

IN THE COURT OF APPEAL FOR ZAMBIA

APPEAL NO. 148 OF 2017

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

CONCIOUS MUFAYA

1st APPELLANT

CHARLES KARANGWA *(Appearing in his capacity as
Church of God Regional Superintendent, Central Africa)*

2nd APPELLANT

PETER THOMAS *(Appearing in his capacity as
Church of God Field Director Africa)*

3rd APPELLANT

AND

BOOKER MUNAMPELU

RESPONDENT

CORAM: Chashi, Siavwapa and Ngulube, JJA

ON: 21st and 22nd February 2018 and 16th May 2018

✓ *For the Appellants: G. Pindani, Messrs Chonta Musaila and Pindani
Advocates and I. M. Kunda (Mrs.) of Messrs George
Kunda and Company*

For the Respondent: S. Mulengeshi of Messrs AB and David

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. *American Cynamid Company Limited v Ethicon Limited (1975)
AC,396*
2. *Shell and BP Zambia Limited v Conidaris and Others (1975) ZR, 174*
3. *Mobil Zambia Limited v Msiska (1983) ZR, 86*
4. *Zambia Railways Limited v Oswell Joseph Simumba (1995/1997) ZR,
41*

5. ***Tommy Mwedelema v Zambia Railways Board (1978) ZR, 65***
6. ***Wilhelm Roman Buchman v The Attorney General (1994) SJ 76 (SC)***
7. ***Turnkey Properties Limited v Lusaka West Development Company Limited, BSK Chiti (Sued as receiver) and Zambia State Insurance Corporation Limited (1984) ZR, 85***
8. ***Preston v Luck (1884) 2 CHD, 497***
9. ***Mutuwila Farms Limited v John Norte – SCZ Judgment No. 28 of 2010***

Legislation referred to:

1. ***The Supreme Court Practice (White Book) 1999***

This is an appeal against the Ruling of the High Court delivered on 16th June 2016 granting the Respondent an injunction.

The brief background to this matter is that the Respondent was in the year 2016, appointed National Overseer for Zambia in the Church of God Zambia (the Church) for a tenure of four years, which appointment was subject to revocation.

On 25th April 2017, the appointment was revoked for a number of reasons. Following the said revocation, the 1st Appellant was appointed as Overseer.

The Respondent refused to acknowledge the revocation and to vacate office.

That prompted the Church through Bishop Victor Chabala as Mission Secretary Treasurer to commence an action against the Respondent, on 2nd May 2017 under cause number 2017/HP/710, seeking the following reliefs:

- (1) That the revocation of the appointment of the Respondent as Overseer for Zambia was lawfully done.
- (2) An interim and mandatory injunction to restrain the Respondent from performing his duties and/or holding out as Overseer and for him to vacate his official residence.
- (3) An order to account for all the finances and assets of the Church.

On the same date, the Respondent under cause number 2017/HP/716, commenced an action against the Appellants herein; seeking the following reliefs:

- (1) A declaration that he is the legitimate and rightful Overseer of the Church having been duly elected.
- (2) An Order for re-instatement, damages for loss of credibility and reputation.
- (3) An Order for an injunction.

The Respondent was on even date granted an ex parte Order for an interim injunction, restraining the 1st Appellant from carrying out any acts or conduct under or by virtue of the office of National Overseer of the Church pending determination of the main cause.

It was further ordered that the Respondent continues working as Overseer and that the Appellants be restrained from evicting the Respondent from the administrative Bishop's personage and from taking custody of any property of the Church.

The Appellants were further restrained from announcing, publishing or causing to publish any document, notice or communication that purport that the 1st Appellant is the Overseer of the Church.

The two causes were subsequently consolidated by consent of the parties and the ex parte injunction was heard inter partes.

After considering the affidavit evidence, the arguments and the requisite principles of law in the granting of injunctions, the learned Judge in the court below, opined that there was a serious triable issue; the applicant had a clear right to relief and was likely to suffer irreparable injury in the event that the matter was resolved in his favour.

Further that, in order to maintain the status quo, that was a fit and proper case to grant an interim injunction pending determination of the main matter.

Disenchanted with the Ruling, the Appellants appealed to this Court advancing five grounds of appeal couched as follows:

- (1) The court below erred in law and in fact when it granted an interim injunction in favour of the Respondent pending determination of the main matter
- (2) The court below erred in law and in fact by relying on the Respondent's Counsel's submission, "that from the affidavits in support and reply, the applicant had not pointed out any provisions of the constitution or minute book which the Church of God had not followed.
- (3) The court below erred in law and fact by asking the question for determination but failing to answer it (at page 20 of the ruling)" in my view the main issue in whether the rightly removed from his office of National Overseer and whether in view of the said removal, the 1st Respondent was legally appointed to replace him (**note:** typographical omissions in the excerpt).
- (4) The court erred in law in granting the injunction on the premises "Therefore in Order to maintain the status quo" at page 21 last paragraph. The error is curable by Order 29/L/9 RSC, 1999 edition.
- (5) The court below erred in law by not considering settled law that a dismissed employee for whom re-instatement is unlikely may be

adequately compensated in damages without suffering irreparable damage.

At the hearing of the appeal, Mr. Pindani, Counsel for the Appellants relied on the heads of argument.

In arguing the first ground of appeal Counsel relied on the cases of **American Cynamid Company Limited v Ethicon Limited**¹ and **Shell and BP Zambia Limited v Conidaris and Others**² where it was emphasised that in granting an injunction one of the cardinal principles is that an applicant must show *inter-alia* that he has an arguable case and that if he is not granted the interim relief, he will suffer from irreparable injury, that is injury which cannot be atoned by damages.

Mr. Pindani, drew our attention to the ex parte Order of injunction appearing at pages 141-143 of the record of appeal, (the record) which was confirmed by the Ruling being impugned and submitted that it does not contain an undertaking as to damages, which is a mandatory requirement and a pre-requisite to the granting of an interim injunction as provided for under Order 29/L/23, of **The Rules of the Supreme Court (RSC)**¹.

It was Counsel's contention that an undertaking as to damages ought to be a condition of every interlocutory injunction. That although the court cannot compel an applicant to give an undertaking, it can refuse to grant an injunction unless he does.

According to Counsel, due to the absence of the undertaking, the court below ought not to have granted the injunction.

Counsel further submitted that the administrative Bishop's personage, is the property of the Church which the Respondent occupied by virtue of his appointment as Overseer. That he cannot suffer any irreparable injury if he was to vacate the residence and office. The Respondent was getting a monthly allowance and that is the damage the Respondent may suffer; such loss of income can adequately be compensated in monetary terms.

Counsel placed reliance on the case of **Mobil Zambia Limited v Msiska**³ where the Supreme Court held that:

"In considering whether or not an injunction should be granted, a most important consideration is whether or not damages are an adequate remedy...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 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."

Counsel further submitted that, even in extreme cases of defamation, courts are able to award damages for defamation or loss of employment by dismissal or other unlawful termination.

Counsel argued that the holding in the Ruling to the effect that the Respondent would suffer irreparable damage, considering the position held is not valid, justifiable and relevant consideration at law.

Counsel reiterated that the first and most important consideration when granting an interim injunction is whether damages would be an adequate remedy and that the court erred when it held otherwise.

As regards the second ground of appeal, Counsel submitted that as can be seen from excerpts of the Constitution of the Church and the Minute book appearing at pages 72-80 and 57-71, World Missions Board in consultation with the regional Superintendent are mandated to appoint the Overseer and his appointment is ratified by the International Executive Committee. Therefore, elections are not a mode of ascendance to the position of Overseer but by appointment by the said structures and what happens at the convention of the Council of Ministers is merely ascertaining the suitability of persons aspiring to the office of Overseer by way of a preference vote, which is a vote that ranks the choices in order of preference.

It was further submitted that the ultimate power to appoint the Overseer thus rests with the World Missions Board in consultation with the regional Superintendent and approval by the International Executive Committee in the United States of America. That the Respondents contention that he was elected by the Council of Ministers in Zambia and cannot be removed before the end of his tenure is not supported by any evidence on record.

The Respondent has not referred to any provision in the Constitution and Minute book which provide for the passing of a vote of no confidence in the Overseer in order to be removed from office.

It was Counsel's submission that therefore the Respondents right to relief is not clear and/or there is no serious question of law to be

tried. The lower court consequently misdirected itself by holding that the Appellant had not pointed out the Church Constitution and Minute book provisions which were contravened in the face of the Appellants defence and counter claim as well as the affidavit in opposition for an interim injunction clearly spelling out the legal basis for revoking the appointment.

In arguing the third ground of appeal, Counsel reiterated his argument on grounds one and two and added that the 1st Appellant was correctly appointed in view of the provisions of the Constitution and Minute book.

As regards the fourth ground of appeal, Counsel submitted that the court below should have gone further to explain what it meant by "status quo" to avoid any of the parties misinterpreting it as submitted under the second ground of appeal.

In arguing ground five, Counsel cited the case of **Zambia Railways Limited v Oswell Joseph Simumba**⁴ where it was held that:

"the depriving of the respondent his house and car is not an irreparable injury which cannot be adequately remedied or atoned by damages."

According to Counsel, the Respondent being in the category of an employee cannot obtain an injunction against his employers to the extent of restraining them from evicting him from the house, when he could adequately be compensated by damages.

Counsel further submitted that after being granted the injunction, the Respondent has engaged in acts and behaviour which are

detrimental and prejudicial to the Church. The Respondent has by virtue of the injunction created conditions favourable only to himself, which are against the spirit of the injunction. The case of **Tommy Mwendelema v Zambia Railways Board**⁵ was cited, in which the Supreme Court held that an injunction ought to be discharged when a party to whom it is issued is showing bad conduct.

Counsel urged us to uphold the appeal with costs.

In response, Mr. Mulengeshi, Counsel for the Respondent equally relied on the Respondent's heads of argument.

As regards the first ground of appeal, Counsel whilst agreeing with the Appellants that indeed where there is no undertaking as to damages the court ought not grant an injunction, he however argued that in the case at hand, the court below was on firm ground when it granted the injunction.

Our attention was drawn to page 126 of the record at paragraph 20 of the affidavit in support of ex parte summons for an Order for injunction and submitted that, the Respondent gave a clear undertaking to pay damages to the Appellant for any damages that the Appellant may suffer as a result of the injunction having been granted. That in the premise the Appellants argument in this regard has no merit and cannot stand as an undertaking was sufficiently given under oath.

Counsel further submitted that, the absence of the undertaking is not an irregularity that can render the Order invalid. Further, the injunction was confirmed by the Ruling of the court which took into

consideration all requirements needed for an injunction to be granted.

Counsel contended that, in fact the issue is being raised before this court for the first time as it was not an issue in the court below. The case of **Wilheim Roman Buchman v Attorney General**⁶ was cited where it was held as follows:

“A matter that is not raised in the court below cannot be raised before a higher court as a ground of appeal”

That the matter is therefore improperly before this Court and should not be considered.

On the issue of whether damages would have sufficed to compensate the Respondent, Counsel submitted that in casu the damages would not be an adequate compensation in the event that the injunction was not granted.

According to Counsel, the question to be determined at trial is predicated on the legality of the Respondents removal from the position of Overseer and appointment of the 1st Appellant to the same position.

It is Counsel's view that in the likely event that it is found that the Respondent was improperly removed and in that regard was correctly the Overseer; in effect rendering the appointment of the 1st Appellant as null and void, any acts performed by the 1st Appellant as Overseer would be illegal and null and void and the implications would have far reaching consequences not only to the Respondent, but the Church.

It was further submitted that damages cannot atone for anguish, loss of credibility and reputation. The Respondent is by calling a clergy whose following is predicated on certain pertinent qualities including integrity and honesty and once he loses his reputation and standing as such, there are no damages that can atone in such a manner as to restore his previous standing.

It was Counsel's contention that the court below was on firm ground and this was a proper case for granting of the injunction; it is not merely a matter of inconvenience. Counsel cited the **Mobil Zambia Limited**³ case where it was stated as follows:

"...the court will grant an injunction only if the right to relief is clear and the injunction is necessary to protect the plaintiff from irreparable injury which cannot be atoned for by damages, mere inconvenience is not enough."

In response to the second ground of appeal, Counsel submitted that the reasoning of the court at paragraphs 3, page R18 of the Ruling; the fact that the court outlined the arguments proffered by the Appellants and the Respondent, does not automatically mean reliance was placed by the court on the same. The court below clearly outlined the considerations it made in arriving at its Ruling. According to counsel, this ground is misguided and misconceived. Counsel further submitted that upon perusal of the Ruling, the court's view that the main issue was whether the Respondent was rightly removed from his office of Overseer and whether in view of the said removal, the 1st Appellant was legally appointed to replace him,

are matters to be determined at the trial of the main matter and not at interlocutory stage.

Counsel in that respect cited the case of **Turnkey Properties Limited v Lusaka West Development Company Limited, BSK Chiti (sued as receiver) and Zambia State Insurance Corporation Limited**⁷ where the Supreme Court held *inter alia* that:

“It is improper for a court having an interlocutory application to make comments which may have effect of pre-empting the decision of the issues which are to be decided on the merits to be tried.”

In response to the third ground of appeal, it was Counsels contention that there was nothing wrong in the court asking the question for determination and not proceeding to answer the same. The highlighting and identification of the main issues is the requirement to be satisfied by the court in exercising its discretion in determining whether there is a serious question to be tried at the hearing. The case of **Preston v Luck**⁸ was cited, where the court at page 506 held as follows:

“...of course, to entitle the plaintiff to an interlocutory injunction, though the court is not called upon to decide finally on the right of the parties it is necessary that the court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiffs are entitled to relief.”

Reliance was also placed on the **Turnkey Properties Limited**⁵ case and submitted that the court below could not delve into the veracity or

justification of the reasons why the Respondent was removed from office as the question set out by the court is a subject to be determined at trial through the presentation of evidence.

As regards the fourth ground of appeal, counsel submitted that the status quo in this regard meant the Respondent's continuation in his leadership in the Church in accordance with **Order 29/L/9 RSC**.

In response to the fifth ground of appeal, Counsel contended that the issues being raised were not raised in the court below. The case of **Wilheim Roman Buchman**⁶ was again cited.

Counsel contended that, this ground be dismissed.

We have considered the arguments and the Ruling of the court below.

We shall first consider ground two and three together as they are related and then grounds one, four and five together as they are also related.

The issue which arises in respect to grounds two and three is whether the learned Judge in the court below was in order to take into consideration, matters relating to the determination of the main cause in considering whether to grant the interim injunction or not.

At the stage of determination of an application for an interim or interlocutory injunction, it is not the duty of the court to dwell or delve so much on the facts of the case as regards the merits in the main cause, except where it is necessary and unavoidable to do so in determining whether an injunction should be granted or not.

In other words, at that stage, it is not the duty of the court to pronounce Orders that will determine any of the reliefs being sought or triable issues, except the very one relating to the injunction.

In the case of **American Cynamid Company Limited**¹, two of the key principles derived from the speech of Lord Diplock in granting of an interlocutory application in determining whether there is a serious question to be tried were as follows:

- “1. *The evidence available to the court at the hearing of an application for an interlocutory application is incomplete. It is given on affidavit evidence and has not been tested by oral cross examination.*
2. *It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend, not to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial.”*

In our view, what brings the argument to the fore is what the learned Judge in the court below stated at page 28, line 13 of the record, where he had this to say:

“Having outlined the above and having taken the facts of this case, I have noted that the plaintiff in the main matter was elected as National Overseer for the Church of God, Zambia after election held on 29th August 2015. By a letter

dated 25th April 2017, the plaintiff was ordered to vacate his office as National Overseer and was told to vacate the administrative Bishop's personage within thirty days from 24th April 2017.

The respondent argued that the applicant was validly removed from his position as National Overseer and the 1st respondent was legally appointed as National Overseer instead.

In my view, the main issue is whether he was rightly removed from his office of National Overseer and whether, in view of the said removal, the 1st respondent was legally appointed to replace him.”

In our view, what the learned Judge did, was that he simply noted the facts before him by way of affidavit evidence and went on to pose a question in his quest to determine whether there was a serious triable issue.

The learned Judge did not endeavor and did not embark on any serious findings of fact and law at that stage or resolve any conflicts of evidence.

The learned Judge cannot therefore be faulted in his approach.

We are also of the view that reference to the provisions of the Constitution and /or Minute book of the Church were not by any means the basis for granting of the injunction.

Grounds two and three therefore are bereft of merit and they fail.

Grounds one, four and five raise the issue of whether the learned Judge in the court below was on firm ground in granting the interim injunction to the Respondent.

Before determination of the aforestated issue, we wish to agree with Counsel for the Respondent, that the issue of the undertaking as to damages, though being a cardinal requirement in the granting of an injunction, was not an issue for consideration in the court below. Equally, the same applies to the issues being raised in ground five of the appeal, which are being raised before this Court for the first time.

These issues are incorrectly before us and we decline to entertain them, as they were not issues in the court below.

Reverting to the issue before us, we note that the learned Judge in the court below, after citing several relevant authorities and identifying the requisite principles in granting of interim injunctions, correctly opined that the first and primary element in injunctions is irreparable injury. Further that an injunction will not be granted where damages would be an adequate remedy to the injury complained of if the applicant succeeds in the main cause.

As earlier alluded to, at the end of the day, the learned Judge found that the Respondent had a clear right to relief and that he was likely to suffer irreparable injury if the injunction was not granted.

It is clear from the authorities which were cited by the learned Judge, which were also later acknowledged by the Supreme Court in the case of **Mutuwila Farms Limited v John Norte**⁹ that one of the cardinal principles is that the applicant must show *inter alia* that he has an

arguable case and that if he will not be granted the interim relief, he will suffer from irreparable injury, that is injury which cannot be atoned by damages.

We note from the record that the Respondent did not in the court below, show what irreparable injury he would suffer which cannot be atoned for by damages if the injunction was not granted, although there was an attempt by Counsel to do so in his submissions before this Court.

We also note that apart from stating that the Respondent would likely suffer irreparable injury, the learned Judge did not in the alternative consider the issue of whether in the circumstances of the matter at hand, damages would likely be sufficient on the face of the pleadings before him.

We further note after perusal of the endorsement on the writ of summons and statement of claim appearing at pages 219 and 225 that apart from the reliefs of declaration and reinstatement, the Respondent in the fifth relief was claiming damages for loss of credibility and reputation, mental anguish and distress.

That coupled with the principle laid out in the **Zambia Railways Limited**⁴ case, this in our view is an appropriate case where damages would adequately have sufficed.

Furthermore, it is not sufficient for the court to simply state that the applicant is likely to suffer irreparable injury without identifying the nature of such injury and stating what irreparable injury the Respondent would suffer.

In the view that we have taken, the learned Judge fell short in his considerations. Had he been equal to the task, given the pleadings before him, he would have found that this was not an appropriate case for granting of an interim injunction.

Grounds one and four have merit and succeeds whilst ground five fails.

We accordingly set aside the Ruling of the court below and forthwith discharge the interim injunction which was granted to the Respondent.

We award costs to the Appellants.

Same are to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



M. J. SIAVWAPA
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE