SCANNING

IN THE HIGH COURT FOR ZAMBIA **2019/HP/1821**
AT THE PRINCIPAL REGISTRY
(CIVIL JURISDICTION)

BETWEEN

PATRICIA SULEMAN **1ST APPLICANT**

VERNON SIKAUKA **2ND APPLICANT**

AND

DAYAN INVESTMENTS LIMITED **RESPONDENT**

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

FOR THE APPLICANTS: N. NAWA OF K. MWALE & COMPANY
FOR THE RESPONDENT: E. BANDA OF MESSRS BCM. LEGAL PRACTITIONERS

RULING

Cases Referred To:

1. *American Cyanamid Co. Limited v Ethicon (1975) A.C 396.*
2. *Shelfa v City of London Electric Lights & City Planning (1895) ICH 87.*
3. *Coventry v Lawrence and Another [2014] UKSC 13.*
4. *Hillary Bernard Mukosa v Michael Ronaldson (S.C.Z Judgment No. 7 of 1993).*
5. *Shell & BP Zambia Limited v Connidaris and Others (1975) ZR 174.*

6. *Zimco Properties Limited v LAPCO Limited (1988-1989) ZR 92.*
7. *Nottingham Building Society v Eurodynamic Systems [1993] FSR 468.*

This is the plaintiffs' application for an order of an interim injunction made pursuant to Order 29 Rule 1 of the Rules of the Supreme Court of England 1965, (White Book) 1999 edition. The affidavit is supported by an affidavit dated 14th November, 2019, deposed to by Patricia Suleman, the 1st Applicant herein.

She deposed that the Respondent is a construction company which specialises in, among other activities, block making, and has been carrying on the activity at Plot No. 1705, Great North Road, Kafue since June, 2018.

She went on to depose that as part of its block making activity, the Respondent has caused to arise from its business premises excessive fumes of dust, noise and vibrations which are affecting and continue to affect the applicants' neighbourhood, namely Zambia Compound as well as other surrounding premises.

It was deposed that the Respondent has failed to take any sufficient precautions against such noise, dust or vibrations; or adopt methods of block making and construction which shun causing such dust, noise and vibration, nor have they paid any

sufficient attention to the complaints of the applicants about such dust, noise and vibration.

The 1st Applicant deposed that the Respondent, whose license to operate was suspended by the Zambia Environmental Management Agency on 25th June, 2019, and later reinstated by letter dated 26th August, 2019, have neither installed air measuring devices and pollution control equipment nor have they installed internal air emission monitoring systems approved by ZEMA as a pre-requisite to their continued operations.

It was deposed that if the Respondents are not restrained, the Applicants will continue to suffer irreparable harm including great discomfort, inconvenience, non enjoyment of their premises and possible long-term chest illnesses as a result of the Respondent's block making activities which cannot be properly atoned for in damages.

On the other hand, the Respondent filed an affidavit in opposition dated 17th January, 2020, deposed to by Burhan Acikgoz, the director in the defendant company. It was deposed that at the time of commencement of the block making business, the defendant company had obtained all necessary certificates and licenses from the relevant authorities as shown by exhibit marked "BA1-BA7".

It was also deposed that the applicants herein reside at addresses which are over 3 kilometres and 1 kilometre respectively, away from where the Respondent conducts its business. That is therefore not possible that the Applicants can be affected in any way by the Respondent's conduct of its business.

It was deposed further that the Respondent has taken measures to address the applicants' concerns which include raising and fencing the perimeter wall next to the neighbouring properties, as well as installation of a borehole which supplied water to suppress emissions.

It was also deposed that it is not true that the Respondent has not complied with directions from ZEMA. Further that the suspension was only for two (2) days after the Agency realised that operations by the Respondent were not affecting people around the area, the suspension was lifted as shown by exhibit marked "BA8-BA10".

It was deposed that the applicants have failed to show sufficient grounds to warrant the granting of an interim injunction and that their application should therefore be dismissed as it lacks merit.

When the matter came up for hearing, Counsel on behalf of the applicants, Ms Nawa, submitted that this is an application for an

interim injunction and that she would rely on the affidavit in support.

On the other hand, Counsel on behalf of the Respondent, Mr Banda, submitted that in opposing this application, an affidavit in opposition was filed on 17th January, 2020, and that he would rely on the same. Mr Banda further urged to Court to consider the holding in the case of **American Cyanamid Co. Limited v Ethicon (1975) A.C 396**[1], which is instructive on the requirements for granting an injunction one of which is that the Court must be satisfied that there is a serious question to be tried or that the right to relief is clear. Mr Banda submitted that in paragraph 8 of the defendant's affidavit in opposition, it is a fact which has not been contested that the Respondent's business premises and the applicants' premises are over 3 Kilometres and 1 kilometre apart respectively. That it is therefore not possible that the applicants can be affected by any noise or any pollution whatsoever as they allege. It was submitted that the first requirement that the right to relief must be clear fails.

It was submitted further that a perusal of the applicants' writ and statement of claim will show that the applicants are actually claiming damages which entails that they are conceding on the other hand and that they can adequately be compensated by an

award of damages. It was submitted that the application lacks merit and should be dismissed with costs.

In reply, Ms Nawa submitted that the applicants have a right to relief in this injunction. Ms Nawa drew the attention of this Court to the case of **Shelfa v City of London Electric Lights & City Planning (1895) ICH 87**[2] as well as the case of **Coventry v Lawrence and Another [2014] UKSC 13**[3]. Ms Nawa submitted that the Applicants are residents of Zambia Compound in the Kafue district and are subjected to these noises and fumes and have as a result suffered from coughs and such ailments which injury cannot be atoned for by damages if the injunction is not granted.

I have carefully considered the affidavit evidence as well as the submissions from Counsel on both sides. I wish to state at this point that in an application for an interim injunction, the Court should satisfy itself that there is a serious question to be tried at the hearing and that on the facts before it, the plaintiff is entitled to a right to relief. In the case of **Hillary Bernard Mukosa v Michael Ronaldson (S.C.Z Judgment No. 7 of 1993)**[4]

It was held that:

> ***"An injunction would only be granted to a plaintiff who established that he had a good and arguable claim to the right which he sought to protect."***

Further, it is trite that if the Court finds that there is a serious question to be tried on the merits of the substantive claim, the Court should consider whether the plaintiff will be adequately compensated by an award of damages at trial. In the case of **Shell & BP Zambia Limited v Connidaris and Others (1975) ZR 174**[5] the Supreme Court held, inter alia, that:

> ***"(vi) 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 is 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. (vii) Where any doubt exists as to the Plaintiff's rights or if the violation of an admitted right is denied the Court takes into consideration the balance of convenience to the parties. The burden of showing the greater inconvenience is on the Plaintiff."***

In the case in casu, the applicants have argued that the Respondent herein has caused to arise, from its business premises, excessive fumes of dust, noise and vibrations which are causing great discomfort, inconvenience, non enjoyment of premises and possible long-term chest illnesses which cannot be properly atoned for in damages.

On the other hand, the Respondent argued that it had obtained all necessary licenses from relevant authorities and that measures to address the applicants' concerns were addressed when the Respondent raised and fenced the perimeter wall next

to neighbouring properties and when it installed a borehole which supplied water to suppress emissions.

In the case of **Zimco Properties Limited v LAPCO Limited (1988-1989) ZR 92**[6], the Supreme Court held that:

> ***"The balance of convenience between the parties as to whether to grant an injunction will only arise if the harm done will be irreparable and damages will not suffice to recompense the plaintiff for any harm which may be suffered."***

The applicants, in this case, are claiming that the Respondent is carrying out business activities that are a nuisance to the neighbourhood and which may cause long term respiratory illnesses which cannot be properly atoned for by damages. The Respondent on the other hand, is claiming that it obtained all necessary licenses and that the applicants herein reside at addresses which are over 3 Kilometres and 1 Kilometre apart respectively from the Respondent's business premises and that it is therefore not possible that the applicants can be affected by the Respondent's conduct of its business. This evidence was not rebutted when the matter came up for hearing by Counsel on behalf of the applicants.

In the case of **Nottingham Building Society v Eurodynamic Systems [1993] FSR 468**[7], it was observed that the balance of convenience test may be expressed in terms of whether the risk

of injustice if the injunction is refused, outweighs the risk of injustice if the injunction is granted.

The principle remedy in a nuisance claim is an injunction to restrain the nuisance. Therefore I must be careful and not delve into the main matter at this point. I find that the Respondent herein obtained necessary licenses and certificates from relevant authorities in relation to the operation of its business. The document marked "BA8" also shows that the Zambia Environmental Management Agency lifted the compliance order after inspecting the premises. Furthermore, exhibit marked "BA9-10" shows that the Kafue District Council also resolved to re-open the Respondent's premises after consideration.

I am therefore of the considered view that all necessary licenses were obtained by the Respondent in this case and that necessary inspections were made such that ZEMA and Kafue District Council were satisfied that the Respondent had complied with the law and could therefore continue to operate its business.

Furthermore, the Respondent deposed that the applicants reside 3 Kilometres and 1 Kilometre away from the Respondent's business premises. This evidence was not rebutted by Counsel for the applicants when the matter came up for hearing. I agree

with Counsel for the Respondent that it is difficult to see how the fumes, dust and vibrations are affecting the applicants herein.

I am also of the considered view that the balance of convenience lies with the Respondent herein as he will suffer irreparable injury if the injunction is granted. The Respondent's interest must be taken into account because if an injunction is granted, the Respondent's business will come to a halt until the final determination of this case and if a decision is made in its favour, it would have suffered much loss in terms of profits.

The application for an interim injunction therefore fails in light of the above.

Leave to appeal is granted.

Delivered at Lusaka this 28th **day of** May **2020**

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ELITA PHIRI MWIKISA
HIGH COURT JUDGE