



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1266 OF 2008**

BETWEEN:

SOCIETE BIC S.A.PLAINTIFF

-AND -

**A L JUGAL INVESTMENTS.....1ST DEFENDANT
E. L. PATEL SHOPPING CENTRE.....2ND DEFENDANT
KHURRAM ENTERPRISES.....3RD DEFENDANT
THE COMMISSIONER GENERAL
(MALAWI REVENUE AUTHORITY).....4TH DEFENDANT**

CORAM: THE HONOURABLE JUSTICE E. B. TWEA

Mr Salimu, of Counsel for the plaintiff

Mr Makiyi, of Counsel for the 1st, 2nd & 3rd defendant

Mwimba (Miss) of Counsel for the 4th defendant

Allan Chuma – Official Interpreter

RULING

Twea, J

The plaintiff obtained, ex parte, an anton pillar order against the defendants: the first, second and third being traders and the fourth the Malawi Revenue Authority. The parties, are now before this court for an inter – parte hearing.

The facts of the matters are that the plaintiff, a manufacturer and distributor of ‘crystal pens’ applied for renewal of registration of trademarks and designs of their products in September 2005. The plaintiff alleged that such

renewal and restoration was in fact granted. It was deponed by the plaintiff that the first, second and third defendants were selling ball pens bearing their trade marks or similar marks.

The defendants do not dispute that they are trading in such pens. However, they deponed that they are bona fide purchasers of such goods on the open market. They deponed that the importer of the products was one Martin M. Chenyiraha.

The gist of the case before me, in so far as the first, second and third defendants are concerned, is that the plaintiff has not proved that they are registered proprietors of the trademark and designs in issue. It is argued what the plaintiff has established is that they had applied for renewal. Whether or not this was granted, it is not clear. They now seek that the order be discharged.

The argument by the first, second and third defendant is very good in law. However, I find that their case is equally defective. They have exhibited documents in respect of importations by one Martin M. Chenyiraha. The ball pens that are alleged to have been imported do not carry any particular description therein. The defendants have not even disclosed how they come by documents that belong to a third party. There is no reason given for why the alleged importer did not give evidence. Last but not least, while the evidence before this court shows that the first, second and third defendants were distributing the said pens, there is no evidence proffered by anyone of them of their purchases from Mr Martin Chenyiraha or any other person on the open market. The documents exhibited by the said defendants therefore have no evidential value.

The position before me is clear. We have on one hand, a one time registered proprietor of a trademark and designs. Who sought a renewal. There may or may not have been a renewal. On the other hand, there are traders who are trading in counterfeit products or products that dilute or tarnish the trademark of the other. They may or may not be infringing registered and designs.

There are four prime factors which the court must consider when granting an anton pillar order: there must be a prima facie cause of action, the danger for the plaintiff to be avoided by the grant must be serious, the risk of destruction or removal of the evidence must be more than a mere possibility

and last, the harm likely to be caused by the order to the defendant and his business must not be excessive or out of proportion with the legitimates objectives of the order. Having regard to the circumstances of this case, it is my view that the balance is in favour of maintaining the anton pillar order. If the trademark and designs were reregistered and restored, then the applicant deserves to be protected. However, if they have not been restored I would find that counterfeits have no colour of right to be legitimately traded on any market anyway. It would be contrary to public policy for the court to protect counterfeit products.

I therefore order that anton pillar order should continue until further order of this court. I will however, not grant the plaintiff costs. Costs will be in the cause.

Pronounced in Chambers this 13th day of August, 2008 at Blantyre.

E. B. Twea
JUDGE