

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

2014/HPC/0094

BETWEEN:

COURTYARD HOTEL LIMITED

PLAINTIFF

AND

**ZAMBIA NATIONAL COMMERCIAL BANK PLC
DEFENDANT**

1ST

EDGAR HAMUWELE (*Sued in his capacity as Joint
Receiver of Courtyard Hotel Limited*)
DEFENDANT

2ND

CHRISTOPHER MULENGA (*Sued in his capacity as Joint
Receiver of Courtyard Hotel Limited*)

3RD DEFENDANT

***Before the Hon. Mr. Justice Justin Chashi in Chambers on
the 3rd day of April, 2014***

For the Plaintiff: J. Madaika, Messrs Isaac and Partners
For the 1st Defendant: S. Wamulume (Mrs) Manager- Litigation
*For the 2nd and 3rd Defendants: M. Musonda, Messrs M. Musonda and
Company*

RULING

Cases referred to:

1. *American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504*
2. *Turnkey Properties v. Lusaka West Development Company Ltd., B.S.K. Chiti (sued as Receiver), and Zambia State Insurance Corporation Ltd (1984) Z.R. 85*
3. *Shell & B.P. Zambia Limited v. Conidaris and Others (1975) Z.R. 174*
4. *Gideon Mundanda v. Timothy Mulwani and The Agricultural Finance Co. Ltd and S.S.S. Mwiinga (1987) Z.R. 29*

5. *Mwenye and Randee v.Kapinga (1998) Z.R.17*
6. *Robert Mbonani Simeza (sued as Receiver/Manager of Ital Terrazo Limited) and Finance Bank (Z) Limited v. Ital Terrazzo Limited, SCZ Appeal No.144 of 2009(Unreported)*
7. *Magnum (Zambia) Limited v.Basit Quadri (Receivers/Manager) & Grindlays Bank International Zambia Limited (1981) Z.R. 141*
8. *Kayanje Farming Limited and Christopher Thorne v. Christopher Mulenga (sued as Joint Receiver and Manager of Kayanje Farming Limited (in Receivership) and Edgar Hamuwele sued (as Joint Receiver and Manager of Kayanje Farming Limited (in Receivership) and Zamba National Commercial Bank PLC, SCZ Appeal No. 73 of 2010 (Unreported)*
9. *Christopher Thorne v. Christopher Mulenga (sued as Joint Receiver and Manager of Kayanje Farming Limited (in Receivership) and Edgar Hamuwele sued (as Joint Receiver and Manager of Kayanje Farming Limited (in Receivership) and Zamba National Commercial Bank PLC (2010) 1 Z.R. 221*
10. *Avalon Motors Limited (in Receivership) v. Bernard Leigh Gadsden and Motor City Limited (1998) Z.R.41*

Legislation referred to

11. *The High Court Act, Chapter 27 of the Laws of Zambia*
12. *The Supreme Court Practice (White Book), 1999*
13. *The Companies Act, Chapter 388 of the Laws of Zambia*

Courtyard Hotel Limited, the Plaintiff herein commenced these proceedings against **Zambia National Commercial Bank Plc**, the 1st Defendant, **Edgar Hamuwele** and **Christopher Mulenga**, the 2nd and 3rd Defendants (sued in their capacities as Joint Receivers of Courtyard Hotel Limited) on the 21st day of February, 2014 by way of Writ of Summons accompanied by a Statement of Claim seeking the following reliefs:

- (i) *A declaration that the 1st Defendant's failure to pay the Plaintiff the monies pledged to be disbursed under the Debenture obtained by the 1st Defendant amounts to a fundamental breach of a condition of the said Debenture thereby rendering the Debenture null and void for want of consideration on the part of the 1st Defendant;*
- (ii) *An order that any attempts by the Defendant to enforce the terms of the said Debenture are illegal and null and void;*
- (iii) *An order that the appointment of the 2nd and 3rd Defendants as joint receivers of the Plaintiff pursuant to the said Debenture is illegal and null and void;*
- (iv) *A declaration that the substantive agreement in place and enforceable between the Plaintiff and the 1st Defendant is the Credit Facility letter dated 4th April, 2012;*
- (v) *An order that the 1st Defendant's actions of obtaining further collateral from the Plaintiff but failing to release funds for the said collateral amounts to fraudulent misrepresentation;*
- (vi) *An order for the return of all the securities obtained by the 1st Defendant from the Plaintiff for which the 1st Defendant has furnished no consideration in form of loan disbursements;*
- (vii) *Damages for misrepresentation;*

- (viii) *Special damages for costs incurred by the Plaintiff on account of the 1st Defendant's misrepresentations;*
- (ix) *An injunction to restrain the Defendants by themselves, servants, agents or whomsoever from entering upon the premises of the Plaintiff's private properties for the purpose of taking over management or placing the Plaintiff under receivership and to restrain the 2nd and 3rd [Defendants] from enforcing or in any way carrying out their appointment as joint receivers of Courtyard Hotel Limited;*
- (x) *An order that the Plaintiff's equity of redemption of the Credit Facility executed on 12th April, 2012 still subsists and for a moratorium period within which the Plaintiff can service the said loan;*
- (xi) *Interest on all sums found due and owing;*
- (xii) *Costs of and incidental to these proceedings; and*
- (xiii) *Any other order this Honourable Court may deem fit.*

Attendant to the Writ of Summons in pursuance of the ninth relief, the Plaintiff filed an *ex parte* summons for an order of Interim Injunction pursuant to **Order 27, Rule 4 of the High Court Rules¹¹** as read together with **Order 29, Rule 1 of the Rules of the Supreme Court¹²**. The summons was supported by an affidavit and skeleton arguments both of even date.

In his affidavit the deponent, **Ayub Mulla**, the Managing Director in the employ of the Plaintiff asserts that in December, 2011 the Plaintiff applied for a loan facility from the 1st Defendant in the sum of **US\$15,000,000.00**. The purpose of the loan according to him was to refinance existing loans with other banks and to complete **Courtyard Express Hotel** along Great North Road. However, the 1st Defendant refused to grant the Plaintiff the loan which it applied for in the sum of **US\$15,000,000.00**. The deponent's assertion is that the 1st Defendant instead offered the Plaintiff the sum of **US\$8,000,000.00** by way of a Credit Facility letter dated the 4th day of April, 2012 and that the same was executed by the parties on the 12th day of April, 2012. A copy of the said Credit Facility letter has been produced and marked "**AM1**" to evidence the foregoing.

According to the deponent, the first disbursement of the said sum of money was only made in June, 2012. It is his assertion that the delay on the part of the 1st Defendant in approving the loan and disbursing the funds resulted in the incurrence of escalated costs for construction. Therefore, his evidence is that the Plaintiff requested for a further sum of **US\$1, 000,000.00** from the 1st Defendant in September, 2012 in order to cover for the shortfall caused by escalated costs.

The deponent further asserts that the 1st Defendant required further securities for the original loan by way of a supplementary

letter of offer dated 8th October, 2012 and that the said securities were provided by the Plaintiff. A copy of the said letter has been exhibited as **"AM2"**. According to the deponent, the 1st Defendant also required the Plaintiff to pay the sums of **US\$240,000.00** and **US\$75,000.00** into its account as a prerequisite for the disbursement of the additional sum of **US\$1,000,000.00**. It is his evidence that the Plaintiff accordingly paid the money. However, he asserts that despite providing the additional securities and paying the sums of money as aforestated, the 1st Defendant informed the Plaintiff in December, 2012 that the request for the sum of **US\$1,000,000.00** had been refused. That the delay in communicating this refusal caused further escalation in the construction costs.

Consequently, according to the deponent, in January, 2013, the Plaintiff requested the 1st Defendant to reconsider its position and grant the Plaintiff a sum of **US\$500,000.00** to cover the escalated costs but this request was also denied. He asserts that in May, 2013, the Plaintiff requested the 1st Defendant to have the Plaintiff's loan restructured up to October, 2013 and disburse an extra sum of **US\$200, 000.00** as part of the restructuring. It is the deponent's assertion that the 1st Defendant intimated its willingness to restructure the loan as requested and asked the Plaintiff to execute a debenture as security for the said extra sums of money.

He adds that the Plaintiff provided further securities in form of certificates of title two of which were supposed to be returned to the Plaintiff after registration of Assignments of Rent Receivables but the 1st Defendant has illegally held onto the same without furnishing consideration by way of monetary disbursement. His assertion is that to date, the 1st Defendant has not disbursed the extra sum of **US\$200, 000.00** which it undertook to disburse.

According to the deponent, this has been the case despite the fact that the Plaintiff had been making monthly instalment payments of **US\$20,000.00** between June and October, 2013 as required by the 1st Defendant. A statement of the Plaintiff's account has been exhibited as "**AM3**" to evidence the foregoing.

The deponent further asserts that he requested the 1st Defendant to avail the Plaintiff a copy of the Debenture on several occasions but the 1st Defendant has to date refused to do so. That he has on several occasions met the 1st Defendant's officials and informed them that the Debenture in issue is null and void owing to the 1st Defendant's failure to disburse the funds for the further securities which were furnished. According to the deponent, despite the said failure, the 1st Defendant proceeded to claim that the Plaintiff was in breach of the loan agreement and issued a final demand letter in November, 2013 a copy of which letter has been exhibited as "**AM4**". His assertion is that the said letter contains falsehoods and half-truths, albeit he has not specified the same.

It is the deponent's evidence that on the 18th day of February, 2014, the 1st Defendant sought to enforce the Debenture by appointing the 2nd and 3rd Defendants as joint Receivers of the Plaintiff. A copy of the Notice of Appointment of Receivers and Managers to that effect has been produced and marked "**AM5**". According to the deponent, there is no justification for such appointment as the Plaintiff is not in breach of the loan agreement while on the other hand, the 1st Defendant is in breach of the terms of the Debenture pursuant to which it appointed the Receivers. It is his assertion that the Plaintiff has been making monthly payments towards the settlement of the loan and has taken initiatives to settle the loan some of which initiatives have been specified.

On the basis of the foregoing evidence, this Court granted an **ex parte** order for an Interim Injunction on the 24th day of February, 2014 as prayed pending the **inter parte** hearing of the application.

In opposing the application, the 1st Defendant filed an affidavit in opposition and skeleton arguments on the 28th day of February, 2014. The affidavit was deposed to by **Credo Kambeli Makwembo** the Senior Manager-Restructuring, Special Assets Management Department in the employ of the 1st Defendant.

The deponent in his affidavit begins by stating that this action is improperly before Court as the Plaintiff is under receivership. He then goes on to assert that the delay in disbursing the funds as aforestated was caused by the Plaintiff's delay in providing security in terms of the Credit Facility letter of 4th April, 2012 which has been exhibited as "**CKM1**". Therefore, according to the deponent, any escalated costs incurred by the Plaintiff cannot be attributed to any fault on the part of the 1st Defendant. He adds that in any event, clause 7.14.12 of the said Credit Facility letter provides that any costs overruns were to be met by the Plaintiff itself. Further that under clause 6(8) thereof, the Plaintiff should have assigned to the 1st Defendant rent receivables up to the value of **US\$442,000.00** from **First Alliance Bank Zambia Limited, Phiken Limited** and **Kobil Zambia Limited** but the assignments were not availed to the 1st Defendant on time.

According to the deponent, the letter of 8th October, 2012 was only supplemental to that of 4th April, 2012 and was for the purposes of securing the original loan in the sum of **US\$8,000,000.00**. His assertion is that at no time did the parties agree that the 1st Defendant would disburse a further sum of **US\$1,000,000.00** under the said letter. That there was no agreement that upon provision of additional securities the 1st Defendant would disburse additional funds and that the Plaintiff did not provide all the additional securities as agreed by the parties. Quite contradictory to his foregoing deposition to the

effect that there was no agreement to disburse further funds, the deponent goes on to assert that the Plaintiff's failure to furnish all the agreed securities was the reason why the 1st Defendant did not provide additional funding to the Plaintiff as its assurances to the Plaintiff were based on the agreement that all securities which were pledged would be provided by the Plaintiff.

It is the deponent's further assertion that when the Plaintiff applied for additional funds in October, 2012 it had accumulated monthly interest arrears in the sum **US\$315,000.00** on its account. Therefore, according to him the sums of **US\$240,000.00** and **US\$75,000.00** which the Plaintiff paid to the 1st Defendant were for the settlement of interest arrears and not as a prerequisite for the disbursement of the additional sum of **US\$1,000,000.00** as asserted by the Plaintiff.

The deponent denies the Plaintiff's assertion that the 1st Defendant undertook to disburse an additional sum of **US\$200,000.00** pursuant to the Floating Debenture in issue. Instead, his assertion is that the 1st Defendant requested for the Floating Debenture via its letter of the 31st day of May, 2013 as further additional security. A copy of the said letter has been produced and marked "**CKM3**" in support of the foregoing. The deponent asserts that the disbursement of the additional sum of **US\$200,000.00** was on condition that the Plaintiff complies with all the security requirements in accordance with clause 8.14.2 of the

facility letter dated the 21st day of June, 2013 but the Plaintiff has to date failed to provide security item number 6.6 under that letter. A copy of the said letter has been exhibited as **“CKM4”**.

It is the deponent's assertion that the certificates of title were not surrendered to the 1st Defendant for the purpose of releasing extra funds but for the purpose of registration of the Assignments of Rent Receivables as agreed under the Credit Facility. According to him, the 1st Defendant has not refused to return the said certificates to the Plaintiff and has assured the Plaintiff that the same would be returned once the registration process is completed.

The deponent adds that the 1st Defendant has not refused to surrender to the Plaintiff a copy of the Debenture. He also denies the Plaintiff's assertion that the parties had a meeting in which the Debenture was challenged. Instead, his evidence is that the Debenture is neither defective nor null and void and that in appointing of the Receivers herein, the 1st Defendant was merely exercising its rights thereunder as the Plaintiff had defaulted in its obligations under the Credit Facility. That a copy of the Plaintiff's statement of account which has been exhibited as **“CKM7”** shows that the Plaintiff has defaulted on the agreement by failing to pay the agreed monthly instalments from October 2013 to date.

In response to the foregoing, the Plaintiff filed an affidavit in reply on the 28th day of February, 2014 which affidavit was sworn by **YOUNUS MULLA**, a Director in the employ of the Plaintiff. The deponent asserts in his affidavit that notwithstanding the appointment of the 2nd and 3rd Defendants as Receivers of the Plaintiff, this action is properly before Court as the same relates to the propriety of the said appointment in that there is no legal instrument pursuant to which the appointment was made. His assertion is that there is no receivership herein because the Receivers have not yet taken possession of the Plaintiff's assets.

Further, the deponent disputes that the Plaintiff delayed in providing the Assignments for Rent Receivables. Instead he asserts that the 1st Defendant delayed to effect registration despite being given all the documents and that it even turned down the Plaintiff's offer to assist in registering the documents at the Ministry of Lands.

The deponent reiterates that the Plaintiff provided all the securities that were requested for by the 1st Defendant and that in fact it provided more securities than required which is one of the claims in this action. According to him, the 1st Defendant's undertaking to disburse the sum of **US\$200,000.00** is evidenced by exhibit **"CKM4"** aforestated which provides for the restructuring of the loan by consolidating the existing sum of **US\$8,5 19,728.30**, unauthorized overdraft balance of

K1,516,191.00 and additional term loan of **US\$200,000.00** under clause 1 thereof. It is his assertion that clause 6 of exhibit “**CKM4**” provides for the securities that were to be furnished to secure, *inter alia*, the disbursement of the said sum of **US\$200,000.00** and security item number 13 is the Debenture in issue. Accordingly, that the Debenture was part of the security for the disbursement of **US\$200,000.00** and therefore that the failure to disburse the money rendered the debenture void for want of consideration.

The deponent reiterates that the Plaintiff is not in breach of the loan agreement. Instead he asserts that the 1st Defendant’s failure to disburse the funds it undertook to disburse has adversely affected the progress of Plaintiff’s construction works thereby also affecting its revenue because the works were not completed on time to allow it raise more income. According to him, this failure has directly affected the Plaintiff’s ability to service the loan.

On the 4th day of March, 2014, the 2nd and 3rd Defendants also filed a joint affidavit and skeleton arguments in opposition to the Plaintiff’s application. In their affidavit, the deponents assert that they were appointed as joint Receivers and Managers of the Plaintiff on the 17th day of February, 2014 pursuant to the terms of the Debenture aforestated. That in terms of clause 8 thereof,

they became the sole agents of the Plaintiff following the said appointment.

According to the deponents, no person other than themselves could therefore lawfully, properly or competently institute proceedings on behalf of the Plaintiff. It is their assertion that as this action was commenced by the Plaintiff in its own name, the same is improperly before Court and cannot be maintained. The deponents then proceeded to endorse the contents of the affidavit which was filed on behalf of the 1st Defendant in trying to assert that this is not a proper case in which an Injunction can be sustained in favour of the Plaintiff.

On the 11th day of March, 2014, the Plaintiff filed another set of skeleton arguments in opposition to Defendants' preliminary objection to the Plaintiff's action to the effect that the same is improperly before Court due to lack of *locus standi* on the part of the Plaintiff as it is under receivership. The details of these and other skeleton arguments aforesated are addressed hereunder as and when necessary.

At the *inter parte* hearing of the application on the 13th day of February, 2014, Counsel for the parties relied on the affidavit evidence and skeleton arguments which were filed on behalf of the respective parties. All Counsel buttressed their respective

skeleton arguments by *viva voce* submissions which submissions were all substantially in tandem with the said skeleton arguments.

The gist of the submissions by Counsel for the Plaintiff is that the Plaintiff has satisfied the legal requirements for sustaining the Interim Injunction which was granted *ex parte* on the 24th day of February, 2014. Counsel submitted in his skeleton arguments that these legal requirements are to be found in the case of ***American Cyanamid Co v. Ethicon Ltd***¹, as espoused by the learned authors of the ***Rules of the Supreme Court***¹² under ***Order 27/L/2*** which states that the Court must respectively consider the seriousness of the question to be tried, the adequacy of the remedy of damages for the injured party and where the balance of convenience lies before granting an Interlocutory Injunction.

According to Counsel, the test as to whether or not there is a serious question to be tried entails that the Court should examine whether or not the applicant's claim is frivolous or vexatious and whether the applicant has a real prospect of success in obtaining a permanent Injunction at trial. It was his argument that the Plaintiff has demonstrated serious triable issues in its Originating Process relating to the illegal and improper manner in which the Plaintiff was placed under receivership by the 1st Defendant when the Plaintiff has not defaulted in repaying the loan which it obtained from the 1st Defendant.

Counsel further argued that the Debenture pursuant to which the Receivers were appointed was not properly perfected as no signed copy thereof was delivered to the Plaintiff and the 1st Defendant has not disbursed the funds which ought to have been secured by the Debenture. According to him, this has rendered the Debenture null and void for want of consideration.

In trying to further show that there are serious triable issues, Counsel also referred to the other reliefs which the Plaintiff is seeking in the main matter, albeit, I found the same irrelevant to the instant application before Court. Counsel submitted that the Plaintiff has a strong case with a considerable likelihood of success and that the Plaintiff has demonstrated a clear right to relief. He then proceeded to cite the cases of ***Turnkey Properties v. Lusaka West Development Company Ltd., B.S.K. Chiti (sued as Receiver), and Zambia State Insurance Corporation Ltd²*** and ***Shell & B.P. Zambia Limited v. Conidaris and Others³*** but did not specifically state their relevance to his submissions.

On the adequacy of damages, Counsel submitted that the question that has to be determined is whether or not damages would be sufficient to compensate the Plaintiff for the loss which would be occasioned if the Injunction is not maintained. According to him, the deprivation or dispossession of the Plaintiff's property

and interest in land would result in irreparable injury as the loan is secured by land. It was his submission that the position of the law is that damages cannot adequately compensate a party who has been divested of an interest in land. He cited the cases of ***Gideon Mundanda v. Timothy Mulwani and The Agricultural Finance Co. Ltd and S.S.S. Mwiinga***⁴ and ***Mwenye and Randee v. Kapinga***⁵ to support his submission in that regard. According to Counsel, if the reputation and goodwill of the Plaintiff are tarnished they cannot be atoned for in damages. Counsel also attempted to casually give evidence in his skeleton arguments to the effect that the Receivers herein wish to take over the Plaintiff's hotels which attempt cannot be entertained by this Court for the obvious reason that evidence cannot be adduced by Counsel on behalf of the parties by way of submissions, written or otherwise.

It was further argued by Counsel that the balance of convenience lies with the grant of an Interlocutory Injunction. That justice will be served if the application is sustained so as to maintain the status quo pending the Court's final decision instead of allowing the receivership to proceed as that would be prejudicial to the Plaintiff's interest. Counsel contended that no prejudice will be occasioned to the Defendants if the status quo is so maintained. According to him, if the Injunction is not maintained there will be nothing left for the Court to adjudicate upon because the acts

complained of will take place thereby rendering the action merely academic.

In concluding his submissions with respect to the Injunction, Counsel submitted that the Plaintiff has met the three-prong threshold for an interlocutory injunction and urged the Court to confirm the Interim Injunction which was granted *ex parte*. He also prayed for costs.

As regards the Defendants' assertion that the Plaintiff lacks ***locus standi*** to commence these proceedings because it was placed under receivership, Counsel submitted that there are instances where the Directors of a company can issue process in the name of the company despite the fact that a Receiver has been appointed. According to him, one such instance is where the very instrument pursuant to which the Receiver was appointed is being challenged as in this case. To support this argument, Counsel cited the case of ***Robert Mbonani Simeza (sued as Receiver/Manager of Ital Terrazo Limited) and Finance Bank (Z) Limited v. Ital Terrazo Limited***⁶ in which the Supreme Court held that the directors of a company under receivership should be entitled to sue *inter alia* where the current receiver is himself the wrongdoer; where the directors wish to litigate the validity of the security under which the appointment has taken place; or where the vital interests of the company are at risk from elsewhere and the receiver neglects or declines to

act. According to Counsel, it would be unreasonable for the Directors of the Plaintiff to ask the 2nd and 3rd Defendants to institute an action to challenge their own appointment as it was in the foregoing case.

In her response, Counsel for the 1st Defendant argued that this action was irregularly commenced as the Plaintiff has no ***locus standi*** independent of its Receivers. To support her argument, Counsel cited the case of ***Magnum (Zambia) Limited v. Basit Quadri (Receivers/Manager) & Grindlays Bank International Zambia Limited***⁷ in which this Court held as follows:

- (i) *A receiver who is an agent of the company under receivership is there to secure the interests of the debenture holder and in those circumstances the company concerned is debarred from instituting legal proceedings against its receiver/manager.*
- (ii) *A company under receivership has no locus standi independent of its receiver. As long as a company continues to be subjected to receivership, it is the receiver alone who can sue or defend in the name of the company.*

According to Counsel, the case of ***Robert Mbonani Simeza (sued as Receiver/Manager of Ital Terrazo Limited) and Finance Bank (Z) Limited v. Ital Terrazo Limited***⁶ is distinguishable from the case at hand. Her contention was that in the case at hand the manner of execution of the Debenture and

the authority of the officers of the Plaintiff who executed it on its behalf are not in issue. That what can be seen on record is that the 2nd and 3rd Defendants were duly appointed as Receivers pursuant to a Debenture which was properly executed by the Directors of the Plaintiff and duly registered at the Ministry of Lands and PACRA. Counsel therefore urged the Court to dismiss the entire action and the current application with costs.

In the alternative, Counsel for the 1st Defendant submitted that should the Court be of the view that this action was properly commenced; the application herein should nonetheless fail. Her argument was that the Plaintiff is a defaulting customer of the 1st Defendant who is attempting to shield itself from the default by obtaining an Injunction to create new conditions favourable to itself. She cited the case of ***Turnkey Properties v. Lusaka West Development Company Ltd., B.S.K. Chiti (sued as Receiver), and Zambia State Insurance Corporation Ltd***² to show that an Interlocutory Injunction cannot be used for such purpose. It was Counsel's contention that the Plaintiff is seeking an Injunction in order to continue defaulting and that sustaining the application would thus cause injustice to the 1st Defendant. That if the injunction is maintained the continued indebtedness of the Plaintiff would not be atoned for in damages because the total indebtedness would exceed the market value of the securities which were provided by the Plaintiff.

In similar vein, Counsel for the 2nd and 3rd Defendants submitted that the Plaintiff cannot commence an action in its own name because it was placed under receivership pursuant to **Section 209 of the Companies Act¹³**. He submitted that in terms of **Section 113 and 115** of the said Act, the Receivers are the sole officers and agents of the Plaintiff and it is legally obligatory to have wherever the name of the Plaintiff appears, a statement that it is under receivership, respectively. According to him, the receivership herein is legally unassailable. He also cited the case of **Magnum (Zambia) Limited v. Basit Quadri (Receivers/Manager) & Grindlays Bank International Zambia Limited⁷** and urged the Court to strike out the Writ of Summons issued herein and dismiss the action in its entirety.

Counsel also submitted that since it has been shown that the Plaintiff is in breach of its obligations under the Credit Facility, it is disentitled to the equitable relief of an Injunction. A plethora of authorities were cited in the skeleton arguments to show that such a defaulting party cannot seek an equitable relief one of which being the case of **Kayanje Farming Limited and Christopher Thorne v. Christopher Mulenga (sued as Joint Receiver and Manager of Kayanje Farming Limited (in Receivership) and Edgar Hamuwele sued (as Joint Receiver and Manager of Kayanje Farming Limited (in Receivership) and Zamba National Commercial Bank Plc⁸**. According to Counsel the Plaintiff is running to equity when it is already in

default. He argued that by seeking an injunctive relief, the Plaintiff is seeking to attain a new situation only favourable to itself which is inconsistent with principles governing the granting of injunctive relief enunciated *inter alia* in the case of ***Turnkey Properties v. Lusaka West Development Company Ltd., B.S.K. Chiti (sued as Receiver), and Zambia State Insurance Corporation Ltd²***.

It was Counsel's further contention that the 1st Defendant merely exercised its right under the Debenture when it appointed the 2nd and 3rd Defendants as joint Receivers of the Plaintiff. That the Plaintiff cannot therefore be stopped from exercising its legal rights. Counsel *inter alia* cited the case of ***Christopher Thorne v. Christopher Mulenga (sued as Joint Receiver and Manager of Kayanje Farming Limited (in Receivership) and Edgar Hamuwele sued (as Joint Receiver and Manager of Kayanje Farming Limited (in Receivership) and Zamba National Commercial Bank Plc⁹*** to support his argument.

According to Counsel, the Plaintiff's action is unlikely to succeed because, among other reasons, the issues of illegality and misrepresentation endorsed on the Writ of Summons were not clearly pleaded in accordance with ***Order 18, Rule 8 of the Rules of the Supreme Court¹²***. It was his contention that, in any event, the Plaintiff's surge for an injunction has come too late

in the day because the 1st Defendant has already exercised its rights and therefore cannot be restrained from so doing.

In concluding, Counsel for the 2nd and 3rd Defendants stated that this application is neither novel nor complex as similar applications have already been adjudicated upon by the Court. He reiterated his urge for the Court to dismiss the Plaintiff's application with costs.

In reply, Counsel for the Plaintiff submitted that receivership is a matter of fact and therefore, the mere fact that the 1st Defendant has filed papers for receivership does not constitute constructive receivership at law. His position was that since the Receivers are not yet in possession of the Plaintiff's assets, the Court has the power to restrain them from taking over such assets. According to him, the Injunction will not create any favourable conditions for the Plaintiff as the 1st Defendant retains all the securities it obtained from the Plaintiff including all its rights pending the determination of this matter. It was his contention that nothing has been taken away from the 1st Defendant by the Injunction. Counsel further argued that although a myriad of authorities were cited on the equitable nature of an Injunction, equity is applied on a case to case basis and that none of the cases so cited dealt with the peculiar issues arising herein.

On the issues of illegality and misrepresentation not being clearly pleaded, Counsel submitted that there is no legal requirement for a party to plead a particular statute. That all a party has to do is to present particular facts which would avail him of the relief under the statute which he later seeks to rely on at trial. According to Counsel, the Statement of Claim herein is loaded with such facts and as such, there is reasonably demonstrated likelihood of success.

It was Counsel's further submission that the question in this action is whether the 1st Defendant can invoke an instrument which itself has defaulted on. This default, according to Counsel, is not disputed as evidenced by paragraph 15 of the 1st Defendant's affidavit in opposition. His contention was that the argument that the Debenture is valid is what is being challenged by these proceedings. Counsel further stated that the case of ***Robert Mbonani Simeza (sued as Receiver/Manager of Ital Terrazzo Limited) and Finance Bank (Z) Limited v. Ital Terrazzo Limited***⁶ cannot be distinguished herein as it falls on all fours with the case at hand.

I have carefully considered and fully addressed my mind to the application by the Plaintiff, the affidavit evidence adduced by the parties to this cause, the skeleton arguments and the oral submissions by all Counsel and I am indebted to all Counsel for their spirited arguments.

Before I venture to discuss the merits of the application, I note that to a large extent, the parties labored at this interlocutory stage to deal with substantive issues on the merits of the matter which, if the matter proceeds to trial, ought to be left for that purpose. The Court is however precluded from pronouncing itself on such issues when determining an interlocutory application as the same may have the effect of pre-empting the decision on the issues which are to be decided on the merits at the trial. Among other cases, the case of ***Turnkey Properties v. Lusaka West Development Company Ltd., B.S.K. Chiti (sued as Receiver), and Zambia State Insurance Corporation Ltd²*** is instructive in that respect. I therefore decline to delve into the substantive issues which touch on the merits of the main matter for the current purposes.

Having said that, I take the view that the success or failure of this application is firstly contingent upon the determination of the issue of ***locus standi*** which has been raised by the Defendants. I take this view because if indeed the Plaintiff has no ***locus standi*** to commence these proceedings, it follows that the Plaintiff's application would fail as a necessary consequence thereof regardless of whether or not the application is meritorious. Therefore, I will first determine the issue of ***locus standi*** before considering the Plaintiff's application.

From the evidence on record, it is common cause that the 1st Defendant appointed the 2nd and 3rd Defendants as joint Receivers and Managers of the 1st Plaintiff on the 18th day of February, 2014. Exhibit "**AM5**" aforestated, which is a Notice of Appointment of the 2nd and 3rd Defendants as Receivers and Managers of the Plaintiff which notice is as prescribed by Companies Form 39 evidences the foregoing. Indeed there is unanimity insofar as the parties' evidence is concerned in this regard.

What is in dispute, however, is the validity of the said appointment. On the one hand the Plaintiff asserts that the Debenture pursuant to which the appointment was made is null and void for want of consideration while on the other, the Defendants assert that consideration was furnished for the Debenture and as such same is valid. The sustainability or otherwise of these contradicting assertions is one of the issues that cannot be determined at this stage.

The decision of this Court in the case of **Magnum (Zambia) Limited v. Basit Quadri (Receivers/Manager) & Grindlays Bank International Zambia Limited**⁷ was upheld by the Supreme Court in the case of **Avalon Motors Limited (in Receivership) v. Bernard Leigh Gadsden Motor City Limited**¹⁰. Therefore, I totally agree with both Counsel for the Defendants that a company under receivership has no **locus standi** independent of its Receiver. However, this position is only

a general rule to which there are exceptions. Some of those exceptions were enunciated by the Supreme Court in the foregoing case in the following terms:

“...., it would be improper for a current Receiver being sued in his own name by the company as this would amount to suing himself. See Magnum (Zambia) Limited v Basit Quadri (Receiver/Manager) and another (1981) ZR 141 (which held, inter alia, that a company under receivership has no locus standi independent of its Receiver). However, whenever a current receiver is the wrongdoer (as where he acts in breach of his fiduciary duty or with gross negligence) or where the directors wish to litigate the validity of the security under which the appointment has taken place or in any other case where the vital interests of the company are at risk from the Receiver himself or from elsewhere but the Receiver neglects or declines to act, the directors should be entitled to use the name of the company to litigate.”

This holding was recently reaffirmed in its entirety by the Supreme Court in the case of ***Robert Mbonani Simeza (sued as Receiver/Manager of Ital Terrazo Limited) and Finance Bank (Z) Limited v. Ital Terrazzo Limited***⁶.

As earlier alluded to, this action undoubtedly seeks to impugn the validity of the Debenture pursuant to which the 2nd and 3rd Defendants were appointed as Receivers and Managers of the Plaintiff. This comes out clearly from both the endorsement on the Origination Process and the affidavit evidence adduced on behalf of the Plaintiff. Therefore, since the Directors of the Plaintiff are seeking to litigate the validity of the Debenture under which the said appointment took place, they are entitled to use the name of the Plaintiff to litigate in accordance with the foregoing holding by the Supreme Court. To that extent, I totally agree with Counsel for the Plaintiff that this matter falls on all fours with the said holding. The distinction which Counsel for the 1st Defendant sought to draw is elusive. In my considered view, the mere fact that the Debenture was duly executed and registered with the relevant Government departments has no bearing whatsoever on the fact that the Debenture is being impugned. I take this view because the Plaintiff's assertion is that the Debenture is null and void due to lack of consideration which has nothing to do with the manner in which the said security was executed or indeed its registration. The action was therefore competently commenced by the Plaintiff's Directors in the name of the Plaintiff.

I also take a dim view of the casual manner in which the Defendants sought to challenge the regularity of this action. They sought to do so by way of affidavits in opposition to the Plaintiff's application for an Interlocutory Injunction after entering

appearance which procedure is alien to our legal system. The proper course of action to take in such a case is to enter conditional appearance and apply to set aside the writ of summons for irregularity pursuant to **Order 11, Rule 1 (4) of the High Court Rules¹¹** or to make a formal application if appearance has already been entered and an irregularity is later discovered. I note that this was partly canvassed by the Plaintiff in its affidavit in reply though also improperly so as it is a legal argument.

Having determined that this action is properly before the Court, I now turn to the Plaintiff's application. As earlier alluded to, the Plaintiff's application is for confirmation of the **ex parte** order for an Interim Injunction which was granted on the 24th day of February, 2014 in its favour. The Injunction in its current wording enjoins the 1st, 2nd and 3rd Defendants by themselves, servants, agents or whomsoever from further entering and/or trespassing upon the Plaintiff's property and premises for the purpose of taking over the operations of the Plaintiff or placing the Plaintiff under receivership and further enjoins the 2nd and 3rd Defendants from enforcing or in any way carrying out their appointment as joint Receivers of the Plaintiff.

In an application of this nature, as was argued by Counsel for the Plaintiff, the Court has a duty to first satisfy itself that the applicant's claim is not frivolous or vexatious, that is to say, that

there is a serious question which remains to be tried. However, it must be emphasized that it is not part of the Court's duty at this stage of litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations as such matters are to be dealt with at trial. This is so because, as **Lord Diplock** aptly put in the case of ***American Cyanamid Co v. Ethicon Ltd***¹, "***when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesis the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action***". The question to be determined at this stage therefore is only whether or not the material currently available to the Court discloses that the Plaintiff has any real prospect of succeeding in its claim for a permanent injunction at the conclusion of trial. If and only if, the answer to this question is in the affirmative is the Injunction tentatively sustainable.

In the case in **casu**, I agree with Counsel for the Plaintiff that on the facts before Court, the Plaintiff has demonstrated reasonable prospect of succeeding in its claim for a permanent injunction at

trial if the uncertainty as to the validity of the Debenture is resolved in its favour. In my view, the right to relief is clear in that if indeed, as asserted by the Plaintiff, the Debenture in issue was meant to be security for repayment of the sum of **US\$200,000.00** and that sum was not disbursed by the 1st Defendant, the said security would not be enforceable by the Defendants albeit the veracity of the said assertion is an issue which can only be properly determined at the trial. However, I decline to comment on the contention by Counsel for the 2nd and 3rd Defendants as to the manner in which the Originating Process and the endorsements thereon were drafted and how the same would affect the success of the other reliefs being sought by the Plaintiff for the reason that I have already given hereinbefore.

As regards the assertion to the effect that the Plaintiff has defaulted on the Credit Facility agreement and as such is disentitled to an equitable relief in form of an interlocutory injunction, I take the view that this issue raises yet another uncertainty which can only be properly determined after a full trial. Although the Plaintiff's evidence appears contradictory on the point in that on the one hand it is asserted that the Plaintiff has not defaulted and on the other hand the Plaintiff tries to give an explanation for its failure to pay some of the instalments on the Facility and the steps which it has taken to settle the loan, without pre-empting the Court's decision if the matter proceeds to trial, it would appear that the claim in respect of the Debenture to

which this application relates is quite independent of the Credit Facility in question. The Plaintiff's assertion that the Debenture was meant to secure the repayment of the said **US\$200,000.00** *prima facie* suggests to me that in effect the Plaintiff's assertion is that the Debenture was not meant to secure the repayment of the loan in the sum of **US\$8,000,000.00** which was advanced. Whether this is the case or not is unclear because the Defendants in fact assert that the Debenture was meant to be supplementary security for the repayment of the said loan. What blurs the matter even more is the fact that the Plaintiff asserts that it applied for other loans which were not granted and that it provided more securities than necessary.

In light of the foregoing, if the Debenture was not meant to secure the repayment of the funds which were actually disbursed, the default in issue cannot in itself disentitle the Plaintiff to the relief being sought. This is so because, if that is the case, the default would not be on the agreement pursuant to which the Debenture was executed. Therefore the Plaintiff's default would have no bearing on its claim in respect of the Debenture. This case can thus be contrasted with the cases cited by Counsel for the 2nd and 3rd Defendants in which the default was not only undisputed but the security instruments were also undisputedly meant to secure the repayment of the loan on which such default occurred. In the case in **casu**, although the statement of account which has been exhibited by the 1st Defendant shows that there is

default; the latter is not only disputed but also unclear. Any such default cannot therefore be relied upon to deny the Plaintiff its claim at this stage.

If, as in this case, the material available to the Court at the hearing of an application of this nature discloses that the Plaintiff has real prospect of succeeding in his claim at trial, the next issue the Court should go on to consider is whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. In terms of the case of ***Shell & B.P. Zambia Limited v. Conidaris and Others***³ the determination of this issue is especially indispensable where there is doubt as to the plaintiff's rights or if the violation of an admitted right is denied and the burden of showing the greater inconvenience is on the plaintiff.

From the evidence before Court as set out above, I have no doubt in my mind that this is a contested matter and as such that the rights of the parties concerned and the uncertainties and their answers are far from clear. With respect to the balance of convenience, I take the view that if this Injunction were not to be sustained and the Plaintiff were the successful party at the conclusion of trial, the loss to the Plaintiff would be much more severe than the inconvenience which would be occasioned to the Defendants if left to rely on their right to claim damages from the Plaintiff as undertaken by itself in the injunction. I take this view

because of the limitless nature of the powers by which the Debenture in issue can be enforced in that it entitles the Receivers to take over the management of all the assets of the Plaintiff. This may have far-reaching financial repercussions on the Plaintiff which cannot be atoned for in damages. On the other hand, the only loss the 1st Defendant may suffer can easily be quantified in monetary terms. If anything, regardless of the ultimate decision that the Court may hand down, the 1st Defendant will still be entitled to recover the principal sum that was advanced to the Plaintiff together with interest thereon and may in the interim have recourse to the other securities available to it.

It must be noted, as **Lord Diplock** stated in the case of ***American Cyanamid Co v. Ethicon Ltd***¹, that the object of an Interlocutory Injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty in issue were resolved in his favour at the trial. Therefore, having weighed the foregoing herein against the corresponding need for the Defendants to be protected against possible injury resulting from their being prevented from exercising their own legal rights if the uncertainty is resolved in their favour at trial, I am satisfied that the balance of convenience lies in favour of sustaining the Interlocutory Injunction which was granted ex parte.

Indeed I do not see how doing so would create any new conditions only favourable to the Plaintiff as asserted by the Defendants. In my view, sustaining the Injunction would only preserve the status quo pending trial in that the Plaintiff would, in the interim, be protected from being divested of any interest in its assets while the Defendants would retain their right to enforce the disputed Debenture and claim any damages should the dispute be resolved in their favour at the conclusion of the trial.

Further, the wording of the Injunction as aforestated shows that the Plaintiff acknowledges that the appointment of the Receivers has already taken place. Therefore, since the Plaintiff's assertion is that the 2nd and 3rd Defendants have not started performing their duties as joint Receivers despite the said appointment and none of the Defendants disputed that assertion, it cannot be said that this application has come too late in the day.

For the reasons I have given, the Interim Injunction which was granted *ex parte* on the 24th day of February, 2014 herein is hereby confirmed and shall remain in force during the pendency of these proceedings until any order to the contrary is made by the Court.

Costs of this application shall be in the cause.

Leave to appeal is hereby granted.

Delivered at Lusaka this 3rd day of April, 2014.

Justin Chashi
HIGH COURT JUDGE