

**Albuisson v Fryars
(1998) SLR 117**

Nichole TIRANT for the Plaintiff
Frank ELIZABETH for the Defendant

Judgment delivered on 16 December 1998, by:

AMERASINGHE J: On breach of contract the plaintiff sued the defendant to recover a sum of R98,442.50 as damages and for the return of movables retained by the defendant, with interest and costs. The plaintiff avers that a management agreement was entered into by the parties on 30 June 1998, for the management of "Sandy's Take Away" for a period of two years. He alleges that the defendant on 17 September 1998 unlawfully evicted the plaintiff from the said business establishment, while retaining equipment belonging to him. The plaintiff not only prays for the return of his equipment in the defendant's custody but also claim the value of such equipment estimated at R35,000. An amendment of the plaint dated 9 October 1998 moved to rectify the said duplication of claims but unfortunately resulted in the occurrence of the "Particulars of Damages and Loss", the retention of the value of equipment with an error in the total of the claims. What appear to have been required were only two claims on the same ground to have been made in the alternative.

The plaintiff by motion supported by an affidavit sought an interlocutory injunction to be issued by the court "restraining the respondent from continuing with the lawful detention of the applicant's property, more fully described in the list annexed – herewith and ordering that the defendant return to the applicant herein all the items and documents referred to in the said annex."

The defendant in opposition to the application pleads that the plaintiff voluntarily handed over the business premises back to her and the items of equipment referred to in paragraph 4 of the affidavit was left behind by the plaintiff, and in respect of which she claims a lien as against arrears of rent due from the plaintiff.

In the case of *Phil Enterprises Ltd v Castle Peak* (1973) SLR 327 it was held thus:

The purpose of an injunction is to prevent irreparable injury which is substantial and could not be adequately remedied or atoned for in damages.

The plaintiff has valued the loss of equipment at R35,000, and it is obvious from the claim made in the original plaint that the plaintiff could be compensated for the loss of equipment by the award of damages. Therefore the grant of the injunction sought cannot be considered necessary to prevent irreparable loss. In view of the defendant's claim of a lien over the items of equipment acknowledged to be retained, circumstances

do not warrant the issue of the injunction sought. There can be no doubt if the plaintiff is prevented from making his livelihood from a similar business venture on account of the want of equipment, and if his accustomed mode of livelihood is the running of similar ventures, the plaintiff could have suffered very heavy loss and damage, and the plaintiff's injury would be irreparable. However in his affidavit the plaintiff has made no such representations, hence it could be concluded that his injury would be adequately remedied or atoned for by way of damages.

An issue of an injunction as prayed for by the plaintiff will result in the defendant being compelled to return the items of equipment claimed by the plaintiff. The defendant in her affidavit admits that the plaintiff left behind only some of the listed items when he handed over the business to the defendant. Apart from the said uncertainty of whether the defendant after nearly three months from the date in question is in fact in possession of the said equipment, the plaintiff in his own affidavit has expressed in paragraph 5 that the defendant has continued to operate the take away by herself or through a third party. In an application for a mandatory injunction as prayed for by the plaintiff, it is the burden of the plaintiff to satisfy the injunction otherwise the application cannot succeed. In the instance matter the plaintiff has failed to do so.

In accordance with the reasons given above I deny the plaintiff's application. No costs.

Record: Civil Side No 304 of 1998