IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 801 OF 1998

BETWEEN:

IQBAL IBRAHIM SIDIK MIA.....PLAINTIFF
t/a MIAMI SUPPLIERS

- and -

MALAWI POSTS & TELECOMMUNICATIONS.....DEFENDANTS
CORPORATION

CORAM: TEMBO, J.

Nyirenda, of Counsel for the Plaintiff
Katsala, of Counsel for the Defendant
Chaika (Mrs), Official Interpreter

RULING

Tembo, J. This case relates to a claim of the plaintiff for 15 per cent collection charges or costs on a balance of a judgment debt, which remained outstanding by the time the rule relating to 15 per cent collection costs was published and, therefore, became effective; thus on 24th December, 1999. The judgment was entered on 3rd December, 1998. By that time the rule in question had not yet been promulgated.

The matter first came before the learned Registrar on 9th March, 2001. The issue for determination, then, being whether the plaintiff was entitled to claim the 15 per cent collection costs notwithstanding that the judgment against the defendant was entered before the 15 per cent collection costs rate came into effect.

Although the appeal before me is to be determined by way of a re-hearing, it is expedient that I set out the precise and concise ruling of the Registrar, now appealed against, by which he dismissed the claim made by the plaintiff -

"The first question I would like to consider is: What is the effect of a judgment vis-a-vis the rights of the parties. What this means is that parties are bound by the term of a judgment unless it is amended or set aside. The judgment in this case has never been amended so as to include 15 per cent collection charges. There is, in my view, therefore no basis on which the plaintiff's claim for 15 per cent collection charges or costs can be sustained. The situation could have been different if there were no judgment entered.

In case the foregoing finding could be faulted, Maxwell on the Interpretation of Statutes. 11th edition page 212 is instructive. The learned authors submit that where the law is altered during the pendacy of an action, the rights of the parties are decided according to the law that existed when the action was begun, unless the new statute shows a clear intention to vary such rights. The question to be asked in this case is: What law, was there at the time this action was commenced as regards the rights of the parties to costs. Certainly it was not 15 per cent collection charges provision and there is no clear intention in the new rule that it would apply even to actions brought before its coming into force."

It is prayed for the plaintiff that that order be reversed. Instead, that the court should now make an order requiring the defendant to pay to the plaintiff 15 per cent collection charges on all sums of money paid by the defendant after the new scale of costs came into force.

I have heard both counsel on the matter and I am grateful for their sound, clear and persuasive arguments. On my part, it would appear to be important, first, to set out the rule in question so that its import and extent of its application or effect be rightly ascertained, in the light of those legal arguments. The rule was promulgated under the Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules, 1999, Government Notice No. 49 dated 24th December, 1999. In particular, the rule appears in Table 6, as follows -

“Collection of monies, solicitor and own client charge on instructions to collect any sums of money..... 15 per cent of the amount collected.

Where proceedings are commenced, there shall be additional charge for party and party costs:

Provided that 15 per cent costs shall also be recoverable from the debtor whether proceedings are commenced or not and where proceedings are commenced, it shall be recoverable as part of the judgment debt.”

To begin with, let me accept as correct the submission that if there is nothing to modify, nothing to alter, nothing to qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning: **Multinational Gas and Petrochemical Company -v- Crystal steamship Corporation and Others** (1978) ALR 137 at 144. It is expedient to point out, here, that by S.22 of the General Interpretation Act, any reference to a written law, thus the Constitution, Act, and subsidiary legislation, shall, except where the contrary appears, include a reference to any subsidiary legislation made under the written law to which reference is made. In the instant case, suffice it to mention that the question before the court relates to the interpretation of a provision in a subsidiary legislation made under the Legal Education and Legal Practitioners Act. In that regard, the question involves the interpretation of a statute and, therefore, rules applicable thereupon.

Further, I accept the following as being correct statements of rules concerning the interpretation of statutory provisions:

“If the words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver.” **Fas Brothers Limited -v- Marine Merchants (Nigeria) Limited** (1978) 2 ALRComm 225 at 234.

“I have always understood that, if the words of an Act are unambiguous and clear, you must obey those words, however absurd the result may, appear; and to my mind, the reason for this is obvious. If any other rule were followed, the result would be that the court would be legislating instead of the properly constituted authority of the country, namely, the legislature”.

Per Lopes, J. in R -v- City of London Court Judge (1892) IQB 273 at 301-302.

Be that as it may, courts nowadays so interpret statutes and the constitutions in a way that the statutes and constitutions do not bear absurd meaning: **In Re National Power Authority Decree, 1972: Ipaye and Oni -v- National Electric Power Authority**, (1978) 2 ALR Comm. 246 at 258, per Savage, J:

"It is well established that in cases like this, it is the duty of the court to interpret the law..... so as to avoid the ridiculous. It is trite law that statutes will be construed as far as possible to avoid absurdity. It is the presumption against absurdity."

Against that background, Mr. Nyirenda submits, for the plaintiff, that the learned Registrar's decision was wrong in law in that applying the 15 per cent collection rate to monies collected after the Rules came into effect, under a judgment entered before the Rules came into effect, does not constitute applying the Rules retroactively. After referring to the **Shorter Oxford English Dictionary on Historical Principles** 1933 ed, Vol. 1 at 341 as to the meaning of the word "correct", Mr. Nyirenda submits that that word means a gathering together, the action of collecting, to gather together in one place or group, to gather in (money, debts).

Then Mr. Nyirenda, further submits that, 15 per cent collection charge ought to be, and is, applicable when the monies are gathered in. Thus, it applies to the collection of monies; and not to the entering of judgment. In that connection he submits that it is possible to enter judgment but not to collect the judgment debt, in which case a legal practitioner cannot claim the 15 per cent collection charge since he has not collected, as the charge is calculated from the amount of the judgment debt collected. In the circumstances, it is a firm view of Mr. Nyirenda that the 15 per cent charge was meant to be collected at the time the money was collected and not at the time the judgment was entered. Consequently, the collection charge applicable is the one in force at the time the debtor settled the debt, that is during the time when the 15 per cent collection costs rule was in force. To that extent, the rule is not applied retroactively at all, but prospectively, so the argument seems to suggest.

The other argument Mr. Nyirenda makes, in the alternative, is that the 15 per cent collection charge may not be part of the judgment but may nevertheless be recoverable as part of the judgment debt. Thus, he submits that the rule is intended to enable a successful litigant to obtain 15 per cent collection charge from the judgment debtor in the event that money is recoverable from the judgment debtor. In that respect, it is the firm view of Mr. Nyirenda that the rule has the effect of operating even if the question of collection charges is not addressed in the judgment. Thus, arguments relating to crystallisation of rights of the parties do not arise. Given that understanding, Mr. Nyirenda maintains, that there is no need to amend the judgement or to have it set aside since the provision has automatic application.

Finally, and by way of a third alternative argument, Mr. Nyirenda submits that if applying the 15 per cent collection rate to monies collected after the Rules came into effect under a

judgment entered before the Rules came into effect does constitute applying the Rules retrospectively, then it was the intention of the Legislature that the Rules be retroactive in their effect.

In that connection, Mr. Nyirenda, submits that a general rule of statutory interpretation is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are **prima facie** prospective; and that retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature: **Phillips -v- Eyre** (1870) LR 6 QB 1 at 23; and **Harrison -v- London Borough Council of Hammersmith and Fulham** (1981) 1 WLR 650 at 666, per Waller, L.J.

Further in the case of **Re Athlumney** (1898) 2 QB 547 at 551, Wright L.J. said the following:

"Perhaps no rule of construction is more firmly established than this that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language that is fairly capable of either interpretation it ought to be construed as prospectively only."

In his response, Mr. Katsala has, in the main, made the following submissions: The 15 per cent collection charges rule does not apply to the instant case in that the rule had been promulgated in December, 1999, when the judgment had been entered in 1998. That to construe the rule so as to allow it to apply to the instant case would mean giving to the rule a retroactive effect. That in terms of the rules of interpretation of statutes such effect ought not to be granted unless it is clear from the rule that the legislature so intended a retroactive effect. Referring to the decision of **Athlumney**, in particular to the passage quoted above concerning the judgment of Wright, L.J; Mr. Katsala maintains that the court cannot construe the rule in question in such a way as to give it retroactive effect, thus to impair the rights of the parties without doing violence to the language of the rule. Upon a proper perusal and, therefore, construction of the rule, and in the light of what Wright L.J. said in that case Mr. Katsala submits that the court should give the rule prospective effect only. The rule under consideration is quite clear, it does not say that it has retroactive effect.

Re: A debtor (1936) 1 Ch 237, at 243, Wright M.R. said that where a matter is **res judicata,** any change in the law cannot change the rights of the parties unless it is evident in the Act that the rights be so affected. According to **Osborn's Concise Law Dictionary** 6th ed. By John Burke, Sweet & Maxwell at page 289 res judicata presupposes that there are two opposing parties, that there is a definite issue between

them, that there is a tribunal competent to decide the issue, and that within its competence, the tribunal has done so. Once a matter or issue between parties has been litigated and decided, it cannot be raised again between the same parties.

Mr. Katsala submits that the rights of the parties, including as to costs, were determined on 3rd December, 1998 when the judgment was entered. As such, the amendment of the Rules in December, 1999, cannot re-open the issue between the parties so as to affect their rights under such judgment. To allow the plaintiff the relief now sought by him, would amount to effecting an amendment of the judgment in question. If the court were to amend the judgment in that way it would be wrong of it so to do, in that the plaintiff has not made application therefor and that the court has no jurisdiction so to do. In that connection Mr. Katsala relied on the decision of Mkandawire, J in the case of **Lustania Ltd -v- Pegas Panel Beating Services Limited and Others** Civil Cause No. 1620 of 1999 (unreported): In that case the plaintiff commenced proceedings against the defendant in May, 1999. The ruling was pronounced on 10th November, 2000, and it was in favour of the plaintiff. The Plaintiff had, in its statement of claim, also prayed for costs of the action which in fact were awarded to it. However, between the commencement of the proceedings and the date of the ruling, collection costs had been introduced under the Rules in question. In his judgment, granting the application, Mkandawire. J, said the following -

"The operative date is that of the judgment and not commencement of the action. It will be observed that Table 6 of the Rules provide that where proceedings have been commended collection costs shall be recovered as part of the judgment debt. It is not the commencement of the action that creates a judgment debt but the passing of the judgment. Therefore, the operative date is that of the judgment. In this case it was 10th November, 2000. The Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules would therefore apply to this case."

.....The defendants know or ought to know through their legal practitioners that as from 24th December, 1999, 15 per cent collection costs will be paid on all judgment debts. In the circumstances, if I make a supplemental order, there will be no prejudice or injustice caused to the defendants as the effect of the order is merely to enforce the rules."

Mr. Katsala further submits that it is not correct to say that the 15 per cent collection costs would be recoverable even if they are not addressed in the judgment to which the costs to be collected relate. That the rule requires that the judgment ought expressly to indicate that the plaintiff is entitled to such costs. In that context, Mr. Katsala submits that the rule, in saying that 15 per cent costs will be recoverable as part of a judgment debt merely gives a cause of action to the plaintiff, a thing which was non-existent under the rules which have now been amended.

Finally, Mr. Katsala submits that regard being had to facts in the case and when these are viewed in the light of section 14 (1)(a) of the General Interpretation Act, this action ought to be determined in terms of the old law, applicable when the case was commenced and determined, thus prior to the commencement of the Rules in question. The issue before the court is not when money was or would be collected, but whether the rule applies to the case or not. In answering that question, the date for the collection of the money is irrelevant. In the circumstances, Mr. Katsala prays that the Registrar's ruling be upheld.

Bearing in mind the clear and concise statements on rules of interpretation of statutes, cited and referred to above, it would appear to the court that the reasons for, and therefore, the decision of the learned Registrar, now appealed against, cannot be faulted. Those reasons appear to be on all fours with the reasons for which Mkandawire, J. had allowed a similar prayer of the plaintiff in the case of **Lustania Limited.** In the circumstances, the court would, therefore, prefer the arguments made by Mr. Katsala for the defendant to those made by Mr. Nyirenda for the plaintiff, in that regard.

To begin with, the rule in question must be construed so as to be given the meaning and effect which is ordinarily and naturally evident upon reading it. If upon such reading, it is expressly, or by necessary implication, evident that the rule, itself, makes provision for a retroactive effect, such effect should be ascribed to the rule. However, if such effect is not so evident, the rule must be given prospective effect.

A perusal of the rule, in the light of the issues for determination in the instant case, clearly indicates that where proceedings are commenced there shall be additional charge for party and party costs; that the 15 per cent costs shall also be recoverable from the debtor; and that where proceedings are commenced the 15 per cent costs shall be recoverable as part of the judgment debt. In the view of Mkandawire, J, with which I entirely agree, the operative date is that of the judgment. In that respect, it is not the commencement of the action which creates a judgment debt, but the passing of the judgment. So, in that case the date of the judgment was 10th November, 2000. Mkandawire, J, then ruled that as by then the rule was operational, it applied to the case. He had, therefore, ascribed a prospective effect to the rule. Besides, he had clearly indicated what ought to be important factor to be considered as to whether the rule is applicable in any given case. It was the date of the judgment, not the commencement of the action or any other factor including the date and time for the collection of the costs. The date of the judgment must be one which falls due after the coming into force of the rule in question. Thus, indeed ascribing prospective effect to the rule in question.

Mr. Nyirenda has vehemently urged the court to regard the date of the judgment as irrelevant but the time when the costs are collected. That given such approach, the claim of the plaintiff in the instant case would be covered by the rule. Alternatively that, by such a construction, the rule ought to be said to make express, or implied, provision for retroactive effect. With respect, it is the well considered view of the court that none of

these arguments are sustainable upon an accurate perusal of the rule in question.

Besides the foregoing, the court rejects Mr. Nyirenda's submission that the 15 per cent costs would be recoverable other than by way of being part of the judgment debt. The rule expressly prescribes that such costs be recovered as part of the judgment debt. In that respect the court agrees with the submission of Mr. Katsala that the rule merely makes provision for a cause of action. The party claiming such costs must in fact so state in his statement of claim and the judgment ought to make express reference to the fact that such costs are awarded.

In the circumstances, the appeal is dismissed. It is so ordered. Costs are for the defendant.

MADE in Chambers on Monday 30th April 2001 at Blantyre.

A.K. Tembo

JUDGE