



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
Civil Cause 409 OF 2022**

BETWEEN

FEMALE SEX WORKERS ASSOCIATION

CLAIMANT

AND

**REGISTERED TRUSTEES OF YOUTH NETWORK AND
COUNSELLING**

DEFENDANT

CORAM

:

MATAPA KACHECHE

JUDGE

Dzimphonje

for the Defendant/Applicant

Chimkango

for the claimant/respondent

Mtegha (Mrs)

Court Clerk

RULING

INTRODUCTION AND FACTS

1. On 22nd December, 2022 I ordered that an order of injunction which I had earlier granted without notice on 10th November, 2022 be varied. I further directed that the defendant may start implementing the project subject of these proceedings. I reserved my reasons for the decision and terms of the variation. This is my detailed ruling on the decision varying the injunction.
2. On 10th November, 2022 the claimant made an application for an injunction restraining the defendant from implementing a project under Solicitation number CDC-RFA-GH22-2217 entitled "Addressing Unmet Need in HIV Testing Services (HTS) for priority populations and HIV/AIDS Services for Key Populations Through Effective Delivery Models in Malawi" under the Presidents Emergency Plan for HIV AIDS Relief (PEPFAR).
3. According to the sworn statement filed in support of the application the claimant is a non-profit making organization incorporated under the *Companies Act (Cap 46:03)* of the Laws of Malawi as a company limited by guarantee and registered under *Non-Governmental Organization Act* with objectives of, inter alia, generating credible research on issues affecting rights of female sex workers that will inform them to develop their own responses and mobilizing and capacitating female sex workers on their health and legal rights.
4. The defendant is also a non-governmental non-profit making organization.
5. In or around the month of January, 2022 the defendant became aware of a funding opportunity under the solicitation and title aforementioned. It is stated that the project was to conduct research and develop interventions for HIV prevention for specific groups, with two

components: one targeting female sex workers and the other targeting men who have sex with men. It aimed at achieving:

- a. Reduced new HIV infections among priority and key populations;
 - b. Reduced morbidity and mortality associated with HIV/AIDS;
 - c. Improved capacity to implement innovative and targeted community based HIV testing services in Blantyre and Lilongwe and linkage for men and key populations;
 - d. Enhanced sustainable, appropriate and non-discriminatory HIV service delivery for Key Population in Mwanza, Chikwawa, Chiradzulu and Mzimba.
6. The project was developed by the Centre for Disease Control and Prevention (CDC) which issued a Notice of Funding Opportunity (NOFO). The defendant allegedly developed a proposal which it could submit to CDC in response to the NOFO for consideration to implement the project.
 7. The defendant then approached, among others, the claimant, to partner it in the implementation of the project if the proposal became successful.
 8. The defendant was to be the lead partner while the claimant would be a secondary partner. According to the defendant, these partners were selected on the strength of their knowledge and experience.
 9. The parties thus entered into what they call a Teaming Agreement (TA) in which each party's rights and obligations were outlined. The component to be implemented by the claimant related to interventions for female sex workers in hotspots.
 10. According to term no. 5 of the TA, "In the event that the award from the client is given to YONECO, YONECO and the FSWA agree to negotiate in good faith a final sub-agreement. In the event that the client's requirements for the partner's work is significantly altered by a solicitation amendment, contract modification, or direction from the client, YONECO may terminate this Teaming Agreement by written notice to FSWA".
 11. Further, term no. 4 obliges YONECO to keep FSWA advised on any solicitation amendments that involve the partner's work.
 12. It must be pointed out that the TA could be terminated. The following are the conditions on which the TA could be terminated:
 - a. The client either cancels or withdraws the solicitation;
 - b. Failure of the client to approve the partner for the sub-award work;
 - c. The client determines that YONECO and FSWA have a conflict of interest that cannot be resolved or mitigated;
 - d. The client modifies the Solicitation's terms, scope or funding in a manner that, in YONECO's determination, substantially modifies or impacts the partners budget or scope or YONECO's ability to prime;
 - e. Upon execution of a definitive sub-award by YONECO to the partner;
 - f. YONECO decides not to proceed further with the Solicitation;
 - g. Mutual agreement of the parties to terminate the Teaming agreement;
 - h. Failure by the partner to meet its requirements or responsibilities as described in the agreement;or

- i. The expiration of one (1) year period commencing on the effective date; provided however that the period may be extended by written agreement of the parties.

13. Let me mention that neither party to these proceedings produced the proposal that was submitted to the funder. Moreover, it is not clear from the information provided by the parties if the proposal was independent of the teaming agreement or if the obligations under the teaming agreement would be incorporated in the proposal. As such it is impossible for this court to determine what was contained in the proposal itself. Clearly the defendant is the one with actual knowledge of what was submitted to the funder.

14. However, the claimant produced an unheaded document which they described as the "YONECO Partner information". The document is a letter to the claimant's team from one of the defendant's officers. The first two paragraphs of the letter have the following information:
below is a list of deliverables that YONECO will need from your organization in order to develop the CDC Malawi KP technical and budget application.

Please don't hesitate to contact me with any question or comment you may have. We understand the technical information is proprietary and confirm that this information will only be used for purposes of the above referred bid, for CDC consideration.

15. The letter then proceeds to provide a table containing the main YONECO contact information followed by another table asking for information from the claimant putting a deadline to each item asked for. One of the items requested under this table is what is termed Partner budget template and narrative. The instruction goes as follows:

"please provide the completed partner budget and budget narrative template along with justification per line items based on the guidance with annual budget ceiling of \$400,000.00."

A budget guidance table then follows.

16. This table is followed with another table which outlines components of the project and activities to be undertaken by the partners. The last column demands information from the claimant.

17. Again it is not clear whether this "*KP technical budget application*" is the proposal being referred to or it is something else. If it is not the proposal, then the purpose of the same is not clearly stated. However, what is clear is the fact that the "partner information would be used for the purpose of the technical and budget application.

18. The claimant apparently provided all the requested information. According to the claimant's executive director, she did not receive any updates from the defendant thereafter. In July she started getting congratulatory messages from some of the claimant's partners on the successful bid. She waited to hear from the defendant to no avail. The defendant's executive director began ignoring her calls and she had to go to the defendant's offices in Zomba to physically meet the defendant. It was there that she was told that the proposal had been approved.

19. On 14th October, 2022 the defendant communicated through an email addressed to lucymajawa@gmail.com as follows:

Dear Madam,

Reference is made to our proposed partnership on KP Project to CDC. We write to sincerely express our profound appreciation for accepting to partner with YONECO on the above mentioned project.

However, due to changes in the design and implementation approach on the project, we would be unable to confirm partnership with your organisation this time around, this is beyond our control. The scope of the project was redefined.

YONECO has, however, earmarked your organisation as a potential partner in other future programming where we can co-create and implement interventions.

We do hope that you will understand our situation that is beyond control. Should you have any queries, do not hesitate to reach out to the undersigned.

Yours faithfully,

MacBain Mkandawire.

20. Effectively the communication was that although the application had been approved, the defendant would not be able to implement the project together with the claimant. It was then that the claimant approached this court for an injunction restraining the implementation of the said project.
21. Upon being served with the injunction the defendant promptly applied to have the injunction discharged or vacated.
22. In the sworn statement signed by Counsel Edward Dzimphonje it is alleged that there was a change or modification of the project that necessitated the termination of the T A. The budget was reduced and there was an adoption of an existing project.
23. Indeed, the funder approved \$1, 455, 277.00 of the supposedly proposed \$3, 000, 000.00. The email communicating the approval was to the effect that it was subject to further discussions or negotiations between the defendant and the funder's representative.
24. According to the defendant the discussions took place in the first week of October, 2022. At that meeting the Funder advised that the project implementation model had significantly been altered, especially the component for female sex workers' interventions.
25. It is alleged that in approving the proposal the Funder communicated that:
 - i) The defendant would be inheriting a component of the project that was part of an already existing project dealing with interventions targeting female sex workers. The project had already successfully been run by the Funder for the previous six years and was being implemented by a different implementing partner;
 - ii) The funder directed that the defendant should continue to implement the project within the existing structures that had been established by the previous implementing partner;
 - iii) The funder further advised that, to ensure that there were no disruptions within the targeted districts, the approaches taken by the previous partner with female sex workers within the said district should be maintained;

iv) Some of the activities that had already been implemented had been included in the component earmarked for implementation by the defendant together with the claimant.

26. What is not coming out clear from this information is that the defendant was required to inherit the structures that had already been set up by a previous implementing partner but was not obligated to partner with that partner at all. Further, although the defendant is alleging that the scope of the project was redefined, they are not clear if the project terminated all aspects that were to be implemented by the claimant though it is clear that the defendant would still be required to implement aspects of the project within the populations envisaged under the teaming agreement and whose budget was obviously developed by the claimant.

DEFENDANT'S APPLICATION

27. The defendant cited several grounds for vacating the injunction. The first one is that there was suppression of material facts by the claimant. It has been deposed and submitted that the claimant did not disclose that the project was to be implemented by the defendant as the primary partner and the claimant and a third party as secondary partners.

28. It was also submitted that the claimant did not disclose that the defendant had communicated to the claimant that the component of the project which was supposed to be implemented by the claimant had already been implemented.

29. Thirdly, it was alleged that the claimant did not disclose that the budget for the project had been significantly reduced.

30. The fourth suppression of the material facts related to the fact that the parties did not enter into the sub-award agreement therefore no binding obligations arose between them.

31. The defendant also sought to have the injunction vacated on the ground that damages will be an adequate remedy to the claimant. The damages are quantifiable in that the claim of the claimant in the project has been specified to be \$400, 000.00. On the other hand, if the defendant suffered any damages it would be difficult to assess. Therefore, damages would not be an adequate remedy for the defendant. On this the defendant stated that the effect of the injunction was to stop the whole project and not just the component of the project in which the claimant was to participate. Consequently, the damage is being effected not only on the defendant, but also many other Malawians who would have benefitted from the project.

32. The defendant went on to state that the claimant did not provide any evidence of its capacity to meet the undertaking to pay damages. According to the defendant the claimant is an NGO with no substantial assets and it was highly unlikely that the claimant could pay the damages.

33. On the other hand, the defendant is a large organisation with substantial goodwill, assets and multiple streams of income including sponsorships and other grants with which it could to pay damages if the claimant suffers any.

34. The defendant went on to state that there exist no facts to support urgency in the matter warranting an ex parte grant of injunction considering that the nature of the grant is that it would run for five years.
35. The defendant alleged that it has been and will continue to be prejudiced by the injunction considering that the project was not designed to be solely implemented by the claimant. According to the defendant, the component that was to be implemented by the claimant was yet to be funded by the funder.
36. The injunction meant that the defendant would not be able to pay salaries for key personnel whom it had already recruited to start preliminary operations under the Project.

THE LAW

37. Order 10 rule 27 of the *Courts (High Court) (Civil Procedure) Rules, 2017*, governs the granting of interlocutory injunctions by the Court. It provides as follows:
The Court may, on application, grant an injunction by an interlocutory order when it appears to the Court____
 - (a) there is a serious question to be tried;
 - (b) damages may not be an adequate remedy; and
 - (c) it shall be just to do so,and the order may be made unconditionally or on such terms or conditions as the Court considers just.
38. The principles on the discharge on an order of injunction are slightly different. In addition to considering the factors as prescribed by rule 27, the court can look at other when considering an application to discharge the injunction, this is to ensure that the court arrives at a just conclusion.
39. It must be noted that the granting and discharging of an injunction is a matter of discretion on the part of the court. The principles and considerations are a matter of guidance only.
40. It is trite that any order granted ex parte can be set aside if it is shown that it was wrongly obtained. One of the grounds upon which such an order may be discharged is if it is shown that the party obtaining such an order did so upon suppression of material facts. Material facts are such facts that, if the court had knowledge of them they could have influenced the court to make a decision one way or the other.
41. A party applying to a court for a without notice relief is under a duty to make a full and frank disclosure of all material facts. The facts should be such as would have been known to the claimant if proper inquiries were made.

DETERMINATION

42. Was there suppression of material facts? My answer is that there was no suppression of material facts. The claimant did disclose that the project was to be implemented by the defendant as the primary partner and the claimant as a secondary partner. The issue of a third party as another secondary partner is immaterial to the relationship between the claimant and the defendant.

43. It was also submitted that the claimant did not disclose that the defendant had communicated to the claimant that the component of the project which was supposed to be implemented by the claimant had already been implemented. There is no evidence that the claimant had these facts. The email terminating the agreement does not inform the claimant that the component that it was supposed to implement had already been implemented. Indeed, even in this court the defendant has not clearly come out on this point. All it is alleging is that it is inheriting structures established by a previous partner and that "some of the activities that had already been implemented had been included in the component earmarked for implementation by the defendant together with the claimant." It does not state that the whole component had been implemented. In any event it would be self-contradictory as the component targeting female sex workers is to be implemented still.
44. Thirdly, it was alleged that the claimant did not disclose that the budget for the project had been significantly reduced. Obviously this information was kept out of the claimant's knowledge. Looking at how the defendant was keeping information to itself I wonder how the claimant could possibly have come across this fact.
45. The fourth suppression of the material facts related to the fact that the parties did not enter into the sub-award agreement therefore no binding obligations arose between them. I do not find that this fact was suppressed at all.
46. The defendant contends that there is no serious issue to be tried. It is submitted by the defendant that the T A was merely an agreement to enter into a contract. In the absence of an actual contract there are no legal obligations that the defendant has breached. The defendant further claims that the claim for unjust enrichment is unfounded as the defendant has not received any funds specifically meant for the claimant. It is further stated that the claimant's component of the proposal was not approved by the funder and no specific sums were advanced to the defendant for the claimant.
47. These are the very claims that claimant is making in this matter for the determination of the court. The very fact that there are two versions to the story clearly shows that the matters are contentious. There is a question to be tried – whether the T A created enforceable rights on the part of the parties. It is a very serious issue in the context of an application for injunction.
48. Are damages an adequate remedy? In my view damages may not be an adequate remedy in the circumstances. Although the claimant is in the main claiming the \$400,000.00 damages will have to be proved. We also need to take into consideration that some of the remedies that the claimant is claiming are merely declaratory orders. To say damages will be an adequate remedy will be to stretch matters.
49. Would the sustenance of the injunction be just? In the whole picture in my view the wholesome sustenance of the injunction cannot be just. The parties herein agreed to team for a proposal to implement a project. This is not a business venture. It is a service project to the communities in this country.

50. If we allow the injunction to stand wholesome it will stop the project altogether- not just the components that were to be implemented by the claimant. According to the partner information provided by the claimant the component to be implemented by the claimant would be worth \$400,000.00 per annum. However, if we consider the fact that the budget was reduced and the \$400,000.00 was for the whole project, there are still other components of the project meant to be implemented solely by the defendant or with other stakeholders (which as per the approved budget is worthy over \$900,000.00). As such the injunction would be stopping the utilisation of over \$900,000.00 which has nothing to do with the claimant's interests.
51. The defendant has indicated in this court that at the time only \$56, 000.00 has been disbursed or is earmarked for the immediate disbursement. The project is to be implemented over a period of 5 years. It is, in my view that the implementation of the project can start without significantly affecting the rights of the claimant and its constituency.
52. Having considered all the above factors, I make the following orders:
- The injunction granted on 10th November 2022 be and is hereby varied on the terms appearing in the subsequent paragraphs;
 - The defendant and its agents and partners be at liberty to start implementing project with the funds that are immediately available to it, that is \$56,000.00;
 - The defendant and its agents or partners are restrained from implementing those aspects or components of the project which would have been implemented by the claimant under the T A or the technical and budget application;
 - In any event the defendant is restrained from utilising \$400,000.00 of the total project budget unless this order is varied or vacated or until the issues between the two are resolved either by consent of the parties or by final resolution by this court.
 - The claimant is to prosecute the substantive matter with speed.
53. On the question of costs, I find that these proceedings would not have been necessary if the defendant had been transparent in the manner it conducted itself in relation to the TA before and after the approval of the proposal. The claimant was forced to approach this court due to the manner the defendant was conducting itself. I therefore order that the costs for these proceedings be for the claimant.

Delivered this 23rd day of June 2023



CC Matapa Kacheche

JUDGE