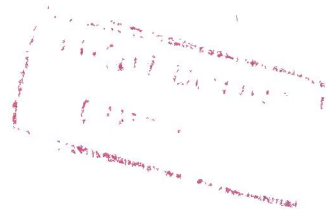


**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 372 OF 2015**



**BETWEEN**

**CLUB MAKOKOLA (1992) LTD ..... PLAINTIFF**

**AND**

**MALAWI REVENUE AUTHORITY ..... DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Msisha, SC and Mr. Banda, of Counsel, for the Plaintiff

Mrs. Likomwa, of Counsel, for the Defendant

Ms. A. Mpasu, Court Clerk

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**ORDER**

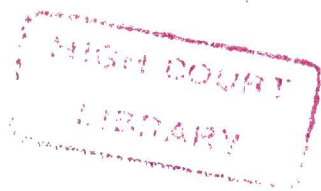
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*Kenyatta Nyirenda, J.*

This is an application brought under Order 29 of the Rules of the Supreme Court whereby the Plaintiff seeks an order restraining the Defendant from attaching or continuing to attach and demanding the payment out of the Plaintiff’s bank accounts with Standard Bank and First Merchant Bank respectively until the Plaintiff has reviewed the Tax Audit results by the Defendant and correct amounts, if any, determined or agreed upon until the final determination of the main action herein. The Defendant opposes the application.

The material facts are set out in the Plaintiffs’ Affidavit in Support of the Application, sworn by Emily Kalinde (hereinafter referred to as the “Plaintiff’s Affidavit”) and the Defendant’s Affidavit in Opposition, sworn by Baziliyo Paundi (hereinafter referred to as the “Defendant’s Affidavit”).

For reasons which appear presently, it is necessary that the Plaintiff’s Affidavit be set out in full:



*"I, Emily Kalinde of S.R. Nicholas Ltd ... make oath and say as follows:*

1. *... I am the Chief Accountant of a group of companies which include the Plaintiff. My immediate superior is the Group Financial Controller Mr Sitha Inpabalan.*
3. *Mr. Inpabalan was taken ill on Wednesday 9/9/2015 and was admitted to Blantyre Adventist Hospital. He was briefly sent home but readmitted in the night of the same day after his conditions suddenly deteriorated. He has been in admission until today (15/9/2015) when he has been discharged but has to be on bed rest.*
4. *The Plaintiff is a limited liability company, which was at all material times carrying on the business of running a lakeshore resort popularly known as Club Makokola...*
5. *The Plaintiff has been carrying on business since 1992 and in accordance with law regularly submits its tax returns covering Vat, Income Tax, etc.*
6. *The Defendant undertook a Tax Audit of the Plaintiff sometime in June 2012. The audit covered the period June 2007 to December 2011 as indicated in the Defendant's letter to the Plaintiff dated 21/6/2012, a copy of which is now produced and shown to me exhibited hereto as "EK 1".*
7. *Though EK1 is dated 21/6/2012, it was received in the office of the Group Financial Controller on 2/6/2015.*
8. *The Group Financial Controller as would normally be the case commenced the process of reviewing the Tax Audit papers and the results. Whilst he was in the process of reviewing EK1 and its worksheets, the defendant issued an Initial Warning in respect of Audit Tax Arrears. That document is dated 19/08/2015 and copy of it is now produced and shown to me exhibited hereto as "EK 2".*
9. *EK 2 was followed by another document headed Strong Warning dated 27/08/2015, a copy of the Strong Warning is now produced and shown to me exhibited hereto marked "EK 3."*
10. *It will be seen that the Tax Audits cover a period which is around 3 to 8 years from 2015. This creates difficulty in the review of old records.*
11. *The Group Financial Controller contacted the writer of EK 2 to request a meeting to discuss aspects of the Tax Audit Report and whether the conclusions and claims being made were correct. He agreed to meet with the writer on Wednesday 9/9/2015. On that day he was taken extremely ill to Blantyre Adventist Hospital where he was admitted as above stated. There is now produced and shown to me exhibited hereto a copy of a two paged Note dated 14/09/2015 confirming his hospitalization and marked "EK 4."*
12. *The Group Financial Controller did request me to contact the Defendant about his illness and to seek a postponement of the scheduled meeting. The personal assistant for the Group Financial Controller telephoned Mr. Crosby Phiri and gave him the message regarding the illness of the Financial and his inability to make the appointed meeting and requesting a postponement.*



10. **THAT** on 17<sup>th</sup> January 2014, the Defendant wrote to the Plaintiff a letter titled, “OPPORTUNITY TO SETTLE YOUR TAX DEBT WITHOUT PAYING PENALTY/INTEREST” which clearly stated the amount of the tax debt and the penalty and invited the Plaintiff to take advantage of Voluntary Compliance Window that allowed payment of taxes without interest a copy of which is now produced and shown to me exhibited hereto as “BP 3”.
11. **THAT** after the letter from MRA dated 17<sup>th</sup> January 2014, the Plaintiff wrote to the Authority on 17<sup>th</sup> February 2014 and a meeting was held on 27<sup>th</sup> February 2014 where the same issues were discussed and the Plaintiff further wrote on 06<sup>th</sup> March 2014 confirming receipt of the audit findings. I attach a copy of the letter dated 6<sup>th</sup> March 2014 from the Plaintiff’s Mr. S. Inpabalan marked and exhibited as “BP 4.”
12. **THAT** it is therefore a misrepresentation of facts for the Plaintiff to claim in paragraph 7 of Emily Kalinde’s affidavit that they received the audit report on 2<sup>nd</sup> June 2015.
13. That it is very clear that the Plaintiffs were aware of the audit findings and demand that was made for payment of the taxes.
14. **THAT** the Plaintiff was cleared advised in the findings to make arrangements to settle the tax liability but has all these years ignored to settle the arrears even when he was offered to do so without the penalties during the Voluntary Compliance Window that the Respondent carried out.
15. **THAT** the defendant then issued a warning to the Plaintiff on 19<sup>th</sup> August 2015 and a Strong warning on 27<sup>th</sup> August 2015 following the Plaintiff’s failure to settle the arrears.
16. **THAT** the warnings that were issued were not pertaining to the audit process but rather to the outstanding taxes that remained unpaid from the time they became due and in terms of the Taxation Act, those taxes are debts to be collected, be it through audit or collection.
17. **THAT** the Plaintiff cannot attempt to re-open the audit process as the law is very clear that he had 30 days from the time the audit findings were known to them within which to raise any issues they had, if any.
18. **THAT** even if we say that they only became aware of the audit in January 2014, it would still mean that the time for the Plaintiff to raise objections has expired long time ago.
19. **THAT** in terms of Section 97 of the Taxation Act as read with Paragraph 1 of the Eight Schedule, the Plaintiff’s time to raise any issues with the audit and assessment has long expired and the Respondent is entitled to enforce the collection of the taxes.
20. **THAT** I have read paragraph 19 of the affidavit of Emily Kalinde and state that it is against the Taxation Act for the Plaintiff to claim that they need 60 days to review

*the audit findings as such a claim has no basis under any taxation laws and as stated, the 30 days allowed by law has long been Respondent.*

21. **THAT** the Respondent, as empowered by law, and in the circumstances was therefore justified to rely on Section 81 of the Taxation Act and appoint agents to collect those taxes that the Plaintiff is still owing the Respondent.
22. **THAT** the Plaintiff, if they still disagree with the defendant, may even request to be allowed to appeal out of time against the assessment but the law clears states that the appeal does not stop the Defendant from collecting the taxes payable.
23. **THAT** in any case if the appeal succeeds, the taxes overpaid are refundable either as cash or credit to the Plaintiff's account.
24. **THAT** it is therefore proper that the Court vacates the order that was granted against the Defendant and it should dismiss with costs the application by the Plaintiff for continued injunction as the same is based on misrepresentations and is misconceived."

The position at law is that it is always open to an opposing party, where an interlocutory injunction was granted *ex parte*, to apply to the court for its discharge on the ground that there had not been frank and full disclosure of all material matters of both fact and law: **The State v. Malawi Communications Regulatory Authority, ex-parte Capital Radio Malawi Limited and Joy Radio Limited, HC/PR Judicial Review Cause No. 29 of 2011, unreported.**

It has been held, in the case of **Brink's Mat Ltd v. Elcombe and Others**[1988] 1 WLR 1350 at 1356F, that the duty of the applicant to make a full and frank disclosure of material facts entails the following:

1. material facts are those which it is material for the judge to know in dealing with the application as made
2. materiality is to be decided by the court and not by assessment of the applicant or his legal advisors
3. the applicant must make proper inquiries before making the application
4. the duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such enquiries
5. the extent of the enquiries which will be held to be proper and therefore necessary must depend on all the circumstances of the case

6. if material non-disclosure is established the court will be astute to ensure deprivation of an ex-parte injunction or any relief obtained thereby
7. whether the fact complained of is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depend on the importance of the fact to the issues and that non-disclosure was innocent is an important consideration but not decisive

From the foregoing, I understand the law to be perfectly well settled. A person who makes an *ex-parte* application to the court, that is to say, in the absence of the person who will be affected by that which the court is asked to do, is under an obligation to the court to make the fullest and possible disclosure of all material facts within his or her knowledge and that if he or she does not make that fullest possible disclosure then he or she cannot obtain any advantage from the proceedings and he or she will be deprived of any advantage he or she may have already obtained by means of the order which has thus been wrongly obtained by him or her. Unless *uberrima fides* can be established, the Court ought not go into the merits of the case, but simply say "*We will not listen to your application because of what you have done*": **Vitsitsi v. Vitsitsi [2002-2003] MLR 419 (SCA)** and **Koreia v. Designated School Board [1995] 2 MLR 649(HC)**

In the instant case, it is clear from a perusal of the Plaintiff's Affidavit, as seen in light of the Defendant's Affidavit, that the Plaintiff suppressed material facts. By the statement in the Plaintiff's Affidavit that "*Though EK1 is dated 21/6/2012, it was received in the office of the Group Financial Controller on 2/6/2015*" and by the Plaintiff not disclosing the various correspondences and meetings that the Plaintiff and the Defendant had in connection with the audit findings between 13<sup>th</sup> June 2012 and 2<sup>nd</sup> June 2015, the Court was given the impression that the Plaintiff was being ambushed by the Defendant in this matter. This was quite plainly not true. As was rightly observed by Potani J. in **Gloria Mchungula Amani v. Stanbic Bank Limited and Another, HC/PR Civil Cause No. 558 of 2007(unreported)** at p.4:

*"It becomes imperative to bear in mind that material facts are facts which if known to the court would have led the court to arrive at a conclusion or order different from the one it arrived at. Therefore, for the conclusion to be reached that the plaintiff suppressed or misrepresented facts, the alleged suppressed facts must be facts which if it were laid before the court the ex-parte injunction could not have been granted".*

In the present case, it is significant to note that the fact that the Plaintiff failed to make frank and full disclosure of all material matters is not denied by the Plaintiff: the allegations of fact in the Defendant's Affidavit pertaining to suppression of

material facts went unchallenged. In light of the foregoing, the Plaintiff's application for an interlocutory injunction is dismissed. I, therefore, discharge the interlocutory injunction that was granted herein.

That really disposes of the application before me but there is also a substantive ground why the Court has to exercise its discretion against ordering the continued application of the injunction that was granted herein. It is trite that in any application for an interlocutory injunction, the first issue before the court has to be "*Is there a serious issue to be tried?*". Indeed this must be so because it would be quite wrong that a plaintiff should obtain relief on the basis of a claim which was groundless. It is, therefore, important that a party seeking an interlocutory injunction has to show that there is a serious case to be tried: **R v. Secretary of State for Transport, Ex-parte Factortame Ltd & Others (No.2)**. If the answer to the question whether there is a serious issue to be tried is "no", the application fails in *limine* (see **C.B.S. Songs v. Amstrad [1988] AC 1013**).

The serious issue to be tried has to be grounded on the evidence before the court. I have read and re-read the Plaintiff's Affidavit and what comes out is that the Plaintiff is begging to be given more/adequate time to complete the review of the Tax Audit Report. By the Plaintiff's own estimation, it required approximately 60 days for it to verify all the records and analyse them against the Tax Audit Report. I do not see any merit in the plea by the Plaintiff, particularly when regard is had to the fact that the Plaintiff had more than three years within which it could have reviewed the Tax Audit Report. In any case, since obtaining the injunction herein, the Plaintiff has had more than five months within which it could have completed this exercise. In the premises, the Plaintiff has, so to speak, failed to cross the threshold that would have necessitated the Court to proceed examine the principles of adequacy of damages and balance of convenience respectively.

Finally, my attention has been drawn to a matter which deserves commenting upon. It is trite that the right to interlocutory relief is not a cause of action in itself. In the apt observation by Lord Diplock in **The Siskina (1979) A.C. 210** at 256:

*"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action"* – [Emphasis by underlining supplied]

In **Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] A.C. 334**, Lord Mustill developed the theme by stating, at 360-362, as follows:

*“the doctrine of The Siskina, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action” - [Emphasis by underlining supplied]*

In the present case, the Writ of Summons, including the statement of claim, was issued on 16<sup>th</sup> September 2015. Having obtained the injunction on the same day, the Plaintiff has paid a blind eye to the substantive case. Almost six months have now elapsed without the Plaintiff taking any step to prosecute the suit herein. In my view, considering all circumstances of the present matter, the delay is intolerable. *“They have lasted so long as to turn justice sour”*, to use the words of Lord Denning M.R. in **Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229, 243**. Clearly, the approach of the Plaintiff constitutes contumacious conduct and abuse of court process of the highest order.

Regarding costs, these normally follow the event and since the Defendant has succeeded, I order that the costs of these proceedings be borne by the Plaintiff. I so order.

Pronounced in Chambers this 7<sup>th</sup> day of March 2016 at Blantyre in the Republic of Malawi.

**Kenyatta Nyirenda**  
**JUDGE**