IN THE HIGH COURT FOR ZAMBIA **2015/HPC/0471**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

SPANCRETE ZAMBIA LIMITED **PLAINTIFF**

AND

ZESCO LIMITED **DEFENDANT**

Before the Honourable Mr Justice W.S Mweemba at Lusaka in Chambers.

For the Plaintiff : *Mr F. Besa – Messrs Besa Legal Practitioners.*

For the Defendant : *Mr Paul Mulenga- Pincipal Legal Officer- ZESCO Limited.*

RULING

LEGISLATION REFERRED TO:

1. ***Rules of the Supreme Court of England 1999 Edition (White Book)***

CASES REFERRED TO:

1. ***American Cynamide Company V Ethicon Limited (1975) AC 396.***
2. ***Fellowes & Son V Fisher (1976) Q.B.D 122.***
3. ***Hina Furnishing Lusaka Limited v Mwaiseni Properties Limited (1983) ZR 45.***
4. ***Hondling Xing Xing Building Company Limited V Zamcapital Enterprises Limited (2010) HP/439.***
5. ***Nottingham Building Society V Eurodynamics Systems (1993) F.S.R. 468.***
6. ***Mkushi Christian Fellowship Trust Limited (Hold Out As Chengelo School) Vs. Henry Musonda Appeal No. 178 Of 2005 (Unreported)***

This is a ruling on an application by the Plaintiff for a Mandatory Injunction. It is supported by an Affidavit sworn by Davies Kataya the Managing Director of the Plaintiff Company and Skeleton Arguments filed into Court on the 24th of November, 2015.

It is deposed by Mr Kataya that on 29th October 2015, the Plaintiff commenced these proceedings against the Defendant and also lodged an application for an interim order of injunction which application, this Court granted.

That in this new application he was repeating the contents of the Affidavit he swore then dated 29th October, 2015 which was already part of this Court's record.

He also deposed that unfortunately at the time the Defendant was served the Order of Interim Injunction, it had already called on and collected the Advance Performance Guarantee from Cavmont Bank thereby occasioning him the same irreparable injury he sought to forestall.

Moreover, that among the orders this Court granted the Plaintiff was to prevent the Defendant from terminating the Contract. Further, that he believed that payment to the Plaintiff of the Advance Performance Guarantee was a fundamental term of the Contract and the Defendants withdrawing it had materially changed the status quo and amounted to the same thing as the Defendant terminating the Contract which was against the spirit of the order granted by this Court.

Further that one of the major irreparable injuries the Plaintiff and he stood to suffer was that Cavmont Bank had now also demanded that they comply with the terms of the Advance Performance Guarantee by refunding it the money it paid to the Defendant failure to which it would foreclose on the property the Plaintiff had pledged as security.

It is further deposed that the action of the Defendant had further rendered the Plaintiff incapable of performing its obligations in this Contract and had further affected the day to day running of the Plaintiff Company and its capacity to perform other equally important contractual obligations and the fear of the Deponent was that this would set the Plaintiff on a spiral of other defaults with its clients.

That he verily believed that this was an unusually strong case for which an order of Mandatory Injunction ought to be granted compelling the Defendant to remit the funds withdrawn from Cavmont Bank to ensure that the status quo was restored.

It is also deposed that his request was that the status quo which the Plaintiff initially sought to preserve be brought into effect, which application would compel the Defendant to remit the sum of K7,787,436 to Cavmont Bank so that the Defendant was prevented from terminating the Contract as already ordered by this Court.

Further, that damages that will be suffered by the Plaintiff should its pledged security be foreclosed by Cavmont Bank and it being declared delinquent and losing all its contractual rights could not be adequately remedied by an award of damages.

That the Plaintiff was seeking an order of Mandatory Injunction compelling the Defendant to restore the Advance Performance Guarantee as the non-remittance of funds to Cavmont Bank would render the earlier order given by this Court restraining the Defendant from terminating the Contract academic, nugatory and of no legal effect which would in turn render these proceedings a waste of time and resources.

There is also an Affidavit in Opposition filed into Court on 7th December, 2015 sworn by Chiti Mulenga the Principal Procurement Officer in the Defendant Company.

He stated that the parties entered into a contract termed ZESCO/003/2/2014 dated 17th September, 2014 (**the Contract**) for the supply and delivery of 120MW 4 Core aerial bundled conductors with insulated neutral and accessories under lot 3 (**the Cable**).

Further that calling the Advance Payment Guarantee was within the Defendants rights owing to the Plaintiff's failure to ship and deliver the cables and that making a call on the Advance Payment could not be equated to cancellation of the Contract.

That the Advance Payment Guarantee from Cavmont Bank (the Bank) allowed for the Defendant to make a call in the event of a breach. Moreover, that the damage claimed by the Plaintiff is primarily monetary in nature and could be atoned for by the payment of damages.

Further, that the Plaintiff had not provided any evidence on the nature of property pledged to the Bank and as such, determining irreparable damage (if any) the Plaintiff would suffer was therefore impossible.

That there were no obligations to be performed as the Contract expired on 17th September, 2015 and that the Plaintiff did not request the Defendant for an extension of the said Contract. That even though the Plaintiff claimed that its day to day running had been affected, no documentary evidence linking the receipt of the monies from the Bank by the Defendant to such hardships had been shown.

Moreover, that despite the Advance Payment to the Plaintiff at the commencement of the Contract and the successful completion of the pre shipment factory acceptance test (a prerequisite to shipment) the Plaintiff still failed to ship and deliver the cable. It is also deposed that this was not a strong case for a mandatory injunction as damages would be adequate compensation.

It is further deposed that remission of the funds claimed by the Plaintiff could not prevent the Contract from terminating because the same had already expired. That this application was an abuse of court process as it was made before the initial application dated 29th October, 2015 and had been disposed of by this Court.

Counsel for the Plaintiff filed Skeleton Arguments in support of the application. Counsel submitted that this Court had been called upon to consider three principles from the case of **AMERICAN CYNAMIDE V ETHICON (1).** Firstly if there was a clear right to relief, secondly where the balance of convenience would lie and thirdly whether the interlocutory relief was necessary to protect a party from irreparable injury which could not be atoned for by the award of damages.

According to Counsel, the Plaintiff had a clear right to relief as demonstrated by the facts in the Affidavit in Support of its application. Secondly, that the balance of convenience lay in granting the order to the Plaintiff.

He also stated that the Contract had been for the sum of K38,937,180.00 but that in its finalisation meeting its terms had been varied by the Defendant and it was agreed that the payment terms should be based on open account and that the Advance payment of 20% shall be paid to the Plaintiff within 30 days after presentation of the invoice and Advance Payment Guarantee equivalent to the amount being claimed.

Secondly, that upon shipment, 50% of the contract value was to be paid to the supplier upon presentation of shipping documentation in favour of the Defendant. Thirdly, that upon delivery and acceptance, 30% would be paid within 30 days on presentation of delivery note and acceptance of the goods by the Defendant at the final destination delivery stores.

In compliance with these terms, the Plaintiff presented a valid Advance Payment Guarantee to the Defendant from Cavmont bank whereupon 20%

deposit in the sum of K7, 787,436.00 was paid to the Plaintiff by the Defendant late in July and at this time, the Plaintiff through its contracted manufacturer of the Aerial Bundled Cables in China Zhengzhou Jin Hang High Tech Com. Limited had already obtained a credit facility in China and had already manufactured 25% (250KM) and was ready for shipment to Zambia and was merely awaiting pre- shipment inspection by Engineers from the Defendant Company.

The parties further agreed at the proposal of the Plaintiff that prior to the commencement of production, a Factory Acceptance Test (FAT) be conducted by representatives from both parties so that the Defendant could satisfy itself that the Manufactured 120mm 4 core Aerial Bundled Conductor met the minimum specifications needed by the Defendant and also that it complied with international standards.

Moreover that after Factory Acceptance Testing was done by the Defendants engineers the Defendant recommended that the Plaintiff should go ahead with execution of the contract awarded and supply the 120mm 4 core Aerial Bundled Conductor manufactured by Zhengzhou Jin Hang High Tech Co. Limited as the same complied with contract specifications.

Further that in the said Factory Acceptance Testing report, it was further recommended that the Plaintiff, at its cost, should arrange a pre shipment factory acceptance test (FAT) prior to the shipment of the first consignment of the manufactured cable by mid- February, 2015 as per contract terms.

However, in or around mid- February 2015 when the first 250km cable (25% of the contract amount) was ready for Pre Shipment Factory acceptance testing, the Plaintiff in compliance with what was agreed asked representatives from the Defendant to go and conduct the FAT. The Defendant without justification changed the list of its representatives to travel and did not avail them on time, whereupon in China the consignment missed the ship on which it was to be transported to Africa and back to

Zambia which made the Plaintiff to incur penalties with the airline in cancelling the old air tickets and having new ones issued.

It was also submitted that after cancellation of the first scheduled travel to China, a second travel date was arranged and the Defendant delayed travelling to go and perform the pre shipment FAT and that this failure was in clear breach of contract which occasioned the following losses to the Plaintiff.

First, the Plaintiff lost USD 176,000.00 which it had paid to shipping companies to transport the cables as the ship left without carrying them prior to inspection.

Second, the said 250KM of cable remained in storage in China for a long time and the Plaintiff incurred an additional USD 52,000.00 in storage charges.

Third, since the express terms of the contract were that 50% of the payment on the contract sum was to be paid upon shipping of the cables, the wilful delay by the Defendant prevented it from claiming this on the merchandise.

Further, that due to the Plaintiff's failure to claim this 50% aforesaid, it was prevented from meeting its payment obligations with the manufacturer of the said cables.

Moreover that the Plaintiff wrote to the Defendant explaining these dire circumstances that the Defendants delay had put the Plaintiff in and asked for payment to be made so that the manufacturer could be paid but the Plaintiff refused to pay.

Due to this failure to pay the manufacturer of the cables for the 250KM (25%) that was ready for shipment, the financier in China terminated the facility to fund the manufacture of 1000km of the cable.

It was also submitted that the Plaintiff had now been informed by Cavmont Bank that the Defendant had written to it calling on the Advance Performance Guarantee and demanding to be paid K7,787,436.00.

Counsel also contended that the Plaintiff intended to aver that the Defendant defaulted on its obligations in the contract and thus maliciously set the Plaintiff up for failure to meet its obligations with the manufacturer and fail to deliver the shipment herein.

Further that from the conduct of the Defendant that over and above its breach, it now intended to illegally terminate the contract and due to all this the Plaintiff had suffered damage, loss and inconvenience.

The Defendant also filed Skeleton Arguments in opposition to the application for an order of Mandatory Injunction. Counsel for the Defendant also relied on the case of **AMERICAN CYNAMIDE V ETHICON (1)** and the first argument presented before Court was on whether or not there was a serious question to be tried.

Counsel contended that there was no serious question to be tried as the claims in the Statement of Claim had been overtaken by events. Firstly, that the Advance Payment Guarantee had been paid by the Bank before the Order of Interim Injunction had been made. Secondly, that restraining the Defendant from terminating the agreement would not be possible as the contract had expired on 17th September, 2015.

Secondly regarding the issue of the adequacy of damages, Counsel contended that the injury complained of was monetary in nature and clearly despite the Plaintiff claiming that damages would not be sufficient to adequately compensate it for any loss it claims it would suffer, the Plaintiff had not shown this Court the irreparable loss it would suffer in any of its documents before Court.

In light of this, counsel contended that damages would suffice for any loss the Plaintiff claims to have suffered.

Regarding the issue of the balance of convenience, Counsel relied on the case of **HONDLING XING XING BUILDING COMPANY LIMITED V ZAMCAPITAL ENTERPRISES LIMITED (4)** where the Court stated that if there is doubt as to the adequacy of damages available to either party or to both, the Court must consider the wide range of matters which go to make up the general balance of convenience as these will vary from case to case. Counsel also cited **AMERICAN CYNAMIDE V ETHICON (1)** where three points for consideration were expressly mentioned. These are the status quo, relative strength of the case, and special factors.

Relying on this Counsel contended that the status quo the Plaintiff sought to maintain had been overtaken by events (prohibiting the Defendant from terminating the contract or stopping the payment of the advance payment guarantee) as the circumstance under which the Plaintiff issued process were no longer the same. This was because the Contract in question had already expired and the Advance Payment Guarantee was paid by the bank before this Court granted the order.

He also argued further on the relative strength of the case. Counsel relied on the statement by Lord Denning in **FELLOWES & SON V FISHER (2)** that:

> ***"If it is a weak case, or it may be met by a strong defence, the Court may refuse the injunction. Sometimes it means that the Court virtually decides the case at this stage".***

Based on this Counsel contended that since the matters claimed for by the Plaintiff had been overtaken by events, any subsequent trial and decision of this Court would be an academic exercise and of no consequence. Thus the

relative strength of this case was weak and as such the injunction should not be granted by this Court.

Further, Counsel argued that there were no special circumstances in this matter that would merit an injunction nor had the Plaintiff gone to any extent to show these in their Skeleton Arguments and application.

Counsel also argued on the issue of breach of contract. He contended that in the case of **HINA FURNISHING LUSAKA LIMITED V MWAISENI PROPERTIES LIMITED (3)** it was stated that:

> ***"A Plaintiff who complains of the defendant's breach of contract will not obtain an injunction if he too is in breach. Equally, he who comes to equity must come with clean hands. Thus, a contracting party who fails to perform his part cannot obtain an injunction to restrain breach of covenant by the other party".***

According to Counsel, it was clear from the Defendant's Affidavit in Opposition to the Plaintiff's Affidavit in Support of Exparte Summons for an Order of Interim injunction that the Plaintiff was in breach of the Contract by failing to ship the cables after the pre shipment test. Thus it was in breach for failure to perform its part and therefore could not obtain an injunction.

During the hearing on 9th December, 2015, both Counsel for the Plaintiff as well as the Defendant relied on their Affidavits and Skeleton Arguments. Counsel for the Plaintiff augmented these when he argued that although the status quo in the Contract had changed this had not materially changed the merits. Moreover, that this Court should take Judicial Notice that banks did not provide Guarantees without security and in this case collateral was supplied to the Bank on which it would foreclose and losing property in such a fashion was irreparable damage.

Moreover, that in the event that this occurred the Plaintiff would be declared a delinquent borrower which was also irreparable damage. Further that it was the pre shipment testing that was not conducted thereby inducing breach which the Defendant had not disputed.

Thus under Order 29 of the Rules of the Supreme Court of England 1999 Edition (White Book) this Court was clothed with power to grant a mandatory injunction pending determination of the matter.

I have considered the Affidavit evidence and the Skeleton Arguments filed by both parties.

The main issue for determination by this Court is whether or not to grant the Plaintiff's application for a mandatory injunction.

According to Order 29/L/1 of the Rules of the Supreme Court of England 1999 Edition (White Book) the mandatory injunction is an exceptional form of relief. It is granted in cases where the Applicant's case is **"unusually strong and clear."**

The principles to be applied were expounded in the case of **NOTTINGHAM BUILDING SOCIETY v EURODYNAMICS SYSTEMS (5*).*** In that case, Chadwick J, elucidated that the overriding consideration was: First 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, 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 establish his right.

Moreover, in the case of ***MKUSHI CHRISTIAN FELLOWSHIP TRUST LIMITED (HOLD OUT AS CHENGELO SCHOOL) V HENRY MUSONDA (6),*** the Supreme Court observed that the learned trial Judge misdirected himself when he decided to grant an interlocutory mandatory injunction which had the effect of determining the substantive issue at interlocutory stage.

In the case herein I do not consider that the Plaintiffs case is unusually strong and clear. I do not feel a high degree of assurance that if I grant a mandatory injunction, at the trial, it will appear that it was rightly granted. The risk of injustice if this injunction is refused does not outweigh the risk of injustice if it is granted.

This is because the main claims of the Plaintiff have been overtaken by events, firstly the Contract executed between the parties expired on 17th September, 2015 and secondly the Advance Payment Guarantee was paid by Cavmont Bank on 30th October, 2015 before I made the Exparte Order for Interim Injunction on 3rd November, 2015.

The Plaintiffs only remaining claim is for damages for breach of Contract. It is trite that if a claimant can be fully compensated by an award of damages, no injunction should be granted unless special circumstances would merit the grant of an injunction.

I am of the considered view that damages in the measure recoverable at common law would be an adequate remedy should the Plaintiff be successful at trial. Further the Defendant would be in a financial position to pay them.

The Plaintiff has also not advanced any special circumstances that would merit the grant of a mandatory injunction.

Based on the foregoing, I hereby dismiss the Plaintiffs application for a mandatory injunction. The Exparte Order for Interim Injunction dated 3rd November, 2015 is discharged. I make no order as to costs, but each party will bear its own costs.

Leave to appeal is granted.

Delivered in Chamber at Lusaka this 29th day of February, 2016.

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WILLIAM S. MWEEMBA
HIGH COURT JUDGE.