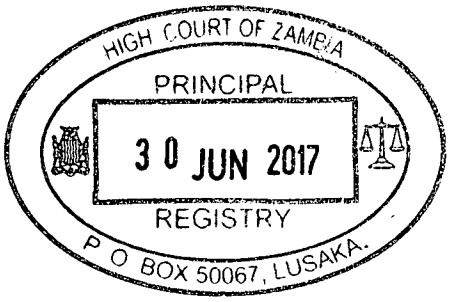
IN THE HIGH COURT FOR ZAMBIA **2016/HP/1232**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

VICTOR SILUMBWE **PLAINTIFF**

AND

PULSE FINANCIAL SERVICES LIMITED **DEFENDENT**

Before the Honourable Mrs. Justice M. C. Kombe

For the Plaintiff : *In person.*

For the Defendant : *Ms. L. Shula – Messrs J & M Advocates.*

RULING

Cases referred to:

1. **Edward Jack Shamwana v. Levy Mwanawasa (1993-1994) Z.R 149.**
2. **American Cyanamid v. Ethicon (1975) A.C 396.**
3. **Harton Ndove v. Zambia Educational and Publishing Company Limited (1980) Z.R. 184.**
4. **Shell and BP (Z) Limited v. Conidaris and others (1975) Z.R 174.**
5. **Hondling Xing Xing Building Co. Ltd v. ZamCapital (2010) 1 Z.R. 30.**
6. **Cayne v. Global Natural Resources (1984) 1 ALL E.R 225.**

Legislation and other work referred to:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia.**
2. **The Rules of the Supreme Court, 1999 Edition (White Book).**
3. **Halsbury Laws of England, Volume 24, Fourth Edition.**

This is a ruling on the Plaintiff's application for an Order of Interim Injunction

restraining the Defendant itself, its servants, agents, employees or debt collectors or whosoever from interfering with the Plaintiff's quiet possession and enjoyment of property pledged and from harassments and intimidation of the Plaintiff and threatening to repossess the property and assets and further forcing collection of interests until further order of the court.

The summons does not indicate the Order pursuant to which the application is made but it is supported by an affidavit deposed to by the Plaintiff **VICTOR SILUMBWE**.

The Plaintiff in his affidavit explained that on 16th May, 2012, he obtained a mortgage loan in the principal sum of K75, 000.00 on a contract of guarantee fixed at 4.5% per month for a duration of thirty six (36) months or three (3) years; that there was a deduction fee of K5, 625.00 leaving K69, 375.00 and that at the end of each month he started paying interest assigned to the mortgage loan.

He went on to explain that about January 2013, he started struggling to make payments as his business was not doing well. Therefore in order to avoid defaulting, he applied to reschedule the duration of the period of payment of the interest on the loan and also that the monthly payment of K3, 375.00 be reduced; that he was called after six (6) days by the Defendant and he was made to sign a consent form for another mortgage loan of K76, 000.00. A copy of the mortgage loan was produced as **'VS3'**; that no cash was given in respect of the new loan.

It was further deposed that he had no intentions to subscribe to the new mortgage loan of K76,000.00 but to clear and redeem the 1st loan of K75,000.00; that on 24th May, 2016, he wrote a letter to the Defendant so that the Accountants could reconcile the interest payable on K75,000.00 and not on K76,000.00 which he had not applied for; that he was informed by the

Defendant that the current loan balance stood at K58,097.57 and that he was in nine (9) months arrears of K27, 402.88 for the new loan.

In this regard he explained that since the loan of 2012 the presumption was that he had paid the Defendant over K129, 439.80 interest and that he would continue paying them beyond 2018; that the conduct of the Defendant was calculated at defrauding him and that he was prejudiced and misled as he had no interest to consent to a new loan.

I declined to grant the order of injunction *ex-parte* and I ordered that it be heard *inter-parte.*

The Defendant opposed the application by filing an affidavit in opposition deposed to by **MARTHA MSONI MWANDILA**, the Head Legal Officer. She deposed that the Plaintiff had not made a full and frank disclosure of material facts relating to this matter. She therefore explained as follows:

That on 16th May, 2012, the Defendant extended a loan facility to the Plaintiff in the sum of K75, 000 for a duration of thirty six (36) months at the interest rate of 4.5% per month on the unpaid principal; that the Plaintiff communicated to repay the borrowed capital and interest in the total sum of K196, 500.00 in thirty six (36) months installments of K5, 458.333. She produced a payment schedule outlining how such payments were to be made.

However, during the subsistence of the loan the Plaintiff started to encounter difficulties in making his installment repayments to the Defendant; that this necessitated the Plaintiff to request for a reduction of the monthly payment amount and changing the date of repayment to the first of every month; that in order for the Defendant to reduce the monthly payments and change the repayment date in favour of the Plaintiff, it was necessary to reschedule the

loan of K75, 000.00 and that this requirement was explained to the Plaintiff; that the process of rescheduling required that the loan period be extended.

The rescheduling process entailed extending the loan duration for a further period of sixty (60) months from 22nd April, 2013; that this extension affected the insurance covers for the collaterals pledged as well as the Plaintiffs insurance policy which was paid under the K75, 000.00 loan agreement; that the insurance cover were only valid for a period of thirty six (36) months; that due to the fact that the Plaintiff did not have the means or the money to pay for Life Assurance Cover for the collateral relating to the loan in question, the Defendant re-calculated the loan and it was pegged at K76, 000.00 to cover the payment of the aforementioned fees and also to offset the Plaintiff's outstanding loan balance of K67, 717.00 as at 22nd April, 2013.

The deponent thus explained that the Defendant rescheduled the loan on 12th April, 2013 to the total sum of K76, 000.00 and the Plaintiff was to repay the total of K182, 803.51 being the principal and interest which amount was repaid by way of the reduced monthly installments of K3, 046.74 for sixty (60) months at the interest of 3.5%; that the Plaintiff duly consented and signed the loan Amortization Statement without any inducement; that the Plaintiff had been inconsistent in making his repayment on the loan facility and had continued to refuse to make loan repayments to the Defendant; that the Defendant had to rely on its debt collectors to engage the Plaintiff at his premises in order to effect payment of loan installments; that it was incorrect to assert that the Plaintiff had paid the loan facility in full.

The deponent deposed that there was no interference with the Plaintiff's quiet enjoyment of his property as he had voluntarily pledged the subject property as collateral for the repayment of the loan.

The Plaintiff replied to the affidavit in opposition by filing an affidavit in reply. The gist of what is contained in the affidavit is that the Defendant had changed its records and had forged his signature in an attempt to escape fraud; that the only true loan he had obtained from the Defendant was dated 16th May, 2012 in the amount of K75, 000.00 and not the mid-term loan of K76, 000.00.

The Plaintiff denied that the Defendant rescheduled the loan and he deposed that he was made to sign a consent form for K76, 000.00 without the Defendant explaining anything on the comprehensive loan insurance; that when he wrote to the Defendant, requesting payment dates to be moved and the installment interest to be reduced, he did not request for a midterm loan; that he believed he had a cause of action to the substantive reliefs sought in the Statement of Claim and that this was a proper case to be granted an Order of Interim Injunction and Permanent Injunction.

He also added that he had disclosed material facts and that is why the Defendant was in a position to file an affidavit in opposition.

At the hearing of the application the Plaintiff informed the court that he would rely on the affidavit in support, affidavit in reply, list of authorities and skeleton arguments and additional affidavit and supplementary legislation and authorities.

I will not reproduce what is contained in the skeleton arguments suffice it to mention that I have considered the submissions and I will be referring to them in this ruling.

The Plaintiff during the hearing added that he was asking the court to grant him a permanent injunction restraining the Defendant from collecting interest for the loans until the matter was fully determined.

In opposing the application learned counsel for the Defendant Ms. L. Shula relied on the affidavit in opposition filed into court together with the skeleton arguments of the same date. She also made verbal submissions. I have considered these submissions when arriving at this decision.

By this application, I have been called upon to determine whether the Plaintiff is entitled to an Order of interlocutory injunction. In doing so, I have carefully considered the caution given by Ngulube J (as he then was) in the case of ***Edward Jack Shamwana v. Levy Mwanawasa***[1] This caution is that I should in no way pre-empt the decision of the issues which are to be decided on the merits and the evidence at the trial of the action.

The classical test to be applied when considering whether an interim injunction should be granted remains that laid down in the case of ***American Cyanamid v. Ethicon.***[2] This case is therefore renowned for the series of questions which have to be considered in deciding whether or not an injunction should be granted.

The first or primary issue is that there must be a serious question to be tried. In terms of the ***American Cyanamid*** case, an injunction will be refused to the claimant who has no 'real prospect of succeeding in his claims for a permanent injunction at the trial.' This therefore comes down to the proposition that the claim must not be frivolous or vexatious. If there is no serious question to be tried, the injunction should be refused.

In the case of ***Harton Ndove v Zambia Educational and Publishing Company Limited***[3] ***Chirwa*** J held that:

> ***"Before granting an interlocutory injunction it must be shown that there is a serious dispute between the parties and the plaintiff must show on the material before court that he has any real prospect of succeeding at trial."***

Conversely, if there is a serious question to be tried, the court should then consider the second question which is whether a claimant could if successful at trial be adequately compensated by an award of damages.

According to paragraph 29/L/5 of the White Book on the guidelines on the adequacy of damages as a remedy, the following questions are to be considered:

1. The governing principle is that the Courts should first consider whether if the plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. If damages would be adequate remedy, and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the plaintiffs claim appeared to be at that stage.

2. If on the other hand damages would not be an adequate remedy, the court should then consider whether if the injunction were granted, the defendant would be adequately compensated under the plaintiff's undertaking as to damages. 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.

In considering this question of adequacy of damages, paragraph 955 of the ***Halsbury's Laws (Fourth Edition)*** is of great importance. It provides that:

> ***'The Plaintiff must as a rule show that an injunction until the hearing is necessary to protect them against irreparable injury; mere inconvenience is not enough.'***

According to the ***Shell and BP (Z) Limited v Conidaris and others*** [4] case irreparable injury means:

> ***"Injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired".***

In the event that there is a doubt as to the adequacy of damages and the ability of the defendant to pay them, then the court should proceed to consider the balance of convenience. Thus once the investigations have reached this stage, the decision of the court whether in favour or against an injunction will inevitably involve some advantage to one or the other side which damages cannot compensate. Therefore the extent of this ***'uncompenstable disadvantage'*** either way is a significant factor in determining the balance of convenience.

Having outlined the fundamental principles, I shall proceed to apply them to the facts of this case.

(i) Serious question to be tried

In determining this question, it is important to consider the endorsement of the Plaintiff's claim on the writ of summons so as to appreciate the nature of the Plaintiff's claim. The Plaintiff's claims *inter alia* are:

1. *Solatium compensation in the sum of K3, 357.120.00 as a solace to the Plaintiff's wounded feeling for physical and emotional stress caused by the contract of 22nd April, 2013.*
2. *Damages of K50, 135.12 to be paid pursuant to Section 30A 1981 of the RSC.*
3. *An Order of the court for foreclosure of the mortgaged loan of 16th May, 2012 as the Plaintiff redeemed the 1st loan at law and equity.*

The Plaintiff claims compensation from the Defendant on the basis that he was made to sign a consent form for K76, 000.00 without the Defendant explaining anything on the comprehensive loan insurance and that he did not request for a midterm loan and that what the Defendant had done was calculated at defrauding him.

From what I am able to discern from the arguments on this question, the Plaintiff has argued that he has a strong case which can enable him obtain damages against the Defendant

The Defendant on the hand has argued that the Plaintiff signed on his own volition the consent form because of his failure to liquidate the loan of K75, 000.00 granted by the Defendant; that this was done after he requested the Defendant to re-schedule the loan repayment. In this regard, they have argued that the Plaintiff has failed to demonstrate a clear right to relief as required by law and therefore the application for an injunction as sought herein must fail.

From the foregoing, this court has to determine whether the Plaintiff is entitled to the reliefs that he seeks. Although the Defendant contends that it is clear from the affidavit evidence that the Plaintiff signed the form on his own volition, I am of the considered view that there is a serious dispute regarding the issue of consent. A determination therefore whether the consent was given by the Plaintiff on his own volition can only be made after the court has examined in a more detailed way the evidence and exhibits relied upon by the parties.

In view of the above, I find in line with the ***Harton Ndove*** case that there is a serious question to be tried by the court. I will therefore consider the next question.

(i) Adequacy of damages

When considering this question, the question I ask is this: if the Plaintiff was to succeed at the trial in establishing his claims set out above, would he be

adequately compensated by an award of damages for the loss caused by the refusal to grant an interlocutory injunction?

The Plaintiff has argued that the damages pleaded in his originating process will not be adequate remedy as the injury or loss that will occur if shelter is dispossessed from him cannot be adequate although the Defendant will be in a financial position to pay.

In addressing this question, the Defendant referred the court to the case of ***Hondling Xing Xing Building Co. Ltd v. ZamCapital*** [5] where the court held *inter alia* that:

> ***'An injunction will not be granted where the damages would be an alternative and adequate remedy to the injury complained of if the applicant succeeded at the trial.'***

It was therefore argued that that since the Plaintiff required this court to restrain the Defendant from further collecting interest in relation to the re-scheduled loan of ZMK 76,000.00, if this court found that the Defendant was not entitled to collect such interest (including the principal sum installments) then the monies that the Defendant may have collected would rightfully be returned to the Plaintiff.

Accordingly, any injury that the Plaintiff may suffer by refusing to grant an injunction can adequately be atoned for by way of damages. As such the effect of refusing to grant an injunction in this regard would merely cause the Plaintiff financial loss which can be atoned for by way of damages thereby obviating the necessity to grant an injunction.

Furthermore, the Defendant has argued that there has been no interference by the Defendant with the quiet possession of the premises as there is no evidence

that the Defendant has exercised its right to foreclose on the property charged as collateral.

I have considered the Plaintiff's contention in this regard. The Plaintiff seeks the following injunctive order:

> ***'An interim injunction restraining the Respondent, themselves, their agents, servants from interfering with the plaintiff's quiet possession of the premises known as a house and from harassments and intimidation and collection of interests until further order of the court.'***

The above order is sought on the basis that the contract of 22nd April, 2013 has caused emotional and physical stress as the Defendant's debt collectors have harassed him in their quest to collect interest relating to this contract which he contends was fraudulently executed.

Based on the foregoing, I am of the considered view that if the Plaintiff were to succeed after the trial; the loss or injury if any that he will suffer as a result of the collection of interest by the Defendant's debt collectors can readily be ascertained through the records of what will be collected and can be paid out to him.

In view of the foregoing, I agree with counsel for the Defendant that the injury that the Plaintiff will suffer if the injunction is not granted is not substantial as it will merely cause financial loss which can be atoned for by way of damages thereby obviating the necessity to grant an injunction.

In answering the question posed therefore, I find that the Plaintiff will be adequately compensated by an award of damages for any loss caused by the refusal to grant an interlocutory injunction if he succeeded at the trial and that the Defendant will be in a financial position to pay the damages.

On the balance of convenience M.J in the case of ***Cayne v Global Natural Resources*** [6] explained that:

> ***'That the balance of convenience is the phrase which of course is always used in this type of application. It is, if I may say so a useful shorthand but in truth, the balance that one is seeking to make is more fundamental more weighty than mere 'convenience'. I think it is quite clear from both cases that although the phrase may well be substantially less elegant, the 'balance of the risk of doing an injustice' better describes the process involved.'***

Therefore when considering this question of balance of convenience, the court is required to determine which of the two parties will suffer greater harm or injustice from granting or refusing to grant an injunction pending a decision on the merits. There are usually three factors that are taken into account when considering the balance of convenience. These are status quo, relative strength of cases and special factors. The Supreme Court in the ***Shell & BP*** case stated that the burden of showing the greater inconvenience is on the plaintiff.

In the present case, the Plaintiff has stated the underlying principle regarding this question but he has not demonstrated that he will suffer greater inconvenience than the Defendant if the injunction is not granted.

The Defendant on the other hand has argued that it has demonstrated that not only will damages be an adequate remedy in this case if the Plaintiff succeeded at the trial but that the Defendant will also be able to pay. In this regard, they have submitted that the balance of convenience lies in refusing to grant the application.

I have considered this question in the light of my earlier finding that the Plaintiff will be adequately compensated by an award of damages for any loss caused by the refusal to grant an interlocutory injunction if he succeeded at the trial. Based on this finding therefore I am of the considered view that there is a risk of doing a greater injustice to the Defendant than to the Plaintiff if the

injunction is granted as the Defendant will not be able to collect the interest payable on the loan facility pending a decision on the merits. I say so because given the background of this case that the Plaintiff has had difficulties in making loan repayments to the Defendant, it is highly unlikely that he will be in a financial position to make the repayments in the event that the Defendant succeeded at trial.

In this regard, I find that the balance of convenience weighs more in refusing to grant the injunction.

On the totality of the evidence adduced and guided by the fundamental principles of injunction law, I find that this is not an appropriate case in which I can exercise my discretion to grant an order of interlocutory injunction. Consequently, the Plaintiff's application for an order of interlocutory injunction is dismissed with costs to the Defendant.

Leave to appeal is granted.

Delivered at Lusaka this 30th day of June, 2017.

.....

M.C. KOMBE
JUDGE