IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)

2017/HPC/0231

BETWEEN:

KEREN MOTORS LIMITED **PLAINTIFF**

AND

ZAMBIA NATIONAL COMMERCIAL BANK PLC **1ST DEFENDANT**

CLEMENT MUGALA (sued in his capacity as Receiver

and Manager of Keren Motors Limited in Receivership) **2ND DEFENDANT**

Coram: **The Hon. Lady Justice Dr. Winnie S. Mwenda in chambers at Lusaka the 26th day of February, 2018.**

For the Plaintiff: Mr. B.M. Mutale SC of Messrs. Ellis & Company and Mr. J.C. Kalokoni of Messrs. Kalokoni and Company.

For the Defendants: Mr. R.M. Simeza SC, appearing with Mr. K. Chenda, both of Messrs. Simeza Sangwa and Associates and Mrs. Musana- In House Counsel, ZANACO.

RULING

Cases referred to:

1. ***American Cyanamid Company v. Ethicon Limited (1975) 1 All ER 504.***
2. ***Abdul Ebrahim Dudhia and 20 Others v. Samukl Patel and First Alliance Bank Zambia Limited, Appeal No. 79 of 2015.***
3. ***Hina Furnishing Lusaka Limited v. Mwaiseni Properties Limited (1983) Z.R. 41.***
4. ***ZESCO Limited v. New Londe Motel, Appeal No. 86 of 2001.***

5. *Development Bank of Zambia v. Chani Enterprises Limited, SCZ Appeal No. 99 of 2001.*
6. *Kayanje Farms Limited (In Receivership) and Christopher J. Thorne v. Christopher Mulenga (sued as Joint Receiver and Manager), Edgar Hamuwele and ZANACO, Appeal No. 73 of 2010.*
7. *Beatrice Nyambe v. Barclays Bank Zambia Plc. Appeal No. 159 of 2008.*
8. *Konkola Copper Mines v. Mitchell Drilling International Limited & Mitchell Drilling (Z) Limited SJZ No. 22 of 2015 (Appeal No. 156/2013).*
9. *The Commissioners of Inland Revenue v. Muller and Company's Margarine Limited (1901) AC 217.*
10. *Morris and Company Limited v. Kenya Commercial Bank Limited and Others (2003) 2 EA 600.*
11. *Kekelwa Samuel Kongwa v. David Nkhata – SCZ Appeal No. 102/2013.*
12. *ZIMCO Properties Limited v. LAPCO Limited (1988) – 1989) Z.R. 92.*
13. *Macdonald Inc. v. Canada (Attorney General), (1994) 1 SCR 311, 1994 CanL II 117 (SCC).*
14. *Evans Marshal & Company v. Bertola S.A. (1973) 1 W.L.R. 349.*
15. *J. Lyons & Sons v. Wilkins (1986) 1 Ch. 811.*
16. *National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica) (2009) 1 W.L.R.1465.*
17. *Edgar Hamuwele (Joint Liquidator of Lima Bank) and Another v. Ngenda Sipalo, SJZ No. 4 of 2010.*
18. *Shell and BP (Zambia) Limited v. Conidaris and Others (1975) Z.R. 174.*
19. *Ahmed Abad v. Turning Metals Limited (1987) Z.R. 86.*
20. *Shepherd Homes Limited v. Sandham (1970) 3 All ER 402.*

Legislation referred to:

1. *Order 27, rule 4 of the High Court Rules, Chapter. 27 of the Laws of Zambia.*
2. *Order 29 of the Rules of the Supreme Court 1999 Edition (the White Book).*
3. *Section 100 of the Companies Act, Chapter 388 of the Laws of Zambia.*
4. *Section 109 (1) and (2) of the Companies Act, Chapter 388 of the Laws of Zambia.*
5. *Section 115 (1) of the Companies Act, Chapter 388 of the Laws of Zambia.*
6. *Section 113 (1) of the Companies Act, Chapter 388 of the Laws of Zambia.*

Works referred to:

1. *Halsbury's Laws of England 4th Edition, Volume 39 (London: Butterworths, 1982), paragraph 982.*
2. *Raymond Walton, Kerr on the Law and Practice as to Receivers, 14th Edition (London: Sweet and Maxwell, 1972), page 224.*

This is the Plaintiff's application for an order of mandatory and prohibitory injunction made pursuant to Order 27, rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia as read with Order 29 of the Rules of the Supreme Court, 1999 Edition (the White Book). At the hearing of the application learned Counsel for the Plaintiff, Mr. B.M. Mutale, SC., submitted that the Plaintiff is applying for a mandatory and prohibitory injunction to restrain the Defendants from managing the Plaintiff's business pending trial. State Counsel Mutale also submitted that they are relying on the Skeleton Arguments in support of the application dated 2nd June, 2017; 5th June, 2017; 29th June, 2017 and 30th January, 2018, and the List of Authorities in support of the application filed into Court.

It was State Counsel's argument that the Plaintiff had met the threshold in the *American Cyanamid Company v. Ethicon Limited*[1] case and thus, it is a proper case for the grant of the injunction. That if the Court does not grant the injunction, the 2nd Defendant will run down the Plaintiff's operations as the Defendants have totally misapprehended the role of a Receiver. Counsel referred the Court to paragraph 3 of the second page of the Deed of Appointment of Receiver and Manager exhibited as "BK2" in the Plaintiff's Affidavit in Reply to the 2nd Defendant's Opposition for an Order of Mandatory and Prohibitory Injunction dated 5th June, 2017. The said paragraph states:

> *"**AND IT IS FURTHER AGREED** that the said Receiver and his personal representatives and estates shall be paid their reasonable remuneration and expenses for so acting out of the sale of the assets of the Company pursuant to section 110 and 346 of the Companies Act. The Receiver shall be paid a fee of **4%** of the proceeds from the assets charged under the debenture."*

According to State Counsel, this is a clear misdirection of the role of a Receiver as a Receiver is not supposed to dissipate the assets of a company. In this regard State Counsel referred the Court to Halsbury's Laws of England 4th Edition, Volume 39, paragraph 982, on the Manager's power to carry on business. The relevant portion cited by State Counsel states as follows:

> *"It is the manager's duty to preserve the goodwill as well as the assets of the business, and he is not allowed, therefore, as a rule, to disregard contracts entered into before his appointment, even though the assets could be realised to much greater advantage if contracts were disregarded."*

Mr. Mutale further referred the Court to Raymond Walton's Kerr on the Law and Practice as to Receivers, 14th Edition, at page 224 where it states the following as regards the role of a Receiver:

> *"He is appointed to preserve the goodwill of the business and, therefore, subject to any directions made on his appointment, it is his duty to carry into effect contracts entered into by the company before his appointment."*

It was State Counsel's further submission that the Plaintiff's Supplementary Affidavit filed into Court on 30th January, 2018 has outlined six contracts that were terminated following the placement of the Plaintiff into receivership. That the 2nd Defendant has not taken any steps to run the business as a company, and in paragraph 3 (v) of the Supplementary Affidavit, reference is made to the termination of a US$64,000,000.00 Million vehicle tracking business agreement with COMESA. It was State Counsel's argument that the 2nd Defendant allowed that contract to be terminated. That the Supplementary Affidavit has illustrated that the Plaintiff has had lucrative contracts terminated purely because of the actions of the Defendants. It was State Counsel's submission that there is a spiral effect arising from the contracts that have been terminated resulting in the Plaintiff suffering immeasurable reputational damage. That as a result of the termination of these contracts, it is likely that the Plaintiff will suffer colossal and immeasurable damage. State Counsel submitted, further, that they have cited authorities which confirm that the superior courts will protect a company from receivership if the result of that receivership is to ground the company to a halt. According to State Counsel, the pace at which the 2nd Defendant has been proceeding shows that the Plaintiff has no prospects of recovering, and the interest of justice should come in and protect the Plaintiff from receivership.

State Counsel submitted in addition, that the Deed of Appointment of the Receiver drew its authority from two debentures, a fixed debenture and a floating debenture. The total amount secured by the two debentures is approximately K4,300,000.00 which is almost negligible compared to the amount which the 2nd Defendant has been mandated to collect, which is in the order of over K47,000,000.00. According to State Counsel, this prospect alone confirms the injustice that is likely to be occasioned to the Plaintiff if not granted an injunction. That in the premises, the interest of justice will be well served if this Court grants the Plaintiff a mandatory and prohibitory injunction restraining the Defendants.

With regard to the Affidavit in Reply filed on 31st January, 2018, State Counsel submitted that the Affidavit was prompted by the averments in the Defendant's Affidavit that the Plaintiff was dissipating the company's assets. It was Counsel's contention that the Plaintiff is denying the allegation as being illogical as the Plaintiff would like to preserve the company as a business entity and in any event, the Plaintiff has no access to its premises. State Counsel submitted that on the totality of the evidence, to prevent the Plaintiff from being ground to a halt or having its premises closed and in the greater interest of justice, a mandatory and prohibitory injunction should be granted.

Mr. Kalokoni, co-Counsel for the Plaintiff, submitted that under Order 29 of the White Book, there is one danger which this Court must avoid at this interlocutory stage, that is, the danger of trying to reconcile the conflicting affidavit evidence. According to Mr. Kalokoni, the Court's role under Order 29 is simply to be satisfied that there are serious issues that must be investigated at trial. That the Plaintiff is convinced that there are serious issues that should be investigated at trial. The first issue, according to Counsel, is what the effect is at law where the Receiver is appointed to recover a sum of money which is not contained in the debenture document. The second issue is, whether it is allowable at law to appoint a Receiver/Manager when the debenture document only provides for the

appointment of a Receiver. The third issue is, whether there are legal sanctions when debenture documents are not registered within the stipulated period. The fourth issue is, whether the law allows two currencies, namely, the Kwacha and the Dollar, to run concurrently on the same facilities and fifthly, whether the Bank complied with the Cost of Borrowing Regulations which protect customers.

Counsel submitted that the Plaintiff had drawn the Court's attention to the case of *Abdul Ebrahim Dudhia and 20 Others v. Samukl Patel and First Alliance Bank Zambia Limited*[2], which states that once illegalities are brought to the attention of the Court, such illegalities override all questions of pleadings including any admissions made therein.

Mr. Kalokoni submitted that the effects of not granting an injunction at this stage would be:

1. To deny the Plaintiff the opportunity to have the serious issues determined at trial;
2. To grant summary judgment to the Defendants since by the end of the trial, the 2nd Defendant would have recovered the contested sum of K47,000,000.00, thus rendering the trial academic;
3. To throw the Plaintiff into liquidation and that cannot be quantified in monetary terms.

It was thus the Plaintiff's prayer that the mandatory and prohibitory injunction be granted.

For the Defendants, learned State Counsel Simeza submitted that the Defendants are opposing the application for an order of mandatory and prohibitory injunction and to that effect, have, filed various affidavits in support of their case. There is the Affidavit of Arnold Chinyama filed on 26th May, 2017 together with Skeleton Arguments of even date. There is also an Affidavit of Clement Mugala filed on 2nd June, 2017 along with Skeleton Arguments filed on the same day.

Further, that there are Additional Skeleton Arguments filed on 26th January, 2018 and an Affidavit in Response also deposed to by Clement Mugala which was filed on 31st January, 2018 accompanied by Skeleton Arguments of even date.

According to State Counsel, the thrust of the contents of the affidavits, including those filed by the Plaintiff, is that the Plaintiff obtained various banking facilities from the 1st Defendant which were secured by debentures exhibited in the Affidavit of Clement Mugala filed into Court on 2nd June, 2017, and also in the Affidavit of Arnold Chinyama dated 26th May, 2017. That the debentures were duly registered and a certificate of registration issued by the Registrar of Companies as evidenced by exhibit "ACM1" in Arnold Chinyama's Affidavit. According to State Counsel, in terms of Section 100 of the Companies Act, a certificate of registration of a debenture is conclusive evidence that the requirements of the law have been complied with. That there can, therefore, be no debate with regard to the Debentures that were issued by the Plaintiff in favour of the 1st Defendant.

State Counsel submitted further, that due to persistent challenges which the Plaintiff was facing in meeting its obligations as regards the facilities it obtained from the 1st Defendant, the facilities were restructured, again at the request of the Plaintiff and a term loan of K40,466,871.00 was given which was to be repaid in 48 equal monthly payments. The first instalment was due on 31st July, 2016. That despite the 1st Defendant's indulgence shown by restructuring the facilities, the Plaintiff continued to default. This was notwithstanding the agreement in the letter exhibited as "CM3" in the Affidavit of Clement Mugala. According to State Counsel. it was specifically agreed between the Plaintiff and the 1st Defendant under clause 7.2 of the Facility Agreement that if there was default in the payment of any amount that was falling due, that default would amount to a breach which would entitle the 1st Defendant to exercise its right to serve a seven-day notice for correction and if there was no correction, the 1st Defendant would be within its

rights to proceed to recover the monies that were due under the facility. State Counsel submitted that the 1st Defendant in the Affidavit of Clement Mugala exhibited a number of letters, particularly "CM4c", "CM5", "CM6a" and "CM6b", being demand notices issued by the 1st Defendant and the undertaking by the Plaintiff to settle the arrears which were owed, which the Plaintiff did not, however, do and as a result, the 1st Defendant was left with no other choice, but to exercise its right under the debentures to appoint a Receiver.

With regard to the Plaintiff's arguments that the 1st Defendant has totally misapprehended the role of the Receiver and that the Receiver is not supposed to dissipate the assets, but to manage the company and keep it going, State Counsel submitted that this was a startling proposition as it was at variance not only with the debenture itself, but also with the law as it is known through the various decided cases. The debenture, which is exhibited in the Affidavit of Clement Mugala, in clause 7 (c), gives the Receiver the power of sale of a charged asset. The power derives its authority from Section 113 (1) of the Companies Act. State Counsel argued that in this case the instrument under which the Receiver was appointed clearly gives the Receiver the power of sale. Counsel further pointed out that it had been argued that the Receiver's remuneration cannot come from the sale of assets. State Counsel submitted, however, that in clause 8 of the debenture, it is provided that a Receiver is deemed an agent of the company and the company is responsible for his remuneration. Therefore, the role of the Receiver includes the power of sale and from the proceeds, to pay his remuneration. State Counsel submitted that the issue, therefore, for this Court's determination is; can the 1st Defendant who has exercised its contractual right under the debenture and statutory provisions, under Section 109 (2) of the Companies Act, be stopped by force of injunction, as is being sought by the Plaintiff? According to State Counsel, the 1st Defendant is asking this question because the effect of the injunction sought by the Plaintiff would be to stop the 1st Defendant from exercising its legal rights which are both

statutory and contractual under the debenture; bearing in mind that the Plaintiff has at the very least, admitted to owing a total sum of K23, 141, 840.37, which sum still remains due and the Plaintiff has done nothing to settle the amount either in full or in part. State Counsel submitted that an injunction cannot come to the aid of an applicant who himself is in serious default of his contractual obligations.

Mr. Simeza submitted that in any event, bearing in mind the nature of the injunction being sought, it is trite law that a mandatory injunction is an exceptional form of relief which is rarely granted and only in circumstances where the applicant's case is unusually strong and clear. According to State Counsel, they have cited decisions which support their argument in their Skeleton Arguments of 26th January, 2018. It was State Counsel's further submission, that the granting of injunctive relief is not only discretionary, but is equally based on equitable considerations. State Counsel asked if this Court could open its doors of equity to the applicant who had made various admissions of default and totally ignored its contractual obligations. He submitted that the applicant cannot seek equitable relief from this Court and referred to the case of *Hina Furnishing Lusaka Limited v. Mwaiseni Properties Limited*[3], in which Kakad J. (as he then was), held that an injunction is an equitable remedy and the Court may not exercise its discretion to grant it where the Plaintiff is in breach of the contract. Kakad J. further referred to the maxims 'he who comes to equity must come with clean hands' and 'he who comes to equity must do equity.' According to State Counsel, the Plaintiff's hands are not clean and therefore, they cannot be heard to cry out loudly on alleged contracts which have been terminated as a natural result of the Plaintiff's own failures or defaults. State Counsel also cited the case of *ZESCO Limited v. New Londe Motel*[4], where Lewanika, DCJ observed that:

> *"The granting of an injunction by the Court below...created an inequitable situation (when) an injunction is meant to be an equitable remedy."*

Another case which State Counsel cited was *Development Bank of Zambia v. Chani Enterprises Limited*[5], where Sakala JS., (as he then was), discharged an interim injunction order which restrained Development Bank of Zambia from appointing a Receiver on the basis that the respondent was in default of loan repayments and that the injunction favoured the respondent at the expense of the appellant. A further case cited by State Counsel was *Kayanje Farms Limited (In Receivership) and Christopher J. Thorne v. Christopher Mulenga, Edgar Hamuwele and ZANACO*[6], where the Supreme Court agreed with the submission by Counsel for the Appellant that the doctrine of equitable or promissory estoppel is rooted in equity; that the 1st Appellant, being in default in its loan obligations, was disentitled from seeking the aid of equity.

Continuing with his submissions, State Counsel Simeza submitted that one thing which is certain is the fact that the Plaintiff is in default, therefore, they cannot seek shelter in injunctive relief. As to the question whether the 1st Defendant can be stopped by injunctive relief from exercising its legal rights, Counsel submitted that that question was answered by the Supreme Court in the case of *Beatrice Nyambe v. Barclays Bank Zambia Plc*[7]. According to State Counsel, that case is on all fours with the case before this Court. In that case the Supreme Court again stated that you cannot restrain a debenture holder from exercising its rights under the debenture.

State Counsel submitted, further, that the Affidavit of Clement Mugala of 31st January, 2018, raises some very sad developments in paragraphs 11 – 13 where the Defendants bring to the attention of the Court the effects of the *ex-parte* order of injunction which the Plaintiff had obtained. It was Counsel's submission that with that order the Plaintiff's directors went back to the premises and the result was asset stripping of the company, the assets in issue being those charged to the 1st Defendant. That following the crystallization of the floating debenture, the Plaintiff's right to deal with the assets came to an end as the assets belong to

the 1st Defendant who has an equitable interest in the same. State Counsel argued that the granting of injunctive relief to the Plaintiff will be a sure way of depriving the 1st Defendant of any possibility of recovering the more than K47,000,000.00 owed to it by the Plaintiff. With regards to the submission that a receiver should step into the shoes of the directors, Mr. Simeza submitted that the issue was addressed by the debenture in clause 7. He submitted that among the various powers of the Receiver is the power to sell some assets in order to raise money. That the Receiver in this case has not even reached that stage yet, but is only managing the assets. Further, that there is no evidence before this Court that the Receiver wants to sell the assets; that if anything, it was the Plaintiff who clandestinely tried to sell some assets as per the affidavit of Clement Mugala.

Responding to the submission that the Receiver is trying to recover more than what is in the debenture, State Counsel submitted that it is not known how much money the Receiver will recover, but even if it is K40,000,000.00, clause 23 in the debenture, exhibited as "CM8" in Clement Mugala's Affidavit provides that the total amount recoverable under the debenture shall be unlimited and the security constituted is to be available for the same. State Counsel wondered where the Plaintiff got the idea that the 1st Defendant could only recover a limited amount of K4,300,000.00 under the Debenture. He submitted that the debenture created was a continuing security for any and all amounts owing to the 1st Defendant.

Reacting to Mr. Kalokoni's submission on the role of this Court, Mr. Simeza submitted that the judgment of Beatrice Nyambe, at page J19, would be helpful to this Court as it considers the argument. According to Counsel, there are no issues for consideration, and besides, there is an admitted sum and the 1st Defendant would be entitled to recover on that sum.

Co-counsel for the Defendants, Mr. Chenda, submitted that the factual reality between the parties is that there is a debt and there is default. He referred the

Court to the Affidavit in Support of Ex-Parte Summons for Mandatory and Prohibitory Injunction filed on 18th May, 2017 deposed to by Berhane Kibrom, paragraph 12, which states, *inter alia,* "...However what the Plaintiff is owing is in the sum of K23,141,840.37 repayable up to 2020 as per signed contract." According to Counsel, the admission of a debt is replicated in paragraph 9 of the Statement of Claim and also in paragraph 15 of the Plaintiff's Reply to the 1st Defendant's Defence. That the only thing not admitted is that the Plaintiff is supposed to be making monthly instalments. On the issue of default, learned Counsel submitted that it is evident from the 2nd Defendant's Affidavit in Opposition filed on 2nd June, 2017, in particular, exhibit "CM5" which is a letter from the Plaintiff to the 1st Defendant where they admit the arrears in terms of monthly instalment payments. It was Counsel's further submission that exhibit "CM6 b" of the same Affidavit, which is another letter from the Plaintiff to the 1st Defendant, is again an admission of the factual reality. He submitted that this case is a strait jacket fit into the Supreme Court cases of Beatrice Nyambe and Kayanje Farms, which by virtue of the doctrine of *stare decisis,* are binding on this Court.

Mr. Chenda submitted further, that to clarify what he termed the myth that there is something wrong about going public about the receivership, from the point that a receiver is appointed, there is a statutory obligation under Section 109 (1) of the Companies Act, to go public by filing a notice at the Companies Registry, which is a public registry. There is also an obligation under the Companies Act, for the Receiver to ensure that all documentation generated by the company reflects the appointment. This documentation includes the company's letter heads, invoices, orders and receipts. To that end, Counsel referred the Court to Section 115 (1) of the Companies Act. He submitted in addition, that there is also an obligation to advertise the appointment in the Government Gazette, therefore, there was nothing wrong in going public about the receivership. That the Plaintiff should fault the statute and not the law-abiding citizen.

Responding to learned State Counsel Mutale's submission that six contracts have been terminated during the period when the Receiver was acting, Mr. Chenda stated that this aspect had been sufficiently addressed by the Defendants in their Affidavit of 31st January, 2018 in paragraph 9 in particular and it is clear that the circumstances for the terminations had nothing to do with the appointment of the Receiver or any acts on his part in that office. That paragraph 10 of the Affidavit of 31st January, 2018 deposed to by Clement Mugala, goes further to state that the arrears to the Zambia Revenue Authority and NAPSA were there before he was appointed as Receiver and there is no affidavit from the Plaintiff which has disputed this fact. Counsel argued that the Plaintiff cannot derive the benefit of an injunction from circumstances brought about by its own wrongs. To support this argument, Counsel cited the case of *Konkola Copper Mines v. Mitchell Drilling*[8]

Reacting to the submission by Mr. Mutale about there being a spiral effect of immeasurable reputational damage to goodwill, Counsel referred the Court to the House of Lords case of The *Commissioner of Inland Revenue v. Muller and Company's Margarine Limited*[9], where Lord Mcnaghten stated the following – at page 223: -

> *"I now come to the second point. It was argued that if goodwill be property, it is property having no local situation. It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold everyday…".*

The point to be taken from that judgment, in learned Counsel's view, is that goodwill is a property that can easily be quantified and its value assessed and compensated through damages.

Proceeding to the observations made in the Plaintiff's Affidavit of 1st February, 2018, Counsel submitted in relation to paragraph 5 thereof, that there is no record of any proceeds of sale from which it can be deduced that the vehicles mentioned therein were actually sold as scrap. With respect to paragraph 7

which alleges that some of the missing assets have been leased out, that there is no record of any lease agreement that has been exhibited to dispute his client's allegation that the assets have been disposed of. Counsel submitted further, that paragraph 12 of the Affidavit contains a general denial that ten vehicles have been sold by the Plaintiff. Further, that the Plaintiff has not gone further to state the whereabouts of the ten vehicles. This, in Counsel's view, is significant because in paragraph 6 of the same Affidavit, the Plaintiff denies that one item has been sold and goes on to state where the item is at the moment. However, there is no evidence that has been presented to account for the assets alluded to despite the Defendants' averment that they have been disposed of. With regard to the averment in paragraph 10 of the Affidavit that certain property was beyond economic repair and was sold as scrap, Counsel submitted that there is no record of a mechanical assessment showing that the item was beyond economic repair and no record of the proceeds from which this Court can comfortably conclude that the item was sold as scrap.

Regarding the submission by Mr. Kalokoni that there are serious issues to be investigated at trial, Counsel submitted that there are no such issues, but only a debt and default by the Plaintiff. Counsel admitted that the exact quantum of the debt may be an issue, but that is no justification for the grant of an injunction. Counsel referred this Court to a decision of the Commercial Court of Kenya, namely, *Morris and Company Limited v. Kenya Commercial Bank Limited and Others*[10], where Ringera J., decided at page 615 thus:

> *"As regards the prayers for interlocutory injunctions to revoke the appointment of the receivers/managers and to restrain them from exercising their powers, I am of the following opinion. It is true that the first defendant has not shown precisely how the amount of KShs 523 389 559 demanded is calculated. No statements have been annexed to the affidavits. And it is also possibly true that the bulk thereof comprises of interest. However, despite Mr. Regeru's contention that no debt is admitted, the plaintiff's own pleading in paragraphs 13, 15 and 18 admits a debt*

of KShs 250 million to the first defendant. So does the plaintiff's director, Joseph Manga Mugwe, in paragraphs 21 and 26 of his affidavit of 14 November 2003 in support of the chamber summons. Given that scenario, can the plaintiff be heard to say that it has a prima facie case that it is not in default of its repayment obligations to the first defendant? I think not. And what is one to make of the fact that the exact amount is in dispute and the interest component thereof is said to be usurious or unconscionable. It is just a tiny ripple in the pond. The law is well settled that a dispute as to the amount due cannot be a ground for an injunction to restrain a mortgagee from exercising its statutory power of sale. By parity of reasoning, it cannot be a ground for restraining a lender from appointing a receiver on grounds of default in payment obligations..."

It was Counsel's submission that it is clear from the Kenyan case referred to above, that disputes about interest computations and amount due cannot be a ground for restraining the lender from appointing a receiver where there is default in payment obligations. Counsel submitted that the case of Abdul Dudhia had been quoted out of context by his colleague and explained that the principle in that case related to how the court is to treat the competing positions of parties at trial whereas the authorities Counsel for the Defendants had cited from the Supreme Court are specific not just to an interlocutory injunction, but also to an injunction against a Receiver and his appointing authority.

Counsel argued further, that pleading and claiming for damages is a bar to the interlocutory injunction which the Plaintiff is seeking as guided by the Supreme Court in the case of *Kekelwa Samuel Kongwa v. David Nkhata*[11], where Mambilima CJ., delivering the judgment of the Court stated as follows, *inter alia,* on pages J13 – J14:

"...we are of the firm view that on the evidence on the record of appeal, the lower court properly directed itself when it discharged the interim injunction. In our opinion, the evidence in this case clearly establishes that damages would be an adequate remedy for the Appellant if he succeeded in his main action. It is

evident from the Appellant's pleadings that he acknowledged the fact that damages would adequately compensate him for the loss of use of the property...Accordingly, we hold that damages would be an adequate remedy if the Appellant succeeded in his main action."

Counsel submitted that an examination of the Plaintiff's Statement of Claim and primary Affidavit filed on 18th May, 2017, shows that in paragraph 11 thereof, the Plaintiff speaks of damage to corporate image, reputation and goodwill, which is similarly pleaded in paragraph 13 of the Statement of Claim. Further, that in paragraph 12 of the Affidavit, the Plaintiff bemoans the loss of business and earnings to try and persuade this Court to grant an injunction. According to Counsel, this again, is almost identical to the pleading in paragraph 14 of the Statement of Claim (paragraph 13 of the Amended Statement of Claim) where values are even attached. Paragraph 13 of the Amended Statement of Claim states as follows:

"13. Further, the Plaintiff will aver that the 2nd Defendant is a trespasser and has wrongfully interfered in the conduct of business by the Management of the Company thus giving rise to loss of business.

PARTICULARS OF LOSS OF BUSINESS

a. RECEIVERSHIP ADVERTISEMENT

Repossessed 64 trucks on account of the advertisement of the receivership at the rate of ZMW 1, 352.20 x 24 days — *ZMW 2, 076, 979 .00*

b. KOBIL CONTRACT

8 trucks at ZMW 3,000.00 per day at 24 working days in a month average — *ZMW 567,000,000.00*

c. MKUSHI ROAD CONTRACT TERMINATION

Outstanding contract amount — *ZMW 45,000,000.00*

d. LOSS OF BUSINESS – COMESA TRUCKING

Retained earnings per annum over 4 years

at $1 to ZMW 9.5 *$3, 880, 553.00*

e. ***DAMAGES FOR TRESPASS***
from 4th March, 2017 *ZMW 100,000,000.00*

f. WRONGFUL CONTRACT INTERFERENCE -KAZUNGULA PROJECT *ZMW 100,000,000.00*

PARTICULARS OF SPIRAL LOSS

(i) Cavmont Bank advance payments guarantee due to the loss of Kazungula Bridge Project worth $401,000.00.

(ii) FEMA Zambia subcontractors due to the loss of the Kazungula Bridge Project worth $40,000.00.

(iii) Zambia State Insurance Performance Bond due to the loss of the Kazungula Bridge Project worth $600,000.00

(iv) Loss of business due to the termination of the Kazungula Contract worth $4, 200,000.00 outstanding contract value."

He concluded that on the strength of the Supreme Court judgment in the Kekelwa case, the damages which the Plaintiff has already quantified cannot be said to be irreparable. Counsel submitted that in this case, damages can quite easily atone for the alleged injury. Further, that there is no evidence that the Plaintiff has brought to suggest that the 1st Defendant which boasts of being big, strong and reliable, cannot meet those damages. Counsel submitted that this case is about money and where money is claimed, then there is no irreparable injury to be protected from since money will atone for the damages. In this regard, Counsel referred this Court to the case of *ZIMCO Properties Limited v. LAPCO Limited*[12] where the Court stated as follows at page 93:

> *"It is quite clear in this case, and it had been accepted by Mr. Michelo on behalf of the plaintiff, that the only question arising between the parties is one of money...Various authorities have been quoted before this Court relating to the balance of convenience to the parties in the granting of an injunction. We must*

> *make it clear that the question of balance of convenience between the parties only arises if the harm done will be irreparable and damages will not suffice to recompense the plaintiff for any harm which may be suffered as a result of the actions of the defendant which it is sought to restrain. It is therefore, inappropriate in this case to discuss the question of balance of convenience. It is clear to us that if the plaintiff is successful in its action it will be adequately compensated by an award of damages..."*

In sum, learned Counsel submitted that the materials before the Court and arguments advanced, demonstrate that the Court can quite properly refuse the application for injunction. He urged the Court to do so with costs.

By way of reply, learned State Counsel Mutale submitted that they had adequately dealt with all the issues that the Defendants' advocates had raised in the Plaintiff's affidavits and various Skeleton Arguments. He observed that Mr. Simeza had argued at length that an application for a mandatory injunction is rarely granted and only in exceptional cases. It was State Counsel's submission that this indeed is the case, but that they had established that the Plaintiff has a strong and clear case which deserves the protection of a mandatory and prohibitory injunction. He submitted further, that the Additional Skeleton Arguments filed on 30th January, 2018, show that courts will grant an injunction if it is established that failure to do so will lead to the destruction or closure of operations of the Plaintiff. These cases are; *Macdonald Inc. v. Canada (Attorney General)*[13]; *Evans Marshall &* Company v. *Bertola S.A.*[14]; *J. Lyons & Sons v. Wilkins*[15]; and *National Commercial Bank Jamaica Limited v. Olint Corp Ltd (Jamaica)*[16].

In the *Macdonald Inc. v. Canada (Attorney General)* case, the Supreme Court of Canada defined the phrase "unquantifiable damage" as follows: -

> *"...It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of*

business by the Court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation..."

In the *Evans Marshall & Company v. Bertola S.A.* case, Sacs LJ., stated as follows:

"...in my judgment damages would not be an adequate remedy in this case...the courts reportedly recognized that there can be claims under contracts which as here it is unjust to confine a Plaintiff to his damages for the breach."

In the case of J. *Lyons & Sons v. Wilkins*, Lord Kay, LJ., stated the following, *inter alia:*

"This is an appeal from an interlocutory injunction, and in all these cases of interlocutory injunctions, where a man's trade is affected, one sees the enormous importance that there may be interference at once before the action can be brought on for trial; because during the interval, which may be long or short, according to the state of business in the courts, a man's trade might be absolutely destroyed or ruined by a course of proceedings which, when the action comes to be tried, may be determined to be utterly illegal; and yet nothing can compensate the man for the utter loss of his business by what has been done in the interval..."

In *National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica)*, Lord Hoffmann said the following with regard to interlocutory injunctions:

"...At the interlocutory stage the court must, therefore, assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Company v. Ethicon Limited (1975) AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."

It was State Counsel's submission that they had adduced cogent evidence which confirms that the 2nd Defendant is on a mission to ground the Plaintiff's operations. State Counsel submitted that the 2nd Defendant had grossly failed in the exercise of his duties as Receiver and if not halted by this Court, the Plaintiff will sooner than later, be driven into liquidation. Mr. Mutale submitted further, that it was quite clear that Counsel for the Defendants had not fully appreciated the role of a Receiver. He said that he had earlier cited a paragraph in Halsbury's Laws of England which defines the role of a Receiver. He drew the attention of the Court to a Supreme Court decision which he said endorses his submission on the effect of receivership, namely, *Edgar Hamuwele (Joint Liquidator of Lima Bank) and Another v. Ngenda Sipalo*[17]. According to Mr. Mutale, the 2nd Defendant seems hell-bent on winding up or dissolving the Plaintiff company and therefore, the interest of justice justifies the issuance of an injunction to preserve and protect the Plaintiff from being wound up.

Mr. Mutale stated that there had been detailed submissions from Counsel for the Defendants on admissions and default. It was his view that the arguments are misconceived because if any amounts have been admitted, which it is denied, the same are irrelevant to the core issues to be tried at trial. The core issues, according to Mr. Mutale, relate to the status of appointment of the Receiver and the validity of debentures dated 20th April, 2013 and 4th August, 2016. In respect of the argument by Counsel for the Defendants that the two instruments were registered at PACRA and therefore, there was no basis for the Plaintiff to challenge their legality, Mr. Mutale submitted that the fact that the two debentures were registered is no bar to their being challenged and therefore, that the Plaintiff is at liberty to challenge them.

Addressing the allegation that the Plaintiff was stripping assets, State Counsel submitted that the Plaintiff, in its Affidavit of 1st February, 2018, had denied the allegation. According to State Counsel, the said Affidavit may not be detailed as

to the whereabouts of the documents, but this was because the Plaintiff had not had time to access the records. That this is evidenced by exhibit "BK1" which is a letter seeking further instructions on the matter. State Counsel submitted that it should be borne in mind that the letter alluded to had been written on 31st January, 2018 and the hearing of the application for injunction was on 2nd February, 2018, which was only two days later. That it would have been too much to expect the Plaintiff which has no access to its office, that has all the documents relating to the motor vehicles, to give a detailed explanation and evidence as to the whereabouts of the said motor vehicles. That, that notwithstanding, the position is that the Plaintiff totally denies any allegations of asset stripping; that in any event, this is not an issue which this Court can determine at this preliminary stage as it is a matter to be determined at trial.

Mr. Kalokoni, responding to Mr. Simeza's argument relating to Section 113 (1) of the Companies Act, submitted that it is indeed the legal position that receivers must act in accordance with the instruments pursuant to which they were appointed. He, however, contended that the 2nd Defendant was breaching statutory law and also impugning the debenture documents by purporting to collect K47,000,000.00 which is not contained in the debenture document. Counsel said that by so doing, the Receiver was acting *ultra vires* the document appointing him. Further, that the alleged admitted sum of K23,000,000.00 is not contained in the debenture documents because the Bank knows that the Plaintiff is not owing the amount at all. According to Counsel, it is a principle of equity that equity follows the law, and the law in this case is contained in Section 113 (1) of the Companies Act, which he submitted, the Receiver had breached thereby disqualifying him from taking refuge in equity. Counsel stated that the position of the law is that whatever is against the law is an illegality which no Court of law anywhere should encourage. Counsel argued that refusing to grant the Plaintiff the injunction would have the effect of giving comfort to the 2nd Defendant, that

he can breach the provisions of the Companies Act with impunity and still seek refuge in this Court, which, Counsel submitted, he should not be allowed to do.

Addressing the allegation of breach of the terms of the law, namely, that the Plaintiff has defaulted on several occasions, thus disentitling it to equity, Mr. Kalokoni submitted that as is evidenced by exhibit "BK3" in the Affidavit in Support of the injunction, the Plaintiff requested the Bank for a reconciliation of the accounts. That put in other words, the K23,000,000.00 was not the overdue amount, hence the Plaintiff's request for a reconciliation. According to Counsel, the answer to the request came in the form of appointment of the 2nd Defendant as Receiver, hence the challenge in claim (v) of the Writ of Summons, of the Demand Notice for irregularity. Further, that in claim (vi), the Plaintiff is challenging the appointment of the 2nd Defendant. Counsel submitted that the Plaintiff is relying on the principle in the Abdul Ibrahim case that illegality, once brought to the attention of the Court, overrides even admissions that are contained in the pleadings. He submitted further, that the alleged defaults by the Plaintiff are matters for proof at trial. On the submission by Mr. Simeza drawing the Court's attention to clause 23 of the debenture documents and accentuating the point that the Bank has unlimited powers for recovery of money from the Plaintiff, Mr. Kalokoni submitted that a perusal of clause 23, will reveal that it is subject to clause 1 of the same debenture document and refers to amounts contained in the finance facilities; that put differently, the power to recover is unlimited only to the extent of the amounts that are contained in the debenture documents and registered at PACRA. Counsel submitted that the Court will not find the sum of K47,000,000.00 at PACRA or the debenture documents.

Counsel drew the Court's attention to exhibit "BK3" in the Affidavit in Reply to the 2nd Defendant's Affidavit in Opposition dated 22nd January, 2018, being a letter of complaint from the Plaintiff against the Receiver/Manager, Mr. Mugala, to the effect that he was trying to financially cripple the operations of the Plaintiff by

diverting funds to the Stanbic account over which he had exclusive control; that to date, the diverted funds still remain unaccounted for. Counsel asked this Court whether, as a court of equity, it should allow the Receiver to bring the Plaintiff to its knees when in fact he is acting contrary to statutory law.

On the issue of crystallisation of the floating charge and its effect of transferring ownership of the assets to the Bank, Counsel agreed that that was the law. However, he submitted that proof that the Plaintiff is owing the Bank K47,000,000.00 is a condition precedent to the crystallisation of the Debenture being relied upon. Counsel argued that *prima facie*, there is no evidence before this Court that the Plaintiff is owing that sum, hence the need for trial.

Regarding the issue of serious issues to refer to trial, Counsel argued that when the Writ of Summons is examined, it will be discovered that the claims which are there are not about computation of interest. That apart from disputing the sum of K47,000,000.00, the Plaintiff has pleaded the cost of borrowing regulations, that the Kwacha interest rate was being slapped on United States Dollar facilities and that two currencies were running concurrently. Counsel submitted that the Beatrice Nyambe case relied upon by the Defendants must be read in context. That in the present case, the 2nd Defendant is trying to collect what he termed, a fictitious amount of K47,000,000.00, which was not the case in the Beatrice Nyambe case. Further that in the Kekelwa Samuel Kongwa case referred to by the Defendants, the interim injunction was denied because the evidence adduced in that case demonstrated that damages would be adequate. Counsel submitted that they had drawn the Court's attention to authorities from Canada and Kenya to show that destruction of business, which Mr. Mugala, the Receiver in this case is allegedly trying to do, cannot be atoned for by damages.

Mr. Kalokoni submitted, lastly, that the Plaintiff in this matter has pleaded breaches of statutory law, namely, the Companies Act; Banking and Financial Services Act; the Cost of Borrowing Regulations; Section 53 of the Competition and Consumer

Protection Act (on unfair contract terms), whereas the 1st Defendant is alleging mere contractual breaches. Counsel argued that denying the Plaintiff the injunction would, in effect, amount to elevating alleged contractual breaches over statutory breaches. It was Counsel's prayer that as equity follows the law, this Court of equity may grant the Plaintiff the injunction prayed for and allow this matter to go to trial.

I have carefully examined the various affidavits and Skeleton Arguments filed by the Plaintiff in Support of its case. I have equally perused the affidavits and Skeleton Arguments filed by the Defendants to reinforce their case. I am indebted to Counsel on both sides for the authorities provided to the Court.

The Plaintiff has applied for a mandatory and prohibitory injunction to restrain the Defendants from operating the Plaintiff's business until conclusion of this matter. I heard arguments from both parties which I have considered before coming up with this ruling. Counsel on both sides submitted extensively in support of their respective cases, the bulk of which, I dare say, relates to the merits of the case. However, at this preliminary stage of proceedings, my role is not to delve into the merits of the case but to decide whether the Plaintiff has met the threshold laid down in the American Cyanamid case for the grant of an interim injunction.

It is trite that the Court's power to grant an interim injunction is discretionary. The exercise of such discretion, needless to say, should be reasonable, equitable and judicious for the simple reason that an improper exercise of the discretion can result in an injustice to a party.

It is critical from the outset to have a clear understanding of the general purpose of an interim injunction. In the American Cyanamid case, Lord Diplock felicitously stated, at page 509 that: -

> *"The object of the interlocutory injunction is to protect the Plaintiff against injury by 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 trial; but the Plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against the injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiff's undertaking in damages if the uncertainty, were resolved in the Defendant's favour at the trial. The Court must weigh the one need against another and determine where the 'balance of convenience' lies."

The most important guidelines, in my view, from the celebrated American Cyanamid case, which the Court is called upon to take into consideration are the following: -

(a) Whether or not the Plaintiff has raised a serious question which must be determined at trial;

(b) If there is a serious question to be tried, whether or not the Plaintiff will be adequately compensated by an award of damages. If, the Plaintiff can be adequately compensated, the interim injunction should be refused, however meritorious the claim may be;

(c) In the event of doubt as to adequacy of damages and the ability of the defendant to pay them if the Plaintiff were to succeed at trial, the court will consider the balance of convenience.

With regard to the first question, namely, whether there is a serious question which must be investigated at trial, I find that the evidence before Court reveals that there are indeed serious issues to be investigated and determined at trial. Learned Counsel Kalokoni outlined five issues for trial. These are as follows: -

1. What the effect is at law where the Receiver is appointed to recover a sum of money which is not contained in the debenture documents;

2. Whether it is allowable at law to appoint a Receiver/Manager when the debenture document only provides for the appointment of a Receiver;
3. Whether there are legal sanctions when debenture documents are not registered within the stipulated time;
4. Whether the law allows two currencies, namely, the Kwacha and the Dollar, to run concurrently on the same facilities; and
5. Whether the Bank complied with the Cost of Borrowing Regulations.

In my considered view, these are serious triable issues which are neither frivolous not vexatious.

Having addressed the issue of whether there is a serious question to be tried, and having found that there are indeed a number of serious triable issues, I now turn to the second guideline, namely, whether the Plaintiff can be adequately compensated by an award of damages. Counsel for the Plaintiff have resolutely argued, citing cases from within and outside the jurisdiction, to prove that damages would not be an adequate remedy in this case. Counsel for the Defendants, on the other hand, have argued that the Plaintiff can be adequately compensated by an award of damages since they are easily quantifiable as evidenced by paragraph 13, among others, of the Plaintiff's Amended Statement of Claim. I am in agreement with the submission by Counsel for the Defendants.

The Plaintiff has bemoaned damage to corporate image, reputation and goodwill in paragraph 12 of its Statement of Claim. It has also alleged loss of business and spiral loss which have been itemised in paragraph 13 of the Statement of Claim, as quoted earlier. In my opinion, all these claims are quantifiable and can be adequately compensated by an award of damages should the Court find in favour of the Plaintiff at trial. Further, as Lord Mcnaghten aptly stated, in *The Commissioners of Inland Revenue v. Muller case* cited above, goodwill is a property which is bought and sold every day. Therefore, its value can be assessed and it can be compensated through damages.

State Counsel Mutale brought to the attention of this Court four foreign judgments to show that Courts will grant an injunction if is established that failure to do so will lead to the destruction or closure of operations of the Plaintiff. However, the said judgments are not binding on this Court, but are merely persuasive. There is no similar judgment in either the Court of Appeal or Supreme Court whose decision would bind this Court. The law as it currently stands in this jurisdiction is as laid down in the celebrated case of *Shell and BP (Zambia) Limited v. Conidaris and Others*[18], where the Supreme Court held as follows: -

> *"A court will not generally grant an injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for by damages, not injury that cannot possibly be repaired."*

Sakala JS., (as he then was), in the case of *Ahmed Abad v. Turning Metals Limited*[19], similarly held that an injunction is inappropriate when damages would be adequate. Therefore, only injury that cannot be adequately atoned for by damages is deemed irreparable and will merit the grant of an injunction. If damages can adequately atone for the injury, then an injunction should not ordinarily be granted. The Supreme Court more recently upheld the principle that an injunction should not be granted if damages would suffice in *Kekelwa Samuel Kongwa v. David Nkhata* cited earlier.

I have no doubt in my mind about the ability of the 1st Defendant, an established financial institution, to pay damages to the Plaintiff in the event that the Plaintiff succeeds at trial. The Plaintiff has not adduced any evidence to prove the contrary. Having found that an award of damages would adequately atone for any injury in this case, going by the Supreme Court decision in *ZIMCO Properties Limited v. LAPCO,* that the question of balance of convenience between the parties only arises if the harm done will be irreparable, and damages will not suffice to recompense the Plaintiff for any harm which may be suffered as a result

of the defendant's action which is sought to restrain, I see no benefit in delving into a discussion of balance of convenience.

A mandatory injunction, in any event, is an extraordinary remedial process which is granted not as a matter of right, but in exercise of sound judicial discretion. State Counsel Simeza cited the case of *Shepherd Homes Limited v. Sandham*[20], where Meggary J. stated at page 349 that the applicant's case has to be unusually strong and clear before a mandatory injunction will be granted. I find the sound ruling in that case persuasive and I adopt it. Contrary to the submission by State Counsel Mutale, I am not persuaded that the Plaintiff's case is unusually strong and clear to warrant the grant of a mandatory injunction.

Having found as I have, I am inclined to dismiss the application for mandatory and prohibitory injunction with costs. The corollary to this is that the ex-parte order of injunction granted on 14th February, 2014, is discharged forthwith.

Leave to appeal is granted.

Dated at Lusaka the **26th** day of **February, 2018.**

W. S. Mwenda (Dr.)
HIGH COURT JUDGE