



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 98 OF 2014

BETWEEN:

COMMERCIAL DRIVERS REHABILITATION

CONSULTATIVE COUNCIL LIMITED

PLAINTIFF

AND

JOINT BOARDER COMMITTEE

1st DEFENDANT

F. MATEMBA

2nd DEFENDANT

Coram: Justice M.A. Tembo,

Mhango, Counsel for the Plaintiff

Kajani Banda, Counsel for the Defendants

Mr Chitatu, Official Court Interpreter

ORDER

This is this court's order on the plaintiff's application for continuation of an order of injunction that was granted by this Court to the plaintiff ex parte on 6th March 2014. That ex parte order restrained the defendants first from charging, demanding and collecting parking fees from the drivers crossing the border at Mwanza or any

other border and secondly from directing the border security personnel to restrain drivers from crossing such border until payment of parking fees. The plaintiff seeks continuation of the ex parte order and the defendants oppose the same.

The plaintiff filed an affidavit in support of their application together with skeleton arguments. The defendants also filed an affidavit in opposition together with skeleton arguments.

The plaintiff's case is as follows. The plaintiff is an organization registered under the Non Governmental Organizations Act and regulated by the Council for Non Governmental Organizations. The plaintiff represents its members who are drivers of commercial vehicles in Malawi plying cross border business within Southern Africa and beyond. The plaintiff stands for and protects the interests of its members.

The members of the plaintiff noted that since January 2014 the 1st defendant, which is a committee operating at Mwanza Border, started levying parking fees within the border and had security agents to enforce the same. Any driver who does not pay the fee is not allowed to leave the parking lot at the border. The plaintiff is aggrieved with the state of affairs given that the 1st defendant and its agent the 2nd defendant do not have legal authority to levy the parking fees. The plaintiff submitted that the power to levy parking fees vests in the local authorities in terms of section 95 of the Road Traffic Act. In essence the plaintiff submitted that the defendants cannot show any such authority or delegated authority to levy parking fees. The plaintiff argued that its members suffer inconvenience not only to pay the fee but when they do not pay the unlawful fees they are not allowed to leave and get locked up at the parking lot which is within the border area where they park their vehicles to process customs clearance formalities.

In the foregoing premises the plaintiff seeks continuation of the injunction pending the determination of the action herein where, among other things, the plaintiff seeks a declaration that the levying of the parking fees by the defendants is unlawful.

On the other hand the case of the defendants is that they are a committee comprising various heads of institutions operating at the Mwanza Border namely Road Traffic Directorate, Department of Immigration and others. The Committee

was formed essentially to improve competitiveness of the Mwanza Border, with foreign financing namely, from the United States Agency for International development. The defendants are not able to show a legal mandate entitling them to levy parking fees as alleged by the plaintiff. The motivation for the parking fee however appears to be noble as the fees are meant to be used to improve the situation at Mwanza border in such matters as sanitation among others.

The defendants argue mainly that the injunction in this matter will result in the 1st defendant committee losing funding for its activities since the foreign financing it gets is under a project which has a particular timeframe which timeframe they will not meet due to the injunction. Loss of funding will make the Mwanza border less competitive as the 1st defendant will be unable to carry out its planned activities in the absence of such funding. The defendants argue that therefore the balance of convenience lies in favour of discharging the injunction in this matter.

This Court is aware of the applicable law on interim injunctions as submitted by both the plaintiff and the defendants. The court will grant an interim injunction where the applicant discloses a good arguable claim to the right he seeks to protect. The court will not try to determine the issues on affidavit evidence but it will be enough if the plaintiff shows that there is a serious question to be tried. If the plaintiff has shown that he has a good arguable claim and that there is a serious question for trial then the court will consider whether the balance of convenience favours the granting of the interim order of injunction. See *Mkwanda v New Building Society* [1997] 1 MLR 210, *Kanyuka v Chiumia* civil cause number 58 of 2003 (High Court) (unreported); *Tembo v Chakuamba* MSCA Civil Appeal Number 30 of 2001 citing the famous case on the subject of injunctions *American Cyanamid Co. v Ethicon Ltd* [1975] 2 WLR 316. The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality. Beyond that, it does not matter if the claimant's chance of winning is 90 per cent or 20 per cent. See *Mothercare Ltd v Robson Books Ltd* [1979] FSR 466 per Megarry V-C at p. 474; *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 per Megaw LJ at p. 373.

The first question this Court has to resolve is whether the plaintiff has disclosed a good arguable claim to the right it seeks to protect.

The plaintiff argues that they have a right to protection from paying fees that are not legally sanctioned in accordance with the law. As well as protection from attendant harassment and detention of vehicles for failure to pay such fees.

On the other hand, the defendants do concede that there are triable issues on the question of the legal mandate of the defendants to levy parking fees given that the 1st defendant Committee originated from initiatives associated with the foreign donor, the United States Agency for International Development.

In these circumstances, the plaintiff has an arguable claim to the right it seeks to protect on behalf of its members. The right being protection from subjection to payment of fees that are not sanctioned by law and the attendant consequences on failure to pay such fees. That is a claim that appears to have substance and reality and deserves a day at trial.

This Court therefore agrees with the plaintiff and the defendant that on the affidavit evidence there is a triable issue to go to trial in relation to the plaintiff's members rights it seeks to protect.

This Court then has to consider the question whether damages would be an adequate remedy to either party if the injunction is granted or vice versa and it turns out later that the court should have arrived at a different decision on the granting of the injunction. Where damages at common law would be an adequate remedy and defendant would be able to pay them, an interlocutory order of injunction should be refused, irrespective of the strength of plaintiff's claim. See *Mkwamba v Indefund Ltd* [1990] 13 MLR 244, *ICL Malawi Ltd v Lilongwe Water Board* civil cause number 64 of 1998 (High Court) (unreported).

The view of the plaintiff is that damages will not be an adequate remedy because despite that the fees are quantifiable, the inconvenience on failure to pay them is not quantifiable. This is so because the plaintiff's members are not allowed to leave the border post when they fail to pay the fee and this is very inconveniencing. The defendants argued that the fees are easily quantifiable and so damages are an adequate remedy in this case.

This Court is persuaded by the plaintiff's argument that despite the fact that fees paid are quantifiable and this Court can order reimbursement of the same, the

inconvenience that attends on failure to pay the fee is one which cannot be quantified and consequently damages would not be an adequate remedy to that extent.

This Court will then have to consider whether the balance of convenience favours the granting of an injunction herein or not.

As rightly submitted by both parties, most injunction cases are determined on the balance of convenience. In *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396 Lord Diplock said, at p. 408:

. . . it would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

In other cases, such as *Cayne v Global Natural Resources plc* [1984] 1 All ER 225, the courts have insisted that it is not mere convenience that needs to be weighed, but the risk of doing an injustice to one side or the other. Lord Diplock in *American Cyanamid Co. v Ethicon Ltd* said the extent to which the disadvantages to each party would be incapable of being compensated in damages is always a significant factor in assessing where the balance of convenience lies.

In *American Cyanamid Co. v Ethicon Ltd* Lord Diplock said at p. 408 that, in considering the balance of convenience: ‘Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo’. From *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, it appears that the status quo ante is the state of affairs before the defendant started the conduct complained of, unless there has been unreasonable delay, when it is the state of affairs immediately before the application.

The defendants argue that the injunction in this matter will result in the 1st defendant committee losing funding for its activities since the financing it gets is under a project which has a particular timeframe. Loss of funding will make the Mwanza border less competitive as the 1st defendant will be unable to carry out its plans. The defendants argue that therefore the balance of convenience lies in discharging the injunction in this matter. On the other hand, the plaintiff argues that the balance of convenience lies in continuing the injunction to stop the levying of the unlawful fees and attendant consequences on failure to pay the fees.

This Court is persuaded that the intentions of the defendants though noble ought to be properly grounded in law. The levying of fees ought to have a legal basis otherwise such levying of fees is unlawful. Since the defendants are unable to show the legal mandate, such as local authority bye-laws, by which they are authorized to levy the parking fees that tips the balance in favour of continuing the injunction granted ex parte in this matter.

The defendants raised a related matter that the plaintiff's members, the truck drivers, are employees of members of the Road Transport Operators Association who own trucks. The Road Transport Operators Association is a member of the 1st defendant. The 1st defendant wonders why the members of the plaintiff are against the levying of the parking fees and yet their employers are agreeable to the same and actually provide the fees to the drivers members of the plaintiff. The plaintiff replied that the drivers who are its members have not seen a circular advising truck owners to provide money for the parking fees to the drivers. But more importantly the drivers who have no money to pay the parking fees are left to languish at the border when the fee itself is not supported by any legal authority such as a bye law.

This court, whilst appreciating the argument of the 1st defendant, is rather persuaded that in fact what is of overriding importance is that the parking fee was not properly sanctioned by law as is required under section 95 the Road Traffic Act. In that case, the parking fees would be unlawful. The fact that driver's employers agree to such unlawful arrangements cannot take away the right of the drivers who suffer the consequences of the unlawful fees on the ground from seeking protection from such unlawful parking fees.

This Court may also consider the relative strength of the parties' cases without delving into the merits of the same. This is a matter of last resort.

In *American Cyanamid Co. v Ethicon Ltd* Lord Diplock said at p. 409 that, as a last resort:

. . . it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in

embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.

In the circumstances of this matter the relative strength of the plaintiff's case is stronger since the defendants are unable to show the legal mandate authorizing the levying of the parking fees in accordance with the law.

The defendants did raise a separate issue that the plaintiff failed to make a full and frank disclosure of material facts in that the plaintiff is a limited liability company and also that the deponent of the affidavit described himself as head of operations for the plaintiff yet he is a truck driver who travels a lot and cannot be operations head.

The plaintiff argues that it is a limited company and registered under the Non Governmental Organizations Act. The plaintiff argues that the deponent of the plaintiff's affidavit is a member of the plaintiff. That such fact has been admitted by the defendants. However, that the defendants have not shown how the failure of the plaintiff to prove that he is operations head of the plaintiff is a material fact to the determination of the instant application. In other words that proof that the deponent is operations head for the plaintiff is not a material fact and in fact it is incumbent on the defendants to disprove the fact that the deponent of the plaintiff's affidavit is the plaintiff's operations head. In short, the plaintiff submits that it did not fail to disclose material facts in this matter.

This Court agrees with the defendants that there is a duty of disclosure of material facts on both lawyers and clients in compiling evidence on applications for injunctions without notice like the one in issue in this matter. See *Mpinganjira v Speaker of the National Assembly and another* [2000-2001] MLR 318, *Beese v Woodhouse* (1970) 1 WLR 568, *Zalira v Hall Holding Limited* civil cause number 144 of 1992 (High Court) (unreported) and *Chidza Trust v Nedbank* civil cause number 2324 of 2006 (High Court) (unreported) . Material facts are facts which if known to the court would have led the court to arrive at a conclusion or order different from the one it arrived at. See *Mchungula v Stanbic Bank Limited and another* civil cause number 558 of 2007 (High Court) (unreported).

However, the view of this Court is that there was indeed, as submitted by the plaintiff, no failure to disclose material facts in this matter. This follows from the

following facts. By its name it is clear that the plaintiff is a form of a limited company. Further the plaintiff disclosed on the ex parte application that it is registered under the Non Governmental Organizations Act. The membership of the deponent of the plaintiff's affidavit with the plaintiff and the fact that the said deponent is operations head for the plaintiff as asserted by the plaintiff has not been disproved by the defendants.

In the foregoing premises, the ex parte order of injunction granted herein shall subsist until the trial of the originating summons of the plaintiff which this Court is sure will be listed for trial soon given the quick mode of listing of chamber matters at this registry.

Costs normally follow the event and are awarded to the successful plaintiff.

Made in chambers at Blantyre this 27th May 2014.

M.A. Tembo

JUDGE