

IN THE HIGH COURT FOR ZAMBIA

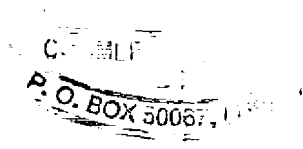
2017/HPC/0295

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



FIRST CAPITAL BANK ZAMBIA LIMITED

PLAINTIFF

AND

ZAMBIA CO-OPERATIVE FEDERATION LTD DEFENDANT

Before the Hon Lady Justice Irene Zeko Mbewe

For the Plaintiff : Mr. R Musumali & Mr. M Sikaulu of Messrs SLM Legal Practitioners

For the Defendant : Mr. R Peterson of Messrs Chibesakunda & Company

RULING

Cases Referred To:

1. *Mareva Compania Naviera SA v International Bulk Carriers SA [1980] 1 ALL E R 213*
2. *Elmar Engineering Limited v Allegra Mining Zambia Limited (2011/HPC/0023)*

3. *Third Chandris Shipping Corporation and Others v Unimarine SA* [1979] 2 ALL E R 972
4. *Adriatic Transport Limited v Fratelli Loci S.R.I Limited* [2012/HPC/0661]
5. *Z Limited v A and Others* [1982] ALL E R 556

Legislation Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*

This is an inter parte application by the Plaintiff for an order for a Mareva Injunction made pursuant to **Order 29 Rule 1 (1) Rules of the Supreme Court, 1999 Edition** as read with **Order 27 Rule 1 High Court Rules, Cap 27 of the Laws of Zambia**. The application is supported by an affidavit deposed to by Ephraim Katwamba Chindama the Credit Manager in the Plaintiff Bank. It is deposed that the Plaintiff commenced legal proceedings against the Defendant claiming for inter alia payment of the sum of US\$1,437,415.66 as at 13th June 2017 being the outstanding amount in respect of an overdraft facility availed to the Defendant on 17th August 2016. That the overdraft facility was availed

pursuant to a credit facility offer and acceptance letter dated 17th August 2016 with attendant terms and conditions (Exhibit EKC-1"). It is deposed that the Defendant obtained the overdraft facility from the Plaintiff for the purposes of financing the supply and delivery of 100,000 metric tonnes of maize to ADMARC Limited of the Republic of Malawi. That clause 7 of the facility letter stated that the facility shall be a revolving line of credit repayable to the Plaintiff on demand and that the Defendant admits that it received a demand from the Plaintiff in accordance with this term in paragraph 9 of its defence. That it was an agreed term that the facility shall expire six months from the date of the drawdown and this is admitted in paragraph 5 of its defence. That clause 13 of the facility letter provides that the Defendant shall route 100 per centum of its trade proceeds and foreign exchange transactions through the account maintained with the Bank. According to the Plaintiff, the Defendant has not been routinely remitting its proceeds through its bank account with the Plaintiff which the Defendant has denied in paragraph 7 of its defence. That it has come to the attention of the Plaintiff that on 10th November 2017, the sum of US\$1,413,573.63 was remitted by Ritz Attorneys at Law as payment for and on behalf

of ADMARC Limited of proceeds under the contract financed by the Plaintiff's for the supply and delivery of maize. That the said US\$1,413,573.63 has been remitted to the Defendant's account No 9580957500479 held at Zambia National Commercial Bank Plc Lusaka branch instead of the Defendant's account held with the Plaintiff (Exhibit "EKC-2"). That the decision by the Defendant to route the money into its bank account with Zambia National Commercial Bank Plc is in breach of the terms and conditions of the facility letter and deliberately aimed at obstructing justice and depriving Plaintiff from recovering the outstanding money due to it under the facility. That the Plaintiff believes that there is a serious risk of the money in the said account being dissipated and utilised whilst the main matter is pending before this Honourable Court. That a Mareva Injunction is necessary as the Plaintiff will be prejudiced as the Defendant disposes of the funds by utilisation of the same and the Plaintiff will this be unable to recover the monies owed to it.

The Defendant opposed the application by way of affidavit filed on 24th November 2017 deposed to by Milimo Hamweetwa a Director of

Human Resources and Administration in the Defendant Company. It is deposed that on the 11th November 2017, the Plaintiff obtained an ex parte order for a Mareva Injunction against the Defendant restraining the sum from dealing howsoever with the funds in the sum of US\$1,413,573.69 thereof, remitted by Ritz Attorney to the Defendant's bank Account No 0580957500479 at Zambia National Commercial Bank Plc. That it is not in dispute that there is a pending dispute between the parties. It is deposed that although it was a term of the facility that the Defendant shall route 100 per cent of its trade proceeds and foreign exchange transactions through the account maintained with the Plaintiff, the said facility has since expired. That the said term and condition was not expressed in the facility as a termination covenant. That Account No 0580957500479 at Zambia National Commercial Bank Plc is the Defendant's main transactional account from which its operations are carried out including its day to day running expenses, payments to its suppliers and payment to its transporters and is also used for the receipt of funds from its various business partners. That the Defendant's receipt of the funds in this Account was in no way aimed at obstructing justice or making itself

Judgment proof, and depriving the Plaintiff from recovering Judgment in this matter if passed in its favour.

According to the Defendant, it is a company incorporated under the laws of Zambia operating within the Zambian jurisdiction and with other assets within the jurisdiction from which any Judgment passed in favour of the Plaintiff's favour may be satisfied. That it is therefore untrue that the Plaintiff will be prejudiced should judgment be passed in their favour. The Defendant attached a list of some of its assets and their estimate values (Exhibit "MH-1"). It is deposed that the Defendant subcontracted Kudya Zambia Company Limited and Transglobe Produce Export Limited to supply maize to Admarc Limited in Malawi and that they have a direct interest in the funds received in the Defendant's Zambia National Commercial Bank Plc Account from Ritz Attorney's in Malawi (Exhibit "MH2-3"). That the Defendant has engaged various transporters to assist in its performance in the supply of maize to Admarc Limited in Malawi (Exhibit "MH4"). That the injunction has had the effect of restraining the Defendant from carrying out its normal operations and is therefore prejudicial to the Defendant. The Defendant attached the Plaintiff's correspondence to the Bank

advising the restraint against the Defendant from assessing its funds from its Account. (Exhibit "MH-5"). That the purpose of a Mareva Injunction is not to stifle the normal business operations of a Defendant, and that the Plaintiff has not disclosed to this Court the Defendant's assets which it would have known had sufficient inquiry been made on the subject matter. That this is not a proper case for the grant of a Mareva Injunction and the application be dismissed.

The Plaintiff filed skeleton arguments on 11th November 2017 and contends that the Plaintiff has a good arguable case on the substantive claim, and that the Defendant has assets within the jurisdiction. That there is a real risk of dissipation or secretion of assets which would render the Plaintiff's relief nugatory. Counsel for the Plaintiff cited the case of **Mareva Compania Naviera SA v International Bulkcarriers SA [1980] 1 ALL E R 213¹** and **Elmar Engineering Limited v Allegra Mining Zambia Limited 2011/HPC/0023²** where the test for the grant of a Mareva Injunction was set out, namely that there must be a debt due and owing, and there must exist a danger that the debtor may dissipate

or dispose of his assets so as to defeat any judgment the Court may grant in favour of the Plaintiff.

In its skeleton arguments, the Defendant cites **Order 29 Rule 1 Rules of the Supreme Court** and **Order 27 Rule 1 High Court Rules, Cap 27 of the Laws of Zambia**. In aid of its arguments, the case of **Chandris Shipping Corporation and Others v Unimarine SA [1979] Q.B 645³**, **Adriatic Transport Limited v Fratelli Loci S R I Limited 2012/HPC/0661⁴**, **Elmar Engineering Limited v Allegra Mining Zambia Limited 2011/HPC/0023²** was cited in respect to the twofold test applied before the granting of a Mareva Injunction. Counsel for the Defendant contends that the Defendant has been deterred from carrying out its ordinary dealings by the granting of the ex parte Mareva Injunction where there has not been shown a danger of improper dissipation of assets. That the Order is oppressive and unjust. Counsel argues that the Defendant has various assets in the jurisdiction and that it is unlikely that in the event that Judgment is passed in favour of the Plaintiff, it will be unable to recover monies allegedly owed to it. The case of **Z Limited v A and Others [1982] Q.B 558⁵** was cited where it was held that a Mareva Injunction should not be used to obtain security for a

judgment in advance or as a means of pressuring the Defendants into settlement. That there has been a lack of proper investigations by the Plaintiff not only into the status of the Defendant's assets but also their composition. It is submitted that the ex parte Mareva Injunction be discharged and the application dismissed with costs to the Defendant.

I have considered the affidavit evidence, skeleton arguments, authorities cited and the oral submissions of counsel. At this interlocutory stage, the sole question to be determined is whether this is a proper case where the Court can exercise its discretion to grant the Plaintiff a Mareva Injunction pending trial and judgment.

The Plaintiff's action is anchored on **Order 29 Rule 1 Rules of the Supreme Court, 1999 Edition** as read with **Order 27 Rule 1 High Court Rules, Cap 27 of the Laws of Zambia**. The law on Mareva Injunctions is well settled and its purpose is not to assist a claimant to secure a potential judgment, but rather, to prevent a Defendant from dissipating his assets with the intention or effect of frustrating the enforcement of a prospective judgment. In the leading case of

Mareva Compania Naviera SA v. International Bulk Carriers SA, the Mareva [1980] 1 All E.R. 213 which the Mareva Injunction derives its name from, Lord Denning M.R held that:

"If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory injunction so as to prevent him disposing of those assets. It seems to me that this is a proper case for the exercise of this jurisdiction. There is money in a bank in London which stands in the name of these charterers. The charterers have control of it, they may at any time dispose of it or remove it out of this country. If they do so, the ship-owners may never get their ship hire...In face of this danger, I think this court ought to grant an injunction to restrain the charterers from disposing of these moneys now in the bank in London until the trial or judgment in this action."

Mustill J in **Third Chandris Shipping Corporation v Unimarine SA [1979] QB 645, 653** stated that:

"The whole point of the Mareva jurisdiction is that the plaintiff proceeds by stealth, so as to pre-empt any action by the

defendant to remove his assets from the jurisdiction [or dissipate them with a view to avoiding any judgment. This entails that the defendant finds that his bank account has been blocked before he has any idea of what is going to happen." This may have extremely serious consequences. Cheques or bills drawn on the account may be presented at a time when adequate funds are available to meet them, and may yet be dishonoured because the injunction inhibits the bank in making payment. Moreover the very secrecy of the procedure deprives the defendant of the opportunity to make a timely alternative arrangement for presentment or payment abroad. The dishonour of the defendants' paper may have disastrous consequences; and all this in a situation where the plaintiff has shown no more than an arguable case. An undertaking by the plaintiff for damages may not always be a sufficient indemnity for the loss the defendant may suffer. Again the blocking of an account may have very serious consequences for a defendant who is dependent on cash flow for his commercial survival."

Stringent tests have been set for a Mareva Injunction which should be satisfied before it is granted. Firstly, there must be a debt due and owing. Secondly, there must exist a danger that the debtor may dissipate or dispose of its assets so as to defeat any judgment the Court may grant in favour of the Plaintiff.

In the present case, is there a debt owing? A perusal of the pleadings in the statement of claim, suggests that the Plaintiff is claiming for the sum of US\$1,437,415.66 availed to the Defendant pursuant to an overdraft facility dated 17th August 2016. This assertion is supported by the Plaintiff in paragraph 6 of its affidavit in support of an order for Mareva Injunction wherein it has shown the facility letter (Exhibit "EK C1"). It is safe to say that the endorsement in the Writ of Summons suggests that this is the position. As to the question whether or not there is a debt due or owing, this is left for the main hearing. I therefore find that the Plaintiff has satisfied the first test.

The second test is whether there exists a danger that the debtor may dissipate or dispose of its assets so as to defeat any Judgment

the Court may grant in favour of the Plaintiff. What this entails is that there must be solid evidence of a real risk that the assets will be dissipated, whether by removal from the jurisdiction, or otherwise dissipated before a Judgment in favour of the Plaintiff can be satisfied. As held in the case of **Third Chandris Shipping Corporation and Others v Unimarine SA [1979] 2 All E R 972³**, the Plaintiff should produce cogent evidence showing its source of information and the basis of the fear that the Defendant will dissipate its assets. The Defendant argues that the overdraft facility with the Plaintiff expired and that the account held at ZANACO is its main transactional account from which its operations are carried out including its day to day running expenses, payments to its suppliers and payments to its transporters, and receipt of funds from its various business partners. The Defendant further argues that the Plaintiff merely believes that there is a serious risk of the money in the Defendant's account being dissipated or disposed of in order to avoid payment of the debt. From the evidence on record, I find that the Plaintiff carried out a due diligence leading into the disclosure of the Defendant receiving monies in the sum of US\$1,413,573.69 in its

Account No 0580957500479 held at Zambia National Commercial Bank Plc (Exhibit "EKC2").

The Defendant justifies this position by arguing that the routing of its 100% proceeds is not a post disbursement covenant and therefore inapplicable. Oddly and rather awkwardly, the Defendant in paragraph 4 and 7 of its defence admits that the said clause is a post disbursement covenant. The defence reads as follows:

"4. The defendant admits the contents of paragraph 8 of the statement of claim."

7. The Defendant denies the contents of paragraph 10 of the Statement of Claim and will show at trial that it has been routing 100% of its trade proceeds and foreign exchange transactions through the account maintained with the Plaintiff.

Paragraph 4 of the defence is in response to paragraph 8 of the Plaintiff's statement of claim which reads as follows:

"8. It was also a post disbursement covenant between the Plaintiff and Defendant that the Defendant shall route 100% of its trade proceeds and foreign exchange

transaction through the account maintained with the Plaintiff's bank."

It goes without saying that the Defendant has provided two parallel contradictory arguments in respect to the routing of its trade proceeds and foreign exchange transaction and the applicability of the post disbursement covenant. In the same breadth, the Defendant in its opposing affidavit to an order for Mareva Injunction dated 24th November 2017 argues in paragraph 6 and 7 as follows:

6. *That although it was a term of the facility that the Defendant shall route 100% of its trade proceeds and foreign exchange transactions through the account maintained with the Plaintiff, the said facility is since expired.*

7. *That the said term and condition was not expressed in the facility as a post termination covenant.*

I am bewildered as to the two opposing positions taken by the Defendant. I am of the respectful view that, the fact that monies were remitted into the Defendant's Zambia National Commercial Bank Plc Account instead of into the Account held with the Plaintiff

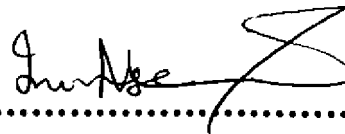
Bank, in my mind, only serves to bolster the Plaintiff's belief that the Defendant may dissipate its assets. It is this Court's finding that the Plaintiff's inquiry and evidence has probative value and falls outside the realm of conjecture as it constitutes specific evidence demonstrating objectively a real risk of dissipation of assets. The Defendant alleges that it has other assets within the jurisdiction from which any Judgment passed in favour of the Plaintiff's may be satisfied (Exhibit "MH1" in the opposing affidavit). I have perused the said list of properties and find it inconclusive as to actual ownership and does little to strengthen the Defendant's argument. I am of the settled mind that the Plaintiff has met the requirements of the second test as laid down in **Mareva Compania Naviera SA v International Bulkcarriers SA [1980] 1 ALL E R 213¹** and **Third Chandris Shipping Corporation and Others v Unimarine SA [1979] QB 645³**.

The upshot is that this is a proper case for the Court to exercise its discretion and the Mareva Injunction granted ex parte on 11th November 2017 will subsist until determination of the substantive matter.

Cost to the Plaintiff to be taxed in default of agreement.

Leave to appeal granted.

Dated this 24th day of January 2018



.....
HON IRENE ZEKO MBEWE
HIGH COURT JUDGE