

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 533 OF 1978



BETWEEN:

IMPORT AND EXPORT COMPANY OF MALAWI (1984)LIMITED...PLAINTIFF

- and -

THANGATA WHOLESALERSDEFENDANT

Coram: MTEGHA, J.

Alufandika of Counsel for the Plaintiff
Chizumila of Counsel for the Defendant
Kadyakale, Law Clerk

R U L I N G

This is an application by the plaintiff to reinstate to the cause list an application by the plaintiff to extend the period of an UNLESS or conditional order which was dismissed by the court for non-attendance of the plaintiff. The application is supported by an affidavit to which I will refer to presently.

Perhaps it would be prudent to state briefly the facts surrounding this issue.

On 7th June 1984 the Registrar dismissed the applicant's application to amend its writ of summons and statement of claim. The writ was issued on 10th November 1978. The reason for the Registrar's refusal to grant leave to amend was inordinate delay by the plaintiff. The applicant appealed to a judge in chambers. The appeal was heard by Unyado J. On 29th October 1984 the learned judge allowed the appeal in these terms:

"I order therefore that the plaintiff have leave to amend its writ of summons and statement of claim. I further order that the plaintiff do serve such amended writ of summons and statement of claim, as directed in this order within fourteen days of the date hereof and that the action stand dismissed with costs if the plaintiff fails to comply with these terms."

No amended writ of summons or statement of claim was served on the defendant. On 25th March 1987 an experte summons was taken out by the applicant to extend the time of service of the writ, and on 14th April, 1987 time was extended for the next 12 months. The amended writ was issued on 21st April, 1987 and served on the respondent on 27th April, 1987. On 4th August 1987 summons under Q. 27 R. 3 of the Rules of Supreme Court was taken out to enter judgment by admissions. It was submitted by Mr. Chizumila, at the hearing of the



summons, that the action stood dismissed because Judge Unyolo's order was not compiled with i.e to serve the amended writ of summons and statement of claim within 14 days from 29th October 1984, and that both the extension of time given by the Registrar and the summons to set judgment by admissions was null and void. An appeal by the Applicant to a judge in chambers was dismissed by Banda J. on 11th December 1987. Thereafter the applicant made an application to extend the "Unless" order, under O.3 rule 5 (5) of Rules of Supreme Court. The application was returnable on 29th January, 1988. The applicant did not turn up and Mr. Justice Banda dismissed the application for non attendance. On 25th April 1988 another application was made to reinstate the application which was dismissed by Banda J for non attendance, but on 4th May, 1988 when the application came before Unyolo J. the applicant did not attend and the application was dismissed. The applicant now applied to this court to reinstate the last application which was dismissed by Unyolo J. This then is the chequered history of this matter. This application, as stated earlier on, is made under O.32/5/5/(4) which states:

"Where an Application made by summons has been dismissed without a hearing by reason of the failure of the party who took out the summons to attend the hearing, the court if satisfied that it is just to do so, may allow the summons to be restored to the list."

The reasons for non attendant are set out in the affidavit of Gibiel David Msosa, the Head Office Debt Collector. He deposed to the fact that after the summons was served on the Respondent and returning a copy thereof to the court, instead of giving the office copy to the company secretary, Mr. Alufandika, his secretary filed it away and never brought it to the attention of the Legal Practitioner. As a result the Legal Practitioner was not aware, hence his failure to attend.

On the other hand Mr. Chizumila, on behalf of the Respondent traced the history of the case, since it started in 1978. He submits that it was incumbent on Mr. Alufandika to note when the case was coming up for hearing, and that he has no genuine wish to prosecute the plaintiff's claim and that the reasons stated on the affidavit are no sufficient.

The application has excercised my mind. I am aware that under the Order which I have cited above I have the discretion to reinstate an application which has been dismissed for non attendance. But the history of this case is that most of the applications made by Mr. Alufandika have been dismissed by the court because of lack of attendance by him or ignoring the time set down by the court. To a large extent he is personally to blame.

However, I must not allow my personal observations to blurr my reasoning. The order gives me the discretion if I consider the application just. The application can only be just if the reasons for non attendance are reasonable. If I accept the facts stated on the affidavit, then I can grant the application because there was a mistake in the Applicant

Office. As matters stand at present, I have no reason to disbelieve the contents of the affidavit. I therefore grant the application and that it be reinstated on the cause list. The applicant is, however, condemned in costs.

Delivered in CHAMBERS this 21st Day of June, 1988
at Blantyre.


H.M. Mtegha
JUDGE