IN THE HIGH COURT FOR ZAMBIA **2020/HP/317**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

DAVIES SHAMATANGA **PLAINTIFF**

AND

FANDU RESOURCES INVESTMENTS LIMITED **DEFENDANT**

BEFORE THE HONOURABLE JUSTICE M.C KOMBE

For the Plaintiff: *Messrs Philsong and Partners*

For the Defendant: *Messrs CC Gabriel & Co*

R U L I N G

Cases referred to:

1. **Edward Jack Shamwana v. Levy Mwanawasa (1993-94) Z.R. 149.**
2. **American Cyanamid Company v. Ethicon (1975) A.C. 406.**
3. **Hilary Bernard Mukosa v. Michael Ronaldson (1993-94) Z.R.26**
4. **Harton Ndove v. Zambia Educational Company (1980) Z.R. 184.**
5. **Shell and BP (Z) Limited v. Conidaris and Others (1975) Z.R 174.**
6. **Gideon Mundanda v. Timothy Mulwani, Agricultural Finance Co Limited and S.S.S Mwiinga (1987) Z.R. 29.**

7. **Jane Mwenya and Jason Randee v. Paul Kapinga (1998) Z.R 17.**
8. **Seventh-Day Adventist Church v. Amock Phiri-SCZ/15/2010**
9. **Michael Chilufya Sata v. Chanda Chimba III and others (2011) 1 Z.R. 519.**
10. **Roraima Data Services v. Zambia Postal Services Corporation (2011) 3 Z.R. 283.**
11. **Cayne v. Global Natural Resources (1984) 1 ALL E.R 225.**
12. **Francome v. Mirror Group Newspapers (1984) 1 W.L.R. 892.**
13. **Fellows v. Fisher Fellowes v. Fisher (1975) 3 W.L.R 184.**
14. **Granada Group Limited v. Ford Motor Co. Limited (1972) FSR 103.**

Legislation and other material referred to:

1. **The High Court Rules Chapter 27 of the Laws of Zambia.**
2. **The Mines and Minerals Development Act. No. 11 of 2015.**
3. **Halsbury Laws of England Volume 24, Fourth Edition.**
4. **Iain S. Goldrein, K.H.P. Wilkinson and M. Kershaw: Commercial Litigation: Pre-emptive Remedies, London, and Sweet & Maxwell 1997.**

The Plaintiff issued a writ of summons in which the substantive claims are a declaration that the Defendant is a trespasser on his property and an order for damages.

The Plaintiff did cause to be filed simultaneously with the writ an *ex parte* application for an order of interim injunction pending the determination of this matter. The application is made pursuant to

Order 27 rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia.

According to the summons, the Order sought is to restrain the Defendant from entering and digging trenches on the Plaintiff's property.

In the affidavit that accompanied the summons, the Plaintiff **DAVIES SHAMATANGA** deposed that sometime in 2011, he started to acquire land in Chibolela village in Chief Shakumbila, Mumbwa which totaled 141.2 hectares. That the purpose of the land was to establish an animal ranch to breed cows, goats and sheep.

That following the purchase of the land, he constructed a 5.5 kilometers road to gravel standard at a total cost of K115,000.00 and that it was the main road which villagers around his farm used to date; that he had constructed various structures on the land for his staff and sank a borehole.

He explained that without his knowledge or consent, the Defendant trespassed on his property and started to dig deep trenches using heavy machinery. That his attempt through the workers to stop the Defendant did not yield any joy as they continued to cause damage to the land.

He added that he had been advised by his advocates that in accordance with the Mines and Minerals Development Act No. 11 of 2015, no person or company is allowed to enter upon any land without the owner or legal occupier's written consent; that the Defendant had caused huge damage and may continue to damage his land thereby destroy the pasture land for animals and trenches which may be death traps for his animals.

I did not consider the application *ex parte* but directed that I shall consider it *interpartes.* I also directed the parties to file skeleton arguments.

The Defendant opposed the application which was deposed to by **KELVIN MUSUKWA,** the Country Manager for the Defendant which is a holding company for White Lion Enterprises Limited.

He deposed that White Lion Enterprises Limited was a holder of a large scale mining licence number 14948-HQ-LML originally issued to Luiri Gold Mines Limited on 11th October 2011 for a period of 25 years. That the licence was transferred to White Lion Enterprises Limited on 26th May, 2015. A copy of the licence was produced in the affidavit.

He further deposed that the licence area was surveyed and was 24,243.917 hectares situated in Mumbwa District in Chief Shakumbila's Chiefdom; that the holder of the licence White Lion Enterprises Limited had given consent to its holding company Fandu Resources Investment Limited the Defendant to obtain and convert 149 hectares in Chibolela village within the mining licence area from customary to leasehold tenure.

That the Defendant was a holder of a large scale exploration licence number 25987-HQ-LEL covering an area of 6.383.7077 hectares. A copy of a print out from the Zambia Mining Cadastre Portal showing the Defendant's exploration area was exhibited.

Further, that the traditional authorities namely His Royal Highness Senior Chief Shakumbila had given consent to the Defendant both for exploration and surface rights and converting from customary holding to leasehold tenure of 149 hectares in Chibolela village. Letters to the Ministry of Mines and Mumbwa Town Council giving consent were produced.

The Defendant therefore denied that it entered upon the Plaintiff's land without his permission; that all entrances upon the Plaintiff's land had been with the consent and concurrence of the Plaintiff as

evidenced by the fact that entry had been granted by way of a gate which had been opened to facilitate entry by the farm manager of the Plaintiff.

That further, the Plaintiff's land was wholly within the mining licence area of the large scale mining licence number 14948-HQ-LML and was acquired subject to the mining rights of the Defendant.

He added that the above notwithstanding, he attended upon the Plaintiff together with the Headman and in his presence the Headman made an offer of alternative land to the Plaintiff to facilitate the continuation of farming activities.

The Plaintiff filed an affidavit in reply. He deposed that contrary to the contents of paragraph 4 of the affidavit in opposition, the ownership of a licence in the particular area was always with the consent of the Director of mines and the rights of the individuals were not subjected to mining activities without fulfilling the conditions as stipulated in the mining licence which the Defendant had exhibited. That the holder of the licence and the Defendant had not fulfilled the conditions contained therein.

It was also averred that the licence exhibited by the Defendant prohibited mining activities before environment assessment had been

done. To his knowledge, no environment assessment had been done on his property and that he was not notified that mining activities would commence on his property in the manner the Defendant had done.

The Plaintiff further explained that ownership of the large scale mining licence was subject to the condition of meeting the wellbeing of the people who occupied the land; that it did not entitle the Defendant to enter on his property without his consent and to start conducting mining activities when it merely had an exploration licence.

He also deposed that the large scale mining licence could not be transferred by consent between two companies; that it could only be transferred with the consent of the Director of Mines which was the case when Luiri Gold Mines Limited transferred to White Lion Enterprises Limited.

He also added that the Defendant could not now claim to obtain consent to transfer the piece of land which had already been allocated to him and recommended by the same traditional leadership much earlier than the Defendant. Further, that the exploration licence did

not entitle the Defendant to dig the deep trenches it had dug and continued to dig on his land.

The Plaintiff further explained that Chief Shakumbila had no residue power to give and/ or recommend another person on the piece of land he had already recommended him to convert to leasehold; that he had never allowed the Defendant to enter on his farm and that the farm manager had never given such authority to the Defendant; that he had never discussed with the Defendant or the Headman to give him another piece of land to facilitate his continuation of his farming activities.

That the Defendant had continued to destroy his land as it had pulled down the wire fence and was constructing another road knowing that there was court process.

The parties filed skeleton arguments. I will not attempt at this stage to replicate the submissions suffice it to mention that I have considered the evidence adduced and addressed my mind to the arguments. I shall be referring to them as and when it is necessary in this ruling.

By this application, I have been called upon to determine whether the Plaintiff is entitled to an Order of interlocutory injunction pending

the final determination of the matter. In doing so, I have carefully considered the caution given by Ngulube J. (as he then was) in the case of **Edward Jack Shamwana v. Levy Mwanawasa**[1]. This caution is that I should in no way pre-empt the decision of the issues which are to be decided on the merits and the evidence at the trial of the action.

The test to be applied when considering whether or not an injunction should be granted remains that laid down by the House of Lords in the seminal case of **American Cyanamid Company v. Ethicon** [2]. This case sets out a series of questions which should guide the court in making a determination. These are:

1. Is there a serious question to be tried?
2. Would damages be adequate?
3. Where does the balance of convenience lie?

However, I am mindful of the fact that the principles established in the ***American Cyanamid*** case are of general application and must not be treated as a statutory definition. This is because it is possible to grant or refuse an interim injunction without applying the ***American Cyanamid*** guidelines.

In following the ***American Cyanamid*** guidelines, the first question I should consider therefore is whether or not the Plaintiff has raised a serious question to be determined at trial. This proposition comes down to the requirement that the claim must not be frivolous or vexatious. This is in line with the holding by the Supreme Court in the case of **Hilary Bernard Mukosa v. Michael Ronaldson** [3] where it was 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."**

Further, in the High Court, Chirwa J, (as he then was) in the case of **Harton Ndove v. Zambia Educational Company** [4] 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."**

In view of the above principles, for the application to succeed, the Plaintiff must demonstrate that there is a serious question to be tried and he has a good and arguable claim to the right he seeks to protect.

The starting point is the endorsement on the writ of summons, the contents of the statement of claim and the reply. By this action, the Plaintiff seeks *inter alia* a declaratory order that the Defendant is trespassing on his property without his consent, damages for trespass on the land and damages for unlawful damage caused to his land.

He contends that he acquired land which is in Chief Shakumbila's area to establish an animal ranch and that he had started the process of converting the land held under customary law into leasehold. In this regard, he had obtained the necessary authorization from the traditional leaders. That the Defendant had entered on the property without his consent and knowledge contrary to the provisions of the Mines and Minerals Development Act No. 11 of 2015 and that the Defendant had not disputed that it had entered onto the property.

The Defendant on the other hand contends that the Plaintiff's property is within the mining licence currently under the name of White Lion Enterprises Limited which company has given written consent to it to do mining activities. That it entered on the Plaintiff's property with consent and concurrence of the Plaintiff.

The Defendant also contends that White Lion Enterprises Limited has given it consent to obtain and convert 149 hectares in Chibolela village within the mining licence area from customary to leasehold tenure. That in this regard, His Royal Highness Senior Chief Shakumbila has given consent it consent for both exploration and surface rights and the conversion from customary holding to leasehold tenure.

It was thus submitted that the Plaintiffs right to relief is not clear and it would be improper to grant an interlocutory injunction on the facts of this case.

In response to this, the Plaintiff contends that the large scale mining licence cannot be transferred by consent between the parties whether by a holding company or not as it can only be transferred with the consent of the Director of Mines.

Furthermore, that the large scale mining licence for White Lion Enterprises prohibits mining activities before environment assessment has been done and that to his knowledge, no environment assessment has been done on his property.

In addition, it is contended that the Defendant cannot claim to have acquired any surface rights by virtue of consent given by White Lion

to transfer a certain portion of land which has already been allocated to him and recommended by the same traditional leadership earlier than the Defendant.

Given the positions taken by the parties, it seems to me perfectly plain that the Plaintiff has brought this action in his attempt to assert his rights (surface) on the land on which the Defendant contends it has mining as well as surface rights. In denying that the Defendant has any mining and surface rights and that it entered with the consent of the Plaintiff, it means that the Plaintiff has raised contentious issues.

However, this Court cannot at this stage of the litigation try to resolve conflicts on the parties respective rights in the property based on affidavit evidence. I am of the considered view that there is need for this Court to examine in more detailed manner at the trial of this matter the evidence and the exhibits in the light of the reliefs sought.

In this regard, I find that there is a serious question to be tried by this Court in relation to the claims made by the Plaintiff.

Having said that, I will proceed to consider the next question as the existence of a serious question to be tried is not itself sufficient. The Plaintiff has to show that irreparable injury will occur to him if the

injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

(i) Adequacy of damages

When considering this question, the question I ask is this: if the Plaintiff were to succeed at the trial in establishing the claims set out in the statement of claim would he be adequately compensated by an award of damages for the loss caused by the refusal to grant an interlocutory injunction?

If damages would be adequate remedy, and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the plaintiff's claim appeared to be at this stage.

If on the other hand damages would not be an adequate remedy, the court should then consider whether if the injunction were granted, the defendant would be adequately compensated under the plaintiff's undertaking as to damages. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

Further paragraph 955 of the Halsbury's Laws of England Volume 24, Fourth Edition provides that:

> **"The Plaintiff must also as a rule be able to show that an injunction until the hearing is necessary to protect him against irreparable injury; mere inconvenience is not enough."**

According to the **Shell and BP (Z) Limited v. Conidaris and Others** (5) case irreparable injury means:

> **"Injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired".**

What the foregoing means is that an injunction will not be granted where damages would be an adequate remedy to the injury complained of in the event that the Plaintiff later succeeds in the main action.

The Plaintiff has argued on this question that it does not seek damages as a means of replacing the land but has sought damages on the fence wire the Defendant had damaged and the deep trenches it had dug and continued to dig despite knowing that this matter was pending in Court.

It was submitted that the subject matter herein is land and damages would not be sufficient to atone for the injury that he is likely to suffer if the injunction is not granted.

The Defendant on the other hand has argued that the main relief that the Plaintiff seeks is damages. That this means that damages can atone for any injury that the Plaintiff would suffer.

I have given careful consideration to the above arguments. It is clear that the dispute relates to the interest that each party has in the land in question. As I have mentioned, the Plaintiff contends that it has surface rights over the land and that the Defendant entered his property without his consent and does not have any mining or surface rights although it has started exploration activities on his property. The Defendant has denied this. It contends that it has entered the land with consent of the Plaintiff and has acquired mining as well as surface rights on the land in question.

I should begin by stating that it is trite law that loss of an interest in a particular piece of land or house no matter how ordinary cannot be adequately compensated by damages. This principle was stated by the Supreme Court in the case of **Gideon Mundanda v. Timothy Mulwani, Agricultural Finance Co Limited and S.S.S Mwiinga** (6)

and was re-affirmed in the case of **Jane Mwenya and Jason Randee v. Paul Kapinga**[7] where it was stated that an award of damages could not adequately compensate a party for loss of land.

I am guided by the above principle. I have considered the position taken by the Plaintiff regarding his interest in the property which I have outlined above. I am of the considered view that although the Plaintiff seeks damages for trespass and damage to land, there is a doubt in my mind as to the adequacy of damages as a remedy.

I say this because the Plaintiff has not only raised the issue that the Defendant has entered the property without obtaining consent from him in accordance with the Mines and Minerals Development Act, but that the Defendant has also started exploration activities by digging deep trenches on the land in search of minerals. In addition he has also disputed that the Defendant has acquired mining and surface rights.

Thus the activities that the Defendant has embarked on as shown in the affidavit in support of this application when it has not even exhibited the exploration licence are likely to destroy or damage the pasture land which the Plaintiff acquired for the purposes of establishing an animal ranch before the serious questions that have

the land to establish an animal ranch. Moreover, the road that is being constructed will likely be of no use to the Plaintiff given the reasons he has advanced.

I should also hasten add that Order 27 rule 4, of the High Court Rules, it provides that:

> **"In any suit for restraining the defendant from the committal of any breach of contract or other injury, and whether the same be accompanied by any claim for damages or not, it shall be lawful for the plaintiff, at any time after the commencement of the suit, and whether before or after judgment, to apply to the Court or a Judge for an injunction to restrain the defendant from the repetition or the continuance of the breach of contract or wrongful act complained of..."**

Given the foregoing provision, it is clear to me that there are certain cases where the applicant cannot be confined to a claim for damages only. I am persuaded by what Matibini J. (as he then was) stated in the case of **Michael Chilufya Sata v. Chanda Chimba III and others**[9] that the courts have power to grant injunctions notwithstanding that there is a claim for damages. Words to much the same effect were used by Chisanga J. (as she then was) in the

case of **Roraima Data Services v. Zambia Postal Services Corporation** (10).

For the foregoing reasons, I am of the considered view that this is one case in which it would be unjust to confine the Plaintiff to a claim for damages in trespass as he is asserting his surface rights over the land in question and there is evidence that the Defendant has entered and has started exploration activities thereby damaging the land scape before the serious questions the Plaintiff has raised have been determined on merit.

In addition, there is no indication from the Defendant that it would be in a financial position to pay the damages.

For the reasons I have taken time to explain, I find that there is a doubt at this stage as to the adequacy of damages to the Plaintiff. In this regard, I shall proceed to consider the balance of convenience.

In the case of **Cayne v. Global Natural Resources** (11) May L.J explained that:

> **"That the balance of convenience is the phrase which of course is always used in this type of application. It is, if I may say so a useful shorthand but in truth, the balance that one is seeking to make is more**

fundamental more weighty than mere 'convenience'. I think it is quite clear from both cases that although the phrase may well be substantially less elegant, the 'balance of the risk of doing an injustice' better describes the process involved.'

Sir John Donaldson M.R. expanded on the same theme in the case of **Francome v. Mirror Group Newspapers** (12) when he stated that:

"I stress again that we are not at this stage concerned to determine the final rights of the parties. Our duty is to make such orders if any as appropriate pending the trial of the action. It is sometimes said that this involves a weighing of the balance of convenience. This is an unfortunate expression. Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are usually asserting wholly inconsistent claims, this is difficult but we have to do or best. In doing so, we are seeking a balance of justice, not convenience." (Underlining mine for emphasis only).

Therefore on the question of balance of convenience, the court is required to determine which of the two parties will suffer greater harm from granting or refusing of an injunction pending a decision

on the merits. Thus in making a determination on this question, the court must consider all the circumstances of the case and the wide range of factors. Although Lord Diplock in the case of ***American Cyanamid*** expressly mentioned three factors that is status quo, relative strength of the cases and special factors, he further stated that:

> **"It would be unwise even to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies let alone to suggest the relative weight to be attached to them. These vary from case to case."**

In relation to the issue of preserving the status quo, the learned authors of the book entitled Commercial Litigation: Pre-emptive Remedies, at page 161 stated the significance and rational of status quo as follows:

> **"If other factors are equally balanced it is a counsel of prudence to take measures as are calculated to preserve the status quo. The rationale is that if the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to**

undertake. On the other hand to interrupt him in the conduct of an established enterprise would cause greater inconvenience to him since he would have to start again to establish it in the event of succeeding at trial." (Underlining mine for emphasis only.)

As regards the meaning of status quo, Sir John Pennycuick in the case of **Fellowes v. Fisher** [13] put it this way that:

> **"By the expression 'status quo' I understand to be meant the position prevailing when the defendant embarked upon the activity sought to be restrained."**

The view therefore I hold is that if the injunction is not granted and the Plaintiff succeeds at the hearing of this matter, he will suffer greater harm than the Defendant given that the nature of the activities the Defendant has embarked will lead to loss of land which is irreparable. To borrow the words used by Chisanga J. in the ***Roraima*** case which I have referred to, the Plaintiff is likely to suffer utter ruin if the injunction is not granted.

Furthermore, the Plaintiff will suffer greater harm if the injunction is not granted as there will be an interruption with the quiet enjoyment of the property he acquired in 2011 and which is being used for keeping farm animals like cows, goats and sheep.

On the other hand, if the injunction is granted and the Defendant succeeds at the trial of this matter, the view I hold is that it will be restrained temporarily from continuing with exploration activities and the harm will not be substantial. This is because it has only embarked on the activities of exploration and construction of the road this year.

In holding this view, I am persuaded by what was stated in the case of **Granada Group Limited v. Ford Motor Co. Limited** (14) that it would be wise to delay a new activity rather than risk damaging one that has been established by the Plaintiff.

It is for this reason that I find that the balance of convenience tilts in granting the injunction so as to preserve the status quo which existed before the Defendant entered and commenced exploration activities on the Plaintiff's land until the rights of the parties have been determined in this matter.

For the foregoing reasons, I find based on the fundamental principles of injunction law that the Plaintiff has demonstrated to the satisfaction of this Court that this is a proper case in which I can exercise my discretion and grant the interlocutory injunction albeit with slight modification on the scope.

I should however point out that by granting this order of injunction, I have not determined at this stage the final rights of the parties. However, I have been persuaded by the observation made in the ***Francome*** case which I have referred to above that it is my duty at this stage considering the facts of the case to make an order which will be appropriate pending the determination of the matter. I have therefore granted this application after considering the different positions taken by the parties and also contemplating the possibility that either party might succeed.

For the avoidance of doubt, an interlocutory injunction is hereby granted restraining the Defendant, whether by itself or its agents from carrying out mining/exploration activities on the Plaintiff's property or in any way dealing with the Plaintiff's property in any manner which will be detrimental to the Plaintiff until final determination of this matter or until further order of this Court. I make no Order as to costs.

DELIVERED AT LUSAKA THIS 22nd DAY OF SEPTEMBER, 2020

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M.C. KOMBE
JUDGE