



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 262 OF 2018

BETWEEN:

LESTON TED MULLI

1st CLAIMANT

SUNRISE PHARMACEUTICAL

2nd CLAIMANT

CHOMBE FOODS LIMITED

3rd CLAIMANT

AND

CHARLES KAJOLOWEKA

1st DEFENDANT

**THE REGISTERED TRUSTEES OF
YOUTH AND SOCIETY**

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Chokocho and Nkhata, Counsel for the Claimants
Mwafulirwa, Counsel for the Defendants
Mankhambera, Official Court Interpreter

ORDER

This is this Court's order on the claimants' application for continuation of an order of interlocutory injunction that was made ex parte under Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules 2017.

By the instant application, the claimants seek continuation of an order of interlocutory injunction restraining the defendants from making some defamatory

comments in relation to the claims that the 2nd and 3rd claimant have before this Court.

The facts of this matter as gathered from the sworn statements before this Court are as follows.

The 1st claimant is a businessman. The 2nd and 3rd claimant are companies in which the 1st claimant is involved.

The 2nd and 3rd claimant were subjected to looting during the demonstrations of 20 July 2011. Consequently, the 2nd and 3rd claimant sued the Attorney General in civil cause number 474 of 2012 for their loss. The High Court ruled in favour of the 2nd and 3rd claimant and awarded them damages. The said damages were paid after a while since the decision awarding the same.

The 2nd and 3rd claimant now seek to have interest assessed on the damages that were paid after a lapse of time since they were awarded. The matter of assessment of interest was set for hearing before the Senior Deputy Registrar of this Court.

In view of the impending hearing, the 1st defendant issued a press release in his capacity as Executive Director of the 2nd defendant in relation to the case of the 2nd and 3rd claimants. The 1st defendant also made a facebook post on the subject on his facebook page.

The effect of the press release from the defendants was that the 2nd and 3rd claimant sued Government in civil cause number 474 of 2011 in relation to the 2011 riots and was awarded damages which Government paid out in highly questionable circumstances.

Additionally, that now the 1st claimant a senior member of the ruling Democratic Progressive Party who owns the 2nd and 3rd claimant is seeking interest. And that the circumstances in which the claims were or are being handled by the Attorney General and the Judiciary raise deep questions on rule of law, governance and that this is plainly another organized malfeasance to defraud the Government.

The 1st claimant denies being a senior member of the ruling Democratic Progressive Party.

The 1st defendant vowed not to relent to stop the claim by the 2nd and 3rd claimant.

The claimants then obtained an interim injunction, ex parte, restraining the defendants from making their pronouncements which the claimants deemed defamatory.

The matter comes for consideration whether the interim order of injunction should be continued pending determination of the claimants' claim for damages for defamation, for removal of the offending facebook post and for a permanent injunction restraining the defendants from making the offending statements.

This Court is aware of the applicable law on interlocutory injunctions as submitted by both the claimants and the defendants.

The court will grant an interlocutory injunction where the claimant discloses a good arguable claim to the right he seeks to protect.

This court will not try to determine the issues on sworn statements but it will be enough if the plaintiff shows that there is a serious question to be tried. See Order 10 rule 27 (a) Courts (High Court) (Civil Procedure) Rules 2017.

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.

If the claimant has shown that he has a good arguable claim and that there is a serious question for trial this Court then next has to consider the question whether damages would be an adequate remedy on the claimant's claim. See Order 10 rule 27 (b) Courts (High Court) (Civil Procedure) Rules 2017.

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 the claimant's claim. See *Mkwamba v Indefund Ltd* [1990] 13 MLR 244.

Where damages are an inadequate remedy the court will consider whether it is just to grant the injunction. See Order 10 rule 27 (c) Courts (High Court) (Civil Procedure) Rules 2017.

This will involve weighing whether the balance of convenience or justice 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.

In determining the instant application for an injunction, this Court would ordinarily have had to consider whether on the sworn statements the claimant has disclosed a triable issue.

If a triable issue was disclosed, the next question would have been whether damages are an adequate remedy on the granting or refusal of the injunction. See Order 10 rule 27 (b) Courts (High Court) (Civil Procedure) Rules 2017.

If damages are not an adequate remedy in the circumstances, the last issue would have been whether granting the order of interlocutory injunction herein would be just. See Order 10 rule 27 (c) Courts (High Court) (Civil Procedure) Rules 2017.

However, considering that this matter involves a claim for an interlocutory injunction in a case alleging defamation the persuasive position is as stated in *Bonnard v Perryman* [1891] 2 Ch 269 where it was held, by a five-judge Court of Appeal, that an interim injunction will not be granted to restrain a publication of an allegedly defamatory statement if the defendant adduces evidence that he will seek to justify the statement (in other words prove, prove that it is true) at trial.

The learned authors Bean et al, *Injunctions* 11th edition (2012) state at 58 that this great case of *Bonnard v Perryman* still remains good law to this day and remains a pillar of the right to free speech in the English jurisdiction from which our law was received.

Our Constitution also places a premium on freedom of speech as correctly submitted by the defendants. As such this Court will not, willy-nilly, gag free speech on the allegation of defamation. And in this connection this Court would like to applaud

the defendants on their quest to ensure transparency, accountability and good governance in the manner our public systems are run in this country.

Having said the foregoing, this Court wishes to observe that the learned authors Bean et al persuasively point out that the rule set out in *Bonnard v Perryman* remains unaffected by the principles set out in the leading case on principles governing the granting of injunctions, namely, *American Cyanamid Co. v Ethicon Ltd* [1975] 2 WLR 316 which has been applied in this jurisdiction in the cases cited by the parties in this matter of *Kanyuka v Chiumia* civil cause number 58 of 2003 (High Court) (unreported) and *Tembo v Chakuamba* MSCA Civil Appeal Number 30 of 2001.

The principles in *American Cyanamid Co. v Ethicon Ltd* are codified in Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules. The parties took time to address this Court on the said principles but this Court advised them to focus on the rule in *Bonnard v Perryman*.

This Court stressed to the parties at the hearing that an interim injunction can only be granted in this matter against the alleged defamatory matter if this Court is satisfied that a plea of justification must fail. The persuasive authority for that position is per Stocker L.J. in *Williams v Woolman* unreported January 30, 1990 (CA).

In view of the foregoing, the claimants submitted that the defendants' plea of justification cannot succeed.

The claimants contended that the defendants cannot be allowed to allege, and threaten to continue alleging, that the Attorney General and the Judiciary and the claimants are involved in a plain scheme to defraud the Government without pointing to any proof.

And particularly, where the records of this Court are public documents which can be accessed by the defendants so that they can indicate an accurate picture during the public discourse they claim to engage in on matters of public interest.

The claimants also protested that the defendants cannot claim free speech at the expense of the right to dignity of the 1st claimant.

The defendants on their part mainly contended that this Court should place a premium on the constitutional right to freedom of speech and cited a recent American case of *Clifford v Trump* CV 18-068935-SJO (FFMx) in which tweets by the United States President targeted at a claimant who complained against their defamatory tenor were ruled to be protected free speech under certain statutes that enriched public discourse on matters of public importance within America.

This Court observed at that point that the American jurisprudence on the subject ought to be treated with care as they approach the matter in a different manner altogether and reference is made to some statutes that are not available in pari materia in our jurisdiction. This Court would therefore not be highly persuaded by the approach in that America case.

The defendants also contended that the claimants will get paid damages arising out of the impugned speech in this matter so long as the impugned speech is on matters of public interest and ought to be allowed and protected as against the interests of the few claimants.

This Court observes, in agreement with the defendants that a premium must be placed on freedom of speech on matters of public interest. However, it is also important to recognize that natural persons such as the 1st claimant have an equally important constitutional right to dignity that must not be violated.

This Court will protect free speech in the face of violation of the dignity of a person by defamation where such free speech has truth or the sting of the alleged defamatory free speech or statement can be justified.

The defendants alluded to many principles, that his Court finds not useful to repeat here, but were unable to point to or adduce some evidence to show that at the trial the impugned defamatory statements would be justified.

It is worth observing that it is indeed easy, as submitted by the claimants, for the defendants to verify the facts in relation to the claimants' claims before this Court. Rather than for the defendants to make defamatory claims against the claimants.

This Court agrees with the defendant that by any stretch of imagination, there is no evidence that the defendants have adduced or pointed to in a bid to show that the proceedings prosecuted by the 2nd and 3rd claimants before this Court are plainly

another organized malfeasance to defraud the Government by the claimants, the Attorney General and this Court.

This Court observes that the defendants themselves concede, in their statement of defence, that their statements are substantially true. That is a concession that parts of their impugned statement are not true.

Regrettably and crucially, the most critical part of their statement that the court proceedings are plainly another organized malfeasance involving the claimants, this Court and the Attorney cannot be justified. There is no evidence pointed to by the defendants to show the truthfulness of that very serious allegation against the claimants.



In the circumstances, this Court finds that the plea of justification made by the defendants must fail and the interlocutory injunction granted *ex parte* herein is continued until the determination of this matter restraining the defendants from continuing making their defamatory statements herein that they promised not to stop making.

The defendant wondered why the claimant could not proceed by way of contempt of court for commenting on on-going proceedings under the *sub judice* rule which bars comments aimed at influencing pending court proceedings.

The claimants correctly retorted that the route of contempt of court is but one of the avenues available to deal with the matters raised by the defendants' conduct in this matter. In any event it is not for the defendants to decide how their impugned conduct must be dealt with.

The defendants also wondered why the claimants feel violated when they also appear to be interested in stopping comments on the Court and the Attorney General.

This Court notes that it is tempting for the matter to be looked at as being about the comments on the Court and the Attorney General. Yet the gist of the impugned defamatory statements, in these proceedings, is that the defendants contend that the claimants are involved in a conspiracy with the two institutions to defraud the Government. That gives the claimants every right to complain about the conduct of the defendants.

The defendants also are worried that the claimant is stifling free speech by obtaining injunctions in matters related to the subject matter of this case against a journalist at a TV station and against the UTM.

It must however be noted that the other side of the coin to the foregoing argument would be that there must be good reason why the injunctions are being granted. This is because the tenor of the discussion of the subject is not justifiable and meriting of protection under the banner of free speech at this stage.

The defendants lamented that the terms of the injunction are too general stopping the defendants from commenting on the on-going case involving the claimants. That does not appear to this Court to be a consideration that should persuade this Court to discontinue the interlocutory injunction.

This is given that in the circumstances the defendants vowed to keep up their plot to stop the claim by making their impugned statements herein such that stopping them from carrying out such a vow calls for such an injunction that they must actually refrain from commenting on the case as they intend to continue to.

Costs on this application are for the claimants.

Made in chambers at Blantyre this 7th November 2018.



M.A. Tembo
JUDGE