



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 232 OF 1993



BETWEEN:

K A M PHIRI..... PLAINTIFF

- and -

B J HADEBE..... DEFENDANT

CORAM: MTEGHA, J.

Kasambara, of Counsel, for the Plaintiff
Chikopa, of Counsel, for the Defendant
Nkhoma, Official Interpreter

R U L I N G

This is an application by the plaintiff, K A M Phiri, for a mandatory injunction that the defendant, B J Hadebe, do deliver up a motor vehicle, Registration Number BC 786, a Mercedes Benz, belonging to him.

From what can be gathered from the affidavits deposed to by the parties, the facts leading up to this application appear to be these: The defendant is a South African national based in Swaziland where he is a majority shareholder in a company known as Yakha Civil Engineers (Proprietary) Limited (hereinafter referred to as the "company"). While in Swaziland, the Union Bank of Swaziland leased a motor vehicle, a MBW, Registration Number ND 412229 (hereinafter referred to as the "BMW"), to the company and as at 22nd January 1993, there was a balance of 202768.44 Swazi Elangeni. In search of business, the defendant sent his Manager, by the name of Beki Kubheka, to come here. Since his Manager had never been here, assistance was sought from Vincent Vusi Dhlamini, who drove the BMW to Malawi. Indeed, documents have been exhibited to show that the BMW was leased to the defendant's company and it was cleared by the Police to be driven to Malawi and that a temporary permit was issued to allow the importation of the vehicle into Malawi and to stay in Malawi from 10th to 31st December 1992. At this stage, the BMW arrived in Malawi with proper documentation.

I will now turn to the plaintiff's affidavit in support of the application for a mandatory interlocutory injunction. The plaintiff says that he is the owner of a motor vehicle, Mercedes Benz, Registration Number BC 786 (hereinafter referred to as the "Benz"). It was registered in his name on 5th January 1993. According to the



affidavit, on 11th January 1993, he permitted Vincent Vuso Dhlamini, a trading partner of the defendant, to drive the Benz to Swaziland and back. He gave Dhlamini written permission together with the registration book so that Dhlamini should not have problems on the way. To his surprise, on 12th February, the defendant brought his car, but refused to hand it over to him until he successfully helped him to recover the defendant's car, the BMW that Dhlamini had sold to Messrs Jakhura and Nathvani without his, the defendant's, knowledge. The defendant handed the matter to his lawyers.

It appears the matter was reported to the Fiscal Police and on 19th February 1993, a meeting was held at the offices of the Fiscal Police where the parties and Messrs Jakhura and Nathvani were present. It appears the Police declined to intervene.

It is the plaintiff's contention that he is afraid that the Benz might be damaged, especially that it is now in the hands of the defendant's legal practitioners who at one time abandoned it in the middle of Victoria Avenue.

However, there is a different version of the events as to what exactly happened to the BMW, and indeed, the Benz. According to the defendant's affidavit, the plaintiff, using a fictitious bill of entry from Swaziland, cleared the BMW with the Fiscal Police in his name. Indeed, Exhibits 7 and 8 support this contention. The affidavit then goes on to say that the plaintiff sold the vehicle to Sporty Car Sales at K300,000.00 and as part-payment, the plaintiff got K100,000.00 and the Benz which is in dispute. This is confirmed by the plaintiff's statement which he gave to the Police, in which he said Dhlamini bought the car as payment for goods (curios) which the plaintiff had sold to Dhlamini; and he cleared the vehicle with the Police and thereafter sold it to Sporty Car Sales, who, in addition to the money, gave him the Benz which he is now claiming to have it returned to him.

It is clear from the affidavits that according to the documents which the plaintiff had relating to the BMW and which he presented to Police for clearance, he was not the owner of the BMW; he also knew clearly that the BMW did not belong to Dhlamini; he also knew that the BMW was in the country on a temporary importation permit; he should not have cleared it. He managed to clear the vehicle because he made false declarations.

According to the Court record, after the plaintiff brought this action against the defendant, he applied to the Court for a Mareva injunction. This application, which was made ex-parte, was rejected by the Court on 1st March 1993. Soon thereafter, the plaintiff applied, again, ex-parte, for an interlocutory injunction to restrain the defendant, his

agents or whosoever from driving, using or permitting the use or removal of the vehicle. On 9th March 1993, I granted this interlocutory injunction. I ordered, in effect, that this injunction should remain in force until the determination of the case. As of now, this injunction has not been vacated. Now, there is this application for a mandatory interlocutory injunction that the defendant should deliver up the Benz to the plaintiff, and that an injunction be granted restraining the defendant from using, disposing the Benz until the trial of this action or until further order.

It will be noted that that part of the prayer which I have just underlined was already granted by me on 9th March 1993, and that that interlocutory injunction, has, as I have pointed out, not been vacated.

It has been submitted by Mr Kasambara that the Benz is the property of the plaintiff. As such, the defendant has no right to hold on to it pending the recovery of the BMW from Sporty Car Sales. Further, he has argued, the BMW was sold to the plaintiff who, in turn, sold it to Sporty Car Sales. He has submitted that the remedy he is seeking is an exceptional one, as can be seen in the cases of **Bonnav -v- Great Western Railway (1883) 24 Ch.1** and **Collison -v- Warren (1901) 1 Ch.812**. He submits that this case is special, in that, firstly, the defendant has not shown to this Court the basis on which he is holding on to the Benz; he is not the owner of the Benz as can be seen from the registration book. Section 167(2) of the Road Traffic Act deems the plaintiff to be the owner.

Secondly, he has submitted that the defendant is not a beneficiary of the BMW, but an agent of the owner, Yakha Civil Engineers Ltd. He cannot, therefore, be the owner of the BMW. He further submitted that the defendant's remedy of lien and the remedy of tracing are not available to him; and his only remedy is by an action for the return of the car against Jakhura, Nathvani, Attorney General and Sporty Car Sales. He has commenced this action. It is Mr Kasambala's contention that if the defendant will be allowed to keep the Benz, the Court will unjustly enrich the defendant. This is a nice submission.

On the other hand, Mr Kasambara has submitted that what the plaintiff is seeking is an equitable remedy. As such, he who comes to equity must come with clean hands. He states that the BMW was sold by the plaintiff; the Benz is part-payment of the sale. The BMW was fraudulently cleared by the plaintiff. He knew that it did not belong to Dhlamini, and all his actions were calculated to defraud. The Benz is part of ill-gotten proceeds; he cannot, therefore, be entitled to it despite the fact that it is registered in his name, until the matter is determined by the Court.

It is quite clear that the plaintiff obtained and sold the BMW fraudulently. No matter how he can claim to be the owner of the Benz, the fact remains that the Benz was part-payment of the BMW which the plaintiff cleared, paid Customs Duty and sold fraudulently.

The Court has jurisdiction to grant a mandatory injunction. As it has been pointed out earlier on, this is a very exceptional relief: Cohen, LJ, said in *Canadian Pacific Railway -v- Gaud* (1949) 2 KB 239 at p249:

"Mr Collard's fourth point raises the question whether interlocutory relief should be granted. I entirely agree with what he said...that the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant; but it can be granted."

It is a well-established principle that the Court also has jurisdiction to grant a mandatory *quia timet* injunction to avoid damage, which is probable, to the plaintiff's property. However, an interlocutory mandatory injunction will not be granted on affidavit evidence where the issues of facts are heavily contested. Furthermore, the remedy is discretionary and, therefore, the general rules of equity apply. The question before me is whether this is a proper case in which I can grant the interlocutory mandatory injunction. The answer, in my view, is no. Here are my reasons for saying so.

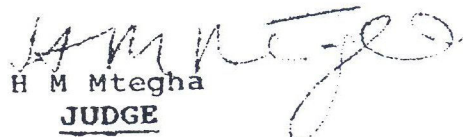
It is quite clear, as I have said earlier on, that the plaintiff fraudulently obtained a number of documents to facilitate the clearance of the BMW. He knew that the vehicle did not belong to him or to Dhlamini. He, and not the defendant, sold the BMW and obtained as additional payment of the sale, the Benz. The Benz is, therefore, part of the proceeds of the BMW. He now seeks the return of the Benz. I think this is an abuse of the process of the Court. It is, so to say, using the Court as an engine of fraud. He who comes to equity must come with clean hands. Again, the registration book is, *prima facie*, evidence that the Benz belongs to the plaintiff. It can be disproved. Possession of the blue book is not conclusive evidence of ownership.

Furthermore, the issues raised by affidavit evidence are heavily contested by either party; so much so that it will not be proper to base my findings on such evidence. Evidence *viva voce* with the appropriate.

Finally, the injunction which I granted on 9th March 1993 has not been vacated; the plaintiff has not applied to have it vacated. It is still in force. I think that order is sufficient to protect both the plaintiff and the defendant until this matter is determined in the actions so commenced.

I, therefore, decline to grant the interlocutory mandatory injunction. I dismiss the application with costs.

MADE in Chambers this 27th day of January 1994, at Blantyre.


H M Mtegha
JUDGE