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“The Role of Equitable Remedies in the Zambian Legal System: ‘A Critical analysis of how effective Injunctions have been in the Zambian Legal System.’ ”



Acknowledgement

To the Most High Living God and my creator JESUS CHRIST to whom all the glory and praise is due, I thank you for giving me the strength and intellect to undertake and complete this programme. I wish to thank my supervisor Mr. G Lyempe for his patience and guidance that he rendered to me without which this project would not have been completed. I also wish to thank the course coordinator and the entire School of Law staff for their timely directions and assistance over the years and especially during the period of this study.

To my pillar of strength my wife; Eugenia, and children; Sipho, Khondwani, Cholwe and Bridget and the rest of the family, I wish to say thank you for understanding and being patient with me and may God richly bless you. I also wish to say thanks to my mwana Isabelle Lemba and the husband Kema Lemba and my gang Emmanuel Mumba, Anthony Kamungoma, Chibamba Lopa, Ziukani Simposya, Mainga Mukando, Humphrey Chibanda, Rajnish Sharma and many others too numerous to mention in this space, for their encouragement. I say thanks guys and God bless you all.

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God richly bless you all.

Felix Chakuamba Zulu.

Dedication

I dedicate this dissertation to my wife; Eugenia and my children; Sipho Khondwani, Cholwe, and Bridget who have been my pillar of strength during this rough yet sweet path. I also wish to dedicate this dissertation to my late parents Henry Moses Zulu and Regina Kalopa Zulu who taught me the value of love, hard work and education.

ABSTRACT.

The kernel of the study is the effect of injunctions in Zambia. The study chronicles the development of equity, the courts of equity and equitable remedies generally and in particular injunctions. The study identified the different types and forms of an injunction also identified the rules and laws governing they issuance.

Injunctions in Zambia issue pursuant to the Supreme Court Act and The English Law (Extent of Application) Act and other plethora of authorities such as the *Whitebook*. By virtue of Order 29 of the *Whitebook*, English judicial decisions have the force of law in Zambia thereby making all court decisions and practice procedures stated therein available in Zambia.

The study looked at ten Zambian judicial decisions on injunctions where it was found that the Zambian courts have wholly depended and followed *ratio decidendi* from two English cases of *Preston v Luck* and *American Cyanamid Co v Ethicon Limited*. The leading cases in Zambia on injunctions are *Shell and BP (Z) LTD v Conidaris and Others* and *Harton Ndove v National Educational Company Zambia Limited* which were decided on the very principles in from the two English cases. It follows from the findings in the study that injunctions in Zambia follow the same law, rules and principles as in other common law jurisdictions.

Following this study the author however, recommends that a wholesome restructuring of the system on injunctions be undertaken, whereby an Act of Parliament on injunctions and other equitable remedies be promulgated that will give practice directions, principles and law. We already have a very rich jurisprudence on the subject matter and by so doing that would result into the growth of the Zambian jurisprudence.

Declaration

I, **Felix Chakuamba Zulu**, Computer Number 88014941, do hereby declare that the contents of this dissertation are based on my own findings and that I have not in any respect used any persons work without acknowledging the same to be so.

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Declaration

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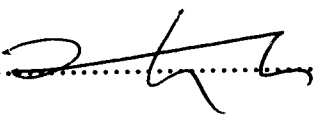
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CHAPTER 1 INTRODUCTION AND BACKGROUND.

1.0.0. Introduction.

It is a settled principle of law that ‘for a very right, there is a remedy and where there is no remedy there is no right’. Simply put it is because we have rights and these rights from time to time get to be violated by others that is why we have remedies. So remedies are there to protect our rights. The protection of the rights is done through some form of judicial action aimed at addressing the issue of the very right, and the result of these actions are namely: the prevention of the right from violation; or where the right has been violated the compensation for the violation of the right; and where possible the restoration of the right violated.

Injunctions and other equitable remedies offer some of the best remedies that a person may obtain judicially when their right has been violated, is being violated or before it is violated so as to prevent its eventual violation. Injunctions are granted by courts with that very purpose of protecting the rights of another.

In *John Musuaya Ngalula v Habib Industries Limited and Others*¹ (the case from which the author formulated the current essay question) the High Court was called upon by the plaintiff to declare that he was the lawful owner of the stand in dispute and that the court should issue an injunction restraining the first defendant, by themselves, or their servants or agents from further development of the said stand among other remedies.

John Musuaya was of the view that his rights of ownership of stand number 30083, the property in issue in the matter, were being violated and was therefore seeking the courts

¹ *John Musuaya Ngalula v Habib Industries Limited And Commissioner of Lands And Lusaka City Council And The Attorney General* Unreported 2010/HP/0412

discretion to stop the defendant, his agents or servants from further development of the stand until his rights over the said stand were declared.

The Court was in no doubt in agreement that the plaintiff, in this cause, had raised a serious question that deserved to be tried (as to who was the rightful owner of the stand in dispute). However, the Court was of the view that an award of damages in this case would be an adequate remedy if the plaintiff were to succeed at trial and refused his application for an interlocutory injunction.

Precedence denotes that damages are never an adequate remedy for land, but *Dr. Justice Matibini*, as he then was, was of the view that damages in this case would nevertheless be an adequate remedy for the plaintiff. He cited among other authorities the cases of *Jane Mwenya and Jason Randee v Kapinga*² and *Tito Waddel (No.2)*³. *Dr Matibini* went on to note in *obiter dicta* that the primary purpose of an interlocutory injunction was the maintenance of the *status quo* and the prevention of *irreparable injury*. He defined *irreparable injury* as ‘injury which is substantial, and can never be adequately remedied, or atoned for by an award of damages.’⁴

After reading this case the author developed a number of questions on injunctions. The author wanted to know what was the effect of an injunction and what laws govern their issuance in Zambia and other common law jurisdictions? Furthermore what were the principles, rules and conditions needed to be considered when applying for an injunction and other equitable remedies? It is hoped that this study will nevertheless answer these questions in addition to the ones set out below under the heading ‘*research questions*’.

² (1998) Z.R. 17.

³ [1977] Ch.D., 106.

⁴ *John Musuaya Ngalula v Habib Industries Limited and Others* at page 17

1.1.0. General Background.

There are two types of remedies that are granted by courts and tribunals of competent jurisdiction and these are namely: Legal and Equitable remedies (which can be collectively called '*Judicial Remedies*'). These remedies are distinguishable, Legal remedies accrue as of right they are statutory in nature though arguably some have their root in equity while equitable remedies accrue at the discretion of the court. Equitable remedies were developed by the medieval courts of equity, they were historically granted by the Court of Chancery and Court of Exchequer until the passage of the Common Law Procedure Act, 1854.⁵

Injunctions and Specific Performance are the two main equitable remedies the others include rescission; declarations; rectification and cancelations; appointment of receivers; equitable estoppel; and trusts. However the interest of the author in this essay is the equitable remedy of injunction.

Injunctions, as a legal instrument, are used every single day by lawyers and judges to protect, prevent or stop some act or other that may affect the rights of another. They are used to protect a person's rights, preserve the *status quo* or stop a wrongful act that the plaintiff wishes not to continue and so forth. An injunction is defined as a court order requiring a party (the defendant) to do or refrain from doing some action that is in violation of the plaintiff's right.

Injunctions in Zambia issue pursuant to Order 29 of the *Rules Supreme Court*⁶ side to side with Order XXIII of the High Court Act⁷ and as per plethora of other authorities (such as the

⁵ (17 and 18. Victoria c.126.)

⁶. *The Supreme Court Practice 1999 White Book*, eds. Jack I H Jacob and Richard Scott. (London: Sweet and Maxwell, 1998).

Supreme Court Act⁸ and the English Law (Extent of Application) Act⁹, court decisions from
Zambian courts and other common law jurisdictions, and other statutes). However, the
Zambian legal system lacks a specific or dedicated legal provision that deals directly and in a
wholesome manner with injunctions.

The legal basis of an injunction in the Zambian legal system almost wholly depends on the
English legal system. For example interlocutory injunctions, have their basis in the English
decisions in *Preston v Luck*¹⁰ and *American Cyanamid Co v Ethicon*¹¹ from whence we have
borrowed extensively into our own judgements. This is better shown in the case of *Harton
Ndove v National Educational Company Zambia Limited*.¹² Where Judge Chirwa, J., as he
then was, quotes *Cotton L.J.*, with authority in the case *Preston v Luck* he defines an
interlocutory injunction as an application by the applicant with one object, of keeping things
in *status quo* so that if after obtaining a judgment in their favour they would have prevented
the defendant from having dealt with the property or matter in issue in such a way as to make
the judgment obtained ineffectual.’¹³

It is as a result of this over dependence on the English legal system that the author has felt
there is need to analyse the effect of injunctions in the Zambian legal system. We have heard
many times that lawyers use injunctions to delay the court process and that they are used

² Cap 27 of the Laws of Zambia. Order XXXIII of the High Court Act Cap 27 of the Laws of Zambia is the same as Order XXXIII of the Subordinate Courts Act Cap 28 of The Laws of Zambia.

⁸ Cap 25 of the Laws of Zambia

⁹ Cap 11 of the Laws of Zambia

¹⁰ [1884] 27 Ch.D. 497

¹¹ [1975] A.C. 396, [1975] 1 All ER 504.

¹² (1980) Z.R. 184 (HC)

¹³ (1980) Z.R. 184 at 186

(injunctions) to gain unwarranted advantage against defendants and also to gain favour of the cause by delaying the process unnecessarily.

1.2.0. Statement of Problem

Zambia lacks its own legal basis or system for injunctions, the legal fraternity has wholly depended on the English provisions and process in terms of statutory provisions and the procedure for the issuance of injunctions. What is the effectiveness of the equitable remedy of an injunction in the Zambia legal system? Injunctions are a very important tool of law that are issued by the courts everyday yet the whole process has no provision but a reference in the Zambian statutes and the practice direction is imported from the English legal system.

1.3.0. Aims and Objectives of the Study.

The aim of the study is to look at how effective injunctions have been used in the Zambian Legal System. The study will chronicle the development of the injunction and analyse if injunctions have indeed achieved they intended objectives and aims in the Zambian legal system. It is also envisage that the study will give an insight into the development and application of injunctions in Zambia and other Common law jurisprudences. The study will also look at the actual process of issuing injunctions, under what conditions they are given, the effect of injunctions on the State and The State Proceedings Act. Look at the effect of injunctions on persons. Compare the position of the Zambian courts to that of the English Courts as regards injunctions.

1.4.0. Significance and Purpose of the Study.

This study will result in the creation of critical mass for the legal fraternity on the subject matter of injunctions. The study will invariably contribute to the academic growth of the legal

fraternity. This will inevitably result in the better understanding of equitable remedies in general and injunctions in Zambia in particular.

1.5.0. Research Questions

The essay is intended to answer the following questions among others:

- a. What is equity and what are equitable remedies?
- b. What are injunctions and what are the different types and forms of injunctions that are available in Zambia and other common law jurisdictions?
- c. What laws govern the issuance of injunctions and other equitable remedies in Zambia?
- d. What rules and principles have the Zambian courts developed in the issuance of injunctions and other equitable remedies and have they been effectively used by the courts in Zambia?

In the process of answering the above questions it is the author's hope that the legal fraternity generally and the author will come out with a better understanding of the equitable remedy of an injunction and the other equitable remedies, their history and development.

1.6.0. Methodology

The research work is mainly qualitative in nature it will involve the collection of secondary data through some comparative desk research work; studying, examining, comparing and contrasting the legal frameworks of equity in general, equitable remedies and most specifically the remedy of injunction. It will involve aspects of literature review, looking at

the legal concepts and provisions and will also look at law reports, publications and ‘concepts papers’ and writings on the subject matter.

1.7.0. Operational Definition of Terms

The following are the operational definitions of some of the concepts and terms used in this study:-

Injunction It is a judicial process whereby the court orders a party (parties) to refrain or avoid from doing or to continue to do a particular act or thing.¹⁴

Equity Is fairness or balance; or is that law that was designed to complement common law it provide remedies for situations that were unavailable at law. It supplemented the strict rules of common law, where the application of law would be too harsh. It allowed judges the use of discretion and application of justice as they saw it in accordance with natural law.

Equitable remedy It is a judicial remedy that is granted at the discretion of the court. The main equitable remedies are injunctions and specific performance.

Common Law It is the law that was developed by the Common law courts of medieval England. It is the general name for Anglo-American case-based system of law as opposed to civic law.¹⁵

¹⁴ *Words and Phrases - Legally Defined*, ed. John B Saunders 2nd edition. (London: Butterworths, 1969), s.v. “Injunctions”.

¹⁵ *Dictionary of Law - Legal Language Defined and Explained*, ed. J. W. Stewart (Glasgow: HarperCollins Publishers, 2001) s.v. “Common law”.

1.8.0. Limitation of the Study

There is an obvious lack of academic and professional information on the subject matter of injunctions. In the entire library of the University of Zambia there was only one book on the subject matter written by *Owen M Fiss* entitled '*Injunctions*'¹⁶. It was the same result with obligatory essays from the undergraduate section no one has written directly on the subject of injunctions least just in passing as an example of an equitable remedy.

1.9.0. Conclusion

The chapter has dealt with the salient features and basic aspect of the research by way of giving an outline of the problem, what are the research questions to be dealt with in this paper and defined key concepts and terms used in the study. The chapter has provided the basic background on which the subsequent chapters will be built from.

¹⁶ Owen, Fiss M, *Injunctions*. (Mineola, New York: The Foundation Press Inco., 1972)

CHAPTER 2 REVIEW OF LITERATURE ON EQUITY.

2.0.0. Introduction

In this chapter the author intends to give an account of the development of equity, the Court of Chancery and Common Law. Identify the various types of equitable remedies that courts give in common law jurisdictions, Zambia and England inclusive, will then look at the various maxims of equity. And will close this chapter by analysing and looking at the five main equitable remedies.

2.1.0. What is Equity?

Equity as a subject has attracted very little academic attention at both postgraduate and undergraduate programmes and the Zambian legal fraternity has also failed to adequately provide a necessary academic insight into this subject other than that it forms part and parcel of the Zambian legal system by virtue of our English legal heritage.

What is Equity? That question has been asked thousands of times and each time there has been no easier or adequate answer to the question suffice to say that main scholars have tried to define it as three different conceptions. It may mean (i) a body of laws and rules; (ii) a historical source of rules in modern English Law; (iii) an abstract idea of justice distinct from that which motivates the common law, and which may be the starting point of new rules of law which are termed equitable.¹⁷

Philip H Pettit in his book *'Equity and The Law of Trust'*¹⁸ has, however, identified seven different meanings for the word equity: "*the word 'equity' is used in seven different senses;*

¹⁷ George Williams Keeton, *An Introduction To Equity*, 6th Edition (London: Sir Isaac Pitman and Sons Ltd, 1965), 2

¹⁸ Philip M Pettit, *Equity and The law of Trust*, (London: Butterworths, 1966).

in the sense of what is fair and just, in the sense of natural law, in the sense of a system of law, in the sense of a theory of justice in which the operation of legal precepts is adjusted to the exigencies of special circumstances, in the sense of a body of law which was administered in the English Court of Chancery when it was a separate court, in the sense in civil law, of a method of liberal interpretation of code provisions in accordance with the spirit and general purpose of the statute, and in Anglo-American law, in the sense of a body of legal precepts which introduce into the law, in suits for specific relief, criteria of justice which are based on higher ethical values than those which are ordinarily required in actions for damages.¹⁹”

Equity is commonly said to be used to ‘mitigate the rigours of common law’, allowing courts to use their discretion and apply justice as they see it in accordance with natural law. In practice, modern equity is now limited by substantive and procedural rules.²⁰ Maitland²¹ defined equity as a gloss on the common law. His (*Maitland*) central theme is that equity is not a system which pretends to cover the whole field of law, but is an appendix or *gloss* on the common law. Some parts of the law are abundantly glossed, others not glossed at all.²²

Some scholars have gone as far as to say that equity is the conscience of the King (Court). However, the principles of equity are better expressed through maxims of equity, they have formed the basis of the principle though they do not always show what particular path to be followed but they invariably steer you in the right direction. It is through the application of these principles that one begins to see what equity is. Courts have used the maxims of equity

¹⁹ Philip M Pettit, 10 -11.

²⁰ Wikipedia, The Free Encyclopedia, ‘Equity (Law)’ [http://en.wikipedia.org/wiki/Equity_\(law\)](http://en.wikipedia.org/wiki/Equity_(law)) (accessed on 23rd October 2011).

²¹ *Frederic William Maitland* (1850 – 1906) was an English jurist and legal historian who is generally regarded as the modern father of English legal History.

²² ‘Harold Greville Hanbury, *Modern Equity: The Principle of Equity*,. 8th Edition (London: Stevens and Sons Ltd, 1962), 18.

to justify the application of the principles for obvious fairness.²³ . There are over twenty maxims of equity of which the most common three would be:

*'He comes into equity must come with clean hands; Equity follows the law; and Equity regards that as done which ought to be done.'*²⁴

It should, however, be noted that there can be no equity without the law as equity always first recognises the existence of the law, hence the maxim that *'equity always follows the law'* but law can exist without equity but it is the application of the law that would invariably be harsh without equity.

Despite the attempt to define equity, it is yet still very difficult to pin point at one precise definition. For the purposes of this study, however, the author defines equity in its wider sense as to mean fair or just; equity is a system of law that originates from medieval England that was practised in the courts of Equity (Court of Chancery and The Court of Exchequer) that introduced equitable remedies such as injunctions and specific performance among others. These equitable remedies are available in the Zambian legal system and other common law jurisdictions, there are five main equitable remedies and these are: *specific performance; injunctions; declaratory judgments; rectification and cancelations; and rescissions.*²⁵

2.2.0. The History of Equity

The Norman Conquest of England of 28th September, 1066 makes both a political and legal landmark on the historical landscape of England and Common Law because it is about this

²³ Philip H Pettit, 11.

²⁴ Philip Pettit, 11-13.

²⁵ Some authors also included the 'appointments of receivers' as an equitable remedy.

very period that we see common law slowly making its mark on the English legal system. Immediately after the Norman Conquest, justice for the ordinary man is administered by the local courts. During this period royal courts and tribunals were not yet available to all subjects as that idea was unthinkable that commoners would mix with royalties and the upper class. Despite this it was still felt that the King and his *Curia Regis* (Council or Cabinet) was the reservoir of justice for the Kingdom (The Fountain of Justice).

Eventually the King got involved in the justice system, he would send appointed judges around the country to hear cases or hold what were called *assizes* (sittings). The judges over the years came up with common laws and practices from these cases and they started to uphold these same rules and decisions in cases of similar facts. The practice became very common and entrenched that the principles became the unwritten laws and rules of these courts, the judges when conducting their sessions would apply these standards on all cases that had similar facts. This developed into a practice that was certain and predictable. And that is how common law started.

The common law practices became very rigid and technical, it developed a writ system coupled with other procedures that made it very difficult for ordinary men to obtain justice or indeed use the system. Because of the rigidity and cost of the system a lot of people suffered all manner of injustices and yet the common law judges resisted any changes to improve or change the system. 'The writ system had settled upon the common law like *an old man of the sea*, Common Law judges could no longer stray from the narrow, but by no means straight paths of the forms of action.'²⁶

²⁶ George Williams Keeton, *An Introduction to Equity*, 5.

Litigants who were discontented with the common law courts started to petition the King to ask him for justice as they held him to be the ultimate fountain or reservoir of justice in the whole of England and Wales. In the beginning the King would consider the cases himself and he judged based on his conscience and natural justice. When the number of petitions increased he gave the responsibility to look at these petitions to the Chancellor who at that time was a clergy and was the keeper of the Great Seal. And this is what gave birth to the Court of Chancery with the Chancellor as the head of the court. The Chancellor was the natural choice for the King as he was the *de facto* secretary of state for all departments he was said to be '*the King's natural prime minister.*' The Chancellor would eventually employ clerks to assist him. In fact the name Chancellor is derived from the word '*cancelli*' which means a screen behind which the secretarial work of the royal household was carried on."²⁷ The word was taken from a wooden desk where these clerks used to work from.

2.2.1. The Court of Chancery.

The Chancellor dealt with these cases on the basis of what he thought was morally right and the sense of right and wrong and not common law. He did not follow any precedents in the decisions he made. 'They (Chancellors) would give or withhold relief, not according to an precedent, but according to the effect produced on their own individual sense of right and wrong by the merits of the particular case before them, as viewed in the light of their innate ideas, prompted by morality, honesty, conscience, or knowledge of good and evil.'²⁸

The Chancery used writs of *subpoena* and *quibusdam certis de cause* which differed materially from these used in the common law courts. The summons given to the defendant

²⁷ William Holdsworth Sir, *A History of English Law*, Vol I, eds. A .L. Goodhart and H. G Hanbury, (London: Methuen and Co. Ltd, Sweet and Maxwell, 1956, reprinted 1966), 37.

²⁸ Harold Greville Hanbury, *Modern Equity: The Principle of Equity*, 8th Edition (London, Stevens and Sons Ltd, 1962), 4.

or witness directed them to appear under a threat of a penalty, forfeiture of sum of money that was called '*Subpoena*'. The defendant or witness was not told the details of the complaint against them they were only commanded to come before the Chancellor to get the complaint made against them by the plaintiff. The court administered the 'rules of equity and good conscience'.²⁹

Maitland summed up the Court of Chancery as follows: 'In the Chancery a man shall not be prejudiced by misleading or by defects of form, he shall be judged according to the truth of his case, and we must judge according to conscience and not according to things alleged by the parties.'³⁰

It is, however, noted that the Chancellor administered the 'law' in cases which escaped the messes of the common law courts. *Lord Evershed*³¹ said 'Equity perfected or fulfilled the common law.' The rules of equity must be understood as constituting a series of appendices to the common law arising where the interests of justice required that a gap should be filled.³²

The advantages of equity were that it was not bound by the writ system as common law was; cases were heard in English and not Latin making it possible for anybody to understand what was doing on; there were no juries; the Chancellor concerned himself with questions of fact and he could order the disclosure of documents by a party if needed by the court to do so. Defendants and witnesses were compelled to attend cases through issuance of *subpoenas* and they were examined on oath.

²⁹ John A Bauman and Kenneth H York, *Cases and Materials on Remedies*, (Minnesota: West Publishing Company St Paul, 1967), 43-44.

³⁰ Harold Greville Hanbury, *Modern Equity*, 4.

³¹ *Lord Raymond Evershed* (1899 – 1966) was a British Judge and scholar who served as Master of the Rolls and subsequently Law Lord.

³² George Williams Keeton, *An Introduction to Equity*, 4.

The courts of equity created new rights and remedies such as trusts that gave beneficiaries of trusts rights against trustees. Equity also developed the 'equity of redemption' that gave back the right of ownership of the land that was mortgaged after repayment of the loan that had become due. The mortgagor was able to return ownership of the land after repaying the mortgage despite having paid the same after the due date. The position at common law was that the mortgagor lost the property after the due date and they still owed the mortgagee the amount unpaid as at due date.

Equity development equitable remedies, these were remedies that were usually unavailable under common law but became available and possible under equity. The remedies include specific performance, injunctions, rescission, rectification, and declaration (the author will look at equitable remedies below).

2.2.2. Rivalry between Equity and Common Law

In time there developed a great rivalry between the Court of Chancery and the Common Law courts. Problems started because of the injunctions that were issued restraining the parties to an action from the common law courts to enforce their judgments. The defendants would obtain an injunction from the Court of Chancery halting the execution of the common law judgments, this annoyed the common law Judges and came to a head in the case *Earl of Oxford's Case*³³ (The famous fight between Chief Justice *Coke* and the *King James I*).

Coke was of the view that where a Common law court had decided a case the Court of Chancery had no power to intervene between the parties³⁴. This dispute was taken to the

³³ [1616] 1 Rep Ch 11

³⁴ This issue started in *Courtney v Glanvil* [1615] Cro.Jac., 343.

King, James I, who decided in favour of the Court of Chancery and he upheld the validity of the common injunction issued by the Chancellor.³⁵

King James I had referred the matter to *Bacon*, the Attorney General and other Counsel who came up with the decision in favour of the Chancellor. It was noted in that decision that even common law judges when they were faced with matters as the one at hand they would refer the parties to Courts of Equity for them to obtain equitable remedies thereby agreeing and accepting the position that Equity prevails over the Law. That has been the position of the law and equity ever since.

Since equity had no fixed rules of its own and did not follow any precedent each Chancellor that came gave judgements in his own style and according to his conscience. This of course was met with a lot criticism. *John Selden*³⁶, an eminent seventeenth century jurist, declared thus that: 'Equity varies with the length of the Chancellor's foot'. Following this criticism *Lord Nottingham*, who was Lord Chancellor from 1673 to 1682, introduced a more systematic approach to cases such that by the nineteenth century, equity had become as rigid as the common law.

There were delays because of both the rigidity system that was created and the lack of judges and other officials to handle the ever increasing number of litigants seeking to use the Court of Chancery. Corruption became the order of the day officials depended on the fees paid by the litigants so officials began to deliberately prolong litigations.

³⁵ *The Earl of Oxford's Case* [1615] 1 Rep. Ch., 11

³⁶ *John Selden* (1584 -- 1654) was an English Jurist and scholar of English law and Jewish Law and in later life a politician.

So in 1854 in an attempt to remedy the problems of both the courts of equity and common law the Common Law Procedure Act 1854³⁷ was promulgated. The Act gave common law courts powers to award equitable remedies too. In 1858 The Lord Cairns Act 1858 (The Chancery Amendment Act 1858³⁸) was passed, this Act gave the Court of Chancery powers to grant damages in addition to, or in substitution for an injunction or a decree of specific performance. This was all in a bid to streamline the two court systems.

2.2.3. The Judicature Acts

The Judicatures Acts 1873 to 1875 were promulgated so as to rationalise the court system in England. The first two Acts were the Supreme Court of Judicature Act 1873³⁹ and the Supreme Court of Judicature Act 1875⁴⁰ there were a number of amending acts that were passed bringing that total of the Judicatures Acts to 12 in all by 1899. The Judicature Acts brought about a unified court system, it changed the manner and procedure in which cases were brought to court but the Acts did not affect the rights and remedies of parties. The Acts brought about the ‘fusion of law and equity’⁴¹ it amalgamated the common law courts and court of equity into one Supreme Court of Judicature where both common law and equity were administered.

The Chancery Amendment Act of 1858⁴², commonly referred to as The Lord Cairns Act deserves a quick mention here, the Act introduced wholesome procedural changes to the

³⁷ (17 and 18. Victoria c.126)

³⁸ (21 & 22 Victoria c. 27)

³⁹ (36 & 37 Victoria c. 66)

⁴⁰ (38 & 39 Victoria c. 77)

⁴¹ Harold Greville Hanbury, *Modern Equity*, 21

⁴² (21 & 22 Victoria c. 27)

Courts of Chancery. The act introduced the awarding of damages by courts of equity alongside the equitable remedies of injunctions and specific performance.

It was envisaged by the drafters of the Judicature Acts that there would be a conflict in this new court system hence they drafted section 25 of the Supreme Court of Judicature Act 1873, that provided that in the event of a conflict between equity and common law, 'equity would prevail' cementing *King James'* position.

2.2.3. The Maxims of Equity

There is no precise explanation as how the maxims of equity came about nevertheless they have formed the basis by which the principles of equity are shown though they do not show the precise path to be followed when dealing with a respective maxim. There are over twenty maxims of equity and that by all means does not mean that the list is exhaustive in itself, these include the following:

*He who comes into equity must come with clean hands; Equity follows the law; Equity regards that as done which ought to be done. Equity acts in personam; He who seeks equity must do equity; Between equal equities the law will prevail; Equity will not suffer a wrong to be without a remedy; and Equity will not aid a volunteer.*⁴³

There is no clearer maxim of equity than '*He who comes to equity must come with clean hands*' and this is true of equity at all periods. Equally true of equity at all periods is another

⁴³ Philip H Pettit, 11-13 and Margaret, Mulela Munalula, *Legal Process: Zambian Cases, Legislation and Commentaries*, (Lusaka: University of Zambia UNZA Press, 2004), 18: For lack of space the other maxims include the following: '*Equity acts on the conscience; Equity aids the vigilant not those who slumber on their rights; Equitable remedies are discretionary; Delay defeats Equity; Equity regards the balance of convenience; He who seeks equity must do equity; Equity delights to do justice and not by halves; Equity like nature does nothing in vain; Equity never wants (lacks) a trustee; Equity regards substance rather form; Equity imputes an intent to fulfil an obligation. Equality is equity; Between equal equities the first in order of time shall prevail; Equity abhors a forfeiture; and Equity will not permit a statute to be a cloak for fraud.*'

great maxim '*Equity acts in personam.*' Dean Ames has truly called this maxim the key to the mastery of equity, it is to be observed in the early precedents of the medieval period, and its application continues unbroken to the present day.⁴⁴

2.3.0. Equitable Remedies

Equitable remedies are judicial remedies that are granted by courts at the discretion of the court they were developed by medieval courts of equity. Historically equitable remedies were granted by the Court of Chancery and Court of Exchequer until the passage of the Common Law Procedure Act, 1854⁴⁵, when the Common Law Courts were also given the power to grant injunctions and other equitable remedies. The Chancery Amendment Act, 1858 (Lord Cairns' Act)⁴⁶, as we have seen above gave the Court of Chancery the power to award damages in addition to or in substitution for an injunction or a decree for specific performance this position still holds today.

Equitable Remedies accrue to the plaintiff at the discretion of the court. Before an equitable remedy is granted it must be proven first that there is a right and that right is been infringed upon and that the applicant has no appropriate legal relief (common law) that they can obtain. Therefore no equitable relief will be obtained where the common law remedy is adequate.⁴⁷

Equitable remedies are available in Zambia and other common law jurisdictions they ensue at the discretion of the court and upon fulfilment of certain conditions. Injunctions, specific performance, rescission; declarations; and rectification and cancelations are the main equitable remedies as has been discussed above. Below is brief on each of these remedies:

⁴⁴ Harold Greville Hanbury, *Modern Equity*, 5

⁴⁵ (17 and 18. Victoria c.126)

⁴⁶ (21 & 22 Victoria c. 27)

⁴⁷ George Williams Kecton, 29.

2.3.1. Injunctions

An Injunction is a judicial remedy equitable in nature that enjoins party to refrain from doing, or to do or not to continue doing a particular act or thing. An injunction is granted in a case in which it appears to the Court to be '*just and convenient*'⁴⁸ to do so.

An Injunction is a judicial process whereby the court orders a party (parties) to refrain or avoid from doing or to continue to do a particular act or thing. It is granted for the purpose of restraining the doing, continuance, or repetition by the person called upon, his servants or agents, of some wrongful act which constitutes an infringement of a legal or equitable right as for instance a breach of contract⁴⁹ to the plaintiff. There are different types and forms of injunctions and those will be dealt with in the next chapter.

2.3.2. Specific Performance

This is an order of the court requiring a person to fulfil their obligation that is under dispute. It is used mostly in contracts to compel the defendant to perform their obligation which they agreed to undertake under the terms and conditions of the contract.

Specific performance, just as all other equitable remedies, will not be granted where damages would be an adequate remedy⁵⁰, nor will it be enforced for contracts for personal services and where the performance will require the constant supervision of the parties by the court.⁵¹

Specific performance will not be granted for vague contracts nor for contracts for the sale of goods, unless the goods in question are very unique and rare and therefore not easy to obtain,

⁴⁸ *Day v Browning* [1878] 10 ChD 294 and *Associated Newspapers Group PLC v Insert Media Limited* [1988] 2 All ER 420 [1988] 1 WLR 509

⁴⁹ *Words and Phrases Legally Defined*, 2nd Edition, ed. John Saunders, (London: Butterworths, 1969) s.v. 'Injunctions'

⁵⁰ *Beswick v Beswick* [1968] AC 58; [1967] 2 All E.R. 1197.

⁵¹ *Posner v Scott-Lewis* [1986] 3 All E.R. 513

e.g. a rare painting, the defendant would in this instance be compelled to handover such a painting. Specific performance is used mainly in matters involving land as the parcel of land is unique and damages are never an adequate remedy for land as shall be seen later on.⁵²

2.3.3. Rescission

This is an equitable remedy that is available to a party to a contract that has been misled by the defendant. Rescission is available for cases of misrepresentation and mutual mistakes where it is possible to restore the parties to their original position before the contract was entered into. The aim of rescission is restoration of the parties to the position they were in before they entered into the contract and also to ensure that the defendant is not unjustly enriched at expense of the applicant.⁵³ Therefore there cannot be rescission for only part of the contract as the ultimate aim is to return the parties to their original *status quo*.

Rescission does not, however, relieve the party in default from further liability in damages if they failure to perform turns out to be in fact a breach of contract.⁵⁴

The remedy will not be enforced where:

- 1 The injured party has affirmed the contract and affirmation may be express or implied;⁵⁵
- 2 It is not possible to restore the parties to their original position⁵⁶;

⁵² *Development Bank of Zambia and Livingstone Saw Mills Limited v Jet Cheer Development (Z) Limited* (2000) Z.R. 144 (SC) and *Jane Mwenya and Jason Randee v Kapinga* (1998) Z.R. 17.

⁵³ Ewan McKendrick. *Contract Law*, 5th Edition, (London: Palgrave Macmillan, 2003), 290.

⁵⁴ *Barclay-Johnson v Yuill* [1980] 3 All ER 190.

⁵⁵ *Long v Lloyd* [1958] 1 W.L.R. 753 and *Leaf v International Galleries* [1950] 1 All ER 693 (CA).

⁵⁶ *Erlander v New Sombero Phosphate Co.* [1878] 3 App Cas. 1218.

3 There has been a lapse of time, the plaintiff has taken unnecessarily too long a time
which time will be taken as an affirmation of the contract⁵⁷; and

4 There are third party rights.⁵⁸

2.3.4. **Rectification**

The intention of rectification is to mend a document or statute between the parties so as to properly record the intention of the parties. So the court will only rectify a contract where there is a common mistake and that the rectification sought will eventually record the intention of the parties.

In *Frederick E Rose (London) Ltd v William H Pim Jnr & Co. Ltd*⁵⁹ the Court of Appeal refused the rectification of the contract between the parties. According to the court the original document didn't fail to record the intention of the parties in fact the document did reflect their intention. It was the case that both parties were under a shared misapprehension that Moroccan 'horsebeans' were the same as 'feveroles' beans. Both parties came to know of the difference after the defendants had delivered the beans. The application for rectification was rejected.

2.3.5. **Declarations**

A declaration determines the rights, duties and obligations of the party but the order does not order for any form of action to be carried out by that party, it's a mere declaration that the right exists. It is for that reason that declarations are usually used against the state so that the

⁵⁷ *Clough v London and North Western Railway Co.* [1871] LR7 Exch. 26.

⁵⁸ *Phillips v Brooks* [1919] 2 K.B. 243, *Lewis v Averay* [1971] 3 All ER 907; [1972] 1 Q.B. 198 and *Ingram v Little* [1960] 1 Q.B. 31.

⁵⁹ [1953] 2 Q.B. 450.

party may have the existence of their rights, duties and obligation declared. Declarations are used to declare the rights, duties and obligation of all manner of agreements including contracts and constitutions. Declaratory judgments merely proclaim the existence of a legal right or relationship, and do not contain any order which may be enforceable against the defendant⁶⁰ when the right has been violated.

2.4.0. Conclusion.

Equity as we have seen above introduced a number of rights and remedies that have changed and improved the application of law. Equitable remedies, rights and duties that before were either ignored or not considered at all have given law, in its entirety, a human face.

Morals and good conscience that are not the written aspect of the law found a place in the decisions of the courts thereby allowing in many cases real justice to prevail. Some equitable rights, duties and remedies have allowed and promoted commerce, for example the equity of redemption has made it possible for mortgagors to keep the property despite them not repaying their mortgage on the agreed date thus contributing greatly to commerce. We can see the presence of equity in many statutes. The Partnership Act 1890⁶¹ and The Sale of Goods Act 1893⁶² are such examples of equity turned into statutory law.

In the next chapter the author will zero in on injunction in common law jurisdictions generally, will define and look at the different types and forms that exist.

⁶⁰ Itzhak Zamir, *The Declaratory Judgment*, (London: The Hebrew University of Jerusalem, Stevens and Sons Limited, 1962) 1.

⁶¹ 53 & 54 Victoria C. 39.

⁶² 56 & 57 Victoria C. 71.

CHAPTER 3 INJUNCTIONS

3.0.0. Introduction.

In the previous chapter five main equitable remedies were identified and defined. In this chapter the author will look in depth at the equitable remedy of an injunction and identify the different types and forms of injunctions that are available in common law jurisdictions and define these different types and forms of injunctions.

We have already noted above that an injunction is an equitable remedy available once it is shown that legal remedies are inadequate. Simply defined an injunction is a court order that requires a party to do or refrain from doing some act. A party that fails to comply with an injunctive may face criminal or civil sanctions including damages or may be cited for contempt of court.

3.1.0. Injunctions

Injunctions are utilised by courts in many special cases where the preservation of the *status quo* or the doing of some act is needed to prevent or stop injury of some kind or the other. Injunctive relief is a discretionary power of the court in which the court, upon deciding that the plaintiff's rights are being violated, balances the irreparability of injuries and inadequacy of damages if the injunction were not granted against the damages that granting an injunction would cause.⁶³

In the process of issuing out an injunction the following principles are followed regardless of what type or form of the injunction you are issuing out:

⁶³ Cornell University. 'injunction' Cornell University, <http://www.law.cornell.edu/wex/injunction/html> accessed on 27th September 2011.

- (I) An injunction is a Discretionary Remedy, it accrues at the discretion of the court. The applicant is at the mercy of the court they must come to court with clean hands thus evoking the maxim: *He who comes into equity must come with clean hands*.
- (II) An injunction is an action *in Personam* the remedy affects individuals or persons and not property (real - *in rem*). Therefore it is obvious from the above that an injunction may be granted against any individual or person as long as it is equitable correct to do so. An injunction may be granted against all the members of a class or organisation.⁶⁴
- (III) In the issuance of an injunction the court must consider Public Interest and Public Policy. However, that is not to say that the court should not take into consideration the protection of the private rights of individuals.

The English cases of *Express Newspapers Limited v Keys*⁶⁵, and *Sevenoaks District Council v Pattullond Vinson Ltd*⁶⁶ best illustrates the position above: In *Express Newspapers Limited v Keys* the Court of Appeal refused to grant the plaintiff an injunction despite a cricket club committing torts of nuisance and negligence in allowing cricket balls to land on the plaintiff's property. It was the Court's view that public interest outweighed the plaintiff's private right to quiet enjoyment of their property. While in *Sevenoaks District Council v Pattullond Vinson Ltd* also a Court of Appeal decision the injunction was granted. In this case the plaintiff had sought an order of an injunction from the court to restrain a motor boat racing club from committing nuisance by excessive noise. The court held that the private rights of the

⁶⁴ *M. Michaels (Furriers) Ltd v Askew*, The Times June 25, 1983 (nuisance by members of 'Animal Aid'); *E.M.I. Records Ltd v Kudhaili*, The Times, June 28, 1983, *Nirex Limited v Barton*, The Times, October 14, 1986.

⁶⁵ [1980] I.R.L.R. 247

⁶⁶ [1984] Ch. 211

plaintiff should not be overridden by the interests of the club or of the general public. Therefore public interest does not always prevail over private rights.

- (iv) Injunctions will not lie against the State and officials of Government acting in their official capacity (the State Proceedings Act⁶⁷)⁶⁸ unless in a situation where there is gross negligence on the part of the official. The proper remedy in cases involving the state would be to obtain a declaration of the rights, duties and obligations, which still leaves the plaintiff without an enforceable remedy especially where the appropriate remedy would have been an injunction for example stopping government action that is injurious to the plaintiff.
- (v) The court must look at the *extent of the damage* when granting an injunction, it is not important to look at the extent of damage that will be done if the injunction is not granted⁶⁹ It should not, therefore, be that because the defendant is able to pay for the damage caused then the injunction should not be given. The fact that a monetary sum could easily be assessed to compensate for it, is no reason for withholding the injunction.^{70 71} The court should grant an injunction not based on the size of the perceived damage which if minimal the defendant would easily accept and pay for but on the fact that it is an infringement on the rights of the plaintiff. An injunction as a remedy is there to protect the rights, duties and obligations of the plaintiff.

⁶⁷ Cap 71 of The Laws of Zambia.

⁶⁸ *Attorney General v Law Association of Zambia* (2008) 1 Z.R. 21 (SC), *Trawink v Lenn* [1985] 1 WLR 532

⁶⁹ *Rochdale Canal Co v King* [1851] 2 Sim (N.S.) 78, *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 W.L.R. 411].

⁷⁰ *Wood v Sutcliffe* [1851] 2 Sim (N.S.) 163. *Express Newspapers Ltd v Keys* [1980] I.R.L.R. 247, *Patel v V.H. Smith (Eziot) Ltd* [1987] 1 W.L.R. 853, *Shelfer v City of London Electric Lighting Co.*, [1895] 1 Ch 287; [1891 – 94] All E.R. Rep. 838 CA.

⁷¹ 'Harold Greville Hanbury and Mandsley, *Modern Equity: The Principles of Equity*,. 13th Edition, International Student Edition. (London: Sweet and Maxwell, 1989),707

- (VI) The issue of '*balance of convenience*' the plaintiff must satisfy the court that their claim is not *frivolous* or *vexatious* that is to say that there is indeed a serious question as regards that right to be tried and considered at trial of the main cause.⁷² This principle has been rebranded so now the party must show that they have *sufficient legal or equitable interest* in making the application.⁷³
- (VIII) Must consider the preservation of the *status quo*: the purpose of the grant of an interlocutory injunction is to preserve the *status quo* until the rights of the parties have been determined in the action.⁷⁴ In *Ndove v National Educational Company Limited Chirwa J* referred to *Preston v Luck* where *Cotton L.J.*, is cited as follows: "*This is an application for an interlocutory injunction, the object of which is to keep things in status quo, so that if at the hearing of the plaintiffs obtain a judgment in their favour, the defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffective.*"⁷⁵
- (IX) Injunctions are sought to prevent a party from dealing in a manner prejudicial to a final order that the court may make in respect of the right, duty or obligation at issue. In *Shell and BP (Z) Ltd v Conidaris and Others* where the Supreme Court held *inter*

⁷² *American Cyanamid Co v Ethicon Limited* [1975] A.C. 396; [1975] 1 All E.R. 504 (HL) and *Cayne v Global Natural Resources PLC* [1984] 1 All E.R. 225 CA

⁷³ *Chief Constable of Kent v V* [1983] Q.B. 34, [1982] 3 All E.R. 36 (CA)

⁷⁴ *Abad v Turning and Metals Limited* (1987) Z.R. 87 at 88

⁷⁵ [1884] 27 ChD. 497 at page 505.

alia that: ‘Where any doubt exists as to the plaintiff’s rights, or if the violation of an admitted right is denied, the court takes into consideration the **balance of convenience** to the parties. The burden of showing the greater inconvenience is on the plaintiff.’

(X). An injunction will not be granted against the prosecution of criminal charges⁷⁶ and actionable wrongs.

Injunctive relief is therefore available in many circumstances to persons (acts *in personam*) at the discretion of the court and it is used for the maintenance of the *status quo* so as to enable a party receive the full benefit of any remedy to which they will be entitled to at the end of the cause.⁷⁷ An injunction will not generally be granted unless where some *irreparable injury* or *damage* will result if the injunction is not granted. It will, however, be granted where damages will not be an adequate remedy.

3.2.0. Types and forms of Injunctions.

There are two types of injunctions; the mandatory injunction and the restrictive (also called prohibitive) injunction. Abet from our definition, that an injunction is a court order to do or refrain from doing some act; it is a mandatory injunction when it is an order to do some act while it is a restrictive injunction when it is an order to refrain from doing some act.

⁷⁶ *York Corporation v Pilkington* [1742] 2 AK., 302; *Re Connolly Brothers* [1911] 1 Ch 731; *Hames Launches v Trinity House* [1961] 1 Ch., 197.

⁷⁷ R.G. Care and D W Fluck. *Civil Procedure in The High Court For Zambia*, (Lusaka: Kenneth Kaunda Foundation, 1986), 36.

There are generally speaking three forms of injunctions namely: perpetual, interlocutory (interim) and *ex parte*. A perpetual injunction, far from the literal meaning of the word, does not mean that it lasts forever but is one that is issued after a cause has been concluded by the court, the cause is *res judicata*. A perpetual injunction can either be mandatory or restrictive as the case may be.

An interlocutory or interim injunction will issue in the interim while the cause is still ongoing. Interlocutory injunctions are issued to maintain the *status quo* until the court can establish or determine the rights of the parties. The interlocutory injunction can either be mandatory or restrictive depending on the case in issue.

Ex parte injunctions many times are interlocutory injunctions, these are orders issued where the plaintiff cannot wait for the next motion day to make the appropriate application to court but wishes to preserve the *status quo* until the motion day. They are issued without giving the other party the chance of opposing the application.

A '*Mareva Injunction*' is another form of an injunction that is of recent development it is used to prevent the defendant from disposing off of their assets within the jurisdiction of the court until the case has been fully disposed off by the court.

There is also what is called '*Anton Piller order*' (famously misspelt as Anton Pillar) this is another form of an injunction that is usually used in patent and copyright actions. The Court by an order of an injunction permits a plaintiff to enter the defendant's premises in order to inspect, remove or make copies of documents that either belong to the plaintiff or relate to the matter at issue that the plaintiff is following up but has no access to ordinarily and will need them in the litigation.

There is a novel phenomenon in the UK called '*super injunctions*' these are basically speaking '*gag orders*'. They are injunctions that are issued to stop the every issue of the injunction from being made public and that fact that the injunction is not to be reported.

3.2.1. Mandatory Injunctions

A mandatory injunction is an injunction that is used to order the doing of something. The injunction requires the performance of some positive action or order to be done. Mandatory Injunctions were usually couched in a negative character, if, for example, the court intended that the defendant should pull down a wall, the order would then be 'that they should refrain from permitting or allowing the wall to remain on the land.' This requirement was, however, removed by the court in the case of *Jackson v Normanby Bricks Co.*⁷⁸ Effectively injunctions may now be couched in either negative or positive character which nevertheless does not take away the fact that a positive action must be done for mandatory injunctions.

3.2.2. Restrictive/ Prohibitive Injunctions

A restrictive or prohibitive injunction is used to restrain a party from doing some act that may injure the other party or is used so as to preserve the *status quo*. It is the opposite of the mandatory injunction as this time it requires that a negative action be done. It is used to stop the doing of something that is an infringement of the plaintiff's rights and freedoms of the plaintiff, for example the publication of material in a newspaper or it can be used to stop the sale or development of property⁷⁹ or stop a party from leaving the jurisdiction of the court until such the time when the case has been concluded or heard or with the court's permission.

⁷⁸ [1899] 1 Ch., 438.

⁷⁹ *John Musuaya Ngalula v Habib Industries Limited And Commissioner of Lands And Lusaka City Council And The Attorney General* Unreported 2010/HP/0412.

3.2.3. Perpetual Injunctions

The real meaning of the phrase perpetual injunction is that the order is meant finally to settle the mutual relations of the parties, being made as the result of an ordinary action, tried in due time and in the ordinary course of events at which the court has heard in the ordinary way the arguments of both sides.⁸⁰

A perpetual injunction is granted when the court has finally determined the rights of the parties and it is the intention therefore of the injunction to prevent the infringement of the said rights and to avoid the need of bringing multiple actions with respect to the same right.

Where a party has established a right at law and shown that it has been violated, he was in general, entitled as of course, according to the law apart from statute, to perpetual injunction restraining the violation^{81 82}

Despite the provision of section 2 in The Lord Cairns' Act, that damages and or either or in lieu of an injunction would be awarded the court will still not allow a legal wrong to continue happening merely because the wrong doer is able and willing to pay for the wrong in damages.⁸³

3.2.4. Interim/Interlocutory Injunctions

This is a more difficult injunction to obtain because the plaintiff must prove that they have a legal or an equitable right to protect and that if not given they would suffer *irreparable*

⁸⁰ Harold Greville Hanbury and Mandsley, 563-4

⁸¹ *Imperil Gas Light and Coke Co (Directors etc) v Broadbent* [1859] 7 HLCas 600, 29 L.J. Ch 377, HL

⁸² *Halsbury Statutes of England and Wales*, eds James Bowman, 4th ed., (London: Butterworths. 1990 reissue) s.v. “perpetual injunctions”

⁸³ *Wood v Sutcliffe* [1851] 2 Sim (N.S.) 163, *Express Newspapers Ltd v Keys* [1980] 1 R.L.R. 247, *Patel v V.H. Smith (Eziot) Ltd* [1987] 1 W.L.R. 853, *Shelfer v City of London Electric Lighting Co.*, [1895] 1 Ch 287, [1891 – 4] All E.R. Rep. 838 CA.

injury. The current law on interim injunctions in Zambia is the decision of the courts in *Shell and BP Zambia Limited v Conidaris and Others*⁸⁴ and *Ndove v National Educational Company Zambia Limited*⁸⁵ with authority from two English cases *Preston v Luck*⁸⁶ and *American Cyanamid Co v Ethicon Limited*⁸⁷ The aim of an interlocutory injunction is the preservation of matters in *status quo* pending the determination of the rights of the parties by a competent court.

It was formerly held that in order to obtain an interlocutory injunction the plaintiff had to establish the probability that he would be successful at trial. This position was, however, restated in *American Cyanamid Co v Ethicon Limited* by Lord Diplock, with the other Lordships concurring. The plaintiff must satisfy the court that their claim is not *frivolous* or *vexatious* (that there is a serious question to be tried), the court should then go on to consider whether the *balance of convenience* lies in favour of granting or refusing the interlocutory relief. In *Cayne v Global Natural Resources PLC*⁸⁸ it was held by the Court of Appeal that where the grant of an interlocutory injunction or its refusal would in fact bring a matter to an end then the guidelines requiring the court to look at the *balance of convenience* do not apply, here the court should approach such a case so as to avoid injustice by all means. A party must show that he has *sufficient legal or equitable interest* in the making of an injunction.⁸⁹

⁸⁴ (1975) Z.R. 174

⁸⁵ (1980) Z.R. 184

⁸⁶ [1884] 27 ChD., 497

⁸⁷ [1975] A.C. 396, [1975] 1 All ER 504.

⁸⁸ [1984] 1 All ER 225 CA,

⁸⁹ *Chief Constable of Kent v V* [1983] Q.B. 34, [1982] 3 All ER 36 CA.

The party that obtains an interlocutory injunction must make an undertaking that they would make good to the other party for any damages that the other party may suffer in the interim as a result of the injunction if ultimately it is proved that the injunction was wrongly granted⁹⁰.

3.2.5. **Ex parte Injunctions**

Ex parte injunctions are usually issued in chambers and are many times interlocutory injunctions but the party applying must prove that there exists a legal or equitable right that needs urgent protection and that there is a very good chance that if not granted the plaintiff may suffer *irreparable damage*. The application is made *ex parte* because the plaintiff may not be able to wait for the next motion day in order that they make appropriate applications to court⁹¹ (need to preserve the *status quo* until the motion day).

This injunction is granted in an emergency setting where only one party is heard and for fear of *irreparable damage* to them the court grants an injunction that will only hold until the next motion day when the other party would be heard too. The applicant takes an undertaking that they would pay for damages that the other party may suffer in the interim as a result of the injunction. And at the next motion day the court may then grant an interim injunction that will last until the full cause is heard.

3.2.6. **Quia Timet Injunctions**

The phrase *quia timet* literally means ‘*because he fears*’, so a ‘*quia timet injunction*’ is an injunction that is issued to prevent any harm or preserve anything from happening. It is issued

⁹⁰ *Smith v Day* [1882] 21 ChD 421.

⁹¹ *Jones v Pacay Rubber and Produce Co* [1911] 1 K.B. 455 at p 457

to prevent an infringement of the plaintiff's right, whereby the infringement is threatened, but is yet to occur. It is a type of a restrictive injunction which may be perpetual or interlocutory.

In *Fletcher v Bealey*⁹² the court stated the conditions necessary for a grant of a *quia timet* injunction and these are that the applicant should have proof of *imminent danger*, there should be proof that the *injury threatened* will if it occurs be *irreparable*, and proof that if the *feared injury* should occur the plaintiff would not be able to *protect themselves* from it.

The court in protecting the plaintiff from this danger or injury will grant the injunction so that the injunction will ultimately stop the defendant from acting in a manner that would cause damage or injury on the plaintiff.

3.2.7. Marvea Injunctions

This was made famous following the ruling in *Mareva Companie Naviera SA v International Bulk Carriers SA*⁹³ it was, however, first used in *Nippon Yusen Kaisha v Karageorgis*.⁹⁴ 'Mareva injunctions' are injunctions used to prevent the defendant from disposing off their asset within the jurisdiction of the court until after the court has finally disposed off the case. They extend to debts or liquidated demands, to commercial actions, and to any actions and claims for damages for breach of contract or for tort.⁹⁵ This power was originally exercised where the defendant was out of jurisdiction but has since been extended so as to restrain the defendant from disposing or dissipating his assets within the jurisdiction of the court.⁹⁶

⁹² [1884] 28 Ch.D. 688.

⁹³ [1980] 1 All ER 213.

⁹⁴ [1975] 3 All E.R. 190, [1975] 2 Lloyd's Rep 509, CA

⁹⁵ *Halsbury Statutes of England and Wales*, ed James Bowman. 4th ed., (London: Butterworths, 1990 reissue), s.v. "Mareva injunctions"

⁹⁶ *Ibid.*

In *Mareva Companie Naviera SA v International Bulk Carriers SA*, a ship-owner let out their ship the 'Mareva' to a foreign charterer, at an agreed fee of half monthly in advance. The charterer defaulted on a payment and the ship owners found out that the charterers had money in an English bank and sought an injunction freezing the account. The order was granted to stop the charterers from moving the money abroad before the case was heard. *Mareva injunctions* are normally *ex parte* for fear that the other party if given notice would move their assets.⁹⁷

3.2.8. Anton Piller Injunctions

The '*Mareva injunction*' is now sought together with an '*Anton Piller order*' made famous by the case *Anton Piller KG v Manufacturing Processes Ltd*⁹⁸ The '*Anton Piller order*' was however, first used in *EMI v Pandit*.⁹⁹ It is usually used in patent and copyright actions, and matrimonial disputes. The Court permits a plaintiff to enter the defendant's premises in order to inspect, remove or make copies of documents that either belong to the plaintiff or relate to the cause that the plaintiff is following up but ordinarily has no access to and will need them in the litigation. The '*Anton Piller Order*' may be obtained *ex parte* in very extreme cases. The plaintiff has to show that it is essential so that justice can be done between the parties and that it could do no real harm to the defendant or his case.¹⁰⁰

In *Anton Piller KG v Manufacturing Processes Ltd*, the plaintiffs made electrical equipment and employed the defendants as their agent in the United Kingdom. They suspected that the

⁹⁷ *ibid*

⁹⁸ [1976] Ch 55, [1978] 1 All ER 779, CA.

⁹⁹ [1975] 1 All E.R. 418

¹⁰⁰ *Halsbury Statutes of England and Wales*, ed James Bowman. 4th ed., (London: Butterworths, 1990 reissue), s.v. "Anton Piller order"

agent was selling their technical drawings to competitors and so applied for an order. The court held that an *ex parte* mandatory injunction would be granted to the effect that the plaintiff could enter the defendant's premises and inspect the relevant documents.

3.2.9. Super Injunctions.

There is very little known about these injunctions except that they are used to prevent the publication of the very thing that is in issue and also prevents the reporting of the fact that the injunction exists. The term *super injunction* was apparently coined by the editor of '*The Guardian*', *Alan Rusbridger* while covering the *Trafigura* controversy.¹⁰¹ Due to the very nature of these injunctions media organisations are not able to report who has obtained a *super injunction* without being in contempt of court that is why very little is known of them.

3.3.0. Conclusion.

From the above chapter it is clear that equitable remedies generally and the injunction in particular are very important equitable tools that courts and individuals use in their daily lives. The impact of the injunction on our everyday life is obvious for all to see. We have seen how and when injunctions are granted, we have identified the two main types of injunctions namely the mandatory and restrictive injunctions one being positive while the other being negative respectively. We have identified the different forms of injunctions that are available in common law jurisdictions and these we have also defined. In the preceding chapter the author intends to localise the injunctions to Zambia, will look at the law governing injunctions in Zambia look at a number of Zambian cases and the effect of injunctions in Zambia.

¹⁰¹ This is the case of bumping of Toxic waste by an Amsterdam based private company *Trafigura*, in Abidjan Cote D'Ivoire that resulted in the death of ten people and hundreds of thousands more became sick due to the exposure to the waste.

CHAPTER 4 RESEARCH FINDING ON INJUNCTIONS IN ZAMBIA

4.0.0. Introduction

In Zambia the doctrines of Equity and the principles of Common law have the force of law this is clear from the provisions of the English Law (Extent of Application)(Amendment) Act and the Supreme Court (Amendment) Act as will be seen soon. Equity in general and injunctions in particular form part of the Zambian legal system and have the force of law in appropriate cases.

In this chapter the author intends to look at the law that governs the issues of injunctions in Zambia, the short history of the Rules of the Supreme Court of England and Wales, and will close the chapter by looking at judicial decisions on the topic of injunction from the Zambian courts of law.

4.1.0. The Law Governing Injunctions in Zambia.

Equitable remedies, and the doctrine of equity and common law principles, accrue in Zambia pursuant to The Supreme Court (Amendment) Act¹⁰², The High Court Act¹⁰³, The Subordinate Courts Act¹⁰⁴ and the English Acts (Extent of Application)(Amendment) Act¹⁰⁵.

By virtue of section 8 of the Supreme Court Act as amended, the *Supreme Court Practice of 1999 of England and Wales*¹⁰⁶ the law and practice in the Court of Appeal in England in force up to 31st December, 1999 apply in Zambia. Therefore in matters where there is no provision

¹⁰² Act No 8 of 2011.

¹⁰³ Cap 27 of The Laws of Zambia

¹⁰⁴ Cap 28 of The Laws of Zambia

¹⁰⁵ Act No 6 of 2011.

¹⁰⁶ *The Whitebook*, The Supreme Court Rules of England and Wales.

in the *Zambian law* the *Whitebook* provisions or practice directions (procedures) shall have the effect of law. The *Rules of the Supreme Court* (RSC) will only fill in the gap in our practice and procedure where our Parliament has not provided the necessary law.¹⁰⁷

The application of the *Whitebook* has since been returned to the position above, before the 2011 Amendments the entire *Whitebook* including all the decided cases therein were *Zambian law* by virtue of the English Law (Extent of Application)(Amendment) Act of 2002¹⁰⁸ which incorporated the entire *Whitebook* in our Rules and Procedures. That position was confirmed by the Supreme Court judgment in *Ruth Kumbi v Robinson Kaleb Zulu*.¹⁰⁹ However, by virtue of Amendment Acts No. 6 and No. 8 of 2011 Zambia has since returned to the position prior to the 2002 Amendments. Therefore where there is no Act of Parliament providing for the necessary law (there exists a gap) or no practice direction by virtue of Amendment Acts No. 6 and 8 of 2011, we can refer to the *Whitebook (1999 edition)* and the law and cases therein where there exists a gap in the *Zambian legal system*.

Injunctions in Zambia issue pursuant to Order 29 of the *Rules of the Supreme Court (Whitebook 1999 edition)* as read with other respective Acts of Parliament. *Zambian Acts of Parliament* currently do not offer much help, on the subject matter for example in the Supreme Court Act injunctions are only mentioned in the negative, under section 24 (1)(e)(ii) an appeal would not issue where there is an injunction or where an appointment of receivers was granted by the High Court. There is no provision in *Zambian Acts of Parliament* that provide for the issuance of injunctions *per se*. The law governing the issuance of injunctions in Zambia is as provided for in the *Whitebook*.

¹⁰⁷ *Dean Namulya Mung'omba, Bwalya Kanyanta Ng'andu and Anti Corruption Commission v Peter Machingwa, Golden Mandandi and the Attorney General* (2003) Z.R. 17.

¹⁰⁸ Act No 14 of 2002.

¹⁰⁹ *Ruth Kumbi v Robinson Kaleb Zulu* SCZ judgment No 19 of 2009 unreported.

4.2.0. **The History of the Rules Supreme Court.**

The Rules of the Supreme Court (RSC) are rules and procedures of court that the Supreme Court of Judicature of England and Wales use in civil cases (practice directions). The RSC basically consists of practice directions on the relevant subject matter that are used by both the Court and legal practitioners in the dispensation of justice. The rules contain the forms, law, procedure, cases and the history of the respective rule so that the parties are in concurrence as they approach the court. However, effective 26th April 1999, RSC are being replaced by *Civil Procedures Rules* (CPR) in a bid to further improve the judicature of England and Wales.

Following the fusion of the Courts of Common Law and Equity into one Supreme Court of Judicature pursuant to the Judicature Acts the rules and practices of the two different courts needed to be harmonised and this was done first in 1883 and the first Rules and Procedure came in force on 24th October, 1883.¹¹⁰ The RSC were made up of 6 Acts of Parliament¹¹¹ and 72 Orders.

The rules and Acts have over the years changed and been supplemented. The 1951 RSC vision had 9 Acts of Parliament and 177 Orders. The RSC contain not only orders, but the history of the orders and cases on each topic, they also contain court forms to be used for the specific order or application being made. They generally give the practitioner the law, cases and forms to use in the specific application, this is so as to harmonise the applications and processing of all the cases by both the lawyers and the courts.

¹¹⁰ Frederic Philip Tomlinson, *The Judicature Acts. Rules of the Supreme Court, 1883*, ed R. T Reid. (London: Williams Clowes & Sons Ltd, 1917), 127.

¹¹¹ The Supreme Court of Judicature Act, 1873, The Supreme Court of Judicature Act, 1875, The Appellate Jurisdiction Act, 1876, The Supreme Court of Judicature Act, 1877, The Supreme Court of Judicature (Officers) Act, 1879 and The Supreme Court of Judicature Act, 1881.

4.3.0. Judicial Decisions by Zambian Courts on Injunctions.

Zambian courts, as the author has already alluded to above, have borrowed extensively from English decisions. Nevertheless the courts have endeavoured and made many pertinent decisions on injunctions and other equitable remedies as is seen in the decisions in *Shell and BP (Zambia) Limited v Conidaris and Others*¹¹² and *Harton Ndove v National Educational Company Zambia Limited*¹¹³ among others.

The first real case on injunctions, in the territory now called Zambia, was reported in 1947 by the Northern Rhodesia High Court in *African Lakes Corporation Ltd v John Murray*.¹¹⁴ This was an application for grant of an injunction to restrain the defendant from entering the service of a rival firm in accordance with a term of his service agreement (restraint from trade) with the plaintiff, the court accordingly refused the application. However, this case has not featured prominently as authority as the Zambian courts continued to borrow extensively from English decisions.

The Zambian courts have used the *ratio decidendi* by Lord Diplock in *American Cyanamid v Ethicon Limited*¹¹⁵ and that of Cotton L. J in *Preston v Luck*¹¹⁶ as the backbone of the law on injunctions. Find below ten judicial decisions from the Zambian courts on injunctions:

4.3.1. *Shell and BP (Zambia) Limited v Conidaris and Others*¹¹⁷. This was an appeal against the dismissal by the High Court of the appellants' application for a grant

¹¹² (1975) Z.R. 174

¹¹³ (1980) Z.R. 184

¹¹⁴ (1945 – 1948) Vol IV NRLR 166 (HC).

¹¹⁵ [1975] A.C. 396, [1975] 1 All E.R. 504

¹¹⁶ [1884] 27 Ch.D. 497.

¹¹⁷ (1975) Z.R. 174

of an injunction. The appellant had in 1967 entered into a licence agreement with a Mr. Cavadias, who was not part of these proceedings, in respect of a filling station which was the subject of the proceedings. However, effective 15th December 1973 Mr. Cavadias entrusted the filling station to the respondents, Messrs. Angelos Conidaris, Pindaros Conidaris and George Conidaris whom he deponed were entrusted to run the filling station on his behalf while on a long absence from Zambia. The appellant issued summons for an interlocutory injunction that the respondent were trespassing and were in wrongful possession of the premises and that the appellants were not able to use the filling station thereon for the sale of their products.

The appealed failed. The Supreme Court held *inter alia* that the appellant must show they would suffer *irreparable injury* if the injunction is not granted which according to the Court they indeed failed to show. The Court went on to define *irreparable injury* as injury which was substantial and could never be adequately remedied or atoned for by damages. Therefore a court will only grant an injunction if it is necessary to protect the plaintiff from *irreparable damage* and *mere inconvenience* is not enough a reason for the court to grant the injunction.

4.3.2. In *Harton Ndove v National Educational Company Zambia Limited* the High Court with authority from English decisions, *Preston v Luck* and *American Cyanamid Co v Ethicon Limited Chirwa J*, as he then was, referred to these decisions in his attempt to define an interlocutory injunction which he based on Lord Diplock's definition in *American Cyanamid Co v Ethicon Limited* which is: the maintenance of the *status quo* while pending the determination of

the rights of the parties by a competent court. The Court noted that before the decision in *American Cyanamid Co v Ethicon Limited* the case was that the plaintiff had to establish that he would be successful at trial for an interim injunction to be granted. The new position following the decision in *American Cyanamid* was that the plaintiff needed to satisfy the court that their claim was not *frivolous* or *vexatious*, that there exists a serious question to be tried and following which the court should also consider whether the *balance of convenience* lies in favour of granting or refusing the interlocutory relief.

Judge *Chirwa* with permission thereof noted that the applicant in this case needed to show the court that their claim was serious and not *frivolous* or *vexatious*. That they had a serious question that needed to be tried by the court and that the *balance of convenience* rested in their favour and that therefore court needed to grant them an interim injunction.

4.3.3. *Billingsley v Mundi*¹¹⁸ The respondent was seeking to restrain the appellant from entering a shop the subject of the dispute and for damages for trespass and loss of business. The case had been taken out by summons sworn by the appellant's friend based on '*Hearsay evidence*'. The High Court however granted the respondent a perpetual injunction.

On appeal the Supreme Court held that contested matters should not be a subject of a '*Hearsay affidavit*' citing *Chikuta v Chipata Rural Council*¹¹⁹. It was also held that the Court was wrong to grant a perpetual injunction before a

¹¹⁸ (1982) Z.R. 11 (S.C.)

¹¹⁹ (1974) Z.R. 241

full hearing of the case had been done and the court should only deal with a particular application at hand as such that any determination at that stage was a nullity. An application for an interim injunction was not an application to settle the matter fully.

The appeal was allowed and the case was remitted to the High Court for the normal course to be undertaken.

4.3.4. *Turnkey Properties Limited v Lusaka West Development Company Ltd., B.S.K. Chiti (Sued As Receiver), And Zambia State Insurance Corporation Ltd.*¹²⁰ The plaintiff applied for an interlocutory injunction in the High Court to restrain the defendants from selling, entering upon, interfering with possession of and damaging of property number 1282 Chelstone. They were also applying that by the same order they be allowed to continue building on the stand during the substance of the order. The High Court refused the application.

On appeal the Supreme Court held that an interlocutory injunction is an appropriate remedy for restoration and preservation of the *status quo*. It was also held that an interlocutory injunction (*inter parte or ex parte*) hearing is not to be used as a platform to determine the substantive rights in issue, it was not a device that the applicant would use to obtain or create new conditions that are favourable to them. Before granting the order the court needs to consider whether damages would otherwise be an adequate remedy and if they were then an injunction would not be granted. The applicant must also show that if the injunction was not granted they would suffer *irreparable injury*

¹²⁰ (1984) Z.R. 85. (SC).

(*Shell and BP Zambia Limited v Conidaris and Others*). The appeal was dismissed.

- 4.3.5. *Abad v Turning and Metals Limited*.¹²¹ The appellant bought a trailer from the respondent which it was agreed would be paid for from the proceeds of the sale of an uncompleted house that the respondent had agreed to purchase from the appellant. When it became apparent that the parties would not agree on the price for the house the contract failed, and the respondent obtained an injunction ordering for the return of the trailer. The appellant appealed against the order to discharge the injunction and sort a mandatory order that he be required instead to pay the respondent the purchase price of the trailer and the respondent release of the trailer and documents of title for the trailer.

The Supreme Court held that where damages are an appropriate and adequate remedy then an injunction should not be granted citing *Turnkeys Properties Ltd v Lusaka West Development Company Ltd*. If an injunction acts as a means of determining the outcome of an action it should not be granted because that pre-emptes the interests of the one who might be successful at trial. The court refused the application for a mandatory order.

- 4.3.6. In *Hastings Gondwe v BP Zambia Limited*¹²² the appellant was employed by the respondent, he applied for early retirement which he was granted, however, the parties could not agree on the price for the *personal-to-holder* motor vehicle at which point the managing director for the respondent company

¹²¹ (1987) Z.R. 86 (S.C.)

¹²² (1995 – 97) Z.R. 178 (S.C.)

requested the appellant to instead return for work the next day which he didn't do following which the respondent was dismissed. On application to the High Court for an injunction to restrain the respondent from claiming possession of the said motor vehicle until the outcome of the main course of action the Court dismissed the application.

The Supreme Court on appeal was of the view that the appellant's appeal be granted on condition that the motor vehicle, subject of the matter, be parked by the appellant and would only be used after the final judgment of the matter as regards the motor vehicle in question. This was so as to keep the matter in *status quo* and avoid *irreparable injury* to either of the parties. The Court used the *ratio decidendi* from the *Shell and BP (Zambia) Ltd v Conidaris and Others* case.

- 4.3.7. *Vas Sale Agencies Limited v Finsbury Investment Limited and Norman Bloem Mabzima (Sued as Caveator) and The Registrar of Lands and Deeds*¹²³ The first respondent entered into a contract of sale for stand number 5969 Lusaka with the appellant. The appellant failed to pay as agreed and the respondent gave a seven days notice to complete the sale failure to which the respondent would cancel the agreement. The appellant, however, discovered that the respondent had entered into another agreement of sale within the seven days as the Respondent had signed a contract of sale with the 2nd Respondent who had placed a caveat on the property which the appellant discovered when he made a search at the Lands and Deeds registry. The appellant sued the respondent

¹²³ (1999) Z.R. 11

for specific performance of the contract and for an *ex parte* order of an injunction.

The Supreme Court held *inter alia* that where an *ex parte* application is declined the proper procedure to adopt is for the court to order that the application should now stand as an *inter parte* summons so that both parties are called and heard on the next available motion day.

The appeal was allowed and the High Court order set aside and the matter was remitted back to the High Court for an *inter parte* hearing.

- 4.3.8. *Manal Investment Limited v Lamise Investment Limited*¹²⁴ This was an appeal following the refusal by the High Court to grant the appellant an injunction to stop the respondent from using a cloth similar to the one registered by the appellant as a protected design under the Registered Design Act¹²⁵ design number 3/97 which the appellant used in the manufacture of mattresses. The respondent imported cloth that was similar with the registered cloth, which they also used in the manufacture of mattresses but with a form that was thinner than that which the appellant was using but still passed off as a product of the appellant. The appellant applied for an interlocutory injunction before the main cause of the cloth would be heard and the High Court dismissed that application.

¹²⁴ (2001) Z.R. 24 (S.C.)

¹²⁵ Cap 402 of the Laws of Zambia

On appeal the Supreme Court held that a single Judge of the Supreme Court had no powers to determine a matter involving a decision of an appeal or a final decision as per section 4 of the Supreme Court Act.

However, the Court allowed, and granted the injunction because the appellant had a registered design hence they enjoyed *copyright privilege* under section 14 of the Registered Design Act. The registration of the design increased the weight of the *balance of convenience* in favour of the appellants. Furthermore at the admission of the respondent the product of the appellant was of superior quality. The Court was satisfied that the appellant would suffer *irreparable damage* if the injunction was not granted.

4.3.9. *Vangelators v Vangelators and Detective Chishimba and Vincent Malambo (Partner Malambo and Company)*¹²⁶ this was an application for an interim injunction to restrain the respondent from continuing with their conspiracy to arrest the plaintiff on trumped up charges of alleged motor vehicle theft in order to defect the ends of justice.

The High Court held that the applicant could not obtain an injunction to restrain ‘*actionable wrongs*’ for which damages are a proper remedy citing the English decision of *London and Blackwall Railway Co v Cross*.¹²⁷ It also held that a court will not grant an interlocutory injunction unless the right to relief

¹²⁶ (2005) Z.R. 132 (H.C.)

¹²⁷ [1886] 31 ChD. 345.

is clear and the injunction is necessary to protect the plaintiff from *irreparable injury*.¹²⁸

Further it was held that the 2nd respondent was a public officer and the Court had no jurisdiction to grant injunctive relief against him pursuant to The State Proceedings Act while the 3rd respondent being an advocate of the High Court and Supreme Court could not be stopped from performing his client's instructions.

4.3.10 In the Supreme Court decision in *Tau Capital Partners Incorporation and Corpus Globe Nominees Limited v Mumena Mushinge Zamsort Limited, Terra Gold (Barbados) Inc*¹²⁹ it was held that the object of an injunction is to maintain the *status quo*, (keep matters in *status quo*) so that if after the hearing the appellant obtains the judgment in their favour the respondent would have been prevented from dealing with the property in such a way that it would not be useful to the appellant.

It was held that the court will not grant an injunction unless it is necessary to protect the plaintiff from *irreparable damage* and that *mere inconvenience* is not enough. The court went on to define *irreparable damage* in the words from *Shell and BP Zambia Limited v Conidaris and Others*.

The Court also held that while an interim injunction is an appropriate remedy for the restoration or preservation of the *status quo* pending trial but it should not be used as a device by which an applicant can attain or create new

¹²⁸ *Shell and BP Zambia v Conidaris and others*

¹²⁹ (2008) 2 Z.R. 179.

conditions favourable to their cause. The Court allowed the application of the injunction.

4.4.0. The Effect of the injunction in Zambia

The ultimate goal of injunctive relief is to stop some act or the refraining from doing of an act that violates, or will violate the rights of another if not stopped. That is the principle that the Zambian Courts in the above decisions are making. The underlining principles in the above Zambian decisions can be summarised in the decision of the two leading cases of *Shell and BP Zambia Limited and Others* and *Ndove v National Educational Company*. The main principles set out are that injunctions are granted to maintain or preserve the *status quo* and so as to avoid *irreparable damage*. These two decisions form the basis for most, if not all, decisions in Zambia on injunctions which derive their authority from *Preston v Luck* and *American Cyanamid Co v Ethicon Limited*.

Below is a brief synopsis of the cases discussed above. In *Shell and BP Zambia Limited v Conidaris and Others*, *Harton Ndove v National Educational Company Ltd*, *Tau Capital Partners and Another v Mumena Mushinge and Others*, and *Hastings Gondwe v BP Zambia Limited*, the courts upheld the proposition that interlocutory injunctions are granted so as to maintain the *status quo* until the matter is finally concluded. The principle is that the injunction will be granted in a situation where it is imperative to maintain the *status quo* so that upon determination of the main cause by the court the hearing would not be a mere academic exercise.

Further in *Shell and BP Zambia Limited v Conidaris and Others*, *Tau Capital Partners and Another v Mumena Mushinge and Others*, *Hastings Gondwe v BP Zambia Limited* and *Manal Investment Limited v Lamise Investment Limited* the courts set out the principle that

injunctions are granted so as to stop *irreparable damage* or *injury* to the applicant. So where the court foresees that the applicant will suffer *irreparable injury* it will grant an injunction.

Injunctions cannot be used to stop a crime or actionable wrongs, in *Vangelators v Vangelators and Others* the court was of the view that the applicant had other remedies at law and as such would not grant the injunction. Furthermore Government officials are not amenable to injunctions and other equitable remedies.

In *Abad v Turning Metals Limited*, *Billingsley v Mundi* and *Turnkey Properties Ltd v Lusaka West Development Co. Ltd* the courts emphasize that application for interim injunctions are by no means meant to settle the main matter. Further in *Abad v Turning Metals Limited* for we see that an injunction will not issue where damages are an adequate form of relief. In *Vas Sale Agencies v Finsbury Investment Limited and Others* the court noted that where an *ex parte* injunction application has failed the right procedure to follow is for the court to order an *inter parte* hearing of the application.

4.5.0 Conclusion

In this chapter the author has dealt with the law pertaining to injunctions and also looked at ten decisions from the Zambian courts. It is worth while to observe that the Zambian courts have based their decision on the authority of English cases. We have seen that the House of Lords decision by Lord Diplock in *American Cyanamid* forms the basis of our Zambian authorities. It is therefore arguable to say that injunctions in Zambia have been as effective as these in England since they are based on the same *ratio decidendi*.

CHAPTER 5 RECOMMENDATIONS AND CONCLUSION.

5.0.0. Introduction

This chapter provides the recommendations and conclusions that the author has arrived at following the above study of equity and the equitable remedy of an injunction and the effect of the same on the Zambian legal system.

The author, has, in the preceding chapters endeavoured to answer the research questions set out in Chapter one. This has taken us to look at equity and injunctions in their broadest sense, defined equity and injunctions and it will therefore be correct to say that equity as a protean of meanings the simplest being that it is fairness and justice while an injunction is an order of the court to do or refrain from doing some act.

Equity and injunctions have the force of law in Zambia pursuant to the Supreme Court Act and other plethora of authorities. So we can safely argue from the above and preceding chapters that injunctions and equity in Zambia are law and they issue pursuant to the Supreme Court (Amendment) Act but depend on the *Whitebook* for all the law and procedure thereon.

In this chapter the author will give out his recommendations and conclusions on the subject matter of ‘equitable remedies in the Zambian legal system: a critical analysis of how effective injunctions have been in the Zambian legal system.’

5.1.0. Recommendations

From the above chapters we have been able to identify that the law governing injunctions in Zambia is wholly based on English law and precedents. However, there are a lot of gaps that exist in our laws and procedures, for example under Section 4 of the Supreme Court Act the

Act limits the powers of a single Judge of the Supreme Court from hearing matters on appeal where the appeal is for a grant of an interim injunction. There is no remedy for an aggrieved party that needs an urgent injunction but to wait for the sitting of the Supreme Court¹³⁰. A party would in this situation suffer *irreparable damage* and would be without remedy until the next sitting of the Supreme Court. The author recommends that Parliament cures this by amending section 4 of the Supreme Court Act so as to allow an interim injunction pending the hearing of the case by more than one Supreme Court Judge.

The author also recommends that the law relating to injunctions be codified into an Act of Parliament, this will, apart from curing such issues as seen above but bring about certainty and predictability of the law in terms of injunctions and other equitable remedies. It is therefore recommended that the Attorney General in consultation with other stakeholders come up with procedures and practice directives on injunctions and other equitable remedies. This over dependence on the English legal system should be a thing of the past 48 years after independence after all we have a very rich jurisprudence already on injunctions to build on.

5.2.0. Conclusion.

The aim of the research was to giving an evaluation of injunctions, how effective injunctions have been in the Zambian legal system. Look at the development of equity and equitable remedies vis a vis injunctions.

In chapter one the author dealt with the basic theories of the research, how the research was to be conducted and the definition of key concepts. The chapter also dealt with setting out of the research design and the research questions. The chapter also propagated what the aims and objectives of the research were, setting out the foundation and guidelines of the research.

¹³⁰ Manal Investment Limited v Lamise Investment Limited (2001) Z.R. 24 at 26.

Chapter two dealt with the general subject of equity, equity was defined and an account of the history of equity was given. We saw the rivalry that developed between equity and common law and the creation of the Court of Chancery. How the Judicature Acts were enacted so as to cure this rivalry between common law and equity. The chapter closes with look at the five main equitable remedies that are available both in Zambia and other common law jurisdictions.

Chapter three dealt with the equitable remedy of an injunction. In this Chapter an injunction was defined as a court order that stops or refrains the doing of some act. The different types and forms of injunctions were identified and defined in this chapter. Mandatory injunctions were defined as positive injunction that requires a party to do some act while restrictive injunctions were defined as negative injunctions that requires the party to refrain from doing some act. The different forms of injunctions were identified as being: interim injunctions, perpetual injunctions, and *ex parte* injunctions. The interim injunction accrues in the interim before the right that is the matter at issue has been decided upon. While a perpetual injunction is meant finally to settle the mutual relations of the parties, the matter is *res judicata*. The *ex parte* injunction is one that is issued to the applicant in a matter that is urgent and they are not able wait for the next motion day. There also other forms of injunctions that were identified and these are: the *Marvea injunction*, the *Anton Piller injunction*, *Quai Timet injunction* and of recent development the *super injunction*. The chapter was concluded by a brief look at each of these forms and types of injunctions.

In chapter four the author looked at what laws govern the issuance of injunctions in Zambia, look at the Rules of The Supreme Court of England and Wales, it is also in this chapter that ten Zambian court decisions were looked at and the chapter was closed by looking at the effect of injunctions in Zambia from the analysis of the court decisions.

It is clear from the above that the Zambian legal framework for injunctions is very weak just like most other fields of the law in Zambia. We need to enact laws and rules that will specifically deal with such matters. This over dependence on the English legal system is not good for a growing legal system we have so developed a rich jurisprudence on which the new laws would be anchored on. Yes we need to start from somewhere and that we have done the English background is important and good yet it high time we have our own systems and laws in place in most topics and fields of law. We should propagate our own comprehensive rules and procedures of court side by side with relevant Acts of Parliament.

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