

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2018/HP/0112**



**B E T W E E N :**

ARCADES DEVELOPMENT PLC

**PLAINTIFF**

**AND**

ALLIANCE MEDIA (Z) LIMITED

**1<sup>ST</sup> DEFENDANT**

LUSAKA CITY COUNCIL

**2<sup>ND</sup> DEFENDANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the  
21<sup>st</sup> day of March, 2018**

*For the Plaintiff:* Mr. M. Desai & Mr. S. Bwalya, Messrs Solly Patel,  
Hamir & Lawrence  
*For the 1<sup>st</sup> Defendant:* Mrs. M. K. Ndhlovu, KN Kaunda Advocates  
*For the 2<sup>nd</sup> Defendant:* Mrs M.B. Mupeso, Legal Officer

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**R U L I N G**

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**Cases Referred To:**

1. *Shell and BP (Z) Limited v Conidaris and Others* (1985) ZR 174
2. *Turnkey Properties v Lusaka West Development Company Ltd BSK Chiti (sued as receiver) & Zambia State Insurance Corporation Ltd* (1984) ZR 85

**Legislation Referred To:**

1. *High Court Act, Chapter 27*
2. *Rules of the Supreme Court 1999*

By this application, the Plaintiff seeks an interim injunction pending determination of the matter pursuant to Order 27 Rule 4 and Order 3 Rule 2 of the High Court Rules read together with Order 29 Rule 1 of the Rules of the Supreme Court and section 13 of the High Court Act. It is supported by an Affidavit.

The deponent **Sonny Mwila Mulenga**, Chief Operations Officer in the Plaintiff Company states that the Plaintiff is the sub-lessee and occupant of Stand No. 2374, which harbours its development known as "Arcades Shopping Mall." He also states that sometime in January, 2018, the 1<sup>st</sup> Defendant began to construct a tri-faced advertising billboard of approximately 10m x 8m (Alliance billboard) near Arcades bus stop and adjacent to the Shopping Mall as shown in the exhibit marked "**SMM1**." That the Alliance billboard is close to the Plaintiff's own (Arcades billboard) currently on site and 9m x 6m in size. This is shown in the exhibit marked "**SMM2**."

The deponent avers that the Arcades billboard belongs to the 1<sup>st</sup> Defendant and was erected on the Plaintiff's premises pursuant to a Memorandum of Agreement between the parties executed

between 23<sup>rd</sup> and 24<sup>th</sup> September, 2003, shown in the exhibit marked "**SMM3.**"

The deponent contends that once the Alliance Billboard is fully constructed, it will be approximately 80 square metres in size and at least 48 percent larger than the existing Arcades billboard. That the dimension of the billboards are shown in exhibit "**SMM4**", in a letter written by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant granting planning permission. The deponent states that once the Alliance billboard is constructed, it will constitute a nuisance and obstruct the Arcades billboard for viewers on Great East Road from the west direction at Arcades. That it will also interfere with the visibility of existing signage and displays of the Plaintiff's tenant Micmar as shown in the exhibit marked "**SMM6.**"

The deponent also states that the Plaintiff and Metro Advertising through their licence agreement of 1<sup>st</sup> October, 2017, agreed to construct a new billboard where the Arcades billboard stands as shown in exhibit "**SMM5.**" That the Plaintiffs property has been undergoing redevelopment and renovations since March

2017 and all shops and businesses will have their own unique signage facing Great East Road. This is shown in the exhibit marked "**SMM7**." The deponent avers that if the Alliance billboard is constructed it will obstruct the visibility of new signage and constitute a nuisance. That the 1<sup>st</sup> Defendant commenced an action against it under cause No. 2017/HP/2106 after it terminated the agreement on the Arcades billboard. That the Plaintiff asked the 1<sup>st</sup> Defendant to stop its works and letters were written in exhibits "**SMM8**" and "**SMM9**", but it ignored them.

The deponent also avers that the Plaintiff's letter of planning permission was only availed to the Plaintiff on 8<sup>th</sup> January, 2018. Further, that the Plaintiff is not aware that the 1<sup>st</sup> Defendant applied for planning permission to construct a billboard on land that is in the vicinity of Arcades Mall. The deponent avers that the 1<sup>st</sup> Defendant's actions are illegal or irregular and unless it is restrained by injunction, it will proceed to fully construct the nuisance billboard to the Plaintiff's disadvantage.



In response, the 1<sup>st</sup> Defendant's Business Development Manager, **Derrick Balengu** deposed an Affidavit in Opposition. He concedes that his Company and the Plaintiff executed a five year lease agreement for exclusive outdoor advertising near Micar on the Plaintiff's premises. This is shown in the exhibit marked "**DB1**". That after its expiration, the lease was not renewed and the parties impliedly by conduct continued to honour their obligations and invoices and payments were exchanged between the parties as shown in the exhibit marked "**DB2**."

It is deposed that the parties entered negotiations to renew the lease on 27<sup>th</sup> July, 2017 but did not agree. Instead it was agreed that the lease would be determined on 28<sup>th</sup> October, 2017 and the 1<sup>st</sup> Defendant would subsequently dismantle the billboard. The deponent avers that the 1<sup>st</sup> Defendant thereafter applied for planning permission to the 2<sup>nd</sup> Defendant to relocate and upgrade the billboard from the Plaintiff's site to Arcades bus stop and approval was given. The deponent states that the 1<sup>st</sup> Defendant has been unable to construct the billboard because of the existing

dispute under cause No. 2017/HP/2106 and there is a claim for an injunction and damages.

The deponent denies that its billboard will not create a nuisance and it has planning permission. That the Plaintiff will not be entitled to erect another billboard similar in size because it has no planning permission. Further, the 2<sup>nd</sup> Defendant does not permit billboards of similar size to be constructed within 75 metres of each other. That the 2<sup>nd</sup> Defendant's building permission precludes the 1<sup>st</sup> Defendant from constructing a similar one.

The deponent avers that the Plaintiff has failed to demonstrate that the 1<sup>st</sup> Defendant's intended billboard, which has planning permission constitutes a nuisance and the Plaintiff's apprehension is unfounded. The deponent further avers that the Plaintiff's claim is motivated by bad faith and aimed at preventing the 1<sup>st</sup> Defendant from relocating and erecting the billboard on the 2<sup>nd</sup> Defendant's site along Great East Road.

The 2<sup>nd</sup> Defendant did not oppose the application.

Learned Counsels for the parties filed written submission for which I am grateful. I shall not reproduce them suffice to state that I will refer to them in this Ruling.

I have anxiously considered the application, the Affidavits and Skeleton Arguments filed herein. The sole issue to be determined is whether this is a proper case where I can exercise my discretionary power to confirm the ex parte order of interim injunction granted to the Plaintiff on 22<sup>nd</sup> January, 2018. There are a plethora of authorities on the principles of injunctive relief and some of them have been cited by the Learned Counsels.

In the case of **Shell and BP v Conidaris**<sup>1</sup>, the Supreme Court stated that a person seeking injunctive relief must demonstrate the following:

- a) *A clear right to relief.*
- b) *Irreparable damage and injury that cannot be atoned for by damages.*
- c) *A tilt of the balance of convenience in the Plaintiff's favour.*

The first issue I must consider is whether on the available evidence, there is a serious question to be tried and if the Plaintiff

has shown a clear right to relief. Upon consideration of the facts, there is a controversy on whether the 1<sup>st</sup> Defendant's billboard will obstruct the Plaintiff's business and development thereby causing a nuisance. Further, there is an allegation of impropriety by the Plaintiff in the manner that the 1<sup>st</sup> Defendant obtained planning permission. In addition, the Plaintiff claims that it is supposed to erect a billboard within the perimeter intended by the 1<sup>st</sup> Defendant. In my view, these issues raise serious questions that cannot be determined at this interlocutory stage but at trial.

The second issue to consider is whether the Plaintiff is likely to suffer irreparable damage, which cannot be atoned for by an award of damages. The Affidavit in Support disclosed that the Plaintiff is renovating and developing Arcades Shopping Mall. Further that the new signage for the shops and businesses is facing the direction of Great East Road. It might be obstructed by the 1<sup>st</sup> Defendant's intended billboard if mounted and members of the public will not be able to view the signage on the property on Great East Road from the western direction.



I take judicial notice that Arcades Shopping Mall is a big complex and if the Plaintiff were to succeed at trial, an award of damages could seemingly appear to be adequate. However, given the number of businesses and shops at the premises, it will not be possible to quantify the business losses that the Plaintiff will suffer. As such, damages may not atone the Plaintiff's losses.

I have considered that the billboard has not yet been constructed by the 1<sup>st</sup> Defendant. Arcades Mall is continuing with its renovations and development without interference. In the case of **Turnkey Properties Limited v Lusaka West Development Limited and Others**<sup>2</sup>, the Supreme Court *inter alia* held that:

**"While it is generally accepted that an interim injunction is appropriate for the preservation or restoration of a particular situation pending trial, it cannot be regarded as a device by which the applicant can attain or create new conditions favourable only to himself and 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 opponent's case and strengthen his own."**

My findings above also tilt the balance of convenience in the Plaintiff's favour. In my view, it is necessary to maintain the status quo until final determination of the matter. I therefore confirm the ex parte Order of interim injunction granted to the Plaintiff on 22<sup>nd</sup>

January, 2018. I award costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted, however it will not arrest the proceedings.

Dated this 21<sup>st</sup> day of March, 2018.

*M. Mapani*

M. Mapani-Kawimbe  
**HIGH COURT JUDGE**