

IN THE SUPREME COURT FOR ZAMBIA - Appeal No. 92 of 2001
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

JAULANI COMPANY LIMITED - Appellant

And

ARK FREIGHT LIMITED - 1st Respondent

HARTLELY TRADING COMPANY

LIMITED - 2nd Respondent

THE ATTORNEY-GENERAL - 3rd Respondent

Corum: Lewanika, DCJ; Chibesakunda, JS and Mambilima JS, on the 4th
October 2001 and 26th July, 2002

For the Appellant - Mr. K. Musaba of Law Bank.

For the 1st & 2nd Respondents - Mr. A. J. Mumba of AJM Chambers.

For the 3rd Respondent - No Appearance.

J U D G M E N T

Mambilima, JS, delivered the judgment of the Court.

Authorities referred to:

- (1) Shell and BP Limited vs Conidaris & Others [1975] ZLR 174
- (2) Manal Investments Limited vs Lamise Investments Ltd, SCZ No. 1 of 2001.
- (3) Hina Furnishing Ltd vs Mwaiseni Properties Ltd (1985) ZR 40.

When we heard this appeal, we allowed it and granted the injunction sought. We indicated that we would give our reasons later and this we now do.

This is an appeal against the decision of the Court below discharging an ex-parte order of interim injunction earlier granted by the Court. The Record of Appeal shows that on 22nd September 2000, the plaintiff was granted an ex-parte order of interim injunction in which the 1st and 2nd Defendants were restrained from developing Stands 10529, 10530, 10531 and 10532 situated along Lumumba Road in Lusaka. The inter-party hearing at which the Court was going to consider the Plaintiff's application that the Order of interim injunction be preserved until the conclusion of the proceedings was set for 28th September 2000 at 14.30 hours. The matter did not take off on that date because documents had not been served on the Defendants. The matter was yet again adjourned to the 20th of October 2000. It would appear that the Court did not sit on that day because the Record of Appeal does not show any proceedings for 20th October, 2000.

On 5th June 2001, the 1st and 2nd Respondents took out summons to discharge the ex-parte Order of interim injunction, which was granted on 22nd September 2000. This application was heard on the 8th of June 2001. Counsel for the Appellant raised a preliminary issue as to whether the Respondents were in order to apply to discharge the interim Order of injunction instead of filing an affidavit in opposition to the application for an interim injunction. He sought an adjournment to enable him file an affidavit in Reply to the Respondents affidavits in opposition. Counsel for the Respondents replied that his application was in order, having been made pursuant to Order 6 as read with Order 30 of the High Court Rules.

In his Ruling, the Learned trial Judge stated that **‘...the injunction which should have been heard on the 28th of September, should be deemed to have fallen off in the event of no further action having been taken by the Plaintiffs to have this matter heard. It is almost eight (8) months since the Order and there has been no action at all.’** He then went on to dismiss the preliminary objection and discharge the ex-parte order earlier obtained.

The Appellant advanced two grounds of appeal, namely, that the Court below misdirected itself in law and fact when it discharged the Appellant’s interim injunction without applying itself to the principles governing the grant or refusal of the remedy of injunction; and that the Court below misdirected itself in law by not hearing the Appellants main application for an interlocutory injunction inter parties.

On the first ground of appeal, Mr. Musaba for the Appellant submitted that the Court below did not at all address its mind to the principles governing the grant or refusal of injunctions as laid down in the case of **Shell and BP Limited vs Conidaris & Others (1)** which are that:

- the Plaintiffs right to relief is clear.
- The injunction is necessary to protect the Plaintiff from irreparable injury.
- There is a serious question to be tried.
- The balance of convenience is tipped in favour of granting than refusing the injunction.

Mr. Musaba also referred us to the case of **Manal Investments Limited vs Lamise Investments Limited (2)** and submitted that in that case, this Court considered the same ground of appeal and allowed

the appeal. He went on to state that had the Court considered the merits of the application, it would have been satisfied that the Appellant had laid out a sufficient case to warrant the grant of an interlocutory injunction pending the determination of the main matter.

On the second ground of appeal, Mr. Musaba submitted that the Court went into obvious error at law by discharging the *ex parte* Order of injunction after hearing arguments on a preliminary issue instead of going further to deal with the main application for an interim injunction. He prayed that this Court will find that there is a need for an Order to restrain the 1st and 2nd Respondents in the manner sought in the Court below.

In reply, Mr. Mumba, for the 1st and 2nd Respondents submitted that the first ground of appeal must fail since the Learned Trial Judge was in order to discharge the *Ex parte* Interim Injunction following a preliminary issue which was raised by the Plaintiff's Counsel. He states that after obtaining an *ex parte* Order of injunction, the Appellant took no further action in the matter. The Order was served by adverts in the newspaper sometime in June 2001 by which time the Respondents has already started to develop the property. This prompted them to apply for the discharge of the *ex parte* Order which was obtained on 28th September, 2000.

Mr. Mumba further submitted that the Affidavit in Support of the application for an *Ex parte* Order of Injunction did not contain sufficient grounds to warrant the grant of an injunction. According to Mr. Mumba, the case of *Shell and BP Ltd vs Conidaris and Others* (1)

does not support the Appellant's case. He went on to state that the **Manal and Lamise (2)** case is distinguishable because in that case, there was a registered copy right and the Court said that the copyright had to be protected until the matter was proved to the contrary. In the present case, there was no evidence that the Appellant had complained to the Commissioner of Lands against the re-entry of the land in dispute.

Mr. Mumba further submitted that the Appellant was sitting on the properties in dispute for 6 years without developing them. He asked the Court to take Judicial notice that if land is not developed within 18 months from the date of allocation, the State is at liberty to re-enter. He referred us to the case of Hina Furnishing Lusaka Ltd vs Mwaiseni Properties Limited (3) and submitted that the Appellant was in breach of the covenant of the lease to develop the land.

On the second ground of appeal, Mr. Mumba submitted that the Appellants took no steps after 22nd September, 2000 to prosecute their application and the only course open to the Respondents was to apply to Court to discharge the exparte Order under Orders 6 and 30 of the High Court Rules. The Order should have fallen off after the Appellant failed to take action. He went on to state that even if the Court had considered the Affidavits which were before it, there were no sufficient grounds upon which the Court could have granted the injunction because the injury complained of was not an irreparable injury. He argues that in any case, the Appellant had breached the covenant to develop the property in question.

After considering the submissions by Counsel and the pleadings on record, we found that the Appellant was by Writ of Summons, seeking in the main, an Order and/or a declaration that it is the legally registered owner of the properties in dispute and an Order that the certificates of re-entry issued by the Commissioner of Lands be declared null and void. At the time of applying for an interlocutory injunction, there was no Defence yet filed to the Statement of Claim. Later, an Affidavit in Opposition to the application for an Order of interim injunction was filed.

According to the record of Appeal, this application was never heard interparties. The *ex parte* Order earlier granted was discharged in June, 2001. In effect therefore, an inter-party hearing was pending before the Court. There is nothing on record to show that the Court had listed the application for hearing after 20th October, 2000. In our view, it was grossly unjust for the Court to have discharged the injunction on a preliminary issue raised by the Appellant.

We also noted that the dispute in this case centered around ownership of land. The Court was to decide whether the plots in question which had been registered in the name of the Appellant were properly re-entered by the Commissioner of Lands. In our view, the Appellant's right to relief was clear and there was a serious issue to be tried. The question of irreparable injury could not be ruled out because damages cannot adequately atone a loss of an interest in land.

For these reasons, we allowed the appeal and granted the interlocutory injunction pending the final determination of the matter and ordered that costs would abide the outcome of the main case.

D. M. Lewanika
DEPUTY CHIEF JUSTICE

L. P. Chibesakunda
SUPREME COURT JUDGE

I. M. C. Mambilima
SUPREME COURT JUDGE