

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 3509 OF 2004**

**BETWEEN:**

**DON NKHOMA .....PLAINTIFF**

**AND**

**MALAWI REVENUE AUTHORITY .....DEFENDANT**

**CORAM: HON. J S MANYUNGWA – JUDGE**

Mr Kalaya, of Counsel for the Plaintiff

Mr Fatch – Official Court Interpreter

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**MANYUNGWA, J.**

This is the plaintiff's application for a mandatory injunction. It is supported by an affidavit duly sworn by the plaintiff himself. When the matter came for hearing ex-parte, my learned brother Justice Chimasula-Phiri refused to grant the order ex-parte and so ordered that it should come by way of an inter-parties summons in compliance with Order 29 Rules of supreme Court Practice, and so the matter came for an interparties hearing on 29<sup>th</sup> December. However despite the fact that when the matter was being adjourned counsel for the defendant was present; he was absent on the 29<sup>th</sup> December 2004, and no explanation was given as to his absence. The court allowed the plaintiff to proceed to argue his application. There is however an affidavit in opposition.

The issue to be determined here is whether a mandatory injunction can be granted. Briefly the facts of the matter are that on 6<sup>th</sup> December 2004, the plaintiff's motor vehicle Registration Number KVD 089GP was detained by

the defendant at Mwanza boarder, when the plaintiff was coming from South Africa where he is ordinarily resident to Malawi. The plaintiff depones in his affidavit that he brought his vehicle under form DA 65, which means the vehicle was not exported to Malawi but that it was just for his personal use whilst he is in the country and that thereafter he would take it back to South Africa. The plaintiff exhibited a copy of the said “DA65” marked as “DN1” together with “DN2” which were copies of Registration Certificates. Form “DA 65” is a Temporal Import Permit, used by the plaintiff signifying that the vehicle is not permanently exported to Malawi as opposed to form “DA550”, which in this case would then attracted the payment of duty. The vehicle was detained at Mwanza boarder for 30days as exhibit “DN 3” shows on the ground that the plaintiff is a holder of a Malawian passport and further ordered that the vehicle must be re-exported despite the police clearance, “DN4” which clearly showed that the vehicle was only here for visitation. The plaintiff avers that by detaining his vehicle, the same, is discrimination as the plaintiff has proper documentation, and that if left unchecked then it would mean that it is a favour for a chosen few, and further that by asking for a deposit, while the vehicle is only in the country for a short period, then it would be oppressive as it is obvious that the vehicle was not meant to be cleared. The plaintiff further avers that asking for a bank guarantee is the same as asking for cash which is scarce, and that the requirement seems to be applied selectively. The plaintiff further argues that, since there is a personal guarantee exhibited as “DK5” made by one Chrissie Liuma Nkhoma, there is therefore no need on the part of the defendant to demand a deposit from the plaintiff.

The defendant on its part filed an affidavit in opposition in which Masauko Malcom Chamkakala, who is the defendant’s Principal Legal Officer deponed that although the vehicle was exported under DA65 in South Africa, that alone cannot dictate the Malawi Revenue Authority on its decision as to whether or not to impose conditions on the Temporary Importation Permit, and that the discretion solely vests in the Commissioner General and that the applicant was only allowed to temporarily import his vehicle on condition that he pays a deposit to the Malawi Revenue Authority equivalent to the duty which he would have paid. The defendant avers that this has been deliberately put in place to avoid incidents of motor vehicles not being re-exported after the expiry of TIP, a situation which deprives the Government of the much needed revenue. The defendant avers that this measure is applied to all vehicles to TIP and is neither discriminatory nor

applied selectively. The defendant further argues that in the absence of a cash deposit, then it can only be substituted by a bank guarantee and not a personal guarantee which is difficult to enforce. The defendant argues that the measure is therefore to ensure that Government's revenue is secured.

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 the courts have the jurisdiction to grant mandatory injunction upon an interlocutory application, See *Bonner V GW RY (1883) 24 ch.D1 p 10.* However it is a very exceptional form of relief. The case must be unusually strong and clear before a mandatory injunction will be granted. In Nottingham *Building Society V Eurodynamics Systems plc [1993] FSR 468* the court granted the mandatory injunction after taking into account the likely result of trial. The principles governing the grant of mandatory injunction were discussed by Lord Upjohn in *Redland Bricks Ltd V Morris [1970] AC 652.* The court must be satisfied at the trial that the injunction was rightly granted, however in some cases, like the situation was in *Leisure Data V Bell [1988] FSR 367,* where if became necessary that some mandatory order had to be made *ad interim,* the court will make the order whether or not the high standard of probability of success at trial is made out.

In the instant case the plaintiff brought his vehicle into Malawi on a Temporal Importation Payment. It is clear that the plaintiff made known to the defendant that the vehicle was only for his personal use whilst in Malawi and that the same was not on permanent export. The defendant then detained the vehicle, and demanded that the plaintiff should pay a deposit to the defendant equivalent to the amount of duty that the plaintiff would have paid had the vehicle been permanently exported to Malawi or that alternatively the plaintiff must have a bank guarantee.

Surely to demand that the plaintiff should deposit cash equivalent to the duty that he would have paid, would in the circumstances be too harsh on the plaintiff, and so too the requirement of a bank guarantee. Although the defendant has the discretion as to what conditions to impose, it must exercise that discretion fairly and judiciously. Lord Diplock in *N.W.L. Limited V Woods [1972] 1 WLR 1294, 1306,* stated that in some situations courts have

focused on other consideration for example on the need to give full weight to all the practical realities of the situation to which the injunction will apply.

In the instant case, the practical reality would, in my view, demand that as the plaintiff is only in the country for a short period and that he intends to re-export the vehicle back to South Africa, clearly the vehicle has not been permanently exported to Malawi, and it would be unfair in the circumstances, to demand that the plaintiff should deposit cash with the defendant equivalent to the amount of duty he would have paid, for to do so is like demanding that he pays duty outright. The practical reality is to allow the plaintiff to have use of his vehicle whilst in the country, and I so order that the defendant should release the motor vehicle in question to the plaintiff. Since the plaintiff has deponed that he is only in the country for a short period, I order that a period of 14 days would be sufficient, at the end of which the vehicle must either be re-exported back to South Africa, or the plaintiff would then be required to pay the duty equivalent. The normal conditions attaching to a vehicle on Temporary Importation Permit shall apply in the plaintiff's case.

Costs of this application to the plaintiff.

*Made in Chambers* this 7<sup>th</sup> day of January 2005

Joselph S Manyungwa  
**JUDGE**