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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

Appeal No.151/2016

BETWEEN:

ZAMSORT ZAMBIA LIMITED	**1ST APPELLANT**
MUMENA MUSHINGE	**2ND APPELLANT**
AND	
CONSOLIDATED ADVISORY SERVICES	**1ST RESPONDENT**
EDWARD SEFUKE	**2ND RESPONDENT**

CORAM: **Musonda, DCJ, Kaoma and Kajimanga JJS**

On 4th June 2019 and 28th January 2021

For the Appellants: **Mr. C. Magubbwi of Messrs Mugubbwi and Associates**

For the Respondents: **Mr. M. Ndalameta of Messrs Musa Dudhia and Company**

J U D G M E N T

Kajimanga, JS delivered the judgment of the Court.

Cases referred to:

1. **Preston v Luck (1884) 27 ChD 497**
2. **Shell and B.P. Zambia Limited v Conidaris and Others (1975) Z.R. 174**
3. **Harley Street Capital Limited v Chalva Tchigirinski and Others [2005] EWHC 2471 (Ch)**
4. **Energy Venture Partners Limited v Malabu Oil and Gas Limited [2014] EWCA Civ 1295**
5. **Jirehouse Capital v Beller [2008] EWHC 725 (Ch)**
6. **Beck v Value Capital Limited [1976] 2 All ER 113**

7. **Commodity Ocean Transport Corporation v Basford Unicorn Industries Limited "The Mito" [1987] 2 Lloyd's Report 197**
8. **American Cyanamid v Ethicon Limited [1975] 1 All ER 504**
9. **In Re DPR Futures Limited [1984] 1 WLR**
10. **Bloomsbury International Ltd (in administration) v Martin Alan Holyoake [2010] EWHC 1150**
11. **Fortress Value Recovery Fund I LLC and Others v Blue Skye Special Opportunities Fund LP (A Firm [2012] EWHC 1486 (Comm)**
12. **Kafue District Council v James Chipulu (1995-1997) Z.R. 190**
13. **Sinclair Investments Holdings SA v Carlton Ellington Cushnie and Others [2004] EWHC 218**
14. **Doctor J. W. Billingsley v J. A. Mundi (1982) Z.R. 11**
15. **Geoffrey Chumbwe v Keith Mukata (2015) 1 Z.R. 210**
16. **Anderson Kambela Mazoka and 2 Others v Levy Patrick Mwanawasa and 2 Others (2005) Z.R. 138**
17. **Rosemary Chibwe v Austin Chibwe (2001) Z.R. 1**
18. **Peter Militis v Wilson Chiwala (2009) Z.R. 41**
19. **Turnkey Properties v Lusaka West Development Company Limited & Others (1984) Z.R. 85**

Legislation and other works referred to:

1. **Rules of the Supreme Court, 1999 Edition; Orders 29/L/23 and 29/L/29**
2. **Halsbury's Laws of England (4th Edition) Volume 10; paragraph 715**

Introduction

[1] This is an appeal from a ruling of the High Court (Mulanda, J.) delivered on 20th April 2016 which ordered the appellants to provide security in the sum of US$200,000.00 as a condition for granting an injunction against the respondents.

[2] The appeal discusses the requirements that are to be met before a court can order a party to fortify an undertaking as to damages for the grant of an interim injunction.

Background

[3] The facts of the case are that the appellants (plaintiffs in the court below) issued a writ of summons against the respondents (defendants in the court below) seeking:

[3.1] An order and declaration that the defendants are not shareholders in the 1st appellant company;

[3.2] An order and declaration that the defendants do not have any beneficial or possessory rights and interest in the issued shares of the 1st plaintiff;

[3.3] A declaration and order that the verbal and/or written agreement between the parties relating to [the] defendants' acquisition of 20% shares in the 1st plaintiff was discharged by reason of non-performance;

[3.4] An order that the defendants have no legal right to meddle in the 1st plaintiff's commercial and business transactions with Ortac Resources Limited and/or any other third parties.

[3.5] An order of injunction restraining and prohibiting the defendants from interfering with the plaintiffs' internal and external dealings, inter se its members and with third parties, including Ortac Resources Limited; [Emphasis added]

[3.6] Costs;

[3.7] Any other or further reliefs the court may deem fit.

[4] The appellants filed a summons for an order of interim injunction whose affidavit in support disclosed that sometime in 2014, the parties verbally negotiated and agreed that the first respondent was going to render its professional mining consultancy and advisory services to the first appellant with respect to the first appellant's mineral tenement subject of a small mining licence number 8248 – HQ SML, commonly known as Kalaba Mine in the North-Western Province of the Republic of Zambia. It was alleged that the parties generally and specifically agreed that the respondents, using their professional expertise and connections, were going to: (i) identify and secure investors for the first appellant's Kalaba Mine project; and (ii) facilitate, arrange and ensure the up-grading of the first appellant's mining licence from a small scale to a large scale one. The parties further agreed that in consideration of the same, the respondents were going to earn twenty per centum (20%) of the first appellant's issued shares.

[5] The appellants contended that the verbal agreement was reduced into a written agreement which the parties intended and agreed to sign, but was never signed by reason of the

respondents deliberate and flagrant neglect, refusal and/or failure to sign. Contemporaneously, the parties through a series of verbal and email communications agreed that in default of the respondents' earning 20% shareholding in the first appellant company through provision of the agreed services, they would only acquire the shares through an outright purchase at a consideration of US$50,000.00. However, the respondents breached the agreement by reason of failure to perform and they equally refused, neglected and/or failed to pay the consideration of US$50,000.00 for the subject shares. By reason of this breach and their failure to pay the consideration for the shares, no share transfer forms were executed and registered for the benefit of the respondents. In the premises, the respondents have never been and are not shareholders in the first appellant.

[6] The affidavit evidence also disclosed that sometime in March 2015, the appellants entered into an exclusivity agreement with a foreign listed company known as Ortac Resources Limited ("Ortac"), for a potential subscription and/or purchase of shares in the first appellant company by the said Ortac, which

agreement was announced on the London Stock Exchange and published on their website and the internet in general. Subsequently, by an email dated 1st April 2015, the second respondent wrote to the first appellant's shareholders and directors claiming that the appellants should have procured his written consent before signing the exclusivity agreement and that in the absence of such consent, a fraud had been committed. It was contended, however, that no such prior written consent was required to be procured or obtained from the respondents, as they are neither shareholders nor directors in the first appellant. Further, that the appellants ensured that all requisite procedures of the company as provided and contained in the articles of association were observed and adhered to before and upon signing the exclusivity agreement and that, as such, no breach or illegality was committed when they entered into and signed the exclusivity agreement.

[7] It was further revealed that on 7th April 2015, the second respondent, again by email, wrote to the shareholders and directors of the first appellant company and threatened to

jeopardise the viability and performance of the exclusivity agreement in the following terms:

> *"I wish to advise that it is in everyone's best interest that you respond today, no later than 16:00 hours. Your failure to provide me with the required explanation may set-off a series of irreversible activities that could imperil the transaction in question."*

[8] The appellants contended that the respondents' conduct and actions were inimical and prejudicial to the interest of the first appellant and that they bore the undoubted capacity and potential of frustrating the exclusivity agreement and any such other investment agreement that the appellants may negotiate and enter into with third parties. That should the respondents imperil the exclusivity agreement in the manner threatened as well as any other third-party investment agreements the appellants will negotiate and enter into, the appellants shall suffer loss and damage. According to the appellants, it was extremely apparent that the respondents were determined to adversely disrupt the operations of the first appellant, and were extremely intent on unscrupulously sabotaging the exclusivity agreement and any other investment and financing deals the appellants would negotiate and enter into. That the peril, injury

and damage that would result from the respondents' destruction of the first appellant's business and commercial transactions with the said Ortac and any other would be investors, would include erosion of the appellant's business integrity and reputation as well as scandalising their Kalaba Project to a wide and cross section of investors and financiers locally and internationally. Essentially, the damage would entail that the appellants and their project were not going to attract investment and finances.

[9] Consequently, the appellants have suffered and continue to suffer damage which cannot be cured by an award of damages as the stress and anguish the respondents are causing the appellants cannot be quantified in monetary terms. Similarly, the damage and injury that would result from the frustration of the Ortac agreement and loss of investment and investor confidence cannot be atoned by an award of damages. The appellants therefore, contended that they have a good arguable case on the merits and that their right to relief as against the respondents was very clear and thus the need for an order of injunction to protect their interests.

[10] In response, the respondents averred in their affidavit in opposition that they never signed the draft agreement because they never agreed to it. That during a meeting held on 9th October 2014, it was agreed that the respondents had a 20% interest in the small mining licence number 8248-HQ-SML and prospecting licence number 19906 HQ-LPL (together called the "target assets"). This interest arose as a result of the respondents having injected the sum of $70,000.00 of which $54,000.00 was the consideration for the acquisition of the 20% interest and the balance was to be added to the then outstanding debt of K100,000.00 which consisted of all the appellants' borrowings from the respondents before 14th June 2014. A video recording of the meeting and transcript was exhibited by the respondents. It was alleged that it was orally agreed by the parties at that meeting that the 20% interest in the target assets would not be transferred without obtaining the respondents' consent. In this regard, the respondents' consent was not to be sought as directors or shareholders but in recognition of the respondents' 20% interest in the target assets. Further, that it was to be agreed in the days that

followed whether the 20% interest would be denoted by shares in the first appellant or by expressly noting the interest on the target assets, but this was not done.

[11] The respondents also stated that during a separate meeting held immediately after the one referred to above, it was further agreed that the respondents had acquired 20% shares in the first appellant. However, it was agreed that an account would have to be rendered by the appellants to the respondents. A video recording of the meeting and a transcript were also exhibited by the respondents. The issue during this second meeting was that the amount was actually $54,000.00 and that 50 minutes into the said video, it was agreed by the parties that an account would be rendered by the appellants to determine whether money previously provided by the respondents, which was to be reimbursed, would exceed or fall short of the said US$54,000.00. If the amount would be found to be less than US$54,000.00, a time frame would then be fixed for payment of the balance. However, the appellants had to date not rendered an account, and this was the only reason money had not been paid, because it was not known whether there was anything

owing at all. In addition, the timeline within which to pay had not been determined.

[12] The respondents denied that they were to provide services to the first appellant as the appellants had already hired a consultant to achieve the objectives which they were alleging the respondents were required to meet. Moreover, the respondents were only going to make their expertise available to the appellants upon acquiring 20% shares in the first appellant and not before. They contended that while they were entitled to 20% shares in the first appellant, they neither held the said shares nor had in their possession the target assets. Consequently, they were not in a position to alienate, waste or damage the shares in question, or the target assets. Conversely, the appellants, by their own admission, had signed an exclusivity agreement and were threatening the respondents' interest in the target assets. In the circumstances, the respondents crave protection from the court, of their interest in the target assets, and the 20% shares in the first appellant so as to further the rights that the second respondent was trying to assert in his emails to the appellants.

[13] The respondents asserted that the appellants did not have an unqualified right as regards the target assets as they had no claim to the respondents' 20% interest in the target assets and that they ought to be restrained from interfering with the said interest. Further, the respondents were in a position to meet an order for damages in the event that the Court considered it necessary. On the other hand, the appellants did not have the means to pay the respondents for the losses that they would suffer if the injunction was maintained.

[14] Further, that since the respondents were entitled to a 20% interest in the target assets, the status quo would be irreversibly altered if the injunction was granted in that the appellants would be able to proceed in their dealings as if the respondents' interest in the target assets does not exist. The respondents were fearful of such an outcome as they contended that the appellants do not have any mineral tenements and would therefore, not be able to make restitution. Furthermore, no amount of money would adequately compensate the respondents if their interest in the target assets was disposed

off under the guise of an injunction. As such, any undertaking by the appellants to pay damages suffered because of the injunction made in these proceedings would be worthless.

[15] In their affidavit in reply, the appellants reiterated that the draft agreement which refers to 20% equity in the first appellant was not signed on account of the second respondent's deliberate neglect, failure or refusal to sign the same on the terms discussed and agreed to by the parties. The respondents' version of events was misconstrued in so far as the acquisition of 20% interest in the target assets was concerned, as the discussed and agreed position was for acquisition of 20% equity by the respondents in the first appellant, which they failed to pay. In any event, the acquisition in the manner postulated by the respondents was and is legally untenable as the respondents have categorically refused that they at any time wanted to have 20% shareholding in the first appellant and therefore they cannot, under the applicable law claim 20% entitlement in the target assets.

[16] The appellants went on to dispute the authenticity and credibility of the two video recordings exhibited by the respondents. Until the date of deposing to their affidavit, the respondents did not produce and give the appellants copies of the video recordings. Therefore, their authenticity and credibility are disputed and the appellants were of the strong view that the recordings had substantially been edited and doctored to suit the respondents' position.

[17] The appellants asserted that the respondents' representation of providing expert and consultancy services to the first appellant aimed at attracting investment was made as a precursor to the respondents' entry into and acquisition of 20% equity in the first appellant's shareholding. Further, that the respondents are not entitled to 20% shares or any other stake in the appellants' assets as they neither paid for the shares nor did the parties have a definitive agreement in place relating thereto as admitted by the respondents. In any event, the respondents did not have a bonafide claim against the appellants at this stage as all the monies which were advanced to the appellants by the respondents have since been repaid.

[18] The appellants contended that in the unlikely event that the respondents had 20% entitlement in the appellants shareholding and or mineral rights, the exclusivity agreement that the respondents intend to sabotage would not in any way affect their entitlement. The first appellant has 100% shares and, therefore, the exclusivity agreement which targets 33% shareholding would be on the remaining 80% shares of the first appellant, exclusive of the 20% that the respondents were wrongly claiming. Consequently, the status quo is that the respondents are not shareholders in the first appellant. Therefore, the exclusivity agreement which is exclusive of the respondents' perceived and non-existent stake in the first appellant should be protected by an order of injunction. Lastly, the appellants contended that they were of sufficient means and capacity to perform their obligations under the undertaking to pay the respondents damages should it later occur that the injunction should not have been issued.

Consideration of the matter by the High Court and decision

[19] After considering the affidavit evidence and arguments of both parties, the learned trial judge found that the appellants' right

to relief was clear as the respondents' shareholding in the first appellant was not certain since they never signed the agreement that would have entitled them to hold the 20% shares in it. In her view, the appellants' affidavit evidence had shown that the parties had agreed that the respondents, using their professional expertise and connections, were going to, among other things, identify and secure investors for the first appellant's Kalaba Mine project and facilitate, arrange and ensure the upgrading of the first appellant's mining licence from a small scale to a large scale one. That although this verbal agreement was reduced into a written agreement which the parties intended and agreed to sign, they never signed it because of the respondents' refusal or failure to sign it.

[20] She noted that the parties through a series of verbal and email communications agreed that in default of the respondents earning 20% shareholding in the first appellant company through provision of the aforesaid services, the respondents were only going to acquire the shares through an outright purchase at a consideration of US$50,000.00. The respondents, however, breached the agreement by not introducing or

facilitating, the introduction of any financiers or investors to the appellant and also failing to arrange and facilitate the upgrading of the licence into a large scale one. Additionally, the respondents failed to pay the consideration of US$50,000.00 for the subject shares. As a result of the respondents' failure to sign the written agreement and breach of the verbal agreement and their failure to pay consideration for the shares, no share transfer forms were executed and registered for the benefit of the respondents. Consequently, she concluded that the respondents had no legal right to interfere with the appellants' dealings with third parties, particularly Ortac.

[21] She reasoned that since the respondents did not sign the written as well as the verbal agreement entered into by the parties, the issue of them holding the 20% shares in the first appellant is questionable and needed to be determined by the court at the hearing of the substantive matter. That being the case, the question of the need for the appellants to procure the written consent of the second respondent before signing the exclusivity agreement, did not arise at this stage. As such, no fraud had been committed by the appellants.

[22] The trial judge opined that there was a situation in this case that needed to be preserved before the substantive matter was disposed of, by the issuance of an injunction. This situation, according to her, was the exclusivity agreement between the appellant and Ortac for a potential subscription or purchase of shares in the first appellant company, which was announced on the London Stock Exchange.

[23] Guided by the case of *Preston v Luck*[1], she found that there was a serious question to be tried. She opined that the appellants had already suffered and continue to suffer damage which cannot be cured by an award of damages because the stress and anguish that the respondents were causing the appellants cannot be quantified in monetary terms. In addition, the damage and injury that would result from the frustration of the Ortac Agreement and loss of investment and investor confidence cannot be atoned by an award of damages. The appellants, therefore, had a good arguable case on the merits and their right to relief as against the respondents was very clear.

[24] As to the contention by the respondents of the exclusivity period

having already expired and therefore, that the entire premise on which the injunction was sought no longer existed, the learned trial judge noted that in terms of clause 2(a) of the exclusivity agreement, the exclusivity period was as between Ortac and the first appellant, a period within which the first appellant was not allowed to hold any discussion or negotiations with any other party. That according to the exclusivity agreement, the relationship between Ortac as an investor in the first appellant subsisted beyond 27th September 2015 as there was provision in clause 2(a) as read with clause 2(d) of the exclusivity agreement that there may be extension of the exclusivity period under the circumstances specified in those clauses. She accordingly found that the arrangement between the first appellant and Ortac was worth protecting by way of an injunction because the effect of Ortac's investment in the first appellant, could not be quantified in damages as the respondents' threats to imperil the investment agreement between the first appellant and Ortac could not be atoned for by damages.

[25] The learned trial judge also found that since the respondents did not execute the agreement intended to sell them 20% shares; did not pay for those shares and no shares were registered as transferred to them; and further, there being no written instrument transferring those shares, the appellants had an arguable claim against the respondents' claim of entitlement to 20% of the target assets. It could not therefore, be argued that owning of shares by Ortac in the first appellant would jeopardise or disadvantage the respondents so as to justify a refusal of the grant of an injunction.

[26] As to whether damages would be adequate for the appellant if the injunction was refused, the learned trial judge observed that the second respondent made it clear in his email to the appellants dated 7th April 2015 that the respondents' intended saboteur actions would set in motion a series of irreversible activities that would imperil the Ortac transaction. She, therefore, found that the respondents had in essence admitted that the effect of their threatened action would be irreparable as it would bring about a series of irreversible activities. Further, since Ortac is a London Stock Exchange listed company and the

transaction the respondents intend to imperil was announced on the said stock exchange, the destruction of the transaction by the respondents would have far and wide irreparable damage which an award in damages cannot atone.

[27] Also relying on the case of *Shell and BP Zambia Limited v Conidaris and Others*[2], the trial judge found that an injunction was necessary to protect the appellants from irreparable injury likely to be occasioned by the respondents which would be substantial and never be adequately remedied or atoned for by damages. She then ordered the appellants to provide security in the sum of US$200,000.00 requested by the respondents in their skeleton arguments, to fortify their undertaking to pay damages should the appellants be found after trial not to have had a good case against the respondents. It was further ordered that this amount be paid into court as a condition for granting the injunction.

The grounds of appeal to this Court

[28] Unhappy with the said orders, the appellants now appeal to this

court on three grounds as follows:

[28.1] The court below erred both in fact and law when it adjudged simpliciter on page R54 of its ruling that considering the nature of this case, I order that the Plaintiffs provide security to fortify their undertaking to pay damages without disclosing the circumstances and indeed in the absence of any circumstances justifying an order for fortification of damages.

[28.2] The judge in the court below erred in fact and law when she ruled that the sum of USD200,000.00 be paid into court by the appellants as security and fortification on the undertaking for the grant of the injunction by mere adoption of the amount suggested by the defendants and without making an independent inquiry and or assessment in the adequacy or inadequacy of the security.

[28.3] Further and in the alternative, the court erred in ordering the astronomical sum of USD200,000.00 as security or fortification for the grant of the injunction which sum far [exceeds] the sum of USD70,000.00 the defendants allege to have invested in the [1st] plaintiff.

[29] Both parties filed heads of argument. In arguing ground one, Mr. Magubbwi, the learned counsel for the appellants contended in the appellants' written heads of argument that the ruling of the court below relating to fortification of damages stems out of the respondents' skeleton arguments where it was submitted as follows:

"If however this Honourable Court is inclined to grant the plaintiffs an injunction, this case is appropriate for an order that the plaintiffs'

undertaking as to damages be fortified in the sum of USD200,000 by payment of a bond or other financial security."

[30] He pointed out that the respondents' affidavit in opposition to the application for an order of injunction did not aver anywhere that the appellants should provide fortification of US$200,000.00 upon its undertaking to pay damages by way of a payment into court or a bond. Neither did it depose to any grounds or circumstances warranting the grant of an order for fortification of damages.

[31] For the legal doctrine of fortification of damages, counsel referred us to Order 29/L/29 of the Rules of the Supreme Court, 1999 Edition (RSC) and submitted that before granting an order in fortification of damages a court should inquire whether it is a proper case for such an order. In resolving its inquiry, the court is required to investigate or interrogate whether; (a) there is a likelihood of a significant loss arising as a result of the injunction and (b) there is a good basis for belief that the undertaking will be insufficient to atone the loss likely to arise.

[32] According to counsel, the approach to be taken by a court in the

above inquiries was considered in the English case of *Harley Street Capital v Tchigirinski*[3] where Hamblen J prescribed the test for fortification of a cross undertaking for damages as follows: A defendant seeking fortification must show that the court can make an intelligent estimate of the likely amount of loss which a defendant might suffer because of the injunction; a sufficient risk of loss; and that the risk was caused, or would be caused, by the grant of injunction. This test, counsel went on, was affirmed in the case of *Energy Venture Partners Limited v Malabu Oil and Gas Limited*[4] where Tomlinson LJ approved Briggs J's summary of the three relevant principles in *Jirehouse v Beller*[5] as follows:

> *"Broadly speaking, they require an intelligent estimate to be made of the likely amount of any loss which may be suffered by the applicant for fortification (here the defendants) by reason of the making of an interim order. They require the court to ascertain whether there is a sufficient level of risk of loss to require fortification. They require that the loss has been or is likely to be caused by the granting of the injunction."*

[33] Applying the foregoing principles to the present case, counsel argued, the affidavit in opposition does not reveal that the respondent disclosed any material suggesting that the grant of

the injunction would create some sufficient level of risk of monetary or financial loss upon it. Secondly, the respondents' affidavit failed to disclose any identifiable loss it was going to suffer as a result of the injunction. That the respondents' only averment was that they purportedly paid a sum of US$54,000.00 for the alleged acquisition of 20% interest in the target asset and it was feared that the appellants may not have any other mineral tenement should the target asset be disposed of. However, counsel argued, the respondents had been repaid the said sum of USD54,000.00. Therefore, the respondents were not exposed to any real or apparent loss meriting fortification of the appellants' undertaking.

[34] Counsel also contended that the respondents did not present the court below with any material that would have allowed it to make an intelligent estimate of any loss that was going to result by reason of the injunction. It was submitted that the respondents did not make out a case for any one of the three principles preceding the application and or grant of a fortification order. Further, the court below was on a wrong trajectory when it merely said it had granted the order based on

the nature of the case as the grant of the order is not simpliciter based on the nature of the case but rather, on established legal principles and the existence of material facts as guided in the *Malabu*[4] case.

[35] In arguing ground two, it was contended by counsel that there was an obligation on the respondents to place material or facts before the court below that would allow it to make an intelligent estimate of the likely loss which might result from the injunction and that this was not done.

[36] It was his contention that in total disregard or lack of knowledge of the legal principles, the court below proceeded to adopt the sum of US$200,000.00 which was conjecturally mooted by the respondents. This approach, he argued, did not represent any action of entrenching itself in an exercise of making out an intelligent estimate of the "but for" the injunction loss that the respondents were going to be exposed to. That at the least, the court was required to ventilate how it came to agree with the sum of US$200,000.00 as appropriate fortification. As the court

failed to do so, it fell into serious factual and legal error and should accordingly be faulted.

[37] In advancing ground three, counsel stated that in the extremely unlikely event that this court was to agree with the judge in the court below that an order of fortification was necessary in this case, it was submitted in the alternative, that the sum of US$200,000.00 was outrageous and obnoxious. He reiterated that the respondents' alleged investment in the first appellant was the sum of US$54,000.00 which was paid back. Relying on the *Malabu*[4] case, he argued that there was a serious mismatch in the order of the court below of a fortification of US$200,000.00 on a principal sum of US$54,000.00. That at the most, the fortification could have been and should not have exceeded the sum of US$12,000.00 being interest on the money for the anticipated duration of the proceedings estimated at two years. Further, given the fact that the money was paid back prior to the order, the respondents were not exposed to any real time value loss of the money and a zero-amount fortification order thus meets the justice of the situation. Counsel

accordingly contended that the entire fortification order of the court below should be revoked with costs to the appellants.

[38] In concluding his arguments, counsel submitted that Order 29/L/29 RSC creates a requirement or impression that a defendant should apply for fortification and it is in the supporting affidavit that the facts satisfying the three stated principles should be disclosed. He argued that there was no such application in this matter and thus the lower court did not have jurisdiction to make an order for security or fortification.

[39] In response to ground one, the learned counsel for the respondent, Mr. Ndalameta submitted in the respondents' heads of argument that the decision whether or not to fortify an undertaking as to damages is a matter of discretion and that the exercise of discretion by the learned trial judge in one way or another ought not to be interfered with ordinarily. The case of *Beck v Value Capital Limited*[6] was cited in support. Counsel contended that the court below did not err in principle when it ordered that the appellants' undertaking as to damages should be fortified. He referred us to the case of *Commodity Ocean*

Transport Corporation v Basford Unicorn Industries Limited, "The Mito"[7] where fortification was explained as follows:

> *"When such security is originally sought it is sought as a condition for the grant of the injunction, in other words, the plaintiff is told: "if you want this injunction you have got to pay the price by fortifying the undertaking as to damages. The plaintiff can then either agree or disqualify himself from obtaining the injunction."*

[40] This, he argued, is precisely what happened to the appellants in the court below. Relying on the case of *American Cynamid Co. v Ethicon Limited*[8], he submitted that ordering fortification of damages is an aspect of dealing with the balance of convenience. Thus, by imposing a condition that the appellants should pay $200,000.00 for the injunction to be granted, the lower court was simply revealing a finding that if the respondents were to be successful after trial, the appellants would not be in a financial position to meet their undertaking as to damages, assuming damages would be an adequate remedy for the respondents. That the alternative open to the lower court was to reject the appellants' application for an injunction. He referred us to the case of *In Re DPR Futures*

Limited[9] on the explanation of the relationship between the balance of convenience and fortification of damages.

[41] It was therefore, counsel's contention that if fortification of the appellants' undertaking is taken away, that would affect the balance of convenience so that it necessarily follows that the injunction is discharged. According to counsel, the lower court did not simply decide that fortification should be provided; the decision was part of the reasoning applied in granting the injunction. As such, the fortification and the injunction cannot be divorced from each other. He argued that the court did not want to potentially leave the respondents uncompensated. The case of *Bloomsbury International Limited (in administration) v Martin Alan Holyoake*[10] was cited in support of this argument.

[42] It was also submitted that courts tend to order fortification of a cross undertaking in damages even at ex-parte stage and that the showing of a sufficient risk of loss is an issue for further fortification. That the respondents did provide evidence on oath of the appellants' precarious debt position of owing $450,000.00 to various third parties and this evidence was contained in the

appellants' own affidavit in support of the application for an injunction showing a total debt of $600,000.00. Counsel contended that it is not practical, to suggest as the appellants do, that a separate application for fortification of an undertaking should follow after an injunction is granted. He referred us to Order 29/L/29 of the RSC which, according to him, seems to infer that a court that would already have granted an injunction without any conditions, would be functus officio in that regard. Therefore, it was contended, it is appropriate that at the point that the provisional ex-parte order is being confirmed or discharged, the court expresses any conditions to be attached and reliance was placed on the case of *Fortress Value Recovery Fund I LLC and Others v Blue Skye Special Opportunities Fund LP (A Firm)* [11].

[43] In response to ground two, counsel submitted that it is not correct to allege that the lower court did not address its mind to the adequacy or inadequacy of the security because it had a hearing and delivered a ruling. He added that the argument in relation to fortification was filed and served on the appellants and that the skeleton arguments containing this issue were

relied on at the *inter partes* hearing. He disagreed with the appellants' position that some sort of further inquiry by the learned trial judge beyond the hearing itself was necessary as litigation would never end if that were the case. According to counsel, the appellants were represented at that hearing and needed no further invitation to make representations in relation to the $200,000.00 suggested by the respondents and that the appellants did not counter the argument on fortification in any way. Neither did they suggest any smaller sum. In addition to attending the hearing, the appellants filed skeleton arguments in support of their application after receiving the respondents' arguments in opposition.

[44] It was argued that while the damages that the respondents would suffer have not been specified, it is apparent that they will be suffered and, in this regard, this Court has held that an intelligent guess would suffice. *Kafue District Council v James Chipulu*[12] and the English case of *Sinclair Investments Holdings SA v Carlton Ellington Cushnie and Others*[13] were cited in support of the argument.

[45] Counsel contended that the lower court made a determination and therefore, there was no need for a further inquiry.

[46] In opposing ground three, counsel stressed that the appellants sat by and watched events unfold without objecting or opposing the argument that $200,000.00 should be paid in fortification of damages. He also submitted that there is nothing in the *Malabu*[4] case to support the appellants' contention that there is some sort of formula to be applied as the determination in that case turned on the peculiar facts. What was being considered was the value of the assets that had been frozen, and how the applicant could not use them. However, in the present case, it is an oversimplification to state simply that because $70,000.00 was invested by the respondents the fortification cannot exceed that sum.

[47] He contended that the whole reason an investment is made is to derive a benefit that exceeds what has been invested and that to expect that fortification cannot, therefore, exceed the investment amount is unrealistic. Further, that the payments allegedly made by the appellants of K235,000.00 at an

unknown exchange rate and $35,000.00 do not address the investment expectation of the respondents.

Consideration of the appeal and decision of the Court

[48] At the hearing, counsel for the respective parties stated that they were relying on their written heads of argument. They both tried to orally augment them briefly, but substantially regurgitating their written heads of argument. It is consequently unnecessary to reproduce their oral arguments here.

[49] We have considered the record of appeal, the ruling appealed against and the arguments of the parties. We shall deal with the three grounds of appeal together as they are interrelated. They all attack the propriety of the order made by the trial judge requiring the appellants to fortify their undertaking in damages in the sum of US$200,000.00.

[50] At pages R53 – R54 of the ruling subject of this appeal, the trial judge concluded as follows:

> *"Therefore, relying on the case of Shell and BP Zambia Limited v Conidaris and Others (7), I find that in this case an injunction is necessary to protect the plaintiffs from irreparable injury likely to be*

occasioned by the defendants, as argued by the plaintiffs, and which in my view, would be substantial and never be adequately remedied or atoned for by damages. Considering the nature of this case, I order that the plaintiffs provide security to fortify their undertaking to pay damages should the plaintiffs be found, after trial of this matter, not to have had a good case against the defendant, in the sum of US$200,000.00 asked for by the Defendants. This amount should be paid into court as a condition for granting this injunction." [Emphasis added]

[51] We discern from the portion of the ruling quoted in the preceding paragraph that what inspired the trial judge to order the appellants to provide security to fortify their undertaking to pay damages was, in her own words, '... the nature of this case' without disclosing or elucidating the specific nature of the case which justified the appellants being ordered to fortify their undertaking in the sum of US$200,000.00. Needless to emphasise, we have stated time without number that every decision made or conclusion reached by a court must be backed by reasons. It should never be based on conjecture.

[52] It is trite that an order granting an interlocutory injunction may

be made either unconditionally or on such terms and conditions as the Court thinks just. In this regard, Order 29/L/23 RSC states that:

> *"In American Cyanamid v. Ethicon Ltd [1975] A.C. 396; [1975] 2 W.L.R. 316, HL, Lord Diplock explained (at 406 and 321) that, where a plaintiff is granted relief by way of interlocutory injunction, the practice is (and has been since at least the middle of the nineteenth century) to make this subject to a condition in the form of the plaintiff's undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it subsequently transpires that it ought not to have been granted, for example, if the proceedings are discontinued, or if the injunction is discharged before trial, or "if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do".... As an extra condition, the plaintiff may be required to fortify the undertaking by giving security (see further para. 29/L/29, below)."*

[53] Order 29/L/29 goes on to state as follows:

> *"In a proper case, the court may impose a condition to the effect that the Plaintiff's undertaking should be fortified by his giving security by the bond of an insurance company or by payment into court or by some other means, for example, by payment to the Applicant's Solicitor or to the Solicitors of each party jointly to be held pending further order (Baxter v. Claydon [1952] W.N. 376 and Practice Direction (Mareva Injunctions and Anton Piller Orders) [1994] 1 W.L.R. 1233 (see Vol. 2, Section 2C, paras 2C-42 et seq.) In these circumstances, unless the Plaintiff is willing and able to provide the security the injunction does not go.*

A defendant should apply for the security at the time when the injunction is granted and the undertaking is given. The Court has no power subsequently to impose such an additional term on the grant of an injunction (Commodity Ocean Transport Corp. v. Basford Unicorn Industries Ltd, The "Mito" [1987] 2 Lloyd's Rep. 197).

Before an application to fortify an undertaking can succeed a likelihood of a significant loss arising as a result of the injunction and a sound basis for belief that the undertaking will be insufficient must be shown (Bhimji v. Chatwani; Chatwani v. Bhimji (No. 2) [1992] 1 W.L.R. 1158; [1992] B.C.L.C. 387)." [Emphasis added]

[54] From the foregoing provisions of Order 29/L/29 RSC, it is as clear as crystal that in order for a court to impose a condition for fortification of damages on a plaintiff, an application should have been made by the defendant to that effect at the time the injunction is granted. The facts before us reveal that no such application was made by the respondents in the present case. As rightly pointed out by the appellants, the order for fortification of the undertaking in damages in the sum of USD200,000.00 imposed on the appellants by the lower court emanated from a request made by the respondents in form of an alternative prayer in their skeleton arguments in opposition to the summons for an injunction. We must underscore the

point that skeleton arguments cannot be a substitute for a formal application as envisaged in Order 29/L/29 RSC. As we see it, the lower court had no jurisdiction to entertain this request as it should have been brought by the respondents by way of a formal application. That is to say, through a summons and an affidavit in support.

[55] Had the correct approach been adopted by the respondents, they would have had to prove, through affidavit evidence, a likelihood of a significant loss arising as a result of the injunction and a sound basis for the belief that the undertaking would be insufficient, in order to succeed in their application. Quite clearly, the respondents omitted to provide any such proof in the present case contrary to the requirements set out in Order 29/L/29 RSC.

[56] Our view therefore, is that the learned trial Judge fell into error when she went ahead to order the appellants to provide security to fortify their undertaking to pay damages in the absence of a formal application. It is settled law that a court can only decide on issues which have been properly submitted to it for

determination. For example, in the case of *Doctor J. W. Billingsley v J. A Mundi*[14], we held that:

> *"Unless the parties have specifically and clearly applied for consent judgment, which they are at liberty to apply for at any stage of an action, the court should only deal with the particular application before it."* [Emphasis added]

[57] Similarly in this case, the court below in delivering its ruling on the appellants' application for an interim injunction should have confined itself to that particular application rather than delving into the issue of fortification of the undertaking on damages in respect of which there was no application before her and against which there was no rebuttal from the appellants. Having done so, the lower court moved itself and exercised a jurisdiction which it did not have as there was no formal application for fortification of damages before her. According to the learned authors of *Halsbury's Laws of England (4th Edition) Volume 10* at paragraph 715, where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing as jurisdiction must be acquired before a decision is given. Stated differently, jurisdiction precedes power. What this effectively means is that the absence of jurisdiction

on the part of the learned trial judge to impose the condition as to the appellants providing security to fortify their undertaking to pay damages nullifies the order it made in that respect.

Conclusion

[58] In the final analysis, we conclude that this appeal has merit. The appeal is accordingly allowed and the order made by the court below in relation to the fortification of damages is hereby set aside. However, the matter does not end here. The question remains whether the trial judge should have granted the injunction in the first place. We shall address this question and the issue of costs as we determine the cross-appeal.

The cross-appeal

[59] The respondents filed a cross-appeal advancing the following grounds:

[59.1] The lower court erred in law and fact when it decided that the 2nd respondent's shareholding in the 1st appellant was not certain because he did not sign the agreement that would have entitled him to the shares, yet the court went on to find that the 2nd respondent breached verbal and email communications by which he was supposed to pay US$50,000 or introduce investors.

[59.2] The court below erred in law and fact by issuing an injunction to protect the 1st appellant's exclusivity agreement with Ortac, in the face of evidence that the exclusivity period had lapsed.

[59.3] The court below erred in law and fact when it relied on the mere lack of registration of an instrument transferring shares, to determine that the 2nd respondent is not entitled to shares in the 1st appellant.

[60] At the hearing, Mr. Maggubwi applied for leave to file the appellants' heads of argument relating to the cross-appeal because he had only seen the respondents' heads of argument the previous day as he was out of the country when they were served on his firm. We granted the application and directed that the appellants' heads of argument be filed on 6th June 2019 and the respondents' arguments in reply if any, by 11th June 2019.

[61] In support of ground one, it was submitted by counsel for the respondents in the respondents' written heads of argument that the analysis by the lower court in its ruling was against the weight of the evidence before it and that the respondents' affidavit in opposition actually contradicted the alleged facts that the court below based its decision on. He contended that no reasons were given why the appellants' affidavit in support was preferred and the respondents' affidavit in opposition was

ignored. Relying on the case of *Geoffrey Chumbwe v Keith Mukata*[15], counsel argued that the lower court is required to evaluate the evidence, accept one version as against the other, and provide reasons for doing so.

[62] It was counsel's submission that the respondents did not sign an agreement that would supposedly have entitled them to 20% shares in the first appellant and exposing them to conditions and obligations they had not bargained for. However, there is proof in their affidavit in opposition that they are entitled to 20% shareholding. He contended that the lower court seems to have been persuaded by the evidence in the appellants' affidavit in support to the effect that the parties agreed through a series of verbal and email communications that in default of the respondents earning 20% shareholding, they were only going to acquire the shares through an outright purchase at a consideration of $50,000.00. Yet, there was no clear evidence of the verbal communications which the parties were involved in and on what day they discussed. That notwithstanding, it was argued, the lower court went on to find that the respondents breached a non-existent agreement, or an agreement that was

never signed and made a determination against the respondents. According to counsel, the analysis of the evidence was unjustifiably one sided and it appears that these factors even led the learned trial judge to believe that the appellants had a clear right to relief when in fact not.

[63] Citing the case of *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others*[16], counsel argued that it is a settled principle that an applicant must prove that he/she is entitled to the relief sought. Thus, the injunction ought not to have been granted as there was no evidence for supporting the lower court's findings against the respondents.

[64] In arguing ground two, counsel contended that the exclusivity period under the contract between the appellants and Ortac expired on 27th September 2015. Although the exclusivity period could be extended in the limited circumstances set out in clause 2(d), there was no evidence on record at the time of the *inter partes* hearing held on 20th November 2015 to show that the period had been extended. Neither was there any evidence that the exclusivity period was likely to be extended.

Thus, there was no evidence on record to support the lower court's finding that there was an exclusivity period or indeed anything to protect. For the principle that courts' conclusions must be based on facts stated on record, counsel relied on the case of *Rosemary Chibwe v Austin Chibwe*[17].

[65] The question he accordingly posed was, what was the lower court protecting by even issuing an injunction in these circumstances? He contended that much as the appellants may argue that it was a broad application for even third parties, there was no evidence of any such third parties beyond Ortac. On this basis, counsel argued, the grant of the injunction was erroneous and misguided.

[66] In support of ground three, counsel began by quoting the following passage at pages R49 – R50 of the ruling of the lower court:

> *"As a result of the defendants' failure to sign the written agreement and breach of the verbal agreement referred to, as well as their failure to pay the consideration for the shares, no share transfer forms were executed and registered for the benefit of the defendants. For this reason, I am satisfied that the ... [defendants] had no legal right to interfere with the plaintiffs' dealings with third parties, in particular,*

Ortac Limited. Since the defendants did not sign the written as well as the verbal agreement referred to above, the issue of them holding the 20% shares in the 1st plaintiff company is questionable and needs to be determined by the court at the hearing of the substantive matter. That being the case, the question of the need for the plaintiffs to procure the written consent of the 2nd defendant before signing the exclusivity agreement, does not arise at this stage. As such, no fraud had been committed by the plaintiffs."

[67] Counsel submitted that it was surprising that in one breath the lower court found it fit to leave determination of the respondents' right to a full hearing at trial but in another, it made a favourable determination in relation to the appellants that they had not perpetuated a fraud on the respondents. He referred us to the learned authors of *Chitty on Contracts General Principles, 22nd Edition* who state at *paragraph 151* that generally, a simple contract need not be reduced in writing provided that the law makes no special provision requiring written evidence of the contract. Regarding the agreement between the parties for the respondents to have shares in the first appellant and an interest in its mining licence, counsel contended that there is no law requiring written evidence of the contract.

[68] We were then referred to the case of *Peter Militis v Wilson Kafuko Chiwala*[18] on the principle that where parties are of full capacity to enter into a contract, a contract between them is enforceable whether written or oral. Our attention was also drawn to the learned authors of *Palmers Company Law, 15th Edition* who at *page 97* describe an agreement to take shares as no different from any other contract and that a formal agreement is not necessary; further, that if in substance an agreement is made, the form is not material.

[69] Counsel therefore, contended that contrary to the lower court's findings, the respondents are indeed 20% shareholders in the first appellant and 20% owners of the target assets and ought not to be injuncted from protecting their interests.

[70] He accordingly urged us to discharge the order of interim injunction by allowing the cross-appeal and that the appeal be dismissed with costs.

[71] In response to ground one, counsel for the appellants submitted that at interlocutory stage the court exercises its discretion to

grant or refuse to grant an injunction on a *prima facie* basis of the material before it and not on the basis of full or final evaluation of the evidence as suggested by the respondents. He argued that if the court assessed and evaluated the evidence in the manner being proffered by the respondents it would then technically usurp a hearing on the merits. We were referred to the case of *Turnkey Properties v Lusaka West Development Company Limited and Others*[19] in support of this argument.

[72] It was his contention that if the court delved into giving reasons for accepting the appellants' affidavit deposition than the respondents', it would have crossed the boundaries set by the above case authority as that would have constituted a final determination of the matter and certainly would have been improper.

[73] As to the respondents' reliance on the *Geoffrey Chumbwe* case[15] in support of their argument that the court should evaluate the evidence, accept one version as against the other and provide reasons for doing so; it was submitted that that case related to a matter heard on a full trial and not one at interlocutory stage

where the determination is based on ex hypothesi determination of affidavit evidence or facts. Thus, counsel argued, the said case is distinguishable from and not applicable to this matter at this stage.

[74] He contended that the respondents have chosen to cherry-pick out of the lower court's observations on the issue of the 20% shareholding. That in keeping within the boundaries of the *Turnkey Properties* case[19], the lower court stated as follows:

> *"As a result of the Defendants' failure to sign the written agreement and breach of the verbal agreement referred to, as well as their failure to pay the consideration for the shares, no share transfer forms were executed and registered for the benefit of the Defendants. For this reason I am satisfied that the Defendant had no legal right to interfere with the Plaintiff's dealings with third parties, in particular Ortac Limited. Since the Defendants did not sign the written as well as the verbal agreement referred to above, the issue of them holding 20% shares in the 1st Plaintiff company is questionable and needs to be determined by the court at the hearing of the substantive matter."*

[75] From the foregoing, counsel argued, it was never lost on the judge that she needed to make a full assessment and evaluation of the evidence as well as determination thereof after trial when she granted the order of interlocutory injunction. Rather, in a

misconceived manner, the respondents' arguments on ground one of the cross-appeal assume the view that the matter has been determined in finality. That if this court accedes to the respondents' view and arguments, the court would then be put on a retreat upon its good decision in the *Turnkey Properties* case[18].

[76] Counsel therefore, submitted that the court below was on *terra firma* in its ex hypothesi consideration of the material before it and in consequence, finding that the appellant had disclosed its clear right to relief and thus qualified for an order of injunction.

[77] In response to ground two, it was argued that the contention that the exclusivity agreement expired upon the expiry of the exclusivity period provided under clause 2(c) is a simplistic view which is extremely dim to the reality that the efficacy of the agreement survived the exclusivity period. According to counsel, clauses 4 and 5 of schedule 1 to the agreement leads credence to the appellants' position that as at *inter partes* date and beyond, the agreement was with full life and worth the

protection by an order of injunction. He referred us to the ruling of the court below where the learned trial judge stated at pages R51 – R52 that:

> *"I must state that the injunction sought by the Plaintiffs against the Defendants is against the Defendants interfering with the 1st Plaintiff's internal and external dealings with third parties and investors. In terms of paragraph 2(a)(i) of the Exclusivity Agreement (Exhibit "BC2"), the exclusivity period was as between Ortac Resources Limited and the 1st Plaintiff, a period within which the first Plaintiff was not allowed to hold any discussions or negotiations with any other party. According to the exclusivity agreement as submitted by the Plaintiffs, the relationship between Ortac Resources Limited as an Investor in the 1st Plaintiff company subsisted beyond the 27th September, 2015. There is provision in paragraph 2(a) as read with paragraph 2(d) of the Exclusivity Agreement that there may be extension of the exclusivity period under the circumstances specified in the said paragraphs. The argument by the Defendant does not, therefore, hold water."*

[78] Counsel accordingly submitted that the lower court was firmly on point in holding that the relationship between the appellants and Ortac survived the exclusivity period. Furthermore, counsel contended, the application for an order of injunction was not restricted only to Ortac. Our attention was drawn to the *inter partes* summons in the record of appeal which reads in part as

follows:

> *"...restraining and prohibiting the Defendants from interfering with, meddling in and disturbing the Plaintiffs' commercial transactions and business dealings with Ortac Resources Limited and any other third parties as well as interfering and disturbing the first Plaintiff's general internal and external business and commercial operations..."*

[79] He contended, in the circumstances, that the reference by the respondents to the *Chibwe* case[17] is totally misconceived as the court below rightly pronounced itself on the continuity of the agreement.

[80] In response to ground three, counsel pointed out that paragraphs 11 and 12 of the affidavit in support of the application for an interim injunction categorically state that no shares were registered as transferred to the Defendants and that this point was admitted by the respondents under paragraphs 5 and 14 of the affidavit in opposition. Therefore, he went on, the *status quo* prevailing is that the respondents [do not] have a *bonafide* claim of ownership of shares in the first appellant and to its assets generally. He referred us to section 57(1) and (2) of the Companies Act, Chapter 388 of the Laws of Zambia ("the Act"), applicable at the time before its repeal, and

argued that the transfer of shares should be evidenced by a written transfer executed by both the transferee and the transferor for it to be legal and effective. However, under paragraphs 10 and 14 of the affidavit in opposition the respondents purport to have acquired and being entitled to 20% shares in the first appellant.

[81] This, he contended, is in total contravention of section 57 of the Act as the respondents are not possessed of any written instrument of transfer of shares from any of the first appellant's shareholders. On this score alone, according to counsel, the respondents' claim of entitlement to shares, in default of a written instrument of transfer, is mischievous and legally unsustainable.

[82] To buttress this argument, counsel referred us to section 64 of the Act, which he argued, was to the effect that shares shall and can only be transferable by a proper written instrument of transfer without any more or less. He also invited us to consider the provisions of section 68 of the Act which state that a share certificate is *prima facie* evidence of title to shares. He submitted

that the respondents have none and, therefore, are *prima facie* not entitled to the alleged 20% shares. Consequently, counsel argued, the respondents' attack of the lower court's position is contrary to the above applicable legal provisions. He accordingly urged us to dismiss the cross-appeal.

[83] In reply to the appellants' heads of argument, counsel for the respondents submitted in respect of ground one, that there is no principle of law to the effect that courts should make a decision on interlocutory applications based on assumptions and that to resolve interlocutory applications in this manner would amount to guess work as there would be no need for parties to provide affidavit evidence if it will be treated without any evidential analysis. He contended that there is no need for any guess work or assumptions in this case considering that the respondents had supporting documents for their assertions whereas the appellants did not.

[84] Further, that the application of the rule that proscribes delving into the merits of the main matter on an interlocutory application does not conversely promote the non-giving of

reasons why one piece of evidence is accepted, and the other piece is rejected, even though it is on a provisional basis. According to counsel, the proper administration of justice requires this standard to be upheld. He accordingly emphasized that the injunction ought not to have been granted as there was no evidential basis for supporting the lower court's findings against the respondents.

[85] Regarding ground two, counsel argued that although the appellants applied for an injunction to prevent interference with other third parties aside from Ortac, it is a fundamental principle of law that courts do not make orders that will be of no effect. The case of *Harry Mwaanga Nkumbula v Attorney General*[20] was cited in support of this principle.

[86] It was his contention that there was no evidence in the present case to suggest that there was anything to protect beyond the exclusivity period that was relied on and negotiations taking place with Ortac at the time of the application. He, therefore, urged us to reverse the issuance of the injunction on the basis of the exclusivity period that had expired.

[87] Concerning ground three, counsel submitted that the respondents do not claim to be registered shareholders of the first appellant but that the lower court ought to have been alive to the possibility that after trial the respondents would be found to be entitled to be registered as shareholders. As such, it was a misdirection to hold that the mere lack of registration of an instrument meant that the respondents were not entitled to shares and ought not to be concerned with the affairs of the first appellant.

[88] He went on to argue that the provisions of section 57 of the Act relied on by the appellants relate to the transfer of shares as distinguished from allotment and that there was nothing in the evidence to specify that it would be a transfer of shares rather than an allotment.

[89] He also contended that if the appellants' submission were correct that the ruling that is subject of this appeal is provisional and therefore ought not to be challenged, the appellants' own appeal would be misguided as the correct

position is that the ruling is amenable to challenge on appeal whether interlocutory or final.

Consideration of the cross-appeal and decision of the Court

[90] Before we consider the cross-appeal, we are compelled to make the following observations. At paragraph [3] of this judgment, we have reproduced the endorsements in the writ of summons issued against the respondents by the appellants in the trial court. Of relevance to this appeal is the endorsement in paragraph [3.5] relating to an order of injunction. The *ex parte* order of interim injunction granted by the trial judge on 18th May 2015 reads as follows (quoting the relevant portion only):

> *"UPON THE DEFENDANT by counsel undertaking to abide by any order that the court may make as to damages in case this court shall hereafter be of the opinion that the defendants shall have sustained any by reason of this order which plaintiffs ought to pay IT IS HEREBY ORDERED THAT the defendants by themselves, their servants, their agents and or by whosoever... BE and ARE HEREBY RESTRAINED and PROHIBITED from in any way interfering with, meddling in and disturbing the plaintiffs' commercial transactions and business dealings with Ortac Resources Limited and or any other third parties as well as interfering with and disturbing the 1st plaintiff's general internal and external business and commercial dealings until the inter partes hearing..."*

[91] The ruling subject of the appeal and this cross-appeal clearly reveals that the affidavit evidence and submissions deployed by both parties in the court below were not confined to the injunction; they were cascaded to the issues reserved for the substantive hearing. In turn, as can be noted from the ruling, the trial judge was also enticed to make some decisions at interlocutory stage, on matters related to the merits of the dispute in the process of determining whether to grant the injunction or not. This was contrary to the guidance we gave in *Turnkey Properties v Lusaka West Development Company Limited and Others*[19]. We said this in that case:

> *"As can be seen from the foregoing summary, the submissions and arguments before us have ranged far and wide. Yet, in the view that we take, it was not all that necessary for a proper determination of the issue at hand, to broaden the scope of the inquiry to include questions touching on the validity or enforceability of the contracts, or the ultimate propriety and adequacy or otherwise of one final remedy as opposed to another which are the very matters, upon which the trial judge must adjudicate at the proper time. Indeed, we do not believe that it would be proper for us, at this stage to make any comments which may have the effect of pre-empting the issues which are to be decided on the merits at the trial. Thus, we do not think that we can properly be called upon to say that the appellant is or is not entitled to specific performance; nor can we concern ourselves with*

what has become of the contract and if they are still capable of performance or not."

[92] In their heads of argument relating to the appeal and this cross-appeal, both parties have again delved into the merits of the substantive issues which must be adjudicated upon by the trial judge at the main hearing. Unlike the trial judge, we shall not be tempted to delve into the merits of the substantive issues which are a preserve of the trier of facts – the trial judge.

[93] We now return to the cross-appeal before us. The cross-appeal discusses the fate of an interim injunction granted by a trial court after delving into the merits of the substantive issues at interlocutory stage and in particular, where the facts of the case do not warrant the grant of interim relief to the applicant.

[94] We have considered the parties' arguments in respect of the cross-appeal. Grounds one and three are entwined as they revolve around the second respondent's alleged shareholding in the first appellant. We will therefore consider them together.

[95] The respondents' grievance in ground one is that the trial judge misdirected herself by deciding that the second respondent's

shareholding in the first appellant was uncertain because of his failure to sign the agreement which would have entitled him to the shares but went on to find that the second respondent breached verbal and email communications by which he was supposed to pay US$50,000.00 or introduce investors. The argument being that the analysis by the lower court in its ruling was against the weight of evidence and the respondents' affidavit in opposition actually contradicted the alleged facts on which the trial judge based her decision, to the effect that the respondents are entitled to 20% shareholding in the first appellant. Further, that the injunction ought not to have been granted as there was no evidence to support the lower court's findings against the respondents.

[96] The appellants' position, on the other hand, is that at interlocutory stage, the court exercises its discretion to grant or refuse to grant an injunction on a *prima facie* basis of the material before it and not on the basis of a full or final evaluation of the evidence. That if the lower court assessed and evaluated the evidence in the manner suggested by the

respondents, it would have technically usurped a hearing on the merits.

[97] In ground three, the respondents complain that the court misdirected itself by relying on the mere lack of registration of an instrument transferring shares, to determine that the second respondent is not entitled to shares in the first appellant. It is contended that there is no law requiring written evidence of the agreement between the parties for the respondents to have shares in the first appellant and interest in its mining licence. That contrary to the lower court's findings the respondents are indeed 20% shareholders in the first appellant and 20% owners of the target assets and therefore, ought not to be injuncted from protecting their interests. The case for the appellants is, in sum, that the respondents' claim of entitlement to shares is mischievous and legally unsustainable as it flies in the teeth of the Act.

[98] We must quickly dispel the misconception created by the appellants that the evaluation of evidence by courts when dealing with an interlocutory application in the manner

suggested by the respondents amounts to usurping a hearing on the merits. We fully agree with the respondents that a court dealing with an interlocutory application for an injunction must evaluate the affidavit evidence deployed by the parties in arriving at its decision whether to grant or deny the application. What is proscribed at interlocutory stage is for the court to delve into the merits of the substantive issues reserved for a full hearing. As we observed earlier in this judgment, the trial judge in this case unfortunately did what is proscribed.

[99] At pages R48 – R49 of her ruling, the trial judge stated as follows:

> *"The affidavit evidence and arguments presented before this court clearly indicate that the plaintiffs' right to relief in this matter is clear as the defendants' shareholding in the 1st plaintiff company is not certain, since they never signed the agreement that would have entitled them to hold 20% shares in it. I say so because the plaintiffs and the defendants, agreed that the defendants, using their professional expertise and connections were going to, among other things, identify and secure investors for the 1st plaintiff's Kalaba Mine project and facilitate, arrange and ensure the upgrading of the 1st plaintiff's aforesaid mining licence from a small scale to a large scale one."* [Emphasis added]

And at pages R49 – R50, she went on to state that:

> *"As a result of the defendants' failure to sign the written agreement and breach of the verbal agreement referred to, as well as the failure to pay the consideration for the shares, no share transfer forms were executed and registered for the benefit of the defendants. For this reason, I am satisfied that the defendants had no legal right to interfere with the plaintiffs' dealings with third parties, in particular, Ortac Limited. Since the defendants did not sign the written as well as the verbal agreement referred to above, the issue of them holding the 20% shares in the 1st plaintiff company is questionable and needs to be determined by the court at the hearing of the substantive matter. That being the case, the question of the need for the plaintiffs to procure the written consent of the 2nd Defendant before signing the exclusivity agreement does not arise at this stage... Therefore, in this matter, there is a situation that needs to be preserved before the substantive matter is disposed off, and which requires the issuance of an injunction. This situation is the exclusivity agreement between the [1st] plaintiff and Ortac Resources Limited for a potential subscription or purchase of shares in the 1st plaintiff company, which exclusivity agreement (exhibit BC2) was announced on the London Stock Exchange."* [Emphasis added]

[100] We note from the passage of the trial judge's ruling quoted at paragraph 99 above that her finding that the appellants' right to relief was clear as the respondents' shareholding in the first appellant is not certain, was informed by the affidavit evidence deployed by the parties. According to the trial judge the respondents' shareholding in the first appellant was not certain

because the evidence before her showed that they did not sign the agreement that would have entitled them to hold 20% shares in the first appellant. Flowing from this finding, the trial judge concluded that she was satisfied that the respondents had no legal right to interfere with the first appellant's dealings with third parties, including Ortac.

[101] The issues relating to the respondents' alleged shareholding in the first appellant were part of the substantive claims sought by the appellants in their writ of summons, to be determined by the trial court as can be noted from paragraphs 3.1 – 3.3 of this judgment. It is plain from the excerpts of the ruling we have quoted above that, contrary to the guidance in the *Turnkey Properties* case[19], the trial judge delved into the merits of the matter by determining the rights of the parties at interlocutory stage, from affidavit evidence which was not tested in cross-examination. In the view that we take, the lower court's findings we have highlighted above could only have been made after a full trial and not at interlocutory stage.

[102] Further, we posit that having determined the issue of the

respondents' alleged shareholding in the first appellant on the merits at interlocutory stage, it was contradictory and a futile exercise on the part of the trial judge to conclude that since the respondents did not sign the agreement, the issue of them holding 20% shares in the first plaintiff was questionable and needed to be determined by the Court at the hearing of the substantive matter. This issue had already been determined at interlocutory stage, albeit improperly, and there could be nothing left to be resolved at the trial.

[103] We therefore, have no hesitation in holding that the interlocutory injunction granted in favour of the appellants under these circumstances is incompetent. It is a product of a legally flawed process. Moreover, the view we take, as will become clearer shortly is that this was not a proper case for the grant of an interlocutory injunction. Grounds one and three must therefore succeed.

[104] In ground two, the respondents assail the trial judge for granting an injunction to protect the first appellant's exclusivity agreement with Ortac when there was evidence that the exclusivity period had lapsed. The respondents' contention is

that at the time of the *inter partes* hearing on 20th November 2015 there was no evidence on record showing that the exclusivity period had been extended or was likely to be extended. That there was, therefore, no evidence to support the lower court's findings that there was an exclusivity period or indeed anything to protect at all. It is also the respondents' argument that even if the appellants may argue that it was a broad application for even third parties, there was no evidence of any third party beyond Ortac. That on this basis, the granting of the injunction was erroneous.

[105] The appellants' contention is that as at the date of the *inter partes* hearing and beyond, the exclusivity agreement was with full life and worth the protection by an order of injunction. Further, that the lower court was on firm ground in holding that the relationship between the appellants and Ortac survived the exclusivity period.

[106] The relevant portion of the lower court's ruling under attack in this ground is at pages R51 – R52. For a better appreciation of its context, it is pertinent that we reproduce it in full. The trial

judge stated as follows:

> *"As to the issue of the exclusivity period having already expired on 27th September 2015, as contended by the defendants, I wish to refer to the Exclusivity Agreement exhibited as 'BC2' in the affidavit in support of this application. Clause 2(a) of the said agreement provides for an exclusivity period which runs from 27th March 2015, to 180 days from that date. The defendants have argued that by clause 2(c) of the said Exclusivity Agreement, the obligations cease to have effect when the exclusivity period lapses, and therefore, submitted that on this basis, the entire premise on which the injunction was sought no longer exists. I must state that the injunction sought by the plaintiffs against the defendants is against the defendants interfering with the 1st plaintiff's internal and external dealings with 3rd parties and investors. In terms of paragraph 2(a)(1) of the Exclusivity Agreement..., the exclusivity period was between Ortac Resources Limited and the 1st Plaintiff, a period within which the 1st plaintiff was not allowed to hold any discussions or negotiations with any other party. According to the exclusivity agreement, and as submitted by the plaintiffs, the relationship between Ortac Resources Limited as an investor in the 1st plaintiff company subsisted beyond the 27th September, 2015. There is provision in paragraph 2(a) as read with paragraph 2(d) of the Exclusivity Agreement <u>that there may be extension of the exclusivity period under the circumstances specified in the said paragraphs</u>. The argument by the defendants therefore does not hold water. Accordingly, the current arrangement between the 1st plaintiff company and Ortac Resources Limited is worth protecting by way of injunction, because the effect of Ortac's investment in the 1st plaintiff company cannot be quantifiable in damages as the defendants' threats to imperil the investment agreement between the 1st plaintiff company and Ortac Resources*

Limited cannot be atoned for by damages."

[107] The trial judge relied on clauses 2(a) and 2(d) of the Exclusivity Agreement in opining that the exclusivity period subsisted beyond 27th September 2015. The said clauses state as follows:

> *"2. In consideration of committing resources and incurring costs and expenses (including but not limited to legal, accounting and other advisory fees and incidental expenses) in our assessment of Project Zambezi and the payment of £1 (receipt of which you hereby acknowledge), by signing this letter you each hereby agree as follows:*
>
> *(a) for the period from the date of this letter (such period as extended pursuant to paragraph 2(c) and paragraph 2(d) below being the "Exclusivity Period") you shall not, and you shall procure that your directors, employees, agents and adviser either directly or indirectly (whether or not in conjunction with any third party) shall not:*
>
> *(i) enter into or continue, facilitate or encourage any discussions or negotiations with any other party relating to the possible purchase of or investment into Zamsort or its business or, except in the ordinary course of trading, of any part of the business of Zamsort or any of the material assets of Zamsort (including without limitation thereof any shares in any subsidiary thereof) (all or any of the foregoing being referred to as a "competing offer") save for:*
>
> *(a) the US$2 million investment expected from Raj Patel (or his affiliates) into Zamsort that you have discussed with us; or*
>
> *(b) you agree terms with third parties (on an arm's length basis) to invest in Zamsort and Ortac, having been*

offered a first right of refusal to invest on equal terms, declines such right; or

(ii) enter into any agreement or arrangement with any other party relating to a competing offer; or

(iii) make available any information relating to Zamsort and/or its assets and/or its business and/or any subsidiary thereof (save to ourselves and any other person of whom we shall notify you) in connection with a competing offer; or

(iv) withdraw from negotiations with us; or

(v) do or omit to do anything which frustrates the ability or affects the willingness of us to sign and complete Project Zambezi or which affects the profitability and/or the material assets of Zamsort;

(b) ...

(c) ...

(d) to the extent that any law or rule of any regulatory authority makes the completion of Project Zambezi unlawful until some third party consent has been obtained the Exclusivity Period shall be extended until such consent has been obtained."

[108] Contrary to the finding by the trial judge, the provisions of clauses 2(a) and 2(d) we have quoted above do not support her opinion that the relationship between Ortac and the first appellant subsisted beyond 27th September 2015, that is to say, beyond 180 days from 27th March 2015. Neither was there evidence, as aptly submitted by the respondents' counsel, showing that at the date of the *inter partes* hearing on 20th

November 2015, the exclusivity period had been extended or was likely to be extended.

[109] We also take the view that the trial judge was not on firm ground when she stated that there was provision in paragraph 2(a) as read with paragraph 2(d) of the Exclusivity Agreement that there may be extension of the exclusivity period under the circumstances specified in those paragraphs. Our understanding of paragraph 2(a) is that it is a prelude to paragraphs 2(a)(i),(ii), (iii), (iv), (v) as can be observed at paragraph 107 of above and nothing more than that.

[110] Furthermore, the import of clause 2(d) is quite clear. The extension of the exclusivity period envisaged therein could only be triggered if "... any law or rule of any regulatory authority makes the completion of Project Zambezi unlawful until some third-party consent has been obtained..." The affidavit evidence before the trial judge does not reveal any circumstance which could have or was likely to trigger an extension of the Exclusivity Agreement at the time of *inter partes* hearing.

[111] It is also worthy of note that the appellants sought injunctive relief because of a threat contained in the email from the second respondent dated 7th April 2015 which was understood by the appellants, as we also understand it, to threaten the appellants' Exclusivity Agreement with Ortac which had expired at the time of the *inter partes* hearing. The said email reads:

> *"I wish to advise that it is in everyone's interest that you respond today, no later than 16:00 hours. Your failure to provide me with the required explanation may set off a series of irreversible activities that could imperil the transaction in question."*

[112] Therefore, we cannot agree more with the respondents' argument that even if the appellants may argue that their application for an injunction was a broad one, there was no evidence of any third party beyond Ortac. For these reasons we hold that it was a misdirection by the trial judge in holding that the arrangement between the first appellant and Ortac was worth protecting by way of an injunction. In other words, we find and hold that the learned trial judge ought not to have awarded injunctive relief to the appellants. We also find merit in ground two.

Conclusion

[113] All the three grounds having succeeded, the net result is that we must allow the cross-appeal.

[114] As both the appeal and the cross-appeal have succeeded, we order the parties to bear their own costs.

M. Musonda
DEPUTY CHIEF JUSTICE

R. M. C. Kaoma
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE