IN THE HIGH COURT FOR ZAMBIA **2012/HPC/0661**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ADRIATIC TRANSPORT LIMITED **PLAINTIFF**

AND

FRATELLI LOCI S.r.I LIMITED **DEFENDANT**

BEFORE HON. JUSTICE NIGEL K. MUTUNA THIS 27TH DAY OF NOVEMBER, 2012.

FOR THE PLAINTIFF: EXPARTE

FOR THE DEFENDANT: EXPARTE

R U L I N G

Cases referred to:

1) ***Z Limited-Vs-A and Others (1982) ALL ER page 356***
2) ***Mareva Compania Novena SA-Vs-International Bulkcarriers SA (1980) 1 ALL ER page 213***
3) ***Third Chandris Corporation-Vs-Urimaire SA (1979) QB 645***

Other authorities referred to:

1) ***Supreme Court Practice 1999 Vol. 1***

This is the Plaintiff's application for an order of mareva injunction. It is made by way of exparte summons and supporting affidavit and it seeks to restrain the Defendant from doing the following acts, that is to say.

> *"whether by itself, its Directors, officers, subsidiary companies, servants or agents or howsoever otherwise from removing or causing to be removed, receiving or taking any steps to receive and/or to remove out of the jurisdiction of this Court, any money, assets or goods within the jurisdiction or from disposing of, or transferring or in any way howsoever dealing with any respective assets within the jurisdiction and without prejudice to the generality of the foregoing, in particular,*
>
> *a. Any sum now or hereinafter due and payable to the defendant by the Road Development Agency, pursuant to Contract for the Rehabilitation/Upgrading or urban road in various towns in Lusaka, Central Copperbelt Province Lot No. 5 Ndola City roads, IPC No. 9;*
> *b. Any sum now or hereinafter due and payable to the defendant by the Road Development Agency, pursuant to Contract for the Rehabilitation/Upgrading or urban road in various towns in Lusaka, Central Copperbelt Province Lot No. 2 Mufulira roads, IPC No. 9;*
> *c. Any sum now or hereinafter due and payable to the Defendant by the Road Development Agency, pursuant to Contract for the upgrading of 70 km of the Pedicle road located in the Democratic Republic of Congo including construction of one reinforced concrete bridge at Lubemba along pedicle road IPC No.1."*

The brief facts this case as they relate to this application are that the Defendant as a road construction company requested the Plaintiff, to provide a quotation for the supply and hire of equipment, transport and related services, in respect of rehabilitation and upgrading of roads. On 25th July, 2011, the Defendant accepted the Plaintiff's charges for hire of the said

equipment and services, whereupon the Plaintiff proceeded to provide the equipment and services. Despite utilizing the equipment and services, the Defendant has defaulted in payment for same for the period April, 2012 to October, 2012, in the sum of K2,878,896,945.47. Arising from the foregoing default, the Plaintiff has commenced this action against the Defendant, pursuant to which it seeks an order of mareva injunction.

The affidavit in support of the application was sworn by one Graziano Luciani. It began by recounting the facts of the case and went on to state that the deponent had been informed by the Defendant's managing director that the Defendant's contracts for construction and rehabilitation of roads had been terminated by the Road Development Agency (RDA). Further that, the Defendant was being investigated together with its managing director and various top management and as a consequence of this, the Defendant's assets have since been frozen pending the conclusion of the investigations.

The deponent went on to state that the Defendant's managing director Antonello Locci has been detained resulting from which the Defendant has ceased all operations. He also stated that there is a possibility that once the Defendant's managing director has been released from detention he will most likely not remain in the jurisdiction of this Court as he is a foreigner. Further that, by reason of the fact that Defendant has had all its contracts terminated and all its managers being foreign nationals, it is unlikely that they will have permits to remain within jurisdiction. As a consequence of this the Defendant has ceased all business activities in the jurisdiction of this Court and has no other assets.

The deponent also stated that he has been informed and availed a copy of a letter from RDA to the Defendant's advocates which reveals that RDA intends to make payment to the Defendant in respect of some of the works done by the Defendant under the contracts. Further that, these are the only

moneys available to the Defendant because it has no other assets, movable or otherwise within the jurisdiction of this Court.

In the skeleton arguments counsel for the Plaintiff argued that in view of the circumstances that the Defendant and its management find themselves in, once the payment due to the Defendant from RDA is paid, it may take steps to ensure that the payment is no longer available or traceable when judgment is given. In articulating the foregoing argument counsel drew the attention of the Court, to the case of ***Z Limited-Vs-A and Others (1).*** She argued that the said case held that a mareva injunction will be granted where firstly, it appears likely that the Plaintiff will recover judgment against the Defendant. Secondly, when there are reasons to believe that the Defendant has assets within the jurisdiction to meet the judgment but may well take steps designed to ensure that the assets are no longer available or traceable when judgment is given against him. Counsel also made reference to the case of ***Mareva Compania Navena SA-Vs-International Bulkcarriers SA (2)*** whose holding is similar to the case of ***Z Limited-Vs-A and Others (1).***

It was argued further that the Plaintiff had demonstrated that it is likely to obtain judgment for the debt due and owing. That there is real danger that the Defendant who has no other assets may dissipate or dispose of the payment once received from RDA to defeat any judgment that may be granted. Further that, once payment is made to the Defendant, it is highly likely to remove transfer or otherwise put beyond the reach of the Plaintiff the payment received. Counsel also argued that the Court does have jurisdiction derived from Order 29 rule L subrule 36 of the ***Supreme Court Practice 1999 (white book)*** to restrain a Defendant from disposing of assets that are within the Court's jurisdiction. Further that, by Order 29 rule L subrule 37 of the ***white book,*** such an order may be granted against a defendant whether it is resident or domiciled within or outside jurisdiction.

I have considered the affidavit evidence and the arguments by counsel. By this application the Plaintiff seeks a mareva injunction to restrain the Defendant from removing from jurisdiction any moneys, assets or goods within jurisdiction or from taking steps to dispose of, or transferring, or in any way, howsoever, dealing with any respective assets within the jurisdiction. Principally, it seeks to restrain the Defendant from disposing of the moneys that are due to it from RDA once the moneys have been paid. It is the intention of the Plaintiff to apply the said moneys to satisfy the judgment that may be granted in its favour in this matter.

The grounds upon which the order it sought are that it has been proved that the Defendant is indebted to the Plaintiff. Further, there is a likelihood of the Defendant dissipating its assets in order to avoid settling the debt due to the Plaintiff.

The application is premised on Order 29 rule L subrule 36 of the ***white book.*** The said Order states as follows:

> ***"In an action in which the plaintiff seeks to recover his property, the Court has jurisdiction to grant an interlocutory injunction restraining the disposal of property over which the plaintiff has a proprietary claim. The single most significant feature of the Mareva 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."***

It is evident from the foregoing Order that as counsel for the Plaintiff has quite rightly argued, this Court has jurisdiction to grant an interlocutory injunction restraining the Defendant from disposing of its assets which the Plaintiff has no proprietary interest in. This is termed a mareva injunction which injunction has its origins in the case of ***Mareva Compania Novara SA-Vs-International Bulkcarriers SA (2).*** It is important that I set out the facts of the said case before I state the holding, for purposes of demonstrating the circumstances that militate for the grant of a mareva injunction. The facts of the case are as follows

> *"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 and back. The vessel was to be put at the disposal of the charterers at Rotterdam. Hire was payable half monthly in advance and the rate was $US3,850 a day from the time of delivery. The vessel was duly delivered to the charterers on 12th May 1975. The charterers sub-chartered it. They 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 the 10% later.*
>
> *Under that voyage charter the vessel was loaded at Bordeaux on 29th May 1975 with a cargo of fertilizer consigned to India. The Indian High Commissioner, in accordance with the obligation under the voyage charter, paid 90% of the freight. But paid it to a bank in London. It was paid out to the Bank of Bilbao in London to the credit of the charterers. The total sum which the Indian High Commissioner paid into the bank was £174,000. Out of that the charterers paid to the shipowners, the plaintiffs, the first two instalments of the half monthly hire. They paid those instalments by credit transferred to the shipowners. The third*

> *was due on 12th June 1975, but the charterers failed to pay it. They could easily have done it, of course, by making a credit transfer in favour of the shipowners. But they did not do it. Telexes passed which made it quite plain that the charterers were unable to pay. They said they were not able to fulfil any part of their obligations under the charter, any they had no alternative but to stop trading efforts to obtain further financial support had been fruitless."*

The holding of the Court was inter alia as follows 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 on interlocutory injunction so as to prevent him disposing of those assets."***

In making the said holding, the Court granted an injunction against the charterers restraining them from disposing of the moneys in the London bank because it found as a fact there was a threat that the charterers would dispose of the moneys to avoid fulfilling their obligations. The case of ***Z Limited-Vs-A and Others (1)*** as I have stated in the earlier part of this ruling, made a similar holding as the one in the ***Mareva (2)*** case.

It is clear from the foregoing holding that the test to be applied before a mareva injunction can be granted 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.

Applying the foregoing test to this matter, it is not disputed that the Defendant is indebted to the Plaintiff. This is evident from exhibit marked "GL2" to the affidavit in support wherein the Defendant's managing director

undertakes to settle the Defendant's indebtedness to the Plaintiff once RDA pay what it owes. As such I find that the Plaintiff has satisfied the first test.

The second test is whether or not there is a threat by the Defendant to dispose of its assets. The exhibit I have referred to, "GL2", is an undertaking by the Defendant to settle its indebtedness to the Plaintiff. This undertaking, in my considered view, has the effect of extinguishing the contention that the Defendant intends dissipating its assets. It not only demonstrates a willingness on the part of the Defendant to honour its obligation to the Plaintiff and not dissipate its assets but also its capacity to meet its obligations. This position is what distinguishes this case from the ***Mareva (1)*** case in which the charterers by the various emails indicated their incapacity to pay. This was notwithstanding the fact that they had funds sitting in a London bank. Further, it is important to note that the threat that the Plaintiff has alluded to arises primarily from the fact that the Defendant's managing director and other managers are foreigner. It has been contended in this respect that since all the Defendant's contracts have been cancelled their permits may not be renewed as such they will leave the jurisdiction of this Court. Quite apart from the fact that the Defendant is a distinct entity from its management, and as such will continue in existence and be entitled to the moneys from RDA despite its foreign managers leaving the country, precedents indicate that the fact that a defendant is a foreigner entity does not, in or of itself, justify the grant of a mareva injunction. The case of ***Third Chandris Shipping Corporation and Others-Vs-Unimaurine SA (4)*** states in this respect as follows at pages 671 to 672:

> ***"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."***

Applying the foregoing test to this case, I am of the considered view that the Plaintiff has failed to satisfy the second test. It has failed to prove that beyond the mere fact that the Defendant's management comprises foreigners, the Defendant is a debt dodger. To the contrary, the undertaking I have alluded to in the earlier part of this ruling, being "GL2" indicates a willingness on the part of the Defendant to settle its indebtedness. Further, the assertions or beliefs by the deponent of the affidavit in support are in my considered view surmise and conjecture and as such have no probative value because the deponent does not state the grounds upon which his belief that there is a threat to dispose of assets is based. The deponent merely expresses a suspicion that such a threat exists and does not make an unequivocal statement to that effect. I am therefore not convinced that there is a real risk of default on the part of the Defendant. I accordingly find no merit in the application and dismiss it.

Delivered in chambers this 27th day of November, 2012.

NIGEL K. MUTUNA

HIGH COURT JUDGE