

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

(Civil Jurisdiction)

2010/HP/776

BETWEEN:

ROYAL OAK (PVT) LIMITED

PLAINTIFF

AND

LUSAKA CITY COUNCIL
DEFENDANT

1ST

AND

ATTORNEY GENERAL
DEFENDANT

2ND

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 27th day of August, 2012.

For the Plaintiff: Mr. P. G. Katupisha of Messrs Millner Katolo and Associates.

For the 1st Defendant: Mr. G Lungu Director of Legal Services Lusaka City Council.

For the 2nd Defendant: Mr. M. Mukwasa, Acting Senior Advocate in the Attorney General's Chambers.

R U L I N G

Cases referred to:

- 1. American Cynamid v Ethicon Limited [1975] A.C. 396.*
- 2. Shell BP (Zambia) Limited v Connidaris and Others (1975) Z.R. 174.*
- 3. Ndove v National Educational Company of Zambia Limited (1980) Z.R. 184.*
- 4. Turnkey Properties v Lusaka West Development Company Limited and Others (1984) Z.R. 85.*
- 5. Mukosa v Ronaldson (1993-1994) Z.R. 26.*
- 6. Fourie v Le Rouxi [2005] EWCA Civ. 204.*

7. *Vestergaard Fraudsen A/S and Others v Best Net Europe Limited and Others* [2009] E.W.H.C. 1456 Ch.
8. *Hondling Xing Xing Building Company Limited v ZAMCAPITAL Enterprises Limited* (2010) Z.R. Volume 1, 30.

Legislation referred to:

1. *High Court Act, cap 27, Orders 27, rule 4; 14, rules 5 and 18; 27, rule 4.*
2. *Food and Drugs Act Cap 303, ss. 24 and 27.*
3. *Food and Drug (Marketing of Breast Milk Substitutes) Regulations, 2006.*
4. *Public Health Act, cap 295, s. 108.*
5. *High Court Act cap 27, Orders 27, rule 4; 14 rules 5 and 18.*
6. *Companies Act cap 388.*
7. *Local Government Act, cap 281.*
8. *Statutory Instrument Number 48 of 2006, Regulation 2, 3 (a) and (b).*
9. *State Proceedings Act cap 71, s.16.*

Work referred to:

1. *H. M. Malek, Phipson on Evidence, Seventh Edition (London, Sweet and Maxwell, 2010).*

This matter was commenced on 22nd July 2010, by way of writ of summons, and as usual accompanied by a statement of claim. In the writ of summons the plaintiff sought the following reliefs:

- (1) a declaration that *D'lite cereal* is not a breast milk substitute;
- (2) damages for loss of sales of *D'lite cereal*;
- (3) an injunction to restrain the defendant by itself, its servants or agents or otherwise whosoever from interfering and doing or continuing to do anything to induce further breaches of the contracts specified in paragraph 12 of the

statement of claim or any similar contracts made by the plaintiff with third parties;

- (4) any other relief the Court shall deem fit;
- (5) interest on the amount to be found due; and
- (6) costs.

In the accompanying statement of claim, the plaintiff has pleaded the following: It is a limited company carrying on manufacturing business. And the defendant is a local authority overseeing the capital city of Lusaka. The facts giving rise to this cause of action are that by a letter dated 29th June, 2010, the defendant invited the plaintiff to a meeting following an advertisement placed by the plaintiff in the press headlined: *“Breast Milk Substitute; D’lite Cereal”*.

In a response to the invitation, and by a letter dated 7th July, 2010, the plaintiff’s holding company; Trade Kings Limited, objected to the insinuation made by the 1st defendant that the plaintiff held out that *“D’lite Cereal”* is a *“Breast Milk Substitute.”* The plaintiff contended that the literature inscribed on every box of *D’lite Cereal* explicitly states that the product is not a *“Breast Milk Substitute”*. The literature in fact encourages breast feeding mothers to breast feed for as long as they can. In any event, the plaintiff averred that *D’lite cereal* can only be commenced on a baby at the age of six months and upwards. In the main, the plaintiff’s contends that the advertisement *D’lite Baby cereal* does not in any way breach any statutory obligation on its part. And

D'lite cereal is not, and has never been held out as a “*breast milk substitute.*”

The chief complaint of the plaintiff is therefore that in total disregard of the plaintiff's explanation outlined above, and the statutory provisions, the defendant by a letter dated 14th July, 2010, ordered the plaintiff to stop advertising *D'lite cereal*. The defendant went further and directed *Muvi TV* and Zambia National Broadcasting Corporation Limited (*ZNBC TV*), from running the advertisement in issue. Further, the plaintiff alleged that the 1st defendant has threatened the plaintiff to prosecute it in the “*fast track Court*”; contrary to the law.

The plaintiff is also aggrieved because prior to the alleged wrongful acts complained of by the 1st defendant, the plaintiff had entered into contracts with *Muvi TV*, and *ZNBC TV* to run on their television channels the advertisement in issue. The advertisements were meant to promote the product. And to educate the public, and the users of its nutritional value. In the meanwhile, the defendant maliciously and wrongfully ordered and or induced *Muvi TV* and *ZNBC TV* to disregard the advertising contracts. And urged them to refuse to perform the contracts. To this end, the Director General of *ZNBC* was specifically requested to surrender the footage containing the *D'lite cereal* advertisement.

As a result of the actions taken by the defendant, the plaintiff claims that but for the interference of the defendant, it produces 15 000 cases of *D'lite cereal* per month. And 180, 000 cases per year. Each case costs K75, 000=00. Thus the plaintiff claims that it has lost the benefit of the advertising contracts, and suffered a loss of sales estimated to be in the region of K 1, 350, 000, 000=00 per month. Further, the defendant contends that unless restrained by an injunction, the defendant will continue to threaten, and interfere with the business of the plaintiff.

On the same day, 22nd July, 2010, the plaintiff issued out of the principal registry summons for an interim injunction. The summons were issued pursuant to Order 27, rule 4, of the High Court Rules. The terms of the summons were that: it be ordered that the defendant be restrained whether by itself, its servants, or agents from maliciously and wrongfully interfering, and or inducing *Muvi TV* and *ZNBC TV* from breaking their advertising contracts *D'lite cereal* on their television channels.

The summons were supported by an affidavit dated 22nd July, 2010. The affidavit in support which was sworn by Dr. Bright Mwansa Chunga; the Plaintiff's Director and Head of Corporate Affairs essentially repeated the contents of the statement of claim. It is therefore unnecessary to recite the contents of the affidavit.

On 23rd July, 2010, I heard the application on an *ex parte* basis. And in order to maintain the *status quo*, I allowed the application, and granted an *ex parte* injunction on 28th July, 2010.

Later, the plaintiff's advocate, issued summons for non-joinder of a party. And sought leave to amend the writ of summons and statement of claim. The summons were issued pursuant to Order 14, rule 5 and 18 of the High Court Rules. The aim of the application was to join the Attorney General as a 2nd defendant. In the accompanying affidavit, Dr. Chunga deposed *inter alia*, that on 23rd July, 2010, in apparent reference to "*D'lite cereal*", the spokesperson for the Ministry of Health was quoted in the *Times of Zambia* at page 2 in issue number 14814 of Friday 23rd July, 2010, as decreeing; "*Stop advertising Breast Milk Substitute.*" Thus the plaintiff contends that it is important for the Ministry of Health through the Attorney General to be joined to these proceedings for them to come and demonstrate what harm, if any, is endangered by the plaintiff encouraging mothers to breast feed their children, even when the children are being feed on "*D'lite cereal*" after six months of child's birth.

Eventually, on 11th August, 2010, by consent of the parties, the Attorney General was joined to the proceedings as the 2nd defendant.

On 29th July, 2010, the 1st defendant filed the memorandum of appearance and defence. The 1st defendant's defence was amended on 23rd August, 2010. In the amended defence, the 1st defendant contends that *D'lite cereal* qualifies to be called "*breast milk substitute*" since the consumers of the product are infants, and continue breast feeding even after six months. Be that as it may, the 1st defendant neither denies nor admits the assertion by the plaintiff that the advertisement in issue does not in any way breach any statutory obligation on its part, and has never been held out as a "*breast milk substitute.*" At any rate, the 1st defendant contends that the plaintiff is not in a position to supervise the consumers to commence consuming cereals at the age of six months.

As regards the allegation that the 1st defendant on 14th July, 2010, ordered a stop to the advertisement of "*D'lite cereal*" on *Muvi TV* and *ZNBC TV*, the 1st defendant contends that the advertisement of "*D'lite Cereal*" breached Regulations 2, 3 (a) and (b) of the Food and Drug (Marketing of Breast Milk Substitutes) Regulations 2006. Notwithstanding, the 1st defendant denies that at no time did it order a stop to the advertisement of "*D'lite cereal*", on *Muvi TV* and *ZNBC TV*. But the 1st defendant admits that it requested for a footage from *Muvi TV* and *ZNBC TV*. Be that as it may, the 1st defendant contends that the promotion of "*D'lite cereal*", through the *Muvi TV* and *ZNBC TV* was wrongful. Ultimately, the 1st

defendant denies that it caused any loss to the plaintiff because the controversy centers around the advertisement, and not the product in issue.

The 2nd defendant filed the memorandum of appearance and defence on 27th October, 2010. The 2nd defendant contends that under the provisions of the Food and Drugs (Marketing of Breast Milk Substitutes) Regulations 2006, which are contained in statutory instrument number 48 of 2006, the advertisement and promotion of breast milk substitutes to the general public is prohibited. And further, the 2nd defendant contends that the advertisement and promotion of complementary and designated products is similarly prohibited by regulation 2 of statutory instrument number 48 of 2006.

The 2nd defendant goes on to contend that although, the literature inscribed on the packet of *D'lite cereal* states, that it "*is not a breast milk substitute*", and that it can only be commenced on infants at the age of six months, *D'lite cereal* falls within the category of complimentary foods. And is therefore a designated product which should not be advertised or promoted to the general public.

The 2nd defendant admits the statement attributed to the spokesperson of the Ministry of Health. But it however denies that the statement was made in direct reference to "*D'lite cereal*", or

indeed targeted at the plaintiff. The 2nd defendant contends that the statement was made as precursor to a number of activities to commemorate the yearly; “*World Breast Feeding day*”. Finally, the 2nd defendant contends that any loss or damage suffered by the plaintiff cannot be attributed to the statement made by the spokesperson of the Ministry of Health.

The 2nd defendant did not file any affidavit in opposition to the interim injunction. The position taken by the 2nd defendant not to file an affidavit in opposition is of course in keeping with section 16 of the State Proceedings Act, chapter 71 of the laws of Zambia that prohibits the grant of injunctions against the state.

On 5th October, 2010, Mr. Katupisha filed the submissions in support of the interim injunction on behalf of the plaintiff. In the submissions, Mr. Katupisha submitted that the application for the interim injunction is made pursuant to Order 27, rule 4 of the High Court rules. Order 27, rule 4 enacts as follows:

“In any suit for the restraining the defendant from the committal of any breach of contract or other injury, and whether the same be accompanied by any claim for damages or not, it shall be lawful for the plaintiff at any time after the commencement of the suit and whether before or after judgment, to apply to the Court or judge for an injunction to restrain the defendant from the repetition or the continuance of the breach of contract or wrongful act complained of or the committal of any breach of contract or injury of a contract, or relating to the same property or right and such injunction may be granted by the Court, or a judge on such terms as to the duration of the injunction keeping

an account, giving security or otherwise, as to the Court or a judge shall seem reasonable and just.”

In the course of the submissions, Mr. Katupisha drew my attention to the case of *American Cyanamid Company v Ethicon Limited [1975] A.C. 396*, which lays down the principles or guidelines to apply in considering applications for interim injunctions. Mr. Katupisha argued that a perusal of the writ of summons and statement of claim shows that the plaintiff has raised a serious question or dispute to be tried between the parties. The serious question posed, Mr. Katupisha posited is whether or not the plaintiff's product *D'lite cereal* is a “*breast milk substitute*.” Mr. Katupisha argued that the question should be viewed from both the plaintiff's, as well as the defendant's perspective. That is, the Court ought to consider whether the plaintiff and the defendant have the financial capacity or ability to pay the damages if either party were to suffer financial loss as a result of the grant of an interim injunction.

Mr. Katupisha also in the course of the submissions drew my attention to the decision of Chirwa J, as he was then, in the case of *Ndove v National Educational Company of Zambia Limited (1980) Z.R. 184*. The *Ndove* case, Mr. Kapisha submitted, lays down the governing principle relating to the balance of convenience. In this respect Mr. Katupisha pointed out that in the

Ndove case, Chirwa J, adverted to, and relied on a passage by Lord Diplock in the *Cyanamid* case (supra) at page 323 as follows:

“....the governing principle is that the Court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application and at the time of the trial. If damages in the measure recoverable at common law would be adequate and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the Court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff’s undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application, and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.”

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.”

Mr. Katupisha argued that the preceding quotation, raises two important propositions or principles. First, if damages in the measure recoverable at common law would be adequate and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff's claim appears to be at this stage; second, if damages in the measure recoverable under such an undertaking would be an adequate remedy, and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interim injunction.

In light of the preceding principles in connection with the balance of convenience, Mr. Katupisha argued that the 1st defendant is a local authority currently encountering challenges in meeting its obligations in the city. He went on to argue that the 1st defendant usually depends on grants from the central government and other co-operating partners whose financial support is not in any event meant to pay damages arising from litigation. The financial support given to the 1st defendant by donors, Mr. Katupisha argued, is aimed at executing targeted projects. Thus Mr. Katupisha invited me to take judicial notice of this state of affairs, and pressed that the 1st defendant is not in a financial position to pay damages should the plaintiff suffer any injury and I refused to grant an interim injunction. In this regard Mr. Katupisha estimates that a month's breach in relation to the advertisement already paid for, may bring down the sales to over K 1 billion, which the

defendant may not be able to pay, let alone, damages for breach of contract that may in due course arise.

Conversely, Mr. Katupisha argued that the plaintiff is a limited liability company carrying on manufacturing business and trade. Mr. Katupisha pointed out that in terms of paragraph 15 of the affidavit in support of the interim injunction sworn by Dr. Chunga, the plaintiff produces 15, 000 cases of *D'lite cereal* per month. And 180, 000 cases per year. Each of twelve packets cost k 75, 000=00. This comes down to annual sales of K 13, 500, 000, 000=00, or monthly sales of K 1, 125, 000, 000=00. Against this computation or projection, Mr. Katupisha argued that the plaintiff is in a financial position to pay damages should the 1st defendant suffer any injury as a result of the injunction.

Mr. Katupisha further drew my attention to the English case of *Vestergaard Fraudsen A/S, [2009] EWHC 1456 (Ch)*, where Arnold, J, made the following observation:

“More recently adequacy of damages has ceased to be regarded as a jurisdictional threshold, but it remains relevant to the exercise of discretion. Furthermore, where the claimant has established the invasion of a legal right and sufficient risk of repetition, the claimant is generally regarded as entitled to an injunction save in exceptional circumstances. In such case, damages are ordinarily not regarded as an adequate remedy even if the expected injury to the claimant’s rights is relatively minor.”

Mr. Katupisha submitted that in the *vestergaad case*, Arnold J. suggested the following criteria for awarding damages in lieu of an injunction:

“(1) if the injury to the plaintiff’s legal rights is small;

(2) And is one which is capable of being estimated in money;

(3) And is one which can be adequately compensated by a small money payment; and

(4) And the case is one in which it would be oppressive to the defendant to grant an injunction, then damages in substitution for an injunction may be given”.

Arnold J, went on to state that:

“there may also be cases in which though the four above mentioned requirements exist, the defendant by his conduct, as for instance hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff’s rights has disentitled himself from asking that damages may be assessed in substitution for an injunction when an interim injunction is sought, the Court’s task is holding the ring pending trial.”

On the basis of the preceding authority, Mr. Katupisha urged me to grant the interim injunction pending determination of the main action. Further, Mr. Katupisha argued that the 1st defendant has not been able to demonstrate any loss or injury it is likely to suffer during the subsistence of the injunction. Mr. Katupisha pointed out that the only argument advanced against the continuation of the interim injunction is contained in paragraph 12 of the affidavit in opposition. That is:

“12 that the injunction obtained by the plaintiff be discharged with costs as its continued stay leads to vulnerability of infants in their early months of the life and result into inappropriate feeding practices on infants by their mothers.”

Mr. Katupisha argued that two issues emerge from the preceding paragraph. First, the continued stay of the interim injunction leads to vulnerability of infants in their early months of life. And second, the continued stay of the interim injunction will result into inappropriate feeding practices of infants by their mothers. Mr. Katupisha however countered in response that the 1st defendant has not stated which early months of life these are, and the vulnerability the infants would suffer. Mr. Katupisha also argued that the 1st defendant has not defined the inappropriate feeding practices of infants it referred to. Thus Mr. Katupisha contends that the contention by the 1st defendant is speculative, and has not merit because no evidence has been adduced to substantiate the assertion.

In view of the foregoing, Mr. Katupisha submitted that if the plaintiff were to succeed at trial, it would not be adequately compensated by an award of damages for the loss it would sustain between the time of the discharge of the interim injunction, and the trial, or indeed judgment. Mr. Katupisha stressed that if the interim injunction is not confirmed, the plaintiff's losses are likely to run into billions of kwacha. These losses, Mr. Katupisha argued, are likely to ensue from loss of

business following breaches of contract with *ZNBC TV* and *Muvi TV*.

In addition, Mr. Katupisha relying on the case of *Turnkey Properties v Lusaka West Development Company Limited and Others (1984) Z.R. 85*, submitted that the grant of interlocutory injunction would therefore be appropriate for the preservation of the *status quo* pending trial. Mr. Katupisha contends that the plaintiff has raised serious questions and an arguable claim of right that needs to be protected by an interim injunction. In support of this particular submission, Mr. Katupisha drew my attention to the cases of *Ndove v National Educational Company of Zambia Limited (1980) Z.R. 184*, and *Mukosa v Ronaldson (1993-1994) Z.R. 26*.

As regards the contention by the 1st defendant (in paragraph 5 of the affidavit in opposition) that *D'lite cereal* is a “*breast milk substitute*” which falls within the designated products known as complimentary foods, Mr. Katupisha contends that the 1st defendant has failed to establish the stages at which these products are commenced on an infant. Mr. Katupisha also argued that no packing material has been exhibited as evidence to support the 1st defendant’s argument. At any rate, Mr. Katupisha pointed out that “*breast milk substitute*” is defined in regulation 2 of statutory instrument number 48 of 2006 in the following terms:

“Means any food being marketed or otherwise represented as a partial or total replacement for breast milk whether or not suitable for that purpose and includes infant and follow up formula.”

Mr. Katupisha contends that *D’lite cereal* is not, and has never been marketed or represented as a partial or total replacement for breast milk. Mr. Katupisha went on to argue that *D’lite Cereal* is not meant to satisfy the nutritional requirements of infant up to six months of age. Mr. Katupisha contends that *D’lite cereal* is a porridge introduced to infants after the age of six months. Thus, Mr. Katupisha contends that *D’lite cereal* does also not fall within the designated products known as complimentary foods.

On 26th October, 2010, Mr. G. Lungu, filed submissions on behalf of the 1st defendant. Mr. Lungu contends from the outset that *D’lite cereal* is a “*breast milk substitute,*” because it falls under the designated products or complimentary foods. Mr. Lungu submitted that regulations 3, of statutory instrument number 48 of 2006 enacts as follows;

“3 A manufacturer or a distributor of breast milk substitute and other designated products shall not_____

- (a) advertise or promote the breast milk substitutes and other designated products to the public;*
- (b) provide pregnant women; mothers of infants, their families and care givers with samples of such;*
- (c) entice sales to consumers and health care facilities in the form of special displays, discounts coupons, premiums,*

- rebates, special sales, loss dealers, tie-in sales, prizes, and gifts of such products; or*
- (d) *dispense to pregnant women, mothers of infants, or their families any gifts or articles which may promote the use of milk substitutes and other designated products."*

Mr. Katupisha pointed out that section 27 of the Food and Drugs Act, chapter 303 of the laws of Zambia, "*imposes a duty on every local authority to enforce the provisions of the Foods and Drugs Act.*" Thus Mr. Lungu argued that it was for that reason that the 1st defendant instructed the plaintiff to stop advertising its product *D'lite cereal*, because the advertisement violated the provisions of the Food and Drugs Act. Mr. Lungu also contends that *D'lite cereal* qualifies to be designated as a "*breast milk substitute*", and a complimentary food.

Mr. Lungu contested the assertion by the plaintiff that it is not able to pay damages if ordered to do so. Mr. Lungu disclosed that the 1st defendant has been previously sued. And when ordered to pay damages, has been able to pay damages, as well as the legal costs. In addition, Mr. Lungu pointed out that the 1st defendant is an agent of the central government. Therefore, as an agent of the central government, Mr. Lungu submitted that the 1st defendant receives grants to enable it discharge some of its statutory obligations. Accordingly, Mr. Lungu argued that the *Ndove case* (supra) is really of no assistance to the plaintiff.

Mr. Lungu also argued that granted the low levels of literacy amongst Zambian mothers, there is a risk that some mothers may abandon breast feeding in preference to *D'lite cereal*. And thereby deny the infants the natural nutrition derived from breast feeding. Mr. Lungu argued further that applying the principles laid down in the *Cyanamid case (supra)*, there is no serious question to be tried in this case to warrant the grant of an interim injunction. Mr. Lungu submitted that the question that falls to be determined in this matter is whether or not *D'lite cereal* falls within the category of "*breast milk substitutes*," which are in any event proscribed from being advertised.

Mr. Lungu also contends that the 1st defendant did not interfere with the contracts entered into between the plaintiff and *ZNBC TV* and *Muvi TV*. And he maintains that 1st defendant merely requested for the footage of the advertisement.

On 27th October, 2010, Mr. Mukwasa filed submissions on behalf of the 2nd defendant. Although the 2nd defendant is not directly affected by the application of interim injunction by virtue of section 16 of the State Proceedings Act, Mr. Mukwasa as an officer of the Court volunteered to offer assistance to me in resolving the application at hand. I commend the gesture. Mr. Mukwasa prefaced his submissions by stating that the principles and guidelines for the grant or refusal to grant an injunction were settled in the *American Cyanamid case (supra)*. Mr. Mukwasa

argued that on the facts of this case there is no doubt that there is a serious question to be tried. The only questions that fell to be canvassed and considered in this application are first, whether or not damages would be an adequate remedy to the party injured by the injunction in the event that final judgment is in favour of such party. Second, if it is determined that damages are not an adequate remedy, then the Court will be required to determine where the *“balance of convenience”* lies between the parties in this case.

As regards the question of damages, Mr. Mukwasa submitted that damages would be an adequate remedy for an injury or loss that the plaintiff may suffer should the injunction be refused. Mr. Mukwasa also endorsed the proposition laid down in the *Ndove* case (supra) regarding the question of balance of convenience.

Mr. Mukwasa pointed out that the argument by Mr. Katupisha that it is a notorious fact that the 1st defendant is impercunious is speculative. Mr. Mukwasa argued that there is no evidence to prove that the 1st defendant has no financial capacity to pay damages arising from this litigation

Mr. Mukwasa also argued that in considering the question of damages, it is important to bear in mind that the 1st defendant is under statutory obligation to enforce the provisions of the Food and Drugs Act, in general, and the Food and Drugs (Marketing of Breast Milk Substitutes) Regulations in particular. In light of these statutory obligations, the question that therefore arises, Mr.

Mukwasa posited, is whether or not the 1st defendant should be enjoined from performing its statutory obligations merely because of its perceived financial incapacity to pay damages when ordered to do so. Mr. Mukwasa answered this question in the negative. Mr. Mukwasa also wondered whether or not the grant of an injunction against the 1st defendant, would not indirectly affect the 2nd defendant.

Mr. Mukwasa further observed that the plaintiff, and the 1st defendant canvassed at length the question whether or not *D'lite cereal* is a “breast milk substitute”, or a “complimentary food.” Mr. Mukwasa opined that this is a question that not only falls to be determined at trial, also the only question to be tried. In the circumstances, Mr. Mukwasa submitted that this question has been prematurely raised. Consequently, he declined to dwell on the question.

To sum up, Mr. Mukwasa submitted that damages would be an adequate remedy to award the plaintiff should the Court refuse to confirm the interim injunction and the plaintiff later suffer damages. Further, he submitted that there is no *iota* of evidence to suggest that the 1st defendant is impecunious. And therefore unable to pay damages when ordered to do so. Lastly, he submitted that the effect of granting an injunction against the 1st defendant would implicitly amount to granting an injunction against the State, contrary to the proscription in section 16 of the

State Proceedings Act. He therefore urged me to refuse the application to confirm the interim injunction.

I am indebted to counsel for their assistance in this matter. The fundamental question that falls to be determined in this application is this: whether or not the plaintiff is entitled to an order that the 1st defendant should be restrained from interfering and or inducing *ZNBC TV* or *Muvi TV*, from breaching their contracts with the plaintiff in the running of the advertisement of *D'lite cereal* on their television channels.

Before I answer the preceding question, I would like to state briefly the law relating to interim injunctions. It is a settled principle of injunction law that interim injunctions, should only be granted on the following premises: where the right to relief is clear; where it is necessary to protect a plaintiff from irreparable injury; and mere inconvenience is not enough. The preceding principles were settled in the often cited case of *Shell BP (Zambia) Limited v Connidaris and Other (1975) Z.R. 174*. It is also cardinal to note that in an application for an interim injunction, the overriding requirement in my opinion is that the applicant seeking the relief must clearly show that he has a cause of action entitling him to the relief sought. (See *Fourie v Le Rouxi [2005 EWCA Civ 204]*).

In the case of *Hondling Xing Xing Building Company Limited v ZAMCAPITAL Enterprises Limited 2010, volume 1 Z.R. 30*, I held at

pages 41 - 42, that the principles outlined above though fundamental, need to be applied with circumspection, and systematically on a case by case basis. The classical criteria to be applied whenever considering an application for an interim injunction remains that laid down by the House of Lords in the celebrated case of *American Cyanamid case (supra)*. In the scheme of the *American Cyanamid case (supra)*, the starting point always is to consider the question whether or not there is a serious question posited by the pleadings to be tried. If the answer to this question is in the negative, then that is the end of the matter. If however the answer is in the affirmative, then the Court should proceed to consider what is popularly referred to as the "*balance of convenience*". The term "*balance of convenience*", was in the case of *Francome v Mirror Group Newspapers Limited [1984] 1 W.L.R. 892*, criticized by Sir John Donaldson M.R. at page 898, as ; "*.... Unfortunate expression. [because] our business is justice, not convenience*".

Be that as it may, the question of balance of convenience is considered in three stages. The first principle is that if the claimant would be adequately compensated by an award of damages, if he succeeds at the trial, and the defendant would be able to pay for them, no injunction should be granted however strong the claimant's case. The second principle is that if the claim survives the previous head, the Court must consider whether if an interim injunction is granted, but the defendant succeeds at the trial, the defendant would be adequately

compensated in damages, which then would have to be paid by the claimant. And whether the claimant would be able to pay those damages if such damages would be an adequate remedy, and the claimant would be in a position to pay them, the defendant's prospect of success at the trial, would be no bar to the grant of the injunction.

The third principle stipulates that if there is doubt as to adequacy of the respective remedies in damages available to either party or to both, the Court must consider the wide range of matters which go to make up the general balance of convenience. These will vary from case to case. In the *American Cyanamid case* (supra) three categories were expressly mentioned. That is, the status quo, relative strength of cases, and special factors. I will not in the context of this case advert these factors in any detail.

In the *Hondling Xing Xing case* (supra), I also counseled at page 42, that the principles formulated by Lord Diplock in the *American Cyanamid case* (supra) are of a general application, and must therefore not be treated as a statutory definition. I pointed out, for instance, that the Court may grant, or refuse an application for interim injunction without applying the rigorous guidelines set out in the *American Cyanamid case* (supra) if the action is concerned with, for example, a simple question of statute, a document, or a point of law.

At this juncture it is necessary to set the factual matrix of the controversy into its proper perspective. As already mentioned, the affidavit in support of the *ex-parte* summons for an interim injunction is sworn by Dr. Chunga. Dr. Chunga deposed that: he is the Director of Corporate and Public Affairs in the plaintiff's employ. He confirmed that the plaintiff produces a product called *D'lite* cereal for babies from the age of six months and onward. Dr. Chunga contends that *D'lite cereal* is not a "*breast milk substitute*", as alleged by the 1st defendant. Because it is clearly indicated on its packaging material that *D'lite* cereal is not a "*breast milk substitute*". To support this contention, the packaging material marked "BMX1" was produced in the affidavit in support.

Dr. Chunga went on to aver that the *D'lite* cereal packaging material clearly states that: "*ideally breast feeding should continue as long as possible.*" Meaning that the product ___ *D'lite cereal* ___ is no way a milk substitute, and has never been produced or described or indeed held out as a "*breast milk substitute;*" since it is not.

Dr. Chunga set out the background to this dispute in the following chronological order. On 29th June, 2010, the defendant in its letter

dated 29th June, 2010, invited the plaintiff's Managing Director for a meeting in relation to the alleged advertisement of *D'lite cereal* as a "breast milk substitute." The letter of invitation which was produced in the affidavit in support, and marked as "BMC2" is expressed in the following terms:

**LUSAKA CITY COUNCIL
PUBLIC HEALTH DEPARTMENT**

Director of Public Health
Civic Centre
P.O Box 30789, Lusaka
Telex: 260-1-252141
1256485

Telephone:

Ref: PHSS/6/12/1/AMM/IK

29th June, 2010.

The Managing Director
Royal Oak (Pvt) Limited
Lusaka

Dear Sir

**INVITATION FOR A MEETING ON ADVERTISEMENT OF
BREAST MILK SUBSTITUTE - D'LITE CEREAL.**

It has come to our attention that you have been advertising and promoting an infant cereal called D'lite on Muti TV and ZNBC TV for more than a month now. I wish to state that this advert is a violation of the Food and Drugs (Marketing of Breast Milk

Substitutes) Regulations; Statutory Instrument Number 48 of 2006.

You may wish to know that Regulation 3a states that:

“A manufacturer or a distributor of breast milk substitute and other designated products shall not advertise or promote the breast milk substitutes, and other designated products to the public.”

Regulations 3d also prohibits the manufacturer to:

“Dispense to pregnant women, mother of infants, or their families for the purpose of supplying them with or encouraging them to use the designated product. It is in this light that my office wishes to invite you to a meeting on Thursday, 8th July, 2010, at 10:00 hours to be held in room 105, Ground Floor, Civic Centre Old Wing.

Yours faithfully

*Amos M. Musonda
Director of Public Health*

*Cc: The Permanent Secretary Ministry of Health: Attention:
Director of Public Health and Research.*

*Cc: Director of Legal Services.
Lusaka City Council*

In response, the plaintiff wrote to the 1st defendant on 7th July, 2010, objecting vehemently that *D’lite cereal* is a “*breast milk substitute*”. And that *D’lite cereal* has never been advertised, nor even intended as a “*breast milk substitute*”. In the same letter of 7th July, 2010, the plaintiff pointed out that the literature inscribed on every box of *D’lite cereal* explicitly states that the product is not a “*breast milk substitute*”. The letter of 7th July, was produced

in the affidavit in support, and is marked as "BMC3". The letter is expressed in the following terms:

TRADE KINGS LIMITED
P.O BOX 30824, TEL 00-260-1-286117.
FAX: 00-260-1-288856.
E.mail: tradekings@yahoo.com.

The Director of Public Health.
Public Health Department .
Lusaka City Council .
Civic Centre.
P.O Box 30789.
Lusaka.

FOR THE ATTENTION OF MR. AMOS M. MUSONDA

Dear Sir

SUBJECT: D'LITE BABY CEREAL

I write in response to your letter addressed to the Managing Director, Royal Oak Pvt Limited dated 29th June, 2010, and referenced PHSS/6/12/1 AMM/IK regarding the above mentioned subject.

Royal Oak (Pvt) Limited is a subsidiary of the Trade Kings Group of Companies, and therefore the matter was referred to my office for a reaction. At the onset, I would like to object in the strongest terms possible to your reference of D'lite cereal as a BREAST MILK SUBSTITUTE. D'lite Baby Cereal is not a substitute for breast milk and has never been described or indeed held out as such.

Further, D'lite Baby cereal has never been advertised nor even intended as such. In fact, contrary to your objections, the literature inscribed on every box of D'lite cereal explicitly states that the product, IS NOT A BREAST MILK SUBSTITUTE, and goes

further to encourage feeding mothers to breast feed for as long as they can.

The complaint, if your letter can be regarded as such, actually goes against the grain of the letter, and spirit of the Regulations you have cited. An unbiased reading of the Regulations cited will clearly show that a correct interpretation of the same cannot capture D'lite cereal under definition of BREAST MILK SUBSTITUTE which is defined as:

“Any food being marked or otherwise represented as a partial or total replacement of breast milk, whether or not suitable for that purpose, and includes infant and follow up formula.”

We would like to take this opportunity to invite you to come and view the said advertisements, and also read the literature on the D'lite cereal box. We believe that you have done neither of the two because, in our view, any careful view of the advertisements will show that there is no representation of the type prohibited by Regulations cited and any assertion to the contrary is truly debatable, mischievous, and strained.

Of greater value to us though, is to take note of the fact that from time immemorial, in many Zambian families long before weaning infants off breast feeding, infants have been gradually introduced to semi-solid foods like porridge. Those entrusted with task of tackling malnutrition and poverty recommend fortifying this porridge cheaply with nutrients such as groundnut meal and soya beans meal. Heeding this advice, we have gone further and fortified our wheat based cereal with an additional twelve (12) vitamins, and six (6) minerals to create a semi-solid food product for infants beyond the age of six (6) months during this period of transition.

Finally, we humbly implore your office to reconsider its position, which we see as either being misconceived, or misdirected or indeed both. Maintaining your position, we are prepared to move the matter to the High Court for a ruling.

Yours faithfully

*TRADE KINGS GROUP OF COMPANIES
Dr. Bright M. Chunga
Director and Head, Corporate and Public Affairs.*

*Cc: Ms Eva Jhala
Bemvi and Associates.
Legal Counsel.
Lusaka.*

*Permanent Secretary
Ministry of Health
Lusaka.*

Attention: Director of Public Health and Research

Dr Chunga contends that in total disregard of the letter of 7th July, 2010, the 1st defendant went ahead, on 14th July, 2010, to issue an order stopping the advertisement of *D'lite cereal* on *Muvi TV* and *ZNBC TV*, whose contracts were to promote the product to babies of 6 months and above, as well as increase sales through the larger population of Zambia, and beyond.

Dr. Chunga produced the letter dated 14th July, 2010, which is marked "BMC4" to substantiate his assertion. The letter of 14th July, 2010, is expressed in the following terms:

**LUSAKA CITY COUNCIL
PUBLIC HEALTH DEPARTMENT**

Director of Public Health.
Civic Centre.
P.O Box 30789, Lusaka.
Telex: 260-1-252141.
1256485

Telephone:

Ref: PHSS/6/12/1/AMM/IK

14th July, 2010.

The Managing Director.
Royal Oak (Pvt) Limited.
Lusaka.
Dear Sir

ORDER TO STOP ADVERTISING D'LITE CEREAL

The above subject refers.

As you may be aware you have been advertising and promoting an infant cereal called D'Lite on Muvi TV and ZNBC TV for more than a month now. A meeting was convened in my office to discuss the issue in which you vehemently denied that you are advertising the cereal, and also that your product was not a breast milk substitute as confirmed in the letter written by Trade Kings Ltd dated 7th July, 2010.

A review of the matter at hand has revealed otherwise, and that you are in breach of Regulation 30 of the Food and Drugs (Marketing of Breast Milk substitutes) Regulations, Statutory Instruments number 48 of 2006, made under the Food and Drugs Act cap 303 of the laws of Zambia which states that:

"A Manufacturer or distributor of breast milk substitute and other designated products shall not advertise or promote the breast milk substitute and other designated products to the public."

It is in this perspective that my office is ORDEREDING you to stop advertising D'lite cereal with immediate effect.

You are at liberty to appeal to the Permanent Secretary in the Ministry of Health should you have reservations with this decision.

Yours faithfully

Amos M. Musonda

*Cc: The Permanent Secretary Ministry of Health: Attention:
Director of Public Health and Research.*

*Cc: Director of Legal Services.
Lusaka City Counsel*

Dr. Chunga pointed out that prior to the letters of 29th June, and 14th July, 2010, referred to above, unknown to the plaintiff, the 1st defendant by letter dated 22nd June, 2010, wrote letters to the Managing Director of *Muvi TV* and the Director General of *ZNBC TV* requesting them for a footage of the advertisement *D'lite* cereal as a breast milk. The two letters are identical and were expressed in the following terms.

**LUSAKA CITY COUNCIL
PUBLIC HEALTH DEPARTMENT**

Director of Public Health.
Civic Centre.
P.O Box 30789, Lusaka.
Telex: 260-1-252141.
1256485.

Telephone:

Ref: PHSS/6/12/1/AMM/IK

22nd June, 2010.

The Managing Director.
Muvi TV.
Lusaka.

The Director General
ZNBC
Lusaka

Dear Sir/Madam

**REQUEST FOR FOOTAGE OF ADVERTISEMENT OF BREAST
MILK SUBSTITUTE - D'LITE CEREAL**

The above subject refers.

It has come to our attention that you have been showing an advert promoting an infant cereal called D'Lite for more than one month now. I wish to state that this advert is a violation of the Food and Drugs (Marketing of Breast Milk Substitutes) Regulations 2006.

You may wish to know that Regulation 3a states that:

"A manufacturer or a distributor of breast milk substitute and other designated products shall not advertise or promote the breast milk substitutes and other designated products to the public."

It is in this perspective that my office is seeking a copy of the said footage for purposes of scrutinizing it further, and the corrective action. The same should reach my office latest Friday 23rd June, 2010. The request is in line with section 24 of the Food and Drugs Act, cap 303, and section 108 of the Public Health Act, cap 295 of the laws of Zambia.

Yours faithfully

Amos M. Musonda

*Cc: The Permanent Secretary Ministry of Health: Attention:
Director of Public Health and Research.*

*Cc: Director of Legal Services.
Lusaka City Council .*

In view of the foregoing, Dr. Chunga contends that: the breach complained of by the 1st defendant, and in particular the action taken by the 1st defendant created in the minds of the customers and potential customers that the product; *D'lite* cereal is not for babies of 6 months onwards. And that ever since the advertisements were interfered with by the 1st defendant, there has been a drastic decline in demand, and sales for the *D'lite* cereal have dropped sharply to the detriment of the plaintiff's since the customers are made to believe that the product is not suitable for babies.

In the affidavit in opposition sworn by Greenford Sikazwe, the Assistant Director of Public Health Services, in the employ of the 1st defendant, he denied that the 1st defendant ever directed *Muvi TV* or *ZNBC TV* to discontinue the advertisement of the *D'lite cereal*. Mr. Sikazwe maintains that the 1st defendant only requested a footage of the advertisement from the *Muvi TV* and *ZNBC TV*.

Mr. Sikazwe also denies that the 1st defendant's action had created in the minds of the customers, or potential customers that *D'lite cereal* is unfit for babies, because the 1st defendant had not in fact condemned the quality of *D'lite cereal*. The 1st defendant's concern is with any advertisement that suggests that a baby cereal is a substitute for breast feeding for babies under the age of six months.

Be that as it may, Mr. Sikazwe contends that *D'lite cereal* is a breast milk substitute which falls within the the designated products known as complimentary foods such as vitaso porridge, cerelac, purity, to mention but a few that should not be advertised to the general public. Further, Mr. Sikazwe contends that the packaging of *D'lite cereal* clearly shows that it is professed to be a "*breast milk substitute*" because the consumers of *D'lite cereal* are infants from the age of six months onwards. In the premises, he urged me to discharge the interim injunction granted on 22nd July, 2010.

Before I determine the application before me, I would like to briefly refer to the law relating to the marketing of breast milk substitutes. On 21st April, 2006, the Minister of Health promulgated statutory instrument number 48 of 2006; the Food and Drugs (Marketing of Breast Milk Substitutes) Regulations 2006. These regulations which were issued pursuant to the Food and Drugs Act, cap 303, are aimed at promoting, and protection of breast feeding, by regulating the practices in the marketing of infant and young children feeding products. The regulations, should therefore be seen and understood to be an important intervention tool in child survival programs.

It is now a generally accepted public health standard that breast milk must be given in the first six months of an infant, in order to fulfill all of baby's requirements. The *raison d'etat* for this standard is that breast milk is safe, clean, always at the right temperature, inexpensive and nearly every mother has enough for her baby or babies. Breast milk also contains anti-bodies that help protect the baby against many common children illnesses. The WHO/UNICEF Global Strategy for Infant and Young Children Feeding 2003, also recommends as a global health recommendation that infants be exclusively breast fed for the first six months of life to achieve optimal growth, development, and health.

Statutory Instrument Number 48 of 2006, was therefore developed with the intent to regulate the marketing of breast milk substitutes, and in the process promote and support breast feeding. To this end, Regulation 3 of Statutory Instrument Number 48 of 2006, enacts that:

“3 A manufacturer or a distributor of breast milk substitute, and other designated products shall not_____

- a) advertise or promote the breast milk substitutes and other designated products to the public;*
- b) provide pregnant women, mothers of infants, their families, and care givers with samples of such;*
- c) entice sales to consumers and health care facilities in the form of special displays, discount coupons, premiums, rebates, special sales, loss leaders, tie-in sales, prizes, and gifts of such products; or*
- d) dispense to pregnant women, mothers of infants, or their families any gifts or articles which may promote the use of breast milk substitutes, and other designated products.”*

Clearly, Regulation 3 (a) in particular, categorically and unconditionally proscribes the advertisement or promotion of breast milk substitutes and other designated products to the public. Again, before I dispose of this application, I would like to recall the counsel of Lord Diplock in *American Cyanamid (supra)*, that at the hearing of an application for an interim injunction, the evidence that is deposed in affidavits is incomplete and is not of course amenable to be tested by oral cross-examination. Thus at this stage of the proceedings, it is not expected that the Court will be engaged in resolving conflicts of evidence or indeed difficult questions of law. These are matters deferred to the trial of the action. The primary purpose of an interim injunction is to protect

an applicant against possible violation of his right which may not be adequately compensated in damages; if the matter was ultimately resolved in favour of the applicant. Conversely, the need to protect the applicant must be weighed against the corresponding need of the defendant to be protected against the injury that may arise as a result of preventing the defendant from exercising his own legal rights, for which he may also not be adequately compensated in damages. Thus in weighing the competing needs, the Court is engaged in a task of seeking to identify where as earlier on pointed out the “*balance of convenience lies*”.

As I see it, I am not by this application required to address the main question or issue in this action. Namely, whether *D’lite* cereal is or is not a “*breast milk substitute*”. Or indeed a corollary question, whether or not it is permissible to advertise or promote a “*breast milk substitute*” and other designated products. Instead, what I am required to resolve in this application, is whether or not I should confirm the *ex parte* interim injunction granted on 22nd July, 2010, restraining the defendant from interfering with *Muvi TV* and *ZNBC TV* from interfering with their advertisement of *D’lite* cereal on their television channels.

The following facts are undisputed. The plaintiff is a manufacturer of the *D’lite cereal*. On 22nd June, 2010, the 1st defendant requested *Muvi TV* and *ZNBC TV* to supply it with a copy of the

footage of the advertisement of *D'lite cereal*. The request was made with a view of scrutinizing the footage, and if necessary, take corrective measures. There is no evidence on record that this request was acceded to. In the meanwhile, in a letter dated 29th June, the 1st defendant invited the plaintiff's Managing Director to a meeting in connection with the advertisement. There is also no evidence on record that the meeting was ever convened. What is on record however is that on 7th July, 2010, the plaintiff protested vehemently that it was advertising *D'lite cereal* as a "*breast milk substitute*." Notwithstanding the protest, the 1st defendant in a letter dated 14th July, 2010, went ahead and ordered the plaintiff to stop the advertisement of *D'lite cereal*. Documentary evidence to that effect was produced before me by the plaintiff and went unchallenged by the 1st defendant. I therefore find that the 1st defendant directed the plaintiff to stop advertising *D'lite cereal*. It is the order by the 1st defendant that in fact prompted the application for an interim injunction. . The question that therefore arises is whether or not the action by the 1st defendant in stopping the advertisement of *D'lite cereal* warrants the grant of interim injunction pending trial of the action.

There is no doubt in my mind that the plaintiff has raised a serious question worth investigating through a trial of this action. Although the plaintiff has raised a serious question, the right to relief is not clear because the plaintiff is seeking a declaration that *D'lite cereal* is not a "*breast milk substitute*". This question or

issue will require to be investigated through the trial of the action. In other words, the prospects of succeeding at trial are not clear, or indeed obvious. Thus, since the right to relief is not clear, and prospects of succeeding at trial are not obvious, I am hesitant to confirm the interim injunction.

Another cardinal issue that has exercised my mind in considering this interlocutory application, is whether or not the action complained of _____ stopping the 1st defendant from advertising *D'lite cereal* _____ is likely to result in irreparable injury to the plaintiff. That is, injury which is substantial, and cannot be adequately remedied or atoned for by an award of damages. I have cautioned myself that mere inconvenience to the plaintiff is not sufficient to warrant the grant of the interim injunction. I am therefore satisfied that on the facts of this case the plaintiff is not likely to suffer irreparable injury as defined above. Alternatively stated, the plaintiff can, and will be in my opinion adequately compensated by an award of damages if it succeeds at the trial.

A corollary question that arises is whether or not the 1st defendant would in that event be able to pay the damages. It has been argued by the plaintiff that:

“ the 1st defendant is a local authority struggling to meet its obligation in the city and usually depends on grants from central government and other co-operating partners whose support is not meant to paying damages arising from litigation. But aimed at

fulfilling targeted projects, and this honourable Court can take judicial notice of that as a notorious fact.”

First, I agree with the submission by Mr. Mukwasa, counsel for the 2nd defendant, that the plaintiff has not adduced any evidence whatsoever proving that the 1st defendant is impecunious, and therefore unable to meet its financial obligations. Second, the plaintiff invited me to take judicial notice of the assertion that the 1st defendant is impecunious. Discussing the concept or notion of judicial notice, the learned authors, of Phipson on Evidence, Seventeenth Edition, (London, Thomson Reuters (Legal) Limited, 2010) observe *inter alia* as follows at paragraph 3 -02, at page 61.

“.....the concept covers matters being so notorious or clearly established or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary. Some facts are so notorious or so well established to the knowledge of the Court that they may be accepted without further inquiry..... Judicial notice can save time and cost, and promote consistency in decision making.”

There is no factual basis upon which I can hold that it is notorious fact that the 1st defendant is impecunious. I therefore decline the invitation to take judicial notice of that alleged notoriety. The upshot of all this is therefore that I am satisfied that if the plaintiff succeeded after trial of this action, it would be adequately compensated by an award of damages. I therefore refuse to confirm the interim injunction. Accordingly, I discharge the *ex parte* injunction granted on 22nd July, 2010.

Each party shall bear their respective costs.

Dr. P. Matibini, SC
HIGH COURT JUDGE