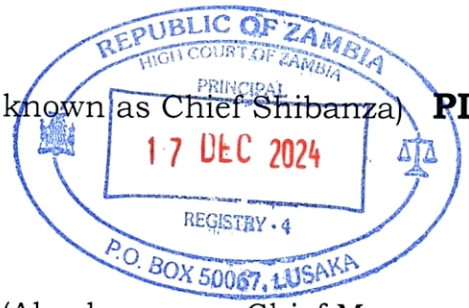
IN THE HIGH COURT FOR ZAMBIA **2022/HP/1734**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil jurisdiction)

BETWEEN:



ENOCK SHELENI (Also known as Chief Shibanza) **PLAINTIFF**

AND

JONATHAN ESHIRON (Also known as Chief Mumena) **1st DEFENDANT**

BOYD TEBULO **2ND DEFENDANT**

Before Judge M.D Bowa on the17th of December 2024

For the Plaintiff: Mr L Kabaso KBF & Partners

For the Defendant: Mr K Wishimanga of AMW & CO

RULING

Cases referred to

1.American Cyanamid Company vs Ethicon Limited 1975 AC 316
2.Tamela Akapelwa and Others vs Joseph Mubukwanu Litinga Ngambu (Appeal no 004/2015)
3.Bernard Kutalika vs Daires Kalonga Appeal No. 73 of 2013.
4.Hina Furnishing Lusaka Limited vs Mwaiseni Properties Limited (1983) ZR 40
5.R vs Kassingtone Income Tax Commissioners Ex Parte Princes Edmand de Polignac (1917) IKB 466 CA 509
6. Shell and BP (Z) Ltd vs Conidaris & Others (1975) ZR 174
7.Hotelier Limited and Another vs Finsbury Limited (2012) ZR 125
8..Communications Authority vs Vodacom Zambia Limited (2009) ZR 196
9.Hilary Bernard Mukosa vs. Michael RanaldsonSCZ Judgment no 7 of 1993
10.Harton Ndove vs. Zambia Educational Company (1980) ZR 184

11.Turnkey Properties vs. Lusaka west Development Company and Others(1084)ZR 89

12.Hubbard v Vosper(1972) 2QB at P84

Other Authorities referred to:

1.Iain S. Goldrein et-al. 1.Commercial Litigation: Pre-emptive Remedies. London Sweet and Maxwell (1997)

2.Matibini P Zambian Civil Procedure: Commentary and cases Lexis Nexis (2017)

I. Introduction

This is a ruling on The Plaintiff's application for an Interim Injunction initiated by summons, affidavit in support and skeleton arguments dated 19th October 2023.

1.1 Affidavit in support

1.2 The Affidavit was sworn by the Plaintiff Enock Sheleni who averred that he is also known as Chief Chibanza the 11th of the Betembuzhi Clan of Solwezi in the North-Western Province of the Republic of Zambia.

1.3 He deposed that on or around the 20th of September 2023, the 2nd Defendant Lumba Dimas, in the company of persons he named as Kipemba Watson, Kilongoshi Paul, Kilungi and others unknown but all alleged agents of Mumena Royal Establishment arrived at Kagonge area in the Plaintiff's

Chiefdom.That they proceeded to remove Sub-Chief Kiyanomo whom he had appointed in or around late 2018.

1.4 That about October 2023, agents from Mumena Royal Establishment that included some named abovewent to Kamiba area and installed Robert Kajoba as Sub-Chief Kajoba in the Chibanza Chiefdom.That on the 6th October 2023, the same agents went to Kasumpa area within Chibanza Kingdom and installed Sub-Chief Kapemba in Chibanza area.

1.5 He averred these incidences that have transpired in the Chibanza Chiefdom have brought confusion as the people in the area have rebelled against the newly appointed leaders who are not known or accepted in the Chiefdom. He added that he had read the Defendants defence and it appeared to suggest that there is no dispute that there was a ceremony at which the Plaintiff was installed as Chief Chibanza but that the Chibanza Chieftainship was abolished by the Colonial regime.

1.6 It was his position that the Chibanza Chieftainship has always been in existence despite the removal of recognition by the Colonial regime.He went on to provide the history of

succession to the throne in paragraph 10 of the Affidavit in Support. He also explained his own ascension to the throne in paragraph 11 and how the Chieftainship Chibanza controlled the Kasenseli Mine as shown in an excerpt from a book titled *"Best history of Zambia"* exhibited **"ES2"**

1.7 Further detail justifying the legitimacy of Chief Chibanza's existence was offered to be documented in a Government report marked **"ES3"**, National archives records and exhibit **"ES4"** being a list of Chiefs and Native authorities.

1.8 He deposed that on 4th of July 2019, he was installed to the substantive position of Chief Chibanza and by tradition handed over the instruments of power to the Queen Mother Namfumu Dorothy Kazhingu. That she in turn handed the said articles to the Traditional Electoral College of the Royal family made up of representative members of the family tree.

1.9 That after his name was cleared by the Traditional Electoral College, it was submitted to the village headman Seti Tambarila and Kabanza Mwepu who by custom is tasked to enthrone Chief Chibanza. That village headman Mushipa then fired a gun thrice to signify acceptance of the chosen

Chief.The Plaintiff was then taken to a makeshift house called "Kombolo" where various rituals were performed.

1.10 He recalled that the instruments of power which included an African royal fly-wisc, insignia, royal throne,gong, gown, a hat and other articles relating to the throne were then handed to him as newly installed Chief Chibanza the 11th .

1.11 He averred that he continues to suffer irreparable damage that cannot be atoned for in damages as the 1st and 2nd Defendants have moved into his territory to undermine his authority by holding meetings to discredit him, removing individuals he has appointed and replacing them with their agents, subdividing huge pieces of land and displacing many of his subjects.

2 Affidavit in opposition

2.1 Jonathan Eshiron the 1st Defendant swore the affidavit in opposition and introduced himself as Chief Mumena. He disputed the assertion that the Plaintiff is Chief Chibanza. He did not dispute the averment that agents were sent to install Sub-Chiefs in the Chibanza area. He however disputed that such action has brought confusion in the Chiefdom. That the practice and procedure which has been in place since the

1940s – 1950s is the same procedure that was used to install the Sub-Chiefs who fall within the Mumena Royal Establishment Catchment.

2.2 He acknowledged the existence of the Chibanza Chiefdom in the then Northern Rhodesia. However, that in 1941, the Chibanza Chieftainship and other Chieftaincies were abolished by Colonial order and never to exist again. That to date there is no Chieftainship known as Chibanza Chieftainship in Zambia. Rather, that what exists is Chibanza as a Sub-Chief. That this information has in fact been confirmed by the Plaintiff himself by exhibit **"ES3"**in the affidavit in support of the application for the injunction.

2.3 That as early as 2009, the Plaintiff was informed that it was not within Government policy to allow additional Chiefdoms that were abolished as per letter marked **"JE1"** from the House of Chiefs.That in spite of this information being given to the Plaintiff, he has continued making attempts to be recognised as Chief Chibanza in a non-existent Chiefdom. Produced as**"JE2"** and **"JE3"** are copies of letters which such information was

repeatedly provided following requests made by the Plaintiff to the Provincial administration in Solwezi.

2.4 As far as he was aware, the last Chief Chibanza was Mwaanza Mulilambange Chibanza who was sitting in Colonial times and was after the Colonial order recognised as an ex-Chief until his death. However, that thereafter, what was known as Chief Chibanza was now considered as position of Sub–Chief which position has remained under the leadership of the Mumena Royal Establishment.

2.5 Further support of this averment was presented to be in exhibit **"JE4"**, a copy of the official Chief Map which it was argued does not show a Chieftaincy known as Chibanza.That following the death of the last Sub-Chief Munene, arrangements were made by the Chiefdom to install a Sub-Chief to replace him. However, that when the Plaintiff heard about this he then arranged for a sham installation to take place.

2.6 The 1st Defendant insisted that the installation was a sham as only he has the authority to approve the installation of a Sub-Chief under Kaonde custom. That without his authority, no installation can take place especially given the fact that he was

required to have a one on one meeting with the incoming Sub-Chief at which he would enthrone him or her with authority to that office.That no such meeting took place.

2.7 He questioned the legitimacy of the excerpt relied upon by the Plaintiff stating that the publication was authored by one Simon Silundu Chibanza who was claiming to be Chief Chibanza. Further that what was relied upon related to the Colonial days and not the current state of affairs.

2.8 He further believed that the Plaintiff had not disclosed any cause of action against him and he had no power to declare any Chieftainship that was already abolished. That his powers extend to the appointment of a Sub-Chief which he exercised when he appointed the 2nd Defendant. That the claims by the Plaintiff if at all, would squarely fall against the persons that abolished the recognition of the Chieftainship he was seeking to restore.That as such the Plaintiff had neither disclosed a reasonable cause of action against the Defendantnor a clear right of relief.

2.9 He further believed as advised by his lawyers that the Plaintiff was required to make a full and frank disclosure of all material

facts. That this the Plaintiff has failed to do by not disclosing that by a Judgment dated 30th August 2022, he was sentenced by the Subordinate Court of the Solwezi District to one-year simple imprisonment suspended for 3 years on condition that he does not hold himself out as Chief Chibanza during that period. The Judgment was exhibited **"JE5".**

2.10 He added that there is no irreparable injury that will be suffered. The 1st Defendant further believed as advised by Counsel that unless and until this Court orders otherwise, he remains the Chief and the Chibanza remains a Sub-Chiefdom.He further believed that the granting of the injunction applied for would not preserve the status quo but in the essence amount to a determination of the entire matter at injunction stage.

2.11.Further that there was no proof that had been exhibited to support the claim of any subdivision of land having taken place. Lastly that no undertaking as to damages had been made in the application for the injunction.

3 Affidavit in reply

3.1 The Plaintiff deposed to an Affidavit in reply dated 15th February 2024.He contended that the 1st Defendant had not demonstrated how he had been appointing the purported Sub-chieftainship Chibanza from the dates stated. Further that the 1st Defendant had not exhibited any document to show that there was in existence a Colonial Order.That the Plaintiff's own exhibit **"ES3"** does not in any way show that there was such abolition.

3.2 He averred that the institution of Chieftaincy exist in accordance with the culture, customs and traditions of the people to whom they apply and the stance by the government in exhibits **"JE1"** and **"JE2"** does not form part of such culture and traditions. Further that the exhibit **"JE1"**was written by the Clerk of the House of Chiefs at the time when the 1st Defendant was serving as Chairman of the House.

3.3 It was further contended that the notion that the Chief Chibanza Chieftaincy is now Sub-Chief has no basis and no evidence has been provided to support this notion. Further that exhibit **"JE4"** is not clear and was produced by the

Colonial masters and not the Government of the Republic of Zambia.

3.4 That in spite of the 1st Defendant's acknowledgement that the Plaintiff and 2 others have an interest to the position of Sub-Chief Chibanza, he went ahead to appoint the 2nd Defendant to be the alleged Sub-Chief Chibanza who has no family ties to the Chibanza Chieftainship.

3.5 He added that the allegation in the 1st Defendant's affidavit that the Chieftainship Chibanza was abolished is not true as **"ES4"** shown by stamps of the District Commissioner in Kasempa dated 16th April 1940 whose native District is Matunda is Chief and not Sub-Chief.

3.6 He explained the source of the publication exhibited **"ES4"** to be the National Archives of Zambia as authenticated by stamp dated 17th February 2023.He acknowledged as true that he was convicted of the stated offence and that the matter is on appeal in the High Court which he contended is not bound by the decision of the Subordinate Court.

3.7 He deposed that the record in the criminal matter will show that the 1st Defendant who was Complainant in the matter

employed traits of intimidation in trying to suppress the Chieftainship Chibanza.

4. Submissions

4.1 The Plaintiff's submissions

4.2 The Plaintiff filed into Court Skeleton Arguments and Lists of Authorities in support of the application dated 19th October 2023. Reference was made to the **American Cyanamid Company vs Ethicon Limited**[1]case on the considerations a Court should take into account when faced with injunction applications.

4.3 Other authorities relied upon are the cases for **Tamela Akapelwa and Others vs Joseph Mubukwanu Litinga Ngambu**[2] and **Bernard Kutalika vs Daires Kalonga**[3] The Plaintiff concluded that this is a proper case warranting the grant of an order of interim injunction as prayed.

4.4 The Defendants Submissions

4.5 In opposing the application, the Defendants filed Skeleton Arguments in opposition dated 31st January 2024. They too relied on *the American Cyanamid case* (supra) on the tests to be satisfied for the grant of injunctive relief. Other authorities

cited were the case of **Hina Furnishing Lusaka Limited vs Mwaiseni Properties Limited**[4]to argue that he who comes to equity must come with clean hands.

4.6 Further reference was made to **R vs Kassingtone Income Tax Commissioners Ex Parte Princes Edmand de Polignac**[5] for the proposition that a person approaching equity must make a full and frank disclosure of all material facts that may affect the decision of the Court. That the inability to approach equity with clean hands or to make such disclosure should result into the denial of the grant of the relief sought by the Court.

4.7 That in this case, the Plaintiff neglected to disclose that by a Judgment dated 30th August 2022,he was sentenced by the Subordinate Court of Solwezi District and sentenced to 1-year simple imprisonment suspended for 3 years on condition that he did not hold himself out to be Chief Chibanza during that period. It was submitted that having failed to do this the Court should deny the relief sought.

4.8 It was further argued that there should be a serious question to be tried. The Learned author of **Zambian Civil Procedure**

Commentary and cases was cited in aid for this proposition. Other authorities cited include **Shell and BP (Z) Ltd vs Conidaris & Others**[6]and **Hotelier Limited and Another vs Finsbury Limited**[7]in support of the argument that a party must demonstrate a clear right of relief to be entitled to the relief.

4.9 It was argued that the Affidavit in support of the Summons for an injunction clearly shows that the Plaintiff had merely relied on a traditional ceremony that was carried out. However, it was the Defendants position that the Chieftaincy does not exist. In the premises that the Plaintiff is desirous of being recognised as Chief of a non-existent Chiefdom and as a result has not demonstrated that he has a serious question to be tried at Court.

4.10 It was further argued that the Plaintiff has not as per holding in the **Communications Authority vs Vodacom Zambia Limited**[8] case among others demonstrated the irreparable injury that he may suffer if the application was not granted.

4.11 Further, that the Plaintiff presents no evidence of the meetings allegedly held to discredit him or the alleged subdivision of the

land. That the Chibanza area will still remain a Sub-Chiefdom even if the application is not granted hence no injury would be suffered by the Plaintiff.

4.12 Further arguments relating to the question of balance of convenience and preservation of the status quo were presented.It was submitted that a grant of the injunction would actually create conditions favourable to the Plaintiff who already believed himself to be Chief Chibanza thereby being the basis of his action in spite the fact that the Chiefdom remains non-existent as far as the Defendant is concerned.

4.13 Lastly, that no undertaking as to damages in the event of failure of the main action was offeredby the Plaintiff in making his application thereby disentitling the Plaintiff from obtaining the injunctive relief sought. The Defendant prayed that the application be dismissed accordingly.

5. The Hearing

5.1 At the hearing both Counsel representing the Plaintiff and the Defendant relied on their filed documents and augmented their positions with oral submissions. Mr Kabaso for the Plaintiff submitted that the 1st Defendant had continued to

appoint leaders in the Chiefdom which he argued was detrimental to the interest of the Plaintiff. That the record would show that both Defendants have no family ties to the clan in the area in dispute.

5.2 Learned counsel added that the exhibit marked **"JE5"** is a criminal Judgment that has no place in a criminal matter more so that the Complainant in that matter is the 1st Defendant. He urged the Court to grant the order of injunction with costs.

5.3 Mr Wishimanga learned counsel on behalf of the Defendants argued that their position was simply that granting the injunction would have the effect of determining the matter in its entirety. He argued that the Plaintiff cannot ask the Court to stop the 1st Defendant from interfering with his Chieftainship when that is the relief that he is seeking before the Court substantively.

5.4 Further that the Plaintiff has not met the conditions for the grant of the relief as set out in the American Cyanamid case. That there is no clear right of relief that has been demonstrated by the Plaintiff.

5.5 Further that reference to exhibit **"JE5"** the criminal Judgment, was only meant to show that the Plaintiff was concealing facts. That he cannot conceal such a material fact of his conviction in the Subordinate Court. That his hands are therefore dirty and the application must accordingly fail with costs.

5.6 In reply Mr. Kabaso argued that the Court is not bound by the decision of Subordinate Court. That what is sought to be restrained is the interference with the Chibanza Chiefdom and not the Mumena Chiefdom. He reiterated his prayer for the grant of an interim injunction.

6. Court's determination

6.1 I have carefully considered the affidavit evidence by both parties and their respective submissions. Both have referred me to the relevant cases that lay out the principles and tests to be applied when a court is considering whether or not to grant an interim injunction.

6.2 In the case of *American Cyanamid Company vs. Ethicon*(**supra),** Lord Diplock set out the tests that a court should apply when exercising its discretion for such applications. Notably, that

the court should address the question whether or not on the facts the Plaintiff has raised a serious question to be determined at trial; whether damages would be an adequate remedy and the Defendant is in a position to pay; and lastly where the balance of convenience lies.

6.3 The first test I must apply therefore is to ascertain if there is a serious question to be tried and a clear right of relief established on the facts. In applying this test, the Supreme Court in the case of **Hilary Bernard Mikosa vs. Michael Ranaldson**[9] went further and held that:

"An injunction would only be granted to a Plaintiff who established that he had a good and arguable claim to the right which he sought to protect"

6.4 Further in the case of **Harton Ndove vs. Zambia Educational Company**[10]Chirwa J. held that:

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

6.5 However, the court must always be mindful not to be drawn into considering arguments that hinge on the substantive

claim. This was indeed the position settled by the Supreme Court in the matter of **Turnkey Properties vs. Lusaka west Development Company and Others**[11] cited by the Plaintiffs wherein the court observed;

"it is improper for a court hearing interlocutory application to make comments which may have the effect of preempting the decision of the issues which are to be decided on the merits to the trial".

6.6 The breadth and depth of the facts and submissions put the court in precisely that position. The court is more or less invited to consider the merits of the case. It also confirms that there are matters in dispute warranting further inquiry at trial.

6.7 Several questions can be discerned from the Affidavit evidence and arguments before me. The question of whether or not Chibanza Chieftainship was abolished and is a Sub-Chieftainship is an issue in dispute.Is the Chief Chibanza position that of a Sub-Chief under Mumena Royal Establishment?, was the installation of the Plaintiff as Chief legitimate or not? are but some questions to be inquired into at trial.

6.8 Without making any attempts to delve into the merits of the matter I find that the Plaintiff does prima facie establish that he has an arguable claim granted the excerpts of published articles he relies on that seemingly justifies the existence of the claimed Chieftaincy. The first test laid out in the American Cyanamid case is therefore resolved in the affirmative.

6.9 However, the inquiry does not end there, the next question to be interrogated is if irreparable injury will result from a failure to grant the injunctive relief or that damages would atone for the contemplated damage. In *Shell BP. Zambia Limited vs Connidaris and Others(supra)* the Supreme Court defined irreparable injury to mean: ***"injury which is substantial and can never be adequately remedied or atoned for by damages not injury which cannot possibly be repaired".***

6.10 If therefore, the Plaintiff can be adequately compensated by an award of damages and the Defendant would be in a position to pay the damages then an injunction should not be granted irrespective of how strong the Plaintiffs case is.

6.11 I would agree with the Defendants submission that the Plaintiff did not specifically mention what irreparable injury he

would suffer either in the Affidavit in support or through the filed and oral submissions made. However, it is common cause that this is a matter pertaining to the ascension to and right to a claimed Chieftainship. I am prepared to find that damages cannot possibly atone for the wrongful deprivation of a duly entitled person ascending to the throne and attendant honour of governing a Chiefdom.

6.12 That said,it is also a fundamental principle in injunction law that being an equitable relief, the party seeking the injunctive relief must approach equity with cleans hands. The learned authors of **Commercial litigation: Pre- emptive Remedies (3rd edition) ,** point to *"fraud"* and *"unclean hands"* as vitiating factors that affect the exercise of the court's discretion of whether or not to grant this equitable relief. Thus, in **Hubbard vs Vosper**[12] Megaw LJ in refusing an application for an injunction by the applicant to restrain the publication by a former member of its confidential records observed that:

"There is here evidence that the Plaintiffs are or have been protecting their secrets by deplorable means such as evidenced by this code of ethics and that being so, they do not come with clean hands to this

court in asking this court to protect their secrets by the equitable remedy of an injunction."

6.13 Further in the case of *Hina Furnishing vs. Mwaiseni Stores(supra)* it was held:

"The court will not grant the remedy in favour of a tenant whose tenancy agreement is subject of a condition precedent which has not been performed...or who is in breach of a term of the agreement such as arrears in rent; for he who comes to equity must come with clean hands"

6.14 The Defendant contends the Plaintiffs' hands are soiled in the act of failing to disclose material facts.

6.15 The learned authors of Commercial litigation Pre-emptive Remedies (Supra) at page 63 observe that the suppression of a material fact may also taint the hands of an applicant for equitable relief. They cite the case of *Kensington Income Tax Commissioners, exp Princes Edmond de Polignac* (Supra)where Warrington L.J observed that:

"It is perfectly well settled that a person who makes on exparte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible

disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclose, then he cannot obtain any advantage from the proceedings and he will be deposed of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

6.16 The Defendant has demonstrated in its affidavit in opposition that the Plaintiff did not disclose the fact that he had been convicted in the Subordinate Court for holding himself out to be Chief Chibanza.The Plaintiff attempts to water down the significance of such non-disclosure suggesting that there was an appeal against the decision and that in any event that Judgment was not only incapable of biding this Court, it could also not be used in these proceedings being a criminal matter.

6.17 However, I find that the court is not being invited to consider the merits of the decision.The Defendant merely points out that there was a criminal case resulting in a conviction anchored on the Plaintiff's claim to the Chieftainship. This I agree was a material fact that he failed to disclose rendering his hands soiled.

6.18 I also agree that the effect of granting the injunction would materially create new conditions and have the effect of determining the matter in its entirety.

6.19 Conclusively, I find that for the above reasons this is not a case that I can exercise my discretion to grant injunctive relief. I would accordingly dismiss the application with costs to be taxed in default of agreement.

Dated at Lusaka this 17th **day of** December **2024**

M.D. BOWA
JUDGE.