

AHMED ABAD v TURNING AND METALS LIMITED (1987) Z.R. 86 (S.C.)

SUPREME COURT  
NGULUBE, D.C.J., GARDNER AND SAKALA, J.J.S.  
21ST MAY AND 29TH JUNE, 1987.  
(S.C.Z. JUDGMENT NO. 13 OF 1987)

**Flynote**

Civil procedure - Interlocutory injunction - Damages adequate remedy - Whether injunction available.

Civil procedure - Interlocutory injunction - Grant having effect of determining action against the future interests of one party - Whether appropriate.

**Headnote**

The appellant agreed, as part of a wider agreement, to buy a trailer from the respondent company. When the agreement fell through the appellant took possession of the trailer. The respondent obtained an interim injunction ordering the appellant to return the trailer. The appellant appealed against the order to discharge the injunction and sought a mandatory order that he be required to pay the respondent the purchase price and the respondent release the trailer and documents of title to him to enable him to register the trailer in his own name.

**Held:**

- (i) An injunction is inappropriate when damages would be an adequate remedy. *Turnkey Properties v Lusaka West Development Company Limited* applied.
- (ii) An injunction should not be granted if the effect would be to determine the outcome of the action against future interests of a party who might be successful at the trial.

**Cases cited:**

- (1) *Shell and BP Zambia Limited v Conidaris and Others* (1975) Z.R. 174
- (2) *Turnkey Properties v Lusaka West Development Company Limited* (1984) Z.R. 85.

For the appellant: L.P. Mwanawasa, Mwanawasa and Company with S. Sikota, Gibson Chigaga and Company

For the respondent: A.Adam, Solly Patel, Hamir and Lawrence.

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**Judgment**

**SAKALA, J.S.:** delivered the judgment of the court.

On 21st May, 1987, when we heard this appeal, we made an order discharging the *ex parte* interim injunction, refused an application for a mandatory injunction, ordered the action to proceed by way of summary trial and made an order for directions. We said then that we would give reasons later and we now give those reasons.

This is an appeal against an order of a High Court commissioner refusing to discharge an *ex parte* interim injunction.

For convenience we will refer to the appellant and the respondent as the defendant and the plaintiff company respectively which they were in the court below. The plaintiff company are the manufacturers of, among other things, trailers. The defendant is a businessman by occupation.

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The facts of the case were that on 26th September 1986 the defendant and the plaintiff entered into an agreement for the sale and purchase of an uncompleted dwelling house situated at Stand No. 6798, Roma Township, Lusaka at a purchase price of K240,000.00 (Two hundred and forty thousand kwacha). Special conditions 8, 10 and 11 of the contract of sale read as follows:

8. The purchase price is payable as follows:
  - (a) K50,000.00 on exchange of Contracts (receipt is acknowledged by the Vendor)
  - (b) K50,000.00 on receipt of the State Consent to Assign (in cash or kind).
  - (c) K40,000.00 on completion.
10. Usual Clause relating to refusal of grant of State Consent or grant of State Consent at the price other than agreed purchase price shall apply to this sale.
11. The Vendor has agreed to buy from the Purchaser a trailer costing around K150,000.00 and the parties here to have specifically agreed that it is up to the Purchaser either to sell the trailer or to pay in cash the sum of K150,000.00 which is mentioned in Clause 8 (b) hereinbefore. The trailer mentioned herein is 3 Axle Semi - Trailer with Chassis No. 7397.

The case for the plaintiff company from the affidavit evidence was that pursuant to the agreement they paid a sum of K90,000.00 in two instalments as part payment of the purchase price. The State consent was granted at K120,000.00. On account of the purchase price having been reduced the defendant became unwilling to proceed with the sale at K120,000.00. Consequently the plaintiff company also became unwilling to proceed with the sale of the trailer at K150,000.00 because it had been agreed that the trailer would be part payment of the house and that its delivery was conditional upon the purchase of the house and at the discretion of the plaintiff company. The plaintiff company contended that the defendant removed the trailer from their premises without authority and that they were unwilling to proceed with the sale of the trailer to the defendant on any condition other than if the defendant agreed to sell his property at K120,000.00.

The defendant did not dispute the existence of the contract of sale but explained that sometime in September 1986 he had approached the plaintiff company's general manager inquiring for a three axle semi-trailer. According to the defendant the general manager informed him that they could supply one at K150,000.00. The defendant further explained that in the course of the discussions he disclosed that he was trying to raise money by selling an uncompleted house. According to the defendant the general manager expressed interest, inspected the house and offered to purchase it at K240,000.00. The defendant stated further that when this price was reduced to K120,000.00 he was not prepared to renegotiate the contract price. He advised his lawyers that if the plaintiff company was unwilling to purchase the house at K240,000.00 then the contract of sale should be cancelled and K90,000.00 should be refunded, and he would pay K150,000.00 for the trailer. The defendant further stated that when it was evident that the purchase of the house would not take place, he approached the plaintiff company with a certified cheque in the sum of K150,000.00 with a letter

from his advocates, but according to the defendant, the plaintiffs general  
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manager informed him that the company was proceeding with the purchase of the house on terms already agreed.

According to the defendant the plaintiff's general manager then allowed him to take the trailer and return with the cheque; but on the same day that he had taken the trailer he was approached by a police-officer in the company of an officer the plaintiff company demanding the return of the trailer, claiming that he had taken it without authority.

On the foregoing facts the plaintiff issued a writ of summons claiming damages for conversion of its trailer - Chassis No. 7397 and an order for mandatory injunction ordering the defendant to return the said trailer. As already stated the plaintiff obtained an *ex parte* interim injunction. The defendant applied for the discharge of the *ex parte* interim order. The summons to discharge the interim injunction was couched in the following language:

"LET ALL PARTIES concerned attend before the Honourable Mrs. Commissioner Mambilima in Chambers on the 30 day of January 1987 at 9 hours on the hearing of an application on behalf of the above named defendant for an order that the interim injunction made by the Court herein and dated 26th December, 1986 be discharged and that thereafter there be made an order requiring the Defendant to pay and the Plaintiff to accept the sum of K150,000.00, the Plaintiff to release to the Defendant the documents of title necessary to register the trailer in the Defendant's name; and finally requiring the Defendant to give an undertaking that in the event that this court should hereafter be of the opinion that the Defendant is liable to pay any further sums on the price of the trailer the Defendant will without any further let or hindrance pay such sums to the Plaintiff AND THAT the costs of and incidental to this application be costs in the cause. "

The High Court Commissioner refused to discharge the interim injunction stating that in her view it was desirable that the trailer the centre of controversy between the parties be where it was and not to be used until the trial of the matter. The defendant's application was thus unsuccessful.

We would like to take the opportunity of this case to observe that it seems to us that a number of practitioners and even some trial courts do not exactly appreciate the status and effect of an *ex parte* interim injunction. It appears to us, as evidenced by the present appeal, that an *ex parte* interim injunction is equated as an interlocutory injunction. This is incorrect. An *ex parte* interim injunction should generally be until a certain day, (see Order 29/1/13, White Book, 1985 edition). This is so as to enable the other party to be served with the summons and the affidavit in order to be heard. An *ex parte* interim injunction, therefore, runs for a limited time generally followed by an interlocutory injunction where the applicant establishes his case. On the other hand the purpose of the grant of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action. (see Order 29/1/2, White Book, 1985 edition).

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Turning to the present appeal, counsel for the appellant Mr Levy Mwanawasa argued two grounds of appeal namely that an injunction should not be granted where damages would be an adequate remedy and that the balance of convenience in the present action lies with the defendant if it should be conducted at all. It must be mentioned that after some indication from the court Mr Mwanawasa abandoned arguments which touched on the merits of the case. In relation to the first ground counsel argued that the ruling by the learned High Court commissioner that the trailer remain where it was and be unused was a misdirection in relation to the principle governing the grant of injunctions namely that an injunction should not be granted where damages would be an adequate remedy. In support of this argument counsel referred the court to Order 29/1/5 of the White Book (1979 edition). He pointed out that the writ of summons in the instant case showed that damages would be an adequate remedy as the value of the trailer was known. He argued that in these circumstances the remedy of an injunction was inappropriate as the plaintiff was not likely to suffer unquantifiable damages while the facts of the case indicated that it was the defendant who would suffer unquantifiable damages from the disruption of his business. Turning to the second ground counsel argued that the balance of convenience was in favour of the defendant but, as damages were an adequate remedy the question did not arise at all. He asked the court to assist the defendant to use the trailer if the injunction was dissolved.

Mr Adam informed the court that he supported the lower court's decision because the property is in dispute and must be protected by way of an injunction. He pointed out that damages in the instant case would be adequate compensation for both parties, and argued that the trailer was not part of the defendant's business prior to the agreement for sale and, therefore, the question of disruption of the defendant's business did not apply to the facts of this case.

We have very carefully considered the arguments and submissions by both counsel, we have also carefully examined the facts of this case. The general principles governing the grant of injunction are not in dispute. In the case of *Shell BP Zambia Limited v Conidaris and Others* (1) this court, in relation to injunction held, inter alia

"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'."

We are satisfied that in the present case an injunction was inappropriate as damages would be totally adequate. In our view the circumstances which must obtain before an injunction is granted do not exist in the present case, namely that damages would be an inadequate remedy. The plaintiff, company being a trading company, all it needs must be money. In the circumstances damages would be adequate.

Turning to the application by the defendant we note that the defendant is seeking a mandatory order which if granted would in our view amount to determining the action, since the injunction sought would transfer the ownership of the trailer to the defendant who would then be entitled to use the same, thereby depriving the plaintiff of any possible right to have the trailer returned unused. In the case of *Turnkey*

*Properties v Lusaka West Development Company Limited, B.S.K. Chiti (sued as receiver) and Zambia State Insurance Corporation Limited* (2) the appellant applied in the High Court for an interlocutory injunction to restrain the respondents from selling or damaging property and to restrain them from entering upon land or interfering with the appellant's possession thereof pending the settlement of a dispute concerning a sub-sale. The appellant sought to continue in possession of the disputed buildings and to continue building during the injunction if granted. The injunction was refused by the High Court. The appellant appealed against that refusal to the Supreme Court. Ngulube, D.C.J., delivering the judgment of the court had this to say at page 88:

"An interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial; but it cannot, in our considered view, be regarded as a device by which the applicant can attain or create new conditions, favourable only to himself, which tip the balance of the contending interests in such a way that he is able, or more likely, to influence the final outcome by bringing about an alteration to the prevailing situation which may weaken the opponents' case and strengthen his own."

A careful reading of the defendant's summons suggests that this is what the defendant would wish to achieve in that he wishes that the interim injunction be discharged, an order be made that he pays and that the plaintiff accepts a sum of K150,000.00 and thereafter releases to the defendant the documents of title necessary to register the trailer in his name. To do so would in our view be to place the defendant in an advantageous position as against the plaintiff. This we are not inclined to accede to. It was for the foregoing reasons that we discharged the injunction and refused the defendant's application for a mandatory order.

As to costs the appeal having succeeded in part and the application having been refused we consider the case an appropriate one to make no order as to costs on either side.

Order accordingly

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