

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

2019/HP/1997

BETWEEN

AFRICAN BANKING CORPORATION ZAMBIA LIMITED
(Trading as Atlas Mara Zambia)

1ST PLAINTIFF

FINANCE BANK ZAMBIA LIMITED



2ND PLAINTIFF

AND

DIMITRIOS MONOKANDILOS

1ST DEFENDANT

FILANDRIA KOURI

2ND DEFENDANT

MAMBWE, SIWILA & LISIMBA (a firm)

3RD DEFENDANT

(Sued and Trading as a Firm)

Before the Honorable Mrs. Justice C. Lombe Phiri in Chambers

For the 1st & 2nd Plaintiffs : *J Sangwa S.C. & I. Mwamba & J.
Chimankata – Simeza Sangwa Association*

For the 1st and 2nd Defendants : *S. Mambwe & M. Lisimba & A Siwila –
Mambwe Swila & Lisimba Advovates*

For the 3rd Defendant : *S. Sikota S.C. – Messrs Central Chambers*

R U L I N G

CASES REFERRED TO:

1. **American Cyanamid Co v Ethicom Ltd [1975] AC 396**
2. **Shell & B.P. Zambia Limited v Conidaris and Others (1975) Z.R. 174 (S.C.)**
3. **Hondling Xing Xing Building Company Limited v Zamcapital Enterprises Limited (2010/HP/439)**

OTHER WORKS REFERRED TO:

1. **Black's Law Dictionary**

This is a ruling on an application by the Plaintiffs for an Order of Injunction to restrain the Defendants by themselves, servants, agents or otherwise howsoever from trespassing upon the Plaintiff's premises or purporting to enforce the Judgment for the sum of US\$949,933.81 and interest under Cause 2012/HPC/577 against the Plaintiffs.

The Plaintiffs were granted an ex-parte Injunction Order based on the facts presented in an affidavit in support of the application that forms part of the record. The said Order was granted pending the inter partes hearing of injunction application.

At the inter partes hearing the application of the parties relied on their affidavits and arguments filed into Court on various dates. They also augmented their arguments with oral submissions which are equally on the record. I will not belabor to restate the affidavit evidence or the submissions and arguments but will refer to them as I render my decision.

From the affidavit evidence on the record it is clearly not in dispute that as a result of a judgment in favour of the 1st and 2nd Defendants in Cause 2012/HPC/577 a Writ of Fifta was issued and executed on the 1st Plaintiff. It is also not in dispute that the parties to the proceedings under Cause 2012/HPC/577 were the 2nd Plaintiff, the 1st Defendant and the 2nd Defendant.

In the Cause before this Court the 1st Plaintiff is contending that they are a separate legal entity from the 2nd Plaintiff therefore the Judgment Debt relating to the 2nd Plaintiff cannot and should not be levied on them. They have therefore claimed that the execution of a Writ of Fifta on them amounted to trespass and wrongful execution and or abuse of the civil process entitling them to an award of damages. Further that they are entitled to sums of money paid to the Sheriff of Zambia and paid into Court and interest on the claimed amounts which the Plaintiff would have realised if the first Plaintiff had lent the money to its customers in the normal course of business. Furthermore, the injunction to restrain the Defendants from trespassing on the Plaintiffs' premises or purporting to enforce the judgment sum and interest under Cause 2012/HPC/577. On the other hand the Defendants have pointed out that in fact the two Plaintiffs are one and the same owing to a merger between them.

The Law on injunctions is well settled in our jurisdiction as is demonstrated by the submissions of both parties. Basically in **American Cyanamid Co v Ethicom Ltd [1975] AC 396⁽¹⁾**, the court developed a set of guidelines to establish whether an applicant's case merited the granting of an interlocutory injunction.

The main American Cyanamid guidelines, as they have come to be known, are:

- a) *Whether there is a serious question to be tried.*
- b) *What would be the balance of convenience of each party should the order be granted (in other words, where does that balance lie?)*
- c) *Whether there are any special factors.*

And, what Lord Diplock referred to as the “governing principle:”

- a) Whether an award of damages would be an adequate remedy, the basis for which he explained as follows:

“... the governing principle is that the court should first consider whether, if the Plaintiff were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable would be [an] adequate remedy and the Defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the Plaintiff’s claim appeared to be at that stage.”

In the Zambian case of Shell & B.P. Zambia Limited v Conidaris and Others (1975) Z.R. 174 (S.C.)⁽²⁾ it was 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.

Further in the case of Hondling Xing Xing Building Company Limited v Zamcapital Enterprises Limited (2010/HP/439)⁽³⁾ it was held inter alia regarding the requirements to be proved that:

- 1. It is a settled fundamental principle of injunction law that interlocutory injunctions should only be granted where the right to relief is clear, and where it is necessary to protect a plaintiff against irreparable injury; mere inconvenience is not enough.*
- 2. An injunction will not be granted were damages would be an alternative and adequate remedy to the injury complained of if the applicant succeeded in the main action.*
- 3. In an application for an injunction, the overriding requirement is that the Applicant must have a cause of action in law entitling him to relief.*
- 4. In deciding whether or not an interim injunction should be granted, the first, or primary issue is that there must be a serious question to be tried.*

5. *An injunction will be refused to a claimant who has no real prospect of succeeding in his claim for a permanent injunction at the trial.*

6. *The question of balance of convenience is considered in three stages.*

First, the governing principle is that if the claimant would be adequately compensated by an award succeeding at the trial, and the Defendant would be able to pay for them, no injunction should be granted, however, strong the claimant's case.

7. *If the claim survives the previous head, the Court must consider whether if an interim injunction is granted, but the defendant succeeds at the trial, the defendant would be adequately compensated in damages which then would have to be paid by the claimant, and whether the claimant would be able to pay those damages if such damages would be adequate remedy, and the claimant would be in a position to pay them, the Defendant's prospects of success as the trial would be no bar to grant the injunction.*

8. *If there is doubt as to the adequacy of the respective remedies in damages available to either party, or to both, the Court must consider the wide range of matters which go to make up general balance of convenience. These include the status quo, relative strength of cases, and special factors.*

9. *As regards the status quo, where other factors appear to be evenly balanced, it is counsel of prudence to take such measures as are calculated to preserve the status quo.*

10. In relation to the relative strength of cases, it is laid down that the Court should not embark on anything resembling a trial of the action on conflicting affidavit evidence.

11. The principles established in the Cynamid case are of general application, and must not be treated as a statutory definition.

Firstly I wish to address the issue whether the 1st and 2nd Defendants should be restrained by way of an injunction from trespassing on the premises of both Plaintiffs in executing the Judgment debt against the 2nd Plaintiff under Cause 2012/HPC/1997. It is trite that the effect of an injunction is that a party is stopped from enjoying the fruits of their Judgment pending the determination of the matter by a Court. It has been argued by the Plaintiffs that the intentions under the Stay in the Supreme Court Application are different from those of the injunction being sought in this matter. They have argued that a stay seeks to restrain the execution of an order of the Court whereas an injunction seeks to protect a party from future not past harm. On the other hand the Defendants have argued that the total effect of the Stay granted by the Supreme Court and the effect of the injunction now being sought before this Court are the same. A “stay” has been defined in the Blacks Law Dictionary as *“the postponement or halting of a proceeding, Judgment or the like”*. Whereas the same source describes an “injunction” as *“A Court Order commanding or preventing an action”*. Clearly the foregoing definitions show that in both cases there is an action that the Court is seeking to stop. In the case of a stay there is a Court order or proceedings going on and there is need to stop it. In the case of an injunction there is an action by another party which the aggrieved party seeks to stop either

permanently or pending the outcome of some decision or fulfilment of some condition. In this case there is no doubt that there is a Judgment against the 2nd Plaintiff. As the affidavit evidence will show there is actually a pending application for leave to Appeal to the Supreme Court. In those proceedings there is already a stay of execution of the Fife. This means that until the application is determined by the Supreme Court the Bailiffs cannot and should not levy any execution on the 2nd Plaintiff. And depending on the order that will come out of the Supreme Court the bailiffs will then act or not. So, for the time being there is a particular status quo pertaining to the issue of execution of the judgment debt in relation to the 2nd Plaintiff that this Court cannot ignore. The status is that the Superior Court has granted a stay thereby holding back the Defendants from continuing with the execution of their judgment. There is no basis upon which this Court should make another order to do that which the sum effect would be the same. Therefore, in relation to the 2nd Plaintiff I find that an order for interim injunction is not tenable as it would amount to a multiplicity of orders in relation to the same facts potentially leading to the Courts making conflicting decisions and embarrassing itself in the process.

Turning to need for the Court to establish triable issues, the claim by the Plaintiffs is that they are separate legal entities therefore the Defendants should not be allowed to execute a judgment relating to the 2nd Plaintiff on the 1st Plaintiff. That the attempt by the Defendants to do so amounted to trespass and wrongful execution thereby causing the 1st Plaintiff injury to its reputation and business. Also, that as a result the Plaintiffs also incurred bailiff's costs for which they claim damages. On the other hand, the Defendants argue that the Plaintiffs are one and the same entity having undergone a merger. Therefore, it is within their rights to execute on the 2nd

Defendant. There is clearly a dispute between the parties regarding this issue which should be tried and cannot be resolved at this point. The first condition is therefore fulfilled that there are triable issues.

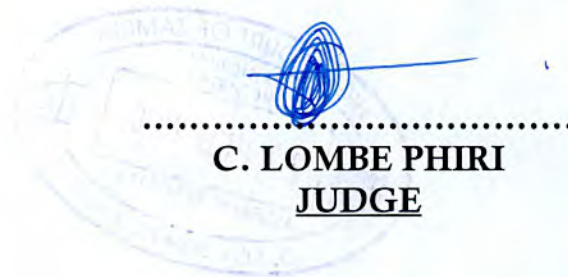
I now turn to the issue of whether or not it has been demonstrated that the 1st Plaintiff risks to suffer irreparable injury if this injunction is not granted. The Plaintiff has stated that the irreparable injury it risks suffering is that to its reputation and good will. It has been submitted that loss in reputation cannot be atoned for in damages therefore the only way to mitigate this is to restrain the Defendants from carrying out the offending act until determination of the matter. The Defendants have argued that the fact that the Plaintiffs are seeking for payment of damages demonstrates that whatever injury they claim they may suffer can be atoned for. A careful look at the Plaintiff's affidavit shows that their claim is that they will suffer irreparable damage to their good will and disruption of business. Therefore, the argument by the Defendants is a mischaracterization of the issues before Court. I therefore find that the argument regarding irreparable injury to good will and disruption of business had merit in relation to the 1st Plaintiff.

Turning to the issue of balance of convenience. In this case I must consider whether if the Plaintiffs are able to stop the execution against themselves of the Judgment debt how will this affect the rights of the Defendants to enjoy the fruits of their judgment? As I have stated firstly there will be no confirmation of the injunction in favour of the 2nd Plaintiff on the reasons here before stated. The rights of the 1st and 2nd Defendants are therefore still subject to the proceedings before the Supreme Court. However, with regard the interests of the 1st Plaintiff weighed against the interests of the Defendants I find that the balance of convenience weighs in favour of the 1st

Plaintiff, who is entitled to enjoy the protection of this Court until the determination of the matter.

In view of the foregoing I find that on the inter partes hearing of the application for an injunction the order as it relates to the 1st Plaintiff succeeds. As regards the 2nd Plaintiff the injunction is discharged. For avoidance of doubt the injunction is only granted to restrain the Defendants from levying execution in Cause 2012/HPC/577 against the 1st Plaintiff until further order of this Court or determination of the matter.

Dated at Lusaka this 27th day of February, 2020.



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C. LOMBE PHIRI
JUDGE

