

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2234 OF 2003

BETWEEN:

T.S.V. MALINGA

t/a Malinga Electrical Construction.....PLAINTIFF

-and-

MALAWI REVENUE AUTHORITY.....DEFENDANT

CORAM: HON. JUSTICE A.C. CHIPETA

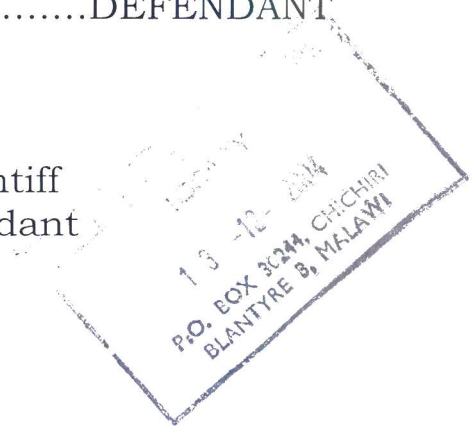
Mulemba, of Counsel for the Plaintiff

Tandwe, of Counsel for the Defendant

Fatch, Official Interpreter

RULING

On 14th August, 2003 this Court (Hon. Justice Mwaungulu sitting) granted to the Plaintiff T.S.V. Malinga t/a Malinga Electrical Construction, an Intertocutory Order of injunction on an ex-parte application. When I go through the application and the order that issued I see that the Plaintiff commenced the action herein and obtained the injunction mentioned on the strength of threat from the Defendant to seize the vehicle herein, an Isuzu KB registration No. TO 600. He duly represented to the Court, when making this ex-parte application, that he had bought the vehicle in issue from a Mr Majawa on 19th December, 2002 (per exhibit "YM1"), and that it was registered in his business name under the new type of Motor Vehicle Registration Certificate on 1st August, 2003. On strength that if the intent of the Defendant to seize the motor



vehicle on account of insufficient duty having been paid for it, the top-up was the liability of the importer per Sections 35 and 91 of the Customs and Excise Act (Cap 42:01), the requested injunction order was duly granted.

What I see next is that the Applicant followed his first steps with an inter-partes Summons for injunction. It was filed on 22nd August, 2003 but was issued on 25th August, 2003. It was set down for 11th September, 2003. The Summons in question was supported by an affidavit different from the affidavit used during ex-parte application stage. While both affidavits were sworn by Mr Yambani Mlemba, of Counsel for the Plaintiff, not all their exhibits matched. The Sales Agreement earlier exhibited as "YM1" remained the same. However, exhibit "YM2" changed. The new exhibit "YM2" was also a registration certificate (alias blue book) for an Isuzu registered NO. TO 600. This however is the earlier version of registration certificate. It shows registration of the said vehicle in the name of a Mr Majawa on 30th November, 1998, and a change of ownership to Malinga Electricals on 23rd December, 2002. Now the new type of registration certificate, which initially had been exhibited as "YM2," is, under this inter-partes application affidavit, marked exhibit "YM3." There is a 4th exhibit, "YM4," a Notice of Detention dated 14th August, 2003 in relation to an Isuzu KB with details of Chassis and Engine Number endorsed, but no registration number cited, also exhibited.

It appears that the inter-partes Summons herein was not heard on the date initially set down. According to Notices of Adjournment on the Court file, it was next set down for the dates 9th October, 2003, 12th November, 2003 and 19th January, 2004 without ever being heard. What features hereafter is the Summons for the Defendant, filed and issued on 11th March, 2004, with a view to vacating the order of interlocutory injunction herein. It was made returnable on 15th March, 2004. This Summons is also supported by an affidavit with two exhibits, marked "ED1" and "ED2." The first exhibit is a copy of Customs Clearance Certificate for a Datsun

Saloon. The date of that document is not clear. The second exhibit is a copy of the old type of registration certificate. It is not a very clear document, but it relates to an Isuzu KB. Its registration number appears to be TO 1600 but the deponent alleges that it is TO 600. Its registration date is 13th May, but the year is not clear. The registered owner is Malinga Electrical Construction.

On the date initially set down for this Summons it was called but it was further adjourned to 22nd March, 2004. The Defendant being desirous of putting in more exhibits the case was on this new date further adjourned to 1st April, 2004. Indeed following this adjournment the Defendant filed a supplementary affidavit in support of its Summons to vacate the injunction order. To this, one exhibit, marked "KL1," was attached. It is a copy of an application for registration of a Datsun registered No. TO 600 in 1994. The deponent of both the affidavits of the Defendant herein is Mr Kingston Lapukeni, Director of Tax Audit and Investigations for the Defendant.

The Summons to vacate order of injunction was however apparently not called on the date it had been adjourned to. It was next set down for 2nd June, 2004 when finally it was indeed argued. It has somewhat puzzled me that the parties appear to, as part of their arguments, have made reference to certain documents that are not part of the documents and exhibits I have mentioned above. I know not whether any extra documents were filed but not brought on the Court file or merely exchanged between the parties without being filed. Actually the parties have made reference to an exhibit marked "SMY1" in a supplementary affidavit of the Plaintiff. I neither have such affidavit nor such exhibit on the Court file and will therefore not be able to comment on such or to take same into account as I decide the Summons. As I have said above the only exhibits I have on the record on the part of the Plaintiff are the one filed in support of the ex-parte Summons for injunction before Hon. Justice Mwaungulu, and the affidavit next filed in support of the inter partes Summons for



injunction last set down for 19th January, 2004. None of these is entitled "Supplementary Affidavit" just as neither of them has any exhibits marked under the series "SYM."

Leaving this aside it has struck me that the parties do not appear to be looking at the injunction herein from the same view point. The Plaintiff, from the Court record, applied for and obtained from the Court an ordinary interlocutory injunction order. From the way the Defendant has couched its application to vacate the interlocutory injunction it is quite at ad idem with the Plaintiff that the injunction it is fighting is the same one that restrained it from seizing Isuzu KB registered No. TO 600. Surprisingly, however, under the same breath in the affidavit in support of this Summons to vacate the Defendant assets that the Court granted a mandatory order of injunction to the Plaintiff and complains that it was unprocedural to grant this type of injunction ex-parte.

Looking at the ex-parte application that was lodged with the Court and at the order that ensued from it, and further looking at both the inter-partes Summons the Plaintiff subsequently took out and even at the Summons to vacate the order the Defendant itself took out, the most I can say is that the alleged grant and existence of mandatory order of injunction in this matter is a figment of the Defendant's imagination. In short the Defendant is attacking as unprocedurally secured an order that was neither applied for, nor granted and which does not exist in this case. I need not be concerned therefore with the Defendant's grievances in so far as they relate to the granting of a mandatory order of injunction, as it is obvious to me that the Defendant is mistaken on this subject.

Proceeding now on the basis that we are dealing with the usual type of interlocutory injunction order, the scenario that emerges from the various affidavits and exhibits filed, as well as from the arguments advanced by both sides, is as follows below. On 13th August, 2003 the officers of the Defendant approached the Plaintiff and alleged that the value of the

vehicle herein had been under-declared on importation. On that basis they evinced an intention to seize the vehicle and they thus asked the Plaintiff to take it to their yard after repairs at the garage they found him. The next day the Plaintiff commenced action by writ for a permanent order of injunction to restrain the intended seizure and/or detention.

At the same time, by ex-parte application, through which he averred that he merely bought the car from someone else within Malawi, the Plaintiff indicated that he was not the importer of the car in question. Through citation of Sections 35 and 91 of the Customs and Excise Act, he was able to convince the Court that if the Defendant's problem is underpayment of duty, their rightful customer was the importer of the vehicle, and not he himself. It is on this account that an injunction was granted to the Plaintiff.

In seeking the vacation of this injunction, I notice that in both the supporting affidavits it has filed, the Defendant has made very bold and accusatory statements. Basically the Defendant has alleged that it is a lie that the Plaintiff bought this car from a Mr Majawa. The Defendant has in fact claimed that the Plaintiff is the importer of the car the Defendant intends to seize and that he did not pay duty on it because he forged the registration book of a Datsun car he imported in 1994 by super imposing the details of the car in question on it. Duty thus still remains unpaid on this Isuzu KB, it has been alleged, and that this is what makes the car liable to seizure. The cover the deponent has put on for making all these accusations is that he conducted investigations at the Road Traffic Department where he claims that the vehicle his office intends to seize has been deregistered and that it is consequently illegally on the roads.

The affidavits of the Defendant, strong though they sound, suffer a major inherent weakness. They are full of hearsay and they are also full of subjective opinion. I really find it rather fanciful that the Defendant would seriously urge this Court to vacate its regularly granted order of injunction

on a combination of hearsay and conjecture in the affidavit it is placing reliance on.

Order 41 rule 5 of the Rules of the Supreme Court provides clear guidelines on what contents affidavits should carry. It is a legal requirement that an affidavit should contain such facts as the deponent is able of his own knowledge to prove. The way the Defendant herein has deposed as to the facts in his affidavit, one would gain the impression that he was either the head of the Road Traffic Department or an employee thereof. Conducting an investigation does not change the fact that the investigator has received information from a source of which he is not the origin. Perhaps therefore an affidavit with statements of information and belief could have been more appropriate, but the affidavits filed by the Defendant are not such. I think it is dangerous in Court proceedings for a witness or a deponent to peddle hearsay so forcefully and to draw bold conclusions from it as if he were preaching the gospel. Sincerely speaking I have serious reservations about the affidavits the Defendant has so much depended its application on, and I cannot therefore allow my judgment to be swayed by this type of evidence.

Let me at this stage associate myself with the decision of Hon. Tembo, J. (as he then was) in Miscellaneous Civil Cause No. 89 of 2002, The State and the Commissioner General of Malawi Revenue Authority, ex-parte Chipiliro Phiri Anganile, in which I think the law on who is liable to pay duty or to top-up on under-paid duty on imported items was well explained. Now in this case where in the main action the Plaintiff sought a permanent order of injunction against the seizure of his car, it is open for the Defendant to file a defence, and if it can manage to bring direct and admissible evidence at trial, it is also open for it to prove who the importer is. Should it prove then that the Defendant is indeed the one who imported the Isuzu KB herein, it will be allowed to seek duty or whatever part of such duty remains unpaid from him. It is only on such proof being furnished that there will be no justification for

barring the Defendant from seizing this vehicle. Before then we cannot act on hearsay and conjecture to sanction seizure of a car which, prima facie, so far, was not imported by the Plaintiff.

Finally before I can put my pen to rest let me comment on Miscellaneous Civil Cause No. 164 of 2003 The State and The Commissioner General of Malawi Revenue Authority, ex-parte Fayaz Ibrahim, which was cited by the Defendant as supporting the position that the injunction herein should be discharged. The first thing to note is that the decision in question came out after a full hearing of Judicial Review proceedings. The Court at that stage was not merely concerned with interlocutory proceedings as we are in this case. It was fully and finally determining the Judicial Review proceedings that were before it. I dare say that as and when this matter also comes to disposal of the final question in the action the Plaintiff has commenced, the Court will fully and effectively determine all points that will have arisen for determination.

If, at that stage the Defendant puts up a convincing fight, the Plaintiff's action will fail and no permanent order of injunction will be granted. Thus the fact that in the Fayaz Ibrahim case the Respondent emerged victorious at the end of the Judicial Review proceedings taken out by the Applicant, is no licence that at interlocutory stage the injunction has to be vacated. It can only be vacated on show of good reasons, and as already pointed out both the affidavits relied on by the Defendant offend Order 41 rule 5 of the Rules of Supreme Court. In fact an examination of the record in the Fayaz Ibrahim case will show that when the Applicant got the leave of the Court to commence Judicial Review proceedings she also obtained an ex-parte injunction against the Respondent. In fact that injunction remained in place throughout the proceedings, and was never vacated or discharged, until the date Hon. Justice Chimasula Phiri was finally deciding on the Judicial Review proceedings. Why then the case should be

authority for vacating an interlocutory injunction at this stage, is not clear.

I should now wind up. It must be abundantly clear, I believe, that the Defendant has goofed in this application. It has founded its application on affidavits that disobey the Rules of the Supreme Court. In consequence the hearsay and conjecture they are full of does not amount to material on which this Court can act to overturn an order of injunction that was soundly granted. In the result I dismiss the Defendant's Summons to vacate interlocutory order of injunction herein with costs.

Made in Chambers this 22nd day of July, 2004 at Blantyre.


A.C. Chipeta
JUDGE

