IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 175/2017 &**
HOLDEN AT LUSAKA **Appeal No. 27/2018**

(Civil Jurisdiction)

B E T W E E N :

FINANCE BANK ZAMBIA PLC **APPELLANT**

AND

LAMASAT INTERNATIONAL LIMITED **RESPONDENT**

CORAM : Chisanga JP, Chishimba and Sichinga, JJA
10th April, 2018, 21st November, 2018 and 7th March, 2019

For the Appellant : Mr. E. Mwitwa and Mr. A. Mumba of Messrs Mwenye & Mwitwa Advocates
For the Respondent : Mr. K. Kaunda of Messrs Ellis & Co.

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court.

CASES REFERRED TO:

1. Zega Limited Vs Zambezi Airlines Ltd SCZ Appeal No. 39 of 2014
2. Diamond Insurance Limited Appeal 39/2014
3. Ellis vs Allen (1914) 1 Ch 104
4. Roger Scolt Miller v Attorney General 1980 ZR 126
5. Water Wells Limited v Wilson Samuel Jackson (1984) ZR 98
6. General Malimba Masheke & Others v Zambia Daily Mail ltd SCZ No-23/2002
7. Amon v Bobbelt 1889 22 QBD 543
8. Stumore v Campbell & Co 1892 1 QB 314 p317
9. Warner v Simpson (1959) QB 297
10. Himani Alloys v Tata Steel LTD 2011(3) RCR (Civil) 10
11. Zinka Vs. The Attorney General (1990-1992) Z.R. 73 S.C
12. Elias Mumeno and 43 Others Vs. Esau Phiri and Others CAZ Appeal No. 63 of 2017
13. Hina Furnishing Lusaka Limited Vs. Mwaiseni Properties Limited (1983) ZR 40
14. Christopher Mulenga, Edgar Hamuwele and Zambia National Commercial Bank Plc (2010) ZR 221 Vol. 1
15. American Cyanamid Company Vs. Ethicon Limited [1975] 1 All ER 504

16. Kanjala Hill Lodge Limited and Another Vs. Stanbic Zambia Limited Appeal No. 46 of 2010 (Selected Judgment Number 17 of 2012)
17. Shell & BP Zambia Limited Vs. Conidaris and Others (1975) ZR 174
18. Akapelwa (Sued as Induna Inete) and Others Vs. Nyumbu (Suing as Chief Chiyengele) SCZ Appeal No. 4 of 2015
19. Ahmed Abad Vs. Turning and Metals Limited (1987) ZR 174
20. Bob Bwembya Luo Vs. Alfred Banda SCZ Appeal No. 52 of 2011 as authority
21. Hondling Xing Building Company Limited Vs. Zamcapital Enterprises Limited (2010) ZR 30 Vol.1
22. Zambia Democratic Congress Vs. Attorney General (SCZ Judgment No. 37 of 1999)
23. Attorney General Vs. Law Association of Zambia (2008) Z.R. 21 Vol. 1 (S.C.)
24. Novartis AG Vs. Dexcel-Pharma Ltd (2008) EWCH 1266 (Pat)
25. Fina Bank Limited Vs. Spare & Industries Limited Civil Appeal No. 51 of 2000
26. Edward Jack Shamwana Vs. Levy Mwanawasa (1994) S. J. 93
27. Smithkline Beecham Plc Vs. Generic (UK) Limited 2001
28. Evans Marshall & Company Vs. Bertola S.A. [1973] 1 WLR 349
29. Lyons & Sons Vs. Wilkins (1986) 1 Ch. 811
30. National Commercial Bank Jamaica Ltd Vs. Olint Corp Ltd (Jamaica) (2009) 1WLR
31. Development Bank of Zambia v Chani Enterprises SCZ Appeal No. 99 of 2001
32. Zambia National commercial Bank PLC, Edgar Hammuwele & Christopher Mulenga (As joint Receiver/Manager of Courtyard Hotel Limited – in Receivership vs. Courtyard Hotel Limited) SCZAppeal No. 141 of 2015

LEGISLATION AND OTHER WORKS REFERRED TO:

1. R. E. Megarry and P. V. Baker Snell's Principles of equity 24th Edition
2. Halsbury's Laws of England Volume 16 (2) 4th Edition
3. Jixi Zhang, Journal of Politics and Law – Fair Trial Rights in ICCPR
4. The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia
5. The High Court Rules, Chapter 27 of the Laws of Zambia
6. Steven Gee Q.C., Commercial Injunctions (2016) 6th Edition
7. G. Lightman & G. Moss, The Law of Receivers and Companies. 6th Edition. London: Sweet & Maxwell,1986.

Appeal numbers 175/2017 and 27/2018 arising from cause number 2017/HP/0150 were consolidated by the court upon application. Therefore they will be determined accordingly. The

consolidated appeal arises from two separate decisions delivered by the court below, refusing to enter judgment on admission and granting the respondent an interim injunction pending determination of the main matter.

The appellant and the respondent were in a banker/customer relationship. The respondent obtained several loan facilities from Finance Bank. The facility relevant to the proceedings is the term loan facility obtained to consolidate the existing facilities into a single loan of US$10,000,000. The term loan facility was also meant to settle the balance of the sum of US$ 3,408,624.65. The tenor was sixty months equating to 60 monthly installments.

During the course of the banking relationship, the appellant Bank was acquired by Atlas Mara Group on 30th June, 2016. On 24th January, 2017, a letter of demand for the full settlement of the sum of US$12.2million was made to the respondent. The respondent was to pay, the said sum owed within 14 days, failure to which a Receiver and Manager would be appointed to ensure recovery of the debt.

The respondent then commenced an action against the appellant. In its amended writ of summons, the respondent

sought an injunction to restrain the bank from prematurely appointing a Receiver to manage its affairs. Further, the respondent sought an order to vary or restructure the settlement terms of the term loan facility and to direct the applicant to settle the overdraft facility arrears in installments. In addition, damages were sought. The appellant settled a defence and counterclaim. Upon the respondent filing a defence to the counterclaim, the appellant applied for entry of judgment on admission.

In respect of the application for judgment on admission, the respondent, in its supporting affidavit, deposed that the appellant had admitted owing the counterclaimed sum of US$12,229,065.63. That the defence to the counterclaim as well as the amended writ of summons by the respondent did not dispute the appellant's claims in the counterclaim. Further, that the respondent admitted pledging a number of properties as security for the Loan. In addition, that the respondent did not dispute being in default of the Term Loan Agreement, its indebtedness and the arrears due.

In opposing the application, the respondent stated that it had not admitted the amounts alleged to be due and outstanding.

The counterclaim sum included penalty and 10% daily compound interest. Therefore, it was undesirable to enforce the mortgage by way of foreclosure. That in any event, the estimated value of the mortgaged properties was US$ 32,400,000 compared to the claimed foreclosure sum of US$ 12,229,065.63. The gist of the opposition being that entry of judgment on admission would render the respondent's claims academic.

The appellant in its affidavit in Reply reiterated that the respondent had admitted liability and that the value of the security properties for the term loan facility was not a defence to the counterclaim nor was it a bar to entry of judgment on admission. The appellant refuted that interest on the account was in contention, and stated that compound interest was agreed upon.

The learned Judge in the court below held that granting the judgment on admission at that stage would fly in the teeth of his ruling dated 13th July 2017 (injunction) which held that there were issues raised that could only be determined at trial. The Judge further stated that;

> ***"granting the sought remedy and relief to the Defendant at this stage will tantamount to terminating the plaintiff's action without being given an opportunity to be heard as dictated by one of the rules of natural justice audi alteram patem..."***

The court below was of the view that the amounts in issue were not quantified and ought to be investigated at trial to determine the amount for which entry of judgment ought to be entered. The court dismissed the application for being devoid of merit.

Being dissatisfied with the refusal to enter judgment on admission, the appellant raised five grounds of appeal as follows;

(1) The court erred in law and fact when it declined to enter judgment on admission against the respondents notwithstanding that the pleadings and the evidence on record show that the respondents have admitted the appellant's counterclaim.

(2) The court below erred in law and in fact when it held at page R7 of the Ruling that granting the judgment on admission will fly in the teeth of the court's ruling of 13th July 2017, when in fact the said ruling dealt with separate issues and was restricted to the respondent's claim.

(3) The court below erred in law and fact when it held at R7 of the Ruling that grating the judgment on admission to the appellant will be tantamount to terminating the respondents' action without being given an opportunity to be heard, when in fact and in law, a counter-claim is a cross action which stands independent of the respondents' claim.

(4) The court below erred in law and in fact when it held at page R8 of the Ruling that the fact that the appellant was contemplating assessment is an admission that the amount claimed is not quantified when in fact the appellant's counterclaim is specific on the amount and interest claimed.

(5) In the alternative, the court below erred in law and in fact when it declined to enter judgment on admission against the respondents notwithstanding the fact that the pleadings and evidence on record show that the respondents do not dispute their liability to the appellant.

Ground one and five will be addressed together as the issue raised is the same. The appellant submits that the High Court is reposed with jurisdiction to enter judgment on admission where admissions of facts or part of a case have been made by a party, pursuant to **Order 21 Rule of the High Court Rules** as well as **Order 27 Rule 3 of the Supreme Court Rules.**

It was contended that an admission may be express or implied and must be clear. The cases of ***Zega Limited Vs. Zambezi Airlines Ltd*** [1] and ***Diamond insurance limited*** [2] were cited as well as the English decision in ***Ellis Vs. Allen*** [3] on admissions made by letter or otherwise. The appellant contended that the court below did not take into account the pleading and evidence on record that showed admitted liability by the respondent. Reference was made to the defence to the counterclaim filed by Lamasat International and the fact that the counter-claim contained admissions by the respondent. Therefore, the appellant was and is entitled to judgment on admission.

In the alternative, Counsel submitted that the issue for assessment should have been referred to the learned Deputy Registrar. He opined that Judgment can be entered as regards liability and thereafter the issue of quantum i.e assessment of damages left to the learned Deputy Registrar. As authority, the cases of ***Roger Scolt Miller v Attorney General*** [4]***; Water Wells Limited v Wilson Samuel Jackson*** [5] and ***General Malimba Masheke & Others v Zambia Daily Mail ltd***[6] were cited.

Ground two assails the holding by the court to the effect that granting judgment on admission will fly in the teeth of the court's earlier ruling of 13th July 2017. The ruling of 13th July 2017 granted the respondent an injunction restraining the appellant from appointing a Receiver/Manager to realize the debt owed. The gist of the argument in this ground being that the earlier ruling dealt with the injunction restraining appointment of Receiver/Manager and that entering judgment on admission cannot be said to fly in the teeth of the ruling

Under ground 3, in respect of the holding that entry of judgment on admission would terminate the respondent's action, Counsel for the appellant submits that a counter-claim is an independent action, a cross action against the plaintiff by a defendant. It stood independent of the respondent's action. As

authority, **Order 15 Rule 2 of the Supreme Court Rules** and the cases of ***Amon v Bobbelt*** [7] and ***Stumore v Campbell & Co*** [8] were cited. Counsel contended that the court below erred in fact by holding that granting the judgment on admission would be tantamount to terminating the respondent's action without an opportunity being given to be heard when the counterclaim is an independent action.

In ground four, the appellant submits that the counter claim amount is specific in the sum of US$ 12,229,065.63 plus compound interest at 10% and not unquantified as stated by the court below. The issue of assessment of the amount owed had nothing to do with the entry of judgment on admission on the specific amount admitted as owing to the appellant. Therefore the court below erred by declining to enter judgment on admission. We were urged to set aside the ruling of the court below.

The respondent, in the heads of argument, submitted that there was no admission of the counterclaimed sum of US$12,229,065.63 in the pleadings as alleged by the appellant. The amount in issue was disputed as it contained charges or penalty interest, hence the request for bank statements. The

issue of penal charges was a matter to be resolved at trial. Reference was made to ***Regulation 10 of S.I No. 179 of 1995***.

It was further submitted that there was no clear admission which could be said to be unconditional and absolute. The gist of the above argument being that having *traversed seriatim* each and every argument in the counter-claim, there was no admission. The case of ***Warner v Simpson*** [9] was cited as authority. It was contended that an admission must be unambiguous and absolute for it to be acted upon. As authority, the case of ***Himani Alloys v Tata Steel LTD*** [10] was cited. Reference was also made to the provisions of ***Order 27 Rule 3 of the High Court Rules*** and ***Order 27/3/4 of the Rules of the Supreme Court.***

In response to grounds two and three, it was submitted that the court below was on firm ground in holding that granting the judgment on admission would essentially terminate the entire action without according the respondent an opportunity to be heard on its claim. The ruling on the injunction dated 13th July 2017 was adverted to in submitting that the court below rightly recognized that there were serious issues to be determined at

trial, hence the dismissal of the application for judgment on admission.

The respondent contended that the issues claimed in the writ and counterclaim were not separate or independent of each other and cannot be determined separately. By way of analogy the cases of ***Zega Limited v Zambezi Airlines Limited***[1] and ***Diamond Insurance Limited***[2] were cited, which dealt with a claim for negligence, liability and entry of judgment on admission. It was argued that it would be unjust to enter judgment on admission without determining all the issues raised, particularly the negligence claim where the sum due can only be ascertained after assessment.

The respondent further argued that entering judgment on admission would contravene its right to be heard, is unconstitutional, and in breach of the international convention on Civil and Political Rights. Reliance was placed on ***Article 118 (a) of the constitution*** on the right to a fair hearing which is replicated by ***Article 14 of the United Nations Convention*** on civil and political rights. The respondent made reference to the ***Article by Jixi Zhang, the journal of politics and law on***

Article 14. On the issue of the right to be heard, the case of ***Zinka v Attorney General*** *(11)* was cited.

In a nutshell, the respondent contends that the statutory provisions on entry of judgment on admission cannot override constitutional provisions, even in the face of a clear admission. The entry of judgment on admission would render the respondent's claims academic in the court below. The respondent went on to cite a number of cases in which the Supreme Court frowned upon academic orders. It was submitted that the court below properly exercised its discretion by declining to enter judgment on admission and that the appeal be dismissed with costs.

We have considered the arguments, authorities cited and the submissions by the learned Counsel for the parties. It is trite that the court has discretionary power to enter judgment on admission under ***Order 27 Rule of the High Court Rules***. This power is exercised in only plain cases where the admission is clear and unequivocal. There is a plethora of decisions on the admissions and entry of judgment. An admission has to be plain and obvious, on the face of it without requiring a magnifying glass to ascertain its meaning. Admissions may be by pleadings

or otherwise. The crux of the first part of this appeal is whether in the circumstances the learned judge erred by refusing to enter judgment on admission.

The requirements to be satisfied before the court can pronounce or enter a judgment on admission are that the admissions have been made in either the pleadings or otherwise, and must be clear and unequivocal. We have perused the pleading by the parties on record. Upon the respondent filing a claim into court, a defence and counterclaim was entered by the appellant seeking payment of the sum of US$ 12,229,065.63. A defence to counter-claim was filed which was the basis of the application for entry of judgment on admission. The respondent in its defence to the counter claim in paragraph six averred that the demand by the appellant was premature and it had not failed to settle its indebtedness with the bank *"but had merely applied to have the settlement terms of the facility restructured"*.

Further, that the proposals made were capable of liquidating the debt of US$ 12,229,065.63 and that the value of the pledged properties exceeded by far the said debt by far. In paragraph 8, the respondent reiterated that it had not failed to settle the debt to the bank as it is a viable going concern with an active income

generating immovable asset portfolio valued at approximately US$ 165,000,000.00.

We are therefore of the view that Lamasat had clearly admitted the indebtedness to the appellant in the claimed sum of US$ 12,229,065.63. The default was admitted by the respondent who averred that it admits the contents of paragraph 1- 7 of the counter-claim. The contents of the admitted paragraphs being the obtaining of the term loan facility in the sum of US$ 13,408,624.65 whose purpose was to consolidate the existing credit facilities into a single loan of US$ 10,000,000 and to settle an outstanding balance of US$ 3,408,624.65. Compound interest of 10% per annum would accrue. Paragraph 15 of the counter claim averred that the respondent had defaulted on its contractual obligations and made undertakings to deposit US$ 3,000,000 to amortise its debt to the bank. Paragraph 7 averred that the respondent had acknowledged its indebtedness and pledged to liquidate outstanding amounts due by December 2016.

We are of the view that the admission in the pleadings having been clear, unambiguous and unequivocal, the court below erred by declining to enter judgment on admission. The

respondent, aside from admitting the counterclaim in respect of the claimed sum, did not dispute liability to the appellant.

The issue in ground two is whether the grant of the judgment on admission would have flown in the teeth of the ruling of 13th July 2017 which granted an interim injunction restraining the appointment of Receiver/Manager. The ruling of 13th July 2017, which we will revert to in determining the appeal against the order of injunction, granted an interim injunction to the respondent, pending determination of its claim for an order to vary or restructure the settlement terms of the term loan facility and to pay the overdraft facility in instalments.

We hold the view that entering judgment on admission against the respondent would not have flown in the teeth of the ruling granting an injunction. The lower court therefore erred by refusing to enter judgment on admission. A court cannot refuse to grant judgment on admission in the face of clear admissions.

Ground three assails the holding by the lower court to the effect that entering judgment on admission would be tantamount to terminating the respondent's action without being given an opportunity to be heard. It is trite that a judgment on admission can be entered before determining whether the admitted sum can

be liquidated in instalments; analogous to a claim to restructure the payment of the loan. The entry of judgment on admission has no bearing on other claims. We find no merit in ground three.

In ground four, the issue is whether the amount claimed by the appellant is not quantified. The court below stated that the fact that the appellant was contemplating assessment is an admission that the claimed sum is not quantified.

We are of the view that the court below erred. Perusal of the counter-claim on record clearly shows the amount claimed by the bank, i.e the sum of US$ 12,229,065.63 plus contractual interest at 10% compounded daily from the 24th January 2017 until full payment. There was nothing unquantified about the claim of 12.2 million dollars to require reference to assessment. At the most only the interest could be assessed. In any event, the agreed compound interest is known and is easily quantified.

In conclusion, we hold the view that, there was clear admission of liability in the sum of US$ 12,229,065.63 which the court below ought to have entered judgment accordingly.

We accordingly set aside the ruling of the court declining to enter judgment on admission and hereby enter judgment on admission in the admitted sum of US$ 12,229,065.63 with

interest as contractually agreed at 10% compounded from 24th January 2017 until date hereof, and thereafter at the current bank lending rate.

We now turn to consider the appeal against the order of injunction against the appellant. The respondent in the affidavit filed in support of the application for an interim injunction, deposed that the demand letter by the appellant Bank did not disclose the nature of the default. The respondent bewailed the financial constraints it was experiencing and the lack of capacity to mobilize resources within 14 days to satisfy the demand. The respondent further stated that the appointment of the Receiver/Manager would be detrimental as it would attract a 'call' on all other existing facilities with other financial institutions. In addition, the respondent contended that the appointment of a Receiver/Manager would reduce the reposed confidence of its suppliers and customers. Consequently, the respondent would be compelled to wind up the company, resulting in the loss of employment of over 1,000 of its employees.

According to the respondent, the loss and damage likely to be suffered in the event of the appointment of a

Receiver/Manager would be immense and cannot be atoned for by any award of damages.

In opposing the application, the appellant stated that the restructured term loan facility of the sum of US$13 million was repayable in monthly installments of US$ 213,220.50. The facility was secured by a Debenture on the fixed and floating assets of the respondent.

According to the appellant, the respondent defaulted and continues to default in liquidating the indebtedness. This culminated into the appellant issuing the respondent a demand letter. Further, that the respondent is in arrears of eight installments and has an overdrawn amount in the sum of US$ 1.5million. The default in payment was and has been acknowledged by the respondent who has made futile promises to settle the debt.

The appellant stated that the injunction would give the respondent an unfair advantage and would prejudice the appellant. Further, that the respondent would not suffer irreparable damages if the injunction is not granted which cannot be atoned for in damages. In any event, the appellant is capable of paying the damages should any be suffered. As to the balance

of convenience, the appellant deposed that it weighs in its' favour.

The learned Judge in the court below considered the principles applicable to the grant of injunctions namely; clear right to relief, irreparable injury, and balance of convenience and maintenance of the status quo. The lower Court found that the respondent had a clear right to relief which raised serious questions to be tried. Though the learned Judge held that the respondent would be adequately compensated in damages, he was of the view that refusing the grant of the injunction would terminate the whole matter prematurely without considering the serious questions raised. Consequently, the Judge granted the interim injunction to maintain the status quo.

Being dissatisfied with the decision of the court below, the appellant fronted 4 grounds of appeal namely that;

1. ***The Court below erred in law and fact when it decided to grant the respondent an interlocutory injunction solely on the ground that it needed to maintain the status quo notwithstanding that the respondent had come to court with tainted hands owing to its default on its obligations to pay back amounts owed by it to the respondent.***
2. ***The court below erred in law and fact when it decided that the respondent had a clear claim to relief notwithstanding that the Court had found as a fact, that the respondent had borrowed***

money from the appellant and had defaulted on its repayments to the appellant.

3. ***The Court below erred in law and in fact when it decided to grant the respondent an interlocutory injunction notwithstanding that the Court acknowledged that the appellant's contention that damages would be an adequate remedy had merit.***
4. ***The Court below erred in law and in fact when it decided that not granting the respondent an interlocutory injunction would terminate the whole matter prematurely contrary to the pleadings and claims filed by the parties which show that the claim for an injunction was only one of the several claims in contention.***

The appellant filed into Court heads of argument dated 29th December, 2017. It was submitted, under ground 1, that the trial Court found as a fact that the respondent was indebted to the appellant and was in default. Further, at the time the letter of demand was issued, there was an outstanding sum of US$ of 1, 767, 771.90 and US$1, 597, 409.22 on the overdrawn account. To date, the respondent has failed to discharge its monthly installments.

The appellant argued that clearly the respondent was in default and had come to equity with tainted hands. We were referred to the latin maxim *'he who comes to equity must come with clean hands'*. The appellant further referred us to an extract from **Snell's Principles of equity 24th Edition** and **Halsbury's**

Laws of England Volume 16 (2) 4th Edition at paragraph 560 where the learned authors discussed the above maxim. It was contended that the respondent did not have a clean past record when it approached the trial Court for an interlocutory injunction. We were referred to our decision in the case of ***Elias Mumeno and 43 Others Vs. Esau Phiri and Others*** (12) where we stated that;

> ***"The court below found that since the Plaintiffs were squatters who did not have the approval of the relevant authorities to be on the land, they had not come to equity with clean hands, in our view, the defence of unclean hands will apply where there is a link between the applicant's wrongful act and the rights he seeks to enforce. Inequitable conduct by the applicant is usually a bar to equitable relief...The burden to show that they had no blemish fell on the Plaintiffs."***

The appellant submits that there is a link between the maxim or defence of unclean hands and the right to relief. In a nutshell, the gist of the appellant's arguments is that the respondent cannot seek an equitable relief having defaulted on the loan facility. Further, that the lower court having found that the respondent was in default ought not to have granted the interim injunction to the detriment of the appellant's legal and contractual rights to recover the debt. To persuade us, we were referred to the High Court cases of ***Hina Furnishing Lusaka Limited Vs. Mwaiseni Properties Limited*** (13) and ***Christopher Mulenga, Edgar***

Hamuwele and Zambia National Commercial Bank Plc [14] and the principle that an injunction being an equitable remedy should not be sought by a party who is in breach of contract or one whose hands are tainted.

In arguing ground 2, the appellant submitted that the court erred when it granted the respondent an interim injunction inspite of holding that the respondent had defaulted on the loan and has not liquidated its indebtedness to the appellant. The respondent had no clear right to relief. We were referred to the case of ***American Cyanamid Company Vs. Ethicon Limited*** [15] where Lord Diplock discussed the principles the court ought to employ in deciding whether or not to grant an injunction.

The appellant reiterated that the respondent had no clear right to relief. Clause 20 of the term loan facility clearly stipulated that upon default, the appellant had a right to demand for the outstanding sum on the facility if the default is not remedied within 14 days. We were referred to the Supreme Court case of ***Kanjala Hill Lodge Limited and Another Vs. Stanbic Zambia Limited*** [16] in which the Court stated that in an instance where parties include a default clause in their agreement, then there is an indication that the clause ought to be invoked on default. The

appellant argued that in the circumstances it is entitled to invoke the default clause.

The appellant's further argument is that in any event the respondent cannot restrain it from exercising its legal right to appoint a Receiver/Manager in order to recover monies owed. Our attention was drawn to the decision in the case of ***Christopher Mulenga, Edgar Hamuwele and Zambia National Commercial Bank Plc*** [14] where the court refused to grant an injunction restraining a party from appointing a receiver.

Under ground 3, the appellant argued that where damages would be an adequate remedy an injunction ought not to be granted. In support of this proposition we were referred to the cases of ***Shell & BP Zambia Limited Vs. Conidaris and Others*** [17], ***Akapelwa (Sued as Induna Inete) and Others Vs. Nyumbu (Suing as Chief Chiyengele)*** [18], ***Ahmed Abad Vs. Turning and Metals Limited*** [19], ***Bob Bwembya Luo Vs. Alfred Banda*** [20] and ***Hondling Xing Xing Building Company Limited Vs. Zamcapital Enterprises Limited*** [21] as authority. The appellant argued that the Amended Writ of Summons on record clearly indicates that the respondent made several claims for damages therefore it can be adequately compensated for in damages. It was submitted that having found

that damages were an adequate remedy the trial Court ought to have declined to grant the interim injunction.

The appellant, in arguing ground 4 contended that the claim, for an injunction was just one of the remedies sought from the court. Therefore refusal to grant the injunction would not have determined the whole matter. Further, that had the trial Court properly directed itself it would have found that the respondent's claim is mainly a claim for damages.

The respondent filed heads of argument dated 5th April, 2018. In response to grounds 1 and 4 the respondent submits that the Court merely upheld its constitutional right to be heard on its claims when it confirmed the injunction. Further, that the appellant's counter claim was commenced after the respondent had sought the court's indulgence to revise payment plans. In addition, that the demand notice by the appellant is premature and irregular.

The respondent contended that had the lower Court discharged the ex-parte order of injunction, the claims would have been defeated without it being afforded an opportunity to be heard contrary to the provisions of the **Constitution** and the **International Convention on Civil and Political Rights**. The

respondent invited us to have regard to **Articles 1(1), 1 (3)** and **Article 18 (9)** with regards to a fair hearing and to the provisions of the Constitution which bind all institutions and persons in Zambia. We were further referred to a commentary on Article 14 of the United Nations International Convention on Civil and Political Rights, by Jixi Zhang in the **Journal of Politics and Law**, relating to the right of every individual to have access to the courts and a claim to justice. To further buttress the importance of the right to be heard we were referred to the case of ***Zinka Vs. The Attorney General*** [11].

In refuting the argument that the respondent has come to court with tainted hands, it was contended that the sum demanded by the appellant has been disputed because it includes amounts other than the outstanding arrears contrary to Clause 20 of the Term Sheet. Further, that the respondent has shown good faith by continuing to make substantial payments on the facility even after the lower Court granted the ex-parte order of injunction.

The respondent argued that an injunction is not only an equitable remedy but is also a statutory remedy. Where statute law and equity conflict, the former prevails. Therefore, the right

to be heard would still prevail over the principles of equity even in the face of non-payment by the respondent. In respect of the authorities cited by the appellant to the effect that an injunction is an equitable remedy not to be sought by a party in breach of contract or one whose hands are tainted, the respondent contends that the cases are not only inapplicable but distinguishable.

It was submitted that vacating the injunction would render the respondent's claims in the lower court academic. We were referred to the cases of ***Zambia Democratic Congress Vs. Attorney General*** [22] and ***Attorney General Vs. Law Association of Zambia*** [23] where the court disapproved of being engaged in academic exercises.

The respondent argued that the lower court was on firm ground when it held that discharging the injunction would terminate the whole matter prematurely. Further, that for orderliness and in line with the constitutional right to a fair hearing all the claims ought to be determined concurrently.

In response to ground 2, the respondent contended that the sum demanded by the appellant is disputed owing to the fact that it contravenes the provisions of Clause 20 of the Term Sheet

which allows the appellant to issue a demand notice with respect to outstanding arrears only. Therefore the demand notice issued by the appellant is irregular entitling the respondent to a right to relief.

According to the respondent, the debenture was preceded by three mortgage securities valued in the sum of US$32, 400, 000.00. This value is more than the sum claimed in the demand notice. The respondent went on to argue that the demand notice was issued in bad faith and is premature as the appellant ought to have exhausted the mortgage securities before threatening receivership. Therefore, there are serious issues to be determined at trial. We were referred to the case of ***Novartis AG Vs. Dexcel-Pharma Ltd*** [24] on the consideration that in assessing whether or not triable issues exist, the court is not called upon to finally determine the whole matter.

It was submitted that by threatening receivership the Bank was in essence attempting to deny the respondent its statutory right of redemption as provided for under **Section 66 (1) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia**.

The respondent contended that the counter-claim for foreclosure and sale are a confirmation that the mortgage securities ought to have been exhausted before threatening receivership which is a remedy of last resort. We were referred to the Kenyan case of ***Fina Bank Limited Vs. Spare & Industries Limited*** [25] where the court discussed the negative repercussions of a company being placed on receivership, which ought to be considered before a court may grant an injunction preventing receivership.

In respect of the cited case of ***Kanjala Hill Lodge Limited and Another Vs. Stanbic Zambia Limited*** [16] it was submitted that it is distinguishable, the creditors were not at the same time mortgagees and debenture holders as is the case herein. Further, that the demand notice by the appellant was made in bad faith because Cavmont Bank Limited had already made an undertaking to pay the outstanding balance in the sum of US$2, 500, 000.00 as evidenced by a letter appearing at page 265 of the Record of Appeal. On the 10th of January, 2017, Madison Asset Management Company also confirmed that it would transfer the sum of US$1, 500, 000.00 on or before 16th January, 2017.

In response to ground 3 the respondent argued that **Order 27 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia** empowers the court to grant an injunction even where the applicant's claims is for damages. Damages are not a bar to granting an order of injunction. We were referred to the case of ***Edward Jack Shamwana Vs. Levy Mwanawasa*** [26] where the Supreme Court stated that adequacy of monetary compensation is nearly always a ground for not granting an injunction. The respondent contends that damages would not atone for the loss to the respondent of the properties whose value (US$200, 000, 000.00) is considerably higher than the value at which the appellant was purchased by Atlas Mara (US$60, 000, 000.00). Further, that the respondent's status and loss of opportunity cannot be atoned for in damages.

The respondent went on to highlight the nature of irreparable damages to be suffered in the event of receivership such as lawsuits by its employees and suppliers of materials as well as the anticipated termination of loan facilities obtained from other financial institutions on account of the demand notice. Equally, that the respondent's brand and goodwill cannot be atoned for in damages. We were referred to the cases of ***Smithkline Beecham Plc Vs. Generic (UK) Limited*** [27], ***Evans Marshall***

& Company Vs. Bertola S.A. [28], ***Lyons & Sons Vs. Wilkins*** [29] and ***National Commercial Bank Jamaica Ltd Vs. Olint Corp Ltd (Jamaica)*** [30] on the issue of whether or not damages would be an adequate remedy. To further buttress the issue of the inadequacy of damages, the respondent referred us to a passage from the learned author of **Commercial Injunctions (2016) 6th Edition** on the losses to be taken into account for the purposes of deciding whether damages would be an adequate remedy for the claimant.

In conclusion, the respondent submits that the application of principles of equity depends on the nature of the claims. Further, that these claims are also affected by statutory provisions that relate to the issues before the court. The respondent argued that on the whole, the balance of convenience tilts in its favor.

In response, Mr. Mwitwa, in respect of the cited case of ***Zega Limited Vs. Zambezi Airlines limited***[1] submitted that the case is distinguishable as it dealt with the tort of negligence, whereas the issue before us arises from a loan secured by a mortgage.

Learned Counsel went on to contend that the need to ensure justice is done must be for the benefit of all parties in the

matter and that the exercise of discretion must be exercised judiciously. It was submitted that the court's discretion was exercised wrongly in view of the admission of indebtedness by the respondents. Reference was made to the Reply and Defence to Counterclaim at pages 267 -273 of volume one of the record, particularly paragraph seven, where the respondent averred that it was capable of liquidating the debt of US$12, 229, 065.53.

In respect of the assertion that the entry of judgment on admission would terminate the respondent's claims, it was submitted that the claims are capable of being determined on their own. We were therefore urged to dismiss the appeal with costs.

We have considered the appeal, the authorities cited and the submissions advanced. Grounds 1, 2, and 3 of the appeal raise issues namely the applicable principle of law in the grant of injunctions, and whether the learned judge in the court below was on firm ground in refusing to grant the injunction. The said grounds will be dealt with as one. The fourth ground raises the issue whether the refusal to grant an injunction would have terminated the whole matter prematurely.

The undisputed facts are that the respondent obtained a term loan facility to consolidate the existing facilities into a single loan of 10 million dollars and to settle the balance of the loan of 3.4 million dollars. As security for the loan, the legal mortgages were executed in respect of three properties. The relevant security being the Debenture created on the fixed and floating assets of the plaintiff to secure the sum of US$12,000,000 and interest. The appellant then issued a letter of demand for settlement of the sum owed within 14 days, failure to which a receiver and manager would be appointed to recover the debt. The application for an injunction was granted by the court below.

It is trite that an applicant must satisfy the thresholds of issuance of interlocutory injunctions, that there is a prima facie case with probability of success, that the applicant will suffer irreparable injury which would not adequately be compensated by an award of damages and if the court is in doubt, it will decide the application on the balance of convenience.

A prima facie case is one which on the material presented a court properly directing itself will conclude that there exists a right which has apparently been infringed by the other party. On the issue of whether there is a clear right to relief, we have looked

at the writ and claim by the respondent. Lamasat admits defaulting on its obligations in respect of the short term loan. The consequences of defaulting being the right of Finance Bank to call in the debt and appoint a Receiver/Manager pursuant to the Debenture/Floating charges over the assets of Lamasat.

A debenture security provides for the appointment by the secured creditor upon any default by the debtors or occurrence of specified events, of a receiver with powers to carry on the company's business with the view of reviewing the company or to the beneficial sale of the entity as a going concern. We refer to the learned authors of **The Law of Receivers and Companies, 6th Edition, 1986 at page 10 paragraph 2-07**. In the case of a floating charge, the creditor has a choice whether to make the appointment.

In a nutshell, a debenture holder has the right to exercise its contractual right pursuant to the debenture upon clear default. The respondent having defaulted on the loan facility agreement, the bank is entitled and empowered under the debenture to appoint a Receiver/Manager. We are therefore, on the above basis, of the view that the respondent has not shown a prima facie case with a probability of success. The applicant,

Lamasat, who sought the equitable injunctive relief has not come to court with clean hands, having defaulted on his obligations. The applicant has acknowledged being in arrears of the monthly repayments and is disentitled from seeking the aid of equity.

It is trite that the court will not normally interfere with the appointment of a receiver under the terms of a debenture holder, unless it is not for the benefit of the holder or the appointment was in bad faith. According to ***Halsbury's Law of England 3rd Edition Volume 6*** paragraph 699, *"a debenture often gives power to appoint a Receiver and Manager in specified events....."*

There are a plethora of authorities in which interim injunctions restraining the appointment of a receiver have been discharged on the basis that the applicant was in default of the loan obligations. See the cases of ***Development Bank of Zambia v Chani Enterprises*** [31]; and ***Zambia National commercial Bank PLC, Edgar Hammuwele & Christopher Mulenga (As joint Receiver/Manager of Courtyard Hotel Limited – in Receivership vs. Courtyard Hotel Limited)*** [32]. In the latter case of ***Zambia National commercial Bank PLC, Edgar Hammuwele & Christopher Mulenga (As joint Receiver/Manager of Courtyard Hotel Limited – in Receivership vs. Courtyard Hotel Limited)*** [32] the Supreme Court after making

reference to the ***Kayanje Farming Ltd*** and the ***Development Bank of Zambia*** cases, went further to state that;

> ***"Clearly, the two authorities are on point in this case as the plaintiff had defaulted in its loan obligations which default prompted the 1st defendant to exercise its rights under the floating debenture and to appoint the 2nd and 3rd defendants as joint receivers and managers of the plaintiff company. Without a doubt, the plaintiff is disentitled from seeking the aid of equity and there can be no doubt that the injuctive relief granted, to the plaintiff created conditions favourable only to the plaintiff at the expense of the charge holder. As we see it, there was no uncertainty regarding the issue of default to be determined at trial."***

On the issue of whether the respondent would suffer irreparable loss and injury unless the injunction is granted, we hold the view that the respondent has not established that it will suffer irreparable loss which cannot be adequately compensated by an award of damages.

The respondent contends that it will suffer the following unatonable damages; law suits by its employees and suppliers of materials as well as the anticipated termination of loan facilities obtained from other financial institutions. Further, its brand and goodwill cannot be atoned for in damages. The respondent in the court below sought damages for lack of good faith, breach of duty of care and negligence in invoking the receivership process;

damages for defamation and loss of opportunity as well as an order to vary or restructure the settlement terms of the loan and to settle the overdraft facility arrears in instalments. We hold the view that the claims advanced can be adequately compensated by an award of damages.

The respondent in challenging the appointment of receiver/manager raised the issue that its securities are valued far more than the amount owed of US$12 million. It is trite that parties in a contractual relationship are bound by the contract. The value of the security is not a basis to challenge the appointment of a receiver where the bank intends to realize the security as a Debenture holder.

Clearly the appellant bank is in a position to compensate the respondent and that capacity has not been challenged. Conversely, it is the applicant who has no capacity to pay damages. We refer to the financial constraints deposed to by the respondent.

This brings us to the remaining issue, the holding by the court that granting the injunction would terminate the whole matter prematurely. We are of the view that the learned Judge in the court below erred. Perusal of the amended claims at page 94

alluded to earlier are damages arising from alleged negligence, which do not terminate upon refusal of the grant of an injunction.

Having considered the principles applicable in injunctions, it must be borne in mind that we are essentially dealing with the issue simply of whether one can injunct, restrain or prevent the appointment of a Receiver/Manager pursuant to a Debenture agreement. We are of the view that a debtor cannot restrain the appointment of a receiver by a creditor pursuant to a debenture, where there is clear default by the debtor.

The default disentitles the applicant from seeking the aid of equity. We therefore overturn the decision of the lower court and discharge the interim injunction granted. For the forgoing reasons, we allow the consolidated appeal, with costs to the appellant.

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F. M Chisanga
JUDGE PRESIDENT
COURT OF APPEAL

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F. M Chishimba
COURT OF APPEAL JUDGE

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DLY Sichinga
COURT OF APPEAL JUDGE