

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

2018/HP/0566

BETWEEN:

EMELIO CHILEKWA & 18 OTHERS



PLAINTIFF

AND

LUSAKA CITY COUNCIL

1ST DEFENDANT

TRASFORD MWILA

2ND DEFENDANT

MOSES PHIRI

3RD DEFENDANT

BOLAN MUSHITU

4TH DEFENDANT

GILBERT MAFUTA

5TH DEFENDANT

HENRY SHAPOLONGO

6TH DEFENDANT

PETER MWAPE

7TH DEFENDANT

CHRISPIN MBEWE

8TH DEFENDANT

Before Hon. Mr. Justice Mathew L. Zulu, the 3rd day of May, 2018

For the Plaintiff: Mr. M.H Haimbe, Messrs. Malambo & Co.

*For the Defendant: Mrs. Y.N. Muwowo, In House Counsel, Council
Lusaka City Council.*

RULING

Cases referred to:

- 1. Heinrich Hotels Ltd T/A Hotel Edinburgh Hotel v. Kitwe City Council, Third Parties and Others (2011)1 Z.R.155*
- 2. Shepherd Homes Ltd v. Sandhams [1970]3 ALL. E.R 402*

3. *Greyford Monde v. Winstone Chibwe (Sued in his capacity as Secretary General of the United Party for National Development) (SCZ Judgment No. 5 of 2016) at page 15.*
4. *Nottingham Building Society v. Eurodynamics Systems [1993] F.S.R. 468 at 474.*
5. *Ahmed Abad v. Turning Metals Limited (1987)Z.R. 86 (S.C.)*
6. *American Cynamid Company v. Ethiocon Limited (1975) AC at page 408.*
7. *Shell and BP v. Conidaris and Others (1975) ZR, 174.*

Legislation referred to:

1. *The High Court Act, Chapter 27 of the Laws of Zambia.*
2. *Order 29/L/1 of the Supreme Court, 1999, (White Book).*

List of Authorities referred to:

1. *The Halsbury's Laws of England, Volume 12 (5th edition) at paragraph 1133 and 1104.*

This is the plaintiffs' application for an order of interlocutory injunction pursuant to Order 27 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia as read with Order 29 Rule 1 of the Rules of the Supreme Court 1965(White Book) filed on 22nd March 2018.

The brief background to this application is that the plaintiffs on 22nd March, 2018 commenced this action against the defendants by

way of Writ of Summons and Statement of Claim claiming *inter alia* an order compelling the 1st defendant to perform its statutory duty in accordance with its mandate as set out under the Markets and Bus Stations Act No.7 of 2007, an order of mandatory injunction directing the 1st defendant to secure the free and unhindered use of Kulima Tower Bus Station by the plaintiffs, an order of prohibitory injunction to restrain the 2nd to 8th defendants from: collecting levies, fees or other monies from the plaintiffs and interfering with operations at Kulima Tower Bus Station, special damages for the losses incurred per day from 5th March, 2018 and every day the plaintiffs were prevented from conducting their business at Kulima Tower Bus Station.

The Plaintiffs on even date also applied for an ex parte order of interim injunction which I directed be heard inter partes on 16th April, 2018. The application is supported by an Affidavit deposed by Emelio Chilekwa one of the plaintiffs in this matter. The gist of the averments is that the plaintiffs are bus service operators who have operated from Kulima Tower Bus Station for several years, paying all prescribed fees, levies and other lawful conditions imposed by

the 1st defendant during such period. He deposes that the 2nd to 8th defendants have equally been levying fees from the plaintiffs and other bus operators at the Station with the permission or acquiescence of the 1st defendant despite the said defendants not being agents, servants or employees of the 1st defendant. He deposes that on 5th March, 2018, the plaintiffs were forcibly removed from the Station by the 2nd to 8th defendants on account of their allegiance to an opposition political party. The deponent avers that the 1st defendant has failed to perform its statutory duty to manage the operations of the Station. He deposes that unless the 1st defendant is compelled to perform its duties, the illegal situation at the Station will continue and also that unless restrained the 2nd to 8th defendants will continue to perpetuate their illegal acts.

The application was opposed by the 1st defendant by way of an Affidavit dated 12th April, 2018 deposed by Collins Mulenga, the Station Manager at the Station. He deposes that the 1st defendant is mandated to manage and control the Kulima Tower Bus Station. He avers that the 1st defendant has never authorised the 2nd to 8th defendants to run the station expressly or impliedly so. He asserts

that there have been no disturbances at the Station. The deponent avers that the 1st defendant has not denied the plaintiffs access to the Station and also avers that it is managing and controlling the station in accordance with its statutory mandate.

When the matter came up for the hearing of the interlocutory injunction on 16th April, 2018, Counsel for the plaintiffs informed the court that service of the documents pertaining to this application had been effected on the defendants as shown by the Affidavit of Service dated 4th April, 2018. I therefore, proceeded to hear the application.

Counsel for the plaintiffs relied on the Affidavit in Support and argued it by way of oral arguments in relation to the application for a mandatory injunction that the 1st defendant is under a statutory duty to manage and control bus stations in Lusaka including Kulima Tower Bus Station and that in view of the allegations that the 1st defendant is failing in its statutory duty, this honourable court ought to grant the mandatory injunction to ensure that the balance of convenience is not swayed pending the determination of the main matter. He contended that the veracity of the averment

that the 1st defendant is currently executing its mandate cannot be determined at this stage of the proceedings without a full trial and that granting a mandatory injunction will not prejudice the 1st defendant as it is the 1st defendant's duty to manage and control the Station. Counsel relied on **Henrich Hotels Ltd Trading as Hotel Edinburg v. Kitwe City Council and Others**¹ in support of his application for a mandatory injunction.

In relation to the application for a prohibitory injunction, counsel submitted that if the order is granted, it would ensure that the public interest is protected thereby obviating the need of this court to consider whether damages will be an adequate remedy and avoid the perpetuation of unlawful acts by the 2nd to 8th defendants. He contended that there is a serious question to be tried and that this is a proper case to grant the relief sought especially that the matter relates to the execution of a duty imposed by law.

The 1st defendant relied on the Affidavit in Opposition and counsel also augmented the same orally. The gist of her arguments was that the 1st defendant already performs its duties at the Station and that a mandatory injunction is not necessary. She also argued that the

1st defendant will be prejudiced if the order sought is granted as the plaintiffs' motives for seeking the mandatory injunction are not clear as the 1st defendant is already performing its duties.

In response, counsel for the plaintiffs submitted that the 1st defendant has not demonstrated what prejudice the 1st defendant will suffer as the mandatory injunction merely seeks to compel it to perform duties which are imposed on it by statute. He also argued that the documents on record demonstrate that there are no hidden motives on the part of the plaintiffs in seeking the reliefs sought.

I have seriously considered the plaintiffs' and the 1st defendant's Affidavits and the oral submissions of counsel. The issue for determination is whether this is a proper case to exercise my discretion to grant the plaintiffs a mandatory and prohibitory interlocutory injunction.

I will firstly determine the application for a mandatory injunction. A mandatory injunction is one that orders someone to do specified acts and it is appropriate for the restoration of a particular situation pending trial. It will only be granted in special circumstances as it usually carries with it a higher risk of injustice by its nature, in the

event that it later turns out that the injunction should not have been granted in the first place. See: **Shepherd Homes Ltd v. Sandham**², the **Halsbury's Laws of England, Volume 12 (5th edition)** at paragraph 1104 and **Greyford Monde v. Winston Chibwe**³.

The principles that must be applied when determining an application for a mandatory injunction were espoused by Chadwick J in **Nottingham Building Society v. Eurodynamics Systems**⁴ which were cited with approval in **Heinrich Hotel v. Kitwe City Council and Others**¹. Chadwick stated the following:

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 stage such as where the risk of injustice if the injunction is refused sufficiently outweigh the risk of injustice if it is granted.

The learned authors of the **Halsbury's laws of England, Volume 12 (5th edition)** at paragraph 1133 state that a mandatory injunction should not be granted unless the case is clear and one which the court ought to decide at once. However, I must state that the court will not grant an interlocutory mandatory injunction if the effect would be to determine the whole action before the determination of the main matter. See **Ahmed Abad v. Turning Metals Ltd⁵**.

In view of the foregoing authorities, I am of the considered view that this court in determining an application for a mandatory injunction must determine whether there is a clear case and the court must feel a high assurance that the plaintiff will be able to establish their case at trial. Further, according to Order 29/L/1 of the RSC, a

mandatory injunction should not be granted on affidavit evidence where the issues of facts are strongly contested.

I am persuaded and properly guided by the above authorities and I will therefore proceed to determine which course between granting the mandatory injunction or withholding the injunction would carry the least risk of injustice in this case. The first issue that I will determine is whether on the affidavit evidence, the case is clear and whether this court feels a high degree of assurance that the plaintiffs will establish their case at trial.

On the facts before me, it is not in dispute that 1st defendant has a duty to manage and control Kulima Tower Bus Station. I also find that the plaintiffs as any other bus service operators have the right to be allowed to operate at the Station on meeting all the lawful conditions imposed by the 1st defendant for operating at the Station as is confirmed by the 1st defendant at paragraph 14 of its Affidavit in Opposition. It therefore follows that the plaintiffs may legally sustain an action against the 1st defendant in the event that they are unjustifiably and without any legal basis prevented from operating at the Station. However, on the evidence before me, I am

unable to find that the 1st defendant has not been performing its duties at the Station or that the plaintiffs have been denied access to the Station at this stage of the proceeding as these facts are in contention and I am of the view that these issues may only be properly dealt with at trial. In view of the foregoing, I am therefore unable to form an opinion and hold a high degree of assurance that the plaintiffs will be able to establish their case at trial. I further hold the view that a mandatory injunction should not be granted where the facts that lie at the core of the application are in contention as is the case in this matter.

Further, I am of the considered view that this is not an exceptional case where the court will nonetheless grant a mandatory injunction even though it does not feel a high degree of assurance that the plaintiffs will establish their case at trial where the risk of injustice if the injunction is refused sufficiently outweighs the risk of injustice if it is granted as the harm the plaintiffs may allegedly suffer in this case if it is established at trial that they have been prevented from operating from the Station may be compensated by

an award in damages for each day they would have been prevented from operating from the Station.

The second application I will now determine is the plaintiffs' application for a prohibitory or restrictive injunction restraining the 2nd to 8th defendant from interfering with the operations at Kulima Tower Bus Station. This application has not been opposed by the 2nd to 8th defendants. The principles relating to applications for restrictive or prohibitory injunctions were espoused in the celebrated case of **American Cynamid Company v. Ethicon Limited**⁶ and our own authorities in *inter alia* **Shell and BP v. Conidoris**⁷. The Supreme Court held that a party 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 for determination is whether there is a serious question to be tried. The plaintiffs aver that they have been

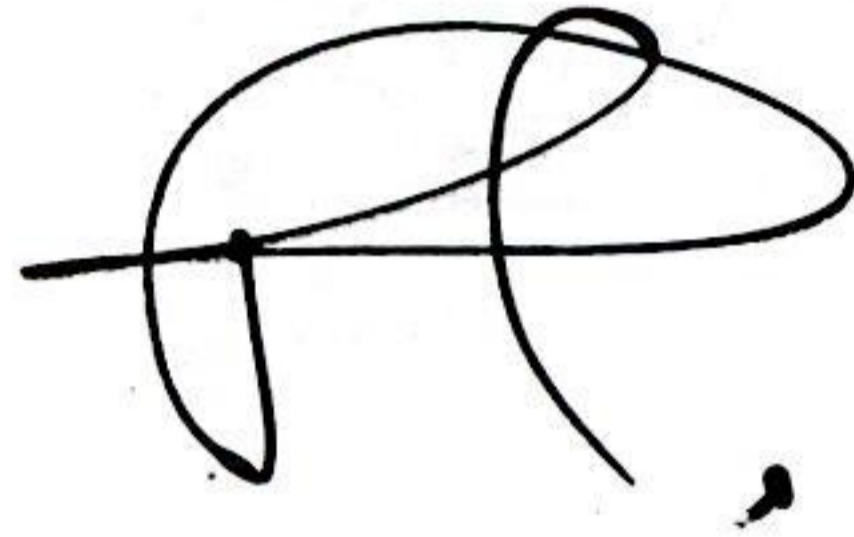
prevented from operating from the Kulima Tower Bus Station by the 2nd to 8th defendants on account of their allegiance to an opposition political party. It is also the evidence on record that the Station is available for use by any bus operator upon meeting the conditions imposed by the 1st defendant. On the evidence before me, I find that there is a serious question to be tried. The next question which must be resolved is whether the plaintiffs will suffer irreparable damage if the injunction is not granted. I am of the considered view that the damage that the plaintiffs may suffer if they establish their rights at trial is damage which can be adequately atoned by an award for damages for each day they have allegedly been prevented from operating from the Station. I am guided by the case of **American Cyanamid Company v. Ethicon Ltd**⁶ where the following was stated-

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.

In the light of the above, I find no merit in the application for a mandatory and restrictive injunction and I accordingly dismiss the application and order that the costs be in the cause.

Leave to appeal is granted.

Dated the 3rd day of May 2018



**MATHEW. L. ZULU
HIGH COURT JUDGE**