

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

2016/HPC/0093

2011/HK/408

2013/HP/0346

(Civil Jurisdiction)

BETWEEN:

SHOPRITE HOLDINGS LIMITED

1ST PLAINTIFF

SHOPRITE CHECKERS PARTY LIMITED

2ND PLAINTIFF

AND

LEWIS CHISANGA MOSE

1ST DEFENDANT

LEWIS NATHAN ADVOCATES

2ND DEFENDANT

(Sued as a Firm)

SATURNIA REGNA PENSION TRUST

3RD DEFENDANT

SCHEME LIMITED AND 24 OTHERS

Before The Hon Lady Justice Irene Zeko Mbewe in Chambers

For the 1st and 2nd Plaintiff: Mr. William Nyirenda SC

*Mr. Bota of Messrs William Nyirenda and
Company*

For the 1st and 2nd Defendant: Mr. Chakoleka of Messrs Mulenga Mundashi

Kasonde Legal Practitioners

RULING

Cases Referred To:

1. *Finsbury Investments Limited v Antonio Ventriglia and Manuela Ventriglia* 2008/HPC/366
2. *Cheltenham & Gloucester Building Society v. Ricketts and others* [1993] 4 All E.R. 276 at 281
3. *Financiera Avenida v Shiblaq* [1990] CA Transcript 973
4. *F Hoffmann-La Roche and Co A.G and others v Secretary of State for Trade and Industry* [1975] A.C 295
5. *Smith v Day* 21 Ch D 421
6. *Watts v Watts* [2013] EWHC 4434

Legislation Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*

Other Works Referred To:

1. *I.C.F Spry in "The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectifications and Equitable Damages, Sweet and Maxwell, 9th Edition, 2014*
2. *Zuckerman in Zuckerman on Civil Procedure: Principles of Practice, Sweet and Maxwell, 3rd Edition 2013*
3. *Garner "Black's Law Dictionary" , Thomson Reuters, 8th Edition*

This is a Ruling on the 1st and 2nd Plaintiff's preliminary notice of motion objecting to an application by the 1st and 2nd Defendant's for assessment of damages.

The brief background to this application is that following an *ex parte* application of the 1st and 2nd Plaintiff, an interim injunction was granted on 2nd September 2011 in which an undertaking as to damages was made by the 1st and 2nd Plaintiff. On 2nd February, 2012 the interim injunction was discharged by this Court. On 9th December, 2016, the 1st and 2nd Defendant following the discharge of the interim injunction and pursuant to the undertaking made by the 1st and 2nd Plaintiff, filed into Court a summons for assessment of damages. The 1st and 2nd Plaintiff filed a notice of motion to raise a preliminary issue.

The following preliminary issues are raised for determination, namely -

- (1) Whether or not there can be an order for assessment of damages in the absence of any finding of the Court regarding damages.**
- (2) Whether or not there can be an order for assessment of damages in a matter that is continuing and to which the Court never made any order as to damages.**
- (3) Whether or not, the application by the Defendants herein in light of the contents of the Interim Order and the**

Ruling of the Court does not amount to abuse of court process.

The notice of motion to raise preliminary issues is supported by an affidavit in support and skeleton arguments dated 31st January 2017. The supporting affidavit is deposed by Mr. Charles Bota the General Manager in the 2nd Plaintiff Company. The gist of the evidence is that the 1st and 2nd Plaintiff obtained an interim injunction under Cause No 2011/HK/408 against the 1st and 2nd Defendant where an undertaking as to damages was made. That the said interim injunction was later discharged. It is averred that there was no argument or declaration that the 1st and 2nd Defendant had sustained damages as a result of the grant of the interim injunction which is a pre-condition of the said undertaking.

According to the 1st and 2nd Plaintiff, in the absence of any finding or order as to damages, and following the consolidation of the matter with Cause No 2013/HPC/0346, and the matter being active, there cannot be an order for assessment of damages which the Court never granted. It is deposed that the 1st and 2nd Defendant are merely abusing the court process. That any

assessment of damages is premised on the finding of the Court as to damages following a hearing or an inquiry of the Court on the matter.

The 1st and 2nd Defendant filed skeleton arguments. Counsel for the 1st and 2nd Defendant submits that the order for assessment of damages is rightly before the Court. Counsel contends that **Order 3 Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia** does not provide for the raising of a preliminary issue as **Order 33 of the Rules of the Supreme Court, 1999 Edition** expressly sets out the procedure to be followed in raising a preliminary issue. Counsel for the 1st and 2nd Defendant submits that the words "*Subject to any particular rules...*" in **Order 3 Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia** entails that the said order does not apply where there are particular rules governing an issue and that the application is incompetently before the Court. It is Counsel for the 1st and 2nd Defendant's contention that the 1st and 2nd Plaintiff should have sought the leave of this Court before raising the preliminary issue, and in support of this proposition

relied on the case of **Finsbury Investment Limited v Antonio Ventriglia and Manuela Ventriglia**¹.

In the alternative, Counsel for the 1st and 2nd Defendant argues that should the Court find that the preliminary issue is properly before Court, the motion does not have merit as **Order 27 Rule 6 of the High Court Rules, Cap 27 of the Laws of Zambia** gives the Court jurisdiction to make an order for assessment of damages where an injunction is found to be unjustified, and **Order 29/L/23 of the White Book** is instructive in this respect. Counsel for the 1st and 2nd Defendant argues that the idea behind the application for an order for assessment of damages is for the applicant to show the damages suffered on account of the injunction and it is out of such evidence that this Court then decides whether or not to refer the matter to assessment.

Further that when an application to enforce the undertaking as to damages is made, this Court must decide whether to enforce the undertaking and to decide as to what loss the applicant has suffered. That the application for an order for assessment made by the 1st and 2nd Defendant does not amount to abuse of court

process and neither is there any requirement that such an application should be made after the conclusion of the trial as **Order 27 Rule 6 of the High Court Rules, Cap 27 of the Laws of Zambia** does not assign any time frame within which such application should be made. Counsel for the 1st and 2nd Defendant submits that the preliminary issue raised by the 1st and 2nd Plaintiff does not have any merit and is merely meant to delay proceedings in this matter.

At the hearing, Counsel for the 1st and 2nd Plaintiff relied on the skeleton arguments and made reference to the undertaking embodied in the Order and argues that there is nothing before this Court to assess. That the anticipation of **Order 27 Rule 6 of the High Court Rules, Cap 27 of the Laws of Zambia** is a determination that damages have arisen. That **Editorial Note 29/L/34 Rules of the Supreme Court, 1999 Edition** is useful firstly with respect to an undertaking where an injunction is discharged before trial, and secondly, the Court can either refuse the application, or consider and order for enforcement of the undertaking. Thirdly, the Court can consider the undertaking to be

enforced but direct an inquiry into issues of causation and quantum of the purported damages. The Court in making its determination should act judiciously.

Counsel for the 1st and 2nd Defendant in opposing the notion of motion to raise a preliminary issue relied on the skeleton arguments and in response to Counsel for the 1st and 2nd Plaintiff's argument that the 1st and 2nd Defendant's application cannot be made without a determination as to damages, submits that **Order 27 Rule 6 High Court Rules, Cap 27 of the Laws of Zambia** is clear in that where an injunction is discharged, a party is at liberty to make an application for the enforcement of the undertaking as to damages. Counsel for the 1st and 2nd Defendant argues that the issues raised by the 1st and 2nd Plaintiff should have been raised in opposing the Defendant's application for assessment of damages rather than raising a preliminary issue. Counsel for the 1st and 2nd Defendant argues that in terms of **Order 27 Rule 6 High Court Rules, Cap 27 of the Laws of Zambia**, the Court is invited to determine whether or not the undertaking as to damages should be enforced. In making this determination, the Court should be availed

evidence as to damages or loss suffered by the 1st and 2nd Defendant, and thereafter the determination is then made. It is Counsel for the 1st and 2nd Defendant's argument that the 1st and 2nd Plaintiff seem to be suggesting that this determination should have been made at the time the injunction was discharged and that this position is not supported in any way by **Order 27 Rule 6 of the High Court Rules, Cap 27 of the Laws of Zambia**. That the application for an order to refer the matter for assessment is properly before the Court.

In respect to **Editorial Note 29/L/34 Rules of the Supreme Court, 1999 Edition**, Counsel for the 1st and 2nd Defendant argues that this Editorial Note deals with mareva injunction and action pillar and hence inapplicable. Counsel argues that the 1st and 2nd Plaintiff have misapprehended the Editorial Note in that the 1st and 2nd Defendant's application is the first stage in seeking to enforce the undertaking as to damages where the Court makes a determination as to whether the Applicant has suffered damages and whether there is need for an inquiry. Counsel for the 1st and 2nd Defendant submits that the preliminary issues raised are

misconceived and should be dismissed as the 1st and 2nd Defendant's application is rightly before this Court.

In response, Counsel for the 1st and 2nd Plaintiff argues that the application filed into Court is clearly for an order for assessment of damages, and not whether or not the undertaking has been enforced. Counsel for the 1st and 2nd Plaintiff argues that the 1st and 2nd Defendant is not inviting the Court to exercise its discretion at the first stage but rather there seems to be a presumption that there is no need for the first stage and that the damages be assessed.

I have carefully considered the skeleton arguments, list of authorities and oral submission made by Counsel for the parties, and the authorities drawn to my attention.

The 1st and 2nd Plaintiff's application is premised on **Order 3 Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia** which states as follows:

"subject to any particular rules, the Court or a Judge may in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice

whether such order has been expressly asked by the person entitled to the benefit of the order or not."

Counsel for the 1st and 2nd Defendant argues that the 1st and 2nd Plaintiff's application is misconceived as a preliminary issue is supposed to be brought pursuant to **Order 33 Rules of the Supreme Court, 1999 Edition** which explicitly and in sufficient detail sets out the procedure to be followed in raising preliminary issues, and that leave is required before raising the preliminary issue. Further that the words "*subject to any particular rules*" entails that the said order does not apply where there are particular rules governing an issue.

I have carefully perused **Order 3 Rule 2 High Court Rules, Cap 27 of the Laws of Zambia**. I concur with Counsel for the 1st and 2nd Defendant that this rule entails that an order will not apply where there are particular rules governing an issue. The correct Order when raising a preliminary issue is **Order 33 Rules of the Supreme Court, 1999 Edition**. Though the 1st and 2nd Plaintiff have brought the preliminary issue under a wrong order, the jurisdiction to grant the order sought exists and the mere fact that

the present application is expressed to be brought under **Order 3 Rule 2 High Court Rules, Cap 27 of the Laws of Zambia**, in my view does not render the notice of motion to raise a preliminary issue fatally defective or incompetent. I therefore proceed as if the preliminary issue was brought under the appropriate order.

The preliminary issue raises an important point affecting the practice of the Court on enforcement of undertaking as to damages given by the successful applicant for an *ex parte* interlocutory injunction, and where the said injunction is subsequently dismissed after an *inter parte* hearing.

An undertaking as to damages is given to the Court by the applicant for an injunction order and the undertaking is intended to provide a means of compensating the party restrained if subsequently, the injunction is discharged. The practice of requiring an undertaking as to damages is set out in the English case of **Cheltenham and Gloucester Building Society v Rickett**², where Peter Gibson L.J explained as follows:

" The practice of requiring an undertaking in damages from the applicant for such an injunction as the price for

its grant was originated by the court of Chancery as an adjunct to the equitable remedy of an injunction. There is an obvious risk of unfairness to a respondent against whom an interlocutory injunction is granted at a time when the issues have not been fully determined and when usually all the facts have not been ascertained. The order might subsequently prove to have been wrongly made but in the meantime the respondent by reason of compliance with the injunction may have suffered serious loss from which he will not be compensated by the relief sought in the proceedings. The risk of such injustice is greater when the interlocutory injunction has been granted ex parte.

The 1st and 2nd Plaintiffs undertaking as to damages read as follows:

"AND THE Plaintiffs by their Counsel undertaking to abide by an Order this Court may make as to damages in case this Court shall hereafter be of the opinion that the defendants shall have sustained any damages by reason of this Order which the Plaintiffs ought to pay."

This undertaking clearly gives the Court the discretion to make an order for damages if the Court opines so. The often cited proposition is that the Court retains a discretion whether or not to enforce the undertaking as to damages. In the exercise of that discretion, the

Court is to act judicially and judiciously with reference to the circumstances of the case. Instructive is the case of **Financiera Avenida S.A v Basil Mutei Shiblaq**³ where Lloyd L.J opined that the discretion is to be exercised in accordance with equitable principles taking into account the circumstances in which the injunction was obtained, the success or otherwise of the Plaintiff on the merits at trial, the subsequent conduct of the Defendant and all other circumstances.

An application for an inquiry as to damages pursuant to an undertaking is a two stage process. The Court must first decide whether the undertaking should be enforced. The second stage is the Court's consideration of the quantum of damages. In all these stages, the Court retains a discretion whether or not to enforce the undertaking as to damages. The Court retains a discretion not to enforce an undertaking as to damages in circumstances where it is inequitable to do so. This is affirmed by Lord Diplock in the case of **F Hoffmann-La Roche and Co A.G and others v Secretary of State for Trade and Industry**⁴, where it held that:

" the court exacts the undertaking for the Defendant's benefit. It retains a decree not to enforce the undertaking if it considers that the conduct of the Defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced, the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. Assessment made on same basis as damages for breach of contract would be assessed....."

Similarly, in the case of **Financiera Avenida S A v. Shiblaq** ³ Lloyd L.J observed that:

"...the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at trial, the subsequent conduct of the defendant and all other circumstances of the case".

As to what is inequitable, the learned authors **I.C.F Spry** in "**The Principles of Equitable Remedies: specific Performance, Injunctions, Rectifications and Equitable Damages, Sweet and Maxwell, 9th Edition, 2014**" noted that there is no closed list as to

what equitable principles may be taken into account and considered in an enforcement of an undertaking as to damages.

An enforcement of an undertaking as to damages is arrived at in a sequential way. Instructive is the English case of **Cheltenham and Gloucester Building Society v Ricketts** ² that sets out the steps as follows. Firstly, there must be a decision on whether the injunction was wrongly granted. If wrongly granted, the Court must decide whether the undertaking should be enforced. Thirdly once the decision to enforce the undertaking is made, then the Court must make an order of enforcement of the undertaking. Fourthly, the Court must order an inquiry into damages. Fifthly, the Court determines when the inquiry should take place, that is, before the trial, at the trial or after the trial. Sixth, damages are then assessed on the principles applicable to a breach of contract. Seventh, only damages caused by the grant of the injunction are recoverable.

From the aforesaid, before the Court can order an inquiry, it must be satisfied that the injunction was obtained improperly and that the injunction ought not to have been given. This position is postulated in **Editorial Note/29/L/30 Rules of the Supreme**

Court, 1999 Edition cited by both parties where it states as follows:

"when an application to enforce an undertaking as to damages is made there are two separate points to consider, as a matter of discretion, should the Court order that the undertaking be enforced. Secondly if so, what loss had the defendant suffered in terms of money, was it caused by the order and was it too remote? A judge may leave both questions to be determined at the same time, or more probably, in an enquiry as to damage, he may decide the first question himself. If he answers it in the sense that the undertaking should be enforced, he may then leave it to some other holder of judicial office to enquiry into causation, remoteness and quantum....."

I concur with this passage which neatly sums up the process of enforcement of an undertaking as to damages, and I shall apply the said principles to the matter at hand.

The 1st and 2nd Plaintiff's first preliminary issue is whether or not there can be an order for assessment of damages in the absence of any finding of the Court regarding damages. Counsel for the 1st and 2nd Defendant vehemently argues that the injunction having been

discharged, it follows that it was unjustified and that the Court has the power to make an assessment of damages suffered by the 1st and 2nd Defendant. Further, that the purpose of the 1st and 2nd Defendant's application for assessment of damages is to invite the Court to determine whether or not the undertaking as to damages should be enforced.

A perusal of the 1st and 2nd Defendant's summons filed on 9th December, 2016 is for assessment of damages pursuant to the undertaking as to damages made by the 1st and 2nd Plaintiff, and not whether or not the undertaking as to damages should be enforced. Counsel for the 1st and 2nd Defendant relied on **Order 27 Rule 6 of the High Court Rules, Cap 27 of the Laws of Zambia** on assessment of damages and **Editorial Note 29/L/39 of the Rules of the Supreme Court** which sets out the process for enforcement of an undertaking as to damages as envisaged in the English authority of **Cheltenham and Gloucester Building Society v Ricketts**² and the **Hoffmann-La Roche case**⁴.

Importantly, in our jurisdiction, **Order 27 Rule 6 of the High Court Rules, Cap 27 of the Laws of Zambia** provides as follows:

"A Judge may, on application or on his own motion pursuant to an undertaking as to damages, order an assessment of damages arising out of a discharged injunction found to have been unjustified, and that the damages shall be assessed by the Registrar."

The pre-condition in **Order 27 Rule 6 of the High Court Rules, Cap 27 of the Laws of Zambia** is that before an assessment of damages can be done, the discharged injunction should have been found to have been unjustified. In the present case, the reasons given by the Court for the discharge of the interim injunction are as follows:

"that the Plaintiffs have not shown that it is only their money that is deposited in the 1st Defendant's accounts in Zambia and elsewhere. Indeed great prejudice will be caused particularly to the other clients of the 1st Defendant if I grant the injunction the Plaintiffs seek. Even the business of the 1st Defendant may be adversely affected."

..... Under these circumstances, and for the reasons I have given, I am compelled to refuse the Plaintiffs application."

I find that following the discharge of the interim injunction on 2nd February 2012, the determination for the enforcement of the undertaking as to damages has not been made. I say so as the decision to discharge the interim injunction was not based on a finding that the 1st and 2nd Defendant has breached the contract of mandate or agency, breached their fiduciary duties to the 1st and 2nd Plaintiff, or that they are liable to pay damages for breach of contract as stated in the claims in the Writ of Summons.

Therefore, in deciding whether the undertaking as to damages should be enforced, the Court determines whether the Plaintiff has succeeded on the merits of its claims and whether there are special circumstances that exist to dissuade the Court from ordering an inquiry as to assessment of damages. Thereafter, depending on the Court's decision, it may proceed to order an assessment into damages and when it should take place, which could be before trial, at trial or after trial.

Arising from my findings in the preceding paragraphs, it follows that there can be no order for assessment of damages in the absence of any finding of the Court that the 1st and 2nd Defendant suffered damages. The 1st and 2nd Plaintiff's first preliminary issue succeeds.

The second preliminary issue is whether or not there can be an order for assessment of damages in a matter that is continuing and to which the Court never made any order as to damages. Arising from my earlier finding, it follows that there can only be an order for assessment of damages after the Court determines whether or not there should be an enforcement of the undertaking as to damages. The rationale for this is provided by the learned author **Zuckerman in Zuckerman on Civil Procedure: Principles of Practice, Sweet and Maxwell, 3rd Edition 2013**, as follows:

"in the case of an interlocutory injunction, the compensation is for harm to substantive rights caused as a result of the restraint which turned out to have been unjustified. Normally the dispute is over the subject matter of the injunction and the trial then determines the substantive rights of the parties."

'What this means is that the successful party at trial would have established their substantive rights. In a continuing matter, I opine that the appropriate time for making an inquiry after an order for enforcement of the undertaking of damages is granted, is at the trial as that is where material issues as to whether or not the Defendant ought to be compensated in damages are determined. I am fortified in my findings by the case of **Watts v. Watts** ⁵ where Sykes J held that:

“The defendant then submitted that I should order a damages enquiry. I decline to do so, and I believe that the proper course applying the authority of *Ushers Brewery v King & Co (Finance) Limited* [1972] Ch 148 is to reserve the question of whether there should be a damages enquiry to the judge hearing the trial of this action. My reasons are that there are extremely serious allegations made by the Claimant against the Defendant in this action. I am not in a position to judge whether or not they are justified. If they are justified, it may well be that the judge at trial will consider it an injustice for the Claimant to have to pay damages to a Defendant who has essentially defrauded him. Therefore, I reserve that question to the trial judge”.

I concur with Counsel for the 1st and 2nd Plaintiff that no order as to damages has been made. Therefore, the 1st and 2nd Plaintiff's second preliminary issue succeeds.

The third preliminary issue is whether or not the application by the 1st and 2nd Defendant in light of the contents of the interim order and the Ruling of the Court of 2nd February, 2012 amounts to abuse of court process. Counsel for the 1st and 2nd Plaintiff argues that the terms of the interim injunction and the subsequent Ruling of the Court never granted any Order as to damages, and that this amounts to abuse of court process by the 1st and 2nd Defendant.

It is trite law that the process of Court must be carried out properly, honestly and in good faith. **Black's Law Dictionary, Thomson Reuters 8th Edition**, defines "*abuse of process*" to mean:

" the improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope. In that sense, abuse of court process is a perversion of justice.

The 1st and 2nd Defendant's application for summons for assessment of damages is made pursuant to **Order 27 Rule 6 of**

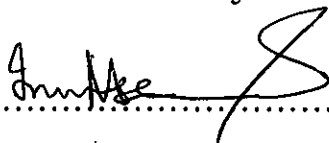
the High Court Rules, Cap 27 Laws of Zambia as read with Editorial Note 29/L/30, Rules of the Supreme Court, 1999 Edition. As stated in the preceding paragraphs, from an interpretation of Order 27 Rule 6 High Court Rules, Cap 27 of the Laws of Zambia, it is a pre-condition that the discharged injunction should have been found to be unjustified, and only then can damages be assessed by the Registrar. For that reason, I find that the 1st and 2nd Defendant application for assessment of damages is prematurely before this Court and an abuse of court process. The third preliminary issue succeeds.

The 1st and 2nd Defendant is at liberty to make the appropriate application before this Court.

I award costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal granted.

Dated in Lusaka in Chambers this 15th day of June, 2017.

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IRENE ZEKO MBEWE
HIGH COURT JUDGE