



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**CIVIL CAUSE NO 498 OF 2016**

**BETWEEN**

**MIKE APPEL AND GATTO LIMITED ..... PLAINTIFF  
AND  
GENERAL MOTORS SOUTH AFRICA (PTY) LIMITED .... DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Mbeta, of Counsel, for the Plaintiff

Mr. Jangale, of Counsel, for the Defendant

Mr. O. Chitatu, Court Clerk

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**ORDER**

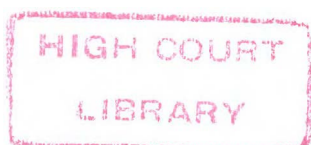
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*Kenyatta Nyirenda, J.*

**Introduction**

There are before the Court two applications. The Plaintiff applies for an order for the continuation of the injunction order it obtained herein [hereinafter referred to as the “Plaintiff’s application”] while the Defendant seeks to have the present case transferred to the Commercial Division of the High Court [hereinafter referred to as the “Defendant’s application”].

The injunction restrains the Defendants, its servants, agents or whomsoever from executing the Dealer Sales and Service Agreement or any dealership agreement however designated for Isuzu and Chevrolet motor vehicles with any car dealer in Malawi/outside to deal with these in the said motor vehicles in Malawi in whatsoever manner including launching or advertising for the dealership in the name of any purported appointed agent or importing or causing to be imported into Malawi any such motor vehicles pending the determination of this matter or further order of the court.



The injunction was granted shortly after the Plaintiff had commenced an action by way of originating summons seeking the following orders against the Defendant:

- (a) a declaration that the Defendant's conduct in appointing another dealer for Isuzu and Chevrolet motor vehicles in Malawi and terminating the Dealer Sales and Service Agreement (DSSA) with the plaintiff is in breach of clause 4.5 (c) of the DSSA and therefore illegal in that the Defendant did not write the Plaintiff on the same so that the Plaintiff could reply thereto within 30 days;
- (b) a declaration that the Defendant acted illegally and in breach of clause 3.2 of the DSSA by terminating the DSSA with the Plaintiff without invoking the dispute resolution mechanism under the DSSA on the allegation that the Plaintiff's tax evasion allegations by the Malawi Revenue Authority had put the Defendant's reputation in disrepute as alleged by the Defendant in its letter of 29<sup>th</sup> March, 2016; hence the said termination of the DSSA and the appointment of another dealer is illegal and be set aside;
- (c) a declaration that the Defendant ought to have further had recourse to clause 6 of DSSA to engage the Constructive Engagement Process which has 150 days timeline to ensure that the Plaintiff is back to viability failing which the termination of the DSSA could have been resorted to; hence the said termination of the DSSA and the appointment of another dealer is illegal and be set aside;
- (d) a declaration that Defendant failed to conduct business in 'an open and fair manner and share responsibility and obtain dealer input in the decision making process.' as specified under clause 3 of the DSSA before terminating the DSSA with the Plaintiff and appointing another dealer; hence the said termination of the DSSA and the appointment of another dealer is illegal and be set aside;
- (e) a declaration that the Defendant ought to have reviewed the failure in performance of the Plaintiff under clause 9(7) of the DSSA and provide at least 3 months for the Plaintiff to remedy the failure before termination of the DSSA and the appointing another dealer, hence the said termination of the DSSA and the appointment of another dealer is illegal and be set aside;

- (f) an order setting aside the termination of the DSSA and the appointment of another dealer for Isuzu and Chevrolet motor vehicles for the Malawi Market; and
- (g) any order the Court may deem fit for the ‘ubuntu’ doctrine under the South African Constitution and other laws and policies.

### The Plaintiff’s Application

The Plaintiff’s application is brought under Order 29 of the Rules of the Supreme Court (RSC) and it is supported by the affidavit evidence of Mr. Nazeer Osman, the Plaintiff’s Chief Executive Officer [hereinafter referred to as the “Plaintiff’s affidavit”]

For reasons that will become clear in a moment, it is necessary to set out in full that part of the Plaintiff’s affidavit that relates to facts only:

- “2. *All matters of facts deponed to herein are, unless otherwise stated; personally know to me as the Chief Executive Officer for the Plaintiff and I verily believe the same to be true to the best of my knowledge and information.*
3. *The Plaintiff has been a dealer for Isuzu Motor Vehicle since 1970 under 1970 under Isuzu Japan and from 1994 under Delta Motor Corporation which then changed to General Motor South Africa (Pty) Limited (GMSA) in 2003. Thus the Plaintiff has been an Isuzu dealer 46 years ruining and the oldest Isuzu distributor in Africa. I exhibit copies of the email correspondence with Delta Motor Corporation/GMSA (in transition) dated 20<sup>th</sup> June, 202 and the current agreement with GMSA marked NO 1 and NO 2 respectively.*
4. *Sometime in 2014, the Malawi Revenue Authority seized our books of accounts on alleged tax evasion investigations which have been on going to the present date. However, on or about 29<sup>th</sup> February, 2016, the Malawi Revenue Authority illegally levied distress and shut down our company premises in Limbe as well as Lilongwe and this was published in the Newspapers in Malawi as well as online publication by the Malawi Revenue Authority.*
5. *The Defendant got the news of the closure of our company premises by the Malawi Revenue Authority through an online publication and subsequently wrote us suggesting the termination of the franchise by 31<sup>st</sup> May, 2016 on account that the publication had brought the reputation of the Defendant into disrepute. I exhibit a copy of our letter dated 8<sup>th</sup> April, 2016 marked NO.3.*
6. *The Plaintiff responded to the Defendant’s letter 29<sup>th</sup> March, 2016 through emails and letter dated 8<sup>th</sup> April, 2016 in which we did explain to the defendant all the underlying circumstances regarding the closure of our company premises. I exhibit a copy of our letter dated 8<sup>th</sup> April, 2016 marked NO.4.*

7. *The Defendant did not reply to our said letter but instead, on 1<sup>st</sup> July, 2016, Peter Leyland, the Defendant's Export Manager, came to Malawi and discussed with us all the MRA issues but also asked if the Defendant could appoint another dealer to act alongside the Plaintiff which suggestion the Plaintiff objected to in view of the long impeccable dealership history on Isuzu motor vehicles. This was a cordial meeting and he assured us that the dealership was intact as the Defendant appreciated our MRA predicament.*
8. *As a way of appraising the Defendant of the MRA issues, sometime in August, 2016 I did send a copy of the Tax Clearance Certificate duly issued by MRA. I exhibit copies of the Tax Clearance Certificate and the email to the Defendant marked NO.5.*
9. *Surprisingly, on 29<sup>th</sup> August, 2016, the Defendant wrote the Plaintiff indicating that the Defendant will appoint another leadership in Malawi and will also not renew the subsisting contract with the Plaintiff. I exhibit a copy of the Defendant's letter dated 29<sup>th</sup> August, 2016 marked NO.6.*
10. *As required by the dealership, we lodged an appeal with the Defendant by our letter dated 14<sup>th</sup> October, 2016. A copy of the said letter is exhibited and marked NO.7.*
11. *Again to our surprise, the Defendant rejected the appeal by letter dated 19<sup>th</sup> October, 2016 and further advised a copy of the said letter is exhibited, and marked No.8.*
12. *The Plaintiff verily believes that the Defendant's conduct is in clear breach of the Dealer Sales and Service Agreement (DSSA) as follows:*
  - 12.1 *Under clause 4.5 (C) of the DSSA, the Defendant could not appoint another dealer in Malawi unless the Defendant writes the Plaintiff on the same and the Plaintiff has to reply within 30 days. This was never done. Instead, the Defendant communicated of the appointment of another dealer in letters marked NO.6 and NO.8*
  - 12.2 *It is clear that there was a dispute between the Plaintiff and the Defendant on the allegation that the MRA issue had put the Defendant's reputation in disrepute as alleged by the Defendant in their letter dated 29<sup>th</sup> March, 2016 (NO.3). In that regard, the Defendant ought to have invoked clause 3.2 of the DSSA which was not done.*
  - 12.3 *The Defendant ought to have further had recourse to clause 6 of DSSA to engage the Constructive Engagement Process which has 150 days timeline to ensure that the plaintiff is back to viability failing which the termination of the DSSA could have been resorted to.*
  - 12.4 *Besides, the Defendant has failed to conduct business in 'an open and fair manner and share responsibility and obtain dealer input in the decision making process.' as specified under clauses 3 of the DSSA. Thus both the Constructive Engagement Process and the Dispute resolution provisions*

*were violated and without the engagement of the Plaintiff, the Defendant proceeded to appoint another dealer.*

- 12.5 *Under clause 9 (7) of the DSSA, the Defendant ought to have reviewed the failure in performance of the Plaintiff and provide at least 3 months to remedy the failure. The defendant did not do this as well.*
13. *The Plaintiff verily believes that the MRA issue was a force majeure for which the Defendant could not have based to terminate the contract without invoking the other remedial clause in the DSSA.*
14. *Furthermore, the contract between the parties was renewable almost automatically due to the impeccable performance of the Plaintiff over the 46 years of dealership. Thus the Plaintiff's business has been mainly Isuzu motor vehicles dealership and have built an enviable reputation and goodwill in the market which is now being unfairly, inequitable and wrongly compromised by the Defendant's illegal termination of the contract.*
15. *The Plaintiff further verily believes that the illegal conduct of the Defendant cannot be left to compensation as not only is the damage to the goodwill of over 46 years difficult to assess but the net effect of the Defendant's conduct is to essentially make the Plaintiff shut down its operations. Thus the very essence of the Plaintiff's existence is being greatly undermined and no amount of damages will make good for such damage.*
16. *In the premises, it is only fair and equitable that the Defendant be restrained from executing the Dealer Sales and Service Agreement or any dealership agreement however designated for Isuzu and Chevrolet motor vehicles with any other car dealer in Malawi/outside to deal in the said vehicles in Malawi in whatsoever manner including launching or advertising for the dealership in the name of any purported appointed agent or importing or causing to be imported into Malawi any such motor vehicles.*
16. *The Plaintiff makes an undertaking that in the event it is later determined that the Court ought not to have granted an order of injunction and the Defendant prove that it has suffered damages, the Plaintiff will be held responsible to pay the damages as may be asserted by the Court..."*

The Defendant is opposed to the Plaintiff's application and it filed an affidavit in opposition, sworn by Mr. Elton Jangale [hereinafter referred to as the "Defendant's affidavit"]. For purposes of parity of treatment and transparency, I will also set out in full the substantive part of the Defendant's affidavit. It reads:

- "2. *THAT I have carefully gone through the Originating Summons and Affidavit in support sworn by Mr. Nazeer Osman and all the exhibits attached thereto. It is evident that the matters arises out of a commercial transaction relating to motor*

*vehicle s dealer sales and services dealership agreement between the Plaintiff and the Defendant.*

3. **THAT Exhibit NO 2** is the said Dealer Sales and Service Agreement (“DSSA”) entered covering a period from 1<sup>st</sup> January 2015 to 31<sup>st</sup> December 2016 (“Expiry Date”).
4. **THAT** there is no evidence deponed by the Plaintiff to show that the DSSA was ended prematurely prior to its expiry date of 31<sup>st</sup> December 2016 (“Expiry Date”).
5. **THAT** to the contrary, **Exhibits NO 6 and NO 8** show that the DSSA would come to an end automatically on the Expiry Date.
6. **THAT Exhibit NO 6**, which is a letter dated 29 August 2016 from the Defendant to the Plaintiff, shows that the Defendant informed the Plaintiff that it was not going to renew the DSSA when it formally comes to an end on the Expiry Date on 31 December 2016. As the DSSA was for a period covering from 1 January 2015 to 31 December 2016. This means that the Defendant advised the Plaintiff of its intention not to renew the DSSA more than 90 days (to be precise, 123 days) prior to the expiry date.
7. **THAT Exhibit NO 8**, which is a letter dated 19 October 2016 from the Defendant to the Plaintiff, shows that the Defendant echoed to the Plaintiff that the DSSA would come to an end on the Expiry Date.
8. **THAT two(2) days before the DSSA came to an end on the Expiry Date, the Plaintiff obtained an interim order of interlocutory injunction on 29<sup>th</sup> December 2016, without disclosing that the DSSA would end on the Expiry Date, but claiming in its Affidavit particularly at paragraph 18 that the Defendant had, in breach, terminated the DSSA.**
9. In obtaining the order, the Plaintiff suppressed material facts by failing to disclose to the Court that the DSSA was yet to come to end automatically on 31<sup>st</sup> December 2016.

**WHEREFORE** I humbly pray that this Court make an order discharging the interim order of interlocutory injunction on the ground that the Plaintiff had suppressed material facts to obtain the injunction.”

I have set out all these relevant facts *in extenso* so as to show clearly the issues that are involved in this matter.

It is trite that as far as an *ex parte* application is concerned, all the facts must be laid before the Court and nothing must be suppressed. The Court requires *uberrima fides* on the part of the applicant: see **R. v. Kensington Income Tax Commissioners, ex p. Princess Edmond De Polignac [1917] KB 486** [hereinafter referred to as the “**Kensington Income Tax Commissioner Case**”].

The *ratio decidendi* of **Kensington Income Tax Commissioners Case** is that if an *ex parte* injunction has been granted upon an affidavit which was not candid and did not fairly state the facts, but state them in such a way as to mislead and deceive the Court, there is power inherent in the Court, in order to protect itself and prevent an abuse of process, to discharge the injunction and even to refuse to proceed further with the examination of the merits: see also **Somanje v. Somanje, Chilamwa and Stumbles (Trading as Sacranie, Gow and Company) [1987-89] 12 MLR 326, Vitsitsi v. Vitsitsi [2002-2003] MLR 419 (SCA), Koreia v Designated School Board [1995] 2 MLR 649(HC) and The State v. Malawi Communications Regulatory Authority, ex-parte Capital Radio Malawi Limited and Joy Radio Limited, HC/PR Judicial Review Cause No. 29 of 2011 (unreported).**

In the instant case, it is clear from a perusal of the documents before the Court that the Plaintiff inexplicably failed to disclose relevant facts, namely, that the DSSA came to an end on its Expiry Date without any breach on the part of the Defendant. It is noteworthy that this damning fact went unchallenged. I am not at all persuaded that the non-disclosure was due to inadvertency. This was a material fact which should have been disclosed to the judge during the ex-parte application.

In the circumstances and in view of the conclusion that I have reached on the issue of suppression of material facts, I do not see the consideration of the other grounds argued before me as being in anyway necessary any longer. I, accordingly, rest my decision on the sole ground that the Plaintiff suppressed material facts.

All in all, the continuation of the injunction cannot be sustained. The injunction has, accordingly, to be discharged with costs. I so order.

#### The Defendant's Application

This is an application by the Defendant for a transfer of this case from this Division to the Commercial Division. The Plaintiff is opposed to the transfer of the case.

The submissions by Counsel Jangale were concise and brief. He contended that it is clear from a perusal of the Originating Summons as well as the Plaintiff's Affidavit that this matter arises from a commercial transaction relating to the DSSA. Counsel Jangale proceeded to assert that in terms of section 6A of the Courts Act, it is the commercial Division and not the Civil Division of the High Court that is charged with hearing of commercial matters.

To buttress his submissions, Counsel Jangale cited the case of **Leonard Dickson Chiutsi v. National Bank of Malawi, HC/PR Civil Cause 119 of 2016**



(unreported:3<sup>rd</sup> November 2016) as authority for the proposition that the default position is that a commercial matter must be commenced in the Commercial Division and a party resisting the transfer of such a matter bears the burden of showing compelling reasons for not having the matter transferred.

The submissions by Counsel Khan more or less followed the “legal arguments” in the Plaintiff’s Affidavit in Opposition to Transfer Matter and it might not be out of order to quote in full the material parts thereof:

- “4. *In as far as the matter is a commercial matter and should have ordinarily been commenced in the Commercial Division of the High Court of Malawi, I verily believe that this matter’s first court of call should have been Port Elizabeth Local Division of the High Court in the Republic of South Africa in accordance with clause no. 10.3 of the GMSA Dealer Sales and Service Agreement a copy of which is exhibited as NO 2 in my Affidavit in Support of the Originating Summons.*
5. *However, because of the non-exclusive jurisdiction of the Port Elizabeth Local Division of the High Court in the Republic of South Africa as agreed by the parties herein, the Plaintiff was at liberty to commence the present proceedings before any court of competent jurisdiction similar to the said South African Court which I verily believe this Court is.*
6. *Furthermore, clause 10.3 of the said Agreement clearly states that the applicable laws in as far as the construction of the said contract and disputes arising therefrom are the laws of the Republic of South Africa.*
7. *I, thus, verily believe that this matter is in the right forum in as far as the parties clearly agreed to submit to the laws of the Republic of South Africa and a court of similar competence as the Port Elizabeth Local Division of the High Court of the Republic of South Africa.*
8. *Furthermore, there are no special circumstances advanced by the Defendant to warrant the transfer of the matter from a Court that has competence to handle the matter as envisaged under clause 10.3 of the said Agreement.*
9. *I further believe that since the matter is already set for hearing of the Originating Summons and the Defendant has already filed its Affidavits in Opposition to the Originating Summons, the Defendant not only waived the right to insist on the transfer of the matter by filling documents in opposition to the Originating Summons which I believe is akin to pleading to the originating process but also that the transfer will delay the resolution of the matter.*
- 10 *In the premises, it is in the interest of justice that the matter be tried by this Court, which has the competence to deal with the matter just like the Port Elizabeth Local Division of the High Court of the Republic of South Africa and to ensure quick disposal of the dispute between the parties herein.”*



I have considered the grounds advanced by the Plaintiff for objecting to the transfer of this matter to the Commercial Division and I find them wanting. Both parties agree that the case concerns a commercial matter. Section 2 of the Courts Act, as amended by the Courts (Amendment) Act, 2016 [Act No. 23 of 2016], defines a “commercial matter” as follows:

*“commercial matter” means a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not, including—*

- (a) the formation or governance of a business or commercial organization;*
- (b) the contractual relationship of a business or commercial organization;*
- (c) liabilities arising from commercial or business transactions;*
- (d) the restructuring or payment of commercial debts;*
- (e) the winding up of companies or bankruptcy of persons;*
- (f) the enforcement or review of commercial arbitration award;*
- (g) the enforcement of foreign judgments of commercial matters subject to the provisions of the law;*
- (h) the supply or exchange of goods and services;*
- (i) banking, negotiable instruments, international credit and similar financial services;*
- (j) insurance services; or*
- (k) the operation of stock and foreign exchange markets,*

*in the event of doubt as to whether a matter is commercial or not, the judge at the outset or during the course of the action, shall have power to resolve the issue; ”*

As was aptly observed by this Court in **Chiutsi v. National Bank of Malawi** supra, it is important when considering the definition of “commercial matter” to bear in mind that paragraphs (a) to (k) inclusive merely set out a few examples of matters that fall within the phrase, which is in the chapeau of the definition, that is, *“a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not”*. As long as a civil case is of commercial significance and it arises out of or connected with any relationship of commercial or business nature, it qualifies as a commercial matter under the Courts Act.

It is clear from the evidence so far before this Court that both parties concede that the case herein pertains to the DSSA and the same involves huge sums of money. On the basis of the foregoing, there is no doubt in my mind that what we have here

is a civil matter of commercial significance arising out of or connected with a relationship of commercial or business nature. Whether or not a hearing of such a matter in the Republic of South Africa could have taken place within or without the Port Elizabeth Local Division of the High Court is neither here or there.

Accordingly, it is my finding that the case herein is a commercial matter.

In terms of section 6A of the Courts Act, it is the Commercial Division, and not this Court (Civil Division), that is charged with hearing commercial matters. In the premises, this matter has to be transferred to the Commercial Division. I, accordingly, direct that the Plaintiff should have this case transferred to Commercial Division within 14 days hereof, failing which the action shall automatically stand dismissed.

Pronounced in Chambers this 22<sup>nd</sup> day of May 2017 at Blantyre in the Republic of Malawi.

A handwritten signature in black ink, appearing to read 'KENY', enclosed within a circular scribble. A long, horizontal, wavy line extends from the right side of the signature.

**Kenyatta Nyirenda**  
**JUDGE**