

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1651 OF 2005**

BETWEEN:

SMALL HOLDER FARMERS FERTILISER REVOLVING FUND OF
MALAWI.....PLAINTIFF

- and -

EXPORT TRADING CO. LIMITED.....DEFENDANT

CORAM: CHIMASULA PHIRI J

Mrs Kondowe of counsel for the plaintiff

Tandwe of counsel for the defendant

Chinthenga – official interpreter

RULING

Chimasula Phiri

This is an inter-partes summons for a mandatory injunction order brought at the instance of the defendant. The defendant prays for an order that the plaintiff be ordered to release to the defendant 519 bags of fertilizer now allegedly being wrongfully withheld by the plaintiff. In the alternative that the plaintiff either by itself, servants, officers or agents be ordered to refrain from continuing to detain the defendant’s fertilizers comprising 519 bags. The plaintiff opposes the summons.

The basic facts in support of the summons are set out in the affidavit of Maheshwar Bandam, the Financial Controller of the defendant. He has stated that the plaintiff commenced action against the defendant on 31st May 2005 to recover arrears of rental, storage and handling charges in respect of the plaintiff's space occupied by the defendant at the plaintiff's Chirimba and Kanengo depots.

In the action, the plaintiff also claimed interest on the arrears, indemnity on the collection costs payable by the plaintiff to its legal practitioners as well as party and party costs of the action. That by a consent order dated 26th August 2005 the court ordered and directed as follows:-

By Consent

1. *That the defendants do pay the plaintiff US\$114,002 handling and storage charges in three equal instalments of US\$38,000.00.*
2. *That the first instalment amounting to US\$38,000.83 be paid on signing this consent order.*
3. *That the second instalment amounting of US\$38,000.83 be paid within 30 days of the date of payment of the first instalment.*
4. *That the third and final payment in the sum of US\$38,000.83 83 be paid within 30 days of the date of payment of the second instalment*
5. *That the plaintiff do release upon payment of each instalment excess quantities of the defendant's stock of fertilizer now in its custody each time retaining sufficient stock as an agreed lien to secure any outstanding instalments. The retained stocks shall be segregated from other fertilizers and the property marked*

(physically or otherwise) as belonging to the defendant subject to the right of lien herein agreed.

6. *That costs to the plaintiff be agreed or taxed if not agreed to.*

AND IT IS FURTHER ORDERED AND DIRECTED *that further action herein be and is hereby stayed on the following conditions –*

- a. *That the defendant liquidates the debt herein by monthly instalments of US\$38,000.83 with the first instalment becoming due for payment on August 22, 2005 and the subsequent instalments to be paid according to the terms set out in paragraphs 3 and 4 above.*
- b. *That in the event of default of payment of any instalment subsisting for more than 7 days the plaintiff be at liberty to realize its lien for the whole balance of the debt forthwith without further order of the court and interest to be paid on the sums above at the rate of 8% per annum calculated from the date of the respective invoices until full payment.*
- c. *That upon completion of all the payments herein agreed, the plaintiff shall release to the defendant all stocks being held by it and in the event of any shortage or under-delivery thereof the plaintiff shall be liable to the defendant for the value representing such stocks.*

It has been deponed that pursuant to the said Consent Order, the defendant made payments towards settlement of the debt as follows:-

23/08/05.....	K4,736,263.85
26/09/05.....	K4,743,430.80
26/09/05.....	K4,743,430.80

It will be noted that the second and final payments were made on the same day and earlier than envisaged in the Consent Order. Upon settlement of the agreed sums of money, the defendant requested the plaintiff to release all fertilizer stocks held by them. In reply, the plaintiff by letter of 29th September 2005 raised the issue of further storage charges as follows:-

Dear Sir,

HANDLING AND STORAGE CHARGES

We refer to the subject mentioned above and acknowledge receipt of the three instalments of \$38,000.83 each.

In view of this development, you may now proceed to collect the fertilizer stocks from our warehouses but should leave %10,629 worth of it or 500 bags of NPK at Kanengo Depot to cover storage charges for three months of July through September. The same would be released after settlement of the invoices.

Yours faithfully,

The deponent has stated that there was nothing in the Consent Order requiring payment of additional money by the defendant. Further, after the defendant had paid up the sums indicated in the Consent Order proceeded to sell the fertilizer to their customer Avon Wholesalers. However, the defendant is unable to deliver to its customer because of continued detention of fertilizer stocks by the plaintiff.

The Affidavit in Opposition sworn, by Maureen Kondowe, counsel for the plaintiff stated that the payment that the plaintiff demands from the defendant is in respect of storage charges that the defendant continued to incur during the execution of the Consent Order. She has deponed that the Consent Order in question had nothing to do with the present claim of US\$10,629.00. She has further contended that it is clear that the agreement between the parties was for the storage of fertiliser, which the plaintiff allegedly continued to store on behalf of the defendant.

The plaintiff has disputed that its refusal to release the fertilizer is without cause because there is outstanding US\$10.629.00 in storage charges.

The defendant made a reply through Affidavit of Samuel Tembenu, legal practitioner for the defendant. He stated that the claim made by the plaintiff is without contractual basis since there was no agreement that the plaintiff would charge further storage charges incurred after signing the Consent Order. He has stated further that the Consent Order was for purposes of settling the dispute between the parties in a manner acceptable to both of them and such a compromise did not envisage any further liability to pay storage charges. The defendant states that if the plaintiff had intended that further storage charges should be imposed, then it should have done so by clearly and expressly providing for that in the Consent Order. The defendant states that it was at the plaintiff's insistence that fertilizer representing unpaid sums be retained despite assurance from the defendant of its commitment to honouring the terms of the Consent Order nor in any negotiations prior thereto, did the parties agree that the defendant would be liable to pay storage charges during the period the plaintiff insisted to retain the fertilizers.

ISSUES

Whether or not this is a proper case, in which the court should grant a mandatory/interlocutory injunction?

THE APPLICABLE LAW

On the mandatory injunction

*According to Order 29/1/05 the court has jurisdiction to grant a mandatory injunction upon an interlocutory application. However, mandatory injunction is a very exceptional form of relief. See **Chirwa vs Kaunda t/a Chika Building Contractors** 16 (2) MLR 503 and **The State vs The Commissioner General and Mrs Tracy Yiannakis** civil cause number 116 of 2005 (unreported).*

*The principles governing the grant of mandatory injunction were set out by Lord Upjohn in the case of **Redland Bricks Ltd vs Morris** (1969) 2 All ER 576 as follows:*

1. *The grant of mandatory injunction is entirely at the discretion of the court. Every case must depend essentially upon its own circumstances.*
2. *A mandatory injunction can only be granted where the plaintiff shows very strong probability upon the facts that grave damage will accrue to him in future.*
3. *Damages will not be sufficient or adequate remedy if such damage does happen.*
4. *Unlike the case where a negative injunction is granted to prevent the continuance or recurrence of a wrongful act, the question of the cost to the defendant to do the work to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account.*

*In **Leisure Data v Bell** (1988) FSR 367 it was held that the principles governing mandatory injunction are different from those governing prohibitory injunctions and that before granting a mandatory injunction, that case must be unusually clear and strong. It was further held that where the practical reality of a situation made an interim injunction necessary, the court will make the order whether or not the high standard of probability of success is made out.*

On the Consent Judgment and Orders

Order 42/5A/3 Rules of the Supreme Court provides in part as follows:

“It should of course be realized that a Consent Judgment or Order, obtained under the consent procedure under this rule will have the same force and effect as an order made by a Judge, Master or Referee. It will be a Consent Judgment or Order made by or in the name of the court and will have all the consequences of the Court Judgment or Order.”

Mandatory injunctions are granted only in exceptional circumstances. The grant of every mandatory injunction depends on its own peculiar circumstances; hence, the principles for its application can only be laid down in general terms.

FINDINGS

It is the plaintiff's argument that in retaining the remaining bags of fertilizer, it has not breached any terms of the Consent Order dated August 26, 2005. This is the case because such retention is in line with its right to a lien over the stocks of fertilizer as enshrined in clause 5 of the consent order dated August 26, 2005. A lien is defined as a right at common law in one man to retain that, which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied. See the case of **Hammonds vs Barclay** (1808) 2 East 227 at 235, per Grose J. See also Saunders J. B. (ed) Words and Phrases legally defined, London: Butterworths (1989) 3rd ed., page 45. In the case of **MTS Limited vs Truck Clinic Limited** [1993] 16(2) MLR 638, it was held that there was no express or implied authority to entitle the defendant to a lien over the two vehicles since the amount owed was made up of a number of bills raised over a period of five months arising from a running account involving various other vehicles which the plaintiff had with the defendant. As a result, a mandatory injunction as sought was granted.

The plaintiff relies on clause 5 of the Consent Order as the basis of the lien. Regrettably, the effect of clause 5 did not go beyond what was embodied expressly in the Consent Order. The instalments being referred to relate to what is contained in clauses 1 to 4 of the Consent Order. If the plaintiff had contemplated by the Consent Order that the defendant would be liable to pay further storage charges during the execution of the Consent Order the phraseology in clause 5 could have included "***and any further or accruing storage charges***" after the phrase "***any outstanding instalments***".

I do not think that it proper for the plaintiff to claim lien when it was not so provided for. After all, it appears that the plaintiff insisted on keeping the stocks of fertilizer and only releasing in piecemeal on receipt of an instalment. I get the impression that the plaintiff did not believe that the Consent Order would be respected by the defendant, a belief which was proved wrong. It would be inequitable and unjust to allow the plaintiff to charge storage charges for that extended period. The very last clause of the Consent Order provided for authority to the plaintiff to release to the defendant all stocks being held by it and in the event of shortage, the plaintiff would be liable. I find that the plaintiff's refusal to release 519 bags of fertilizer is wrongful and in breach of the express term of the Consent Order.

As earlier indicated a grant of a mandatory injunction order is sparingly done in the discretion of the court. There must be unusually strong and clear case for it to be granted. In the present case, there being no lien and the stocks being detained at the instance of the plaintiff, it cannot be fair and equitable to allow the plaintiff benefit by way of payment of further storage charges. This is an equitable remedy and principles of fairness come into play.

It is my utmost considered view that the plaintiff has diminished willingness to voluntarily release the stocks to the defendant and only a court intervention can compel the plaintiff to do so. Hence, this order that the plaintiff forthwith releases to the defendant 519 bags of fertilizer currently in the possession and custody of the plaintiff.

In the Affidavit in Reply, the defendant also prayed for an order of assessment of damages suffered by the defendant. I am inclined to decline this prayer because it did not come in the inter-partes summons. The plaintiff did not have an opportunity to effectively defend such a claim. If the defendant has suffered any damage or loss due to withholding of its fertilizer stock, that mater is not **res judicata** and the defendant can commence an action in that regard.

Costs are in the discretion of the court. However, the most established practice is that costs follow the event. In this matter, the defendant has successfully pursued its claim and would be entitled to costs of this application.

MADE in chambers this 2nd day of February 2006 at Blantyre.

Chimasula Phiri

JUDGE