



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1790 OF 2008**

BETWEEN:

O.K. CHABVULAPLAINTIFF

- AND -

**R. E. CHIRWA.....1ST DEFENDANT
CHATONDA t/a CHATONDA
DEBT COLLECTORS.....2ND DEFENDANT**

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA
Mr Tembo, of Counsel for the plaintiff
Mr T. Kalua, of Counsel for the defendant
Mrs Kamuloni – Official Interpreter

ORDER

Manyungwa, J

This is an the plaintiff's application for an order of mandatory injunction compelling the defendants to return goods which the defendants seized unlawfully from the plaintiff. The plaintiff in this matter is Mr O.K. Chabvula whilst the defendant is Mr R. E. Chirwa Chatonda, who carries on or trades in the name of Chatonda Debt Collectors. The application is made under Order 29 r 1 of the Rules of the Supreme Court. There is an affidavit in support of the application as well as skeleton arguments. The defendant opposes the application and has also filed an affidavit in opposition.

In his affidavit in support of the application Mr Maxwell Tembo, of Counsel for the plaintiff deposed that the plaintiff commenced the action herein claiming wrongful interference with his goods by the defendants. It is stated by the said Mr Tembo that the defendants forcefully confiscated goods belonging to the plaintiff pending payment of the sum of MK450, 000.00 which the plaintiff allegedly owes the 1st defendant. It is averred that the defendants used force to confiscate the said goods and the goods were confiscated in the absence of any court order or any agreement between the parties. It is further stated that the plaintiff was forced to sign a document containing the confiscated goods as is evident from exhibit "MC1". It is further deposed that the plaintiff was threatened with death for him to sign the said documents and the defendant came with people who beat up the plaintiff and his wife thereby forcing them to sign the documents, and that the plaintiff did not sign the said document out of his free will but he was forced to do so and threatened. It is therefore contended that in the premises the goods were unlawfully obtained from the plaintiff, and so the plaintiff prays for an order of mandatory injunction compelling the defendant to return the goods to him until further order of the court. The goods seized included a DSTV Decoder, TV Deck, 3 Stereo speakers, 1 Heater, 1 coffee maker, 1 stereo receiver, 4 plate cooker, one upright fridge, 4 piece sofa set 6 Dining chair set, 1 TV Stand, Sitting Room fan, TV Screen, TV stand, coffee table with 2 stools.

The defendants oppose the summons and in his affidavit in opposition, Mr Trouble Kalua, of Counsel, for the defendant deposes that the 1st defendant has known the plaintiff and his whole family for sometime as fellow businessmen in Lilongwe. The deponent further deposes that sometime in 2006 the plaintiff became financially embarrassed and made it a habit of borrowing money from the 1st defendant which he would repay on certain agreed dates, and that as the plaintiff had become used to so doing on 2nd September 2006 he borrowed from the 1st defendant the sum of MK122,500.00 inclusive of agreed interest which he repaid on 20th September, 2006. It is further stated that barely three days later on 23rd September, 2006 the plaintiff borrowed from the 1st defendant a further sum of MK147, 000.00 inclusive of interest which he repaid on 14th October, 2006. The deponent further deposes that the plaintiff's financial position did not seem to improve, and consequently the plaintiff asked for and was lent a further sum of money by the 1st defendant which he promised to pay back on 14th November, 2006. The total sum agreed as being due to the

defendant from the plaintiff inclusive of interest was MK375, 000.00. It is stated that the plaintiff failed to repay the 1st defendant the said sum of money as promised and the sum remains due and owing to this very day. The deponent further deposes that having failed to collect his money from the plaintiff the 1st defendant engaged the services of the 2nd defendant, a debt collector to collect the money on his behalf. It is stated by Mr Kalua, that the plaintiff was contacted by the 2nd defendant and on 30th November 2006 the plaintiff voluntarily agreed to give up his household goods as security for the debt which he promised to clear by 3rd December 2006. In breach of his promise to pay and instead of making good what he owed, the plaintiff lodged a complaint with the police alleging that the defendants had stolen his goods. The deponent further deposes that the 2nd defendant was arrested on the same day in Lilongwe and taken to Lilongwe Police for questioning, and that the plaintiff's claim or complaint at that time was not that he had been threatened or was forced to surrender the goods but that the defendants had stolen his goods. It is further stated that all concerned parties were summoned to Lilongwe Police on 1st December 2006 by a CID officer named Phiri for interrogations, and present at that meeting was the plaintiff, his wife and the defendants. It is stated that when the police heard both sides of the story, they threw out the complaint and ordered all concerned parties to go as there was not the slightest hint of the felony of theft of which the plaintiff had complained. It was also clear to the police that there had been no force or threat thereof that had been used against the plaintiff by the defendants, and that outside the police station the plaintiff promised the defendants that he would soon arrange to settle the debt and collect his goods. This notwithstanding, however, the debt still remains outstanding. The defendants therefore contends that going through the affidavit sworn on behalf of the plaintiff, it is clear that the plaintiff never disclosed all the material facts, and that it is abundantly clear that the plaintiff did not have an arguable claim which he seeks to protect. The defendants further contends that the plaintiff has demonstrated a desire to take the defendants for a ride and unjustly enrich himself by borrowing and the not paying back, and that the plaintiff therefore wishes to use the court in furtherance of his scheme to rip – off the defendants. In any case the defendants contend that damages here would be adequate as opposed to the equitable relief of injunction to which the plaintiff seeks to come with unclean hands. The defendant therefore prays for the dismissal of the summons.

ISSUES FOR DETERMINATION:

The main issue for the determination of the court is whether or not a mandatory injunction should be granted to the plaintiff compelling the defendant to return the goods the plaintiff seized from the plaintiff.

THE LAW:

It must be appreciated that the principles governing the grant or refusal of a mandatory injunction are different from those regarding the grant or refusal of an interlocutory injunction. There is no doubt however that courts have 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 hearing”.

However, as it has always been said a mandatory injunction is a discretionary and very exceptional form of relief. See ***Canadian Pacific Railway V Gaud***. Thus the granting or refusal of a mandatory order of injunction is solely discretionary and therefore rules of equity apply See also ***Chirwa V Kaunda t/a Chika Building Contractors***².

The principles governing the grant of a mandatory injunction were succinctly discussed by the learned Lord Upjohn in the leading case on mandatory injunctions namely ***Redland Bricks Limited V Morris***³. 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:-

¹ ***Bonner Great Western Railway*** (1883) 24 Ch. D 10

² ***Chilwa V Kaunda t/a Chiku Building Contractors*** [1993] 16(2) MLR 502

³ ***Redland Bricks Limited V Morris*** [1970] AC 652

- 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 the future. As Lord Dunedin said in 1919 it is not sufficient to say 'timeo' [*Attorney General for the Dominion V Ritchie Contracting and Supply Co*]¹. 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 is granted. In *Nottingham Building Society V Eurodynamics Systems*² 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*, 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 or not. A mandatory injunction will most obviously be granted *qui timet* 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. See *Hooper V Rodgers*³. A mandatory injunction will also be granted where the facts are not contested.

In the instant case, whilst it is not disputed that the plaintiff owes the defendant the sums as articulated in the plaintiffs affidavit amounting to MK450, 000.00, there is no evidence however that it was agreed between the parties that the goods that were confiscated by the defendant would be used as security for the debt, neither has it been shown that it was agreed that the said debt or loan would attract interest. Clearly the seizure by the defendant of the plaintiff's goods was neither authorised or supported by any consent from the plaintiff. Moreover the goods so seized are household goods, and in my considered opinion there is high probability that the goods would be damaged by the time the matter is concluded. In any case, the defendants have taken a counter – claim, and if they succeed in the counter – claim.

In the premises and in the circumstances of the foregoing, I therefore order, and I hereby grant a mandatory order of injunction to the plaintiff

¹ *Attorney General for the Dominion V Ritchie Contracting Company* AC 999,1005

² *Nottingham Building Society V Eurodynamics Systems*

³ *Hooper V Rogers* (1975) CL 43

compelling the defendant to return the goods he unlawfully seized from the plaintiff.

As regards the issue of costs I order that each party do pay its own costs.

Pronounced in Chambers at Principal Registry this 14th day of October, 2008.

Joselph S Manyungwa
JUDGE