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**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 338 OF 2016**

BETWEEN:

DAN LUFANI

PLAINTIFF

AND

**CHRISTOPHER TOCHUKWU NWAOGWUGWU
SISQO PRODUCTIONS (PTY) LTD**

**1st DEFENDANT
2nd DEFENDANT**

Coram: JUSTICE M.A. TEMBO,
Gondwe, Counsel for the Plaintiff
Dr Nkhata, Counsel for the Defendants
Mtegha, Official Court Interpreter

ORDER

This is this -Court's order on the plaintiffs application for continuation of an order of injunction that the plaintiff obtained ex parte in this matter.

The subject matter of the dispute herein is an artist management agreement that the plaintiff entered with the defendants. Under the agreement, the plaintiff who is a Malawian music artist, was to be managed by the defendants, who are a Nigerian national ordinarily resident in the Republic of South Africa and a company registered in the Republic of South Africa respectively. The plaintiff claims the defendant has breached the said agreement.

The injunction that was obtained ex parte by the plaintiff restrained the defendants from cancelling or insinuating cancellation of the launch of the plaintiff's song called 'sweet banana' in collaboration with a Nigerian artist known as KCEE that is set for 6th November 2016.

The grounds for the injunction were that the plaintiff has a reasonable cause of action against the defendants in that the defendants have breached the artist management agreement, that the preparation for the launch of the plaintiffs song is at a very advanced stage so that cancellation of it shall cause not only financial damage but also damage to the plaintiff s reputation , credibility and integrity and that such damage cannot be compensated in damages and that the balance of convenience or justice tilts in favour of restraining the defendants from further tampering with the plaintiff s show set for 6th November 2016 .

This Court now, after hearing both parties, decides the question whether the injunction should continue until the determination of the plaintiff s claim for K4, 270, 000 which represents the sums of money that the plaintiff claims the defendants failed to pay him when he travelled to Nigeria and the Republic of South Africa under the artist management agreement herein.

At the ex parte stage, the plaintiff asserted that the defendants ' failure to pay him the expenses he is claiming constituted a breach of the artist management agreement and this led the parties to an arbitration as per the agreement.

The plaintiff claimed that the arbitration failed because the defendants failed to pay arbitrator's fees. As a result, the plaintiff sought the help of this Court which he got by way of the ex parte order of injunction.

The plaintiff argued that where a party fails to pay arbitration fees it waives the right to contest the arbitration and the innocent party can proceed to get remedies before the court. The plaintiff cited the American case of *Sanderson Farms Inc v Gatlin* 848 So. 2d 828 (Miss. 2003) where it was decided that a party who refused to pay his share of arbitration fees had breached the arbitration agreement and therefore had waived his right to arbitrate and contest liability.

The defendants submitted that the arbitration did not fail but rather that the arbitrator withdrew from the arbitration for confidential reasons and a new arbitrator ought to

have been appointed. Further, that in such a case the plaintiff was not entitled to come to this Court until arbitration was concluded.

The defendants also argued that it is actually the plaintiff who is acting in breach of the contract by organizing a music show with a Nigerian artist to whom he was introduced by the defendants and using the defendants' logo on the show adverts but without the involvement of the defendants. Particularly, where the plaintiff never gave any written notice of default alleged against the defendants with respect to payments claimed not to have been paid.

The defendants also asserted that the plaintiff did not come to this Court with clean hands in that he did not disclose that according to clause 20 of the artist management agreement he was supposed to give a 30 days' written notice of any alleged breaches of the artist management agreement herein and that the defendants have 60 days to remedy the said breaches before the plaintiff could exercise his right to terminate the agreement.

The plaintiff admitted not giving any such notice as required under the contract before termination. He however stated that he could have given notice except that there were less than 30 days before break-down of arbitration between the parties and the date of the show. The plaintiff submitted further that in any event the plaintiff clearly wants out of the contract and must be allowed to seek the help of this Court in that regard.

This Court finds as a fact that the dispute between the parties went to arbitration and further that, on the evidence, the arbitration failed to proceed and a new arbitrator was to be appointed because the defendants did not pay the arbitrators fees.

This Court will therefore have to first determine whether the plaintiff was entitled to come before this Court when the artist management agreement provided for arbitration in case of disputes and the parties went to arbitration which failed to proceed because the defendants failed to pay the arbitration fees.

It appears to this Court that section 13 (6) of the Arbitration Act provides that this Court has power to make orders of injunction as was the case in this matter in relation to a reference to arbitration. Section 13 (6) of the Arbitration Act provides that

The Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of-

- (a) security for costs;
- (b) discovery of documents and interrogatories ;
- (c) the giving of evidence by affidavit;
- (d) examination on oath of any witness before an officer of the Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction;
- (e) the preservation, interim custody or sale of any goods which are the subject matter of the reference;
- (f) securing the amount in dispute in the reference;
- (g) the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorizing for any of the purposes aforesaid any persons to enter upon or into any land or building in the possession of any party to the reference, or authorizing any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence; and
- (h) interim injunctions or the appointment of a receiver, as it has for the purpose of and in relation to an action or matter in the Court:

Provided that nothing in this subsection shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.

In the circumstances, the plaintiff was within his rights to come to seek redress before this Court even though the matter was proceeding under the arbitration. It is therefore irrelevant that the arbitration had not failed as submitted by the plaintiff or that the said arbitration was to continue if the parties appointed a new arbitrator. In either case this Court retains the power to grant an injunction when the matter was referred to arbitration.

The second issue this Court has to determine is whether the plaintiff came to this Court with clean hands or not. This will entail answering the question whether the

plaintiff suppressed a material fact, namely, that it was him and not the defendants who had breached the artist management agreement by proceeding to organize a show without the defendants instead of first following the procedure for terminating his agreement with the defendants.

This Court is convinced that the plaintiff failed to follow the protocol on termination of the artist management agreement before he could venture to organize a show with an artist that he was introduced to by the defendants. The plaintiff does not deny that fact.

The plaintiff was under an obligation to disclose to this Court at the ex parte stage that he was supposed to give notice to the defendants of the alleged defaults by the defendants that he claimed constitute breach of the artist management agreement by the defendants. The plaintiff never made such disclosure. The importance of making notification of the defaults was to give a chance to the defendants to make good the defaults.

Instead, the plaintiff tried to explain to this Court at the hearing that he did not have enough time to make notification of the defaults to the defendants herein. The plaintiff completely missed the point.

The issue before this Court is that the plaintiff failed at the ex parte stage to make a disclosure to this Court, of the fact that he admitted, of not making a notification of default to the defendants as per the agreement before the plaintiff could act as if the agreement had been terminated by him. In effect the plaintiff failed to disclose that he was in fact himself in breach of the artist management agreement in the manner he sought to terminate the said agreement.

Had this Court been appraised of the fact that the plaintiff was, in fact, himself in breach of the artist management agreement in the manner he sought to terminate the said agreement this Court would have wished to know the reasons why it should give relief to the plaintiff in such circumstances against the defendants' alleged breaches. That was never the case as the plaintiff sought to resile from the agreement with the defendant in a manner that was not in line with the agreement and which was also not clarified to this Court.

There was therefore a failure to disclose a material fact on the part of the plaintiff namely, that he ought to have complied with clause 20 of the artist management agreement by giving the defendants 30 days' notice of alleged defaults on their part in breach of the agreement before terminating the contract. This is fatal to the order that the plaintiff obtained ex parte in this matter.

The law is well settled as held in the case of *Chiume and others v Alliance for Democracy (AFORD) and another* [2005] MLR 88 where it was stated as follows. That it is the duty of plaintiffs to make full and frank disclosure of the material facts for an application for an order of injunction. Further, that what is material fact is to be decided by the court and not the plaintiffs or their advisers. Further, that the duty of disclosure applies to material facts known to the plaintiffs and to any additional facts which should be known if proper inquiries are made. Further, that the question whether a fact not disclosed is sufficiently material to justify the immediate discharge of the injunction depends on the importance of the fact to the issues to be decided. And finally, that the test before court is, has failure to disclose material facts known to the plaintiff led the court to give a decision that it could not have given had all the material facts been disclosed? If the answer is in the affirmative then the court must discharge the injunction.

In the present matter, this Court would not have granted the ex parte order of injunction if it was made aware of the fact that the plaintiff was organizing the show to the exclusion of the defendants without first following the agreed terms for termination of the artist management agreement and precluding the defendants the chance to remedy whatever breach he alleged was committed by the defendants.

In the foregoing premise the injunction that was obtained ex parte herein is discharged. The plaintiff cannot proceed to organize the show on 6th November 2016 to the exclusion of the defendants until this matter is concluded.

This Court would also have dissolved the injunction herein on the basis of an analysis of the case on the law governing the granting of injunctions.

This Court is aware of the applicable law on interim injunctions as submitted by both the plaintiff and the defendants. Namely, that the court will grant an interim injunction where the applicant discloses a good arguable claim to the right he seeks to protect. The court will not try to determine the issues on affidavit evidence but it

will be enough if the plaintiff shows that there is a serious question to be tried. If the plaintiff has shown that he has a good arguable claim and that there is a serious question for trial then the court will consider whether the balance of convenience favours the granting of the interim order of injunction . See *Kanyuka v Chiumia* civil cause number 58 of 2003 (High Court) (unreported); *Tembo v Chakuamba* MSCA Civil Appeal Number 30 of 2001 both citing the famous *American Cyanamid Co. v Ethicon Ltd* [1975] 2 WLR 316. The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality . Beyond that, it does not matter if the claimant's chance of winning is 90 per cent or 20 per cent. See *Mothercare Ltd v Robson Books Ltd* [1979] FSR 466 per Megarry V-C at p. 474; *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 per Megaw LJ at p. 373.

The first question this Court has to resolve is whether the plaintiff has disclosed a good arguable claim to the right he seeks to protect.

This Court has doubts that the plaintiff has established a good arguable claim to the right he seeks to protect in that he failed to follow the artist management agreement in terminating the same so that he could go ahead and preclude the defendants in organizing the show set for 6th November 2016.

The plaintiff conceded not giving any notice of the defendants' default as required under the artist management agreement and denied the defendants a chance to remedy the alleged default. That was not in the spirit of the agreement as rightly submitted by the defendants. This state of affairs should preclude the plaintiff from getting injunctive relief as rightly submitted by the defendants.

Assuming the plaintiff had an arguable claim then this Court would have had to consider the question whether damages would be an adequate remedy to the plaintiff if the injunction is not granted. As rightly submitted by both parties where damages at common law would be an adequate remedy and defendant would be able to pay them, an interlocutory order of injunction should be refused, irrespective of the strength of plaintiff s claim. See *Mkwamba v Indefund Ltd* [1990] 13 MLR 244.

The plaintiff contended that damages will not be an adequate remedy because the loss of his reputation due to the cancellation of the show is irreparable. Further, that the defendants have no assets in Malawi and cannot pay the damages.

The defendant however contends that in the event that the plaintiff succeeds at trial then damages will be an adequate remedy since the show on 6th November 2016 is meant to realize money.

This Court's view is that the plaintiff's contention is right on this aspect in that although the show is about money the defendants are ordinarily resident outside the jurisdiction and it would be difficult to realize the damages if the plaintiff were to prove his claim at trial. Regrettably, at this point the plaintiff did not follow the spirit of the contract as already found and it would not matter that damages are not an adequate remedy in the circumstances.

This Court would then also have had to considered where the balance of convenience lies in this matter.

Most injunction cases are determined on the balance of convenience. In *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396 Lord Diplock said, at p. 408:

. . . it would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

In other cases, such as *Cayne v Global Natural Resources plc* [1984] 1 All ER 225, the courts have insisted that it is not mere convenience that needs to be weighed, but the risk of doing an injustice to one side or the other. Lord Diplock in *American Cyanamid Co. v Ethicon Ltd* said the extent to which the disadvantages to each party would be incapable of being compensated in damages is always a significant factor in assessing where the balance of convenience lies.

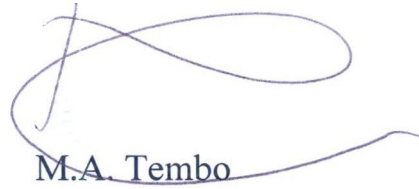
The plaintiff contended that he would suffer reputational damage which would not be compensated in money terms.

The defendants contended that the plaintiff should have followed the agreement to avoid the situation he is in. Further, that there has not been proof of loss of reputation due to cancellation of a music show.

The finding of this Court is that the balance of convenience lies in favour of not continuing the order of injunction because, as rightly submitted by the defendants, we have before us a plaintiff who has rushed to organize a show to the exclusion of his promoters that he had freely contracted to part with only upon following a certain

-process. The plaintiff has not followed the said process. As rightly submitted by the defendants, it would not be just to aid such a plaintiff with injunctive relief. The balance of convenience would therefore tilt in favour of discharging the injunction in this matter.

Costs are for the successful defendants in this matter. Made in chambers at Blantyre this 31st October 2016.



M.A. Tembo

JUDGE