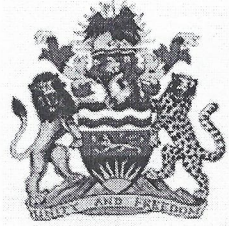


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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NUMBER 180 OF 2020

MULLI BROTHERS LIMITED.....CLAIMANT

VERSUS

RACHEL FATCH (ON HER OWN BEHALF
AND ON BEHALF OF VENDORS ASSOCIATION)
SAMUEL MAWINDO
LAUDON MILLION
MR. CHAMBA
MRX. CHEMBE MISSI
MR. BRIAN
MR. LEMANI
MR. HAROLD
MR. GRECIAN
MR. KHUMBO
MR. CHITANI
PERSONS UNKNOWN

1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT
4th DEFENDANT
5th DEFENDANT
6th DEFENDANT
7th DEFENDANT
8th DEFENDANT
9th DEFENDANT
10th DEFENDANT
11th DEFENDANT
12th DEFENDANT

CORAM: HON. JUSTICE J. ALIDE
J.C. Kalampa, of counsel for the claimant
B. Semphani, of counsel for the defendant
B. Ntonya, Court Clerk

ORDER

This is the court's order on the claimant's application for continuation of an order for an interlocutory injunction that was granted *ex parte* by this Court on 17th June 2020. The order was as follows verbatim:

“Until further Order of the Court, the First defendant by himself, his officers, agents or whomsoever are restrained from doing, attempting to

do or causing or procuring other persons to do or attempting to do the following:

- a. Stopping, hindering, obstructing, deterring, encumbering or otherwise preventing the Claimant from delivering maize to National Food Reserve Agency (NFRA) and any other persons at any deliver points; and or*
- b. Intimidating or otherwise threatening the Claimant and/or its affiliates and business partners.”*

The order further required the claimant to file an *interpartes* application within 14 days from the date thereof. This matter therefore came before this Court for the hearing of the said *interpartes* application. Prior to the hearing of the *interpartes* application, the Claimant obtained a further *ex-parte* order under Order 6, rules 5,6 and 7 of the CPR and the Courts inherent jurisdiction, adding a further 10 first defendants. Further, both parties filed notices to cross examine the deponents of both sworn statements respectively.

During the hearing of the *interpartes* application, the claimant adopted the sworn statement and the supplementary sworn statement by the claimant's Human Resources Director, one Christopher Kamphinda Banda, in support of the application, and the skeleton arguments in support of the application. Likewise, the first defendant adopted her sworn statement in opposition to the application, and the skeleton arguments in opposition to the application. Both deponents of the sworn statements were cross examined by the other party respectively. After hearing of the application, both parties filed submissions in support, and in opposition, to the application as applicable.

The dispute herein emanates from a contract for the supply of maize that the claimant signed with the Ministry of Agriculture and Food Security. The issues leading to the dispute were presented by both the claimant and the first defendant. I have found it necessary to present the same from both the claimant's and first defendant's side because it has implications in this matter.

According to the claimant, in or about January 2020, the Ministry of Agriculture and Food Security placed an advertisement in the local press requesting for bids for the supply and delivery of maize to various parts of the country under the Contingency Emergency Response. The supply and the delivery of the maize was under different lots which were to be supplied to the National Food Reserves Agency's (NFRA) various silos in the country. Following the advertisement, various bidders including the claimant bought tender documents and submitted bids for the same. On 2nd June 2020, the Principal Secretary for the ministry sent

the claimant a Notification to Award a Contract in the sum of K2, 260,000,000.00 (Two Billion Two Hundred and Sixty Million Kwacha) for the supply and delivery of the maize in five lots. Four of the five lots were to be delivered at NFRA Kanengo Silos, in Lilongwe, and one at NFRA Kazomba Silos in Mzimba. On 4th June 2020, the claimant responded to the said letter accepting the award of the contract. A formal contract was then executed between the ministry and the claimant on 3rd June 2020. It was a term of the contract that the maize be delivered within 30 days of the signing of the contract.

The claimant then observed that on or about 15th June 2020, the defendants, with intent to injure the claimant by threats and unlawful means, intimidated and coerced the claimant into breaching the said contract on the allegations that the claimant was involved in unfair competition practices. The threats were perpetrated through the blocking and prevention of the claimant and their agents from delivering the maize at NFRA Silos in Kanengo. The defendants closed the gates at the said premises, and caused demonstrations thereat against the claimant's delivery of the maize. The claimant contends that the conduct of the defendants resulted in the failure by the claimant to deliver the maize as per the contract. It was in this respect that the claimant proceeded to this Court and obtained the *ex parte* injunction.

According to the first defendant, she is the Chairperson of the Vendors' Association, and was one of the produce traders who, in her personal capacity, responded to the advertisement for the supply and delivery of maize indicated above. Accordingly, she proceeded and bought tender documents for the same. However, at the time that she went to submit her bid, she was told by the Principal Secretary at the ministry that the Malawi Government had withdrawn the request to bid. However, she and her colleagues later learnt that the claimant had been awarded five lots of the said contract, and that the other two were awarded to the former President's daughter, and Asian and some Democratic Progressive Party functionaries. Following this, the defendants and the other produce traders went to meet the Principal Secretary at the ministry to enquire about the matter. During the meeting, the defendants were advised that contracts for the supply and delivery of the maize had indeed been awarded to the successful bidders including the claimant. He then advised them to proceed and approach the claimant, if they were still interested in the supply of maize, to explore the possibility of supplying the same to the claimant at the Government of Malawi's minimum price which is K200 per kilogramme.

Following the above discussion some of the maize traders proceeded with their maize to NFRA Kanengo Silos with a view of selling the same to the claimant. However upon reaching NFRA Kanengo Silos there were disagreements. The disagreements arose because the claimant was only willing to buy the maize from

them at a price lower than the set Government's minimum price. The defendants were advised that the claimant was going to buy maize from them at the price of K155.00 per kilogramme, and not the K200.00 per kilogramme as per the Government's minimum price. Tempers flared as a result of this and some commotion ensued.

The first defendant stated that she was not among the group that went to NFRA. However when she was made aware of disagreements, she proceeded to NFRA Kanengo Silos to try and resolve the matter, in her capacity as Chairperson of the Vendors Association. To this effect she engaged management of NFRA who advised them to seek direction from the Principal Secretary at the Ministry of Agriculture and Food Security. Accordingly, the defendants led by the first defendant, and some of the suppliers of the maize proceeded to engage the Principal Secretary on the matter and in the process left their trucks on the queue at the NFRA premises as they were proceeding for the discussions with a hope that the issue was going to be resolved. Unfortunately, the issue was not resolved during the said discussions. Following the deadlock in the discussions, and on the advice of the Principal Secretary the traders went back to NFRA where they removed their trucks from the premises on the very same day. The court was informed that the trucks that were parked at the NFRA premises at Kanengo on the day in question were all trucks belonging to various maize traders who wanted to sell their maize to the claimant who in turn was going to supply to NFRA.

I have deliberately set out all these facts *in extenso* so that the issues in this matter are clearly appreciated.

The court is conversant with the applicable law on interim injunctions as submitted by both counsel. The grant of interlocutory injunction is governed by Order 10 rule 27 of the CPR. It is provided that:

"The Court may, on application, grant an injunction by an interlocutory order where it appears to the court that:

- (a) there is a serious question to be tried;*
- (b) damages may not be an adequate remedy; and*
- (c) it shall be just to do so,*

and the order may be made unconditionally or on such terms or conditions as the Court considers just."

In the famous House of Lords case, *American Cyanamid Co. vs Ethicon Ltd* [1975] A.C. 396 Lord Diplock on page 409 ably summarised the principles governing the grant or the refusal of injunctions as follows:

- (a) The applicant must establish that he has a good arguable claim to the rights he wants to protect;
- (b) The court must not attempt to decide the claim on the affidavits as it is enough if the Applicant has shown that there is serious question to be tried;
- (c) The Court should consider whether or not damages may be an adequate remedy; and
- (d) The Court should consider where the balance of convenience lies.

In support of the application, the claimant contend that the actions of the defendants in the matter called for the extension of the injunction in that there were serious issues to be tried and that damages were not going to be an adequate remedy. It was further submitted that the balance of convenience tilted in favour of the injunction being extended.

There are several points raised by the first defendant opposing the application. One of the points that was raised is that when a party obtains an order for an injunction *ex parte*, he has a duty to make a full and frank disclosure of all material facts at the time they obtained the *ex parte* order. See *The State v Malawi Communications Regulatory Authority ex parte Joy Radio* civil cause number 143 of 2008 (High Court) (unreported). It was argued that the claimant failed to disclose some of the facts which could have made the Court think otherwise at the time it considered the *ex parte* application. The facts that were not disclosed were that the applicant was actually buying maize from some of the defendants at the NFRA Kanengo Silos on the day in question and that the dispute arose because they could not agree on the price. The defendants were demanding that the applicant should buy maize from the defendants based on the prices set by Government of Malawi in accordance with the Agriculture (General Purposes) (Minimum Prices for Agricultural Crops) Regulations 2020 made under the Agriculture (General Purposes Act) (Cap 65:05), while on the other hand the claimant wanted to buy the maize at a lower price than that prescribed by the regulations.

The Court agrees with the respondent that the applicant ought to have disclosed the full facts as submitted. As far as an *ex parte* applications are concerned, all the facts must be laid before the courts and nothing may be suppressed. The Court requires *uberrima fides* on the part of the applicant as stated by Lord Cozens-Hardy, M.R. in *R v Kensington Income Tax Commissioners ex parte Princess Edmond De Polignac* [1917] 1 K.B. 486.

In *Chiume and Others vs Alliance for Democracy (AFORD) and another*, [2005] MLR 88, page 91, Chombo J. stated that:

“Put briefly the test before the Court is: has the failure to disclose material facts known to the plaintiff led to the court 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 circumstances, it the Court’s view that the *ex parte* order for interlocutory injunction would not have been granted if the applicant had fully disclosed all material facts relating to this matter. In this regard, there is no basis that the said order should be extended.

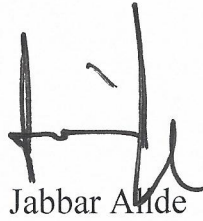
Further the Court feels that it will not be in the interest of justice for it to extend the interlocutory injunction bearing in mind that the conduct of the claimant herein was bent on contravening the Agriculture (General Purposes)(Minimum Prices for Agricultural Crops) Regulations 2020 cited above. In *Holman v Johnson* (1775) 1 COWP 341, Lord Mansfield on page 343 stated as follows:

“The objection, that a contract is immoral or illegal as between plaintiff and first defendant, sounds at all times very ill in the mouth of the first defendant. It is not for, his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the first defendant has advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiffs own stating or otherwise, the cause of action appears to arise ex turpi causa, or a transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the first defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the first defendant were to change sides, and the first defendant was to bring his action against the plaintiff, the latter would then have advantage of it; for where both are equally in fault, potior est conditio defendentis.”

In the circumstances, it is not the Court’s wish to be seen to be perpetrating some illegality in this matter by extending the injunction. In saying this, the Court is alive to the fact that this issue of illegality will be considered at the main trial. However, the Court felt that it was still necessary that this issue be discussed at this point as it informs the discussion on whether or not it is in the interest of justice that the interlocutory injunction should be extended. The Court finds and concludes that it is not in the interest of justice that a Court should ignore an apparent infringement of the law.

In view of the above, the said *ex parte* order for an interlocutory injunction granted by the Court on 17th June 2020 is hereby discharged accordingly. Costs are for the first defendants as they normally follow the event.

Made in chambers at Blantyre this 21st July 2020.



Jabbar Aude

JUDGE

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