

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1830 OF 2001

BETWEEN :

GERRY ALICK NKHOMA (MALE) PLAINTIFF

AND

PRESS CORPORATION LIMITED (A LIMITED LIABILITY COMPANY) DEFENDANT

CORAM : CHIMASULA PHIRI, J.

Mr Gustave Kaliwo of Counsel for the Plaintiff/Respondent

Mr Nkuna of Counsel for the Defendant/Applicant

Mrs Katunga and/Mrs Chingana Official Interpreters

RULING

This summons to vacate or vary an injunction order dated 18th July 2001 has been brought by the defendant on the grounds that the order be discharged for non disclosure of material facts and/or that the facts of the case did not warrant an injunction as damages would be an adequate remedy for the plaintiff. Alternatively, the defendant prays for an order that the said order of injunction to be varied to allow the defendants to recover the company vehicle immediately and also to remove the restrain on the defendant against publishing any notice in any newspaper that the plaintiff is no longer employed by the defendant. The defendant also prays for costs for this application. The application is supported by an affidavit of Clement Chilingulo sworn on 19th August 2001 and the supplementary affidavit of Tchaka Nkuna sworn on 16th August 2001. The application is strongly opposed by the plaintiff who has filed an affidavit in reply.

The background of this matter is that the plaintiff was employed as a company secretary for the defendant in 1994. In July 2000 the plaintiff's employment contract was renewed for thirty months. In January, 2001 the plaintiff was promoted to the post of Group Administrative Director. The plaintiff alleges that frequently he disagreed with his new Group Chief Executive on administration and legal matters. According to the plaintiff the Group Chief Executive did not want to take the plaintiff's advice and never tolerated an objection from any other member of the management team. In a letter dated 22 May 2001 the Group Chief Executive accused the plaintiff of inefficiency and/or incompetence. The plaintiff got that letter on the 28th of May 2001 upon his return from overseas and responded immediately. On 19th June 2001 the plaintiff was served with a notice to attend a disciplinary hearing on 20 June 2001 concerning his misconduct for the period from 1994 up to date. On 20th June 2001 the plaintiff attended the disciplinary hearing. According to the plaintiff, the hearing was postponed to a date to be communicated. Later, the plaintiff has contended in his affidavit that he was advised that the defendant intended to resolve the matter outside the disciplinary tribunal. The plaintiff in his affidavit in support of the *ex parte* summons for the interlocutory injunction order indicated that an agreement for him to resign under certain conditions was agreed. It is alleged by the plaintiff that the defendant subsequently backtracked on that agreement and dismissed the plaintiff from its employ on the condition that the plaintiff had failed to resign according to the terms set down by the defendant. Following the dismissal, the defendant demanded that the plaintiff surrenders all the defendant's property which was at the disposal of the plaintiff. This included a company car, a company house and a cell phone among others. The plaintiff rushed to the court to obtain an *ex parte* injunction order restraining the defendant from taking away its property from the plaintiff until after the matter was resolved in court. At the same time the plaintiff sued the defendant for specific performance of an agreement for the payment of terminal benefits in the sum of K2,500,000.00 or thereabout. The plaintiff also claimed prohibitive and mandatory injunction against the defendant.

Upon being served with the interlocutory injunction order the defendant applied to this court for an order to vacate or vary the injunction. In the affidavit of Mr Chilingulo in support of the summons, deponent stated that when the plaintiff applied for an interlocutory injunction order, he misrepresented to the court the facts relating to his performance at work. Further the defendant has stated that the disciplinary

hearing was duly convened on 20th June 2001 and that it was conclusively decided that a summarily disciplinary offence had been committed by the plaintiff but it was resolved that a recommendation be tabled before the executive committee meeting. It is alleged by the defendant that on 3rd July 2001, the letter was written to the plaintiff informing him of the results of the disciplinary hearing. The letter purported to terminate the plaintiff's contract of employment if he did not accept the option of resign based on the conditions outlined in that letter within 24 hours. It should be observed that this letter which is exhibit CC 11 does not have any date and it is the plaintiff's contention that he never received this letter i.e. this is the first time he is seeing it. The defendant is contending that the plaintiff failed to disclose to the court the contents of the letter thereby making a misrepresentation that he voluntarily resigned pursuant to agreement made on 12th July 2001 i.e. exhibit GAN 8. The defendant is contending that due to the alleged misrepresentation of the plaintiff, the case that was put before the court was materially different from what it should have been i.e. it was a misrepresentation of the facts obtained at the time the application was made. In the supplementary affidavit in support of this application counsel for the defendant has deponed that the plaintiff unconditionally makes an admission that he no longer works and will no longer work for the defendant anymore. The plaintiff is not seeking to enforce a right to remain in the employ of the defendant but is claiming specific performance of terms and agreement for payment of terminal benefits. The defendant has stated that it is currently in dire need of the use of the company house and company vehicle for its other members of staff. It has been contended that in view of affidavit of Mr Chilingulo the injunction order of 18th July 2001 was granted based on misrepresentation and or suppression of facts. In addition or in the alternative the injunction order ought not to have been granted in such terms as damages would have been a sufficient remedy for the plaintiff's claims. Therefore the defendant prays for the discharge of the order or variation of the said order allowing the defendant to recover the said vehicle immediately or publish a notice in the newspaper to the effect that the plaintiff is no longer in the employ of the defendant.

The plaintiff in his affidavit in reply opposes the application of the defendant on several grounds. One point taken by the plaintiff is that the affidavit in support of this application should have been sworn by the Chief Executive of Press Corporation Limited and not Mr Chilingulo or counsel. With respect, this argument does not hold

any water at all because clearly the law in Order 41 Rule 5 Rule (2) allows for at least such type of affidavit as in the present case to be used as long as their contents, sources, statements of belief and authority are indicated. Furthermore, in the present case there was no question of cross examination any of the deponents. The plaintiff has contended in his affidavit that the disciplinary committee merely rubber stamped the decision of the Chief Executive. Again with respect, this is mere opinion or speculation by the plaintiff because no factual evidence has been brought by the plaintiff. The plaintiff has clearly indicated in his affidavit that the real issue in question in this case is whether the agreement of 12th July 2001 exhibit CC 12 is specifically enforceable or not. The plaintiff has contended in his affidavit that whether or not he has an MBA degree is a question of fact that must be determined at the trial. As such it cannot at this point be conclusively stated whether or not the plaintiff made a misrepresentation about his qualification at his interview in 1994. It must be observed that in his affidavit in reply the plaintiff has indicated that after his dismissal he was subjected to humiliating, harsh and cruel treatment. This factor prompted him to seek court's intervention for the protection and preservation of a *status quo*. The plaintiff has contended that the defendant does not need the vehicle which the plaintiff is keeping because the defendant has bought a new fleet of BMWs. Further the plaintiff contends that the defendant has not employed a new Group Director of Administration hence there is no person who needs the house currently occupied by the plaintiff. With greatest respect this point does not hold water at all. It has to be observed that the plaintiff has unconditionally stated in his affidavit that he is no longer working for the defendant company, how come the he wants to paint a picture that he knows very well the plans of the defendant company? Again, it is possible that the new Group Director of Administration has not been recruited by the defendant because the defendant is waiting for the plaintiff to move out of the official residence of such a director. The plaintiff would wish this court could maintain the injunction order.

On 22 August 2001 I discharged the injunction order but reserved my reasons for doing so which I now proceed to give. Both counsel in their submissions addressed the court on the objectives of an injunction order. They cited several leading foreign cases on the point. I will refer to local cases where such foreign cases have been approved and applied by our High Court. In **Mobil Oil (Malawi) Limited Vs Leonard Mutsinze** Civil Cause Number 1510 of 1992, Chatsika J. stated that :-

“the principles upon which an application for an injunction will be considered are set in Order 29/1/2 and 29/1/3 of the Rules of the Supreme Court and were succinctly elucidated in the case of American Cyanamid Co. v Ethicon Ltd (1975) AC 396. Before an injunction can be granted, it must be established that the applicant has a good claim to the right he seeks to protect. The court does not decide the claim on the evidence contained in the affidavits. A good claim is said to have been established if the applicant shows that there is a serious point to be decided. When these principles have been established, the Court exercises its discretion on the balance of convenience. In deciding the question of the balance of convenience the court will consider whether damages will be a sufficient remedy for the mischief which is complained of and even if it considers that damages will be a sufficient remedy, it must further consider and decide whether the defendant or wrongdoer shall be able to pay such damages.”

This was followed in the case of **Malawi Revenue Authority Vs R.E. Mwenitete** Civil Cause Number 697 of 2001 (High Court unreported). In this case the defendant who was interdicted continued to live in the house which was previously allocated to him by his employer i.e. Department of Customs and Excise. On formation of MRA ownership of the house passed on to MRA. MRA demanded that Mr Mwenitete should vacate the house. He refused and this prompted MRA to seek an order restraining Mr Mwenitete from continuing to occupy the house. The court granted the order because Mr Mwenitete did not have a right to continue staying in the house. In **Harry Thindwa Vs Central East African Railways Company**, Civil Cause Number 969 of 2000, (High Court unreported), the defendant terminated the plaintiffs employment. The plaintiff was asked to vacate the defendants company house within a given period. The plaintiff refused to vacate the house arguing that he had sued for wrongful termination of employment. On the basis of **Pew Limited Vs H Mvula** Civil Cause Number 1589 of 1993 (High Court unreported) and **Malawi Council for the Handicapped Vs Leonidas Kavalo** Civil Cause Number 770 of 1996 (High Court unreported), this Court held that the plaintiff was not entitled to continue occupying the house of the defendant because he had no legal right to continue in occupation. This court held that there was no legal basis for granting the plaintiff

interim injunction order in the first instance and as such an interlocutory injunction order was discharged. The proper remedy in such instances must always be action for damages. In **Hewitt Gomile Vs Stansfield Motors Limited** Civil Cause Number 995 of 2000 (High Court unreported), the plaintiff was declared redundant in his employment. The plaintiff who was a very senior officer in the defendant organisation refused to surrender the company car which was in his possession because of his desire to sue the defendant for wrongful termination of employment. The plaintiff obtained an interlocutory injunction order restraining the defendant from repossessing the vehicle. In an application to have the order discharged I readily grant such a prayer on the basis that when ones employment is terminated, the fringe benefits ceases too and that a pending suit does not restore this benefit.

In the present case the plaintiff is no longer in employment of the defendant and it follows that all fringe benefits which he had by virtue of his employment have ceased to exist. There is no way his pending suit could resurrect these fringe benefits. It is abundantly clear from the writ of summons that he is seeking to enforce specific performance of claim for the payment of terminal benefits. There is no doubt that such terminal benefits are quantifiable. There is no claim in the writ indicating that he has a right to the house or the vehicle or other defendant company property at all. With greatest respect this factor should have clearly shown that this is a matter where an interlocutory injunction order ought not to have been made in the first instance because damages would have been the only proper remedy. On that score I would discharge an earlier order of the injunction.

I now turn to the issue of non disclosure of material facts. Going through the affidavit in support of the *ex parte* summons, I have reservations on the attack made by the defendant on the plaintiff that he failed to disclose certain facts. I am of the view that the plaintiff made a disclosure of the relevant facts and in certain circumstances where he failed to Exhibit certain documents a reasonable explanation has been given.

Lastly it cannot be disputed that the plaintiff was a very senior and influential officer in the defendant organisation. It would therefore be important that the public should know that he no longer occupies his previous position in the defendant company. There is no evidence by the plaintiff to show that this would infringe

certain common practices or norms in employment circles. The defendant is entitled to publish such a notice for the protection of its own business transactions. The only restriction on the part of the defendant is that the defendant should not state whether the plaintiff was dismissed or retired or resigned because that is a triable issue in this matter.

The issue of costs is discretionary. Mostly costs follow the event. In this matter, the defendant has succeeded to have the injunction order discharged while the plaintiff has failed to maintain an order. However, it has to be noted that the discharge is not on the basis that the plaintiff failed to disclose the material facts but because the Judge should not have granted the order in the first instance. Therefore, it would even be fair to order that each party should bear its own costs for this application.

MADE in Chambers this 24th day of August 2001 at Blantyre.



CHIMASULA PHIRI
JUDGE