MSISKA (1983) Z.R. 86 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER AND MUWO, JJ.S.
28TH JUNE ,1983 AND 29TH JULY, 1983
(S.C.Z. JUDGMENT NO. 11 OF 1983)
APPEAL NO. 5 OF 1983 .

Flynote
Civil Procedure - Appeal - Supreme Court of Zambia Act, s. 24 (1) (e) - Procedure provided.
Civil Procedure - Court Process - Obtaining tactical advantage - Effect of.
Civil Procedure - Writ - Endorsement of - Non-disclosure of material fact - Effect of.
Civil Procedure - Injunction - Discharge of - Effect on parties.
Civil Procedure - Injunction - Grant of.

Headnote
In an appeal against a High Court order refusing to strike out an endorsement on a writ of summons and discharge an interlocutory injunction, the Supreme Court dismissed the appeal on the former issue, but allowed the latter.

Held:
(i) Despite the deviation in this case, due to the agreement of the parties, the proper procedure under s.24 (1) (e) of the Supreme Court of Zambia Act, is that no appeal can lie to the Supreme Court without the leave of the High Court; or if that has been refused, without the leave of Supreme Court Judge.
(ii) Obtaining a tactical advantage by taking steps which are available in law is not an abuse of the court's process.
(iii) Non-disclosure of fact on the writ of summons must be shown to be material before it can warrant the discharge of an injunction.

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(iv) However the discharge of an injunction for non-disclosure does not affect the right of a plaintiff to the grant of an injunction if the circumstances would warrant such an order.
(v) The court will grant an injunction only if the right to relief is clear and the injunction is necessary to protect the plaintiff from irreparable injury which cannot be atoned for by damages; mere inconvenience is not enough.

Cases cited:
(1) Mwendalema v Zambia Railways Board (1978) Z.R. 65.
(2) Shell and B.P. (Z) Ltd. v Conidaris and Ors (1975) Z.R 174.

Legislation referred to:

High Court Rules, Cap. 50, O. 27.
Supreme Court Act, Cap 52, s. 24 (1) (e).
Supreme Court Rules, Cap. 52, r.17.

For the appellant: G. A. Stacey, Lloyd Jones and Collins.
For the respondent: H. H. Ndhlovu, Jacques and Partners.

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

This is an appeal against an order of a High Court Judge refusing to strike out an endorsement of a writ of summons and refusing to discharge an interlocutory injunction.

At the hearing of the appeal, we made an order dismissing the appeal against the judge's refusal to strike out the endorsement on the writ and allowing the appeal against the granting of an injunction We said that we would give reasons later, and we now give those reasons.

The appellant is a company engaged in the supply of motor fuels and lubricating oil. The respondent is the licencee of two service stations owned by the appellant and occupied by the respondent under licence for the sale of the appellant's fuels and lubricants. The licences in respect of both premises are in the same terms and contain in the 5th schedules thereof, provisions, the breach of which entitles the appellant to terminate the licences forthwith. The provisions relevant to this case read as follows:

"1. The Licencee shall -

(a) Use the Licencee's best endeavours to sell as large a quantity as possible of mobil's motor fuel from the premises and shall at all times maintain an adequate stock thereof.

2. The Licencee shall -

(a) Take delivery of and purchase from Mobil at Mobil's standard prices to dealers in force at a date of each delivery, all motor fuel sold or kept at the promises in loads of not less than the minimum load and pay for them by direct debit or in such other manner and at such time as may be other wise agreed in writing unless and until otherwise agreed pay for each load in advance.

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5. The Licencee shall -

(a) Not open or permit to be opened any motor fuel tank on the premises or remove or permit to be removed any seal than by any person or persons authorised so to do by law or with the prior written consent of Mobil.

(c) Not buy, sell or over for sale on or from or keep at the premises or any adjoining or adjacent premises:

(i) any motor fuel other than the brands manufactured or distributed

by or on behalf of Mobil;

(iii) any lubricants or products for engine cooling systems other than the brands manufactured or distributed by or on behalf of Mobil and such other brands as Mobil shall from time to time permit in writing."

On the 23rd of August, 1982, the appellant wrote to the respondent letter in the following terms:

Our Ref. RS/SS/203 August, 23, 1982
Mr P. Msiska,
Edinburgh Service Station,
P.O. Box 1500,
Kitwe.

Dear Mr P Msiska,

Termination of Dealer Licence

We wish to advise you that your dealer licence has been terminated effective August, 1982. You are requested to leave the premises by the mentioned date together with all your possession by no later than 2000 hours.

We have taken this action because you are in breach of your contractual obligations under the fifth schedule of the dealer licence agreement under clause 1 (A), 2 (A), 5 (A) and (C).
Any goods, stocks or possessions left in our building after the said date and time will be deemed to be ours to sell off and contra your outstanding account with us.

Your co-operation in this matter will be appreciated.
Very truly yours,
Mobil Oil Zambia Limited
Signed:
B.L. Mweemba
for Sales Manager
BLM :cb

On 28th of August, 1982, the respondent issued a writ against the appellant which writ was specially endorsed in the following terms: "The plaintiff's claim is for,

1. A declaration that the Plaintiff is entitled to continued occupation of the premises known as Plot 25, Independence Avenue,

Kitwe (or popularly known as Edinburg Service Station) and those premises along the Kitwe/Ndola Road known as Kafue (Mobil) Service Station and the use of the equipment known as lubricating equipment and other effects thereat.

2. An injunction restraining the defendant by itself or its servants or agents or otherwise however from removing or threatening to remove or evict the plaintiff or interfering in any manner with the plaintiff in his occupation or operation of the said stations or the use of the

said equipment or effects and further restraining the defendant from refusing or stopping to supply the plaintiff with motor fuel and lubricants, until further order of the court and further restraining the defendant from threatening or intending or breach of an agreement entered into between the plaintiff and defendant on or about 1st May, 1980, relating to or partly to the matters of the Service Stations aforesaid.

3. Damages further or other relief and costs."

On the 31st August, 1982, the respondent applied for an interim injunction against the appellant, and, in support of the application filed an affidavit sworn on the 30th of August, 1982 in which he averred that he had carefully examined the grounds upon which the appellant purported to evict him and that none of the grounds stated in the appellant's letter existed. The affidavit continued to the effect that the respondent could not operate the service stations unless the appellant continued to supply lubricants and fuel and the respondent believed that the appellant was likely to discontinue providing the lubricants and fuel and possibly to interfere with the use of the equipment and other effects at the Service Stations. In paragraph 7 of his affidavit the respondent denied that he was in breach of the agreement as suggested by the appellant and he said that he verily believed that the grounds were non-existent and that the appellant was saying that he was in breach of the agreements only to avoid breaching the agreement itself.

Pursuant to the respondent's application, an interim injunction dated the 31st August, 1982, was granted by a Judge of the High Court in the following terms:

"(a) That the Defendant by itself, its servants or agents be restrained by and an injunction be and is hereby granted restraining the Defendant from removing or threatening to remove or evict the plaintiff or interfering in any manner with the Plaintiff in his occupation or operation of the service stations known as Edinburg Service Station situated at Plot No. 25, Independence Avenue, Kitwe and Kafue Filling station situated along Kitwe/Ndola Road Plot No. 1412 Kitwe until further order of the Court.

(b) That the defendant by itself or its servants or agents by in- junction aforesaid be and are restrained from interfering in any manner with the plaintiff's use of the equipment or effects situated

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at the service stations aforesaid, until further order of the Court.

(c) That the defendant by itself, its servants or agents by in junction aforesaid be and are restrained from refusing or stopping to supply the plaintiff in course of business with motor fuel and lubricants, until further order of the Court; and

(d) That the defendant by itself, its servants or agents by in junction aforesaid be and hereby restrained from threatening or intending a breach of agreements made between the plaintiff and the defendant relating to the said service stations, until further order of the Court."

The learned judge did not fix a date for hearing the matter inter partes, and the appellant applied to the Judge for an order to set aside the interim injunction, to strike out the endorsement on the writ on the grounds that it was frivolous and vexatious and an abuse of the process of the court, and for damages against the respondent in terms of his undertaking.

In support of the application, the appellant filed affidavits by employees of the appellant confirming that what books were available from the respondent had been checked and it had been found that a large amount of fuel had been obtained by the respondent on the black market, with the consequence that the appellant had lost a potential profit. There was a further allegation sworn to by one Chiteta, an internal auditor employed by the appellant, to the effect that the respondent had admitted obtaining fuel on the black market, and had said that this was because there had been delays in delivering fuel from Ndola. The deponent averred that he had not believed that there were any delays. There was an averment that the respondent had promised to disclose the names of his black market suppliers but had failed to do so.

In his ruling on the application by the appellant the learned Judge ruled that the application to strike out the endorsement on the writ of summons should have been made to the District Registrar and the application was refused as having been made in the wrong court. Before this court it has been conceded on behalf of the respondent, that the learned Judge had jurisdiction to deal with the application to strike out, but that his finding should be taken as meaning that he had referred the application, to the District Registrar. Mr Stacey, on behalf of the appellant, has pointed out that the learned Judge specifically stated that he was refusing the application, and not referring it to anyone else, and that, in any event, it would be practically impossible for the District Registrar to deal with such an application when his senior, that is a Judge in an appellate position, had granted an interim injunction. Without commenting on the second part of this argument, we have no hesitation in holding tat the learned Judge in fact refused the application and did not refer it to the District Registrar as suggested.

It transpired that one other problem arose out of the appeal against the order relating to the striking out, and that was that the order related to an interlocutory matter and, therefore in terms of section 24 (i) (e) of

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the Supreme Court of Zambia Act, no appeal can lie to this court without the leave of a judge of the High Court, or, if that had been refused, without leave of a judge of this court. In terms of Rule 17 of this Court's Rules, whenever an application may be made to this court or the High Court, it shall be made in the first instance to the High Court. Mr Stacey has asked that he be allowed to make such application for leave to this court without first having applied to the High Court. In view of the fact that Mr Ndhlovu, on behalf of the respondent, indicated that he was prepared to consent to the application for leave being made directly to this court, we grant such leave. We would, however, emphasise that this must not in any way be taken as precedent in the future.

In view of the fact that the learned trial judge refused to entertain the application to strike out, this court was invited to deal with the application de novo. Mr Stacey argued that, although the respondent was in the wrong, he had obtained an unfair advantage by issuing a writ and thereby became the plaintiff in the action. This, urged Mr Stacey, was an abuse of the court's process, because the respondent was thereby able to apply for an injunction (a remedy which was denied to the appellant in view of the terms of Order 27 of the High Court Rules) and, having obtained an injunction, was in an unassailable position because he had thereby obtained all the advantages which were claimed in the writ and there was no need for him to continue with the main action. No

further argument as to the claim being frivolous and vexatious was made except to the extent that Mr Stacey argued that, as the affidavit evidence on behalf of the appellant showed that there was a serious fraud or breech of the licences by the respondent's obtaining fuel from the black market, which evidence was uncontroverted by any affidavit in reply, it was clear that the respondent had no answer to the appellant's allegation. It was further argued that in his judgment the learned judge had accepted the allegations contained in the affidavits in support of the appellant's applications in that, during the course of his judgment, he said "the affidavits filed by the defendant company (the appellant) in support of this application to discharge the injunction is evidence of breach.... " Mr Stacey maintained that this finding on the uncontroverted evidence of the affidavits was an indication that the respondent had no case. This argument, does not take into account all the learned Judge's comments which must be read as a whole. We cannot ignore the fact that, after finding that the affidavits by the appellant were evidence of broach, the learned Judge went on to say "that is evidence which must be adduced at the trial of the complainant's action which if proved can lead to the eviction of the plaintiff from the premises." It is clear that the words "if proved" indicate that at that stage the learned Judge was not prepared to accept the affidavit evidence as uncontroverted fact. The findings by the learned Judge in no way supports the appellant's claim that the respondent does not have an arguable case. In fact, in his affidavit in support of the ex-parte application for an interim injunction, the respondent specifically denied that there had been any breach at all of the licences and said specifically that there had been none of the breaches alleged in the appellant's letter of termination.

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The respondent's claim in the endorsement on the writ is for a declaration that he is entitled to continue the occupation of the premises and for an injunction. The affidavit evidence on both sides discloses that the appellant maintains that there have been serious breaches of the licences, which entitle the appellant to possession of the promises, and the respondent maintains that there have been no such breaches and the appellant is therefore not entitled to terminate the licensing agreements.

At the full trial of the action, it would be in the discretion of the trial judge to decide whether or not this was an appropriate case to make such a declaration if he were satisfied that the respondent had proved his case. At this stage, however, it would be inappropriate and, indeed, improper on the evidence before the court, to decide that the remedy of a declaration cannot be claimed by the respondent. As to the claim for an injunction, this is discretionary remedy and, where two parties are contesting the right to possession of premises, it is not at all uncommon for such a claim to be made. Whether or not in the circumstances of this case an injunction should be granted is an entirely different matter, but so far as the endorsement on the writ is concerned, it is not improper for such a claim to be advanced.

With regard to Mr Stacey's argument that, although the respondent is the person in the wrong, he obtained an unfair advantage by acting so quickly that he become the plaintiff in the action instead of the appellant, we agree that he has obtained an advantage in that he is now in charge of the conduct of the action and has a right to apply for an injunction whereas as under Order 27 the appellant, as defendant, has no such right. However, the obtaining of an advantage by taking steps which are available in law not itself an abuse of the court's process. There is no ground for finding

that the respondent's tactical advantage was obtained improperly and the application to strike out the endorsement on the writ is dismissed.

We turn now to the application to set aside the injunction.

Mr Stacey argued that the reasons for the application to strike out the endorsement on the writ supported the application to set aside the injunction. He also argued that the respondent had been guilty of non-disclosure of a material fact when making his ex-parte application for an interim injunction, in that he had failed to disclose the allegation by the appellant that black market fuel was being sold in the licenced service stations. The affidavit by the respondent in support of the ex-parte application for an injunction exhibited the appellant's letter terminating the licences and also exhibited copies of the licence agreements. The letter of termination refers to breaches of clauses l(A) 2(A) 5(A) and 5(C) of the fifth schedule to the agreements. Reference to the licence agreements reveals that these clauses contain provisions that the respondent should sell only the appellant's products, and should not sell any other products and should not tamper with the seals to the underground fuel tanks.In his affidavit in support of the application the respondent averred that he had carefully considered the allegations of breach and there had been no such breaches at all. Mr Stacey argues that the respondent did not mention to the judge the appellant's allegation of dealing in black market fuel, and

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this amounted to a non-disclosure. The non-disclosure referred to must be of a material fact, that is, a fact which could affect a judge's decision as to whether or not an injunction should be granted. In this case, there was a disclosure to the judge that the appellant was alleging that the respondent was in breach of the agreement by failing to obtain his fuel requirements from the appellant and by selling fuel and other products not belonging to the appellant. The learned judge, therefore, knew that there wars dispute as to whether the respondent was in breach of the licences and on this information he had to decide whether an injunction was appropriate. In the case of *Mwendelema v Zambia Railways Board* (1), an example of non-disclosure was dealt with by this court. The plaintiff in that case alleged that he was a member of a Trade Union and as such he was entitled to some protection under the Industrial Relations Act, 1971. When applying for an injunction seeking that protection he did not disclose to the court that there was an allegation that he had been expelled from the Union and his membership thereof was disputed. It was held that the dispute about membership of the Union should have been disclosed and this non-disclosure in the present case before this court consists of failure to mention that the appellants were alleging the respondent's obtaining of fuel on the black market. Whilst such an allegation is very serious in that it amounts to an allegation that the respondent has been the receiver of stolen property it does not affect the existence or not of breach of the provisions of an agreement. The reference to black market fuel is immaterial; there would be breach of the relevant provisions if the respondent were to purchase fuel from some other honest suppliers. We do not consider that there was a non-disclosure so material that it would warrant the discharge of the injunction. In any event, as we pointed out in the *Mwendelema* case, the discharge of an injunction for non-dsclosure does not affect the right of a plaintiff to the grant of an injunction if the circumstances, together with the disclosure of the previously undisclosed material, would warrant such an order.

In considering whether or not an injunction should be granted a most important consideration is whether or not damages are an adequate remedy.

As this court said in the case of *Shell and BP* Zambia Limited Conidaris & Ors. (2):

> "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".

In that case, this court held that an injunction should not be granted to restrain an alleged trespasser from selling fuel from the licensor's premises. The case at present before us, of course, relates to an application by a licencee to prevent the licensor from interfering with the conduct of his business. In both cases, however, the loss of either party can be calculated as loss of profits and both cases there is remedy in damages.

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There is nothing in the present case to indicate that it should be an exception to the general rule and consequently this not an appropriate case for the granting of an injunction. On this ground the appeal is allowed and the interim injunction granted on the 31st August, 1982, is discharged.

Despite the fact that the appellant was not successful on one ground of his appeal the costs are not divisible, and we order that the costs in this court and in the court below shall be borne by the respondent.

Appeal allowed
