IN THE COURT OF APPEAL OF ZAMBIA **CAZ/08/318/2017**
HOLDEN AT LUSAKA **APPEAL NO. 7 OF 2018**
(*Civil Jurisdiction*)

BETWEEN:

PHILLIP MOYO	**APPELLANT**
AND	
DOREEN SIITA	**1ST RESPONDENT**
PHENEAS PUMULO	**2ND RESPONDENT**
THE ATTORNEY-GENERAL	**3RD RESPONDENT**

Coram: *Mulongoti, Sichinga and Ngulube, JJA*
On the 27th June, 2018 and 10th August, 2018

For the Appellant: *Mr. F.S. Chunga of Messrs Silweya and Company*
For the 1st and 2nd Respondent: *N/A*
For the 3rd Respondent: *Mrs. F.M. Chibowa – Senior State Advocate*

JUDGMENT

Sichinga, JA delivered the Judgment of the Court

Cases referred to:

1. *Tommy Mwendalama v. Zambia Railways Board (1978) ZR 65 (SC)*
2. *Nkhata and Others vs. Attorney-General (1966) ZR 124 (SC)*
3. *Attorney-General v. Ndhlovu (1986) ZR 12 (SC)*
4. *Geradus Van Baxtel v. Rosalyn Mary Kearny (1987) ZR 63 (SC)*

5. *Turnkey Properties v. Lusaka West Development Company Limited and another (1984) ZR 105 (SC)*
6. *American Cyanamid Company Limited v. Ethicon Limited (1975) AC 396*
7. *Mothercare Limited v. Robson Books Limited FSR 466 at 474*

In this appeal, we will refer to the appellant as the plaintiff and the respondents as the defendants, as this is what the parties are in the court below.

This is an appeal against a Ruling of the High Court of 3rd November, 2017 in which the court below held that the plaintiff (appellant now) had not shown evidence of a clear claim to entitle him to injunctive relief to restrain the 1st and 2nd respondents from installing the 1st respondent as Chieftainess Moomba until the final determination of the matter.

In the main cause, the appellant seeks the nullification of the election of the 1st respondent as Chieftainess Moomba, and an order for a fresh election owing to alleged wrongful acts and irregularities.

The factual background to the case is set out at length in the statement of claim. It is useful for us to recite a brief of the same. The plaintiff and the 1st defendant are members of the Bakasheta clan of the Moomba chieftaincy of Kazungula District of Southern Province. They are both eligible to ascend to the throne of the chieftaincy as Chief Moomba. Following the royal family's resolve of the composition of the electoral college, an election was held in

which the 1st Defendant emerged the winner. The plaintiff then commenced an action seeking to nullify the election of the 1st defendant and an order for a fresh election owing to alleged wrongful acts and irregularities. He also sought an interim injunction to restrain the 1st and 2nd defendants, their servants or agents or whosoever from holding an installation ceremony of the 1st defendant as heiress to the throne of the Moomba chiefdom on 14th October, 2017 or on any other date pending the final determination of the matter.

In his affidavit in support of the interim injunction, dated 9th October, 2017, the plaintiff deposed that he was challenging the selection and or appointment of the 1st defendant to the throne of Chief Moomba. He stated that the 1st and 2nd defendants were making arrangements for the installation of the 1st defendant on the 14th October, 2017 and that the 1st defendant had provided funds for some named individuals to travel for the installation which was being planned before recognition by the President of the Republic of Zambia as required by law. The court then granted an ex-parte order of injunction pending inter-partes hearing.

The 2nd defendant filed an affidavit in opposition. He deposed that the 1st defendant was duly elected as chieftainess Moomba by a lawfully constituted electoral college consisting of members of the Bakasheta family. The Government through the Permanent Secretary of the Southern Province had recognized the 1st defendant

as duly elected Chieftainess Moomba in accordance with the customs of the Nkoya speaking people of Kazungula and is entitled to such privileges and benefits attached to the office of the chief. The 2nd defendant further deposed that the plaintiff had lost the election as Chief Moomba for which he is bitter and bent on distracting the installation of the newly elected chieftain Moomba who was lawfully elected on 14th September, 2017. The deponent urged the court below to discharge the ex-parte order of injunction granted to the plaintiff on 22nd October, 2017 and allow the installation of the 1st defendant as chieftainess Moomba.

After the inter partes hearing the learned trial judge considered the facts of the case. He outlined the election process, in particular, events prior to the formation of the Electoral College, the voting process and the outcome of the election. The court noted that the plaintiff had conceded defeat and remarked that the will of the majority ought to be respected. The court found that the plaintiff's action to challenge the outcome of the election was an afterthought. The court dealt with the requirement for recognition of an elected chief by the Republican President, as contended by the plaintiff, and held that the current Constitution under Article 165 (2) (a) had abolished the requirement of recognition of chiefs by the head of state. The court found that the plaintiff had not shown evidence of a clear claim to entitle him to an order of injunction since he had lost the election to the office of Chief Moomba. The court accordingly dismissed the application for an interlocutory

injunction for lack of merit by its ruling of 3rd November, 2017 and discharged the ex-parte order of injunction.

Dissatisfied with the Ruling of the learned High Court Judge, the plaintiff has now appealed to this court on the following grounds:

1. ***That the learned trial Judge erred in law and fact to make a substantive finding that the 1st respondent was duly and properly elected when that is the main cause.***
2. ***That the learned trial Judge erred in law in not restricting himself to the application before him; i.e. an interim injunction pending the disposal of the main cause.***

The plaintiff filed his heads of argument on 15th January, 2018 and heads of argument in reply dated 20th June, 2018 to which he entirely relied.

Under ground one, the submissions made on behalf of the plaintiff were that the learned judge disregarded the plaintiff's affidavit evidence in reply wherein he disputed the genuiness of the exhibited minutes and in fact called them "fake/false." That notwithstanding the learned judge did not only refuse to confirm the ex-parte interlocutory interim injunction but went further to make a pronouncement on the main issue of irregularities and found that the 1st defendant was duly elected and that it was therefore right to have proceeded with the installation. Counsel submitted that the learned judge's findings were a misdirection and

a fatal error in law and fact on his part by dealing with the triable issues at interlocutory stage and which ought to have been left to be dealt with at trial. The case of ***Tommy Mwendalama v. Zambia Railways Board***[1] was cited in support of this position of the law. In that case the Supreme Court discussed the inappropriateness of dealing with triable issues at interlocutory stage/hearing when it held that:

> ***"...the question before the High Court was whether or not the appellant was a member of the union at the time of his proposed transfer and that most important issue was a triable issue which should not have been decided at an interlocutory hearing."***

In casu, it is submitted that the alleged serious irregularities were triable issues which the learned judge should have left for the trial.

Under the second ground, counsel relies on the submission advanced in ground one. Further, it is submitted that the learned judge should have restricted his Ruling to the interlocutory application before him and not to touch on the triable issues which should be determined after hearing and testing the oral evidence at trial. Thus even the learned judge's pronouncement that the plaintiff's interlocutory application had no merit was a fatal misdirection in the face of the alleged irregularities and should be set aside and the ex-parte order of interim injunction restored, pending the determination of the matter.

At the hearing of the appeal, Mr. Chunga merely relied on the filed arguments. In response to the court's inquiry, counsel stated that the *status quo* was such that the 1st defendant had not been installed as Chieftainess Moomba.

In response to ground one, the 1st and 2nd defendants submit that the learned trial judge was on firm ground when he found as a fact that the 1st defendant was duly and properly elected. It is submitted that the court took into account the issues and evidence before him in deciding to discharge the interim injunction. The 1st and 2nd defendants contend that it is a finding of fact that the plaintiff contested the election of Chief Moomba and lost to the 1st defendant. That there was no error on the part of the learned trial judge in his Ruling. It was therefore submitted that we should not interfere with the lower court's Ruling as an appellate court. The cases of ***Nkhata and Others v. Attorney-General***[2] and ***Attorney-General v. Ndhlovu***[3] were cited as authorities for this proposition.

Further, the 1st and 2nd defendants' counsel referred us to the case of ***Gerardus Van Baxtel v. Rosalyn Mary Kearny (a minor)***[4] where the Supreme Court in refusing to interfere with the finding of fact in the court below made reference to the case of ***Nkhata and Others*** supra and stated the following:

> ***"In his Judgment, the learned trial Commissioner gave detailed reasons and reviewed all the evidence which was before him and decided to disbelieve the defendant. For our part, we are satisfied that one of the conditions***

referred to in Nkhata has been demonstrated to us to enable this court to reverse findings which were amply supported by the evidence on record."

Counsel submits that *in casu* there is no reasonable ground on which we should interfere with the Ruling of the court below and therefore we are urged to dismiss ground one of the appeal.

Under ground two, the 1st and 2nd defendants rely on the submissions advanced in ground one. In addition, it is submitted that the appeal lacks merit and the same is an attempt by the plaintiff to obtain an injunction which was denied by the lower court. We are therefore urged to dismiss the appeal for lack of merit and uphold the lower court's decision.

On behalf of the 3rd defendant, Mrs. Chibowa, the learned Senior State Advocate stated that the state did not file any arguments into court as it was not affected by the injunction in the lower court. However, counsel made oral submissions to the effect that the state agreed with the plaintiff's position that there was excess of jurisdiction in the lower court. She submitted that the court below pre-empted the issues which ought to be determined at full trial. Counsel relied on the case of ***Turnkey Properties v. Lusaka West Development Company***[5]. Mrs. Chibowa submitted that the learned trial judge determined who had won on mere affidavit evidence which was improper as guided by the Supreme Court. Counsel contended that the affidavit evidence was incomplete and had not

had the benefit of being tested by oral examination. She agreed with the plaintiff's position.

In reply, it is submitted on behalf of the plaintiff, that the cases of ***Nkhata and Others*** supra and ***Attorney General v. Ndhlovu*** supra cited by the defendants do not support the 1st and 2nd defendants' position in this appeal. That in these cases the trial judge evaluated the evidence following which findings of fact were made and the demeanor of the witness was taken into account. That *in casu* the judge made his final determination on an interlocutory application based on affidavits filed. Therefore, there was no evidence for evaluation by the judge upon which he could have made findings of facts and could have determined the demeanor of the witnesses on either side. It is submitted that the judge did not hear the evidence of the serious allegation of irregularities cited by the plaintiff in his statement of claim on record.

The 1st and 2nd defendants reiterated the arguments under ground one in the second ground.

In conclusion, we are urged to remit the matter to the lower court so that the issues of irregularities referred to by the plaintiff are duly adjudicated upon and a final determination is made which will not be perverse to the evidence and the findings of fact.

We will consider the two grounds of appeal together as they are interlinked. The issue this appeal raises is whether the learned trial judge dealt with the substantive matter at interlocutory stage.

It is settled law in this jurisdiction that when determining whether or not to grant an interim injunction, the court must consider the guidelines enunciated in the case of ***American Cyanamid v. Ethicon Company Limited.***[6] as follows:

a. *There must be a serious question to be tried.*
b. *The court should not resolve conflicts of evidence or undertake a detailed consideration of the law. Rather, if there is a serious question to be tried, the court should consider the balance of convenience.*
c. *As to the balance of convenience, the court should first consider, if the claimant were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial.*
d. *If common law damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the claimant's claim appeared.*
e. *If, however, damages would not provide an adequate remedy for the claimant in the event of his succeeding at trial, the court*

should then consider whether, if the defendant were to succeed at trial in establishing his right to do that which was sought to be restrained, the defendant would be adequately compensated by an award of damages under the claimant's undertaking in damages.

f. *If damages in the measure recoverable under these undertakings would be an adequate remedy and the claimant would be in a financial position to pay them, there would be no reason upon this ground to refuse an interim injunction.*

g. *Where there is doubt as to the adequacy of the respective remedies in damages available to either party or both, then the general balance of convenience arises.*

h. *Where the factors relevant to the general balance of convenience are evenly balanced, the court will generally take such measures as may be necessary to preserve the status quo.*

It is trite law that in investigating the presence of a serious issue to be tried, the court is not to undertake an investigation in the nature of a preliminary trial of the action. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations.

We agree with Mr. Chunga's and Mrs. Chibowa's submissions that the alleged irregularities in the election process were triable issues which the learned trial judge should have left for determination at trial. By not adhering to the guidelines in the grant of injunctions, the learned trial judge fell into grave error. He further made comments which clearly could have the effect of pre-empting the outcome of the trial when he referred to the action as an 'afterthought'. This is unacceptable. In the case of ***Turnkey Properties v. Lusaka West Development Company Limited supra***, the Supreme Court held *inter alia* that:

> ***"It is improper for a court hearing an interlocutory application to make comments which may have the effect of pre-empting the decision of the issues which are to be decided on the merits at the trial."***

The question of a serious question to be tried was succinctly summarized by Sir Robert Megarry VC in the case of ***Mothercare Limited v. Robson Books Limited***[7] in the following terms:

> ***"The prospects of the plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the plaintiff has prospects of success which in substance and reality exists. Odds against success no longer defeat the plaintiff unless they are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, the plaintiff fails, for he can point to no question to be tried***

which can be called 'serious' and no prospect of success which can be called 'real'."

In ***American Cyanamid*** supra, the view expressed that it was not advisable for a judge to express at the interim stage an opinion as to the prospects of success of either party as such views might be embarrassing to the judge who would try the case.

In casu, the approach taken by the learned trial judge was exhaustive as to deal with the main matter when he stated at page R5-R6:

"The defendants were therefore in order when they after informing the relevant offices planned to install the 1st defendant as Chieftainess Moomba as she was so elected by her people. The plaintiff in this case has not shown evidence of a clear claim or case for which he can be said that he deserves an injunction. He lost the election to the office of chief."

Having revisited the guidelines for grant of injunction, we are of the considered view that this is an appropriate case in which an injunction should be granted. We opine that there is a serious question to be tried. We have also considered the balance of convenience and *status quo*. In the view we have taken we find merit in this appeal.

We would therefore summarise the position we have taken by stating that at the core of the dispute in this matter is a chieftaincy

wrangle and two claimants vying for the throne. As Lord Diplock said at ***page 408*** in ***American Cyanamid***, *"Where other actors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo."* We also note that the appellant made an undertaking as to damages. We accordingly set aside the Ruling of the court below which discharged the ex-parte order of injunction granted on 11th October, 2017.

We accordingly grant the appellant an interim injunction pending determination of the matter. Costs in the cause.

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J.Z. Mulongoti
COURT OF APPEAL JUDGE

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D.L.Y. Sichinga
COURT OF APPEAL JUDGE

.....
P.C.M. Ngulube
COURT OF APPEAL JUDGE