

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1603 OF 2002

BETWEEN:

JOSE COELHO.....PLAINTIFF

- and -

O.V. CUSTODIO.....1st DEFENDANT

M. A. B DA COSTA CUSTODIO..... 2nd DEFENDANT

LUSITANIA LIMITED..... 3RD DEFENDANT

CORAM: CHIMASULA PHIRI J.

T. C. Nyirenda of Counsel for the Plaintiff

D. Njobvu of Counsel for the Defendants

M. H. Fatch –Court Clerk.

ORDER

On 25th October 2002, the plaintiff obtained an ex-parte injunction order restraining the defendant and their servants or agents from selling or disposing of the assets of the 3rd defendant until after the determination of an inter-partes application. The present summons is for continuation of the injunction. The affidavit of Jose Coelho sworn on 25th October 2002 states that he is claiming for an order of specific performance of an agreement that 20% of the shares in the 3rd defendant be issued to the plaintiff and for an order that the defendants do all such acts and execute all such documents as may be

necessary to transfer to the plaintiff 20% of shares. It is the plaintiff's contention that the defendants are trying to sell the assets of the 3rd defendant as per Malawi News advertisement placed in the paper of 14th – 20th September 2002. The concern of the plaintiff is that in the event that all the assets are sold, the money may be paid to the 1st and 2nd defendants and thereby render the plaintiff's action nugatory.

The defendants have strongly opposed this application. In the Affidavit in Opposition, the defendants have contended that there was no contract for sale or acquisition of shares by the plaintiff in the 3rd defendant company. Secondly, that damages would adequately compensate the plaintiff. The defendants contend that damages would be the appropriate remedy. Furthermore, that the plaintiff's action for specific performance and injunction is misconceived. Thirdly, the defendants have alleged that the plaintiff has been guilty of inordinate and/or excessive delay in applying for relief to enforce the alleged contract for the sale/acquisition of shares. Therefore, the plaintiff is not entitled to the remedy of either specific performance or injunction. Lastly, the defendants have stated that the business of the 3rd defendant company is at a standstill and the 3rd defendant is simply servicing debts and laying off employees. The 3rd defendant intends to sell the goods advertised in the Malawi News as part of the process of servicing its debts and further to pay off its remaining servants. The defendants have contended that the balance of convenience lies in favour of not granting the injunction in order to allow the 3rd defendants to realise some cash to satisfy creditors. The plaintiff served a further Affidavit sworn on 25th November 2002. The plaintiff insists that he is a 20% shareholder of the 3rd defendant. The plaintiff has tried to exhibit financial statements of the 3rd defendant to show that it is economically viable and that there should not be any picture that the 3rd defendant is operating under any financial squeeze. The defendants served a Supplementary Affidavit explaining the status of the letter from the defendants to the Immigration concerning the plaintiff. The defendants accuse the plaintiff of suppressing and/or deliberately misrepresenting facts. The defendants further dispute the assertion of the plaintiff that he left his previous employment to acquire shares in the 3rd defendant company. The defendants contend that the plaintiff joined the 3rd defendant because it offered him competitive conditions of employment. The defendants have exhibited financial statements of the 3rd defendants to present a picture that the company is financially handicapped and it cannot continue in that status quo.

The submissions of both Counsel were more or less along the lines of their affidavits. The hearing of this application dragged for some time and at times I could feel that issues for the main trial were being tackled. In *Mobil Oil (Malawi) Ltd 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 out 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 Company v Ethicon Limited* (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 wrong doer shall be able to pay such damages."

In the present case it is not in dispute that there was a contract of employment between the defendants as employers and the plaintiff as an employee. There is a dispute as to whether or not remuneration included an offer to the plaintiff of 20% shares in the 3rd defendant company. This issue cannot be resolved on affidavit evidence. There is need for a full-scale trial. The issue of these shares involves a private company and as such the shares cannot be listed on the public market. It is important that the 3rd defendant should retain its existence. If it were a public company, the plaintiff, if successful, would be able to buy shares on the open market. This aspect militates against the defendants' wish of disposing off assets of the 3rd defendant company. The balance of convenience tilts in favour of retaining the injunction order until the trial of the main action or a further order of this court. I have fully considered the defendants' submission in relation to damages as an adequate remedy for the plaintiff. Further, the contention of undue delay features highly on the list of the defendant. However, I am unable to accept these aspects. The shares in a private company are different from share in a public company. Further, I do not see any undue delay in commencing this action by the plaintiff because the defendants only advertised for the sell of assets in the 3rd defendant in September 2002, and the plaintiff immediately reacted. As already indicated, I am inclined to uphold the continuation of the injunction order. I can only add that there should be a speedy trial.

MADE IN CHAMBERS this day 30th of January 2003, at Blantyre.

Chimasula Phiri

JUDGE