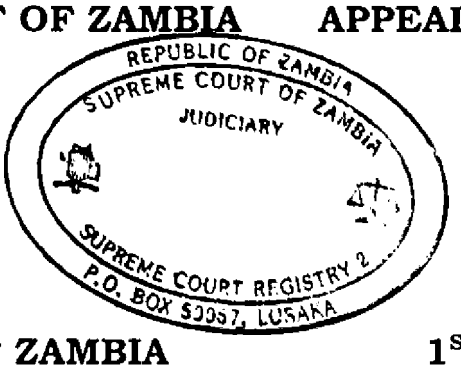
IN THE SUPREME COURT OF ZAMBIA APPEAL NO.160/2016
HOLDEN AT NDOLA
(Civil Jurisdiction)



BETWEEN:

DEVELOPMENT BANK OF ZAMBIA	**1ST APPELLANTS**
FRASER CHISHIMBA	**2ND APPELLANTS**

AND

STAR ENERGY LIMITED	**1ST RESPONDENT**
NASRI SAFIEDINE	**2ND RESPONDENT**
JAFFAR YOUSEEF DIAB	**3RD RESPONDENT**
ABBAS SAFFIEDINE	**4TH RESPONDENT**
GEOFREY MUFAYA	**6TH RESPONDENT**

Coram: Hamaundu, Malila and Kaoma, JJS

On 5th March, 2018 and 11th March, 2019

For the appellant : Mr O. Sitimela, Messrs Fraser Associates

For the Respondents: Messrs Butler & Co

JUDGMENT

HAMAUNDU, JS, delivered the judgment of the Court.

Cases referred to:

1. **Hina Furnishers Limited v Mwaiseni Properties Limited (1983) ZR 40.**
2. **American Cyanamid Co. v Ethicon Limited [1975] A.C. 269**

Legislation referred to:

The Companies Act, Chapter 388 of the Laws of Zambia

Rules referred to:

1. **The Supreme Court Rules, Chapter 25 of the Laws of Zambia**
2. **Rules of the Supreme Court (White Book), Order 29L**
3. **The High Court Rules Chapter 27 of the Laws of Zambia**

There are two appeals by the appellant in this matter. The first one is against the grant by the High Court of an interlocutory injunction in favour of the respondents. The second one is against the refusal by the High Court to transfer this matter from the General List (Division) to the Commercial List (Division) of the High Court.

The 1st respondent is a limited company engaged in the business of making coal briquettes. The 2nd to the 6th respondents are its shareholders and directors. Sometime in 2009 the 1st respondent obtained a loan in United States dollars from the 1st appellant bank for plant and machinery relating to its business. As security for that loan the 1st respondent executed two mortgages, a debenture and a charge. The mortgages had a clause which empowered the 1st appellant bank to appoint a receiver or manager

over the 1st respondent whenever the money secured by the deeds had become payable.

The 1st respondent defaulted on the repayments on the loan. Consequently, in 2014, the 1st respondent commenced an action against all the respondents, demanding payment of the money due and the realization of the securities. In the course of interlocutory proceedings, that action was referred to court-annexed mediation. While the matter was pending mediation, the 1st appellant discontinued it wholly on 4th November, 2015, by way of a notice of even date filed into court. On 14th December, 2015 the 1st appellant appointed the 2nd appellant as receiver/manager over the 1st respondent. The appellant filed notice of that appointment at the companies' registry on 14th January, 2016.

In March, 2016, the 2nd appellant advertised in a local newspaper the sale of the plant and machinery relating to the 1st respondent's business. The respondents rushed to court and filed this suit, seeking an order restraining the 2nd appellant, as receiver, from carrying out his functions and going ahead with the intended sale of the business assets. They also sought an order declaring the

appointment of the receiver null and void. The respondents also sought damages.

Together with this suit, the respondents filed an application for an interlocutory injunction, restraining the 2nd defendant from selling the assets and performing his duties as receiver. The respondents made this application on the strength, according to them, that : (i) there is a serious question to be tried in that; (a) it was irregular for the 1st appellant to have appointed a receiver while the matter was still before a mediator and the respondents were still waiting for the conclusion of the mediation process; (b) alternatively, considering that the 1st appellant discontinued its action, it was irregular to appoint a receiver without first making a demand for payment of the money; (c) the 1st appellant did not notify the Registrar of Companies of the appointment of the receiver within the seven days prescribed in the Companies Act: and (ii) damages would not be an adequate remedy to the respondents.

The court below decided that, in its view, there was a serious case to be tried and that the respondents would suffer irreparable damage if the injunction was not granted. The injunction was, consequently, granted.

The appellant appealed against that decision.

The appellants subsequently applied for the action to be transferred to the Commercial List. The court below refused that application on the ground that the question whether or not the receiver was properly appointed did not have commercial connotations.

The appellants appealed against the second decision as well. Hence the two appeals before us.

The appeal against the grant of the injunction was supported by what the appellants consider to be six grounds of appeal. In essence, only the first and second grounds are proper grounds as prescribed by **rule 58(2)** of the **Supreme Court Rules**, **Chapter 25** of the **Laws of Zambia**. The rest of the purported grounds are actually arguments. We shall set out the proper grounds of appeal. The first ground states:

> **"1. The court below erred in law and fact when it failed to attach weight to the undisputed fact that the applicant/plaintiff (1st respondent) was behind in instalments on its loan with the 1st defendant (1st appellant). He who comes to equity does so with clean hands."**

The second ground reads:

> **"2. The court below erred in law and fact by placing heavy reliance on the court annexed mediation in cause no. 2014/HPC/0508 as one of the arguable issues to be tried when there was ample evidence to show that that particular cause had in fact been discontinued."**

The appeal against the refusal is on three grounds. Again, we note that the purported second ground is an argument expanding the first ground. We shall set out only the first and third grounds.

The first ground states:

> **"1. The court below erred in law and fact by proceeding to make a determination on the summons before it on its own without hearing the applicant. That such conduct was and still is, against the** *audi partem maxim* **in adjudication and judicial proceedings."**

The third ground states:

> **"3. The court below fell into error when it ignored or spurned the opportunity to recognize that the Receivership under debate had its roots firmly planted in the Debenture and Mortgage Deed made between the Appellant and the Respondent."**

In their written heads of argument, the appellants argued that, the mediation process being court annexed, the filing of the notice of discontinuance effectively brought the process to an end; and hence the mediation process was never a factor to be taken into

account in considering whether there was a serious question to be tried. To our surprise, learned counsel for the appellants, in his oral arguments, said that in his view there was a serious question to be tried.

It was also argued that there was no dispute that the 1st appellant was in arrears in the sum of US$2,672,169.36 and that, consequently, the appointment of the receiver was to enable the 1st appellant recover the undisputed loan. In the circumstances, the appellants argued, the respondents cannot seek the equitable remedy of injunction. The case of **Hina Furnishers Limited v Mwaiseni Properties Limited**[1] was cited in support of that argument.

There was also an argument on damages. It was argued that the respondents are promoters of an investment company for profit and, therefore, their loss could easily be ascertained in monetary terms.

In the second appeal, we were referred to the definition of a commercial action under **Order LIII** of the **High Court Rules Chapter 27** of the **Laws of Zambia**. The appellants then argued that the appointment of the receiver was made pursuant to a

debenture; as such, to determine whether or not the appointment was good or invalid, it would be necessary to peruse and interpret the debenture.

The respondents elected not to attend the hearing. They, therefore, relied on their written heads of argument.

In response, the respondents abandoned their argument that the matter was still in the mediation process when the receiver was appointed. Instead they now argued that, having discontinued its action, the appellant should have first served a demand for payment of money due before appointing the receiver.

With regard to the adequacy of damages, the respondents submitted that the sale of the assets which constituted the coal briquette and coke manufacturing plant would have resulted in irreparable damage to the 1st respondent, including its business.

With regard to the second appeal, the respondents supported the refusal by the lower court to transfer the action to the Commercial List. They argued that their action was merely questioning the lawfulness of the appointment of the 2nd appellant as receiver of the 1st respondent; hence the question of banker/customer relationship was not an issue.

Those were the main, or real, arguments before us on the two appeals.

The questions to be considered in determining whether or not an injunction should be granted are very clear and straight forward. These are as set out in the case of **American Cyanamid Co. v Ethicon Ltd**[2], namely;

(i) *Is there a serious question to be tried? If the answer is yes, then further related questions arise, namely;*

(ii) *Would damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction? If not, where does the balance of convenience lie?*

The application of these questions is very well explained by **Order 29L** of the **Rules** of the **Supreme Court** *(White Book).* The first question is a threshold requirement: So that the question of adequacy of damages is only considered where a serious question to be tried is established. Hence, where that question is not established, the injunction will not be granted and there would be no need to consider the adequacy of damages.

What amounts to a serious question to be tried is explained in **Order 29/L/4**. This provides:

> " *'not frivolous or vexatious', 'a serious question to be tried', 'a real prospect of success'* — **What then is the** *American Cyanamid* **threshold test? Lord Diplock said it is sufficient if the court asks ifself: is the applicant's action** *'not frivolous or vexatious'?*, **is there** *'a serious question to be tried'?*, **is there** *'a real prospect that he will succeed in his claim for a permanent injunction at the trial'?*
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> .....**The expression** *'frivolous or vexatious'* **is a term of art well known to lawyers in the context of applications to strike out pleadings. It states a low test and may not include a virtually hopeless claim provided it is honestly brought. For this reason, the authorities show a preference for stating the** *American Cyanamid* **threshold test in terms giving natural meanings to the expressions** *'a serious question to be tried'* **and** *'a real prospect of success'* **and for ignoring the expression** *'not frivolous or vexatious'*. **The prospects of the plaintiff's success are to be investigated to a limited extent. All that has to be seen is whether he has prospects of success which, in substance and reality, exist. Odds against success do not defeat him unless they are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects are so small that they lack substance and reality, then he fails; for he can point to no question to be tried which can be called** *'serious'*, **and no prospects of such success which can be called** *'real'*. "

The respondents now say that the question to be tried lies in the fact that the 1st appellant appointed a receiver before serving a

demand for payment of money after it discontinued its action. We have noted at the beginning that a clause in the mortgage that empowered the 1st appellant to appoint a receiver did provide that the 1st appellant could do so whenever money was due; and not after a demand notice had been served on the 1st respondent. We further note that the 1st appellant commenced its action against the respondents only after a demand for payment of money due had been served on them; and no payment was made. We presume that that state of affairs was still existing when it discontinued its action, and hence, there was no need for a second demand for payment. Even assuming that the argument by the respondent was valid, the respondents have not premised their action on the ground that they were capable of paying the money due; there is no averment in the pleadings that states that, had the demand notice been served on them a second time, they would have liquidated the amount due; thereby circumventing the appointment of the receiver. As matters stand, even if the 1st appellant were to be ordered to serve a second demand notice, there would still be no payment; thereby prompting the 1st appellant to appoint a receiver again. Clearly, the success by the respondents in such a case would

merely be technical, and not real. So, in this case the respondents cannot say that the fact that the 1st appellant did not serve a demand notice again is a serious question to be tried; or that, on that ground, their action has a real prospect of success.

While still on the question to be tried, the other issue raised by the respondents in the court below was that the appointment of the receiver should be annulled because the 1st appellant filed the notice of appointment beyond the seven days prescribed by the **Companies Act**.

We note that the Registrar of Companies did, nevertheless, allow the 1st appellant to file its notice of appointment. **Section 371** of the **Companies Act**, **Chapter 388** of the **Laws of Zambia** permits the Registrar to accept lodgment of documents even after the period of their lodgment has expired. Two of those instances are; (i) the case where a person, before the period expires, requests the Registrar to extend the period, and; (ii) after the prescribed period has expired, where the person has paid an additional fee prescribed.

The point we wish to make is that these obstacles will be encountered by a person before they lodge the document. Once

there is evidence that a particular document was lodged, it is presumed that the document was accepted by the Registrar under any of the circumstances prescribed in **Section 371**. So, where, as in this case, the notice of appointment was accepted and lodged, one does not need a trial to determine its validity. It is, therefore, our view that even this issue is not a serious question to be tried.

Consequently, we hold that the respondents had shown no serious question to be tried before the court below; and on that ground, the question of adequacy of damages did not even arise. The interlocutory injunction should not have been granted.

Coming to the second appeal, we think that the arguments that are very relevant to this appeal are those with regard to what constitutes a commercial matter. We do not think that the first ground of appeal which faults the court below for deciding the application merely on the documents that the appellants had filed goes to the root of what the appellants intended to achieve by that application; namely to transfer the case to the Commercial List.

Order LIII of the **High Court Rules** defines a commercial action as any cause arising out of any transaction relating to commercial trade, industry or any action of a business nature. As

rightly pointed out by the appellants, it is not difficult to see that the appointment of the receiver arose out of a transaction relating to commercial trade. In fact, the respondents themselves, in arguing that the 1st appellant should have served a second demand notice before appointing the receiver, were referring to the instruments from which the 1st appellant derived its power. This goes to show that those commercial deeds and the claims in this action are intertwined. We, therefore, think that this was a matter fit for transfer to the commercial list.

In conclusion, the two appeals will succeed. The interlocutory injunction that was granted by the court below is set aside. This action is transferred to the Commercial List, which is now called the Commercial Division of the High Court. The appellants will have costs of both this appeal and the two application in the court below.

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E. M. Hamaundu
SUPREME COURT JUDGE

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M. Malila
SUPREME COURT JUDGE

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R. M. C. Kaoma
SUPREME COURT JUDGE