

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 469 OF 2003**

**BETWEEN:**

C. E.G. GOVATI (MALE).....PLAINTIFF

- and -

B. P. MALAWI LTD.....DEFENDANT

**CORAM: CHIMASULA PHIRI J.**

N. K. Masiku of Counsel for the Plaintiff  
K. Ching'ande of Counsel for the Defendant  
M. H. Fatch – Court Clerk.

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**ORDER**

On 14th February 2003 the plaintiff obtained an order of injunction restraining the defendant itself, servants or agents or otherwise howsoever from evicting the plaintiff from premises known as Lunzu Service Filling Station or repossessing the same or interfering in any manner whatsoever in the plaintiff's usage thereof until determination of the substantive action between the parties or until the hearing of inter-partes summons. On 21st February 2003 the plaintiff filed an interpartes summons for interlocutory injunction. There is an affidavit in support of the summons. On behalf of the defendant there are filed in this court 3 Affidavits in opposition. The deponents are Reuben Gondwe, Sylvester Chattonda Gondwe and Kuliya Ching'ande, Legal Practitioner for the defendant.

In the affidavit of Mr Masiku, Legal Practitioner for the plaintiff sworn on 20th February 2003 particularly in paragraph 6.4, reliance is put on the alleged fact that the plaintiff would pay the defendant a rental of K270.00 per month towards the purchase of the premises. The deponent has exhibited a **confidential internal memorandum** from Sales Manager to the Chief Executive of the defendant company – dated 20th October 1980. In that memorandum the Sales Manager is reporting to the Chief Executive that if the property is sold to Mr Govati, the latter is

prepared to resign. Secondly, that the book value of the property was acceptable to Mr Govati. However, an arrangement would have to be made for payment of purchase price by monthly instalments of K452.00 per month for 24 months. Finally, a recommendation was made that Mr Govati be allowed to operate the site at a rental to be agreed at a later date or be sold the property. Another **Exhibit dated 22nd July 1981** from the Sales Manager to the Chief Executive indicated that the purchasing of the property was not discussed. However, the presumption would be to allow Mr Govati to pay a monthly rental of 270.00 towards purchasing the property valued at K9,300.00. The purpose of the memorandum was to seek guidance of the Chief Executive. By letter of 13th August, 1981 the plaintiff gave notice terminating his services with the defendant. The Chief Executive acknowledged receipt of the letter on 19th August 1981. What has prompted the action is the fact that on 13th January 2003 the defendant wrote the plaintiff that the Lease/Dealership Agreement expired in 1999 and has not been renewed and notice of termination was given as lapsing on 12th February 2003. The plaintiff responded by letter dated 4th February, 2003 disputing the notice to vacate the premises and calling the defendant to remove its equipment within 7 days.

In the affidavit of Reuben Gondwe, he stated that in 1990-92, the plaintiff signed a tenancy agreement. Sometime in 1994 the plaintiff claimed ownership of the premises but was unable to prove it. On the contrary the defendant produced evidence of ownership whereupon the plaintiff continued paying rent as a tenant.

In the affidavit of Sylvester Chattonda Gondwe, he has stated that he worked for the defendant from 1970 to 1991 and he knows the plaintiff. Mr Gondwe says he was involved in the transaction between the plaintiff and the defendant in connection with the Lunzu Service Filling Station. Up until the time the deponent left the defendant company, the plaintiff was a periodic tenant paying rent monthly.

In the affidavit of Mr Ching'ande, there is **Exhibit KC7** which is the Dealership Schedule executed by the plaintiff on 23rd December 1998 and the defendant on 7th January 1999. It sets down the rental value and property description. This is the framework of the scene where these

two parties are ready for a showdown – one claiming to be owner of the property and the other disputing that claim and indicating that he owns the property.

In **Mobil Oil (Malawi) Ltd vs Leonard Mutsinze** – Civil Cause No. 1510 of 1992, Chatsika J. stated that:-

*"the principles upon which an application for an injunction will be considered are set out in Order 29/1/2 and 29/1/3 of the Rules of the Supreme Court and were succinctly elucidated in the case of **American Cynamid Company v Ethicon Limited (1975) AC 396**. Before an injunction can be granted, it must be established that the applicant has a good claim to the right he seeks to protect. The court does not decide the claim on the evidence contained in the affidavits. A good claim is said to have been established if the applicant shows that there is a serious point to be decided. When these principles have been established, the Court exercises its discretion on the balance of convenience. In deciding the question of the balance of convenience the Court will consider whether damages will be a sufficient remedy for the mischief which is complained of and even if it considers that damages will be a sufficient remedy, it must further consider and decide whether the defendant or wrong doer shall be able to pay such damages."*

In the present case there is no dispute that the plaintiff and the defendant have had dealings for over 40 years. In the first 18 years of that relationship the plaintiff was an employee of the defendant. He left employment on his own to set up business similar to that of the defendant. Obviously he could not keep both the job and business because there could have been conflict of interest. To crown the relationship which had span for 18 years the defendant offered the plaintiff dealership agreement for the Lunzu Service Filling Station as a monthly tenant. The triable issue boils down to whether or not the plaintiff was paying such rentals towards the purchase price which had been valued at K9,300.00 in 1980 or the issue of proposed outright sale had fallen off? This cannot be exhausted on the affidavits in the interlocutory applications. Even if a Deed document is exhibited, it is not conclusive evidence of a transaction. There is need for witnesses to be examined and cross-examined to verify the details on the Deed and subsequent oral or partly written arrangements between the parties. I am mindful that with Statute of Frauds, 1677 still operating as part of our law, there would be restrictions on the admission of parol evidence particularly where it may run counter to the written agreement. All in all I find that the plaintiff has a right which he seeks to protect through an injunction order. This remedy is in the discretion of the Court and as such I have to consider the balance of convenience. The Court will generally consider whether more harm will be done by granting or by refusing an injunction. In particular it will usually be wiser to delay a new activity rather than to risk damaging one that is established – vide: **American Cynamid Company v Ethicon Limited (1975) AC 396** at page 408.

In this matter it must be borne in mind that both parties are in commercial business. The desire is that both parties should not suffer loss of business in so far as it may be practicable.

The defendant should assess the property for current rental value and the plaintiff should pay to the defendant such rentals until the Originating Summons is disposed off or further order of this court is made. The Originating Summons should be granted expedited hearing and in any event no later than 31st May 2003. The interlocutory injunction order of 14th February 2003 is extended accordingly. No order is made as to costs.

**MADE IN CHAMBERS** this 21st day of March, 2003 at the High Court in Blantyre.

Chimasula Phiri  
**JUDGE**