

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil Cause number 3019 of 2003

Between

TONY HAWKINS AND OTHERS Plaintiff

And

EDITH MLINER Defendant

CORAM: DF MWAUNGULU (JUDGE)

Kadwa, legal practitioner, for the plaintiff

Makhalira, legal practitioner, for the defendant

Matakenya, official court interpreter

Mwaungulu, J.

ORDER

The defendant, Ms Mliner, applies to dissolve a second injunction the plaintiffs, Mr. Hawken and others, obtained ex parte. On 25th December, 2003, when dissolving the injunction, the detailed reasons were reserved. The events on the file so far are important for the conclusion. It is useful, therefore, to rehearse the events necessary to the 25th December, 2003 order.

The plaintiffs and the defendant have residences in Sunnyside here in the City of Blantyre. Other residents have resided there for forty-eight years. The area is essentially residential, schools and a golf course are the only public amenities. It was relatively quiet until the defendant, it appears, rebuilt her residence into a restaurant, a discotheque and sundries. The complex borders Mr. Hawken's residence. It also appears the construction defied Town Planning directions and prohibitions. The plaintiffs contend the defiance

premises on connections with the powers. The plaintiffs displayed communications from the City Council showing resignation and powerlessness to intervene. The plaintiffs mention the loud noises from music, revelers, expanded traffic exuding from the premises. The residents complain that the expanded traffic has increased the risk of accidents and may be a whole problem for residents. The residents have, with little success, written the City Assembly and sought police assistance.

On 13th November, 2003 the plaintiffs took out an originating summons for declarations that the defendant's conduct is a public nuisance and that the operation of a night club in the locality is a nullity and an injunction restraining the defendant herself, her servants and/or agents from operating the night club and bar. It is unclear whether the plaintiff served the originating summons on the defendant. On the same day the plaintiff obtained an interlocutory injunction ex parte restraining the defendant from operating the Sunset Plaza Night Club and Bar until the hearing of an application inter partes. On 14th November, 2003 this Court rejected the defendant's application ex parte to dissolve the injunction. This Court ordered the application to be heard inter partes. The matter was set for 17th November, 2003.

The application came on 17th November, 2003. The parties sought an adjournment to enable negotiations. On 24th November, 2003 there was a consent order signed by the judge. Under the consent order the defendants by themselves, their servants and/or agents were not to play loud music at the Sunset Plaza; the defendants were to take all lawful steps to control the noise levels made by the patrons to the said Sunset Plaza; and the defendants were to remove anything that might constitute a public nuisance. It was part of the consent order that the Malawi Bureau of Standards were to monitor noise levels every week and report to the Court and the plaintiff.

On 23rd December, 2003 the plaintiff obtained another injunction ex parte. Essentially that order was granted because neither the Court nor the plaintiff have, in accordance with the consent order, received any report from the Malawi Bureau of Standards on the noise levels. The plaintiff deposes that the Malawi Bureau of Standards could not furnish the report because their equipment is not working. The plaintiffs further state that shortly after the consent order, on the 29th November, the defendants organized a Discotheque competition. The plaintiff, therefore, complain that the defendants have breached the said order on the fresh evidence preferred.

On the view taken on the matter it is unnecessary to comment on all these aspects. It suffices just to make two comments. First, that on the record there are two orders of injunction: the one dated 13th November, 2003 and the other dated 24th November 2003. It is unclear which one has been breached. The consent order did not withdraw the earlier order. Even accepting that the latter was breached, there is little to suggest in the evidence

that the defendant acted in breach of the order. All DEK8 suggests is that the previous night (to the date of the letter) was a nightmare.

The first point taken for the defendant was that the plaintiff was estopped by the consent order from getting the injunction. True, following *Kinch v Walcott* [1929] AC 483; *Re S. American, etc., Co* [1895] 1 Ch 37; and *Law v Law* [1905] 1 Ch. 140 at 158, a judgment by consent, unless set aside, binds the parties and acts as an estoppel. This, however, was an agreement, by consent, embodied in a judge's order and no final judgment is signed. There cannot, on the authority of *Rice v Reed* [1900] 1 Q.B. 54, and in particular the words of *Vaughan Williams, L.J.*, at 66, be an estoppel on such consent order.

The critical point, however, is that already there is an injunction against the defendant. The one sought here is in much like the first one. There should be no other injunction to the same effect. If, as the plaintiffs allege, there are breaches of the injunctions, the next course of action is not another injunction but proceedings on disobedience of the injunction. The defendant having disobeyed, the plaintiff can institute committal proceedings.

Made in court this 29th Day of December 2003

DF Mwaungulu
JUDGE