IN THE HIGH COURT OF ZAMBIA **2010/HPC/322**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

COSTAIN SIMAMBA **PLAINTIFF**

AND

ADMAC-CARMICHAEL LIMITED **1ST DEFENDANT**
ALLAN PALMER **2ND DEFENDANT**

BEFORE THE HON. MR. JUSTICE C. KAJIMANGA IN CHAMBERS THIS 22ND DAY OF JUNE, 2011.

FOR THE PLAINTIFF: Mr. M. Chiteba, Messrs Mulenga Mundashi & Co.

FOR THE DEFENDANTS: Mr. K. Katai, Messrs KCK & Associates
and Mr. K. Bwalya, Messrs D. H. Kemp & Co.

R U L I N G

Cases referred to:

1. Z Limited v A and Others [1982] ALL ER 556
2. Third Chandris Shipping Corporation and Others v Unimarine SA [1979] 2 ALL ER 972
3. Polly Peck International Plc v Nadir & Others (No. 2) [1992] 4 ALL ER 769

4. Mareva Compania Navera SA v International Bulkcarriers SA [1980] 1 ALL ER 213

This is an application by the Plaintiff for an order of Mareva injunction to freeze the Defendants' assets both within and outside the jurisdiction of this Court and restraining the Defendants from dealing with or disposing of any of the said assets pending trial of this matter. The application is supported by an affidavit sworn by the Plaintiff which discloses that on 5th June, 1996 the 1st Defendant entered into a contract ("the first contract") with the Ministry of Communications and Transport ("the MCT") for the supply by the 1st Defendant of 6 No 4 x 4 fire tenders and 2No 6 x 6 fire tenders (see exhibit "CS1"). The first contract was only partly performed with the 1st Defendant having delivered two fire tender trucks and the MCT having paid the sum of £849,948.80 for them. The 1st Defendant through its agent, the 2nd Defendant, approached the Plaintiff and engaged him as a debt collector to renegotiate the first contract in order to ensure completion of performance by the 1st Defendant and the MCT via an e-mail dated 1st June, 2009 (see exhibit "CS2"). According to the said e-mail the Plaintiff was supposed to be paid for his services for successfully concluding the first contract in advance of payment by the MCT to the 1st Defendant.

The Plaintiff's affidavit in support also discloses that as part of his mandate to renegotiate and ensure completion of performance of the first contract, the 1st Defendant acting through the 2nd Defendant authorized him to retain lawyers to deal with the legal issues arising out of the first contract on a separate fee from his fees for debt collection (see exhibit "CS3"). In line with his mandate, the Plaintiff advised the Defendants to appoint Ellis & Company as legal advisors for the renegotiation of the first contract, which they did. The Plaintiff proceeded to enter into negotiations with the MCT for the completion of performance of the first contract by the 1st Defendant and

the MCT. Arising from the negotiations which the Plaintiff undertook with the MCT on behalf of the 1st Defendant, the MCT executed a supplemental agreement to the first contract for £7,500,000.00 (see exhibit "CS4"). In line with the mandate given to him by the 1st Defendant, he issued a fee note to the 1st Defendant on 12th April, 2010 in the sum of £2,016,000.00 in respect of the services that he had rendered (see exhibit "CS5"). The Plaintiff has made numerous representations to the Defendants for them to settle his fee note but they have refused, failed and/or neglected to settle the said fee note. Following the 1st Defendant's failure to settle his fee note, he commenced an action before this Court on 18th May, 2010 seeking payment of the fee note together with interest and costs.

The Plaintiff's affidavit in support further discloses that the Plaintiff has been advised by his advocates and verily believes the same to be true, that given the circumstances of this case, he has a good arguable case on his substantive claim before this Court. The Plaintiff is aware that the 1st Defendant is a body corporate incorporated and domiciled in the United Kingdom and the 2nd Defendant is also domiciled in the United Kingdom. Owing to the fact that both Defendants are domiciled outside the jurisdiction of this Court, they are unlikely to have sufficient assets within Zambia to satisfy his claim if this Court were to find in his favour with respect to his claim. If unrestrained, there is a real risk that the Defendants shall dissipate any assets they have both within and outside the jurisdiction of this Court and they may as a result render any judgment he may obtain nugatory.

The affidavit in support also discloses that following execution of the supplemental agreement by the 1st Defendant and the MCT, the Plaintiff is now aware that the 1st Defendant is about to be paid any time from now by the MCT for the supply of the remaining tenders outlined in the said agreement. According to the information he has received, the process of paying the Defendants by the MCT is now at an advanced stage. In terms of

clause (e) of the supplemental agreement, the MCT is supposed to pay the contract sum into the bank account of Ellis & Company held at Standard Chartered Bank, Cairo Road branch in Lusaka. If the Defendants are allowed to deal with or dispose of the said funds once they have been deposited in the said bank account or paid to them any where else (whether within or outside Zambia) the Plaintiff will likely be unable to enforce any judgment that may be passed by this Court if the judgment is passed in his favour, as the Defendants do not have any assets within the jurisdiction of this Court. The Plaintiff craves the indulgence of this Court to grant an interim order of Mareva injunction freezing the Defendants' assets both within and outside the jurisdiction of this Court and restraining the said Defendants from dealing with or disposing of any of the said assets pending the trial of this matter.

The Defendant's affidavit in opposition sworn by David Samutela, the 1st Defendant's authorized representative in this matter discloses that on 5th June, 1996 the 1st Defendant entered into a contract with the MCT for the supply of fire tenders. The 1st Defendant never failed to perform the contract as alleged by the Plaintiff but the MCT failed to pay the contract price for the manufacture of all fire tenders. The e-mail dated 1st June, 2009 does not constitute a letter of appointment and any inference to this by the Plaintiff as forming a binding obligation is erroneous. The said e-mail clearly states that the parties have to come up with a deal acceptable to both of them. As far as the 1st Defendant is concerned no such agreement was reached.

The affidavit in opposition also discloses that contrary to paragraph 9 of the Plaintiff's affidavit in support, the 1st Defendant did not authorize the Plaintiff to retain lawyers. The 1st Defendant itself retained the services of Ellis & Company to act on its behalf in the negotiation with the MCT as per the power of attorney (exhibit "DS1"). The letter from the 1st Defendant dated 22nd December, 2009 (exhibit "DS2") clearly states that they would only deal with Ellis & Company and not third parties. Confirmation of this

was made by Ellis & Company in its e-mail dated 23rd December, 2009 (exhibit "DS3") in which they stated that they had not received any instructions from a third party. The Plaintiff's assertion in paragraph 11 of his affidavit is also misleading as the only party with the mandate to negotiate the contract on behalf of the 1st Defendant was Ellis & Company. The supplemental agreement exhibited by the Plaintiff in his affidavit was drafted by Ellis & Company, further confirming that they were the ones mandated to act on the 1st Defendant's behalf. There is no correspondence from the Plaintiff to the MCT to prove that he ever participated in any negotiations on behalf of the 1st Defendant.

The affidavit in opposition further discloses that in his affidavit, the Plaintiff has also exhibited a bill wherein he describes himself as the principal agent in renegotiating the contract with the MCT but there is evidence before Court that he was not the duly appointed agent but Ellis & Company were. In his pleadings, the Plaintiff also referred to himself as a debt collector, a consultant and a negotiator, clearly indicating that he was unsure as to the role he performed if at all in the transaction. The Plaintiff is merely attempting to gain undue pecuniary enrichment from a transaction in which he had minimal involvement.

The affidavit in opposition also discloses that the contract between the 1st Defendant and the MCT was specific in the manner the money to be paid to the 1st Defendant was to be used, namely, for the manufacture and delivery of the remaining six fire tender trucks to the MCT, a fact known to the Plaintiff. The said contract has been in abeyance for a period in excess of ten years. If the Court were to award the injunction sought by the Plaintiff, the party to suffer loss would be the MCT who are not a party to this matter and would therefore be unable to enforce their rights of specific performance of the contract executed between them and the 1st Defendant. If the Court were to award a mareva injunction it would be a grave injustice considering

the fact that the contract price is yet to be paid after thirteen years and there is no guarantee that payment would be made as alluded to by the Plaintiff. The Plaintiff has not provided proof that he would suffer irreparable damage if the injunction was not awarded or has he made an undertaking as to damages the 1st Defendant would suffer.

The Plaintiff's affidavit in reply discloses that the Plaintiff was approached and engaged as a debt collector by the 1st Defendant through the 2nd Defendant at the recommendation of one David Samutela via an e-mail dated 1st June, 2009 (see exhibit "CS1"). In that e-mail the said David Samutela recommended to the 2nd Defendant that the 1st Defendant should write a letter to the MCT appointing him as debt collector for the contract between the 1st Defendant and the MCT. It is clear from the said e-mail that the 1st Defendant has failed to finalise the first contract and therefore required the Plaintiff's services to finalize the same and ensure its enforceability. Following his appointment by the Defendants, he advised them to appoint Ellis & Company as legal representatives to deal with the legal issues that were likely to arise in relation to finalization of the first contract. By e-mail dated 3rd June, 2009 the 2nd Defendant confirmed to him that his fees would be separate and distinct from any legal fees arising out of the transaction. On 10th June, 2009 the 2nd Defendant wrote to Mr. Bonaventure Mutale, SC of Ellis & Company confirming that the revised contract price would include their legal fees and the Plaintiff's fees separately (see exhibit "CS3").

The affidavit in reply further discloses that on 23rd June, 2009 a meeting was held at the offices of Ellis & Company, attended by Mr. Bonaventure Mutale, SC and Mr. Likando Kalaluka both of Ellis & Company, David Samutela, Brian Wiggins, the sales director of the 1st Defendant company and himself. At that meeting it was agreed that the Plaintiff would negotiate for a revision of the contract price for the first contract to take into

account the escalation clause contained therein and that once that figure had been ascertained and if he negotiated a final contact price higher than that figure incorporating the price escalation, he would be entitled to the balance payable over and above the invoice issued by the 1st Defendant to the MCT (see exhibit "CS4" being a copy of the minutes of the said meeting). On 25th June, 2009 the 1st Defendant wrote a letter to Ellis & Company confirming the resolutions of the meeting of 23rd March, 2009 (see exhibit "CS5"). It is clear from page 2 of exhibit "CS5" that local charges of £1,220,000.00 were to be added to the total contract figure of £3,733,734.00 to be presented to MCT for the purpose of negotiations, bringing the proposed figure to £4,953,734.00. It is also clear from the said letter that if a figure above the price of £4, 953,734.00 was negotiated and agreed with the MCT, the premium would be apportioned on 50/50 basis between Ellis and Company who were to hold the funds inclusive of local costs in Zambia and the 1st Defendant.

The affidavit in reply also discloses that in line with the mandate given to him by the Defendants, the Plaintiff in conjunction with Ellis and Company, renegotiated the first contract with the MCT and the negotiations culminated into a supplemental agreement being executed between the MCT and the 1st Defendant on 8th December, 2009 at a contract price of £7,500,000.00 (see exhibit "CS6" being a copy of minutes of the meeting held on 15th October, 2009). It is clear from the minutes of the said meeting that David Samutela, Brian Wiggins and the 2nd Defendant were all in attendance. The Plaintiff discharged his mandate as soon as the MCT executed the supplemental agreement on 8th December, 2009 and he was entitled to payment at that point. Following execution of the supplemental agreement, the Plaintiff had a meeting with the 2nd Defendant on 15th December, 2009 at which the latter confirmed that the Plaintiff's fees would be paid separately from those of Ellis and Company (see exhibits collectively marked "CS7" being copies of e-mails from the Defendants).

The affidavit in reply further discloses that in terms of clause (e) of the supplemental agreement the MCT was supposed to pay the entire contract sum of £7,500,000.00 to Ellis & Company who were only entitled to their legal fees in the sum of £185,000.00 which they are claiming before this Court under cause number 2010/HPC/259. As a principal consultant for the finalization of the contract, the Plaintiff was entitled to 50% of the gain from the initial contract figure which was to be proposed to the MCT in the sum of £4,953,734.00 to the final contract figure in the supplemental agreement of £7,500,000.00. A letter from Rockshield International, a company in which David Samutela is managing director, to Ellis & Company and copied to the Plaintiff (exhibit "CS8") clearly states that debt collection fees were to be separate and distinct from legal fees.

The affidavit in reply also discloses that in an e-mail of 15th March, 2010 addressed to him and Mr. Bonaventure Mutale, SC, the 1st Defendant through the 2nd Defendant purported to terminate his mandate as well as that of Ellis & Company, stating that the 1st Defendant was entitled to do so under the agreement (see exhibits collectively marked "CS9". The agreement referred to in the said exhibits does not provide for termination of the agreement. It is clear from the foregoing that David Samutela is not being truthful in his affidavit when he states that the Plaintiff had minimal involvement in this transaction when he was the one who recommended the Plaintiff's services to the Defendants and was privy to all the arrangements pertaining to the revival of the first contract wherein he was the principal player.

The affidavit in reply further discloses that the 1st Defendant is a foreign based company with no assets in Zambia and the 2nd Defendant is a foreign national who is not resident in Zambia and with no assets within the jurisdiction of the Court. As a result of the Plaintiff's anticipated failure to enforce any judgment that this Court may make in his favour, he stands to

suffer irreparable harm if his application for an interim Mareva injunction is not granted.

The affidavit in reply also discloses that contrary to the impression created by David Samutela that the sum of £7,500,000.00 is to be used for manufacturing six fire tenders, the cost inclusive of the 1st Defendant's profit is only £3,733,734.00 as stated on page 2 of exhibit "CS2". The Plaintiff's application for a Mareva injunction does not relate to the entire contract price of £7,500,000.00 but only to the sum of £2,500,000.00 which covers his claim, interest and costs. The draft order drawn by his advocates contains an undertaking as to damages made by him in the event that the Court later forms an opinion that the order of Mareva injunction was wrongly granted.

On behalf of the Plaintiff, Mr. Chiteba submitted that the requirements for an interim Mareva injunction are set out in Order 29/L/65 of the Rules of the Supreme Court (White Book), 1999 edition as follows: that the plaintiff has a good arguable case; that the Plaintiff has satisfied the Court that there are no sufficient assets in the jurisdiction to satisfy the claim and that there are assets outside jurisdiction; and that there is a real risk of dissipation of the defendant's assets so as to render any judgment the plaintiff may obtain nugatory.

Counsel contended that it is clear from the Plaintiff's affidavit evidence that he has a good arguable case as there is a demonstration that he was engaged by the Defendants in specific terms which provided for his being compensated upon successful conclusion of the contract between the 1st Defendant and the MCT. Mr. Chiteba also submitted that the Defendants do not have assets within the jurisdiction but are in the United Kingdom. He also submitted that there was a real risk of dissipation of the Defendants' assets such as to render any judgment in favour of the Plaintiff nugatory and the Court was referred to Clause (e) of the supplemental agreement which

provides that the proceeds would be paid into the account of Ellis & Company. It was his submission that if the Defendants were allowed to deal with the proceeds of the contract to be deposited into the account of Ellis and Company these proceedings may be rendered an academic exercise. Counsel accordingly prayed that the application be granted with costs to the Plaintiff.

On behalf of the Defendants, Mr. Katai submitted that the Plaintiff's advocates have failed to provide proof that the Defendants' assets will be dissipated and that there are no assets within jurisdiction. Counsel also wondered how the contract between the 1st Defendant and the MCT, the two e-mails and the supplemental agreement exhibited by the Plaintiff would necessitate the awarding of a Mareva injunction. Mr. Katai submitted that it would be a travesty, if a Mareva injunction was awarded on the strength of a contract and its performance by a third party.

Mr. Katai further submitted that the undisputed evidence of the Defendants was that the 1st Defendant was a multinational company and that it would be able to meet its obligations if judgment in the main cause was awarded in favour of the Plaintiff. He also argued that the Plaintiff has not given any undertaking as to damages which would ensue if the Mareva injunction was awarded.

It was Mr. Katai's submission that he could confidently state that the possibility of the contract between the 1st Defendant and the MCT which the Plaintiff seeks to rely, continuing for another thirteen years was high. Counsel accordingly argued that it would be wrong for this Court to award a mareva injunction which may be imposed against the 1st Defendant for an indefinite period. He accordingly urged the Court to dismiss the Plaintiff's application.

Also on behalf of the Defendants, Mr. Bwalya submitted that the Plaintiff has applied for a freezing order to apply within Zambia and world wide. He argued that if such an order were to be granted it would have consequences not only in Zambia but world wide. Mr. Bwalya also contended that it is not sufficient in an application for a Mareva injunction to submit that the applicant has a good arguable case; there must be a likelihood of the applicant succeeding in the main action. Counsel referred the Court to the affidavit evidence of the Plaintiff where he describes himself as a debt collector and his amended statement of claim where he describes himself as a principal negotiator, etc. Mr. Bwalya submitted that the Plaintiff has failed to show any valid agreement between himself and the Defendants for which he is to be paid the sum of £2,016,000.00 and he cited the case of ***Z Limited v A and Others(1)*** particularly at page 572 where it is stated as follows:

> ***"It follows that in my view, Mareva injunctions should be granted, but granted only, when it appears to the court that there is a combination of two circumstances. First, when it appears likely that the Plaintiff will recover judgment against the defendant for a certain or approximate sum. Second, when there are also reasons to believe that the defendant has assets within the jurisdiction to meet the judgment in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him."***

According to Counsel, this does not include dealing with the assets in the normal course. He further submitted that the fact that the Defendant is incorporated outside jurisdiction is not sufficient reason for granting an injunction and he referred the Court to the case of ***Third Chandris Shipping Corporation and Others v Unimarine SA(2).*** It was also Mr.

Bwalya's contention that the Plaintiff has not impeached the credit worthiness of the 1st Defendant company in these proceedings. According to counsel, this is a critical consideration in arriving at the conclusion whether or not the 1st Defendant is likely to dissipate its assets.

Mr. Bwalya further submitted that the Plaintiff's intention is to use the order of injunction in any oppressive manner to protect a cause of action which is at best speculative. He contended that this would be an abuse of the court process, a practice which is discouraged as reported in ***Polly Peck International Plc v Nadir and Others (No. 2)(3).***

Counsel finally submitted that some of the contents of the affidavit in support are based on information on the part of the Plaintiff but the sources are not disclosed. He argued that such evidence is inadmissible. Mr. Bwalya also urged the Court to dismiss the application with costs.

In reply, Mr. Chiteba submitted that the Plaintiff has a good arguable case because from exhibit "CS1" it is clear that the Defendants engaged the Plaintiff to reactivate the contract in issue which had been dormant for thirteen years. Counsel argued that although the Defendants have tried to deny this the Plaintiff's affidavit in reply shows the extent to which the Plaintiff was a principal player in ensuring the finalization of the contract.

On the likelihood of dissipation of assets, Mr. Chiteba submitted that the Defendants' attempt to deny the Plaintiff what is due to him to the effect that the did not play any role in finalizing the contract is sufficient to enable the Court exercise its discretion to protect the Plaintiff's interests in the interim while the matter is pending determination.

On the Mareva injunction being oppressive, Counsel submitted that the application being sought by the Plaintiff was limited to a specific amount and therefore, the Defendants' operations would not be crippled as alleged by the Defendant.

Regarding the Plaintiff's undertaking as to damages, Mr. Chiteba submitted that this had been made by the Plaintiff in the draft order filed in Court.

It was also his submission that the order sought by the Plaintiff was not in respect of the entire sum of £7,500,000.00. Further, Counsel urged the Court to consider the provision of Order 3, rule 2 of the rules of the High Court Cap 27 which gives this Court jurisdiction to make any interlocutory order considered necessary for doing justice whether the same is expressly pleaded or not.

I have considered the affidavit evidence, skeleton arguments, authorities cited and the oral submissions of counsel. There can be no doubt that the Plaintiff has raised a number of issues in this application. The voluminous affidavits also attest to the fact that both parties have made various allegations which must be determined by the Court at a trial. For now and at this interlocutory stage, the sole question to be determined is whether this is a proper case where the Court can exercise its discretion to grant the Plaintiff a Mareva injunction pending trial and judgment.

The Plaintiff has applied for a 'freezing' or Mareva injunction. The genesis of this injunction is the case of ***Mareva Compania Naviera SA v International Bulkcarriers SA(4***). I thought that it is important to state the facts of this case in detail so that the basis of a Mareva injunction can be understood in its proper perspective. The facts of the ***Mareva*** case are these. The Plaintiffs were shipowners who owned the vessel Mareva. They let it to the defendants ('the charterers') on a time charter for a trip out to the Far East. Hire was payable half monthly in advance and the rate was US$3,850.00 a day from the time of delivery. The vessel was delivered to the charterers on 12th May, 1975. The charterers sub-chartered it and let it on a voyage charter to the President of India. Freight was payable under

that voyage charter: 90% was to be paid against the documents and 10% later.

Under the voyage charter the vessel was loaded at Bordeaux on 29th May, 1975 with a cargo of fertilizer consignment to India. The Indian High Commission, in accordance with the obligations under the voyage charter paid 90% of the freight to the Bank of Bilbao in London to the credit of the charterers. The total sum which the Indian High Commission paid into the bank was £174,000.00, out of which the charterers paid to the shipowners, the Plaintiffs, the first two instalments of the half monthly hire. They paid the instalments by credit transferred to the shipowners. The third instalment was due on 12th June, 1975 but the charterers failed to pay it. They said they were unable to fulfill any part of their obligations under the charter, and they had no alternative but to stop trading. Their efforts to obtain further financial support had been fruitless. Consequently, the shipowners treated the charterers' conduct as a repudiation of the charter. They issued a writ claiming the unpaid hire amounting to US$30,800.00, and damages for repudiation. Meanwhile, they believed that there was a grave danger that the moneys in the bank in London would disappear. So they applied for an injunction to restrain the disposal of the moneys in the bank. And this is what Lord Denning M R said at page 215:

> ***"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. It seems to me that this is a proper case for the exercise of this jurisdiction. <u>There is money in a bank in London which stands in the name of these charterers.</u> <u>The charterers have control of it. They may at any time dispose of it or remove it out of this country.</u> If***

they do so, the shipowners may never get their ship hire… In face of this danger I think this court ought to grant an injunction to restrain the charterers from disposing of these moneys now in the bank in London until the trial or judgment in this action" (underline my emphasis).

Two ingredients for a Mareva injunction immediately stand out from that case. First, there must be a debt due and owing. Second, 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. In the instant case there is a debt of £2,016,000.00 alleged to be owing to the Plaintiff by the Defendant. This, of course, is the substantive claim to be determined at the trial. Critical to this application is whether there is a danger that the Defendants may dispose of their assets to render any judgment the Court may grant in the Plaintiff's favour nugatory. The Plaintiff believes so. According to his evidence he has information that the process of paying the Defendants by the MCT has reached an advanced stage. The Plaintiff also deposed that if the Defendants were allowed to deal with or dispose of the funds once they had been deposited in the bank account of Ellis & Company or paid to them elsewhere the Plaintiff would be unable to enforce any judgment that may be passed in his favour as they do not have assets within the jurisdiction of the Court.

The Plaintiff did not produce any proof that the MCT was about to pay the Defendants. The Plaintiff's belief that this was about to happen is only known to him, not to the Court. It is not the business of Courts to make decisions based on conjecture. As properly submitted by Mr. Bwalya, the Plaintiff has not disclosed the sources of his information. It therefore follows that such evidence cannot be given any probative value.

So is there a danger of the Plaintiffs dissipating their assets? In terms of the funds from the MCT, it is clear from the evidence on record that these

moneys have neither been paid into the account of Ellis & Company nor are they under the control of the Defendants, unlike in the ***Mareva*** case. It seems to me therefore, that the Plaintiff's contention that the Defendants are about to dissipate the moneys from the MCT cannot be sustained. Such a risk in my view is murky.

Regarding the Defendants' assets outside the jurisdiction of this Court, their evidence is that the 1st Defendant is a multinational company which can meet its obligation in the event that judgment was awarded in favour of the Plaintiff in the main matter. As Mr. Bwalya aptly argued, the Plaintiff has not disputed the credit worthiness of the 1st Defendant company in these proceedings. If I may add, there is no evidence on record that the 1st Defendant is experiencing financial hemorrhage to be incapable of paying the judgment debt if such was ordered by the Court. I believe that the Plaintiff can be able to enforce his judgment in the United Kingdom where the 1st Defendant company has its business domicile. I am persuaded on this issue by the judgment of Lawton L. J. in the ***Third Chandris Shipping Corporation*** case when he stated as follows at page 987:

> ***"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 appearances 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."

I respectfully agree with the foregoing. Mr. Chiteba also submitted that the Defendants' attempt to deny the Plaintiff what was due to him is sufficient to make the Court grant him a Mareva injunction. I entertain serious reservations with this argument. The Plaintiff, as it is clear from the

foregoing, needs to show more to succeed in his application. In my view, he has not done so. Counsel also urged the Court to invoke Order 3, rule 2 of the rules of the High Court Cap 27 of the Laws of Zambia and make an order it considers necessary for doing justice. This order reads as follows:

> ***"Subject to any particular rules, the Court or a Judge may, in all cases 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."***

I am of the firm opinion that on the facts of this application, there are no special circumstances that can compel the Court to invoke Order 3, rule 2.

On the allegation that the Plaintiff has not made an undertaking as to damages, I agree with Mr. Chiteba that this is contained in the draft ex parte order filed with the application. This order was not served on the Defendants by the Plaintiff because in the wisdom of the Court, there were no compelling reasons for this application to be heard and determined ex parte, hence the inter partes hearing preceding this ruling.

In the final analysis, I have come to the inescapable conclusion that this is not a proper case where the Court can exercise its discretion to grant a Mareva injunction. The Plaintiff's application is accordingly dismissed with costs.

DELIVERED THIS 22ND DAY OF JUNE, 2011.

C. KAJIMANGA

JUDGE