**Selected Judgment No.11 of 2019**
**P. 383**

**IN THE SUPREME COURT OF ZAMBIA APPEAL NO.64/2015**
**HOLDEN AT KABWE SCZ/8/66/2015**
*(Civil Jurisdiction)*



BETWEEN:

**AFRITEC ASSET MANAGEMENT COMPANY LIMITED** **1ST APPELLANT**

**CPD PROPERTIES LIMITED** **2ND APPELLENT**

AND

**THE GYNAE AND ANTENANTAL CLINIC LIMITED** **1ST RESPONDENT**

**KENNETH MUUKA** **2ND RESPONDENT**

**Coram: Musonda, Ag.DCJ, Hamaundu, Kabuka, Mutuna and Chinyama, JJS**
On 7th November, 2017 and 28th March, 2019

For the Appellants: Ms J. Mutemi, Messrs Theotis Mataka & Sampa Legal Practitioners
For the Respondent: Mr B. Luo, Messers Palan & George Advocates

# JUDGMENT

**HAMAUNDU, JS,** delivered the Judgment of the Court

Cases referred to:

1. **American Cyanamid Co v Ethicon Limited (1975) A.C 396**
2. **Shell and BP Limited v Connidaris and others (1975) ZR 174**
3. **Hillary Bernard Mukosa v Michael Ronaldson (1993-94) ZR 26**

4. **Mwenya & Another v Kapinga (1998) ZR 17**
5. **Mundanda v Mulwani & two others (1987) ZR 29**
6. **Manal Investment Limited v Lamise Investment Limited (2001) ZR**

Legislation referred to:

1. **The Supreme Court of Zambia Act, Chapter, 25 of the Laws of Zambia, S.4**
2. **The Supreme Court Act, 1981 (England)**

Rules of Court referred to:

1. **Rules of the Supreme Court (White Book), O.29**
2. **The Supreme Court Rules, Chapter, 25 of the Laws of Zambia, Rule, 54**

## 1.0 INTRODUCTION

The appellants appeal against an interlocutory ruling of the High Court by which the respondents were granted an interlocutory injunction which restrained the appellants from imposing a levy on the respondents and denying the latter access to their respective plots in premises known as Roma Park.

In this appeal we deal with what is meant by the following question when considering an application for an injunction: **"would damages be adequate compensation to the plaintiff for interim loss pending trial?"** We also deal with a very important question, namely, whether a

party aggrieved by a decision on an application for an injunction should proceed by way of an appeal to the full bench of an appellate court. In this regard we re-examine the provisions of **Section 4** of the **Supreme Court Act, Chapter, 25** of the **Laws of Zambia**.

## 2.0 BACKGROUND

2.1 The facts that were before the court below are these: The respondents bought plots on a piece of land which is managed by the appellants as an enclosed community known as Roma Park. One of the conditions of belonging to that community was that all owners of plots in the area belonged to an association known as Roma Park Home Owners Association, which was to be managed by a Board of Trustees. The object of the Association was to provide general management, maintenance, safety and security within Roma Park. The constitution of the Association provided for levies to be charged on the members in order

to achieve the Association's objects. While arrangements were being made to put a Board of Trustees in place, the appellants made temporary arrangements for the members to pay a sum of K500 per month as contribution towards; (i) the maintenance of the park and (ii) payment for the security guards that were guarding the premises, among other outgoings that needed financing. The two respondents were the only members that objected to the temporary arrangement. The appellants then barred the two respondents from gaining access to their plots on the condition that they would only be allowed access thereto when they start paying the contributions.

**3.0 THE CASE AND ARGUMENTS IN THE COURT BELOW**

3.1 The respondents took out an originating summons, seeking, as their main remedy, an order that the levy imposed by the appellants is without legal sanction and, therefore, null and void. On the strength of that remedy, the respondents applied for an interlocutory injunction to

restrain the appellants from imposing the temporary levy and from denying the respondents access to their plots.

3.2 Before the court below the parties cited the usual cases in which the principles governing the grant of injunctions have been set out, namely; **American Cyanamid Co v Ethicon Limited**[1], **Shell** and **BP Limited v Connidaris and others**[2]; and **Hillary Bernard Mukosa v Michael Ronaldson**[3]. The application was, therefore, argued on the following questions that arise from the decisions in those cases;

*(i) Is there a serious question to be tried*

*(ii) Would damages be adequate compensation to the plaintiff for interim loss pending trial; and,*

*(iii) Does the balance of convenience lie in granting the interim injunction or in refusing to grant it?*

3.3 On behalf of the respondents it was argued that there was a serious question to be tried in that the levy which the appellants were imposing was contractually in the sole

purview of the Roma Park Home Owners Association; which Association was not yet in existence. That, in any event, the 1st appellant was a stranger to the contract and could, therefore, not enforce it. The appellants argued that, in this case, it was not an issue of failure to pay but rather a question of principle that the contract between the 2nd appellant and the respondents ought to be abided by and respected.

3.4 On the question whether damages would be adequate compensation, it was argued that the respondents had suffered in a material particular as a result of the appellants' action and that if the latter were allowed to carry on with what they were doing, the respondents were likely to suffer irreparable damage which could not be atoned for in damages.

3.5 On behalf of the appellants the application was opposed, mainly, on the question whether or not there was a serious question to be tried. It was argued that the respondents

had failed to show that there was a serious question to be tried. To demonstrate that argument, the respondents delved into issues that are yet to be dealt with at the hearing of the substantive action.

## 4.0 THE DECISION OF THE COURT BELOW

4.1 The court below cautioned itself against delving into issues that are yet to be determined at the trial. After examining the endorsements on the originating process, the court had no difficulty in finding that the respondents were requesting it to determine the legality of the levy that was being charged by the 1st respondent on behalf of the Roma Park Home Owners Association; and that that determination could only be made upon examination, in detail, of the scope of the contractual rights and obligations of the parties. The court below, therefore, held that there was a serious question to be tried.

4.2 Coming to the question whether damages would be an adequate remedy, the court considered that question in the context of disputes over land. In that regard, the court placed reliance on our decisions in cases such as **Mwenya & Another v Kapinga**[4] and **Mundanda v Mulwani & two others**[5] in which we stated the principle that a judge's discretion in relation to specific performance of contracts for the sale of land is limited because damages cannot adequately compensate a party for breach of a contract for the sale of land.

4.3 The court observed that the two respondents owned and held title to their respective plots in the Park. Consequently, it was the court's view that the barring by the appellants of the respondents from gaining access to their plots was likely to result in the respective pieces of land remaining undeveloped; and that any development that already existed thereon will either be damaged or go to waste. In the court's view, therefore, it would not be

possible to replace the injury that would be caused to the property. For that reason, the court held that, in this case, damages would not be adequate compensation.

4.4 The court then went on to consider the balance of convenience. It weighed the inconvenience that either side was likely to suffer and came to the conclusion that the respondents would be more disadvantaged by being denied access to their plots than the appellants would be by loss of payments from the respondents.

4.5 The court, therefore, granted the respondents the injunction which they sought.

**5.0 THE APPEAL**

5.1 The appellants have filed three grounds of appeal, as follows;

> **"1. The learned judge in the court below erred both in law and in fact when she held that the respondents had demonstrated that there is a serious question to be tried by the court regarding the charging and collection of levies by the 1st appellant.**

2. **The learned judge in the court below erred in fact and in law when she found that an award of damages would not be an appropriate remedy for the respondents.**
3. **The learned judge in the court below erred in law and in fact when she held that the balance of convenience in this matter lies in favour of the respondents."**

## 6.0 THE ARGUMENTS

6.1 The arguments advanced by the parties at the hearing of the appeal revolved around the same authorities and principles. We do not find it necessary to delve into them again.

## 7.0 DECISION OF THE COURT

7.1 On the question whether or not there is a serious question to be tried, we do not hesitate to concur with the court below that there is such a question before it. This is because, upon reading the originating process, it is clear that the respondents are challenging the contractual authority of the respondents to impose the levy. This will obviously require the court to look at the contractual rights and obligations of the parties.

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7.2 On the question whether damages would be adequate compensation, it is our view that, by approaching the question from the perspective that the respondents own pieces of land, the court determined that question in the wrong context. The question that the respondents brought to court was whether or not the appellants should be allowed to charge a levy or contribution in the interim period that the Roma Park Home Owners Association Board of Trustees was yet to be put in place. So, the injunction that was sought was to restrain the appellants from charging levy or contribution while the question is still being determined. It was clear that the appellants were denying the respondents access to their plots in order to compel them to pay the levy or contribution. As far as the application for the injunction was concerned, the barring of the respondents from gaining access to their plots was a secondary issue; it would fall away upon the determination either way of the issue whether or not the

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appellants should be restrained from charging levy or contribution in the interim period. To demonstrate this, we shall give examples of two situations: first, if the injunction sought had been denied, the result would have been that the respondents would have paid the levy or contribution; after all, the respondents themselves said that the question was not one of inability to pay the levy or contribution but one of the spirit of the contract. Once the respondents had paid the levy or contribution, the appellants would have had no reason to deny them access to their plots. The second situation is what is obtaining now: the injunction was granted in this case. The respondents have since then been gaining access to their plots without paying the levy or contribution.

7.3 So, the question of the adequacy of damages as compensation should have been considered from the context of the first situation, namely: If the injunction were to be denied, thereby compelling the respondents to pay

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the levy or contribution, what damage would they suffer? It becomes clear that the nature of the damage they would suffer is the accumulated levies that they would be paying, up to the time that the question is determined, and not the waste or damage to their property.

7.4 The next question is whether that damage was irreparable.

The answer is simple: the accumulated levies would be quantifiable and, should the court find that they were improperly charged, an order could easily be made that they should either be refunded or credited towards future levies that will be properly charged. As a matter of fact, the appellants in their originating process have, in addition to claims for damages, a claim for a refund of all illegally levied levies which the appellants had paid. This attests to the fact that even the appellants entertain no doubt that the damage is quantifiable and, as such, not irreparable. Clearly, therefore, the damage that the respondents would suffer by the refusal to grant the injunction is not

irreparable. For this reason, the court below erred in law when it held that the damage that the respondents would suffer is irreparable.

7.5 The question as to where the balance of convenience lies only arises where damages are found not to be adequate compensation. Since our view is that the damage in this case was not irreparable we find it unnecessary to delve into the third ground of appeal.

7.6 For the foregoing reasons, the appeal ought to succeed. Before we conclude, however, we wish to say something with regard to the procedure by which this appeal came to us. Which brings us to the second question in this appeal.

## 8.0 SHOULD A DECISION ON AN APPLICATION FOR AN INTERLOCUTORY INJUNCTION BE BY WAY OF APPEAL TO THE FULL BENCH OF THE COURT?

8.1 We are aware that in the case of **Manal Investments Limited v Lamise Investment Limited**[6] we held that an appeal from a decision of the High Court on an injunction, should lie direct to the full bench of this

court. We are of the view that perhaps the time is ripe for us to revisit what we said in that case. In this regard, we did ask counsel at the hearing of this appeal to address us, in written submissions, as regards what we said in the **Manal Investments case**. Counsel for both parties did duly file their respective submissions.

8.2 In their submissions, counsel for the parties raised the same concerns we raised with the Respondents' counsel emphasizing that an appeal from the refusal of the grant of an interlocutory injunction should be distinguished from one involving the refusal of the injunction which is not interlocutory in nature.

## 9.0 THE COURT'S CURRENT VIEW

9.1 Our concern lies in the fact that in view of what we said in the ***Manal*** case, even where a party is seeking an interlocutory injunction as opposed to a permanent injunction and his application is denied by the High Court,

the matter comes to us, or now the Court of Appeal, by way of the usual lengthy appeals procedure as opposed to a renewal of the application.

9.2 This arises from the interpretation we gave of Section 4 of the ***Supreme Court Act*** in the ***Manal*** case. The section states in part as follows:

> **"A single Judge of the Court may exercise any power vested in the Court not involving the decision of an appeal or a final decision in the exercise of its original jurisdiction ..."**

9.3 Whilst the Section clothes a single Judge of the Court with jurisdiction to exercise any power of the Court it denies such Judge the jurisdiction to hear an appeal or any matter that will result in the rendering of a final decision of the Court. We thus found that the single Judge in the ***Manal*** case had no jurisdiction to hear an application on appeal relating to an interlocutory application for an injunction because the view we took was that, it involved

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a decision on appeal and should thus have come to us by way of appeal.

9.4 As a consequence of the holding in the ***Manal*** case, where an applicant is denied the relief of an interlocutory or other injunction by the High Court, the remedy currently lies in launching an appeal to the Court of Appeal and not renewal of the application before a single Judge of that Court. Before the establishment of the Court of Appeal such appeals would come to us. Therefore, when such an application comes before the Court of Appeal it comes as an appeal.

9.5 The net result of what we have said in the preceding paragraphs is that by the time that we or the Court of Appeal have heard the appeal, the exercise is rendered academic because even if the appeal were to succeed, the action sought to have been injuncted will have taken place and may be irreversible. This is the case, because the interlocutory injunction as opposed to permanent

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injunctions seek to retain the status quo pending trial of the matter by the High Court.

9.6 The approach taken in the English Courts as at 1999, which is the relevant cut off period for Zambia, since our resort to the English Civil Procedure Practice is restricted to the 1999 edition of the ***White Book***, was that resort to a decision on an interlocutory injunction was by way of appeal to the Court of Appeal. Order 29 rule 1A sub-rule 14 states, in this regard, as follows:

> **"The Supreme Court Act 1981, s.18(1A) states that, in any such class of case as may be prescribed by Rules of the Supreme Court, an appeal shall lie to the Court of Appeal only with leave. The classes of cases prescribed for the purposes of s.18(1A) are listed in O.59, r.1B - It is stated there that leave is required in the case of "interlocutory Orders" of the High Court or any other Court or tribunal except in the following cases namely, (1) where the liberty of the subject is concerned, and (2) in the case of a decree nisi in a matrimonial cause. An order granting an interlocutory injunction or for the appointment of a receiver is an interlocutory Order (O.59, r.1A(6)(5))**

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> **Consequently, leave to appeal is required in respect of any appeal against the grant or refusal of an interlocutory injunction, or the grant or refusal of an application to vary or discharge such an injunction ..."**

9.7 The foregoing order not only prescribes an appeal as the remedy but that prior to resorting to an appeal, the aggrieved party should have obtained leave from the High Court to appeal. Where the High Court declines such leave, resort was had to the appellate Court.

9.8 In addition to what we have said in the preceding paragraph it is important to note that the prescribed procedure of appeal against an order granting or refusing an interlocutory injunction arises from the English ***Supreme Court Act*** of 1981. The relevance of this is that, although we resort to the ***White Book*** where our practice and procedure is deficient, the statute book of England beyond the year 1911 is not applicable to us. This is notwithstanding the fact that such statute is referred to in the ***White Book***.

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9.9 For purposes of clarity, the source of the practice and procedure in England of the remedy against an order in respect of an interlocutory injunction is section 18(1A) of the ***Supreme Court Act***. This section is not applicable to Zambia, as such we cannot adopt the procedure prescribed therein. Further, in our interpretation of the practice and procedure in the ***Manal*** case we referred to Section 4 of the ***Supreme Court of Zambia Act*** whose relevant portion we have set out in paragraph – 9.2 of this judgment. What is clear from that section is that it does not specifically say that the recourse against a decision in an interlocutory injunction is an appeal. It merely sets out the power of a single judge.

9.10 The question that begs an answer, therefore, is, can we say with certainty that a decision made by an appellate Court on an application for an interlocutory injunction falls squarely in the ambit of Section 4. That is, is it a *"decision on an appeal or a final decision of [the Court's] original jurisdiction"*?

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9.11 The answer to the question we have posed in the preceding paragraph rests in the manner in which a matter is presented to the appellate Court. In relation to this Court, a decision of an appeal is one which is made by a panel of not less than three judges arising from an appeal lodged in accordance with Rule 54 of the ***Supreme Court Rules***. This is the case with the Court of Appeal as well.

9.12 In the case of *"a final decision"* in the exercise of the Court's original jurisdiction, this is applicable to the Supreme Court and is similar to a decision on appeal.

9.13 The position we have taken is that the dilemma we are in and seeking to resolve here arises from the fact that we have always held the view that recourse to an order dismissing an injunction lies in an appeal. We have held this position despite there being no provision to that effect in our ***Supreme Court Act***. This is contrary to the practice in England where it is specifically legislated as we have explained in the preceding paragraphs.

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9.14 An application for an interlocutory injunction coming to us or the Court of Appeal will not result in a final decision or decision on appeal because, it is interlocutory in nature as it will pend the final determination of the matter in the High Court. Such application should thus be treated as such and be determinable by a single judge of this Court and the Court of Appeal by way of renewal of the application. However, where the decision is that on a final injunction, the position is different, it must come on appeal, as the decision by this Court or Court of Appeal on it will be a final decision or a decision on an appeal. To this extent we misdirected ourselves in the Manal case when we held that such an application should come to an appellate court by way of an appeal. We accordingly reverse our decision in that case.

9.15 The time has come for us to treat applications for an injunction emanating from the High Court with the urgency they deserve. This is not unusual because we already deal and treat applications for a stay of execution and leave to appeal from the High Court with the urgency that they deserve.

**10.0 CONCLUSION**

10.1 Otherwise, this appeal succeeds. We set aside the order of injunction that was granted by the court below. The appellants will have their costs both here and in the court below.

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M. Musonda
**ACTING DEPUTY CHIEF JUSTICE**

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E. M. Hamaundu
**SUPREME COURT JUDGE**

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J. K. Kabuka
**SUPREME COURT JUDGE**

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N. K. Mutuna
**SUPREME COURT JUDGE**

.....

J. Chinyama
**SUPREME COURT JUDGE**