



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 214 OF 2007

BETWEEN:

DAIRIBORD MALAWI LIMITEDPLAINTIFF

- AND -

MR PHILLIP MSINDODEFENDANT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA

Mr Ngwira, of Counsel, for the plaintiff

Defendant – Absent

Mr Mdala – Official Court Interpreter

ORDER

Manyungwa, J.

This is the plaintiff's application for an Order of a mandatory injunction, requiring the defendant, who was the plaintiff's managing director to return or surrender the furniture and the lap-top computer to the plaintiff. The application is made pursuant to **Order 29** of the Rules of the Supreme Court and is supported by an affidavit sworn by Mr Chifundo Ngwira, Counsel for the plaintiff herein. There is no affidavit in opposition filed by the defendant nor did the defendant attend to the hearing or give any reason for his absence. The Court therefore ordered the hearing to proceed in the absence of the defendant.

It is deponed by Mr Ngwira, on behalf of the plaintiff that the defendant, Mr Phillip Msindo was until December, 31st 2006 the Managing Director of the

plaintiff's company. It is stated further by Mr Ngwira, that the defendant was transferred to Zimbabwe on Secondment to the plaintiff's external company of which the plaintiff is a shareholder. It is further averred by Mr Ngwira that during the defendant's tenure as the plaintiff company's Managing Director in the country, the plaintiff bought furniture and furnished the same in the defendant's company house, and that the said furniture at all material times belonged to the plaintiff company, as is evidenced by a copy of the inventory of the said furniture marked as exhibit "CV 1". It is further averred that during the subsistence of the defendant's employment with the plaintiff company the plaintiff bought a lap-top computer for use by the Managing Director and that since the defendant was transferred to Zimbabwe, he was supposed to surrender the furniture and the lap-top to the plaintiff company which he did not. The plaintiff company now has a new Managing Director who commenced her duties on the 13th of January, 2007. On 13th January, 2007 the plaintiff's Managing Director wrote the defendant requesting him to handover the lap-top computer to her. The plaintiff tendered exhibit "CV 2" as evidence of the same.

Mr Ngwira further states that the plaintiff's Legal Practitioners, Lawson and Company on 17th January, 2007 wrote the defendant and asked the defendant to surrender the furniture and the lap-top computer and that the defendant has not so surrendered the same and that it is the plaintiff's belief that the defendant will not return the plaintiff's properties unless so ordered by the courts. Further, it is contended that the new Managing Director is being affected in her work as she has no lap-top computer to use in her day to day operations since all the information of the plaintiff's operations are in the lap-top. Further that the new Managing Director has no furniture to use as she requires the furniture that is still with the defendant in her house. The plaintiff therefore prays to this court that both the lap-top computer and the furniture be returned or surrendered by the defendant to the plaintiff, and so seeks a mandatory order of injunction to effect the same.

The main issue for determination of this court is whether in the circumstances of this case, the court should grant an order of a mandatory injunction. It must be appreciated that the principles governing the grant of a mandatory injunction are different from those regarding the grant of interlocutory injunctions. There is no doubt however that courts have the jurisdiction to grant a mandatory injunction upon an interlocutory application. In the case of **Bonner Vs Greater Western Railway Company** 1883 24 Ch. D 1 at page 10 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 an interlocutory application as well as the hearing”.

See also the case of **Collison Vs Warren** (1901) Ch. 812. However, an interlocutory mandatory injunction is discretionary and a very exceptional form of relief. See **Canadian Pacific Railway Vs Gaud** [1949] 2KB 239 – CA. The case must be unusually strong and clear before a mandatory injunction will be granted. In **Nottingham Building Society Vs Enrodynamics Systemes** pls [1993] FSR 468 the court granted the mandatory injunction after taking into account the likely result of the trial. The principles governing the grant of mandatory injunction were succinctly discussed by Lord Upjohn in **Redland Bricks Ltd V Morris** [1970] AC 652; [1969] 2ALLER, 576. This is what the court said at page 665.

“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 damages 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 Ritch Contracting and Supply Company]** AC 999, 1005. 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 court must be satisfied at the trial that the injunction was rightly granted. However in some cases like in **Leisure Date V Bell** [1988] FSR 367 where it became necessary that some mandatory order had to be made **as 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.

I have carefully considered the facts in this case. I must point out here that the facts as presented by the plaintiff were not disputed. The defendant neither put in an affidavit in opposition nor appeared at the hearing. The facts are therefore uncontroverted. I therefore accordingly, find that the lap-top computer and the furniture herein, the subject matter of this application, belong to the applicant, and that the applicant has demonstrated a high likelihood of success at trail. Furthermore, the applicant's case is in my view clear and strong.

In these circumstances and by reason of the foregoing therefore, I grant to the applicant an order of mandatory injunction requiring the defendant to return the lap-top computer and the furniture to the applicant within the next 7 days from the date of this order.

I also award costs to the applicant.

Made at Principal Registry, Blantyre this 23rd day of February, 2007.

Joselph S Manyungwa
JUDGE