IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 3510 OF 2001

BETWEEN:

G. Naura t/a GREEN CAR HIRE SERVICES.....PLAINTIFF

-and-

THE LEASING & FINANCE COMPANY OF MALAWI.....DEFENDANT

CORAM: **TEMBO, J.**
Nyimba, of Counsel for the Plaintiff
Msiska, of Counsel for the Defendant
Mankhanamba, Court Clerk

RULING

TEMBO, J: This is an inter parties application of G. Naura who is trading as Green Car Hire Services, the plaintiff, for an order of injunction to restrain the Leasing & finance Company of Malawi, the defendants, by itself or through its servants or agents or followers, or whomsoever from disposing, seizing, auctioning or using the vehicles herein until the conclusion of this matter or further order of the court. In fact, the plaintiff had obtained an ex-parte order of injunction, in that respect, on 29th November, 2001 and this application is made by the plaintiff for a further order of the court to continue that earlier order. There is affidavit evidence in support of, and opposition to, the application.

As can be gleaned from the affidavits of the parties, the facts of this case are as follows: The plaintiff and the defendant, in or about 1999 and 2000, had entered into three separate lease agreements in respect of a number of vehicles: thus Agreement No. B0047089 in respect of Toyota Hilux Pickup Registration No. BL273 and Toyota Hilux D/Cab Pickup Registration

No. BK 9236; Agreement No. B0047016 in respect of Mazda S/Wagon Registration No. BK 2811 and Toyota Hilux D/Cab Pick up Registration No. BK 9236; and Agreement No. B004145 in request of Nissan D/Cab Pick up Registration No. PE 190 and Nissan Diesel Truck Registration No. MJ 9141. Each of these lease agreements has or had a clause prescribing the term of the lease, the rental payable and the dates on which the rental is or was payable by the plaintiff, as lessee, thereunder.

A default or breach clause in each of these agreements prescribes the rights of the defendant, lessor therein, upon the plaintiff being in default or breach in respect of the plaintiff's payment obligations. Thus, without prejudice to the defendant's right to arrears of rentals, the defendant may terminate the lease agreement if the plaintiff fails to pay any rent when the same becomes due and payable. Under the three lease agreements, the defendant was entitled to repossess Nissan D/cab Registration No. PE 190;Mazda station wagon Registration No. BK 2811 and Nissan Diesel, Registration No. MJ 9141, as security, in the event of the plaintiff being in default as to his payment obligations.

The plaintiff on or about May, 2001 suffered default in his payment obligations. By that date the total balance in arrears was put at K3,940,554.01. Consequently, the defendant terminated the lease agreements and sought to realise security as prescribed under those agreements. Since then to-date the amount of that balance has continued to grow in that the plaintiff, on his part, has continued to be in default in that regard.

Due to plaintiff's continued default, the defendant has repossessed the vehicles with Registration Numbers PE 190, Nissan D/cab and BK 2811 Mazda station wagon. Besides the foregoing, on his part, the plaintiff had voluntarily surrendered to the defendant his Toyota Vx Registration NO. PE 9999 so that the defendant would sell it in a bid to enable the plaintiff to clear off his indebtedness to the defendant in that respect.

In the view of the plaintiff, the Toyota Vx PE 9999, was not part of the leased vehicles and was not offered as security by the plaintiff. The defendant had sold that vehicle by tender, but the sale has since been rescinded in that the plaintiff kept the Blue Book and would not sanction the sale on the ground that the price offered and agreed was too low in the circumstances. The plaintiff had hoped that a price in the region of K5 million

would be fetched for the Toyota Vx PE 9999. If such were the case, the plaintiff's indebtedness to the defendant would have been greatly reduced, if not wiped out altogether. However, the defendant had only managed to sell the vehicle at the price of K1.1 million. The plaintiff was given opportunity, by the defendant, to match the offer. Although the plaintiff had contended that he had earlier on received an urgent offer for K4.3 million from United Engineering, the plaintiff did not, in that behalf, take advantage, given the express offer made to him, of having the vehicle sold at that price or indeed at any price higher than K1.1 million at which the vehicle was eventually sold by the defendant.

Meanwhile the defendant is ready and willing to return the Toyota Vx PE 9999 to the plaintiff subject to the plaintiff first reimbursing to the defendant the amount paid by the defendant to the person or entity that had bought the vehicle, in respect of the various expenses incurred for the repair of the vehicle by that person or entity.

By his writ of summons and statement of claim, relative to this application, the plaintiff's claim is for an injunction and costs.

Ord. 29 of R.S.C. is the applicable law and the case of ***American Cynamid Co -v- Ethicon Ltd*** (1975) A.C. 396 is the case authority to be applied. The usual purpose of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action. The plaintiff, on the basis of the foregoing affidavit evidence, must show to the satisfaction of the court on a balance of probabilities that he has a good arguable claim to the right he seeks to protect. The court must not attempt to decide the plaintiff's claim on the basis of the affidavits filed herein; it is enough for the plaintiff to show that there is a serious question to be tried. If the plaintiff satisfied the court on the foregoing, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on the balance of convenience.

To begin with even a mere glance at the foregoing affidavit evidence, the plaintiff's writ of summons and the statement of claim, when these are viewed in the light of the applicable principles of law briefly outlined above, would abundantly show that the instant application is misconceived. The evidence outlined above clearly shows that the plaintiff is in default of his payment obligations under the three lease agreements. As a matter of fact, the amount in arrears of rentals to be paid by the plaintiff under those

agreement by May, 2001 was about K4 million. No doubt this amount has grown bigger by now, it being the affidavit evidence that since then the plaintiff has done very little, if nothing at all, to pay up those arrears of rentals. Yes, had the sale of the Toyota Vx PE 9999 not been rescinded, some payment, through not quite substantial regard being had to the total balance outstanding, would have been made by the plaintiff towards that balance. In the circumstances, and particular regard being had to the fact that what there was, and continues to be, between the parties was, and is, a business relationship, the plaintiff has not established that he has a good arguable claim to the right he seeks to protect. The court, given the evidence outlined above, does not see any serious question that ought to be tried in the case. The plaintiff is claiming for an injunction and costs. The status quo sought to be maintained would be the level of the plaintiff's indebtedness to the defendant, thus by restraining the defendant from realising its security under the lease agreements. Given the fact that the parties are in agreement on the fact that the plaintiff is in default in respect of his payment obligations, on commercial transactions, the plaintiff cannot be said to have any right to prevent the defendant from realising its security under those agreements.

The application is dismissed accordingly.

Be that as it may, it is the view of the court that the defendant should return the Toyota Vx PE 9999 to the plaintiff forthwith and without more to be done by the plaintiff in that regard. Any claims which the defendant might have in respect of the expenses for the repairs done to that vehicle should be dealt with by way of a counterclaim to the main action of the plaintiff or indeed in any other way not being the continued failure on the part of the defendant from returning the vehicle to the plaintiff.

It is so ordered. Costs are for the defendant.

Pronounced in open Court this 16th day of April, 2002 Blantyre.

A.K. Tembo
JUDGE