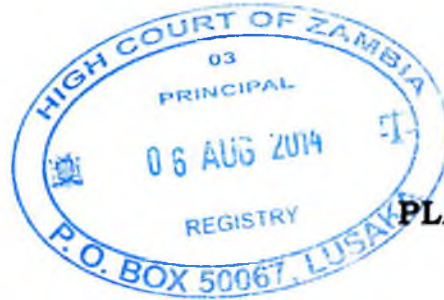


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2014/HP/1043



BETWEEN:

CHIEF MWANATETE

PLAINTIFF

AND

**INNOCENT MUNYIKWA LUSHATO
MWEENE MUTONDO**

**1ST DEFENDANT
2ND DEFENDANT**

**Before The Honourable Mr. Justice I. C. T. Chali in Chambers at
Lusaka, the 6th day of August 2014.**

**For the Plaintiff: Mr. C. L. Mundia, SC - Messrs. C L Mundia &
Comapany**

For the Defendants: Mr. S. S. Zulu, SC - Messrs. Zulu & Company

RULING

The Plaintiff commenced an action by way of writ of summons accompanied with a statement of claim seeking, *inter alia*, a declaration that the installation of the 1st Defendant by the 2nd Defendant as Mweene Matanda of the Luampa District is null and void as the 2nd Defendant violated the provisions of the Chiefs Act, Chapter 287 and Article 128 of the Constitution of Zambia.

And pending the determination of the action, the Plaintiff applied for an interlocutory injunction to restrain the Defendants whether by themselves, their successors in title, and/or their agents or servants from interfering with the Plaintiff's duties, functions and any other chiefly activities he may wish to undertake in his area.

The Plaintiff had on 3rd July 2014, filed an affidavit in support of his application as well as a second affidavit on 29th July 2014, which was in reply to the opposing affidavit filed on 28th July, on behalf of the Defendants.

At the hearing of the application, Counsel for the Defendants, Mr. S.S. Zulu, SC, objected to the use of the affidavit in reply, arguing that it had been filed without the leave of the Court, and that as such it ought not to be allowed on the record. He submitted that in an injunction application, an applicant is only allowed one affidavit and can only file a second affidavit with the leave of the Court.

However, Counsel did not cite any authority for that proposition either from the practice rules or in the decided cases, and I did not find any except in the High Court decision of MAGNUS, J in the case of COMMONWEALTH DEVELOPMENT CORPORATION v. CENTRAL AFRICAN POWER CORPORATION (1968) Z R 90 in which he held that:

“Affidavits in excess of the number normally submitted under the High Court Rules and Practice may be admitted into evidence in the discretion of the Judge - especially when neither side objects to their inclusion.”

In the CDC case, the learned Judge observed as follows at page 96 of the report:

“In the previous action, no affidavits in opposition had been filed at the time the matter first came before the

learned Deputy Registrar and only two were before him when he finally decided the matter, and, so far as I can gather, when it came before the learned Chief Justice on appeal. In the present action there has, if anything, been a superabundance of affidavit evidence. Not only was there the statutory affidavit in support of the application filed by the Plaintiff and a later affidavit, dealing with the stamp duty claim, but no less than four affidavits filed by the defendant in opposition, the first alone...., exhibiting, in addition to the usual exhibits, two further affidavits. This means that I had, in effect, before me, six affidavits sworn in support of the defendant's case..... The practice on application of this sort is, in general, to limit the number of affidavits - usually to one affidavit in opposition, which the defendant is entitled to put in as of right, and, with leave, on affidavit in reply on behalf of the Plaintiff. As, however, neither side objected to the inclusion of these affidavits, and as most of them had already been prepared by the time that the matter came before me, I decided to allow them to be put in. In any case, ... they were of assistance to the Court."

Indeed, the application before me, being an interlocutory injunction, was to be supported by at least one statutory affidavit. Further, and as of right, the Defendants were entitled to put in at least the one statutory affidavit they are entitled to. However, thereafter, a party had to apply for leave to file a further affidavit. The rationale for this is simply that a

party putting in the first affidavit ought to frame it in such a way that it takes into account and covers all the facts relevant to his case. He ought not to anticipate being given a second opportunity to advance his case, except possibly for arguments on the evidence before Court.

Equally, a respondent ought to do likewise to his affidavit in opposition. The practice is similar to that in use in the exchange of pleadings where a party serves his statement of claim on the opponent who, in response, serves his defence and counterclaim, if any. Under normal circumstances, the claimant will not be required to file any reply to the defence, unless such defence raises issues which could not have been reasonably anticipated by the Plaintiff.

In the case before me, the Plaintiff filed the affidavit in reply without first having sought leave of the Court. And Counsel for the Defendants had taken issue with that affidavit. In my view, I can only admit that affidavit on two grounds; one, that the facts or issues raised in the opposing affidavit could not have been reasonably anticipated by the Plaintiff at the time he settled his affidavit in support of his application; and two, that the issues and matters raised in the affidavit in reply are critical to a determination whether or not to grant the interlocutory injunction.

I have perused the three affidavits filed in the matter, and I find that the issues or matters raised in the opposing affidavit could have been easily anticipated by the Plaintiff so as to cover them in his supporting affidavit. In his affidavit in reply, the Plaintiff has raised new matters to which the Defendants will not have an opportunity to respond. Further, I do not

R5

think that the affidavit in reply will be necessary in assisting me to more fairly determine the interlocutory application.

Lastly, and although Counsel for the Defendants did not raise the issue, I find the affidavit in reply, particularly paragraphs 9, 15 and 17 to offend against the provisions of Order 5 Rule 15 of the High Court Rules, Chapter 27 of the Laws of Zambia, which provides thus:

“An affidavit shall not contain extraneous matter by way of objection or prayer or legal arguments or conclusion.”

For the foregoing reasons, the Defendants’ Counsel’s objection to the affidavit in reply is upheld. That affidavit will accordingly be expunged from the record.

Leave to appeal is granted.

Delivered in Chambers, the 6th day of August, 2014.


I. C. T. Chali
JUDGE