

IN THE HIGH COURT OF MALAWI

CIVIL CAUSE NO. 635 OF 1988



Between

BUDGET RENT A CAR CORPORATION PLAINTIFF

AND

M.I. ABDULLA AND TWO OTHERS DEFENDANT

Coram : D.F. Mwaungulu, Registrar

Counsel for the Plaintiff, Zimba

Counsel for the Defendant, Chisanga

ORDER

On the 2nd of November, 1993 I restored the action following an order ex parte by the Deputy Registrar, Madam Ansah, dismissing the action for want of prosecution and failure by the defendant to comply with an order for payment of security for costs. The order for security for costs was made by the Deputy Registrar then, Mr. Chipeta, on 15th September, 1989.

Madam Zimba had two grounds for setting aside the order of Madam Ansah. She submits correctly, in my view, that the security had in fact been furnished. She exhibited the receipt by this Court evidencing payment on the 3rd of November, 1989 well within the forty five days in which the Deputy Registrar, Mr. Chipeta, ordered the plaintiff to furnish the security for costs. Apart from that the record of the Court in various places shows that the security for costs was furnished. On that score alone, I would have set aside the order. It would be unconscionable not



allow the plaintiff to prosecute his claim when he had complied with the order.

Mr. Chisanga, however, contends that there was no way in which he would have known that the security for costs had been furnished. Unfortunately, the plaintiffs legal practitioners did not appear on the hearing before Madam Ansah. If they had, the matter would have been resolved differently. On the other hand, there was enough information on the record of the court, which the court was entitled to look at, to show that security for costs had been furnished. Mr. Chisanga contends that the plaintiff did not notify the defendant of the payment of the security. Notification of payment into court is provided by order 22, rule 1 (2) of the Rules of the Supreme Court. No similar rule exists for payment of security for costs. Order 23, rule 2 provides that where an order is made requiring any party to give security for costs, the security shall be given in such manner, at such time and on such terms (if any) as the Court may direct. There is no requirement on the plaintiff to notify the defendant of the payment. It is very important that the other party should be notified of the payment of security for costs. The rules do not require it. All, according to the rules, is left with the court. The court may have to direct that such notice be given. It would be wrong in principle, once security has been furnished to foil a party's action simply because he has failed to notify the defendant of the furnishing of security., unless the court ordered the notice to be given to the other party. In this case Mr. Chipeta only ordered that the security for costs be paid into court. The plaintiff did that. Once security has been furnished a party cannot be penalised for failing to notify the other party of the payment.

There is another reason why the order here should be set aside. The order to dismiss the action for want of prosecution and failure to pay security for costs was obtained ex parte. The plaintiff did not appear before the Deputy Registrar. The plaintiff was served with the summons. According to Madamimba her colleague appeared. Her colleague was sent off because it is deposed, the matter was not on the cause list. Her colleague nevertheless waited thinking that Mr. Chisanga was the one handling the matter. No reason is given for thinking that Mr. Chisanga was the one handling the matter. It was in fact Mr. Banda, of the same firm as Mr. Chisanga, who was handling the matter and obtained the order from the Deputy Registrar in the absence of Madamimba's colleague. It is also clear from the record that Madamimba's colleague never had the matter called before the Deputy Registrar. I said all this to say that order 32 rule 6 allows the court to set aside any order made without the party. It is accepted both by the bench and on the bar that such orders will be reconsidered by the court on proof of new facts or on it appearing to the court just to do so. The reason for this is that the other party has not been heard (per Cohen L.J., in Boyle v Sacker (1888) 39Ch. D. 249, 251.

I, therefore, ordered the action be restored
MADE in Chambers this 3rd day of November, 1993



D.F. Mwaungulu
REGISTRAR