

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO 1896 OF 2006

BETWEEN :

CHRRORIDE BATTERIES (Mw) LIMITED PLAINTIFF
AND
VISCOCITY.....1ST DEFENDANT
GABRO LTD 2ND DEFENDANT
TIRELLCROSSROADS 3RD DEFENDANT
VISION TRADING 4TH DEFENDANT
ASSOCIATED SUPPLIERS 5TH DEFENDANT
T. T. TYRES LTD6TH DEFENDANT
THE COMMISSIONER GENERAL(MRA).... 7TH DEFENDANT

CORAM: HON JUSTICE M.C.C. MKANDAWIRE

Mr. Msuku for Plaintiff

Mr.Chidothe for Defendant

Mrs. Edith Malani Official Interpreter

Mkandawire J

RULING

This is an application for a permanent injunction pursuant to order 29 Rule I of the Supreme Court. The order sought by the plaintiff is for the defendants to be restrained permanently from further dealing in Exide batteries.

Brief facts of the matter herein are that the plaintiff is a body corporate based in Blantyre that inter alia distribute Exide Batteries under the trade mark 'Exide' within Malawi. The plaintiff

entered into an agreement with Chloride CA, the proprietors of the said trade mark. In consideration of this, the plaintiff pays royalties and were made the sole distributors under the said trade mark. Later, the plaintiff discovered that the defendants a part from the 7th Defendant were also distributing and selling batteries under the trade mark 'Exide.' The said batteries are however not original exide batteries but counter-feits.

The 2nd and 3rd Defendants have filed in an affidavit in opposition. In brief, they say that they have been selling 'Chloride Exide' batteries imported from Kenya and manufactured by Associated Battery Manufacturers Limited of Kenya who have a registered trade mark for 'chloride exide.' They further say that they do not sell counterfeits but genuine products of the said Associated Battery Manufacturers Ltd of Kenya. They therefore say that the plaintiff has no legal or intellectual property right to protect in 'Exide'.

The 7th defendant has also filed in an affidavit in which they oppose this application. Firstly, they say that an injunction can not be obtained against them because they do not deal in counterfeits of the Exide Batteries. Secondly, they say that if such an injunction is obtained against them, it would be equal to stopping them from conducting its duty of collecting revenue on behalf of the Government. Thirdly they say that granting a permanent injunction against them would jeopardise their functions in all their parts as its officers would have to be acquainted with the deference between genuine and counterfeit Exide Batteries. They therefore pray to this Court that the balance of convenience would require that the injunction should lie against the dealers in the batteries and their clearing agents rather than them.

The issue in this matter is whether the court ought to grant a permanent injunction restraining the defendants from dealing with 'Exide Batteries'.

The position at law is very clear with regard to granting of injunctions. The Court is supposed to consider two issues. First, whether the plaintiff has a good arguable claim to the right being claimed or whether there is a serious triable issue. Secondly, where does the pendulum of convenience swing, whether in favour of or against granting injunction. I should point it out at the onset that at this point I need not delve into the details of the facts or law. Doing that

would actually mean usurping the role of the trial court on the substantive issue or matter. The principles on which the granting of injunctions hinge on have been well laid down in the case of American Cyanamid vs Ethicon Ltd (1975) A.C. 396. These principles are so notorious to be reproduced. I have looked at the defence put forward by the defendants in particular the 2nd and 3rd. The first thing they raise relates to the importation of Chloride Exide Batteries from Kenya Manufacture by Associated Battery Manufacturers Limited who have a registered trade mark for 'Chloride Exide'. The defendants have not even exhibited the existence of that registered trade mark. Secondly, the defendants have referred to Section 32 of the Competition and Fair Trading Act. They have also referred to Article 55 of the COMESA Treaty.

Much as I do appreciate the province of the Competition and Fair Trading Act in particular section 32, it should be borne in mind however that the provisions of this Act work in harmony with other existing legislation such as the Patents and Trademarks Act. The same applies to the COMESA Treaty which I have taken judicial notice of.

As facts stand now, I find that the plaintiff have exclusive rights to distribute batteries with the trade mark 'Exide'. They are even paying royalties to the proprietor. The plaintiff therefore has good claim in the protection of the trade mark 'Exide.' I also find that the balance of convenience tilts towards granting the sought injunction. I therefore grant the injunction against the 1st, 2nd, 3rd, 4th, 5th and 6th defendants.

As for the 7th defendant I do not think that there is merit in the application against them. The 7th defendant is placed in a different position from the rest of the other. I therefore order that no injunction be granted against them.

I award costs to the plaintiff.

MADE IN CHAMBERS this 31st day of October, 2006 at Blantyre

M.C.C. Mkandawire

JUDGE