Banda J

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 560 OF 1988

BETWEEN:

NATIONAL BANK OF MALAWI.....PLAINTIFF

- and -

SUMUKA ENTERPRISES LTD AND B M K MHANGO.....DEFENDANTS

CORAM: D F MWAUNGULU, REGISTRAR
For the Plaintiff, Jussab
For the Defendants, Mhango

R U L I N G

This is an application by the plaintiff, National Bank of Malawi, to set aside an "unless order" that I made on the 20th March 1991. The application is allowed. Consequently, the Judgment entered on the 11th April 1991 also falls through.

The Order that was made on 20th March 1991 was to the effect that the plaintiff's action should stand dismissed unless further and better particulars were served on the defendants, Sumuka Enterprises Limited and B M K Mhango, by 17.00 hours on 10th April 1991. The order that was drawn - it was drawn on the same day - followed word by word the notes that I made on that day. It is important to look at the exact wording because the order on which the earlier directions were made, although akin to the order of 20th March 1991, differs from the actual application by the defendants of the 4th May 1990. I should quote the exact wording of the application:

> "LET ALL PARTIES concerned attend before the Registrar at the High Court of Malawi in Blantyre at 8.30 o'clock forenoon on 12th the day of June 1990 on the hearing of an application on the part of the Defendant for an order that the plaintiff do within 14 days make discovery of the following Better and Further Particulars by discovering.
>
> (A) Records of Suspence Accounts bearing the entries for the following documentary credits, that is to say; Letters of credit numbered 36/83, 45/84, 11/84, 20/84, 24/84, 27/84, 29/84, 40/84, 50/84, 61/84, 65/84, 12/85, 29/85, 32/85 and bill No. 85/383.

(B) Records of Payments in and out of the plaintiff's Suspence Account relative to the documentary credits listed in (A) above.

(C) Entries of the Resultant Interest earned and/or charged to the Defendant's Account over the period the moneys were in plaintiff's Suspence Account."

The application was heard on the 12th June 1990, but I delivered my Ruling on 26th July 1990. I ordered that further particulars be served on the defendants by 17.00 hours on the 23rd August 1990. The particulars were not served on the date I ordered. They were served on 12th September 1990. On 15th September 1990 the defendants wrote to the plaintiff's legal practitioner, alleging that the crder had not been fully complied with. The exact point of departure can be seen from an excerpt from the letter:

"a) Records of Plaintiff's Suspense Accounts (we need copies of the Ledger Statement of Suspense Accounts).

b) Records of payments in and payments out of all the documentary credits. You omitted entries for LC 27/84, 40/84, 32/85 and bill No. 85/383.

c) Plaintiff's Records not provided, (we need copies of the said dccumentary credits, as well as, copies of the relevant Bank Statements).

The plaintiff did not supply the copies of the records as required by this request from the defendants. So, on 6th March 1991 the defendants took out a Summons to strike out the plaintiff's action for failure to comply with an order for further and better particulars as specified in my order of 26th July 1990. The Summons was set down for 20th March 1991.

On the 20th March 1991, Mr Mhango, appearing for the defendants, the applicants in the Summons, and Mr Tembenu, appearing for the plaintiff, the respondent in the Summons, appeared before me in Chambers. Both agreed that they wanted an "unless order", which I ordered in the words I mentioned earlier.

When the order was served, Mr Jussab, of the same Legal House as Mr Tembenu who appeared on 20th March 1991, noticed that the particulars had in fact been served on the defendants, except that copies as requested by the letter were not. On 9th April 1991 he put in this application.

In the affidavit in support of the application, Mr Jussab depones that the particulars were in fact served. He says, therefore, the plaintiff could not furnish copies as requested by the letter from the defendants, because that is furnished by discovery and inspection of documents. He contends, therefore, that the "unless order" was mistaken and should be set aside. Mr Mhango says that this Court has no jurisdiction, because the "unless order" was drawn and perfected, and that it was by consent and can only be remedied by a fresh action.

In my opinion, Mr Jussab is right in seeking the setting aside of the "unless order" of 20th March 1991. This order and the one prior to it reffered only to further and better particulars. At no point in time was it suggested that copies should be given instead of particulars. This is confirmed by the ruling that I made and the orders which were drawn by both Counsel and signed by the Court. The plaintiff had actually served the particulars as required by the order. He was not, therefore, guilty of contravening directions that were made. It would be improper, for the record of the Court, to continue as if in fact the plaintiff had not complied. That the record should be corrected is peremptory if there is an application, but Mr Mhango says that this Court has no jurisdiction to do this.

The first point taken by Mr Mhango is that the "unless order" was drawn and perfected and the master has no jurisdiction in Chambers to look at the matter. It is conceded that the orders that I made were interlocutory, in the sense that they affected procedural aspects of the action and in themselves do not decide the rights of the parties to the action. I think I am stating the law properly when I say that in relation to interlocutory orders, even if they are drawn or perfected, the master has jurisdiction to set them aside if, for example, as was the case here, there was an error. (Prestney -v- Corporation of Colchester (1883) 24 Ch.D., 376). At page 384 Lord Justice Cotton says:-

> "The order being in that form, I have no doubt that Mr Justice Pearson had full jurisdiction and power to make such an order because the former order did not decide anything as of right between the parties, but merely directed how the documents which are mentioned in the affidavit should be produced; the matter not having then been brought before the court as to the inconvenience of producing these documents in London rather than in Colchester, it was put in what is the common form. In my opinion, the judge must have a right in dealing with such a question and in dealing with what has been directed by a previous interlocutory order when new facts are brought before him to show that following the precise direction of that interlocutory order will cause what he

> considers unnecessary inconvenience or other injury to the parties, to give directions with, notwithstanding the previous interlocutory order, a different mode shall be adopted to carry out into effect the substance of the previous order."

This gives the Court quite a measure of laxity in dealing with interlocutory orders. This power emanates from the general powers of the court to regulate its own procedures. In R v- Bloomsbury and Marylebone County Court, Exparte Villawest Ltd (1976) 1 All E.R. 897, 900, Lord Denning M.R. said:

> "Every court has inherent power to control its own procedure, even though there is nothing in the rules about it."

In Fritz -v- Hobson (1880) 14 Ch.D., pages 542, 561, Fry J. said:

> "According to my understanding of the practice (and this is confirmed by what the Master of the Rolls has said), all orders of the court carry with them in gremio liberty to apply to the court."

(See the cases of Ainsworth -v- Wilding (1896) 1 Ch.D., page 673; Mullins -v- Howell (1879) 11 Ch.D., page 763). There is no doubt in my mind that, notwithstanding that the "unless order" has been perfected, I have power to set aside, much more so in this case where the request for copies by the defendants is in conflict with the Orders that were made and contrary to the practice of the Courts, which requires that copies and records be looked at by the opposite side at inspection.

Mr Mhango also argued that this Order could not be set aside because it was obtained by consent. The Order which was drawn by the defendants was not even designated as being by consent as required by the rules. The only reason why Mr Mhango thinks that the Order was by consent is because he and the legal practitioner for the plaintiff came before me and agreed on the terms of the order. This is not the normal rendition of an "order by consent" which would require a fresh action. The importance of the distinction was first expressed by Lord Green M.R. in Chandless Chandless -v- Nicholson (1943) 2 K.B. 321, 324:

> "The original order which Master Ball made is not on its face expressed to be a consent order, and if it was a consent order it can only have been by a very regrettable mistake or inadvertence that that circumstance was not expressed in it. If an order is made by consent the practice should invariably be that it should on the face of it be expressed so to have been made. When the

> court finds an order which is not expressed to be made by consent it certainly is not going to treat it as a consent order unless it is satisfied that it was in fact a consent order. In the present case I am left in considerable doubt whether this order was a consent order in the strict sense. There is a great deal of difference between a consent order in the technical sense and an order which embodies provisions to which neither party objects. The mere fact that one side submits to an order does not make that order a consent order within the technical meaning of that expression, and I am not the least bit satisfied, having regard to the conflicting statements which we have before us as to how this order came to be drawn up, that it was a consent order in the technical sense. I cannot help thinking that at the time he made that order Master Ball cannot have so regarded it, because it is impossible to think that so learned and experienced a master, when he was making a consent order, should have disregarded what I apprehend is the universal practice of expressing on the face of the order that it is a consent order."

This was adumbrated by Lord Denning M.R. in Siebe Gorman Ltd -v- Pneupac Ltd (1982) 1 WLR, 185, 189-190. In a beautiful passage, Lord Denning M.R. decided that the sort of orders where counsel appear before a master agreeing on some terms as to conduct of proceedings are not necessarily "orders by consent" as the words are strictly understood. Such orders are treated like all other interlocutory orders and can be set aside. He said:

> "We have had the discussion about court consent orders. It should be clearly understood by the provision that, when the order is expressed to be made by 'consent', it is ambiguous. There are two meanings to the words by consent'. That was observed by Lord Green M.R. in Chandless Chandless -v- Nicholson. One meaning is this: The words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: The words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order may be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used."

The order which was made here falls in the latter category of Lord Denning's statement. It can, therefore, be varied. In fact, a similar result was envisaged in Mullins -v- Howell. At page 766 Lord Jessel M.R. said, in a passage quoted with approval by Lord Justice Cotton in Ainsworth -v- Wilding at page 679:

> "I have no doubt that the court has jurisdiction to discharge an order made on omission by consent when it is proved to have been made under a mistake, though that mistake was on one side only, the court having a sort of general control over orders made on interlocutory applications."

I would hold, therefore, that although the Order of 20th March 1991 was obtained by consent of both parties in the loose understanding of the words, I have jurisdiction to set it aside and more so where the particulars had actually been served on the defendants in full compliance with the Order of the Court, although copies as requested by the defendants, have not been furnished.

MADE in Chambers this 19th day of November 1991, at Blantyre.

D F Mwaungulu
REGISTRAR