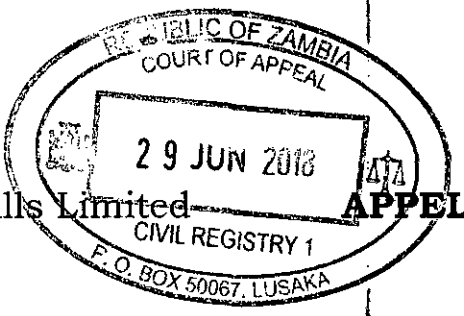
IN THE COURT OF APPEAL FOR ZAMBIA **Appeal No. 47/2018**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



B E T W E E N :

MM Intergrated Steel Mills Limited — **APPELLANT**

AND

African Trading Limited	**1ST RESPONDENT**
Cardinal Distributors Ltd	**2ND RESPONDENT**
Lusaka City Council	**3RD RESPONDENT**
Attorney General	**4TH RESPONDENT**

CORAM : Chisanga JP, Chishimba and Sichinga, JJA
11th April, 2018 and 29th June, 2018

For the Appellant	:	Mr. A. Kasolo and Mr. W. Mubanga of Messrs AKM Legal Practitioners
For the 1st & 2nd Respondent	:	Mr. P. Songolo of Messrs Philsong & Partners
For the 3rd Respondent	:	No Appearance
For the 4th Respondent	:	No Appearance

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court.

CASES REFERRED TO:

1. Shell & BP Zambia Limited Vs. Connidaris & Others (1975) ZR 174
2. Harton Ndove Vs. Zambia Educational Company Limited (1980) ZR 184
3. Turnkey Properties Vs. Lusaka West Development Company Ltd, B.S.K. Chiti (Sued as Receiver) (1984) Z.R. 85
4. Mobil Zambia Limited Vs. Msiska (1988) ZR 56
5. Zambia State Insurance Corporation Limited Vs. Dennis Muliokela (1990) Z.R. 18
6. American Cyanamid Vs. Ethicon (1975) A.C. 396
7. Re Liso (1969) ZLR 6 CA

8. Nkhata and Others Vs. The Attorney General (1966) ZLR 124
9. Augustine Kapembwa Vs. Danny Maimbolwa and Attorney General (1981) ZR 127
10. Mobil Oil Zambia Limited Vs. Ramesh M. Patel (1988-89) ZLR 12
11. Attorney General Transport Limited Vs. Gideon Phiri (1994) S. J. 52 (SC)
12. Industrial Gases Limited Vs. Waraf Transport Limited and Mussah Mogeehaid (1997) S.J. 6 (S.C.)
13. Galaunia Farms Limited Vs. National Milling Company Limited and National Milling Corporation Limited (2004) Z.R. 1 (SC)
14. Nkongolo Farms Limited Vs. Zambia National Commercial Bank Limited Kent Choice Limited (In Receivership) Charles Huruperi (2005) ZR 78
15. Ndongo Vs. Moses Mulyango, Roostico Banda (SCZ Judgment No. 4 of 2011)
16. Preston Vs. Luck (1884(27 C.D.) 497
17. Attorney General Vs. Marcus Kampumba Achiume (1983) Z.R. 1
18. Stripes Zambia Limited Vs. Cinderella Investments Limited and Sana Industries Limited SCZ Appeal No. 200 of 2012
19. Winnie Zaloumis (Suing in her capacity as National Secretary for MMD) Vs. Felix Mutati and Others SCZ Judgment No. 28 of 2016
20. John Mumba and Others Vs. Zambia Red-Cross Society (2006) Z.R. 137
21. Tau Capital Partners Incorporation and Another V Mumena Mushinge and Others (2008) Vol. 2 Z.R. 179 H.C
22. Memory Corporation PLC Vs. Sidhu and Another (2001) 1 WLR 1443 CA
23. Siporex Trade SA v Comdel Commodities (1986) 2 Lloyd's Rep 428.
24. Brink's Mat Ltd v Elcombe CA 1988

LEGISLATION AND OTHER WORKS REFERRED TO:

1. The Zambian Civil Procedure: Commentary and Cases (2017) Lexis Nexis
2. Order 52/1/7 of the Rules of the Supreme Court of England (White Book) 1999 Edition

This is an appeal against the Ruling of the High Court refusing to grant an interim injunction.

The facts that culminated into the Ruling subject of the Appeal are as follows; Appellant had commenced an action against the Respondents seeking the following relief as summarised below;

i. *An order of injunction restraining the 1st and 2nd Respondents from developing structures, carrying out any construction or other related works on its property otherwise known as F/378a/A/1 Lusaka.*
ii. *A declaration that property No. F/378a/A/1 Lusaka on Certificate of Title Number 203790 belongs to it*
iii. *an order to nullify and cancel all subdivisions created illegally on the land,*
iv. *Possession and restitution of land as well as damages.*

According to the supporting affidavit, the Appellant, is the beneficial and registered owner of the remaining extent of Subdivision No. 1 of Subdivision A of Farm No. 387a as per certificate of title dated 10th December, 2012, in extent 12.6 hectares, acquired from Lusaka Building & Transport Limited .

The 1st Respondent is the alleged developer constructing structures at properties known as Subdivisions 86 – 90 which are situated within the Appellant's property. The 2nd Respondent is the registered owner of the newly created Subdivisions 86 – 90 of

Subdivision 1 of Subdivision A of Farm 387a. It was stated that at the time of acquisition of the land by the Appellant there was a public road in existence passing through the Appellant's land. Between 2014 and 2015, the Road Development Agency constructed a bituminous road passing through the Appellant's land. This was done without the Appellant's consent. As a result of the public road construction, the Applicant erected a wall fence against some of its structures and buildings for security reasons.

In May 2017, Lusaka City Council erected a Bill Board within the Appellant's premises advising of change of use of Stands number 86 – 90 Great East Road from residential to commercial. According to the Appellant the above subdivisions are part of *F/378a/A/1 Lusaka* which belongs to it.

A search at the Lands and Deeds Registry revealed that the newly created plots/stands were registered in the 2nd Respondent's names by way of direct first leases on 13th November, 2014 and certificates of title were issued on even date. Assignments of the property in issue were from 5 different individuals to the 2nd Respondent who had paid the sum of ZMW100, 000 as consideration for each portion. The Appellant averred that the 3rd and 4th Respondents had no authority to create, allocate and alienate the

Subdivisions inside its land. Thus the alienation was fraudulent, illegal, null and void.

It was alleged that as a result of the alienation of its land, the Appellant has suffered and continues to suffer great loss. Therefore it would be just and equitable to preserve and maintain the status quo and restrain any further construction or developments of structures on the property. The Appellant stated that damages cannot adequately compensate it as the subject matter in dispute is land.

The 1st and 2nd Respondents in their affidavit in opposition essentially deposed that they purchased the 5 Subdivisions of F/378a (86 – 90) from the registered owners of the properties and title deeds were duly issued by Commissioner of Lands.

Prior to the purchase of the properties by the 1st and 2nd Respondents, Lusaka City Council had approved the allocation of five residential plots in Villa Wanga on 16th September, 2014. On 23rd September, 2014 the Town Clerk of Lusaka City Council wrote to the Commissioner of Lands over the decision to create 5 residential plots in Villa Wanga and advised that the piece of land be subdivided. Five subdivisions were created and sold as per receipts on record. Upon payment, the Commissioner of Lands issued certificates of title in

favour of the individuals, from whom the 2nd Respondent purchased the property in question. Consent was obtained and statutory obligations paid to Zambia Revenue Authority.

In May, 2017, the 1st Respondent purchased the land in issue and applied for change of use to commercial, hence the public notice dated 8th May 2017 placed on the premises. On 31st July, 2017, the 1st Respondent obtained approval from Zambia Environmental Management Agency (ZEMA) to construct a Filling Station. Lusaka City Council had no objection to the construction of a service station at the site. The Energy Regulation Board also approved the application for construction license of the Filling Station on 12th October, 2017.

On 24th November, 2017 there was a letter of complaint to the Lusaka City Council and Commissioner of Lands by the Appellant stating that the land allocated to individuals who in turn sold to the 2nd Respondent was a road reserve bordering their plot on the eastern side and that it was the only access it had to its property.

On the 9th of January, 2018, the Appellant obtained an ex-parte order of interim injunction against the 1st and 2nd Respondent restraining them from developing structures, carrying out any construction or other related works on the subject being

F/378a/A/1/86/87/88/89 and 90. The basis being that the properties have all been created and lie within the remaining extent of property No F/3789/A/1, Lusaka which property belongs to the Appellant.

According to the 1st and 2nd Respondent, the ex-parte injunction obtained by the Appellant was obtained on half-truths because whilst the Applicant alleged that RDA had constructed a road passing through or next to its piece of land, the letter to Lusaka City Council and the Ministry of Lands state otherwise as there is unnamed road access out of Great East Road into the Appellant's property. Their land is not a road reserve as contended by the Appellant.

The Respondents on the issue of damage to be suffered stated that there is no damage to be suffered by the Appellant as the land purchased by the 1st and 2nd Respondents was State land. Further that there is no status quo to be maintained by the grant of the injunction.

In its affidavit in reply, the Appellant maintained that Subdivisions 86 to 90 were created and are situated within its land known as *F/378a/A/1 Lusaka.* In respect to exhibit marked "VNSAP3", the letter by Lusaka City Council on the proposed

subdivision, the Appellant stated that it related to a different property namely property number F/379/A/1.

The learned Judge in the lower Court found that the Appellant had failed or neglected to mention, in its affidavit in support of the application for an ex-parte injunction, that the land in dispute was a road reserve. The failure to disclose the material facts by the Appellant when applying for an interim order of injunction was the basis upon which the lower Court discharged the ex-parte order of injunction.

Being dissatisfied by the Ruling of the lower Court, the Appellant raised the 7 grounds of appeal couched in the following terms;

1. ***The learned Judge misdirected herself by not following the principles as set out in the case of American Cyanamid Vs. Ethicon (1975) Ac 396 in determining the matter before her.***
2. ***The learned Judge below erred in law and fact by delving into the merits and demerits of the case and when she made findings of fact which were unsupported by any evidence, at injunction stage of the case against the principles of law guiding injunctions.***
3. ***The learned Judge erred in law and fact by discharging the exparte order of interim injunction she had earlier granted on the ground that material facts were not***

disclosed when in fact the contrary was the position, that the Plaintiff had fully disclosed the material facts known to him at the time of granting the ex-parte order.

4. ***The learned Judge misapprehended the law and the meaning of full and frank disclosure of material facts by her desiring that the Plaintiff should have discussed in detail the contents of one of the many exhibits before her marked 'BZ5' in the affidavit in support, even when at the time of granting the ex-parte order of interim injunction, this evidence was disclosed and before her.***
5. ***The learned Judge erred by reading in her own words and thus rewriting the contents of the letter exhibited as 'BZ5' in the Plaintiff's affidavit in support of the application for an order of interim injunction and giving the said letter a whole new meaning than that of the author.***
6. ***The learned Judge misapprehended the law and facts and fell into grave error when she failed to distinguish the facts before her and applied the law in the case of Stripes Zambia Limited Vs. Cinderella Investments Limited and Sana Industries Limited Appeal No. 200/2012.***
7. ***The learned Judge fell in grave error in proceeding to discharge the injunction even in light of an application for leave to commence committal proceedings for the alleged disobedience of the ex-parte order of interim injunction she had earlier granted.***

The Appellant filed into Court heads of argument dated 22nd March, 2018. Under ground 1, the Appellant submits that the principles upon which a Court ought to place reliance in determining

an application for an injunction have been discussed in a plethora of authorities including the following; ***Shell & BP Zambia Limited Vs. Connidaris & Others*** [1], ***Harton Ndove Vs. Zambia Educational Company Limited*** [2], ***Turnkey Properties Vs. Lusaka West Development Company Ltd, B.S.K. Chiti*** [3], ***Mobil Zambia Limited Vs. Msiska*** [4] and ***Zambia State Insurance Corporation Limited Vs. Dennis Muliokela*** [5]. The principles enunciated in the above cited cases have their foundation in the case of ***American Cyanamid Vs. Ethicon*** [6].

It was the Appellant's contention that the Ruling subject of appeal did not properly apply the principles laid down in ***American Cyanamid Vs. Ethicon***. Further, that a reading of the Ruling at Page 24 of the Record of Appeal shows that the learned Judge went beyond assessing whether or not there was a serious issue to be tried. The court went further and made a determination on the merits. It found that the letter exhibited as 'BZ5' in the affidavit in support of the application for an injunction revealed that the property in question did not in fact belong to the Appellant. The Appellant went on to argue that a proper reading of the said letter did not warrant the conclusion or finding made by the lower Court. We were referred to the case of ***Re Liso*** [7] where the learned Judge; '***rejected the meaning of the letter in favour of her own meaning for which we can see no basis or authority whatsoever***'.

It was argued by the Appellant that the lower Court ought to have found that there are triable issues. The Appellant had pointed out to the Court the letter in issue. The contents of the letter reveals that the Appellant referred to the road reserve as belonging to it. Therefore, the conclusion following the reading of the letter was perverse as there was no evidence before Court to the effect that the land in question was initially a road reserve as suggested by the lower Court in her Ruling. Further, that the evidence on record does not show that the land in question was offered to any individuals to buy. The Appellant argued that the findings by the lower Court were made without any supporting evidence. We were referred to the following cases on the effect of findings of fact made in the absence of evidence or upon a misapprehension of the facts namely; ***Nkhata and Others Vs. The Attorney General*** [8], ***Augustine Kapembwa Vs. Danny Maimbolwa and Attorney General*** [9], ***Mobil Oil Zambia Limited Vs. Ramesh M. Patel*** [10], ***Attorney General Transport Limited Vs. Gideon Phiri*** [11], ***Industrial Gases Limited Vs. Waraf Transport Limited and Mussah Mogeehaid*** [12], ***Galaunia Farms Limited Vs. National Milling Company Limited and National Milling Corporation Limited*** [13], ***Nkongolo Farms Limited Vs. Zambia National Commercial Bank Limited Kent Choice Limited (In Receivership) Charles Huruperi*** [14], ***Ndongo Vs. Moses Mulyango, Roostico Banda*** [15].

It was the Appellant's contention that the lower Court expected the Appellant to disclose that the land was initially a road reserve and was later offered to individuals to buy when in fact the said information was not true. Further, that the Appellant could not have been expected to disclose material facts which did not in fact exist. The Appellant went on to add that the correct position regarding the land in issue is the fact that the land in issue forms part of the Appellant's land and that the 3rd and 4th Respondents, without its consent, went ahead and alienated the land. This position, according to the Appellant, is a serious matter that ought to be determined at trial. Further, the fact that the land in question was the Appellant's private road reserve was disclosed and shown by the letter in question. The said letter was also exhibited at the time the Appellant made the ex-parte application for an injunction.

The Appellant contended that the lower Court must have been misled by paragraph 33 of the 1st and 2nd Respondent's Affidavit in opposition to the summons for the grant of the ex-parte Order of Injunction in which it was insinuated that the land in issue was merely bordering the Appellant's plot when the correct position is that the construction was being done on the Appellant's road reserve which is on the Appellant's property. It was further contended that

the 1st and 2nd Appellant in paragraph 34 of the said affidavit sought to mislead the Court that the road constructed through the Appellant's property was the same as the Appellant's own road reserve, which was referred to in the letter, when in fact not.

It was argued that the 1st and 2nd Respondents continued to mislead the lower Court in their arguments when they suggested that the property in issue was not the Appellant's but was State land that was next to the Appellant's property. The Appellant further argued that the fact that the parties herein had different claims regarding the land in issue showed that there were issues raised that were suitable to go to trial. In addition, that had the lower Court not been misled by the assertions and arguments by the 1st and 2nd Respondents it would not have come to the conclusions contained in the Ruling subject of the Appeal.

Under ground 2 the Appellant contended that the lower Court erred when it delved into the merits of the case and made findings which were unsupported by evidence. The Appellant was irked by the findings made by the lower Court namely that; indeed the land in question was initially a road reserve, that the land in question was subsequently offered to individuals to buy and that the Appellant had acknowledged that the land in question was a road reserve.

These findings, according to the Appellant, could only have been made in the face of evidence led at trial.

The Appellant argued that even though the guidance of the Court in ***Preston Vs. Luck*** [16] was to the effect that the Court, when determining an application for an injunction, ought to satisfy itself that there are serious questions to be tried at the hearing; the Court is precluded from determining issues that can only be determined at trial as was held in the case of ***Shell & BP Zambia Limited Vs. Connidaris & Others*** [1]. We were referred to a passage from Dr. Matibini's book **The Zambian Civil Procedure: Commentary and Cases, 2017** where the learned author comments on the fact that the Courts when determining an application for an injunction ought not to resolve conflicts of evidence on affidavits or to attempt to decide difficult questions of law which demand detailed argument and careful consideration. The Appellant contended that the findings made by the lower Court were premature.

The Appellant did not address grounds 3, 4 and 5 of the heads of arguments contending that the same have been adequately canvassed under ground 1. The Appellant contended that the Court's analysis of the evidence before it was unbalanced and that the Court merely placed reliance on one exhibit from all the information before

it. We were referred to the case of ***Attorney General Vs. Marcus Kampumba Achiume*** *(17)* where the Supreme Court urged the lower Courts to guard against unbalanced analysis of evidence.

In ground 6 the Appellant argued that there was nothing further to disclose by the Appellant other than what was already before the Court. Further, that the Court could not expect the Appellant to confirm that the land in issue was initially a road reserve, which was subsequently offered to the individuals to buy when this was not factual. The lower Court misapprehended the principle of full and frank disclosure. The cited case of ***Stripes Zambia Limited Vs. Cinderella Investments Limited and Sana Industries Limited*** *(18)* is distinguishable as the facts in the said case reveals that the material facts existed, were truthful and were not disclosed by the Applicant leading to the discharge of the injunction. *In casu* there were no material facts that existed that had not been disclosed by the Appellant. The Court should not have discharged the ex-parte injunction on that basis.

Under ground 7, the Appellant argued that while the ex-parte injunction was still in force the 1st and 2nd Respondents continued to undertake the very activities that the Court had restrained from being undertaken. Consequently the Appellant commenced

committal proceedings which the lower Court did not consider before rendering its Ruling which in effect discharged the injunction. It was argued that the Court ought to have considered the committal proceedings first before the application for the injunction as the committal proceedings are criminal in nature. We were referred to **Order 52/1/7 of the Rules of the Supreme Court of England (White Book) 1999 Edition** which provides that committal proceedings ought to be determined swiftly and decisively. The Appellant also referred to the case of ***Winnie Zaloumis (Suing in her capacity as National Secretary of MMD) Vs. Felix Mutati and Others*** [19]. The Appellant contended that committal proceedings commenced before conclusion of a matter amount to a preliminary issue which ought to be disposed off first. We were referred to the case of ***Post Newspapers Limited Vs. Rupiah Banda (2009) ZR 254*** as authority of this proposition.

The Appellant cited the case of ***John Mumba and Others Vs. Zambia Red-Cross Society*** [20] where the Court held that the remedy of a party whose ex-parte injunction is later dissolved is to appeal against the discharge. Further, that such refusal to grant an injunction will undoubtedly be a fresh application before the full court. The Appellant submitted that the lower Court erred in discharging the

Order of injunction as there was no basis for the discharge; The Court was urged to restore the injunction.

The 1st and 2nd Respondents filed into Court heads of argument dated 6th April, 2018. In response to ground 1 the Respondents argued that Learned Judge in the Court below did not discharge the injunction on the basis of the merits or otherwise of the application. The lower Court discharged the ex parte injunction Order on the ground that the Appellant failed to disclose all material and relevant facts to the court. The Respondents submit that where a party fails to disclose all material and relevant facts including those that may be in favour of the other party, the court is not under any obligation to answer the questions that ought to be addressed in an application for an injunction as opined by the Court in the cited case of ***American Cyanamid Vs. Ethicon*** [6] and a plethora of other cases within our jurisdiction.

The 1st and 2nd Respondents further submit that an injunction is not granted as a matter of right. It is an equitable remedy granted at the discretion of the court. Therefore an applicant must come to court with clean hands. The Appellant breached this principle by failing to make full and frank disclosure of all material facts relevant to the application. The Court was

therefore justified in discharging the injunction without addressing its mind to the questions that a court ought to answer when determining an injunction as guided in ***American Cyanamid Vs. Ethicon*** [6]. Further, that the lower Court was fortified in taking the route it did by a decision of the Supreme Court of Zambia and the provisions of **Order 29/1A/24 of the Rules of the Supreme Court of England (White Book) 1999 Edition**.

The 1st and 2nd Respondents contended that where one party to the action raises the issue of non-disclosure of all material facts at the inter-parte hearing the court must consider the question raised before proceeding to consider the application on its merits. Further, that the court is under an obligation to consider whether or not the applicant has indeed disclosed all material facts relevant to the application. It was submitted that every application for an injunction must disclose all material and relevant facts. The case of ***Stripes Zambia Limited Vs. Cinderella Investments Limited and Sana Industries Limited*** [18] was cited in aid of this proposition.

The 1st and 2nd Respondents argued that the lower Court was justified in discharging the injunction on account the Appellant did not fully disclose material facts. Further that the lower Court

was meant to believe that the Appellant had no road access to its property at all and that the Appellant had been boxed in. The letter appearing on page 99-100 of the Record of Appeal, according to the Respondents, reveals that the Appellant confirmed that there was a road reserve on the eastern side of its plot. Further, that this is in contravention of paragraph 7 of the Appellant's affidavit in support of the application for an injunction in which the Appellant contended that the road reserve was within its plot.

The Respondents contended that it is trite that adjoining neighbours to a road reserve do not own the road reserve and neither do they enjoy a right of first refusal in the event that the road reserve is re-planned and is available for offer for sale. It was further argued that the Court was mandated to determine what facts where material as guided by the Court in ***Tau Capital Partners Incorporation and Another V Mumena Mushinge and Others*** [21].

The Respondents argued that failure to disclose material facts and attempting to mislead the court in the manner the Appellant did at paragraph 7 of its Affidavit in Support of its application for an ex-parte order is sufficient to warrant setting aside the ex-parte injunction order. The Court would further be justified in condemning an erring party in costs and ordering

payment of damages for any harm caused by the injunction. We were referred to a passage from the book entitled, **Zambian Civil procedure: Commentary and Cases Volume 1 Published by Lexis Nexis in 2017** where the learned author discussed the duty upon a party applying for an ex-parte order for an injunction to fully disclose all material facts.

In response to ground 2, the Respondents reiterated that the learned Judge in the court below did not discharge the injunction on the basis of the merits of the application but on the fact that the Appellant did not fully disclose all material facts. Further that the lower Court did not make any findings of fact or delve into the merits of the case when it rendered its Ruling.

In response to ground 3 and 4 the Respondents contended that it is not for the party applying for an injunction to determine what information is material or not. The only duty an applicant has is to ensure a full and frank disclosure of all matters and or material facts relevant to the application. It was submitted that it is up to the Court to decide what material is relevant. The Respondents cited the case of ***Tau Capital Partners Incorporation and Another V Mumena Mushinge and Others*** [21] and the observation by the learned author of the text **Zambian Civil Procedure:**

Commentary and Cases at paragraph 19.6.2 specifically at page 776 of Volume 1 as authority for this proposition.

The Respondents submit that the learned Judge in the court below found that material facts had not been disclosed and proceeded to properly discharge the ex-parte injunction. Further, that the Appellant knew or ought to have known that the issue of ownership of the road reserve was critical and needed a full and frank disclosure to the Court. We were referred to the case of ***Memory Corporation PLC Vs. Sidhu and Another*** [22] where the Court emphasised the need and duty to fully disclose all significant factual and legal aspects of a case. The Respondents contended that owing to the conduct of the Appellant, the court below cannot be faulted for discharging the ex-parte injunction order.

In response to ground 5 and 6 the Respondents argued that the court below properly interpreted the letter in issue using the literal rule of interpretation. Further, that the said letter is self-explanatory and the Judge's interpretation cannot be faulted by the Appellant as it was the Appellant's duty to explain their understanding of the letter to the court as the Court had been moved ex-parte.

It was argued that the court below properly applied the decision in the ***Stripes Zambia Limited Vs. Cinderella Investments Limited and Sana Industries Limited*** [18] relied upon. Further, that there is nothing wrong in the excerpts of the Ruling of the Learned High Court Judge cited in the Appellant's Heads of Arguments because even if the first offerees of the five plots did not purchase their plots, the 1st and 2nd Respondents in fact bought their five pieces of land. Further that the original offerees were not parties to these proceedings for the court below to have been concerned with them.

In response to ground 7, the Respondents stated that they only came to know about the committal proceedings after serving the Appellant with the Record of Appeal and heads of arguments on 23rd March, 2018. Further, that as counsel of record, the Appellant did not communicate to Counsel for the Respondents regarding the alleged continued construction activities on the property in question. In fact, the Respondents were instructed to cease construction activities following the exparte order of an injunction.

It was the Respondents' argument that there is no law that prohibits a Judge from delivering a Ruling on the date allocated for

delivery simply because an application for leave to commence contempt proceedings has been filed. Though the Respondents concede that committal proceedings ought to be attended to with urgency it is argued that there was no prejudice occasioned by the Court proceeding to hear the application for an injunction first given that it was not a guarantee that leave to commence committal proceedings would have been granted by the Court.

It was contended by the Respondents that in fact this ground of appeal is not properly before the Court as the application for leave to commence committal proceedings has not been heard yet.

In response to the Appellant's renewal of the application for an injunction before the Court, the Respondents oppose the said application and relies on its affidavits in the Court below as well as the heads of arguments filed. The Respondents went on to argue that this is not a proper case for the Court to grant an injunction as the prospects of success of the Appellant's claims, at trial, are dim. The Respondents have obtained all licenses needed to operate a fuel station and have since changed the use of the land to which the Appellant did not object. The Respondents added that the Appellant is seeking damages and compensation in its writ of summons which entails that an injunction is an inappropriate

remedy. The Court was urged to decline the sought order and dismiss the appeal.

We have considered the appeal, the heads of argument and authorities cited. The Appellant raised seven grounds of appeal. Ground 1, 2 and 6 will be dealt with together. We shall further deal with grounds 3, 4 and 5 as one as they raise the issue of non-disclosure of material facts.

It is not in issue that the Appellant is the registered proprietor of stand F/378a/1A1 Lusaka. Further that the 2nd Respondent had purchased S/D numbers 86 to 90 from third parties who had been offered land by Lusaka City Council. The 2nd Respondent in turn sold the subdivision numbers 86 – 90 to the 1st Respondent. The 1st Respondent subsequently applied for change of use of land to commercial and commenced construction of a filling station. The Appellant's contention being that subdivisions 86 – 90 are situated within his land.

The law relating to the grant of injunctions is settled, namely right to relief being clear or serious question to be decided at trial, irreparable injury, balance of convenience and maintenance of status quo. The issue is whether the Applicant had satisfied the conditions for the grant of the injunction. We will first tackle the

issue of alleged non-disclosure of material facts by the Appellant to warrant the discharge of the ex-parte order of interim injunction by the court below. The court below on the issue of non-disclosure of material facts held that;

> ***"As can be seen from the arguments advanced by the 1st and 2nd Defendants, an Applicant for an order of interim injunction must give full disclosure of all the material facts, even if they are favourable to the other party. That being the position, it was expected that the Plaintiff in making the application would have disclosed in the affidavit in support of the application that indeed the land in dispute was initially a road reserve which was subsequently offered to individuals to buy, and further state its interest in the said land on the basis of those facts, and why the injunction should be granted.***
>
> ***What was portrayed by the Plaintiff is that the land in dispute forms part of its land, and the 3rd and 4th Defendants without its consent went ahead and alienated the said land. However exhibit 'BZ5' to the affidavit in support of the application is authored by the Plaintiff to the 3rd Defendant in which it acknowledges that the land in dispute was a road reserve. The failure to disclose in the averments in the affidavit, that the land in dispute was a road reserve. The failure to disclose by the Plaintiff when applying ex-parte for the order of injunction. On that basis, this is ground for the discharge of the injunction. Without any further considerations."***

It is trite that where an interim injunction is sought without notice i.e ex-parte, there is a duty on the Applicant to make full and frank disclosure of all relevant facts so that it has all the evidence necessary before it to determine the application. The duty deprives the wrong doer of an advantage improperly obtained. The Applicant must show the utmost good faith and disclose its case fully and fairly. Materiality is a matter to be decided by the

court and not the Applicant. Failure to comply with the duty, the court can set aside an interim injunction at the full hearing. Ultimately, the court has the discretion whether to set aside the interim injunction and take into account all relevant circumstances. The issue is whether there was full and frank disclosure of material facts.

The Appellant in its supporting affidavit at pages 43 – 50 of the record deposed that the newly created subdivisions 86 to 90 of S/D No 1 of S/D A of Farm 387a are all ***"situated within the Appellant's property known as subdivision No. 1 of subdivision A of Farm 387a or property No. F/387a/A/1".*** Paragraph 15, 19, 23 and 24 of the above affidavit states that the subdivisions were created inside the Appellant's land.

The Appellant vehemently argues that it had disclosed in the letter, exhibit marked "BZ5" attached to the supporting affidavit that the land in issue was a road reserve, hence there was full disclosure of material facts. We are of the view that this is contrary to the deposition in its affidavit in support in which the Appellant states repeatedly that the land alienated to the 2nd Respondent by the 3rd and 4th Respondents was inside the Appellant's land.

In our view, though the Applicant made mention of a road reserve where constructions works were underway, we cannot fault the holding by learned Judge that the failure to disclose in the averments in the affidavit, that the land in dispute was a road reserve, shows that material facts in the matter were not fully disclosed. The Appellant omitted to disclose the material facts that the land in dispute was a road reserve or created from a road reserve. The Applicant was evasive on these material facts.

The duty to make full and frank disclosure is wide and the Applicant must put all the relevant facts before it. The Applicant must identify the crucial points for and against the application and not rely on general statements and the mere exhibiting of documents. This duty applies to facts known by the Applicant and facts that would have been know had proper enquiries been made. It is not enough to assume that just because a document is attached to the affidavit in support, it is treated as having been disclosed. See the case of ***Siporex Trade SA v Comdel Commodities***[23]. Where an applicant obtains an ex-parte injunction without full disclosure of material facts, the injunction may be discharged at inter parte. We refer to the case of ***Brink's Mat Ltd v Elcombe CA*** [24] where Balcombe LJ stated that;

"The rule that an ex-parte injunction will be discharged if it was improperly obtained without full disclosure has a two-fold purpose. It will deprive the wrong doer of an advantage improperly obtained... But it also serves as a deterrent to ensure that persons who make ex-parte applications realise that they have this duty of disclosure and of the consequences ... Nevertheless, this Judge made rule cannot be allowed itself to become an instrument of injustice ..."

We will revert back to the issue of whether, discretion ought to have been exercised by the court below to grant a fresh injunction in its place not withstanding that there was non-disclosure when the ex-parte injunction was obtained.

In respect of grounds 3, 4 and 5 we find no merits. Equally we hold the view that there was no misapprehension of the law or meaning of full and frank disclosure of material facts by the court below. Further, the learned trial Judge did not read or import her own words or rewrite the contents of the letter authored by the Appellant itself in respect of the road reserve.

In ground two, the Appellant's contention is that the learned trial Judge delved into the merits and demerits of the case at an interlocutory stage, thereby making findings of fact unsupported by any evidence. The finding of facts being that the land in question was initially a road reserve a fact acknowledged by the Appellant and was offered to individuals to buy. It is argued these findings were premature at this stage.

It is trite that the court in determining an application for injunction is not at this stage concerned with the merits of the main matter or substantive issues. The main claim by the Appellant is a declaration that property F/378a/A/1 Lusaka on certificate of title number 203790 belongs to it, as well as an order of cancelling of all subdivisions created illegally on the land, possession, and restitution.

We are of the view that the learned Judge did not delve into the merits of the case or make any declaration in respect of property F/378a/A/1. Nor did the court make findings of fact unsupported by evidence. We find no merit in ground 2.

The Appellant in ground one contends that the learned Judge below misdirected herself by not applying the principles set out in the case of ***American Cyanamid Vs Ethicon*** on injunctions. Though the arguments under ground one in the heads of arguments are upharzard, the gist is that there are serious questions/issues to be tried or determined. In an injunction, it is the clear right to relief or serious question to be determined that is considered.

Having stated earlier that notwithstanding that there was non-disclosure of material facts when the ex-parte injunction was

obtained, the court has discretion to consider whether to grant a fresh injunction in its place. This discretion is exercised sparingly, taking into account the applicable principles.

We have considered whether the lower court ought to have granted the injunction notwithstanding the non-disclosure of material facts.

The issue is whether the Appellant's right to relief is clear or there are serious questions raised. We are of the view that the right to relief is not clear. Without delving into the merits of the main matter, the subdivision numbers 86 – 90 in issue, appear to have been created and alienated out of land that belonged to Lusaka City Council. The 2nd Respondent was issued with certificate of titles in respect of lots 86 – 90. The 2nd Respondent in turn sold the properties to the 1st Respondent.

On the issue of irreparable injury, we are of the view that damages will suffice as sought by the Appellant. See page 84 of the record namely the statement of claim. We are of the view that the Appellant even after considering the principles enunciated in the ***American Cyanamid*** case had failed to satisfy the requirements for the grant of an interim injunction.

We accordingly dismiss the appeal, with costs to the 1st and 2nd Respondents.

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F. M Chisanga
JUDGE PRESIDENT
COURT OF APPEAL

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F.M. Chishimba
COURT OF APPEAL JUDGE

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D.L.Y. Sichinga
COURT OF APPEAL JUDGE