

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**Civil Cause Number 553 of 2003**

Between

SOPHEN MWAMBUNGU

Plaintiff

And

SHALOM COMPANY

1<sup>st</sup> Defendant

And

FIRST FACTORING BANK

2<sup>nd</sup> Defendant

And

GRAIN AND MILLING COMPANY

3<sup>rd</sup> Defendant

**CORAM:** D F MWAUNGULU (JUDGE)

Mtambo, Legal Practitioner, for the plaintiff

Nkhono, Legal Practitioner, for the 2<sup>nd</sup> Defendant

Fatchi, the official court interpreter

**Mwaungulu, J**

**ORDER**

This Court will dismiss the plaintiff's application for an interlocutory injunction.

Before this inter partes application, this Court granted the injunction ex parte at the plaintiff's instance. This Court rejected the second defendant's application to dissolve the injunction. Where a party shows there is a matter which must proceed to trial, damages are an inadequate remedy for such loss as the other party may suffer pending the trial or, being an adequate remedy, neither party can pay damages, the court will, on a balance of justice, exercise its discretion to grant an injunction.

The action against the first defendant, Shalom Company, is that Shalom Company sold goods to the third defendant, Grain and Milling Company Ltd, as the plaintiff's agent. Grain and Milling Company Limited has not paid the first defendant. The first defendant approached the second defendant, First Factoring Company Limited, a discount house, to discount the transaction. Trial will show whether money amounting to K10, 000, 000, which the plaintiff suggests the second defendant advanced the first defendant, was prior money for which this transaction was partly paying or money the plaintiff used to finance the transaction. The plaintiff suggests that, whatever the case, the first defendant's actions amount to a fraud. The plaintiff's injunction, however, is not directed at the first or second defendant. It is directed against the third defendant to stop them from paying the money to the discount house or the first defendant.

First, the plaintiff suggests the third defendant should not pay the money to the second defendant or first defendant because the plaintiff was, to the third defendant, a disclosed or undisclosed agent. Secondly, it is suggested the first defendant acted fraudulently. Trial will clothe and substantiate these charges. Consequently, there are matters of law and fact which only a trial can settle. However, giving the matter the complexion most favourable to the plaintiff, the reliefs sought redound in damages. The affidavits far from suggest the defendants cannot pay damages should the Court find for the plaintiff.

From what I understand of *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; [1975] 1 All E.R. 504, where damages are an adequate remedy and the defendant can pay them, the court will normally refuse the injunction. The justification is that should trial prove her right, damages will placate the wrong where damages, as here, are what the parties contemplate. Conversely, the court will refuse an interlocutory injunction where damages, albeit an adequate remedy, the plaintiff cannot compensate the defendant should trial show the defendant is right. The plaintiff's affidavit far from establishes that he can compensate the defendants should trial establish the defendants right. It must be understood that interlocutory injunctions are made on the usual undertaking as to damages. It is on this undertaking that courts do what at common law is almost anathema, preventing a party exercising rights before a court determines those rights.

Since damages are an adequate remedy and the defendants, because the contrary is not shown, can pay them should trial prove them right and the plaintiff, because the plaintiff has not shown, cannot pay them should trial prove the defendants right, it is unnecessary to consider the balance of justice and maintain the status quo. I, therefore, dismiss the

application for interlocutory injunction with costs.

Made this 30<sup>th</sup> Day of October, 2003.

D F Mwaungulu

JUDGE