



THE JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE No. 78 OF 2011

Between:

THE REGISTERED TRUSTEES OF DEVELOPMENT
OF MALAWIAN ENTERPRISES TRUST (DEMAT)

PLAINTIFF

AND

DANIEL W. GHAMBI

DEFENDANT

RULING

On 9th March 2011 the plaintiff filed with the court a writ of summons seeking declaratory orders in context of the defendant's contract of employment with the plaintiff and claiming relief under the tort of trespass by the defendant to the plaintiff's property and goods. At the time of filing the originating process the plaintiff by way of an *ex parte* summons applied and obtained an order of interlocutory injunction compelling the defendant to surrender to the plaintiff motor vehicle registration number MC2665 Nissan Tiida, a Toshiba Computer laptop and HP P1005 Printer. The injunction also restrained the defendant from visiting the plaintiff's work premises or to come within 100 metres of its work premises or insult or disturb any of the employees or disrupt work at the plaintiff's work place.

After he was served with the order of injunction the defendant took out a summons under Order 29 of the Rules of the Supreme Court and Order 32 rule 6 of the Rules of the Supreme Court to discharge or vary the said order of injunction on the ground that the plaintiff concealed material facts when obtaining the order of injunction.

The summons was heard by the late Honourable Justice Manyungwa and I was assigned to prepare and pronounce the ruling following the sudden demise of His Lordship.

In terms of the evidence the record of the case reveals that the defendant filed an affidavit in support of the application that was sworn by Mr. Ghambi, the defendant himself as well as a supplementary affidavit that was sworn by Mr. Kalua the legal practitioner for the defendant. The defendant contends that the plaintiff deliberately concealed that proceedings were underway in the Industrial Relations Court (IRC) concerning amongst other things the motor vehicle, the laptop and the printer and that the application for interim relief was scheduled for hearing on 11th March 2011. The defendant asserts that these facts were material because if they had been disclosed the court would have appreciated that the matters in dispute were highly in contention and were before a specialised court and that the High Court would have been provided with the occasion to decide to either transfer the matters to the IRC or to maintain them in the High Court. The defendant argues that because of the non-disclosure of these material facts there is at present an order of interlocutory injunction which is at variance with the order of the Industrial Relations Court being exhibit marked DG 4. The defendant prays that the interlocutory order of injunction which was granted on 10th March 2011 be vacated.

The plaintiff filed an affidavit in opposition to the defendant's summons which was sworn by Mr. Katulukira, the Acting General Manager, of the plaintiff. The plaintiff whilst admitting that the defendant commenced action in the Industrial Relations Court claiming labour related reliefs it contends that the IRC took long to perfect its order for interim relief and that the plaintiff commenced proceedings in the High Court seeking different reliefs that do not fall under labour law such as damages for trespass on the plaintiff's property and goods. The plaintiff argues that the defendant is unwilling to submit to authority of this court as he has neglected or refused to comply with the order of interim injunction and he is in contempt of court and that by his application to vacate or vary the injunction, he has come to court with unclean hands and equity cannot assist him. The plaintiff is of the view that the defendant's summons should be dismissed as he has failed to establish any reasonable basis for either the variation or vacation of the injunction and that the order of injunction should be maintained and complied with.

The main issues that this court has to determine is whether or not first, the plaintiff concealed material facts and secondly, the order of injunction which was granted herein should be discharged?

The case of *American Cyanamid Co. v Ethicon Ltd* (1975) 1 ALL ER 504 provides the principles and guidelines on the court's discretion to grant or refuse an application for an interlocutory injunction. To establish whether an applicant has adequate case for the granting of an interlocutory a court considers the following factors:

- i. whether the applicant had a strong on merely an arguable case;
- ii. the adequacy of damages as a remedy;
- iii. the balance of convenience;
- iv. whether the status quo should be maintained;

If the applicant satisfies the above test, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on the balance of convenience. It is a trite law that the primary function of injunction is to retain *status quo* but only and only if doing so will not result in injustice, unfairness or inconvenience.

In an *ex parte* application the applicant is obligated to lay all the material facts before the court: *STR Agencies and others v Spagnolo and others*.¹ The Supreme Court of Appeal in *Vitsitsi v Vitsitsi*² stated that 'it is a perfectly and long settled principle of law that a person who makes an *ex parte* application to the court is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not do so he will not be allowed any advantage gained by means of an order which will have been so obtained'.³ The court has the jurisdiction to discharge an injunction if it transpires later that the injunction was obtained by suppression of material facts.

The affidavit evidence reveals that the defendant alleges that he was not given his benefits after his contract of employment ended and he was waiting for his benefits to be given so that he could return the property to his employers and the employers were not doing justice as well by holding to his benefits after the contract ended. This court finds that the matters in this civil action are based on labour issues

¹ [1998] MLR 366 (HC).

² [2002–2003] MLR 419 (SCA).

³ [2002–2003] MLR 419 (SCA) at 422.

and it is an abuse of the process of the court for the plaintiff to commence an action in the High Court on the pretext that the action is arising from a tort of trespass which is not claimable in the Industrial Relations Court when the plaintiff knows very well that the properties that are in issue before the High Court form part of the issues before the Industrial Relations Court as part of the defendant's alleged and claimed benefits in the course of contesting his termination of employment.

In present matter, this court is of the view that the plaintiff obtained the order of interim injunction through suppressing material facts by failing to disclose that there were proceedings between the parties on the same facts and subject matter in the Industrial Relations Court concerning amongst other things the motor vehicle, the laptop and the printer and that an inter *partes* motion for interim relief was filed on 22nd February 2011 and when its hearing failed to take place on 25th February 2011 it was adjourned and that the ruling was rendered on 16th March 2011.

Under the circumstances it is appropriate that the defendant's summons be and is hereby allowed for the abovementioned reasons. The order of interim injunction is accordingly discharged.

The costs occasioned by this summons are awarded to the defendant.

Delivered in open court this 26th day of September 2018 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Case Information:

The late Hon Justice Manyungwa
Mr. Zambezi
Mr. Kalua
Ms. Nyirenda/ Ms. Million

Presiding Judge.
Counsel for the Plaintiff.
Counsel for the Defendant.
Court Clerks.