IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil Cause number 3191 of 2003

Between

AMINA HAMID DAUDI t/a …………………………………………… Plaintiff
AMIS ENTERPRISES

And

SUGAR CORPORATION OF MALAWI………………………………. Defendant

CORAM: DF MWAUNGULU (JUDGE)
Masumbu, legal practitioner, for the plaintiff
Tomoka, legal practitioner, for the defendant
Matakenya, official court interpreter

Mwaungulu, J.

ORDER

The plaintiff' applies for an interlocutory injunction. On 8th December 2003 this Court granted the plaintiff an ex parte injunction requiring the defendant, Sugar Corporation of Malawi Limited, to continue with the contract. The injunction was to last for four days unless renewed. On 15th December 2003 the parties extended it to an order of an inter partes hearing. The defendant wanted to treat this application as a discharge for the injunction. I decided we proceed with the plaintiff's application for an interlocutory injunction. On reading the affidavits, listening to argument and on the principles, detailed very well by Mr. Tomoka, legal practitioner for the defendant, governing this area of law, the plaintiff deserves the interlocutory injunction. It is necessary, for the formidable points argued, to consider the evidence surrounding the application.

The defendant manufactures sugar and uses people like Amina Daudi, the plaintiff, through standard contracts, to distribute sugar. On 1st April 2001 the plaintiff, trading as Amis Enterprises, and Sugar Corporation of Malawi Limited concluded such a contract. It is necessary to highlight the contract's aspects crucial for this application. Article 18 provides:

"18.1 This Agreement shall be subject to termination before the expiry of its term in any of the following events:

18.1.1 If either party hereto gives to the other two months prior written notice of its intention to terminate this Agreement.

18.1.2 If Amis commits a breach of any one or more of the terms and conditions contained in this Agreement and shall not remedy the same (if it is capable of remedy) within 30 days after notice id given to it by Sucoma specifying the breach and requiring such remedy. For the avoidance of any doubt failure to pay any amount that is due shall not be considered as a defaults capable of remedy;

18.1.3 Forthwith at the instance of Sucoma if Amis shall have been shown by any recognised and competent authority to have committed any fraudulent act misrepresentation or other morally unsound action which could in the opinion of Sucoma affect the reputation and potential performance of the Business;

18.1.4 If Amis shall cease or threaten to cease to carry on the Business;

Article 24 provides:

"Any notice or other communication required to be given or made under this Agreement shall be in writing and maybe sent by hand mail, post or telefax or e-mail and shall be deemed to have been received by the party to whom it is addressed."

The contract was for two years. It expired on 30th March 2003. The parties decided, till the formal contract, to continue on similar terms.

On 3rd May 2002 the defendant allowed the plaintiff to operate a retail shop anywhere the plaintiff chose. The plaintiff was to sell at the same price as at his Mulanje depot. The

arrangement, to avoid complaints from the plaintiff's rivals, was not to use sugar at Mulanje depot in a retail outlet with another wholesale outlet. The plaintiff opened a depot in Blantyre. He was, under the agreement, to buy from the Blantyre depot. These arrangements caused problems.

On the 15th August 2003 the defendant discussed the matter with the plaintiff and wrote the plaintiff about the new terms. The plaintiff's wholesale area became 100 km radius from his depot. The plaintiff was not to operate the Blantyre retail outlet. On 13th November 2003 the defendant wrote the plaintiff terminating the agreement because the plaintiff "continuously breached the agreement by disregarding our warnings not to sell sugar in Blantyre and Limbe." The defendant, therefore, gave the plaintiff 30 days to wind up the operation and reconcile accounts.

On 5th December 2003 the plaintiff took out an originating summons to determine whether the defendant could terminate the contract without giving the plaintiff an opportunity to be heard; whether the defendant could terminate the contract without furnishing the plaintiff evidence, documented or otherwise, of alleged breaches of contract; whether the defendant's decision terminating the contract is supported by the evidence available; and whether the defendant's action in giving notice of termination is not unconscionable and oppressive regard being had to the circumstances of the case. He seeks an injunction to restrain the defendant from interfering or threatening to interfere with the contract. The plaintiff's legal practitioner originating summons, drafted in ostentatious and inexplicable manner, obscures the contractual issues emerging. The real issues are breach of contract and remedies available to either or both. For this application, therefore, the question becomes whether this court should grant an injunction in aid of those breaches. The injunction the plaintiff seeks is negative: it requires this Court to prevent the defendant from threatening to or terminating the plaintiff's contract to distribute sugar.

Both Mr. Masumbu, legal practitioner for the plaintiff, and Mr. Tomoka relied, correctly in my view, on the principles Lord Diplock laid in American Cyanamid Co v Ethicon Ltd [1975] AC 396 and followed in this Court since Nathwani and others v Mtawali [1990] 13 MLR 289. Candlex Ltd v Phiri, Civ. Cas. No. 713 of 2000, 11th May 2000, unreported, and Chakuamba v Tembo, Civ. Cas. No. 2509 of 2001, 22nd October, 2001, unreported, elaborate the process aspects and factors influencing the decision. The Supreme Court of Appeal has affirmed the case in Tembo v Chakuamba MSCA Misc. Civ. Application. No. 230 of 2001, unreported. In that case, Tambala, J.A., sitting as a single Justice of the Court on an application to stay execution suggested that this Court in using the concept of where justice lay introduced a different test from 'balance of convenience' in American Cynamid v Ethicon Co.

This Court never introduced a new test. It only emphasized what courts actually do, balance the interests of justice, when preventing or encouraging parties' conduct before rights of the parties are known. In Francome v. Mirror Group Newspapers Ltd., [1984] 1 WLR 892, Sir John Donaldson, M.R., criticising the expression 'balance of convenience',

said this about the purpose of interim injunctions:

"Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience."

In R. v. Secretary of State for Transport, ex parte Factortame Ltd. (No 2), [1991] AC 603, in the House of Lords, Lord Bridge said:

"Questions as to adequacy of an alternative remedy in damages to the party claiming injunctive relief and a cross-undertaking in damages to the party against whom the relief is sought play a primary role in assisting the court to determine which course offers the best prospect that injustice may be avoided or minimised."

First, a court will not grant an injunction unless there is a matter to go to 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. There is tacit acceptance about there being matters for trial. First, there is nothing from the affidavits to suggest that the warnings, the basis of the termination, were, according to article 24, in writing. Secondly, there is little also to suggest that the defendant, again in writing, gave, according to article 18, the thirty days for the plaintiff to demonstrate remedy for the wrong alleged. Thirdly, little suggests what sugar the plaintiff sold in Blantyre. The ban, as written communication shows, was for retailing in Blantyre. It is unclear that the ban included wholesaling in Blantyre. May be that is why the plaintiff contends that Blantyre is within the 100 km radius. Fourthly, there is the very question whether the contract expired in view of the new arrangements. There are, therefore, matters to go to trial.

Secondly, once there is a matter that should go to 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 an injunction if the plaintiff cannot pay them. It has not been suggested that the plaintiff cannot pay the damages and compensate the defendant for losses caused by the injunction should trial prove the defendant right. 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 cannot pay them. There is no suggestion the defendant cannot pay the damages should trial prove the plaintiff right. Damages will be an inadequate remedy where the plaintiff's or defendant's losses are difficult to compute: ICL (Malawi) Limited v Lilongwe Water Board Civ. Cas. No. 64 of 1998, unreported.

The plaintiff's losses from the defendant's stoppage are the profits and probably the good will from the business. The defendant contends that the plaintiff will be able to continue in the sugar business. One however cannot easily calculate the profits a business man can

make at the end of the business. The losses are different from damages for breach of a sale of a product; it is easy to compute the market value of the goods not delivered or paid for by the seller or buyer respectively. Even for the period of the notice, it is not easy to know the plaintiff's losses or profits.

Moreover, even if damages are an adequate remedy, the court may grant an injunction where damages were not matters the parties contemplated. As I understand this transaction, the contract allowed the plaintiff distribute sugar on terms agreed with the defendant. The defendant, in the sugar business for the past fifteen years, reached the zenith of the business by this contract. I do not think that the parties were contemplating damages for this kind of business. The plaintiff's losses go to the goodwill of the plaintiff's business.

This case differs from ICL (Malawi) Limited v Lilongwe Water Board Civ. Cas. No. 64 of 1998, unreported. The defendant relies on this statement by Chimasula, J.:

"Further, if the defendant were found liable, would pecuniary compensation be difficult to assess and/or would the defendant be unable to pay such damages? I see no such evidence in the affidavits in opposition as would logically lead to such inference. Therefore, on reflection, it has come apparent that the injunction was founded on a decision which was wrong in law. It should not have been granted in the first place because damages would be adequate compensation to the plaintiff if the defendant becomes liable and damages would not be difficult to assess. Whether the goods are special or ordinary that would not be sound basis for thinking that damages would not be easy to assess. At the very end of the contract there is a price tag and this would be the center for the award. I do not think that the issue of business reputation is primary. It may be important but secondary."

The uniqueness of a product, even if damages are easy to assess and there is a price to it, does not necessarily mean that a court cannot grant an injunction. If the goods are unique, the court is likely to grant specific performance and an injunction can be granted to aid specific performance: Pearne v Lisle (1749) Amb. 75, 77; Falcke v Gray (1859) 4 Drew 651, 658; and North v Great Northern Railway (1860) 2 Giff 64, 69. In Behnke v Bede Shipping Co Ltd [1927] 1 KB 649, Wright, J., thought that a ship was a specific chattel and ordered specific performance. The court however also granted an injunction in aid of specific performance. Wright, J., considered the ship of 'particular and unique value' to the buyer, the buyer wanted the ship for immediate use and damages were an inadequate remedy.

Where damages are an inadequate remedy the court will order specific performance and an injunction to aid it. There are cases where damages will not do justice to the parties and specific performance may do more justice to the parties: Beswick v Beswick [1968]

AC 58. Lord Pearce approved this statement from the Australian decision of Coulls v Bagot's Executor and Trustee Co. Ltd 40 A.L.J.R. 471 at 477 and 487:

"It seems to me that contracts to pay money or transfer property to a third person are always all events very often, contracts for breach of which damages would be an inadequate remedy – all the more so if it be right (I do not think it is) that damages recoverable by the promisee are only nominal. Nominal or substantial, the question seems to be the same, for when specific relief is given in lieu of damages it is because the remedy, damages, cannot satisfy the demands of justice. 'The court, ' said Lord Selbourne, 'gives specific performance instead of damages, only when it can by that means do more perfect and complete justice'. …Complete and perfect justice to a promisee may well require that a promisor perform his promise to pay money or transfer property to a third party. … There is no reason today for limiting by particular categories, rather than by general principal, the cases in which order for specific performance will be made."

Lord Pearce then said:

"It is argued that the court should be deterred from making the order because there will be technical difficulties in enforcing it. In my opinion, the court should not likely be deterred by such a consideration from making an order which justice requires."

The case of Evans Marshal and Co. Ltd v Bertola SA [1973] 1 WLR 349 at 379 was a case where an injunction was sought in support of an order for specific performance and where the question of adequacy of damages also arose. The modern view was expressed by Sachs, LJ at 349:

"The standard question in relation to the grant of an injunction, 'Are damages an adequate remedy?', might perhaps, in the light of the authorities of recent years, be re-written: 'Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?'"

There are therefore from the facts emerging from the affidavits and arguments a lot that will be considered during trial. If, as the plaintiff contends, the defendant is in breach of the contract, the plaintiff has to repudiate and recover damages. The plaintiff may, because of what we have just said, think that damages are not an adequate and just remedy and that specific performance might give the just result. An injunction may be granted to aid specific performance.

In that case the balance of justice is in favour of granting the injunction. Mr. Tomoka

argues that the balance of convenience tilts in favour of the defendants for three reasons. First, that continuing the injunction would disrupt a scheme put in place for cheaper distribution of sugar. He is unclear on how. As I understand it, the plaintiff has not sold sugar in defiance of the order since the last discussions and, as long as he does that as we await trial, there is no such threat. Secondly, Mr. Tomoka contends that the injunction gives more rights to the plaintiff as under the contract. If the court grants specific performance the result will be the same.

I grant the interlocutory injunction

Made in Court this 24th December 2003

D F Mwaungulu

JUDGE