



JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Misc Civil Cause No. 41 of 2013

BETWEEN

JOUBERTINA FURNISHERS (PTY) LIMITED

t/a CARNIVAL FURNITURES

PLAINTIFF

AND

LILONGWE CITY MALL

DEFENDANT

CORAM:

THE HONOURABLE JUSTICE D. MWAUNGULU

Gondwe, Of Counsel, For the Plaintiff

Ng'omba, Of Counsel, For the defendant.

Mwanyongo , Official Court Interpreter

Mwaungulu, J

ORDER

In this case, the plaintiff, Joubertina Furnishers, t/a Carnival Furnishers, seek an interlocutory injunction against the defendant, Lilongwe City Mall. The plaintiff and the defendant are, respectively, tenant and landlord. The landlord

has distrained for rent. The plaintiff commenced an action by originating summons. This application aids the pending action. For urgency, I directed that, instead of determining the matter *ex parte*, the parties make an opposed *ex parte* application. If there is an appeal, parties may, instead of appealing to the Supreme Court, bring the matter before me for reconsideration.

Requiring a party to perform some action, a positive injunction, before rights are determined, is unfair to a successful party performing the action, even where there is monetary compensation, especially when money cannot adequately compensated the damage. Equally, restraining a party from performing some action, a negative injunction, while a court determines a matter, is frustrating to a successful party. Such restraint or positive action vindicates justice and fairness to a successful applicant. In determining whether to grant interim reliefs, therefore, courts try to do the fair, just and convenient. Consequently, the principles and guidelines in *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 39, save in the exceptional circumstances in which they may not apply, should be applied fervently to avoid injustice and inconvenience from interim reliefs.

Is there a serious matter to be tried?

The preliminary is to determine whether there is a serious issue to be tried. The court examines the originating process and the supporting affidavit mindful that at this stage the court is not on trial and relies on untested affidavit evidence. In the originating summons the plaintiff seeks declarations that (a) the distress on land under the Registered Land Act was null and void; (b) the distress (Amendment) Act 1888 is inconsistent with the Registered Land Act and cannot apply land under the Registered Land Act; (c) the distress was irregular because in the lessor can only exercise the right of the forfeiture after serving written notice and commencing court action; (d) that the certificate of appointment as bailiff for purposes of Distress did not comply with the Law of Distress Act 1888; (e) the distress was irregular because it included distress for taxes and rates. The plaintiff also seeks interlocutory injunction restraining the defendant from seizing and

impounding the plaintiff's chattels by distress until the court determines the action.

The supporting affidavit is very sparse on the facts. It shows that the parties were landlord and tenant and that, to enforce payment, the landlord distrained for rent. There is nothing in the affidavit that suggests that the landlord forfeited the lease. The plaintiff exhibits the landlord's certificate to the Sherriff of Malawi as a bailiff to distrain the tenant's goods. The affidavit also raises matters of law that are not evidence.

Neither the originating summons nor the affidavit raises serious factual or legal issues for granting interim relief. On facts, there is no dispute that all the landlord did was distraining for rent. The document the Sheriff of Malawi acted on reads:

"TAKE NOTICE that the Sherriff of Malawi has been appointed as bailiff for purpose of distraining for arrears of rent on behalf of Lilongwe City Mall Limited, at Shop No. GF 15 at Lilongwe City Mall, in Lilongwe, as occupied by Jourbetina Furnishers (Pty) Limited t/a Carnival Furnishers."

Besides legal questions, discussed later, there is no dispute on that the landlord issued it and that it was in this form. This matter concerns the landlord distressing for rent. The affidavit does not suggest rent was paid before or after the document or the distress. The facts do not raise serious issues. The ensuing discourse is long because, without local legislation, practice and procedure, I have recourse to statutes of general application in England and Wales before 1902.

First, the plaintiff's Counsel argues that the common law, the distress procedure and the Landlord and Tenant Acts and Distress Acts before 1902 do not apply to land under the Registered Land Act. I read and reread section 3 of the Registered Land Act and, in doing, so, I found no reason for Counsel's conclusion. Marginal notes to statutory provisions are not part of the provision. They, however, aid interpretation. The marginal notes to section 3 are "Reconciliation with other laws." Consequently, other written laws, practice and procedures' are 'reconciled' with the Act if they are not 'inconsistent with this Act:'

“Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act:

“Provided that, except where a contrary intention appears, nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law or as overriding any provision of any other written law requiring the consent or approval of any authority to any dealing.”

The Malawi Supreme Court of Appeal in *Gumair Garments Manufacturing (EPZ) Ltd in Liquidation and Crown Fashions Ltd v Ismail Properties Ltd*, MSCA Civil Appeal No. 29 of 2006, unreported said:

“After considering oral and written argument of counsel for the Appellants and respondents our clear position is that the English law of Distress Amendment Act 1888 is an Act of general Application and that in the absence of local statute governing distress for rent in Malawi, it applies in this country. ”

Secondly the plaintiff's Counsel argues that, if the Act applies, the Sheriff of Malawi lacks the certificate under section 7 of the Law of Distress Amendment Act 1888:

“...No person shall act as a Bailiff to levy any distress for rent unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a (judge assigned to a county court distress or acting as a judge so assigned) as such certificate may general or apply to a particular distress or distress, and may be granted at any time after the passing of this Act in such manners as may be prescribed by rules under this Act”.

Section 7 of the Law of Distress Amendment Act 1888 and other statutes analyzed later expanded or improved the landlord's common law right to distrain for rent by enabling the landlord to use bailiffs or sheriffs by. At common law, only the landlord, if the landlord could do it peacefully, could distrain for rent.

Counsel, relying on the statement by the Supreme Court of Appeal below in *Gumair Garments Manufacturing (EPZ) Ltd in Liquidation and Crown Fashions Ltd v Ismail Properties Ltd*, argues that the law applicable to distress of rent in Malawi is the Law of Distress Amendment act 1888:

“We therefore agree with learned Counsel for the Appellants that where distress for rent is concerned the relevant law is the 1888 English statute of law of Distress Amendment Act”.

This is not a very accurate statement of the law on distress in Malawi. As the cited Act itself shows, Law of Distress Amendment Act, it is only an amending statute. It is not a repealing Act. It is an amendment or addition to existing statutes on distress for rent before 1902. The following Acts on the law of distress on rent apply in Malawi: the Statute of Marlborough 1267; Statute of Exchequer; Distress for Rent Act 1689; Distress for Rent Act 1737; Sale of Farming Stock Act 1816; Deserted Tenements Act 1817; Distress (Costs) Act 1817; Distress (Costs) Act 1827; Pound Breach Act 1843; Law of Distress Amendment Act 1888; Law of Distress Amendment Act 1895. These statutes, for purposes of this case, are a compendium of what can be distressed for, who, apart from the landlord, can be used to distrain for rent and where you can distrain for rent. This statutory body actually covers many aspects of distress for rent law that are not covered by the Law of Distress Amendment Act 1888.

On what can be distressed for, Counsel for the plaintiff, relying on the *Zambian case of Distress Amendment Act 1888 and in the matter of an Application for General Certificate as a Certified Bailiff and in the matter of Patrick Kamaya, (1987) Z.R 7*, by the High Court of Zambia, submits that the distress here, in so far as it includes rates and taxes, is wrong. The *Zambian decision* is only persuasive in my Court and, for reasons appearing shortly, cannot be followed in this Court.

I have not read the report. It is unnecessary on the view I take of Malawi's legal position. It is possible that statutes of general application in England and Wales applied to Zambia as to us. In Malawi, statutes of general application before 1902 are, unless repealed or replaced, part of our received law. Concerning distress for rates and taxes, without local statutes, rates and taxes can

be distrained under the Distress (Costs) Act 1827. Here, however, distress for rates and taxes is a non-issue. The supporting affidavit does not suggest that the defendant distrained for rates and taxes. The 'certificate of appointment as a bailiff for purposes of distress' the plaintiff exhibited mentions that the Sheriff of Malawi was to distrain for rent, nothing more.

Concerning who, besides the landlord, can distrain for rent, confusion, very insignificant, arises from the certificate. There is a synergy between some functions the sheriff and bailiff perform. The two are not one and the same person. In fact, the sheriff appoints bailiffs to perform almost all sheriff functions. The reverse is not true. This distinction is very important. If a bailiff's judge's certificate is necessary generally for distress for rent, the Sheriff of Malawi cannot generally be used to distress for rent unless a judge periodically issues to the sheriff a bailiff certificate under the Law of Distress Amendment Act 1895. That is unnecessary. The Sheriff of Malawi by virtue of appointment performs these functions.

Can the Sheriff of Malawi distress for rent? Does he perform the functions as bailiff under the Law of Distress Act Amendment Act and, if so does he need periodic bailiff judge's certificate? The main question must be answered in the affirmative. The sheriff's office can be used to distress for rent because of section 1 of the Distress Act 1689. The statute does not give the sheriff this power because the sheriff is a bailiff, but because the office is of a sheriff. Consequently, the other questions must be answered in the negative. The Sheriff of Malawi does not distress for rent because the sheriff is a bailiff. Neither does the Sheriff of Malawi distrain for rent because of the Sheriff Act. In the Act the sheriff's functions relate to 'process' which, under section 2 of the Act, means 'a formal written authority issued by a court for the enforcement of a judgment and includes a warrant of possession and any other written warrant of arrest, commitment or imprisonment.' The landlord distraining for rent does not need a court's decision. The sheriff distrains for rent because of the distress for rent legislation. The Sheriff of Malawi, distraining for rent by virtue of his office, not as bailiff, does not require the certificate under section 7 of the Law of Distress Amendment Act 1888. The office of Sheriff of Malawi is a permanent and

continuous office and by virtue of section 3 (3) of the Sheriffs Act occupied by an officer of the High Court who does not need Courts certification. In fact, under the Law of Distress Amendment Act 1895, the Registrar, like the judge, may issue bailiff certificates.

The 'certificate of appointment as a bailiff for purposes of distress' by the landlord's Counsel should be understood under these considerations. It is unnecessary when the Sheriff of Malawi distrains for rent that the notification indicates that the sheriff does so as bailiff. The sheriff is not a bailiff. In fact, in law, it is not necessary, though usual, that the landlord should give a sheriff or bailiff a written authority to levy (Halsbury's Statutes, 4th ed., volume 13, p. 581, footnotes). The certificate could be superfluous.

In resolving the legal issues, I was mindful of what was said by this Court in *Mwapasa and Another v Stanbic Bank Limited and another* Misc Civ. Cause No. 110 of 2003, unreported:

"A court must at this stage avoid resolving complex legal questions appreciated through factual and legal issues only trial can afford and unravel. On the other hand, where the legal issue is clear and simple, the court should resolve it and refuse or allow the injunction."

The detail in arguing the legal points was necessary. Ultimately, in substance, there are no serious legal issues raised on the sparse and agreed facts to warrant a trial on the basis of which I should accord the plaintiff the interim relief sought.

Are damages an adequate remedy?

If I erred in finding that there is no serious question to be tried, on the threshold whether damages are an adequate remedy, the situation of landlord and tenant where the issue is that the tenant has not paid and is failing to pay rent, the *American Cyanamid Co v Ethicon Ltd* principle and guidelines may not apply or applied with difficulty, and sometimes be inappropriate (*R v Secretary of State for Health ex parte Generics (UK) Ltd* (1997) *The Times*, February 25, C.A.). A tenant who does not pay his rent suffers no damage from the landlord's exercise of the right to distrain for rent. The landlord does. The tenant would suffer loss is

if the distress is wrongful. The only action, however, would be in trespass and, generally, damages would be an adequate remedy. The only wrong, according to the plaintiff, is that the landlord employed a non certified bailiff. The Sheriff of Malawi needs no such certification. In any case, damages would be an adequate remedy for the plaintiff. In my judgment, if the injunction is refused, the plaintiff would be adequately compensated in damages at the trial so much so that the only question is whether the landlord would be able to pay. If the landlord can compensate the plaintiff in damages, the court must refuse the injunction, however strong the plaintiff's case (per Browne L.J. in *Fellows & Son v Fisher* [1976] 1 Q.B. 122, 127; *Kasema v National Bank of Malawi* Civil Cause No. 2299 of 2001, unreported). Counsel for the defendant, who appeared on an opposed ex parte application, could not file an affidavit, but his guidance and assistance, is that the landlord should be able to pay the plaintiff the damages. I cannot agree more, the tenant has unpaid rent which can set off against a trespass action.

If I erred, I consider whether, if I grant the injunction, the defendant would be compensated in damages. Most certainly, the defendant would be adequately compensated in damages. The defendant's losses are monthly rentals. They are calculable and ascertainable. So the only question must be whether the plaintiff would be able to pay them. So far the tenant paid nothing. The affidavit does not suggest that the plaintiff paid the arrears or will pay them in the immediate future.

Balance of Justice and Convenience

Preserving the status quo ante

Even if I erred, the balance of justice and convenience is for refusing the injunction. The paramount aim of interim injunction is preserve *status quo* (*Siskina (Cargo Owners) v Distos Compania Naviera SA, The Siskina* [1977] A.C. 210 and [1977]3 All E.R.803. at 256 and 824, per Lord Diplock. There are bound to be situations where, like here, preserving the *status quo*, might be unjust and inconvenient. The case of *Thompson v Park* [1944] 1 K.B. 408 sends you reeling with laughter when reading what the Judges said and how they said it but, even in

this jest, Goddard L.J., makes a serious point: trying to preserve a status quo might be unjust. At page 410, he says:

“It is a strange argument to address to a court of law that we ought to help the defendant who has trespassed and got himself into these premises in the way in which he has done and to say that that would be preserving the status quo and a good reason for not granting an injunction”.

The primary function of interim injunction is to retain status quo but only and only if doing so will not result in injustice, unfairness or inconvenience. In this case, retaining the status quo will be unfair to the landlord. It means that the tenant benefits from both the premises and failure or neglect to pay rent. Where does that leave the landlord?

Relative strength of the party's cases

In ascertaining balance of justice or convenience the court may have to consider the relative strengths of a party's case. Generally, this must be done when in a case there is nothing to separate between the parties on the inconvenience and injustice they might suffer, mindful that the comparison is based on affidavit evidence and where there is a clearly a case made out showing a very likely result for one case as against the other. It is concomitant with justice and convenience that where a judge, on clear and admitted facts, concludes one party's case is much stronger than the other to direct the interim relief accordingly (*Series 5 Software v Clarke* [1996] 1 All E.R. 853; *Series 5 Software v Clarke* [1996] 1 All E.R. 853; *Fellows & Sons v Fisher*, *ibid.* As earlier demonstrated, the landlord's case is much stronger than the plaintiff's case. The tenant has not just paid rent and the landlord, to recover rent, has distrained. If there is an error with the document the landlord's lawyers sent, as we have seen, it was unnecessary and the Sheriff of Malawi could have acted without it.

Denying or granting the injunction may finally dispose of the matter

In rejecting the interim injunction, I am mindful that the action may finally dispose of the matter. For indeed, my rejection of the interim relief the landlord has to sell the distressed goods to recover the arrears. The tenant, therefore,

continuation with the action would be unnecessary. That, however, can also be said if I allowed the injunction. The tenant would effectively continue to use the premises without paying the arrears of rent, unless of course, trial of the action is expedited. Where, therefore, an injunction is likely to dispose of the matter, the words of Lord Diplock in *N.W.L. Ltd v Woods* [1979] 1294, 1307, are instructive:

“Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeed in establishing his right to injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other”.

Exception to *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396

Unless something really exceptional exists, the court would find it extremely difficult to order an interim injunction on a landlord who, to enforce payment, distrains for rent. The common law gives the landlord the right, without court action, to distrain for rent when the tenant defaults. Once the distress is proper, the tenant has no cause of action against the landlord to sustain an application for interlocutory relief. Granting interlocutory relief in such a case is impracticable. It is possible to argue that in such a case, we are applying the principles in *American Cyanamid Co v Ethicon Ltd* (*Cambridge Nutrition Limited v. British Broadcasting Corporation* [1990] 3 All E.R. 523 at 539 CA, per Ralph Gibson L.J., and *Lawrence David Limited v Ashton sub nomine Ashton v Lawrence David Ltd* [1991] All E.R. 385, 396). May be this is just an exception to *American Cyanamid Co v Ethicon Ltd* (see *Cayne v. Global Natural Resources Plc.* (1984) 1 All E.R. 225 at 234 and 238, CA, per Kerr and May L.JJ and *Cambridge Nutrition Limited V. British Broadcasting Corporation* (1990). At the end of the day, courts are supposed to do that which is just and fair, whether we are in the confines of the ***American Cyanamid Co v Ethicon Ltd*** or we are in the usual court business,

doing justice in a particular case. I think that in this case, granting the injunction so that the landlord does not recover rentals from a tenant goes to the core of the right to distress which this court, after its existence cannot abridge, except by legislation. There has been a lot of legislation to protect the tenant in a dwelling house, for good reasons. As between commercial entities, such intrusion may be unnecessary. There might be no reason why one commercial entity should bear the loss of another commercial entity. It probably makes sense, but very little business sense.

I dismiss the application for an interim injunction. Costs will be in the cause.

Made this 3rd Day of May 2013

D.F. Mwaungulu

JUDGE