

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 832 OF 2000

N A NTAJA1st PLAINTIFF

AND

N J MAKUNGANYA 2ND PLAINTIFF

VERSUS

BLANTYRE CITY ASSEMBLY.....DEFENDANT

CORAM: D F MWAUNGULU (Judge)

Chisale, Legal Practitioner, for the plaintiff

Nyasulu, Legal Practitioner, for the defendant

Moyo (Mrs.), Official Interpreter

MWAUNGULU, J

ORDER

Mr. Ntaja and Mr. Makunganya apply for an interlocutory injunction against Blantyre City Assembly. They want this Court to restrain the defendant from withdrawing from the plaintiffs two motor vehicles. There is a bitter dispute between the plaintiffs and the defendant about the two motor vehicles. Initially the plaintiffs appeared before me for an order ex parte. I could not grant the ex parte order. I ordered the application be heard inter partes for reasons appearing in this order.

The plaintiffs are the defendant's employees. They allege the defendant sold them two motor vehicles. The City Assembly was selling its boarded-off motor vehicles. The City Assembly issued a memo to staff at the City of Blantyre premises to that effect. The City Assembly also appointed Trust Auctioneers and Estate Agents[1980] Limited agents for the auction. On 8th December 1999 the plaintiffs informed the defendant they were going to bid for the motor vehicles. They informed the defendant that they wanted the defendant to allow them to pay for the cars by monthly instalments should they succeed at the auction. The defendant did not reply to the plaintiffs' requests.

The plaintiffs won the bid. On 14th December 1999 the City Assembly advised the Director of Road Traffic to change ownership of the motor vehicles from the City Assembly to the two plaintiffs. This was done. On 25th January 2000 the City Assembly wrote the plaintiffs approving their car loans' applications. The plaintiffs proceeded to complete loan application forms. They allege that was just a formality. It appears the loan applications are unapproved.

Whatever happened to the loan application, on 25th February 2000 the City Assembly informed the plaintiffs it is withdrawing the motor vehicles from the plaintiff's immediately. The pretext is that the plaintiffs never complied with the terms of the auction requiring payments in cash or bank certified cheques. The City Assembly further contends the plaintiffs are not under their contract entitled to a loan. Even if they were, the City Assembly also contends the plaintiffs are disabled because loans are unavailable for motor vehicles used for over ten years. The plaintiffs cannot buy the motor vehicles because the City Assembly cannot furnish the loans according to the employment contract.

The difficulty here seems to my mind to emanate from a confusion which must be resolved at an early stage. If this is resolved, it will be easy to see the perspective in this application. The defendants are in two distinct relationships. The City Assembly is the plaintiffs' employee. The City Assembly is also the plaintiffs' vendor. The former relationship is totally unrelated to the sale of the motor vehicle. Clearly the injunction application cannot be based on it. Facilitation for purchase of a car is purely a contractual matter. This Court, if it had power to do so, cannot force the City Assembly to provide loans on terms other than those the City Assembly agreed with the City Assembly's employees.

It matters less that the vendor here is the employer. If the vendor was other than the City Assembly, this Court, again if it had such power, would not have forced that vendor to release the car if the City Assembly refused the plaintiffs the loan for the reasons the City Assembly suggests. The plaintiffs would have had to rely on the employer's breach of the contract and never have the car. The other vendor would not be forced to deliver the car if the price is not paid. If the car was delivered to the buyer, the seller would only have to

sue for the price. It is the suit for the price that may be significant in determining whether to grant the interim relief that the plaintiffs seek.

In the second relationship the City Assembly is a vendor. The matter can be looked at from two perspectives which, in my judgement, have no consequence on the outcome of the application. Whichever view one takes, the application for an interlocutory injunction must fail. If the sale took place, property passed at the fall of the hammer. There, if as the plaintiffs contend, the plaintiffs possessed the cars, the defendant's interference is a tort in detinue or conversion. If the plaintiffs never had possession, at the fall of the hammer the contract was concluded. The defendant's failure to deliver the cars is breach of contract. The plaintiffs can repudiate the contract and resort to their remedies in contract. The plaintiffs can sue for damages or specific performance. The latter remedy is unavailable in matters of this nature. The plaintiffs' rights therefore only sound in damages. The Court would not normally grant specific performance for such a contract. Courts grant injunctions to aid specific performance. The question here is whether on the facts of this case the plaintiff is entitled to an interim interlocutory injunction.

Recently in *Candlex Limited v Phiri* Civ. Cas No. 718 of 2000, unreported, *Bata Shoe Company(Malawi) Ltd. v Shore Rubber (LiLongwe) Limited*, Civ. Cas No 3816 of 1999, unreported and *Agriculture Development and Marketing Corporation of Malawi v Kakusa*, Civ. Cas No 713 of 2000, unreported, this Court considered the scope of its jurisdiction to grant interlocutory injunctions. The Court simply applied and explained the principles the House of Lords, particularly the judgement of Lord Diplock, all the other Lords agreeing, ably laid in *American Cynamid Co. Ltd. v Ethicon Ltd.*, [1975] 1 All ER 504.

Here there is a triable issue and the action is not frivolous and vexatious. As I have shown, the sale was probably complete at the fall of the hammer. The City contends, however, that the plaintiffs never paid. The terms were strictly cash or bank certified cheque at the fall of the hammer. The plaintiffs suggest that, contrary to the terms of the sale, they had an arrangement to pay by instalments. These are matters to be resolved, not now, but at the trial. Regardless, if the sale was complete, the plaintiffs have a right to delivery if the defendants never delivered the motor vehicles. If the defendant delivered the motor vehicles, the defendant's rights are to the price. They are liable in tort for interfering with the plaintiff's rights to title or possession. Trial should resolve these matters. The plaintiffs have created a right to be considered for a grant of the interlocutory injunction they seek, subject to what follows.

In *Candlex Limited v Phiri*, I showed that all Lord Diplock did was lay an approach underlying general principles on which Courts grant permanent injunctions. I stated that an application for an interlocutory injunction must generally countenance the prospect of a permanent injunction being given. A court will not grant an interlocutory injunction where it cannot grant a permanent injunction. This is why Lord Diplock in his speech started by clearly laying down this aspect:

“ ... [T]he governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award in damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of trial.”

In *Candlex Limited v Phiri* this Court said:

“An interim injunction is a stop gap mechanism. The court must bear in mind the likelihood of the Court granting a permanent injunction at the end of the trial. If the court cannot grant an injunction at the end of the trial, as, for example, where the action can only be met in damages, the court may not grant an interim injunction.”

A permanent injunction will not be granted where damages are an adequate remedy (*London and Blackwall Railway Co. v Cross*, (1886) 31 Ch D 354, 369, per Lindley, L J). The injury must be irreparable, i e, the applicant’s rights must be such as cannot be covered or acquitted by damages (*Bloxam v Metropolitan Rly Co.*, (1868) 3 Ch App. 337,354). The injury must also be continuous.

This is not a case where the Court can grant a permanent injunction. The plaintiff’ action sounds in tort and in contracts. Damages are an adequate remedy for either cause of action. At the end of trial the court would not grant a permanent injunction. Interlocutory injunctions avoid injustice between the time of the application and when the rights of the parties are finally determined. The first principle in *American Cynamid Co. Ltd. v Ethicon Ltd.* is considering whether damages are an adequate remedy for losses the plaintiff will suffer between the application and the trial. On the first principle the Court also considers whether, if they be adequate remedy, the defendant can pay the damages. In *Hodgson v Duce*, (1856) 4 WR 576, the Court granted an injunction because, for a defendant pauper, damages cannot be an adequate remedy for the plaintiff. The Court of Appeal in modern times decided similarly in *Alfred Dunhill Ltd. v Sunoptic SA*, [1979] FSR 337. For breach of contract or duty in tort damages are worked out in a way considering developments in the market value of a chattel. That way damages, in a fair way, adequately cater for the plaintiff’s losses if the injunction is not granted. It is not suggested the defendant cannot pay. They can pay. On the first principle then the plaintiff cannot be granted the interim injunction he seeks.

On the second principle the application is also refused. The Court considers whether on the plaintiff’s undertaking the defendant’s losses in the interim can adequately be compensated in damages. The Court considers whether the plaintiff can pay them. The defendant’s losses will be for loss of use. These are quantifiable and can adequately be compensated. Can the plaintiff pay them? I doubt. The plaintiff’s cannot pay for the

motor vehicles by cash. They rely on a loan application from the defendant. The defendant suggests that, at their level of salary, the plaintiffs are not be entitled to any facility. I am aware damages for loss of use may not be as high. In this Court, permanent injunctions, which in principle should be heard within two months, are heard after a long time and are protracted. The second plaintiff applied to the defendant to be bailed out of a mortgage. I have grave doubts that the plaintiffs would pay on their undertaking. I would refuse the application on the same score.

It is unnecessary to consider the balance of justice. I refuse the application with costs.

Made in Chambers this 5th Day of June 2000.

D F Mwaungulu

JUDGE