

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 605 OF 2004**

BETWEEN:

CANE PRODUCTS LIMITED..... PLAINTIFF

S. E. KAONGA t/a

E & E CIVIL ENGINEERING.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

CORAM: CHIMASULA PHIRI J.

Bazuka Mhango, of counsel for plaintiff

Masumbu, of counsel for 1st defendant

Mr Somba - Court Clerk.

RULING

Chimasula Phiri, J,

On 9th March 2004, by a specially endorsed writ, the plaintiffs commenced an action claiming damages for breach of contract against the first defendant and for inducing breach of contract against the second defendant.

On 10th March 2004 the plaintiffs obtained an order of injunction restraining the defendants, their servants or agents or any other person from collecting any moneys due as contracts sum under contracts number 019/RIEP/R&B/10 AND 019/RIEP/R&B/11 until the money has been accounted for to the plaintiff and/or from proceeding with the contracts until the

plaintiff has been paid of all amounts which have fallen due. This interim injunction order was granted for 7 days pending inter-partes application. The inter-partes summons for interlocutory injunction was scheduled for hearing on 16th March 2004. The application is supported by the affidavit of Benjamin Kingsley Msosa sworn on 9th March 2004. He states that for many years he has worked for the plaintiff and has acted generally in an advisory capacity. In the more recent times, he has also acted as company secretary for the plaintiff. He has stated that the defendant sub-contracted to the plaintiff the rehabilitation of roads and bridges in Nsanje RDP under contract number 019/RIEP/R&B/11 lots 01, 02 and 07 (Nyachilandu EPA, Nsanje District) and contract number 019/RIEP/R&B/10, lots 01- 03 (Zunde EPA, Nsanje District). He has further stated that the plaintiff proceeded with the construction of works which wereby the first defendant on a mutual understanding that the plaintiff will be entitled to repayment of 90% of the value of the works done for all payments approved by the employer, Rural Income Enhancement Project (Agriculture and Road Section). It is further stated that pursuant therefore to the plaintiff using its financial resources, personnel and capital equipment to undertake the sub-contract works under the contracts. The deponent was informed by the defendant some time in January 2004 and the employer specifically confirmed it to be true that a sum of K400, 000.00 had been paid to the first defendant for part of the works carried out under the stated contracts. In February 2004 the deponent was informed by the employer that a further payment of over K3.5 million had been made to the first defendant for the works partly executed on the two contracts. It is the belief of the deponent that the first defendant has received and collected moneys from the employer without paying the plaintiff for the sub-contracted works to it thereby forcing the plaintiff to incur huge expenses and operate the project works due to lack of consumables. The plaintiff applies to this court that the defendant be restrained from collecting any moneys from the employer until all the moneys which have been collected from the employer have been accounted for and/until the plaintiff is paid all moneys due on the works already undertaken aforementioned is paid in accordance with the arrangements between the plaintiff and the first defendant. Further the plaintiff prays that the first defendant be restrained from proceeding with any works under the said aforementioned contracts until he has paid the plaintiff the sum of K7,373,425.00 being hiring charges which has fallen due under two contracts less 10% commission for an advisory fees. It is also the plaintiff's prayer that the second

defendant be ordered, to suspend all payments until the first defendant has accounted to the plaintiff for all the moneys, which have been collected under the two contracts.

The first defendant filed an affidavit in opposition sworn on 18th March 2004 and a supplementary affidavit in opposition sworn 19th March 2004. In the affidavit in opposition, Mr Kaonga states that he is the manager of E. & E. Civil Engineering and has exhibited the certificate of registration. He states that sometime in May 2003, he responded to a newspaper advertisement inviting tenders for the construction of roads and bridges in Nsanje District. He exhibited letters of acceptance to his bids from Ministry of Agriculture, Irrigation and Food Security in respect of contract numbers 019/RIEP/R&B/10 and 019/RIEP/R&B/11. The copies of the agreements were exhibited. Mr Kaonga states that he contacted various individuals to assist him financially. He also contacted Mr Patel of Cane Products Limited. That Mr Patel initially undertook to provide all financial assistance required for the bridges including machinery and arrangements for all insurance bonds in support of the project and payments of wages and salaries. When the project commenced all that the plaintiff did was to drive machinery at the site. No provision for fuels was arranged nor were the performance guarantees arranged. The work commenced on 15th November 2003 and the first defendant was under an obligation to pay the employees their first salaries on 30th November 2003. The plaintiff did not provide funds necessary for salaries, consequently, the first defendant paid salaries amounting K90,000.00 from other resources. This was done due to pressure from the employees but during the month of December 2003 the first defendant was required to complete the works in terms of the agreements and having noted the difficulties he was experiencing with the plaintiff, the first defendant decided to find an alternative for completing the project. At that point, there was growing pressure from the Ministry of Agriculture, Irrigation and Food Security for completing of the contracts. There was however, indication that they would terminate the contracts if the projects were not undertaken with speed. A letter to that effect has been exhibited. The first defendant obtained performance guarantees from Prime Insurance Company Limited in respect of the two agreements. He also obtained contracts or risks policy in respect of the two contracts. In June 2004 after the first defendant had arranged all the performance guarantees, all finances and works were currently in progress, was consulted by the representative of the plaintiff to advise that the plaintiff would provide all financial resources if the first defendant signed

agreements entitled Nsanje Road Works Agreement. The first defendant refused to sign this agreement in view of the previous behaviour of the plaintiff's personnel and also the fact that the first defendant had found alternative means of doing the project himself. Furthermore, all that time the first defendant was informed that Mr Patel of Cane Products was in South Africa. Subsequently, it was surprising to the first defendant to be served with interlocutory injunction order. The first defendant has contended that the contract for roads and bridges maintenance was between himself and the Ministry of Agriculture, Irrigation and Food Security and the plaintiff is not privy to that agreement. Further, the plaintiff has not provided any financial resources to the first defendant. If the injunction is allowed to stand, it has the potential of creating a situation where the first defendant would be in breach of the contracts signed with the Ministry of Agriculture, Irrigation and Food Security. Furthermore, the plaintiff can have recourse to other legal remedies. In the supplementary affidavit in opposition, Mr Kaonga has contended that the plaintiff has not demonstrated existence of a triable issue and that the injunction was obtained on a suppression of material facts.

The plaintiff has filed an affidavit in reply sworn by Benjamin Kingsley Msosa on 26th March 2004 alleging that the certificate of registration of the first defendant expired. Further that the first defendant used the plaintiff's financial resources to tender favourably for contracts exceeding his limit. Furthermore, that the plaintiff advanced Mr Kaonga some money for his upkeep and his business errands on the mutual understanding that once contracts are awarded to the first defendant such contracts would be sub-contracted to the plaintiff. Furthermore, it has been stated in the affidavit reply that the plaintiff supplied all consumable materials, cement and fuel advance to Mr Kaonga for his first operational expenses.

The plaintiff denies that it was under an obligation to issue guarantee bonds and insurance cover for the contracts but that the plaintiff indicated that it would assist in raising the same should the first defendant fail to raise them. Lastly, the first defendant refused to sign any agreements with the plaintiff hence the commencement of the legal action. Finally, the first defendant filed a further supplementary affidavit sworn on the 9th March 2004. In this affidavit, he has sworn that E & E Civil Engineering applied for inclusion in the K15 million category. Further, the first defendant indicates or argues that most of the receipts exhibited by the plaintiff

were not signed by Mr Kaonga or his representative. Finally, that it would constitute an abuse of process to pretend to recover a debt by an injunction. Both parties addressed the court in their respective positions. The counsel for the first defendant made a written skeleton argument in which he has submitted that the court has jurisdiction to discharge an interlocutory injunction if the same was obtained by suppression of facts or if sufficient grounds are shown for the discharge of the injunction order (**London City Agents, (JCD) Limited v Lee (1970), Ch 597**). Mr Masumbu also submitted that in determining whether there is a serious question to be tried, the cases show that the court must not attempt to resolve conflicts of evidence on the affidavits. Furthermore, Mr Masumbu has submitted that no injunction ought to be granted where damages would be an adequate remedy and the defendant is not in position to pay. Further it is clear in the case at hand that damages would be easy to quantify and there is no evidence to suggest that the first defendant would not be able to pay. He has relied on the cases of **ICL(Malawi) Limited v Lilongwe Water Board**, civil case 64 of 1998 (unreported). In that case, I restated the legal position as follows:

*The legal position is that the usual purpose for an interlocutory injunction is to preserve the **status quo** until the rights of the parties have been determined in the action. The injunction will almost, always be negative in form, to restrain the defendant from doing some act. The principles to be applied in applications for interlocutory injunctions have been authoritatively explained by Lord Diplock in **American Cyanamid Company-vs-Ethicon Ltd** [1975] All E.R. 504. They may be summarised as follows: (1) the plaintiff must establish that he has a good arguable claim to the right he seeks to protect; (2) the court must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried. (3) if the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on the balance of convenience. Similarly, the court has power to discharge the **ex parte** order where it appears that the interim order was irregularly obtained by suppression of facts. The court also has power, on the application of the defendant to dissolve or discharge an injunction which the plaintiff has obtained eg if it subsequently becomes apparent that the injunction was founded on a decision which was wrong in law - vide: **Regents Oild Co Ltd –vs- J. T. Leavesley (Inchfield) Ltd** (1966) 2 All E.R. 454".*

Mr Masumbu has also cited the cases **Evelyn Mwapasa and Another v Stanbic Bank Limited and another**, Miscellaneous Civil Cause number 110 of 2003 (unreported) in which Justice Mwaungulu echoed the principles laid down in the cases of **American Cynamid Co. v Ethicon Ltd** (1975) ALL ER 504 Mr Mhango submitted that the first defendant did not have the capacity to perform the contracts otherwise he heavily relied on the financial resources of the plaintiff. Furthermore, the amount of work done or sponsored by the plaintiff exceeded K90,000.00. The open market value of the work done by the plaintiff is in excess of K7,000,000.00. If the first defendant collects all the money from contracts, the plaintiff shall have suffered enormous loss, and damages would not be an adequate remedy. Mr Mhango submits that the circumstances of the proceedings favour the retention of the interlocutory injunction order.

I bear in mind the principles as laid in the case of **American Cynamid** and repeatedly quoted in the local cases. Recently in civil case number 2552 of 2003 **Stonard Makani suing on behalf of the children of Chindebvu Tengani versus Attorney General** (unreported), I repeated that the usual purpose of an interlocutory injunction is to preserve the **status quo** until rights of the parties have been determined in the action. The plaintiff must establish that he has a good arguable claim to the right he seeks to protect. The court must not attempt to decide the claim on the affidavit. It is enough if the plaintiff shows there is a serious question to be tried. If the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise on the court's discretion on the balance of convenience. The balance of convenience can often be in favour of the party who seems to have a better case **Manchester Corporation v Connolly** [1970] ALL ER 961 . Factors relevant to the exercise of the discretion are many and varied. First principle is whether damages will be a sufficient remedy, if yes, an injunction ought not to be granted. Damages will seldom be a sufficient remedy if the wrong-doer is unlikely to be able to pay them. Damages may also be insufficient if the wrong is (a) irreparable or (b) outside of pecuniary compensation or (c) if damages will be very difficult to assess. It will be, generally, likely to consider where more harm will be done in granting or refusing injunction. In particular it will usually be wiser to delay new activity rather than risk damaging one that is established. **Granada Group Limited v Ford Motor Company Limited** [1972], FSR 103.

Dissolving Injunction

*If on hearing of the motion by the plaintiff for an injunction or in the alternative, to continue an interim injunction already obtained **ex- parte**, it appears that the interim order was irregularly obtained by suppression of facts, the court may discharge the **ex-parte** order without any cross notice of motion for that purpose by the defendant **Boyce v Gill** (1891) 64 LT 824).*

The court also has power, on the application of the defendant by motion or summons to dissolve or discharge any injunction which the plaintiff has obtained e.g. if it subsequently becomes apparent that the injunction was founded on a decision which was wrong in law. (**Regent Oil Company Ltd v J. T. Leavesley Inchfield**) [1966] 2 ALL ER 454.

In the present case, the issue between the plaintiff and the defendant refers to alleged breach of contract. No such contract has been exhibited where one would conclude that the plaintiff is entitled to retain 90% of the contractual proceeds in the contract between the first defendant and the Ministry of Agriculture, Irrigation and Food Security. Assuming that such a contract indeed existed, it is my finding that if breach of that contract existed, damages would easily be assessed and quantified. Furthermore, no evidence has been provided by the plaintiff that the first defendant would not be able to pay any such damages due to the plaintiff if he became liable. On the contrary, registration of the first defendant is a pointer that the first defendant has a financial capability to pay huge sums of damages. Furthermore, it is clear in the circumstances of this case that in the event that the first defendant fails to complete execution of all the contracts with the Ministry of Agriculture, Irrigation and Food Security, the first defendant would be made liable in those contracts because the injunction order has the potential risk of reducing the cash flow for the first defendant and drastically affecting his operations. The balance of convenience does not favour the continuation of the interlocutory injunction order and I hereby dissolve it.

The issue of costs is discretionary, normally costs follow the event. I order that the plaintiff shall pay costs of and incidental to this application.

MADE in chambers on this 5th day of April 2004 at the Principal Registry in Blantyre.

Chimasula Phiri

JUDGE