

DOCTOR J.W. BILLINGSLEY v J.A. MUNDI (1982) Z.R. 11 (S.C.)

SUPREME COURT

BRUCE-LYLE, AG. C.J. , NGULUBE , D.C.J. AND MUWO ,J.S.

29TH APRIL AND 10TH MAY, 1982

(S.C.Z. JUDGMENT NO.10 OF 1982)

APPEAL NO.16 OF 1981

Flynote

Civil Procedure - Injunction - Determination of interlocutory injunction - Matters to be considered.

Evidence - Affidavit - Contested matter subject of hearsay affidavits - Undesirability.

Headnote

Having issued a writ of summons, claiming possession of shop, an injunction to restrain the appellant from entering the subject shop and damages for trespass and loss of business, the respondent took out a summons for an interlocutory injunction supported by an affidavit sworn by friend of his on hearsay evidence. Upon hearing the application the learned Commissioner granted, a perpetual injunction, order for vacant possession and awarded damages which in fact and effect made his judgment final determination of the entire action.

Held:

- (i) Contested matter should not be the subject of hearsay affidavit.
- (ii) Unless the parties have specifically and clearly applied for consent judgment, which they are at liberty to apply for at any stage of an action, the court should only deal with the particular application before it.

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- (iii) An interim injunction application should be treated as such and purported final determination of all the issues at that stage is a nullity.

Case cited:

- (1) Chikuta v Chipata Rural Council (1974) Z.R. 241.

For the appellant: W. M. Muzyamba, Chigaga and Co.

For the respondent: F. S. Chunga, Silweya and Co.

Judgment

NGULUBE, D.C.J.:

On the 29th April, 1982, when we heard this appeal the learned the Acting Chief Justice, in pronouncing the unanimous order of this court, indicated that the appeal would be allowed, the judgment appealed against set aside with costs to the appellant, and the action remitted to the High Court to take its normal course.

The circumstances leading to this appeal so far as it is necessary to refer to them were these. The

respondent issued a writ of summons on 13th October, 1980, claiming :

- (1) Possession of a shop situate on a portion of Plot No. 231 Chilumbulu Road, Lusaka;
- (2) An injunction to restrain the appellant from entering the subject shop and from interfering and interrupting the operation of the respondent's business; and
- (3) Damages for trespass and for loss of business.

On 31st October, 1980, the respondent took out summons for an interlocutory injunction. The affidavit in support on behalf of the respondent was sworn by a friend of his who claimed that he had been left the charge of the shop. On behalf of the appellant the affidavit was sworn by his advocate at the time. The affidavits were largely hearsay and, in my view, it is highly undesirable that a contested matter should be the subject of hearsay affidavits. I would respectfully echo the sentiments of Doyle, C.J., in *Chikuta v Chipata Rural Council* (1), at p. 243 from line where the practice among lawyers of making such affidavits was deprecated. When the application for an interlocutory injunction came up before the learned High Court Commissioner, the advocates concerned contrived to argue not only the application properly before the court, but every aspect of the respondent's case as disclosed by the writ. In the event the learned High Court Commissioner in his judgment on the application granted a perpetual injunction, an order for vacant possession, and awarded damages. In fact and in effect that judgment purported to be a final determination of the entire action.

Mr Muzyamba, who now has conduct of the appellant's case submitted that the learned High Court Commissioner erred in law in granting vacant possession, perpetual injunction, and damages on an application for an interim injunction when such relief fell to be determined on the merits in the normal course after a trial. With these submissions.

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I entirely agree. Indeed, Mr Chuunga, who appears for the respondent, quite properly concedes and agrees that the judgment appealed against cannot be supported.

In the light of the unanimous conclusion already indicated by this court when we heard this appeal, I am of the view that it is unnecessary to give further consideration to any aspect of this case other than to stress that, unless the parties have specifically and clearly applied for a consent judgment, which they are at liberty to apply for at any stage of an action, the court should only deal with the particular application properly before it. The application for an interim injunction should be treated as such and should not be taken as a convenient opportunity for the summary determination in finality of an entire suit. In this case I would hold that the purported final determination of all the issues at that stage was premature and incompetent, and accordingly a complete nullity.

For the foregoing reasons the appeal was allowed with costs, the judgment of the court below set aside, and the case remitted to the High Court to take its normal course.

Judgment

BRUCE-LYLE, Ag .C.J.: I agree.

Judgment

MUWO, J.S.: I also agree.

Appeal allowed
