



IN THE HIGH COURT OF MALAWI  
CIVIL DIVISION  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 37 OF 2018

BETWEEN

SHEIKH DINALA CHABULIKA.....FIRST CLAIMANT  
AND

REGISTERED TRUSTEES OF MUSLIM ASSOCIATION OF  
MALAWI.....SECOND CLAIMANT  
AND

UMALI MATOLA..... DEFENDANT

CORAM Hon Justice Nriwa, Judge  
Mr. C. Makumba of counsel for the claimant  
Mr. A. Kamwendo of counsel for the defendants  
Mrs. Mtegha Court Clerk

RULING

CLAIM

The claimants commenced an action against the defendants for damages for defamation. The claimants are, respectively, executive committee member and Registered Trustees of Muslim Association of Malawi. In the allegation, the defendant created a WhatsApp group on which they used to publish, in the claimants' view, some defamatory materials against the claimants.

In the claimant's statement of case, the materials on the social media group, comprising more than thirty members, were likely to be read by a big group of people. The words in their ordinary meaning, according to the claimants, were meant to be understood that the claimants were crooks, untrustworthy, thieves

and fraudsters who have been defrauding Muslims and non-Muslims in this country.

### INJUNCTION

On the commencement of the action, the claimants sought an interlocutory injunction restraining the defendant from further publishing statements about the first and second claimants.

This is an application to continue with the injunction. In the alternative, the application is to discharge the injunction. There are sworn statements in favour of either extending or removing the injunction

### GRANTING OF INTERLOCUTORY INJUNCTION

Order 10 Rule 27 of Courts (High Court) (Civil Procedure) Rules, 2017 provides that:

The Court may, on application, grant an injunction by an interlocutory order where it appears to the Court that-

- (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.

In the case of *Amina Hamid Daudi t/a Amis Enterprises v Sucoma*, Civil Cause No. 3191 of 2003, Mwaungulu J enumerated the following principles:

- i. A Court will not grant an injunction unless there is a matter to go for trial.
- ii. Once there is matter that should go to trial, the Court has to consider whether damages are an adequate remedy.

The learned Judge had this to say on page 4 of his judgment:

“First, a Court will not grant an injunction unless there is a matter to go for trial. This obviously filters cases not deserving the equitable relief that by its nature prevents exercise of rights before a Court finally determines the matter... Secondly, once there is a matter that should go for trial, the Court has to consider whether damages are an adequate remedy. This consideration requires answers to two sequel questions. First from the perspective of the defendant, even if damages are an adequate remedy, the Court will refuse the injunction if the plaintiff cannot pay them. Secondly from the perspective of the plaintiff, if damages are an adequate remedy and the defendant can pay them the Court will refuse an injunction. The Court may therefore allow the

injunction, where damages are an adequate remedy and the defendant can pay them.”

### EXTENDING OR DISCHARGING INTERLOCUTORY INJUNCTION

To extend an injunction or to stop it, depends on the same factors that the Court considers when granting an interlocutory injunction. A hearing is paramount where the Court grants an injunction without notice to the other party. The real question at such hearing is whether the Court, having all the facts, would not have granted the injunction in the first place. The question mostly becomes whether the applicant for the injunction did not reveal some facts which, if revealed, would not have led the Judge to grant the injunction.

In *Bon Kalindo v Spring Company Limited* [2013] MLR 25, the Supreme Court of Appeal said material facts are facts which are material for the Judge to know and are necessary for the exercise of jurisdiction. The court went on to say that the failure to make full and frank disclosure of material facts should lead to the discharge of an injunction. *Mkwanda v NBS Bank* [1993] MLR 72, *Brink's MAT Ltd v Elcombe* [1988] 1 WLR 1350).

The rationale for this reasoning is that the Court granted a relief without hearing the person against whom the relief was sought - *The State v Council for University of Malawi, ex-parte Allan Chihana and Steve Musopole*, Misc. Civil Cause no. 98 of 2006 (HC) (LDR). The applicant, therefore has, in the application without notice, to make to the Court a full and frank disclosure of the facts. The court must discharge an interlocutory order if it could not have made it, had the claimant given all the material facts known to him or her.

### ARGUMENTS

The claimants are arguing that there are serious issues to be tried in this matter. They argue that the words that the complainants are complaining of were conveyed through WhatsApp and that the media platform has a wide circulation. On a balance of convenience, they argue that it would be better if the injunction were continued with a view to protecting the claimants' reputation.

On the other hand, the defendants argue that there are no triable issues in this matter. They argue that the claimants are only meant at stopping their fellow Muslims from commenting on issues concerning their leadership. Counsel for the defendants argues that all Muslims have a right to make fair comments against their leaders. Counsel argued that the comments by the defendants were triggered by the way the claimants treated the defendant, his organization and donors by arguing that the defendants, the organization and the donors were terrorists.

The other argument is that the claimants did not fully disclose what they did to attract the discussion or comments on the social media.



Counsel argued that the claimant did not disclose that there were issues to do with accounting of donor money that led to the withdrawal of donations to the claimants' organization by the principal donor. The donor diverted the aid to the defendants, making the claimants to become envious of that issue. Counsel argues that the claimants did not disclose this point that there was communication between themselves the defendants and the donors and that that issue found this way on WhatsApp and attracted comments from all Muslims. Counsel argues that the claimants do not have clean hands as the claimants themselves started publishing false allegations against the defendants and the donors. Counsel therefore argues that the claimants could not have the audacity to rush to the court to make the claims because their hands are not clean.

Counsel further argued that damages could be an adequate remedy as the claimants are claiming damages and the injury claimed can be remedied by damages.

### ANALYSIS AND FINDINGS

In determining the issue, I consider firstly whether there are serious issues for trial and whether damages would be adequate as a remedy for the claimants' cause of action. On the face of it, the claimants have a claim bordering on protection of their reputation. There is, in my judgement, an issue worth trying.

The defendants argue that the claimants triggered the issues among the parties.

Nonetheless, the claimants have commenced the cause of action while the defendants have not. The question of triable issues, without delving much into the claim and evidence, is based on the claimant's claim. The issue raised by the defendant can be related to whether the claimants suppressed material facts. I fail to appreciate that argument. I do not find the issue that the claimants started the altercation to be of significance, at this juncture. Therefore, I do not find that that was a fact which the claimants were under an obligation to reveal. I, therefore, do not find that the claimants suppressed material facts

Finally, let me comment on adequacy of damages. The defendants have argued that the claimants may get recompense through damages. He claimants are complaining of defamation. The injunction serves not the damage that has already been occasioned but avoidance of further damage. The tort of defamation goes to the issue of one's reputation. Arguably, much as damages are awardable in cases of defamation, money cannot easily compensate one's loss of reputation, integrity, self-esteem as well as anguish suffered due to defamatory acts and words.

*In Kent Community Health NHS Foundation Trust v NHS Swale CCG and NHS Dartford, Gravesham and Swanley CCG* [2016] EWHC 1393 (TCC), the Court

held that the court accepted that in some cases damages might not be an adequate remedy on grounds of it not being possible to calculate the loss incurred. For example, where the relief sought is the protection of privacy, financial compensation might well be inadequate. The question of the adequacy of damages should be answered by reference to the interests of the person seeking the injunction.

In *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349, the Court said the real question is not whether damages are an adequate remedy but, whether it is

“just, in all the circumstances, that a plaintiff should be confined to his remedy in damages”.

Because the issue in the matter is about the protection of the claimants’ reputation, and damages would not be adequate, the balance of convenience lies in continuation of the injunction. As Mr Justice Cooke commented in *Lauritzencool Ab v Lady Navigation Inc* [2004] EWHC 2607 (Comm),

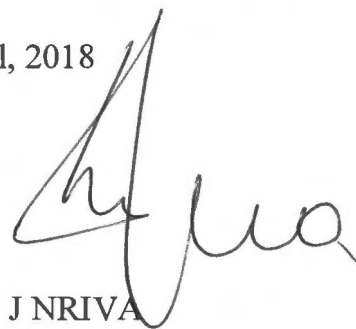
“the purpose of an interlocutory injunction is protection not just against loss which would sound in damages but against violation of any right where damages would not be adequate compensation. Loss of goodwill, loss of reputation and [...] loss of competitiveness or marketability are all matters which can be taken into account”.

#### CONCLUSIONS AND DIRECTION

There is a triable issue in the matter; damages are not necessarily adequate due to the nature of the claim in this matter. Therefore, the balance of convenience lies in the continuation of the injunction. I order the continuation of the injunction until the determination of the matter.

I order the matter to proceed to mediation within the prerequisites of the Civil Procedure Rules.

DELIVERED this 19<sup>th</sup> day of April, 2018



J N RIVA

JUDGE