

**SCZ. JUDGMENT No. 17/2013**

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**IN THE SUPREME COURT FOR ZAMBIA  
11/2009  
HOLDEN AT LUSAKA  
2010  
(Civil Jurisdiction)**

**APPEAL NO.  
SCZ NO. 13 OF**

**BETWEEN:  
FINSBURY INVESTMENTS LIMITED  
RAJAN MAHTAN (DR)  
JOAN CRAVEN  
DAVID P. K. KANAGANAYAGAM  
AND  
ANTONIO VENTRIGLIA  
MANUELA VENTRIGLIA**

**FIRST APPLICANT  
SECOND APPLICANT  
THIRD APPLICANT  
FOURTH APPLICANT  
  
FIRST RESPONDENT  
SECOND RESPONDENT**

**Coram: Chibesakunda, Ag. CJ, Mwanamwambwa, and  
Chibomba, JJS, On 31<sup>st</sup> January, 2013 and 14<sup>th</sup>  
November, 2013**

**For the Applicants :** Mr. M. M. Mundashi, S.C of Mulenga Mundashi and Company, Mr. J. Sangwa, S.C of Simeza Sangwa and Associates and Mr. M. L. Sikaulu of SLM Legal Practitioners.

**For the Respondents:** Mr. V. Malambo, S.C, Mr. M.H Haimbe and Ms. Kalyabantu, of Malambo and Company.

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**J U D G M E N T**

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**Chibesakunda, Acting CJ., delivered the Judgment of the Court.**

**Cases referred to:**

**1. R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex-parte Pinochet Ugarte (1999) 1 All ER 577;**

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**2. Chibote Limited, Mazembe Tractor Company Limited, Minestone (Zambia) Limited, Minestone Estates Limited and Meridien BIAO Bank (Zambia) Limited (In Liquidation) (2003) ZR 10;**

**3. Taylor v. Lawrence (2002) 2 All ER 353;**

**4. Re Uddin (a Child) (2005) 3 All ER 550;**

**5. Brocket v. Luton Corporation (1951) WN 380;**

**6. R. D Harbottle (Mercantile) Ltd and Another v. National Westminster Bank Ltd and Others (1977) 2 All ER 862;**

**7. Maxwell Mwamba and Stora Solomon Mbuzi v. Attorney General of Zambia (1993) 3 LRC 166**

**8. Bourbaud v. Bourbaud (1864) 12 WR 1024;**

**9. Cretanor Maritime Co Ltd v. Irish Marine Management Ltd (1978) 3 All ER 164;**

**10. Trinity Engineering (PVT) Limited v. Zambia National Commercial Bank Limited (1995-1997) Z.R 189;**

**11. The Siskina Case (1979) A.C 210;**

**12. Abel Mulenga and Others v. Mabvuto Adan Avuta Chikumbi and Attorney General (2006) Z.R 33;**

**13. John Mumba, Danny Museteka, Dr. W. Amisi, Dennis S. Sumuyuni v. Zambia Red Cross Society (2006) ZR 137; and**

**14. American Cyanamid v. Ethicon (1975) All ER 504.**

**Legislation referred to:**

**1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia;**

**2. The Supreme Court Act, Chapter 25 of the Laws of Zambia; and**

**3. The Rules of the Supreme Court, 1999 Edition;**

**Other works referred to:**

***The Halsbury's Laws of England (Reissue), 4<sup>th</sup> Edition, Volume 24,.***

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This application has come before us by way of a Notice of Motion which, according to the caption of the motion, has been made pursuant to Rule 48 of the Supreme Court Rules, Chapter 25 of the Laws of Zambia; Order 29 Rule 1A/33 of the Rules of the Supreme Court, 1999 edition; and the inherent jurisdiction of this Court. The Applicants are asking us to discharge the order of interim injunction, which we made on 21<sup>st</sup> April, 2010.

The History of this matter, in so far as it is relevant to this motion, is that sometime in 2005, Zambezi Portland Cement Limited (hereinafter referred to as "ZPC") obtained a loan of US\$12,000.00 from the Eastern and Southern African Trade Bank (hereinafter referred to as "the PTA Bank"). On 8<sup>th</sup> July, 2008, the PTA Bank notified ZPC that it had defaulted in its obligations under the Loan Agreement. The Bank also demanded immediate repayment of the whole loan, together with interest, costs and other charges thereon. ZPC failed to comply with that demand.

So, on 14<sup>th</sup> July, 2008, the PTA Bank appointed one Robert Mbonani Simeza as Receiver for ZPC.

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Aggrieved by the appointment of the Receiver, on 6<sup>th</sup> September, 2008, the Respondents, claiming to be shareholders in ZPC, instituted legal action in the High Court, under Cause No. 2008/HN/268, against the PTA Bank and Mr. Simeza. They prayed for, *inter alia*, an order for an interim injunction restraining the Receiver, his agents, servants or whosoever, from performing duties of a Receiver until the determination of the matter or a further order of the court. The interim injunction was granted *ex-parte* on 6<sup>th</sup> September, 2008. However, in a ruling delivered on 28<sup>th</sup> October, 2008, after *inter-partes* hearing, the learned trial Judge discharged the injunction.

Dissatisfied with the said ruling, the Respondents appealed to this Court on the ground, *inter alia*, that the court below erred in law and in fact when it refused to grant them the interlocutory injunction. In our judgment of 21<sup>st</sup> April, 2010, we found merit in

the said ground. We, therefore, held that there was need for an interlocutory injunction to be granted to the Respondents to protect ZPC's property *pendete lite*.

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It is that injunction which the Applicants are asking us to discharge. The Applicants are not parties to the High Court matter, Cause No. 2008/HN/268, nor were they parties to the appeal in which this Court granted the interlocutory injunction. They have, nevertheless, spiritedly argued that there is no legal impediment that bars a non-party to an action, from applying for the dissolution of an injunction granted in that action, if the non-party can prove that they have been detrimentally affected by the injunction. They have contended that they have been adversely affected by the injunction. That, in fact, there have been changes in circumstances from the time the injunction was granted to-date. That these changes have rendered the continued existence of the injunction nugatory.

For the sake of clarity, we will reproduce the grounds upon which the Applicants have based this motion, namely-

**(a) that in the interval between when the injunction was first granted and dissolved by the High Court and the time that the Supreme Court restored the said injunction in its**

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**judgment of 21<sup>st</sup> April, 2010, there was a material change of circumstances namely:**

**(i) when the injunction was first granted on 6<sup>th</sup> September 2008, the cement plant, which was financed by the PTA Bank was partially complete hence not in production;**

**(ii) the initial plan of the receiver appointed by the PTA Bank, and the basis on which the injunction was granted, was to dispose of the assets of ZPC, but this was abandoned and the receiver instead went on to source additional funds to complete the plant and did indeed complete the cement Plant in October 2009 and production of the cement started in November 2009; and**

**(b) that after the passing of the judgment of the Supreme Court on 21<sup>st</sup> April 2010, restoring the injunction there has been a material change of circumstances namely:**

- (i) that soon after the delivery of the judgment by the Supreme Court, the Respondents forcefully removed the receiver and manager of Zambezi Portland Cement Limited (In receivership) and assumed the management and control of the company to the exclusion of the Applicants;**
- (ii) the Respondents have stopped and continue to stop the holding of the meetings of the board of directors of ZPC**

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- as a result no meeting of the board of directors of ZPC has been held since 2008;**
- (iii) the Respondents have stopped and continue to stop the holding of the members' meetings of ZPC and as such no members' meeting of ZPC has been held since 2008;**
- (iv) by Notice dated 20<sup>th</sup> April 2012, the PTA Bank discharged the receiver and manager of ZPC and its receivership was accordingly lifted;**
- (v) on the strength of the judgment of the Supreme Court restoring the injunction, an injunction was issued against the Applicants, under Cause No. 2008/HN/268, in their capacities as directors of ZPC restraining them from calling for or attending any meeting of the board of directors of ZPC;**

- (vi) on the strength of the judgment of the Supreme Court restoring the injunction an injunction was issued against the shareholders of ZPC, under Cause No. 2008/HN/268, restraining them from calling for or attending any meeting of the shareholders of ZPC;**
- (vii) in the month of November 2012, the First Respondent and his sons, who had assumed the management of ZPC since April 2010, were declared prohibited immigrants and deported from Zambia leaving ZPC without any credible management in place.**

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The Notice of Motion is supported by an Affidavit deposed to, on behalf of all the other Applicants, by the second Applicant. According to the Affidavit, the first Applicant holds 58 per cent of the shares of ZPC; the second Applicant is the Chairperson of the first Applicant and is a Member of the Board of Directors of ZPC; and the third and fourth Applicants are both Members of the Board of Directors of ZPC.



The Affidavit shows that the Respondents have obtained a number of injunctions, in the High Court, against the Applicants on the strength of this Court's injunction. That on 31<sup>st</sup> May, 2011, when the second Applicant caused a notice of meetings for the Board of Directors and Members of ZPC, to be issued, the Respondents moved the High Court, in Cause No. 2008/HPC/366, seeking an injunction to restrain the Applicants from convening any directors' or shareholders' meetings of ZPC contending that they were the only ones mandated by this Court's judgment of 21<sup>st</sup> April, 2010, to manage the affairs of ZPC pending the determination of Cause No. 2008/HN/268. The Respondents were granted an ex-

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*parte* injunction which was later discharged on 12<sup>th</sup> July, 2011, following *inter-partes* hearing.

The Affidavit also discloses that on 15<sup>th</sup> July, 2011, the Respondents again moved the High Court, in Cause No. 2008/HN/268, seeking an injunction against the Directors of ZPC

from convening any meeting of the Board of Directors. That the said injunction was granted *ex-parte* and confirmed on 11<sup>th</sup> October, 2012, after *inter-partes* hearing.

The Affidavit further discloses that by a notice dated 20<sup>th</sup> April, 2012, the PTA Bank discharged Mr. Alfred Jack Lungu, who had replaced Mr. Simeza, from continuing as Receiver of ZPC. That this marked the end of the receivership of ZPC. That following the lifting of the receivership, on 19<sup>th</sup> October, 2012, the first Applicant caused a notice for a General Meeting of Members of ZPC to be issued. That, however, on 31<sup>st</sup> October, 2012, the Respondents applied, in Cause No. 2008/HPC/366, for an injunction to restrain the first Applicant from attending the said meeting.

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That the injunction was granted *ex-parte* and the application is yet to be heard *inter-partes*.

The Affidavit also reveals that in November, 2012, it was reported in the public media that the Respondents and their sons,

who had been running the affairs of ZPC since 2010, had been declared prohibited immigrants and deported from Zambia. That although the Respondents were given leave to move the High Court by way of judicial review, they have not come back to Zambia since November, 2012.

The Respondents did not file an Affidavit in opposition to the Applicants' Affidavit in support of the Notice of Motion.

On behalf of the Applicants, Mr. Mundashi, S.C, Mr. Sangwa, S.C, and Mr. Sikaulu, made extensive oral submissions before us. They supplemented their oral submissions with detailed written heads of argument.

Counsel presented their arguments under four broad headings, that is-

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- (a) whether this Court has jurisdiction to hear this motion;**
- (b) whether the Applicants have *locus standi* to move this Court in the manner they have done;**

**(c) whether the injunction sought to be discharged was granted by this Court or by the High Court? and**

**(d) whether this motion has merit.**

Counsel started by addressing the question of whose injunction is in place. It was Counsel's submission that the injunction was granted by this Court in our judgment of 21<sup>st</sup> April, 2010. That the *ex-parte* injunction which was granted by the High Court was no longer in existence as it was dissolved by the learned trial Judge on 28<sup>th</sup> October, 2008.

With regard to the jurisdiction of this Court to discharge its own injunction, Counsel argued that generally this Court has power to review its own decisions. Counsel referred us to Rule 48 (5) of the Supreme Court Rules Cap 25, section 7 of the Supreme Court Act Cap 25 and Article 92(1) of the Constitution of Zambia, as authorities for this argument.

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Counsel also cited the cases of ***R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex-parte Pinochet***

**Ugarte<sup>(1)</sup>, Chibote Limited, Mazembe Tractor Company Limited, Minestone (Zambia) Limited, Minestone Estates Limited and Meridien BIAO Bank (Zambia) Limited (In Liquidation)<sup>(2)</sup>, Taylor v. Lawrence<sup>(3)</sup> and Re Uddin (a Child)<sup>(4)</sup>.**

Counsel contended that with regard to injunctions, the general proposition of the law is that a court, which grants an injunction, has the authority to entertain an application for its dissolution. Counsel referred us to the **Halsbury's Laws of England, paragraph 111** and the cases of **Brocket v. Luton Corporation<sup>(5)</sup>** and **R. D Harbottle (Mercantile) Ltd and Another v. National Westminster Bank Ltd and Others<sup>(6)</sup>**, to augment this argument.

On the question of the Applicants' *locus standi*, Counsel argued that the Applicants have *locus standi* because this Court is very liberal on the issue of *locus standi*. Counsel invited this Court to consider our decision in the case of **Maxwell Mwamba and**

***Stora Solomon Mbuzi v. Attorney General of Zambia***<sup>(7)</sup>, as authority for that contention.

Counsel went on to submit that in fact, the Applicants are not strangers to the injunction they are asking this Court to discharge. That the Respondents have, on the strength of the said injunction, obtained injunctions in the High Court to restrain the Applicants from holding shareholders' and directors' meetings. That, therefore, the Applicants have sufficient interest to move this Court and seek for the dissolution of its injunction.

It was Counsel's further submission that if this Court is not persuaded by the foregoing arguments, this Court should still consider the Applicants' motion because it is trite law that a stranger to proceedings can apply for the discharge of an injunction granted in those proceedings in certain circumstances. In this regard, Counsel relied on the ***Halsbury's Laws of England, paragraph 111*** and the cases of ***Bourbaud v. Bourbaud***<sup>(8)</sup>,

***Cretanor Maritime Co Ltd v. Irish Marine Management Ltd<sup>(9)</sup>***, and the ***R. D Harbottle Case<sup>(6)</sup>***.

Coming to the merits of this motion, Counsel contended that it is trite law that material change in circumstances, since the grant of an interim injunction, is a ground for the discharge of that injunction. To augment this contention, Counsel referred us to Order 29 of the Rules of the Supreme Court, 1999, the ***Pinochet Case<sup>(1)</sup>***, the ***Chibote Case<sup>(2)</sup>***, ***Taylor v. Lawrence<sup>(3)</sup>***, and the ***Re Uddin (a Child) Case<sup>(4)</sup>***.

On the basis of the foregoing submissions, Counsel prayed that the motion for the dissolution of the injunction be upheld and the said injunction be discharged. In the alternative, Counsel asked this Court to interpret the meaning of the phrase used in our judgment, namely that **“...there was need for an interlocutory injunction to be granted to the Appellants to protect property *pendete lite*.”**

In response to the heads of argument and oral submissions made by Counsel for the Applicants, Mr. Malambo, S.C, Mr. Haimbe and Ms. Kalyabantu, on behalf of the Respondents, made equally detailed oral submissions which they supplemented with well researched written heads of argument. Counsel took a legal position which, according to them, did not require the Respondents to file an Affidavit in opposition to the Affidavit filed by the Applicants.

Counsel argued that the Applicants' motion is incompetent as the application seeks to review a final reasoned decision of this Court by submission of fresh evidence. That the law relating to the status of the decisions of this Court was that such decisions are final. In support of this argument, Counsel referred us to Article 92(1) of the Constitution and this Court's decisions in the ***Chibote Case*<sup>(2)</sup>** and ***Trinity Engineering (PVT) Limited v. Zambia National Commercial Bank Limited*<sup>(10)</sup>**.



It was Counsel's further contention that this Court has no jurisdiction to receive fresh evidence except where it is exercising

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original jurisdiction or in terms of section 25 of the Supreme Court Act, Cap 25. That accordingly, this Court cannot admit the fresh evidence adduced by the Applicants to the effect that there has been a change in circumstances since the passing of this Court's judgment of 21<sup>st</sup> April, 2010.

Counsel went on to argue that since the Applicants' grievance arose from injunctions granted by the High Court, the remedy available to them was appealing against those injunctions. To buttress this argument, Counsel cited section 23 of the Supreme Court Act, Cap 25.

With regard to which court's injunction is in place, Counsel submitted that the injunction that is currently subsisting is that which was granted by the High Court on 6<sup>th</sup> September, 2008, in Cause No. 2008/HN/168. That all the Supreme Court did, when the matter came to this Court on appeal, was to confirm the High

Court's *ex-parte* injunction. To buttress this argument, Counsel relied on the ***Siskina Case***<sup>(11)</sup>.

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On the jurisdiction of this Court to discharge its own injunction, Counsel argued that since the injunction was that of the High Court, this Court could only have jurisdiction to discharge it if the application was brought by way of an appeal from the High Court. Counsel cited sections 7 and 23 of the Supreme Court Act, Cap 25, and the ***Brocket Case***<sup>(5)</sup>, as authorities for this argument.

Coming to the Applicants' *locus standi*, Counsel contended that they do not have sufficient interest to move this Court because they are not party to the High Court proceedings that gave rise to the appeal in which this Court confirmed the injunction. Counsel referred us to the case of ***Abel Mulenga and Others v. Mabvuto Adan Avuta Chikumbi and Attorney General***<sup>(12)</sup>, to support this argument.

With regard to the Applicants' alternative prayer, Counsel expressed the view that that prayer was an application to this Court to interpret its judgment of 21<sup>st</sup> April, 2010. That such an application is incompetent and this Court has no jurisdiction to

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entertain it because it has not been disclosed in the Applicants' notice of motion as one of the remedies the Applicants are seeking from this Court.

We have given thoughtful consideration to the issues raised in this motion. This motion raises a seminal issue which has never been raised before in our jurisdiction, namely: whether a non-party to an action can apply for the discharge of an injunction granted in that action.

In our view, the questions we have to adjudicate on in this motion are- (a) whether the injunction in issue was granted by this Court or by the court below; (b) whether the Applicants have *locus standi* to move this Court to discharge that injunction to which they are not parties; (c) whether this Court has jurisdiction

to discharge the injunction; and (d) whether the Applicants' motion has merit.

We will start with deciding on which Court's injunction is in place. From inception, we must state that we do not agree with Counsel for the Respondents that the injunction in contention was

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granted by the High Court at Ndola on 6<sup>th</sup> September, 2008. From the documents contained in the four volumes filed in this motion, it is clear that the *ex-parte* injunction, granted to the Respondents on 6<sup>th</sup> September, 2008, was discharged on 28<sup>th</sup> October, 2008, after *inter-partes* hearing. This can be seen from the learned trial Judge's ruling of 28<sup>th</sup> October, 2008, where the Judge categorically said that-

**"In the event I find that the Plaintiffs (Respondents herein) are not entitled to the discretionary remedy of an injunction. Their application for an order of interlocutory injunction pending suit is therefore refused and the same is dismissed. The interim order of injunction stands discharged."** (emphasis ours).

Considering the clear wording of the ruling of the court below, we find it very difficult to appreciate Counsel for the Respondents' argument that the *ex-parte* interim injunction granted by the trial court on 6<sup>th</sup> September, 2008, was restored.

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It is trite law that an *ex-parte* injunction is a temporary order which is given subject to *inter-partes* hearing. The learned authors of the ***Halsbury's Laws of England, paragraph 963***, have said that-

**“An injunction will not usually be granted without notice, but if the court is satisfied that the delay caused by proceedings in the ordinary way might entail irreparable or serious mischief it may make a temporary order ex pate upon such terms as it thinks just.” (emphasis ours)**

From the foregoing, it is beyond question that an *ex-parte* injunction is a temporary order and the Judge, who grants it, retains the discretion to dissolve it if, after hearing the opposing

side, it becomes obvious that it should never have been granted at the *ex-parte* stage or that its continuation is no longer necessary. In fact, a study of the *ex-parte* order of interim injunction granted on 6<sup>th</sup> September, 2008, shows that the injunction was to subsist “**until after the determination of (the) matter or any further court order**” (emphasis ours). It is our view, therefore, that when

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the learned trial Judge made the order, in his judgment of 28<sup>th</sup> October, 2008, refusing the application for the injunction to continue beyond the *inter-partes* hearing, the *ex-parte* interim injunction came to an end.

It is settled law that neither the High Court after discharging its order of *ex parte* injunction nor the Supreme Court subsequently can stay the High Court decision. Once an interlocutory injunction is discharged there is nothing to stay; there is no court order in place which is capable of being enforced. The parties revert to the original positions in which they

were before the injunction was granted. For this reason, it is untenable at law to contend that the injunction which was granted by the High Court on 6<sup>th</sup> September, 2008, and dissolved by the same court on 28<sup>th</sup> October, 2008, was revived by this Court in our judgment of 21<sup>st</sup> April, 2010. The injunction of the High Court ceased to exist the moment the learned trial Judge discharged it. The appeal to this Court, in so far as it related to the discharge of the injunction, was in effect a fresh application for an injunction. So the injunction we granted to the

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Respondents was consequently a fresh injunction. In this regard, we assert our decision in the case of ***John Mumba, Danny Museteka, Dr. W. Amisi, Dennis S. Sumuyuni v. Zambia Red Cross Society***<sup>(13)</sup>. The brief facts of that case are that the Plaintiffs were tenants of some property known as 1196 Kudu Road, Kabulonga, comprising some flats. Sometime in September, 2004, the Defendant decided to sell the said flats without giving the Plaintiffs the first chance of refusal. The Plaintiffs decided to commence an action seeking for, *inter alia*, an *ex-parte* injunction

to restrain the Defendant from interfering with their quiet enjoyment and occupation of the said flats. The *ex-parte* injunction was granted, but it was dissolved on 26<sup>th</sup> November, 2004, after an *inter-partes* hearing. The Plaintiffs then applied for an *ex-parte* order to stay execution pending an application for review of the ruling of 26<sup>th</sup> November, 2004. The *ex-parte* order was granted on 28<sup>th</sup> December, 2004. The application for review was refused and the *ex-parte* stay of execution order was discharged by the trial Judge. The Plaintiffs appealed to this Court.

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In the meantime, the Plaintiffs also applied for another *ex-parte* order, before a single Judge of this Court, to stay the High Court ruling of 26<sup>th</sup> November, 2004. The application was granted pending the hearing and determination of the appeal by the full Court. To contextualise what we said in that case, on the status of a discharged injunction, we have quoted extensively from that case. We said the following:

**“The learned trial judge, after *inter-parte* hearing, dissolved the *ex-parte* injunction he had earlier**



granted to the plaintiffs on the ground that the case was not a proper one in which he could use his discretion to grant the injunctive order prayed for. The learned trial Judge properly directed himself on this issue. However, after the injunction was discharged, the court below granted an *ex-parte* order for stay of execution. The Court below should have asked itself, before granting the said stay as to “what was there to stay”. When the *ex-parte* injunction was discharged, the parties retained their original status which could not be stayed by the Court. We really find no justification or ground for the learned trial judge to have granted the stay of execution when the application for

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review of the ruling of 26<sup>th</sup> November, 2004, was pending before him. He, however, properly directed himself when he discharged it after *inter parte* hearing.

A similar position still existed when the application for stay of execution was made before the single judge of this Court. What we have said of the trial judge regarding the grant of the stay in this case is true of what should have been done by the single

**judge of this Court. There was nothing to be stayed by the Court i.e. which could be enforced as a court order if the application had not been granted. We wish to emphasise the point that when a court grants an *ex-parte* injunction which is later dissolved, the only remedy remaining, to the party applying for it, is to appeal against such refusal. The appeal against that refusal will undoubtedly be a fresh application before the full Court because a single judge of the Court has no jurisdiction to grant an injunction. The grant of stay in this case by the single judge of this Court amounted to a grant of a fresh injunction to plaintiffs, which should not have been the case.”**

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In affirming our decision in the ***John Mumba Case***<sup>(13)</sup>, we hold that the injunction sought to be discharged by this motion was granted by this Court in our judgment of 21<sup>st</sup> April, 2010.

Coming to the Applicants' *locus standi*, Counsel for the Respondents have insisted, on the authority of the ***Abel***

**Mulenga Case**<sup>(12)</sup>, that the mere fact that the Applicants have been affected by the decisions of the court below does not clothe them with sufficient interest or *locus standi*. We have carefully examined our decision in the **Abel Mulenga Case**<sup>(12)</sup>. In our view, our holding in that case related to the *locus standi* of a third party who wants to be joined to legal proceedings as opposed to the *locus standi* of a non-party who wants a court to discharge an injunction which has affected them. The latter is the situation in the instant case; the Applicants are asking us to dissolve our injunction. They have not expressed any desire to be joined, as parties, to Cause No. 2008/HN/268 or indeed Cause No. 2008/HPC/366.

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For the sake of clarity, we will briefly restate the facts of the **Abel Mulenga Case**<sup>(12)</sup>. That matter was an appeal against the ruling of the Industrial Relations Court refusing the Appellants leave to be joined in the proceedings between the 1<sup>st</sup>

Respondents and the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondents were former employees of the defunct National Agricultural Marketing Board (NAMBOARD) who, upon dissolution of NAMBOARD, had their contracts of service transferred to the Zambia Co-operative Federation (ZCF) and then to the Government of the Republic of Zambia (GRZ). The 1<sup>st</sup> Respondents were declared redundant and they instituted proceedings in the court below pursuant to section 85(4) of the Industrial and Labour Relations Act, claiming, *inter alia*, terminal benefits from their former employer, the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondents were successful in their action and the court below ordered the 2<sup>nd</sup> Respondent to pay them sums of money representing their terminal benefits. By agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 2<sup>nd</sup> Respondent offered to sell to the 1<sup>st</sup> Respondents some housing units that belonged to

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NAMBOARD, in addition to, or in lieu of the monies, that had been awarded to the 1<sup>st</sup> Respondents, as terminal benefits. Some of the housing units offered for sale to the 1<sup>st</sup> Respondents were

occupied by the Appellants. On the other hand, the Appellants, at the time when the proceedings were being instituted, were all either employees or former employees of the ZCF and were occupying some of the housing units as tenants. The Appellants sought to join the proceedings between the Respondents in order to assert their rights, as sitting tenants, to purchase those housing units. On the foregoing facts, we said the following:

**“As has been pointed out by Counsel for the 1<sup>st</sup> respondent, the proceedings before the Court below concerned the entitlement to terminal benefits of the 1st respondent (as former employees) from the 2<sup>nd</sup> respondent (as their former employer). In other words, this was a dispute between former employees and their former employer which was within the competence of the Industrial Relations Court to determine. In order for the appellants to be joined as parties to this action, the appellants ought to have shown that they have an interest**

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**in the subject matter of the action. The appellants were not employees of the 2<sup>nd</sup> respondent and did not have any dispute with the 2<sup>nd</sup> respondent relating to**

**payment of their terminal benefits. The mere fact that the appellants may have been affected by the decision of the Court below does not clothe them with sufficient interest or *locus standi* entitling them to be joined to the dispute. Further, there can be no dispute that the Industrial Relations Court is not the right forum to go to assert one's rights to purchase a house as sitting tenant because it does not have that jurisdiction. For these reasons, we are satisfied that the Court below was on firm ground in refusing the appellants to be joined as parties as they did not have *locus standi*."**

Clearly, the position in the ***Abel Mulenga Case***<sup>(12)</sup> is very different from the situation in the instant case. We refused to allow the Appellants, in that case, to be joined to the proceedings, on the ground that they did not have an interest in the subject matter of that action. Their grievance related to their claim that they were entitled to purchase the houses as sitting tenants. Conversely, the subject matter in the action between the Respondents, in the

Industrial Relations Court, was about the 1<sup>st</sup> Respondents' claim for terminal benefits from the 2<sup>nd</sup> Respondent.

Unlike the ***Abel Mulenga Case***<sup>(12)</sup>, in the instant case, the Applicants are not applying to be joined as parties to these proceedings or the proceedings in Cause No. 2008/HN/268; they are merely asking us to discharge an injunction which they claim affects them.

Further, it is our view that the Applicants have a genuine interest in having the injunction discharged. They have been affected by our injunction and as per the ***Maxwell Mwamba Case***<sup>(7)</sup>, they have *locus standi* to apply for the discharge of the said injunction. The brief facts of the ***Maxwell Mwamba Case***<sup>(7)</sup>, are that the Appellants moved this Court for a declaration that the President had acted in breach of article 44(1) of the Constitution of Zambia, Cap 1, by failing to act with dignity in the discharge of his executive functions when appointing two members of the National Assembly, Mr. Vernon Mwanga and Mrs. Mirriam Wina, as Minister

and Deputy Minister (the Ministers), respectively. That the President breached the said article because in 1985, a detainees' tribunal, established by the former head of State, Dr. Kenneth Kaunda, implicated the duo in dealing with mandrax, a dangerous drug. On appeal to this Court, Counsel for the Respondent submitted, *inter alia*, that the Appellants did not have *locus standi* to institute proceedings to nullify the appointments of the two Ministers, especially in view of the fact that the two Ministers had never even been heard on the issue. Deciding on the question of *locus standi*, we said the following:

**“However, on the question of *locus standi*, we have to balance two aspects of the public interest; namely the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging meddlesome private ‘Attorney Generals’ to move the courts in matters that do not concern them.” (Emphasis ours)**



In our considered view, the Applicants cannot be considered to be meddlesome private ‘Attorney-Generals’ who have moved this

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Court in a matter that does not concern them. As we have already adjudged in this judgment, the injunction in issue detrimentally affects the Applicants. So, as per the ***Maxwell Mwamba Case***<sup>(7)</sup>, we hold the view that the Applicants have *locus standi* to bring this motion before us.

In addition to the foregoing, we do not see any legal necessity or requirement for the Applicants to establish that they have an interest in the actual subject matter of Cause No. 2008/HN/268 or Cause No. 2008/HPC/366, before this Court can hold that they have *locus standi* to apply for the discharge of the injunction. In this regard, we agree with Counsel for the Applicants that there is case law, *albeit* none from our jurisdiction, to the effect that one does not need to be a party to the proceedings in which an injunction arose for them to have *locus*

*standi* to apply for the dissolution of that injunction. We must reiterate, however, that this is the first time that this Court has been faced with an application, by strangers to an action, to discharge an injunction granted in a matter in which they are not parties.

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We have painstakingly scrutinised a number of authorities that discuss legal principles relating to a non-party having *locus standi* to apply for the discharge of an injunction which affects them. These authorities establish that a non-party can approach a court, to have an injunction discharged, if that non-party can show that they have been affected by the injunction. One of the earliest decisions on this subject is the ***Bourbaud Case***<sup>(8)</sup>. In that case, Wood, V.C allowed an application for the discharge an injunction, made at the instance of one Robert Attenborough, who was a non-party to the action, on the ground that the injunction affected him.

The principle established in the ***Bourbaud Case***<sup>(8)</sup> has been adopted in latter cases. One of the latter cases is the ***Cretanor Maritime Case***<sup>(9)</sup>. The brief facts of that case are that the owners, a foreign company, chartered a vessel to the charterers who were also a foreign company. The charterers executed a debenture in favour of an Irish bank charging their undertaking and property as security for money due or to become due to the bank. The debenture was guaranteed by M. A dispute arose between the

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owners and the charterers prompting the owners to obtain an injunction in the High Court restraining the charterers from removing out of the jurisdiction, any assets up to a certain value. On 27<sup>th</sup> September, M, who had honoured his guarantee and had become the debenture holder, under Irish law, by assignment of the debenture to him by the bank, appointed a Receiver under the debenture to collect and get in the charterers' assets. On 24<sup>th</sup> November, the Receiver applied to have the injunction discharged so that he could remove the fund to Ireland. The debenture holder

was not a party to the action between the owners and the Charters. The judge discharged the injunction and ordered that the fund should be released to the Receiver for removal out of the jurisdiction. The owners appealed contending that the Receiver, as the charterers' agent, could be in no better position than the charterers, and was, therefore, bound by the injunction. Delivering the judgment of the Court of Appeal, Buckley, LJ, said the following:

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**“For reasons which I have stated when dealing with the owners’ first head of argument I do not think that the receiver in his capacity as agent of the company can obtain the discharge of the injunction, but I see no reason why the debenture holder should not apply for this. Where an injunction has been granted in an action which affects someone who is not a party to the action, he can apply in the action for the discharge of that injunction without himself being made a party to the action (see *Bourbaud v Bourbaud*, Daniell’s Chancery Practice and Kerr on Injunctions)**

**....Treating the application as made by the debenture holder, ought we to dissolve the injunction?....I think that the deposit certificate should be released to the receiver free from the injunction, and accordingly I would affirm the order of Donaldson J of 2 December 1977, discharging the injunction and order that the certificate of deposit be released by Richards, Butler & Co to the receiver forthwith.” (Emphasis ours)**

Another case is the ***R. D Harbottle Case***<sup>(6)</sup>. In that case, the Plaintiffs entered into contracts with Egyptian buyers for the sale of some goods. The contracts provided that the Plaintiffs were to establish a ‘guarantee’, confirmed by a bank, of five per cent of the

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price in favour of the buyers. The guarantees were established with two Egyptian banks. That was done by the Plaintiffs instructing their own bank (‘the bank’) to confirm the guarantees to the respective Egyptian banks, which in turn confirmed the guarantees to the buyers. Disputes arose between the Plaintiffs and the buyers and in each case the buyers demanded payment

under the guarantees. The bank took the view that it had no option but to pay. The Plaintiffs obtained *ex-parte* interim injunctions restraining the bank and the Egyptian banks from paying, and the buyers from obtaining payment under the guarantees. The bank applied for the discharge of the injunctions issued against it. None of the other Defendants entered an appearance. At the hearing of the bank's application, the Plaintiffs contended, *inter alia*, that since the only application before the court was the application by the bank to discharge the injunctions against itself, the court had no jurisdiction to discharge the injunctions against the other Defendants. Kerr, J, accepted to discharge the injunctions against

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all the Defendants. He also laid down the following principles on the discharge of injunctions:

**“Injunctions, as here, are frequently granted *ex parte* on the basis of hurried applications against persons before they have any notice of the application. They**

are not bound to enter an appearance when they are served, but they would be guilty of a contempt of court if they disobey the injunction. When the matter then comes back before the court to continue the order and can be fully considered and at greater leisure, why should the court not have inherent jurisdiction to discharge its prior discretionary order if it appears to it right to do so, even though the persons concerned have not entered an appearance and therefore do not themselves apply for the discharge of the injunction? Why should the court be bound to leave its discretionary order in force when it considers that the order should not have been made, or should not have been continued, and when disobedience to the order is a contempt of court? I cannot believe that this can be right. Moreover, it is settled law that an injunction may be enforced against third parties if, with knowledge of its existence, they assist the party against whom it has been issued to contravene it. Conversely, if a

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third party is adversely affected by the terms of an injunction, our procedure permits him to apply to have it discharged: see *Bourbaud v. Bourbaud*. All

**this shows the flexibility of the procedure concerning these important orders.**” (Emphasis ours)

The learned authors of the *Halsbury’s Laws of England*, **paragraph 1020**, have equally stated that **“a stranger to the suit who is affected by an injunction may apply to dissolve it”**.

We adopt the foregoing principles and accordingly hold that the Applicants, though strangers to the main action, have *locus standi* to apply for the discharge of the subject injunction because, in our view, they have shown us that they have been detrimentally affected by that injunction. The Applicants have established to this Court that, on the strength of this Court’s injunction, the Respondents have obtained injunctions in the High Court, against them, to restrain them from participating in the affairs of ZPC. We have already referred to these injunctions, when discussing the Applicants’ Affidavit in support of the Notice of Motion.



Also, the Respondents have not disputed the facts contained in the said Affidavit of the Applicants. They have, however, canvassed that this Court has no jurisdiction to discharge the injunction. That the Applicants' motion is incompetent because it calls for the review of this Court's final reasoned decision by submission of fresh evidence.

We have taken time to look at authorities relating to the jurisdiction of an appellate court to review, vary or rescind its final decisions. In our view, it is beyond contest that, as a general rule, this Court's decisions are final. However, this Court has power to reopen and revisit its own decision in exceptional circumstances. We take a leaf from one of the United Kingdom's landmark decisions on this subject, the ***Pinochet Case***<sup>(1)</sup>. The Applicant in that case was a former head of state of Chile. The Government of Spain sought his extradition so that he could be tried for various crimes against humanity allegedly committed whilst he was head of state. Two provisional warrants for his arrest were issued by a metropolitan stipendiary magistrate. The applicant successfully applied to the

Divisional Court to quash those warrants. The Divisional Court quashed the first warrant but stayed the quashing of the second warrant. The Applicant appealed to the House of Lords. Amnesty International (AI) was granted leave to intervene in the proceedings. On 25<sup>th</sup> November, 1998, by a majority of three to two, the second warrant was restored. Subsequently, the Applicant discovered that one of the Law Lords in the majority was a director and chairperson of Amnesty International Charity Ltd. He petitioned the House to set aside the order of 25<sup>th</sup> November. Delivering the judgment of the House on its jurisdiction to reopen its final decisions, Lord Browne-Wilkinson said the following:

**“As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority.**

**In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any**

**injustice caused by an earlier order of this House.  
There is**

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**no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co Ltd v Broome (No 2)* [1972] 2 All ER 849, [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address arguments on the point.**

**However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.”**

We adopted the principles established in the ***Pinochet Case*<sup>(1)</sup>**, when we decided the ***Chibote Case*<sup>(2)</sup>**. The ***Chibote Case*<sup>(2)</sup>** involved an application for an order to correct this Court’s judgment. The application was made pursuant to Rule 78 of our

Supreme Court Rules. We said that **“we totally agree with the House of Lords (in the *Pinochet Case*), on the unfettered inherent jurisdiction of**

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**the Court”**. We, however, refused to reopen our decision on the basis that **“there was no error, omission or slip in our judgment. As we see it, the applicants were simply dissatisfied with our judgment, and would have us vary our judgment, so as to bring about a result more acceptable to them.”**

Clearly, as the foregoing authorities establish, this Court has unfettered inherent jurisdiction and in appropriate cases, it can reopen its final decisions and rescind or vary such decisions. This Court will not, however, reopen its decision merely on the ground that a party to that decision is dissatisfied with it and wants a more favourable decision. In our considered view, the power of this Court to reopen its decision can only be invoked in exceptional circumstances where the interest of justice demands that to be done. In ***Re Uddin (a Child)***<sup>(4)</sup>, Dame Elizabeth Butler-

Loss P, summarised the circumstances in which an appellate court can reopen its final decision as follows:

**“the Court of Appeal or the High Court will not reopen a final determination of any appeal unless- (a) it is necessary**

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**to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative effective remedy.”**

In our view, this is a proper case where this Court can reopen its decision. This inherent unfettered jurisdiction must be weighed against an equally important principle of the finality of this Court’s decisions and the principle of *functus officio*. This Court can only invoke its unfettered inherent jurisdiction where the interests of justice demands that to be done; where the interests of justice outweigh the equally essential principles of finality and *functus officio*.

In the instant case, it is our view that the interests of justice demand that we reopen and revisit our decision to grant the

Respondents the injunction. The Applicants have been adversely affected by our injunction because the Respondents have applied for injunctions in the court below, and in certain instances have been granted such injunctions, on the strength of our injunction. It is our view, therefore, that the circumstances of this case are

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exceptional. Also this application is the most effective remedy available to the Applicants because the injunction in question was granted by this Court and it is only this court which can discharge it. We do not agree with Counsel for the Respondents that appealing against the respective injunctions granted by the High Court would be an effective alternative remedy. Such appeals would not have the effect of discharging this Court's injunction and consequently our injunction would continue subsisting.

Coming specifically to the discharge of injunctions, we are of the considered view that the principles, in this regard, are not as onerous as those relating to the review of other final decisions of this Court. This is more so where, as in this case, the injunction

concerned is not a permanent injunction but an interlocutory one. It is trite law that the Court which grants an injunction has jurisdiction to discharge that injunction. The learned authors of the *Halsbury's Laws of England, paragraph 1020*, have said that **“an application to dissolve (an injunction) ought to be made to the court by which the injunction was granted....”**

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Similarly, in the *Brocket Case*<sup>(5)</sup>, Vaisey, J said that **“an application for the discharge or suspension or further suspension of an injunction should normally be made to the Judge who tried the action in which the injunction was granted.”**

Additionally, it is incontestable that the injunction in issue was not a permanent injunction but an interlocutory injunction. It was supposed to subsist until the final determination of Cause No. 2008/HN/168 or until a further order of this Court. This is clear from the wording of the injunction itself, the relevant part of which is as follows:

**“...it is this day ORDERED AND DIRECTED that:**

- 1. the Receiver or his agents, servants or whosoever be restrained from performing duties of a Receiver until after the determination of this matter or any further Court Order....”** (see page 30 of volume 2 of the motion).

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Clearly, the subsistence of the interlocutory injunction was subject, *inter alia*, to **any further order** of this Court.

Lord Diplock, in ***American Cyanamid v. Ethicon***<sup>(14)</sup>, makes the same point that the grant of an interlocutory injunction is a remedy that is both temporary and discretionary. Accordingly, the argument advanced on behalf of the Respondents, that this Court has no jurisdiction to discharge its own injunction as it is a final decision, is untenable and devoid of any legal basis.



For the foregoing reasons, we hold that this Court has jurisdiction to discharge the interlocutory injunction it granted the Respondents on 21<sup>st</sup> April, 2010.

Having held that this Court has jurisdiction to revisit its own decisions and to vary or reverse its own decisions in exceptional circumstances, we are of the opinion that the blanket argument by Counsel for the Respondents that this Court cannot receive fresh evidence is unattainable. The fact that this Court can hear and determine applications for the reopening of its final decisions and

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the discharge of its injunctions, shows that this Court has the attendant power, in such cases, to receive fresh evidence. It is only when we accept to receive fresh evidence that this Court would be in a position to know whether there are exceptional circumstances warranting the reopening of its decision or the discharging of its injunction. An application for the reopening of this Court's decision or the discharge of its injunctions is a fresh

application which, almost invariably, cannot be decided in the absence of fresh evidence to support the application.

Accordingly, we hold that in an application for the reopening of this Court's decision or the discharge of its injunction, this Court has jurisdiction to take into account any fresh evidence relevant to such application.

The question then is: have the Applicants established sufficient cause to warrant the discharge of our injunction? As already stated in this judgment, this motion has been grounded on the assertion that there has been a material change in

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circumstances since we granted the Respondents this injunction. The Applicants have outlined the changes in circumstances in their motion. We have already reproduced the said changes elsewhere in this judgment. The Respondents have not contested these changes. The only question, therefore, is: can this Court discharge the injunction on the basis of the said changed circumstances?

Although the Respondents have not challenged the changed circumstances, listed in the Applicants' Notice of Motion and supporting Affidavit, we are of the view that the circumstances outlined under paragraph (a) of the motion have no bearing on our injunction because they occurred before we granted the injunction. Furthermore, of the seven circumstances listed under paragraph (b), only two are pertinent to the determination of whether this Court should discharge the injunction or not. The other circumstances, in our view, only demonstrate the effect that our injunction has had on the Applicants. So we will not deal with the other five circumstances. The two circumstances that are pertinent to this application are that-

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- 1. by notice dated 20<sup>th</sup> April, 2012, the PTA Bank discharged the Receiver of ZPC and accordingly lifted the receivership; and**
- 2. in the month of November, 2012, the First Respondent and his sons, who had assumed the management of ZPC since April, 2010, were declared prohibited immigrants and deported from Zambia**

**leaving ZPC without any credible management in place.**

We agree entirely with the Applicants that the two changes in circumstances occurred after this Court granted the injunction. We agree that these changes are so material that they ought to be considered in deciding whether or not the injunction should be dissolved. Our view is that the injunction is no longer saving the purpose for which this Court granted it as the purposes, for which the Respondents applied for the injunction and, consequently, the basis upon which that injunction was granted, have been rendered nugatory by the lifting of the receivership. The reasons upon which the Respondents based their application for the injunction can be established from the Affidavits they filed in support of their

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application. The Respondents' Affidavit in support of the *inter-parte* summons for an interlocutory injunction, filed on 6<sup>th</sup> September, 2008, shows that the main grounds that the Respondents advanced in that Affidavit were that-

- (1) the Cement Plant, which was 95% complete, was of high technical nature and required someone who understood mining and chemical engineering to manage it;**
- (2) the Receiver was appointed for a company that was not yet a going concern as to be managed by a Receiver;**
- (3) the receivership was enforced weeks before the cement production was to be commissioned, and, therefore, that there was no reasonable fear that the company was going to fail to meet its obligations; and**
- (4) the Receiver had, to the date of the Affidavit, not allowed the Respondents to enter the premises of the company.** (see paragraphs 19, 20, 21 and 25 of the Affidavit at pages 34-38 of volume 2 of the motion).

In his Further Affidavit in Support of Summons for the interlocutory injunction, dated 17<sup>th</sup> October, 2008, the reasons

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given by the 1<sup>st</sup> Respondent for the need for an interlocutory injunction were essentially that-

- (1)the valuation of Zambezi Portland Cement was beyond US\$ 18 million and if the Receiver was allowed to sale it he would not take into consideration the interest of the shareholders;**
- (2)whereas Zambezi Portland Cement was under construction the same was highly technical and only the first Respondent, who planned it, understood its technical intricacies and not the Receiver/Manager; and**
- (3)the first Respondent feared that if the Receiver/Manager was not restrained from acting as such, the property in issue might be sold at a ridiculously low price and the Respondents would suffer great loss. (see paragraphs 4, 5 and 6 of that Affidavit at pages 346-347 of volume 2 of the motion).**

From the foregoing, it is incontrovertible that the Respondents applied for this injunction so that they could be protected from the Receiver; so that the Receiver could be restrained from destroying the investment which they claimed they had put into ZPC. Accordingly, this injunction was relevant, at the time when we granted it, because ZPC was under receivership and there was a genuine need to safeguard its property until the suit was conclusively determined. Now that ZPC is no longer under receivership, we are of the firm view that the threat perceived to have been posed by the Receiver, to the assets of the company, is no longer there.

In addition, the Respondents, who asked for the protection of this Court, have been declared prohibited immigrants and deported from Zambia. It is not known whether they will ever come back to Zambia, and if they will, when that will be. In this regard, we respectfully share Lord Diplock's view, in the ***American Cyanamid Case*<sup>(14)</sup>**, when he said that **"the object of the interlocutory injunction is to protect the Plaintiff against injury by the**

**violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial....”**

As we have already said, ZPC is no longer under receivership and the Respondents are no longer in Zambia. Applying the principle enunciated by Lord Diplock in the ***American Cyanamid Case***<sup>(14)</sup>, we are of the view that the injunction is no longer necessary.

We, therefore, hold that there is merit in the Applicants' Notice of Motion for the discharge of our injunction. Accordingly, this motion succeeds. We discharge the injunction we granted the Respondents on 21<sup>st</sup> April, 2010.

Since this application is unprecedented and has made an immense contribution to the growth our jurisprudence, we order each part to bear their own costs.



L. P. Chibesakunda  
**ACTING CHIEF JUSTICE**

M. S. Mwanamwambwa, JJS  
**SUPREME COURT JUDGE**

H. Chibomba, JJS  
**SUPREME COURT JUDGE**