

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 392 OF 2017**

**BETWEEN:**

**YEMURAI (PVT) LTD t/a HAWKER SIDDELY  
ENGINEERING (MALAWI)**

**CLAIMANT**

**AND**

**DON KASONDOLE**

**1<sup>st</sup> DEFENDANT**

**C&A ELECTRICAL ENGINEERING  
PRIVATE LIMITED**

**2<sup>nd</sup> DEFENDANT**

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

M'bwana, Counsel for the Claimant  
Masanje, Counsel for the Defendants  
Mpasu, Official Court Interpreter

**ORDER**

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

By the instant application the claimant seeks continuation of the order of injunction restraining the defendants from interfering with the claimant's business by falsely

indicating or misrepresenting that the claimant's business has been taken over by the 2<sup>nd</sup> defendant and that the claimant has ceased its operations in Malawi and its operations have been taken over by the 2<sup>nd</sup> defendant.

Both parties filed sworn statements and skeleton arguments and were heard orally.

The subject matter of the dispute herein is the allegation that the defendants are interfering with the claimant's business by falsely indicating or misrepresenting that the claimant's business has been taken over by the 2<sup>nd</sup> defendant and that the claimant has ceased its operations in Malawi and its operations have been taken over by the 2<sup>nd</sup> defendant.

The claimant is in the business of dealing in repairs of transformers, electrical motors, generators, welding machines, line construction, electrical installations and mobile oil filtration. And the 1<sup>st</sup> defendant used to be its manager until the time he was dismissed due to misconduct.

After his dismissal, the 1<sup>st</sup> defendant formed his own company the 2<sup>nd</sup> defendant and carries on the same business as the claimant.

The claimant asserts that the defendants' business brochure is almost exactly in the same words as the claimant's and is intended to mislead the claimant's clients.

And that the 1<sup>st</sup> defendant has been visiting the claimant's clients and potential clients telling them that the claimant has shut down its operations and that the 2<sup>nd</sup> defendant has actually taken over those operations together with all equipment belonging to the claimant and that effectively those clients should channel all their requirements to the 2<sup>nd</sup> defendant.

The claimant added that, as a result of the false representations by the 1<sup>st</sup> defendant, its clients have started sending their business to the defendants thereby causing the claimant lose business. It asserted that such loss cannot easily be compensated in damages.

The claimant asked that the defendants be stopped from peddling their lies herein.

On their part, the defendants agreed that indeed the 1<sup>st</sup> defendant used to be an employee of the claimant since 1<sup>st</sup> September 2016 with the responsibility of looking for new clients and dealing with such clients on the claimant's behalf.



He confirmed that he was dismissed from the employment of the claimant and ventured out to set up a business with others but dealing in a similar business to that of the claimant.

He indicated that on 3<sup>rd</sup> October 2016, the claimant put up a notice in the Malawi News indicating that the 1<sup>st</sup> defendant was no longer its employee and was not allowed to transact in the claimant's name.

The 1<sup>st</sup> defendant indicated that the 2<sup>nd</sup> defendant bid for work upon invitation through tender just like the claimant and others did and that the claimant got the work. For instance, at FES Limited.

The 1<sup>st</sup> defendant asserted that although the 2<sup>nd</sup> defendant's brochure is similar to that of the claimant all it does is present similar information but with clear reference to the 2<sup>nd</sup> defendant only. And that it is not the reason why the claimant is losing business.

He added that the claimant might be losing business due to poor marketing strategy and because the CEO of the claimant does not stay in Malawi and some staff of the claimant also left the claimant's service.

This Court is aware of the applicable law on interlocutory injunctions as submitted by both the claimant and the defendants. The court will grant an interim injunction where the claimant discloses a good arguable claim to the right he seeks to protect. The 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 Cynamid Co. v Ethicon Ltd* [1975] 2 WLR 316.

In determining the instant application for injunction, this Court must determine whether on the sworn statements the claimant has disclosed a triable issue.

The claimant's case is that the defendants are stealing its business by misrepresenting that the claimant has closed its business and the same has been taken over by the defendants.

The defendants contend that there is no claim worth pursuing in this matter. And that, in fact, any disgruntled former employer and competitor can make the allegation being made by the claimant. The defendants contended that the allegation is empty given that there is no mention of which client or clients of the claimant has been illegally taken away by the defendants.

The claimant attempted, unsuccessfully, to rely on the disciplinary proceedings against the 1<sup>st</sup> defendant on dismissal to show that he had been stealing the claimant's clients.

This Court observes that, as correctly submitted by the defendants, the claimant has clearly failed to set up the facts to properly support the basis of its allegations by



failing to indicate who are the clients in question to whom the defendants have made the false misrepresentations.

As correctly argued by the defendants, any disgruntled former employer can make allegations as are being made against the defendants with a view to stifle legitimate competition.

Further, the likelihood of the alleged false misrepresentations having any practical effect and therefore being made is doubtful given that the claimant put a notice in the papers stating that the 1<sup>st</sup> defendant is no longer its employee clearly pointing to the fact that the claimant is still in business in Malawi.

On the other hand, the defendants have clearly demonstrated how they have competed fairly and squarely with the claimant to get the business in question.

In the end, this Court agrees with the defendants that the claimant has not shown a triable issue in this matter. Consequently, there is no basis for continuing the injunction that the claimant obtained on an ex parte basis.

In the circumstances, the injunction obtained ex parte by the claimant is accordingly discharged.

Of course, damages would not be an adequate remedy in this matter given that it would not be easy to compensate the claimant if its business was obliterated by the alleged schemes of the defendants. And the question whether the injunction should be continued or not would have turned on whether it was just in the circumstances if there was a triable issue.

In deciding whether it is just to grant the order of injunction sought, this Court will therefore consider where the balance of convenience lies in this matter.

As correctly noted by the parties, most injunction applications 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 declining to continue the injunction sought by the claimant.

The status quo before the ex parte order of injunction is that the claimant carried on its business and the defendants also carried on their business.

As correctly submitted by the defendants, the claimant only objected to the misrepresentations allegedly made by the defendants thereby taking away the business of the claimant. It turns out that the said alleged illegal schemes of the defendants cannot be substantiated by any facts by affidavit given that there is no indication of even a single client of the claimant allegedly being involved illegally by the defendants.

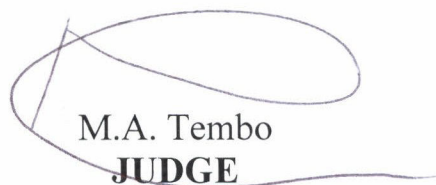
It would therefore not be just to continue an injunction against the defendants in such circumstances where no concrete, but only a vague, allegation is made out by sworn statement.

In the circumstances, this Court declines to continue the order of injunction herein.

This Court is mindful that this matter can and should be quickly escalated to trial so that the issues at hand are resolved without undue delay. This is given the fact that now matters are assigned to specific judges upon commencement.

The injunction is accordingly discharged with costs to the defendants.

Made in chambers at Blantyre this 18<sup>th</sup> January 2018.

  
M.A. Tembo  
**JUDGE**