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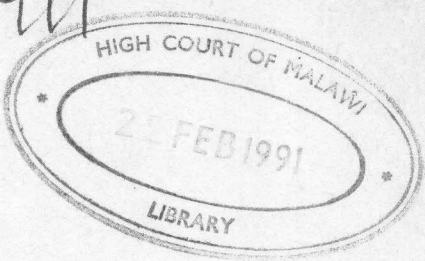


14 Jan 1991

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1230 OF 1990



BETWEEN:

SOUTHERN BOTTLERS PLAINTIFF

- AND -

YAKUB MAHOMED ISSA 1ST DEFENDANT

- AND -

AZIZ MAHOMED ISSA 2ND DEFENDANT

Coram

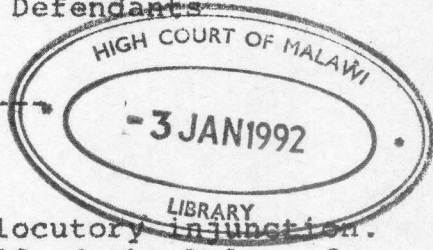
UNYOLO, J.

Msaka of Counsel for the Plaintiff

Mwafulirwa of Counsel for the Defendants

Kholowa, Court Clerk

R U L I N G



This is an application for an interlocutory ~~injunction~~.
It is made under the provisions of Order 29 of the Rules of
the Supreme Court.

The pertinent facts are these: The Plaintiff is a company which carries on the business of manufacturing beverages in this country and is the registered owner of two trade marks, namely, "FREEZIT" and "Sobo FREEZIT". Both these trade marks were registered in the year 1986 in Part A of the Trade Marks Register under Class 32, in respect of beers, mineral and aerated waters and non-alcoholic drinks, fruit drinks, fruit juices, syrups and other preparations for making beverages. The Defendants, on the other hand, carry on business in partnership under the name and style of Issa's Food Products, which was registered for the purposes of manufacturing food products. And trading thus the Defendants have also put on the market and are selling a beverage which is described as "Issa's Ice Cool Freezits". The Plaintiff contends that the use by the Defendants of the word "Freezits" on a beverage also in Class 32 is an infringement of the Plaintiff's trade marks abovementioned, on the ground that such use is likely to deceive or cause confusion in the course of trade between the Defendants' goods and the Plaintiff's goods. The Plaintiff avers that unless restrained by a court order, the Defendants will continue infringing the said trade marks, thereby causing further damage and, therefore, applies for an order that the Defendants, and

each of them by themselves, their agents or servants, or howsoever otherwise be restrained and an injunction be granted restraining them from using the said word "Freezits" on their said product, or from howsoever infringing the two trade marks already mentioned.

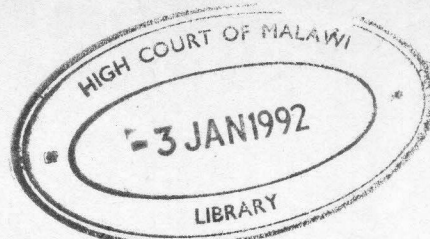
In their opposing affidavit, the Defendants contend that everybody in this country is quite familiar with the trade marks the Plaintiff seeks to protect and that there can be no question of deception or confusion resulting from the use by the Defendants of the word "Freezits" complained of, having regard also to the words "Issa's Ice Cool" prefixed thereto which, according to the Defendants, are distinctive. In a word, the Defendants contend that the description they have given their product in this matter cannot be an infringement of the Plaintiff's trade marks herein. The Defendants contend further that it would be unfair and unjust to grant the injunction sought, as that would tantamount to restricting competition among manufacturers. The Defendants ask that for these reasons, the application should be dismissed.

I am obliged to learned Counsel on both sides for the eloquent argument they put up at the hearing of the application and for their commendable industry in looking up the law.

A useful case on the subject of interim injunctions which this Court has persistently followed is American Cyanamid Company - v - Ethicon Limited (1975) 1 All. E.R. 504. It explains elaborately the principles to be applied in applications for interlocutory injunctions, as in the present case. These have been summarised thus:-

- (a) The plaintiff must establish that he has a good arguable claim to the right he seeks to protect;
- (b) The Court must not attempt to decide the Claim on the parties' affidavits. It is sufficient if the Plaintiff shows that there is a serious question to be tried; and
- (c) If the Plaintiff satisfied these tests, the grant or refusal of an injunction is a discretionary matter for the Court on the balance of convenience.

Referring to the present case, it is to be observed that there is no controversy the Plaintiff is the registered owner of the two trade marks "FREEZIT" and "Sobo FREEZIT" and in terms of section 9 of the Trade Marks Act, upon such registration, the Plaintiff was given or deemed to be given the exclusive right to the use of these trade marks. It would be an infringement of the Plaintiff's right under the Act for any person to use



any mark identical with the said trade marks or so nearly resembling the same so as to be likely to deceive or cause confusion in the course of business.

In short, I find it has been established that the Plaintiff has an arguable claim to the exclusive right of use of the trade marks it seeks to protect in this case. I find further that it has been shown that there is a serious question to be tried, namely, whether the Defendants' description of their beverage as "Issa's Ice CoolFreezits" infringes the said right. With respect, that question cannot be decided at this juncture simply on the affidavits of the parties. Evidence will have to be called at the trial of the action.

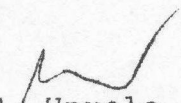
Having made these findings, I still have to decide whether the balance of convenience lies in favour of granting the injunction or not. I am aware that although the Court has a discretion in the matter, such discretion must be exercised judicially; that is to say, in accordance with reason and justice.

The first observation to be made is that the Plaintiff is not requesting the Defendants to stop selling their beverage, but simply to stop them from using the word "Freezits". I think that there is a material difference between the two situations, as in the latter situation, the Defendants would merely describe their beverage differently and still be able to sell the same in the meantime. Secondly, the Plaintiff's case appears to me quite strong even at this stage. The examples cited by Mr. Msaka, learned Counsel for the Plaintiff, were illuminating and to the point. Surely it would, *prima impressionis*, be misleading in the course of trade for him, as he argued, to go into the manufacturing of some kind of soap in this country today and call his product "Msaka's Lifebouy" or "Msaka's Lifebouys", considering that Lever Brothers are already known to be the manufacturers of Lifebouy soap in this country and considering further that the word "Lifebouy" is not an ordinary or common name. I am making these observations just by the way, not intending thereby to influence the final decision of the Court at the end of the trial. Thirdly, I take the view, on the total facts, that more harm may be done to the Plaintiff by refusing the injunction since, as I have said earlier, the Defendants may still be able to sell their beverage herein even with the description or trade name changed. On the contrary, the Plaintiff might suffer such damages as would be difficult to assess if the injunction was refused. Finally, I take note of the undertaking made by the Plaintiff through Counsel to pay any damages which the Defendants might suffer should they ultimately succeed at the trial.

For the foregoing reasons, the application succeeds and I make an order as prayed for by the Plaintiff restraining the Defendants from using the said word "Freezits" on

their beverage herein until after the trial of the action in this case or until further order, subject to the abovementioned undertaking for damages.

DELIVERED in Chambers this 14th day of January, 1991, at Blantyre.


L. E. Unyolo
JUDGE