

**IN THE HIGH COURT FOR ZAMBIA**

**2009/HK/554**

**AT THE KITWE DISTRICT REGISTRY**

**(Civil Jurisdiction)**

**BETWEEN:**

**HEINRICH HOTELS LIMITED  
T/A HOTEL EDINBURGH**

**- PLAINTIFF**

**AND**

**KITWE CITY COUNCIL  
REAL MASTERS LIMITED  
AZ GLOBAL PHONES LIMITED  
SEASON ELECTRONIC LIMITED  
MZ TRADING LIMITED**

**- DEFENDANT  
- THIRD PARTIES**

**(Any other occupant of the Road reserve and frontage Stand 36 Kitwe)**

Before the Honourable Mrs. Justice R.M.C. Kaoma in Chambers this 15<sup>th</sup> day of June, 2011

For the Plaintiff: Mr. M. Chugani – Chugani & Co.

For the Defendant: Mr. V. Michelo – Kitwe City Council

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**RULING ON APPLICATION FOR MANDATORY INJUNCTION**

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**Cases referred to:**

1. American Cyanamid Co. v Ethicon Limited (1975) A.C. 396
2. Leisure Data v Brill (1988) FSR 367
3. Agip Zambia Limited v LK Motors and Caltex Oil Zambia Limited – Appeal No. 26 of 2002 (unreported).
4. Manchester Corporation v Connolly (1970) Ch. 420
5. Zockoll Group Ltd v Mercury Communications Ltd August 27, 1998, CA (unreported)
6. Nottingham Building Society v Eurodynamics Systems (1993) L.S.R 468 at 474
7. Von Joel v Hornsey (1995) 2 Ch. 774
8. Meade v Haringey London Borough Council (1979) 2 ALL ER 1016

This is an application by the defendant Kitwe City Council for an order of mandatory injunction directing the third parties namely Real Masters Limited, AZ Global Phones Limited, Season Electronic Limited, MZ Trading Limited and other occupants of the road reserve and frontage of Stand No. 36 to remove their make shift shops as construction going on at the said stand pose danger to the public shopping from the third parties' shops and also that the defendant cannot pay the plaintiff the loss that would be occasioned by the third parties' continued occupation of the disputed land as the plaintiff has borrowed US\$500 000 to complete the works.

The first affidavit in support filed on 22<sup>nd</sup> February 2011 is deposed to by one Mohamed Iqbal Malik of Ndola, a director/Secretary of the plaintiff company. In the said affidavit, Mr. Malik has deposed that the plaintiff has borrowed US\$500 000 from First National Zambia Limited to develop Stand No. 36 Kitwe but has not been able to do so because of the presence of the third parties. He has exhibited the loan agreement. He has also deposed that the development of the said stand was supposed to have been finished sometime back and that most of the shops have already been allocated as shown by the schedule of applicants also exhibited to the affidavit. He has further deposed that the plaintiff's inability to develop the property in good time has resulted in losses and that on 13<sup>th</sup> January 2011 some traders from the said containers forced their way unto Stand No. 36 and threatened to beat their foreman on the ground that the continued development of the said stand was disturbing their trading and that the matter was reported to the police as shown by the letter also exhibited to the affidavit.

There is a second affidavit in support filed on 23<sup>rd</sup> February 2011 sworn by Alick Derrick Simwinga then Town Clerk of the defendant. In the said affidavit the Town Clerk stated inter alia, that the defendant allowed the third parties to occupy the road reserve and frontage of Stand No. 36 on the understanding that the third parties would pay site rent to the defendant which they did from time to time though they were all in arrears most of the time; and that in June 2009 following plaintiff's notice to the defendant that they were about to start constructing a shopping complex on the said stand, the defendant issued a one month notice to the third parties to remove their makeshift stalls.

The Town Clerk further deposed that when they did not do so the plaintiff obtained a judgment against the defendant directing the defendant to remove the third parties from the road reserve and frontage of Stand No. 36 Kitwe; that the third parties joined the proceedings claiming that they are legal traders entitled to remain trading on Chisokone Avenue; that the third parties have no legal authority to remain on the land on which the makeshift containers are as they have no title to the land or authority from the defendant; and that the third parties' continued occupation of the road reserve and frontage to the stand poses serious danger to the public as materials can fall on members of the public passing near the construction site.

The deponent has further stated that the plaintiff has threatened to pass the loss occasioned by the delay as a result of the third parties' occupation of the road reserve; that being petty traders the third parties cannot compensate the plaintiff and defendant for the loss that will arise by the continued occupation of the road reserve and the injury that would arise from injury to members of the public; that the defendant seeks relief by way of mandatory injunction directing the third parties to remove the makeshift stalls on the construction site; and that the third parties have no chance to succeed at trial as they have no legal authority or right to remain on the road reserve either by way of a certificate of title or licence from the defendant. Exhibited to the affidavit are notices to the third parties to terminate occupation of the road reserve in question issued in September and November 2009, the judgment on admission in favour of the plaintiff, and photographs of the building under construction and containers underneath.

When the matter came up for hearing on 9<sup>th</sup> March 2011 the third parties had not filed any opposing affidavit and Mr. Chalenga their counsel informed the Court that he had taken instructions only from Real Masters Limited and AZ Global Phones Limited and that the instructing clients for the other two third parties were out of town and that they all wished to file a common affidavit. Despite objection by the defendant and the plaintiff I granted an adjournment to 21<sup>st</sup> March 2011. Unfortunately there was still no opposing affidavit when the matter came up and Mr. Chalenga proceeded on what he termed the law.

Mr. Michelo on behalf of the defendant relied on the second affidavit in support and List of Authorities filed on 7<sup>th</sup> March 2011. He reiterated that the third parties have no right to be where they are and that there might be injury to people moving on the construction site. He added that the case of *American Cyanamid Co. v Ethicon Limited* (1) refers to public interest and submitted that as a public authority, public interest demands that the structures which are there without any licence or certificate of title must be removed within three days should the order be granted looking at the level the development has reached and that the third parties have had adequate notice and would have moved a long time ago.

Mr. Chugani on behalf of the plaintiff also reiterated that the third parties are on site illegally and should be removed and that a substantial amount of money has been borrowed by the plaintiff for the project and that because of wrangles work has come to a standstill. Counsel has also submitted that the plaintiff has afforded the third parties chance to apply for the shops that are under construction, but none of them has done so and that the people allocated shops may take action against the plaintiff for failure to complete the construction. Lastly counsel urged that the third parties are using strong arm tactics to deter the plaintiff from developing the property as shown by the police report.

In opposing the application Mr. Chalenga has relied on Order 29 rule 1 (5) RSC 1997 which provides that an interlocutory mandatory injunction will not be granted on points of facts that are strongly contested and involve industrial disputes which would only be tried or decided at trial. Counsel has urged that the case against the third parties as stated in the third party notice filed on 16<sup>th</sup> July 2010 is not strong or clear and that the cause of action is totally different from the claim arising from the application for mandatory injunction. Counsel has also urged that from the case of *Leisure Data v Brill* (2) referred to by Mr. Michelo on the List of Authorities, an order of mandatory injunction has an effect of determining the main matter and that for that reason the case has to be unusually strong.

Counsel has further submitted that the interference referred to relates to a block of flats and nuisance relating to a block of flats and that a closer perusal of the reliefs being sought if granted in the main matter would be totally different from this application. He has urged that the cause of action is not very clear because the flats being talked about are none-existent; that the ordinary use of the property as being claimed is not there; and that the order sought has an effect of determining the main matter in finality and should not be granted. He referred to *Agip Zambia Limited v LK Motors and Caltex Oil Zambia Limited* (3).

In his reply Mr. Michelo has contended that from the totality of the case, their case is unusually strong; and that the reliefs sought in the statement of claim and the other pleadings are the same and are contained in the judgment obtained by the plaintiff for removal of the containers from the frontage of the premises in question.

Counsel has also contended that what they want to happen is the final determination of the matter and has referred to *Manchester Corporation v Connolly* (4). He says that the third parties have not provided a certificate of title or licence to remain where they are and that for them to counterclaim that they are entitled to remain trading alongside Chisokone Avenue Kitwe is promoting anarchy. Counsel has urged that when the action was commenced in 2009 there were flats on the property, but later the owner changed the land use backed by the law and is building a shopping centre and that the order that the third parties should remove their containers remains.

On his part Mr. Chugani has replied that planning permission was sought to construct a shopping centre and has urged the court to take judicial notice that there was a rezoning of the residential area to commercial and that the case is very strong because the containers are there illegally and that the court cannot condone illegality. He has also urged that there is in fact a judgment that has ordered the defendant to remove the traders which is unfulfilled.

## **THE FACTS**

From the affidavit evidence before me and the submissions by counsel for all the parties it is quite clear that the plaintiff is the legal owner of Stand No. 36 Kitwe which at the time of commencement of these proceedings on 23<sup>rd</sup> September 2009 had comprised of residential flats. It is also quite clear that about 2004 the defendant allowed the third parties to occupy the road reserve and frontage of Stand No. 36 Kitwe on the understanding that the third parties would pay site rent to the defendant which was paid from time to time. It is also a fact that subsequent to these proceedings the defendant rezoned the area including the area where Stand No. 36 is situated from residential to commercial and that the plaintiff obtained building permission to demolish the flats and to construct a shopping complex. It is further a fact that subsequently the plaintiff advised the defendant to remove the third parties from the road reserve and frontage of Stand No. 36 Kitwe and that the defendant issued to the third parties in September and November 2009 notices to remove their makeshift stalls from the road reserve and frontage of Stand No. 36 Kitwe.

It is also quite clear that the notices to vacate were received by the third parties as evidenced by a letter written by one Saleh Nsabula on behalf of all other traders affected to the Town Clerk on 16<sup>th</sup> December 2009 which is exhibited as "VM3" to the affidavit of Victor Michelo in support of summons for leave to issue a third party notice dated 21<sup>st</sup> June 2010. In the said letter the traders were pleading with the defendant for an extension of time for six months to vacate the premises. In that letter they did not claim any legal entitlement to remain on the premises. It is also clear that the notices to vacate and the letter by the traders asking for an extension of time were written after the learned Deputy Registrar had granted the judgment on admission which, inter alia, ordered the defendant to remove the illegal traders placed on the road reserve in front of Stand No. 36 Kitwe in Kabengele Avenue as well as the side of Stand No. 36 along Chisokone Avenue. It is quite clear that the traders have failed to vacate the premises prompting the defendant to apply before the Deputy Registrar for leave to issue third party proceedings against the traders.

In their defence to the third party notice the third parties admit that they were permitted by the defendant to trade alongside Chisokone Avenue. They have stated that they have paid all requisite stand charges and trading licences to the defendant and denied that their cargo containers block the view of any flats as no such flats exist or that the containers along Chisokone Avenue have interfered with the plaintiff's ordinary use of the property, or that they are trading in any alcohol. They have alleged that if there is any pollution, it must be other marketeers or clients and that it is the duty of the defendant to clean the place. They have counter-claimed for a declaration that they are legal traders and entitled to remain trading along Chisokone Avenue, Kitwe.

### **THE LAW**

The Court has jurisdiction upon an interlocutory application to grant a mandatory injunction directing that a positive act should be done to repair some omission or to restore the prior position by undoing some wrongful act but this is a very exceptional form of relief and the Court will decline to grant a mandatory injunction which could not be enforced (see para 29/L/1 RSC 1999 Edition page 563).

In *Leisure Data v Brill (2)* referred to by Mr. Michelo and Mr. Chalenga in their arguments and quoted at para 29/L/1 RSC 1999, it was said that circumstances can arise where it is necessary that some form of mandatory order should be made to deal with a situation which cannot on the practical realities be left to wait until the trial. In the same para at page 564 the learned authors have said that in *Zockoll Group Ltd v Mercury Communications Ltd August 27, 1998, CA (5)* the authorities were reviewed and that the Court said that "all the citation that should in future be necessary" is found in the concise summary of the law in *Nottingham Building Society v Eurodynamics Systems (6)*, where Chadwick J said the principles to be applied are; first, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense of granting an interlocutory injunction to a party who fails to establish his right at trial (or would fail if there was a trial) or, alternatively in failing to grant an injunction to a party who succeeds (or would succeed) at trial.

Secondly, in considering whether to grant a mandatory injunction, the Court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the Court does feel a high degree of assurance that the plaintiff will be able to establish this right at trial. Finally, even where the Court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory state such as where the risk of injustice if the injunction is refused sufficiently outweigh the risk of injustice if it is granted.

In *Von Joel v Hornsey* (7) also cited at para 29/L/1 page 564 an interlocutory injunction was granted to a plaintiff in an obstruction of ancient lights action requiring the defendant to pull down so much of a building as had been erected after receiving notice of the action. And in *Meade v Haringey London Borough Council* (8) also quoted on the same page, it was held as rightly stated by Mr. Challenga that an interlocutory mandatory injunction should not be granted on affidavit evidence where the issues of fact are strongly contested and involve disputes which could only be determined on the trial of the action.

### **THIS CASE**

In this particular case the third parties admit that they were allowed on the premises in question by the defendant. In my view they went on the premises as licencees. The third parties do not dispute that they were given notices to vacate the premises sometime in September and November, 2009 or that the notices have long expired. The third parties have neither title to the premises nor authority of the plaintiff or defendant to continue in occupation of the premises.

I am inclined to agree with Mr. Chugani that the fact that the flats referred to in the writ and judgment on admission are no longer in existence does not mean that the third parties can continue to occupy the premises without authority. It is also clear that since the notices to vacate were given to the third parties they have not paid any site rent or charges to the defendant.

The third parties have put up a defence and counter-claim to the third party notice, but I am not satisfied that there are issues that are highly contested as was the case in *Meade v Haringey London Borough Council* (8). The two cases are clearly distinguishable on the facts. While the third parties are seeking for a declaration that they are legal traders and entitled to remain trading along Chisokone Avenue, they have not filed any affidavit in opposition to the application for mandatory injunction to explain how they are entitled to remain trading along Chisokone Avenue or to show that they have paid all requisite stand charges and trading licences to the defendant.

Moreover, as I have already said, upon receiving the notices to vacate in 2009 the third parties asked for an extension of time to enable them put their cats together and undertook to cooperate with management of Hotel Edinburgh to allow them with their construction works while they were looking for alternative places to relocate to. But one and half years later the third parties are still on the premises and are now threatening the workers on site and interfering with the construction works as occurred on 13<sup>th</sup> January 2011. Quite clearly the third parties were not party to the judgment on admission which declared the plaintiff entitled to have the ordinary use of Stand 36 Kitwe including the frontage thereon as well as the unrestricted view of the flats surroundings as well as unhindered flow of fresh air and light, which also declared that the defendant has illegally allowed traders to place cargo containers in the road reserve in front of Stand 36 as well as on the front side of the said flats; and ordered the defendant to remove the illegal traders placed on the road reserve in front of Stand 36 in Kabengele Avenue as well as the side of Stand 36 along Chisokone Avenue forthwith. I believe that for the defendant to enforce the judgment it had to join the third parties to the proceedings.

Taking into consideration the principles enunciated by Chadwick, J in *Nottingham Building Society Eurodynamic Systems* (6) I firmly believe that the plaintiff will be able to establish its right to the premises occupied by the third parties at the trial of the action and I think that granting a mandatory injunction at this interlocutory stage is likely to involve the least risk of injustice if it turns out to be “wrong”. Further, I am alive to the principle that directing the third parties to remove the containers from the premises in question at this interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made.

However, the construction at stand No. 36 has reached an advanced stage as can be seen from exhibit “ADS 3” on the defendant’s affidavit in support, and from the ground itself. I can see that the containers in question are right beneath the rising building which is under construction and that some metal pieces are hanging above the make shift stalls as deposed in para 16 of the said affidavit. I agree entirely with counsel for the defendant that the continued occupation of the road reserve and frontage to Stand No. 36 poses a serious danger not only to the public, but to the third parties as well, as metal pieces can fall on them. Furthermore, it is not in dispute as urged by Mr. Chugani that the plaintiff has borrowed US\$500 000 to develop the stand or that the presence of the third parties on the premises in question has hindered the completion of the shopping centre thus resulting in the plaintiff incurring losses.

In conclusion, having weighed the balance of convenience, as it were, I believe that this is one exceptional case in which withholding a mandatory injunction would in fact carry a risk of greater injustice. Accordingly I grant a mandatory injunction directing the third parties herein within the next 14 days and not later than 30<sup>th</sup> June 2011 to remove their make shift shops in front of Stand No. 36 Kitwe as well as the road reserve on Kabengele Road as the construction going on at the said stand poses a great danger to the public shopping from the third parties’ shops and also that the defendant cannot pay the plaintiff the loss that would be occasioned by the third parties continued occupation of the disputed premises as the plaintiff has borrowed US\$500 000 to complete the works.

Should the third parties disregard this mandatory injunction the defendant would be at liberty to move in and raze the make shifts stalls. The costs of this application are for the plaintiff and the defendant as against the third parties.

Delivered in Chambers at Kitwe this 15<sup>th</sup> day of June 2011

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**R.M.C. Kaoma**  
**JUDGE**