15 May 1992

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.836 OF 1990

BETWEEN:

B.J. MAGALETA ..... PLAINTIFF

AND

SAVJANI & COMPANY ..... DEFENDANT

CORAM: BANDA, CHIEF JUSTICE
Chikopa/Kapanda, Counsel for the Plaintiff
Mbendera, Counsel for the Defendant
Phiri, Senior Court Reporter
Kaundama, Official Interpreter

JUDGMENT

The plaintiff is suing the defendants for damages for financial loss suffered by him as a result of the alleged defendants' professional negligence in handling a transaction of sale of property on Plot No.519, Naperi, belonging to the plaintiff. The brief facts in this case would appear to be as follows:

The plaintiff gave instructions to Messrs. Real Estate Agents Limited through Exhibit 1 to sell his property on Plot No. BC 519, Naperi. The intention was that the proceeds from this sale would be utilised to pay off outstanding City rates to the City of Blantyre on Plot BC 519 and on Plot NY 27 and also to pay off the balance of a capital sum due on a mortgage with New Building Society. It would appear that Messrs. Real Estates Agents in turn instructed the defendants to sell the property on behalf of the plaintiff. The defendants duly carried out the sale and all attendant transactions. It is conceded by the defendants that they omitted to pay the capital sum to the New Building Society as instructed by the plaintiff.

It is contended by the plaintiff that it was the duty of the defendants and their agents to exercise all reasonable care, skill, diligence and competence as legal practitioners

in respect of the sale and the payment of the capital sum due on the mortgage. It is further contended by the plaintiff that by reason of the negligence and breach of duty by the defendants the New Building Society was not paid the capital sum due on the mortgage. The particulars of negligence are set out in paragraphs 6(a), 6(b) and 6(d) of the statement of claim. Paragraph 6(a) alleges that the defendants failed to take any or any adequate or effective measures to ensure that the capital amount due on the said mortgage had been paid. In paragraph 6(d) it is alleged that the defendants failed to exercise reasonable care, skill, diligence and competence in the handling of the sale of the said house and all incidental matters thereto.

It is the case of the defendants that after the sale of the property they provided an account to Messrs. Real Estates Agents with a copy to the plaintiff. The account explained how the proceeds of sale had been utilised. It is clear from the account that the capital sum was not paid to the New Building Society. Equally, it is clear that the balance of the cheque which the plaintiff received included the capital sum which had not been paid to the New Building Society. The basis of the claim in this action is that it was negligence on the part of the defendants for omitting to pay out the capital sum to the New Building Society.

An action against a solicitor for want of skill is substantially an action which arises from a contract. A solicitor is bound to exercise a reasonable degree of care, skill and knowledge in all legal business he undertakes. It is trite law that actionable negligence has three essential elements:

(a) a legal duty towards the client to exercise reasonable care and skill or both;

(b) a breach of that duty by a solicitor, that is failure to attain the standard of care or skill expected of him; and

(c) actual loss to the client as the direct result of such breach.

At common law a solicitor contracts to be skillful and careful for a professional man gives an implied undertaking to bring to the exercise of his profession a reasonable degree of care and skill. Consequently the undertaking is not fulfilled by a solicitor who either does not possess the requisite skill or does not exercise it. The duty is the same whether the solicitor is retained for reward or volunteers his services and the standard of care required is that of a reasonably competent solicitor. It is the duty of the solicitor to carry

out his instructions in the matters to which he is retained by all proper means. It is also his duty to consult with his client in all the questions of doubt which do not come within the express or implied discretion left to him. And it is also his duty to keep his client informed to a certain extent as may be reasonably necessary.

As I have already indicated, the standard of care and skill which is demanded from a solicitor is that of a reasonably competent and diligent solicitor. As was said by Lord Campbell in the case of Purves vs Landell (1845) 12 CL and F 91:

> "What is necessary to maintain such an action? Most undoubtedly that the professional adviser should be guilty of some misconduct, some fraudulent proceeding or should be chargeable with gross negligence or with gross ignorance. It is only upon one or either of these grounds that the client can maintain an action against the professional adviser."

It is clear in my judgment, therefore, that in order for an action in negligence against a solicitor to succeed it is not enough to prove that the solicitor has made an error of judgment or has shown ignorance of some particular part of the law. To succeed the plaintiff must show that the error or ignorance was such that an ordinarily competent solicitor would not have made or shown it. It may be necessary now to qualify what Lord Campbell said in the Landell's case by what the case of Hedley Bryne vs Heller and Partners (1964) AC 465 decides. See also what Lord Denning says in the case of Dutton vs Bognor Regis (1972) 1 Q.B. 373. It has been held that a solicitor is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the case for trial; the mismanagement of so much of the conduct of the cause as is usually and ordinarily expected from his profession. On the other hand, it has been held that a solicitor is not liable for errors in judgment upon points of new occurrence or doubtful instruction or such as are usually entrusted to men in the higher branch of the profession of the law - see the case of Godfrey vs Dalton (1830) 6 BING 460.

It is clear, therefore, that in order for the plaintiff to succeed against the defendant, he must show that by omitting to pay the New Building Society the capital sum the defendants were grossly negligent. The plaintiffs must also show that the cause for damages they have suffered are a direct result of the alleged negligence by the defendants.

Mr. Chikopa who appeared for the plaintiff has contended that had the defendants acted properly they would not have failed to deduct the capital sum due to the New Building

Society. He has also contended that the plaintiffs were entitled to contest the proceedings as they did. He submitted that it was wrong to contend that it was wrong for the plaintiff to contest the garnishee proceedings. He contended that it could not be said that the costs incurred were unreasonable. On the other hand, Mr. Mbendera who appeared for the defendants contended that the claim arises from defending a matter on which liability was not disputed. He submitted that the costs arose because the plaintiff's lawyers failed to present the claim expeditiously, competently and diligently. It was Mr. Mbendera's contention that the plaintiff is seeking to be compensated for errors which were committed through his own lawyers. Mr. Mbendera has further submitted that it could not be contended by any stretch of imagination that the costs which have arisen in this case have come about because the defendants failed to pay the capital sum to the New Building Society.

I have carefully considered the evidence in this case together with Counsel's submission on the issues. As I have earlier indicated the defendants submitted an account to M/s Real Estates Agents with a copy to the plaintiff. That account explained quite clearly how the proceeds of sale had been utilised. It is clear to me that the plaintiff, who must have known how much was due to the new Building Society, must have realised when he received the cheque with a copy of an account that the New Building Society had not been paid the capital sum. It is idle for him to pretend, therefore, that he assumed that the defendants had paid the capital sum when the account makes it clear that this was not the case. The plaintiff knew when he received a copy of an account that the capital sum had not been paid to the New Building Society. In my view, although the defendants omitted paying the New Building Society from source as they were directed, the fact that they gave an account of how the proceeds of sale had been utilised, discharged their duty both to Real Estates and the plaintiff. It would have been different, in my view, if the defendants had not submitted an account explaining how they had dealt with the proceeds of sale. However, even in those circumstances the issue would have been whether there had been gross negligence.

I find, therefore, that there was no breach of any duty of care by the defendants to the plaintiff. I find that any omission to pay the capital sum to New Building Society was not gross negligence nor was it gross ignorance. They had informed the plaintiff what they had done with the proceeds of sale and the plaintiff knew or ought to have known that the capital sum had not been paid and that he was still liable to pay it. The costs that have been incurred in this case have come about because the plaintiff sought to defend the case which could not be defended. The costs incurred did not directly result from the omission to pay the capital sum. Liability had already been conceded and judgment by consent

had been entered. And according to the Ruling of the Registrar, which is Exhibit 22 in this case, there was no agreement to pay the debt by instalments. The issue of whether there was an agreement to pay the debt by instalments was seriously canvassed before the Registrar and after hearing the arguments on merits the Registrar found that there was no such agreement. There was no appeal on that finding and the matter is, therefore, res judicata and should not have been canvassed again before this Court. The garnishee proceedings which the plaintiffs sought to resist was a mode of enforcing judgment which the defendants had chosen. They were entitled to enforce it by that procedure.

I am satisfied, therefore, that the plaintiff's action against the defendants has not been substantiated and it must fail with costs.

PRONOUNCED in open Court this 15th day of May, 1992 at Blantyre.

R.A. Banda
CHIEF JUSTICE