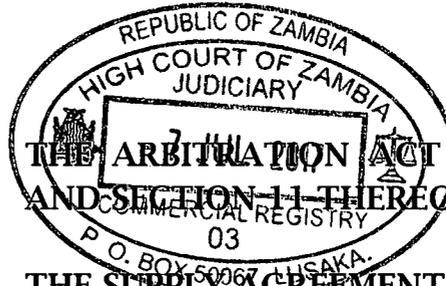


IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2017/HPC/0247

IN THE MATTER OF:



THE ARBITRATION ACT OF ZAMBIA
AND SECTION 11 THEREOF

IN THE MATTER OF:

THE SUPPLY AGREEMENT FOR
CONCRETE AND AGGREGATE DATED
21ST JUNE, 2015

IN THE MATTER OF:

ORDERS 27 RULE 4 AND 30 RULL 11
OF THE HIGH COURT RULES A.R.W.
ORDER 29 OF RSC (1999) EDITION

BETWEEN:

KEREN MOTORS LIMITED

APPLICANT

AND

DAEWOO ENGINEERING AND CONSTRUCTION
COMPANY LIMITED

RESPONDENT

Before: **Hon. Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka the
7th day of July, 2017.**

For the Applicant: Mr. B. Gondwe of Messrs Buta Gondwe and
Associates

For the Respondent: Mr. J. Akafumba of Messrs. Mak Partners appearing
with Mr. M. Cheelo also of Mak Partners and Mr. C.
P. Chuula of Messrs Chibesakunda and Company.

RULING

Legislation referred to:

1. Order 14A rules 1 and 2 of the Rules of the Supreme Court, 1999 Edition (White Book).

2. Order 33 rule 3 of the Rules of the Supreme Court, 1999 Edition.
3. Order 3 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.
4. Order 27 rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia
5. Order 29 rule 1 of the Rules of the Supreme Court, 1999 Edition.

This is a preliminary issue raised by the Respondent herein pursuant to Order 14A rules 1 and 2 of the Rules of the Supreme Court, 1999 Edition (the White Book) in relation to the Ex-parte Order of Mandatory and Prohibitory Injunction granted on 22nd June, 2017.

Order 14A rule 1 of the Rules of the Supreme Court provides that an application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1- which provides that every application in Chambers not made ex-parte must be made by summons), may be made orally in the course of any interlocutory application to the Court. This is read together with Order 33 rule 3 of the Rules of the Supreme Court, 1999 Edition which gives power to the Court to determine any question that may be brought before it and Order 3 rule 2 of the High Court Act which gives the Court or a Judge the power to 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.

Mr. Akafumba, learned Counsel for the Respondent, submitted that this Court was moved by the Applicant on 5th June, 2017 through an *ex-parte* summons which the Court did not grant and the matter came up on 14th June, 2017 for *inter-partes* hearing. However, the matter did not take off because Counsel for the Respondent asked for an adjournment to enable them respond to the application which was served on them late.

The Court granted the adjournment and the matter was adjourned to 26th June, 2017 for *inter-partes* hearing. However, on 22nd June, 2017 the Applicant made an application for renewal of the ex-parte summons for order of Mandatory and Prohibitory Injunction pursuant to Order 3 rule 2 of the High Court Rules and Order 29 rule 1 of the Rules of the Supreme Court,

1999 Edition, which order was granted. The *ex-parte* order of injunction came to the notice of the Respondent's Counsel on 26th June, 2017 after returning to their office whereupon they examined the Orders relied upon by the Applicant and concluded that the said Orders did not in any way support the application for renewal of the *ex-parte* summons.

According to Mr. Akafumba, the Court was not properly moved. Further, that it is a principle of law that orders of court and rules of court are specifically there to guide the administration of justice, and that this novel application of renewal of *ex-parte* summons is not supported by the Orders that the Applicant relied upon. It was learned Counsel's submission that Order 3, rule 2 of the High Court Rules and 29 rule 1 of the Supreme Court Rules are routine orders on which any applicant can rely when applying for an injunction.

It was Counsel's contention that on 14th June, 2017, the Court made a ruling that this matter be heard *inter-partes* on 26th June, 2017 and if the Applicant felt that there were urgent matters that needed to be attended to, the avenue open to the Applicant was to apply for review or at worst, appeal. Therefore, since the application made on 22nd June, 2017 which resulted in the grant of a Mandatory and Prohibitory Injunction was not supported by the Orders upon which this Court was moved, the *ex-parte* order of injunction must be discharged, so that the parties revert to what they were before the *ex-parte* order of 22nd June, 2017 was granted and the matter be heard *inter-partes*. Mr. Chuula, co-Counsel for the Respondent fully supported the application.

In response, Mr. Gondwe, learned Counsel for the Applicant submitted that the manner in which the Respondent raised the preliminary issue was not in keeping with the rules of court and in effect amounted to an ambush of the Applicant which, he claimed, is not the practice in civil matters and more so, matters on the Commercial List where applications should be filed on time including the arguments thereof. According to Counsel, the Applicant had not had sufficient time to appreciate the preliminary issue and respond to the same. Counsel submitted further that speaking from memory, Order

14A has pre-conditions that have to be met if one is to proceed via this Order. Counsel contended that the preliminary issue should be disallowed as it has the tendency of prejudicing the Applicant.

Submitting on the substantive issue raised in the preliminary issue, Mr. Gondwe stated that this Court was in fact properly moved and that it had sufficient authority under Order 3 rule 2 of the High Court Rules to consider the renewal application for an *ex-parte* order of Mandatory and Prohibitory Injunction. According to Counsel, the justification for the grant of the *ex-parte* order of Mandatory and Prohibitory Injunction was that the justice of the case required an interlocutory order to be made pending determination of the main matter. Counsel argued that this Court has the authority to adjudicate on the same whether a party has in fact asked for such an order or not if satisfied that the justice and circumstances of the case demand that the order be granted.

Learned Counsel submitted that if the Court looked at the record, it would note that when it was adjourning the matter on 14th June, 2017 there was an indication from the Respondent's Counsel that an Affidavit in Opposition would be filed in a day or two but that was not done and this being an injunction application, the actions of the Respondent was ruining the Applicant financially and if any more time had lapsed, further damage would have been inflicted to the complete ruin of the Applicant.

It was Counsel's further submission that the Respondent filed its Affidavit in Opposition to the Summons for Mandatory and Prohibitory Injunction on 26th June, 2017 which was the day of the *inter-partes* hearing of the summons for injunctions. That it is on record that in the affidavit in support of the application for renewal of the *ex-parte* summons the Applicant had expressed the fear that the matter would not proceed on 26th June, 2017 and the Applicant stood to suffer irreparable damage unless protected by the Court.

According to Counsel, during the same period, the Respondent had taken further steps in effecting termination of the subject matter by way of

pushing for performance bonds and faced with these circumstances, the Applicant was left with little choice but to seek to renew its application for an *ex-parte* order of injunction which the Court granted accordingly.

It was Counsel's contention that the Court was on firm ground pursuant to Order 3 rule 2 of the High Court Rules and Order 29 rule 1 of the Rules of the Supreme Court to grant the *ex-parte* order of injunction. It was Counsel's argument that the situation would have been otherwise had the Court observed that from the Respondent's conduct they intended to await the decision of the Court on the pending application for injunction.

It was Counsel's submission that the *ex-parte* order granted on 22nd June, 2017 was simply to ensure that the *status quo* was maintained. Learned Counsel submitted finally, that the putting of a date for the matter to be resolved *inter-partes* cannot be construed *per se* as the Court declining to grant the injunction *ex-parte*.

According to Counsel, there is no indication by the Court anywhere on the record to warrant the construction that is being put on the Court's action by the Respondent.

Therefore, the preliminary issue is not justified because the *ex-parte* order of injunction was necessary due to the length of time the hearing of the *inter-partes* summons was taking and in order to preserve the *status quo* in the light of further steps which the Respondent was taking which was ruining the Applicant financially.

Counsel submitted that the Applicant is ready to have this matter heard and determined on an even playing field. For these reasons, the preliminary issue should not be allowed.

In reply, Mr. Akafumba stated that contrary to Mr. Gondwe's submission that he had been ambushed by the raising of the preliminary issue, his colleague had gone to great length to justify the application the Applicant made on 22nd June, 2017 and that there is nothing new in the preliminary issue raised as this is the Applicant's application for injunction. Counsel submitted that

they are not in any way questioning the powers of this Court to grant any order which the Court deems fit but that the issue at hand is the strange procedure that was adopted by the Applicant.

It was Counsel's contention that he had looked at Order 14A rule 2 of the Rules of the Supreme Court and according to him, it does not give any pre-conditions with the only limitation being where the State is involved. Counsel reiterated his earlier submission that the issue before Court is that the Orders which the Applicant relied on to move the Court do not in any way support the application referred to as renewal of *ex-parte* application for order of mandatory and prohibitory injunction. He also reiterated that orders of the Court are set for a purpose and that is, the administration of justice.

Therefore, citing an order which does not support the application made cannot be justified by the urgency of the matter, otherwise, there would be chaos in the courts of law.

Counsel submitted that the application by the Applicant is hanging and therefore, the *ex parte* order of Mandatory and Prohibitory Injunction should be discharged so that the parties are heard on the application as it stood on 14th June, 2017.

I have carefully examined Orders 3 rule 2 of the High Court Rules and 29 rule 1 of the Rules of the Supreme Court, 1999 Edition and considered the oral submissions by both Counsel in support of and against the preliminary issue. Learned Counsel for the Respondent has submitted that they are not questioning the powers of this Court to grant any orders the Court deems fit; that the issue at hand is, as Counsel put it, the strange procedure that was adopted by the Applicant in moving the Court for an *ex-parte* order of Mandatory and Prohibitory Injunction. Therefore, the issue for determination, in my view, is whether the Court was properly moved to grant the *ex-parte* order of injunction. Before I make a determination on the issue before this Court I would like to state that in as much as the Respondent's preliminary issue appears to have taken the Applicant off guard, an oral

application of such nature is permitted by Order 14A rule 2 of the Rules of the Supreme Court. This is an exception to the usual requirement of summons accompanied by an affidavit and Skeleton Arguments. The editorial notes found in Order 14A/2/3 gives the requirements for employing the procedure under Order 14A which in my view, were met by the Respondent notwithstanding the submission by learned Counsel for the Respondent that the Order does not have preconditions to be satisfied for one to rely on the said Order.

Coming to the issue for determination, in order to answer the question whether the Court was properly moved to grant the *ex parte* order of injunction, the two Orders relied upon by the Applicant to move this Court must be examined. Order 3 rule 2 of the High Court Rules provides 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.”

Order 29 rules 1 (1) and (2) of the Rules of the Supreme Court, 1999 Edition provides that: -

“1-(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party’s writ, originating summons, counter claim or third party notice, as the case maybe.

(2) Where the case is one of urgency such application may be made ex-parte on affidavit but, except as aforesaid, such application must be by motion or summons.

(3) ...”

It is clear from the above Orders that the Applicant moved this Court on the basis of Order 3 rule 2 of the High Court Rules which was buttressed by Order 29 rule 1 of the Rules of the Supreme Court, 1999. While being alive

to the fact that Order 3 rule 2 of the High Court Rules vests the Court or a Judge with a general power to make any orders that it or he deems fit, the power under the said Order is expressly stated to be subject to any particular rules and that is where order 29 rule 1 of the White Book which deals with injunctions comes in.

The application for renewal is indeed novel but it was clearly supported by the two Orders referred to above. Counsel for the Respondent argued that the two Orders referred to above are routine Orders which any applicant can rely on when making an application for injunction. In my view that argument is essentially an admission that the Applicant herein was in order to rely on the said Orders which can be relied upon by any applicant. It is also noteworthy that this Court could have, even without the application by the Applicant, granted the *ex-parte* order by virtue of Order 3 rule 2 of the High Court Rules if the Court was of the view that it was necessary for doing justice.

I concur with the submission by the Applicant that the order of 22nd June, 2017 was granted simply to ensure that the *status quo* was maintained pending the *inter-partes* hearing of the Summons for Mandatory and Prohibitory Injunction. Indeed the *ex-parte* order was necessitated by the averments by Berhane Kibron the Applicant's Managing Director in his Affidavit in Support of Summons Renewing Application for An Ex-parte Order filed on 22nd June, 2017 to the effect that the Respondents had continued taking steps unilaterally and precipitating further actions by other creditors leading to the termination of the supply agreement of 2015. That it was clear that the Respondent wanted to continue acting unilaterally and in disregard of the supply agreement to the detriment of the Applicant who was in danger of being completely ruined and suffering irreparable damage unless restrained by the Court. That it is was therefore, necessary to renew the Applicant's application and prayer for an *ex-parte* order so that the *status quo* was maintained.

Counsel for the Respondent submitted that orders and rules of Court are specifically there to guide the administration of justice. I am in agreement with this submission but would state that in this case the Orders relied upon by the Applicant did support the application as demonstrated above. Consequently, it is my finding that the Court was properly moved to grant the *ex parte* order of Mandatory and Prohibitory Injunction on 22nd June, 2017. I therefore dismiss the preliminary issue herein for being without merit. I award costs to the Applicant, to be taxed in default of agreement.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 7th day of July, 2017.



W. S. Mwenda (Dr.)
JUDGE