THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 300 OF 2020

(Arising from Civil Suit No. 278 of 2020)

1. PERFORMANCE FURNISHINGS (U) LTD

2. MOHAMMED ESMAIL :::::::::::::::::::::::::: APPLICANTS/PLAINTIFFS

VERSUS

DIAMOND TRUST BANK (U) LTD :::::::::::: RESPONDENT/DEFENDANT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Chamber Summons under *Section 38 of the Judicature Act and Order 41 Rules 1 and 9 of the Civil Procedure Rules* for orders that:-

1. A temporary injunction doth issue restraining the Respondent, its servants, assigns or agents from:

a) Treating the arbitrary debit of USD 1,917,584.91 as an overdraft, loan or other credit facility to the Applicants, and/or charging interest thereon; and

b) Enforcing or realising the Applicant's securities held by it until the final disposal of the head suit.

2. Costs of the application be provided for.

The grounds upon which the application is based are summarised in the Chamber Summons and contained in an affidavit deponed to by **Mohammed Esmail**, a Director of the 1st Applicant. Briefly, the grounds are that:

a) On 10th March 2017, the 1st Applicant entered into a term loan agreement with *Bank One* Limited of Port Louis, Mauritius, for EUR 1,805,000. The loan was secured by a Standby Letter of Credit **(SBLC)** issued by the Respondent.

b) The SBLC was secured by a debenture over the 1st Applicant's assets, a charge on the 2nd Applicant's properties, and his personal guarantee.

c) The last SBLC was due to expire on 1st April 2020 but the Respondent negligently failed to obey the Applicants' instructions to renew it in a timely manner, and only renewed it on 17th April 2020 through its affiliate, DTB Kenya.

d) As a result of the Respondent's negligence, *Bank One Limited* lodged a claim on the SBLC, and payment was effected by the Respondent debiting the 1st Applicant's operating account with USD 1,917,584.91 on 21st April 2020.

e) The Respondent is now purporting to render the Applicant indebted to it in the sum arbitrarily debited, and has threatened to convert the recalled SBLC as a funded facility secured by the Applicants' properties.

f) The Applicants have filed the head suit against the Respondent seeking, among others, damages, a permanent injunction restraining the Respondent from enforcing the Applicants' securities and for reversal of the arbitrary debit effected on the Applicants' account.

g) The unilateral imposition of this colossal liability poses imminent risks to the Applicants including arbitrarily charging interest, adverse credit rating with the Credit Reference Bureau, paralyzing of the Applicant's business plans and cash flow projections, realization of securities and insolvency.

h) A temporary injunction is required to preserve the status quo and prevent the main suit from being rendered nugatory; and the

Applicants will suffer irreparable loss that cannot be atoned by damages if the application is not granted.

i) The balance of convenience is in favour of the Applicants who are in occupation of some of the mortgaged properties while others are let to third parties on long term lease.

j) It is fair and equitable that the application is allowed to preserve the status quo.

The Respondent opposed the application vide an affidavit in reply deponed to by **Mbabazi K. Emajeit**, the Head Legal and Company Secretary of the Respondent who laid down the background and facts pertaining to the relationship between the Applicants, *Bank One* of Mauritius, Diamond Trust Bank Kenya and the Respondent. The deponent made the following averments, among others, in specific reply to the Chamber Summons and the affidavit in support thereof:

a) Upon agreement between the Applicants and the Respondent, the parties executed a Standby Letter of Credit (SBLC) on the 14th March 2017 for a facility in the maximum amount of USD 1,900,000 and a maximum amount of the Bank Guarantee cum Letter of Credit of USD 200,000. The said facility was secured by properties of the Applicants that were listed in the offer document.

b) On 28th March 2017, a SBLC for EUR 1,706,000 was issued by way of a SWIFT notice to *Bank One* Mauritius by the Respondent through its sister bank Diamond Trust Bank Kenya and was renewable annually. The SBLC was in accordance with the term loan agreement between the 1st Applicant and Bank One Mauritius. The SBLC was renewable upon request by the 1st Applicant on an annual basis until settlement of the entire liabilities. Indeed, the SBLC kept being renewed annually upon request by the 1st Applicant; the renewal was vide offer letters

dated 16th March 2018 and 29th March 2019 respectively on the same terms as previously agreed.

c) The last renewal of 29th March 2019 was for the period 1st April 2019 to 31st March 2020. On 26th February 2020, the Respondent informed the 1st Applicant that the SBLC would expire on 31st March 2020 and requested the 1st Applicant to provide documentation to enable the Respondent commence renewal of the facilities in time. The Respondent attached a copy of an email of the said date. The 1st Applicant applied for renewal of the SBLC on 18th March 2020. A copy of a letter of the same date was attached. The 1st Applicant provided for some of the necessary documents on 20th March 2020 and promised to provide the others later. On 23rd March 2020, the Respondent reminded the 1st Applicant of the incompleteness of its documents and requested the same to be provided in time. Copies of email correspondences were attached.

d) On 31st March 2020, Bank One by SWIFT NOTICE communicated its call on the SBLC for the sum of EUR 1,777,821.08. The Respondent proceeded to renew the SBLC and confirmed the extension of the same to Bank One on 1st April 2020. On 7th April 2020, Bank One made a second call on the Respondent to pay the amount secured by the SBLC. On 14th April 2020, Bank One made a final call on the Respondent to pay the amount secured and the Respondent honoured the call by debiting the 1st Applicant's account as it was contractually obligated to do.

e) At all material times, there has been a validly existing SBLC as renewed by the Respondent who has met all its obligations therein and, as such, the main suit has no likelihood of success and discloses no prima facie case with any probability of success. The Respondent or its agents are not responsible for the actions of Bank One in recalling the term loan facility. The

Respondent was obligated to pay the secured sum upon demand by Bank One and did not carry out any arbitrary debit on the 1st Applicant's account as all debits therein were in accordance with the terms of the offer letter executed with the Applicants and subsequently renewed.

f) The Applicants are not subject to any irreparable loss as the properties were mortgaged by the Applicants and the Applicants are only seeking to hide away from their contractual obligations. No notices of demand had been issued by the Respondent to initiate foreclosure and the allegation by the Applicants is baseless, speculative and without proof, especially owing to the existing legal framework under the COVID 19 pandemic guidelines issued by the Government and the Bank of Uganda.

g) The Applicants can be adequately compensated by way of damages in the unlikely event of the case succeeding considering that the Respondent is a financial institution with the capacity to pay any such damages.

h) The Applicants have filed this application to avoid its contractual obligations and/or to frustrate the Respondent's efforts to realise its securities and to delay the recovery of amounts that are rightfully due and owing to the Respondent.

i) The application cannot be granted since the Applicants have not deposited or even indicated that they are able and willing to deposit 30% of the outstanding amount as required by the law.

j) On a balance of convenience, the Respondent stands to lose more than the Applicants in the event that this application is granted considering that the Respondent will be deprived of collecting money rightfully due and owing to it as a licensed financial institution.

k) The application does not meet the considerations for the grant of a temporary injunction and no prejudice shall be suffered by the Applicants if the orders sought are not granted.

An affidavit in rejoinder was deponed to by Mohmmed Esmail, the Director of the 1st Applicant. I do not intend to set out the averments here but I have taken them into consideration.

At the hearing, the Applicants were represented by Mr. Nelson Nerima from M/s Nambale, Nerima & Co. Advocates and the Respondent was represented by Mr. Ssebuufu Usaama and Mr. Isingoma Esau from K & K Advocates. Counsel made and filed written submissions which I have reviewed and considered in the course of the resolving the issues before the Court.

The Position of the Law

It was submitted by Counsel for the Applicant that grant of a temporary injunction is an exercise of the court's discretion for purposes of maintaining the status quo until the question to be investigated in the suit is tried on the merits and disposed of finally. Counsel submitted that the principles for grant of a temporary injunction were summarised in the case of ***Giella vs. Cassman Brown & Co Ltd [1973] 1 EA 358*** where **Spry VP at 360** held that:

> ***"The conditions for the grant of an interlocutory injunction are .... first, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

Counsel for the Applicant therefore submitted that the three named considerations form the issues for determination by the Court.

While Counsel for the Respondent agreed on the position of the law on the grant of a temporary injunction as set out by Counsel for the Applicant, the Respondent's Counsel pointed out that for an application for a temporary injunction arising from a mortgage transaction, the statutory provisions under the Mortgage Act, 2009 and the Mortgage Regulations 2012 must be applied. Counsel relied on the decision of **Madrama J.** (as he then was) in the case of ***Willis International & Anor V Dfcu Bank, Miscellaneous Application No. 1000 Of 2015 at Pg. 11***.

Counsel for the Respondent submitted that in the present case, the first consideration is that the Applicant must deposit 30% of the forced sale value of the mortgaged property or the outstanding amount. It is only if this consideration is satisfied that the Court can then consider the other conditions for grant of ordinary applications for temporary injunctions.

Counsel for the Respondent argued that where the requirement has not been satisfied by the Applicant, the Courts have rejected applications for injunctions on that ground alone. Counsel relied on the provision in *Regulation 13 (1) of the Mortgage Regulations* and the cases of ***Ganafa Peter Kisawuzi V Dfcu Bank Limited, Court of Appeal Civil Application No. 0064 Of 2016***; ***Parul Ben Banot Versus Victoria Finance Company Ltd Misc. Application 319 Of 2017***; and ***Ben Semakula & Co. Limited Versus The Microfinance Support Centre Limited, Misc. Application No. 761 Of 2016***.

Counsel for the Respondent therefore submitted that on the ground of failure to deposit the required 30%, this application ought to be dismissed as it is not necessary to delve into whether the conditions for grant of a temporary injunction have been complied with.

In their submissions in rejoinder, Counsel for the Applicants pointed out that *Regulation 13 (1) of the Mortgage Regulations* only covers applications seeking to *adjourn* or *stop* a sale by public auction. Counsel submitted that conduct of a sale of mortgaged property by public auction is governed by *Regulation 8 of the Regulations*. Counsel further submitted that in the present application, none of the above mandatory provisions have been complied with. Counsel submitted that there was, in fact, no date of sale sought to be adjourned or stopped. To the contrary, the Respondent had consistently maintained that it has not commenced foreclosure. Counsel therefore submitted that all the authorities that have been cited by the Respondent's Counsel relate to *adjournment* or *stoppage* of sale where foreclosure has commenced; and the authorities were therefore wholly irrelevant.

Counsel for the Applicants further pointed out that according to *Regulation 13 (1) of the Mortgage Regulations*, the legal requirement is for deposit of 30% of the forced sale value of the mortgaged property, or outstanding amount, whichever is higher. Counsel submitted that this presupposes that the property has been valued for sale and there is a valuation report in accordance with *Regulation 11 of the Regulations*. Counsel further submitted that it was not surprising that in the present case, the Respondent was unable to address the Court on the specific fraction that formed the 30% of the forced sale value of the properties herein in issue. Counsel argued that the Respondent's prayer for deposit of 30% of the outstanding amount is inapplicable since it is obviously lower than the possible forced sale value of the properties which the Respondent concedes that their market values totaled to USD 14,491,392 and UGX 1,500,000,000/=.

Counsel for the Applicant relied on the decision in ***Parul Ben Banot Versus Victoria Finance Company Ltd (supra)*** to argue that without ascertaining the market value and forced sale value of the mortgaged

property before sale, *regulation 13* cannot be applicable. Counsel concluded that there was no foreclosure in the instant case and therefore the requirement to deposit 30% could not be imposed upon the Applicants.

I will start by setting out the relevant provisions of *Regulation 13 of the Mortgage Regulations*. The Regulation is titled *"Adjournment or stoppage of sale"*. *Regulation 13 (1)* thereof provides –

> *The court may on the application of the mortgagor, spouse, agent of the mortgagor or any other interested party and for reasonable cause, adjourn a sale by public auction to a specified date and time upon payment of a security deposit of 30% of the forced sale value of the mortgaged property or outstanding amount whichever is higher.* (emphasis added)

It is clear to me that the above provision presupposes a sale or commencement of the process of sale before the requirement for deposit of 30% can be triggered. Under the *Mortgage Act* and the *Regulations*, the law is clear as to how and when foreclosure and sale of a mortgaged property is commenced. This is provided for under Part III of the Regulations. *Regulations 8, 9 and 10* provide for manner of sale (by public auction, by order of court or by private treaty). *Regulation 11* provides for valuation of the mortgaged property as a mandatory requirement before sale. *Regulation 13* is already set out herein above. *Part V of the Mortgage Act, 2009* provides for powers of a Mortgagee. *Section 19 thereof* provides for a notice of default in the following terms:

> *(1) Where money secured by a mortgage under this Act is made payable on demand, a demand in writing shall create a default in payment.*
>
> *(2) Where the mortgagor is in default of any obligation to pay the principal sum on demand or interest or any other periodic payment*

or any part of it due under any mortgage or in the fulfilment of any covenant or condition, express or implied in any mortgage, the mortgagee may serve on the mortgagor a notice in writing of the default and require the mortgagor to rectify the default within forty-five working days.

Section 20 of the Act provides for remedies of the Mortgagee. *Section 20 (e) thereof* provides that where *"the mortgagor is in default and does not comply with the notice served on him or her under section 19, the mortgagee may sell the mortgaged land".*

The conditions laid out in the above legal provisions have to be in place, in my view, before the Mortgagee can utilize the remedies and exercise the power of sale of the mortgaged property. Clearly, the process of sale cannot be said to have commenced before a notice and the fact of default as stipulated under *Section 19 of the Mortgage Act.* Consequently, before the process of sale commences, one cannot legally refer to adjournment or stoppage of a sale. In my considered view, the application of *Regulation 13 of the Mortgage Regulations* is triggered by a notice of default or a demand notice issued by the Mortgagee to the Mortgagor or such other interested party. Before that fact, it is misconceived in my view for a Mortgagee to demand for deposit of 30% by the Mortgagor before the latter can access the discretionary remedy of an interlocutory injunction from the Court.

The reasoning of **Madrama J. (as he then was)** in ***Parul Ben Banot Versus Victoria Finance Company Ltd (supra)*** supports the above view. He states, at page 17:

"It is a mandatory requirement for the mortgagee to ascertain the market value and forced sale value of the mortgaged property before sale thereof. Obviously regulation 13 can only be applied with a clear

understanding or evidence of the valuation of the suit property ... It is also a further requirement that the valuation has to be done prior to the sale of the suit property and at most six months or a lesser period before the sale. In other words, the property cannot be sold without valuation of the mortgaged property as that would be in breach of statute. In those circumstances, can regulation 13 be applied blindly without considering the antecedent of the threatened sale? I think not. For instance, [the] court has to be satisfied that there was compliance with the provisions of section 19 of the Mortgage Act 2009 prior to sale and the procedure prescribed for sale. Similarly, valuation of the property is a condition precedent to sale. The Respondent by insisting on Regulation 13 of the Mortgage Regulations should satisfy the court that it has [had] compliance with the statutory conditions precedent. Failure to do so mean it cannot insist on the strict enforcement of the statute."

To my understanding therefore, the position of the law is that where the process of foreclosure and sale of the mortgaged property has not commenced, *Regulation 13 of the Mortgage Regulations* does not apply. As such, a Mortgagor seeking an interlocutory injunction before the Court is not required by law to make deposit of 30% of the forced sale value of the mortgaged property or the outstanding amount, whichever is higher. Therefore, in an application for a temporary injunction such as the one before me, the well laid down conditions for grant of an ordinary temporary injunction apply, namely that:

a) The applicant has shown a prima facie case with a probability of success.

b) An injunction will normally not be granted unless the Applicant might otherwise suffer irreparable loss or injury, which cannot be adequately compensated for in damages.
c) If the court is in doubt, the case will be determined on the balance of convenience.

Issues for determination by the Court

Three issues are up for determination by the Court, namely:

1. Whether the Applicants have shown a prima facie case with a probability of success.
2. Whether, if the application is not granted, the Applicants stand to suffer irreparable loss or injury, which cannot be adequately compensated for in damages.
3. If the Court is in doubt, in whose favour is the balance of convenience?

Resolution of the Issues

Issue 1: Whether the Applicants have shown a prima facie case with a probability of success.

It was submitted by Counsel for the Applicants that according to **Lord Diplock** in ***American Cyanamid Co. Ltd v Ethicon [1975] 1 ALL ER 504 at page 510***, to establish a prima facie case, all that the plaintiff needs to show by his action is that there are serious questions to be tried and that the action is not frivolous or vexatious. Counsel submitted that in the main suit, the applicants/plaintiffs are seeking damages for breach of fiduciary duty, negligence and breach of contract; a permanent injunction restraining the respondent/defendant from enforcing the applicants' securities; and reversal of an unlawful debit effected on the applicants' account in the sum of **US$ 1,917,584.91**.

Counsel submitted that the Applicant has proved by affidavit of Mohammed Esmail that the Respondent failed to honor instructions to renew the Standby Letter of Credit (SBLC) within time, which was of essence. By reason of the Respondent's negligence, breach of fiduciary duty and breach of contract, the Applicant suffered premature loan recall by M/s *Bank One.*

On the allegation of breach of contract, Counsel for the Applicants submitted that Clause 2 (a) of the contract between the parties (annexure E2 of the affidavit in reply of **Mbabazi K. Emejeit**) explicitly provided that "*the SBLC of US$ 1,900,000 will continue to secure the term loan facility with Bank One Mauritius for another 12 months.*" Clause 3(a) further provided that "*the SBLC shall be available for a period of 12 months and renewable on a yearly basis for a period of 5 years.*" Counsel submitted that it was a fundamental term of the customer/banker contractual relationship that the Respondent would diligently implement the Applicant's instructions to renew the SBLC.

On the allegation of breach of fiduciary duty and negligence on the part of the Respondent, Counsel for the Applicants submitted that the Respondent, well aware that time was of essence and of the consequences of delay, undertook to renew the SBLC. The 1st Applicant relied on legitimate expectation that the Respondent would abide by its fiduciary duty to its customer, and fulfil its duty of care by diligently acting. As of 31st March 2020 when a claim was lodged, the Respondent had breached its duty to renew the SBLC. Counsel relied on the text in **"The Law Relating to Domestic Banking" Volume 1** by **G.A. Penn, A.M. Shea** and **A. Arora** at pages 65 & 66 regarding the nature of the fiduciary duty owed to the customer by the bank.

The Applicants' Counsel further submitted that as a result of the above breaches of duty by the Respondent, the Applicant lost a 5-year term loan when the same was prematurely recalled by *Bank One*. To aggravate matters, Counsel submitted, the Respondent did not inform the Applicant when the loan was recalled, but continued to correspond with Bank One behind the Applicant's back. Counsel submitted that these breaches also contravened the *Financial Consumer Protection Guidelines, 2011*, issued by Bank of Uganda. Counsel therefore concluded that the suit from which this application arises discloses a prima facie case of gross negligence, breach of fiduciary duty and breach of contract with high likelihood of success.

For the Respondent, Counsel relied on the text in **Halsbury's Laws of England 4th Edition Vol. 24 Paragraph 858** as to what the Court should take into consideration when determining existence of a prima facie case. It was observed in the text thus –

> **"On an application for an interlocutory injunction, the court must be satisfied that there are serious questions to be tried. The material available at the hearing of the application must disclose that the plaintiff has real prospects for succeeding in his claim for a permanent injunction at the trial".**

On the allegation of breach of contract, Counsel for the Respondent submitted that the Respondent had shown in the affidavit in reply that the main suit discloses no prima facie case because:

(i) By the Applicants' admission, the properties (for which the temporary injunction is being sought) were pledged as security by the Applicants to the Respondent.

(ii) The Applicants further admit that the SBLC was furnished by the Respondent and called upon by Bank One on 31st March 2020 to which the Respondent effected payment.

(iii) At the time of the call on the SBLC dated 29th March 2019 by Bank One, it was still validly existing and the Respondent was under an obligation to honour the call.

(iv) The Applicants have in their affidavit in rejoinder not challenged the fact that at the time of the call on the SBLC by Bank One, the SBLC issued by the Respondent was valid and the Respondent was under an obligation to make payment of the same.

Counsel relied on ***Steel Rolling Mills Ltd & 3 Ors V Standard Chartered Bank (U) Ltd HC M.A No. 829 of 2015***; and ***U.P. State Sugar Corporation Vs M/S. Sumac International Ltd, The Supreme Court of India at Page 4*** for their submission that the Court should be guided by the uncontroverted evidence of the Respondent that a payment was made under the subsisting SBLC upon call by Bank One which the Respondent was obligated to pay and the Applicants are consequently indebted to the Respondent.

Counsel for the Respondent further submitted that the renewal of the SBLC issued by Diamond Trust Bank Uganda was not automatic and was for a period of one-year renewable on a yearly basis. The 1st Applicant was therefore required to apply for renewal of the SBLC. The Respondent was entitled, upon application by the 1st Applicant, to renew or refuse to renew the SBLC.

On the claim for breach of fiduciary duty or negligence, Counsel submitted that the Respondent has not breached any fiduciary duty to the Applicants or any contractual terms as claimed. Counsel submitted that the Respondent had shown in the affidavit in reply to that:

(i) The Standby Letter of Credit was renewable upon request by the 1st Applicant on an annual basis until settlement of the entire liabilities.

(ii) The Standby Letters of Credit were renewed annually upon request of the 1st Applicant.

(iii) The Respondent informed the 1st Applicant of the fact that the SBLC was to expire on 31st March 2020 and requested for necessary documentation to renew the SBLC in time.

(iv) The 1st Applicant almost a month later replied with incomplete documentation and was advised to organize the same.

(v) The Respondent still proceeded to renew the SBLC with Bank One on 1st April 2020.

The Respondent's Counsel submitted that the Applicants' attempt to challenge the Respondent's right to enforce their lawful rights of recovery of monies paid under a Standby Letter of Credit vide the main suit is frivolous, vexatious and brought in bad faith simply to delay the 1st Applicant's clear payment obligations. Counsel therefore concluded that it was clear that, by the Applicants' application, there is no prima facie case disclosed by the Applicants with a probability of success.

I have taken into consideration the Applicant's submissions in rejoinder and I will refer to them in the course of reaching my decision.

From the law, the evidence and submissions of Counsel as highlighted above, it is my view that for the Applicants to establish a prima facie case in the instant case, they have to establish two elements; one that they have shown a high possibility of securing a permanent injunction in the main suit; and two, that they have shown a high possibility of securing a reversal of the debit of USD 1,917,584.91. For the Applicants to establish the two above listed elements, they have to show to the Court's satisfaction that they either had an automatic

right to a renewal of the SBLC or that they had no contribution to the delay or non-renewal in time of the SBLC. They further have to show that there is a high possibility that they will not be required to repay the sum paid to Bank One Mauritius by the Respondent or any part thereof.

Counsel for the Applicants alleged in their submissions in rejoinder that there was a clause in the SBLC that provided that "*the SBLC will be issued for a period of one year and shall be automatically renewable on yearly basis for a further 6 years*". Counsel however did not point the Court to that provision in any SBLC on record and did not attach the same to any of the Applicant's pleadings. I find the true position to be that stated by the Respondent's Counsel to the effect that the SBLC issued by the Respondent was renewable annually upon application by the 1st Applicant and approval by the Respondent. The Applicants therefore had a role to play to secure the renewal and it is not true that the renewal was automatic.

On the evidence before me, my attention has not been drawn to any correspondence by which the Applicants applied for renewal of the SBLC that was expiring on 31st March 2020. Rather, it was the Respondent who, on 26th February 2020 informed the Applicants that the SBLC would be expiring on 31st March 2020 and requested the Applicants to furnish the Respondent with necessary documents to enable them process the renewal. Evidence shows that the 1st Applicant responded on 18th March 2020 providing some information and promising to provide more. It is further shown in evidence that by 23rd March 2020, the Respondent was still unsatisfied with the information supplied by the Applicants and, by email, reminded them of the incompleteness of the documents.

In view of the above, it is clear to me that while the Applicants had a role to play in the renewal of the SBLC, they have not convinced the Court that they played their role in time. The Applicants have also not satisfied the Court that they had no contribution in the non-renewal in time of the SBLC.

The other element that has to be proved by the Applicants is that there is a high possibility that the Applicants will not be required to repay the sum paid to Bank One Mauritius by the Respondent or any part thereof. It is clearly shown on record that the 1st Applicant obtained a term loan facility from Bank One Mauritius that was secured by the SBLC issued by the Respondent. It is not disputed that consequent to non-renewal of the SBLC by 31st March 2020, Bank One made a call on the facility and the Respondent paid the sum that was demanded and then debited the 1st Applicant's account to the tune of USD 1,917,584.91. The manner and correctness of the procedure taken by the Respondent is the subject of litigation in the main suit. What is clear however is that the Respondent paid up fully the sum advanced by Bank One to the 1st Applicant. The question is: Whatever finding the Court may make in the main suit, is there a real possibility that the 1st Applicant will not have to refund the money paid on its behalf by the Respondent? I do not see such kind of possibility. The possibility, in my view, lies in determination of how much to be paid back, when and how. Such a possibility does not point to a prima facie case for grant of an interlocutory injunction in such circumstances.

In the premises therefore, as shown above, the Applicants have not established a prima facie case with a probability of success of the nature that would warrant grant of a temporary injunction in the present case. The first issue is answered in the negative.

Issue 2: Whether, if the application is not granted, the Applicants stand to suffer irreparable loss or injury, which cannot be adequately compensated for in damages.

Counsel for the Applicants submitted that the Respondent had debited the 1st Applicant's account with a colossal sum of **USD 1,917,584.91** as a debt due and was also arbitrarily debiting the 1st Applicant's account with unconscionable interest. Counsel submitted that if the temporary injunction application is not granted, the Applicants stood to suffer irreparably in terms of adverse credit rating with the Credit Reference Bureau; foreclosure of their properties coupled with the effect of the COVID 19 pandemic on the value of the properties; and the possibility of eventual insolvency on the part of the Applicants. Counsel argued that all the listed losses or injuries were incapable of being atoned for by way of damages.

In reply, Counsel for the Respondent submitted that the Applicant's loss has a monetary value and therefore is not irreparable injury within the meaning of the law. Counsel submitted that there was no evidence of the alleged arbitrary imposition of any colossal liability that has been adduced and the Applicants only seek to hide away from their contractual obligations. Counsel further argued that no notices of demand have been issued by the Respondent to initiate foreclosure; the Respondent has adequate resources and means to adequately compensate the Applicants in the event that the suit is determined in the Applicants' favour; and that there was no status quo to maintain as the payment of the secured loan facility upon demand by Bank One Mauritius has already been effected in accordance with the contractual terms between the parties.

Counsel relied on the case of ***Rural Credit Finance Company Limited & 2 Ors V Microfinance Support Centre Limited (Misc. Application No. 86 Of 2014) Pg. 7,*** where the Court stated:

The general rule is that "the sale of property pledged as security in a loan agreement or mortgage cannot lead to irreparable loss parse – See case of David Luyigu vs. Stanbic Bank (U) Ltd HCMA 202/12.

Secondly, decided cases have established that "where a party agrees that a particular property is suitable as security, it cannot plead that the property has sentimental or spiritual value or sanctity – See Matex Commercial Supplies Ltd and Another vs. Euro+ Bank Ltd (in Liquidation) [2008] IEA Page 216.

Counsel concluded that the Applicants had not shown that they will suffer any irreparable harm incapable of being atoned for in damages.

Counsel for the Applicants made further submissions in rejoinder which I have taken into consideration.

I am not in agreement with the submission of Counsel for the Applicants that the imposition of a debt of USD 1,917,584.91 and the charging of unconscionable interest thereby constitute irreparable injury. These are financial positions that can be reversed once the Court establishes that they were erroneously taken and due compensation thereby ordered. As I have pointed out herein above, it is an undisputed fact that the Respondent paid money to Bank One Mauritius. It is also a given that such money has to be refunded. The disagreement should, in my understanding, be on modalities for correcting any anomalies. In that case I do not find reason as to why the Applicants should neglect the alleged imposed indebtedness thereby automatically making it a non-performing facility. In my view, this argument by the Applicants lies within the domain of mitigation of damages. It does not constitute irreparable harm. The same consideration would go for the argument regarding adverse credit

rating to the Credit Reference Bureau. The Applicants are expected to take those steps that will mitigate loss rather than abdicating a contractual liability that they may have to face in the end.

Regarding the argument on foreclosure, it is true that the Respondent has not taken any step towards foreclosure. It is however apparent that if this injunction is not granted, and the Applicants do not service the facility, the Respondent will be at liberty to initiate foreclosure any time. The question is whether foreclosure of mortgaged property can occasion irreparable injury. I am persuaded by the reasoning of **Anglin J.** in ***Rural Credit Finance Company Limited & 2 Ors V Microfinance Support Centre Limited (supra)***. Where a party has pledged property as security for a bank facility, the fact that they have disagreed with the Bank and the Bank is threatening to move in to foreclose the property cannot constitute irreparable harm. The assumption is that by the time a person uses a particular property as collateral, they envisage a possibility that the property may be subjected to sale or disposal in any other way.

The argument by the Applicants herein is that the possible foreclosure is for a facility that the Applicants have neither sought nor agreed to. This takes us back to whether the Applicants envisaged that there was a possibility of the term loan facility given by Bank One being recalled before the end of the full term. The SBLC indicates that it was renewable every year. As already indicated, there is no evidence that the renewal was automatic. The SBLC also indicated that if it was not renewed by a particular date at the end of the 12 months, Bank One would recall the facility. This apparently was a risk known to the Applicants. The Applicants also knew that in case of recall, it was not the Applicants to arrange payment, but the Respondent to make payment upon a SWIFT Notice being communicated to them.

Given the above circumstances, it is not true in my view, and it has not been proved before me, that the Applicants were totally unaware of the possibility and consequences of non-renewal of the SBLC. Thus if the Applicants were aware, or ought to have been aware, they cannot claim that the possibility of foreclosure of properties they pledged as security constitute irreparable loss.

The other claim by the Applicants was that if the court does not grant injunctive relief, failure by the Applicants to pay the debt shall amount to inability to pay debts within the meaning of the Insolvency Act. The Applicants will therefore be insolvent and subjected to the consequences of insolvency including receivership and winding up.

In reply, Counsel for the Respondent submitted that the above claim was speculative and not supported by any evidence in form of demands made by the Respondent. Counsel referred to the case of ***Ddamulira Vs Attorney General, Constitutional Court Miscellaneous Application No.24 Of 2015*** for the submission that this ground was speculative, premature and ought to be disregarded.

I agree with Counsel for the Respondent that it is speculative and premature for the Applicants to talk of insolvency in absence of any move towards that direction. As I have already pointed out herein above, the Applicants took out a business facility. The possibility of recall of such a facility before its maturity is not only implied but is often an express term of the agreement. In the present case, in the letter of offer dated 29th March 2019 (Annexture "A" to the affidavit in support), *Clause 13 (b) thereof* indicates that the *"Bank reserves the right to recall the loan facility, without prior notice, if one or more aforementioned terms are not fulfilled"*. The same term appears in Clause 12 (b) of the Offer Letter of 3rd March 2017 (Annexture "A" to the affidavit in reply; and in the Facility Offer Letter by Bank One

dated 10th March 2017 (Disbursement Condition No. 1 at page 3 thereof).

Whether any terms of the agreement were breached is the subject of litigation in the main suit. The important point here, however, is that there was an express notice to the Applicants of a possibility of recall of the facility before its maturity date. That being the case, the Applicants cannot claim that they are so not in position to finance their existing liabilities to the extent that they presently have a potential risk of being declared unable to pay their debts. This still calls in the aspect of mitigation of loss. Where there is a possibility that the Applicants may still have to pay the debt owing, subject to the final decision on the amount and manner of payment, it is reasonable in my view for the Applicants to keep servicing the facility for two reasons. One, to avoid an over accumulation of liability which may actually drive the Applicants into insolvency; and two, the assurance that in case the Court finds that the Applicants made any overpayment, the overpaid amount would have to be refunded to them. In the circumstances therefore, the ground of possible risk of insolvency raises no possibility of irreparable harm upon the Applicants.

In the premises, the Applicants have not satisfied the Court that they are likely to suffer any loss or injury that cannot be adequately atoned for in damages. There is also no evidence that the Respondent may not be in position to pay any damages that may reasonably be passed by the Court in the circumstances of the present case. This ground of the application also fails and issue two is answered in the negative.

<u>Issue 3</u>: If the Court is in doubt, in whose favour is the balance of convenience?

Although the Court is not in doubt as to whether any of the two first above conditions have been adequately determined, let me point out that the balance of convenience in the present case lies in the Applicants continuously servicing the facility for the two reasons I have indicated in issue two above. This will not only mitigate loss but will also avoid possible financial catastrophe that may face either party to the suit owing to accumulation of losses, interest and penalties occasioned by passage of time. In my view, therefore, the balance of convenience lies in not granting the temporary injunction.

In all therefore, the application for the order of a temporary injunction fails and is accordingly dismissed. Since the substance of the dispute is yet to be investigated, I order that the costs shall abide the outcome of the main suit.

It is so ordered.

Boniface Wamala
JUDGE
17/07/2020