IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

Application 60 / 2023

BETWEEN:

KALYMNOS PROCESSING LIMITED 1st Appellant
ALBERTINA KASHIBA 2nd Appellant

AND

KONKOLA COPPER MINES PLC (IN LIQUIDATION) Respondent

Coram: Mchenga DJP, Banda-Bobo and Sharpe-Phiri, JJA
on 2nd October 2023 and 25th October 2023

For the Appellants: Mr. L. Yeta of Central Chambers & Mr. J. Sinkala of Messrs Justin Legal Practitioners

For the Respondent: Mr. N. Chaleka of Messrs ECB Legal Practitioners

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R U L I N G

Sharpe-Phiri, JA, delivered the Ruling of the Court

Legislation referred to:

1. The Court of Appeal Rules, Act No. 7 of 2016
2. The Rules of the Supreme Court, White Book (1999 Edition)

Cases referred to:

1. Konkola Copper Mines Plc v Kronos Mining Limited, Attorney General and ZCCM Investments Holdings Plc - 2009/HK/574
2. Mareva Compania Navera SA v International Bulk Carriers SA (1980) 1 All ER 213
3. Adriatic Transport Limited. V Fratelli Loci S.R.I Limited - 2012/HPC/0661
4. Costain Simamba V Admac Carmichael Limited, Allan Palmer - 2010/HPC/322
5. Third Chandris Shipping Corporation and Others v Unimarine SA (1979) QB 645

1. Introduction

1.1 This is a ruling on an application brought by Konkola Copper Mines Plc (In Liquidation), the respondent herein, seeking to set aside the ex-parte Mareva injunction granted by our sister Ngulube J, a single Judge of this Court on 30 June 2023 under cause number CAZ/8/454/2022.

1.2 The respondent also filed summons for a stay of execution of the ex-parte Mareva injunction granted to the appellants on 30 June 2023 pending determination of this Motion. The fate of the second application will be determined by our decision herein.

2.0 Background to the Motion

2.1 The appellants brought an application for a Mareva injunction before a single Judge of this Court on 27 April 2023. The summons was heard by the Judge in the absence of the respondent, who applied to set it aside.

2.2 Before the Judge could hear the respondent's application to set aside the Mareva injunction, the appellants raised a preliminary objection, arguing that the application had been heard inter-parte and that such application to set aside ought to be heard by the full bench of this Court.

2.3 After considering the objection, in her ruling on the application on 31 July 2023, the single Judge upheld the appellant's preliminary objection holding that she did not have jurisdiction to entertain the respondent's application to set aside the Mareva injunction order and dismissed it accordingly.

3.0 Motion to set aside ruling of single Judge

3.1 Following the dismissal of the application, the respondent filed this Motion before the full Court on 10 August 2023 seeking to vary, discharge or set aside the ruling of 30 June 2023 on the grounds set out below and expanded upon in the affidavit in support, namely that:

i. *The Appellant did not make full and frank disclosure of all material facts including and not limited to the fact that it has transferred its license to an entity called Tubombeshe Mining Limited.*

ii. *The question of an injunction is a subject matter of the appeal and therefore cannot be determined by a single Judge.*

iii. *It is not legally tenable for the appellant to have any proprietary interest in the materials situate on SP6 as it merely holds an exploration license; and*

iv. *There is no danger of assets being removed from jurisdiction.*

4.0 Affidavit in support of Motion to set aside

4.1 An affidavit in support of the motion was sworn by *Celine Meena Nair*, the Provisional Liquidator of the respondent Company. She deposed that she was in receipt of a ruling of a single Judge made ex-parte on 30 June 2023 served on her office on 5 July 2023, granting an interim Mareva injunction against minerals purportedly extracted by the respondent over the mining tenement until the determination of the matter inter-parte.

4.2 Following a preliminary issue raised by the appellants at the inter-parte hearing, the single Judge of this Court concurred with the appellants that the initial hearing of the Mareva injunction was made inter-parte. She proceeded to dismiss the respondent's application and condemn the respondent to costs.

4.3 The deponent further explained that she was in receipt of a letter from the appellants' advocates suggesting that she had been served process in relation to the hearing date of the Mareva injunction and subsequently informing her of the ruling of 30 June 2023 which was copied to relevant Ministries and Departments to supposedly ensure that exports permits applied for by the respondent would not be permitted. She further

deposed that the appellants have misled the Court as they had not placed material facts before Court, to which if they had done so, the ex-parte order of Mareva injunction would not have been granted.

4.4 The material facts alleged to have been withheld from the Court by the appellants were detailed as follows that:

i. The 1st appellant, (who happens to be the only appellant as the 2nd appellant has never appeared in this dispute), transferred its small-scale exploration license to an entity called Tubombeshe Mining Limited on 1 November 2022.

ii. The said Tubombeshe Mining Limited had commenced an action against the respondent herein over the same tenement before the Kabwe High Court to forum shop and obtained an ex-parte order of interim injunction on 31 May 2023.

iii. The respondent herein appeared before the Kabwe High Court for inter-parte hearing and discovered that the said Tubombeshe Mining Limited had discontinued the said matter.

iv. The respondent commenced the action subject of the appeal herein on 13 April 2018 and the appellants had filed a defence and counterclaim on 18 August 2020 under cause number 2028/HKC/0030 at Kitwe.

v. On 25 March 2022 before the said transfer of the license by the 1st Appellant to the said Tubombeshe Mining Limited, the Kitwe matter subject of this appeal was concluded pending judgment.

vi. The Kitwe High Court rendered judgment on 26 September 2022 holding the respondent as owner and legal occupier of the surface rights over the three properties (i.e., Subdivision C of Farm 927, Farm No. 1426, and Farm No. 942) where OB1 and SP6 are located. On the strength of this finding of fact, the Court granted a permanent injunction against the appellants over the said area.

vii. The Kitwe High Court further held that the law does not permit the use of an Exploration License to mine minerals on OB1 and SP6, the areas covered by Explorations License No. 29287-HQ-SEL.

viii. The Kitwe High Court also held that the area in question constituting the dumps OB1 and SP6 belong to the respondent as surface rights holder, and it is used as an integral part of the respondent's mining operations; and

ix. The appellants cannot injunct the respondent as it will disrupt all mining activities and destroy the subject matter of this dispute, and the reason why the Court below ordered a permanent injunction against the appellants.

x. The 1st appellant therefore has no claim to mine in the disputed area and had this been disclosed to the Court, it would not have granted the ex-parte order as the appellants have no clear right to relief.

4.5 The deponent further stated that two High Court Judges and the Supreme Court have previously held that the said dump in dispute is an integral part of the respondent's mining activities which cannot be interrupted as

it is active, and the process of reclamation is a continuous process. The Liquidator referred to the case of **Konkola Copper Mines Plc v Kronos Mining Limited, Attorney General and ZCCM Investments Holdings Plc 2009/HK/574**[1] in which Judge Makungu granted an injunction on 5 May 2011 restraining the 1st appellant from encroaching upon OB1. The 1st appellant appealed to the Supreme Court, who rendered a decision on 20 March 2012 confirming the injunction.

4.6 The deponent further contended that paragraphs 5 to 16 of the affidavit in support of the Mareva Injunction sworn by one Dimitrios Monokandilos, did not make full disclosure and deliberately neglected to inform this Court that the Supreme Court confirmed that the respondent is at liberty to continue with its operations on OB1.

4.7 Further, according to the said affidavit, the appellants refer to a claim of US$2,400,000,000 which the High Court dismissed in its entirety. Therefore, the 1st appellant has no right to mine, and its monetary claim has no legs to stand on as indicated by Judge Pengele in his judgment.

4.8 The deponent further contends that the affidavit in support of the Mareva Injunction asserts that the majority shareholder of the respondent being Vedanta Mineral Resources, is a company domiciled outside Zambia and therefore their fear is that the minerals are being externalized by the respondent. That however the appellants neglected to mention that the deponent has been appointed as Provisional Liquidator and thus stepped into the shoes of management and being the Official Receiver in Zambia.

Therefore, any apprehension by the appellants that the respondent's management is based outside jurisdiction is unfounded.

4.9 Further, that the appellants' failure to disclose material facts as revealed above, constitutes ground to set aside the ex-parte ruling of Mareva injunction. Also, the appellants have deliberately misled the Court and are attempting to use the injunction to cripple the subject of this appeal seeing that they have very dim prospects of succeeding.

5.0 Affidavit in opposition to Motion to set aside ruling

5.1 The appellant filed an affidavit in opposition to the Motion on 4th October 2023 sworn by Dimitrios Monokandilos, a director of the 1st appellant. He contended that the Mareva injunction was heard inter-parte as confirmed by the single Judge in her ruling of 31st July 2023.

5.2 The deponent further states that the appellants gave full and frank disclosure relevant to the grant of the Mareva Injunction. That the fact around transfer of the mineral rights, was immaterial to the grant of the Mareva Injunction as it was done on 1st November 2022 after the action arose.

5.3 The appellants disputed that Tubombeshe Mining Limited and the appellants are not privy to internal and/or administrative directions taken by the company save to add that as a separate legal entity it is within its rights to pursue legal action against the respondent. The appellant added

that Tubombeshe Mining Limited has since joined these proceedings as an interested party to defend its rights and protect its property, an action that cannot be deemed as abuse of court process.

5.4 The deponent further contended that a permanent injunction related to two different issues and that the matter of the injunction was the subject of appeal and cannot be dealt with at this stage. The deponent added that the site visit was conducted at SP16 and not the area in dispute. Further, that the single Judge's order had not stopped the respondent from mining except exportation. That the appellants are no longer owners of the mineral rights over the said areas and are not mining hence there cannot be any destruction of the subject matter.

5.5 The further contention is that the single Judge injuncted the respondent from externalizing and/or exporting the 12.6 million tons of minerals already extracted in the sum of US$2,400,000,000 as such the deposition by the respondent is wrong and shows a lack of understanding of the facts in issue.

5.6 The deponent further stated that a perusal of the ruling reveals that the case was not decided on the merits and the question of whether OB1 and SP6 were indeed an integral part was not determined. That the ruling showed that the Court granted an injunction to preserve the status quo pending determination of the main matter. In addition, the cases cited by the respondent are materially different to the case at hand which deal with surface rights.

5.7 The further contention is that the issues in the **Kronos** case referred to by the Respondent were settled by consent. That the material circumstances from 2011 have since changed 12 years later. That there is no order from the Supreme Court in relation to this case. That the appellants were not a party to the said action, nor does it stem from the same set of facts to warrant its disclosure. That there was no dispute as to surface rights as in this matter, both surface rights and minerals rights are yet to be determined.

5.8 The further contention is that the appeal before the Court of Appeal has been called to determine the appellant's counterclaim of US$2,400,000,000 which was the monetary claim before the lower Court. That Vedanta Minerals Resources is a foreign company and the majority shareholder of the respondent. That although a liquidator was appointed, this does not alter the shareholding in the company. The further contention is that despite the Mareva injunction, the respondents have continued exporting materials beyond the Court's reach to the detriment of the appellants.

5.9 The appellants repeated the relevant and material facts in support of the Mareva Injunction, that they were granted mining rights under license number 21443-HQ-SEL and artisan mining right 214119-HQ-AMR on 23rd November 2016 and 3rd October 2016 respectively; that the said licenses covered OB1 and SP6 which was located on subdivision c of farm No. 927, Farm 1426 and Farm No. 942 which surface rights were allegedly owned by the respondent and constituting the disputed area.

That regardless of the uncertainty as to the surface rights ownership, the respondent did not own any mineral rights over the said area as that belonged to the appellants, even though the respondent claimed that the materials in the said OB1 and SP6 belonged to them having acquired them from ZCCM in 1990s.

5.10 That further to the above, the respondent then commenced a matter in the High Court for Zambia under cause number 2018/HKC/0030 against the appellants to stop the appellants accessing the area covered by the mineral licenses OB1 and SP6; that the appellant being a mineral rights holder on the said area filed into Court, a defence and counterclaim in the same cause for the protection of its rights and damages for minerals that were extracted by the respondent.

5.11 That the appellants have since appealed the judgment of the lower Court of 26th September 2022 by filing notice of appeal; that the appeal also deals with the payment of the sum of US$2,400,000,000 being the value of the 12 million tons of tenements that the respondent already extracted from its mining area. That notwithstanding the aforesaid, between the period of October 2017 to February 2018 the Mines Development Department compiled a report to the effect that the respondent mined more than twelve million tons valued at approximately US$2,400,000,000 which proceeds are not accounted for by the respondent as they mined on the appellant's mineral area despite being told to stop.

5.12 Further, that the respondent is a company incorporated in Zambia currently in liquidation and having as its majority shareholder, Vendata Resources Plc which is listed on the London Stock Exchange; that Vendata Resources Plc among other shareholders are domiciled in the United Kingdom and the respondent has dissipated and expropriated the revenue earned from its operations in Zambia on the appellants mining area and externalized it, which has resulted in the appellants suffering loss of revenue.

5.13 It is further contended that the minerals mined by the respondent from OB1 and SP6 during the years 2017 to 2020 are the property of the appellants who owned the mineral rights over the property and not the respondent who had no mineral rights over the said area. Therefore, the respondent is truly indebted to the appellants; and that the export of the minerals mined from the appellants' area covered by its license will place the appellants' assets in the hands of foreign entities and therefore it will be impossible to enforce the Courts judgment pending appeal, more so if the appellants are successful.

5.14 The deponent stated that the 1st appellant had undertaken to cover damages should it ultimately be adjudged that the injunction was unnecessary, that the Mareva injunction was not intended to cripple the respondent but meant to ensure that should the appellants be successful the enforcement of the judgment is not rendered academic.

5.15 The appellants further contended that even with the Mareva injunction in place, the respondent has been secretly exporting the extracted minerals in disobedience of this Court, and without it, the respondent will blatantly export to defeat the arms of justice and completely prejudice the appellants' rights.

5.16 That in the circumstances of this case, where the Mareva injunction has only restrained the externalization and/or exporting of the minerals already extracted from the disputed area, it would be a fit and proper case to maintain it as the subject matter will still be in the respondent's custody within jurisdiction.

6.0 Affidavit in reply to affidavit in opposition to Motion to set aside Mareva injunction

6.1 The respondent filed an affidavit in reply on 6th October 2023 sworn by Glory Mwenya Chipoya, Senior Legal Counsel of the respondent. She deposed that the issue of the Mareva injunction being granted ex-parte or inter-parte is moot given this Court's ruling dated 2nd October 2023. Further, that it is only the Court which can determine questions of relevance, adding that the appellants had a duty to make full and frank disclosure of all facts which it deliberately did not do. The deponent contended that it was untrue that the appellants share the same facts and legal issues advancing that the true position is that the 1st appellant held exploration licence No. 29287-HQ-SEL while the 2nd appellant holds an artisans mining licence No. 21419-HQ-AMR.

6.2 The deponent stated that the transfer of the 1st appellant's license to Tubombeshe Minerals Limited is a material fact which ought to have been disclosed especially considering the findings of the Court below as the transfer of the license divested the 1st appellant of any claims including prosecuting this Appeal. The deponent further contended that the rights exercisable under an exploration license are predetermined by law and do not include the extraction of minerals by way of mining hence the Court cannot turn a blind eye to the express provisions of the law.

6.3 The respondent further contended that the production of copper and its by-products, cobalt, pyrite, acid and anode slimes are its chief core business and if it is restrained in the manner envisaged by the Mareva injunction, the consequences would be devastating to including the respondent's inability to operate without exporting. Therefore the ripple effect is that the contactors have to cease operations on the SP6. Further, that the Mareva injunction has also affected the revenue generation of the respondent as it is unable to export and generate incomes from sales which has resulted in the respondent being unable to meet its daily and monthly obligations to its suppliers and contractors on account of lack of income.

6.4 The respondent deposed that by their own admission, the appellants are not owners of the mining rights which is a material fact that ought to have been disclosed to the single Judge of this Court and the distraction of mining operations and invariably destruction of the subject matter is as envisaged in the facts outlined above.

6.5 The respondent deposed that the facts in the case of **Konkola Copper Mines Plc v Kronos Mining Limited and Others** are similar with this case as both relate to the same disputed area and both related to an encroachment upon the respondent's surface and mining rights situate on OB1 and SP6. That the appellants are not seeking to maintain the status quo but to create conditions which are favourable to themselves. The deponent stated that the status quo is that the SP6 area is an active dump and reclamations area for the respondent and is integral to its operations and that has been the case since even before 2011 as was observed by the Supreme Court in the Kronos case. It is therefore not correct to assert that circumstances have changed.

6.6 The respondent deposed that even though the appellants were not a party to the Kronos case, the fact remains that the Supreme Court recognized OB1/SP6 to be the active dump and granted an injunction to that effect which fact cannot be ignored. Further, the appellants ought to have disclosed this information to the single Judge of this Court. Also, that it is an abuse of Court process to attempt to obtain two injunctions over the same subject matter in two different Courts. The deponent contended that though the appointment of a Liquidator does not alter the shareholding of a company, the appellant had stated that the Liquidator was externalizing resources to the shareholders, and this is reflected at page 4 of the ruling granting the Mareva injunction. That this does not constitute the basis for the assertion and the fears of the appellants remain unfounded.

6.7 The respondent contended that the ruling granting the Mareva injunction was express in that it was *'against minerals extracted by the respondent over the mining tenement in dispute herein'*. That the SP6 dump is a crucial source of material for the respondent, but in view of the injunction, the respondent has been compelled under very constrained circumstances to rely on mineral ore from other sources to sustain its operations and mitigate the impact of the consequential default of its contractual obligations with third parties as indicated earlier. That the export permits are therefore in respect of such other sources of ore and not the disputed area. That the respondent's core business is copper productions and the export process is a course of the respondent's business and not an externalization of materials as suggested by the appellants.

6.8 That the appellants are not suffering any prejudice, but on the contrary, the respondent continues to suffer prejudice on account of the Mareva injunction obtained by the appellants. That in relation to the relevant material facts asserted by the appellants in support of the Mareva injunction, the respondent maintained that the 1st appellant's license 21443-HQ-SEL is an exploration license which fact the appellant omitted to disclose. That Judge Pengele did make a finding that an exploration license does not grant any right to extract minerals; that the respondent recognized this fact and attempted to incorporate the 2nd appellant's artisan license 21419-HQ-AMR; that the law prohibits, as the judgment of Judge Pengele at page J35 recognized this position, when it ruled that it *'would be unlawful and a clear contravention of the Act for*

the 1st Defendant to purport to circumvent the provisions of the Act by partnering with the 2nd Defendant', which portion of the judgment the appellant have not appealed against; that the appellant's counterclaims were dismissed in their entirety including the claim for US$2,400,000,000; that the respondent does not need to render an account to the appellants as the materials situate on OB1 and SP6 did not belong to the appellants at any point whatsoever and that in view of the judgment of the High Court, the report filed by the Mines and Minerals Development Department is inconsequential and of no effect whatsoever; and that the respondent has not dissipated or expropriated any revenue earned from operations on the appellant's mining area but on its own mining and surface rights area. The appellants' claims were dismissed, and that the High Court affirmed the respondent's ownership of the OB1 and SP6, that the appellant's idea that the respondent is indebted to it is delusional, given the judgment of the High Court.

6.9 That in view of the foregoing, the respondent reserves the right to enforce the 1st appellant's undertaking as to damages more so that the respondent is in receipt of emailed demands from third parties following the grant of the Mareva injunction. That it is untrue that the respondent has been secretly exporting minerals in disobedience of this Court's order. The respondent has been operating as per its normal course of business and has relied on sources of minerals outside of the disputed area, a fact which the appellant ought to be aware of as they were on site during trial and could not visibly see that the stockpiles (SPs) are more than one. The

deponent deposed that the respondent has fully complied with the ruling granting the Mareva injunction at very high cost.

7.0 Heads of Arguments of the parties

7.1 The parties filed skeleton arguments on diverse dates in support of their respective positions. The same will not be reproduced but referred to where necessary.

8.0 Hearing of the Respondent's Motion and Application for stay

8.1 The parties were heard on 2nd October 2023. Their respective Counsel were in attendance and relied on their requisite affidavits and arguments before Court.

9.0 Analysis and Decision of this Court

9.1 We have carefully considered the evidence on record, the arguments of the parties and the ruling sought to be impugned. By this application, the Respondent's chief contention is the ex-parte ruling granted by the single Judge of this Court on 30 June 2023 effectively granting a Mareva injunction against the minerals extracted by the respondent over the mining in the disputed area.

9.2 In determining this motion, we are mindful that it was brought pursuant to the provisions of **Section 9(b) of the Court of Appeal Act** which provides that:

> ***'A single judge of the Court may exercise a power vested in the Court not involving the decision of an appeal, except that -***
>
> ...
>
> ***(b) in civil matters, an order, direction, or decision made or given in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Court.'***

9.3 From the foregoing provision, it is manifest that a single Judge of this Court can exercise such powers as may be exercised by this Court, but such power cannot be exercised on matters involving the decision of an appeal. It is also clear from the said provision that a decision of a single Judge may be varied, discharged, or reversed by the Court where the Court deems fit.

9.4 In determining the application before us and the grounds thereof, we have examined the provisions of **Section 9(b) of the Court of Appeal Act** in relation to the powers of the full Court to vary or reverse a decision of a single Judge of the Court. An application brought before the full court under **Section 9(b) of the CAR** should be dealt with by way of a rehearing of the application that was before a single Judge. The Judges of the full Court consider the application as a renewed application before them as if coming to them for the first time.

9.5 Therefore, in considering this application and the grounds of appeal thereof, we ought to rehear the application before the single Judge of this Court as a fresh application before us. As stated, the application is before us by way of Notice of Motion filed on 10 August 2023 to set aside the ruling of the single Judge of this Court of 30 June 2023.

9.6 In considering the motion before us, we will deliberate on the application that was before the single Judge for a Mareva injunction which was brought pursuant to **Order VII Rule 1 of the Court of Appeal Rules** and **Order 29 Rules 1 and 2 of the Rules of the Supreme Court (White Book), 1999 Edition**.

9.7 The circumstances under which a Mareva injunction is to be granted have been pronounced in **Order 29 rule L sub rule 36 of the White Book** as follows:

> ***'In an action in which the Plaintiff seeks to recover his property, the Court has jurisdiction to grant an interlocutory injunction restraining the disposal of property over which the Plaintiff has a proprietary claim. The single most significant feature of the Mareva injunction is that it goes beyond this and enables the Court to grant the plaintiff an interlocutory injunction restraining the defendants from disposing of, or even merely dealing with, his assets over which the plaintiff asserts no proprietary claim but which after judgment may be attached to satisfy a money judgment. One of the hazards facing a plaintiff***

in litigation is that, come the day of judgment, it may not be possible for him to obtain satisfaction of that judgment fully or at all. By a Mareva injunction a defendant may be prevented from artificially creating such a situation; a defendant is not to be permitted to thwart in advance orders which the Court may make.'

9.8 The said provision is explanatory that the Courts are empowered to grant a Mareva injunction to prevent a defendant from disposing or transferring assets out of the Court's jurisdiction, to avoid enforcement of any succeeding judgment.

9.9 The origins of a Mareva injunction stem from the case of **Mareva Compania Narva SA v International Bulk Carriers SA**[2] where Lord Denning MR set out the circumstances under which such injunctions would be granted. The holding of the Court in that case was as follows:

'If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of this asset so as to defeat it before the judgment, the Court has jurisdiction in a proper case to grant an interlocutory injunction so as to prevent him disposing of those assets.'

9.10 The above authority illuminates the test for the grant of a Mareva injunction. The legal principles and conditions that a party seeking a Mareva injunction must establish before Court are that there appears to

be a debt due and owing, and there must exist a real danger that the debtor may dissipate or dispose of the assets to defeat any judgment that the Court may grant in favour of the applicant.

9.11 From this case, we have since upheld the principles from the Mareva case in this jurisdiction. Our learned brothers Mutuna J and Kajimanga J sitting independently as High Court Judges did so in the cases cited below, the cases of **Adriatic Transport Limited. V Fratelli Loci S.R.I Limited**[3] and **Costain Simamba V Admac Carmichael Limited, Allan Palmer**[4] affirmed that in order to succeed in a claim for a Mareva injunction, an applicant ought to satisfy the Court that *'there must be a debt due and owing, and there must exist a danger that the debtor may dissipate or dispose of his assets so as to defeat any judgment the Court may grant in favour of the plaintiff'*.

9.12 In this regard, the first issue for consideration of the application is whether there appears to be a debt due and owing to the appellants by the respondent. The appellants contended in their application before the single Judge that they were granted mining rights by the Ministry of Mines and Minerals Development under license No. 21443-HQ-SEL and artisan mining rights No. 214119-HQ-AMR on 23 November 2016 and 3 October 2016 which covered OB1 and SP6 located on Subdivision C of Farm No. 927, Farm No. 1426 and Farm No. 942.

9.13 The further contention of the appellants is that the respondent claim to own the said three properties and the surface rights having acquired the

land from ZCCM and therefore have denied the appellants access to the land. That the dispute between the appellants and the respondent in relation to the rights to OB1 and SP6 was determined by the High Court in favour of the respondent who had lodged an appeal before this Court.

9.14 The appellants further contended that the respondent had extracted minerals from the appellants mining area from October 2017 and February 2018 which the respondent had not accounted for, and involving 12 million tons of tenements valued at US$2,400,000,000. The above is the evidence upon which the single Judge granted the Mareva injunction against the respondent.

9.15 In response to this application, the respondent confirmed that the action between the parties brought in the Kitwe High Court in relation to the same tenement was concluded on 26 September 2022 with a finding of the Court that the respondent is the legal owner and occupier of the surface rights over the three properties where OB1 and SP6 are located. The Court further granted the respondent a permanent injunction against the appellants over the area.

9.16 The respondent further contends that the 1st appellant had in any event transferred its Small-Scale Exploration license to a company called Tubombeshe Mining Limited on 1 November 2022 and that subsequent actions with this new entity have been ongoing in relation to the same tenement. That the said company had instituted an action in the Kabwe High Court and secured an injunction which was subsequently

discharged, and the action discontinued. The contention of the respondent is that the 1st appellant and Tubombeshe Miniing Limited entity are abusing the court system with multiple actions over the same tenement. The issue relating to ownership of OB1 and SP6 is the subject of an appeal before this Court.

9.17 In considering whether to uphold the grant of the Mareva injunction, it is essential to consider whether it appears that the appellants have a good arguable case that the debt is due and owing to it by the respondent. From the evidence on record, it is undisputable that the respondent is the legal owner of the land upon which OD1 and SP6 are situated to which the appellants claim to have mining rights. Given, that the lower Court has already adjudged that the contested dumps belong to the respondent having purchased the same from ZCCM sometime back, the contention that there can be any subsisting debt owed to the appellants from the respondent in relation to mining rights over the said area is doubtful.

9.18 The second ingredient is whether there exists any risk of default of the respondent escaping or disposing of its assets to defeat any judgment that the Court may grant in favour of the appellants.

9.19 On this question, the Court stated in the case of **Third Chandris Shipping Corporation and Others v Unimarine SA**,[5] as follows:

> ***'The mere fact that a defendant having assets within the jurisdiction of the Commercial Court is a foreigner or a foreign***

corporation cannot, in my judgment, by itself justify the granting of a Mareva Injunction.

There must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from jurisdiction.. what they have to do is to find out all they can about the party with whom they are dealing, including origins, business domicile, length of time in business, assets and the like, and they will probably be wary of the appearance of wealth which are not backed by known assets. In my judgment the Commercial Court should approve applications for Mareva injunctions in the same way. Its Judges have special experience in commercial cases, and they can be expected to identify likely debt dodgers as well as probably better than, most businessmen. They should not expect to be given of previous defaults or specific incidents of commercial malpractice. Further they should remember that affidavits asserting belief in, or the fear of, default have no probative value unless the sources and grounds thereof are set out: see **RSC** *Order 4, r5 (2). In Judgment an affidavit in support of a Mareva injunction should give enough particulars of the Plaintiff's case to enable the Court to assess its strength and should set out what enquiries have been made about the Defendant's business and what information has been revealed, including that relating to its size, origin, business domicile, the location of its known assets and the circumstances in which the dispute has arisen. These*

facts should enable a commercial Judge to infer whether there is likely to be any real risk of default.

Default is most unlikely if the defendant is a long-established, well-known foreign corporation or is known to have substantial assets in countries where English judgments can easily be enforced under the Foreign Judgment (Reciprocal Enforcement) Act 1933 or otherwise. But if nothing can be found out about the defendant, that by itself may be enough to justify a Mareva injunction.'

9.20 By virtue of the foregoing, an applicant seeking a Mareva injunction is required to provide sufficient facts and particulars for a Court to establish whether there is a real danger of dissipation of assets or whether there is likely to be any real risk of default. These particulars include enquiries made into the Defendant's business, size, origin, domicile, and location of known assets.

9.21 In support of the Mareva injunction, the appellants also contended that the respondent had dissipated and expropriated revenue from its operations which had resulted in the appellant losing revenue because of the respondents exporting minerals to foreign entities. The appellants have not asserted that the respondent was about to dissipate its assets to defeat any judgment of the Court, nor did they prove there was any risk of default.

9.22 Given the foregoing, we take the view that the application of the appellants fell short of the requirements for the grant of a *Mareva* Injunction as there was no real danger that the respondent would dissipate or dispose of its assets to evade an ensuing judgment against it.

9.23 Turning to consider the grounds upon which the appellants sought to set aside the said ruling of the single Judge, namely that: the appellants did not make full and frank disclosure of all material facts including the fact that it has transferred its license to an entity called Tubombeshe Mining Limited; that the question of an injunction is a subject matter of the appeal and ought not to have been determined by a single Judge; that it is not legally tenable for the appellants to have any proprietary interest in the materials situate on SP6 as it merely holds an exploration license; and that there was no danger of assets being removed from jurisdiction.

9.24 We have perused the affidavit evidence before us. From the affidavit in reply, it is clear and not in dispute that there is currently an appeal pending before this Court against a decision of the Kitwe High dated 26th September 2022 involving the same parties as subsist herein. This evidence is to be found in the affidavit in reply filed on 6 October 2023 by the respondent where exhibit GMC is a memorandum of appeal to that effect filed sometime in October 2022. Of further significance to this application is ground 10 of appeal in the said memorandum which reads as follows:

"The Court below erred in law and in fact when it proceeded to grant the Respondent a permanent injunction against the appellants on tenement where the appellants have valid licences without addressing the fate of the appellants' licences".

9.25 From the foregoing, it is easy to see and agree with the respondent that the appellants did not make full and frank disclosure of all material facts in the application they made before the single Judge. Further, the aforesaid account of facts demonstrates the appellants resolve to abuse Court process by countering the specific issues pending before appeal with an independent ex-parte application for a Mareva injunction before the single Judge of this Court even when the order of stay of execution had been granted to preserve the status quo of the parties, a situation which would potentially lead to two conflicting decisions from this Court.

9.26 The trial Court had granted a permanent injunction against the appellants yet stayed its judgment pending appeal, but the appellants proceeded to apply for a Mareva injunction against the respondent from the single Judge of this Court without disclosing the said facts, which we consider to be material to the application that had been made before the single Judge.

9.27 Furthermore, though a permanent injunction and a Mareva injunction maybe premised on different legal principles, the resulting effect in the circumstance of this case is the same. Examination of the evidence before

us reveals that the appellants where themselves presenting an issue subject of an active appeal before a single Judge, which is not tenable as shown in the earlier part of our ruling.

9.28 We have arrived at this conclusion upon scrutinizing the grounds of appeal as presented in the memorandum of appeal filed somewhere in October 2022 and exhibited as GMC 3 in the affidavit in reply of this motion. Particularly, ground 10 of the said memorandum challenges the grant of permanent injunction by the trial Court over disputed areas, OB1 and SP6, yet the appellants still went ahead to present an application for Mareva injunction before a single Judge over a subject matter that is actively pending determination by the Court, which fact was not disclosed before the single Judge, nor that the judgment of the trial Court had been stayed.

9.29 Mareva injunctions are ordinarily used to prevent a defendant from disposing of its assets or taking assets out of jurisdiction, once an action is served, so as to avoid enforcement of a judgment. Considering all the foregoing, we take the view that this is not a proper case to warrant the grant of a Mareva injunction in favour of the appellants. The ruling of the single Judge of 30 June 2023 is set aside forthwith for the reasons given above.

9.30 It also follows that the respondent's application to stay execution of the ruling granting the Mareva injunction falls away and is dismissed accordingly.

10.0 Conclusion

10.1 The ruling of the single Judge of 30 June 2023 having been set aside, and the respondent having substantially been successful, we order and direct that costs of these applications be borne by the appellants, to be taxed in default of agreement.

C.F.R Mchenga
DEPUTY JUDGE PRESIDENT

A.M. Banda-Bobo
COURT OF APPEAL JUDGE

N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE