channels provided in the Tender document were not utilized timeously.

At the hearing of the matter, counsel for the plaintiff relied on the affidavit in support of the application. Counsel went on to refer this court to the case of **Shell vs B.P**¹ for the argument that the court has power to grant an injunction if the right to relief is clear and where there will irreparable damage. On the issue of right to relief, counsel referred this Court to the case of **Zambia Revenue Authority vs Makeni Gardens**² where the Supreme Court held that all the Court needed to do at interlocutory stage is to be satisfied that there is a serious question to be tried and that the Court ought to interfere to preserve the property without waiting for the right to be established at trial. It was counsel's contention that there is a serious question to be tried as there is a dispute over the legality of the tender document and as such the right to relief was clear. In relation to irreparable injury, counsel argued that in the event that an injunction was not granted, the defendant would proceed to award a contract of the said tender and members of the plaintiff's association would suffer injury which could not be atoned for by damages.

In opposing these submissions, counsel for the defendant relied on the affidavit in opposition as well as their skeleton arguments all filed on the 24th April, 2020. It was counsel's contention that the plaintiff had failed to satisfactorily establish how the defendant has failed to carry out the Procurement Process for the tender in question in accordance with the prescribed law. Counsel went on to argue that the defendant had in its letter to the plaintiff explained how it had conducted the tender in question in line with the guiding principles in Zambia. The Court was referred to the case of **Communications Authority vs Vodacom Zambia Limited**³ for the argument that it is for the party seeking an injunction to establish clearly that he is entitled to the right which he seeks to be protected by an injunction. It was counsel's considered view that as the plaintiff's right to relief was not clear, the prospect of success of the plaintiff's claim was not clear from the onset. In relation to irreparable injury, counsel argued that the loss and inconvenience to the other participants of the tender process who followed the procurement process would be far greater than the inconvenience that the plaintiffs would suffer. Counsel urged this court to dismiss the plaintiff's application.

I am indebted to both counsel for their submissions and arguments which I have taken into consideration.

Before, I delve into the arguments raised by both counsel a pertinent issue in relation to the jurisdiction of this Court to hear not only this application but the substantive cause of action must be addressed. A perusal of the affidavit in support of this application, the further affidavit filed by the plaintiff, the affidavit in opposition as well as the substantive pleadings reveals that the dispute between the two parties arises out of a public procurement process which process is governed by *The Public Procurement Act, No. 12 of 2008*. Section 70 of the *Public Procurement Act* provides that anyone that is aggrieved with a procuring entity may appeal to the *Zambia Public Procurement Authority*. Upon a cursory perusal of the record there is no evidence of such steps having been taken by the plaintiff. More cardinal however to the

jurisdiction of this Court, is that Section 71 of the said *Public Procurement Act* provides:

“Any dispute over the matter or decision made under this Act shall be determined by arbitration in accordance with the provision of the Arbitration Act.”

The above provision is couched in mandatory terms and as such the dispute between the parties must be determined by Arbitration. However, Section 11 sub-rules (1), (2) paragraphs (c) and (d) and (4) paragraph (a) of the *Arbitration Act No. 19 of 2000* provides that:

“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-

.....

(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.

(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;

It is apparent that there has been no arbitral tribunal appointed to resolve this dispute and on that basis this court has jurisdiction to hear the application for an interlocutory injunction. However, the parties are at this stage advised to take into consideration and show cause to this court at the

Status Conference why the matter should not be stayed and referred to Arbitration.

Turning now to the injunction application the Supreme Court in the case of **Tawela Akapelwa and others vs Josiah Mubukwanu Nyumbu**⁴ outlined the principles that a court should take into consideration on whether or not to grant an injunction. Justice Malila at pages 20 to 21 of the said judgment aptly stated as follows:

*“It is settled that a judge considering an application for an interim injunction ought, as a matter of practice, to be guided by the principles which were so clearly set out in the **American Cynamid Company Ltd. v. Ethicon Limited**⁵ cited by learned counsel. It is clear to us that both learned counsel are fully alive to those principles to guide the court in considering whether or not to grant an injunction, namely;*

(1) whether there is a serious question to be tried;

(2) whether damages would be adequate to compensate the plaintiff (respondent in this case);

(3) whether the balance of convenience tilts in favour of granting the injunction to the plaintiff (respondent);
and

(4) whether the plaintiff (respondent) has come to court with clean hands.

These considerations should be foremost in the mind of any judge considering whether or not to grant an injunction.”

These guiding principles are for the preserve of the court to assess as to their existence when determining whether to grant an injunction or not. The parties at best can only attempt to persuade the court as to their existence or non-existence. On that premise I am ably guided by these principles in directing my mind to the set of facts in this case.

Upon examination of the same, it is unequivocally clear that there is a serious case to be tried with regard to the legality of the tender document as well as the procurement process that was followed by the defendant.

However, in relation to damages I am of the considered view that this is a case where the injury suffered by the plaintiff can be atoned for by damages. This is so because the procurement process is one that revolves around a procuring entity seeking a service for which, there will be a reward in monetary terms to the successful bidder. As such there is no guarantee that a particular bidder, such as the plaintiff in this case, is assured of being awarded the tender. Further, this Court is alive to the fact that, there are a number of business entities involved in this process and should it be discovered through the dispute resolution procedure, that the tender document was in fact legal and the procurement process was in line with the required statutory provisions and guiding principles, there would not only be damages suffered by the defendant but there would also be inconvenience suffered by all the other prospective bidders as alluded to by counsel for the defendant.

Consequently the balance of convenience does not tip in favour of the plaintiff as should it be found that an injunction should not have been granted, it is not certain whether the plaintiff's association will be in a position to compensate the defendant as there has been no such demonstration before this Court. Whereas should it be found that the plaintiff should have been granted an injunction, the defendant in my view will be able to adequately compensate the plaintiff.

Turning to the final principle, the letter that the defendant has exhibited dated the 6th April, 2020, which claims to address all the plaintiff's concerns, may reveal that the plaintiff has not come to court with clean hands. The veracity of the document however is yet to be tested and can only be adequately done at a full hearing of the substantive matter.

Consequently, an injunction in my assessment would not be an equitable remedy given the prevailing circumstances in this case.

The upshot of the matter is that, this is not an appropriate case for the granting of an injunction and the application is dismissed. A status conference is now set for hearing on the 13th July, 2020 at 09:00.

Leave to appeal is granted.

Dated the.....29th.....day ofMay.....2020



Ruth Chibbabbuka

JUDGE