IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 9 OF 199

(Being High Court Civil Cause No. 359 of 1998)

BETWEEN:

THE REGISTERED TRUSTEES OF THE
CHRISTIAN SERVICE COMMITTEE.....APPELLANTS

- and -

MANDALA BUILDING AND
CONSTRUCTION COMPANY LIMITED.....RESPONDENTS

BEFORE: THE HONOURABLE MR JUSTICE KALAILE, JA
THE HONOURABLE MR JUSTICE TAMBALA, JA
THE HONOURABLE JUSTICE MRS MSOSA, JA
Kaliwo, Counsel for the Appellants
Sidhu, Counsel for the Respondents
Ngaiyaye, Official Interpreter
Marsen, Recording Officer

J U D G M E N T

Kalaile, JA

The facts of the case are lucidly presented, save for a few omissions, in the Respondent's skeleton arguments. It is stated therein that the Appellants engaged the Respondents to carry out construction work of an office block along Angoni Road, off Zalewa Road, in the City of Blantyre. The project was agreed at a contractual sum of K9.6 million. The Appellants and Respondents duly entered into a contract for that purpose and thereafter the Respondents embarked on the project in May 1995. The contract project is Exhibit BC1 and its full title is "**Articles of Agreement and Conditions of Contract for the erection of office complex situated at Angoni Road, Blantyre"**. We shall refer to this document hereinafter merely as "the project contract".

The whole project contract was intended to be completed within a period of sixty weeks, starting from May 1995 and ending on or about 19th July 1996. Furthermore, the Appellants appointed Messrs Kamwaza Design Partnership, Chartered Architects as lead consultants to manage the building project and to render architectural services for the project. Messrs Fitzwilliam Partnership, who are Chartered Quantity Surveyors and Consultants, were also appointed to provide quantity surveying services for the entire project.

However, the project failed to get completed within the contractual period of sixty weeks. Apparently, there were cost over-runs, and the Appellants blamed the delay and cost over-runs on the Respondents. On the other hand, the Respondents blamed the delays and cost-over-runs on the Appellants and Messrs Kamwaza Design Partnership as the sole cause of the same. As a result of these disagreements, the Respondents, on 1st August 1997, gave notice of termination of the project contract. Pursuant to the provisions of Clause 27(2) of the project contract, the Respondents detained a quantity of building materials which had been supplied to them by the Appellants. The proviso to Clause 27(2) of the project contract stated that -

"Provided that in addition to all other remedies the contractor upon such determination may take possession of and shall have a lien upon all unfixed goods and materials which may have become the property of the employer under Clause 14 of the Conditions until payment of all monies due to the Contractor from the Employer."

In this context, the "Contractor" is the Respondents and "Employer" is the Appellants. The Appellants put the value of these materials at K1.95 million, which value the Respondents did not dispute. The Appellants wanted these materials back, but the Respondents declined to return them, contending that they had a lien over them, in that the Appellants still owed the Respondents arrears in payment in the sum of K3.5 million for the work done.

It was argued, on behalf of the Appellants, that they did not owe the Respondents the sum

of K3.5 million, because in accordance to Clause 31 of the project contract, only the architect is empowered to issue certificates stating the amount due to the contractor from the employer. No such certificate was issued with regard to the claim for the sum of K3.5 million. In other words, this claim is not valid, as it failed to comply with the specific provisions of the project contract. The Respondents appeared to ignore the fact that only the architect could issue such certificates and not the Quantity Surveyors' valuations, which seem to be the basis for the claim for the sum of K3.5 million. The letter from Kamwaza Design Partnership which we reproduce below clearly highlights this point. The Quantity Surveyors valuations cannot be a substitute for the architect's certificates under the terms stipulated in the project contract. This is how Mr Kamwaza put it -

"16 July 1997

Mandala Building & Construction Limited

P O Box 2137

BLANTYRE

Attention Mr B Clow

Dear Sir

RE: OFFICE BLOCK ON ANGONI ROAD BLANTYRE FOR CHRISTIAN SERVICE COMMITTEE

Thank you for your letter dated 16 July 1997 on the above. We have noted your interest to take sides with the Quantity Surveyors but wonder what authority moral or professional you have for such a stance?

From the Conditions of Contract at Clause 31, it is clear that the architect is the only one empowered to issue certificates. It is also clear that the contractor must furnish whatever proof is required to the architect. If you wish to ignore these provisions, we have no problem. We simply find it amazing that you are happy to boast about how many

years you have been operating as contractors and yet the most basic of roles in the conditions of Contract are either not understood or simply ignored.

We are convinced that the sentiments raised in your letter are based on emotion and not a reasoned assessment of the facts. We have asked for proof of various items. Why is it so difficult to provide that information to us?

When in previous correspondence and discussions you have mistakenly referred to the Quantity Surveyors valuations as certificates, we were tempted to believe it was a genuine oversight. But we note that this mistake continues to feature in your letters. Is there a problem in distinguishing the two?

It would seem that it is your wish to get your Interim Certificates from the Quantity Surveyors. Please feel free to do so.

Yours faithfully

KAMWAZA DESIGN PARTNERSHIP

D J KAMWAZA

cc: The Fitzwilliam Partnership

The Director - Christian Service Committee"

Be that as it may, the Appellants were able to prove, in terms of Clause 31 of the project contract, that they over-paid the Respondents by K852,086.98. We reproduce Exhibit SM4.B, which is the requisite certificate in terms of Clause 31 of the project contract -

"**KAMWAZA DESIGN PARTNERSHIP**

CHARTERED ARCHITECTS

INTERIM CERTIFICATE

Employer: **CHRISTIAN SERVICE COMMITTEE** **Job Ref:**

P.O. Box 51294 **Certificate No. 12**

LIMBE **Issue Date: 14/05/97**

Valuation Date: 13/05/97

Contractor: **MANDALA BUILDING & CONSTRUCTION** TO EMPLOYER

COMPANY LTD TO CONTRACTOR

P.O. BOX 2137 TO ARCHITECT

BLANTYRE TO QUANTITY SURVEYOR

Works: **OFFICE BLOCK**

Situated at: **ANGONI ROAD, BLANTYRE**

Under the terms of the contract dated

in the sum of K9,644,00 for the works named and situated as stated above.

We certify that the following interim payment is due from the employer to the Contractor; and We direct the contractor that the amounts of Interim or Final payments to Nominated Subcontractors included in this Certificate and listed on the attached statement of Retention and of Nominated Subcontractors' values are due to be discharged to those named:

Gross Valuation inclusive of the value of works by nominated

Subcontractors **and WCA and Fluctuations** K 11,574,060.57

Less Retention which may be retained by the employer as detailed

on the statement of Retention K 482,232.20

Less total amount stated as due in Interim Certificate previously

issued up to and including Interim Certificate Number 11 **and WCA**

recovery (K1,928,929.00) K 11,943,915.35

Amount due for payment on this Certificate (K 852,086.98)

(in words)

Credit balance in favour of Christian Service Committee of

EIGHT HUNDRED AND FIFTY-TWO THOUSAND AND

EIGHTY-SIX KWACHA NINETY-EIGHT TAMBALA

SIGNED: D. J. Kamwaza ARCHITECT"

This chronicle of events is what prompted the application by the Appellants for a

mandatory injunction compelling the Respondents to deliver up possession of the building materials valued at K1.95 million to the Appellants. The application was dismissed in the Court below and has now come before us on appeal. On 4th June 1998, we granted a mandatory injunction as prayed for by the Appellants and ordered that all materials left in the hands of the Respondents for purposes of completing the

three-storey building along Angoni Road in the City of Blantyre be returned to the Appellants. We now give our reasons for so ordering.

Two paragraphs in the High Court judgment are pivotal in this appeal and we shall reproduce them in full in this judgment, since they relate to the law which the trial Judge applied. The first paragraph reads as follows -

"The Court has jurisdiction to grant a mandatory injunction upon an interlocutory application: **Bonner v G W Ry (1883), 24 Ch.D**, and **Collison v Warren (1901), 1 Ch.D 812**. It is indeed an exceptional form of relief. The principles outlined by **Lord Diplock** in **American Cynamid Co** related to negative injunctions, are not relevant to mandatory injunctions. For a mandatory injunction to be granted, among other things, the Court ought first to consider that the case of the applicant is unusually strong and clear. A 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: per **Lord Upjohn** in **Morris v Redland Bricks Ltd (1970), AC 65**." (emphasis supplied)

This is the law which the learned trial Judge applied to the facts of this case. In applying the law to the facts, this is what the learned trial judge observed -

"Although an impression may be had that the plaintiff is seeking from the Court an order for both a negative and a mandatory injunction, the proper view is that in fact the plaintiff's application is in respect of an order for a mandatory injunction. The effect of the orders sought by the plaintiff is that the plaintiff wants a mandatory injunction. This is the expressed view of Mr Maziya, the deponent of the affidavit in support of the plaintiff's application. Yes, in paragraph 34 of his affidavit in support of the plaintiff's application herein, Mr Maziya humbly prays unto the Court that a mandatory injunction should be issued by the Court, ordering the defendant to return to the plaintiff the building materials and items in question. It is the view of the Court that indeed the application of the plaintiff can only be said to be for a mandatory injunction. That being the case, the court must, before granting the order sought, consider whether the case of the plaintiff now pending for determination before the Court is, or ought, to be viewed as being one that can be said to be unusually strong and clear. A perusal of the affidavit evidence of the parties does not create that impression to the Court....Finally, it is the well-considered view of the Court that the plaintiff can be compensated in damages. No

submission was made on behalf of the plaintiff that the defendant could not be compensated in damages and that the defendant would not be able to pay them, if ordered by the Court so to do."

It is this judgment which the Appellants are dissatisfied with, and the first point of law which the Appellants disagree with are the words, or rather, the proposition that -

"The Court must, before granting the order sought, consider whether the case of the plaintiff now pending for determination before the Court is, or ought, to be viewed as being one that can be said to be unusually strong and clear."

Although what was said by **Lord Upjohn** in **Morris v Redland Bricks Ltd** was good law in 1970, it would appear that by the eighties the law had taken a different course. In 1978, the House of Lords reviewed the law in connection with interlocutory injunctions, thus in the case of **NWL Ltd v Woods (1979), 3 All ER 614**, per **Lord Diplock** -

"In assessing whether what is compendously called the balance of convenience lies in granting or refusing interlocutory injunctions in actions between parties of undoubted solvency the judge is engaged in weighing the respective risks that injustice may result from deciding one way rather than the other at a stage when the evidence is incomplete. On the one hand, there is the risk that if the interlocutory injunction is refused but the plaintiff succeeds in establishing at the trial his legal right for the protection of which the injunction had been sought he may in the meantime have suffered harm and inconvenience for which an award of money can provide no adequate recompense. On the other hand there is a risk that if the interlocutory injunction is granted but the plaintiff fails at the trial the defendant may in the meantime have suffered harm and inconvenience which is similarly irrecompensable."

In a later judgment of 1986, **Hoffman, J** granted a mandatory injunction where the following were the facts of the case. The defendant was an English company engaged in film distribution by means of financing and acquiring rights in films which it then distributed worldwide through sub-distributors in different countries. In order to effect distribution in Italy the defendant entered into a contract with R, acting on behalf of the plaintiff, a company which R later incorporated in Guernsey for the purpose of the contract. Sometime later, following a change in the defendant's management, the defendant wished to renegotiate the contract with the plaintiff with a view to splitting distribution proceeds between the defendant and the plaintiff on terms much less favourable to the plaintiff than previously. The new terms caused a dispute to arise between the parties, and the defendant, claiming that the plaintiff was in breach of the contract, refused to send to the plaintiff dubbing material for certain films, with the result that the plaintiff was unable to distribute them for exhibiting in Italy. The plaintiff accordingly issued a summons seeking, **inter alia**, an interlocutory mandatory injunction requiring the films to be delivered to the plaintiff.

Hoffman, J held that in determining whether to grant an interlocutory injunction, the question for the Court to consider was not whether the injunction sought 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 succeeded at the trial. This seems to us to be the correct proposition of law to apply.

The main or strongest argument which Counsel for the Respondents submitted was that which the trial Judge summarised in the following terms in his judgment -

"Again, the decision of the defendant to hold unto the building materials supplied to the defendant during the time when the defendant was working on the project, does appear to be justified by the conditions of the building contract which accord to the defendant a right of a lien in the circumstances."

This is, **prima facie**, correct, in that the proviso of Clause 27(2) on page 15 of the project contract does give this right to the Respondents. But then, this right is dependent upon the Respondents satisfying the other provisions of the project contract, such as Clause 31, which stipulates that at the period of interim certificates named in the appendix to these conditions the architect supervising officer shall issue a certificate stating the amount due to the respondents, from the appellants, and the respondents shall, subject to the deposition of a satisfactory performance bond with the architect supervising officer, be entitled to payment thereafter within the period named in the appendix to these conditions.

We are aware that the Respondents were unhappy with the way Kamwaza Design Partnership conducted their duties, but when it was proposed that a different firm of architects should take over by evaluating what Kamwaza Design Partnership had done, the Respondents' response was, in our opinion, a prevarication. This can be seen by reading Exhibit SM 12, which is dated 19th December 1997. We now reproduce that letter, which reads -

"**M A N D A L A**

EDC/jm

19 December 1997

Christian Service Committee

P O Box 51294

LIMBE

Dear Sirs

CSC OFFICE BLOCK ON ANGONI ROAD

We acknowledge receipt of your letter of 17 December 1997. We confirm that we are currently in the process of examining Messrs. Chimangafisi and Partners valuation dated 30 November 1997 and have provided them with the labour register as they requested.

However, there are major differences between their valuation and our claim which need to be agreed. Some of these we detail as follows :-

1. Roofing. The waterproofing was carried out by a specialist subcontractor who has been paid by us for what he had done. He has stated that the Dermabit used is equal to Derbigum and has issued guarantees to that effect. (These were sent to Kamwaza Design Partnership under cover of our letter of 15 July 1997). We believe the Project Architect is being unreasonable in refusing to sanction this change. Dermabit has been extensively used in projects within Malawi.

2. Ceilings. Re rating of Rhinoboard. As the original measured material was cellotex it follows that the gypsum ceiling board substitution has to be re rated. It is not a fluctuation.

3. Ballinstrading. The ballinstrading was not completed at the time the contract was determined. There had been numerous alterations requested by the architects. As the work is incomplete, we believe that it would be proper for B & C to be allowed to finish should they so wish. However, they must be paid for what they have already done and this should be reflected in the final accounts.

4. Electrical sub-contract. The last payment we received - Cert. 11 - included K564913,75 as the gross payable to Everglo. This was paid within 14 days of our receipt of payment. We did not receive any further payment after Certificate 11 so we could hardly be expected to make further payment to this nominated sub-contractor.

5. Materials on/off site. There were insufficient materials supplied by the client in

terms of plumbing materials. The items included as materials on site are in our CSC Store and will be required to complete the project.

6. Kitchen Units. The kitchen units were made redundant by the change in layout - it was just an excuse to say they were of unacceptable standard. However, we will use them elsewhere so I agree that they can be excluded.

7. Additional Reinforcement. No allowance has been made for waste and wrongly supplied bars etc. Our claim for this was carefully calculated and we will expect full reimbursement.

8. Fluctuations. The labour register has been given to the Q.S. The 20% mark-up on fluctuations was agreed - refer to minute 1.12.03 of the pre contract meeting.

It is apparent from the above, that there is still a fair amount to do before the account can be stated as agreed. We believe there is still a considerable amount of money due to us and in terms of the contract will maintain our 'lien' on materials until we have had full and final settlement.

Yours faithfully

E D Campbell

COMPANY SECRETARY

cc : Kamwaza Design

Chimangafisi & Partners"

It should also be noted that the Respondents wrote the above-cited letter on 19th December 1997, whereas they terminated the contract on 1st August 1997, that is to say, four months earlier. This is clearly unacceptable conduct on the part of the Respondents. Had it been that this letter was written before the Respondents terminated the project contract, we would have been less hasty in granting the mandatory injunction as we did on the 4th of June 1998. This is so, as it would have shown that the Respondents took all possible steps to try to accommodate the viewpoints of the Appellants and or Kamwaza Design Partnership. But the way the Respondents conducted themselves shows that they were prepared to terminate the project contract, and, at the same time, retain the building materials on site, regardless of the concerns expressed by the Appellants.

Perhaps the following paragraph from **Halsbury's Laws of England** aptly summarises our approach in the manner in which we came to our decision in this matter -

"Conduct of Parties. In considering whether an interlocutory injunction should be granted, the court has regard to the conduct and dealings of the parties before application was made by the plaintiff to preserve and protect his right, since the jurisdiction to interfere, being purely equitable, is governed by equitable principles." **Halsbury's Laws of England 4th Edn. para 957**, at **page 540**.

In his judgment, the trial Judge placed reliance on the principle that a court ought first to consider that the case of the applicant is unusually strong and clear when granting a mandatory injunction. This is indeed true, but this is not the only principle that applies. **Halsbury's Laws of England, 4th Edn., at para 948**, demonstrates that there are other principles which would apply with equal force in granting mandatory injunctions. The said paragraph reads, at page 534, as follows -

"Mandatory injunctions on interlocutory applications. A mandatory injunction can be granted on an interlocutory application as well as the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction, it is completed, a mandatory injunction will be granted on an interlocutory application."

In our considered opinion, it is proper to grant a mandatory injunction in the present circumstances, as we are of the view that the case is perfectly clear and one which we feel ought to be decided promptly, especially since there is no evidence that either party is insolvent. Again, it is clear to us that the Respondents have not fulfilled their contractual obligations under Clause 31 of the project contract. It is equally clear that the Respondents did not act bona fide by presenting their side of the story in writing prior to terminating the project contract as evidenced by the letter dated 19th December 1997, which was signed by the Company Secretary, Mr E D Campbell. Whereas the Appellants may not have been totally blameless either, we find that the Respondents cannot avail themselves of the provisions of Clause 27(2) by retaining possession of building materials which were bought by the Appellants. Let the Appellants complete the building structure, then the Respondents can enforce their rights, if any, thereafter.

It is for these reasons that we decided to grant the mandatory injunction which the appellants prayed for in these proceedings.

DELIVERED in open Court this 11th day of August 1998, at Blantyre.

Signed: .....

J B KALAILE, JA

Signed: .....

D G TAMBALA, JA

Signed: .....

A S E MSOSA, JA