

Zuneth Sattar and Ashok Nair v Nation Publications Limited and Blantyre Newspapers Limited

Order

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| Court: | High Court of Malawi |
| Registry: | Civil Division |
| Bench: | Honourable Justice M.A Tembo |
| Cause Number: | Civil Cause Number 431 of 2021 |
| Date of Judgment: | November 18, 2021 |
| Bar: | appellant unrepresented respondent unrepresented |

1. This is this Court's order on the claimants' without notice application for an order of interlocutory injunction made under Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules 2017.

2. By the instant application the claimants seek an order of injunction granted without notice to the defendant, restraining the defendants by themselves, their servants, agents or otherwise from publishing any story to do with or touching on

the search and seizure that the Anti-Corruption Bureau executed on the claimants as the said matter is still under investigations and in court and may potentially defame the claimants to unestablished levels.

3. The facts as gathered from the sworn statements of counsel for the claimants show that on 5th October, 2021, the Anti-Corruption Bureau officers went to the claimants' offices at Ocean industries with a warrant of access, search and seizure which was obtained before the Chief Resident Magistrate Court at Lilongwe.

4. The warrant was meant to access evidence that had to do with Xelite Stripes Ltd, Xavier and Mallachite FZE Companies, the allegation being that the claimants obtained contracts from the Malawi Police Service and the Malawi Defence Force using these companies by bribing politically exposed persons.

5. The 1st claimant is also being investigated in respect of the same allegations in the United Kingdom where he currently resides.

6. Counsel made an application on behalf of the claimants before the Chief Resident Magistrate Court to have the search and seizure warrant set aside but that application was dismissed and the Court gave the Anti-Corruption Bureau authority to deal with the seized items as part of their investigations in a manner it deems fit.

7. To date the Anti-Corruption Bureau has not finalized its investigations as to whether the alleged offence was indeed committed by the claimants or not. Meanwhile, the claimants have been getting incessant phone calls from journalists employed by the defendants asking for details regarding the contracts in issue and whether indeed the claimants did bribe politically exposed persons to be awarded the contracts in issue.

8. The claimants assert that it is obvious that these journalists wasn't this information in order for them to write stories to be published in their respective papers, being Nation Newspaper, Weekend Nation and Nation for the 1st defendant and Daily Times, Malawi News and Sunday Times for the 2nd defendant.

9. The claimants asserted that the publication of any story touching on the allegations at hand before the Anti-Corruption Bureau has completed its investigations may be prejudicial to these investigations and in fact end up being defamatory of the claimants. And that should the defendants be allowed to proceed with their intention to public about the allegations levelled against the claimants, the claimants stand to lose their personal and business reputation should it turn out that they are innocent of the allegations.

10. It is against this background that the claimants seek the order of injunction and make the usual undertaking to pay damages should it turn out that the

injunction is wrongly sought and granted.

11. The claimants made submissions on the application at hand which this Court has considered in arriving at its decision herein.

12. This Court is aware of the applicable law on interlocutory injunctions as submitted by the claimants. The court will grant an interim injunction where the claimant discloses a good arguable claim to the right he seeks to protect. The court will not try to determine the issues on sworn statements but it will be enough if the claimant shows that there is a serious question to be tried. See Order 10 rule 27 (a) Courts (High Court) (Civil Procedure) Rules 2017.

13. 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.

14. If the claimant has shown that he has a good arguable claim and that there is a serious question for trial this Court, then next has to consider the question whether damages would be an adequate remedy on the claimant's claim. See Order 10 rule 27 (b) Courts (High Court) (Civil Procedure) Rules 2017.

15. 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 the claimant's claim. See *Mkwamba v Indefund Ltd* [1990] 13 MLR 244.

16. Where damages are an inadequate remedy the court will consider whether it is just to grant the injunction. See Order 10 rule 27 (c) Courts (High Court) (Civil Procedure) Rules 2017. This will involve weighing whether the balance of convenience or justice 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.

17. Counsel for the claimants cited the case of *Mulli and others v Kajoloweka and another* civil cause number 262 of 2018 (High Court) (unreported) in support of the claimants' application contending that in that particular case this Court had granted an injunction in circumstances similar to the present one. This Court is not persuaded.

18. In the *Mulli* case, this Court found as a fact that the defendants were accused of making allegations which was clearly not true, as conceded by the defendants, in connection to ongoing court proceedings as against the claimants. That case is therefore distinguishable from the present matter on the facts.

19. In determining the instant application for an injunction, this Court would ordinarily have had to consider whether on the sworn statements the claimants have disclosed a triable issue.

20. If a triable issue was disclosed, the next question would have been whether damages are an adequate remedy on the granting or refusal of the injunction. See Order 10 rule 27 (b) Courts (High Court) (Civil Procedure) Rules 2017.

21. If damages are not an adequate remedy in the circumstances, the last issue would have been whether granting the order of interlocutory injunction herein would be just. See Order 10 rule 27 (c) Courts (High Court) (Civil Procedure) Rules 2017.

22. However, considering that this matter involves a claim for an interlocutory injunction in a case alleging defamation the persuasive position is as stated in *Bonnard v Perryman* [1891] 2 Ch 269 where it was held, by a five-judge Court of Appeal, that an interim injunction will not be granted to restrain a publication of an allegedly defamatory statement if the defendant adduces evidence that he will seek to justify the statement, in other words, prove that it is true, at trial.

23. The learned authors Bean et al, *Injunctions* 11th edition (2012) persuasively state at 58 that this great case of *Bonnard v Perryman* still remains good law to

this day and remains a pillar of the right to free speech in the English jurisdiction from which our law was received.

24. Our Constitution also places a premium on freedom of speech and freedom of the press. As such this Court will not, willy-nilly, gag free speech or freedom of the press on the allegation of defamation.

25. This Court wishes to observe that the learned authors Bean et al persuasively point out that the rule set out in *Bonnard v Perryman* remains unaffected by the principles set out in the leading case on principles governing the granting of injunctions, namely, *American Cyanamid Co. v Ethicon Ltd* [1975] 2 WLR 316 which has been applied in this jurisdiction in the cases cited by the parties in this matter of *Kanyuka v Chiumia* civil cause number 58 of 2003 (High Court) (unreported) and *Tembo v Chakuamba* MSCA Civil Appeal Number 30 of 2001.

26. The principles in *American Cyanamid Co. v Ethicon Ltd* are codified in Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules.

27. This Court wishes to stress that an interim injunction can only be granted in this matter against the alleged potentially defamatory matter if this Court is satisfied that a plea of justification must fail. The persuasive authority for that position is per Stocker L.J. in *Williams v Woolman* unreported January 30, 1990 (CA).

28. In the present case, there is no allegation that the defendants want to make false publications against the claimants. From the facts, all the defendants' journalists have done is to seek to get a comment from the claimants about the ongoing investigation by the Anti Corruption Bureau. The fears of the claimants on these facts do not meet the threshold for granting an injunction that would gag free speech and a free press. The public interest in the reporting by the press on the matters herein outweigh the personal interests of the claimants that they seek to protect by injunction at this stage. At this stage, there is no allegation of falsehood at all as against the defendants to warrant the curtailing of free speech and press freedom. At this point in time, it is impossible to say that the defendants would be unable to prove at trial that what they want to report on in this matter is true or justified. The plea of justification cannot be dispelled at this point in time.

29. Having considered this application, this Court does not think there is a basis for curtailing the public interest to be served by the media reporting on the subject matter of this application.

30. In the foregoing circumstances, the application for injunction made by the claimants without notice to the defendants is accordingly declined.

Made in chambers at Blantyre this 18th November, 2021.