IN THE HIGH COURT FOR ZAMBIA **2017/HPC/0393**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

HUBREY MILTON MUSALU **1ST PLAINTIFF**

SHIRLEY DAKA **2ND PLAINTIFF**

MAPEPE BIBLE COLLEGE REGISTERED TRUSTEES **3RD PLAINTIFF**

AND

AB BANK ZAMBIA LIMITED **DEFENDANT**

CORAM: Hon. Madam Justice Dr. W.S. Mwenda in Chambers at Lusaka on the 17th day of November, 2017.

For the Plaintiffs: Mr. L. Mwanabo of Messrs. L. M. Chambers

For the Defendant: Ms. C. Nyangu – Legal Officer of AB Bank Zambia Limited

RULING

Cases referred to:

1. *Shamwana v. Mwanawasa (1993-94) ZR 149.*
2. *American Cyanamid Co. v. Ethicon Limited [1975] 1 All E.R. 504 H.L.*
3. *Shell and BP Zambia Limited v. Conidaris and Others (1974) Z.R. 281 (H.C.).*
4. *Mobil Oil Zambia Limited v. Msiska (1983) Z.R. 86 (S.C.).*
5. *Turnkey Properties Limited v. Lusaka West Development Company Limited (1984) Z.R. 85 (S.C.).*

6. *Hina Furnishing Lusaka Ltd v. Mwaiseni Properties Ltd (1983) Z.R. 40 (H.C.).*
7. *Jane Chikwata v. Itezhi -tezhi District Council, S.C.Z Judgment No. 42 2006.*
8. *Hubbard v. Vosper (1972) 1 All ER 1023, C.A.*
9. *Michael Chilufya Sata v Chanda Chimba III, Zambia National Broadcasting Corporation, MUVI TV Limited, MOBI TV International Limited, 2010/HP/1282.*
10. *Harton Ndove v National Educational Company of Zambia Limited (1980) Z.R. 184 (H.C.).*
11. *Hodgson v. Duce (1856) 4 WR 576.*
12. *Hondling Xing Xing Building Company Limited v. Zamcapital Enterprises Limited, 2010/HP/439.*
13. *Garden Cottage Foods Limited v Milk Marketing Board (1983) 2 All ER 770, H.L.*

Legislation referred to:

1. *Order 27 Rules 1 and 4 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
2. *Order 29 Rule 1 of the Rules of the Supreme Court, 1999 Edition ("The White Book").*

Publications referred to:

Halsbury's Laws of England, 5th Edition [RELX (UK), 2015], Vol. 12 paragraphs 581, 583, 584, 1109.

This is an application by the Plaintiffs for an order of interim injunction.

The background to the Application is that on 30th August, 2017, the Plaintiffs issued a Writ of Summons (hereinafter referred to as "the Writ") from the Commercial Registry against the Defendant, accompanied by a Statement of Claim for the following relief:

(a) A declaration that the manner in which the Defendant handled the Plaintiffs' application for the loan facility amounts to unfair trading practices;

(b) An order to re-open the agreements entered into between the Plaintiffs and the Defendant for being extortionate;

(c) An order compelling the Defendant to rectify the anomalies by the two (2) loans by consolidating the two (2) payment plans into one so that a single interest rate is payable on the two (2) loans;

(d) An interim injunction restraining the Defendant from selling and/or foreclosing on the assets used as security in the loan facilities;

(e) Damages for the loss of savings occasioned by the anomalies caused by the Defendant;

(f) Costs; and

(g) Any other relief the court may deem fit.

In pursuance of relief (d), above, the Plaintiffs took out a Summons for an Order of Interim Injunction on 1st September, 2017 (hereinafter referred to as "the Application"), wherein the Plaintiffs craved for an order of interim injunction restraining the Defendant whether by itself or by its servants or agents or, whosoever acting on its behalf, from taking possession, foreclosing and/or selling, alienating or subdividing or interfering with the assets used as security in the loan facilities for the reasons stated in the Affidavit in Support thereof.

A reading of exhibit "LM1" of the Affidavit of Service filed into Court on 11th September, 2017 and sworn by one Lameck Malungisa, led to the observation that Counsel for the Plaintiffs had, on 4th September, 2017, effected service of the Writ of Summons, Statement of Claim, Summons for an Order of Interim Injunction and the Affidavit and Skeleton Arguments in Support thereof. While the Defendant filed its Affidavit in Opposition to the Summons for Interim Injunction (hereinafter referred to

as "the Affidavit in Opposition") and the accompanying Skeleton Arguments, there was at the time of hearing this Application, no Defence and/or Appearance to the Writ and Statement of Claim on the court record.

It is also on the record that the Plaintiffs further filed an Affidavit in Reply to the Defendant's Affidavit in Opposition, on 19th September, 2017.

The Application is made pursuant to Order 27 Rules 1 and 4 of the High Court Rules, Chapter 27 of the Laws of Zambia (hereinafter referred to as "the High Court Rules") as read with Order 29 Rule 1 of the Rules of the Supreme Court, 1999 Edition (hereinafter referred to as "the White Book"), and is accompanied by an Affidavit in Support of Summons for an Order of Interim Injunction (hereinafter referred to as "the Affidavit in Support"); and the Plaintiffs' Skeleton Arguments and List of Authorities, also filed into court on 1st September, 2017.

Order 27 Rules 1 and 4 of the High Court Rules provides as follows:

> *"1. In any suit in which it shall be shown, to the satisfaction of the Court or a Judge, that any property which is in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit, it shall be lawful for the Court or a Judge to issue an injunction to such party, commanding him to refrain from doing the particular act complained of, or to give such order, for the purpose of staying and preventing him from wasting, damaging or alienating the property, as to the Court or a Judge may deem fit, and, in all cases in which it may appear to the Court or a Judge to be necessary for the preservation or the better management or custody of any property which is in dispute in a suit, it shall be lawful for the Court or a Judge to appoint a receiver or manager of such property, and, if need be, to remove the person in whose possession or custody the property*

may be from the possession or custody thereof, and to commit the same to the custody of such receiver or manager, and to grant to such receiver or manager all such powers for the management or the preservation and improvement of the property, and the collection of the rents and profits thereof, and the application and disposal of such rents and profits, as to the Court or a Judge may seem proper...

4. In any suit for restraining the defendant from the committal of any breach of contract or other injury, and whether the same be accompanied by any claim for damages or not, it shall be lawful for the plaintiff, at any time after the commencement of the suit, and whether before or after judgment, to apply to the Court or a Judge for an injunction to restrain the defendant from the repetition or the continuance of the breach of contract or wrongful act complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right, and such injunction may be granted by the Court or a Judge on such terms as to the duration of the injunction, keeping an account, giving security or otherwise, as to the Court or a Judge shall seem reasonable and just:

Provided that any order for an injunction may be discharged, varied or set aside by the Court or a Judge, on application made thereto by any party dissatisfied with such order."

Order 29 Rule 1 of the White Book, in turn, provides as follows:

"An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third-party notice, as the case may be."

At the hearing of the Application, on 19th September, 2017, Counsel for the Plaintiffs indicated that he would rely on the Affidavit in Support, the

Affidavit in Reply and the Plaintiffs' Skeleton Arguments filed in support of the Application.

It is the deponent's testimony in the Affidavit in Support that, some time in February 2017, the Board of Trustees for the 3rd Plaintiff passed a resolution authorising the 3rd Plaintiff to apply for a loan from the Defendant in the sum of K1,000,000.00. To augment this assertion, the deponent has produced exhibits "HMM1a" and "HMM1b", which he has described as copies of the Board resolutions and the loan application, respectively.

The deponent avers that the 3rd Plaintiff had applied to pay back the said sum together with interest within two (2) years and that the purpose of the loan was to enable the 3rd Plaintiff to undertake renovations or improvements to its five (5) teachers' houses which were in a dilapidated state.

It is the deponent's further testimony that the Defendant was provided with all architectural drawings, bills of quantities, artist impression designs, contractor's schedule of work, which suggested three (3) months completion period, and a quotation from the preferred contractor. To this end, the deponent has produced exhibits "HMM2a" to "HMM2e", which he has described as copies of the said documents.

The deponent further avers that the total costs of the work were slightly above the value of K1,000,000.00, and hence the application for the loan to the stated value of K1,000,000.00 by the 3rd Plaintiff. It is also his testimony that part of the repayment for the loan was to come from the income derived from rentals from the same houses after renovations.

It was the deponent's testimony that there was an understanding between the Plaintiffs and the Defendant that the 3rd Plaintiff would service the loan using rentals to be realised from the renovated teachers' houses and that the 3rd Plaintiff would be given a three (3) months moratorium period before repayments could commence.

The deponent further deposed that the Defendant started computing the interest and making demands for repayment before giving the 3rd Plaintiff the three (3) months moratorium period; and that while discussions where still being held, the Defendant issued a final demand letter on 31st July, 2017 for repayment of all arrears. He produced exhibit "HMM5", a copy of the said notice, as proof of his assertion.

The deponent deposed that when the Plaintiffs' advocates responded to the Defendant's letter, the Defendant terminated the loan agreements and demanded for full repayment within fourteen (14) days. As proof of this assertion, the deponent produced exhibits "HMM6" and "HMM7", being copies of the letter from the Plaintiffs' advocates and the termination letter from the Defendant, respectively.

The deponent also deposed that the Defendant's demands have never been accompanied by statements on the loan to show the Plaintiffs how the interest was computed. That while the Defendant was behaving nicely when approached for the loan, it has now become hostile and aggressive towards the Plaintiffs; and that the conduct and behavior of the Defendant was misleading and deceptive in the manner it handled the approval of the loan in issue and the terms thereof.

It is the deponent's further testimony that the Defendant's failure to properly consider the repayment plan for the two loans caused the 3rd Plaintiff to have difficulties servicing the loans and the 3rd Plaintiff decided to stop doing so until the disputes are resolved. That the Defendant has, therefore, created a situation aimed at making the 3rd Plaintiff fail to repay the loans normally with the sole purpose of wanting to take over the properties used as security.

The deponent deposed that the 3rd Plaintiff has at no point refused to repay the loans, but simply asked the Defendant to rectify the anomalies by consolidating the repayment periods so that the two loan facilities could attract one interest rate, as was intended by the 3rd Plaintiff when the initial application was made. That the Defendant's failure to rectify the anomaly and to fairly treat the Plaintiffs, has created a situation that has made it difficult for the 3rd Plaintiff to service the loan facilities; and that the Defendant's action is calculated to facilitate foreclosure on and sale of the assets used as security. That complying with the Defendant's demands and repayment plan would lead to the 3rd Plaintiff losing K24,000.00 per month.

Finally, the deponent deposed that unless the Defendant is restrained by way of injunction, it will proceed to take possession of the 3rd Plaintiff's assets and foreclose, thereby rendering this action academic.

Counsel for the Plaintiffs augmented the Application with Skeleton Arguments, the gist of which is that there is need to maintain the *status quo* by restraining the Defendant from taking possession or selling the properties in issue, pending determination of these proceedings.

In the said Skeleton Arguments, Counsel for the Plaintiffs cited Orders 27 (1) and (4) of the High Court Rules and 29 Rule 1 of the White Book, which have been quoted above. Counsel submitted, in that respect, that the court can grant an injunction where the property in dispute is likely to be wasted, damaged or alienated by any party to the suit; and that the Plaintiffs had demonstrated the real threat posed by the Defendant to the assets that were used as security.

Counsel for the Plaintiffs referred the court to the explanatory notes in Order 29/1/2 of the White Book. I have perused the White Book and the said notes are not in the 1999 Edition, from which Counsel purports to quote. What Counsel for the Plaintiffs has cited, instead, is a provision from the Supreme Court Practice 1997, otherwise known as the County Court Rules, 1998 or the Black Book. These rules do not apply to Zambia. In light of this, I shall disregard the said explanatory notes.

Counsel for the Plaintiffs also cited the case of *Shamwana v. Mwanawasa*[1], which discusses an instance where the court is faced with an *ex parte* application for an injunction. Counsel has quoted the following from that case:

> *"It is an elementary requirement of fairness and justice that as a general rule both sides be afforded the opportunity to be heard and where it is sought to depart from this norm, as in an ex parte application for an injunction, strong grounds must be shown to justify the application being made ex parte. The application must be made promptly as soon as the plaintiff becomes aware of his or her cause of action and there is need either to preserve the status quo or to prevent irreparable or serious mischief. Ex parte injunctions, as the learned authors of the White Book and Halsbury's Laws of England observe, are for cases of real urgency where there has*

been a true impossibility of giving notice to the opponent. what is more, the material that is placed before the court on an ex parte application for an injunction should disclose, at first glance or prima facie, a strong case on the merits for the possible grant of an interlocutory injunction once an inter partes hearing takes place."

However, the said quotation has its basis on an earlier statement issued by the Chief Justice in the same case, as follows:

"Let me take this opportunity to dispel the notion, which unfortunately seems to be widely held, that ex parte injunctions are available more or less as a matter of course; almost automatically for the asking. They are not and in this regard, I wish to draw attention to Order 29 R.S.C.1993 White Book, especially the discussion at Order 29/1/8. I also wish to borrow from the language of paragraph 1051, Halsbury's Laws of England, 4th Edition, Volume 24, that an injunction will not usually be granted without notice, but if the court is satisfied that the delay caused by proceeding in the ordinary way might entail irreparable or serious mischief, it may make a temporary order ex parte upon such terms as it thinks just. The granting of ex parte injunctions is the exercise of a very extraordinary jurisdiction, and therefore the time at which the plaintiff first had notice of the act complained of will be looked at very carefully in order to prevent an improper order being made against a party in his absence, and if the applicant has acquiesced for some time it will not be granted."

It is my considered view, from the foregoing, that the context in which the two citations are to be understood is that of circumstances that would justify an application for an injunction being heard *ex parte* as opposed to an *inter partes* hearing. However, even though this Application was initially made *ex parte* and the Shamwana case would have been a more relevant authority had the status of the Application been maintained as *ex parte,*

this is no longer an issue to consider in this Application as both parties have already been heard *inter partes.*

Counsel for the Plaintiffs also cited the cases of *American Cyanamid Co. v. Ethicon Ltd*[2], *Shell and BP Zambia Limited v. Conidaris and Others*[3] *and Mobil Oil Zambia Limited v. Msiska*[4], to establish the principles to be considered when granting an injunction.

Counsel also referred to paragraph 765 of the Halsbury's Laws of England, 3rd Edition, Volume 2, which states that the plaintiff must also as a rule be able to show that an injunction order is necessary until the hearing to protect him against irreparable injury; mere inconvenience is not enough.

At the hearing of this Application, Counsel for the Plaintiffs submitted that this is a proper and fit case for the grant of an injunction and that there is a real issue in dispute as highlighted in the Statement of Claim. Counsel for the Plaintiffs further contended that the issue in dispute relates to property, hence satisfying the principle of irreparable damage.

Counsel also reiterated that the Plaintiffs are merely asking that the *status quo* be maintained, pending determination of the main matter; and that the Defendant would not be prejudiced by a grant of an interim injunction as his claim was monetary with a component of interest that may apply up to the period of determination of the main matter.

In opposing the Application, Counsel for the Defendant filed the Affidavit in Opposition, sworn by one Evans Muluka, wherein he deposed that on 23rd February, 2017, the 1st and 2nd Plaintiffs were granted a loan in the sum of K550,000.00, payable in ten (10) monthly instalments.

The deponent further averred that on 27th April, 2017, the 1st and 2nd Plaintiffs were granted a parallel loan in the sum of K500,000.00 payable in twenty-four (24) monthly instalments; and that the 1st and 2nd Plaintiffs did not at any time refuse the grant of the two loans, but proceeded to sign the loan agreements and signaling acceptance of the terms therein.

It is also the deponent's testimony that it was a term of the loan agreements that the Plaintiffs would repay the first loan in ten (10) monthly instalments of K60,786.79 plus interest thereon and also repay the second loan in twenty-four (24) monthly instalments of K37,111.91. To this end, the deponent exhibited as "EM 1-2", copies of the payment plans.

It is the deponent's further testimony that it was a term of the loan agreements that the Plaintiffs were required to provide security for the respective loans alluded to above; and that therefore, the Plaintiffs executed two collateral contracts in respect of the loan agreements.

The deponent averred that the Plaintiffs, have to date, paid only one out of the ten (10) instalments due as of 10th August, 2017 on the first loan, in total disregard of the terms of the loan agreement; and that they have, to date, not paid any instalments on the second loan, despite numerous reminders from the Defendant, to settle their indebtedness.

The deponent also deposed that owing to the Plaintiffs' failure to settle the due instalments, the Defendant recalled the loans, on 10th August, 2017, and demanded full payment of the sum of K1,148,495.26, which he said, remains unpaid to date.

The deponent further deposed that the Plaintiffs were granted the loans on the basis that repayment of the said loans would be from the sale of the properties owned by the 3rd Plaintiff and as proof of this assertion, the deponent produced exhibit "EM 3-7", being copies of offer letters issued by the 3rd Plaintiff. The deponent also produced exhibit "EM 8-15", being copies of income receipts, as proof of the assertion that the Plaintiffs provided the Defendant with proof of cash flow.

The deponent finally deposed that the Defendant and not the Plaintiffs would suffer irreparable damage if the interim injunction is granted, as the loan was still outstanding and ninety-one (91) days overdue as at the date of the Affidavit in Opposition.

The Defendant's opposition is supported by Skeleton Arguments, in which it is contended that the Plaintiffs have not met the standards that warrant an order of interim injunction. Highlighting the said standards, Counsel for the Defendant has referred this court to the case of *Shell and BP Zambia Limited v. Conidaris and Others*[3], emphasising that a court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury; and that mere inconvenience is not enough.

Counsel for the Defendant also referred this court to the case of *Turnkey Properties Limited v. Lusaka West Development Company Limited*[5], to buttress his submission that the Plaintiffs, by this Application, are seeking to create new conditions favourable only to themselves; a situation said to be frowned upon by the courts. Further, Counsel for the Defendant also contended that the same case also dealt with the issue of balance of

convenience which should be considered by the court by weighing where the said balance lies.

Counsel for the Defendant further submitted that it is trite law that an injunction is an equitable remedy and that he who comes to equity must come with clean hands. In this respect, Counsel cited the case of *Hina Furnishing Lusaka Ltd v. Mwaiseni Properties Ltd*[6], contending that an injunction is an equitable remedy and the court may not exercise its discretion to grant it where the plaintiff is in breach of the contract.

Counsel further contended that the matters raised by the Plaintiffs in the Affidavit in Reply, particularly paragraph 6; and paragraphs 8 to 9 of the Affidavit in Support, relate to triable issues that go to the merits of the Plaintiffs' case against the Defendants and that the same should not be considered in the Application.

In reply to the Defendant's opposition, the deponent of the Plaintiffs' Affidavit in Reply deposed that the Defendant has not disputed the facts and evidence contained in the Plaintiffs' application for injunction that they were engaged in unfair trading in considering the loan application of K1,000,000.00 which the Defendant later granted in two parts. To this end, the deponent went ahead to give a detailed account of the alleged unfair trading under paragraph 6 of the Affidavit in Reply.

Counsel for the Plaintiffs submitted, at the hearing, that the debt ascribed to the Plaintiffs by the Defendant relates to the very issues in dispute. He further submitted that the Plaintiffs are challenging the contracts alleged to be breached and that if at this stage, the court was to conclude that the Plaintiffs are in breach of the agreements, that may as well be the

determination of the whole matter. He submitted that the issue of breach should be left to be determined at full trial.

Counsel for the Plaintiffs contended that it is one of the principles of law on injunctions that the court is not supposed to pre-empt or make comments that tend to prejudice the determination of the main matter. Counsel, in this regard, referred the court to the case of *Jane Chikwata v. Itezhi- tezhi District Council*[7].

Counsel for the Plaintiffs finally submitted that if the Application is not granted as prayed by the Plaintiffs, the trial of the main matter will be rendered academic in the event that the Defendant proceeds to take possession and sell the properties in issue without recourse to court; and that even if the injunction is not granted, it will be a multiplicity of actions for the Defendant to proceed to deal with the assets in issue when there is a matter pending before this court.

I have carefully considered the documents filed by the parties in support of their respective cases.

In my view, the issue for determination in this Application is whether or not the Plaintiffs have satisfied the requirements for the grant of an interim injunction and whether the Defendant has sufficiently rebutted the Application.

From the onset, it is crucial to have an understanding of the general purpose of an interim injunction. In the case of *American Cyanamid Company v. Ethicon Limited*[2], Lord Diplock stated, at 509, that:

> *"The object of the 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 were resolved in his favour at trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against the injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies."

The principles upon which the courts ought to act in considering an application for an interim injunction are elucidated in paragraph 581 of Halsbury's Laws of England, 5th Edition, volume 12 (hereinafter referred to as "Halsbury's Laws of England") as follows:

"On application for injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated; but in no case will the court grant an interlocutory injunction as of course.

It is not necessary that the court should find a case which would entitle the claimant to relief at all events, it is quite sufficient for it to find a case which shows that there is a substantial question to be investigated, that interim interference on a balance of convenience and inconvenience to the one party and to the other is expedient, and that the status quo should be preserved until that question can be finally disposed of.

The tendency is to avoid trying the same question twice and to grant injunctions only in clear cases. However, where there is no doubt as to the legal rights an interim injunction will be granted, and it is no objection that

the relief so granted is substantially the same as the whole relief claimed in the action except that it is only to endure until the hearing of the action."

It was concluded in the case of *Hubbard v. Vosper*[8], that each case must be decided on a basis of fairness, justice and common sense in relation to the whole of the issues of fact and law which are relevant in the particular case.

Further, in our very own High Court case of *Michael Chilufya Sata v. Chanda Chimba III, Zambia National Broadcasting Corporation, MUVI TV Limited, MOBI TV International Limited*[9], it was held that:

"...The fundamental principle upon which an injunction is granted, whether interim or perpetual, is that the injury to be inflicted would be of such character that the claimant could not be practically compensated in damages.

The grant of an injunction being an equitable remedy is always discretionary and this discretion belongs to the trial judge..."

The case of *Michael Chilufya Sata v. Chanda Chimba III, Zambia National Broadcasting Corporation, MUVI TV Limited, MOBI TV International Limited*[9], borrowing significantly from the Cyanamid case, outlines the guidelines concerning the issues to consider in an application for an interim injunction. While being alive to the fact that a judgment of a court of equal jurisdiction is not binding on this court, I find the decision of Matibini, J (as he was then), in this regard, of great value.

The following are the principles outlined in that case, regarding the pertinent issues to consider when determining an application for an interim injunction:

"...The current practice is that in an application for an interim injunction, the first question that needs to be addressed, invariably, is whether or not a claimant has raised a serious question to be determined at trial. This requirement really boils down to the proposition that a claim must not be frivolous or vexatious. The claim must also have the prospect of succeeding at trial. Therefore, assuming that there is no serious question to be considered at trial and the prospects of succeeding at trial are in any event dim, the application for an interim injunction ought to be refused...

... if there is a serious question to be tried, the Court should go on to consider whether a claimant could if successful at trial, be adequately compensated by an award of damages...

... In the event that there is doubt as to the adequacy of damages and the ability of the defendant to pay them if the applicant were to succeed at trial, then the Court should proceed to consider the balance of convenience...

... Where the other factors referred to above appear evenly balanced, it is advisable to maintain the status quo."

The principle regarding serious question to be tried, which was one of the principles established in the case of *American Cyanamid Company v. Ethicon Limited,*[2] is also stated in Paragraph 583 of Halsbury's Laws of England which provides that on application for an interim injunction, the court must be satisfied that there is a serious question to be tried. The court therefore, must be satisfied that the claim is not frivolous or vexatious. In this regard, it was held in the case of *Harton Ndove v. National Educational Company of Zambia Limited*[10] 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 the trial."

In determining whether there is a serious question to be tried, the material available to the court at the hearing of the application must disclose that the claimant has real prospects for succeeding in his claim for a permanent injunction at the trial. Citing the case of *American Cyanamid Company v. Ethicon Limited*[2], the learned authors of Halsbury's Laws of England state that it is no part of the court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit 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 consideration.

At the hearing of this Application, Counsel for the Defendant advanced the argument that an injunction is an equitable remedy subject to the principle of equity that 'he who comes to equity must come with clean hands'. In effect, Counsel for the Defendant was submitting that there was breach of contract on the part of the Plaintiffs. Counsel for the Plaintiffs submitted, in reply, that one of the principles of law on injunctions is that the court is not supposed to pre-empt the determination of the main matter.

It is trite law that an injunction is an equitable remedy and the court may not exercise its discretion to grant it where the plaintiff is in breach of the contract. However, based on the aforesaid, I tend to agree with Counsel for the Plaintiffs in that the submission by Counsel for the Defendant does indeed touch on the merits of the main matter and to admit the said argument would have the effect of giving the main matter a final determination, without trial.

Further, Counsel for the Defendant contended that some matters raised by the Plaintiffs in their evidence, particularly paragraphs 8 to 9 of the

Affidavit in Support and paragraph 6 of the Affidavit in Reply, relate to triable issues that go to the merits of the Plaintiffs' case against the Defendants and that the same should not be considered in the Application. I have considered the same and I am inclined to agree with Counsel. Therefore, I shall sever the same from the evidence. I shall treat the Defendant's corresponding responses as well as similarly triable issues raised independently, in like manner.

I have examined the record and considered the issues raised before this court. A perusal of the parties' affidavits reveals that the parties have each raised issues in their evidence which, in my opinion, are triable and should be subjected to investigation.

In view of the foregoing, I am satisfied that there is a serious question to be tried which is neither frivolous nor vexatious. The facts on record, in my opinion, disclose a real prospect of the Plaintiffs succeeding at trial.

Having addressed the issue of whether or not there is a serious question to be tried, I now move to the issue of whether a grant of or refusal to grant an interim injunction would result in irreparable damage on the party against whom the odds lie.

The learned authors of Halsbury's Laws of England, state in paragraph 1109, that *prima facie*, the court will not grant an injunction to restrain an actionable wrong for which damages are an adequate remedy. The Claimant must also show that an injunction until the hearing, is necessary to protect him against irreparable injury. Mere inconvenience is not enough. Irreparable injury is injury which is substantial and could never be adequately remedied or atoned for by damages or any other decree which the court may pronounce. An example of a situation when damages

may not be considered adequate can be derived from the case of *Hodgson v. Duce*[11] where the defendant was a pauper and the claimant was granted an injunction to restrain the defendant from trespassing on the ground that, as against a pauper, damages did not constitute an adequate remedy.

It is the Defendant's testimony that it is able to compensate the Plaintiffs should they suffer damage by virtue of a refusal by this court to grant the interim injunction. Ideally, if the claimant can be fully compensated by an award of damages, no injunction should be granted at all. However, the learned authors of Halsbury's Laws of England, do state in paragraph 581 (already quoted above), that:

> *"It is not necessary that the court should find a case which would entitle the claimant to relief at all events, it is quite sufficient for it to find a case which shows that there is a substantial question to be investigated, that interim interference on a balance of convenience and inconvenience to the one party and to the other is expedient, and that the status quo should be preserved until that question can be finally disposed of."*

From the above quotation, it seems to me that the conditions to consider for the grant of an injunction need not all be applied in each and every case. In view of the foregoing, therefore, I find that the question of whether damages would be adequate compensation has been overridden by the initial question of whether there is a serious question to be tried.

Similarly, with regard to the balance of convenience, the learned authors of Halsbury's Laws of England, state, in paragraph 584 that unless the material available to the court at the hearing of the application for an interim injunction fails to disclose that the claimant has any real prospect of succeeding in his claim for a permanent injunction at trial, the court

should go on to consider whether the balance of convenience lies in favour of granting or refusing the interim relief that is sought.

I have already addressed the issue of there being a serious question to be tried. The same being in the affirmative, I see no value in dwelling on the question of balance of convenience.

The final issue left to be addressed and which Counsel for the Plaintiffs had raised in his submissions is the need to maintain the *status quo.* Guidance concerning this question is given in the case of *Hondling Xing Xing Building Company Limited v. Zamcapital Enterprises Limited*[12], where it was held as follows:

> *"As regards the status quo, where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo."*

Having found earlier that there is a serious question in this matter to be tried, it naturally follows that the *status quo* should be preserved until that question can be finally disposed of. For avoidance of doubt as to the meaning of *status quo*, guidance is provided in the case of *Garden Cottage Foods Limited v Milk Marketing Board*[13], where it was held as follows:

> *"For the purpose of deciding whether an interlocutory injunction should be granted to preserve the status quo, the status quo is the state of affairs existing during the period immediately preceding the issue of the writ seeking the permanent injunction or, if there is unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion."*

In view of the foregoing considerations, I am persuaded that the facts in this Application warrant the grant of an interim injunction. Consequently, I am inclined to grant the interim injunction as prayed by the Plaintiffs in

order that the *status quo* be maintained and the matter be given an opportunity to proceed to trial.

Costs follow the event.

Dated at Lusaka the 17th day of November, 2017.

W.S. MWENDA (Dr)
HIGH COURT JUDGE