IN THE HIGH COURT FOR ZAMBIA **2009/HPC/0006**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

NATIONAL AIRPORTS CORPORATION LIMITED **PLAINTIFF**

AND

MINES AIR SERVICES LIMITED **DEFENDANT**
(T/A ZAMBIAN AIRWAYS)

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 20th DAY OF JULY, 2011.

For the Plaintiff	:	Mr. L. Linyama of Messrs Eric Silwamba & Company.
For the Defendant	:	Mrs. N. Simachela of Messrs MNB, Legal Practitioners.

RULING

Cases referred to:

1. ***Standard Bank Limited –VS- Brocks (1972) ZLR page 306.***
2. ***Cretanor Maritime Co. Limited –VS- Irish Marine Management Limited (1978) 3 ALL ER page 164.***

Other authorities referred to:

1. ***High Court Act Cap 27.***
2. ***Blacks Law Dictionary by Bryan A. Garner 8th edition.***

This is the Plaintiff's application for interim attachment of property. It comes before this Court by way of a rehearing following, a consent order to that effect executed by the parties before the Supreme Court. The initial application was made by way of *ex parte* summons filed on 11th March, 2009, in support whereof is an affidavit and skeleton arguments.

When the matter came up for hearing on 13th May, 2011, the parties were directed to file submissions 10 days apart following which I would render a ruling. A perusal of the record indicates that the Defendant filed an affidavit opposing the application and skeleton arguments on 29th April, 2011. The Plaintiff did not file submissions in favour of the application. I am therefore left with no choice but to consider the affidavit in support and skeleton arguments filed on 11th and 16th March, 2009, respectively, in support of this application when it initially came up in 2009.

The affidavit in support was sworn by one Elita Phiri Mwikisa, corporation counsel for the Plaintiff. It revealed that there is a consent judgment against the Defendant in the sums of USD 2,175,160.08 and K47,291,700.00. It also revealed that the deponent verily believed that the Defendant is undergoing financial difficulties and that it had suspended its operations. Further, that some of the Defendant's identifiable assets such as motor vehicles had been removed from the Defendant's premises and had their company colours re-sprayed.

The affidavit in opposition was sworn by one Sipho Phiri, the receiver manager of the Defendant. It began by highlighted the background to the case in respect of the default judgment entered against the Defendant on 10th February, 2009. It also indicated the fact that the Plaintiff applied for an interim attachment of property order which was granted on 13th March, 2009.

The deponent ended by stating that he was advised and verily believed that an interim attachment order can not be obtained after judgment. Further, that the Defendant having been placed under receivership, there can be no execution against its assets.

In the Plaintiff's skeleton arguments reference was made to Order 26 rule 1 of the ***High Court Act*** and the ***Standard Bank Limited –VS- Brocks (1)*** and ***Cretanor Maritime Company Limited –VS- Irish Marine Management Ltd (2)*** cases. It was argued that the Plaintiff having entered judgment against the Defendant has proprietary interest in it and therefore can proceed against its assets notwithstanding any change in their ownership arising from sharp practice.

In the skeleton arguments counsel for the Defendant argued that the application is irregular and flouts procedure as it can only be made at the time of institution of proceedings or before judgment. Further, that the order was being pursued as a device for executing the judgment. This, it was argued can not be sustained as the Defendant is in receivership.

I have considered the affidavit evidence and submissions filed herein. The starting point in consideration of this application is determining the effect of order 26 rule 1 of the ***High Court Act***. The said Order states as follow;

> ***"If the Defendant, in any suit for an amount or value of five hundred thousand kwacha or upwards, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property, or any part thereof, or to remove any such property from the jurisdiction, the Plaintiff may apply to the Court or a Judge, either at the time of the institution of the suit, or at any time thereafter until final judgment, to call upon the Defendant to furnish sufficient security to fulfil any decree that may be made against him in the suit, and, on his***

failing to give such security, to direct that any property, movable or immovable, belonging to the Defendant, shall be attached until the further order of the Court or a Judge."

(The underlining is the Court's for emphasis only).

By the use of the word "… the Plaintiff may apply to Court … either at the time of institution of the suit, or any time thereafter until final judgment…" implies that such an application can only be made before judgment. This fact is evidenced by the use of the word "interim" in the title to the Order i.e. interim attachment of property, which word is defined by ***Blacks Law Dictionary*** at page 832 thus;

"done, made, or occurring for an intervening time; temporary or provisional"

and at page 1130, the same authority defines interim order thus

"a temporary Court decree that takes effect until something else occurs."

whilst at page 136 provisional (which word is used at page 832) attachment is defined as

"a prejudgment attachment in which the debtor's property is seized so that if the creditor altimately prevails the creditor will be assured of recovering on the judgment through the sale of the seized goods"

When these definitions are read together it is clear that an application under order 26 rule 1 can only be made before judgment for purposes of securing the judgment debtors assets for use in execution of an eventual judgment. It can not in my considered view be made after judgment as in this case.

In arriving at the foregoing finding I have considered the cases cited by counsel for the Plaintiff of ***Standard Bank Ltd –VS- Brocks (1)*** and ***Cretanor Maritime Co. Ltd –VS- Irish Marine Management Limited (2)***. The said cases do not in any way aid the Plaintiff as regards when an application for interim attachment of property should be made. They in effect merely make a distinction as to when the relief of interim attachment of property is appropriate as opposed to an injunction and state the difference between the two reliefs. Further, even assuming that this application was properly before me I find that the Plaintiff has not satisfied two requirements under Order 26(1) to warrant the grant of the order. The first is that for such an order to be granted there must be a threat or intention on the part of the Defendant to dispose of his assets in order to obstruct or delay execution of any judgment. This is as per the holding in the case of ***Standard Bank Limited –VS- Brocks (1)*** which states as follows at page 307;

> ***"The remedy which a Plaintiff has to protect his future chances of payment lies under Order XXVI of the Rules, namely, an interim attachment. Such attachment can of course only be issued where a Defendant is about to remove or dispose of the property with intent to obstruct or delay execution of any decree that may be passed against him."***

The evidence to support this allegation is contained in the Plaintiff's affidavit in support. By paragraphs 5 and 6 the deponent to the affidavit highlights the perceived threat as follows;

> *"… the Defendant is undergoing financial difficult and that in fact the Defendant has since suspended its operations as a commercial airline."*

and

> *"… some of the identifiable assets such as motor vehicles have been removed from the company premises and some have had their company colours re-sprayed with ordinary colours."*

I find that the said allegations fall far short of the threat envisaged under order 26 rule 1 as expounded in the ***Standard Bank (1)*** case. To begin with the fact that a Defendant is going through financial difficulty is of no relevance in considering the relief sought. Further, the fact that motor vehicles have been removed from the premises and had their colours changed, in and of itself, is also of no consequence in determining such an application. It must be shown that the intention of the Defendant is to obstruct or delay execution of any decree or judgment that the Court may give. This in my considered view has not been proved by the Plaintiff. In fact the converse is the position because exhibit "EPM1" to the affidavit in support and the facts in paragraph 6 indicate that subsequent to the judgment the Defendant's assets, namely the vehicles were still intact. As such no threat of disposal of the assets was posed and the Plaintiff was at liberty to levy execution at that time.

The second reason relates to the requirement that prior to making an application such as the one before me, the Plaintiff should call upon the Defendant to provide security and only where a Defendant fails to provide such security, is the Plaintiff empowered to apply for an interim order of attachment. Order 26 rule 1 states in part in this respect as follows;

> ***"... the Plaintiff may apply to the Court...<u>to call upon the Defendant to furnish sufficient security to fulfil any decree that may be made against him in the suit, and, on his failing to give such security</u>, to direct that any property, movable or immovable belonging to the Defendant, shall be attached..."***

(The underlining is the Court's for emphasis only).

It is clear from the foregoing portion of the Order that the Plaintiff must first call upon the Defendant to furnish enough security to satisfy any judgment. Only upon his failing so to do, should a Court consider attaching his property.

A perusal of the record indicates that the Plaintiff did not initially call upon the Defendant to furnish security to satisfy any judgment that may be given. For this reason the application is premature.

Regarding the argument that the Defendant is in receivership therefore no execution can be levied against it, I am not able to make a determination on it as there is no evidence on record to prove this fact.

By way of conclusion, the Plaintiff's claim lacks merit and I accordingly dismiss it. Consequently the *ex parte* order granted on 13th March, 2009, attaching the Defendant's property is hereby discharged. I also order costs to the Defendant, to be agreed in default taxed.

Leave to appeal is granted.

Delivered on the 20th day of July, 2011.

Nigel K. Mutuna
HIGH COURT JUDGE