TURNKEY PROPERTIES v LUSAKA WEST DEVELOPMENT COMPANY LTD., B.S.K. CHITI (SUED AS RECEIVER), AND ZAMBIA STATE INSURANCE CORPORATION LTD. (1984) Z.R. 85 (S.C.)

SUPREME COURT
SILUNGWE,C.J., NGULUBE, D.C.J., AND MUWO, J.S
16TH AND 17TH MAY, AND 15TH JUNE, 1984
(S.C.Z. JUDGMENT NO. 3 OF 1984)

Flynote
Civil Procedure - Interlocutory injunction - Alternative remedy in damages - Consideration of.
Civil Procedure - Interlocutory Injunction - Appropriate when - Arguments and submissions in - Court not to make comment in - Device not to be used as.
Civil Procedure - Interlocutory injunctions - Device to create new conditions - Condemnation of.
Civil Procedure-lnterlocutory injunction - Merits - Impropriety of Pre-empting decision.

Headnote
The appellant applied in the High Court for an interlocutory injunction to restrain the respondents from selling or damaging property and to restrain them from entering upon land or interfering with the appellant's possession thereof pending the settlement of a dispute concerning sub-sale. The appellant sought to continue in possession of the disputed buildings and to continue building during the injunction if granted. The injunction was refused lay the High Court. This was an appeal against that decision.

p86
held:
(i) An interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial.
(ii) It is improper for a court hearing an interlocutory application to make comments which may have the erect of pre-empting the decision of the issues which are to be decided on the merits to the trial.
(iii) An interlocutory intimation should not be regarded as a device by which an applicant can attain or create new conditions favourable only to himself.
(iv) In applications for Interlocutory injunctions the possibility of damages being an adequate remedy should always be considered.

Authority and Cases referred to:
(1) Chitty and Contracts, (25th Edn.) para. 1764.
(2) Gordon Hill Trust Ltd. v Segall [1941] 2 All. E.R. 379.
(3) Shell and BP Zambia Ltd. v Conidaris and Ors. (1975) Z.R. 174.

Legislation referred to:
High Court Act, Cap. 50, Ord. 27.

For the appellant: A.M. Hamir, of SolIy Patel, Hamir and Lawrence.
For the first respondent: G. Chilupe, of Chilupe and Company.
For the second and third respondents: B.S. Chiti, of Zambia State Insurance Corporation Limited.

Judgment

NGULUBE, D.C.J., delivered the judgment of the court.

This is an appear against the refusal by a High Court judge to grant an interlocutory injunction. The brief history of the case is as follows. The case cantered around stand No. 1282 Chelston, Lusaka, of which the receiver of the registered owner is the second respondent. Houses are being constructed on this stand for sale to the public as individual units. On 26th August, 1981, a Law Association of Zambia form of contract of sale wits entered into between the first respondent as vendor and the appellant as purchaser of this property for a sum of K350,000. Subsequently, on 9th September, 1981, the receiver as vendor entered into a contract of sale of the same stand with the first respondent as purchaser for a sum of K250,000. This contract appears to have been the culmination of sundry previous contracts and of a multilateral arrangement covering all the parties in this action. Differences arose and the appellant issued a writ. The appellant applied for an interim injunction (presumably under Order 27of the High Court Rules) to restrain all the respondents from selling or damaging the property and to restrain them from entering upon the land or interfering with the appellant's possession thereof as builder

p87

and intended purchaser under the sub-sale. The learned judge considered that, as damages would be an adequate alternative remedy, an interlocutory injunction would not be granted. The appellant has appealed against that determination.

The submissions made by Mr Hamir, on behalf of the appellant, can be summarised as follows:

(a) That the learned judge was wrong to say that the appellant appeared to have an adequate alternative remedy in damages because, in the eyes of law, contracts for the sale of land have long been accorded a special position where damages are generally considered inadequate and specific performance the more appropriate remedy, even in a case where the purchaser intended to resell the property. In this regard, reference was made to, inter Anglia, para 1764 of *Chitty* (1) on Contracts (General Principles) With Edition, which is to that effect;

(b) That the appellant has expended a considerable sum in contemplation of eventually becoming the owner and sole developer of the land and that, as the planned developments would result in a housing estate worth K9 million, the vastness of the proposed investment was such that damages would lie inadequate and, for that reason, an interim injunction ought to have been granted;

(c) That the interim injunction would enable the appellant to remain in possession and to continue building the units for sale to the public so as to enable the first respondent; to sell

the first batch of units and to use the proceeds, in terms of the contract between the respondents, to pay the purchase price to the second and third respondents who would then give title to the first respondent; who would, :in turn, then be able to complete their contract with the appellant.

The response to these submissions by Messrs Chilupe and Chiti, on behalf of the respondents, can be summarised as follows:

(1) That the learned judge was not wrong in holding, that damages could be an adequate alternative remedy and that, in any case, as the appellant only has a claim to an equitable right, an interim injunction cannot be grunted since it should only be issued in support of a legal right;
(2) That the remedy of specific performance would not be available against the first respondent since they do not have title to the land which they can convey to the appellant;
(3) That the contracts are invalid and, in any case, stipulated that the first respondent, and not the appellant, would sell! the first batch of residential units so that the appellant could not seek to restrain the respondents in the manner sought;

p88

(4) That the appellant was a developer who would have sold the units to be constructed and can, therefore not claim a personal or emotional interest in the land and that, in these circumstances, monetary damages would be adequate.

As can be seen from the foregoing summary, the submissions and arguments before us have ranged far and wide. Yet, in the view that we take, it was not all that necessary for a proper determination of the issue at hand, to broaden the scope of the inquiry to include questions touching on the validity or enforceability of the contracts; or the ultimate propriety and adequacy or otherwise of one final remedy as opposed to another which are the very matters upon which the trial judge must adjudicate at the proper time. Indeed, we do not believe that it would be proper for us, at this stage, to make any comments which may have the effect of pre-empting the issues which are to be decided on the merits at the trial. Thus we do not think that we can properly be called upon to say that the, appellant is or is not entitled to specific performance; nor can we concern ourselves with what has become of the contracts and if they are still capable of performance or not. Our starting point must be to accept that one contract was entered into between the respondents inter se and another contract between the first respondent and the appellant. The appellant claims to be a purchaser under the sub-scale which, prima facie, is a contract which may validly be entered into and in which the first respondent could, in equity, legitimately describe himself as the beneficial owner. We need only cite *Gordon Hill Ltd. v Segall* (2), as one of the many authorities for the recognition of the validity of a contract of sub-sale. We must accept, also, that the appellant appears to be a builder and developer, as well as a purchaser under the sub-sale which was or is undoubtedly contingent upon the due performance of the main contract of sale between the respondents inter se. It is obvious, also, that the res respondents have their own rights and interests in the property too. The basic question, therefore, is whether the learned judge was wrong refusing to grant the interlocutory injunction and whether it is necessary to grant the interlocutory injunction

to the effect requested for by the appellant in order to preserve a particular state of amass best calculated to ensure that, at the end of the day, the best type of justice has been done to all the parties.

An interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial; but it cannot, in our considered view, be regarded as a device by which the applicant can attain or create new conditions, favourable only to himself, which tip the balance of the contending interests in such a way that he is able, or more likely, to influence the final outcome by bringing about an alteration to the prevailing situation which may weaken the opponents' case and strengthen his own. If we understood Mr Hamir's third submission correctly, this is what the appellant would wish to achieve by continuing to build under the contracts in dispute and thus place the respondents in a position where they would most probably be able to perform the contracts and unable to

p89

resist performance on their current arguments which, it is reasonable to assume, may be the present basis of their defence to the clams In the main action.

The major criticism of the learned High Court judge's determination concerned the holding that damages appeared to be available as an adequate alternative remedy in this case. In our considered opinion, the learned judge was on firm ground bearing in mind the stage of the action namely, an interlocutory application for an injunction pending trial in circumstances and on facts where it was necessary to weigh the contending rights and to find where the balance of convenience to the parties lay. Damages are the universal remedy for breaches of contract and are practically always an alternative remedy to a claim for specific performance even of a contract for the sale of land. The issue, therefore, is one of adequacy and it would be inappropriate, at this interlocutory stage, to do any more than to assess on the available material the probable consequences to the rights of the parties of the refusal, or the grant of an interlocutory injunction. In order to succeed, the appellant should have demonstrated that, not only was their right to the relief sought clear, but above all, that the injunction is necessary to protect them from irreparable injury. In *Shell and BP Zambia Ltd W v Conidaris and ors.* (3),this court reaffirmed the principles underlying the grant of an interlocutory in- junction and, on that authority, the learned judge could only be faulted if it had been shown that the appellant would suffer a substantial injury which could never be adequately remedied or atoned for by damages. A purchaser who is principally a developer of residential units for sale to the public and who, in the event of loss of the land, stands to lose profits, even on a K9 million project, does not thereby necessarily stand in peril of suffering the sort of loss referred to in the Shell and BP case. The onus was on the appellant to establish that the greater inconvenience pointed in his direction and that an injunction was necessary on the principles to which we have referred. The submissions in this respect cannot stand for the additional reason that, even in the absence of an interlocutory injunction, it is apparent that the remedies claimed in the writ will still be viable propositions at the trial, if only the parties can get on with the action which, we were given to understand has not gone past the obtaining of an order for directions. An application for an interlocutory injunction by its nature, is certainly not a good reason for the lack of any appreciable progress on the main action.

It follows from what we have said that this appeal must fail. The costs will follow the event and will be taxed in default of agreement.

Appeal dismissed
