JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1128 OF 2008

BETWEEN:

CHANYUMBU TRANSPORT &
CHANYUMBU TRADING……..……..PLAINTIFF

- AND -

STANDARD BANK LIMITED ……...DEFENDANT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA
Mr Edwin Banda, of Counsel for the plaintiff
Mr Msusa, of Counsel for the defendant
Mr Allan Chuma – Official Interpreter

R U L I N G

Manyungwa, J

INTRODUCTION:

This is the plaintiff's application for an Order of Mandatory Injunction requiring the defendant bank by itself, its agents, servants or whosoever to release the trucks they had seized from the plaintiff pending the determination of the matter herein. The application is taken under Order 29 of the Rules of the Supreme Court and is supported by an affidavit sworn by

Mr Geoffrey Shozi Sadyalunda. The defendant opposes the application and there is an affidavit in opposition sworn by Mr Yotamu Machila, the defendant's Credit Control Manager.

FACTUAL BACKGROUND:

In his affidavit in support, which was initially sworn supplementary to an earlier affidavit, which was later withdrawn on technical grounds, Mr Geoffrey Shozi Sadyalunda the plaintiff's Managing Director, deponed that the plaintiff obtained a loan from the defendant which as at the date of hearing stood at MK19, 758, 971.00. It is further deposed that the plaintiff took a further loan with which he used to purchase trucks. The deponent further deposes that there were two facilities, namely the Maize Facility and the Motor vehicle asset Facility and that whilst it is admitted that there was default by the plaintiff on the maize facility, there was no default on the vehicle asset facility. This notwithstanding however the defendant seized the plaintiff's vehicles, which were charges under the vehicle asset facility in order to service both accounts. It was therefore contended by Mr Banda for the plaintiff that the defendant bank did not have a good reason for removing the vehicles as there was no court order mandating the defendant bank to act as it did, and that there was no agreement that the said vehicles could be removed in the manner as the defendant bank did. The plaintiff therefore contends that the defendant bank's action in removing the vehicles was illegal and wrongful and unauthorized by any agreement and actually contrary to the spirit of the agreement between the parties. The plaintiff therefore contends that the defendant bank is not entitled to seize the trucks in issue as the defendant could not recover on the facility in which there is no default.

As I indicated earlier on the defendant opposes the application for a mandatory injunction. In his affidavit in opposition Mr Yotamu Machila, the defendant's Credit Control Manager, whose responsibilities include overseeing of bad debts and other banking facilities deposed that in or around April, 2007 Mr Geoffrey Shozi Sadyalunda solely trading as Chanyumbu Trading was granted a short term loan of MK20,000,000.00 by the defendant and that it was an express agreement in terms of clause 2 of the loan agreement dated 24th day of April, 2007 (herein referred to as the Facility Letter) that the loan was exclusively availed to Chanyumbu Trading to assist it in the purchase of 5000 metric tones of Maize to be supplied to the National Food Reserve Agency. The said letter marked as exhibit "YM1" dated 24th April, 2007 and addressed to the plaintiff from the defendant and is attached to the affidavit of Mr Machila. The deponent further deposed that in terms of Clause 4.2 of "YM1", the loan was supposed to be repaid by one bullet payment by the due date of 29th day of June, 2007. It is further deposed that at the request of Chanyumbu Trading and by way of a variation letter dated the 7th day of May, 2007, the loan above – mentioned was later increased from MK20, 000,000 to MK30, 000,000 as is evidenced by a letter exhibit "YM2" dated 7th April, 2007 from the defendant that bank addressed to the plaintiff. It is further deposed in the meantime the plaintiff Chanyumbu Trading did not honour its contractual obligation to fully exonerate its indebtedness to the defendant on the repayment date. That instead Chanyumbu Trading asked for an extension of the repayment date, a prayer which was granted by the defendant bank in good faith by extending the repayment date to 30th day of September 2007 and that this was even reduced into writing by way of another variation letter

dated 12th July 2007, as evidenced by exhibit 'YM3' a letter from the defendant bank to chanyumbu Trading. It is further deposed that upon the request of plaintiff and by way of variation letter dated 3rd August 2007 the loan was again increased from MK30,000,000.00 to MK40,000,000.00 as is evidenced by exhibit 'YM4'. A letter from the defendant bank and addressed to the plaintiff.

It is further stated by the deponent that in the meantime the plaintiff Chanyumbu again failed to honour its contractual obligation to fully exonerate its indebtedness to the defendant on the repayment date to wit 30th September, 2007. The plaintiff asked for yet another extension of the repayment date a prayer which was granted by the bank in good faith by extending the repayment date to 30th day of November 2007 as is evidenced by another variation letter dated 19th October, 2007, which was from the defendant to the plaintiff, marked as exhibit 'YM5'. Again it is deposed that despite this extension, of the repayment period to 30th November, 2007, the plaintiff, Chanuymbu failed to fully exonerate. It is further stated that Chanyumbu Trading also asked for yet another extension of the repayment date and the said repayment date was extended to 30th January, 2008 as is evidenced by the defendant's letter dated 31st day of December, 2007. The deponent further states that despite all the extensions of the repayment period and the last extension of the said repayment period to the 30th day of January, 2008 the plaintiff again failed to honour its contractual obligation to fully exonerate its indebtedness to the defendants. It is further deposed that as of 9th day of May, 2008 the sum owing to the defendant by the plaintiff stood at MK20,242,119.40 with interest still accruing at a contractual penalty rate of 27.95, 10% above the defendant's base lending rate, as is

evidenced by exhibit 'YM7'. The deponent further states as much as exhibits 'YM2', YM3, 'YM4' and 'YM5' and 'YM6' were variation letters varying some terms which were expressly mentioned to have been varied, they all expressly made savings on other terms of the Facility letter i.e 'YM1' by stating in explicit terms that save for the amendments therein, 'YM1' would remain unaltered and was to continue to be of full force and effect.

It is further deposed that Mr Geoffrey Shozi Sadyalunda, this time around solely trading as Chanyumbu Transport, was again granted a Lease Facility (herein referred to as a Lease Facility) under which the defendant leased its moveable assets (herein referred to as "the Leased Assets") to Chanyumbu Transport. These moveable assets included.

a) Volvo F10 Truck registration number ZA8670, chasis number SCV42CCPC905195, Engine number 253915 and
b) Tri – Axle Flatbed Trailer registration number NB 2063, chasis number HFT027
c) Freightliner Truck FLD registration number NS1730, chasis number IFUYDCYB2XL38771 engine number 11890320
d) Henred Fruehauf Tanker, registration number NS1735, chasis number HFT0297
e) Freighliner Truck FLD Horse, registration number NS 1685, chasis number IFUYDZYB7TL598746, engine number 06R0272528
f) Henred Fruehauf Trailer, registration number NS 1698, chaisis number HFT0264.

It is further deposed that the said Lease Facility was among other documents, governed by a Master lease agreement dated 7th May, 2007, as is evidenced by exhibit 'YM8'. The leased assets were only leased and not sold by the defendant bank to the plaintiff as is clearly evident by clause 6 of exhibit 'YM8' which in reference to the Leased Assets clearly stated that they were to remain the property of the lessor to wit the defendant bank ***id est*** and that nothing was to be construed as conferring on the lessee namely the plaintiff, any right or interest in the Leased Assets other than the lease. It is further contended on behalf of the defendant bank that in as much as the defendant had availed a number of facilities to Mr Geoffrey Shozi Sadyalunda trading in different capacities, there was a cross – default agreement as it was expressly agreed by the defendant and the said Geoffrey Shozi Sadyalunda in terms of clause 9 of 'YM1' that failure to make payment amount due in terms of exhibit 'YM1' or any other facilities that the defendant bank had accorded to Geoffrey Shozi Sadyalunda would make all other facilities availed to the said Geoffrey Shozi Sadyalunda to immediately become due and payable. The said clause no 9 of exhibit 'YM1' provided as follows:-

> "9 Default
>
> If the Borrower should fail to make payment by due date of any amount due in terms of the Short Term Loan Facility or any other facilities that the Bank has accorded to the Borrower or shall become insolvent the full amount of the facility and any other facilities accorded to the Borrower by the Bank together with additional interest as defined in this Facility Letter shall immediately become due and payable. In addition the bank shall have the right to exercise all

> other remedies available to them in terms of the Laws of Malawi".

The deponent further contends that since the said Mr Geoffrey Shozi Sadyalunda was a sole trader trading under Chanyumbu Trading and Chanyumbu Transport, the Loan and the Lease Facilities were in essence given to him as one person. The deponent therefore stated that since Chanyumbu Trading defaulted on the short Term Loan which was governed by exhibit 'YM1' and that this in effect gave sanctity to what the defendant bank and Chanymbu Trading had agreed to, that the default on the Loan in terms of exhibit 'YM1' meant that Mr Geoffrey Shozi Sadyalunda had also defaulted on all other facilities including those granted by the defendant to Chanyumbu Transport. It is also stated that there was an express mutually agreed provision to set – off on page 6 of exhibit 'YM1' which was to the following effect:

> "The Bank may, at any time without notice or demand to the Borrower and notwithstanding whatsoever combine or consolidate all any then existing accounts of the Borrower with the Bank including accounts in the name of the Bank whether current deposit, loan or of any other nature whatsoever, whether subject to notice or not and in whatever currency denominated and whether held in the name of the Borrower alone or jointly with others wherever situate and set – off or transfer any sums standing to the credit of any one or more such accounts in or towards satisfaction of any obligations and liabilities to the Bank of the Borrower whether such liabilities be present, future, actual, contingent, primary collateral, joint or several and

> the borrower expressly waives any rights of set – off that the borrower may have, so far as is permitted by law, in respect of any claim which it may now have or at any time hereafter have against the Bank and the Bank may use any such money to purchase any currently or currencies required to effect such application".

The defendant therefore contends that in terms of the contractual set – off provision, no notice was required before the defendant invoked the provision and that the provision applied to all or any of the existing accounts of the said Mr Geoffrey Shozi Sadyalunda and the same was applicable notwithstanding any settlement of account by Mr Geoffrey Shozi Sadyalunda. Further, it is contended on behalf of the defendant bank that going by the spirit the of cross – default provision in clause 9 of exhibit 'YM1'. The default by Chanyumbu Trading meant that Chanyumbu Transport had also defaulted and this contractually entitled the defendant bank to evoke the above quoted set – off provision on all or any of the existing accounts of Mr Geoffrey Shozi Sadyalunda and so the defendant bank indeed applied the deposits to the tune of MK835, 678.62 on the account of Chanyumbu Transport on the loan account. It is therefore deponed that Mr Geoffrey Shozi Sadyalunda therefore lied when he deposed that the defendant bank unilaterally transferred the sum of MK845, 678.62 on the account of Chanyumbu Transport to lessen the indebtedness of Chanyumbu Trading on the loan account as there was prior written consent in the set – off provision. It is therefore stated that the averrements by the said Geoffrey Shozi Sadyalunda in paragraph 15 of the affidavit in support to the effect that the defendant misapplied its own general terms and conditions are therefore not correct as it was expressly stated in exhibit

'YM1' in the general terms and conditions that the said general terms were applicable not only to overdrafts but also to other banking facilities. The deponent further stated that the sums owing from Mr Geoffrey Shozi Sadyalunda to the defendant bank in respect of the Lease Facility granted to Chanyumbu Transport as at the time of hearing stood at MK15, 985.346.04 and that interest was still accruing. The repossession of the Leased Assets therefore, so the defendant contends, is premised on the rights conferred on the defendant as owner and lessor and as consolidated by clause 16 of the Master Lease Agreement on the understanding that Chanyumbu Transport had defaulted on the First Lease Faclitity and Second Lease Facility by virtue of defaulting on the loan facility granted to Chanuymbu Trading and in no way are the Leased Assets being repossessed as security of the loan facility as is alleged by Mr Geoffrey Shozi Sadyalunda as averred in pargraph 18 of the first affidavit in support.

It is therefore contended on behalf of the defendant that the defendant bank is not in breach of any contract with Mr Geoffrey Shozi Sadyalunda and so far the defendant bank has not done and has not threatened to do anything which in the final analysis would be construed as being tantamount to a breach of any contract with the said Mr Geoffrey Shozi Sadyalunda. That in any case it is Mr Geoffrey Shozi Sadyalunda who is in breach of the contracts he entered with the defendant bank and that he is being unconscionable by misinforming the court by saying that it the defendant bank which is in breach and also by not giving the correct information vis – a – vis ownership of the Leased Assets so as to enable the court exercise its discretion; and as such that he has undoubtedly approached the court with tarnished hands. Consequently, the defendant, so states, that Mr Geoffrey

Shozi Sadyalunda has therefore failed in his duty to make a full and frank disclosure and to proceed with the highest good faith. It is further contended on behalf of the defendant that the fact that Mr Geoffrey Shozi Sadyalunda acknowledged that he is in default and that he had defaulted 5 times on the repayment date signifies that he himself has not done equity to the defendant and that by his failure to honour his contractual obligations, the said Mr Geoffrey Shozi Sadyalunda has shown that he is not prepared to act as a man of conscience towards the defendant bank. It is further contended on behalf of the defendant gave bank that the defendant bank ample time to Mr Sadyalunda in which to remedy the situation, a thing which he did not fully appreciate by doing the needful and that after the default therefore Mr Sadyalunda had no legal right whatsoever to the Leased Assets in the face of the defendant's contractual and legal right to the same. The defendant bank further contends the said leased assets or trucks are not particularised by the plaintiff in terms of their registration numbers, or chasis and engine numbers, and that in these premises therefore the said Mr Geoffrey Shozi Sadyalunda is indirectly compelling the court to guess as to whether what he calls his trucks are actually the Leased Assets which the defendant bank seized from the said Mr Geoffrey Shozi Sadyalunda. The defendant therefore contends that the balance of convenience heavily tilts in favour of the defendant bank and that there is nothing in the plaintiff's affidavit which shows that the plaintiff has displayed sufficient grounds to wrestle the said balance of convenience in its favour and that more harm would be occasioned in granting the injunction than its refusal. The defendant further contends that should it later turn out that the repossession was wrongful, then damages would be a sufficient remedy and that the defendant has the financial muscle to pay them. As such the anticipated fear on the part of the

said Mr Geoffrey Shozi Sadyalunda would therefore not be irreparable nor would it be outside the scope of pecuniary compensation. In the circumstances therefore, the defendant so states, that the plaintiff has failed to show that he has a good arguable claim to the right that he seeks to protect, neither has he shown that he has a real prospect that he will succeed in his claim at the trial.

The main issue(s) for determination in this matter is the circumstances is whether the plaintiff is entitled to an order of a mandatory injunction against the defendant bank.

THE LAW:

To begin with it must be appreciated that the principles governing the grant or refusal of a mandatory injunction are different from those regarding the grant of interlocutory injunctions. There is no doubt however that courts [High Court] has the jurisdiction to grant a mandatory injunction upon an interlocutory application. In the case of ***Bonner V Great Western Railway***[1] Lord Justice Fry had this to say:

> "I entirely agree. I have no doubt of the jurisdiction of the court to grant a mandatory injunction on an interlocutory application as well as the hearing"

However, a mandatory injunction is a discretionary and very exceptional form of relief. See***:*** ***Canadian Pacific Railway V Gaud***[2] Thus the granting or refusal of a mandatory order of injunction is solely discretionary and

[1] ***Bonner V Great Western Railway***(1883) 24 Ch D p10
[2] ***Canadian Pacific Railway V Gaud*** [1942] 2 KB 239

therefore rules of equity apply. See also ***Chirwa V Kaunda t/a Chika Building Contractors***[1]**.**

The principles governing the grant of a mandatory injunction were succinctly discussed by the learned Lord Upjohn in the celebrated case on mandatory injunctions namely ***Redland Bricks Limited V Morris***[2] This is what the court said:-

> "The grant of a mandatory injunction is of course, entirely discretionary and unlike a negative injunction, can never be 'as of course'. Every case must depend essentially upon its own particular circumstances. Any general principles for its application can only be laid down in the most general terms:-
>
> a) 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 future. As Lord Dunedin said in 1919 it is not sufficient to say 'timeo' [***Attorney General for the Dominion V Ritch Contracting and Supply Company.***[3] It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.
> b) Damages will not be a sufficient or adequate remedy if such damage does happen".

Further the case must be unusually strong and clear before a mandatory injunction will be granted. In ***Nottingham Building Society V***

[1] ***Chirwa V Kaunda t/a Chika Building Contractors***
[2] ***Redland Bricks Limited V Morris*** [1970] AC 652
[3] ***Attorney General for the Domininion V Ritch Contracting and Supply Company*** AC 999, 1005

Eurodynamics Systems[1] the court granted a mandatory injunction after taking into account the likely result of the trial. Moreover, the court must be satisfied at the trial that the injunction was rightly granted. However, in some cases like in ***Leisure Date V Bell***[2] where it became necessary that some mandatory order had to be made ***ad interim*** the court will make the order whether or not the high standard of probability of success at the trial is made out. A mandatory injunction will most obviously be granted where this is the only way in which to avoid the proven probability of damage and in such a case it is open to the court to award damages. A mandatory injunction will also be granted where the facts are not contested.

The Malawi Supreme Court of appeal in the case of the ***Registered Trustees of the Christian Service Committee V Mandala Building and Construction Company Limited***[3] has in a way in my view, restated the law on mandatory injunctions. This is what the then Lordships said:

> "[I]n determining whether to grant an interlocutory injunction, the question for the court to consider was not whether it was mandatory or prohibitory, but whether the injustice that would be caused to the defendant if the plaintiff was granted an injunction and later failed at the trial outweighed the injustice that would be caused to the plaintiff if an injunction was refused and he later succeeded at the trial".

[1] ***Nottingham Building Society V Eurodynamics Systems*** [993] FSR 1
[2] ***Leisure Date V Bell*** 1988 FSR
[3] ***Registered Trustees of the Christian Service Committee V Mandala Building and Construction Co. Ltd*** MSCA Civil Appeal

Further, as it was stated in ***Shephered Holmes Ltd V Sandham***[4] by Megarry J that in a normal case, the court must ***inter alia*** feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted.

In the instant case it is clear from the affidavits that the plaintiff obtained certain loans from the defendant bank for the furtherance of his business. Chanyumbu Transport entered into a vehicle and asset finance facility with the defendant bank in which the defendant financed the purchase of the plaintiff's two trucks. Chanyumbu Trading also got a loan from the defendant bank through which the defendant bank financed the plaintiff's maize business. The Chanyumbu Transport loan facility was being serviced properly but had the two trucks financed as security. The trading facility for Chanyumbu Trading had no security and for sometime remained in arrears because of the hostile economic climate in relation to maize. It appears that the defendant bank then transferred the money paid to service the transport account into the trading account and then informed the plaintiff that it was proceeding to seize the trucks because the maize/transport loan facility was in heavy arrears and default. Later the defendant bank claimed that the two loan facilities were being considered as one and could therefore interchange security. It was at that juncture that the plaintiff then applied to court for an injunction pending determination of the several questions on the defendant conduct. The defendant bank then swiftly moved to seize the plaintiff's trucks, a move which made or resulted in the plaintiff losing out on contracts although the subject matter of the seizure was a subject of court proceedings.

[4] ***Shepherd Holmes Ltd V Sandham*** 1971 Ch. 340

It was submitted by Mr Banda for the plaintiff that the defendant bank had no right to seize and remove the trucks and further that there was no agreement between the two parties that in the event of a default by the plaintiff on the maize facility, then the defendant could seize vehicles in the vehicle asset facility. It was therefore contended on behalf of the plaintiff that in doing what the defendant bank was wrongful and has been presumptuous and so must be retrained by this court.

On his part Mr Msusa for the defendant whilst admitting that the plaintiff had indeed two Facilities with the defendant, namely the maize facility and the vehicle asset facility submitted that there was according to clause 9 of exhibit "YM1", an express agreement between the parties, by the so called a 'cross default clause' which technically meant that default on one facility would be deemed default on all. The plaintiff, so Mr Msusa contended defaulted on the maize facility and so consequently in line with Clause 9 of the Facility Letter, exhibit "YM1", the plaintiff had also defaulted on the other facility, namely the Vehicle Asset Facility. It was submitted on behalf of the defendant bank that the plaintiff defaulted five (5) times notwithstanding the fact that he was required as per agreement to make one bullet payment as per exhibit "YM3", and according to exhibit "YM5" the plaintiff was required to make the said payment by 30th June, 2008, which he failed to do. The defendant bank however did not invoke the 'cross default clause', which if it had wished would have invoked a long time back. Further, it was submitted by Mr Msusa, that according to Clause 6 of exhibit "YM8", the defendant bank did not seize the trucks as the lessor but as the owner, as the property in the said trucks remained with the defendant bank, and that therefore in terms of Clause 16(2)(2) of exhibit "YM8", the

defendant bank was entitled to get possession of the said trucks. Counsel also contended that the plaintiff's submission that the defendant bank could not deal with or combine the plaintiff's two accounts because there was no agreement to that effect, was incorrect. This is because exhibit "YM1" at page 6 gave the bank the right to set – off; to combine or consolidate all or any then existing accounts of the plaintiff, without any notice or demand and notwithstanding any settlement of account.

The law on this aspect is in my view very clear, a banker has a right to combine two or more accounts held by its customer without notice and set – off against the other unless it has made some other agreement, express or implied to keep them separate. In ***Halesowen Presswork & Assemblies Limited V Westminster Bank Ltd***[1] the facts were as follows: In 1968 the H. Company, one of an associated group, had a single loan account, overdrawn by £11,339 at a branch of the defendant bank, and a trading account in credit at Lloyds Bank. The defendant bank was concerned about overdraft account, and (2) that in law a bank had no right of set – off but must prove in the liquidation as unsecured creditor for the overdraft. It was also submitted that the bank could not rely on the mutual set – off provisions of Section 31 of the Bankruptcy Act, 1914 which might apply on the liquidation. Roskill, J found as a fact that the bank had not orally agreed not to consolidate the two accounts and accepted the bank's main contention in law the that bank was entitled by virtue of the banker's lien to set – off the credit and debt balances in the two accounts and he made no decision on the applicability of Section 31. On appeal by the liquidator, when the applicability of Section 31 was more fully argued, it was held (1) That the right in law of a banker to

[1] ***Halesowen Presswork & Assemblies Limited V Westminster*** [1971] QB1

combine the accounts of a customer and set – off debts against credits could be excluded by an agreement express or implied to keep the accounts separate. (2) That the agreement of April 4 was an express agreement by which the bank, in consideration for the transfer to it of a trading account in credit, undertook to keep the customer's two accounts segregated for four months; that the agreement had not been terminated before the winding – up and that it remained in force after the liquidation and was effective to prevent the bank exercising the right to appropriate the credit balance in the No.2 account in reduction of the overdraft in the No.1 account. Accordingly, the liquidator was entitled to recover the credit amount for the Creditors and the bank must prove as an unsecured creditor in the liquidation for the amount of the overdraft group's financial position and displeased at not having the advantage of the trading account. At a meeting on April, 4 it was orally agreed that the company should transfer the trading account from Lloyds Bank to the defendant's branch at C (where it became the number 2 account) and that the existing loan account (the No.1 account) should be frozen and the bank confirmed the arrangement in a letter stating that in the absence of materially changed circumstances it would adhere to the arrangement for a period of 4 months. On May, 20 the company gave notice under Section 293 of the Companies Act, 1948 convening a meeting of creditors for 2:30 p.m. on June, 12 to consider a winding – up resolution. The bank received the notice but took no steps to terminate the April 4, agreement and dealing on the No.2 trading account continued.

On the morning of June, 12 a cheque for £8,611 drawn in favour of the company was paid in for the credit of the No.2 account. In the afternoon, the creditors meeting confirmed the resolution to wind up the company and a

liquidator was appointed. His request to the bank to pay over the credit balance in the No.2 account was refused by the bank. In consequential proceedings the liquidator claimed (1) that the agreement of April, 4 included an undertaking by the bank that if the company transferred the trading account the bank would in no circumstances set – off any balance on that account against the frozen creditors and the bank must prove as an unsecured creditor in the liquidation for the amount of the overdraft unless at the moment of liquidation the dealings between banker and customer in relation to the two accounts had that degree of mutuality which would bring into play for the benefit of the bank the set – off provision of Section 31 of the Bankruptcy Act, 1914. In delivering their judgment and allowing the Appeal, Roskill J, Lord Denning MR, Winn and Buckley L, J Especially Roskill J had this to say at P 20:

> "The true view, as I thin, is that if a banker agrees with his customer to open two or more accounts, the banker had, by virtue of his lien, the right to move either assets or liabilities from one account to the other without the customer's consent, unless the banker has expressly or impliedly agreed with his customer that he will not do so; such agreement may be for a limited period or it may be indefinite in the duration or it may be only for such a period as the banker – customer relationship subsists…It seems plain upon the authorities that the right of lien is exercisable over all securities of any kind which come into the possession of the banker as banker, and that securities include cheques and their proceeds. That right of lien exists and extends to cover a banker's own indebtedness to his customer, when the customer is also indebted to the

> banker on another account or other accounts. This seems an unusual application of the concept of lien but it is an application well established and justified by the authorities to which I have referred. But just as securities must come into the possession of the banker as banker, so they must belong to the customer in the same right as that in which the customer has incurred his indebtedness to the banker. As the cases show securities belonging to the customer as (for example) a trustee or a partner cannot be the subject of the banker's lien in respect of indebtedness incurred by the customer in his personal capacity".

It appears to me, and I no doubt agree, that there are a series of cases in which various banks effectively combined or applied one account with or to another, and the common characteristics to them all was total absence of any contractual arrangement prohibiting or restricting combination of the accounts at the will of the banker. In ***Re European Bank Agra Bank Claim***[1] James LJ said at page 44

> "[I]t is not open to the customer in the absence of some special contract to say that the securities which he deposits are only applicable to one account".

In the case of ***Bolland V Bygraves***[2] sir Charles CJ (as Lord Tenterden then was) said at page 273.

> "I think that a banker who stands in this relation to a customer has a lien upon any securities of that customer

[1] In ***Re European Bank Agra Bank Claim*** (1872) 8 ch. App 41
[2] ***Bolland V Bygraves*** (1825) RY & M 271

> which may, for any purpose, be placed in his hands, and he has a right to retain them to countervail the liabilities he has so incurred on his behalf, till those liabilities have ceased".

And in ***Brandao V Burnett***[1], a decision of the House of Lords, which decision was referred to by Ungoed – Thomas J, ***In Re Keever [A Bankrupt]***[2] although the House decided that on the facts found the bankers concerned had no lien, but Lord Campbell, who delivered the first speech, stated categorically at p530 that the House was entitled to take judicial notice of the general lien as part of the law merchant. His Lordship said at page 531:

> "Bankers, most undoubtedly, have a general lien on all securities deposited with them, as bankers, by a customer, unless there be an express contract or circumstances that show an implied contract inconsistent with lien".

The learned Lord Campbell in delivering his judgement also quoted an earlier decision of Lord Kenyon, in ***Davis V Bowsher***[3] where the judge had said:

> "Bankers have a general lien on all securities in their hands, for their general balance, unless there be evidence to show that any particular security was received under any special circumstances which would take it out of the common rule".

[1] ***Brando V Burnett*** (1846) 3 CB 519
[2] ***Re Keever A Bankrupt*** [1967]ch. 182
[3] ***Davis V Bowser*** (1794) 5. T. R. 488, 491

Lord Lyndhurst L.C. concurring, said at p535:

> "I think there is no question, that, by the law merchant, a banker has a lien upon securities deposited with him for his general balance. I consider this part of the established law of the country".

Further in the case of ***Barclays Bank Ltd V Okenarche***[1] the defendant stole a building society pass book belonging to a Mr Crounch, and went to the Sloane Square branch of the plaintiff bank, where he claimed to be Mr Crounch and said he wishes to withdraw some £1,600.00 from the building society and upon a deposit account at the bank. He later paid in the building society's cheque and was allowed to withdraw almost the whole amount while it was still un cleared. On the same day he opened a current account at the plaintiff's Battersea Park branch and paid the cash he had withdrawn from Sloane square. When the building society cheque was dishonoured, payment having been stopped the bank sought to combine the defendant's accounts.

Mocatta J held in that case that although there can not be an overdraft on a deposit account and therefore the payment out to the defendant was not a loan on the deposit account, yet the loan had been made, and was a banking transaction; and the bank was entitled to combine the defendant's indebtedness to them at Sloane square with their indebtedness to him at Battersea Park. In reviewing the authorities, the learned Mocatta J said:

> "As regards the case in which the customer has separate running current accounts at each of the two branches of a

[1] ***Barclays Bank Ltd V Okenarhe*** [1966] 2 Lloyds Rep. 87

> bank, it is plain that the general principle is that the bank is entitled to combine the two accounts. There is clear authority for this in the case of ***Garnett V Mc Kewan***[1]. The Learned Barons in giving their judgement in that case, emphasised, of course, as one would have expected that there was no right of combination in relation to accounts maintained with a banker by one person but in two different capacities; for example, one account might be a personal account of the customer and the other a trust account. Further, it was made clear by Baron Bramwell that the right to combine did not arise if there was an agreement between the customer and the banker that the two accounts should be kept separate, or if such an agreement should be implied from their conduct. Furthermore, in the case the learned judges dealt with what, at first sight might seem the apparent anomaly that the customer cannot without the specific agreement of the bank draw on account A a sum in excess of his balance on that account but which is less than the combined balance at account A and B. That limitation on the customer's rights, in other words, the inability of the customer without specific agreement to combine two accounts, is explained as necessary business efficacy. It would make the task of the banker impossible if every branch was expected to know the state of the customer's account at every other branch".

Thus it is clear in my considered judgement that a banker has a right to combine two or more of the customer's account, and the right can only be extinguished where there is an agreement express or implied that the said

[1] ***Garnett V Mc Kewan*** (1872) L. R. 8 Ex 10

two accounts could not be combined. The setting-off of a credit balance against an overdraft or loan of the same customer has sometimes been regarded as an example of as banker's lien, but properly the two conceptions are distinct. See ***Halesowen Presswork case***[1] in particular judgement of Buckley L.J in the Court of Appeal.

In ***Garnett v Mc Kewan*** a customer drew cheques against his credit balance at one branch of a bank. At another branch he was indented to an amount almost as great as the credit balance at the first, and then bank, without notice to him, combined the balances and dishonoured his cheques. It was held that they were entitled to do so.

Some doubt arose as to this almost unqualified right to set-off as a result of a dictum of swift J in ***Greehalgh & Sons v Union Bank of Manchester Limited***[2] in which he rejected the possibility of any set-off between two accounts. The doubts raised by this dictum of Swift J, were finally laid to rest, when in the ***Halesowen Presswork case,*** Lord Kilbrandon in the House of Lords approved Lord Denning's express rejection, in the court below, of Swift J's view. Thus there can no longer be any question as to the banker's right to combine accounts in appropriate circumstances.

And while doubt continued, however, the banks introduced the letters of set-off which are signed by customers relying upon credit balances for borrowing on other accounts. The letters of set-off acknowledge the banker's right to combine, and are in effect no more than evidence of a right

[1] ***Halesowen Presswork and Assemblies Limited V Westminster*** [1971]ibid
[2] ***Greenhelgh & Sons V Union Bank of Manchester Limited*** [1924] 2 KB 153

already existing; they are a useful precaution against a customer's possible protests but do not themselves create any right. See ***Midland Bank Limited v Reckill and others***[1].

In the instant case there is no dispute that the plaintiff had fallen in arrears on the maize facility and on about five occasions the plaintiff failed to make good the loan. In my view, considering that the initial arrangement was that the plaintiff had to make one bullet payment, I am sure that everybody would agree that the defendant bank was more than lenient. The defendant bank was therefore entitled in my most considered opinion, to combine or set it off with the vehicle asset facility, since as we have seen there was no agreement either express or implied to treat the two accounts as a separate. Actually, on the contrary as is evidenced by exhibit "YM1", clause 9 and exhibit "YM8" clause 16(2)(2), there was an express agreement between the parties that the defendant bank could at any time utilize the assets or securities of one account if there was default of another account without giving notice or demand to the plaintiff. There was also a "cross default clause" that entitled the defendant bank to freeze or posses or call in the assets or securities of any account if there was default on the other without giving notice and that the defendant bank was at liberty indeed to combine the accounts without giving notice. Furthermore in my considered judgement, there was an express agreement between the two parties that the defendant bank could indeed combine any of the plaintiff's facilities without giving any notice whatsoever to the plaintiff.

CONCLUSION:

[1] ***Midland Bank Limited v Reckilt and others*** 1933 AC 1

In these circumstances and by reason of the foregoing it is my finding that the balance of convenience tilts heavily in favour of the defendant bank. In my most considered view the plaintiff has not satisfied me that he has an unusually strong case to warrant the grant of mandatory injunction. In any case, the plaintiff has not demonstrated before this court that should it happen that the injunction, if granted, were later found to have been wrongly granted, that he would be in a position to pay damages to the defendant. If anything, I think, it is the defendant who would easily pay damages should it later transpire that the court should have granted the injunction sought.

Consequently, I refuse to grant the prayer sought by the plaintiff for a mandatory injunction and I hereby dismiss the plaintiff's summons.

As to costs, I order that each party do pay its own costs.

Pronounced in Chambers at Principal Registry this 9th day of October, 2008.

Joselph S Manyungwa

JUDGE