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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVL CAUSE NUMBER 298 OF 2021

BETWEEN:

PEARSON HOLDINGS SOUTHERN AFRICA (PTY) LIMITED **CLAIMANT**

AND

NIGEL DOYLE **DEFENDANT**

CORAM: JUSTICE M.A. TEMBO

Mlauzi and Mlambe, Counsel for the Claimant
Dikiya, Counsel for the Defendant
Mankhambera, Official Court Interpreter

ORDER

1. This is this Court's order on the defendant's application to strike out these proceedings on the ground of *forum non conveniens* meaning that this Court is an inappropriate forum and that another court outside Malawi is a more appropriate one to try the matters in this case. The application is opposed by the claimant.
2. The claimant is a private limited company incorporated in the Republic of South Africa, and is part of Pearson Plc which has a presence in over 200 countries across the world. The defendant is a British National and was at all

material times the Managing Director of Anglia Book Distributors Limited in Malawi.

3. The claimant and Anglia Book Distributors Limited entered an agreement whereby the latter undertook to distribute the claimant's educational materials in Malawi.
4. There was a breakdown of the business relationship between the claimant and Anglia Book Distributors Limited. That culminated in the execution of a judgment before the Commercial Division of this Court here in Malawi by the claimant on Anglia Book Distributors Limited. That judgment had been obtained in the Republic of South Africa.
5. Subsequently, the defendant started sending emails to the claimant's officers in the Republic of South Africa and England on the same subject matter of the litigation that was before the Commercial Division of this Court despite the claimant advising the defendant to communicate through its lawyers. The claimant found the communications to be offensive and commenced the present matter claiming that the defendant had committed certain torts such as libel among others and sought to restrain the defendant accordingly. The claimant also obtained an order of injunction without notice restraining the defendant's impugned conduct in these proceedings.
6. The defendant made the instant application seeking that the action be struck out on account of the fact that it is commenced in a forum that is not appropriate. He essentially reasoned that he believed that all the alleged offensive communications were sent via emails and that they were accessed in the Republic of South Africa or in England. He therefore contended that none of the alleged torts happened in Malawi and that it was wrong for the claimant to sue him in a Malawian Court.
7. Both parties correctly observed that section 108 of the Constitution gives this Court power to determine whether it should exercise its jurisdiction or not in any matter as it exercises its unlimited original jurisdiction in civil and criminal matters.
8. The defendant then submitted that matters raising conflict of law issues, like the one herein, require the Court to ask itself whether it has to exercise jurisdiction in the matter or not. And that the question of *forum conveniens,* that is, appropriate forum in civil litigation, has to be explored by looking at factors connecting the Court's jurisdiction to the matter in dispute. He added

that the question of jurisdiction receives varying answers depending on the type of dispute that the Court has to resolve.

9. He then noted that, in the present matter, the claimant is seeking to restrain him from directly communicating with the claimant's officers via email and the like.
10. He observed that for torts, the main connecting factor that drives the Court to have jurisdiction is the *lex loci delicti* meaning, the place where the tort was committed or place of the injury or wrong. He submitted that the generally accepted position in conflict of laws for online defamation is that the appropriate forum is to be decided by looking at the place where the content has been accessed as this is where publication takes place. On that point he referred to the case of *Dow Jones v Gutnick* [2002] HCA 56, 210 CLR 575, 194 ALR 433, 77 ALJR 255.
11. He then observed that the place where emails were accessed should be the appropriate forum for the claimant's case to be had herein namely, the South African courts. He asserted that there is nothing connecting Malawian Courts to the matter given that the claimant is registered and domiciled in South Africa where his emails got accessed and the other parties who accessed the emails are domiciled in England. Whereas he is a British national.
12. He then submitted that the other principle of conflict of laws is that where a case in tort is tried in which some parties or events have some connection with other jurisdiction, the choice of law rule to be applied is that the matters of substance are governed by the law of the place of the commission of the tort. On that point he referred again to the case of *Dow Jones v Gutnick* [2002] HCA 56, 210 CLR 575, 194 ALR 433, 77 ALJR 255.
13. He then asserted that therefore the governing law herein on the claimant's case and on the injunction application cannot be Malawian law.
14. The defendant therefore sought that the instant proceedings be dismissed accordingly.
15. On its part, the claimant submitted that under the common law principles of private international law, the grounds of jurisdiction are the presence of the defendant within the territory of the court's jurisdiction at the time of service and the submission to the court's jurisdiction. The defendant alluded to the learned author John O'brien, Conflict of Laws, (1999), 2nd edition at 82. It also alluded to the case of *Maharanee of Baroda v Wildenstein* [1972] 2 All

ER 689 which held that it is a well-established principle of conflict of laws that a court can assume jurisdiction over a defendant present within its jurisdiction in an action *in personam,* that is an action seeking to compel a defendant to do or refrain from doing something or to pay damages, even if the defendant's presence in the jurisdiction is temporary.

16. The claimant then submitted that the jurisdiction of this Court in this matter has been established on account of the defendant's presence in Malawi as a Director of Anglia Distributors Limited and the defendant having been served the summons here in Malawi.

17. The claimant then submitted that once jurisdiction has been established this Court ought to proceed to determine the matter. It submitted that the doctrine of *lex loci delicti* alluded to by the defendant has no role to play in the determination of jurisdiction. Rather that once the court's jurisdiction is established by the presence of the defendant at time of service then the *lex loci delicti* rule is resorted to in order to determine the applicable law to the tort in question.

18. The claimant asserted that once the court's jurisdiction is established through presence of the defendant and service on him, it becomes the duty of the defendant to raise and prove the issue of *forum non conveniens,* that is, that there is another more appropriate jurisdiction than the jurisdiction where he got served that should hear and determine the case suitably for the interests of the parties and the ends of justice. And that the defendant once he raises the issue of *forum non conveniens,* must show to this Court which factors point to the other forum as being more appropriate. Such factors include, among others, those governing convenience and expense such as the availability of witnesses, the law governing the relevant transactions and the places where the respective parties reside or carry on business. On this aspect, the claimant referred to the cases of *Club Resorts v Van Breda* 2012 SCC 17 and *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1986] 3 All ER 843. This Court observes that, it is however open to the claimant, even where the defendant shows prima facie that there is another more suitable forum, to show that other circumstances why the matter must still be tried in the impugned forum for example that he will clearly not be able to obtain justice in the foreign court. See *Mohammed v Bank of Kuwait and Middle East KSC* [1996] 1 WLR 1483 CA.

19. The claimant then submitted that there is not available a more appropriate forum for the claimant to commence proceedings in this matter than in this Court. It observed that the defendant is domiciled or resident in Malawi and he conducts business in Malawi. Further, that the background to this matter arises from his business in Malawi and that the defendant accepted service of the summons here in Malawi. And further, that it will be less costly to the defendant if the trial proceeds here in Malawi. And that enforcement proceedings would take place in Malawi if the claim is successful.
20. The claimant then argued that if this Court finds that it has jurisdiction and that it is an appropriate forum then the applicable law is that of Malawi. Further, that even if it is found that South African law is applicable then such law would be applied in terms of Order 17 rule 60 of the Courts (High Court) (Civil Procedure) Rules, 2017 which provides for procedure on evidence on findings on questions of foreign law.
21. The claimant then asserted that applications for injunction in Malawi are made under the Courts (High Court) (Civil Procedure) Rules, 2017 and that it cannot lie in the defendant's mouth that the law of South Africa where the claimant is based ought to apply on such an application.
22. This Court agrees with the parties that this Court has unlimited original jurisdiction to hear and determine civil cases as provided in section 108 of the Constitution. And that, however, where a case involves foreign connecting factors this Court also has jurisdiction to determine whether to hear such a case or not. So, where the issue of *forum non conveniens* is raised by a defendant this Court has power to decide whether another court outside Malawi is more suitable to hear and determine the case due to factors connecting the other forum to the case. For example, all things being equal, the fact that a foreign claimant has come to commence a matter before this Court in relation to real property outside Malawi may be a reason for this Court to decide that a foreign court in the country where the real property is located is more suitable to deal with the case even though this Court has unlimited original jurisdiction.
23. This Court agrees with the claimant that in so far as jurisdictional analysis is concerned, for actions in *personam* such as the one herein, this Court would exercise jurisdiction due to the presence of the defendant in Malawi and the fact that he was served with the summons here in Malawi despite the foreign

factors connected to the case at hand. That is the common law rule on conflict of laws as established in the highly persuasive case of *Maharanee of Baroda v Wildenstein* [1972] 2 All ER 689. This Court finds no good reason for departing from the reasoning in this highly persuasive case. This persuasive decision reflects our own jurisprudence on the matter as indicated in the case of *Pillay v Mtenje* [2004] MLR 275 (HC).

24. This Court agrees with the claimant that the rule of *lex loci delicti commissi,* to put it in full, concerns choice of applicable law once the jurisdiction of the Court has been established. It entails that the law to be applied in the case is that of the place where the wrong occurred once the tort was committed. This indeed has nothing to do with the jurisdiction of this Court to try this matter. See *Pillay v Mtenje* [2004] MLR 275 (HC).

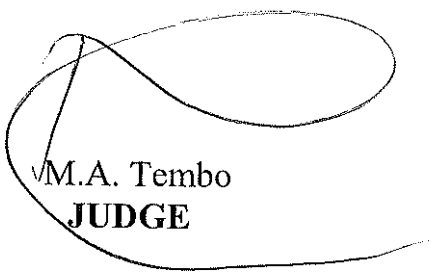
25. In short, this Court has jurisdiction in the present matter in view of the fact that the defendant is resident here in Malawi and carries on his business here in Malawi where he was served the summons in these proceedings. This Court therefore is not persuaded by the defendant's submission that the generally accepted position in conflict of laws for online defamation is that the appropriate forum is to be decided by looking at the place where the content has been accessed as this is where publication takes place. That position as relied upon by the defendant and based on the Australian case of *Dow Jones v Gutnick* [2002] HCA 56, 210 CLR 575, 194 ALR 433, 77 ALJR 255 is less persuasive given that it varies from our common law that has its roots in English common law.

26. As indicated by the claimant, the defendant having raised the issue of *forum non conveniens* then bore the burden of showing that there is another jurisdiction that is more appropriately suitable to determine the present matter.

27. Having considered the factors present in this matter, this Court agrees with the claimant that it is more suitable in the interests of the parties and the ends of justice that this Court exercises its jurisdiction to try this matter. The defendant has therefore failed to prove his claim of *forum non conveniens* given that he is resident here and carries on his business here and it is most convenient that this matter be tried here. Should the claimant succeed on its claims it will also be easier to enforce the decision in this matter rather than commencing proceedings in South Africa or England and then coming here to go through the process of registration of a foreign judgment.

28. This Court however agrees with the defendant that the other common law principle of conflict of laws is that where a case in tort is tried in which some parties or events have some connection with other jurisdiction, the choice of law rule to be applied is that the matters of substance or merits are governed by the law of the place of the commission of the tort. The case of *Dow Jones v Gutnick* [2002] HCA 56, 210 CLR 575, 194 ALR 433, 77 ALJR 255 closely resembles the common law position on that point to a good extent. In fact, in the context of defamation, the choice of applicable law depends on the place where the individual transfer or delivery of the defamatory information took place. See *Bata v Bata* [1948] WN 366 (CA). On the face of the statement of case, to succeed in defamation, the claimant would have to prove the claim per the law of the place where the tort got committed, namely, South Africa and England. And Order 17 rule 60 of the Courts (High Court) (Civil Procedure) Rules, 2017 on proof of a finding on a question of foreign law would come into play as submitted by the claimant.
29. However, with regard to applications for injunction, Malawian procedure law ought to have applied since this Court has jurisdiction to determine this matter. This Court finds it logically hard to have acted outside the relevant procedural Rules, the defendant not having raised the matter at the time the application for injunction was made since it was made without notice to the defendant as allowed by the Rules. In any event, it has not been shown by the defendant that under South African law, which has a robust privacy protection regime, the claimant would not be protected from libelous material and online harassment. The application for injunction sought to restrain the defendant from doing something, that is sending impugned emails.
30. Additionally, matters of procedure at common law on conflict of laws are governed by the *lex fori*, the law of the country in which an action is brought, in this case being the Courts (High Court) (Civil Procedure) Rules, 2017. See Re *Fuld* (No. 3) [1968] P 675.
31. This Court therefore ultimately finds that it has jurisdiction to determine the instant matter and to have granted the order of interlocutory injunction herein.

Made in chambers at Blantyre this 12th November, 2021.



M.A. Tembo
JUDGE