IN THE HIGH COURT FOR ZAMBIA **2011/HPC/0746**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

CHIAWA INVESTMENT AND DEVELOPMENT LIMITED T/A ROYAL ZAMBEZI LODGE	**PLAINTIFF**
AND	
G & G SAFARIS LIMITED	**1ST DEFENDANT**
CHONGWE RIVER LODGE LIMITED	**2ND DEFENDANT**
CHONGWE RIVER HOUSE LIMITED	**3RD DEFENDANT**
TSIKA ISLAND LIMITED	**4TH DEFENDANT**
NYAMANGWE SAFARIS LIMITED	**5TH DEFENDANT**

CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at Lusaka on the 24th day of August, 2018.

For the Plaintiff:	Mr. M. Nkulukusa of Messrs. Charles Siamutwa Legal Practitioners
For the 2nd and 3rd Defendants:	Mr. K. Wishimanga of Messrs A. M. Wood and Company

RULING

Cases referred to:

1. *American Cyanamid Company v. Ethicon Limited [1975] 1 All E.R. 504 H.L.*
2. *Chrispin Lwali, Saviour Chishimba, Stephen Mubanga Chitalu and 26 Others v. Edward Mumbi, Michael Chilufya Sata and The Attorney General, SCZ No. 7 of 2009.*

3. *Shell and BP Zambia Limited v. Conidaris and Others (1974) Z.R. 281 (H.C.).*
4. *Evelyn Kangwa and Another v. Thandiwe Banda and The Attorney General, Appeal No. 28/2011.*
5. *Ubuchinga Investments Limited v. Teclamicael Menstab and Another, Judgment No. 25 of 2014.*
6. *Turnkey Properties Limited v. Lusaka West Development Company Limited (1984) Z.R. 85 (S.C.).*
7. *Hina Furnishing Lusaka Ltd v. Mwaiseni Properties Ltd (1983) Z.R. 40 (H.C.).*
8. *Edward Jack Shamwana v. Levy Mwanawasa (1993-94) ZR 149.*
9. *Hubbard v. Vosper (1972) 1 All ER 1023, C.A.*
10. *Harton Ndove v National Educational Company of Zambia Limited (1980) Z.R. 184 (H.C.).*
11. *Garden Cottage Foods Limited v Milk Marketing Board (1983) 2 All ER 770, H.L.*
12. *Hondling Xing Xing Building Company Limited v. Zamcapital Enterprises Limited, 2010/HP/439.*

Legislation referred to:

1. *Order 27 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
2. *Order 3, Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
3. *Order 29 Rule 1 of the Rules of the Supreme Court, 1999 Edition ("The White Book").*
4. *Order 27, Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
5. *Order 29/1A/33 of the Rules of the Supreme Court, 1999 Edition ("The White Book").*
6. *Order 29/1/2 of the Rules of the Supreme Court, 1999 Edition ("The White Book").*

Publications referred to:

Halsbury's Laws of England, 5th Edition [RELX (UK), 2015], Vol. 12 paragraphs 581 and 583.

This is an application by the 2nd and 3rd Defendants for an order of interim injunction (herein referred to as "the Application"). The Application is made pursuant to Order 27 as read with Order 3, Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia

(hereinafter referred to as the "High Court Rules") and also pursuant to Order 29 Rule 1 of the Rules of the Supreme Court, 1999 Edition (hereinafter referred to as "the White Book").

The Application is accompanied by an affidavit (hereinafter referred to as the "Affidavit in Support") sworn by one Renee Susan Milner, the Managing Director of the 2nd Defendant, and filed into court on 9th June, 2017. Further, the Application is accompanied by Skeleton Arguments and List of Authorities, of even date.

It is the deponent's testimony, in the said Affidavit in Support, that the Plaintiff commenced action against the Defendants on 20th December, 2011 and that the action culminated into a Consent Judgment, dated 17th April, 2012.

That in clause 4 of the said Consent Judgment, it was provided that the 2nd, 3rd and 4th Defendants and the Plaintiff shall cooperate with each other for the purpose of amicably establishing boundaries pertaining to the Royal Zambezi Aerodrome including jointly approaching the Surveyor General and other officials at the Ministry of Lands in order to ensure that all registered land is properly surveyed and all beacons and boundaries are agreed by all affected parties. The parties were at liberty to exercise any legal rights as they would deem fit in the event that they were aggrieved by the Surveyor General's decision contemplated by the paragraph.

It is the deponent's further testimony that the Consent Judgment also provided in clause 6.5, that the Passenger Access Fee payable

pursuant to paragraph 6 would be collected and paid by the airlines on which the Defendants' guests access the Royal Zambezi Aerodrome.

That pursuant to the Consent Judgment, the Commissioner of Lands invited the Plaintiff and the Defendants to a survey/boundary verification. To lend support to this assertion, the deponent has produced exhibit "RSM1", being a copy of the letter authored by the Commissioner of Lands.

The deponent deposes that by a letter dated 24th May, 2013. It was communicated to the parties that the Plaintiff's property, Farm 9157, encroached onto the 3rd Defendant's Lot 15443/M by about 14 hectares. That the recommendation following this was that the Certificate of Title relating to Farm 9157 be cancelled and that a new Certificate of Title, reflecting the correct extent of the farm, be issued. To fortify this assertion, the deponent has produced exhibit "RSM2", being a copy of the letter and survey report from the Commissioner of Lands.

It is the deponent's averment that following the above, the 3rd Defendant advised the Plaintiff that there were no Passenger Access Fees due to the Plaintiff as the Aerodrome fell within the 3rd Defendant's property. To support this, the deponent produced exhibit "RSM3", being a copy of the letter to Plaintiff's Advocates.

The deponent deposes that the Plaintiff being dissatisfied with the Surveyor General's report, took out an action against the 3rd

Defendant and the Attorney General under cause number 2014/HP/229. To buttress this assertion, the deponent has produced exhibit "RSM4", being a copy of the Petition and affidavit verifying facts, filed into court by the Plaintiff. That the said proceedings are pending before Madam Justice A. Bobo-Banda.

That despite the said matter under cause number 2014/HP/229, the Plaintiff threatened to enforce the Consent Judgment herein by way of Writ of Fieri Facias. In support, the deponent has produced exhibit "RSM5", being a copy of the letter from the Plaintiff's advocates to the 3rd Defendant's advocates.

It is also the deponent's testimony that the action by the Plaintiff was highly prejudicial to the 3rd Defendant and its business interests and concerns as there had been no breach of the Consent Judgment or at all. Further, that under cause number 2014/HP/229, the Plaintiff is essentially challenging the decision of the Surveyor General in line with clause 4 of the Consent Judgment of 17th April, 2012.

That the Plaintiff's threats were without basis as the 3rd Defendant had been in compliance with clause 6.5 of the Consent Judgment in that all its guests who use Proflight Zambia were charged Passengers Access Fees.

Deposing that an order staying the execution of the Consent Judgment was granted by Hon. Mrs. Justice F. M. Chishimba, pending determination of the proceedings under cause number

2014/HP/229, the deponent produced exhibit "RSM6", being a copy of the said order.

That while the stay of execution was still in effect, the Plaintiff took out an application for orders for directions essentially challenging the order for stay of execution of the Consent Judgment.

The deponent deposes that the court declined to issue the orders for directions until the petition under cause number 2014/HP/229 was determined, which petition has yet to be determined. That as such, the Consent Judgment and order aforesaid, are still in force.

Lending support to the assertion that despite the stay of execution of the Consent Judgment the Plaintiff has purported to restrict access of the 2nd and 3rd Defendants' guests from landing at the Zambezi Aerodrome, the subject of these proceedings and the petition; the deponent produced exhibit "RSM8", being a copy of an email speaking to the same. That the actions of the Plaintiff are in total disrespect of the court orders.

It is the deponent's testimony that due to the aforesaid, Proflight indicated that whenever it was carrying any of the 2nd and 3rd Defendants' guests it would be landing at Jeki Airstrip, an alternative airstrip located approximately 50 Kilometers from the 2nd and 3rd Defendants' business premises. That consequently, as opposed to taking 15 to 20 minutes, guests are then driven for about four hours to the lodge, on a dust road.

The deponent has deposed further that the Plaintiff's restrictions aforesaid will result in an unquantifiable loss in the business revenues, reputation and good will for the 2nd and 3rd Defendants. That the damages envisaged cannot be atoned for by an award of damages.

The deponent avers the Plaintiff will continue to occasion the 2nd and 3rd Defendants the damage aforesaid, unless restrained by this Court, and that, in any event, the Plaintiff continues to use part of the airstrip that falls within the 2nd and 3rd Defendants' land.

That the 2nd and 3rd Defendants undertake to abide by any order as to damages that this Court will make, in the event that this Court is of the opinion that the Plaintiff shall have sustained loss by reason of granting this Application.

Counsel for the 2nd and 3rd Defendants has augmented the Application with Skeleton Arguments, the gist of which is that there is need to maintain the *status quo* pending determination of these proceedings as well as those under cause 2014/HP/229. In this regard, Counsel has submitted that the Affidavit in Support has shown that the execution of the Consent Judgment was stayed and that the same has not been appealed against. That, consequently, an injunction would be the best remedy to ensure that the *status quo* is preserved and/or restored.

Counsel has referred the Court to the case of *American Cyanamid Company v. Ethicon Limited*[1] to highlight the benchmarks for a

successful injunction application; namely, a clear right to relief; serious questions to be tried; irreparable injury and inadequacy of damages; and a gauging of where the balance of convenience lies.

With regard to the right to relief, Counsel has submitted that a right to relief is clear from the Affidavit in Support, in that it has shown that the execution of the Consent Judgment was stayed pending conclusion of the proceedings in cause number 2014/HP/229/. Further, that by acting in a restrictive manner, the Plaintiff's actions give rise to the 2nd and 3rd Defendants' right to relief.

As regards the benchmark that there must be serious questions to be tried, Counsel has submitted that there is a serious question to be tried in these circumstances; namely, whether the Plaintiff can purport to exercise some powers under a Consent Judgment, execution of which has been stayed.

With respect to irreparable injury, Counsel has submitted that the circumstances herein are such that an injunction ought to be granted as the injury that has been suffered and will be suffered by the 2nd and 3rd Defendants, is of a kind that cannot be adequately atoned for by an award of damages. Further, that there can be no quantification of the reputational loss and good will which will be suffered by the 2nd and 3rd Defendants.

Regarding the benchmark of the balance of convenience, Counsel has submitted that the determination of the same is based on two matters, namely; the protection of the claimant against injury by

violation of his rights for which he could not be adequately compensated in damages recovered in an action if uncertainty were resolved in his favour at trial; and the defendant's need to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he should be adequately compensated under the claimant's undertaking in damages if the uncertainty were to be resolved in the defendant's favour at trial. In light of this, Counsel has submitted that the Affidavit in Support clearly shows that the balance of convenience lies in favour of the 2nd and 3rd Defendants.

Citing the case of *Chrispin Lwali, Saviour Chishimba, Stephen Mubanga Chitalu and 26 Others v. Edward Mumbi, Michael Chilufya Sata and The Attorney General*[2], Counsel further submitted that the fact that issues of compliance with the law or court orders have arisen, this Court is duty bound to grant the injunction.

In opposing the Application, Counsel for the Plaintiff also filed an affidavit (hereinafter referred to as the "Affidavit in Opposition"), sworn by one Milao Nkulukusa, a director in the Plaintiff Company; and dated 5th September, 2017.

The deponent has deposed that on 9th June, 2017, the 2nd and 3rd Defendants were granted an *ex parte* order of injunction restraining the Plaintiff from, *inter alia*, restricting the 2nd and 3rd Defendants, their guests and all aircrafts carrying the said Defendants' guests from accessing the Plaintiff's privately licensed Aerodrome and from

acting in any manner that is contrary to the order staying execution of the Consent Judgment dated 4th November, 2014 and the Ruling dated 9th July, 2015. To support this assertion, the deponent has produced exhibits "MN1" and "MN2", being copies of the *ex parte* order of injunction and Consent Judgment, respectively.

It is the deponent's testimony that a perusal of the order of injunction seems to show that it is predicated on the fact that it is pending final determination of the matter herein and the ruling of this Court staying execution of the Consent Judgment, pending final determination of the matter under cause number 2014/HP/229.

The deponent further deposes that the matter under cause number 2014/HP/229 was discontinued prior to the Defendants herein serving the Plaintiff the *ex parte* order of injunction and the Plaintiff becoming aware of the same. To fortify this assertion, the deponent has produced exhibit "MN3", being a copy of the Notice of Discontinuance.

That the condition precedents upon which the *ex parte* order of injunction was obtained do not exist based the matter having already been determined by way of Consent Judgment; and the action under cause number 2014/HP/229 having been discontinued, and the stay of execution consequently ceasing to have effect.

Finally, the deponent has deposed that from the Consent Judgment, exhibited as "MN2", there is no dispute that the Plaintiff is the legal owner of the Aerodrome in question. That the Consent Judgment shows that the 2nd and 3rd Defendants were, on account of the Plaintiff's ownership of the Aerodrome, ordered to continue paying the access and landing fees.

The Affidavit in Opposition is augmented by Skeleton Arguments filed into court on 25th August, 2017, the gist of which is that the 2nd and 3rd Defendants have failed in toto to show any reason that would merit the Court making the *ex parte* injunction interlocutory.

Counsel for the Plaintiff, in the said Skeleton Arguments, has reiterated the principles established in the *American Cyanamid* case and further referred the Court to the case of *Shell and BP Zambia Limited v. Conidaris and Others*[3] in submitting on the basis upon which an injunction can be granted.

Counsel has also submitted that it can be observed from the Consent Judgment that the injunction application was made on account of there being an order staying execution of the Consent Judgment and a ruling endorsing that position; and on the basis that there is a matter pending determination under this cause.

Counsel for the Plaintiff has further submitted that this is a proper case for discharging the injunction in that the 2nd and 3rd Defendants

have not satisfied the guidelines set out in the *American Cyanamid* case.

With regard to there being serious questions to be tried, Counsel has submitted that this matter has already been fully determined by this Court, through the Consent Judgment and that the order for stay of execution did not set aside the Consent Judgment, which setting aside can only be achieved through a fresh action challenging the said Consent Judgment. Further, that the said order for stay of execution was pending determination of the matter under cause number 2014/HP/229, the discontinuance of which culminated into its determination and cessation of the order for stay of execution. In this respect, Counsel has referred the Court to the cases of *Evelyn Kangwa and Another v. Thandiwe Banda and The Attorney General*[4], *Ubuchinga Investments Limited v. Teclamicael Menstab and Another*[5] and *Turnkey Properties Limited v. Lusaka West Development Company Limited*[6].

Counsel has also cited Order 27, Rule 4 of the High Court Rules as read together with Order 29/1A/33 of the White Book, to fortify his submission that the Court has power to discharge an injunction where the grounds required to warrant the grant of an injunction are insufficient.

With regard to the right of relief, Counsel has referred the Court to the explanatory notes under Order 29/1/2 of the White Book to lend

support to his submission that there is no clear right of relief demonstrated by the 2nd and 3rd Defendants to warrant an interlocutory injunction.

As regards the principle that an injunction ought only to be granted where the applicant will suffer irreparable damage, Counsel for the Plaintiff has submitted that the 2nd and 3rd Defendants have not satisfied the same as their Affidavit in Support reveals that they still retain two options for conducting their business. That the 2nd and 3rd Defendants want to avoid the alternative options because they will incur an extra cost as opposed to using the Plaintiff's Aerodrome, which is at no cost at all, a financially convenient option.

With respect to the balance of convenience, Counsel for the Plaintiff has submitted that the same lies with the Plaintiff in that as the licence holder over the Aerodrome, it has to comply with the conditions in the licence such as the licence not being transferable. Further, that the Plaintiff as a privately owned/licensed Aerodrome, is under the legal obligation to charge landing fees and access for use. That a person wishing to use the licence must apply for access and pay the landing and access fees in order to ensure that the licence holder is compliant with the licence conditions.

Counsel, in this regard, has submitted that the potential loss to the 2nd and 3rd Defendants is far less than the inconvenience of the Plaintiff; and that the potential loss to the Plaintiff is far greater than

the inconvenience that the 2nd and 3rd Defendants would suffer if left to rely on its remedy in damages.

Citing the case of *Hina Furnishing Lusaka Ltd v. Mwaiseni Properties Ltd*[7], Counsel has submitted that the remedy of an injunction being an equitable one, the person seeking it must come with clean hands. That the 2nd and 3rd Defendants' hands are soiled in that not only are they acting contrary to the unqualified order of court to pay access and landing fees, but that they are also refusing to pay for the use of the Plaintiff's Aerodrome.

Finally, Counsel for the Plaintiff has submitted that the 2nd and 3rd Defendants seek to use the injunction to create conditions favourable only to themselves.

In reply to the Plaintiff's opposition, an affidavit (hereinafter referred to as the "Affidavit in Reply"), sworn by Renee Susan Milner, the 2nd Defendant company's Managing Director, was filed into court on 15th September, 2017.

The deponent avers that the deponent of the Affidavit in Opposition, although deposing as director of the Plaintiff is the advocate seized with conduct of the matter on behalf of the Plaintiff and that therefore, should not ordinarily depose to affidavits which contain contentious matters.

It is the testimony of the deponent (Renee Susan Milner) that the Notice of Discontinuance was never brought to the attention of the 2nd and 3rd Defendants, until 13th June, 2017 when it was served by the Plaintiff.

In disputing paragraph 8 of the Affidavit in Opposition, the deponent deposed that the injunction was obtained pending determination of the matters as outlined in the injunction itself.

That the Plaintiff has failed to disclose that it discontinued the proceedings under cause number 2014/HP/229 because there was a preliminary issue pending determination. To lend support to this assertion, the deponent has produced "RSM1", being a copy of the proceedings under cause number 2014/HP/229.

That she has been advised by the 2nd and 3rd Defendant's Advocates that the Plaintiff's discontinuance of the proceedings under cause number 2014/HP/229 was calculated to escape orders of court.

It is also the deponent's testimony that the Plaintiff has failed to disclose that it commenced proceedings in the Lands Tribunal under LAT Number 39/2017. To support this assertion, the deponent has produced exhibit "RSM2", being a copy of the Complaint and supporting affidavit.

That under the said Complaint, the Plaintiff obtained an injunction against the 2nd and 3rd Defendants, restricting them from accessing the Aerodrome, the subject of this dispute. To fortify this, the deponent has produced "RSM3", being a copy of the said injunction.

The deponent avers that the Plaintiff only commenced the proceedings in the Lands Tribunal because it knew that it was the only way it could get an injunction against the 2nd and 3rd Defendants away from the proceedings in the High Court.

That the proceedings in the Lands Tribunal will confirm the Consent Judgment and that as such, the injunction ought to be granted to preserve the *status quo* as it is better to maintain the status rather than create a completely new one.

Further, the deponent has testified that the proceedings in the Lands Tribunal raise very serious questions which will only be determined at trial.

That the prejudice the 2nd and 3rd Defendants will suffer if the injunction is discharged will be immeasurable as shown in the Affidavit in Support and that the Plaintiff will not suffer any prejudice by virtue of the injunction being sustained.

At the hearing of the Application, Counsel for the 2nd and 3rd Defendants stated that they would rely on the Affidavit in Support and the Skeleton Arguments and added that an injunction is a discretionary remedy based on the circumstances of each case.

In response, Counsel for the Plaintiff cited the case of *Edward Jack Shamwana v. Levy Mwanawasa*[8] to submit that it is well settled that no injunction will be granted if the Defendant states his intention of pleading a recognised defence unless the Plaintiff can satisfy the

court that the defence will fail. That an injunction is an interim relief and that it is clear that there must be a defence to talk about, but that no such circumstances exist in this case.

Further, Counsel submitted that the Consent Judgment laid the circumstances applicable to both parties and that the *ex parte* order of injunction of 9th June, 2017 actually altered the said circumstances. That sustaining the injunction will continue to alter the circumstances and the status quo which was not only agreed by the parties but confirmed by the Court. Counsel, thus, submitted that granting this Application would go against the well-established principle that an injunction should not be used to create a new set of circumstances favourable to one party.

In reply, Counsel for the 2nd and 3rd Defendants submitted that the there are two orders on the record, namely an order of this Court and a ruling of this Court stopping the Plaintiff from reaping a benefit arising from its own actions. That the Plaintiff sought to escape the said orders by discontinuing the matter in cause number 2014/HP/229 and that the Plaintiff should be caught by the web of injunction.

I have carefully considered this Application and the evidence in support and in opposition thereof; as well as the accompanying Skeleton Arguments and List of Authorities. I have also carefully

considered the judicial authorities that Counsel have brought to this Court's attention.

In my view, the issue for determination in this Application, is whether or not the 2nd and 3rd Defendants have satisfied the requirements for the grant of an interlocutory injunction and whether the Plaintiff has sufficiently rebutted the Application.

From the onset, it is crucial to have an understanding of the general purpose of an interlocutory injunction and this was well stated by Lord Diplock, in the case of *American Cyanamid Company v. Ethicon Limited* (already cited above) at page 509, as follows:

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

The principles upon which courts ought to act in considering an application for an interlocutory injunction are also elucidated in paragraph 581 of Halsbury's Laws of England, 5th Edition, volume 12 (hereinafter referred to as "Halsbury's Laws of England") as follows:

"On application for injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated; but in no case will the court grant an interlocutory injunction as of course.

It is not necessary that the court should find a case which would entitle the claimant to relief at all events, it is quite sufficient for it to find a case which shows that there is a substantial question to be investigated, that interim interference on a balance of convenience and inconvenience to the one party and to the other is expedient, and that the status quo should be preserved until that question can be finally disposed of.

The tendency is to avoid trying the same question twice and to grant injunctions only in clear cases. However, where there is no doubt as to the legal rights an interim injunction will be granted, and it is no objection that the relief so granted is substantially the same as the whole relief claimed in the action except that it is only to endure until the hearing of the action."

Further, it was concluded in the case of *Hubbard v. Vosper*[9], that each case must be decided on a basis of fairness, justice and common sense in relation to the whole of the issues of fact and law which are relevant in the particular case.

Briefly, a recount of the relevant events in this case is that the Plaintiff commenced these proceedings against the Defendants, which culminated into a Consent Judgment. It was one of the terms of the said Consent Judgment that the 2nd, 3rd and 4th Defendants and the Plaintiff would cooperate with each other for the purpose of

amicably establishing the boundaries pertaining to the Royal Zambezi Aerodrome (that is the property in dispute), including jointly approaching the Surveyor General and other officials at the Ministry of Lands in order to ensure that the land is properly surveyed and all beacons and boundaries are agreed by all the affected parties. The said term further provided that the parties were at liberty to exercise any legal rights as they would deem fit in the event that they were aggrieved by the decision of the Surveyor General.

As fate would have it, the Plaintiff was aggrieved by the decision of the Surveyor General and in pursuance of the Consent Judgment, lodged a petition under cause Number 2014/HP/229 against the 3rd Defendant, essentially challenging the decision of the Surveyor General. To allow determination of the petition under cause Number 2014/HP/229, execution of the Consent Judgment was accordingly stayed, although the petition was subsequently discontinued on 7th June, 2017 and a fresh complaint filed at the Lands Tribunal on 8th June, 2017, under cause Number LAT/39/2017, essentially claiming the same relief as that under the discontinued matter.

The 2nd and 3rd Defendants then made this Application, on 9th June, 2017, for an order granting the 2nd and 3rd Defendants, their guests and all aircraft carrying the 2nd and 3rd Defendants' guests landing rights and access to the Zambezi Aerodrome in Lower Zambezi; and restraining the Plaintiff from restricting the 2nd and 3rd Defendant's guests access landing rights, pending determination of the petition under cause Number 2014/HP/229 (the matter since discontinued).

Proceeding on the guidance in *Hubbard v. Vosper,* that each case must be decided on a basis of fairness, justice and common sense in relation to the whole of the issues of fact and law which are relevant in the particular case, I find that it suffices to mention, at this point, that I opine that the effect of discontinuing cause Number 2014/HP/229 in respect of which the stay of execution of the Consent Judgment was granted, is such that the stay of execution is automatically discharged, leaving the Consent Judgment open to execution.

I am also of the view that the manner in which clause 4 of the Consent Judgment is couched is such that it gives the parties leeway to seek redress against the decision of the Surveyor General without limit. However, if it should be the desire of the Plaintiff that it still exercises its rights under clause 4 of the Consent Judgment, to challenge the decision of the Surveyor General through a fresh action, then it should follow that similar conditions of stay of execution of the Consent Judgment would be desired by the 2nd and 3rd Defendants. This, to me, appears to be the undercurrent of the Application herein.

It further appears, in my view, suspicious that the Plaintiff has sought to effect the option of exercising its legal rights under clause 4 of the Consent Judgment (which option is exactly the same as the one previously exercised under cause Number 2014/HP/229, although discontinued, and in respect of which the stay of execution of the Consent Judgment was granted), but desires to do so in a

manner that defeats the purpose of the stay of execution previously granted.

I am inclined, in this regard, to agree with Counsel for the 2nd and 3rd Defendants that the Plaintiff sought to escape this Court's orders by discontinuing the matter in cause number 2014/HP/229 and that the Plaintiff should be caught by the web of injunction.

The important issue to consider in these circumstances is that the Plaintiff sought to exercise its right under clause 4 of the Consent Judgment under cause Number 2014/HP/229 and in that regard, the execution of the Consent Judgment was stayed to allow for the determination of cause Number 2014/HP/229. The Plaintiff then discontinued cause Number 2014/HP/229 and decided to commence another matter claiming the same relief, this time before the Lands Tribunal and is simultaneously seeking to execute the same Consent Judgment while the tribunal entertains the new matter. In my view, this is calculated to escape the effect of the stay of execution relating to the discontinued matter, the purpose of which was to stop the parties from executing the provisions of the Consent Judgment until any matter commenced by virtue of clause 4 of the Consent Judgment is duly resolved. Therefore, but for the discontinuance, I opine that the 2nd and 3rd Defendants would logically have desired to have the stay of execution continue until the matter under cause Number 2014/HP/229 was resolved.

In light of the foregoing, I am inclined to agree with the sentiments of the 2nd and 3rd Defendants that the proceedings in the Lands Tribunal were commenced by the Plaintiff because it knew that it was the only way it could get an injunction against the 2nd and 3rd Defendants away from the proceedings in the High Court.

Further, while the Plaintiff has exhibited the Notice of Discontinuance of cause Number 2014/HP/229, it has not provided any proof that the same was served on the 2nd and 3rd Defendants. Similarly, the 2nd and 3rd Defendants, although alleging that the said notice was only brought to their attention on 13th June, 2017 which is four days after this Application was made, have also not provided any proof that the notice was served on them on the alleged date. In view of this, I have found nothing on the record to satisfy me that the said notice was duly served on the 2nd and 3rd Defendants. In the absence thereof, I shall proceed on the assumption that there was no service of the Notice to Discontinue by the Plaintiff on the 2nd and 3rd Defendants.

Counsel for the Plaintiff has submitted that this matter has already been fully determined by this Court, through the Consent Judgment and that the order for stay of execution did not set aside the Consent Judgment, which setting aside can only be achieved through a fresh action challenging the said Consent Judgment. While I agree that Counsel is technically correct, I am of the view that the failure to serve the Notice of Discontinuance on the 2nd and 3rd Defendants

precludes the Plaintiff from contending in the said manner. To find otherwise would be an affront to the bases established in the case of *Hubbard v. Vosper*, above.

Counsel for the Plaintiff has also submitted that the order for stay of execution was pending determination of the matter under cause number 2014/HP/229, the discontinuance of which culminated into its determination and cessation of the order for stay of execution. Part of the relief in the Consent Judgment that the Plaintiff seeks to execute by virtue of the cessation of the order for stay of execution is equitable in nature. It is, indeed, a trite principle of equity that 'he who comes to equity must come with clean hands'.

While the Plaintiff, on one hand, is claiming that the discontinuance of cause Number 2014/HP/229 culminated into its determination, it has proceeded to seek the same relief before a different forum, being the Lands Tribunal. This does not appear, to me, like an action taken in good faith, and neither was the discontinuance intended to really determine the case. Had the facts, allegations and the relief sought by the Plaintiff in the Complaint filed at the Lands Tribunal been significantly different from those under cause Number 2014/HP/229, my finding would have been different.

Turning to the benchmarks set in the *American Cyanamid Company v. Ethicon Limited* case, cited by both parties herein, I am indebted to Counsel for their outline of the principles therein.

As regards the benchmark that there ought to be a serious question to be tried, it was stated in Paragraph 583 of Halsbury's Laws of England that on application for an injunction, the court must be satisfied that there is a serious question to be tried and that the court therefore, must be satisfied that the claim is not frivolous or vexatious. In this regard, it was held in the case of *Harton Ndove v. National Educational Company of Zambia Limited*[10] that:

> *"Before granting an interlocutory injunction it must be shown that there is a serious dispute between the parties and the plaintiff must show on the material before court, that he has any real prospect of succeeding at the trial."*

In determining whether there is a serious question to be tried, the material available to the court at the hearing of the application must disclose that the claimant has real prospects for succeeding in his claim for a permanent injunction at the trial.

I have examined the material on record and I am satisfied that there is a serious question to be tried which is neither frivolous nor vexatious, and this is not only as demonstrated by the previous stay of execution, which the Plaintiff claims is now discharged, despite there being no proof of service of the Notice of Discontinuance; but also demonstrated by the Plaintiff's own action of commencing another matter which is on all fours with the discontinued one, before the Lands Tribunal, two days after discontinuing cause Number

2014/HP/229. Further, the facts on record, in my opinion, disclose a real prospect of the 2nd and 3rd Defendants succeeding at trial.

Counsel for the Plaintiff has submitted on all the benchmarks laid out in the *American Cyanamid Company v. Ethicon Limited* case, with the final submission that the 2nd and 3rd Defendants have not satisfied any of the said benchmarks, so as to warrant a grant of an order of interlocutory injunction in favour of the 2nd and 3rd Defendants.

While the Could would not have any issue with addressing each and every one of the Plaintiff's contentions, the learned authors of Halsbury's Laws of England, do state in paragraph 581 (already quoted above), as follows:

> *"It is not necessary that the court should find a case which would entitle the claimant to relief at all events, it is quite sufficient for it to find a case which shows that there is a substantial question to be investigated, that interim interference on a balance of convenience and inconvenience to the one party and to the other is expedient, and that the status quo should be preserved until that question can be finally disposed of."*

From the above quotation, it seems to me that the conditions to consider for the grant of an injunction need not all be applied in each and every case. In view of the foregoing, therefore, I find that the question of the remainder of the benchmarks in the *American Cyanamid Company v. Ethicon Limited* case have been overridden by the initial question of whether there is a serious question to be tried.

Having found earlier that there is a serious question in this matter to be tried, it naturally follows that the *status quo* should be preserved until that question can be finally disposed of. For avoidance of doubt as to the meaning of *status quo*, guidance is provided in the case of *Garden Cottage Foods Limited v Milk Marketing Board*[11], where it was held as follows:

> *"For the purpose of deciding whether an interlocutory injunction should be granted to preserve the status quo, the status quo is the state of affairs existing during the period immediately preceding the issue of the writ seeking the permanent injunction or, if there is unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion."*

The need for maintenance of the *status quo* was clearly stated in the case of *Hondling Xing Xing Building Company Limited v. Zamcapital Enterprises Limited*[12], where it was held as follows:

> *"As regards the status quo, where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo."*

In view of the foregoing and on the strength of Order 3, Rule 2 of the High Court Rules which permits courts to make any interlocutory order which they consider necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not, I am persuaded that the facts in this Application warrant the grant of an interlocutory injunction. Consequently, having found that the Notice of Discontinuance of cause Number 2014/HP/229 was not served on the 2nd and 3rd Defendants, I am

inclined to grant the interlocutory injunction in order that the *status quo* immediately before the alleged discontinuance of cause Number 2014/HP/229 be maintained. The said injunction is granted subject to discharge upon the Plaintiff showing proof on record of service of the Notice of Discontinuance of cause Number 2014/HP/229, on the 2nd and 3rd Defendants.

Costs of and incidental to this Application are awarded to the 2nd and 3rd Defendants, to be agreed or taxed in default of agreement.

Dated at Lusaka the 24th day of August, 2018.

W.S. MWENDA (Dr)
HIGH COURT JUDGE