IN THE HIGH COURT FOR ZAMBIA **2017/HPC/0240**
COMMERCIAL DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N:

COURTYARD HOTEL LIMITED (In Receivership)	**1ST PLAINTIFF**
VICFALLS COURTYARD HOTEL LIMITED (T/A COURTYARD HOTEL VICTORIA FALLS)	**2ND PLAINTIFF**
AYUB FAKIR MULLA	**3RD PLAINTIFF**
ZABUNISSA ISMAIL MULLA	**4TH PLAINTIFF**
LINK PHARMACY LIMITED	**5TH PLAINTIFF**

AND

FIRST NATIONAL BANK ZAMBIA LIMITED	**1ST DEFENDANT**
GRANDVIEW PROPERTIES LIMITED	**2ND DEFENDANT**

Delivered in Chambers before Honourable Mr. Justice Sunday B. Nkonde, SC at Lusaka this 9th day of August, 2017.

For the Plaintiffs : *Mesdames D. Bunting of Messrs D. Bunting & Associates*
For the 1st Defendant : *Mesdames G. Musyani & Mr. M. Moonga – In-House Counsel*
For the 2nd Defendant : *Mr. A. J. Shonga, SC & Mr. N. Ng'andu of Messrs Shamwana & Co.*

RULING

CASES REFERRED TO:

1) *American Cynamid Co. v Ethicon Co. Limited (1975) AC 396*
2) *Preston v Luck (1884) 2 CHD 497*
3) *Harton Ndove v Zambia Educational Company Limited (1980) ZR 184*
4) *Shell and BP Zambia Ltd v Conidaris (1975) ZR 174*
5) *Gideon Mundanda v Timothy Mulwani, Agricultural Finance Company*

Limited and S.S.S. Mwiinga. (1987) ZR 29 (S.C)

6) *Turkey Properties v Lusaka West Development Company Limited and Others. (1984) ZR 85*
7) *Zimco Properties Limited v Lapco Limited.*
8) *Maxis Sdn Bnd v Shruhanjaya Syarikot Malaysia & Others (2004) 2 MLJ 84*
9) *Shelfer v City of London Electronic Lighting Co. (1895)1 Ch. 287*
10) *Coventry and Others v Lawrence and Another. (2014) 2 WLR 433*

LEGISLATION REFERRED TO:

1) *High Court Rules, Chapter 27 of the Laws of Zambia.*

On 30th May, 2017, the Plaintiffs commenced this action against the Defendants; the "Plaintiff's claim" being for

I. *An Inquiry or account of whether the properties foreclosed under Appeal No. 006/2015 being Stand Nos. 25280 and 25211 Lusaka (Courtyard Hotel Limited); and Subdivision A of Stand No. 2869, Livingstone (Courtyard Hotel Victoria Falls) have been re-advertised and sold by the 1st Defendant to the 2nd Defendant on terms different from those earlier advertised and whether the purchase money has been received and in what manner the purchase money has been expended.*

II. *An Order for the 1st Defendant to produce the valuation reports of all the Mortgaged properties obtained prior to the sale.*

III. *An Order for the 1st Defendant to produce a statement of the 1st Plaintiff's accounts to ascertain the current outstanding sums, if any, due to the 1st Defendant after taking into account the proceeds for the sale of the foreclosed properties;*

IV. An Inquiry as to damages for failure, by the 1st Defendant, to obtain a fair and proper price for the mortgaged properties.

V. *An Order for payment to the 1st Plaintiff by the 1st Defendant of any excess sums due to the 1st Plaintiff upon taking account and application of the proceeds of sale of the foreclosed properties.*

VI. Alternatively,

i) If the properties were undervalued/undersold, an Order for payment of any sums that would have been due to the 1st Plaintiff in excess had the properties been sold at a fair and proper price by the 1st Defendant; or

ii) If completion has not occurred an Order to set aside the sale

VII. Damages for negligence by the 1st Defendant and the following sums of money from the 1st Defendant:

i) USD 1,119,960.00 being the cost of goods stolen from the 1st and 2nd Plaintiffs,

ii) USD 745,600 being the cost of the 1st and 2nd Plaintiffs' damaged goods.

VIII. The sum of USD 1,018,500 being loss of business

IX. An injunction to restrain:

i) the 2nd Defendant (whether acting by themselves, their Directors, Officers, Servants, Agents or otherwise howsoever) from passing off hospitality services not being of the 2nd Plaintiff, as and for the same, whether by use of the mark "Courtyard Hotel Victoria Falls" or any other colourable imitation of the said mark,

ii) the 1st Defendant (whether acting by themselves, their Directors, Officers, Servants, Agents or otherwise howsoever) from enabling, assisting, causing, procuring or authorizing the 2nd Defendant to do any of the aforesaid acts.

X. An Order for delivery-up or destruction upon oath of all articles in the possession or control of the 2nd Defendant, the use of which would be a breach of the foregoing injunction

XI. An inquiry as to the proceeds obtained by the 2nd Defendant from the use of the 1st and 2nd Plaintiff's moveable property.

XII. The following sums of money from the 2nd Defendant:

i. USD 280,000 being damages for the use of the 1st and 2nd Plaintiffs Goodwill for a period of 7 months.

ii. USD 738,000 being rental for use of the 1st and 2nd Plaintiffs moveable property.

XIII. An inquiry as to damages or at the Plaintiff's option an account of profits, and an order for payment of all sums found due together with interest as aforesaid.

XIV: Further or other relief the Court may deem fit; and

XV. Costs of the proceedings.

On the same day, the Plaintiffs, thus, applied by Summons accompanied by an Affidavit for the injunctive reliefs to accordingly be granted. The supporting Affidavit was sworn by **AYUB FAKIR MULLA**, the 3rd Plaintiff and Shareholder and Director of the 1st and 2nd Plaintiffs and guarantor of a loan obtained by the 1st Plaintiff from the 1st Defendant.

It was deponed in the supporting Affidavit that after the 1st Plaintiff defaulted on its obligation of repayment on two facilities acquired from the 1st Defendant, the 1st Defendant commenced a Mortgage action and obtained Judgment for foreclosure, possession and sale of the Mortgage properties being Stand No. 25279, 25280 and Stand 25211 Lusaka and subdivision A of Stand No. 2869 Livingstone. It was further deponed that the 1st Defendant sold the said properties to the 2nd Defendant which in about December, 2016 took possession and commenced action using the mark "Courtyard Hotel Victoria Falls" in relation to hospitality services not being services of the 1st and 2nd Plaintiff.

According to the deponent, the 1st Plaintiff had for 12 years traded in hospitality industry under the name and mark "*Courtyard Hotel*" and the services provided by "*Courtyard Hotel*" in the last 5 years included but not limited to Accommodation, Conference Room, Restaurant, Coffees Shop, Gymnasium and Health Bar whose services the 1st and 2nd Plaintiffs had widely advertised and promoted. However, that whenever members of the public see hospitality services sold or promoted or by reference to the name "*Courtyard Hotel*" or anything colourably similar, they take the same to be the services of the 1st and 2nd Plaintiffs, none other.

It was stated by the deponed that the acts of the 2nd Defendant are leading members of the public to believe, contrary to the fact, that the 2nd Defendant's services under "*Courtyard Hotel Victoria Falls*" are the services of the 2nd Plaintiff or otherwise connected with them and in the premises, an injunction was

necessary to protect the Plaintiffs from irreparable injury that cannot be atoned for by damages.

Exhibited to the supporting Affidavit were, inter alia, a copy of a "*Courtyard Hotel Victoria Falls*" branded cash Receipt dated 16th April, 2017 issued by the 2nd Defendant for one night accommodation and a copy of a letter dated 17th May, 2017 from the Plaintiffs' Advocates to the 2nd Defendant demanding USD 280,000-00 for use of "*Courtyard Hotel Victoria Falls*" Goodwill for 7 months; from December, 2016 to April, 2017.

Both Defendants opposed the application. The 1st Defendant filed an Affidavit in opposition sworn by EUPHRINE KOMBE, the Senior Manager – Ongoing Risk Management while the 2nd Defendant's Affidavit in opposition was sworn by BOKANI SOKO, its Managing Director.

In the Affidavit in opposition for the 1st Defendant, it was stated that the Plaintiffs had no cause of action against the 1st Defendant and, thus, no clear relief against the 1st Defendant in this action.

In the Affidavit in opposition for the 2nd Defendant, the deponent, Soko, stated that the 3rd Plaintiff in his capacity as Director of the 2nd Plaintiff had verbally permitted the 2nd Defendant to continue trading as "*Courtyard Hotel Victoria Falls*" before the commencement of operations in March, 2017 with compensation for use of the name to be agreed later.

It was further stated that the use of the name "*Courtyard Hotels Victoria Falls*" by the 2nd Defendant was with full knowledge and blessings of the 2nd Plaintiff.

The 2nd Defendant, however, denied continued use of the 2nd Plaintiff's Goodwill and being privy to issues or disputes between the Plaintiffs and the 1st Defendant.

The Plaintiffs filed into Court an Affidavit in Reply, principally to deny any agreement between the 3rd Plaintiff and the 2nd Defendant for payment of damages for the use of the goodwill as alleged by the deponent of the 2nd Defendant's Affidavit in opposition.

All the parties also filed Skeleton Arguments and List of Authorities but for reasons that will soon become clear, I will mainly concentrate on making reference to the Plaintiffs' and the 2nd Defendant's Skeleton Arguments and Authorities.

Learned Counsel for the Plaintiffs, Ms Buntings started by citing **Order XXVII** of the **High Court Rules** which provides that:

> *"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..."

Learned Counsel then went on to argue that the Court has developed a set of guidelines or principles to establish whether an Applicant's case merits the granting of an interlocutory injunction; these being

a) *A serious question to be tried, meaning that there has to be a good arguable case.*

b) *Irreparable damage or injury*

c) *The balance of convenience (see* ***American Cynamid Co. v Ethicon Co. Limited***[1]**)**

On the first principle referred to above, Learned Counsel cited the case of **Preston v Luck**[2] where the Court stated that:

> ***"it is necessary that the Court should 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 Plaintiffs are entitled to relief."***

Similarly, in **Harton Ndove v Zambia Educational Company Limited**[3] Chirwa J, as he then was, 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 that he has a real prospect of succeeding at trial."

Thus, Learned Counsel submitted that the 2nd Defendant's acts of passing off their hospitality services as those of the Plaintiffs' is a triable issue to satisfy the above principle and that, as demonstrated in the Affidavit in support, the 1st and 2nd Plaintiffs have built up their Goodwill over 12 and 5 years, respectively. In the premises, the Plaintiffs have high prospects of succeeding at trial.

The case of **Shell and BP Zambia Ltd v Conidaris**[4] was on the other hand cited where the Supreme Court discussed the principle of irreparable damage or injury; 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, mere inconvenience is not enough. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for by damages."***

Learned Counsel hence submitted that the substantial damage that the reputation of the "*Courtyard Hotel*" brand has suffered and is likely to suffer as a result of the "substandard services" being offered by the 2nd Plaintiff under the said brand can never be adequately atoned for by damages.

The case of **Gideon Mundanda v Timothy Mulwani, Agricultural Finance Company Limited and S.S.S. Mwiinga**[5] was also cited to advance the argument

that there are situations when an injunction could be granted even where damages can be quantified. Learned Counsel referred to the holding of the Court in that case that:

> *"The High Court has power to award damages in addition to, or in substitution for specific performance or injunction"*

on the "balance of convenience", Learned Counsel referred to the case of **American Cyanamid** case (supra) where it was held that:

> *"the objectives of the interlocutory injunction is to protect the Plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in its favour at the trial, but the Plaintiff's need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury from his having been prevented from exercising his own right for which he could 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."*

Learned Counsel, therefore, in ending submitted that in this matter, the Defendants have no rights as regards the use of the *"Courtyard Hotel"* name as

the 1st and 2nd Plaintiffs have duly built up the Goodwill of the said name through various forms of advertising and the public thus associates hospitality services offered under that name as being, only, of the 1st and 2nd Plaintiffs' group of Companies.

Learned State Counsel Mr. Shonga argued for the 2nd Defendant. On the right to relief, Mr. Shonga, SC drew the Court's attention to the fact that there appeared to be no dispute that the 2nd Defendant, until the 1st Defendant took possession of the premises in Livingstone, traded as "*Courtyard Hotel Victoria Falls*" and that the 2nd Defendant continued to trade under the same when it commenced operations in Livingstone. To that extent, Learned State Counsel magnanimously conceded that the 2nd Plaintiff may have a clear right to relief and no other Plaintiff.

Learned State Counsel was, however, quick to point out that what appeared to be in dispute is whether or not the 2nd Defendant had the blessings of the 2nd Plaintiff to use the name as alleged in the 2nd Defendant's Affidavit in opposition to summons for interim injunction.

Learned State Counsel further argued that notwithstanding that an Applicant may have shown that he has the right to relief, it is settled law that an injunction will not be granted unless the Applicant has shown that he will suffer irreparable injury if the injunction is not granted; and placed reliance on the ***Shell and BP case***, (supra) as authority for the proposition. He expanded by recalling that the Supreme Court has consistently held the view that the issue of the adequacy of damages must be investigated prior to the grant of an interim injunction. Thus,

In ***Turkey Properties v Lusaka West Development Company Limited and Others***[6], the Court held that:

> ***" In applications for interlocutory injunctions the possibility of damages being an adequate remedy should always be considered."***

Learned State Counsel invited the Court to make such an inquiry in this case based on the Affidavit evidence available

Learned State Counsel also brought out the fact that the Plaintiffs had failed to specify which of them will suffer injury and in what form the injury will take as in most paragraphs of the Affidavit in support, the word expressed was "Plaintiffs" and not a specific or particular Plaintiff.

Further, it was argued that a glance of the parties appearing on the writ of summons showed that it is only the 2nd Plaintiff who was and expressed as "trading as *Courtyard Hotel Victoria Falls*" and it ought to follow that the only party with locus to bring forth this claim against the 2nd Defendant was the 2nd Plaintiff and none other. In other words, the 1st, 3rd, 4th and 5th Plaintiffs, have no interest in the name "*Courtyard Hotel Victoria Falls*", it was submitted.

Thus, in relation to the 2nd Plaintiff, Learned Counsel posed the question: What injury has the 2nd Plaintiff indicated to this Court that it will suffer if the injunction is not granted? According to the Learned State Counsel, the only paragraph in the Affidavit in support that related to injury suffered is paragraph 19, which reads:

> ***" That in the premises an interim injunction is necessary to protect the Plaintiffs' from irreparable injury that cannot be atoned for by damages."***

Learned State Counsel stressed that the Affidavit in support did not specify what this injury is or which Plaintiff will suffer the injury or, indeed, how and that it was not for the Court to employ its imagination to find irreparable injury.

Learned State Counsel also drew this Court's attention to paragraph 17 of the Affidavit in support of interim injunction, where the deponent said:

> ***"That by letter dated 17th May 2017, the Plaintiffs through their Advocates wrote to the 2nd Defendants demanding payment for use of Courtyard Hotel Victoria Falls Goodwill for 7 months from December 2016 to April 2017 which stood at US$ 280,000 and US$ 738,000 rental for use of the properties. There is now produced and shown to me a true copy of the said letter marked exhibit "AFM9".***

From paragraph 17 quoted above, Learned State Counsel urged this Court to deduce that clearly the Plaintiffs are, in fact, pursuing nothing more than a money claim; though the method employed to quantify their loss was yet to be negotiated upon, the Plaintiffs had in fact also had somehow come up with what their loss for the 7 months had been.

In further arguing the matter, Learned State Counsel also touched on the originating process filed and contended that the Writ of Summons confirmed that the Plaintiff were not attempting to have the 2nd Defendant stop using the mark "*Courtyard Hotel Victoria Falls*" permanently, but only temporarily through the interim injunction sought from this Court.

Learned State Counsel vehemently argued that where an Applicant has sought no more than a money claim, the Courts have been less than sympathetic and unwilling to grant interim relief by way of injunction, understandably so as a money claim is indicative that damages will be an adequate remedy. In ***Zimco Properties Limited v Lapco Limited***[7], Gardner JS had this to say in a matter that predominantly addressed the issue of balance of convenience:

> "***It is clear to us that if the Plaintiff is successful in its action it will be adequately compensated by an award of damages. In the circumstances, therefore, the granting of the injunction was improper and this appeal must succeed."***

According to Learned state Counsel, the facts of this case pointed to the fact that damages would be an adequate remedy as the 2nd Plaintiff quantified its claims before this Court.

On the Plaintiffs' reliance on the case of ***Gideon Mundanda v Timothy Mulwani and Others*** and the submission that the Supreme Court on that case held that the High Court has power to award damages in addition to, or in substitution for specific performance or injunction, learned State Counsel countered that the

Court made no such finding in that case. He argued that the ***Gideon Mundanda*** case concerned specific performance of agreements for sale of land. It did not involve discourse, of any sort, surrounding the principles in play on the grant of interlocutory injunctions. In that case, the Court held thus:

> ***" A Judge's discretion in relation to specific performance of contracts for the sale of land is limited as damages cannot adequately compensate a party for breach of a contract for the sale of land."***

At page 34 to 35 of the Judgment, the Court also said:

> ***"The Appeal is allowed and the order for damages made by the High Court is set aside. In its place we substitute an order for specific performance of the contract for the sale by the first Respondent to the Appellant at a purchase price of K20,000-00 of Four thousand Acres of Farm No. 82'a,....."***

The above authority, it was submitted, was therefore, not helpful in convincing the Court to grant the Plaintiffs the injunctive relief sought.

Learned State Counsel, therefore, submitted that the 2nd Plaintiff did not deserve the injunctive relief sought to be granted.

In the responding arguments, Learned Counsel for the Plaintiffs Ms. Bunting contended that even though damages were quantified, that is not to say damages are sufficient to cover exactly what the Plaintiffs would suffer. The Learned

Counsel cited the Malaysian case of ***Maxis Sdn Bnd v Shruhanjaya Syarikot Malaysia & Others***[8] where it was said:

> ***"When dealing with damages or injury to goodwill and reputation, which is intangible and abstract in nature, the amount of damages, and injury caused is exceedingly difficult to identify and ascertain."***

Learned Counsel also relied on what was said by the Court of Appeal in England in the case of ***Shelfer v City of London Electronic Lighting Co.***[9] that the "***Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrong doer is able and willing to pay for the injury he may inflict.***" Further that ***" a person committing a wrongful act (whether it be a public Company or a private individual) is not thereby entitled to ask the Court to sanction this doing so by purchasing his neighbour's rights, by assessing damages in that behalf…"***

Thus, the Plaintiffs' Learned Counsel insisted that the injunction sought was deserved.

At the hearing, oral submissions were made by respective Counsel mainly to buttress the Skeleton Arguments filed and relied on. Learned State Counsel, Mr. Shonga in addition submitted that the **Shelfer** case cited by the Plaintiffs' Learned Counsel was seriously doubted in a more recent and Supreme Court of England case of ***Coventry and Others v Lawrence and Another***[10]. Learned State Counsel concluded by re-stating that in Zambia, " *the law remains that where damages*

are capable of being quantified, the Court would not exercise its discretion to grant an interlocutory injunction."

On their part, Learned Counsel for the 1st Defendant, Mr. Moonga and Ms. Musyani vehemently submitted that the Plaintiffs have not shown an arguable case to pursue at trial against the 1st Defendant. It was further submitted that the nature of the injunction sought against the 1st Defendant was unclear in that it has not been shown how the 1st Defendant has, for instance, assisted the 2nd Defendant to pass off the hospitality services not being of the 2nd Plaintiff as alleged. The two Learned Counsel, therefore, urged this Court to dismiss the application for interlocutory injunction with costs.

I have carefully considered the application including all the contending Affidavits filed and before me. I am also grateful to Counsel for the incisive arguments.

The question I am confronted with is whether this is a proper case in which to grant interlocutory injunction.

But before proceeding any further on the above posed question, it is necessary that I briefly deal with the objection raised by Learned State Counsel Mr. Shonga during the course of the oral arguments. This was to the effect that the Plaintiffs should not be allowed to rely on the contents of the Affidavit in Reply and Skeleton Arguments filed into Court on 16th June, 2017 because no leave of the Court had been obtained prior to the filing.

I have since visited the history of these proceedings. The record shows that at the hearing on 15th June, 2017, there was an adjournment at the request of the Plaintiffs' Learned Counsel on the ground that the Plaintiffs intended to file an Affidavit in Reply and further Skeleton Arguments to the opposing Affidavits. I then granted the adjournment to 27th June, 2017 and the Plaintiffs proceeded to so file on 16th June, 2017. I am, therefore, satisfied that although I may not have expressly stated as such, the Affidavit in Reply and Skeleton Arguments objected to are on record with the permission of this Court.

Returning to the question posed for determination, there is common ground among the parties that in doing so, the Court has to consider the principles or guidelines laid down in the **American Cynamid** case, that is:

(a) *Whether the Claimant has shown an arguable case for trial.*

(b) *Whether the Claimant will suffer irreparable damage if the injunction was not granted.*

(c) *Whether the balance of convenience lies in favour of granting or refusing the injunction.*

However, these principles are not to be understood as inflexible or *"cast in stone"* as [illegible] the Court from considering any other relevant factor.

Further, the principles should also be considered taking into account the particular facts and circumstances of the case.

A serious and arguable case for trial

As between the Plaintiffs and the 1st Defendant, the contention of the 1st Defendant is that there is no substantive relief against it and, therefore, no right to relief has been shown to warrant the grant of interlocutory injunction. This contention was repeated in the oral submissions at the hearing and I observed that there was no counter argument from the Plaintiffs' Learned Counsel. Clearly, there is no arguable case for trial against the 1st Defendant and the injunction sought is refused merely on this principle with costs to the 1st Defendant.

As regards the 2nd Defendant, matters become a little bit complicated. A close perusal of the Writ of Summons and Statement of Claim, reveals that it is the 1st and 2nd Plaintiffs that are claiming the use of the name "**Courtyard Hotel Victoria Falls**" by the 2nd Defendant. In paragraphs 42,43,44 and 45 of the Statement of Claim, it was avered that:

" 42. **The 1st and 2nd Plaintiffs have for 12 and 5 years, respectively, traded in the hospitality industry under the name and mark "Courtyard Hotel". The services provided by "Courtyard Hotel" in the last 12 years include but are not limited to:**

i. ***Accommodation***

ii. ***Conference room***

iii. ***Restaurant***

iv. ***Coffee Shop***

v. ***Gym***

vi. ***Health Bar***

43. **Further, the 1st and 2nd Plaintiffs have widely advertised and promoted their services by and under the name and mark "Courtyard Hotel".**

<u>Particulars of Advertisement and Promotion</u>

i. Newspaper advertisements

ii. Brochures

iii. Facebook page

44. **By reason of the aforesaid, the 1st Plaintiff and 2nd Plaintiff have built up and owns a valuable goodwill in the name "Courtyard Hotel" when used in the hospitality industry. Accordingly, whenever members of the public see hospitality services sold or promoted under or by reference to the name "Courtyard Hotel", or anything colourably similar thereto, they take the same to be the services of the 1st Plaintiff and 2nd Plaintiff, none other.**

45. **On a date unknown to the 1st and 2nd Plaintiffs but in about December 2016, the 2nd Defendant took possession of the said mortgaged properties, the 2nd Defendant and or its agents commenced using the mark "Courtyard Hotel Victoria Falls" in relation to hospitality services not being services of the 1st and 2nd Plaintiff."**

In short, of the five Plaintiffs, only the 1st Plaintiff and 2nd Plaintiff have a serious and arguable case to pursue at trial; that is, clear right to relief. This then calls for consideration of the second principle of "irreparable harm."

Irreparable damage

The argument put forth on behalf of the Plaintiffs (1st Plaintiff and 2nd Plaintiff) is that even though damages were quantified, it is not an acceptance that damages would be sufficient to cover the damage to be suffered and that this applies to cases dealing with damages to goodwill and reputation. On the other hand, the 2nd Defendant's contention as argued by Learned State Counsel Mr. Shonga is that where what is sought was no more than a money claim, Courts have been unwilling to grant interim relief by way of injunction and because damages of US$280,000-00 were quantified for use of the goodwill for 7 months, an injunction as an interim relief is inappropriate in this case.

While agreeing with the argument of Learned Counsel for the Plaintiffs Ms. Bunting that damages in passing off cases are exceedingly difficult to identity, I do not see this to mean that a Court confronted with an application for an injunction in a passing off case has no choice but to grant the injunction as an interim relief. That cannot be the law. There is no such category of cases in which the Court's discretion is fettered and it is no wonder that such a radical understanding of the law was criticized in the **Coventry** case. To the contrary, the discretion always remains that of the Court, which has to also take into account particular facts and circumstances of each case.

In this case, there is no contention that there was quantified the damages suffered by the 1st Plaintiff and 2nd Plaintiff for use of the name "**Courtyard Hotel Victoria Falls**" as goodwill by the 2nd Defendant. There is also no dispute that a

demand for payment of the quantified amount was made to the 2nd Defendant by letter from the Plaintiffs' Advocates dated 17th May, 2017. The 2nd Defendant on its part has admitted having used the name "**Courtyard Hotel Victoria falls**" but disputes that it has continued to use the name. The view I take, therefore, is that by computing damages for use of the goodwill for 7 months and making a demand to the 2nd Defendant for payment of the quantified amount, this was indeed indictive that damages were adequate relief in lieu of injunction. The allegation that the 1st Plaintiff and 2nd Plaintiff will suffer irreparable harm or injury which cannot be compensated for in damages if the interim relief of injunction is not granted and they later succeed in the action is, therefore, not proven. In any case, there is no evidence that the 2nd Defendant has continued or intends to continue in spite of the 2nd Defendant's denial that it has continued to use the name "**Courtyard Hotel Victoria Falls.**"

In a nutshell, I am not persuaded that this is a matter in which I can exercise my discretion and Order that an interim relief by way of injunction should be granted. Instead, the claim for injunction against the 1st Defendant and 2nd Defendant is refused with costs to the 1st Defendant and 2nd Defendant.

Dated at Lusaka this 9th day of August, 2017.

HON. MR. JUSTICE SUNDAY B. NKONDE, SC
HIGH COURT JUDGE