

IN THE HIGH COURT FOR ZAMBIA  
HOLDEN AT LUSAKA  
CIVIL JURISDICTION

2015/HP/1267

BETWEEN

ALAGAPPAN MURUGAPPAN

1<sup>st</sup> Plaintiff

NAGGAMAI MURUGAPPAN

2<sup>nd</sup> Plaintiff

AND



INDO ZAMBIA BANK LIMITED

1<sup>st</sup> Defendant

CORAM:

Honorable Mr. Justice Mubanga Kondolo, SC

MARSHAL:

Ethel Phiri

FOR THE PLAINTIFF:

Mr. M. Katolo of Messrs Milner Katolo & Associates

FOR THE 1<sup>st</sup> & 2<sup>nd</sup> DEFENDANTS:

Mr. I.M. Mabbolobolo Makala of Messrs Makala &  
Company

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## R U L I N G

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### AUTHORITIES

### STATUTES

1. Halsberys laws of England<sup>1</sup>, Volume 11, 385 (5<sup>th</sup> Ed.)
2. High Court Act, Chapter 27, Laws of Zambia

### CASES

1. American Cyanamid v Ethicon (1975) AC 396
2. Zambia State Insurance Corporation v Dennis Muliokela SCZ/9/1990
3. Preston v Luck (1884) 27Ch D 497

The Applicant herein filed an ex parte summons for an order of interim injunction pursuant to Order 27 HCR<sup>1</sup> supported by an affidavit. The court ordered that the application would be heard inter parties. The Respondents duly filed their affidavit in opposition. The Respondents have not filed an affidavit in reply.

The application for an injunction was filed on the heels of a Writ of Summons in which the Plaintiff (the Applicant) sought the following relief;

1. *An Order that the contract relating to the loan from defendant to the Plaintiff for the purchase of stand no. 428 a property situate in Kabulonga Lusaka by the Plaintiffs is frustrated and unenforceable*
2. *An Order that the Defendants is not entitled to recover any money or at all from the plaintiffs on ground of an operative mistake*
3. *An order of injunction restraining the defendant whether by itself or through its agents or servant or howsoever described from effecting any monthly deductions in respect of alleged loan recoveries from the plaintiffs joint determination of the matter or until further order of court.*
4. *An Order for the refund by the defendant of any money deducted from the plaintiff's joint account*
5. *Interest*
6. *Costs*
7. *And any other reliefs the court may deem fit*

According to the statement of claim the Plaintiff Responded to an advert in the newspaper in which a house was being sold at ZK600, 000. The Plaintiff engaged lawyers to assist in the conveyancing process and paid the Vendor a cash deposit in the sum of ZK100, 000 at their advocate's boardroom.

The Plaintiff then obtained a loan by way of mortgage in the sum of ZK800, 000 from the Defendant bank. The Plaintiff thereafter instructed the Defendant to pay the sum of ZK440, 000 directly to the Vendor and the balance of the loan amount was paid to the Plaintiff.

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<sup>1</sup> Order 27, Rule 4, High Court Rules, High Court Act, Chapter 27, Laws of Zambia

The Plaintiffs later discovered that they had been swindled by the purported Vendor as the title deeds were fake and their surveyor confirmed that the property reflected on the said title deeds did not correlate to the property they were shown.

In the meantime, the Defendant commenced deductions from the Plaintiffs Bank Account pursuant to the terms of the mortgage and declined the Defendants request to stop the said deductions. The Plaintiffs have taken the position that the deductions must be stopped "as the subject matter is not in existence, which has prevented the execution of the mortgage with the Defendant". The Plaintiffs further claim that the contract has been frustrated and they shall suffer irreparable loss if the deductions continue as they have lost the property they intended to purchase and also the money at the same time.

The Defendants filed an affidavit in opposition in which they confirmed that the Plaintiff had applied for a mortgage in the sum ZK800, 000 and the sum was duly remitted in the manner already described by the Plaintiffs.

The Plaintiffs requested the Defendant to exempt them from appointing advocates from the Banks panel of approved lawyers as they had already appointed their own lawyers. The Plaintiffs were thus duly represented by their own advocates in the transaction and the only role played by the Defendants was to remit the monies to the Plaintiffs according to their own instructions.

The Defendants asked the court to not grant the injunction to halt deductions from the plaintiffs loan account as this would greatly prejudice the Defendant and leave it with no recourse to recover what was paid out on behalf of the Plaintiffs on their instruction and that of their advocates of their own choice.

When the matter came up for inter parte's hearing both the Plaintiffs and their advocates were absent but learned counsel for the Defendants informed the court that the parties had agreed that they would file arguments on whose basis the court would deliver its ruling.

The parties have not filed their written arguments within the prescribed period and I have therefore proceeded to deliver my ruling nonetheless.

This is an application for an injunction which is a discretionary remedy and as such must be granted sparingly and only upon satisfying the basic requirements for the grant of this relief.

In the landmark case of **American Cyanamid v Ethicon**<sup>2</sup> it was held that in order to grant an injunction the court must establish that there is a serious question to be tried. This was echoed by the learned authors of **Halsburys laws of England**<sup>3</sup> who said as follows;

*'The material available to the court at the hearing must disclose that the claimant has real prospects of succeeding in his claim for a permanent injunction or trial'.*

This position of the law was further articulated in **ZSIC v Dennis Mulikelela**<sup>4</sup> in which the Supreme Court approved the ruling in **Preston v Luck**<sup>5</sup> where it was said that over and above the court satisfying itself that there was a serious question to be tried, the court should also be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief.

Establishing whether or not the Plaintiffs claim passes the test in **Preston v Luck**<sup>6</sup> requires that the facts be previewed.

The Plaintiff applied to Defendant for a house loan in the sum of ZK800, 000 for the purchase of Stand No. 428, Kabulonga and the parties executed a Loan Agreement to that effect. The entire sum of ZK800, 000 was advanced to the Plaintiffs according to their instructions and the Plaintiffs entered into a transaction with the purported Vendor of the said house.

The Plaintiffs declined to use any of the Defendant banks approved lawyers and requested that they utilize advocates of their own choice. Other than advancing payments according to the Plaintiffs instructions, the Defendant bank was not involved in the conveyance between the Plaintiffs and the purported Vendor of the house.

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<sup>2</sup> *American Cyanamid – Vs – Ethicon (1975) AC 396*

<sup>3</sup> *Halsburys laws of England*<sup>3</sup>, Volume 11, 385 (5<sup>th</sup> Ed.)

<sup>4</sup> *ZSIC v Dennis Mulikelela SCZ No. 9 of 1990*

<sup>5</sup> *Preston v Luck (1884) 27Ch D 497*

<sup>6</sup> *Ibid*

The Plaintiffs have submitted that the loan service payments should be stopped because the subject matter of the agreement, (the house) is no longer existent thereby rendering the mortgage frustrated.

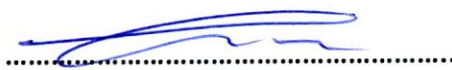
The primary subject matter of the mortgage agreement between the Plaintiff and the Defendant is the ZK800, 000 together with its attendant charges. The mortgaged property (the house) is simply collateral and therefore the secondary subject matter. The Plaintiffs never took possession of the house which was therefore never yielded to the Plaintiffs as security by way of a legal mortgage as provided by the loan agreement.

The Plaintiffs at their own request received the sum of ZK800, 000 from the Defendants. They dealt with the purported Vendor exclusively and with lawyers of their choice and after being swindled they are suggesting that the Defendant bank should bear the loss.

I am not convinced that the Plaintiff has shown that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief.

The Application for an interim injunction is consequently refused with costs to the Defendant.

Dated at Lusaka this ..... day of January, 2016.



Mubanga Kondolo, SC  
Judge