



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 254 OF 2016**

**BETWEEN:**

**DR GIFT STEN CHINOMBA**

**PLAINTIFF**

**AND**

**ATTORNEY GENERAL**

**DEFENDANT**

**Coram: JUSTICE M.A. TEMBO,**

Hara, Counsel for the Plaintiff  
Itimu, Counsel for the Defendant  
Chanonga, Official Court Interpreter

**ORDER**

This is this Court's order on the plaintiff's application for continuation of an order of injunction that the plaintiff obtained ex parte in this matter.

The subject matter of the dispute herein is the interdiction of the plaintiff by the defendant on no pay as part of the disciplinary process. The injunction that was granted ex parte restrained the defendant from withholding the plaintiff's pay whilst he is on interdiction. This Court now, after hearing both parties, decides the question whether the injunction should continue until the plaintiff's challenge to the withholding of his pay is determined by this Court at trial.

The plaintiff is employed by the Government in the Ministry of Health and it is a term of his contract of employment under Regulation 40 (1)(a) of the Malawi Public Service Regulations which provides that where an employee in the Government is interdicted on grounds of misappropriation of public funds his pay shall be withheld.

The plaintiff was interdicted on suspected misappropriation of public funds and is seeking continuation of the order of injunction restraining the defendant from withholding his salary during the period of interdiction.

The plaintiff argued essentially that there are triable issues in this matter in that infliction of a monetary penalty as part of the disciplinary process is proscribed under section 56 (3) and (4) of the Employment Act. This assertion that there are triable issues is not really contested by the defendant. Suffice to say that it is only at trial that the question is to be resolved whether indeed the conduct of the defendant herein is proscribed by statute as claimed by the plaintiff.

The defendant however contends that in the event that the plaintiff succeeds at trial then damages will be an adequate remedy and as such the balance of convenience lies in not continuing the injunction.

The plaintiff contended that damages will not be an adequate remedy because the lack of pay will entail untold hardship on his part. This is the case because the plaintiff will not be able to sustain himself in his daily life since his pay will have been withheld.

This Court is aware of the applicable law on interim injunctions as submitted by both the plaintiff and the defendant. 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 *Kanyuka v Chiumia* civil cause number 58 of 2003 (High Court) (unreported); *Tembo v Chakuamba* MSCA Civil Appeal Number 30 of 2001 both citing the famous *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 he seeks to protect.

This Court finds that the plaintiff has established a good arguable claim to the right he seeks to protect in that the impugned conduct seems to violate a clear statutory provision. On the face of it section 56 (3) and (4) of the Employment Act is clear as follows

(3) Subject to subsection (4), no employer shall impose a fine or other monetary penalty on an employee:

Provided that the employer may not pay wages to the employee for the period he has been absent from work without permission of the employer and without reasonable excuse.

(4) An employer may deduct an amount of money from an employee's wages as restitution for property damaged by the employee.

It can indeed be argued by the plaintiff that despite the clear contractual provision entitling the defendant to interdict the plaintiff on no pay there is a statutory provision to the contrary in section 56 (3) and (4) of the Employment Act. The employer may impose a monetary penalty where the employee is absent from work without permission but not when the employee is willing to come to work and is being stopped by the action of the employer be it disciplinary or otherwise. This Statutory provision binds the defendant. See section 2 of the Employment Act.

This Court then next has to consider the question whether damages would be an adequate remedy to either party if the injunction is not granted. As rightly submitted by both parties 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.

The plaintiff contended that damages will not be an adequate remedy because the lack of pay will entail untold hardship on his part. This is the case because the plaintiff will not be able to sustain himself in his daily life since his pay will have been withheld. This pay he contends only meets his basic necessities.

The defendant however contends that in the event that the plaintiff succeeds at trial then damages will be an adequate remedy and as such the balance of convenience lies in not continuing the injunction.

This Court is persuaded that, strictly speaking, what the plaintiff gets from his contract of employment is a salary. If he indeed succeeds at trial then that salary can easily be computed as contended by the defendant. This Court is not really concerned as to what use the plaintiff puts that salary. The fact that the plaintiff will suffer hardship is true but that does not make damages inadequate in this matter. However, damages are going to be inadequate to the extent that once the plaintiff's claim is proved at trial then the plaintiff will have suffered from an offence committed by the defendant contrary to the Employment Act in terms of section 66 of the Employment Act which provides that

(1) Any person who contravenes a provision of this Act for which no offence is specifically provided shall be guilty of an offence and liable to a fine of K5,000 and to imprisonment for one year.

(2) Any person who is guilty of an offence under this Act for which no penalty is specifically provided shall be liable to a fine of K5,000 and to imprisonment for one year.

Interdiction on no pay is arguably in contravention of the statutory provisions on discipline as contained in section 56 (3) and (4) Employment Act. Such a contravention of the Employment Act would be an offence in terms of section 66 (1) of the Employment Act. In that case it would not be possible for damages to adequately compensate the plaintiff for the perpetual offence likely to be committed by the defendant during the life of the interdiction on no pay.

There is also persuasive authority according to Bean et al *Injunctions* 11th Edition (2012) at 67 that where a private or corporate person can show that a property interest of his is being interfered with by a criminal act and that the statute creating the offence was passed for the benefit or protection of a particular class of

individuals including the claimant, the court may grant a prohibitory injunction restraining the defendant from damaging the claimant's interest. see *Ex Parte Islands Records Ltd* [1978] Ch. 122 as interpreted in *Lonrho Ltd v Shell Petroleum Co Ltd (No.2)* [1982] A.C. 173 at 187. This Court agrees that as a matter of public policy this Court should intervene to stop commission of offences against persons whose property interest were meant to be protected by the statute creating such an offence as is the case in this matter. For that reason the injunction herein would have been continued as well.

This Court will next consider where the balance of convenience lies in this matter.

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.

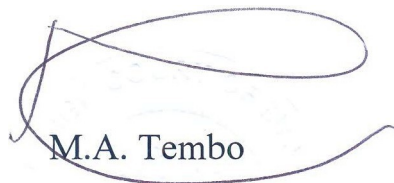
In other cases, such as *Cayne v Global Natural Resources plc* [1984] 1 All ER 225, the courts have insisted that it is not mere convenience that needs to be weighed, but the risk of doing an injustice to one side or the other. Lord Diplock in *American Cyanamid Co. v Ethicon Ltd* said the extent to 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.

The finding of this Court is that the balance of convenience lies in favour of continuing the order of injunction because we are dealing with the high likelihood of the defendant committing an offence under the Employment Act by withholding pay from the plaintiff as part of its disciplinary process under very old regulations that clearly pre-date the relevant statutory framework. The Court must intervene to prevent the likely further commission of the offence herein.

For the avoidance of doubt this Court wishes to state that it is only restraining the withholding of pay during interdiction. The interdiction itself is not being questioned at all in these proceedings. The plaintiff will therefore remain on interdiction but with pay.

This should spare the defendant to take disciplinary action against the plaintiff fairly quickly knowing that he is on pay whilst on interdiction. In contrast, the unsatisfactory situation in public service has been that employees are normally put on interdiction on no pay and the responsible authorities tend to forget to finalize the disciplinary process against such people since they are not being paid at all. This Court is confident that it will be realized by all charged with disciplinary functions in public service that it is morally reprehensible and legally negligent to delay finalization of disciplinary proceedings against an employee who is interdicted on pay because the tax-paying public through the Government would lose a lot of essential money by paying a non productive employee for a long time.

Costs are for the successful plaintiff in this matter. Made  
in chambers at Blantyre this 8<sup>th</sup> July 2016.



M.A. Tembo

**JUDGE**