

IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY



CIVIL CAUSE NO. 152 OF 1989

BETWEEN: ROBERT A. CHONGWE.....PLAINTIFF

- and -

SOLOMONI NKHONJERA.....DEFENDANT

Coram: MWAUNGULU, Registrar

Mhango, Counsel for the plaintiff  
Msisha, Counsel for the defendant

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RULING

When I was about to hear the plaintiff's application for an order for interim payment under Order 29, rule 12 of the Rules of the Supreme Court, Mr. Msisha made a preliminary objection. He argued, correctly in my view, that the High Court in Malawi has no jurisdiction to make such an order inspite that it is provided for under the Order and rule mentioned. Definitely, the policy reflected in the rule is very sound and ought to be recommended immediately to Parliament. It is particularly useful in fatal accident claims where liability is admitted and judgment has been obtained in default and what remains is assessment of damages. Functional and beneficial as the rule is, it is not our law. Our legal system cannot be criticised for sloth for even in the United Kingdom itself with all its depth of legal history, the policy was not introduced till 1969.

Order 29, rule 11 of the Rules of the Supreme Court provides:-

- "(1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied -
- (a) that the defendant against whom the order is sought (in this paragraph referred to as "the respondent") has admitted liability for the plaintiff's damages, or
  - (b) that the plaintiff has obtained judgment against the respondent or, where there are two or more defendants, against any of them,



the Court may, if it thinks fit and subject to paragraph (2) order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.

- (2) No order shall be made under paragraph (1) in an action for personal injuries if it appears to the Court that the defendant is not a person falling within one of the following categories, namely -
- (a) a person who is insured in respect of the plaintiff's claim
  - (b) a public authority; or
  - (c) a person whose means and resources are such as to enable him to make the interim payment."

Although the Rules of the Supreme Court are transposed into our High Court, not all orders and rules apply directly. Section 29 of the Courts Act provides:-

"Save as otherwise provided in this Act, the practice and procedure of the High Court shall, so far as local circumstances admit, be the practice and procedure (including the practice and procedure relating to execution) provided in the Rules of the Supreme Court:

Provided that -

- (a) the Rules of the Supreme Court may at any time be varied, supplemented, revoked or replaced by rules of court made under this Act;
- (b) any of the Rules of the Supreme Court which refer solely to procedure under Acts of the United Kingdom Parliament other than statutes of general application in force in England on the eleventh day of August, 1902, and any such Acts as have been applied to or are from time to time in force in Malawi shall not have any application in Malawi;
- (c) if any provision of the Rules of the Supreme Court is inconsistent with any provision of any rules of court, the latter shall prevail and the Rules of the Supreme Court shall, to the extent of such inconsistency, be void."



The precursor to Order 29, rule 11 is the recommendation which resulted in Section 20 of the Administration of Justice Act 1969:

"The power to make rules under section 99 of the Judicature Act 1925, and the power to make County Court rules under section 102 of the County Courts Act 1959, shall each include power by any such rules to make provision for enabling the court in which any proceedings are pending, in such circumstances as may be specified in the rules, to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order, either by payment into court or (if the order so provides) by paying it to another party to the proceedings."

Order 29, rules 11 - 18 were introduced in the same year.

From this it can be seen that Order 29, rules 11 - 18 were introduced in 1969. The United Kingdom Statutes that apply to Malawi are those of general application in 1902. The Administration of Justice Act 1969 does not apply to Malawi. Mr. Mhango argued that the 1925 Act, on which the 1969 Act was based, is a Consolidation Act and could be applied to Malawi, particularly the 1873 Act. I did not find the 1873 Act in the Statute books. Even if I did find the Act, a Consolidation Act, really consolidates existing provisions. There was no legislation on interim payments before 1925, and indeed after 1925, till 1969. Order 29, rules 11 - 18 of the Rules of the Supreme Court, in so far as it is based on the Administration of Justice Act 1969, is not part of our law. It is a useful piece of legislation and one would want Parliament to look into it.

Mr. Mhango says I can grant the order under the inherent power of the Court. The Court has got inherent powers only on those matters which it is known to have and on those aspects that affect its identity and powers. What I am requested here can only be conferred on the Court by Parliament. Of course, in legal thinking there is a measure of judicial legislation. Courts should be wary to legislate where Parliament should.

I uphold the objection and dismiss the summons for interim payments with costs.

Made in Chambers this 21<sup>st</sup> day of December, 1991 at Blantyre.

  
D.F. Mwanangulu  
REGISTRAR