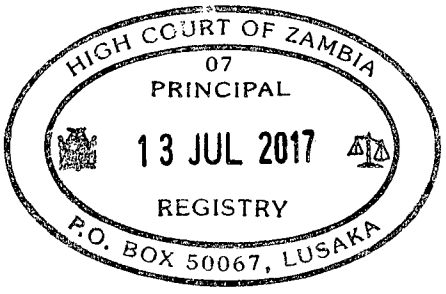
IN THE HIGH COURT FOR ZAMBIA **2017/HP/0150**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

LAMASAT INTERNATIONAL LIMITED **PLAINTIFF**

AND

FINANCE BANK ZAMBIA PLC **DEFENDANT**

BEFORE HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiffs: *Mr. K. Kaunda of Messrs Ellis and Company*

For the Defendant: *Mr. M. Mwenye SC Mr. J. Kabwe of Messrs Mwenye and Mwitwa Advocates*

RULING

Cases Referred to:

1. *American Cynamid Company v Ethicon Ltd. (1975) AC 396*
2. *Communication Authority of Zambia v Vodacom Zambia Limited (2009) ZR 196*
3. *Hondling Xing Xing Building Company Limited v ZamCapital Enterprise Limited*

4. *J. K. Rambai Patel v Mukesh Kumar Patel (1985) Z.R. 220 (S.C.)*
5. *Mukosa v Michael Ronaldson (1993-1994) ZR 26*
6. *Shell BP Zambia Limited v Conidaris and Others (1975) Z.R. 174.*
7. *Turnkey Properties Limited v Lusaka West Development Limited and Others (1985) ZR 85.*

This was the Plaintiff's application for an Order of Interlocutory Injunction pursuant to Order 27 of the High Court Rules and Order 29 of the Rules of the Supreme Court 1999 Edition.The said Application was supported by an affidavit filed into Court on 31st January, 2017 and a supplementary affidavit in support dated 27th March, 2017 as well as an affidavit in Reply.

The affidavit in support of the application was deposed to by one Mohamad Ahmad, the Chairman of the Plaintiff Company. He swore that the Defendant executed a Term Loan Facility for the sum of $13,408,624.65. The said Term LoanFacility was exhibited and marked **"MA1"**. He deposed that the said Facility was to consolidate the Plaintiff's existing credit facility in the books of the Defendant into a single loan of US$10,000,000 and to obtain settlement of the balance which was US$3,408,624.65, which sum was categorized as an overdraft facility.

The affidavit revealed that theTerm Loan Facility was for a period of 60 months from the date of restructure and repayment of the loan

was to be made in 60 equal monthly installments inclusive of interest. On 18th July, 2016, the Defendants Executive Director for Corporate Banking, Retail and Marketing wrote to the Plaintiff advising the completion of the acquisition of the Defendant by Atlas Mara. The acquisition was stated to have been concluded on 30th June, 2016. A copy of the letter was exhibited and marked **"MA2"**.

The deponent also swore that on 22nd September, 2016, Dr. Rajan Mahtani called a meeting with the Managing Director of the Plaintiff, Mr. Mahmoud Ahmad, to discuss issues relatingto the banking facilities with the Defendant, inter alia, a demand for the settlement of all dues to the Defendant, failure of which the necessary legal action would be taken against the Plaintiff.The said meeting was also attended to by the former Managing Director, Mr. Barkat Ali.

On 1st November, 2016 the said Mr. Barkat Ali is said to have made a telephone call to the Managing Director of the Plaintiff purported to make a follow up on the meeting of 22nd September, 2016.In light of the said meeting and communication attended by the Plaintiff's Managing Director andthe Defendant's Executive Director of Credit, a Ms. Charity Shitumbanuma, in order to ascertain the capacities in which Dr. Rajan Mahtani and Mr. Barkat Ali are involving themselves with the said credit facilities, wherein, the Plaintiffwas informed of Mr. Barkat Ali's role as a consultant but were not informed as to Dr. Rajan Mahtani's role.

The Plaintiff's Advocates wrote to the Defendants' Managing Director on 4th November, 2016 but had not had a response to date. A copy of the said letter was exhibited and marked **"MA3"**. He said that on or about 26th January, 2017, the Plaintiff received a letter from the Defendant demanding settlement of a total sum of US$12,129,065.63 on its Term Loan Facility and arrears of Overdrawn Account Facility within fourteen days and that failure to make the said payment would prompt the Defendant to appoint a Receiver/Manager to recover the debt.A copy of the letter was exhibited and marked **"MA4"**.

This letter, according to the deponent, disclosed that the nature of the default that the Plaintiff was in breach of as stipulated under clause 20 of the Term Loan Facility dated 13th April, 2016 which was marked **"MA5"**.

He deposed that irrespective of the financial constraints being experienced by the Plaintiff, which constraints had been communicated to the Defendant, the Plaintiff had been servicing its accounts with the Defendant and had deposited payment in the respective sums of US$865,999.19 and ZMK21,859,934.88 from 16th October, 2016 to date. A copy of the statement of account was exhibited and marked "MA6".

The Plaintiff had no capacity to mobilize resources within 14 days so as to satisfy the said demand. The Plaintiff had however made several financial arrangements that would in due course generate funds to satisfy the said demand. He stated that one such

document relates to a facility that the Plaintiff had secured with Madison Asset Management Company Limited (MamCo) which was executed by the Defendant on 9th December, 2016 at a total cost of US$9,000,000, which would be utilized to settle the Defendant's indebtedness to the Plaintiff. A copy of the Addendum to Loan Agreement was also exhibited and marked **"MA 7"**.

He averred that should this Court not grant their application for an Order of Interim Injunction, the said appointment of a Receiver/ Manager should be detrimental to the Plaintiff, whereby the said appointment would attract a call on all other existing facilities with other financial institutions, the facility with MamCo, breach of construction agreements with the Ministry of Agriculture and other institutions. He stated further that subsequently, the appointment of Receiver/ Manager would attract a 'no confidence' attitude in suppliers and customers alike. Consequently, the Plaintiff may be compelled to wind up the company and this will lead to over 1,000 employees facing inevitable redundancies.

It was contended that the Plaintiff was concerned with the role of Dr. Rajan Mahtani and Mr. Barkat Ali in calling in the facilities and believed that the Defendant was not acting in good faith. According to him, the affidavit he would swear in support of the Application to vary or restructure Settlement Terms of Loan and Variation of Monthly Installments would disclose details as to how the Plaintiff proposed to fully settle its indebtedness with the Defendant. He swore that it was clear from the above that the loss and damages

that the Plaintiff would suffer in the event that a receiver was appointed, are immeasurable and would not be atoned for by any award of compensatory damages. He stated that in the interest of justice, the Plaintiff sought the Court's indulgence by granting it an Order of Interim Injunction to restrain the Defendant from appointing a receiver pending the determination of this matter.

The Plaintiff undertook to pay damages in the event that the Court later determined that the Order sought herein was not necessary.

In the Plaintiff's supplementary affidavit in supportthe deponent added that the Plaintiff's other loan facilities with different Finance institutions had clauses that empower these financial institution to immediately recall all the facilities and demand full payment of the sums in the facilities. He produced copies of the facilities highlighting the relevant clauses and the same were marked **"MA2"**.

He stated further that unless the Order of Injunction was granted and confirmed, the Plaintiff was likely to suffer irreparable damage and maybe wound up when all the facilities were called in. He averred that MamCo had already called one of the Plaintiff's facilities, which had caused serious operational and expansion challenges to the Plaintiff. A copy of the letter from MamCo was produced and marked **"MA3"**.

He further swore that Kurema Africa, a sub-Saharan finance and investment company terminated the negotiations with the Plaintiff for refinancing of the Plaintiff's facilities following the threat of

receivership. He exhibited a copy of the letter from Kurema confirming this position and marked the same as **"MA 4"**. He finally swore that the Defendant's Defence and Counter-claim was silent on the issue of receivership herein.

The Defendant filed in an opposing affidavit on 27th March, 2017 deposed to by one Charity Nsunge Shitumbanuma, the Head of Credit in the Defendant Company. She deposed that on or about 11th April, 2016, the Defendant extended a Term Loan Facility to the Plaintiff in the sum of US$13,408,624.65. She stated that the purpose of the Term Loan Facility was to consolidate the Plaintiff's existing credit facilities in the Defendant's books into a single loan of US$10,000,000 and to settle an outstanding balance of US$3,408,624.65. She referred to exhibit **"MA1"** in the Plaintiff's affidavit in support.

She swore that the Plaintiff was required to liquid its indebtedness to the Defendant in 60 equal monthly instalments of at least US$213,220.05, with the first such instalment falling due on the 30th May, 2016. She stated that the parties further agreed that compound interest of 10% per annum would accrue on all outstanding amounts and that interest would be calculated on a daily basis. She said it was further agreed that the rate of interest could be changed at the absolute discretion of the Defendant. Further that as security for the Term Loan Facility, the Plaintiff offered and the Defendant took out several securities, including a

debenture on the fixed and floating assets of the Plaintiff to secure US$12,000,000 and interest.

She averred that clause 20 of the Facility, inter alia, stipulates that in the event that the Plaintiff committed any breach or made any defaulting the observation or performance of any term, condition, undertaking or covenant of the facility, which breach was not remedied within 14 days after becoming aware of such breach, the Plaintiff would pay the Defendant forthwith on the Defendant's first written demand all amounts outstanding under the facility.

Her affidavit revealed that contrary to the terms of the Term Loan Facility, the Plaintiff defaulted and continued to default in liquidating its indebtedness to the Defendant within the agreed 60 monthly instalments. That as at the date of the letter of demand exhibited in **"MA4"** in the Plaintiff's affidavit in support, on 24th January, 2017 the Plaintiff failed to make 8 instalments amounting to a total of US$1,767,771.90 and US$1,579,409,22 on the overdrawn account and had to date failed to continue meeting its monthly commitments.

She further swore that the Plaintiff's engagement with the Defendanthad been characterized by promises and undertakings which the Plaintiff had repeatedly failed to fulfill.She stated that she believed that the Plaintiff was not entitled to an injunction because it had come to Court with dirty hands or tainted hands on account of its default.

According to her despite the Plaintiff's assertions in its affidavit in support, it is contractually bound to honour its obligations to the Defendant as stipulated in the Term Loan Facility. She also stated that exhibit **"MA4"** was written by the Defendant in exercise of its legitimate contractual rights after the Plaintiff's default on its loan obligations and as a result of the Plaintiff's failure to fulfil its undertakings to settle debts due to the Defendant. She added that the same letter stipulates the nature of default by the Plaintiff, being failure to timeously liquidate the sum of US$1,579,409.22 on the Overdrawn Account and the sum of US$10,649,656.41 on the Term Loan Facility, bringing the total to US$12,229,065.63 as at 24th January, 2017.

It was contended that the Plaintiff was in fact aware of its default in liquidating its indebtedness to the Defendant. That the Plaintiff had previously acknowledged its default and made promises and undertakings to the Defendant which it had repeatedly failed to fulfil.

She swore that by a letter dated 10th June, 2016, the Plaintiff acknowledged that it had defaulted on its contractual obligations to the Defendant and promised to regularize its accounts with the Defendant within a month of the said letter. She stated that the Plaintiff made an undertaking to deposit the sum of US$3,000,000.00with the Defendant to amortise its debts with the Defendant. However, the Plaintiff is said not to have made good on

its undertaking. She produced a copy of the said letter and marked it exhibit "CSN1".

It was her deposition that as a consequence of the Plaintiff's default, by a letter dated 22nd June, 2016 from the Defendant to the Plaintiff, the Defendant expressed concern over the Plaintiff's non-settlement of its obligations to the Defendant. A copy of this letter was produced and marked **"CSN2"**.

The deponent asserted that by a letter the 22nd of September, 2016, the Plaintiff further acknowledged its indebtedness to the Defendant and pledged to liquidate outstanding amounts due to the Defendant by December, 2016. That the Plaintiff requested the Defendant to give it up to December, 2016 to settle all outstanding amounts due to the Defendant. A copy of this letter was exhibited and marked **"CSN3"**.

According to her, as at December, 2016, and despite several written and verbal undertakings, the Plaintiff did not make good on its assurance and undertakings to the Defendant to liquidate the outstanding amounts due to the Defendant. She stated that of the 8 monthly instalments which the Plaintiff should have made by the end of December, 2016, the Plaintiff did not remit any instalments and continued to be in default to date.

She revealed that owing to the Plaintiff's continued default and breach of the terms of the Term Loan Facility, and in accordance with the terms of the said facility, the Defendant, by a letter dated 24th January, 2017 wrote to the Plaintiff's to demandthe settlement

of the sum of US$12,229, 065.63 within 14days of the date of the letter, but the Plaintiff againfailed to settle its indebtedness to the Defendant. She produced a copy of the letter and marked it **"CSN4"**.

It was further averred that the Defendant was within its contractual rights to demand payment from the Plaintiff following the Plaintiff's default in liquidating its indebtedness to the Defendant on the terms agreed by the parties. The Defendant was further contractually entitled to recover all amounts due to it. She added that the deposited payments allegedly made by the Plaintiff were far below what it contracted to pay and that in any case, the said payments had no bearing on the Plaintiff's outstanding liabilities to the Defendant. She stated that the Plaintiff had an obligation to repay all sums borrowed plus interest as and when they fell due.

It was her contention that the Plaintiff's incapacity to mobilize resources could not form the basis of a grant of an interlocutory injunction and she believed that a debtor's inability to pay was not and had never been a ground upon which the creditor should be denied the right to recover amount due to him from his debtor.She added that according to the Term Loan Facility, the Defendant is entitled to recover all outstanding amounts in the event of breach or default by the Plaintiff.

She stated that the Defendant was not a part to any alleged agreement with MamCo and any such agreement did not relieve the Plaintiff from honouring its contractual obligations to the

Defendant, and neither does it prevent the Defendant from enforcing its contractual rights to recover outstanding sums from the Plaintiff. She further stated that if the interlocutory injunction was granted, it would give the Plaintiff an unfair advantage and secured advantages for the Plaintiff that it would not normally be entitled to under the contracts willingly entered into between the parties. That since the Defendant was a bank that provided financial services to its customers, the Defendant would be severely prejudiced if the injunction was granted to prevent it from recovering the substantial amounts owed to it by the Plaintiff.

She asserted that the Plaintiff's concerns were misplaced as the terms of the Term Loan Facility were clear on the parties thereto and the events of default were clearly spelt out. She contended that she had been advised that the application envisaged by the Plaintiff was not tenable in view of the binding nature of the contractual obligations between the parties.

According to her, the Plaintiff would not suffer any irreparable damage that could not be adequately be atoned for by damages which the Defendant was capable of paying in the event that they were awarded to the Plaintiff. It was her contention that the balance of convenience was in favour of the Defendant and it would be in the interest of justice for this Court to place the viability of the business of the Plaintiff before the business interests of the Defendant.

It was her further deposition that the Plaintiff had had more than ample time to rectify its financial standing with the Defendant, but had instead continued to be in breach of its contractual obligations to the Defendant. She stated that as at 20th March, 2017, the Plaintiff's outstanding liability to the Defendant stood at US$11,546,123.89 and the Plaintiff continued to use the interim injunction granted to it by this Court to default on its contractual obligations to the Defendant.

In light of this it was the deponent's contention that the Plaintiff's application for an interlocutory injunction was merely an attempt to avoid the recovery of a debt that the Plaintiff had on various occasions acknowledged and admitted and which the Defendant was contractually entitled to recover. That the Plaintiff failed to fulfill its undertakings from as far back as June 2016. She stated that this was not a proper case for this Court to exercise its equitable jurisdiction to grant an interlocutory injunction to the Plaintiff.

Both parties filed in skeleton arguments and list of authorities. In the Plaintiff's skeleton arguments the gist of the arguments by Counsel for the Plaintiffwas that this Court had jurisdiction to grant the Plaintiff an injunction based on the fact that the Plaintiff would suffer irreparable injury if the same were not granted.

He cited the case of ***Shell and BP Zambia Ltd. V Conidaris and Others (1975) ZR 174*** where they cited the case of ***American Cynamid Co. v Ethicon Ltd (1975) 1 ALL ER 504*** where the Court

found that it would not generally grant an interlocutory injunction unless the right to relief was clear and the same was necessary to protect the Plaintiff from irreparable injury.

Similar sentiments were echoed in the case of ***Edward Jack Shamwana v Levy Mwanawasa (1994) S.J. 93 (HC)*** where it was stated that the principle of monetary compensation is nearly always a ground for not granting such interlocutory relief.

He argued that the monetary compensation was not a bar to the order sought but merely a major factor. He submitted that the Court should specifically on the facts herein where the Defendant's actions were arbitrary, unreasonable and unfair. That the loss and damages that the Plaintiff had suffered and would further suffer in the event that this Order was not confirmed were immeasurable and would not be adequately be atoned for by any award of compensatory damages.

He stated that the Plaintiff had over 1000 employees who were likely to be affected by the Defendant's impending action and that should this Court dismiss the Ex-parte Injunction granted herein, the Plaintiff was likely to be wound up as its other facilities with other financial institutions had allowed them to recall the said facilities.

It was his submission that the balance of convenience favoured the granting of the application than to refuse it as the Plaintiff had clearly demonstrated that regardless of the arbitrary, unfair and unreasonable behavior exhibited by the Defendant, they were

making alternative financial arrangements to settle the Defendant's Debts. He submitted that the Application for an Order of Interlocutory Injunction pending the determination of this matter be granted.

The Defendant's learned Counsel in their skeleton arguments argued that the ex-parte order of injunction be discharged as the Plaintiff had not satisfied the requirements for the grant of an interlocutory injunction.They cited the case of American Cynamid Company v Ethicon where the general principles on injunctions were outlined.

They submitted that from the facts and evidence before Court the Plaintiff's claim failed to satisfy all the prerequisite benchmarks for the grant of an injunction. They argued that the Plaintiff had failed to demonstrate that there was a serious question to be tried in the main matter. They stated that the remedies sought by the Plaintiff all arose from the Plaintiff's failure to settle its obligations to the Defendant as the Plaintiff had approached the Court with the aim of varying or restructuring the terms of the Term Loan Facility. They cited the case of ***Tijem Enterprises Limited v Children International Zambia (2011) ZR 75*** to support ifs argument.

It was their submission that there was no serious question to be tried as the law on the reliefs sought by the Plaintiff was already settled. They further cited the case of ***Mukosa v Michael Ronaldson (1993-1994) ZR 26*** where the Court held that an injunction would be granted only to a Plaintiff who establishes that

he had a good arguable claim to the right he seeks to protect. According to them the Plaintiff failed to demonstrate any serious question to be tried.

They further submitted that the remedies primarily sought by the Plaintiff were damages. Damages were therefore an adequate remedy to compensate the Plaintiff in this matter. In view of this it was their submission that an injunction should therefore not be granted and cited the case of ***Bob Bwembya Luo v Alfred Banda Appeal No. 52 of 2011*** to strongly support their submission. They further cited the case of ***Hondling Xing Xing Building Company Ltd. v Zamcapital Enterprises Limited (2010) 1 ZR 30*** where the Court held that an injunction would not be granted where damages would be an alternative and adequate remedy to the injury complained of if the applicant succeeded in the main action.

They argued that since the Plaintiff was in the business of making money, any disruption to its business if found to be wrongful could be adequately be atoned for in monetary terms.

It was Counsel's further submission that a Court would not grant an interlocutory injunction unless the Court was satisfied that the Plaintiff was likely to succeed in the relief sought. They cited the case of ***Zambia State Insurance Corporation Ltd. v Mulukelela (1990-1992) ZR 18***. It was argued that in view of the evidence before the Court the Plaintiff had no arguable claim to prevent the Defendant from demanding payment and subsequently recovering

all outstanding amounts due in accordance with the provisions of the Term loan Facility.

With regard to the where the balance of convenience lies, Defense Counsel cited various authorities including ***Turnkey Properties Limited v Lusaka West Development and others (1984) ZR 85***. In that case it was held that an interlocutory injunction cannot be legitimately used as a stratagem to create or maintain new conditions favourable only to the applicant. They submitted that the grant of this injunction would grant favourable conditions only to the Plaintiff.

It was argued that if the interlocutory injunction is granted, it would give the Plaintiff an unfair advantage and secure an advantage for the Plaintiff that it would not normally be entitled to under the contracts willingly entered into between the parties. They added that the Defendant being a bank would be prejudiced if the injunction was granted to prevent it from recovering the substantial amounts owed to it by the Plaintiff.

They submitted that the Plaintiff had failed to meet all of the constituent elements for granting the injunction, and the application. They further submitted that the Plaintiff was not entitled to the grant of an interlocutory injunction on the basis of well settled principles established by the Supreme Court of Zambia. They argued that where facts were not in dispute, the Court may grant or refuse to grant an interlocutory injunction without

applying the guidelines in the American Cynamid case. Various authorities were cited to support this argument.

It was submitted that from the facts before this Court, the Plaintiff continued to be in default and breach of the terms of the Term Loan Facility and as such the Defendant could not be restrained from exercising its legal and contractual rights available to demand payment and enforce its rights as a debenture holder in the vent of continued default.The argued that the Defendant was entitled to invoke the default clause in view of the Plaintiff's continued default and breach of the terms of the Term Loan Facility. That the Defendant could not be restrained from exercising its legal right to appoint a Receiver to realize the assets comprised in the security.

Counsel also submitted that an injunction was an equitable remedy and it was an established principle of law that *"he who comes to equity must come with clean hands"*and *"he who comes to equity must do equity"*. They argued that the Plaintiff's continued breach of the Term Loan Agreement did not entitle it to an injunction.They cited the cases of ***Hina Furnishing Lusaka Ltd. v Mwaiseni Properties Ltd. (1983) ZR 40*** and ***Christopher James Thorne v Christopher Mulenga, Edgar Hamuwele and Zambia National Commercial Bank Plc. (2010) ZR 221.***

They further submitted that economic hardship was not a defence and could not form for obtaining an injunction from this Court. That this Court could not out of sympathy accede to an application which the law does not support. They drew the Court's attention to

the case of Court Yard Hotel Limited v Zambia National Commercial Bank and Others Appeal No. 150 of 2016 (SCZ No. 11 of 2017) to support the Defendant's case. It was finally submitted that this was a fit and proper case for the Court to exercise its discretion and discharge the exparte order of injunction granted to the Plaintiff with costs borne by the Plaintiff.

The Plaintiff's Counsel submitted skeleton arguments in reply and argued that the amended statement of claim raised issues that could only be determined at trial and as such it was evident that there were serious triable issues in this matter. Further that the Defendant's Counter claim confirmed that there were serious questions to be tried. Counsel cited an authority which has n=been considered by this Court to support this argument.

With regard to whether damages were an adequate remedy it was argued that claims for damages were not a bar to the relief of interim injunction especially where loss of reputation , loss of opportunity and loss of chance could not be adequately redressed in damages. He cited the case of ***Michael Chilufya Sata v Chanda Chimba and Others (2011) ZR 519*** where the Court granted an Interim Injunction notwithstanding that there was a claim for damages.

Further, he submitted that the cases of Bob Bwembya Luo v Alfred Banda, Courtyard Hotel Ltd. v Zambia National Commercial Bank and 2 others and Kanjala Hills Lodge and Another v Stanbic Bank

Zambia Ltd cited by Defense Counsel were distinguishable from the present case.

He submitted further that the threatening receivership without exhausting the Mortgage securities, the Defendant attempted to deny the Plaintiff its statutory right of redemption as provided in section 66(1) of the Lands and Deeds Registry Act and this was a breach in itself.

He argued that based on the preceding submissions the Plaintiff had a good arguable claim as evidenced by the Amended Writ of Summons and Amended Statement of Claim. She submitted that appointing a Receiver would be pre-emptory and render this Court's determination as to whether or not to grant the Defendant's counter-claim for foreclosure an academic exercise.

He further submitted that on the basis of the above and the unquantifiability of the Plaintiff's damages, the balance of convenience tips towards the Plaintiff. He cited the case of Michael Chilufya Sata v Chanda Chimba and Others to support his argument. He emphasized that the degree of the Plaintiff's unquantifiable damages was high and could not adequately be atoned for by damages. That the interest of justice would favour preserving the status quo.

The matter came up for hearing on 15th June, 2017 and the parties made oral submissions to augment the skeleton arguments.

The LearnedCounsel for the Plaintiff, Mr. Kaunda stated that he would entirely rely on the affidavits and skeleton arguments together with the list of authorities before Court. He added that the Plaintiff had satisfied the required four principles of the injunction and prayed that the ex parte order should be confirmed pending determination of the matter.

In opposing this application the Counsel for the Defendant,the Learned Mr. Mwenye, SC, submitted that it was common cause that the Plaintiff borrowed over US$13 million from the Defendant. Secondly, that as at the time the Plaintiff rushed to Court to obtain an injunction it had defaulted on its obligations for over eight months. Further, almost four months after obtaining the interim Order of injunction, the Plaintiff had used and continued to use the Order of injunction to breach its contractual obligations and to default on the loan repayment.

He submitted that the Plaintiff's default was running to one year. Fourthly, that the facility letter exhibited as MA1 in the Plaintiff's affidavit in support filed on 31st January 2017 clearly showed that the parties willingly entered into a contractual relationship and that upon default, the Defendant was contractually entitled to do the very thing that the Order of Interlocutory injunction would prevent it from doing. He drew the Court's attention to the full text of the letter of facility and particularly paragraph 20.

Finally, it was submitted that the only plausible grounds that the Plaintiff had advanced for the grant of the injunction was that it

was in economic hardships. It had not cited a single contractual clause or obligation that had been breached by the Defendant.

He argued that in view of all these facts that could be gleaned from the affidavit, the law was very clear that an injunction could not be granted at interlocutory level to aid an applicant in the continued breach of its contractual obligations and the Supreme Court had been very clear on this point as stated in the written submissions.

Further, he argued that with injunctions, the parties were in the realm of equity and the maxims of equity must be brought to bear. He stated that one of the more relevant ones of those maxims was that *"he who comes to equity must come with clean hands"*. He added that by the Plaintiff's own admission in the various documents before Court, the Plaintiff was in breach for almost one year and as such its hands were clearly not clean.

He further argued that an analysis of rule 27 relied on by the Plaintiff showed that in fact it was meant to prevent continuedbreaches only. In fact the sort of the rule showed that the framers in fact frown upon the conduct of parties who breached their obligations. He submitted that in this instance Order 27 rule 4 frownedupon the breach by a party such as Plaintiff.

Counsel submitted that admittedly, they were all sympathetic of the financial hardships. He however, argued that at law sympathy for financial hardship was not a ground for granting an injunction. To the contrary, the Supreme Court had held that inability to pay was not a ground to refuse a rightful claimant. Similarly, the Plaintiff's

inability to meet contractual obligation was not a ground to prevent the Defendant from asserting its contractual right.

Finally, State Counsel submitted that there was no ground for the grant of the interlocutory injunction. He submitted that theSupreme Court had been very clear on this issue and he referred to the case of Kasengele v Zambia National Commercial Bank where the Court held that inability to pay was not a ground when granting a claim. In the present case the consequence for the discharge of the injunction may lead to the appointment of a receiver. Unfortunately, much as the Defendant may sympathize, the Court's hands were tied. The only question was whether the Plaintiff qualified on the fact or the law and the answer to that was that they did not.

He added that it was in the Public interest that the wheels of commerce continue to be lubricated by parties fulfilling their obligations and paying their debt and loan defaults were an unwelcome cog.

Counsel Mr. Kabwe added that the affidavit in support of this application in paragraph 19 it was stated that there was an application to vary of restructure the terms of the Loan and Variationof monthly instalments. He stated that there was no such application filed by the Plaintiff filed before this Court. In view of this there was no basis to grant an injunction before Court on a matter that was not tenable and not before Court.

In Replying to the Defendants submission, Counsel for the Plaintiff submitted that it was not correct that the only reason that the Plaintiff sought the injunction was economic hardship. He submitted that paragraph 11 of the affidavit in reply showed that the threatened receivership was premature and in bad faith.He stated that it was premature because there was no attempt by the Defendant to realize the loan from the mortgaged facilities. He submitted that that act in itself breached the Bankers Association Code of Conduct whose relevant portions have been exhibited.

Counsel argued that the threatened receivership was an attempt by the Defendants to deny the Plaintiff of the statutory right of redemption contrary to section 186 of the Lands and a Deeds Registry Act. He argued that the argument that there was no breach of any contractual clause by the Defendantcould not be sustained and on that ground could not be heard.

He argued that it would preemptive of the Court's determination of the matter if the Order of Injunction was not granted. As the Defendants' submissions before court had confirmed that it was possible they may appoint a receiver before the matter was concluded.

As regards the issue of receiver the submission was he the submission that a debenture holder could not be retrained from exercising his right, he submitted that the facts in the present case were unique as they involved different securities which included mortgages.

It was counsel's submission that paragraph 3 of the supplementary affidavit showed that after that order was issued and as at the date of that supplementary affidavit, the Plaintiff had paid a total sum of US$ 1million as evidence by exhibit **"MA1"**.

Further paragraph 13 also shows that they had made payments towards the said loan. He stated that where damages were not adequate compensation

He submitted that the statutory provisions in Order 27 rule 4expressly empowered this Court to grant the Order of injunction whether or not there was a claim for damages. The said Order empowers the Court to grant an injunction upon a breach of contract or injury. This Order was not restricted to breach of contracts.

It was submitted that there was no evidence before Court to supportState Counsel's submissions on the intention of the makers of that Order. He submitted that the case of Kasengele submitted by the Defendant was clearly distinguishable. In the present case the facts show that there were several securities including mortgaged properties and that the Plaintiff had the right of redemption

With respect to paragraph 19 of the affidavit in support it was there submission that the application before Court was not one that to vary or restructure the facility. That application is made after the Court had made judgment.

He submitted that the application had merit and that the Ex-parte Order of Injunction should be confirmed pending the summary hearing of the matter.

On the alleged breaches, it was submitted that the right of redemption under section 66(1) Cap 185 could not be superseded by any contractual breaches. On the Courts concurrent jurisdiction, specific statutory law in this case Order 27 rule 4 of the High Court rules would override general principles of law in this case those principles of equity.

I have considered the affidavit evidence on record and the detailed arguments by both parties.From the onset I must state that injunctions are an equitable remedy and already noted by Defence Counsel. Further, the granting of the injunction is discretionary, and that discretion should exercise it judiciously.

The principles of consideration in granting injunctions as well articulated by both Defence Counsel and Counsel for the Plaintiff were clearly espoused in the ***American Cyanamid*** case where Lord Diplock laid down guidelines on how the Court's discretion in relation to injunctions should be exercised.

The starting point in injunction was well articulated in the case of ***Hondling Xing Xing Building Company Limited v Zamcapital Zambia Limited*** cited by the Defendant where Justice Matibini stated that

"It is a settled fundamental principle of injunction law that interlocutory injunctions should be granted where the right to relief is clear, and where it is necessary to protect a plaintiff against irreparable injury"

Irreparable injury was well defined in the case of ***Shell BP Zambia Limited v Conidaris and Others*** where the Court defined irreparable to mean

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

The law is clear as shown by the wealth of the authorities filed by the parties that, an injunction will not be granted were damages would be an alternative adequate remedy to the injury complained of if the applicant succeeds in the main action.

Secondly,before the Court exercises its discretion to grant an injunction, the Applicant must show that he has a clear right to relief. Justice Matibini in the case of Hondling Xing Xing stated that

"in an application for an injunction the overriding requirement is that the applicant must have a cause of action in law entitling him to relief"

Similarly in the case of ***Communications Authority v Vodacom Zambia Limited (2009) ZR 196***, the Supreme Court stated that as regards the right to relief, it is for the party seeking an injunction to

establish clearly that he is entitled to the right which he seeks to protect by an injunction.

This was also established in the case of ***Shell BP Zambia Limited v Conidaris and Others*** where it was held that *the court will not generally grant an interlocutory injunction unless the right to relief is clear.*

Another important consideration is the where the balance of convenience lies.Whilst it is generally accepted or acknowledged that an interim injunction is appropriate for the preservation or restoration of a particular situation pending trial, it cannot be regarded as a device by which the applicant can attain, or create new conditions favourable only to himself. These sentiments were echoed by Ngulube D.C.J. as he was then, in ***Turnkey Properties Limited v Lusaka West Development Limited and Others (1985) ZR 85.***

Having outlined the above, it is not in dispute that thePlaintiff borrowed from the Defendant by virtue of a Term LoanFacility which was for a duration of 60 days. It is also not in dispute that the Plaintiff defaulted in the repayments as agreed by the parties. The Defendant then issued a letter requesting the Plaintiff to pay the total sum of US$ 12,229,0065.63 on the Term Loan Facility failing to which the Defendant would appoint a Receiver/Manager to recover the said debt.

The Plaintiff the took out an action against the Defendantclaiming, inter alia an Order for injunction to restrain the defendant from appointing a receiver to manage the affairs of the Plaintiff and an order directing the Plaintiff to pay the Term Loan Facility in instalments.

Based on the facts before me I agree with Defense Counsel as well as the authorities cited above that for this Court to grant an injunction, the Applicant must show that there are serious questions to try at law. In the present case the Plaintiff instituted an action asking the Court to vary or restructure the Settlement terms of the Term Loan Facility as well as an order directing the Plaintiff to pay the overdraft facility in instalments. They have further asked the Court to restrain the Defendant from appointing a receiver to manage the Plaintiff's affairs.

It is my firm view that the Plaintiff has a clear right to relief as these issues raise serious questions to try at law which can only be determined at trial. I agree with the case of ***Mukosa v Michael Ronaldson*** cited by the Defense that an injunction would be granted only to a Plaintiff who establishes that he had a good arguable claim to the right he seeks to protect. In my view the Plaintiff had shown a good arguable claim.

While Defense Counsel's arguments that the Plaintiff would be adequately compensated in damages may have some merit, the fact that not granting this injunction would terminate the whole matter prematurely without considering the serious questions to be tried at

law leaves me with no choice but to grant the injunction to maintain the status quo pending the determination of the main matter.

I accordingly confirm my earlier Order of Interim of Injunction. With regard to costs, costs are in the discretion of the Court but that discretion should be judiciously exercised. In the justice of this case costs shall be in the cause.

Leave to Appeal is granted.

Delivered under my hand and seal this 13th day of July, 2017

Mwila Chitabo, S.C.

JUDGE