



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

CIVIL CAUSE NO. 1603 OF 2002

BETWEEN:

J. COEHLO.....PLAINTIFF

-AND-

O.V. CUSTODIO AND OTHERS.....DEFENDANT

CORAM: HON. JUSTICE POTANI

Nyirenda, of Counsel for the Plaintiff

Njobvu, of Counsel for the Defendant

RULING

The Plaintiff's claim as endorsed in the Writ herein is for specific performance of an agreement that 20 percent of the shares in the 3rd defendant be issued to the plaintiff in consideration of the plaintiff agreeing to word for the 3rd defendant as Managing Director and for an order that the

defendants do all such acts and execute all such documents as may be necessary to transfer to the plaintiff 20 percent shares in the 3rd defendant. Upon being served with the Writ, the defendants gave notice of intention to defend and subsequently served a defence. Then the plaintiff took out and served a summons for directions in response to which the defendants filed and served notice to apply for further and better particulars at the hearing of the plaintiff's summons for directions.

I shall first deal with the directions being sought by the plaintiff. It clearly came out from counsel's respective arguments that the borne of contention is only with regard to the direction being sought in paragraph 1 of the plaintiff's summons which reads as follows:

“that the defendant specify what is meant by ‘expedience’ in paragraph 5 of the defence or indicate whether it was the defendant’s intention to give false information to the Department of Immigration.”

Counsel for the defendants described the above request as being a very strange one. Without elaborating, he expressed the view that such a request would not serve any purpose at this stage of the procedures that would only call for argument. He further asserted that it is a matter that can best be dealt with during submission. In other words, what the defendants are

saying is that what is meant by “expedience” in paragraph 5 of the defence need not be clarified before the trial of the matter as it is a matter that will be dealt with by way of submissions after all evidence is taken.

It is to be noted that the words “expedience” in paragraph 5 of the defence are used to answer to the plaintiff’s averment in paragraph 5 of the statement of claim that the 1st and 2nd defendants as directors of the 3rd defendant wrote the Department of Immigration advising that the plaintiff held 20 percent shares in the 3rd defendant in furtherance of the agreement on which the plaintiff’s claim is based. The defendants deny that the letter was written in furtherance of such an agreement as a matter of “expedience.” It is therefore quite apparent that the purpose for which the defendants wrote the Immigration Authorities would be a vital aspect in establishing whether or not there was an agreement between the parties that the plaintiff would have 20 percent shares issued to him. It is there necessary that the defendants should specify what is meant by “expedience” if the plaintiff is to know what evidence to bring to prove that Immigration authorities were written in furtherance of the agreement if action is based on and not otherwise as the defendants alleged... once the defendants clarify what is meant by “expedience”.

Likely to be clear in the communication to Immigration was intended to give information as such it is not necessary to grant the direction sought in the alternative that the defendants should indicate whether the intention was to give false information to the Immigration Department. It is therefore ordered that within 14 days from the service of this order the defendants do specify and clarity to the plaintiff what is meant by “expedience” in paragraph 5 of the defence.

Then there is the defendants’ application for further and better particulars Order 25 rule 7 of the Rules of the Supreme Court allows for such an application to be made during the hearing of a summons for directions as long as prior notice of not less than 7 days is given. The further and better particulars the defendant seems relate to paragraphs 2, 3 and 6 of the statement of claim as follows:

PARAGRAPH 2

- (a) The terms and amendments upon which the plaintiff was invited to take up the post of Managing Director as alleged.
- (h) Whether such terms were oral or in writing , or in writing the date when the documents were written and by whom was it signed (sic).

PARAGRAPH 3

- (a) The number of shares in the 3rd defendant that were offered as alleged.
- (b) The terms and conditions relating to the offer of the 20 percent shares in the 3rd defendant:
 - (i) Who made the offer
 - (ii) The Price to be paid by the plaintiffTo whom was the price paid
When was such price paid.

PARAGRAPH 5

- (a) The dates on which the alleged requests for share and share certificates were made.
- (h) Whether such requests were oral or in writing
- (c) To whom were such requests made, the 1st, 2nd, or 3rd defendant.

As the court considers counsels for the parties' submissions, it is important to appreciate and bear in mind that the summons for direction stage as governed by Order 25 of Rules of the Supreme Court is intended to provide for what has been described as a thorough stocktaking relating to the issues in the action and therefore identify the nature of the evidence likely to be

required at the trial so as to shorten the trial and save cost generally.

The defendant's applications shall therefore be considered within that spirit of Order 25. The stand taken by the plaintiff is that it is only the further and better particulars requested for as set out on PARAGRAPH 2(b) and PARAGRAPH 6 (b) that are reasonable and necessary and therefore the plaintiff is prepared to provide. As for the remaining requests, the plaintiff contends that the answers to them are to be found in the statement of claim. Counsel for the plaintiff has made reference to specific parts of the statement of claim which he believes answers to the specific requests.

The court would first wish to observe that in paragraph 2 of the defence the defendants admit to have offered the post of Managing Director as alleged by the plaintiff in paragraph 2 of the statement of claim. Since it is the defendants who made the offer, then they should be expected to know the terms and conditions of the offer as such the request for further and better particulars of the terms and conditions of such an offer is unreasonable and unnecessary. In any case, the plaintiff having indicated willingness to provide the answer to the request whether the terms were oral or written,

should it so happen that the terms were written then surely the defendant's concerns as to what the terms and conditions were would be more than addressed if they do not know such terms and conditions yet the defendants' request in PARAGRAPH 2(a) is therefore not granted but the one in PARAGRAPH 2(b) is granted.

With regard to the requests in PARAGRAPH 3, it is to be noted that the defendant in paragraph 3 denies having offered the plaintiff 20 percent shares in the 3rd defendant as alleged in paragraph 3 of the statement of claim. It is quite apparent to the court that the defendants seek the particulars in PARAGRAPH 3 in order to be put to light about the nature of the evidence the plaintiff has to support his allegation in paragraph 3 of the statement of claim so as to be able to either make admissions thereby saving time or prepare for defence. The court therefore would readily grant the defendants request for further and better particulars found in PARAGRAPH 3.

The requests in PARAGRAH 6 which also centre on the shares allegedly

offered to the plaintiff also have to be looked at the light of the fact that the defendants deny having offered the plaintiff shares. That being the case, the requests must be allowed for the same reasons as in the case of the requests in PARAGRAPH E 3.

In summing up, it is ordered that the further and better particulars the court has allowed to be provided by the plaintiff be provided within 14 days from the date of service of the order.

It is further ordered that discovery of documents be by the exchange of lists of documents within 14 days after the expiry of the time period for provision of further and better particulars by the plaintiff and the clarification of the words “expedience” by the defendant.

Inspection of documents to take place within 7 days after the expiry of the time for discovery. The trial to be set down during the listing conference for the Easter Session.

Costs of the action to be in the cause.

Made in Chambers this day of December, 2006, at Blantyre.

H.S.B. POTANI

JUDGE