

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

2011/HPC/0023

BETWEEN:

ELMAR ENGINEERING LIMITED

PLAINTIFF

AND

ALLEGRA MINING ZAMBIA LIMITED

DEFENDANT

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 13th DAY OF JULY, 2011

For the Plaintiff : Mr. Madaika of Simeza Sangwa & Associates
For the Defendant : Mr. P. Chungu Ranchod Chungu Advocates

RULING

Cases referred to:

- 1. *Smith -VS- Peters (1895) LR.***
- 2. *Bank Mellat -VS- Nikpour (1985) Com. L.R. 158.***
- 3. *R -VS- Kensington Insurance Tax Commissioners Ex-parte Polynac (1917) 1KB 486.***
- 4. *Third Chandris Corporation -VS- Unimarine SA (1979) QB 645.***
- 5. *London and Blackwall RY -VS- Cross (1886) 31 Ch D 345.***
- 6. *Aristogerasimos Vangelatos -VS- Demetre Vangelatos, Detective Constable Chishimba and V.B. Malambo (Partner Malambo and Company) (2005) ZR 132.***
- 7. *Mareva Compania Navera SA -VS- International Bulkcarriers SA (1980) 1 ALL ER page 213.***

Other authorities referred to:

- 1. Supreme Court Practice, 1999, Volume 1.**
- 2. Halsbury's Laws of England third edition, Volume 21 page 343.**
- 3. Commercial Litigation: Preemptive Remedies, third edition Sweet and Maxwell 1997 page 207.**

On 13th May, 2011, I granted an ex-parte order for a *mareva* injunction in favour of the Plaintiff against the Defendant. The matter came up on inter parte hearing on 8th June, 2011. The relief sought by the Plaintiff as endorsed in the summons is as follows;

- “(i) *The Defendant whether by itself, its servants or agents or any of them or otherwise howsoever be restrained from removing from the jurisdiction or in any way dealing with or diminishing the value of any of its assets whether held in its own name or not and whether solely or jointly owned;*
- (ii) *The Defendant whether by itself, its servants or agents or any of them or otherwise howsoever be restrained from disposing of, assigning, charging or otherwise dealing with any of its assets within the jurisdiction whether held in its own name or not and whether solely or jointly owned; and*
- (iii) *The Defendant do cause to be sworn and filed into Court within 7 days from date of the Order an affidavit in which it discloses all its assets (including bank accounts) whether held in its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets and exhibiting all documents to evidence ownership, custody or control.”*

The affidavit in support was sworn by one Elizabeth Grobbelaar and it began by highlighting the business relationship between the two parties. It went on to state that certain third parties had obtained an injunction against the Defendant which undermined the relationship of the two parties and put the equipment which is the subject of this dispute at risk. This prompted the

Plaintiff to remove some of the said equipment from the Defendant's premises to a safe place. The deponent went on to state as follows in relation to the status of the Defendant; it does not have substantial assets in Zambia to enable it satisfy any judgment that may be entered in favour of the Plaintiff; it is merely a subsidiary controlled, financed and operated by the main company in Australia; it has no permanent status in Zambia and it carries out its mining operations using a third party's licence; and the Defendant's bank account is with Standard Chartered bank and it is now almost dissipated. She also listed the assets held by the Defendant in Zambia.

The affidavit in opposition was sworn by one Kenneth James Fitzgerald and it revealed as follows; that the Defendant is not indebted to the Plaintiff; the subject matter for which this injunction is sought is restrained under cause number 2010/HP/1155; the Defendant is a Zambian company incorporated under the laws of Zambia and it operates independently. It has not operated anywhere else other than Zambia; the Defendant does not own motor vehicles ABZ 4365 and ABZ 3755, nor does it own any quad bike; the Defendant's account with Standard Chartered Bank is not depleted; and the Plaintiff has not made full and frank disclosure of the Defendant's assets and has only made insufficient inquiry on the subject.

When the application came up for hearing, counsel for the two parties not only relied on the skeleton arguments filed but they also made verbal submissions. Mr. Madaika for the Plaintiff began by stating that the application was anchored on order 29 rule L subrule 35A of the **Supreme Court Practice (white book)**. He went on to highlight the relief sought as endorsed in the summons and the grounds upon which it was sought, being that; the Defendant had no permanent status in Zambia and merely operates through a third party; and the Plaintiff is not aware of any fixed assets nor other investments other than those disclosed, belonging to the Defendant. It

was therefore argued that there was need for the grant of the order sought in order to preserve the property otherwise the Plaintiff would suffer irreparable injury in the event of success. This it was argued would ensure administration of Justice within the inherent jurisdiction of the Court so that any judgment this Court would render would be enforceable. My attention in this respect was drawn to Practice Note 29/1A/0 under Order 29 rule 1A of the **white book** and the case of **Smith -VS- Peters (1)**.

The second limb of counsel for the Plaintiff's argument related to assets disclosure. It was argued that this Court has a discretion to grant an order for assets disclosure in circumstances such as this where an order of injunction had been granted. My attention in this respect was drawn to order 29 rule 1A of the **white book**.

Mr. P. Chungu for the Defendant advanced his submissions on three limbs. The first limb was that since the relief sought was an equitable one, the Plaintiff was obliged to come to Court with clean hands. It was argued that in obtaining the *ex parte* order the Plaintiff misrepresented in certain facts and withheld material facts. Counsel went on to highlight the misrepresentation of facts as being those relating to the Defendant's alleged assets and the status of the Defendant's account.

In the second limb, counsel addressed the need for full and frank disclosure on the part of the Plaintiff in making the application. My attention in this respect was drawn to the cases of **Bank Mellak -VS- Nikpour (2)**, **R-VS-Kensington Insurance Tax Commissioners Ex parte Polignac (3)** and **Third Chandris Corporation -VS- Unimarine SA (4)**. It was argued in this respect that there was non disclosure in respect of the amounts in the Defendant's bank account. Further that, there was no frank disclosure that the vehicles did not belong to the Defendant.

The third limb of counsel's argument related to damages and irreparable injury. It was argued that the Plaintiff is not entitled to the relief sought as the injury it is bound to suffer can easily be atoned in an award of damages. In arguing this ground counsel made reference to the case of ***London and Blackwell RY -VS- Cross (5)*** and ***Aristogerasimos Vangelatos -VS- Demetre Vangelatos, Detective Constable Chishimba and V. B. Malambo (Partner Malambo and Co) (6)***.

The fourth limb of counsel's argument was to the effect that the purpose of an injunction is to maintain the status quo. By this application it was argued, the Plaintiff intended to do the exact opposite. Therefore, the Court should not grant the order. Reliance was made on ***Halsbury's Laws of England***, third edition, in articulating this argument.

In counsel's concluding remarks, he drew my attention to the six-hurdle test that must be satisfied for one to be entitled to a *mareva* injunction. In doing so he made reference, ***Commercial Litigation: Pre-emptive Remedies*** third edition. It was argued that the Plaintiff had failed to satisfy most of the tests laid down therein.

Before I determine this application it is important that I state what my task is at this stage of the proceedings. It is simply this that, I have to determine if this is a proper case for the grant of a *mareva* injunction. I am not at this stage called upon to determine the merits and demerits of the matter as that is reserved for the full trial of this matter. I am prompted to make the foregoing comment because in both the evidence and arguments the parties have gone to great length at addressing me on their respective positions as they relate to the main claim before me.

The circumstances under which a *mareva* injunction will be granted have been aptly stated under order 29 rule L subrule 36 of the **white book**. The said order states thus;

“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 jurisdiction is that it goes beyond this and enables the Court to grant the Plaintiff an interlocutory injunction restraining the Defendant from disposing of, or even merely dealing with, his assets, being 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.”

Further its origins are in the ***Mareva Compania Navera SA -VS- International Bulk-Carriers SA (1)*** case, where Lord Denning MR had this to say at page 215 in respect of what instances such injunctions will be granted in;

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

(The underlining is the Court’s for emphasis only).

It is evident from the foregoing authorities that the test is 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.

The question, whether or not there is a debt due and owing is left for the main hearing. For now it is safe to say that the endorsement in the summons suggests that this is the position. Regarding the second test, the arguments advanced are that the Defendant has no meaningful existence in Zambia as it is funded and operated by a foreign entity. Also that it is carrying out its operations through a third party's licence. Further, that any judgment that this Court may grant in favour of the Plaintiff may not be satisfied as the Defendant does not have sufficient assets to meet the judgment and is dissipating its bank account held at Standard Chartered Bank.

The first argument alleging the Defendant's lack of presence does not have the support of Order 29 rule L subrule 35A of the **white book** and the **Mareva (7)** case as that is not one of the criteria laid down for the grant of such an injunction. In arriving at the foregoing finding I am alive to the holding in the case of **Third Chandris Shipping Corporation and Others -VS- Unimarine SA (4)** in which the Court stated *inter alia* 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 the 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 of 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, r.5 (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, origins, 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."

(Underlining is the Court's for emphasis only).

It is clear from the foregoing that the fact that a company is a foreign company does not in and of itself entitle a person claiming a debt against it to a *mareva* injunction. There must be something more in the form of real danger of dissipation of assets.

The second argument alleges a fear of dissipation of assets by the Defendant. In making the said allegations, the Plaintiff does not specify its source of the information or the basis of the fear. This falls far short of the test laid down in the ***Third Chandris (4)*** case for the need for affidavits to set out the sources and grounds to enable the Court to assess its strengths. There has been a lack of proper investigation by the Plaintiff not only into the status of the Defendant's assets but also their composition. This is evident from the fact that the Plaintiff alleged ownership of certain vehicles by the Defendant which are properties of third parties. (see exhibits "KF2" and "KF3" to the affidavit in opposition. There is, in my considered opinion, no proof whatsoever that the Defendant is about to dissipate its assets.

Regarding the issue of an assets disclosure affidavit, counsel for the Plaintiff argued that where an injunction is granted such as in this matter, the Court can go ahead and order the filing of an assets disclosure affidavit. Reliance was made on Order 29 rule 1A of the ***white book***.

Order 29 rule 1A of the ***white book*** states as follows;

"Cross -examination of assets disclosure affidavit

Where -

- (a) The Court has made an order restraining any party from removing from the jurisdiction of the High Court, or otherwise dealing with, any assets.***

(b) That party has in compliance with the order, or any order made in connection with it, filed affidavit evidence as to his or any other assets, and

(c) The Court has ordered that that party shall be cross-examined on his affidavit,

The Court may order that the cross-examination shall be conducted otherwise than before a judge, in which case the cross-examination shall take place before a master or, if a master so orders, before an examiner of the Court.”

It is clear from the foregoing order that it make provision for an applicant to cross examine a party against whom a restraining order has been granted preventing him from removing his assets from jurisdiction, on his affidavit evidence. It does not make provision for the ordering of the filing of an assets disclosure affidavit.

In view of what I have stated in the preceding paragraphs, I find that this application lacks merit and I accordingly dismiss it. Consequently the *ex parte* order granted on 13th May, 2011 is discharged. I also award costs the Defendant.

Leave to appeal is granted.

Delivered on the 13th day of July, 2011.

Nigel K. Mutuna
HIGH COURT JUDGE

