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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO 2416 OF 2000

BETWEEN:

BERN TAULO (MALE) t/a MAKWASA PVT CLINIC

PLAINTIFF

AND

E. MAULANA (MALE)

DEFENDANT

CORAM: R.R. MZIKAMANDA, J.

Mr. Chingande, of Counsel for the Plaintiff
Mr. C. Mhango, of Counsel for the Defendant
S.P. Moyo, Official Interpreter

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ORDER

This is an application for mandatory injunction. The summon for mandatory injunction were taken out on 20th July, 2000 returnable on 4th August, 2000. The application is opposed.

The application is supported by an affidavit sworn by Bern Taulo and it is in 32 paragraphs. Briefly the affidavit shows that the plaintiff had been offered the sale of a Toyota Hilux pickup vehicle registration number NE 561 by the defendant at the price of K350,000. The plaintiff is a Clinical Officer running a private medical clinic and the defendant is a garage owner. The defendant had been treated at the plaintiff's clinic. The defendant left the vehicle with the plaintiff for him to use it and make up his mind whether to buy it or not. Subsequently the

plaintiff agreed to buy the vehicle and that payment of the purchase price would be by three instalments of K120,000 on 10th April, 2000, K120,000 on May, 2000 and K110,000 on 10th June, 2000. On 10th April, 2000 the plaintiff was unable to pay the money and the defendant agreed to a further split of the first instalment. The defendant collected and signed for K13,000 on 11th April, 2000, K40,000 on 14th April, 2000 and K30,000 on 27th April, 2000. On 5th May, 2000 he collected and signed for K20,000. So too on 8th May, 2000. By 10th June, 2000 there was a balance of K115,000 of the purchase price. On 11th June, 2000 the defendant collected and signed for K10,000 and on 12th June, 2000 he collected and signed for K4,000. On 16th June, 2000 the defendant collected and signed for K7,000 while on 19th June, 2000 he collected and signed for K20,000. The balance was K73,000. It was agreed that the balance would be paid on 29th June, 2000. This meant that K277,000 had been paid in 15 instalments. On 28th June, 2000 the plaintiff approached the defendant to plead for a further extension of the time within which to pay the balance. The defendant refused saying he had to settle a bank loan which would otherwise accumulate interest. The defendant also refused an offer by plaintiff to settle the interest that would necessarily be incurred as a consequence of his failing to settle the balance. Instead the defendant snatched the vehicle giving the plaintiff up to the 30th June, 2000 to settle the K73,000. On 30th June, 2000 he offered the defendant K28,000 but the defendant refused to accept it. On 3rd July, 2000 he offered K60,000 but the defendant refused to accept this. On 7th July, 2000 the defendant informed the plaintiff that he was never going to release the vehicle to plaintiff unless the plaintiff settled the defendant's bank interest of K160,000. The prayer of the plaintiff is for a mandatory injunction ordering the defendant by himself, his servants or agents or howsoever otherwise to forthwith deliver up to the plaintiff in good and running order the motor vehicle Toyota Hilux registration mark NE 561 and a further order that upon such delivery of the motor vehicle the defendant do accept from the plaintiff payment of the sum of K73,000.

The defence filed an affidavit in opposition. It is sworn by, Ernest Maulana, the defendant. It shows that he agreed with the plaintiff that he would sell him his motor vehicle at K350,000. It was agreed that the purchase price would be paid in three instalments. The plaintiff failed to keep up with the instalments and on 28th June, 2000 the plaintiff personally and on his own volition brought the motor

vehicle and handed it over to the defendant for failure to pay for it. The defendant denied to have snatched the vehicle. A mandatory injunction as prayed for in this case would amount to an order for specific performance, a relief not prayed for.

Then there is an affidavit in reply to the affidavit in opposition. The affidavit in reply was sworn by the plaintiff. It is in 10 paragraphs. The plaintiff denies in this affidavit that the issue of a Commercial Bank loan the defendant had was relevant to the sale of the motor vehicle in question and he further contends that at no point did the defendant mention to him that the repayment of the loan was the reason why he was selling and why he sold the vehicle to him. The plaintiff further avers that the defendant falsely presents that the defendant was generally putting up his motor vehicle for sale and that the plaintiff offered to purchase it. In paragraph 4 of this affidavit the plaintiff avers that paragraph 7 of the defendant's affidavit is dishonest and a clear lie. He avers that it was not in February, 2000 as the defendant averred but in March, 2000 that the parties discoursed touching on the motor vehicle. It is not correct that the three instalments first agreed were payable over a period of 45 days. He denies contents of paragraph 9 of the defendant, which paragraph avers that contents of paragraphs 9 and 10 of the plaintiff's affidavit are untrue. The plaintiff denied to have breached the contract or to have voluntarily surrendered the vehicle to the defendant, but that the defendant inequitably snatched the vehicle from the plaintiff.

I heard some lengthy submissions in this matter. I will pay due regard to them. It is pertinent at this point to refresh our memory on the nature of the claim before this court. This is an inter-parte summons for mandatory injunction filed on 20th July, 2000 and accompanied by specially endorsed writ also issued on 20th July, 2000. Under the Writ the relief sought are a mandatory injunction ordering the defendant to deliver up to the plaintiff in good order the motor vehicle Toyota Hilux Registration Number NE 561 and a further order that the defendant accepts K73,000 being balance of purchase price; damages for loss of use of the vehicle, exemplary damages and costs of the action. The defendant filed an acknowledgement of service of writ with an intention to contest the action endorsed. The matter has not been tried. This order relates to the motion for mandatory injunction which was argued before this court.



Under Order 29 rule 1 of the Rules of the Supreme Court an application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of a cause or matter, whether or not a claim for the injunction was included in the party's writ, originating summons, counter claim or third party notice as the case may be. And an injunction is an order of the court restraining the commission or the continuance of some wrongful act, or the continuance of some omission. An injunction is not a cause of action as it is only designed to maintain a status quo. An injunction is said to be mandatory if it directs that a positive act should be done to repair some omission or to restore the prior position by undoing some wrongful act (**Bonner V Great Western Railway Company** (1883) 24 Ch. D 1; **Collison V Warren** (1901) 1 Ch. 812 CA; **Canadian Pacific Railway V Gaud** (1949) 2 KB 239 CA). In arguing the motion counsel for the plaintiff submitted that this was an application for an interlocutory mandatory injunction and thereafter the matter could go for trial on the remaining heads of claims. While a mandatory injunction (be it interlocutory or final) does not escape the 'balance of convenience' test, there are principles on which it may be ordered. The case of **Shepherd Homes Ltd V Sandham** (1971) Ch. 34; (1970) 3 ALL E.R. 403 laid down some general guidelines for the determination of an application for a mandatory injunction. These guidelines were followed in **International Finance Ltd V Agroexport** (1986) 1 WLR 657; (1986) 1 ALL ER 901. They are these:

- (a) The applicant's case has to be "unusually strong and clear" before a mandatory injunction will be granted;
- (b) The court 'in a normal case' must *inter alia* feel a "high degree of assurance" that at the trial it will appear that the injunction was rightly granted;
- (c) The requisite degree of assurance is higher standard than required for prohibitory injunction and it is higher than the prima facie case test.

The case of **Morris V Redland Bricks** (1970) AC 625 cited by counsel for defence appears to be in line with the principles in the **Shepherd Homes Ltd** case. Lord Upjohn is quoted as having said at page 665 that:

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“ 1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future... It is a jurisdiction to be exercised sparingly and with caution but in a proper case unhesitatingly.

2. Damages will not be a sufficient or adequate remedy if such damage does happen. This only the application of a general principle of equity; it has nothing to do with Lord Cairns' Act or Shelfers case (1895) 1 Ch. 287.”

Further an interlocutory mandatory injunction must aim to give full weight to practical realities of the situation to which the injunction will apply and which cannot wait for trial. The question to ask is whether withholding mandatory injunction creates a risk of greater injustice. In considering to grant a mandatory injunction the court must keep in mind that an order which requires a party to take positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibit action thereby preserving status quo. In this regard it is legitimate where a mandatory injunction is sought to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at the trial. It is also pertinent to note that an interlocutory mandatory injunction will not be granted on affidavit evidence where the issues of fact are strongly contested which could only be determined on the trial of the action (**Meade V Haringey London Borough Council** (1979) 1 E.R. 494; (1979) 1 WLR 637; (1979) 2 ALL E.R. 1016 CA.)

Applying these principles of law to the case at hand one sees that the matter is rooted in contract of sale of a motor vehicle between the parties. The said contract appears to have been partly oral and partly evidenced in writing as there were receipt vouchers signed signifying the payment of part of the purchase price. It is clear in the affidavits before me that there are differences of perception as to the terms of the contract from the point of view of the plaintiff and from the point of view of the defendant. There is disagreement as to the time when the parties entered into the contract of sale. There is disagreement as to the period of payment of the purchase price although the parties agree that the purchase price was to be paid in three agreed instalments. There is disagreement as to what transpired in the

course of discussion leading to the purchase of the vehicle. It is not clear on the affidavits as well as in the arguments whether a breach of contract is alleged except for the suggestion from the defence that the plaintiff surrendered the vehicle to him having failed to pay. There is dispute as to whether the vehicle was voluntarily surrendered back to the defendant or that the defendant snatched it from the plaintiff. I have earlier highlighted some paragraph in the affidavit where the defendant averred that the plaintiff stated untruths in the affidavit and where the plaintiff averred that the defendant stated untruths in his affidavit in opposition. The mandatory injunction sought in here would virtually amount to a determination of the rights and obligations of the parties on the contract for sale of the motor vehicle. Now the terms of the contract not being clear on the affidavit evidence and indeed such terms had been varied by the parties although it is not clear how far the variation went, and there being clear dispute about some such terms, this court can hardly make findings of fact in the absence of such evidence as would subject the parties to cross-examination. In short I am unable to say that the applicant's case is unusually strong and clear such that I may grant a mandatory injunction. I am unable to say that there is a degree of assurance is higher that the "*prima facie case*" test that at the trial it will appear that the injunction was rightly granted. I do note that the plaintiff had paid a substantial part of the agreed purchase price and that by 29th June, 2000 a balance of K73,000 remained unpaid. It is not clear what the parties agreed in the event of the plaintiff failing to pay the balance by the agreed date of 29th June, 2000. It has been argued elsewhere that the plaintiff had originally set his priorities such that he did not want to buy a motor vehicle before completing the upgrading of his clinic. The attractive offer by the defendant made the plaintiff to readjust his priorities. He was prepared to wait for some time before buying a motor vehicle. The question whether the matter cannot wait for trial would thus be answered in the negative, particularly in this matter where there are highly contentious issues going to the root of the contract.

In arguing the application counsel at various points invited this court to invoke equitable considerations to resolve the matter in favour of the plaintiff by ordering the defendant to deliver the vehicle to plaintiff. A survey of the maxims of equity shows that equity would not apply in this case because it would have to follow the law. The plaintiff has not finished paying for the vehicle. He in fact failed to pay by 29th June, 2000. He would have to come to equity with clean


hands in order for equity to act in his favour. An order that the plaintiff pays up K73,000 when clearly he failed to pay because he did not have money then would only amount the court varying the terms of the contract, which terms are themselves not clear on the affidavit evidence before the court. It is not for the court to make or remake a contract for the parties.

The point was raised that a mandatory injunction would in the circumstances of the case amount to order for specific performance which relief was not pleaded. I do not intend to discuss specific performance here save to say that the jurisdiction to order specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect such as informality, mistake or illegality.

Let me also add that there is nothing to suggest that the vehicle in question is of such a unique character that the plaintiff would not be able to find another on the market. In this regard, if it is found that there is a breach of contract on the part of the defendant damages would be an adequate remedy.

For the reasons discussed above the application for a mandatory injunction in this case fails and it is dismissed with costs. Let the matter in this cause be resolved by way of ordinary court process otherwise than by way of motion as was done here.

Made in chambers this 24th day of August, 2000 at Blantyre.


R.R. Mzikamanda
JUDGE.

